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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

INTERNATIONAL TRADE AND INVESTMENT LAW

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I. Introduction

A. Background

1. AALCO has dealt with the topic "WTO as a Framework Agreement and Code of Conduct for the World Trade", including the WTO Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS), from the time when the Uruguay Round negotiations were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. At the Thirty-Fourth Session of AALCO held at Doha, Qatar in 1995, the item "WTO as a Framework Agreement and Code of Conduct for the World Trade" was for the first time introduced in the Agenda of AALCO. Thereafter, this item continued to remain on the agenda of the Organization and was deliberated upon during the subsequent sessions. At these sessions, the Secretariat was directed to monitor the development related to the WTO, particularly the relevant legal aspects of dispute settlement mechanism. At the Fifty-Fifth Annual Session of AALCO, in 2016, where the outcome of the 2015 Nairobi Ministerial Conference was discussed between Member States, the Secretariat was mandated 'to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs'.

2. The noteworthy work of AALCO in following WTO's work in promoting multilateral trade further includes the convening of a two-day seminar on "Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters" at New Delhi in 1998, in cooperation with the Government of India; and the publication of the Special Study on "Special and Differential Treatment under WTO Agreements" at the Forty-Second Session held in Seoul in 2003. In 2010 AALCO's Centre for Research and Training (CRT) organized a five-days training program on "Basic Course on the World Trade Organization (WTO)" from 1-5 February 2010. A five-day training workshop on the World Trade Organization was again organized by the CRT of AALCO in cooperation with the Institute for Training and Technical Cooperation (ITTC), World Trade Organization from 28th March to 1st April 2011 at the AALCO Headquarters, New Delhi. The topics included, Introduction to the World Trade Organization, WTO Basic Principles and Exceptions, Exercises on Basic Principles, General Agreement on Services (GATS), and Trade Related Aspects of Intellectual Property Rights (TRIPS). A Training Programme on WTO was jointly organized by AALCO and the Institute of Malaysian and International Studies (IKMAS) from 14 – 16 November, 2017 in Bangi, Malaysia. This training programme was organized as a preparatory training session for the participants from Member States, Arbitration Centers of AALCO and Non-Member States, in view of the then upcoming 11th WTO Ministerial Conference from 10-13 December, 2017, in Argentina.

3. On the establishment of the UNCITRAL in 1968, one of the first areas in which it sought to focus upon in its agenda was "International Commercial Arbitration". Towards this end, the UNCITRAL appointed Professor Ian Nestor, as it Special Rapporteur who submitted a detailed report highlighting the inadequacy of the existing mechanisms and suggested the establishment of regional arbitration centers. According to the "AALCC's (now AALCO) scheme for Settlement of Disputes of Economic and Commercial Matters" it was the report of the Special Rapporteur that provided the impetus for the AALCC to place the topic on its agenda and initiate follow up action which was done at the Tokyo Session in 1974.[1] At the Tokyo Session, AALCO endorsed the recommendations of its Trade Law Sub-Committee, that efforts should be made by Member States to develop institutional arbitration in the Asian and African regions. After subsequent Studies on the part of the Secretariat in this regard, and endorsing the Trade Law Sub-Committee's recommendations in this regard, AALCO entered into Agreements between the Governments of Malaysia, Arab Republic of Egypt, Nigeria, Islamic Republic of Iran, and the Republic of Kenya, to establish Regional Arbitration Centers (RACs) therein.

4. Coming to the International Investment Regime, AALCO has long associated itself with the issue of a congenial investment environment, and actively worked towards the direction of having an appropriate investor-State relation. The question of promotion and protection of investments on a reciprocal basis was first discussed at the Twenty First Annual Session of AALCO (then AALCC) in Indonesia, Jakarta, in the context of regional co-operation in the field of industry among the countries of the Asian-African region. This was followed by more intensive discussion of the matter at the Ministerial Meeting held in Kuala Lumpur in December 1980 under the auspices of the Government of Malaysia in collaboration with the AALCC. That meeting recognized the need to create stable but flexible relations between the investor and the host government particularly where the investments were made by one developing country in another. The meeting examined the various modalities which had hitherto been employed for protection of investments and in the light of the discussions, indicated the desirability of formulation of the draft of a model umbrella investment protection agreement for consideration by member governments.

5. The Secretariat had accordingly prepared the tentative draft of a model bilateral agreement on investment protection intended to be applicable between the countries of the region to serve as a basis for preliminary discussions by an Expert Group. The Secretariat draft was taken up for consideration during the Committee's Colombo Session held in May 1981 by its Trade Law Sub-Committee. The report of the Trade Law Sub-Committee was thereafter placed before another Ministerial Meeting on Regional Co-operation in Industries held in Istanbul in September 1981 at the invitation of the Government of Turkey in

[1] See AALCC Secretariat "AALCC's Scheme for Settlement of Disputes in Economic and Commercial Matter" in "Regional Seminar on International Commercial Arbitration, Cairo" (available on file with the AALCO Secretariat).

collaboration with the AALCC. As a result of the overall survey of the position held by various Governments within the Asian-African region, it became apparent that a uniform approach in the matter of promotion and protection of investments through the formulation of a single draft of a bilateral treaty, however desirable, might not result in an adequate response in practical terms. It was therefore felt that the AALCC's study on the subject could perhaps contemplate preparation of models for three different types of bilateral agreements. The primary objective was aimed at creating a climate in which Governments would be prepared to accept the concept of promotion and protection of investments under bilateral arrangements.

6. A revised study prepared by the Secretariat in November 1982 accordingly contained the suggestion that an endeavor be made to prepare the texts of three model agreements even though much of the material to be used in each of the texts would be common.[2]An open-ended Expert Group afterwards endorsed the Secretary-General's suggestion that the Committee's approach should be towards formulation of alternative models in the matter of promotion and protection of investments rather than pursue a single model approach. The matter was thereafter discussed at the AALCC's Twenty-third Session held in Tokyo in May 1983.

7. The Committee, after taking note of various observations made in the course of its deliberations, decided to transmit to Member Governments the three Models of bilateral agreements for promotion and protection of investments, as finally adopted together with explanatory notes with the request that these model bilateral agreements be brought to the notice of the appropriate authorities and government departments.

8. More recently on 2 March 2016, AALCO Secretariat organized a Seminar on "*International Investment and WTO*" at its Headquarters. The Seminar discussed topics like "Investor State Dispute Resolution: Current Challenges for Asian and African Countries".

B. Issues for focused deliberation at the Current Annual Session

1) Regional Trade Agreements and Effect on WTO
2) Intellectual Property (IP) and TRIPS
3) AALCO's Regional Arbitration Centers

[2] The tentative formulations in regard to the three possible model agreements were included in the study, namely:
Model A: Draft of a bilateral agreement basically on similar pattern as the agreements entered into between some of the countries of the region with industrialized States with certain changes and improvements particularly in the matter of promotion of investments.
Model B: Draft of an agreement whose provisions are somewhat more restrictive in the matter of protection of investments and contemplate a degree of flexibility in regard to reception and protection of investments.
Model C: Draft of an agreement on the pattern of Model 'A' but applicable to specific classes of investments only as determined by the host State.

II. Deliberations at the Fifty-Fifth Annual Session

9. The meeting began with the then Secretary-General of AALCO, Prof. Dr. Rahmat Mohamad introducing the Agenda Item for discussion, "WTO as a Framework Agreement and Code of Conduct for World Trade", by stating that WTO as an institution has always had immense significance for the welfare of the people of the world, and especially for the people of the developing countries. He briefly spoke about the Doha Development Agenda (DDA), and lamented over the fact that even after running through many Ministerial Conferences, it had not been successful in delivering the promised pro-development changes. Next he focused on the Tenth Ministerial Conference held in December 2015 at Nairobi, and stated that even in this Session there was no consensus on an issue as basic and crucial as whether or not the future rounds of trade negotiations would be guided by the Doha Development Framework.

10. Next, as a trade policy expert and distinguished speaker invited for the session, Prof. Abhijit Das made his presentation on "Trans Pacific Partnership Agreement (TPP) and the Legal Implications for the WTO". In his presentation he spoke in length on the interface between some of the TPP provisions and the corresponding provisions in WTO. Firstly he spoke about the Most Favored Nation (MFN) provision in WTO, which with respect to Free Trade Agreements (FTA) mandates that all FTAs must provide for tariff elimination on substantially all trade. He mentions that whereas the TPP fulfills this requirement with respect to trade, it falls short of it when it comes to services. Next he talks of the definition of ownership test in regards to granting of subsidies by public bodies in the TPP, which is largely built upon the US argument, and runs counter to the corresponding jurisprudence that has evolved within the WTO dispute settlement mechanism. With regards to Border measures in the TRIPS Agreement (Article 61) also he states that the corresponding measures in TPP is based on certain terms and concepts which were included in certain arguments made before the WTO panel in certain cases, but these were rejected. Therefore, he states that if the TPP gets implemented, jurisprudence will build around some of these key provisions, which will in turn subsequently influence the jurisprudence at WTO. Finally, he described the choice between the dispute settlement procedure at the TPP and the WTO dispute settlement as a 'fork in the road', which could turn out to be problematic later in time, as if a losing party at the TPP panel approaches the WTO Panel, and the matter relates to one of the covered agreements, then the WTO Panel would be obliged to adjudicate on the matter.

11. Delegates from the following Member-States presented their statements on the identified issues relating to "WTO as a Framework Agreement and Code of Conduct for World Trade": People's Republic of China, Republic of India, Japan, Republic of South Africa, and the Federal Democratic Republic of Nepal.

12. The delegate from People's Republic of China expressed that as both the 2013 Bali Ministerial as well as the 2015 Nairobi Ministerial had reaped some negotiation outcomes on the DDA, it demonstrates the important role that WTO can play in international trade liberalization. However, he also lamented on the fact that for the first time in its history it

publicly recognized that Members have different views on the path forward regarding the DDA. This may generate uncertainty as to the future efforts with respect to DDA, as well as adopting new approaches and methods. Notwithstanding, he also re-emphasized that developing countries should support multilateral trading system, and push forward the Doha Round of negotiations, including continuing negotiations on the remaining Doha issues like agriculture and NAMA. Development is the core objective of the Doha Rounds, and a legitimate expectation of the developing States who constitute more than half of the WTO membership. If the DDA commitments fail to materialize, the trust and confidence of these States would be seriously impaired. He also stated that the developing States should have an open attitude towards new issues that are of immediate interest to them. However, these issues should not hamper the remaining issues of the DDA. Lastly he stated that as the G20 Presidency in that year, China had advised the members to take a stand against protectionism, and work towards multilateral trade.

13. The delegate from the Republic of India focused his presentation on two issues, a) continued relevance of WTO; and b) WTO's relationship with RTAs. He stated that considering the expanding membership of WTO, functioning of its unique dispute settlement system, work in its regular committees, and the progress made thus far in the DDA, underscores the important role played by the institution. He stated that DDA is important for the collective interest of developing nations, including that of poor farmers and the food security of hundreds of millions. He further noted that plurilateral approaches impinge on the multilateral trading system, and cannot be a substitute for it. It is important that such arrangements compliment, and not segment the multilateral trading system. Lastly he stated that in support of WTO rules India had ratified the Trade Facilitation Agreement (TFA).

14. The delegate from Japan firstly affirmed that rules-based multilateral trading system under WTO is the central pillar of Japan's trade policy. Calling a swift entry into force of the TFA, he added that in order to keep WTO relevant countries should explore new approaches and "up-to-date" issues. He further stated that plurilateral negotiations act as an effective approach to accelerate trade liberalization, and therefore, these should be considered as ways of making intensive negotiations. He further encouraged developing countries to enter into high level of liberalization, as that would bring positive impact on their own economic growth. He supported initiatives like "Aid for Trade" for that purpose. Lastly he stated that the TPP would not only promote economic growth within Asia-Pacific region, but also strengthen other universal values such as freedom, democracy, human rights etc. Japan intends to push forward other similar economic agreements, such as the Regional Comprehensive Economic Partnership (RCEP), Japan-EU Economic Partnership, and Japan-China-Republic of Korea Free Trade Agreement.

15. The delegate from the Republic of South Africa stated firstly that multilateral trading system under WTO should be given priority, and the same should not be taken over by plurilateral agreements. Secondly, he stated that the inclusion of new issues or new approaches to multilateral negotiations is not viable until the DDA issues do not materialize.

16. The delegate from the Federal Democratic Republic of Nepal noted that the discussions in the WTO should take into account the special needs of the least developed countries. Therefore, he emphasized on the critical importance of the multilateral rule-based trading system. AALCO must endeavor that the spirit of the DDA is not diluted by trade negotiations at regional level. Without pre-judging the wisdom of the plurilateral agreements, AALCO must stand firmly in favor of multilateral approach. Special and differential treatment and transfer of technology and technical assistance to developing countries must be the basis of any further trade negotiations. Finally he informed that Nepal had initiated the process of ratification of the TFA.

III. General Discussion and Recent Developments

A. Regional Trade Agreements and Effect on WTO

1) Rise of Regional Trade Agreements

17. The negotiations under the GATT regime had soon begun to lose momentum and beginning in the early 1990s some countries seem to have given up on the Rounds, as can be seen from the emergence and proliferation of regional trade agreements (RTAs). The United States and the EU began to negotiate RTAs—each with different countries—that were deeper than the shallow integration approach of the GATT, which had mostly limited its disciplines to border barriers such as import tariffs. These deeper commitments found in RTAs have come to be known as either WTO-plus or WTO-extra provisions. The WTO-plus builds upon provisions already undertaken multilaterally. WTO-extra commitments, on the other hand, are RTA provisions for which there is no WTO counterpart. These currently include labor and environmental standards. Since the early 2000s, these RTAs – as allowed under WTO rules – have really flourished. Interestingly, this development has taken place in the context of minimal progress in multilateral trade negotiations, thereby suggesting strong interest by many countries to consider regional markets as an important avenue for expanding trade.

18. Multilateralism is, however, the optimal approach to promote trade and investment liberalization around the world. With the rise of global value chains, barriers among third countries upstream or downstream to trade have begun to matter just as much as barriers between direct trading partners. Instead of creating a multitude of country specific solutions, barriers to trade between countries are ideally addressed in a single, global set of rules. Regional trade liberalization can support longer-term multilateral liberalization if regional agreements are truly market-opening and contain harmonized, global components wherever possible. If negotiated in accordance with principles and rules contained in WTO agreements, these regional initiatives can support longer-term multilateral liberalization.[3]

[3] "Mega Regional Trade Agreements and the Multilateral Trading System", International Chamber of Commerce, Policy Statement, 8 March, 2016.

19. There are divergent views on the economic implications of RTAs: that is, whether RTAs are stumbling blocks or building blocks toward future multilateral liberalization. Economic theory has long predicted that it could go either way. The reality from historical episodes, unfortunately, is not much clearer. In some important cases, multilateral liberalization has followed the formation of RTAs, but in others, RTAs created impediments that resulted in less subsequent multilateral liberalization.[4]

20. A number of political-economic forces have contributed to the push toward the mega-regional agreements arising today. One factor is the interest of multinational firms in global supply chains—the process by which firms organize their production across numerous countries—which causes the firms to lobby for new types of agreements to address their concerns.[5]This includes additional legal protection for their foreign investment as well as further reductions to the costs of shipping goods across multiple national borders. Firms want to produce goods that can be certified for multiple markets; they have thus also urged policymakers to improve coordination of product regulations historically set independently across different markets.[6]Another notable factor is that WTO multilateralism has not delivered significant achievements during the past two decades – but some minor exceptions.[7]Especially the stalemate in the WTO Doha Round and discord over the development agenda among main players has fostered an increased focus on the negotiations through multiple "tracks" including the "regional" avenues. Most of these agreements go beyond the WTO's remit in terms of coverage and deepness, presenting a new platform to change world trade rules and to bring further trade opening. RTAs are expected to deliver the best practices in areas that have not been appropriately handled at the multilateral level; such areas include trade in services, investments, technical standards, and regulatory issues. Moreover, transaction costs for negotiating a wider agenda shall be lower compared to the grand bargain under the WTO negotiations which requires "consensus" among all players under a 'single undertaking'. Thus, RTAs provide venues with more practical, result-oriented approaches, while mega-deals offer the possibility for the hubs in the driving seat to impose

[4] See for example, NunoLimão, "Preferential Trade Agreements as Stumbling Blocks for Multilateral Trade Liberalization: Evidence for the U.S.," *American Economic Review* 96, no. 3, 2006, pp. 896–914, Baybars Karacaovali and NunoLimão, "The Clash of Liberalizations: Preferential vs. Multilateral Trade Liberalization in the European Union," *Journal of International Economics* 74, no. 2, 2008, pp. 299–327. Building block evidence that Latin American free trade areas led to additional unilateral liberalization during the 1990s is provided by Antoni Estevadeordal, Caroline Freund, and Emanuel Ornelas, "Does Regionalism Affect Trade Liberalization toward Nonmembers?" *Quarterly Journal of Economics* 123, no. 4, 2008, pp. 1532–1575.

[5] The fact that global supply chain activity has affected trade policy negotiations is not new. Indeed, Blanchard, Bown, and Johnson provide evidence that such influences even affected the tariffs set by high-income and emerging economies over the period 1995 to 2009. See Emily J. Blanchard, Chad P. Bown, and Robert C. Johnson, "Global Supply Chains and Trade Policy," National Bureau of Economic Research (NBER) Working Paper no. 21883, January 2016.

[6] Chad P. Brown, "Mega-Regional Trade Agreements and the Future of the WTO – Part of Discussion Paper Series on Global and Regional Governance", Council on Foreign Relations, September, 2016, p. 2.

[7] A consensus on the signing of Trade Facilitation Agreement (TFA) at Bali in December 2013, as well as the extension of the ITA and elimination of agricultural export subsidies as agreed in Nairobi WTO Ministerial Conference held in December 2015, can be regarded as some of the major outcomes.

robust and binding provisions in as diverse areas as the labor standards, environment, intellectual property issues, FDIs, food security so on.[8]

2) Implications for Third Parties and Multilateral Trade

21. However, the Mega-RTAs are not devoid of challenges either. These challenges may include: a) higher risks of discriminatory impact; b) more restrictive and stringent regulatory measures for extra-RTA trade; and c) difficult accession of non-Members. The most anticipated impact of mega-RTAs relates to the risk of discrimination against third-country exports. Discrimination here may lead to trade diversion, i.e. the substitution of lower-cost imports from third countries with the higher-cost imports of RTA members due to differential tariff treatment.[9] Overall it can be argued that the success of mega-deals depends on how they counter these challenges – that is, to reduce the risk of discriminatory impact; provide less-stringent regulatory measures for third countries; bring flexible mechanisms to boost spillover effects; and to make the system more open and credible for all.[10]

22. Presently, three major MRTAs are envisaged: the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States; the recently concluded Trans-Pacific Partnership (TPP) between eleven nations across the Pacific Rim; and the Regional Comprehensive Economic Partnership (RCEP) between sixteen economies from Asia and the Pacific (ASEAN 10 + 6). If these agreements are implemented, they would considerably modify the world trade landscape with systemic challenges for the multilateral trading system. Many experts in the field deem these agreements, and especially the TPP and the TTIP to be "gold standard" agreements that would establish the new rules of trade for a new century. The biggest concern arising from these mega-regional agreements for most developing countries not party to them, however, is that they will undermine the rules-based multilateral trading system.[11]

23. As stated earlier these MRTAs can result in both negative and positive consequences for third parties. Positive consequences could arise from deeper integration of some of the largest economies of the world. If standards were harmonized, for example, exporters would only

[8] M. Barrosso, former president of European Commission, raised in his official statement for TTIP in June 2013 that "these [TTIP] negotiations can be a game changer",< http://europa.eu/rapid/press-release_MEMO-13569_en.htm> thus consolidating his previous statement in February 2013 'this negotiation will set the standard – not only for our future bilateral trade and investment, including regulatory issues, but also for the development of global trade rules' (italics added), <http://europa.eu/rapid/press-release_SPEECH-13-121_en.htm>.

[9] M. SaitAkman, "Global Trade Governance and G20: A Response to Mega Regional Trade Agreements", Vol. 1, Issue 1, China's Rising Role in Global Governance: Opportunities and Challenges, *Rising Powers Quarterly*, September 2016.

[10] M. SaitAkman, Simon Evenett, et al., "Catalyst? TTIP's Impact on the Rest", VOX CEPR's Policy Portal, 7 April 2015, available at: <https://voxeu.org/article/catalyst-ttip-s-impact-rest>.

[11] Kimberly Elliott, "How Much 'Mega' in the Mega Regional TPP and TTIP: Implications for Developing Countries", CGD Policy Paper 079, March 2016. See generally, M. SaitAkman, Simon Evenett, et al., "Catalyst? TTIP's Impact on the Rest", VOX CEPR's Policy Portal, 7 April 2015, available at: <https://voxeu.org/article/catalyst-ttip-s-impact-rest>.

have to worry about compliance with a single regime in an enlarged market. A second potential benefit is an income effect. To the extent that efficiency gains are made and trade costs reduced, a growth dividend could be forthcoming from which all parties can benefit. Negative outcomes flow essentially from three main sources that could hit both trade and investment. First, there may be a direct discriminatory effect that asserts itself though trade diversion. Second, import restrictions may increase as a result of new regulations or regulatory arrangements that ultimately reduce market access. These would not be presented as import restrictions, but they would act like them. Third, new regulations might raise production costs in third party economies and reduce competitiveness.[12]

24. Trading partners advance trade and investment liberalization in different ways, including through regional trade agreements, especially in the absence of progress in multilateral negotiations in the World Trade Organization (WTO). Regional agreements may enable parties to conclude levels of liberalization beyond the multilateral consensus, and may be able to address specific issues that do not yet register on the multilateral menu. The resulting achievements in trade liberalization may be substantial, and if constructed properly and in a manner consistent with WTO rules, may aptly complement multilateral rules. In turn, these achievements contribute to greater progress on a multilateral basis within the WTO. For example, such achievements can include ambitious tariff reduction objectives (such as zero-for-zero) and the reduction of non-tariff barriers, including through regulatory cooperation.[13]

25. **Recommendations**

a) The Secretariat in consultation with Member States, and subject to the availability of necessary resources, may organize a Seminar to discuss the potential effect of RTAs and MRTAs on multilateral trade, and measures to reduce trade diversion and a negative effect on Third Parties, which are common consequences of such agreements.
b) The Member States would endeavor to achieve trade liberalization in the RTAs in a manner that they are consistent with the WTO rules and complement multilateral trade.

B. Intellectual Property (IP) and TRIPS

1) Introduction

[12] M. SaitAkman, Simon Evenett, et al., "Catalyst? TTIP's Impact on the Rest", VOX CEPR's Policy Portal, 7 April 2015, available at: <https://voxeu.org/article/catalyst-ttip-s-impact-rest>.
[13] There are now hundreds of preferential agreements in place, each with different terms, conditions, and compliance arrangements through which business must navigate. For these reasons, ICC prefers multilateral agreements within the WTO; or if that is not feasible, plurilateral agreements built into the WTO system and based on the of Most-Favored Nation (MFN) principle and open architecture, as instruments for further liberalizing international trade in a consistent, efficient manner. See generally, "Mega Regional Trade Agreements and the Multilateral Trading System", International Chamber of Commerce, Policy Statement, 8 March, 2016.

26. One of the first international agreements for the protection of intellectual property rights (IPR) was the Paris Convention, signed in 1883 and the subject of successive revisions. The Paris Convention requires national treatment, but lacks provisions for effective enforcement or dispute settlement. In the field of copyright, the Berne Convention also lacks effective enforcement provisions. The World Intellectual Property Organization (WIPO), a specialized agency of the United Nations whose mandate is to promote the protection of intellectual property, administers the Paris and Berne Conventions and other intellectual property treaties. A major weakness of WIPO, however, is that this agency lacks enforcement authority and power. Thus the WTO with its enforcement power through the dispute settlement mechanism was enlisted to play a major role in international IP through TRIPs.

27. A crucial outcome of the Uruguay Round negotiation was coming into effect of a new international instrument on Intellectual Property Rights called the Agreement on Trade-Related Aspects of Intellectual Property Rights. The TRIPS Agreement, as it is more popularly known, addresses a wide range of Intellectual Property Rights which includes traditional subject matters like patents, copyrights, trademarks and industrial designs as well as new subjects like geographical indications and trade secrets.

28. The TRIPS Agreement (1) established minimum substantive standards of IPRs protection that all WTO Members must implement; (2) it required each WTO Member to maintain adequate measures for securing and enforcing IPRs; and (3) it subjected TRIPS-related controversies to dispute settlement under the WTO Dispute Settlement Understanding (hereinafter DSU). The TRIPs Agreement also sets out standards of enforcement of IP rights by foreign rights holders as well as national rights holders. Enforcement must be effective as well as fair and equitable. There must be judicial review of final administrative decisions. Civil and administrative enforcement procedures must conform to certain standards regarding matters such as evidence and proof and due process matters, and must offer a full range of remedies including injunctions and damages. Members must adopt border procedures that allow an IP rights holder to block the import of infringing goods. Parties must also provide appropriate criminal penalties for willful violators of IP rights. The TRIPs Agreement requires WTO members to establish an adequate IP office and procedures to facilitate the acquisition and maintenance of IP rights. Procedures for the grant and registration of IP rights must operate within reasonable periods, and the law must allow *inter partes* proceedings of opposition, revocation, and cancellation.

29. Thus, a major breakthrough was achieved in the GATT Uruguay Round when they persuaded developing country Members to adopt and enforce high levels of IPRs protection as part of an integrated WTO framework. Subsequently, however, a minimalist approach has been taken regarding any TRIPS-related negotiations to be undertaken. Perhaps the strongest argument in favor of linking IP and trade is that linkage will facilitate technology transfer and therefore development in developing countries. The TRIPs Agreement does not,

however, resolve many issues resulting from different intellectual property regimes in different countries.

30. With the advent of globalization, higher standards of IP protection and international enforcement has become increasingly important. In the words of WTO DG Roberto Azevedo, it is hard to think of a global issue today that does not have a significant intellectual property dimension. Consider public health, innovation and access to medicines. Consider climate change and the development of green technologies. Intellectual property is central to these issues. And of course, it is also a big issue when it comes to trade as well.

2) Current Developments

31. The reasons for controversy over TRIPS are complex, and reflect the increasing importance of technology in maintaining competitive advantages in world trade, the existing disparity in the capacity of WTO Members to create and commercialize new technologies, and the view held by a number of Members that the present focus of intellectual property rights (hereinafter IPRs) on new technologies substantially undervalues existing stocks of knowledge and information.[14]

32. The subject of the TRIPS Agreement is witnessing considerable new developments and challenges today. At the multilateral level, negotiations are under way in WTO to refine and expand certain areas of TRIPS agreement whereas in several Free Trade Agreements, there is already a process underway to introduce new provisions, which can be more than what the TRIPS provides for, hence are said to be TRIPS-plus.

33. The Uruguay Round TRIPS Agreement negotiations did not resolve all the issues that were on the table, and the agreement includes its own "built-in agenda" for future negotiations. That is, the TRIPS Agreement was not envisaged as an entirely static legal instrument. Since the TRIPS Agreement entered into force, WTO Members have decided to elaborate and enhance these review processes. The most significant addition to these processes is the work on public health and access to medicines issues in line with the Doha Declaration on the TRIPS Agreement and Public Health.

34. The Council for TRIPS is the body responsible for administering the TRIPS Agreement. In particular, it monitors the operation of the Agreement. In its regular sessions, the TRIPS Council mostly serves as a forum for discussion between members on key issues. It is open to all WTO members and observers. The TRIPS Council also meets in “special sessions”. These are for negotiations on a multilateral system for notifying and registering geographical indications for wines and spirits, under the Doha Development Agenda. As stated earlier the TRIPS Agreement contains a "built-in" agenda to review TRIPS provisions on geographical

[14] Frederick M. Abbott, “The Enduring Enigma of TRIPS: A Challenge for the World Economic System”, *I J. INT'L ECON. L.* 497 (1998).

indications and biotechnology patenting and to examine the scope and modalities of non-violation complaints. The Council also has a number of other standing agenda items, including on observer status, the relationship between the TRIPS Agreement and the Convention on Biological Diversity and the protection of traditional knowledge and folklore. Additional issues are being discussed on an ad hoc basis, such as access to medicines and public health, climate change, electronic commerce, the enforcement of intellectual property rights, intellectual property and innovation and issues of particular interest to LDCs.[15]

35. Articles 65.2 and 65.3 of the TRIPS Agreement delayed the implementation of the TRIPS Agreement in less developed and transition countries for four years. Article 66.1 granted least developed countries a transitional period of ten years, which has since been extended to at least seventeen and a half years. Article 66.2 states that "[d]eveloped country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base." Article 67 requires developed countries to "provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members."

36. The World Trade Organization (WTO) and its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) celebrated their 20th anniversary in 2015. To mark the event, the World Health Organization (WHO), World Intellectual Property Organization (WIPO) and the WTO held the fifth in the series of trilateral symposia to discuss practical ways in which the twin challenges of innovation and access have been addressed. It looked at selected data on the complex relationship between trade in medical technologies, patents, innovation and access, including the role of TRIPS flexibilities and recent experiences with the use of compulsory licenses and voluntary license agreements. The aim was to assist governments and other interested parties in well-informed, evidence-based policy making. WTO Director General, Robert Azevêdo, stated during the symposium that "[TRIPS] is a key tool for balancing the need of ensuring fair access to medicines, while also supporting the necessary innovation. In these 20 years, over 130 WTO members have notified IP laws and regulations under TRIPS — and they have shown considerable diversity in how they have applied the broad principles of the Agreement".[16]

37. TRIPS has been treated with skepticism, however, expressing concern that overall TRIPS and related free trade agreements ultimately have had the effect of simply expanding monopoly power and maximizing profits, thus deepening the health gap between the rich and

[15] https://www.wto.org/english/tratop_e/trips_e/intel6_e.htm
[16] "Public Health, Intellectual Property, and TRIPS at 20: Innovation and Access to Medicines; Learning from the Past, Illuminating the Future", Briefing Series on Trilateral Cooperation, 2016. Available at: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_gc_14.pdf.

the poor. In the Sixth Ministerial Meeting in Hong Kong, countries voted to accept the proposal to formally amend the TRIPS Agreement. The proposed amendment was to add article 31bis to the TRIPS Agreement. The TRIPS Agreement was amended through the Protocol of 6 December 2005 that entered into force on 23 January 2017. The amendment inserted a new Article 31bis into the Agreement as well as an Annex and Appendix. These provide the legal basis for WTO members to grant special compulsory licences exclusively for the production and export of affordable generic medicines to other members that cannot domestically produce the needed medicines in sufficient quantities for their patients.[17]

38. In addition, less developed countries seem to have achieved some success in linking the disclosure issue in the TRIPS Agreement to the Convention on Biological Diversity. Such discussion is particularly important in light of the recent adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity.[18] Adopted in October 2010, this protocol aims to promote the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and the sustainable use of biological diversity.

39. Moreover, as per the decision taken by the Council for TRIPS the LDC Members of the WTO would be allowed to maintain maximum flexibility in their approach to patenting pharmaceutical products until at least 2033, following a decision taken by the said body on 6 November 2015. This means LDCs can choose whether or not to protect pharmaceutical patents and clinical trial data before 2033. The decision also keeps open the option for further extensions beyond that date.[19]

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[17] Flexibilities such as compulsory licensing are written into the TRIPS Agreement — governments can issue compulsory licences to allow companies to make a patented product or use a patented process under licence without the consent of the patent owner, but only under certain conditions aimed at safeguarding the legitimate interests of the patent holder. In August 2003, WTO members decided to remove an important obstacle to affordable drug imports by waiving the limitation in the TRIPS Agreement to predominantly supply the local market. Two years later, WTO members agreed on 6 December 2005 to permanently incorporate the 2003 waiver decision into the TRIPS Agreement subject to the acceptance of two-thirds of WTO members. The WTO TRIPS Council recently discussed the TRIPS public health amendment. A range of delegations urged WTO members that are yet to accept the amendment to do so expeditiously and called for work to make it operational. During related discussions on the UN High Level Panel Report on Access to Medicines, one delegation also recalled the Panel's recommendation to revise the system of compulsory licences for export. See "WTO IP Rules Amended to Ease Poor Countries' Access to Affordable Medicines", 23 January 2017, available at:
https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm.

[18]Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, Oct. 29, 2010, available at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

[19] "Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products", Decision of the Council for TRIPS of 6 November 2015, IP/C/73, available at:
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/73.pdf.

40. Intellectual property rights — how they are granted, regulated and exercised — are also relevant to how technologies related to climate change are developed and transferred to developing countries. International policy debate on climate change has touched on several issues concerning intellectual property in general, and the TRIPS Agreement in particular. WTO members have discussed this in TRIPS Council meetings. The challenge of developing green technologies, and of disseminating them to where they are needed, brings intellectual property into the frame. Incentives are needed for companies and institutions to invest in research and development in the relevant technologies; a framework is needed to support the diffusion and transfer of technologies. The TRIPS Agreement is part of the global intellectual property system that aims to contribute to promoting technological innovation and its transfer and dissemination.[20]

41. Another important aspect is that of "Non-violation", where complaints refer to cases where a WTO member believes that the actions of another member deprived it of an expected benefit, even if no WTO agreement has been violated. These complaints are possible under WTO agreements pertaining to goods and services. However, such complaints are currently not permitted under the TRIPS. Under Article 64.2 of the TRIPS Agreement, a "moratorium" was established prohibiting non-violation complaints on IP rights for the first five years after the establishment of the WTO (i.e. 1995–99), after which members were to make recommendations to the Ministerial Conference, the WTO's highest decision-making body, for approval. This moratorium has been extended a number of times since, from one Ministerial Conference to the next, the latest being the extension from the 2017 Buenos Aires Ministerial Conference to the next meeting, which ministers agreed to hold in 2019.[21]

42. **Recommendations**

a) The Secretariat in consultation with Member States, and subject to the availability of necessary resources, may organize an inter-Sessional meeting or Workshop to discuss the review of the TRIPS Agreement including any future amendments to it, as well as the optimal use of the "flexibilities" in the TRIPS Agreement for access to technology.
b) The Member States would endeavor to work towards progressive liberalization of trade grounded within the WTO rules

[20] "Climate Change and the WTO Intellectual Property (TRIPS) Agreement", available at: https://www.wto.org/english/tratop_e/trips_e/cchange_e.htm.
[21] The Ministerial Decision on "TRIPS non-violation and situation complaints" of 13 December 2017 says: "We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to our Decision of 19 December 2015 on "TRIPS Non-Violation and Situation Complaints" (WT/L/976), and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next session in 2019. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement." See "'Non-violation' complaints (Article 64.2)", available at: https://www.wto.org/english/tratop_e/trips_e/nonviolation_e.htm.

C. AALCO's Regional Arbitration Centers

43. During its Thirteenth Annual Session held in Lagos (Nigeria) in 1973, AALCO proposed that apart from follow-up of the work of the United Nations Commission on International Trade Law (UNCITRAL) in the field of International Commercial Arbitration, the Organization should also conduct an independent study on some of the more important practical problems relating to the subject from the point of view of the Asian-African region. Accordingly, the Secretariat prepared an outline of the study, which received favorable response from the Member States. The Secretariat thereafter prepared a detailed and comprehensive study and the Trade Law Sub-Committee considered this study during the Fifteenth Annual Session held in Tokyo (Japan) in 1974. At the Tokyo Session, AALCO endorsed the recommendations of its Trade Law Sub-Committee, that efforts should be made by Member States to develop institutional arbitration in the Asian and African regions. After subsequent Studies on the part of the Secretariat in this regard, and endorsing the Trade Law Sub-Committee's recommendations in this regard, AALCO entered into Agreements between the Governments of Malaysia, Arab Republic of Egypt, Nigeria, Islamic Republic of Iran, and the Republic of Kenya, to establish Regional Arbitration Centers (RACs) therein.

44. During the course of the research and investigation carried out by the ALCC Secretariat the followings points of convergence emerged from the divergent views elicited from the Member States, which became instrumental in the formation of the RACs[22]:

a) Commodity Agreements: The Commodity Associations would appoint arbitrators belonging mostly to developed countries who were part of its panel, conducting arbitrations predominantly seated in the institutions of Europe. Further, due to the foreign seated nature of the arbitration, the parties in developing countries would be unable to appoint counsel to represent them as the paucity of foreign exchange and foreign exchange regulations proved to be serious impediments in the retaining of effective representation before the arbitral tribunal.[23]
b) Inequality in negotiating power: The most common complaint of the governments from the regions of Asia and Africa, were that from the perspective of negotiating a contract the developing countries were in a weaker position whether it be for supply of plants and machinery, transfer of technology, or access to markets. Due to this imbalance in negotiation power, the dispute settlement clauses were invariably drafted in a manner whereby the private institutions in Europe were conferred with the jurisdiction to adjudicate the dispute. It was also expressed that, foreign seated arbitrations were usually

[22] See AALCO Secretariat's Draft on "A Report on the Legal Framework Governing the Relationship between AALCO and the Regional Arbitration Centres Established under its Auspices", (available on file with the AALCO Secretariat).
[23] K.R. Khan, The Law and Organisation of International Commody Agreements (1982) in AALCC Secretariat 'AALCC's Scheme for Settlement of Disputes in Economic and Commercial Matter' in 'Regional Seminar on International Commercial Arbitration, Cairo' (available on file with the AALCO Secretariat).

the common practice and were insisted upon more so in development projects under aid and assistance programmes.

c) Systemic Inequalities: While ascertaining the views of the Member States several governments confessed to have given into the demands of the contractors under the threat of a time consuming and costly foreign seated arbitrations, while dealing with a lack of experienced and qualified representation before the tribunal in developing countries. Further, views were expressed on behalf of some governments that it was derogatory for them to be subjected to the jurisdiction of foreign arbitral tribunals. There was also unanimity amongst the states that the arbitrations involving governmental parties should be ad hoc in nature preferably seated in the place of performance of the contract.

d) Lacunae in the present prevailing system: The prevailing system for international commercial arbitration at the time was a product of the efforts of the European States during the Colonial period, and as such was ill-equipped to deal with an international community which had exponentially expanded in membership during the decolonization period, admitting new Asian and African States to the membership of the UN thereby conferring their collective recognition. Institutions such as the Permanent Court of Arbitration, International Court of Arbitration under auspices of the ICC and the London Court of International Arbitration under the supervision of the London Chamber of Commerce were adept and experienced in administering arbitral disputes between foreign nationals, and as such the national institutions or chambers of commerce providing facilities of arbitration were not acceptable to them due to their self-interest and apprehensions. At the time, in the absence of the UNCITRAL Arbitration Rules 3 of 1976 achieving a consensus on procedure for ad hoc arbitration proved to too onerous a task for most developing capital importing countries who were staunch supporters for the ad hoc arbitration.[24]

45. It was from these discussions that it was proposed that the rules governing the regional arbitration centres should promote the UNCITRAL Arbitration Rules, 1976 and that the ICC itself was open to the idea of holding its own proceedings at the place where the performance of the contract takes place.[25] The RACs were consequently established to achieve broadly the following purposes: a) Promoting international commercial arbitration in the Asian and African regions; b) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions; c) Rendering assistance in the conduct of Ad Hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules; d) Assisting the enforcement of arbitral awards; and e) Providing for arbitration under the auspices of the Centre where appropriate.

[24] P. G. Lim, 'Kuala Lumpur Centre for Arbitration' (available on file with the AALCO secretariat).
[25] See for eg. MOU between the AIAC and the ICC available at: https://iccwbo.org/media-wall/news-speeches/klrcaicc-sign-mou-boost-dispute-resolution.

46. Therefore, the RACs offer, facilitate, and assist for the conduct of arbitral proceedings, including the enforcement of awards made in the proceedings held under the auspices of the Centre. The Rules for arbitration under the auspices of the Centre are the UNCITRAL Arbitration Rules of 1976 with certain modifications and adaptations. Other main functions of the Centre are to promote international commercial arbitration in the Asia Pacific region and to render advice and assistance to parties who may approach the Centre. Apart from these services, the Centres also provides other options for the settlement of disputes such as mediation/conciliation under the Conciliation Rules of the Centre.

47**. Recommendations**

a) The Secretariat in consultation with Member States, and subject to the availability of necessary resources, may coordinate with the RACs in conducting joint activities and consultations in order to provide an efficacious and timely process of arbitration within them.
b) The RACs in cooperation with the Secretariat would endeavor to update themselves with the best practices of the arbitration institutions of the world.

IV. Comments and Observations of the Secretariat

48. A clear drift towards RTAs and MRTAs has been a visible consequence of the stalemate in the DDA and a lack of any real progress on the multilateral trading forum. As scholars remain divided over what effect these may have on the multilateral liberalization of trade, this divide is visible even amongst the AALCO Member States. There is no question that these MRTAs, if implemented, will cover a large portion of global trade and investment, and are most likely to have a significant impact on States that are not parties to them, as well as on the general jurisprudence of the WTO. The impact on third parties is likely to be increased competition and preference erosion in MRTA markets. Therefore, what is essential now is that States increasingly conclude these Agreements within the principles of the rules of WTO, ensuring that regional approaches support multilateral outcomes, as plurilateral agreements cannot be a substitute for the multilateral trading system that ensures fair trade for even the developing and least developed nations.

49. In the words of WTO DG Roberto Azevedo, it is hard to think of a global issue today that does not have a significant intellectual property dimension. Consider public health, innovation and access to medicines. Consider climate change and the development of green technologies. Intellectual property is central to these issues. There is an immediate need to strike a balance between demands of higher standards of IP protection and international enforcement on the one hand, and the need for access to technology on the other.

50. AALCO's RAC's in the field of administering disputes today not only compete with the older European traditional arbitration centres such as the Permanent Court of Arbitration, the Stockholm Centre for International Commercial Arbitration, or the International Court of Arbitration but also with a host of recent arbitration centres. Thus, it is of utmost importance today to keep the Centres updated with the best practices of the arbitration institutions of the world. In furtherance of the objectives of the agreement between AALCO and the Host states it remains pertinent to coordinate with such Centres in conducting joint activities and consultations in order to provide an efficacious and timely process of arbitration within them.[26]

[26] See AALCO Secretariat's Draft on "A Report on the Legal Framework Governing the Relationship between AALCO and the Regional Arbitration Centres Established under its Auspices", (available on file with the AALCO Secretariat).