VERBATIM RECORD OF THE HALF-DAY SPECIAL MEETING ON "INTERNATIONAL INVESTMENT, TRADE AND DEVELOPMENT" HELD ON WEDNESDAY, 4TH JULY 2007 AT 10.00 AM

President: We take our seats. We begin with our half-day Special Meeting sponsored by the host country and the subject is "International Investment, Trade and Development". The first theme is Investment and Trade in Legal Services. I call on Advocate Vincent Saldahna, President of the National Democratic Lawyer's Association to come forward. He chairs this particular thematic session. There are three panelists, first is Mr. Wamkele Keabetswe Mene from the Department of Trade and Industry in South Africa, and Mr. Nabil Lodey from Freshfields Law Firm who comes from Paris and Justice Dennis Davis, a Judge in the South African Judiciary. Thank you. I now give the floor to the chair of this session, Advocate Mr. Saldahna.

Mr. Vincent Saldahna, President, National Democratic Lawyers Association, Republic of South Africa: Thank you very much Minister. It is my pleasure to Chair the session this morning. We have three panelists who will raise various important issues with regard to the Trade, particularly in, Legal Services based on the GATS and the WTO process. Before we begin the session, I would like to ask the Secretary-General of AALCO Amb. Kamil to address us.

Secretary-General: Good morning Excellencies, Ladies and Gentlemen. Good morning Mr. Chairman.

On behalf of all of you I welcome the Chairman and the Panelists of this very important topic of today that is "International Investment, Trade and Development" and I welcome all of you to this very important topic.

Mr. Chair, in today's interdependent world, wider-intercourse among nations and the need for their economic cooperation has enhanced the role of international trade and investments. Historically, international law and trade and investment have been perceived by the developing countries as an instrument that guarantees the prerogative rights to the colonizers over their colonies. The birth of the United Nations and the emergence of the new nations from colonial dominations necessitated a political upheaval. The newly independent nations while asserting their new found freedom, sovereignty and right to self determination, implemented schemes for nationalization and imposed stringent conditions on the trading and investment activities.

Mr. Chair, the scenario now has begun to change and the developing countries are beginning to view trade and foreign investments in the light of the concept of partnership rather than confrontation. This is because of the growing realization among the developing countries that the foreign investment and trade is an essential component of sustainable development strategies at the national, regional and global levels. The developing world requires billions of dollars in investments to tackle poverty and for development opportunities. This is most obviously so for the least developed countries.

However, the changing trade and investment climate has also brought in new challenges, particularly in the context of foreign investment. There is indeed an urgent need to study the impact of trade and investment on local and host State economy and its sustainable development perspective. Further, the host State should exercise judiciously their right to regulate, which is a basic attribute of sovereignty under international law, with a view to promoting domestic development priorities and linkages, and protect the public welfare from possible negative impacts.

Mr. Chair, Trade and Investment has been part of AALCO's work programme for many years and has considered issues such as Promotion and Protection of Investment in 1983; Promotional Meetings on Investments in 1986; Legal Framework for Joint Ventures during 1988-91; etc. In 1981, the Organization, through its Trade Law Sub-Committee, had also prepared the texts of three Model Bilateral Agreements on Investment Protection. On trade law matters, AALCO has been involved and complementing the works of UN agencies and the World Trade Organization.

I won't keep you more than that. We have experts around us and they would give us more than that. I give the floor to Mr. Vincent Saldana to chair us and guide us with the panelists on how developing countries should go about in this very important topic. Thank you and good morning.

THEME ONE: INVESTMENT AND TRADE IN LEGAL SERVICES

Mr. Vincent Saldana: Thank you Ambassador. I thought in the beginning just to correct something, that is, I am not an Advocate and those of us in the Attorney's profession would say that it is almost a demotion. My colleagues in the bar would say that Vincent is not an Advocate, he is just the Attorney. Madam Minister, I come from a private profession with an NGO background. Hence, I would chair the session without my own personal perspectives and I will hope to hear from the panelists in this discussion some of the challenges and the processes as far as within this profession and within various countries. Some of the areas of concern are low level of participation by many countries, particularly, African countries in the WTO process on GATS. So, therefore, I would like to hear, what the issues of concerns raised from that perspective are and also to share with us the perspectives of multilateral or bilateral arrangements that are presently underway given the present state of Doha round to indicate any progress ever made outside the process. Definitely, I would also like to hear from the South Africans about their views in particular, and one of the speakers will address the issues specifically and also from the floor the present position of South Africa in the present negotiations.

That is by way of an opening comment, let me introduce the three panelists, I will introduce and give their biographies in beginning so that there is no interruption from the floor for discussion. The first panelist is the Deputy Director of International Trade and Economic Division in the Department of Trade and Industry, South Africa that is Mr. Wamkele Keabetswe Mene. Mr. Mene is in-charge of the negotiations related to international trade in services in South Africa. Currently, he is involved in the EPA negotiations with European Commission as well as on the Negotiation of South Africa on framework for the liberalization in services on SADC region. As a service trade negotiator, his main role in the WTO is related to service and various bilateral negotiations. He is qualified with a Masters Degree in Trade Policy from the School of Oriental and African Studies in the United Kingdom. Mr. Mene will be the first presenter.

Thereafter, we have Mr. Nabil Lodey. He is a Barrister from England at Wales. He is specialized in public international law and international arbitration. He is an Associate of a law firm Freshfields and he would give us the private perspective, in particular, by England and Wales. He has some crucial issues to share with us. The third speaker is none other than our Judge Dennis Davis who is known to some of you. Judge Davis was appointed as Judge of Cape Town here in the High Court, in 1998. So post 1994, he is one of the Judges who went through the processes of Judicial Services Commission in South Africa. He is Judge President of the Competition Appeals Court since 2004 and previously, a Professor of Law in the University of Cape Town and University of Witwatersrand. He is also a honourary

Professor of Law at University of Cape Town and where he still teaches tax law, competition law and constitutional law.

Ladies and Gentlemen, we have very interesting panelists with us today. They will raise important issues with us. I now call Mr. Mene to present. Thank you.

Mr. W.K. Mene, Department of Trade and Industry, Republic of South Africa: Mr. Chairman. Thank you. Madam Minister, the Deputy Minister, Secretary-General, Distinguished Guests, Ladies and Gentlemen, Good Morning and welcome to South Africa.

This morning we will touch briefly on the issues before us on the Investment in Trade and Legal Services and extent in which the developing countries are taking part in that process and also what form of engagement that developing countries are taking in particular. It will attempt to build on the remarks made by the Secretary-General, particularly, with regard to the issue of domestic regulation, which I know that the issue, is very close to the heart of many lawyers not only in South Africa, but all over the world. Some of the trends in Legal services when you look at the data are astonishing. In 1991, Italy's, legal service exports grew from 4 Million to 115 million dollars in 1997. Australia's exports in legal services grew from 29 million to 118 million dollars for the same period. Of course, the dominant exporters of the Legal Services the U.S. and U.K. precisely because most of the business transactions are preferred to be based under New York Law and UK Law and that explains the dominance of those jurisdictions. The UK and US net trade balance was $ 2 billion in 1990. It has significantly increased, but the figure have not released up-to-date and the trouble is that we don't have a database in global trade to measure services, so all our figures data dates back to early 1990's.

The globalization of the legal services, in particular, the internationalization of the economy has led to the growth in exports of legal services and in the provision of legal service on cross border basis. The increase in the multi-jurisdictional transactions has also led to this growth by way of trans-border transaction, supplying services, and legal services on a cross border basis. This is mainly on a business-to-business basis. A firm sitting in New York provides legal services to a company in South Africa. Typically, that is the kind of service in legal services trade. So this has been a catalyst for investment in legal services and actually leads to legal services forming part of the GATS between 1995 and 2000. So the GATS have become the international legal framework as it were, which is the basis for provision of those legal services. The GATS defines the scope of legal services for example, in the GATS, it defines the kind of services in a country can open up and liberalize to and the services typically have been liberalized by many countries are provisions of the international legal services, provisions of what is called home country legal service and provision of third country legal services. Now, activities related to the administration of justice like prosecutors, court clerks and so on, have been culled out of the GATS, because the GATS has built in recognition that public services are completely outside the scope of the GATS. So that is why most countries have made commitments, multilateral commitments, that include as I said earlier, international legal services provision thereof and third country legal services and home country legal services. Article VI of GATS deals specifically with "domestic regulation", as Secretary-General was saying, this Article gives the right to states to regulate. So in other words, you establish yourself as a country, you establish the qualification requirement, and the professional requirements in order for the people to come and practice in your country. So there is in built recognition of importance to the domestic regulation within the GATS.

You will find typically that the foreign legal consultants entering particular markets

under the framework of the GATS will enter to provide services that are outside of what is referred to as public services. So, the competition that they bring in is not the kind of competition that would affect the people who provide services on a domestic level. An International Law Firm would come to South Africa, for example, or to any other country to provide services on initial public offering, mergers and acquisitions. These are the kinds of services, the international law firms typically offer a commercial presence in the countries to provide. We have not seen any evidence to suggest that international law firms will come to a country to provide, for example, conveying services or services related to transfer of real estate and so on. Precisely because domestic regulation in a way prohibit that. In South Africa, we have made two kinds of commitments. In our schedule of commitments to WTO. We have committed to allow foreign legal consultants to come and provide the legal services on international law, advisory services on third country law and advisory services on South African Law, if they meet the professional requirement for being admitted as a lawyer in South Africa and that is generally the trend in most countries. So there is a marginal role for domestic law in international trade in legal service.

Some of the barriers which we have identified to international trade in legal service are two fold: (i) in terms of market access, and (ii) in terms of national treatment. If you look schedules of some country's legislations, for example: the European Commission, you will find a slew of jurisdictions within the European Commission where nationality requirements exist. In other words, in order for you to be able to access that market, you must be a national of one of the member countries of the E.U. Foreign equity requirements are also a barrier to trade. Language requirements are a barrier to the trade. Prior residency requirement are a barrier to the trade. Commercial presence, for example, some countries say that they will allow only 20 law firms to set up a commercial presence in their country. Economic needs test are also a form of barrier to trade. So these barriers of trade are the basis of the negotiations of WTO at the moment. Most countries are moving towards completely removing all the limitations in their schedule of commitments. All limitations, except, of course, domestic regulations which is local qualifications requirements for the practice of domestic law and providing representation of services in domestic law.

There have been benefits that have been identified for the developing countries in opening up their legal services market and some of those benefits, of course, are transfer of expertise, increased FDI, technology transfer and some argues that improvement of quality, competition in the market, restructured and more competitive domestic legal environment, so depending upon which way you look at it. There are benefits to liberalization of legal services provided that, I must emphasize, domestic regulations and local policy requirements are sacrosanct or they are respected. In the current round, what we have identified is recognition, is more so than in the previous round, Uruguay Round. We identified that, indeed, there is recognition of importance of legal services in International Trade. Countries are beginning to liberalize, the legal services markets and liberalizing them in two ways. (i) in the provision of international legal services in international law; and (ii) allowing foreign legal consultants for providing legal services in third country law and home country law. This, of course, is embedded in globalization which requires the legal profession to make such moves, to move in that direction.

So, we are hoping that by the end of this round, Doha Round, that we will see the new commercial opportunities and new trade flows in the provision of legal services and, in particular, international legal services and the developing countries like South Africa and others will benefit from this. It is not inconceivable to that South

African lawyers will provide advisory services to companies in China or any other jurisdictions. One of the ways that they could do to get legal credibility is through countries making commitments in GATS operating within the WTO Framework. Just by way of closing, Mr. Chair, if I can I just touch upon the issue of the lack of participation of African countries, developing countries in particular in these negotiations. I think there is an embedded fear and the fear is that once you allow the WTO to come in to your jurisdiction to tell you what to do, then your right to regulation is gone. In fact, it is actually opposite in the GATS. The GATS is absolutely clear on the domestic regulation and therefore countries should be able to open up their legal services of their market on that basis invoking Article VI of the GATS.

Our own experience in South Africa working closely with Department of Justice and the Law Society of Africa is that there is a willingness to allow the market to become global. The South African market would be more and more global, would become competitive for foreign law firms to come and invest in the country. In recognition, however, of the right to regulate to the effect that if a foreign lawyer wants to practice in South Africa, he/she must have subject them to our own qualification and professional requirements. So, Mr. Chair, that is just a way of providing an overview of what is happening multilaterally and also within our country. I am sure it will provide fruitful thought as the discussions progress. Thank you very much.

Chairperson: Thank you Mr. Mene. Let us hear from Mr. Nabil Lodey from Freshfields.

Mr. Nabil Lodey, Freshfields, Paris: Thank you very much Mr. Chair. Firstly, thank you for the invitation. It is great pleasure to be here and to speak to so many distinguished guests.

I think it is not always a good start when two panelists during panel discussion actually agree with each other and I would start with my presentation. I fully agree with previous panelists. This is an important area because international legal services need to look at the difference between regulation and liberalization. My personal perspective, as associated with international law firm is not in representing my firm per se, but actually is a general viewpoint of international law firm. Looking at the developing countries interest, one can look at why law firms want to enter particular markets and the idea is to put a critical analysis to the restriction that a law firm would face and put it to floor why these restrictions are in place and why certain States feel it necessary to make any changes. As a member of a client driven industry, if you see, developing countries have many opportunities, commercial prospects, massive development projects, finance and international trade. Wherever there are Multinational Corporations, Law firms are required to facilitate transnational work and also to assist and conduct dispute resolution. Like many of the clients I represent, if a law firm wishes to be in a certain country, they will look at the same factors, like at the economic, political situation and also for the stability and growth potential. The GATS liberalization in legal services has some resistance to the trade in legal services as far as fine balance between fair regulations by a developing State and adapting to a change in investment environment is concerned. To that we have an example of an international accountancy firm, which was operating in a liberalized environment and there is a comparative study made by International Bar Association which looks at the very similar profession. They share the same qualities of independence, confidentiality, prohibition of conflicts of interest, ethical requirements, professional competence and regulation structure. International Bar Association discusses as to whether any applicable lessons to accounting law firm are to be mutually followed in liberalizing the legal services, looking at the protection of

regulatory structure that is often placed in many developing States.

First, we have to look at why these procedures are in place. Primary reason, I think is to protect domestic law firms from competition. As a presumption there are lots of international law firms coming in to take over domestic law firms. They allow for brain drain from talented lawyers in the domestic country being employed by international law firms and there is also a worry that advocacy court work would move away to foreign lawyers. Developing states shall be protected by these worries through, as we previously said the qualification requirements, nationality or practicing difficulties or technical requirements on who can own a law firm, requirement for legal sponsorship and also number of active partners available.

There has also been resistance, in my opinion, as to whether there is a long established Bar experience in particular developing States and I think that such regulation is necessary and dialogue is required between Governments and the Bar Associations to actually identify what the government has committed to and exactly how the Bar can respond to those challenges. I do not think any country could expect a lawyer to arrive in a State to set up the practice immediately and hence, there is some requirements from the Bar to regulate such practices. So under the GATS, many States agree to Schedule of commitments. The liberalization of legal services is the next in agenda as one would expect, because it has opened up trade in other services. But any State may be softer in law to face restriction of partnerships and legal firms practicing in the states will improve in due course. Number of States are adopting a planned and phased process. I am not going into the details that they are different in each case. But international law firm are certainly positioning themselves in different developing states, in readiness when that market will become open.

There are joint ventures; local lawyers are planned for the future. Dialogue is required between the Government and the Bar Association. Many lawyers do not know what the Government will be signing up to and the consultative process is required to meet the challenges to protect the national advocates. Domestically, number of law firms have to raise their level to protect competition from abroad and this is happening and for example, in India and also in the South Africa large number of law firms have merged together. There is number of regional agreements, in order to facilitate cross border exchange. I think when this occur efficiently and effectively there is a requirement for international law firms to come and set up the base in a particular state. All I need is a strong agreement with sufficient local domestic firms so that they can provide their clients with domestic support and jurisdiction because that is what international law firms are looking at. I think the international law firms can bring in the expertise on transactional work or in dispute settlement. I need an office and I need to become a local lawyer. It is the relationship could be of mutual cooperation.

So they take advantage of local jurisdictional skills available at the international expertise. Many domestic law firms are unable to provide just because it was unavailable. I think it is already here. The liberalization already occurred in many developing countries and they are already using international law firms for the investment. For example, India's take over of the largest 6.2 billion conducted by UK firm, through a permission to operate in India. So, I think there is a requirement to engage domestic law firms by the international law firms. I think you can turn on to otherwise, the disadvantage and negative viewpoint to look at. There is positive viewpoint which says that the domestic law firm needs to retain from the State. I would like law firms to come in and cooperate for future joint venture. Mr. Chair,

these are my main points and I look forward to the questions during the discussion.

Chairperson: Thank you Mr. Lodey. It is difficult with a judge on the panel particularly in South Africa, I served in the Law Society. South Africa and all the law societies in the region we are under tremendous pressure to open up and to allow lawyers from Zimbabwe, Botswana, Lesotho to be able to practice in South Africa. The report always says that if South African judges sit on our courts and are allowed in Botswana, Namibia, Swaziland and in Lesotho; if the level of judiciary from your area crosses border and judges too cross border; it is very difficult to decide the important matters of local jurisdiction and should the lawyers not be concerned about their cross border legal practice. So, there is a tremendous pressure on Southern African region and I think is useful for us to get the perspective from judiciary. But I think Judge Davis will also give us a broader perspective on the debate. Thanks.

Judge Dennis Davis, South African Judiciary: Thank you very much Chair. Minister, Deputy Minister and Distinguished Delegates, thank you for inviting me. I should start off by saying I am not representing the judiciary. I assure you that I am representing myself as a Judge on the court and benefit of experience should not be construed as a representative of the South African judiciary. Let me begin by posing this particular question to you. When we talk about legal services for who are these legal services that we are talking? Let me perhaps be more specific. I would want to suggest that in a country like mine and I would assume that in many countries represented here this morning, one of the crucial issues or perhaps the crucial issues of legal services is legal services for the poor people, the disadvantaged. How does one make ones legal system a legitimate system whereby all get legal representation?

I think one needs to bear that important consideration in mind when we talk about the other issues, which I suspect more directly implicated through GATS. With that introductory remark, let me make my second point which is this. One of the problems that we all face, that is the developing countries, is the question of globalization where you got the national law on the one hand versus the international law on the other. Increasingly no country can simply have a legal profession which has only expertise in its own national law. And I want to advance two issues in relation to this, (i) the question of international institutions. We will be talking about the right to development and why I am entering this is because it seems to me that we are trying to project ourselves and over the next 10, 20, 30 years far greater degree of the manner in which the law will be located in international institutions is incredible. If human rights, right to development, trade liberalization etc., are going to really work in the world manifestly, international institution and their laws that flows from those institutions will become critical and so it's no longer possible for me to see law merely as a national issue.

The second point, I want to make is, the way in which comparative law is impacting on national law. Let me give you some judicial perspective which we know, something like the Anti-trust law or competition law, depending upon how you use the word. In almost all countries, more than 100 countries today, have a competition law. I should tell you that in the 1950's, there were only three countries; Canada, United States of America and the European Union. Now, more than a hundred exist. If you were a judge like I am, in a Competition Court, you look at your Act and you realize that the Act, your legislation is really drawn primarily from two primary sources, and I am prepared to talk during tea to every delegate here who can tell me, if their system of Anti-trust law is not derived from the American Sherman Act or Articles 81 and 82 of the European treaty, by and large. So when you sit as a judge, you are required to know about their systems or as a judge in essentially a developing countries like mine,

I am interested in knowing as to what happened in Korea, Indonesia and many of the countries which has competition law. China, for example, is now developing its competition jurisprudence which is critical. India, again the same point. I need to know about those because these laws help shape my awareness on competition law jurisprudence. The point here I can seek is that I do not see law any longer purely of national categories. This is the point about the GATS Agreement and the issue with regard to the legal services.

Now moving on to the third issue, notwithstanding the two points that I have made, the question we have to ask ourselves is how do we implement this Agreement? How de we allow, the countries to develop their commitments in terms of GATS? How do they respond to requests in terms of GATS? In the context of expertise is required but on the other hand, one does not want the destruction of indigenous legal firms and culture. It's an interesting issue here. Quite clearly you do not want Multinational Corporations firms to move into a country and destroy the local institutions, law firms and on the other hand, it is not such a terribly bad idea to have competition. One of the problems, I have found as a judge was that in a country like mine in the critical areas of international institutions, WTO law, competition law, so on and so forth; is that two or three people in a sense monopolize the market but do not really help in development of the law that is responsive to the countries needs within the international law context. I think we need to debate those issues, that issue of competition and the issue of vested interests and on the other hand, development of the local expertise.

My own view is that when you look at the four modes which flow out of the GATS on legal services, it manifests the importance for countries to make commitments. In my own view, the expertise from other countries can be provided with regard to international law. I want to suggest that when it comes to WTO, the developing countries are often in terrible position, because they do not have enough local expertise and they need to develop that and that's where the international law becomes important. It is obvious to me, when it comes to home country services, that is, for example United Kingdom law firm providing services with regard to the United Kingdom law in South Africa that is some thing which we should welcome. Let us say expertise with regard to Indian law will help a United Kingdom law firm as well. Of course, the question comes what about those firms which comes in and provides legal services in other country, the domestic country that seems to be a form of question. What the GATS treaty does is, it allows and open same approach. It is quite clear that the entire liberalization process is vested on the GATS. Thus, consider entry requirements being qualification, licensing requirements for granting of practice rights of member countries. How that is done, is of course, another point to debate. But what I do want to say is that I think the commitments which are inherent in the GATS are important, because of the expertise, increase in international economic intercourse, international arbitration becomes important and we need to develop experts, where do developing countries get expertise?

But, I want to suggest the GATS treatise on the whole notion of legal services needs to be ultimately seen within the context of providing developing countries with greater expertise, without in any way undermining the infrastructure of those countries and without undermining the possibility of developing countries to develop their own expertise and stand on their own feet. This should not give rise to any legal imperialism but rather of legal development and I would want to suggest, the Chair, my last remark would be that one of the issues I think to be discussed on the legal services today because, it highlights the importance of the GATS treaties, highlights the importance of providing developing countries access to the kind of expertise which will make

international law and international commitments far more even-handed then they have been in between developed and developing countries till date. Thank you.

Chairperson: Thank you Judge Davis. Thank you all panelists. Floor is open for the discussions. Please indicate by showing your hands. Any question you want to raise? Kenya.

The Delegate of the Republic of Kenya: Thank you Mr. Chairman. May I first congratulate the three presenters for their beautiful presentations and we thank you for the position you have taken on various issues. Before I went into politics, I use to serve in the National Bar of Kenya and I was elected to serve in the Bar. In the Law Society of Kenya I was one of the representatives from the provinces. And I know there has been great resistance towards opening up legal practice to other people from outside Kenya. And what I was going to suggest is that this whole question of GATS is even more frightening. Because I know when big law firm which are coming and they are going to be allowed to practice within your country, the legal fraternity gets very jittery. Some time it is because people are not very aware about the provisions of GATS and I was very excited by the proposal that came from one of the presenters here that the law societies in our various countries need to engage the government and probably the Ministry of Justice/department and the Ministry of Trade for these things to be made clear. So that we can all understand the purposes here.

I was going to suggest that may be we do two things. First of all, we take a position and this is subject to debate and of course, good thought can give way to a better thought. We suggest that it would be better to start discussion with in the states that have already, in some form of trade agreements so that if they are opening up within, say the commissary job, people develop trust before we go to commit internationally i.e. at the GATS level. So if we could take that kind of position, it would help, so that people can start adjusting, because as the Judge said these are realities which are coming and we need to adjust to that. So if that can be looked and see how can a framework be developed for States which already are at the economic partnership agreements to develop a framework within which we can engage at that level. The second thing, I felt we could look at is the issue that was raised that needs to be developed further that we already know there is resistance from local legal Bars in our various countries and yet we know that there are some benefits as it was outlined here. Is it possible for the Center for Research to come up with also a framework or charter or guidelines with in which our Member countries can be assisted to start those discussions at the local levels, so that we can start removing this resistance. That will help us move forward instead of remaining static. So that we can make some progress with our own local situation. So I was thinking if this can be done. It is like a challenge for Center for Research to look on those guidelines and secondly whether we can take the position as said to see if people can be open to their local EPAs and engage GATS because the fear is real. Most of you who have gone for agreements and discussions you will see that the Africa would probably, in one topic, have ten people. America would come up with a delegation of a hundred. Discussions are pretty lopsided and that's why we have had problems with the agreements coming out in a lopsided manner. These are the realities. So I have those two thoughts, I open up for debate. I thank you Mr. Chairman.

Chairperson: Thank you the delegate of Kenya for very practical suggestions and if the floor can also respond to those very practical suggestions. Next Uganda

The Delegate of Uganda: Mr. Chairman, Thank you so much and of course I thank the presenters for their very solid views. On the onset, Mr. Chairman, I would like to support the position of our brothers and

sisters in Kenya on this issue. I too have a feeling that this is an issue where we have to go with some checks and balances. Liberalization is certainly very good. It has certainly benefited many of our countries. We would also know that the full blast immediate liberalization is also not good. Yes, we can rebuild our legal jurisprudence, based on international norms, of course, the development of legal services is no longer a parochial national issue. It should be broadened for those acceptable. I will give you an example and if there is any person who is better updated on that matter, my understanding be corrected. I visited Sudan in the late 90s and I noticed one interesting thing. For instance, you need not be a lawyer to represent me in Court, say on tax matters. But if you are a specialist in matters of taxation and if I feel that you can represent me very well in the court, well and good. It was working very well. It was only from my own study there that it was only in criminal matters, certainly, it must be State lawyer in order to undertake legal services in Court of Law. But in civil matters you need not be necessarily a lawyer. And this is working perfectly well. In Uganda, our law is very strict. We have the Advocates Act, we have institutions, universities which provide professional legal education. Then we have an institution called Law Development Center where we must actually obtain a diploma for legal practice. The legal restrictions are very much on the attainment of that diploma in legal practice. That it is even difficult for certain institutions which offer legal education at university level to enter into that institution which offers diploma in legal education. If we can have restrictions with in all countries on the attainment of that professional requirement what about if we actually-come and say-open it immediately. At the international level certainly I don't think Uganda is very safe. So I think it is better that we take, my colleague from Kenya put it very well, for instance in East Africa we got even East African Lawyers Society. Let us begin with sensitization at that level. And then we progressively move on to international levels. Thank you so much.

Chairperson: Thank you the delegate from Uganda. Now I call upon the Sultanate of Oman

The Delegate of the Sultanate of Oman[1]: Thank you Mr. Chairman, We are suffering as well as confronting the same problem, which is the problem of opening up space in the Sultanate's legal bureau and lawyer's office in order to enter the country and to compete with Advocates and consultative domestic legal offices. But our tendency at this stage is to allow consultative legal offices. Foreign firms do come and practice legal consultation only. But to plead in front of court this is not accepted at this stage. My question is: Is this possible and would this cope with the principles of the World Trade Organization and is it possible for us to continue as such this tendency at a certain period until matters would be more matured. Thank you very much.

Chairperson: Thank you the Delegate of Oman. This is a very pertinent question raised by the delegate and it is open to the floor. I would request the panelists to respond. Now Professor Gutto

Professor S. Gutto: Thank you Chair. I would comment as an academic. The discussions seem to really suggest that, you need also to link it to our curriculum in terms of legal education. I think Justice Davis was right to suggest that we ought to train lawyers who are vast in local law but also international law. But between those two there is also the aspect of comparative law i.e. comparing laws of various countries. And within Africa, I think there is a suggestion and a responsibility which has been given, for example, The Pan Africa Panel, when it becomes a legislative body begins to harmonise laws of countries. I think that is an area where at least for

[1] Statement made in Arabic. Unofficial translation from the interpreter's version.

African countries need to make some effort so that there is both international law and national law which are harmonized. Secondly, it would appear that the suggestion from the Hon'ble Minister from Kenya is quite appealing. However, one wonders whether the world out there is going to wait for Africa to first build common positions. We may have to think of much faster ways of ensuring that the legal systems, particularly the legal profession and how it is organized and operates are really transformed quicker than waiting. It is good to have common positions but one would like some fast tracking. Because the world is not waiting. They are already in Africa and doing business with Africa as we had from the legal practitioner from international legal firm. These are two comments I have. Thank you

Chairperson: Thank you Professor Gutto. The delegate from Kuwait.

The Delegate of the State of Kuwait: First of all, I would like to highlight that for the developing countries, usually, liberalization, means domination. Most of the developing countries, they believe that the liberalization in this field leads to domination by foreigners. IN Kuwait, we face some problems regarding this field. We have a Gulf Cooperation Council, we have between us the legal system is open for us to practice. There is also for our Arab Nations, they can also practice if they register with in their system. But what I can see now for us in Kuwait and what I believe that we need/raise awareness in this field. This should be the duty or responsibility of the WTO Secretariat. To raise the awareness with in the developing countries that liberalization doesn't mean that domination of foreigners on the natives. Another thing is that the foreigners offering legal services has to be in consistent with the local laws. Main point that I want to raise is that awareness is the most important thing and I believe that the WTO and the AALCO can do lot of things in this field. Thank you very much.

Chairperson: Thank you delegate from Kuwait. Indonesia

The Delegate of the Republic of Indonesia: Thank you Chairman. Indonesia is of the common view that the involvement of foreign lawyers in domestic legal system shall be for the purpose of developing knowledge and expertise of the domestic lawyers. In this regard, I would like to inform until now Indonesia has not yet opened its court to legal practice rendered by the international lawyers. Since international lawyer might work in Indonesian lawyer office with the duty to provide professional legal service limited to academic purpose to enhance the capacity building and transfer of knowledge. Thank you.

Chairperson: Thank you delegate from Indonesia. Republic of Korea.

The Delegate of the Republic of Korea: Thank you Mr. Chairman. I would like to thank all the Panelists for giving us very informative and thought provoking presentations. I would like to make a few observations, in particular, now Korea is in the process of concluding a number of bilateral treaties and agreements with other countries beyond General Agreement Trade in Services. We are experiencing that our legal services market should be eventually opened up for foreign international law firms. It seems to me that it is a reality. But one of the problems, if I can put this problem into even longer perspective, when we talk about international law, it includes special branches of international law, including law of WTO and international foreign direct investment and essentially the competence of lawyers of different countries may vary . Let me take an example, English law which mean that they will have common exam for English lawyer and the Korean Bar, also there is Korean Bar examination. But, international law with such a vast area how we can guarantee the level of expertise and competence of each lawyer, who knows

about international law. So, regarding professional negligence, how appropriate the legal services to be provided by the international law firms. That kind of things also should be addressed in this context. I am talking about rather longer problem rather than simply opening up the markets. Thank you very much.

Chairperson: Thank you the delegate from Korea. We did start the Session late, so we need a tea break, so I need to have an indication from the floor how many more contributions. I see South Africa. Any other country? I invite the Deputy Minister of Justice of South Africa.

The Delegate of the Republic of South Africa: Thank you Chairperson. It seems to me that the Good Judge has really summarized and at the end there a change in all of us and that is that this topic we have discussed is really inevitable. It is already taking place because of technology, people can basically get expertise anywhere and therefore it seems that there is, particularly, in the developing countries like us, a need to see how we can make sure that this mechanism doesn't again become, as the Judge said, as one of legal imperialism and rather of legal capacity building. I think that really is the way we should be at and I think that many suggestions have been made of research, attaining common position and so on. But, I think as Professor Gutto pointed out, if we take too long with this process we would definitely be overtaken and we will not be able to maximize how we deal with this issue. Of course, we also know that WTO talks are stalled and it will take some time again before we will look into this. I was wanting to suggest that may be the drafting committee should be looking at a possible mechanism, how to take this matter forth. May be there is a possibility, for example, may be I am not sure how AALCO operates, but may be there is a possibility for creating a team of say, three Member States to look at this matters first, as to look at the all the options that are available, how to regulate the best we can, in particularly, in the developing countries. So I wanted to suggest that may be all the proposal been made here, the drafting committee looks at it with the aim and objective of trying to find a mechanism how to look at this matter from a perspective of further building Asian-African solidarity. That is the proposal I have. Thank you very much.

Chairperson: Thank you Deputy Minister. Before I ask the panelists to respond is there any country with any pressing matter which the Panelists to respond to. If not we close the participation from the floor and ask the each panelists to make closing comments.

Mr. W.K.Mene: Thank you Chair. Thank you for the comments and questions. I have just a few couple of responses. There are different starting points. One starting point is, it recognizes the inevitability of globalization, in particular, globalization of legal services. I think once you make this admission, you ask yourselves a critical question, how do you integrate your own economy, your own legal services into that process. So that as some are saying that you don't get left behind. Our experience is that as you liberalize you don't really open your market immediately. Your liberalization process whether it is in legal services or in financial services or any other sector, its got to be properly sequenced and has to got to be unfold in a way in which it will not undermine your economy after liberalization. So first, set up the regulation infrastructure first. We have that by way of the Law Society, Attorneys and Advocates Act. So the regulation is there. So our integration into the global legal services economy is underpinned by our own domestic regulations. Furthermore, If you look at Article VI of the GATS it provides comforts in terms of domestic regulations. There is no requirement, I am not defending the GATS or WTO for that matter, I am speaking purely from our own experience. There is no requirement from the GATS for you to depart from your own domestic regulations. As you integrate your legal services economy into the global economy,

in fact you can schedule limitations on market access and national treatment and what most country do is that, they will require a foreign law firm to employ 20 percent local lawyers for the purpose of transfer of skills and so on and so forth. So there is a built in recognition of the needs of the developing countries into the GATS itself. We have tried to make use of that. It took South Africa over three years to make an initial offer on legal services and to the WTO and other trading members. Reason is because of the complexities involved and because of the extent to which we have to negotiate and consult with internal stake holders and make sure that people understand what the implications are. So that everybody is comfortable with what you are doing. The point that is made by Kenya is well taken. Ideally, you want to have regional integration of services, in particular, legal services before you start making commitments at a multilateral level. Because, if you do not do that you run the danger of foreclosing your own opportunity within the region to formulate that policy. The difficulty, is of course, as my deputy minister was saying, you may get left behind by events. If you don't act quickly enough. So I think you have to strike a balance between regional integration of legal services and regulation thereof. And at the same time making sure that globalisation doesn't leave you behind. Technology doesn't leave you behind. FDI doesn't leave you behind. A range of other potential benefits don't leave you behind. SADC is at the moment involved in a process to liberalize services within the region. Although legal services is one of the areas of the sectors that we are yet to look into. We will look into it in the future because this is an important area.

If I can briefly respond to the comment by Colleague from Kuwait, the WTO is Member driven. So if there is a need that a country identifies, a particular need, then as a member you have the right to ask the Secretariat. If there is a need for workshop with in the region to raise awareness, so on and so forth, as a Member of WTO, that is the right you have to go to the Secretariat and say can you come and provide this technical support in our country or in our region. So Chair, just by way of closing remarks, I think if you make a distinction between representational services and advisory services as the scope of the GATS tells, you can reach a better level of comfort in terms of making commitments much easier. Because representational services can be entirely carved out i.e. prosecutorial services, public defenders, judges, and so on and so forth. Administration of justice could be completely carved out. So when you allow foreign law firms to enter your markets you can restrict the areas of legal services which they provide. So there are ways and means by which we could do it. But, of course, the most important area is domestic consultation, we will take time with that and to make commitments that you are most comfortable with, recognizing the right to domestic regulation but also recognizing the imperatives of globalization. It is, of course, a judgment call, it is a sovereign judgment call, whether you make that sort of commitments. But study indicates that increasingly there are benefits in making sequenced and properly well thought liberalization of certain legal services. Thank you Chair.

Chairperson: Thank you Mr. Mene

Mr. Nabil Lodey, Fresh fields Law Firm, Paris: Thank you Mr. Chair. I think it is important to bear in mind that the world's indigenous legal institution should not be destroyed. There needs to be a move to form an alliance so that actually a comparative advantage can be gained. Liberalization of legal services could offer more. It can encourage investments by offering potential investors the opportunity to have expertise within three areas. Domestic law of their own Company, domestic law of the State they can invest in and international law and it is important to provide all three services in one package and I think an alliance between domestic law firms in a country and

its national law firms could provide that. I might get into the two comments made by the Deputy Minister of Justice of South Africa, because there is various strategy in law firms, there is an African strategy and there is an Asian/ Central European to engage in developing markets and these are, law firms are recruiting, lawyers that have been trained in this domestic countries . They are employed in international offices and specifically looking at their home jurisdictions. So they are already positioned themselves waiting for the market to open up. I think it is more beneficial for the domestic law firms to engage in and take advantage of the competitive market and allow large law firms to come in and take over. Because that would now offer the best package I think for the domestic stage. As regards the last comment from the delegate of Kenya, I fully agree with the consultative suggestion, I want to offer something else, also bilateral discussions between law societies of different countries to engage and moving further towards liberalization of legal services. Thank you

Chairperson: Thank you Mr. Nabil. Judge Davis

Judge D. Davis: I will be brief Mr. Chair. Just three points. I want to endorse the recommendations and proposals of the Kenyan delegate and Deputy Justice Minister of South Africa. I think some sort of broader and perhaps more detailed guidelines regarding legal services of the kind we are talking about becomes important. I think one of the difficulties we have and you listen to the debate this morning, we all are flying as to what kind of framework could be developed and I think your suggestion is an excellent and should be followed. Let me just make two final points which have come up from delegates. Its absolutely correct, as pointed out by one delegate that there are different forms of legal expertise. Let me be specific. Clearly, developing countries, particularly with regard to developing international law or international obligations, increasingly have to rely on international law firms from other parts of the world to give them advice. But rarely are the situation that you develop local capacity which comes out of that, then when you negotiate, when you are taking advice, for example, WTO or any other forms of legal obligations you are always dependent on advice that doesn't really understand the local needs and the local culture. We have to develop, it seems to me, develop a local capacity to understand and comprehend international law, and comparative law, as Professor Gutto has mentioned that mediated through the experiences of country in question. And that's why all these issues become important because what you want is in essence international cooperation, particularly on the advisory side, as my colleague was mentioning. But in a way which allows the indigenous developing country needs to actually come full forward in the way in which international law is seen. If you are simply going to rely on international law firms, international expertise unmediated through the needs of the developing countries, we don't not get any further. That's the real issue we need to address. My final point is this, with regard to questions of legal representation in courts from foreign lawyers, as far as the cynical view is that which we enough problems in the local bars having other people. Frankly, I can see no reason, when there comes questions of foreign law, and comparative law, why somebody who is in the legal team from another country shouldn't actually be able to argue. It seems to be in that particular point, rather than having a local lawyer who pretends that he/she who is an expert in an area which is actually not. It is often because of xenophobia of local legal Bars, it is very difficult to implement, but it is time that we actually think about.

Chairperson: Thank you Judge. Thank you to all the three panelist and also to the very practical and very useful suggestions which have come from the floor. Sultanate of Oman

The Delegate of the Sultanate of Oman[2]: Thank you. I did not receive a clear cut answer to the query I have set forth and the Panelist who has answered to some of the questions did mix up matters between what the question made by my colleague from Kuwait and what I have said myself. My question was-we in the Sultanate of Oman are facing this problem but we were of the view that at the present stage we should allow the foreign firms to practice legal consultations and consultative legal matters only, without having the right to plead before the Courts and Tribunals and this rights only be confined to the nationals themselves and those who can be given that right according to law. My question was-would this be a temporary solution for us in Sultanate of Oman and others in the developing countries and whether the rules of the WTO allow this. This is the question: Can one of the Panelists answer this question in a clear cut manner.

Chairperson: Thank you, Delegate from Oman. I am going to ask Mr. Mene to answer the question.

Mr. Mene: Thank you Chair. The answer is yes. You can do that. As you schedule your legal services commitment you can identify those areas where you are making commitments. Areas that you are liberalizing. You can carve out the areas that you are not liberalizing. You can be very clear and specific in saying that consultancy services and/or advisory services only. You can state again categorically that representational services, appearing before a Judge and so on and so forth are reserved for nationals. Otherwise you can limit market access in terms of nationality requirement. GATS have provision for that in that it allows for progressive liberalization of all sectors that it covers. So definitely that is something you can do. Thank you.

Chairperson: Thank you Mr. Mene. The delegate from Oman you are happy? Thank you. The delegate from Saudi Arabia.

The Delegate of the Kingdom of Saudi Arabia[3]: Thank you Mr. Chairman. What I would like to speak in this Meeting is a proposal presented by the Kingdom of Saudi Arabia that some of the African countries and Asian countries has acceded the World Trade Organization and made the negotiations pertaining to this and confronted numerous difficulties and problems for several years. Some countries were able to surpass this and come to know different methods in the World Trade Organization and were able to join the Organization while protecting its internal legal and economic affairs. There are certain countries still negotiating with the World Trade Organization and the Kingdom has passed 12 years, we started negotiating in 1993 and we joined in 2005. Hence the Kingdom of Saudi Arabia from here we propose that there should be a committee formed from the Member States in our Organization, in order to give legal advice to other countries who are AALCO Members who have not joined the WTO or who are still at the stage of negotiations to guarantee that it will join the WTO. Thank you Mr. President.

Chairperson: Thank you the delegate from Saudi Arabia. I wish to close the Session. Any comments from the Panelist? If not I would like to thank them and I thought while ending the session it is quite clear that number of important and practical suggestions with regard to the way forward. I think the people are right when they say you can't stop a process and regather because we are really going to miss out. We are looking at this parallel processes. Parallel processes of dialogue, interaction, sharing of information, of educating, of entering into regional arrangements, so all this takes place at a multi parallel process. I

[2] Statement delivered in Arabic. Unofficial translation from the interpreter's version.

[3] Statement delivered in Arabic. Unofficial translation from the interpreter's version.

think that is what really the broader context of Kenyan suggestion is. We can do a number of process at the same time. I think, very importantly, all three Panelists emphasized the importance of dialogue. Dialogue at the level between governments, its law societies; dialogue between the Government and other stakeholders in the region. More importantly, the dialogue amongst all those who are impacted upon by the liberalization processes. So I want to thank the floor for raising the very important and practical suggestions and the information which they shared. And also to the Panelists too. I think they have stimulated amongst all of us some urgency about the issue, some debate about the issue, but more importantly, it enables us to be more empowered to be able to engage when we go back home, our different government and law societies to take this very important issue forward. I handover to the Hon'ble Minister to close the Session.

President: I think it was an engaging Session. Very stimulating. We will break for tea and return at 11.45. and move on to discuss the second theme: Right to Development: African NEPAD Strategy in Investment and Trade?

THEME TWO: RIGHT TO DEVELOPMENT: AFRICAN NEPAD STRATEGY IN INVESTMENT AND TRADE?

President: Welcome. The Panelists for this Session should come forward please. Please take the seats. We are out of time. Theme 2 is "Right to Development: African NEPAD Strategy in Investment and Trade?" Chairperson is Justice Dennis Davis. The Panelists are Professor Shadrack Gutto; Mr. M. R. Williams, Director, Department of Trade and Industry, Republic of South Africa; and Ms. Thuli Madonsela, Member of the South African Law Reform Commission. I now handover to Judge Dennis Davis to chair the Session.

Chairperson Justice Dennis Davis: Thank you Hon'ble Minister. Ambassador Kamil, Hon'ble Delegates. Good morning. This Session deals with two interrelated issues: right to development and the issue of development pattern which may be developed through NEPAD, there should be effectively a question mark at the end of the line. So it would read Right to Development: African-NEPAD Strategy in Investment and Trade?, Should there be one. I will introduce the three Panelists now and then we will try for questions. The first Panelist is Professor Shadrack Gutto, he has a distinguished academic record, it includes doctorate from Lund, Sweden. He is a man who has made significant contribution to debates in South African law, public international law, human rights law, property law, land reforms, constitutional law etc. He is currently the Chairperson of the Center for African Renaissance Studies, University of the Republic of South Africa, Pretoria. The Second Panelist, here on my extreme left is Mr. M.R.Williams, he is a qualified attorney and then he joined the Department of Trade and Industry, South Africa. Currently, he is Director, Legal and International Trade and Investment in the international trade division of the department of trade and industry. He has acted both in the capacity of legal advisor and a trade negotiator, in both capacity. The third speaker is on my right is Ms. Thuli Madonsela, who is known to me in many capacities. Once upon a time she was my employee when I was Director for the Center for Applied Legal Studies at University, but she has gone to far more considerable matters. She is now a full time Member of the South African Law Reform Commission having been appointed by President Mbeki. She was one of the eleven technical experts appointed to work with the National Assembly, drafting South Africa's new Constitution. She has also been involved in drafting and preparation of Equality and Prevention of Unfair Discrimination Act, Green paper on Employment Equity and Framing of Employment Equity Act. I call on Professor Gutto to commence proceeding.

Professor Shadrack Gutto, Center for African Renaissance Studies, University of the Republic of South Africa: Thank you very much Judge Davis, Hon'ble Ministers, distinguished guests, all protocol observed.

The question around the right to development is an important one, particularly, for us in Africa, but also, indeed for most of the developing countries in the South. But one would even also say for the so called developed countries, development is always process that is continuous. In times of legal recognition of the right to development, Africa took the lead in 1981 when the African Charter on Human and Peoples Rights was adopted. There are three provisions within the Charter that deal with the right to development. Articles 20, 21 and 22. Article 21 deals with the question of self determination which is defined within the Charter including economic, political and cultural self determination. Article 21 deals with the question of right of the peoples of Africa to control their resources and where there are exploitation to seek redress. It also talks about the need to reign in foreign monopolies that really control a lot of resources in the continent. Article 22 deals with the question of right to development and indeed, after the adoption of the African Charter, there was a lot of debate among human rights communities in the world as a whole, many blamed Africa for diluting human rights by including the right to development. How can you have a right which is a right belonging to all people and so on, because it is not individualized enough. That is one of the criticisms. But it didn't take long before the UN system recognized the importance of the right to development. In 1986, a Declaration was adopted by the UN General Assembly which then recognized the right to development. Indeed, in 1987, the world went further, when the World Commission on the Environment and Development came out with another definition which extended development to the whole issue of the right to sustainable development and extended the conceptualization around development. Indeed, we find again more recently in the Johannesburg Summit on Sustainable Development, in 2002, this matter was also recognized. And indeed, Africa went further in 2003 to adopt the Protocol on the Rights of Women in Africa where the right to sustainable development is recognized and one of the Panelists will deal that aspect much later. Importantly, in the Millennium Declaration by the UN in 2000, indeed, we find under Paragraph 11, a very clear statement that we are committed in making the right to development, a reality for everyone and in freeing the entire human race from want. Indeed, there has been a series of development and devolution of this concept. In 2004, the Human Rights Council asked me to present a study which would try to look at how to enforce the right to development and to give it a much more firmer legal standing. Because it remains a declaration which many regard as soft law, how could we strengthen these right to ensure that is, if you like, becomes treaty law, if that is possible. So that shows that within the UN system there are processes which are trying to look into strengthening the right from the normative concept, which is now universally recognized to much more legally binding instrument. I mentioned this because development is a real challenge, if we talk about questions ending poverty and development and so on. We have to deal with questions around development.

Within Africa, of course, we recognize the importance of strengthening the whole question around the political good governance, but also looking at institutions to change the regional body into becoming an institution that engages the right to development: social, economic and cultural development. And within it we find that there are some institutions which are being set up or are in the process of being set up such as the African Central Bank, African Monetary Union and African Investment Bank. All which are meant to try and have Africa generates it own resources and begin

to develop in a way that it realizes on itself. Much more recently or concurrent with the evolution of the OAU into the AU, Africa adopted the New Partnership for Africa's Development, which is important. One of it is to call on Africa to have a paradigm shift in terms of how it wants to develop. Having suffered from structural adjustment, all sorts of models of development which were fashioned in Washington through the World Bank and the IMF and simply imposed onto the continent. All that those did was to drive Africa into deeper indebtness. It weakened the State capacity to engage on developmental issues. And indeed, today, people are talking about weakened States and failed States. But those failures came because of various paradigms of developments that were imposed on to the continent. So the new partnership for Africa's development, talks about one to say, Africans must start to take the destiny into their own hands. They must craft Africa's development path and manage that process. They have to reject the idea, there are certain well wishers out there who will come and do things for Africa. Therefore, we have to change from this paradigm of donor dependency and donor driven development to one of partnership, which are based on partnership on between society and the State structures, business, civil society and so on and between states within Africa. Regional integration is very very important, indeed within the paradigm of NEPAD, but indeed, also that Africa is not going to be static in the way it approaches this matter, it is going to look for international partnerships which are based on mutual benefits to Africa. And therefore, in looking at the whole question of right to development within the paradigm of NEPAD and its transformation it is very very important, therefore to see this mindset changed which NEPAD is trying to bring about. NEPAD also in paragraph 43 recognizes the importance of right to development which it explicitly does spell out, that the type of development that is being thought about is sustainable development which it includes among other things, paying particular attention to issues of environmental protection and preservation and so on. Within the NEPAD, indeed, there are certain mechanisms of measurement. One of those is Africa Peer Review Mechanism where countries volunteer for independent evaluation by the peers through the technical committees and so on. Indeed, four countries have already gone through this process, since it was initiated in 2004. Those countries are Ghana, Rwanda, Kenya and South Africa. Through the peer review mechanism, they do measure questions around democracy and political governance, economic governance and management, corporate governance and social economic development and indeed we hope that through this self initiated processes we are beginning to examine how we do things to try and remove the culture of dependency which simply leads to more underdevelopment. Right to development, therefore, within the NEPAD concept is very relevant and it should be seen to include among other things, right based approach to development, mainstreaming of rights in development and so on. Those are the issues that I thought are important to the topic that we are discussing. Thank you very much.

Chairperson: Thank you Prof. S. Gutto.
May I now call on Mr. Williams.

Mr. M. R. Williams, Director, Department of Trade and Industry, Government of the Republic of South Africa: ***Right to Development: African NEPAD Strategy on Investment and Trade? How Development relates to Trade from a WTO perspective:***

Thank you Mr. Chair. There are two reasons why any possible African NEPAD Strategy on trade will have to take into consideration the dynamics of the rules-based trading system of the WTO and the current participation of African countries therein.
Firstly, the full participation in global trade is a developmental challenge for developing countries. Secondly, most developing

countries are members of the WTO (the World Trade Organisation) and are therefore subjected to its rules governing global trade.

Multilateral Engagement

Multilateralism is the intergovernmental, institutional and policy response to globalisation and the growing interdependence of national economies. The establishment of the WTO as a multilateral institution for international trade, despite its imbalances and deficiencies, reduces the scope for unilateral trade measures and aims to ensure that economic interactions, including the resolution of disputes, are governed by a system of rules, and not solely by economic power. For these reasons, developing countries have a clear interest in strengthening the system in a manner that promotes their development. However, most developing countries are being marginalized as globalization takes place because of the unequal distribution of economic and political power in international trade relations. Although, the legally binding and enforceable nature of the multilateral rules and disciplines contained in WTO agreements has strengthened the rules-based trading system, most developing countries are not benefiting from this trade dispensation. The Doha Development Agenda has recognized the need for developing countries' interests to be addressed in the negotiations by taking into account the development dimension.

Development Dimension

Firstly, fair trade would remove the obstacles that developing countries experience in exporting their products to developed country markets and create opportunities for them to advance their development. Secondly, increasing the capacity of developing countries to develop their comparative advantage to produce and export would provide the necessary, institutional, productive and export capabilities, needed by these countries to level playing field in the trading system. Thirdly, establishing rules that ensure that a fair balance between the costs and the benefits of new agreements for developing countries and the need for these rules to provide appropriate flexibility for developing countries to implement development policies. Fourthly, by building a transparent and inclusive system of decision making in the WTO we will be contributing to the capacity of developing countries to participate effectively in the making of decisions that are democratic and consistent with the above three dimensions of development. Thus, four elements of the development dimension of the multilateral trading system can be unpacked as: fair trade, capacity building, balanced rules and good governance.

1. Fair Trade.

Fair trade should be distinguished from free trade (free trade is the liberalization of trade as advocated by the developed countries without taking into account the level of development and constraints of developing countries whereas fair trade requires the removal of unfair obstacles for developing country exports, taking into account the development dimension of trade and leveling the playing field). For example, with regard to agriculture, the commitment by the developed countries to the elimination of export subsidies and substantial reductions in domestic support, together with the promise of substantial market opening, even for sensitive products, has built the foundations for an ambitious result for the removal of protection and distortions in agricultural markets. Developing countries could at last be assured of developing their comparative advantage and expanding their exports into developed countries markets.

2. Capacity Building

The issue of preference erosion (these are preferences that were granted unilaterally by developed countries to some developing countries and least developed countries,

which will now be eroded as further liberalization takes place e.g. General System of Preferences "GSP", Lome Convention) was recognized and sought to be addressed in the negotiations. The issue of preference erosion poses complex development challenges for several developing countries. A range of measure may need to be applied to assist these countries to manage their adjustment, supply side and diversification strategies.

A further issue is participation in the WTO dispute resolution, which is one of the most important implementation tools in the WTO. Very few developing countries have participated in the dispute settlement system thus far. Most developing countries do not have the skilled personnel or the financial resources to participate in this system. Those who do, for example, have to rely on European or American lawyers for representation. Participation does not also guarantee that a complaint will result in the violation being remedied. The rules are such that there is a dependence of goodwill on the developed countries to implement any ruling made against them which is in favour of a developing country. The remedy for non-implementation of a ruling by a developed country that a developing country has is an option to withdraw trade concessions that it has made to the developed country. Considering the low level of trade and the fact that it is the developing country that would be hurt by such withdrawal of concessions, makes the remedy null and void of any enforceable effect. A further problem that the developing country would face is that the developed country might retaliate with a dispute action of its own, which if successful would harm the trade interest of the developing country.

3. Balanced Rules

A proposal has been made by developing countries that in applying trade rules in a flexible manner to facilitate the development of developing countries most in need, the WTO would need to ensure that damage to other countries, especially the poor developing countries, is minimized. Thus the application of such flexibilities would need to be monitored by a mechanism to be established in the WTO. Such a mechanism would assist in extending such flexibilities to those countries that need it, and review the application of such measures and their continuation, based on criteria to be agreed.

Examples of the unbalanced nature of WTO engagement

a) Unbalanced Agreement on Agriculture

The policies of the developed countries in Agriculture have been criticised for; preventing access for the exports of developing countries, which in many cases is their main comparative advantage; for distorting world markets and thus stifling the exports of agriculturally competitive countries; and destroying the livelihoods of poor farmers in the South by dumping subsidized products in their local markets. In addition a domestically administered higher price - created through the use of domestic price support - that is significantly above world market levels can only be sustained behind high tariff protection. In turn the increased supply created by higher domestic prices, can only be exported with the use of export subsidies.

b) Unbalanced Commitments

Some examples are TRIPS Agreement (Trade related Aspects of Intellectual Property Rights) and other outstanding implementation issues. The TRIPS agreement in particular is extremely challenging for developing countries to implement in there domestic jurisdiction. Developing countries were supposed to have complied with the TRIPS agreement by 1 January 2000 but very few are in compliance with the implementation of the TRIPS agreement. Developing countries find it difficult to go through the extensive exercise of drafting the necessary laws to implement the TRIPS agreement in their

domestic legislation. The establishment of the necessary institution will also come at a great cost to developing countries. This will require the set up of administration processes and the recruitment and training of personnel at great financial cost whereas developing countries have other pressing priorities that will compete for such funds.

c) Unbalanced Agenda

Despite the fact that the negotiating agenda is already overloaded and the developing countries do not have the necessary capacity to deal with all the negotiating issues, the developed countries also tried to load new generation issues, such as investment, competition, government procurement and trade facilitation on the negotiating agenda. This was rejected by developing countries but discussions on trade facilitation have continued.

4. Good Governance

The issue of transparency and monitoring of the implementation of WTO agreements is of great concern for developing countries. In the past the developed countries have organized secret meetings amongst themselves (this was known as green room meetings) to negotiate the various trade issues and afterwards would present any decision taken by them to the developing countries as a *fait accompli* (an issue that has already been decided and can only be rubber stamped).

The Need for Alliances

The WTO works on the basis of consensus and previous rounds of multilateral negotiations demonstrated the importance of alliances and coalition building. Developing countries, therefore, have to enter into appropriate alliances such as the G20, NAMA11 (developing country alliances), for example, to strengthen the developmental dimension in multilateral trade relations. It is also increasingly important to forge issue-specific alliances in informal groupings such as the Cairns Group (mixed developed and developing country alliance) and in official meetings such as the TRIPS Council.

Conclusion

For developing countries that have undertaken adjustment and reform in their economies, and are poised to reap the benefits of improved competitiveness, the WTO remains an important instrument to promote their trade through wider and deeper market access, particularly into the economies of the North.

Regional and Bilateral Responses

However, our multilateral engagement should not take away from the importance of regional initiatives. Almost all countries have entered into regional trading arrangements, which can play an important role in promoting development and integration into the global economy. African countries have therefore formed regional groupings and in terms of South-South cooperation have also developed bilateral trade relations with markets in Latin America and Asia. Intra-regional trade offers vast export opportunities to developing countries because they are growing rapidly. In light of the complementarities that emerge from comparable levels of industrial development, these economies also offer unique opportunities in terms of investment, joint ventures and technology transfer.

Chairperson: Thank you Mr. Williams,
May I now call on Ms. Madonsela.

Ms. Thuli N. Madonsela, Member of the South African Law Reform Commission: ***Right to Development: Focus on Law, Gender and Development***

Chairperson, President of AALCO, the Hon. Mrs. Brigitte Mabandla, Secretary-General of AALCO, Senior Officers of AALCO,

distinguished participants, ladies and gentlemen,

I am honoured and delighted to participate in this important meeting, the Forty-Sixth Session of AALCO. I am particularly humbled by the honour of sharing some insights with you on the subject of the right to development focusing on law, gender and development.

My fellow panelists have given a comprehensive view of the evolution and content of the right to development and the status of this right in international law.

My focus is on the following sub-themes:

- The relationship between gender and development with emphasis on the global call for mainstreaming gender in development; and
- The relationship between law and development.

One of the encouraging developments in the global discourse on development is the paradigm shift from parochial perspectives on development which included focusing on economic progress instead of the betterment of the human condition. Professor Shadrack has given us meaningful insights on contemporary views on the meaning of the right to development.

Furthermore, development then was largely measured in terms of the growth of a country's GDP even if it meant that such GDP reflected the income of a handful while the vast majority was living in abject poverty. The concept of human solidarity was not seen as a value then except within the African human rights system. However, even in the African context the concept of human solidarity was not necessarily carried through in development measures.

The Millennium Development Goals constitute a major milestones in the global shift towards a more meaningful and inclusive understanding of the concept of development.

Another encouraging recent development is global acceptance of the urgency of the need for states to implement measures in pursuit of human development. This again is the central content of the Millennium Declaration and millennium development goals.

Global acceptance for the need to mainstream gender in development also constitutes an important fairly recent development. Formally adopted during the Beijing Conference in 1995 as a global strategy for the advancement of women, gender mainstreaming has also become an integral part of the development dialogue. However, I will get back to challenges with regard to implementation.

Why Gender mainstreaming?

Why gender and development and specifically why mainstream gender in development? The answer to this question is partially answered by the discussion on development perspectives that place emphasis on participation and inclusive. Gender difference is clearly a permanent and universal form of difference that needs to be taken into account in this regard.

The following quotation from then Chairperson of the South African Commission on gender equality, Ms. Thenjiwe Mtintso, made at a SADC Conference on Development in 1997 gives us some pointers:

> "There can be no sustainable development when women, who constitute half the SADC's population, have no opportunity to unload their potential; when development programmes are completely gender unfriendly; when decisions about changing the lives of people are taken without the

> participation of half of the very lives that have to be changed"

The Beijing Platform for Action (BPA) and several other international instruments adopt the same approach. This includes the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, particularly Article 19 thereof. Article 19 specifically deals with the right to sustainable development and Article 19(b) directs States to integrate a gender perspective in development measures.

There are numerous studies that link the subordination of women to poverty and related forms of under development. Several of these studies have been done by international agencies such as UNDP and UNICEF.

Indeed, if more than half the population is excluded from decision-making and execution of development activities it makes sense that the success of such development initiatives would be undermined. Firstly, the perspectives of that segment of the population would be missed. Secondly, the needs of that segment of the population would not inform the conceptualization of development strategies and this would undermine effective targeting. Thirdly, a huge human capital complement often remains idle as women and girls are excluded from development activities. In the economy this compromises global competitiveness.

Incidentally, the link between inclusive opportunities and collective growth underpins South Africa's development policies such as the Accelerated Shared Growth Initiative (ASGISA) and equality laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act, Employment Equity Act and Broad Based Black Economic Empowerment Act.

I've noted that Japan's gender equality statute specifically alludes to the link between gender equality and the country's pursuit of global competitiveness.

What I've presented above is a utilitarian perspective on the need for gender mainstreaming. However, a utilitarian perspective has its limits as sometimes it is more expedient to undermine equality in the interests of broader national development interests. This is often the case in areas such as trade and investment, including employment rights. It is accordingly important to maintain a human rights perspective on the issue of development.

In any event momentary compromises on equality to facilitate trade and investment in the interests of current economic growth objectives may compromise long-term sustainable development.

Law, Development and Gender Equality

The issue of law and development is a fairly underdeveloped area. Even more underdeveloped is the discourse on law, gender and development.

The law can be an important instrument of change. Indeed quintessential liberals believe that the rule of law is the answer to the betterment of the human condition. Developments in international human rights law actually provide some support for this view. There is no doubting that international human rights law has served as a catalyst for many important legal developments that have strengthened the protection of human rights generally and bettered the human condition. These developments have covered areas such as torture, harmful culture and customs, employment rights, trafficking in human, gender violence, health, education and access to economic resources such as land and finance.

However, we need to be realistic about the law and its limits. For example, are our laws always underpinned by the commitment to human rights and more specifically, the

commitment to all human rights to all as per the Vienna Declaration on Human Rights?

The other issue we need to examine with regard to the law is the extent to which our legal principles and practices promote inclusive societies. This is not only important for gender equality but also for the advancement of society as a whole. I mention the advancement of society as a whole because of the interconnectedness of humanity. For example, due to human interconnectedness, families and communities that depend on women become or remain poor where women are economically disadvantaged or exploited.

Is it possible that some of our laws not only undermine the principle of equal protection but actually constitute some of the contributing factors to underdevelopment and the exacerbation of structural inequality? I would like to give particular consideration to the following areas of the law:

- Proprietary aspects of Divorce Laws;
- Aspects of Succession laws;
- Trade laws;
- Law of Contract;
- Land laws;
- Some of the court processes. A former judge from one of the SADC region countries once passionately outlined to South African judges examples of how, in the quest for efficiency judicial systems were becoming efficient in crushing the human spirit.

Problems in these areas of the law underscore the need for mainstreaming gender. Another dimension of law and development that we need to address is the question of who is to drive the development agenda. Is it to be the courts in pursuit of their mandates in constitutional democracies or is the development agenda to be left to the elected representatives of the people? In my view an approach that will advance equally the interests of women and men will be that which strikes a balance between the role of participatory democracy and the rule of law. Of course, the participatory democracy means equal participation of women and men in all political and administrative processes. This is the commitment of the African Union and the South African government. However, a lot more effort needs to be made towards translating the commitment into reality.

Some of the factors that undermine Women's participation in and benefit from development:

- Failure to adopt a systems approach to development. In many instances this translates to giving with one hand and taking away with another;
- Armed Conflict;
- Gender Violence;
- Health-Many health challenges are both a symptom of underdevelopment and an impediment to development. Let's take for example, the issue of HIV;
- Access to economic resources;
- Women empowerment policies and programmes with poor sustainability arrangements that encourage women to leave paid work but end up in failed development or business ventures;
- Education: Like health, education is both a symptom of underdevelopment and also an impediment to development;
- Access to decision-making;
- Aspects of globalization that exacerbate gender inequality, particularly economic inequality. It is important to note that the problem often lies in failure to align trade arrangements with some of the local realities and failure to prepare affected local groups, particularly women, for the resultant changes.

Possibilities for moving forward

There can be no doubt that the pursuit of development as human rights issue constitutes an important global pursuit. However, for development as improvement of the human condition, to be realized, an approach that takes into account the diversity of human conditions and needs is essential. In other words, we need to mainstream equality. At the center of such approach is the question of mainstreaming or integrating gender perspectives in all legal and policy processes at global and national levels. This should also include trade agreements.

The following ideas may be worth some consideration for AALCO Member States and AALCO participation in UN and other international law reform and policy dialogues:

- Mainstreaming development. In other words we should stop seeing development as a concern for certain spheres of government. All possible causal and influencing factors should be taken into account.
- If we truly see development as an inalienable human right then plans or activities that threaten this right ought to be stopped or modified by states.
- Mainstreaming gender and other equality considerations. Our legal and policy processes should be informed by an equality impact analysis focusing on gender and other systemic forms of inequality that may be indirectly exacerbated. One size-fits-all usually entails the survival of the fittest and those who suffer from historical systemic inequality and disadvantage are less fit.
- Ensure equal participation of women and men and other forms of inclusiveness in our national and international legal and policy processes as well as trade agreements.

As we move forward and get back to policy law reform and policy development processes, its important to forge a common vision of the right to development and to integrate this in our processes. This is important because human solidarity is not merely a welfare matter but an important condition for our collective survival as human beings.

In conclusion, allow me to share a quotation from one of South Africa's pioneers of an inclusive approach to the betterment of the human condition, Charlotte Maxeke, one of South Africa's struggle icons said in 1930:

> *"If you definitely and earnestly set out to lift women and children up … you will find that the men will benefit, and, thus, the whole community…."*

Chairperson: Thank you. Now the discussion is open.

Delegate of the Islamic Republic of Iran: Thank you Mr. Chairman. First of all I would like to appreciate you and all the panelists in this session for their deliberations on the Right to Development, the one most important issue. Two distinguished panelist considered that the right to development in the international arena has been considered in different regional and international bodies, particularly in UN General Assembly, Commission for Human Rights, High Commissioner for Human Rights and finally in Human Rights Council. In this context, I would like to ask on an issue affecting the public.The unilateral sanctions made by some countries have violated right to development. Prof. Gutto would be right person to answer this question. Do you think that there is any confrontation between these unilateral sanctions and the realization of right to development? On the other hand, according to the United Nations Resolution

in the General Assembly and the Security Council, the humanitarian aspects and developmental purposes needs to be considered while implementing sanctions. Do you think that the economic development of every country which is the main aspect of realization of the right to development, has been affected by the bad consequences of this economic sanctions made by the Security Council or other bodies. And finally, according to the significance of this topic and the benefits of the developing countries, particularly the Asian and African countries, I think it is better and also necessary that this issues could be considered by the AALCO Secretariat and reported to the Annual Session. Thank you very much.

Chairperson: Thank you honorable delegate from Iran.

The Delegate of Uganda: Thank very much Mr. Chairman and thank you very much the panelists. First I think this having been my first time attending AALCO Meetings, I must confess that I was a bit lost, but I must say that I am beginning to find my bearing, and I must thank you so much for putting us on track. I think the problem, if I may speak from the African point of view, and developing countries in general, is that there has been lack of self evaluation. Actually you know what our problem has been – always talking, blaming colonialist for any problem that we face. We lack direction because we have failed to come to terms with our own problems. I will give you an example, from the east African point of view. Uganda was for a long time in midst of wars. Not so much of problems that, for instance infested Uganda, emerged in Kenya. Tanzania was stable, politically and socially. But if you talk in terms of development, if you look at our GDP's, what is the difference. They are the same. Then we begin wondering what exactly is the problem. Failure to access ourselves, know our weaknesses, strength, opportunities, threats. In a way we are happy that we are now in the African Peer Review Mechanism. When we get people from the developed countries, they formulate treaties for us, they ask us to incorporate them in our national legislations, they talk about sustainable development. What is sustainable development? These peoples confuse us with these terms, instead of giving us the money and putting it in some projects.

I visited countries, let me give you an example, Ireland. I found out that if an investor invest in Ireland and employed one Irish person, that investor will be given incentive, including fiscal – 5000 Irish pounds for employing one Irish person. When these people come to Africa and other developing countries, for instance World Bank, tell you that you cannot do that. I do agree that fiscal incentive is important to promote investment. If you are addressing a disadvantage, you give an advantage so that an investor is able to take off. You must provide infrastructure, but than it is the chicken and egg problem – which come first. So the crux of the matter that I am trying to push across is that we the developing countries, particularly we in Africa, must be able to assist our programmes, but also be able to fight our problems and we have to help ourselves. Thank you so much.

Chairperson: Thank you. Sudan.

The Delegate of Sudan[4]: Thank you Mr. President. I thank the panelist for their statements which they gave to us here. We in the Sudan think that it is of paramount importance that we in the whole developing countries and Africa, in particular, needs to look forward to ways and means to strengthen our administrative and economic systems to eradicate poverty and to develop our industrial and agricultural potentials and production, to render adequate educational and sanitary services to our citizens and to

[4] Statement made in Arabic. Unofficial translation from the interpreter's version.

promote our capabilities. These goals can be achieved only by embarking on serious local, national, regional and international partnerships, especially with countries and organizations which have long and vast knowledge and experience in all fields. At the same time we need to think deeply of our requirements. On the one hand, we should open our doors to receive the knowledge and experiences of others in order that we build our capacities and develop our countries. On the other hand, we are under a national and moral obligation to preserve our integrity, sovereignty, and national interests. We need to protect our local farmers and producers. Therefore our laws should be clearly drafted between these two requirements. Africa is full of people with knowledge and experience who can draw plans in this respect. I end by saying that when we talk about good governance, rule of law, human rights, stability or peace, in the African context, we should not ignore the vital role that can be played by the African Union. We should not undermine or weaken this important organization on which we rely a lot to be done for Africa in all respects. Thank you.

Chairperson: Thank you. UAE

The Delegate of the United Arab Emirates[5]: Mr. President, at the outset I would like to extend my thanks to the panelists and I would like to refer to the positive aspects. There are many positive experiments from countries of Asia and Africa in the process of development and reorganization. These countries have achieved great progress in all domains and there are countries such as South Africa and my country, the UAE. These countries are to be considered as models in the domain of development and I believe it is incumbent on us to take advantage and profit from the experience of these countries. The process of development should be taken as right, now that it has become a reality which should be followed. As following, one of the most important elements of development is to profit and take advantage from the world economic advancement in addition to advancement in education, training etc. We should concentrate on these issues in order to realize proper and sound development. There should be a political will and political leadership in these countries who can concentrate largely and in an impartial manner in the process of development. There is also a need for international cooperation to benefit from other countries experience. Lastly, I would like to underline the matter that in Africa and Asia, we have huge resources and expertise which can lead us towards sustainable development. Thank you.

Chairperson: Thank you. Republic of Korea.

The Delegate of the Republic of Korea: Thank you Mr. Chairman. I was initially hesitant to take the floor again, but I could not resist temptation to take the floor because this is very interesting discussion. I shall be very brief. From a legal point of view, when you talk of a right to something, we should think about who is the holder of this right. My first question is who has the right to development. Every human being and in that case country A and country B – one country is very developed and the other country is not very developed. Do the people from this well developed country have also this right or not? If the answer is in the affirmative, my question is about the other aspect – what is the corresponding obligation to this right to development and who is the holder of this obligation. Is the obligation lies with the international community at the global level or only the developed countries takes this responsibility or developing countries or in a community, other human beings should also have this kind of obligation as to right to development. I think when we talk about right to development, we have to think about solely from legal perspective. If you mention 'right', it cannot be understood

[5] Statement made in Arabic. Unofficial translation from the interpreter's version.

without involving law, the right-duty relationship. Thank you

Chairperson: It is a very important point. I believe we could spend a whole day on that alone.

The Delegate of Japan: Thank you Mr. Chairman. I appreciate the good presentation of the three panelists. My statement is just information. On next May 2008, Japan will host the post African Development Conference by inviting prominent African leaders including the African Union. The title of the conference is "Towards a Developed Africa" in order to promote ownership of African Countries as well as partnership with international societies. That International Conference, TICAD IV, is closely linked to NEPAD economic strategy, to discuss how to realize economic development in Africa.

Chairperson: Thank you. Indonesia.

The Delegate of the Republic of Indonesia: Thank you Mr. Chairperson. I congratulate the three panelists for their presentation. Allow me to share the efforts of the Indonesian government in order to address the issue of international trade, investment and development. In order to achieve the millennium development goals, the Indonesian government has adopted the trilateral strategy. The plan is to stimulate trade through greater export and investment. The second is to promote employment in retail sector. And the third is alleviating poverty through rural development and agriculture. Because of this impact and job creation, we see investment especially as an accessory to mitigate the consequence of poverty. That is why we are determined to make foreign direct investment the engine of our economic growth. The Indonesian government strives to increase the flow of foreign direct investment by encouraging the conclusion of bilateral agreements. On the promotion and protection of investment as well as the establishment of the Joint Investment Promotion Committee within the Asian and African region. Indonesia has concluded such agreement with, among other, the Government of China, Bangladesh, Egypt, India, Iran, Sri Lanka, Mongolia, Malaysia, Pakistan, Republic of Korea, Qatar, Saudi Arabia, Sudan, Singapore, Syria and Thailand. To boost the investment climate, in March 2007, the Indonesian Parliament has passed the law on capital investment. The law provides the foreign and local investor equal treatment. It provides guarantees against national seizure. There is also a clause for dispute settlement, it also provides for various incentives to encourage partnership between big business and small-medium enterprises. We continue to expand tax base and seek to unite tax and custom procedure, relaxing and liberalizing the oil and gas sector to attract more investments.

With regard to international trade, Indonesia endorsed that trade is for development. We continue to aspire broad based trade policy meaning that we give importance to employment for all stalk holders from all sectors. Second, is a comprehensive trade policy with is based on the principle of fairness, sustainable development, rural development, farmers livelihood and food security and we strive to gradually eliminate non-tariff barriers. Let me emphasis here that international cooperation are imperative for development. While we are developing a strategy for institutional development through good governance, combating corruption, driving private sector growth, this would be used as conditionality. Partnership between the developed and the developing countries should be conducive and mutually beneficial. We the Asian and African countries should strengthen our collaboration in achieving a fair system of international trade within the framework of the WTO. Thank you.

Chairperson: Thank you. Oman

The Delegate of the Sultanate of Oman[6]: Thank you my Chairman. I thank all the panelist for the good description of that perhaps all were not aware of. However, I would like to make a comment and question on Mr. Williams lecture. I may be wrong, but would like to understand it better. Mr. Williams said that when the goods from the developed countries come to the liberalized developing country they would destroy the domestic trade of that goods. While I also agree to that possibility, I can also see a good thing about it to. I have a feeling that it would create competition with the goods that are domestically produced. Because producers of the goods will feel that they have to produce something better in order to be competitive to the goods of the foreign country. Secondly, I think WTO has taken care of that. I don't know if you mean to tell us that the panel does not do its work properly, because WTO has taken consideration of developing countries problems through the Agreements, which is GATT, there is an Enabling Clause which allows developed countries to give preferential treatment to developing countries. And this is done according to Clause 4 without expecting anything in return. In other words, when the developed countries give preferential treatment to the developing countries it should not expect the same in return. So through the Agreement it is taken care off. At the same time, there is also the Committee on Trade and Development which is the main body which is focusing in this area in the WTO and the WTO Secretariat provides technical assistance. So can you please explain what you meant because I feel that the WTO Agreement has taken care and does it mean the panel does not do it work or not.

Chairperson: Kenya is the last delegate.

The Delegate of the Republic of Kenya: Thank you Mr. Chairman. I thank the panelists for the presentations they have made. Mr. Chairman, I was just thinking a good thought, which could give way for a better thought. When we come to a gathering like this, it is good if we could mobilize specific points of action that we can take, because, the theories about the right to development are good and we all know them, but specific points could make us rally, to move us out of here knowing that this is one thing that we have agreed and we could do and therefore leave it to the Secretariat to develop the idea further. Mr. Chairman, this is what I am driving at. We have discussed the question of health, right to development, and other third generation rights etc. Can we agree to pick up on one thing for example, health? The question of health is crucial, it effects all of us and it is a question that everything to do with right to development. When the Government of South Africa was fighting the case of generic drug, we were all not participating. The war was left to one country. What is it that we could do as a team here, to be prepared in future in case some thing like that happen again and the question is what Kenya could do to help that case when it was taking place. And I think this is the kind of forum where we could agree to come up with a legal team that can handle some of the questions of the case, because that structure does not exist. The Secretariat can look into the details as to how this could be setup. The same legal team could make specific points by following up on matters that effect all of us. For example, there are countries that are known to be notorious in terms of polluting sea that are affecting both Asia and Africa. When we are in that position, we use to file case even when we knew that we may not win the case, we use to put specific point across the court. If we have this legal team comprising Asia and Africa, we could thing about issues like case of carbon emission-which is the country in the developed world which is the most notorious. What can we do as a team, so that AALCO can be felt and say that this thing we have agreed specifically. Mr. Chairman, this would help us, we can say by next year we are reporting, we have this and this,

[6] Statement made in Arabic. Unofficial translation from the interpreter's version.

rather than being academic. Thank you very much.

Chairperson: That is a very important point. I can comment later about the case that is going to come to my court. I am going to ask the panelist to make a short comment, as we are running out of time.

Professor S. Gutto: Thank you Mr. Chairman. Lot of questions has been raised. Let me start from Kenya. One of the thing that we can really do is really for AALCO Members to participate collectively in enhancing the status of right to development into a treaty form. The second is to have parameters of implementation so that we can measure countries on the extent to which that is build in to their policies of development. Thirdly, in cases such as the one you mentioned, where the countries are battling with matters that are of relevance to others, there are two ways. One is to join as friends of courts and secondly for us to put in place the African Court of Justice which has not been put into place.

On the question on sanctions, I would say two things. One is that, one has to ask whether the sanction is legally sound and legitimate. Did it go through, or agreed on by the multilateral bodies such as the UN system properly. And secondly, if it is imposed, what is the impact. If the impact is going to undermine human rights and so on then these are the issues we should be talking about. But the UN Security Council is undemocratic institution from an African point of view and Africa is asking for the democratization of the UN Security Council and one hopes that all the Members would support the democratization of the UN Security Council.

Uganda, the questions were quite interesting, but we ought to know that Africa has been developing North America, Europe, South and Central America for five hundred years. If we look at the UNCTAD Report of 2005 you find that between 1972 and 2002 Africa borrowed an equivalent of 540 billion US Dollars. During that period, Africa paid back 550 billion US Dollars. In other words, we paid back more than what it borrowed and still have a debt of 300 billion. This means that you pay and you pay over and over. So there are double stands in the world and we need to confront that matter. Lastly, to say something about the South Korea's question of the rights, the right to development as it is in the Resolution of the UN and also in the African Charter is basically a right which the right holders are individuals and people collectively. The duty is not only on States but also on people, because you can realize right only through participation in development issues. So it is not just the States out there, but also the State and the People do their duties as far as the right to development is concerned. We can prepare a background paper to explain this. Thank you.

Chairperson: Thank you. Mr. Williams.

Mr. M. R. Williams: I will just briefly also want to respond to Republic of Korea's question. As far as the right to development is concerned as to the holder of the rights- There are a number of conventions which refers to the right to development, but that conventions are not enforceable. So there is no obligation on another country, for instance, country A has a right and country B has a obligation as far as rights are concerned. There is no such obligation unless country B wants to undertake such obligation. But I think it is more important for the developing countries to define what that right is and to defend that right. What you find is a lot of developed countries try and make developing countries to do away with that right to development. So obviously we should approach from that perspective.

As far as Oman's question is concerned, I am not sure whether you heard the context in which I raised about the point of goods

coming from developed countries and going into developing countries. It concerned agricultural goods. In the EU, for example, agricultural goods are heavily subsidized and if your producers are going to be able to compete fairly with the EU producers, you need to heavily subsidise your produce as well. If you do not do it, you don't have fair trade. There is free trade for EU, but you do not have fair trade. As far as the Enabling Clause is concerned, my understanding of the Enabling clause is that it only applies when least developed countries negotiate preferential trade agreement with one another. Your example of developed countries giving preferences to developing countries, I can use the EU as an example, where they have preferences to developing countries, namely the ACP countries and in that case they made use of a waiver in terms of the Lome Convention. This would be expiring by the end of the year and if they are not renewing they have to give the same preference to other countries. Thank you.

Ms. Thuli N. Madonsela: Thank you Mr. Chair. For me what is important is to have an inclusive concept of development and our society is not going to develop truly and sustainably if we do not use an inclusive concept. An inclusive concept obviously includes taking into account the needs and participation of women and men. Secondly, the inclusive concept of development should also include trade and investment. If we do see right to development as a right, then it should include everything else we do. The right to life, for example, cannot be violated in any situation at all. We do not only look at life in only one particular context. So I would like to say that right to development, if we see it as a right, must include everything that we do, even if it is not directly related to right to development. In response to the comment of Honorable delegate of Uganda, I think sustainable development is in our interest. Definitely, when we are talking about inclusive development, we have to look at sustainable development, otherwise at the end of the day you are going to leave behind a legacy of poverty and degraded environment to the next generation. Finally, I believe that the principle of inclusiveness is in the interest of human survival. Thank you.

Chairperson: I was asked to recognize the delegate from Kuwait.

The Delegate of the State of Kuwait: Thank you Mr. Chairman. I also thank all the panelist who has spoken on this topic. The Government of Kuwait is convinced of the importance of liberalization of trade and the importance of the local and foreign investors to play a very important role in moving economy in our country. Hence, we have enacted a law pertaining to investment in 2001 and by providing such law it provides incentives and advantages and procedures representing in some tax exemptions for 10 years from the formation of any new projects and other customs exemptions, partially or fully. Also this law would provide freedom for the investors to transfer money with profits outside our country, in addition to the freedom to transfer ownership to other investors. Also, in a way to expand development, this law would open most of the economic sectors in front of the foreign investors, with the exception of looking for oil and exploiting it. Also the investor would have the freedom to establish corporate in Kuwait to be solely owned by them without any local partner. Mr. Chairman, in order to develop our country more, and to enhance economic investment, we are developing the airport and sea port, passing the foreign banking law and development projects for infrastructure. Thank you very much.

Chairperson: Before closing the session, I would like to thank all the three panelists. Some point that I can just briefly add. Prof. Gutto mentioned that to a large degree the developing world has been in the grip of a "Washington consensus". What is very significant, I think, in the context of this

debate would have been whether the Washington consensus is now outdated. The mere liberalism will no longer be the dominant framework within which economists are seen internationally. I came across just the other day a book by Francis Fukuyama, who has written earlier about the 'End of History'. This is a writing by a fairly right wing American commentator who is now arguing that without the recognition of economic development, for example, the US would have no influence in the world. I find this very interesting that if you read a book from somebody who have argued for a soundness of more liberal framework, now suggesting that they may no longer work. So when we talk about right to development, it seem to me, we need to ask two questions. What model or models of development are appropriate for continents such as Africa, and to what extent can we Africans, perhaps, learn from the remarkable developments taking place in Asia. The quite clear phenomenon that countries like, China and India, play critical role at the end of the century. Who will bet against the notion that the China, India and Japan would dominate the world economy rather than the USA. What at the end does that mean for us. What type of development does that offer and that seem to me the critical question. Secondly, I would also want to endorse the point made by Ms. Madonsela, the sidelining of the gender on the development agenda. It is an important consideration that we should take account of. And thirdly and finally the issue of fair trade as opposed to free trade and how do we read development into that.

My last point before concluding, which I cannot resist is with reference to the point made by the delegate from Kenya, regarding the litigation of the kind that was seen South Africa, which was brought before the competition authorities in South Africa. The question raised by you is this – to what extent does a case like that brought out in one country have implications for other countries. And to what extent can one develop something of a strategy around the right to development in the developing world to in fact push that right further and further so that the whole human kind actually does enjoy the right to development. I thank all the panelists and thank for all the questions put by the delegates.

President: I join Justice Davis in thanking the Panelists and all the participants. It was indeed a simulating discussion. We will pick on some of the suggestions in the course of our deliberations. Thank you all. See you at 3 PM for the Meeting on Counterterrorism.

The Meeting was thereafter adjourned