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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

INTERNATIONAL TRADE AND INVESTMENT LAW

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INTERNATIONAL TRADE AND INVESTMENT LAW

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I. Introduction

A. Background

1. The 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. However, in view of increasing intertwining and close interrelation between the two regimes, at the Fifty-Seventh Annual Session of AALCO held from 8-12 October 2018 in Tokyo, Japan, 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 Sixtieth 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 Thirty-Fourth Annual Session held in Doha, the 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. The inter-sessional 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 Forty-Second 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) of 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. Under the wider topic of Economic and Trade Law Matters, International Investment Law and Agreements were first examined under the ambit of Regional Cooperation in the Context of the New International Economic Order. At the Twenty-First Annual Session (1980) held in Jakarta, the Republic of Indonesia, a report on matters pertaining to bilateral investment treaties, investment guarantees, and petroleum export was placed before the Trade Law Sub-Committee. At that session, preparations were made for the Ministerial Meeting which was held later that year as a result of which the Secretariat was directed to prepare Model Investment Agreements based on the study of the provisions in existing Bilateral Investment Treaties. After examination by an Expert Group of the divergent agreements and State practice in the area, the agreements which had three options were finally adopted and transmitted to the Member States at the Twenty-Fourth Annual Session held in 1985 at Kathmandu, Nepal.

7. Renewed interest was exhibited in the topic when International Investment Agreements (IIAs) were discussed under the agenda item 'Report on the Work of UNCITRAL and other International Organizations in the field of International Trade Law.' While discussion on issues relating to Investor-State Arbitration were underway at various international forums, issues such as transparency in arbitration, rising costs and duration of arbitration, lack of expertise and shrinking policy of host nations were at the forefront of discussions at the Fifty-Fourth Annual Session of AALCO held in Beijing, the People's Republic of China in 2015.

8. More recently, issues relating to the legitimacy of investment arbitration and its reform have been discussed under the agenda item International Trade and Investment at the Fifty-Seventh Annual Session held in Tokyo, Japan in 2018, the Fifty-Eighth Annual Session at Dar es Salaam, United Republic of Tanzania in 2019 and was placed on the agenda, albeit as a non-deliberated topic, at the Fifty-Ninth Annual Session of AALCO held at Hong Kong SAR, the People's Republic of China in 2021. The present brief continues to identify and place in context the issues for deliberation on the latest developments in relation to International Investment Agreements and Investor-State Dispute Settlement (ISDS) under the sub-topics mentioned below at the United Nations Commission for International Trade Law (UNICTRAL) and the United Nations Conference for Trade and Development (UNCTAD).

B. Deliberation at the Fifty-Ninth Annual Session of AALCO (Hong Kong SAR, the People's Republic of China, 29 November- 1 December 2021)

9. During the Fifty-Ninth Annual Session in 2021, even though the agenda item International Trade and Investment Law could not be taken up for deliberation, several Member States expressed their views on the topic in their general statements. The centrality of the multilateral system institutionalized in the WTO was underscored, yet again. The need to safeguard the WTO-centered system whilst undertaking the necessary reform, and the importance of Asian and African participation in such reform so as to increase the representation and decision-making power of developing countries, was emphasized by the People's Republic of China[1] and the Union of Myanmar.[2]

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[1] Verbatim Record of Discussions, Fifty-Ninth Annual Session of AALCO 2021, at <https://www.aalco.int/Final%20Verbatim%20Record%20of%20the%2059%20Annual%20Session%202021.pdf> 33
[2] *Ibid* 39

10. As regards the work of the UNCITRAL it was emphasized by the Kingdom of Thailand that several working groups of UNCITRAL are focusing on reducing legal obstacles faced by Micro, Small and Medium Enterprises (MSMEs) and that the work of the UNCITRAL has a lot of potential benefits for the post-COVID recovery. It was noted that the UNCITRAL has enlarged its membership from 60 to 70 seats in total and that Asia and Africa have one more additional seat each in the Commission, however also noting that Africa and Asia still remain under-represented. It was also expressed that Member States of AALCO need to play an active role in reaching out to the other regions to enhance the representative character of the UNCITRAL in the near future.[3]

C. Issues for focused deliberations at the current Annual Session

i. 12th Ministerial Conference of the World Trade Organization (WTO)

ii. UNCITRAL Working Group III and Investor-State Dispute Settlement Reform

a. Draft code of conduct for adjudicators in international investment disputes

b. Draft provisions of the Statute of the Standing Multilateral Mechanism for Investment Disputes also referred to as the Multilateral Investment Court

iii. The UNCTAD and recent developments in the International Investment Agreements Regime

II. General Discussions and Recent Developments

A. 12th Ministerial Conference of the WTO

11. From 12 to 17 June 2022, the WTO held an extended 12th Ministerial Conference (MC12) at WTO headquarters in Geneva, after it had been postponed twice owing to the

[3] *Ibid* 51

pandemic. The Conference was co-hosted by Kazakhstan and chaired by Mr. Timur Suleimenov, Deputy Chief of Staff of Kazakhstan's President. The outcome of the MC12, the result of hard-won compromises, covers a wide range of key agenda items. Whether the outcome could provide new momentum for the WTO, which critics have often portrayed as moribund especially in view of its Appellate Body being defunct, remains to be seen.

12. With the consensus-based organization struggling with major challenges in the three pillars of its mandate, i.e., the negotiating, monitoring and adjudication functions, MC12 was a litmus test for the WTO's relevance when it comes to delivering on a broad range of issues, including health, food security, an e-commerce moratorium, fisheries subsidies and WTO reform. This Secretariat brief seeks to furnish a brief report of the outcome of MC12, highlighting key areas of progress or contention, and further identify some possible avenues for cooperation and further negotiation for AALCO's Asian-African membership.

1. Agreement on Fisheries Subsidies

13. Since its creation in 1995, negotiations at the WTO have resulted in only very few multilateral agreements – the most recent being the 2013 Trade Facilitation Agreement – while some major plurilateral talks, such as those on the trade in services agreement (TiSA) and the environmental goods agreement (EGA), have become gridlocked.

14. After the WTO was set up in 1995, the potential environmental effects of fishery subsidies were discussed within its Committee on Trade and the Environment (1997-1999). From the outset, WTO members had widely differing opinions on the role of fisheries subsidies as a cause of overfishing. After more than two decades of WTO negotiations, MC12 reached a partial multilateral agreement on harmful fisheries subsidies[4] in support of UN Sustainable Development Goal 14.6.

15. A perusal of the provisions of the Agreement establishes that it is still a work in progress. Article 3 includes a prohibition on subsidies contributing to illegal, unregulated and unreported (IUU) fishing as well as related transparency provisions. Article 4 contains a prohibition on subsidies for overfished stocks except for "rebuilding the stock to a

[4] WT/MIN(22)/33 WT/L/1144, 22 June 2022, Agreement on Fisheries Subsidies, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/33.pdf&Open=True> accessed 1 August 2022

biologically sustainable level". Both articles provide for a 2-year transition period, during which subsidies granted or maintained by developing countries, including least developed countries (LDCs), up to and within the exclusive economic zone (EEZ) are exempt from these prohibitions and from dispute settlement.

16. WTO members were unable to agree on three related, highly controversial, special and differential treatment (SDT) provisions for developing countries, that require further negotiations at MC13: a transition period, a *de minimis* exemption for those whose global marine capture share is under 0.8%, and a carve-out for artisanal and subsistence fishing within a certain distance from a country's coast. Article 5, in contrast to its originally conceived version,[5] now merely contains a prohibition on subsidies for fishing on the unregulated high seas, i.e. the most vulnerable areas that lack an established and coordinated fisheries management regime.

2. Agriculture and Food Security

17. After certain geopolitical tensions surfaced recently, a number of countries have imposed export restrictions, adversely affecting global agricultural trade. Therefore, dealing with export restrictions and public stockholding for food security were controversial items on the MC12 agenda. As a matter of fact, these issues have always solicited much attention and negotiation since the adoption of the package deal.

18. The MC12 statement[6] on the emergency response to food insecurity reflects an agreement on the exercise of restraint in introducing export restrictions, but does not ban them. It encourages members to release surplus stock to international markets, but a decision on a permanent solution for public stockholding programmes was deferred to MC13, scheduled for December 2023.

19. One of the AALCO Member States who is a large user of public stockholding programmes had requested that in general they be permanently exempted from WTO rules on

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[5] Draft Text of 10 June 2022, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W20.pdf&Open=True> accessed 1 August 2022

[6] WT/MIN(22)/28 WT/L/1139, 22 June 2022, Ministerial Declaration on The Emergency Response to Food Insecurity, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/28.pdf&Open=True> accessed 1 August 2022

trade distorting farm subsidies. Although the MC12 decided that World Food Programme humanitarian purchases should be exempt from export restrictions, but did not agree on a roadmap for future agricultural negotiations, including on disciplines on trade-distorting subsidies. It appears that the WTO's interim 2013 Bali decision to exempt public stockholding programs from legal challenge under certain conditions still appears to be the most promising avenue for resolution, provided the conditions are suitably revised to reflect the present exigencies, and transparency is maintained in reporting by the WTO members.

3. Pandemic Response: TRIPS Waiver on COVID-19 vaccines

20. The vaccination rate gap between developed and developing countries has remained prominent. Despite certain multilateral efforts to make COVID-19 vaccines more widely available in developing countries, vaccine equity remained unattainable.

21. Two AALCO Member States, India and South Africa submitted a proposal to the WTO in 2020[7] and 2021[8] for a temporary waiver of intellectual property (IP) rights for vaccines, medicines, diagnostics, therapeutics, personal protective equipment, and health technologies under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

22. After the long-standing US opposition to the weakening of IP rights was reversed in 2021, and support rendered for temporary TRIPS flexibilities, the EU aligned its position, and engaged with all three countries on a 'Quad' proposal, excluding from the waiver developing countries that exported more than 10% of world vaccine doses in 2021.[9] The provision was modified in the final decision on the partial TRIPS waiver with a view to making declarations by countries not availing themselves of the waiver legally binding.[10]

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[7] IP/C/W/669, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19: Communication from India and South Africa, 2 October 2020 at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True> accessed 1 August 2022

[8] IP/C/W/669/Rev.1, Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, 25 May 2021 at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669R1.pdf&Open=True> accessed 1 August 2022

[9] WTO, "TRIPS Council hears initial reactions to Quad's outcome document on IP COVID-19 response", 6 May 2022, at< https://www.wto.org/english/news_e/news22_e/trip_06may22_e.htm> accessed 1 August 2022

[10] WT/MIN(22)/30 WT/L/1141, Ministerial Decision on the TRIPS Agreement, 22 June 2022, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/30.pdf&Open=True> accessed 1 August 2022

23. The scope of the waiver, which is valid for five years, is limited to patents, and excludes trade secrets, copyrights and industrial designs. It authorizes eligible countries to issue compulsory licenses under domestic law regarding the subject matter of patents without the consent of the patent holder, including through executive action, without this being considered as a violation of the TRIPS agreement. The final decision authorizes eligible countries to waive the TRIPS requirement to use compulsory licenses predominantly for the domestic market, and thus enables exports. The enabling framework of the TRIPS waiver ought to be implemented expeditiously by suitably amending the domestic intellectual property laws.

24. A decision on the waiver's extension to therapeutics and diagnostics was deferred up to 6 months after MC12. While the decision does recognize immunization as a global public good, its impact would have been much bigger if therapeutics would have been included from the beginning.

4. E-commerce

25. MC12 perceived another extension of the e-commerce moratorium to boost digital trade.[11] Since 1998, WTO members have agreed not to impose customs duties on electronic transmissions. Some developing countries, including India and South Africa, are opposed to the moratorium, which, they argue, limits their policy space to generate income from customs duties on electronic transmissions. India and South Africa had made several joint submissions at the WTO, highlighting the adverse impact of the zero customs duties on electronic transmissions or digitizable products on developing nations. A review of the moratorium can help these countries generate more revenues through customs duties.

26. Nonetheless, at MC12, WTO members once again agreed to extend the moratorium until MC13, a vital outcome for the digital economy, for small and medium-sized enterprises (SMEs) and start-ups. The WTO members also agreed to reinvigorate their work under the Work Programme on Electronic Commerce, including challenges and opportunities affecting the developing countries and LDCs.

[11] WT/MIN(22)/32 WT/L/1143, 22 June 2022, Work Programme on Electronic Commerce, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/32.pdf&Open=True> accessed 1 August 2022

5. WTO Reform

27. In the MC12 ‘outcome document’, and not in a binding decision, WTO members agreed to “commit to work towards necessary reform of the WTO ... to improve all its functions”. [12] Regarding the revival of Appellate Body, they committed “to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024”. Members reaffirmed that special and differential treatment (SDT) provisions for developing country members and LDCs constitute an integral part of the WTO and its agreements, noting, however, that SDT in WTO agreements should be precise, effective and operational.

B. UNCITRAL Working Group III and Investor-State Dispute Settlement Reform.

28. The decade following the year 2010, witnessed the burgeoning of the investor-state arbitrations arising out of various bilateral and multilateral investment treaties that States had entered into in the previous decades.[13] The various guarantees and protections granted to investors in these investment treaties were soon realized in practice by States, as their actual scope and content were clarified in various subsequent arbitral awards.[14]

29. While the investment treaties were entered into by States to promote foreign direct investment, as disputes arose many host nations were beginning to experience the restriction in their sovereign regulatory space as policy measures taken by States were challenged by investors before arbitral tribunals. Whether the measures were taken in furtherance of environmental protection, sustainable development, safeguarding public health, taxation, national security or other social aims, these would have to conform to the substantive guarantees provided for in the treaties.[15]

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[12] WT/MIN(22)/24 WT/L/1135, MC12 Outcome Document, 22 June 2022, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/24.pdf&Open=True> accessed 1 August 2022

[13] See generally, L.N. Paulsson, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (OUP 2015)

[14] See for eg. J. Paulsson, ‘Arbitration Without Privity’ (1995) ICSID Review- Foreign International Law Journal 232; Z. Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2011) 2 Journal of International Dispute Settlement 97; P. Ranjan, *India and bilateral investment treaties : refusal, acceptance, backlash* (OUP 2019); G.V. Harten, *Investment Treaty Arbitration and Global Public Law* (OUP 2008)

[15] C. Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The

While these concerns were realized by States in relation to the substantive obligations, many issues were faced also by States regarding the procedure for dispute settlement.[16] Since the early years of post-war investment protection, arbitration has been the preferred mode for settlement of investment disputes between States and investors. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States entered into force on 14 October 1966 and was shortly followed by the first bilateral investment treaty that provided for arbitration between investors and States, i.e. between Italy and Chad which was signed in 1969.[17]

30. The first dispute administered by the International Centre for the Settlement of Investment Disputes (ICSID), that was submitted to arbitration for which consent was provided for in the bilateral investment treaty was only much later in the year 1990.[18] Since then the number of investment arbitrations has increased exponentially, challenging the measures taken by a number of States in various stages of development. Today, ICSID does not remain as the only forum or legal regime governing investment arbitration; many other arbitral institutions such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International arbitration (LCIA) and more recent ones such as the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) have successfully administered investment arbitration. Within a span of a few decades International Investment Law and Investor-State Arbitration have emerged as a specialized field of international law practiced by a highly specialized elite group of practitioners with a vast reserve of institutionalized knowledge in the procedure as well as the substantive law.[19]

31. As developed States with well-established domestic legal regimes and processes were beginning to face claims challenging various regulatory measures, the interest of public interest groups, renowned media and publication houses and civil society organizations

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TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27; A. Kulick, Global Public Interest in International Investment Law (CUP 2012)

[16] G. Kahale, 'Is Investment Arbitration Broken?' (2012) 7 TDM; The Economist, 'The Arbitration Game: Governments are souring on treaties to protect foreign investors' (11 October 2014)

[17] R. Dolzer and C. Schreur, *Principles of International Investment Law* (2nd edn, OUP 2009) 7

[18] AAPL v. Sri Lanka ICSID Case no. ARB/87/3 (27 June 1990)

[19] A.S. Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance and Legitimacy* (OUP 2017); J. Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes* (Brill Nijhoff 2021)

increasingly began to rise.[20] Questions were being raised in legislatures and highest echelons of State administration about the process through which investment arbitration tribunals arrived at their decision whether they conformed to the requirements of transparency, consistency and legitimacy which were considered essential as their decisions not only impacted the immediate parties to the dispute but the public at large, as well as the public exchequer.[21] It was clearly emerging that a mode of dispute settlement which was developed for catering to the disputes of essentially a private nature served better by rules that protected confidentiality, was in fact being utilized to adjudicate disputes involving public law matters touching upon the sovereignty of States.

32. The response from States was swift, often coupled with a declaration of policy against all private adjudication of investment disputes. Some States denunciated the ICSID Convention while others terminated bilateral investment treaties en masse, while some others engaged in the renegotiation of these treaties from a more informed perspective.[22]

33. Responding to these calls, many institutions took up the task of engaging in offering solutions for the reform of the system rather than calling for its all-out rejection. A major concern identified by bodies such as the United National Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD) in its early reports was the expansive interpretation given to treaty protections by the arbitrators in their awards that often went beyond the immediate parties to the dispute. While standards such as Fair and Equitable Treatment, Indirect Expropriation, Umbrella Clause Protection, Most Favoured Nation Protection, Full Protection and Security, Denial of Justice, Effective means of enforcing claims were common place in most BITs, their content and scope of application differed significantly between arbitral tribunals. Further, many States were also unable to accept the wide interpretations taken by the arbitrators as opposed to the

[20] M. Waibel et al. (eds.), *The Backlash against Investment Arbitration* (Kluwer, 2010); The Economist, *The Arbitration Game* (11 October 2014); C.N. Brower and S. Melikian, ‘We Have Met The Enemy and He is US!: Is the industrialized North ‘Going South’ on investor-State arbitration?’ (2015) 31 Arbitration International 19

[21] S.D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent decisions’ (2005) Fordham Law Review 107

[22] Press Release, ICSID, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), available at <http://www.worldbank.org/icsid/highlights/05-16-07.htm>; Press Release, ICSID, Ecuador’s Notification under Article 25(4) of the ICSID Convention (Dec. 5, 2007), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9>; Press Release, ICSID, Venezuela Submits a Notice Under Article 71 of the ICSID Convention (Jan. 26, 2012),available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageNaMe=Announcement100>.

expectations that States had from these treaties at the time of signing these treaties in terms of the corresponding benefits they would accrue.

34. While these substantive obligations were found in the multitude of investment treaties with significantly varying language which was the subject of negotiation between the States, arbitration was the preferred mode for dispute resolution between all States and investors. The UNCITRAL therefore thought it prudent to focus its resources and time on seeking procedural reform in an incremental manner that could yield a tangible solution acceptable to a wide spectrum of States with diverse economic and political systems and differing degrees of economic development.[23]

35. The UNCITRAL in 2015 at its forty-eighth session had taken note of the various concerns that States had with investor-state arbitration and that many organizations had prepared proposals for its reform to address those concerns.[24] Accordingly, the Secretariat of the UNCITRAL conducted a study along with the Centre for International Dispute Settlement (CIDS) to assess whether the UN Convention on Transparency in Treaty-based Investor-State Arbitration, 2014 could serve as a model for possible reforms in the field of investor-State arbitration.[25]

36. On due consideration of the reports prepared by the Secretariat in conjunction with various organizations that had conducted work on the topic such as the OECD and ICSID, the UNCITRAL entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS) with a view of allowing each State the choice of whether to and to what extent it wishes to adopt the solutions so arrived at.[26]

37. At the initial meetings of the Working Group III a number of concerns that were raised by States were taken note of. These concerns broadly fell into three categories:- (1)

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[23] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) 6

[24] UNGA, 'Report of the UNCITRAL on the work of its forty-eighth session (29 June – 16 July 2015)' UN Doc A/70/17 (11 September 2015) 52

[25] G. Kaufmann-Kohler and M. Potestà. "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and road map" (2016), available via the UNCITRAL website at: <http://www.uncitral.org /pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_ Convention_serve_ as_a_model.pdf.>

[26] UNGA, 'Report of the UNCITRAL on the work of its fiftieth session (29 June – 16 July 2015)' UN Doc A/70/17 (11 September 2015) 52

duration and costs of ISDS, (2) Incoherence and inconsistency of awards, (3) lack of sufficient guarantees of independence, impartiality and diversity of arbitrators.[27]

38. With a view to addressing these concerns, a solution with two work streams were devised by the Commission firstly to work on the establishment of a standing multilateral mechanism or multilateral investment court with a build-in appeals mechanism designed to adhere to the standards of transparency, legitimacy and fairness which could be established through a treaty for which draft provisions were prepared by the Secretariat.[28]

39. Secondly the other work stream would work on the code of conduct for adjudicators addressing concerns of costs, durations and concerns of concurrent proceedings, counterclaims and ADR and dispute prevention over which draft provisions were also prepared by the working group. At present the preliminary draft provisions for both documents are open for comments from States, while the Secretariat is currently revising the draft provisions in accordance with the deliberations and instructions for preparatory work arising out of the previous Working Group III meeting held in New York from 14-18 February 2022.[29]

40. While other solutions were also presented in the Working Group III meetings such as the establishment of a multilateral advisory centre on ISDS, draft provisions on assessment of damages as well as solutions in the form of draft provisions addressing concerns arising out of third party funding, the same were at a preliminary stage and under preparation by the Secretariat. Therefore, it assumes importance that the attention of the AALCO Member States be drawn to the text of the draft provisions of the (a) draft code of conduct (articles 1-11) and (b) draft provision of the Statute of the Multilateral Investment Tribunal concerning the selection and appointment of ISDS Tribunal Members (articles 1-7).

[27] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018) 5

[28] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) 13

[29] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14-18 February 2022) 4

1. Draft of the code of conduct for adjudicators

41. Arising out of concerns raised by States regarding the lack of or apparent lack of independence and impartiality of ISDS tribunal members, general support was expressed for developing a code of conduct for ISDS tribunal members. After having discussed the various concerns raised by States regarding ISDS and having resolved that reform would be desirable in this respect, the UNCITRAL Secretariat was requested to undertake preparatory work on a number of topics, including on the preparation of a code of conduct, jointly with the ICSID Secretariat.[30]

42. Accordingly a joint working paper was prepared by the aforesaid organizations which provided a basis for discussion for the Working Group at its thirty-eighth session at Vienna from 14-18 October 2019.[31] At that meeting it was generally felt that the nature of the code of conduct should be binding and mandatory and therefore preference was expressed for providing concrete rules rather than guidelines. As regards the scope, it was expressed that as part of the multilateral instrument on ISDS reform the code could apply to existing investment treaties, binding judges and adjudicators and other actors such as counsel, appointing authorities, tribunal secretaries and other support personnel.[32]

43. As regards the preparatory work on the code, guidance was provided by the Working Group on the content of the code which would be directed towards addressing concerns arising out of ensuring independence, impartiality, integrity, diligence and efficiency of arbitrators and adjudicators as well as regulating the role of other support personnel where required.[33]

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[30] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) 11

[31] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Background information on a code of conduct-Note by the Secretariat' UN Doc. A/CN.9/WG.III/WP.167 (31 July 2019)

[32] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019) 11

[33] *Ibid* 14

i. Report of the UNCITRAL Working Group III on the work of its forty-first session (Vienna, 15-19 November 2021) and forty-second session (New York 14-18 February)

44. The draft provisions of the code of the conduct for adjudicators prepared by the UNCITRAL Secretariat in cooperation with the ICSID Secretariat, was placed for the consideration of the Working Group at its forty-first session held at Vienna from the 15-19 November 2021.[34] In accordance with the guidance provided by the Working Group at its thirty-eighth session held from 14-18 October 2019 regarding the preparatory work on the code, the following 8 draft provisions were proposed.

1. Article 1 – Definitions

For the purposes of this Code:

1. "Adjudicator" means Arbitrator and Judge;

2. "Arbitrator" means a member of an arbitral tribunal, or a member of an ICSID ad hoc Committee, who is appointed to resolve an "International Investment Dispute" (IID);

3. "Assistant" means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties;

4. "Candidate" means a person who has been contacted regarding potential appointment as an Arbitrator, or who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role;

5. "International Investment Dispute" (IID) means a dispute arising pursuant to the investment promotion and protection provisions in an international treaty;

6. "Judge" means a person appointed as a member of a standing mechanism for IID settlement;

7. "Treaty Party" means a State or Regional Economic Integration Organization (REIO) that is a Party to the treaty upon which consent to adjudicate is based.

2. Article 2 – Application of the Code

1. Articles 3 to 5, 6(1) and 7 to 11 of this Code apply to Adjudicators in IID.

[34] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Draft Code of Conduct-Note by the Secretariat' UN Doc. A/CN.9/WG.III/WP.209 (15 September 2021); UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-first session (Vienna, 15-19 November 2019)

2. Adjudicators shall take reasonable steps to ensure that their Assistants are aware of, and comply with, the Code.
3. Articles 6(2), 7, 8(1), 8(3), 8(4), 10 and 11 of this Code apply to Candidates from the date they are first contacted concerning a possible appointment.
4. Option 1: [This Code shall not apply if the treaty upon which consent to adjudicate is based contains a code of conduct for IID pursuant to that treaty, unless [and to the extent that] the Treaty Parties [or disputing parties] agree otherwise.] Option 2: [This Code shall apply unless otherwise modified by provisions in a code of conduct for IID [or other ethical obligations] for Adjudicators included in the treaty upon which consent to adjudicate is based.]

3. Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial.
2. Article 3(1) encompasses the obligation not to:
(a) [Be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamour;]
(b) Be influenced by loyalty to a Treaty Party, or by loyalty to a disputing party, a non-disputing party, or a non-disputing Treaty Party in the IID;
(c) Take instruction from any organization, government or individual regarding the matters addressed in the IID;
(d) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgment;
(e) Use their position to advance any personal or private interest; or
(f) Assume an obligation or accept a benefit that could interfere with the performance of their duties.

4. Article 4 – Limit on multiple roles

Option 1: “Full prohibition”
An Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID case [or in any other proceeding relating to the application or interpretation of [an] [the same] investment treaty] unless the disputing parties agree otherwise.
Option 2: “Modified prohibition”
Unless the disputing parties agree otherwise, an Adjudicator in an IID shall not act concurrently as a legal representative or expert witness in another IID [or other proceeding] involving:

(a) The same measures;
(b) [Substantially] the same legal issues;
(c) One of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise; or [and]
(d) [The same treaty].
Option 3: "Full disclosure" (with option to challenge)
Adjudicators shall disclose whether they concurrently act as a legal representative, expert, or in any other role on cases involving the same or related parties, the same measures, or [substantially] the same legal issues as are at issue in the IID.

5. Article 5 – Duty of diligence

1. Adjudicators shall perform their duties diligently throughout the proceeding. They shall be reasonably available to the disputing parties and the administering institution, dedicate the necessary time and effort to the proceeding, and render all decisions in a timely manner.
2. Adjudicators shall not delegate their decision-making function to an Assistant or to any other person.

6. Article 6 – Other duties

1. Adjudicators shall:
(a) Display high standards of integrity, fairness, and competence; and
(b) Treat all participants in the proceeding with civility.
2. Candidates shall decline an appointment if they believe they do not have the necessary competence, skills, or availability to fulfil their duties.

7. Article 7 – Ex parte communication of a Candidate or an Adjudicator

1. A Candidate or Adjudicator shall not have any ex parte communication concerning the IID [during the proceeding], except as follows:
(a) To determine a Candidate's expertise, experience, ability, availability, and the existence of any potential conflicts of interest;
(b) To determine the expertise, experience, ability, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Adjudicator, if both disputing parties so agree;
(c) As otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.

2. Communications permitted by Article 7(1) shall not address any issues pertaining to [the merits of the case, including] jurisdictional, procedural, or substantive issues that the Candidate or Adjudicator reasonably anticipates could arise in the IID.
3. "Ex parte communication" means any oral or written communication between a Candidate or Adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the opposing disputing party.

8. Article 8 – Confidentiality

1. Candidates and Adjudicators shall not:
(a) Disclose or use any information concerning, or acquired in connection with, an IID except for the purposes of that proceeding or in accordance with Article 8(2)[or article 8(4)];
(b) [Disclose or use any information concerning or acquired in connection with an IID to gain personal advantage, advantage for others, or to adversely affect the interests of others.]
2. Adjudicators shall not:
(a) Disclose the contents of deliberations or any view expressed by an Adjudicator during the deliberation;
(b) Disclose any draft of a decision, order or award to the disputing [and non-disputing] parties prior to rendering it, unless the applicable rules or treaty so permit or the disputing parties agree otherwise;
(c) Disclose any decision, order or award they have rendered, except in accordance with the applicable rules or treaty or with consent of the disputing parties;
(d) [Comment on any decision, order or award in which they participated [unless that decision, order or award is public.]]
3. The obligations in Article 8 shall survive the end of the proceeding and shall continue to apply indefinitely.
4. [The obligations in Article 8 shall not apply to the extent that that a Candidate or Adjudicator is legally compelled to disclose confidential information in a court or other competent body or must disclose such information to protect his or her rights in a court or other competent body].

45. The draft provisions were considered in detail by the Working Group at its forty-first session providing guidance for the Secretariat to amend the same in accordance with the views expressed by the States, international organizations and other stake holders. While preferences were expressed regarding the various options presented by the Secretariat in the

draft provisions, detailed comments on the language to be employed, and correlating information to be provided in the commentary also followed. Accordingly, the revised draft provisions were presented at the next session of the Working Group III i.e. at the forty-second session at New York held from 14-18 February 2022.

46. The revised draft provisions presented by the Secretariat to the Working Group at its forty-second session for its consideration have been produced below.

1. Article 1 – Definitions

For the purposes of this Code:

1. "International Investment Dispute" (IID) means a dispute between an investor and a State or a Regional Economic Integration Organization (REIO) [or any constituent subdivision or agency of a State or a REIO] submitted pursuant to: (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract;
2. "Adjudicator" means an Arbitrator or a Judge;
3. "Arbitrator" means a person who is a member of an arbitral tribunal, or a member of an ICSID ad hoc Committee, who is appointed to resolve an IID;
4. "Judge" means a person who is a member of a standing mechanism for IID settlement;
5. "Candidate" means a person who has been contacted regarding potential appointment as an Arbitrator, but who has not yet been appointed, or a person who is under consideration for appointment as a Judge, but who has not yet been confirmed in such role; and
6. "Assistant" means a person working under the direction and control of an Adjudicator to assist with case-specific tasks, as agreed with the disputing parties.

2. Article 2 – Application of the Code

1. This Code applies to [Adjudicators or Candidates in] an IID and may be applied [to/in] any other dispute by agreement of the disputing parties.
2. If the instrument upon which the consent to adjudicate is based contains provisions on ethics or a code of conduct for Adjudicators or Candidates in an IID, this Code shall be construed as complementing such provisions or code. In the event of an inconsistency between an obligation of this Code and an obligation in the instrument upon which consent to adjudicate is based, the latter shall prevail to the extent of the inconsistency.

3. An Adjudicator shall take all reasonable steps to ensure that her or his Assistant is aware of and complies with this Code, including by requiring the Assistant to sign a declaration that they have read and will comply with the Code.

3. Article 3 – Independence and Impartiality

1. Adjudicators shall be independent and impartial at the time of acceptance of appointment or confirmation and shall remain so until the conclusion of the IID proceedings or until the end of their term of office.

2. Paragraph 1 includes, in particular, the obligation not to:

(a) Be influenced by loyalty to a disputing party, a non-disputing party (including a non-disputing Treaty Party), or a legal representative of a disputing or non-disputing party;

(b) Take instruction from any organization, government, or individual regarding the matters addressed in the IID;

(c) Allow any past or present financial, business, professional or personal relationship to influence their conduct or judgment;

(d) Use their position to advance any significant financial or personal interest they might have in one of the disputing parties, or the outcome of the case;

(e) Assume a duty or accept a benefit that could interfere with the performance of their duties; or

(f) Take any action that creates the appearance of a lack of independence or impartiality.

4. Article 4 – Limit on multiple roles

[Paragraphs applicable to Arbitrators only]

1. Unless the disputing parties agree otherwise, an Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding,] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving:

(a) The same measures;

(b) The same or related parties; or

(c) The same provisions of the same treaty.

2. An Arbitrator in an IID proceeding shall not act concurrently [and within a period of three years following the conclusion of the IID proceeding] as a legal representative or an expert witness in another IID proceeding [or any other proceeding] involving legal issues which are

substantially so similar that accepting such a role would create the appearance of a lack of independence or impartiality.

[Paragraphs applicable to Judges only]

3. Judges shall not exercise any political or administrative function. They shall not engage in any other occupation of a professional nature which is incompatible with their obligation of independence or impartiality or with the demands of a full-time office. In particular, they shall not act as a legal representative or expert witness in another IID proceeding.

4. Judges shall declare any other function or occupation to the [President] of the standing mechanism and any question on the application of paragraph 1 shall be settled by the decision of the standing mechanism.

5. Former Judges shall not become involved in any manner in an IID proceeding before the standing mechanism, which was pending, or which they had dealt with, before the end of their term of office.

6. As regards an IID proceeding initiated after their term of office, former judges shall not act as a legal representative of a disputing party or third party in any capacity in proceedings before the standing mechanism within a period of three years following the end of their term of office.

5. Article 5 – Duty of diligence

[Paragraph applicable to Arbitrators only]

1. Arbitrators shall:

(a) Perform their duties diligently throughout the proceeding;

(b) Devote sufficient time to the IID;

(c) Render all decisions in a timely manner;

(d) Refuse concurrent obligations that may impede their ability to perform their duties under the IID in a diligent manner; and

(e) Not delegate their decision-making function.

[Paragraph applicable to Judges only]

2. Judges shall be available to perform the duties of their office diligently, consistent with their terms of office.

6. Article 6 – Other duties

1. Adjudicators shall:

(a) Conduct the proceedings in accordance with high standards of integrity, fairness and competence;

(b) Treat all participants in the proceeding with civility; and

(c) Make their best efforts to maintain and enhance the knowledge, skills and qualities necessary to perform their duties.

[Paragraph applicable to Arbitrator candidates only]

2. Candidates shall accept an appointment only if they have the necessary competence and skills, and are available to fulfil their duties.

[*Paragraph applicable to Judge candidates only*]

3. Candidates shall possess the necessary competence and skills to fulfil their duties in order to be appointed or confirmed as a Judge.

7. Article 7 – Ex parte communication of a Candidate or an Adjudicator

1. “Ex parte communication” means any oral or written communication between a Candidate or Adjudicator and a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the opposing disputing party.

2. Other than as provided in paragraph 3, Candidates or Adjudicators shall not have any ex parte communication concerning the IID prior to the initiation of the IID proceeding and until the conclusion thereof.

3. It is not improper for Candidates or Adjudicators to have ex parte communications in the following circumstances:

(a) To determine the Candidate’s expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest;

(b) To determine the expertise, experience, competence, skills, availability, and the existence of any potential conflicts of interest of a Candidate for presiding Adjudicator, if the disputing parties so agree;

(c) As otherwise permitted by the applicable rules or treaty or agreed by the disputing parties.

4. Ex parte communications provided in paragraph 3 shall not address any procedural or substantive issues related to the IID proceeding or those that the Candidate or Adjudicator could reasonably anticipate to arise in the IID proceeding.

8. Article 8 – Confidentiality

1. Candidates and Adjudicators shall not disclose or use any information [which is not publicly available,] concerning, or acquired in connection with, an IID proceeding, except for

the purposes of that proceeding, as permitted under the applicable rules or treaty, or with the consent of the disputing parties.
2. Adjudicators shall not disclose the contents of deliberations or any view expressed during the deliberations.
[3. Unless a decision is publicly available, Adjudicators shall not comment on that decision in which they participated, prior to the conclusion of the IID proceeding.]
4. Adjudicators shall not disclose any draft of a decision prior to rendering it and any decision they have rendered, except as permitted under the applicable rules or treaty or with the consent of the disputing parties.
5. The obligations in Article 8 shall survive the conclusion of the IID proceeding and shall continue to apply indefinitely.
[6. The obligations in Article 8 shall not apply to the extent that a Candidate or Adjudicator is legally compelled to disclose non-public information in a court or other competent body or must disclose such information to protect his or her rights in a court or other competent body.]

ii. Future work program

47. At the forty-second session of the Working Group the revised draft provisions for the code of conduct for adjudicators were placed before the Working Group for its consideration. While the work plan considered at the thirty-ninth session of the Working Group held in May 2021 expected the draft of the code to be presented to the UNCITRAL in 2022 for adoption the same could not be achieved as the limited conference time reduced from 30 to 20 hours did not allow for the second reading of the draft provisions.[35]

48. It was generally considered that further deliberations on the Code would be facilitated by an article-by-article commentary, which would incorporate the comments and drafting suggestions made by the States and Observers. Accordingly, the Working Group requested the Secretariat in cooperation with the ICSID Secretariat to prepare a revised version of the Code and the aforesaid commentary for the next session scheduled to take place from 5 to 16 September 2022 in Vienna. It was agreed that the Working Group would aim to present the

[35] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14-18 February 2022) at 20

code of conduct and the corresponding commentaries to the Commission for adoption at the fifty-sixth session due to be held in 2023.[36]

2. Draft provisions of the Statute of the Standing Multilateral Mechanism for International Investment Disputes also referred to as the Multilateral Investment Court.

49. Arising out of concerns of apparent lack of independence and impartiality in decision-making with respect to investment disputes, it was generally suggested that there was a need to revisit the mechanism of party-appointment in ISDS proceedings.[37] Other concerns related to the lack of adequacy, effectiveness and transparency of the disclosure and challenge mechanisms as well as the lack of diversity in adjudicators of investment disputes would also be addressed by the establishment of a standing mechanism for the resolution of international investment disputes.[38] It was suggested that under the system in place, while both claimant investors and respondent States had broad autonomy in the selection and appointment of arbitrators for their disputes, it may be considered necessary to limit the involvement of disputing parties as party autonomy need not be a key component of ISDS.[39]

50. Based on this consideration, the Secretariat prepared draft provisions that would establish a permanent body composed of full time adjudicators comparable to existing international courts where States in their capacity as parties to a dispute would not possess the right of appointment, however acting as treaty parties, they would actively participate in the selection of the members of the standing body.[40]

51. Accordingly, at its forty-second session held in New York from 14 to 18 February 2022 the Working Group considered whether a standing body could serve as an improvement over the current system and address some of the concerns regarding apparent lack of

[36] *Ibid* 21
[37] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018) 9
[38] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (New York, 29 October-2 November 2018) 14
[39] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session (Vienna, 20-24 January 2020) 17
[40] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Standing multilateral mechanism: Selection and appointment of ISDS tribunal members and related matters-Note by the Secretariat' UN Doc. A/CN.9/WG.III/WP.213 (8 December 2021)

independence and impartiality arising out of party-appointment of adjudicators, among other concerns.[41] The Working Group had before it a note prepared by the Secretariat on the standing multilateral mechanism specifically dealing with the selection and appointment of ISDS tribunal members. The note took into consideration the broad range of published material such as the draft supplementary paper prepared by the Centre for International Dispute Settlement (CIDS) on 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards' as well as the 'Draft Statute of the Multilateral Investment Court' prepared by Marc Bungenberg and August Reinisch.

52. Based on the discussion of the Working Group at its resumed thirty-eighth session held in 2020, in Vienna, the Secretariat prepared certain draft provisions on the selection and appointment of ISDS tribunal members in the standing multilateral mechanism for resolution of international investment disputes for the consideration of the Working Group at its forty-second session.

i. Report of the UNCITRAL Working Group III on the work of its forty-second session (New York 14-18 February 2022)

53. As suggested in the note prepared by the Secretariat it was generally noted that the establishment of a Multilateral Investment Tribunal would require the adoption of a statute, that would require a preamble setting out the objectives of the tribunals as well as a provision dealing with key definition employed in the statute. As regards the rules of the Tribunal different views were expressed whether those rules should be drafted by the Commission or by the Committee of Parties which would also be a creation of the said statute. In all 9 draft provisions were presented by the Secretariat to the Working Group with draft provisions 1 to 3 dealing with the general framework including establishment of the tribunal, jurisdiction of the tribunal as well as the governance framework of the Standing Mechanism through a Committee of Parties comprising of Member States to the Statute. The selection and representation of the tribunal members were laid out in draft provisions 4 and 5 whereas the nomination and selection of candidates were dealt with in provisions 6 and 7.

[41] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-second session (New York, 14-18 February 2022)

54. The following draft provisions numbered from 1 to 11 were presented to the Working Group for its consideration at its forty-second session.

1. Draft provision 1- Establishment of the Tribunal

A Multilateral Investment Tribunal composed of a first instance and an appellate level is hereby established (referred to as "the Tribunal").

2. Draft provision 2- Jurisdiction

1. [Option 1: The jurisdiction of the Tribunal shall extend to any dispute, between Contracting States as well as between a Contracting State and a national of another Contracting State, arising out of an investment [under an international investment agreement], which the parties consent to submit to the Tribunal.]

[Option 2: The Tribunal shall exercise jurisdiction over any dispute which the parties have consented to submit to the Tribunal.]

2. Consent to submit a dispute to a tribunal established under an international investment agreement shall be deemed to be a consent to submit the dispute to the Tribunal under paragraph 1.

3. Draft provision 3-Governance structure

(a) Committee of the Parties

1. There shall be a committee of the Parties composed of representatives of all the Parties to this Agreement establishing the Tribunal (referred to as "the Committee of the Parties"). The Committee of the Parties shall meet regularly and as appropriate to address matters concerning the functioning of the Tribunal.

2. The Committee of the Parties shall establish its own rules of procedure and shall carry out the functions assigned to it by this Agreement.

3. It shall establish the rules of procedure for the Selection Panel, the first instance and the appellate level, [the Advisory Centre], and the Secretariat. It may review and, if needed, modify these rules on a regular basis.

4. It shall determine the financial rules for the costs to be attributed to the general budget of the Tribunal. This includes rules on the operational costs of the Selection Panel and any reasonable expenses incurred by its members in the exercise of their function.

5. Decisions of the Committee of the Parties shall be adopted by [a simple] [two-thirds] majority.

(b) Tribunal and its President

1. The Tribunal shall determine the relevant rules for carrying out its functions. In particular, it shall lay down regulations necessary for its routine functioning.

2. The Tribunal shall elect its President and Vice-President by a confidential internal voting procedure with each member having one vote. The President and Vice-President shall be elected for a term of three years with the possibility of one re-election.

3. The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

4. Draft provision 4- Tribunal members

1. The Tribunal shall be composed of a body of [--] independent members in [full][part] time office, reflecting the principles of diversity and gender equality, [elected regardless of their nationality][nationals of Parties to the Tribunal, elected][nationals of Parties and of non-Parties to the Tribunal, elected] from among persons of high moral character, [who are jurists of recognized competence,][who have experience working in or consulting governments including as part of the judiciary,] enjoying the highest reputation for fairness and integrity with recognised competence in the fields of public international law, including international investment law and international dispute settlement. The members of the Tribunal shall also be fluent in at least one of the working languages of the Tribunal.

2. The [Presidency of the] Committee of the Parties may propose an amendment in the number of members of the Tribunal indicated in paragraph 1, based on the evolution of caseload and of the Parties to this Agreement, giving the reasons why this is considered necessary and appropriate. The Secretariat shall promptly circulate any such proposal to all Parties. The number of members of the Tribunal may then be amended by a [two-thirds] majority of the representatives in the Committee of the Parties.

3. No two members of the Tribunal shall be nationals of the same State. A member who is a national of more than one State shall be deemed to be a national of the State in which he or she has his or her habitual residence, if applicable, and/or main centre of interests. [This provision shall cease to apply if the number of members of the Tribunal exceeds [x].]

5. Draft provision 5-Ad hoc tribunal members

1. The parties to a dispute may choose a person to sit as Tribunal member, in the following circumstances where the Tribunal decides to form one or more chambers, composed of three or more members as the Tribunal may determine, for dealing with particular categories of cases in accordance with article (--); for example, (to be completed).

2. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in article 6.

6. Draft provision 6- Nomination of candidates

Option 1:

1. Nomination of candidates for election to the Tribunal may be made by any Party to the Agreement establishing the Tribunal. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of article 4, paragraph 1. Each Party may propose [one][two] candidate[s] for any given election [who need not necessarily be a national of that Party], keeping in mind the need to ensure equal representation of genders. The Tribunal members shall be elected from the list of persons thus nominated.

2. Before making these nominations, each Party shall consult representatives of the civil society, judicial and other State bodies, bar associations, business association, and academic and other relevant organizations, in the process of selection of nominees.

Option 2:

Following an open call for candidacies to be issued in accordance with a decision of the Committee of the Parties:

(a) Any person who possesses the qualifications required under article 4, paragraph 1 may apply to the selection process; and

(b) Civil society, bar associations, academic and relevant organizations in the investing community may nominate any person who possesses the qualifications required under article 4, paragraph 1 to the selection process.

7. Draft provision 7-Selection Panel

(a) Mandate

A selection panel (hereinafter referred to as "Panel") is hereby established. Its function is to give an opinion on whether the candidates meet the eligibility criteria stipulated in this

Agreement before the Committee of the Parties makes the appointments referred to in Article 8.

(b) Composition

1. The Panel shall comprise [five][ten or more] persons chosen from among former members of the Tribunal, current or former members of international or national supreme courts and lawyers or academics of high standing and recognised competence. Members of the Panel shall be free of conflicts of interest, serve in their personal capacity, act independently and in the public interest, and not take instructions from any Party or any other State, organisation, or person. The composition of the Panel shall reflect in a balanced manner the geographical diversity, gender, and [the different legal systems of the Parties] [the regional groups referred to in article 8].

2. The members of the Panel shall be appointed by the Committee of the Parties by [qualified][simple] majority from applications [submitted by a Party][received through the open call referred to in paragraph 3].

3. Vacancies for members of the Panel shall be advertised through an open call for applications published by the Tribunal.

4. Applicants shall disclose any circumstances that could give rise to a conflict of interest. In particular, they shall submit a declaration of interest on the basis of a standard form to be published by the Committee of the Parties, together with an updated curriculum vitae. Members of the Panel shall at all times continue to make all efforts to become aware of and disclose any conflict of interest throughout the performance of their duties at the earli est time they become aware of it.

5. Members of the Panel are not eligible to the Tribunal during their membership of the panel and for a period of [three] years thereafter.

6. The composition of the Panel shall be made public by the Committee of the Parties.

(c) Terms of office

1. Members of the Panel shall be appointed for a non -renewable period of [six] years. However, the terms of [three] of the [five] members first appointed, to be determined by lot, shall be of [nine] years.

2. A person appointed to replace a member before the expiry of his or her term of office shall be appointed for the remainder of his or her predecessor’s term.

3. A member of the Panel wishing to resign shall notify the Chair of the Panel, who shall inform the Committee of the Parties. The Committee of the Parties shall initiate the replacement procedure.

4. Should a member of the Panel fail to respect the obligations incumbent on him or her, including after the end of his or her term, the President of the Tribunal may remove the member from the Panel or take other appropriate measures.

5. Pending the replacement procedure, a person who ceases to be a member of the Panel may, with the authorisation of the chair of the Panel, complete any ongoing selection procedure and shall, for that purpose only, be deemed to continue to be a member of the Panel.

(d) Chair and secretariat

1. The Panel shall elect its own chair. The Chair of the Panel shall serve for a period of [three] years.

2. The secretariat of the Committee of the Parties shall serve as the secretariat of the Panel.

(e) Deliberations

1. The Panel may convene in person or through any other means of communication. The procedures and deliberations of the Panel shall be confidential.

2. In carrying out its tasks, the Panel shall ensure protection of confidential information and personal data.

3. The Panel shall endeavour to act by consensus. In the absence of consensus, the Panel shall act by a [qualified] majority of three out of five .

(f) Tasks

1. The Panel shall act at the request of the secretariat once candidates have been nominated by the Parties [or have applied] pursuant to article 6.

2. The Panel shall: (i) review the nominations or applications received including, where appropriate, by hearing the candidates or by requesting candidate to send additional information or other material which the Panel considers necessary for its deliberations; (ii) verify that the candidates meet the requirements for appointment as members of the Tribunal; (iii) call for more nominations if the Panel finds that there is an insufficient number of candidates who meet the eligibility criteria; (iv) provide an opinion on whether candidates meet the requirements referred to in subparagraph (ii); and (v) establish a list of candidates meeting the requirements.

3. The Panel shall complete its work in a timely fashion.

4. The Chair of the Panel may present the opinion of the Panel to the Committee of the Parties.

5. The list of candidates meeting the requirements shall be made public.

6. The Panel shall publish regular reports of its activities.

(g) Working procedures

The Panel may adopt its own working procedures which shall be consistent with this provision.

8. Draft provision 8- Appointment (election)

1. The Panel shall publish the list of the candidates established pursuant to article 7(f)(2) who are eligible for election as members of the Tribunal by classifying them in one of the following regional groups based on [their nationality][the nationality of the country which nominated them for the election or, in case of direct applications, based on the nationality of the candidates]: Asia, Africa, Latin America and the Caribbean, Western Europe and others, and Eastern Europe.
2. The Panel shall recommend [--]members to serve on the appellate level of the Tribunal based on the extensive adjudicatory experience of such candidates.
3. The Members of a particular regional group in the Committee of the Parties will vote on the candidates eligible for election [from their regional group] with the aim to select an initial number of [--] members, of which the following number of members shall be chosen from each regional group: Asia: [--]members Africa: [--]members; Latin America and the Caribbean: [--]members; Western Europe and others: [--]members; and Eastern Europe: [--] members.
4. The Committee of the Parties shall only appoint members of the first instance and appellate level from the list of suitable candidates established by the selection panel pursuant to Article 7(f)(2).
5. At every election, the Committee of the Parties shall ensure the representation of the principal legal systems of the world, equitable geographical distribution, as well as equal gender representation in the Tribunal as a whole.

9. Draft provision 9-Terms of office, renewal and removal

(a) Terms of office and renewal

1. The Tribunal members shall be elected for a period of [nine] years [without the possibility of re-election][and may be re-elected to serve a maximum of [one] additional term].
2. Of the members elected at the first election, the terms of [--] members shall expire at the end of [three] years and the terms of [--] more members shall expire at the end of [six] years. The members whose terms are to expire at the end of [three] and [six] years shall be determined through a draw of lots to be conducted by the Chairperson of the Committee of the Parties immediately after the end of the first election. The members shall continue to hold

office until they are replaced. They will, however, continue in office to complete any disputes that were under their consideration prior to their replacement unless they have been removed in accordance with section (b) below.

(b) Resignation, removal, and replacement

1. A member may be removed from office in case of non-compliance with [draft provision 10] or failure to perform his or her duties by a [unanimous decision][qualified majority of two-thirds] of the members except the member under scrutiny. A member may resign from his or her position through a letter addressed to the President of the Tribunal. The resignation shall become effective upon acceptance by the President. In case of a judicial vacancy, the process of reappointment of members will be conducted in the manner specified in provision 8 above, subject to the modification that only the group which elected the outgoing member will be able to vote and elect a replacement in a special ad-hoc election.

2. A member who has been appointed as a replacement of another member under this provision shall remain in office for a duration of [nine] years except for members who are appointed as replacements for members elected with a shorter period of [three] years or [six] years after the first election. Members who are appointed as a replacement for a member with a shorter-term period will be eligible for re-election for a full term.

10. Draft provision 10-Conditions of services

1. A member of the Tribunal shall comply with the Code of Conduct for Adjudicators in International Investment Disputes.

2. Members shall receive an annual salary. In addition, the President shall receive a special annual allowance. These salaries, allowances, and compensation shall be fixed by the Committee of the Parties.

11. Draft provision 11-Assignment of cases

Option 1 (for paragraph 1)

1. [The President of the Tribunal]][A Committee composed of the President of the Tribunal and a representative number of the members of the Tribunal] shall assign individual members to the chambers of the first instance and appellate levels and assign disputes to the chambers of the Tribunal

Variant 1:

[in accordance with the Rules of Procedure adopted by the Committee of the Parties on assigning the Tribunal members to the chambers of the Tribunal. The Rules of Procedure

may set out guidelines on relevant criteria that the President should consider in making an assignment.]

Variant 2:

[. The assignment of members to the chambers of the Tribunal and the assignment of disputes to the members shall be governed by Rules of Procedure to be adopted by the Committee of the Parties. The President shall consider criteria such as gender and regional diversity as well as diversity of expertise of legal systems, language requirements, [nationality restrictions] and subject area in addition to the guidelines provided under the Rules of Procedure adopted by the Committee of the Parties while assigning the Tribunal members to the chambers of the Tribunal.]

Option 2 (for paragraph 1)

1. Disputes shall be assigned to the chambers of the Tribunal on a randomized basis. The [assignment of members to the chambers of the Tribunal and] the assignment of disputes to the members shall be governed by Rules of Procedure to be adopted by the Committee of the Parties. The President of the Tribunal may decide to assign two or more cases to the same chamber if the preliminary or main issues in two or more cases before different chambers are similar.

2. [A member shall not be assigned to a particular dispute if he or she is a national of either the State party to the dispute or the State whose national is a party to the dispute.]

ii. Future work program

55. The provisional agenda for the forty-second session of the Working Group provided for the discussion of the followings topics : (a) draft code of conduct for adjudicators in international investment disputes and means of implementation, (b) the selection and appointment of ISDS tribunal members and related matters, and (c) the multilateral advisory centre. Before the commencement of the session the Chair had circulated a letter to the Members regarding the priority to be accorded to the topics, with a suggestion that the topic selection and appointment of ISDS tribunal members and related matters be addressed first, followed by the Draft Code of Conduct for adjudicators in International Investment Disputes.

56. However, an alternative proposal was made to consider first the Draft Code of Conduct for adjudicators in International Investment Disputes followed by the multilateral advisory centre, which did not receive support. Accordingly, the proposal of the Chair was

adopted with an assurance that equal time would be allocated to the aforesaid topics in the proposal.

57. At the forty-second session, only 7 out of the 9 draft provisions could be considered by the Working Group after which the Secretariat was requested to prepare a revised version of draft provisions 1 to 7 incorporating the views of the States and Observers. The Working Group agreed to continue its consideration of the remaining draft provisions *viz.* draft provisions 9 to 11 at a future session.[42]

C. The UNCTAD and recent developments in the International Investment Agreements Regime

58. The previous section on the reform of ISDS pursued by States in the UNCITRAL presented the current status of the reform solutions some of which are at the cusp of being referred by the Working Group III to the UNCITRAL for adoption. As discussed the process of reform in the UNCITRAL began in 2017, the impetus for which came not only from the concerns raised by States but also other stakeholders notable among which is the UNCTAD. While studying International Investment Law and Policy in a holistic manner is a function which has been performed by the UNCTAD since the early 1990s, since 2010 the UNCTAD has focussed its attention on a systemic and sustainable development oriented approach towards reforming the International Investment Regime.[43] Accordingly in 2012 the UNCTAD launched its Investment Policy Framework for Sustainable Development (IPFSD), and updated the same in 2015 based on renewed information, experience, feedback and comments.[44]

59. While the policy framework provided guidance for States to establish a new generation of investment policies in line with the sustainable development goals for national and international policy, it also focussed its attention on reforming International Investment Agreements and ISDS. As early as 2012, the UNCTAD identified that while the WTO

[42] *Ibid* 20
[43] J. Weber and C. Titi, 'UNCTAD's Roadmap for IIA Reform of Investment Dispute Settlement' (2015) 21 New Zealand Business Law Quarterly 319
[44] UNCTAD 2012 Investment Policy Framework for Sustainable Development (UNCTAD, 2012) <https://unctad.org/webflyer/investment-policy-framework-sustainable-development-2012-edition> accessed 1 August 2022; UNCTAD 2015 Investment Policy Framework for Sustainable Development (UNCTAD, 2015) <https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf> accessed 1 August 2022

agreements have recognized the concept of Special and Differential Treatment, the same was conspicuously absent from the regime of International Investment Law.[45] Accordingly the policy framework documents identified some early policy options that may be characterised as the beginning of a structured and institutionalized approach towards the reform of the entire field of International Investment Law where the substantive obligations are provided for in treaties and procedure to enforce the same depends on the procedural rules adopted for the conduct of arbitration.

60. Among the early policy suggestions were restrictions on the scope of the wide ranging guarantees prevalent in most existing investment treaties such as the national treatment, fair and equitable treatment, most favoured nation treatment etc., as well as restriction of the right to resort to dispute settlement. Another early policy option suggested by the UNCTAD was to stipulate carefully crafted exceptions to protect human rights, health, core labour standards and the environment, with well working checks and balances, so as to guarantee policy space while avoiding abuse in investment treaties.

61. At the Third International Conference on Financing for Development which led to the adoption of the outcome document titled the 'Addis Ababa Action Agenda', the revised 2015 IPFSD was officially launched providing guidance on moving towards a 'New Generation of Investment Policies'.[46] Among other guidance provided by the Policy Framework, the guidance for International Investment Agreements explained in detail the ramifications of the various popular standards of treatment for sustainable development. One of the notable solutions provided for in the document was the inclusion of Transparency in the treaties which reflected the coordination in reform efforts between the UNCITRAL and UNCTAD, with the former adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration a year earlier in 2014.

62. Along with other policy guidelines relating to domestic measures in the nature of domestic legislations and policies with an objective to promote sustainable growth of foreign investment, the World Investment Report (WIR) has been following the developments in the

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[45] UNCTAD, 'World Investment Report 2012: Towards a New Generation of Investment Policies' (UNCTAD, 2012)

[46] Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (UN, 2015) <https://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf> accessed 1 August 2022

field of International Investment Agreements and Policy since its first volume published in 1991.[47] Since 2012 the WIR has been monitoring the various changes in agreements and policies relating to foreign direct investment that are crucial in the reform of the ISDS as well as increased inclusion of provisions in the agreements that promote sustainable development.

1. Reform of International Investment Agreements--the work of the UNCTAD in the period 2012-2022

63. As discussed, the WIR 2012 took forward the agenda formulated in the IPFSD and provided detailed guidance as to how various clauses prevalent in investment treaties can be altered so as to protect the regulatory freedom of States to promote sustainable development. The WIR 2015 took forward the same approach and reported on the trends followed in making new IIAs, and provided the following guideline for IIA reform. According to the report the reform initiatives should be guided by the goal of harnessing IIAs for sustainable development, focusing on key reform areas, and following a multilevel, systematic and inclusive approach.[48]

64. Among other reform solutions the UNCTAD was one of the first to recommend the creation of an international investment court as a multilateral solution addressing the legitimacy crisis in ISDS. The WIR 2016 identified that many of the reforms options mentioned in the IPFSD and WIR 2015 were being rapidly adopted by States, however since the majority of investment disputes were based on older treaties, reform proposal would have been adopted to address concerns arising out of those obligations.[49] Accordingly, phase 2 of the reforms were put in motion by the WIR 2017, which recommended the reform of around 2500 investment agreements that were in force with a number of options that were presented.[50] Finally issues relating to inconsistency between national policies and other obligations in international law were addressed by the UNCTAD in the WIR 2018, that comprised the phase 3 of the reforms.[51]

[47] UNCTAD, 'World Investment Report 1991: The Triad in Foreign Direct Investment' (UNCTAD, 1991)
[48] UNCTAD, 'World Investment Report 2015:Reforming International Investment Governance' (UNCTAD, 2012)
[49] UNCTAD, 'World Investment Report 2016:Investor Nationality: Policy Challenges' (UNCTAD, 2016)
[50] UNCTAD, 'World Investment Report 2017: Investment and Digital Economy' (UNCTAD, 2017)
[51] UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (UNCTAD, 2018)

65. In 2018, the UNCTAD published the Reform Package for the International Investment Regime that presented a consolidated version of UNCTAD's research and policy guidance on IIA reform derived from the aforesaid WIRs from 2015 to 2018.[52]

66. The report identified three phases in which the reform efforts could be characterised. Phase 1 of IIA Reform concerned the substance of IIAs and addressed five priority areas for reform. It stated that IIA reform should aim at (i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement to address the legitimacy crisis of the current system; (iii) promoting and facilitating investment; (iv) ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects; and (v) enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships.[53]

67. Phase 2 of IIA Reform analysed 10 policy options: (1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning ungratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral mechanisms. Phase 2 of IIA Reform culminated in UNCTAD's October 2017 High-level IIA Conference, when more than 350 experts shared their experiences, identified best practices and charted the way forward towards the third phase of reform.[54]

68. Phase 3 of IIA Reform focused on improving coherence, consistency and interaction between different levels and types of policymaking. In particular, shaping the interaction of national and international dimensions of investment policymaking requires a solid understanding of the different objectives, functions and natures of the legal instruments involved. It was observed that at the domestic level, an incoherent IIA network could expose

[52] UNCTAD, 'UNCTAD's Reform Package for International Investment Regime' (UNCTAD, 2018) <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime 2018-edition-> accessed 1 August 2022
[53] *Ibid* 32
[54] *Ibid* 69

the host State to undesirable effects. IIA reform should also take into account the interaction between IIAs and other bodies of international law affecting investment.[55]

69. While taking stock of the three phases of the reforms the WIR 2019 noted the following points:

Firstly, modernizing old-generation treaties remained a priority. Despite on-going reform efforts, the stock of treaties belonging to the old generation of IIAs that did not include reform oriented features accounted for more than ten times the number of reformed investment agreements.

Secondly, one of the most important elements that was noted was that the reform needed to be holistic. Although reform efforts converge in their objective to make the IIA regime more sustainable development-oriented, they were implemented only intermittently by countries and focussed on specific aspects of the regime that were often addressed in isolation. The reform of investment dispute settlement for example, a focus of worldwide attention recently, was not synchronized with the reform of the substantive rules embodied in IIAs. However, reorienting the investment policy regime towards sustainable development required reforming both the rules on dispute settlement and the treaties' substantive rules.

Thirdly, there were some reformed clauses that were yet to be tested. It was too early to assess the effectiveness of some of the innovative language introduced in IIAs in achieving their objectives of safeguarding countries' right to regulate. Many of the new refinements in IIAs were yet to be tested in investment disputes, and doubts remained about how arbitrators would interpret them in ISDS proceedings. This applied to both new clauses that were widely used in treaties and those that were used relatively rarely.

Fourthly, reform efforts should be inclusive and not be constrained by capacity constraints. Successful reform requires a transparent and inclusive process. Governments and international fora needed to ensure the availability of possibilities for meaningful stakeholder engagement and build the skills and experience of negotiators and policymakers. Bilateral or regional technical assistance programmes could follow up on the capacity-building needs

[55] *Ibid* 93

identified by governments. Sharing of experiences and best practices on IIA reform could foster peer-to-peer learning about sustainable development-oriented reform options.[56]

70. The WIR 2019 took stock of the various new agreements entered into along with the new guiding policies adopted by the States. The Report identified the following guiding principles that were informed by the UNCTAD IPFSD, and developed in collaboration with or jointly with UNCTAD, (a) G20 Guiding Principles for Global Investment Policymaking; (b) Joint African, Caribbean and Pacific Group of States (ACP)-UNCTAD Guiding Principles of Investment Policymaking; (c) Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking; (d) Organization of Islamic Cooperation Guiding Principles for Investment Policymaking; (e) Saudi Arabia Guiding Principles for Investment Policymaking. The report also analysed the trends in ISDS which included monitoring the new and on-going cases as well as studying their outcomes in light of the provisions that were under controversy. In similar vein, the WIR 2020 kept up with the developments keeping track of the efforts being made to reform International Investment Agreements. The report also focussed on the impact of the COVID-19 Pandemic on international investment law making and observed that during the Pandemic negotiation of new investment protection treaties was also slowed down.[57]

71. In 2020, the UNCTAD released a report titled 'International Investment Agreements: Reform Accelerator' which takes the Phase 2 reforms further by aiming to expedite the modernization of the existing stock of old-generation of IIAs.[58] While focussing on the substantive provisions of IIAs it operationalizes the idea of gradual innovations in line with the trend prevalent in IIAs towards securing the sustainable development goals and safeguarding the right of every State to sovereign regulation. It notes the importance of reforming the old-generation treaties especially in light of the COVID-19 Pandemic which prompted governments to take policy measures to address health concerns as well as the economic fallout from the pandemic. Most notably the report proclaims that it complements other ongoing efforts on the reform of IIAs such as those underway at the UNCITRAL and ICSID which have made considerable progress in proposing solutions to reform ISDS.

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[56] UNCTAD, 'World Investment Report 2019: Special Economic Zones' (UNCTAD, 2019) 115
[57] *Ibid* 101
[58] UNCTAD, 'International Investment Agreements: Reform Accelerator' (UNCTAD, 2020) <https://unctad.org /webflyer/international-investment-agreements-reform-accelerator> accessed 1 August 2022

72. The report identified eight key IIA provisions, which builds upon the guidance provided in the IPFSD as well as the Reform Package for the International Investment Regime. Based on the UNCTAD annual IIA conferences, capacity-building programs and policy research the report identified the following prevalent provisions: (1) definition of investment; (2) definition of investor; (3) national treatment (4) most-favoured national treatment (MFN); (5) fair and equitable treatment (FET); (6) full protection and security; (7) indirect expropriation; and (8) public policy exceptions. While analysing these provisions the report provided certain suggestions or options for reform which would further the realization of the sustainable development goals, secure the regulatory rights of the States and at the same time provide adequate protection to foreign investment in host countries. The report describes these options as reflecting the recent treaty practice of States and model IIAs, and for the AALCO Member States particularly it lauds the practice of certain Member States in formulating the following innovative agreements, namely (1) the Japan-Jordan Bilateral Investment Treaty, 2018; (2) ASEAN-Hong Kong, China SAR Investment Agreement, 2017; (3) the Egypt-Mauritius Bilateral Investment Treaty, 2014; (4) the Pan African Investment Code, 2016; (5) the China-South Korea Free Trade Agreement; and (6) the India Model BIT, 2016.[59]

73. The 2021 World Investment Report continued to monitor the trends and presented the following most important developments that took place during the period 2020-2021. The developments noted were the entry into force of the EU agreement to terminate all intra-EU bilateral investment treaties (BITs) and the emergence of new mega-regional IIAs, as well as other developments that continue to influence international investment rules such as multilateral discussions for the reform of the ISDS system.[60]

2. Recent trends in International Investment Agreements and Investor-State Dispute Settlement (ISDS)

74. With this background in mind regarding the active engagement and contribution of the UNCTAD towards the reforms of IIAs and ISDS in the previous decade it becomes imperative to focus on the developments presented in the World Investment Report of 2022 as well as in the IIA's Issues Note.

[59] *Ibid* at 4
[60] UNCTAD, 'World Investment Report 2021: Investing in Sustainable Recovery' (UNCTAD, 2021)

i. IIAs Issues Note- Facts on Investor-State Arbitrations in 2021: With a special focus on tax related ISDS Cases.

75. As reported in the Issues Note the total count of known investor–State dispute settlement (ISDS) cases reached 1,190 at the end of 2021out of which 68 arose out of IIAs. 42 new countries faced cases in 2021 five of which faced their first known ISDS claim. Out of the universe of IIAs the Energy Charter Treaty, 1994 and the North American Free Agreement, 1992 were instruments that were most commonly invoked. Based on the data available with UNCTAD 165 ISDS cases have arisen out of measures relating to tax which is considered a sovereign regulatory prerogative of the State. The Issues Note goes on to provide in-depth and comprehensive data in the annexes about all the known ISDS cases filed in 2021 and provides a comprehensive list of cases arising out of tax measures as well as war, armed conflict, military operations and civil unrest.[61]

ii. The World Investment Report 2022: International Tax Reforms and Sustainable Investment

76. On 9 June 2022, the UNCTAD released its anticipated annual publication titled the World Investment Report 2022 focussing on issues relating to International Tax Reforms and Sustainable Development.[62] The Report recognizes that while global FDI flows have returned to the pre-pandemic levels, the war in Ukraine has caused triple crisis in terms of food, finance and fuel which could have a negative impact on global FDI flows. This report focussed on the impact of national taxation policies implemented by States on flow of foreign investment in their regions. While the flow of investment to developed economies was higher than developing ones, the developing economies welcomed a thirty percent increase in investment taking to the total amount to $ 837 billion.[63] One major trend reflected in the report has been the growth in the digital sectors as well as in the pharmaceutical sectors understandably due to the situation created by the Pandemic. International Investment in the sectors relevant for the Sustainable Development Goals increased by over seventy percent, of

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[61] UNCTAD, 'Facts on Investor-State Arbitration in 2021:With a Special Focus on tax-related ISDS cases' (2002) Issue 1 IIA Issues Note- International Investment Agreements <https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf> accessed 1 August 2022

[62] UNCTAD, 'World Investment Report 2022: International Tax Reforms and Sustainable Investment' (UNCTAD, 2019)

[63] *Ibid* 6

which much of the growth was due to the increase in investment in the project finance.[64] While investment in greenfield projects was still lower than pre-pandemic levels, much of the growth came from investment in the renewable energy sector, while infrastructure, food and health only saw a partial recovery.

77. With respect to the IIA reform, the WIR (2022) notes that an accelerated trend is observable due to notable developments in 2021 and 2022. Among the chief reasons for this accelerated trend was the termination of older BITs, conclusions of regional IIAs and most importantly due to the on-going multilateral efforts at ISDS reform gaining momentum.[65]

78. With respect to the developments in the conclusion and termination of IIAs the WIR (2022) reported that in 2021 the number of terminations exceeded the number of newly concluded IIAs. States signed 13 new IIAs and terminated 86 of them of which 75 were terminated by mutual consent, 4 were unilaterally terminated, 4 were renegotiated and replaced by a newer treaty while 3 expired. Of the 75 terminations by mutual consent 74 of them arose out of the agreement between the European Union (EU) Member States who agreed to terminate all BITs between them while 1 BIT was terminated between the UK and Malta. The recent termination takes the number of terminated IIAs to 483 with 69% of the termination occurring within the last decade.[66]

79. Of the four substantive IIAs concluded in 2021, all of them contain clauses which reflect the coming into effect of the reform proposal being discussed at various forums. While protection measures and treatment guarantees have been clarified, the scope of exceptions has been considerably increased, in all, allowing for greater sovereign regulatory space for States. The aforesaid new IIAs also restrict the scope of ISDS by subjecting it to limited periods when claims can be made.

80. One the major development discussed in the report which is important for the consideration by the AALCO Member States was the commencement of negotiations of the African Continental Free Trade Area Investment Protocol in March 2021 which was subsequently discussed in March 2022 as well. The Protocol aims at the promotion,

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[64] *Ibid* 26
[65] *Ibid* 65
[66] *Ibid* 66

facilitation, and protection of intra-African investment that inculcates the two pronged goal of the reform efforts i.e. fostering sustainable development and safeguarding the right to regulate of States. The Negotiation Principles for the Protocol recognize the UNCTAD's work on IIA reform, and make reference to the IPFSD as well as the International Investment Agreements: Reform Accelerator.

81. The WIR also discussed some of the developments which reflect the general trend towards IIA and ISDS reform which currently underway in a number of forums such as the ICSID, EU Commission, the Energy Charter Modernization Group, the WTO, the OECD and UN bodies such as the UNCITRAL as well as the UN Office on Drugs and Crime.

82. As regards the cases, out of 54 substantive decisions rendered by tribunals, 20 decisions were rendered on merits. 12 decisions held States' liable for breaches of the treaty where 8 decisions dismissed all the claims of the investor. The Report states that by the end of 2021, 807 ISDS proceedings had been concluded and that the relative shares of case outcomes only varied slightly from the trends discerned from previous years.[67]

III. Observations and Comments of the AALCO Secretariat

82. The WTO has proved its centrality for crafting multilateral solutions for global challenges, notably against the backdrop of rising geopolitical tensions. During the pandemic, it has been perceived that certain AALCO Member States have taken the lead in furthering the interests of the developing world's populace on vaccine accessibility. Asian-African voices have rung loud and clear in brokering deals at the MC12, and persistent efforts have reaped positive outcomes, albeit somewhat limited. It is urged that AALCO Member States continue to take such strides in voicing their viewpoints on WTO matters, and utilize AALCO as a platform to exchange, and if possible, coalesce cogent viewpoints to reform the multilateral trading regime.

83. As regards the current state of affairs in International Investment Law dissatisfaction with ISDS culminated in the coming together of States to address their concerns through the Working Group III of the UNCITRAL which began its project in 2017. As mandated, the

[67] *Ibid* 75

Working Group first identified and considered concerns regarding ISDS, thereafter it resolved that reform was desirable in light of these concerns and finally proposed solutions that could be referred to the Commission for adoption. This report considered two such reform proposals that are on the cusp of being recommended by the Working Group to the Commission for adoption, namely the Draft Code of Conduct for Adjudicator in International Investment Disputes and the Draft provisions of the Statute of the Standing Multilateral Mechanism (selection and appointment of ISDS Tribunal Members).

84. The drafts prepared by the Commission have benefitted from the widest possible breath of available expertise from all stakeholders while being government led and consensus based, while maintaining full transparency. The AALCO Member States have made extensive contributions at the Working Group meetings and have submitted detailed comments on the drafts. Therefore, it assumes great importance especially at the present juncture when the drafts are in their final stages that the Member States of AALCO continue their active engagement with the Working Group while forming and cementing their positions while improving the drafts for their widest possible acceptance by all States.

85. The work of the UNCTAD in the area of reforming IIAs and ISDS has been commendable in as much as it was not only one of the first organizations to commence work on the topic but also suggested holistic and comprehensive reform in the area. While issues such as consistency, lack of impartiality, incoherence and legitimacy have been some of the ways in which IIAs and ISDS have suffered from criticism, it was UNCTAD that concentrated on two key issues i.e. fostering sustainable growth of foreign investment in accordance with the SDGs as well as securing the right of sovereign regulation of States in favour of public policy consideration. The success of the work of UNCTAD is clearly visible in the large-scale adoption of its proposals in the new generation of IIAs, that have benefitted from the UNCTAD's comprehensive and wide scale monitoring of developments, its capacity-building endeavours, detailed and explanatory reports and issue notes as well as its general technical assistance which it has rendered to developing and LDC States.

86. As such the work of UNCTAD continues to serve the AALCO Member States in making informed and well considered decisions regarding international investment law and policy as well as the mode of settling disputes in this area.