AALCO/59/HONG KONG/2021/SD/S13

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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

INTERNATIONAL TRADE AND INVESTMENT LAW

The AALCO Secretariat
29-C, Rizal Marg,
Diplomatic Enclave, Chanakyapuri,
New Delhi – 110 021
(INDIA)

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I. Introduction

A. Background

1. The increasingly intertwining and closely interrelated domains of International Trade Law and International Investment Law have traditionally been dealt with separately in the work programme of AALCO, due to the different legal regimes applicable to them. It was only at the 57th Annual Session of AALCO held from 8-12 October, 2018 in Tokyo, Japan that the two topics were considered together in the same general meeting, and dealt with in the same brief as a combined agenda item having common concerns and synergies in discussion. As such, a background on AALCO's engagement with these topics as perceived from the work program of AALCO over the years would be desirable to inform the deliberations on the topic at the 59th Annual Session.

2. The topic "WTO as A Framework Agreement and Code of Conduct for the World Trade" was placed on the agenda of AALCO at its 34th Annual Session held in Doha, State of Qatar in 1995, the same year that the Uruguay Rounds of Negotiation were completed leading to the establishment of the World Trade Organization (WTO) headquartered in Geneva, Switzerland. Thereafter, the topic was featured on the agenda of AALCO's subsequent Annual Sessions, and deliberations were focused on a wide range of issues ranging from promotion of multilateral trade through the acceptance of international instruments, to consenting to a binding dispute settlement mechanism. The AALCO Secretariat was also provided with a mandate to monitor the developments in the WTO, particularly all aspects of the functioning of the Dispute Settlement Body (DSB) and the Appellate Body and their reports.

3. In between Annual Sessions, the work of AALCO on this topic comprised mainly of capacity-building exercises in the form of seminars and conferences, apart from undertaking in-depth perusal of the developments and presenting the results in the form of Special Studies. In 1998, a two-day seminar on "Certain Aspects of the functioning of the WTO Dispute Settlement Mechanism and other Allied Matters' was organized in New Delhi, India in cooperation with the Government of India.

4. At the 42nd Annual Session of AALCO (2003) held in Seoul, the Republic of Korea, a Special Study titled "Special and Differential Treatment under WTO Agreements" prepared

by the AALCO Secretariat was published for information and research purposes. On 1-5 February, 2010, the Centre for Research and Training (CRT) in the AALCO Secretariat organized a five-day training program titled "Basic Course on the World Trade Organization (WTO)". Drawing from the success of this training program, another training workshop was organized in cooperation with the Institute for Training and Technical Cooperation (ITTC), and the WTO from 28 March to 1 April 2011 at the AALCO Headquarters, New Delhi, India. The program focused on a number of topics of contemporary relevance including but not limited to the Introduction to the WTO, the WTO Basic Principles and Exceptions, General Agreements on Trade in Services (GATS) as well as Trade Related Aspects of Intellectual Property Rights (TRIPS).

5. Furthermore, 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, as a preparatory training session for the participants from the Member States, the AALCO Regional Arbitration Centres, as well as certain Non-Member States in view of the 11th WTO Ministerial Conference that was convened from 10- 13 December, 2017 in Buenos Aires, Argentina.

6. Soon after UNCITRAL placed 'International Commercial Arbitration' as one of its agenda items, and after the Report on the item by the Special Rapporteur, Ian Nestor, wherein he highlighted the inadequacy of the existing mechanisms and suggested the establishment of regional arbitration centres, the (then) AALCC (Asian-African Legal Consultative Committee) placed the topic on its agenda and initiated 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 the 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, the Arab Republic of Egypt, Nigeria, the Islamic Republic of Iran, and the Republic of Kenya, to establish Regional Arbitration Centers (RACs) therein.

7. AALCO has long associated itself with the issue of a congenial investment environment. It first discussed the topics of 'Investment Protection', 'Regional Cooperation

[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).

in the Context of the New International Economic Order', and 'Settlement of Disputes' at the Twenty-First Annual Session of AALCC in Jakarta, Indonesia, 1980,[2] and thereafter at subsequent Annual Sessions as well as inter-sessional meetings. After the Jakarta Session, the topic of 'Regional Cooperation in the Context of the New International Economic Order' underwent a more intensive discussion at the Ministerial Meeting held at Kuala Lumpur, Malaysia, in December 1980. The meeting recognized the need to create stable but flexible relations between investors and the host government, particularly in the context where investments were made by nationals or corporations of one developing country in another. The participants generally agreed that the investment climate should be promoted through adequate provisions for protection of investments, repatriation of capital and profits, and also a procedure for settlement of disputes. The meeting further indicated the desirability of formulating a draft model investment protection agreement for the consideration by the Member States.

8. It was generally considered that investment incentives which were offered by various governments under their laws should not normally be incorporated in investment protection agreements. The meeting was also of the view that model agreements should include certain special provisions which would help to promote investments from developing countries. The Secretary-General was further requested to prepare the draft of a model umbrella agreement.

9. The Secretariat's 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 in Regional Cooperation in Industries held in Istanbul in September 1981. Subsequent to the Istanbul meeting, the Secretary-General carried out extensive consultations with a view to prepare a revised study. The consultations revealed a good deal of divergence in State practice, the attitude of States towards bilateral umbrella investment protection agreements, as also in the matter of foreign investments. Therefore, it became apparent that a uniform approach in the matter of promotion and protection of investments may not be practical. The text of the model agreements was placed before the Member States at the Twenty-Third Annual Session at Tokyo, Japan in 1983 and it was decided that the drafts should be further

[2] 'At the Jakarta Session…it was agreed to discuss the Secretary General's Report with respect to the following aspects: (i) possible pattern of legal framework for regional economic cooperation, ii) investment protection and guarantees, and iii) settlement of disputes'. See 'Report of the Twentieth, Twenty-First, and Twenty-Second Sessions held in Seoul (1979), Jakarta (1980), and Colombo (1981)', Asian-African Legal Consultative Committee, The Secretariat of the AALCC (available on file with the AALCO Secretariat), available also at: http://www.aalco.int/report20thto22ndAS.

examined by another Expert Group in order to ensure their wider acceptability to the countries of the region.

10. An Expert Group Meeting was thereafter convened which met in New Delhi during January- February 1984. The Meeting examined the provisions of the drafts and finalised its recommendations in the form of the three models for submission to governments for observation and comments. The Report of the Expert Group was placed before the Twenty-Fourth Session in 1985 (Kathmandu, Nepal) for further consideration by the Committee. No comments of a substantive nature were made by any government. The Committee, after taking note of various observations made in the course of its deliberations, decided to transmit to the 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 appropriate authorities and government departments.

11. Renewed interest in the topic of International Investment Law was shown by the Member States who participated in the Seminar titled ‘International Investment and WTO’ held on 2 March 2016 at the AALCO Headquarters in New Delhi, that *inter alia* had presentations and discussion on sub-topics such as current challenges faced by Asian and African Countries with respect to Investor-State Dispute Resolution. Thereafter, at the Fifty-Seventh Annual Session of AALCO held in 2018 at Tokyo, Japan, the topic ‘International Investment Law’ was once again taken up as a substantive agenda item, and for the first time considered together with ‘International Trade Law’ in the same brief and general meeting. With regards to International Investment Law, discussions focused mainly on AALCO’s Regional Arbitration Centres. Many Member States suggested measures to reduce treaty shopping and methods to modernize International Investment Agreements, to ensure sustainability. Some States sought clarification from the Secretariat on the types of joint activities and consultations to be held between the Regional Arbitration Centres and the aims intended for such activities so as to avoid duplication of activities and efficient use of resources. Further, there was an emphasis on capacity-building amongst Member States with regard to international trade and investment law.

12. With respect to the issue of capacity-building in international investment law, a Seminar on ‘Reviewing Reforms to the International Investment Regime and to the ISDS Mechanism: Perspectives from Asian-African Regions’, in partnership with the African

Institute of International Law, and the People's Republic of China, was held from 19-21 November 2018, at Arusha, the United Republic of Tanzania. The Seminar focused its sessions on the contemporary key outstanding issues on diverse topics namely: a) The Renegotiation and Termination of Investment Treaties; b) Reform Proposals in the UN Commission on the International Trade Law; c) Investment Support Programmes for Least Developed Countries; d) An Appraisal of the Proposal for a World Investment Court; e) Legal Issues Relating to the Belt And Road Initiative; f) Reform of the Investor-State Dispute Settlement Mechanism; g) Prevention and Management of Investment Disputes, and h) The Role of the AALCO Regional Arbitration Centres in the Settlement of Investment Disputes.

13. Most recently International Investment Law was taken up as an agenda item at the Fifty-Eighth Annual Session, at Dar-es-Salaam, Tanzania, in 2019. Two main issues were discussed, namely: a) Investment Dispute Mechanism Reform Initiative, and b) Mediation in Investment Disputes. Member States lauded the work of UNCITRAL in particular the Working Group III. The legal and institutional challenges to the establishment of a permanent investment court were discussed and the nature and jurisdiction of such an institution were reflected upon. General support was expressed for mediation of investment disputes with a consensual basis.

B. Issues for Focused Deliberations at the Current Annual Session

1) COVID-19 and Unilateral Measures Affecting Trade
2) Investment Dispute Mechanism Reform Initiative
3) Mediation in Investment Disputes

II. Deliberation at the Fifty-Eighth Annual Session of AALCO (Dar-es-Salaam, The United Republic of Tanzania, 21-25 October 2019)

14. The Secretary-General of AALCO, H.E. Prof. Dr. Kennedy Gastorn delivered the introductory statement on the subject. He stated that AALCO's engagement with the topics 'International Trade Law' and 'International Investment Law' (as they were then dealt with independently) can be traced back to the 1990s when the two topics gained prominence as

such for the first time on the global stage. He mentioned that the two topics were considered together for the first time at the Fifty-Seventh Annual Session in 2018, in Tokyo, Japan – as it was felt that the two topics have common concerns and synergies.

15. The unprecedented crisis faced by the WTO dispute settlement system was referred to in the statement. The role that could be played by constructive discussion and negotiations in chalking out the best solution to address the impasse was highlighted, and that AALCO could be an apposite platform for such deliberations was underlined.

16. With regard to 'International Investment Law', he stated that the topic received attention for the first time within the work of AALCC entitled as 'The Treatment of Aliens', and was properly discussed as such as a part of the topic 'Regional Cooperation in the Context of the New International Economic Order' at the Twenty-First Annual Session of AALCO held in Jakarta, Indonesia, in 1980.

17. He thereafter stated that at the current Annual Session three issues were identified for discussion, namely: a) WTO Reforms, b) Investment Dispute Mechanism Reform Initiative, and c) Mediation in Investment Disputes.

18. With regards to the sub-topic, 'Investment Dispute Mechanism Reform Initiative', he stated that in the face of continuous and onerous investment claims against States, the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) received a mandate to propose reforms to the Investment Dispute Settlement Mechanism in 2017, and since then a government-led process with inputs from other stakeholders has started. He further noted that while the Commission's work is restricted to procedural issues, further reform of substantive provisions is also needed, as emphasized by some States in Working Group III.

19. With regards to the sub-topic 'Mediation in Investment Disputes' he mentioned that the Secretariat's Brief accounts for the benefits of the application of mediation to investment disputes saving time and costs for both parties to an investment dispute, thereby making mediation a seminal dispute settlement method crucial for maintaining commercial relationship between the parties, even though not all investment disputes are capable of being mediated. He also lauded the recent United Nations Convention on International Settlement Agreements resulting from Mediation, 2019 ('the Singapore Convention') that has provided a regime for the cross-border enforcement of mediated settlements.

20. The first speaker, Dr. Aniruddha Rajput, Member, International Law Commission, as an expert, made a presentation on mediation in investment arbitration as an under- explored option of alternative dispute resolution, which might be resorted to in the cooling off period. The advantages of mediation over arbitration were emphasized and the form such mediation clauses could take was explained.

21. Thereafter, the President of the Fifty-Eighth Annual Session of AALCO, H.E. Amb. Dr. Augustine P. Mahiga opened the floor for comments by the Member States and observers. The following delegations presented their statements on the agenda item: the Republic of Indonesia, the People's Republic of China, the Socialist Republic of Viet Nam, the United Republic of Tanzania, the Republic of India, Japan, the Islamic Republic of Iran and the Republic of Kenya.

22. **The Delegate of the Republic of Indonesia**expressed strong belief that an open, non-discriminatory, and rule-based multilateral trading system must be maintained and strengthened to make the market more effective and balanced amidst the increase of uncertainty in international trade. The meeting was apprised of the fact that Indonesia shares the view that resolving the issue of Appellate Body being defunct should be prioritized to salvage the whole system within the WTO, and that Indonesia welcomes and appreciates the efforts being made by many WTO members to reform the dispute settlement system through the submission of different proposals, and is open to discuss the elements of the proposals.

23. **The Delegate of the People's Republic of China** acknowledged the centrality of the WTO in multilateral regulation of international trade, it was noted that China supports necessary reform of the WTO, in order to enhance its authority and efficacy, to build an open world economy, and to pursue a community with a shared future for mankind. To this end, three basic principles that ought to inform WTO reforms were enumerated, viz., preservation of the core values of non-discrimination and openness; safeguarding the development interests of developing members; and following the practice of decision-making by consensus. Also, five suggestions were adduced on WTO reform. *Firstly*, the WTO reform should uphold the primacy of the multilateral trading system. *Secondly*, the priority of the reform is to address the existential problems faced by the WTO, like the issue of Appellate Body member appointment blockage. *Thirdly*, the reform should address the imbalance of trade rules and respond to the latest developments of our time. *Fourthly*, the reform should safeguard the special and differential treatment for developing members. And *lastly*, the

reform should respect members' development models. Pertinently, willingness was expressed to continue the discussion on these issues within the framework of AALCO with all Member States.

24. With regard to 'International Investment Law', he firstly welcomed the reform initiative proposed by UNCITRAL Working Group III, to solve the problems existing in the investor-State dispute settlement (ISDS) mechanism. He appreciated the fact that despite the various shortcomings that have come into light regarding the current ISDS mechanism, the system as such plays an important role in promoting transnational investment, and building rule of law into international investment governance, and is thus, generally worth maintaining. He further supported the stipulation of transparency discipline for third-party funding, and stated that the legal consequences should be borne by the parties involved for failure to fulfil their disclosure.

25. **The Delegate of the Socialist Republic of Viet Nam** firstly expressed utmost support for international measures to improve the transparency and efficiency of the WTO and ISDS mechanisms. He observed that free trade, integration and economic alignment on regional and international levels would continue to be the dominant trend. Willingness was expressed to cooperate with other States to accelerate the reforms of the WTO, especially of the dispute settlement mechanism.

26. Regarding 'International Investment Law' he stated that Viet Nam has experienced a tremendous rise in foreign investment, by signing various bilateral and multilateral treaties on investment protection and promotion. However, foreign investment has brought about not only opportunities and prosperity but also challenges that involve the investor-State disputes. He stated that, therefore, Viet Nam has voiced its concerns and extended its support for reform of the investor-state dispute settlement (ISDS) mechanism at various forums such as the UNCITRAL and the United Nations Conference on Trade and Development (UNCTAD). He further expressed the view that parties must seek alternative peaceful methods of dispute resolution, such as mediation, before taking up arbitral proceedings. However, he also cautioned that mediation cannot be an obligatory step before arbitration, as unless done in 'good faith' the process of mediation might hinder parties from arriving at a solution.

27. Regarding investment arbitration he re-stated what has been Viet Nam's consistent position at UNCITRAL Working Group III, that third-party funding ought to be observed carefully due to the possibility of abuse; and in any case it must follow the following

safeguards that the funding must be: (i) limited to certain claims to avoid frivolous and bad faith claims; (ii) uphold transparency by requiring fully disclosure of funding terms; (iii) conditioned with security for cost; and (iv) containing remedies for non-compliance.

28. **The Delegate of the United Republic of Tanzania** informed the session that Tanzania is a party to many international trade legal instruments and UN bodies, including the WTO. On the topic 'International Investment Law' he mentioned that while fulfilling its international obligations the Government of Tanzania is also obligated to protect its natural resources for the benefit of its citizens. He mentioned two pieces of legislations in this regard, namely: a) Natural Wealth and Resources (Permanent Sovereignty) Act No. 6 of 2017 – providing measures to ensure that the natural wealth and resources of Tanzania are used for the greatest benefit and welfare of its people, and in case of any disputes arising out of investment or engagement in natural wealth of resources be resolved using dispute resolution institutions available in the country, including those related to negotiations, mediation, conciliation, arbitration and litigation; and b) Natural Wealth and Resources Contracts (Review And Renegotiation of Unconscionable Terms) NO.6 of 2017 – giving the National Assembly powers to review and even initiate re-negotiation of arrangements or agreements made by the government relating to natural wealth and resources and where it finds any unconscionable term, rectifying the same. Expressing strong belief that such measures would support investment as well as benefit its citizens, he called upon the AALCO Member States to support these actions in attainment of the objectives of UN Resolution on Permanent Sovereignty over Natural Resources, 1962.

29. **The delegate of the Republic of India**, regarding the issue of 'Investment Dispute Mechanism Reform Initiative' stated that India is currently in the process of terminating its Bilateral Investment Promotion and Protection Agreements (BIPPAs)/BITs (which allow for such terminations). Drawing on the shortcomings of the current state of BIT arbitration, he stated that India is in the process of renegotiating with partner countries on a new BIT based on India's new model text, which does not contain provisions on settlement of Investor-State Disputes. However, Article 29 of India's new model BIT does mention about developing an institutional mechanism with an appellate body in future for investment treaty disputes.

30. On the question of mediation, he mentioned that India welcomes mediation as a mode of settlement of disputes, and that all Indian investment treaties provide for a cooling-off period of six months. He further added that India is of the view that when it comes to ISDS

reforms it is better to blank canvas to devise a more fair, a more legitimate, and a more self-contained system of ISDS with internal checks and balances to ensure a good quality of decision-making, which may be seamlessly merged into the current landscape of enforcement of decisions.

31. With regard to designing a permanent investment court, he stated that the legal and practical challenges in relation to its composition, structure and certainty ought not to be underestimated, which have been quite exhaustively dealt with under WG-III of UNCITRAL. He lastly added in this regard that India welcomes the move to have deliberations on the proposals for both structural and systemic reforms and further.

32. On the issue of WTO reforms, the precedence of resolution of the Appellate Body impasse was underscored. Any reforms in the WTO must be development centric, preserve the core values of the system, strengthen the provisions of special and differential treatment in existing and future agreements and preserve the multilateral character of WTO.

33. **The Delegate of Japan**, regarding the issue of ‘Mediation in Investment Disputes’, firstly commented that mediation continues to remain an effective tool for investment dispute resolution, as it has been so in the past. At the same time, he also added that while mediation can act as an additional possible method of dispute settlement in the existing investment frameworks such as Free Trade Agreements, Bilateral Investment Treaties and Investment Contracts, it will be unrealistic to attempt to replace existing procedures with mediation. Nevertheless, he stated that Japan would like to continue to consider the possibility of mediation as one of the alternatives regarding the ISDS through actively contributing to the discussions such as on the ICSID rules amendment.

34. Regarding the issue ‘Investment Dispute Mechanism Reform Initiative’, he stated that Japan considers that such a reform needs a balance between protection of investment and States’ right to regulate it, and in this regard, Japan is fully committed to engage in the Working Group III discussions of the UNCITRAL.

35. Intervening on the issue of WTO reforms, he emphasized on the need to find a durable solution to problems related to functions of the Appellate Body.

36. **The Delegate of the Islamic Republic of Iran** with regard to the issue ‘Investment Dispute Mechanism Reform Initiative’, firstly appreciated the progress made in the different working groups of the United Nations Commission on International Trade Law

(UNCITRAL). He specifically mentioned the work of UNCITRAL on expedited arbitration which is less expensive and faster than standard arbitration, as well as the deliberation with UNCITRAL Working Group III and its three-phase mandate concerning reform of Investor-State dispute settlement, expressing positive affirmation that Working Group III is likely to come up with concrete recommendations to address the defects of the current system.

37. Next, he appreciated the critical importance of the topic of e-commerce which is currently on the agenda of Working Group IV of UNCITRAL, acknowledging the work of the Secretariat in preparing a revised draft on the cross-border recognition of identity management and trust services. He further added that in preparing the draft provisions particular attention should be given to the different levels of economic as well as information and communication technology development of the Member States, including the challenges faced by them, especially in the matter of privacy. With regard to the issue of judicial sale of ships as included in the work of Working Group VI of UNCITRAL, he appreciated the work of the Secretariat in preparing a revised draft instrument incorporating the outcome of the deliberations, adding that the new draft should address the concerns expressed by the Member States on the draft text prepared by the Cornite Maritime.[3]

38. Lastly, regarding the issue of 'Mediation in Investment Disputes', appreciating the successful adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation, or the Singapore Convention, 2018, which will assist Member States and their judicial authorities to settle disputes with increased efficiency, particularly in commercial disputes in which the parties seek stability and reliability, he mentioned that the Islamic Republic of Iran signed this Convention on 7 August 2019.

39. **The Delegate of the Republic of Kenya**, regarding the issue of 'Investment Dispute Mechanism Reform Initiative' acknowledged the following challenges that were highlighted at the just concluded UNCITRAL Working Group III, as well as recently experienced by Kenya during the prosecution of the Investor-State Arbitration cases that Kenya was a party to, namely: a) lack of consistency, coherence, predictability of arbitral decisions by Investor-State Dispute Settlement (ISDS) tribunals; b) concerns pertaining to cost and lengthy

[3] The Delegate of the Islamic Republic of Iran added in this regard that the new draft needs to take the following crucial points into consideration, namely: a) right to access to justice including right preferred creditor not being prejudice by provided solutions such as extinguishment of rights by issuing the sale certificate; b) necessity of acquiring judicial approval for foreign judicial decisions so that administrative enforcement can take place internally; c) there should be a contractual link between claimant and the ship, for the pursuance of the judicial sale; and d) it is imperative to exclude State ships from the scope of the draft text.

proceedings and the lack of a mechanism to address frivolous or unmeritorious cases; and c) lack of transparency and regulation on third-party funding and the impact it has on different aspects of ISDS, for instance increase in frivolous claims, costs of ISDS and security for costs. As to the issue of 'Mediation in Investment Disputes' he stated that as a mechanism of Investment dispute settlement should be encouraged with a view to addressing the challenges stated above.

40. Recognizing that the dispute settlement mechanism of the WTO provides a rule-based process to adjudicate over trade disputes, he apprised the meeting that the Republic of Kenya has not actively participated in or utilized the mechanism. This is the case for most of the developing and Least Developed Countries, and the primary reason for the same is the limited technical and financial capability to access this mechanism. It was noted that Kenya recognizes and acknowledges the efforts being made by AALCO to address the existential challenge to the WTO Appellate Body and to find a solution so that the Appellate Body functions as envisaged. Support was expressed for all efforts under the AALCO banner in collecting views towards reforming the WTO.

III. General Discussions and Recent Developments

A. COVID-19 and Unilateral Measures Affecting Trade

41. The COVID-19 pandemic has now resulted in a global economic downturn that could possibly be deeper and more widely felt than the great recession that followed the global financial crisis in 2008-09. As the scale and severity of the pandemic has continued to grow, the adverse impact on national economies has exacerbated. A 9.2% fall was projected in the volume of world merchandise trade in 2020, followed by a 7.2% rise in 2021, leaving trade well below its pre-pandemic trend.[4] Although the projection, at a later date, vouched for a less prolonged decline in trade than initially forecasted, considerable uncertainty remained,

[4] The WTO issued its annual Trade Outlook on 8 April, and an update was issued on 22 June to take account of the rapidly developing situation. On 6 October, a revised trade forecast was issued, see at WTO Press Release, 8 April 2020, "Trade set to plunge as COVID-19 pandemic upends global economy", at https://www.wto.org /english/news_e/pres20_e/pr855_e.htm

and still remains, about the strength of recovery going forward.[5] As per the new estimates in the latest annual trade forecast of the WTO, issued on 31 March 2021, the volume of world merchandise trade is expected to increase by 8.0% in 2021 after having fallen 5.3% in 2020, continuing its rebound from the pandemic-induced collapse that bottomed out in the second quarter of last year.[6]

42. WTO estimates suggest that the volume of services trade fell around 27% during the pandemic, with travel and transport-related sectors, which are important sources of exports for low-income countries, hit hardest.[7] Travel services were down 63% in 2020 and are not expected to fully recover until the pandemic wanes.[8] The trade impact of the crisis has been notably different across regions, as well as across different industrial sectors.

43. The transcendence of a global health emergency to a global economic shock has generated ripples along the principal arteries of the global economy, drastically changing the global environment in which United Nations Member States aspired to implement development policies to achieve the Sustainable Development Goals (SDGs). Although both developed and developing countries have been negatively affected by the economic crisis triggered by the pandemic, the differences are quite stark, both between and within countries. The economic and social impact is particularly severe in structurally weak developing countries, owing to their higher susceptibility to shocks and their lower level of capacity to respond and adjust.

44. Through the channels of international trade, demand and supply shocks that originated in major economies quickly got transmitted to developing regions, leading to disproportionately negative economic shocks in developing countries. Lockdown and other emergency measures implemented by major economies in the first half of 2020 caused market disruptions unparalleled in recent decades. The combined demand and supply shocks in these economies were quickly transmitted to developing regions through networks, or due to a breakdown of such networks, of trade in goods and services. Sectors that represent a major source of external earnings of many developing countries, such as tourism and commodities, were hit hardest by lockdown, transport disruption and emergency health measures taken by major economies.

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[5] The WTO and COVID-19: FAQs at https://www.wto.org/english/tratop_e/covid19_e/faqcovid19_e.htm.

[6] WTO Press Release: World trade primed for strong but uneven recovery after COVID-19 pandemic shock, 31 March 2021, at https://www.wto.org/english/news_e/pres21_e/pr876_e.htm

[7] *Supra* note 5.

[8] *Supra* note 6.

45. A closer scrutiny in the scheme of things reveals that the most proximate cause of the market disruption lies in the economic policy responses to the pandemic, which has been a mixed bag of restraints, mandates, and emergency measures. Apart from lockdowns and other compulsory restrictions on business activities, other measures include the reorganization or nationalization of health care and social service networks, issuance of compulsory licenses for medicines, provision of subsidies to domestic companies, and export controls on medical goods. Furthermore, a domino effect has been perceived in this regard, with some governments responding to other States' restrictions by imposing constraints of their own. The invocation of WTO exceptions has, thus, received an obvious boost in the States' responses to the pandemic. It is imperative herein, therefore, to pore over the semantics of the key rules and exceptions, albeit briefly, that might apply to States' trade-restrictive pandemic responses, along with the related domain of international intellectual property (IP) protection and access to COVID-19 treatment wherein a similar strain of invoking exceptions could be traced.

COVID-19 Pandemic and Trade Related Measures

46. Under the auspices of the WTO, a member may challenge another's pandemic response for running afoul of prohibitions on discriminatory treatment, restrictions on freedom of transit, or import and export restrictions, under the General Agreement on Tariffs and Trade (GATT) or General Agreement on Trade in Services (GATS).

47. Any pandemic-related measure that discriminates among trading partners *de jure* or *de facto*, or that burdens free transit or imposes export restrictions, would likely have to be justified by reference to some exception.[9] In general, governments around the world have been implementing trade-related measures in response to the COVID-19 pandemic, some

[9] A State's justificatory aim is typically relevant only after a prima facie violation is established and an exception is in play; Robert Howse (2016), "The World Trade Organization 20 Years On: Global Governance by Judiciary", *EJIL* 27(9): 9-77, 47-48.

trade restrictive,[10] but a number of countries have also called for the elimination of export controls and restrictions on essential goods.[11]

48. Export restrictions, although generally prohibited by the WTO, may be justified on the grounds of Article XI:2 of the GATT as temporary measures in view of critical shortages of essential goods.[12] Considering the current crisis, the WTO Appellate Body's interpretation of Article XI:2 of the GATT appears to provide WTO Members with the authority to restrict exports of food and medical supplies as long as necessary in order to prevent critical shortages.[13] Export restrictions might be placed on medical products by invoking the general exception of Article XX(b) of the GATT as long as they are strictly limited to the requirements of emergency response. The suitability of invocation of Article XXI(b) of the GATT regarding the protection of security interests in times of an emergency in international relations as justification for the current measures is subject to review.[14]

49. As of mid-September 2020, 141 countries and territories were using 330 emergency trade measures. Among those measures, nearly 75 per cent had no specified termination dates, while the rest were designed to last for an average of six months.[15]

50. A similar strain of invoking exceptions is available to States looking to justify trade policy measures apparently undertaken to ensure access to COVID-19 treatment.

[10] For details, see Ignacio Carreño *et.al.* (2020), "The Implications of the COVID-19 Pandemic on Trade", *European Journal of Risk Regulation*, 11: 402-410.
[11] In order to ensure transparency, the WTO put in place a webpage dedicated to COVID-19, providing up-to-date trade-related information and an updated list of the various notified measures adopted by WTO Members; "COVID-19 and World Trade", at https://www.wto.org/english/tratop_e/covid19_e/covid19_e.htm
[12] WTO Appellate Body Report on China- Raw Materials of 30 January 2012, WT/DS394/AB/R; WT/DS395/AB/ R; WT/DS398/AB/R, paragraphs 331, 324, 326.
[13] J. Pauwelyn (2020), "Export Restrictions in Times of Pandemic: Options and Limits under International Trade Agreements", *Journal of World Trade* 54(5):727-748.
[14] Also, the WTO Appellate Body typically applies a State-centred definition of "emergency in international relations", which revolves around armed conflicts and does not include health emergencies; *Russia-Measures Concerning Traffic in Transit (Ukraine v. Russia)* Panel Report of 5 April 2019 (WT/DS512/R) paragraph 7.76, cited from Ignacio Carreño *et.al.* (2020) *supra* note 10 at 408. Further details in the subsequent part of this brief.
[15] International Trade Centre Market Access Map: COVID-19 Temporary Trade Measures, 2020, cited from UNCTAD (2020), "Chapter 5: Trade as a Catalyst for Fairer and Greener Recovery", UNCTAD (2020), "Chapter 1: COVID-19 has shaken the trade and development landscape", in *Impact of the COVID-19 Pandemic on Trade and Development*, United Nations, Geneva at https://unctad.org/system/files/official-document/osg2020d1_en.pdf at 93.

51. The pandemic has revived one of the most entrenched debates in international trade: whether the WTO rules on intellectual property rights protections are well-suited to responding to public health needs and whether further flexibilities or new approaches are needed, especially in times of crisis.

52. In case a country finds that a patent owner does not or cannot produce or import relevant patented COVID-19 treatments in sufficient amounts or at an affordable price, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) allows it to grant compulsory licenses.[16] Countries with insufficient manufacturing capacity are enabled as well to benefit from compulsory licensing to facilitate access to medicines.[17] It could be expected that corporate social responsibility, and in case of publicly funded research, the state's responsibility to protect public health, will be taken seriously and some form of voluntary licensing will be the norm. Companies can also use the Medicines Patent Pool to license (existing and new) drugs for COVID-19 to ensure affordable access in low and middle income countries.[18]

53. The interplay between Article 31*bis* system for export compulsory licenses and Article 73 TRIPS, setting out the (Article XXI GATT-equivalent) national security exception to commitments under TRIPS constitutes yet another contentious issue. The question arises: can a WTO Member that for whatever reason cannot use the Article 31*bis* system alternatively rely on Article 73, arguing that importing COVID-19 treatment to address its own insufficient manufacturing capacity is "necessary" for protecting its "essential security interests"? And does the current pandemic constitute an "emergency in international relations" under Article 73?

54. The limited guidance from the so far only Panel Report addressing this issue,[19] suggests that the security exception "is not totally 'self-judging'"– but rather requires an

[16] Compulsory license is granted under the conditions of Article 31, TRIPS.
[17] Article 31*bis* TRIPS.
[18] Taking this idea a step further, Costa Rica has proposed for the WHO to set up a voluntary emergency Technology Intellectual Property Pool to ensure global and affordable access to all data, research publications, technology and other informational aspects of Covid19 treatment – a proposal apparently being considered by the WHO; "Coronavirus: International Patent Pool in the Making", 12 April 2020, at http://patentblog.kluweriplaw.com/2020/04/12/coronavirus-international-patent-pool-in-the-making/?doing_wp_cron=159004 1428.9938309192657470703125.
[19] Russia – Traffic in Transit, 5 April 2019, WT/DS512/R.

objective determination whether the requirements in the sub-paragraphs of Article XXI GATT (in present discussion: Article 73 TRIPS) are satisfied; and that an "emergency in international relations" requires a "situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state". Even though this definition is linked to situations akin to an armed conflict, the severity of the COVID-19 pandemic and its far-reaching consequences across the globe, plus the clarifications under para.5(c) of the Doha Declaration that "public health crises, including (…) epidemics" can represent a "national emergency",[20] arguably support an application of Article 73(b)(iii) TRIPS. If WTO Members in the Doha Declaration, a subsequent agreement on the interpretation of TRIPS under Article 31(3)(a) of Vienna Convention on the Law of Treaties, refer to an epidemic as a "national emergency", then a WHO-declared pandemic should constitute an international emergency, especially if accompanied with general economic, social and political instabilities.[21]

55. In addition, the good-faith limit imposed by the Russia – Transit Panel when a WTO member exercises its (limited) discretion to decide what "it considers necessary" to protect its "essential security interests" should not pose a problem in the COVID-19 context: given the number of mortalities and the severity of quarantine measures currently imposed as theonly real alternative, no one can reasonably question a country's decision that considers sufficient availability of effective treatment as a "matter of national security".[22]

56. To sum up, a perusal of application of exceptions in ITL tends to unveil a typical pattern and certain basic elements. *Firstly*, exceptions are only available where the state is pursuing a legitimate regulatory aim, such as the protection of human health or public health, essential security interests, or other essential interests. *Secondly*, the measure must have the requisite nexus to this regulatory aim- this might require that it be "reasonably related," "necessary," or "the only way" to safeguard that interest. This often entails an inquiry into whether less-restrictive alternatives were available to achieve the state's purpose. *Thirdly*,

[20] Declaration on the TRIPS Agreement and Public Health, Doha WTO Ministerial 2001: TRIPS; WT/MIN(01)/DEC/2; 20 November 2001.

[21] Henning Grosse Ruse-Khan, "Access to Covid-19 Treatment and International Intellectual Property Protection – Part I: Patent protection, voluntary access and compulsory licensing", 15 April 2020, at https://www.ejiltalk.org/access-to-covid19-treatment-and-international-intellectual-property-protection-part-i-patent-protection-voluntary-access-and-compulsory-licensing/; Henning Grosse Ruse-Khan, "Access to Covid-19 Treatment and International Intellectual Property Protection - Part II: National security exceptions and test data protection", 28 April 2020, at https://www.lcil.cam.ac.uk/part-ii-access-covid-19-treatment-and-international-intellectual-property-protection.

[22] *Ibid*.

the measure may need to meet overarching requirements of non-arbitrariness, non-discrimination, or good faith.

57. A significant development solicits mention herein. Taking note of the chasm of inequality that the pandemic has deepened, a Waiver Proposal has been submitted by India and South Africa[23] in October 2020, and co-sponsored by Kenya, Eswatini(Swaziland), Pakistan, Mozambique and Bolivia. It envisages a temporary and complementary policy space within the TRIPS framework that could empower governments to take more automatic and expedited actions when accessing the intellectual property-protected technologies that could save the lives of millions of people.[24] Many developing countries demonstrated strong support when the proposal was first presented at the TRIPS Council on 15 October 2020.[25] Several organizations have also come forward voicing their support.[26]

58. The newly appointed Director-General of the WTO, Dr Okonjo-Iweala of Nigeria - the first woman and the first African to serve as the Director-General of the Organization, has opined that the multilateral trading system has shown resilience despite the severity of the global health and economic crisis caused by the COVID-19 pandemic.[27] The Director-General's mid-year report on trade-related developments presented to members on 29 July 2021 has noted that WTO economies have, from mid-October 2020 to mid-May 2021, exercised trade policy restraint and refrained from an acceleration of protectionism that would have further harmed a world economy reeling from the COVID-19 pandemic.[28]Recognizing the urgency of providing access to COVID-19 vaccines, tests and

[23] WTO, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa, IP/C/W/669, 2 October 2020, at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True.

[24] Amnesty International, Briefing for WTO Member States on the TRIPS Waiver Proposal for the Prevention, Containment and Treatment of COVID-19, November 2020 at https://www.amnesty.org/download /Documents/IOR4033652020ENGLISH.PDF.

[25]At the TRIPS Council meeting on 15-16 October 2020, several states, including Argentina, Bangladesh, Chad, Chile, China, Columbia, Costa Rica, Ecuador, El Salvador, Indonesia, Jamaica, Egypt, Mozambique, Nepal, Nicaragua, Nigeria, Pakistan, Philippines, Sri Lanka, Tanzania, Thailand, Turkey and Venezuela expressed full or general support for the Waiver Proposal, with some asking for further information.

[26]More than 300 civil society organizations globally and a number of international organizations including WHO, UNAIDS, the South Centre, and other international organizations including UNITAID, and Drugs for Neglected Diseases initiative have expressed their strong support for the move. A group of UN Special Procedures have also welcomed the proposal; OHCHR, No one is secure until all of us are secure: UN experts decry COVID vaccine hoarding, 9 November 2020, https://www.ohchr.org/EN/NewsEvents/Pages/Display News.aspx? NewsID=26486& LangID=E.

[27]Remarks by the Director-General of the WTO, Informal Trade Policy Review Body meeting — Trade Monitoring Report, 29 July 2021, at https://www.wto.org/english/news_e/spno_e/spno13_e.htm

[28] WT/TPR/OV/W/15, Report of the Trade Policy Review Body from the Director-General on trade-related developments - Mid-October 2020 to mid-May 2021 issued on 13 July 2021, read with corrigenda issued on 23 July 2021 and 30 July 2021 respectively, at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-

treatments to people throughout the developing world, the heads of the International Monetary Fund, World Bank Group, World Health Organization and the WTO launched a new website on 30 July2021 which will serve as a platform for information on access to COVID-19 vaccines, therapeutics and diagnostics and on the activities of the organizations in tackling the pandemic.[29] The website is an initiative of the Task Force on COVID-19 Vaccines, Therapeutics and Diagnostics for Developing Countries, which was set up to identify and resolve impediments to vaccine production and deliveries.

B. Investment Dispute Mechanism Reform Initiative

59. Generally reluctant to bind their foreign direct investment (FDI) policies in multilateral agreements, developing States eventually agreed to submit some aspects of their investment frameworks, especially those concerning protection and treatment of FDI to either stand-alone Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) that contain investment chapters, Double Taxation Treaties (DTTs) between countries or other Investment Contracts (inclusively known as International Investment Agreements (IIAs)) since 1990s.

60. IIAs can be an important factor for host countries to incentivize FDI, both in quantity and quality. FDI may indeed contribute to sustainable development; however, the benefits to host countries are not automatic. It posits that regulations are needed to balance the economic requirements of investors for protection with the need to ensure that investments make a positive contribution to sustainable development in the host State. A reform wave in the BIT regime is, thus, underway in many countries, including the developing and transitioning ones, and which covers, more importantly, the development of Model BITs in many regions, which promise a re-balancing of rights and obligations of investor and host State.

61. An important role in the present unrest in the system is also played by the increasing wide-spread discontent amongst nations with the current Investor-State Dispute Settlement (ISDS) Mechanism. In the absence of an international investment court, States hosting foreign investment or investor States have opted for this mechanism. It has brought about its own challenges to the international law of foreign investment due to procedural inadequacies,

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DP.aspx?language=E&CatalogueIdList=275947,275720,275406&CurrentCatalogueIdIndex=2&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

[29] Multilateral Leaders Task Force on COVID-19 Vaccines, Therapeutics and Diagnostics, at https://www.covid19taskforce.com/en/programs/task-force-on-covid-19-vaccines

inconsistency in the application and interpretation of the key principles of international investment law by the arbitration tribunals, and further, as there is no appellate mechanism to bring about some cohesion and consistency in jurisprudence. Further, it might be acknowledged that investment arbitration itself appears unfair. This is because fairness calls for all parties that are affected by the resolution of a dispute to be given standing in the adjudicative process and because, in investment treaty arbitration, only one class of private interests – the investor – has that right to be heard. Of course, not all foreign investors are well positioned by the system to bring a claim against a State that has abused them in some way. The cost of access precludes many foreign investors ever from bringing a claim.

62. There is no doubt that the inhomogeneous domestic adjudication process, as well as the other methods of Alternative Dispute Resolution(ADR,including mediation) that *up till now* have lacked sufficient enforceability, the ISDS regime continues to remain the preferred investment dispute settlement mechanism, and is commonly provided for by the network of over 3000 BITs and IIAs in operation. With the explosion of investment arbitrations, criticism of ISDS has been growing, and in recent years, has culminated in somewhat of a backlash against the system.

63. Firstly, as per many scholars there is a lack of democratic accountability.[30] Typically, investment tribunals consist of a three-arbitrator panel. Often, each party will select an arbitrator, and the third (often presiding) arbitrator, is selected by the mutual agreement of the parties. Pragmatically, parties are likely to choose individuals who they believe will offer the greatest chance of 'winning'.

64. Secondly, investment disputes are often considered to be public in nature, because they involve the State as a party, and often involve complex issues of public interest and public policy. Indeed, private individuals of questionable qualification are being called upon to settle public disputes. This is problematic because private investment tribunals, 'wield enormous power—displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies'.[31] Furthermore, although the decisions in investment disputes are only directly applicable to the parties to the dispute, in reality, the pronouncements that these tribunals make as to the existence or non-existence of an alleged rule of international foreign investment law or the meaning and scope

[30] Nicolette Butler, Surya Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organization?', *Netherlands International Law Review* (2017), pp. 43-72.

[31] S. Leader, 'Human Rights, Risks, and New Strategies for Global Investment', *Journal of international Economic Law* (2006), pp. 657-705.

of a rule have wider ramifications and implications for other states as well as for international law as a whole.

65. Concerns have also been raised regarding the inadequate representation of developing States amongst panels of arbitrators. Investment arbitration is also criticised for tolerating potential conflicts of interest; as the pool of potential arbitrators is very small indeed;so much so, that arbitrators may very well have worked as counsel for the disputing parties in other cases.

66. ISDS is also heavily criticised for allowing too much confidentiality in proceedings and for a lack of transparency. Traditionally in commercial disputes, emphasis was placed on the need for confidentiality in order to ensure the businesses of the respective parties was not harmed. In turn, this high degree of confidentiality translated into a very opaque process. This has been remedied to a certain degree by the UNCITRAL Transparency Rules of 2014.

67. Another concern with ISDS is the lack of consistency of decisions. There have been a number of highly publicised decisions which demonstrate the lack of consistency in international investment arbitration; in cases where the facts are the same or very similar, different investment tribunals have managed to reach diametrically opposing decisions.[32]

68. Third-party funding (TPF) is another controversial aspect of investor-State arbitration. The potentially high damage awards (recently averaging $500 million per dispute) characteristic of investor-State arbitration under the (BIT) regime have made it a new and highly attractive market for TPF.

69. The vast majority of funding goes to claimants since financing claimants yields a greater profit as compared to the funding of respondent States (which gain no financial award under the current BIT rules). The role of TPF in ISDS raises important concerns given the asymmetric structure of the BIT/ISDS regime. The funding model for TPF in ISDS is predicated on claimants having a direct voice in the selection of adjudicators, and with States having narrowly circumscribed substantive rights under the treaties, and no right of appeal.

[32] Some of the most famous examples of such inconsistent decisions include CME and Lauder (CME Czech Republic B.V. v. Czech Republic, Ad hoc—UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003 and Lauder v. Czech Republic, Ad hoc—UNCITRAL Arbitration Rules, Final Award, 3 September 2001) as well as the SGS cases (SGS Socie´te´ Ge´ne´rale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (2003), 42 ILM 1290 and SGS Socie´te´ Ge´ne´rale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (2004)). For academic commentary of inconsistencies see for example, S. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', (2005) Fordham Law Review, pp. 1521-1626.

By contrast, the cost for States to defend claims and pay awards is ultimately borne by the public, who, as taxpayers, are the residual risk-bearers in the current system. Developing States are particularly vulnerable. Although there is currently no systemic requirement to disclose the presence or identity of third-party funders, recent trends favour increased transparency regarding the existence and identity of a TPF funder as well as the terms of funding agreements, while also seeking remedies for non-compliance.

70. The current pandemic (COVID-19) has slowed down the treaty-making pace. Several negotiations for BITs and treaties with investment provisions (TIPs) scheduled for 2020 have already been cancelled or postponed.[33] Even though investment tribunals recognise and respect the exercise of significant discretion by States in response to public health issues, however, it is important to note that sovereign measures in response to COVID-19 may violate foreign investment protections contained in the IIAs if they are discriminatory or disproportionate. Therefore, even during a global pandemic, States are likely to be challenged for implementing measures that interfere with an investor's private rights. ISDS reforms are, thus, a crucial necessity for States than they had ever been before.

UNCITRAL Working Group III Reforms

71. UNCITRAL's first attempt to reform ISDS was through the promulgation of the Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), which were incorporated in the 2013 version of the UNCITRAL Rules. Between 2015 and 2016 the UNCITRAL Secretariat conducted a study on whether the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention) could provide a useful model for possible reforms in the field of investor–State arbitration. The Secretariat presented the result of a study prepared by the Geneva Centre for International Dispute Settlement (the CIDS Report). After discussions, UNCITRAL decided to retain the issue on its agenda for further consideration at its Fiftieth Session, in 2017 and to decide whether to mandate a working group to undertake related work. At its Thirty-Fourth to Thirty-Seventh Sessions, Working Group III undertook work on

[33] Examples include the postponement of negotiations for a Brazil-Nigeria BIT; delays for the negotiations of the new Investment Protocol of the African Continental Free Trade Agreement; and the postponement of the EU-United Kingdom Free Trade Agreement.

the possible reform of the ISDS mechanism, based on the mandate given to it by the Commission at its Fiftieth Session, in 2017.

72. Working Group III, tasked with identifying concerns regarding ISDS, considers whether reform is desirable and, if so, develops recommendations. As such, Working Group III is entrusted with a broad mandate which would ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led. Working Group III meets bi-annually to tackle its broad mandate. The Working Group has made substantial progress in its previous sessions, by identifying concerns and considering whether reform in those areas was desirable. These concerns fell into three categories: (1) concerns pertaining to consistency, coherence, predictability and correctness of arbitral awards; (2) concerns pertaining to arbitrators and decision-makers; and (3) concerns pertaining to cost and duration of ISDS cases (with focus on arbitration proceedings). The 37th session in New York was devoted to addressing and identifying some additional concerns and creating a work plan for carrying out phase three of the mandate—developing possible ISDS reform options.

73. At its Thirty-Eighth Session, in October 2019, the Working Group agreed on a project schedule of possible reform options, in accordance with the third phase of its mandate.[34]At its resumed Thirty-Eighth Session, in January 2020, the Working Group continued its deliberations on reform options and undertook a preliminary consideration of the main elements of a possible appellate mechanism with the goal of clarifying, defining and elaborating such option, without prejudice to any delegations' final position.[35] It also undertook a preliminary consideration of issues related to the enforcement of decisions rendered through a permanent appellate mechanism or a standing first-tier body.[36]The Thirty-Eighth Session considered the following reform options: a) multilateral advisory centre and related capacity-building activities; b) code of conduct; c) third-party funding; d) stand-alone review or appellate mechanism; e) standing multilateral investment court; and f) selection and appointment of arbitrators and adjudicators.

74. Based on the decision at its Thirty-Eighth Session the Working Group undertook consideration of the following reform options at its Thirty-Ninth Session (5-9 October 2020, Vienna):

[34]A/CN.9/1004, paras. 16–27 and 104.
[35]A/CN.9/1004/Add.1, paras. 16-51.
[36]A/CN.9/1004/Add.1, paras. 62-81).

a) dispute prevention and mitigation as well as other means of alternative dispute resolution;
b) reflective loss and shareholder claims;
c) multiple proceedings including counterclaims;
d) security for costs and means to address frivolous claims;
e) treaty interpretation by States parties; and
f) multilateral instrument on ISDS reform.

75. It was clarified, however, that the Working Group would not be making any decision on whether to adopt a particular reform option at the current stage of the deliberations.

(a) Dispute Prevention and Mitigation as well as other Means of Alternative Dispute Resolution

76. At the outset, it was highlighted that the focus of reforms in that area would be on the pre-dispute phase, rather than after a dispute has been brought to arbitration. It was underlined that dispute prevention and mitigation measures contributed to create a stable and predictable climate for investment and played a significant role in both attracting and retaining investments. It was suggested that States, when negotiating investment treaties, should consider providing for dispute prevention and mitigation as well as pre-arbitration consultation procedures.

77. It was further underlined that best practices, guidelines or even a model text on dispute prevention or mitigation could be developed that would assist States in their efforts to prevent disputes. In that regard, it was noted that work on best practices had already been done by States and inter-governmental organizations, including by the World Bank, and by non-governmental organizations. Therefore, it was said that in developing what the best practices were, the Secretariat *would be mainly responsible for identifying and compiling the relevant information into guidelines, or a model text which may form part of a potential multilateral instrument on ISDS reform*.

78. As regards alternative dispute resolution methods, the Working Group considered mediation, conciliation and other forms of ADR methods. It was pointed out that such methods, which were less time- and cost-intensive than arbitration, also offered a high degree

of flexibility and autonomy to the disputing parties, allowing the preservation and improvement of long-term relationships and the protection of foreign investment. It was observed that ADR methods were still largely underutilised in the ISDS context, and the structural, legislative and policy impediments particular for governments were noted. With regard to how ADR methods could be promoted and more widely used, it was said that policies as well as the legal framework for encouraging mediation would be necessary. In that context, it was highlighted that the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") provided for a useful instrument also in the context of ISDS. In addition, it was clarified that ADR methods were a means to be considered not just before but also during a dispute and it was suggested that guidelines should be developed to encourage arbitral tribunals and disputing parties to explore such methods proactively. However, it was also noted that not all disputes were suitable for mediation, and that any work that might be undertaken should ensure that the application of ADR methods would not lead to unintended consequences such as regulators failing to act appropriately in the public interest.

79. After discussion, the Working Group requested the Secretariat to prepare model clauses reflecting best practices on the amicable settlement or cooling-off period, including an adequate length of time and clear rules on how such period could be complied with. The Secretariat was further requested to prepare guidelines and best practices for participants in ISDS mediation.

(b) Multiple Proceedings and Counterclaims, Including Reflective Loss and Shareholder Claims.

80. Multiple proceedings by claimant investors have been long identified as a concern by the Working Group due to, among others, their possible negative impact on the cost and duration of the ISDS proceedings, potential inconsistent outcomes, possible double recovery, forum shopping as well as abuse of the process by claimant investors. It was widely felt by States that while on the one hand, there is the need for multilateral efforts to address the concerns raised by multiple proceedings, it is also important to balance that with the requirement of ensuring the continued promotion of foreign investment as well as protection of foreign investors, on the other.

81. After discussion, the Working Group requested the Secretariat to: (i) identify more specifically the types of multiple proceedings and shareholder claims that might arise and the concerns or lack of concerns associated with each, so as to further define the scope of the issue; (ii) compile a list of the tools and mechanisms that already existed in treaty practice to address these concerns, and identify for which of the type of multiple proceedings the tool was used; (iii) recommend model clauses (including for potential use in a multilateral instrument on ISDS reform) which would reflect an improvement of existing tools, particularly in light of the problems that continued to be faced; and (iv) recommend options for the implementation of these tools in the ways intended, such as through resolutions of the General Assembly, guidelines to tribunals, or other explanatory works.

82. With respect to counter-claims while pointing out that one of the primary reasons for the lack of counter-claims in ISDS was the absence of substantive obligations on the part of investors in investment treaties, and that drafting such obligations would not fall within the mandate of the Working Group, which focuses on procedural aspects, it was nevertheless felt that further work of a procedural nature on counterclaims should remain part of the work; as counter-claims offer a number of benefits like procedural efficiency, deterring frivolous claims, and avoiding a multiplicity of claims. The Secretariat was asked to prepare model clauses that could be used as consent clauses of the investor clarifying the jurisdiction of the ISDS tribunals to hear counterclaims as well as the question of admissibility.

(c) Security for Costs and Frivolous Claims

83. Security for costs has the potential for protecting States against a claimant's inability or unwillingness to pay, and it also contributes to discouraging frivolous claims. However, it was also underlined that a balanced approach,whichwould need to be taken as security for costs could limit access to justice for certain investors, particularly small and medium-sized enterprises. It was further mentioned that security for costs should not inadvertently delay the proceedings or increase costs and that due consideration should be given to preserving procedural fairness. Empirical evidence suggested that security for costs was ordered in very exceptional circumstances reflecting a high threshold of existing mechanisms and that ISDS tribunals were generally reluctant to grant such orders. As such, it was suggested that some guidance should be provided to ISDS tribunals on the ordering of security for costs under

existing mechanisms. It was also generally felt that the existence of third-party funding or the lack of commitment of the third-party funder to take responsibility for cost awards were elements to be taken into account when ordering security for costs.

84. The Working Group requested the Secretariat to prepare guidelines and best practices regarding how the security for costs provisions could be applied in a fair and consistent manner. It was indicated that such guidelines could not only instruct ISDS tribunals on the appropriate application of the conditions but could also address issues regarding how much security would generally be required, how it could be paid, and other such practical questions, and further observe the following guidelines: (i) primarily focus on making security for costs available for respondents against claimants; (ii) clarify that security for costs would only be available on request of a party; and (iii) not apply against third parties.

(d) Interpretation of Investment Treaties by Treaty Parties

85. While noting that treaty Parties had numerous tools at their disposal to ensure that the interpretation of their investment treaties was in line with their intent, it was also mentioned that interpretations by treaty Parties remained rare, particularly for developing States that lacked sufficient capacity and resources for the same. In addition, it was suggested that treaty Parties might be reluctant to provide their interpretation when a case was ongoing to avoid any interference. It was further suggested that the establishment of joint committees usually made it easier for treaty Parties to agree on joint interpretation, as such committees would monitor the process. It was further suggested that a balance needed to be found between protecting the independence of the ISDS tribunals and treaty Parties’ intent.

86. It was also held that although interpretive tools could clarify ambiguities, interpretation of substantive investment obligations could only be promoted through precise and careful drafting of the treaty provisions themselves, including the use of interpretive language in the investment treaty. It was further pointed out that interpretative tools may pose serious challenges, namely the difficult distinction between treaty interpretation and treaty amendment on the one hand as well as the impact on investors’ rights on the other. After discussion, in light of the interpretative tools already available to treaty Parties and the various views expressed on the works that could nevertheless be usefully carried out, the

Working Group requested the Secretariat to compile the various interpretive tools contained in investment treaties, building on available resources. In addition to such a compilation, the Working Group requested that the Secretariat prepare information on why the existing tools on treaty interpretation were not effectively used by States or were not accepted by tribunals and how the numerous tools that were identified could be effectively used.

(e) Multilateral Instrument on ISDS Reforms

87. It was held that for some reforms the use of a multilateral instrument on ISDS reform was the only way of applying them to the vast network of existing investment treaties, whereas for other options, different forms, such as a model clause or guidance to tribunals, could be prepared to implement them.

88. It was said that a multilateral instrument on ISDS reform would aim to provide a framework for implementing multiple reform options. The following characteristics were suggested as being important: the instrument should: (i) respond to identified concerns, in particular consistency and coherence, and promote legal certainty in ISDS; (ii) establish a flexible framework, whereby States could choose the reform options – including the mechanism for ISDS and relevant procedural tools, also accommodating future developments in the field of ISDS; (iii) provide temporal flexibility to allow continued participation by States Parties; (iv) allow for the widest possible participation of States to achieve an overall reform of ISDS; and (v) provide for a holistic approach to ISDS reform clearly setting forth the objective of achieving sustainable development through international investment. Regarding the possible contents of a multilateral instrument, it was suggested that the instrument could provide for a minimum standard, in other words, certain core elements that would need to be adopted by all participating States. The question was raised of the possible incompatibility between this multilateral instrument and other existing multilateral instruments including in particular the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It was suggested that such question would need to be examined together with the possible amendments of the provisions of these conventions.

89. The Fortieth Session of Working Group III took place from 8-12 February 2021, and then resumed from 4-5 May 2021. The Working Group considered the following reform options: (i) selection and appointment of ISDS tribunal members; and (ii) appellate mechanism. It was stated during the discussions that a cost-benefit analysis would be required particularly when departing from the existing ISDS mechanism (including for both ad hoc arbitration and the creation of new standing bodies).

(a) Selection and Appointment of Adjudicators in a Standing Mechanism

90. It was recalled that at its resumed Thirty-Eighth Session, the Working Group had noted that disputing parties would have no or little influence on the appointment of the adjudicators in a standing mechanism, which would make it similar to existing international courts and tribunals. However, in the present discussions it was generally highlighted that the selection and appointment mechanism in the current arbitration-based ISDS regime represented a balance among a number of interests involved, and preserved party autonomy and flexibility. It was said that reform efforts should focus on improving the existing regime rather than replacing it. Therefore, it was the general view that the selection of the adjudicators must be made by the parties and that using a predetermined list of adjudicators or roster would be against the essence of arbitration. It was also mentioned that transparency and ethics in the appointment process under the ISDS regime as well as avoidance of any suspicion of cronyism and other forms of corruption were essential.

91. With regards to theestablishment of a standing body, particularly in light of the financial resources that would be required, during the deliberations differing views were reiterated on whether a standing body would be effective in resolving the concerns identified by the Working Group, such as inconsistency, incoherency, lack of transparency and legitimacy, and cost and duration. It was stated that for one, a critical mass of States needed to participate in any permanent structure for it to function properly and be financially and logistically viable; and that secondly, consideringthat the selection and appointment authority would be shifted from the disputing parties to contracting States in a permanent framework, there would be the need of guaranteeing the independence of the adjudicators mostly (though not only) by and vis-à-vis the contracting Parties to the statutes of a standing body. It was emphasized that designing a selection process that, *inter alia*, would ensure that adjudicators

would be independent from the constituent States would be more critical in a standing body than in the present ISDS regime, and therefore, the element of politics ought to be acknowledged.

92. Regarding the composition of a permanent body, the Working Group considered whether to establish a "full representation" or "selective representation" body. That is, whether each contracting State would appoint an adjudicator on a permanent basis, usually a national of that State; or whether not all contracting States would be represented in the pool of adjudicators. Preference was expressed for the selective representation model, which could be based on balanced representation.The Working Group further considered whether there should be *ad hoc* judges to hear cases where the respondent State was not represented in the standing body in such cases. It was suggested that if the State party to the dispute was to have the right to appoint a judge ad hoc, the same right would need to be granted to the investor, to ensure equality. It was, however, pointed out that there might then be little difference between a standing body with ad hoc judges and the existing ISDS mechanism based on arbitration if, in particular, the chamber of this standing body would consist of three adjudicators. However, all in all it was noted that the ability to appoint an ad hoc judge could contribute to the legitimacy of any outcome. With regard to the number of judges it was said that determining the number of judges based on the workload was practical but not desirable in the earlier stages, as the contracting States might not be appropriately represented, and diversity could not be achieved. It was also questioned whether an increased workload would necessarily justify an increase in the number of judges, considering the operational costs of a standing body. Regarding the nomination of candidates, it was underlined that the nomination process needed to be open and transparent.

93. Regarding the selection and appointment process of the adjudicators it was noted that the options for selection and appointment included the following: (i) direct appointment by each State; (ii) appointment by a vote of the contracting States; or (iii) appointment by an independent commission. It was further pointed out that appointments on the basis of expertise and integrity rather than on political consideration would be more likely if the selection process were to be (i) multilayered; (ii) open to stakeholders; and (iii) transparent. A series of questions were raised including how the selection panel would be constituted, how such panel members would be appointed, how to ensure that they would be qualified and be representative of the different interests, and how to ensure that there would be no conflict of interest between such panel members and the nominated candidates. In that regard, a view

was expressed that direct selection by the contracting States might be preferable. With regards to term of office and renewal, it was mentioned that in determining the appropriate term, the average duration required to resolve ISDS cases as well as the need to ensure a workload balance among the adjudicators would need to be taken into account. The importance of security of tenure, and longer non-renewable terms with financial security so as to ensure the independence of the adjudicators was emphasized. It was noted that the factors that ensured independence could limit accountability and that trade-off should be considered.

94. The Working Group noted the interest in ensuring balanced representation and diversity (regional groups, gender, legal traditions, expertise, language capabilities) to promote legitimacy, accountability, independence and procedural fairness. The possibility of rotating the adjudicators' posts to ensure diverse representation was mentioned. It was pointed out that several mechanisms would need to be put in place to shield the institution collectively and the adjudicators individually from external influences, such as those mentioned above like security of tenure, terms of office and financial security, and others, like adequate resources, rules on incompatibilities, privileges and immunities, and case assignment rules.

(b) Appellate Mechanism

95. The Working Group stated that an appeal mechanism could enhance the correctness and consistency of decisions rendered by ISDS tribunals, and thereby increase the overall predictability and the efficiency of ISDS. References were made to recently concluded free trade agreements that contained provisions on appellate mechanisms. Reference was also made to existing appellate mechanisms, like the WTO Appellate Body. In order to ensure that an appellate mechanism would not result in a full rehearing on each and every aspect of the cases, nor lead to systematic or frivolous appeals, it was underlined that features in the appellate mechanism, such as a high standard of review, security for costs and early dismissal of manifestly unfounded appeals, modelled after Rule 41(5) of the International Centre for Settlement of Investment Disputes (ICSID) Rules, would need to be developed to ensure a manageable caseload. It was further highlighted that the development of an appellate mechanism ought to take into account the current fragmented investment regime, consisting

of many different investment treaties, and the potential impact an appellate mechanism might have on the development of investment law. It was also noted that the scope and standard of review would have an impact on the effective operation of any appellate mechanism and that both the grounds for appeal and standard of review should be clearly defined for the sake of certainty and efficiency. It was also pointed out that the aim should be to keep the appellate mechanism simple, so that it would be accessible to all users, including small- and medium-sized enterprises.

96. Regarding the options for the scope of review of an appellate mechanism to cover grounds for annulment and setting aside, was noted that, as the grounds for appeal normally encompassed the narrower grounds for annulment and setting aside, the existence of an appeal could be seen as an additional layer of review, making annulment and setting aside redundant. It was suggested that the grounds for annulment and setting aside also be included as grounds for review to avoid a multiplication of proceedings. Doubts were expressed about the functionality of such an approach, questioning whether domestic courts would be willing to defer their authority to an international body and whether member States to ICSID would be willing to consider such a change.

97. It was stated that more analysis was required on whether the creation of an appellate mechanism would be compatible with current procedures. It was suggested that the analysis should cover whether an appellate mechanism could co-exist with the current ISDS legal framework and, if so, how. Further, it was generally felt that only final decisions rendered at the end of the first-tier proceedings should be subject to appeal. Therefore, it was stated that decisions on interim measures, which were temporary in nature, and could be reversed by the tribunal ordering them, should be excluded from the scope. Further, it was stated that there should be a mechanism for the appellate body to efficiently filter and dismiss appeals that did not meet on a prima facie basis the grounds for appeal, so as to ensure an efficient process and limit caseload.

98. Regarding security for costs it was stated that such a provision could deter unnecessary or frivolous appeals, and could thereby address concerns relating to cost and duration and function as a filter to ensure the manageability of appeals.

99. Another noteworthy development coming out of Working Group III has been the publication, on 1 May 2020, of the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. The draft Code of Conduct was prepared jointly by the ICSID and

UNCITRAL Secretariat, partly in response to concern over arbitrators' independence and impartiality. Its text provides policymakers with a range of options on issues including disclosure obligations, repeat appointments, issue conflicts, and more. As the first version received extensive input on the draft through consultation with State delegates and other interested stakeholders, a second version of the Code was published on April 19, 2021.

C. Mediation in Investment Disputes

100. While the process of investment arbitration tends to become more unpredictable due to inconsistencies between arbitral awards exacerbating the divergence in opinions between arbitrators relating to interpretation of standard protection clauses, States have shown a desire to take control of the process, which is possible through adopting mediation among other dispute resolution procedures. Focusing on the *prevention* of disputes, rather than *post-dispute* regulation, is increasingly being presented as a cost-effective approach to the reform of ISDS. It is widely recognized today that methods of ADR such as mediation and conciliation are less time- and cost-intensive than arbitration, and that their increased use would therefore address concerns regarding cost and duration of ISDS. In addition, alternative dispute resolution methods are considered as offering a high degree of flexibility and autonomy to the disputing parties, allowing the preservation of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts. Mediation also usually helps to clarify the positions of the disputing parties, thereby reducing the gap between them, and allowing to focus on the issues that are at stake.

101. Often investment treaties foresee a time frame, more commonly known as the 'cooling-off' period, ranging from three to eighteen months during which the disputing parties may attempt amicable settlement, before arbitration. This may foresee consultations and negotiations, mediation or conciliation, or make reference to amicable settlement without indicating how this is to be achieved. Recent investment treaties, however, while maintaining the cooling-off period, provide more guidance on a more detailed alternative dispute resolution provisions, including stand-alone mediation provisions.

102. Rules on mediation and other alternative dispute resolution methods that could be applied in ISDS have been developed by various institutions such as ICSID, UNCITRAL, Energy Charter Treaty, International Chamber of Commerce (ICC), Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the International Bar Association (IBA). However, despite the legal framework ADR methods seem to be rarely used in practice.

103. Working Group III at its Thirty-Ninth Session, while considering the topic of promotion of the use of ADR in settlement of investment disputes, after discussions on the topic requested the Secretariat to prepare model clauses reflecting best practices on the amicable settlement or cooling-off period, including an adequate length of time and clear rules on how such period could be complied with. It was said that the model clauses should encourage disputing parties to use mediation as a possible step to avoid resorting to arbitration. The Secretariat was requested to prepare guidelines and best practices for participants in ISDS mediation, covering matters such as: (i) the organizational aspects that States might need to consider at the national level to minimize structural or policy impediments and to ensure that mediation could be effectively used; (ii) the representation of public interest in the mediation; and (iii) the setting up of lists or rosters of qualified mediators in the field of ISDS. However, it was also underlined that attention should be given to avoid unnecessary delays and costs and ensure that mediation or other forms of ADR would be used in a meaningful manner.

104. In order to foster the enforcement of settlement agreements resulting from mediation, UNCITRAL prepared the United Nations Convention on International Settlement Agreements Resulting from Mediation, (the Singapore Convention on Mediation), which was adopted by the United Nations General Assembly in December 2018, and opened for signature by all States on 7 August 2019. Up till now 53 States have signed the Convention and 6 States have ratified the same. The Convention entered into force on 12 September 2020, that is, six months after the deposit of the third ratification instrument by Qatar, the first two being Singapore and Fiji. An often-cited challenge to the use of mediation has been the lack of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation. It was in response to this need that the Singapore Convention was developed and adopted by the United Nations.

105. The Singapore Convention applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. The Singapore

Convention, thus, creates a harmonized framework for cost-effective and prompt enforcement of international mediated settlement agreements, aiming to render mediation more efficient and attractive to commercial parties globally, as an alternative to international arbitration and litigation. It fills a missing gap of enforcement options for mediation, as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards successfully did for arbitration (the *New York Convention*) and the 2005 Hague Convention on Choice of Court Agreements (the *Hague Convention*) attempts to do for litigation.

106. Prior to the Singapore Convention, an international mediated settlement agreement lacked enforceability in and of itself. This meant that if the losing party did not voluntarily comply with the outcome of a mediation, the innocent party had to initiate arbitration or court proceedings for breach of contract and subsequently seek to enforce the resulting arbitral award or court judgement in order to obtain the relief sought, which caused additional unnecessary expenses and wasted time. This was a major deterrent for parties to even consider mediation, as they could simply opt for arbitration and ensure enforceability. The entry into force of the SingaporeConvention is, therefore, expected to ease the disruptions caused by the COVID-19, as its objective is to ensure expeditious resolution of disputes on a global scale, without imposing unnecessary burden on States in the cases of investment disputes, in these critical times.

IV. Observations and Comments of the AALCO Secretariat

107. In the international trade law regime, recourse to exceptions does provide States with latitude and demonstrates the system's flexibility. Export restrictions, when authorized by trade agreements in certain exceptions to treaty commitments, such as when necessary to protect public health, promote the long-term stability of trade agreements by giving national governments an "escape clause" when domestic political pressure might otherwise lead to longer lasting violations or abandonment of treaty obligations.

108. However, reliance on exceptions in this reactive model of dispute settlement reinforces the perception that States' trade obligations normally forbid the kinds of measures taken in response to problems like the pandemic. Seeking to justify pandemic-related measures only through exceptions implies that similar measures would likely violate those

same rules under less extreme circumstances. This paradigm may seem well equipped to handle the occasional extraordinary event like the global response to some once-in-a-generation pandemic, but less so new forms of national industrial policy and intervention that emerge from the crisis. Also, the crisis-orientation of exceptions can make forward-looking preventative regulations difficult to justify. Moreover, justifying measures by invoking exceptions could decrease flexibility over time: indeed, a consensus that the pandemic represents the archetypal public health emergency might, over time, suggest that lesser disruptions do not qualify.

109. Therefore, it is the need of the hour to deliberate upon ways in which the multilateral trading regime might be made inclusive, sustainable and not hinged on a reactive model of dispute settlement. This could be an effective first step towards modeling a world order that responds better to unexpected calamities, and a catalyst for a smooth transition to the new normal. AALCO could be an appropriate platform to exchange views on this matter.

110. States and various other stakeholders have widely recognized that ISDS is fundamentally flawed and needs deep reform. Various stakeholders, therefore, are engaging in the UNCITRAL-led ISDS reform process limited to the procedural aspects of ISDS, which presently in the process of identifying concerns meriting reform. The UNCITRAL process creates the need and the opportunity to explore how procedural innovations could help rebalance the asymmetrical nature of ISDS. Since it began its work in 2017, Working Group III has studied and developed ISDS reform options suggested by Member States, covering issues as varied as: (i) the possible creation of a stand-alone review or appellate mechanism for investment disputes; (ii) the possible creation of a standing first-instance and appeal investment court; (iii) arbitrator appointment methods and ethics such as the issue of "double hatting"; (iv) control mechanisms on treaty interpretation; (v) dispute prevention and mitigation; (vi) cost management; and (vii) third-party funding. While WG III enjoys broad discretion in discharging its mandate, any solutions devised will take into account the ongoing work of relevant international organisations, and each State may decide the extent to which it chooses to adopt the proposed solutions.

111. These various reform efforts, particularly those being led by Working Group III, seem especially relevant today. ISDS is once again in the spotlight, with some observers fearful that State measures taken in response to the pandemic may lead to an onslaught of investment claims against States, many of which already face daunting fiscal challenges.

112. Therefore, the AALCO Secretariat continues to attach high importance to this topic, as it keeps up following the reform process taking place in Working Group III of the UNCITRAL, along with general discussions on the topic. While the Secretariat observes that the Commission has agreed to restrict the scope of deliberation only to procedural issues, it notes, however, that further reform of substantive provisions is also needed as many States continue to place emphasis on Working Group III. The Secretariat further considers the grouping of concerns in the schedule form along with some of their solutions as proposed to a positive development, as it focuses on streamlining the solutions so that consensus on the final work product can be achieved in a timely manner. The AALCO Secretariat requests Member States of AALCO to contribute to the deliberations and submit their positions so that the views of all States in particular developing ones may also be taken due note of by the Commission, and the final outcome achieved is agreeable to all States.

113. Further, it may be said that in order for the entire exercise of ISDS reforms to be meaningful, it is essential to first consider what the investment treaties aim to achieve, and then to consider what form(s) of dispute settlement will best advance those objectives. This means not only looking at reform of the existing ISDS mechanism, but also alternatives to it. Mediation as a viable form of investment dispute resolution system has garnered increasing attention from States in the past, who recognize the significant advantages that mediation as means of investment dispute resolution offers over other modes of dispute settlement. Saving of time and costs, control over the proceedings, as well as preservation of the commercial relationship between the parties are some of the significant advantages that mediation can offer. It should also be recalled that mediation is an interest-based mode of dispute resolution as opposed to other adjudicatory ones such as arbitration and litigation which are rights-based.

114. The Secretariat, in this regard, urges AALCO Member States to adopt mediation procedures in their respective Free Trade Agreements, Bilateral Investment Treaties as well as Investment Contracts in order to benefit from the process and promote the timely cost-effective settlement of investment disputes. It further encourages its Member States to consider the signature and ratification of the UN Convention on International Settlement Agreements Resulting from Mediation in order to create an environment of stability and certainty for the enforcement of settlement agreements arising out of disputes concerning investments, among others. The Secretariat is ready to render any assistance regarding information sharing to Member States should such needs arise.