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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 at the same general meeting, and dealt with in the same brief as a combined agenda item having common concerns and synergies in discussion. Since then, the agenda item "International Trade and Investment Law" has been dealt within the same Secretariat brief, and has been deliberated upon in the same general meeting (barring the Fifty-Ninth Annual Session in 2021 held in Hong Kong SAR in hybrid mode).

2. 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 Sixty-first Annual Session.

3. 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. In the same year the Uruguay Rounds of Negotiation were concluded leading to the establishment of the World Trade Organization (hereinafter 'WTO') headquartered in Geneva, Switzerland. Thereafter, the topic has 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.

4. The inter-sessional work of AALCO on this topic comprised mainly of capacity-building exercises in the form of seminars and conferences, and 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.

5. 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. From 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).

6. 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.

7. As part of 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.

8. Renewed interest was exhibited in the topic when International Investment Agreements (hereinafter '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 the Investor-State Dispute Settlement (hereinafter 'ISDS') 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.

9. 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, and the Fifty-Eighth Annual Session at Dar es Salaam, United Republic of Tanzania in 2019. The topic was the focus of discussions at the seminar on reviewing reforms to the international investment regime and to the ISDS mechanism, jointly organized by the African Institute of International Law (AIIL) and the AALCO, held at Arusha, Tanzania, from 19-21 November 2018. With participation from a number of Member States of AALCO, as well as the United Nations Commission for International Trade Law (UNCITRAL) and other organizations the seminar discussed a number of issues concerning the reform of investor-state arbitration looking at both substantive and procedural solutions.

10. Further following up on the work of the UNCITRAL generally, and specifically on the reform of ISDS, a public lecture was delivered by Ms. Anna Joubin-Bret, the Secretary of

UNICTRAL on 20 March 2019 at the AALCO Headquarters in New Delhi, Republic of India. In her lecture, she provided an overview of the work of UNCITRAL on the topics on its work program. The lecture also dealt with the key issues that the Working Group III of the UNCITRAL was dealing with and some of the proposal it received for reforms based on the work of other institutions dealing with IIAs and ISDS as well as members and observers in the Working Group. The lecture was well attended by Ambassadors, Liaison Officers and representatives of Member States as well as legal professionals, academics, policy researchers and students.

11. Thereafter item was thereafter 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, wherein a Secretariat report was prepared presenting the latest developments. At the Sixtieth Annual Session held in New Delhi (HQ), the Republic of India on 26-28 September 2022, deliberations took place on the reform of International Investment Agreements and ISDS mechanism in accordance with the work underway at the UNCITRAL and the United Nations Conference for Trade and Development (UNCTAD). Together with inputs from experts, the Member States provided valuable insights into their own experience with the implementation of some of the reform proposal identified by the UNCITRAL and UNCTAD. Member States were supportive of the work of UNCITRAL and UNCTAD and expressed their intention of active engagement in the process and need for continued work on the topic.

12. Recently, on 14 September 2023 the AALCO Secretariat received the Members of the UNCITRAL Secretariat and UNCITRAL Regional Centre for Asia and the Pacific at the AALCO Headquarters. Ms. Anna Joubin-Bret, Secretary of the UNCITRAL delivered a public lecture providing an overview of the work of UNCITRAL over the previous year, focussing on key topics such as dispute settlement, judicial sale of ships and cross-border insolvency in addition to the work of the Working Group III on the reform of ISDS. In her lecture, she expressed confidence in the cooperation between AALCO and UNCITRAL on common topics on their work programs and expressed her willingness to cooperate on further endeavours in the future.

B. Deliberations at the Sixtieth Annual Session of AALCO [New Delhi (HQ), Republic of India, 26 September - 28 September 2022]

13. The topic was introduced by H.E. Dr. Kamalinne Pinitpuvadol, the Secretary-General of AALCO. In his statement he referred to the long-standing association of the topic with AALCO from its earliest days, and explained that the topics "International Trade Law" and International Investment Law have common concerns and synergies. Hence since the Fifty-Seventh Annual Session held in Tokyo, Japan in 2018 it was felt that the topics could be considered in a single topic titled "International Trade and Investment Law". He further noted that in light of the prevailing environment in international relations the topics selected for focused deliberation could not have been more relevant. He also expressed his belief that Member States would have much to contribute towards taking the discussion forward on the key issues identified.

14. The first speaker Dr. Aniruddha Rajput, Member, UN International Law Commission, as expert delivered a presentation on counterclaims in investment arbitration. In his presentation, the advantages of counter-claims for AALCO Member States were underlined as were the unresolved issues which made counter-claims hard to bring for respondent States. He emphasized the importance of counter-claims for respondent States that were committed to ensuring respect for human rights and environmental obligations especially when they appeared to conflict with obligations in undertaken investment agreements. While addressing ICSID arbitration as well as ad-hoc arbitration, he delineated the procedural requirement of counterclaims and how it was extremely limited in nature as prevalent in the investment treaties in force as of now. While addressing reform efforts particularly in the UNCITRAL Working Group III, he criticized the approached taken therein where counter-claims were in effect treated only as a procedural issue. While in his view the procedural and substantive issues were deeply interlinked and hence ought to be considered together. Before concluding he commended the Asian and African States for their informed State practice of investment treaties wherein widely worded counter-claims clauses were employed opening the scope for substantive obligations on investors being enforced through counter-claims.

15. Thereafter, the President of the Sixtieth Annual Session of AALCO, Ms. Uma Sekhar, Additional Secretary, Legal & Treaties Division, Ministry of External Affairs, the Republic of India opened the floor for statements from Member States followed by observers. The following delegations delivered statements on the agenda item: Malaysia, the Socialist Republic of Viet Nam, the Republic of Kenya, Japan, the United Republic of Tanzania, the Republic of Indonesia, Nepal, the Islamic Republic of Iran, the Republic of India, the People's Republic of China, and the Hague Conference on Private International Law (HCCH).

16. **The Delegate of Malaysia** expressed support for the efforts made to review and enhance the WTO's function in order to restore the effectiveness and credibility of the WTO as the main forum for the negotiation of trade rules and further liberalization. In this regards it was also stated that the Appellate body of the WTO is an important body without which the WTO's function as the main forum for the settlement of trade disputes would fail. The delegate also expressed belief that the Member States of the WTO need to vigorously engage in constructive discussion to achieve concrete solutions in line with the mission of the WTO. In relation to the issues concerning International Investment Dispute Settlement, support was expressed for the Standing Multilateral Mechanism for investment disputes and it was advised that the UNCITRAL commence discussions relating to the organization and administrative aspects simultaneously with other issues. In relation to the work of UNCTAD it was emphasized that while many IIAs contained provisions on sustainable development the practical effectiveness of these provisions needed to be considered in accordance with policy considerations. Before concluding, it was stated that Malaysia has actively contributed in most of the areas highlighted in the report and will continue to engage with the UNCITRAL Working Group III to ensure that a dynamic and robust discussion is conducted.

17. **The Delegate of the Socialist Republic of Viet Nam** expressed its support for the development of the Code of Conduct for Adjudicators in International Investment Disputes by the UNCITRAL and took note that the draft was under its second reading along with the commentary. With respect to the Code of Conduct, articles 4 and 8 were addressed as having gained tremendous attention and scrutiny as they dealt with the issues of the prohibition of double hatting and confidential information respectively. As regards the establishment of the

multilateral mechanism, the delegation raised concerns regarding the qualifications of judges in terms of experience and need to ensure diversity in terms of legal systems, languages and backgrounds in the field of international law. On the allocation of seats it was stated that the delegation concurred with the allocation in accordance with the UN system while taking into consideration the membership of the mechanism.

18. **The Delegate of the Republic of Kenya** in relation to the 12th WTO Ministerial Conference stated that the Ministers reaffirmed the provision of special differential treatment for developing countries and LDCs the successful conclusion of which would accelerate growth and development. It was also stated that the Republic of Kenya was represented in the Africa forum organized by UNCITRAL on the side-lines of the 12th Ministerial Conference to discuss commercial law for the facilitation of sustainable development from an African perspective. The delegation expressed is commitment to the processes and acknowledged that Africa had massive resources but was largely deficient in capital and technological know-how to tap the potential in various sectors. It was further explained that this gap was usually filled by foreign investors contributing to the conclusion of Bilateral Investment Treaties which remained a complex issue requiring balancing of interests of the investors and host countries. As regards the topic ISDS reform under Working Group III of the UNCITRAL, the delegate expressed that the Republic of Kenya affirmed its support to the Code of Conduct for Adjudicators in International Investment Disputes. It was further expressed that the code should build uniformity in standards dealing with issues of independence and impartiality and the dilemma of double hatting and repeat appointments amongst other challenges.

19. **The Delegate of Japan** stated that he had three points to make. Firstly, with respect to the 12th Ministerial Conference of the WTO it was stated that while confirming its role as the core of the multilateral trading system, the WTO must seek a long-lasting solution for urgent dispute settlement reform. It was affirmed that Japan would continue to collaborate with all Members in this regard. Secondly, with respect to the work of the UNCITRAL, the delegate expressed that Japan considers that the ISDS mechanism needed a balance between protection of investors and States' rights to regulate and recognizes the need for reform for which it would fully engage in the Working Group III discussion of the UNCITRAL so that the discussions on

appropriate reforms would be conducted without prejudice to the outcome and would appropriately address actual concerns. Thirdly, regarding the work of the UNCTAD it was stated that Japan has been actively engaged in concluding investment agreements with modernized content. The Japan-Jordan Bilateral Investment Treaty has been referred to in its report titled ”International Investment Agreements: Reform Accelerator” in several articles. It was further informed in this regard that in June 2022 Japan signed a Bilateral Investment Agreement with Bahrain, which is a Member State of AALCO. The delegate concluded by stating that Japan would continue to work on improving the legal foundation to enhance predictability for investors and promote investment activities.

20. **The Delegate of the United Republic of Tanzania** recognized the need to address the potential increase of disputes between partners especially amongst AALCO Member States in order to mitigate and if possible, eliminate them. In this regard, it was stated that dispute settlement through different mechanisms including arbitration is exceptionally effective and widely accepted means of resolving international trade and investment disputes.

21. Further it was informed that the United Republic of Tanzania as a developing country attached great importance to the efforts that AALCO is thriving to achieve in settlement of disputes in investment regime. Belief was expressed that this method will not only help Tanzania but all Member States to reduce risks associated with foreign investments predominantly by proving a neutral forum for their final and binding resolutions of such disputes. If well implemented, dispute settlement forums can help lessen commercial disputes accumulation, and hence increase foreign investment and promote economic development.

22. The meeting was further apprised that the government under the leadership of H.E. Samia Suluhu Hassan, the President of the United Republic of Tanzania had embarked on a number of initiatives towards realizing industrial economy. The country in so doing had in 2020 enacted a new Arbitration Act and its rules to promote speedy, timely and just resolution of international trade and investment disputes. An understanding was expressed that investors need the guarantee of local legal regime in the case of disputes and in that context there was need to strengthen national courts and our institutions for settlement of disputes.

23. **The Delegate of the Republic of Indonesia** expressed appreciation for the Geneva Package as the output from the 12th WTO Ministerial Conference which enabled more policy space, including in the aspect of strengthening agricultural sovereignty and security, protection of small-scale fisheries, access to vaccine production, and legal certainty in dispute settlement and digital economy in Indonesia. On behalf of the Republic of Indonesia he also encouraged AALCO Member States to respect and implement the Geneva Package to ensure effective policy sustainability.

24. On the issue of ISDS Reform, it was stated that Indonesia was involved in the deliberations in UNCITRAL Working Group II and consistently encouraged the reform effort to balance the rights and duties between investors and States. Raising the issue of third party funding the Delegate of the Republic of Indonesia provided an example of recent arbitration proceedings concerning Churchill Mining and Planet Mining v. Indonesia, wherein the respondent State could not recover costs from the claimant due to its bankruptcy nor from the third-party funder.

25. It was further informed that due to this unfortunate experience several suggestions to amend the ICSID Rules on the provisions concerning third party funding and security for costs were submitted by Indonesia. The amendments were eventually concluded on 1 July 2022.

26. Before concluding it was stated that Indonesia encouraged investors to exhaust local remedies before making an ISDS claims and use mediation as a method of alternate dispute resolution as opposed to litigation and international arbitration which were fractious in nature. It was also informed that Indonesia had introduced mandatory mediation procedures in its bilateral investment agreements negotiations.

27. **The Delegate of Nepal** with respect to international trade law recognized that in the last few decades the WTO and its associated instruments were guided by the liberalisation of trade and the WTO dispute settlement mechanism, which were considered as a core feature of the system. However, it was also emphasized that for the past few years the process has been by unilateralism and a new form of protectionism on one hand, and the least developed countries'

reform initiatives have not yielded any fruits because of non-effective implementation of the special and differential treatment system, structural and capacity constraints and imposition of technical and non-technical barriers for the goods of LLDCs, on the other. Therefore, the need for a comprehensive reform in the international trade regime was expressed as being imperative.

28. Further with respect to ISDS, concerns such as forum-shopping, lack of stability and predictability of arbitral award, arbitrator's professionalism, impartiality and independence, lack of specific code of conduct of the arbitrators' adjudication, third party funding, long time frames and high costs were expressed. Further it was stated that the investment treaties and the dispute settlement mechanisms have undermined the sovereign regulatory power of the States taken in furtherance of environmental protection, sustainable development, safeguarding public health and taxation, national security or other social aims have been challenged by investors before dispute settlement mechanisms. Before concluding the imperative need to reform old investment agreements was expressed taking into account the aforementioned issues and the concerns of LDCs.

29. **The Delegate of the Islamic Republic of Iran** addressed the issues regarding the UNCITRAL Working Group III and UNCTAD in his statement. Regarding the UNCITRAL Working Group III, belief was expressed that the ISDS reform process should be an effort to strike a balance between the rights and obligations of all relevant stakeholders including protecting investors and their investments on the one side and preserving a State's policy space and right to regulate foreign investments in its territories on the other side. It should strike a more equitable balance between the objectives of foreign investors and the host State and also legitimate public policy objectives. With respect to the UNCITAL Working Group III a number of issues were addressed including the establishment of an advisory centre, the Permanent Investment Court, and the Code of Conduct for arbitrators and judges. Regarding the advisory centre it was stated that it could be useful and efficient in addressing the concerns regarding costs and duration in ISDS. Further it was also expressed that it could assist in capacity-building and in the sharing of best practices much to the relief of developing and least developed countries as well as small and medium-sized enterprises.

30. With respect to the Permanent Investment Code three propositions were expressed that must be addressed to resolve the underlying concerns of consistency and fragmentation, among others. First, the ISDS regime's existing practices are diverse. Second, the regime is too complex, decentralized and multi-faceted to allow for the simple implementation of simple instruments across the board. Third, replacing this complex system with a simple and more unified one at least for this stage is out of reach. Further a better approach was suggested which would be to think through the concerns of the ISDS regime identified at the outset and consider how to leverage each of these in ways that promote the adoption of beneficiaries. Belief was expressed that it would be more efficient and fruitful if progress was made by specifying the best solution for any types of concerns at the first stage and for the form of the instrument to follow thereafter.

31. Further in relation to the Code of Conduct it was recognized that existing instruments such as the CETA standards, IBA Code of Conduct and the ICSID amended rules addressed some concerns albeit with limitations. Therefore, it was advised that in order to avoid duplicity of work in the area a new code of conduct was essential.

32. In relation to the work of UNCTAD the statement focussed on the World Investment Report 2022. It was recognized that 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. In this regard, it was stated that further support was urgently needed from developed countries, international trade and financial institutions and specialized agencies, especially in terms of technology transfer, capacity building, inclusive investment and trade as well as sustainable financing. Finally the critical need to uphold multilateralism and reject unilateral economic and financial measures not in conformity with the UN Charter was emphasized.

33. **The Delegate of the Republic of India** delivered general observation on the topic. With respect to WTO reforms the belief was expressed that that the outcomes of the 12th Ministerial Conference of the WTO were a testimony of the strength in the multilateral trading system of the WTO whereby members came together in pursuit of mutually beneficial outcomes. It was expressed that India believed that the WTO members needed to build trust among its members

and repose confidence in the Multilateral Trading System which needed to be continued. In relation to the future work on agriculture it was expressed that the role of public stock holding remained vital in addressing food insecurity concerns for India and other developing countries. It was stated that India was of the view that agriculture negotiations at the WTO should ensure that the special and differential treatment for developing countries is preserved. It was also informed that India did not support mainstreaming of environment, climate change issues within WTO's work that these should be dealt with within the appropriate international forums. It was affirmed that India was of the view that the multilateral trading system should not take over the vision and the goals laid out under the Multilateral Environmental Frameworks or agreements such as UNFCCC and Paris Agreement. In relation to e-commerce it was noted that increasing participation of developing countries in global e-commerce continued to be a challenge and that there had been no comprehensive assessment of the developmental aspects of global e-commerce under the Work Programme on Electronic Commerce.

34. In relation to the Ministerial Declaration on the WTO Response to the Covid-19 Pandemic and Preparedness, the steps taken were welcomed as it recognizes the importance of supply constraints of Covid-19 vaccines, therapeutics, diagnostics and other essential medical goods faced by countries and therefore, the need for increasing and diversifying production for Covid-19 vaccines, therapeutics, diagnostics and other essential medical goods, and diversifying manufacturing locations.

35. Turning to the UNCITRAL Working Group III and ISDS Reform certain observations were made. It was stated that India is a growing economy and supports a liberal policy to attract potential investors. The developing and developed member States have proposed different reform options which need further consensus among the Member States to arrive at a practical solution towards the reform of the ISDS Mechanism. It was explained that India considered the discussion on reform options ranging from the Code of Conduct of Arbitrators to Third Party Funding etc., as very important. Further, some limitations in the prevailing system of resolving investment disputes were identified particularly concurrent proceedings, multiple proceedings treaty shopping and enforcement issues. Before concluding, some observations were also made regarding the exorbitant costs involved in the present system.

36. **The Delegate of the Republic of Cameroon** in relation to the Working Group III encouraged nationals to investment locally in their country in Africa.

37. **The Delegate of the People's Republic of China** expressed that it was a crucial and important victory for multilateralism that the WTO members jointly tackled global challenges and promoted the recovery of the world economy by reaching a package of agreements at the 12th Ministerial Conference.

38. It was stated that, as a staunch supporter of the multilateral trading system, China was willing to work with Asian and African countries to promote the implementation of the 12th Ministerial Conference results, speed up the ratification process of the Fishery Subsidies Agreement that has been reached, and actively participate in the follow-up negotiations on fisheries subsidies; adhere to the principles of transparency, inclusiveness and non-discrimination, actively participate in the consultation on intellectual property exemption of new coronary pneumonia diagnosis and treatment products, pay attention to and solve the accessibility and affordability of new coronary pneumonia related products for developing members; strengthen communication and cooperation on WTO reform and other important issues, and promote the first WTO specific reform proposals which were formulated before the 13th Ministerial Conference to allow the multilateral trading system to play a greater role in global economic governance.

39. With respect to the UNCITRAL Working Group III reform proposals on ISDS, it was stated that it would help overcome the shortcomings of the current investment dispute settlement mechanism and help maintain the balance between investors and host countries. It was affirmed that China supported the reform and was willing to maintain communication with UNCITRAL member countries in Asia and Africa to jointly advance the reform process.

40. **The Delegate of the Hague Conference on Private International Law (HCCH)** delivered a statement tracing the history and work program of the organization as well providing an overview of its recent activities. In his statement it was underlined how international trade and investment are intertwined with international legislative processes, the rule of law and a mature

system of rule-based commerce contributing as a stabilizing factor along with due process protections and strong judicial and legal infrastructure.

II. General Discussions and Recent Developments

A. The 12th Ministerial Conference of the World Trade Organization (WTO) [12 to 17 June 2022, Geneva, Switzerland]: Evaluation and Expectation

1. Brief Stocktaking of the 12th Ministerial Conference

41. WTO held an extended 12th Ministerial Conference (MC12) at WTO headquarters in Geneva from 12 to 17 June 2022. The MC12 had been postponed twice owing to the pandemic. The Conference was co-hosted by Kazakhstan and chaired by Mr. Timur Suleimenov, Deputy Chief of Staff of Kazakhstan's President. The package of agreements secured at the MC12 was the culmination of efforts by WTO members to provide concrete trade-related responses to important challenges facing the world today. The "Geneva package" adopted by the WTO members included the following multilaterally negotiated outcomes on a series of key trade initiatives:

i. an outcome document[1]

ii. a package on WTO response to emergencies, comprising:

- a Ministerial Declaration on the Emergency Response to Food Insecurity[2]
- a Ministerial Decision on World Food Programme (WFP) Food Purchases Exemptions from Export Prohibitions or Restrictions[3]
- a Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics[4]
- a Ministerial Decision on the Agreement on Trade-related Aspects of Intellectual Property Rights[5]

iii. a Decision on the E-commerce Moratorium and Work Programme[6]

[1] (WT/MIN(22)/24)
[2] (WT/MIN(22)/28)
[3] (WT/MIN(22)/29)
[4] (WT/MIN(22)/31)
[5] (WT/MIN(22)/30)

iv. an Agreement on Fisheries Subsidies[7]

42. In addition, ministers adopted two decisions - on the Work Programme on Small Economies[8] and on the TRIPS non-violation and situation complaints[9] - and a Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges.[10]

43. The 13th Ministerial Conference of the WTO (MC13) is scheduled to be held tentatively in February 2024 in Abu Dhabi, United Arab Emirates. Therefore, certain issues that might be of concern to the AALCO Member States have been identified and briefly dealt within the Secretariat Brief. This has been done with the objective of furthering the possibility of inviting deliberations of Member States on those issues during the Sixty-First Annual Session of AALCO. Such deliberations could be an addition to, or supplement, the ongoing negotiations within the WTO, and a precursor to the negotiations at the MC13.

2. Issues soliciting in-depth engagement in the upcoming 13th Ministerial Conference [tentatively in February 2024]

2.1. Fisheries Subsidies

44. 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 held on 17

[6] (WT/MIN(22)/32)
[7] (WT/MIN(22)/33)
[8] (WT/MIN(22)/25)
[9] (WT/MIN(22)/26)
[10] (WT/MIN(22)/27)

June 2022 reached a multilateral agreement on harmful fisheries subsidies,[11] albeit a rudimentary one, in support of UN Sustainable Development Goal 14.6.[12]

45. The objective of sustainable development played a central role in the Doha Round of multilateral trade negotiations in 2001 where the WTO members committed to negotiations in order to "clarify and improve WTO disciplines on fisheries subsidies."[13] The 2005 WTO Hong Kong Ministerial Declaration expanded upon this commitment.

46. The WTO Agreement on Fisheries Subsidies (AFS) will enter into force and become legally binding on the WTO members who have accepted it once a quorum of at least two-thirds of the 164 WTO members, i.e. 110 members, accept it. To date, 43 WTO Members have deposited their instruments of acceptance. Four AALCO Member States feature in that list, namely, the People's Republic of China, Japan, Nigeria and Singapore. Many WTO Members indicate that they are close to complete in their domestic acceptance processes, and the Director-General is calling for the Agreement to enter into force by the MC13 to be held in February 2024. To meet this target, the WTO Members will need to accelerate their acceptance processes as much as possible. The WTO Secretariat stands ready to assist Members. The AFS is interim in nature, with an obligation to adopt comprehensive disciplines within four years of its entry into force. The definition of a subsidy under the AFS draws directly from Articles 1.1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM). Fisheries subsidies, under the AFS, are specific subsidies, which are financial contributions, incomes or price supports by governments or public bodies, and conferring benefits. Such subsidies reduce the cost of fishing and artificially increase profits or revenue, thereby increasing fishing capacity in a fishery system. As a matter of fact, a factor that led to the negotiations being carried out under the auspices of the WTO was the pre-existing ASCM. However, the AFS went a step forward in

[11] 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

[12] Target 14.6 of the UN SDG lays down the following: "By 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation."

[13] WTO, 'Doha Declarations' 12 (WTO, 2003) <https://www.wto.org/english/res_e/booksp_e/ddec_e.pdf> accessed 27 September 2023

addressing the environmental harm of fisheries subsidies, thereby going beyond the narrow trade-distortive focus of the ASCM.

47. The AFS applies exclusively "to marine wild capture fishing and fishing related activities at sea."[14] It prohibits subsidies contributing to illegal, unreported and unregulated (IUU) fishing on overfished stocks and fishing in the unregulated high seas. While negotiating the comprehensive agreement, the WTO members must seek to prohibit additional categories of subsidies, such as those likely to contribute to overcapacity and fuel subsidies. Certain ambiguities and inadequacies in the provisions must be addressed with a view towards effective enforcement.

48. The main regulations of the AFS are the following. Article 3 of the Agreement prohibits the grant or maintenance of subsidies to vessels or operators engaged in IUU fishing or activities in support of IUU fishing. The definition for IUU fishing adopted in the AFS is the same as that provided in the FAO International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing. Determinations may be made by any WTO Member in its capacity as coastal or flag State, as well as by Regional Fisheries Management Organizations or Arrangements (RFMO/As). The relevant subsidizing Member is obligated to give due regard to the information received from relevant port State, and take appropriate actions in respect of its subsidies.

49. Article 4 of the AFS prohibits Members from granting or maintaining subsidies, "for fishing or fishing related activities regarding an overfished stock". Any decision in this regard must be based on best scientific evidence available to the State under whose jurisdiction the fishing is taking place or by a relevant RFMO/A. However, the manner of determining these issues may pose problems.

50. Article 5 of the AFS contains further provisions in relation to other subsidies, provided to fishing or related activities outside of the jurisdiction of a coastal Member or a coastal non-Member and outside the competence of an RFMO/A.

[14] WTO, 'Implementing the WTO Agreement on Fisheries Subsidies: Challenges and Opportunities for Developing and Least Developed Country Members' (WTO, 2022) <https://www.wto.org/english/res_e/booksp_e/implementfishagreement22_e.pdf> accessed 27 September 2023

51. In respect of the prohibition on subsidization of IUU fishing and fishing of overfished stocks, provision is made for special and differential treatment during a period of two years from the date of entry into force of the Agreement. Subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, up to and within the EEZ shall be exempt from actions based on articles 4.1 and 10 of the Agreement. Article 7 further establishes provisions for technical assistance and capacity building for implementing the AFS.

52. The AFS also establishes a Committee on Fisheries Subsidies to review annually the implementation and operation of the Agreement. To complement the transparency provisions of the ASCM, in its Article 8, the AFS provides that Members are required to submit information on the type or kind of fishing activity to which they provide subsidies. The obligation to provide information on certain other aspects exists to the "extent possible". This best endeavour clause may pose difficulties in relation to enforcement.

53. The existing WTO Dispute Settlement Understanding (DSU) has been made applicable to disputes between Members in respect of disputes arising under the WTO AFS, except in respect of any matter under Articles 3, 4 and 5 of the AFS, where the provisions of Article 4 of the ASCM dealing with remedies and invoking the DSU shall instead apply. As part of the AFS, WTO members endorsed the establishment of the WTO Fisheries Funding Mechanism Trust Fund, a new funding mechanism to accept voluntary contributions, with the aim of providing technical assistance to developing country members to help them implement the Agreement. The Fund came into existence last year and has received substantial contributions from WTO Members. It is now in its set-up Phase, which is expected to conclude in the next several months.

2.2. Pandemic Response: TRIPS Waiver extension to therapeutics and diagnostics

54. The pandemic exacerbated the inequalities between the developed and the developing world, particularly in the context of access to COVID-19 vaccines, therapeutics and diagnostics. At MC12, a Ministerial Declaration on the WTO response to the current and future pandemics was adopted, which includes a waiver of certain requirements under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concerning the use of compulsory

licenses to produce COVID-19 vaccines. The scope of the waiver, which is valid for five years, is limited to patents. 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.

55. A decision on the waiver's extension to therapeutics and diagnostics was deferred up till 17 December 2022. However, a decision on the extension has not yet been reached, and could prove to be contentious during the MC13. At a meeting of the Council for TRIPS on 16-17 March, WTO Mmembers continued the discussion on whether to extend the TRIPS Decision to COVID-19 diagnostics and therapeutics.[15] At the same meeting, the WTO members also provided detailed information on a large number of newly notified laws and regulations and exchanged experiences on cross-border cooperation among Intellectual Property Offices.

2.3. Agriculture and Food Security

56. Food security and the allied issues of ending agricultural export subsidies and public stockholding have always solicited much attention and negotiation among the WTO members. At MC12, WTO members agreed on two outcomes on trade and food security as part of the "Geneva package" of agreements. Firstly, a decision exempting food from export restrictions when procured for humanitarian purposes by the World Food Programme (WFP) was agreed upon. Secondly, a Ministerial Declaration on the Emergency Response to Food Insecurity was agreed on, the first such declaration on this topic adopted at the WTO. In line with this declaration, WTO members established a work programme on food security for LDCs and the net food-importing developing countries (NFIDCs) at the Committee on Agriculture in November 2022.

[15] TRIPS and Public Health: Members continue discussion on TRIPS Decision extension to therapeutics and diagnostics, 17 March 2023, at https://www.wto.org/english/news_e/news23_e/heal_17mar23_e.htm

57. The decision adopted in Nairobi in 2015,[16] abolishing agricultural export subsidies and setting new rules for other forms of farm export support, contributed to progress on the UN Sustainable Development Goal 2.b.[17] At the 2013 Bali Ministerial Conference, it was agreed that, on an interim basis, public stockholding programmes in developing countries would not be challenged legally even if a country's agreed limits for trade-distorting domestic support were breached.[18] A decision on public stockholding taken at the 2015 Nairobi Ministerial Conference reaffirmed the commitment of the previous Ministerial Conference in Bali, and encouraged WTO members to make all concerted efforts to agree on a permanent solution.[19]

58. At MC12, no agreement was reached 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.

2.4. E-commerce

59. Products that were conventionally traded physically are now increasingly traded digitally. Customs duties are usually applied by WTO members on imported goods and services but since 1998 they have agreed not to impose tariffs on electronic transmissions.[20] 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.

[16] Export Competition: Ministerial Decision of 19 December 2015 : WT/MIN(15)/45 - WT/L/980
[17] Target 2.b of the UN SDG 2 reads as follows: "Correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round."
[18] Public Stockholding for Food Security Purposes, Ministerial Decision (WT/MIN(13)/38 - WT/L/913)
[19] Public Stockholding for Food Security Purposes, Ministerial Decision of 19 December 2015 : WT/MIN(15)/44 - WT/L/979
[20] Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2, 25 May 1998

60. However, 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. It has been contended that a review of the moratorium can help these countries generate more revenues through customs duties.

2.5. WTO Reform

61. In the MC12 'outcome document' listed above, and not in a binding decision, WTO members agreed to "commit to work towards necessary reform of the WTO ... to improve all its functions".[21] The work will be carried out through the WTO's General Council and its subsidiary bodies, with decisions to be submitted to the next Ministerial Conference in 2024. 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".[22]

62. The WTO 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. The pertinence of effective and operational SDT provisions for developing States has been incessantly highlighted by several AALCO Member States in their interventions at AALCO Annual Sessions.

2.6. Addressing the Appellate Body Impasse

63. The WTO's dispute settlement system, once described as its 'crown jewel', has been stuck in limbo since 2019. In the absence of a functioning Appellate Body, some members have resorted to an alternative appeal mechanism based on arbitration proceedings under Article 25 of the Dispute Settlement Understanding (DSU) of the WTO. This practice has been somewhat

[21] 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
[22] Ibid.

institutionalized in a stop-gap solution in the form of the multi-party interim appeal arrangement (MPIA), which has been operational since 2020. Under the MPIA, a pool of arbitrators has been appointed by its State parties. The pool comprises persons of recognized authority, with demonstrated expertise in law, international trade and the WTO Agreements. In any WTO dispute between participants where a party triggers an appeal against a WTO panel report, three members of the pool are selected randomly to hear an appeal under the arrangement.

64. Four AALCO Member States feature in the list of MPIA Parties, *viz.,* the People's Republic of China, Japan, Pakistan and Singapore. Members not party to the MPIA do have the option to agree to such arbitration in a particular dispute, as panel reports do not become binding until adoption and the reports cannot be adopted while an 'appeal to the void' is pending.

65. So far, one case, the *frozen fries* anti-dumping dispute between the EU and Colombia,[23] has been decided under the MPIA. One other appeal has been decided through arbitration agreed between the parties, although not under the MPIA, on local manufacturer requirements for sales of pharmaceuticals in Türkiye.[24]

66. The requests for consultation to the WTO have dropped significantly since 2019. As of 31 December 2022, parties to ten disputes have agreed on procedures for review of panel reports through arbitration, and, as noted above, arbitrators have issued awards in two such proceedings.

67. Despite the afore-noted commitment in MC12 to have a fully and well-functioning dispute settlement system accessible to all Members by 2024, apprehensions have been expressed. Perhaps it would not be completely imprudent to assume that the WTO appellate mechanism may not be revived in its erstwhile format. Two possibilities are being debated in the annals of WTO reform. Firstly, the present plurilateral and interim solution of resorting to the alternative appeal mechanism based on arbitration proceedings might be institutionalized multilaterally. Secondly, and drawing an analogy to the International Court of Justice, it has been

[23] *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and The Netherlands*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS591/ARB25 (21 December 2022).
[24] *Turkey – Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS583/ARB25 (25 July 2022).

suggested that it might be necessary to conceptualize an appeals body where not all WTO members accept routine compulsory jurisdiction or where a WTO member has a waiver to opt out.[25] It has been contended that "if supported by the vast majority of WTO members and institutionalized with a secretariat within the organization, such a tribunal may acquire much of the legitimacy enjoyed by the original Appellate Body."[26]

68. In yet another pro tem approach, some WTO members have started to seek bilateral resolution of disputes through diplomatic channels.[27] However, resorting to such interim solutions may be construed as a threat to or lack of faith in the multilateral trading system.

B. Report on the select work of the United Nations Commission on International Trade Law (UNCITRAL)

1. Brief overview

69. With concerns against the ISDS Mechanism rising from a number of States with differing legal, economic and social systems as well as broad spectrum of economic development, the UNCITRAL 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.[28]

70. In 2015 at its forty-eighth session the UNCITRAL took note of the various concerns that States had with investor-state arbitration and the work of organizations that had prepared proposals for its reform to address those concerns.[29] Accordingly, the Secretariat of the

[25] See, R. Howse and J. Langille (2023), "Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future", American Journal of International Law, 117(1): 1-47.
[26] R. Howse, IISD-Policy Analysis: Unappealable but not Unappealing: WTO dispute settlement without the Appellate Body, 17 July 2023 at https://www.iisd.org/articles/policy-analysis/wto-dispute-settlement-without-appellate-body
[27] For example, India and the US have recently resorted to this strategy to end six long-standing trade disputes at the WTO.
[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) 6
[29] 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

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.[30]

71. 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 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.[31]

72. At the initial meetings of the Working Group III several concerns were identified. These concerns broadly fell into three categories:- (1) duration and costs of ISDS; (2) incoherence and inconsistency of awards ; and (3) lack of sufficient guarantees of independence, impartiality and diversity of arbitrators.[32]

73. Looking to address these concerns, a solution with two work streams were devised by the Commission. Firstly, a work stream would 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.[33]

74. Secondly, the other work stream would work on the code of conduct for adjudicators addressing concerns of impartiality and independence, ethics, limits of multiple roles,

[30] 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.>

[31] 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

[32] 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

[33] 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

confidentiality and costs. 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.

75. At its forty-fifth session held in New York from 27–31 March 2023 the Working Group completed the third reading text of the draft provisions of the code of conduct for arbitrators recommended the submission of the same to the Commission for adoption at its fifty-sixth session in July 2023. The code of conduct for arbitrators was adopted by the UNCITRAL accordingly.

2. The Code of Conduct for arbitrators and judges in investment dispute resolution

76. At its forty-first session held at Vienna from the 15-19 November 2021 the Working Group considered the draft provisions of a single code of the conduct for adjudicators prepared by the UNCITRAL Secretariat in cooperation with the ICSID Secretariat. In all 8 draft provisions were considered and, in accordance with views expressed by the States, international organizations and other stake holders, the Secretariat was requested to consider preparatory work on the provisions to reflect the same. The suggestions included preferences regarding the various options provided for in the draft, detailed comments on the language to be employed and request correlating information and explanation to be included in the commentary.[34] A revised draft was presented to the Working Group at its forty-second session; however the code could not be adopted by the Working Group as the limited conference time reduced from 30 to 20 hours did not allow for the second reading of the draft provisions.[35]

77. The Working Group commenced its second reading of the draft code of conduct for adjudicators at its forty-third session held at Vienna from 5-16 September 2022. An informal

[34] 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)

[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

draft of the accompanying commentary was also presented to facilitate the deliberations on the Code. At the outset, the Working Group considered how to present the Code to the Commission, mainly whether it should be presented as a single text applicable to both arbitrators and judges of a standing mechanism or as two separate texts.

78. While it was expressed that there were benefits in continuing to discuss the provisions applicable to arbitrators and judges in a single text as there somewhat identical standards. However, some doubts were expressed about whether the code could regulate the conduct of judges, while there remained a lack of clarity of how the standing mechanism would operate, the functions and the role played by judges as determined by their terms of service whether it be full-time or part-time.

79. On deliberation the Working Group concluded that it would continue its deliberations and consider the articles of the Code as they would apply to both arbitrators and judges, but that it would work towards presenting two separate texts to the Commission for its consideration in 2023 – a code of conduct for arbitrators for adoption by the Commission, and a code of conduct for judges for adoption in principle. It was believed that adoption in principle would provide flexibility to revisit any pending issues and make any necessary adjustments once the deliberations on the standing mechanism had progressed.

80. After much deliberation, the Secretariat was requested to prepare, based on the deliberations and decisions of the Working Group, two separate texts, a code of conduct for Arbitrators and a code of conduct for Judges, to be accompanied by their respective commentaries. The Secretariat was also requested to hold informal meetings to further seek a common understanding within Working Group on outstanding issues.

81. At its forty-fourth session held at Vienna from 23-27 January 2023 continued its deliberations on the two codes of conduct, and their respective commentaries. After deliberations, the Working Group requested the Secretariat to the two codes of conduct with respective commentaries to the UNCITRAL at its fifty-sixth session to be held in July 2023. The Secretariat was also requested to prepare revised drafts and effecting any editorial changes to the

codes and their respective commentaries. The only outstanding issue that remained for further deliberation at its forty-fifth session in March, 2023 was the issue of multiple roles or double hatting.

82. While the third reading of the codes had been completed, and only outstanding issue remained for deliberation, at the forty-fifth session held at New York from 27-31 March 2023, doubts were expressed regarding the feasibility of the work on the Code for Judges as a decision had yet to be made on the establishment and design of a standing mechanism to resolve investment disputes. The Working Group continued its deliberations on articles 3,4 and 11 relating to the issue of multiple roles or double hatting.

83. After much deliberation at the forty-fifth session the Working Group requested the Secretariat to revise the draft Codes based on the decisions and deliberations of the Working Group and to present them with their accompanying commentaries for finalization and adoption by the Commission at its fifty-sixth session in July 2023.

84. In that context, it was recommended that the Code for Arbitrators should be made available for use by disputing parties, institutions, and States. The Working Group recommended that the Code for Judges be adopted in principle as the Working Group was in the process of discussing the possible establishment of a standing mechanism to resolve investment disputes and if such a mechanism were to be established, exactly how the Code was to be incorporated into instruments of a standing mechanism would be the subject of further consideration. It was also decided that the possible inclusion of the Codes in a multilateral instrument on ISDS reform, which the Working Group was in the process of developing, would be considered at a later stage.

85. At its fifty-sixth session held at Vienna from 3-21 July 2023 the code of conduct for arbitrators was adopted while the code of conduct for judges was taken note of by the UNCITRAL. The final version of the code of conduct for arbitrators and the code of conduct for judges have been enclosed herewith as Annexure I.

3. Investment mediation and dispute prevention

86. At its thirty-fourth meeting, the Working Group expressed that it was conversant with the fact that most investment disputes were submitted to arbitration but nonetheless considered the question whether work should be limited to arbitration or could it include other types of existing ISDS mechanisms such as negotiation, conciliation and mediation which were also present in investment treaties.[36]

87. There was a generally-shared view that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could reduce the costs and duration of arbitration. The Working Group also noted in this regard that UNCITRAL Working Group II was also mandated to consider the topic enforcement of mediated settlement agreements which considered the enforcement of settlement agreements and sought to establish uniform approaches to their enforcement across border for commercial matters.[37]

88. It was also expressed that such alternative methods were an integral part of ISDS, and are mandatory under some investment treaties, which may assist in identifying concerns as well as possible procedural solutions for concerns about arbitration in ISDS. Therefore, it should be considered by the Working Group.

89. While some potential concerns were mentioned regarding mediation, it was widely felt that work should focus on arbitration and the concerns it has raised. Accordingly, it was said that the work should first concentrate on identifying concerns regarding arbitration, and that other types of ISDS mechanisms could subsequently be considered as part of a holistic approach to addressing those concerns. [38]

[36] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 Novemeber-1 December 2017) 6
[37] Ibid
[38] Ibid

90. At its thirty-sixth session in the context of the need for all parties as well as the tribunal to abide by the established timeline, reference was made to the use of dispute resolution means other than arbitration such as mediation as one of the ways to curb costs in the arbitration.[39]

91. At its thirty-ninth meeting, the Working Group considered mediation, conciliation and other forms of alternative dispute resolution (ADR) methods. At the outset it was recognized that such methods, which were less time- and cost-intensive than arbitration, also offered a high degree of flexibility and autonomy to the disputing parties, allowing the preservation and improvement of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts.[40]

92. It was also noted by the Working Group that some investment treaties foresaw a time frame (ranging from three to eighteen months) during which the disputing parties were required to attempt amicable settlement before arbitration (commonly known as the "cooling -off" period).

93. It was also recognized that the cooling-off period should provide an opportunity for a claimant investor and a State to avoid arbitration by solving the dispute through negotiations, consultations or mediation. It was emphasised that, for the cooling-off period to be a successful tool, it needed to be sufficiently long, more than six months. In that context, it was underlined that guidance was needed on how to make effective use of the cooling-off period.[41]

94. While most ISDS cases are disposed of by settlement and termination by mutual consent the Working Group recognized some concerns in the mediation process regarding coordination among the relevant government agencies, the legal certainty required for officials to be involved in such settlement and ensuring the necessary approvals and authorizations. It was said that policies as well as the legal framework for encouraging mediation would be necessary. In that

[39] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October-2 November 2019) 17
[40] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5- 9 October 2020) 7
[41] Ibid 6-8

context, it was highlighted that the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention on Mediation") provided for a useful instrument also in the context of ISDS.[42]

95. The Working Group also considered whether to undertake the development of model clauses, which would: (i) indicate procedural steps the disputing parties could usefully take; (ii) guide parties on how to conduct mediation; (iii) include a realistic time frame; and (iv) possibly address mandatory mediation as a prerequisite to arbitration. On that last point, it was pointed out that making mediation mandatory might be detrimental in certain situations and would be at odds with the voluntary nature of the mediation process. [43]

96. Subsequent to the deliberations, the Working Group requested the Secretariat to work with the Member States and international organizations on compilation of best practices for States on dispute prevention and mitigation in light of the discussions of the Working Group. The Secretariat was also requested to examine how such best practices could be applied by States in a more consistent manner and was requested to suggest possible means to implement these best practices, such as the development of guidance or model texts.[44]

97. In its working paper, the Secretariat stated that while data suggest that around 20 per cent of ISDS cases are settled confidentially, and it is not possible to ascertain whether the settlements have been reached through mediation. As mentioned by the Working Group in relation to the difficulties regarding coordination, it was said that policies as well as the legal framework for encouraging mediation would need to be developed or strengthened to make mediation more effective.[45]

98. The Secretariat further noted that very few treaties offer mediation and fewer regulate the mediation procedure. If the investment treaty does not refer to mediation or does not include a provision requiring the disputing parties to undertake mediation, a subsequent ad hoc agreement

[42] Ibid 8
[43] Ibid 8
[44] Ibid 18
[45] UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS): Draft provisions on mediation: Note by the Secretariat' UN Doc. A/CN.9/WG.III/WP.217 (13 July 2022) 5

would be required. Negotiation and signing such an agreement are an additional procedural step, requires efforts and time and for government officials the necessary authority to engage in a voluntary mediation. The strengthening of the offer to resort to mediation is therefore an important condition for States and investors alike.[46]

99. Therefore, the Secretariat suggested that where mediation is provided for in the underlying investment treaty, there is a clear policy basis to conduct mediation and thus States should consider providing for mediation in their investment treaties so as to establish favourable conditions for its use.

100. It was also emphasized by the Secretariat that leaving the decision as to whether to use mediation fully in the hands of the parties had indeed proven unsuccessful. In this regard it was suggest that there were different possible options for developing model provisions for use in investment treaties which could be conducive to the use of mediation by the disputing parties. Accordingly, a set of draft provisions with a variety of options covering the views of the Working Group were submitted to the Working Group. Further deliberations were undertaken forty-third and forty-fourth sessions of the Working Group, on the basis of which the Secretariat was requested to make suitable modifications to the provisions and guidelines.[47]

101. At its forty-fifth session, the Working Group requested the Secretariat to revise the draft provisions on mediation based on the decisions and deliberations of the Working Group and to present them for consideration by the UNCITRAL at its fifty-sixth session in 2023. It was further agreed at the forty-fifth session that the draft provisions should be recommended for use by States in their treaties and for possible inclusion of those provisions in a multilateral instrument on ISDS reform, which the Working Group was in the process of developing, would be considered at a later stage.[48] The UNCITRAL Model provisions on investment mediation has been enclosed herewith as Annexure II.

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[46] Ibid 6

[47] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 23- 27 January 2023); UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fourth session (Vienna,)

[48] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fifth session (New York, 27-31 March 2023) 22

4. UNCITAL guidelines on investment mediation

102. With respect to the UNCITRAL guidelines on investment mediation, its purpose as mentioned in the adopted documents is to explain how mediation can be utilized to resolve international investment disputes. The Guidelines clarify that they do not intend to promote best practice, but rather list and describe briefly issues that should be considered when undertaking investment mediation. It also provides the words of caution that owing to the flexible nature of mediation, the procedural styles, practices, and methods that lead parties to a settlement of a dispute may vary.[49]

103. As expressed in its purposes it is intended to assist parties in understanding the different aspects of investment mediation, the nuances of the process and the possible benefits. The parties and the mediator may use or refer to the Guidelines at their discretion and to the extent they see fit, and need not adopt or provide reasons for not adopting any particular element of the Guidelines. The Guidelines do not impose any legal requirements binding upon the parties or the mediator and are not suitable to be used as mediation rules.[50]

104. At its forty-fifth session, the Working Group requested the Secretariat to revise the draft guidelines based on the decisions and deliberations of the Working Group and to present them for consideration by the UNCITRAL at its fifty-sixth session in 2023. It was at the forty-fifth session that the draft provisions should be recommended for use by States in their treaties and for possible inclusion of those provisions in a multilateral instrument on ISDS reform, which the Working Group was in the process of developing, and would be considered at a later stage.[51]

[49] UNCITRAL, 'Draft UNCITRAL guidelines on investment mediation: Note by the Secretariat' UN Doc. A/CN.9/1151 (21 April 2023) 2
[50] Ibid 2
[51] UNCITRAL, 'Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fifth session (New York, 27-31 March 2023) 22

105. At its fifty-sixth session held at Vienna from 3-21 July 2023 the UNCITRAL adopted the UNCITRAL Model Provisions on Mediation and the UNCITRAL Guidelines on Mediation for International Investment Disputes.[52]

5. United Nations Convention on the International Effects of Judicial Sales of Ships (New York, 2022) (the "Beijing Convention on the Judicial Sale of Ships")

106. On 7 December 2022 the UN General Assembly adopted the United Nations Convention on the International Effects of Judicial Sales of Ships, also known as the "Beijing Convention on the Judicial Sale of Ships".[53] It establishes a harmonized regime for giving international effect to judicial sales, while preserving domestic law governing the procedure of judicial sales and the circumstances in which judicial sales confer clean title. This convention endeavours to ensure legal certainty as to the title that the purchaser acquires in the ship as it navigates internationally, the Convention is designed to maximize the price that the ship is able to attract in the market and the proceeds available for distribution among creditors, and to promote international trade.[54]

Key provisions

107. The basic rule of the Convention is that a judicial sale conducted in one State Party which has the effect of conferring clean title on the purchaser has the same effect in every other State Party as provided for in article 6 and is subject only to the public policy exception provided for in article 10.

108. The Convention regime prescribes additional rules which establish how a judicial sale is given effect after completion. The first is a requirement that the ship registry deregister the ship or transfer registration at the request of the purchaser (article 7). The second is a prohibition on arresting the ship for a claim arising from a pre-existing right or interest (i.e. a right or interest

[52] UN, 'UN Commission on International Trade Law finalizes four legal texts during the first week of its 56th Session in Vienna' (UN Press release) UN Doc. UNIS/L/344 (12 July 2023) <https://unis.unvienna.org/unis/en/pressrels/2023/unisl344.html> accessed 14 August 2023

[53] UNGA, 'United Nations Convention on the International Effects of Judicial Sales of Ships' UNGA Res 77/100 UN Doc. A/RES/77/100 (7 December 2022)

[54] Ibid 7

extinguished by the sale) (article 8). The third is the conferral of exclusive jurisdiction on the courts of the State of judicial sale to hear a challenge to the judicial sale (article 9).[55]

109. To support the operation of the regime and to safeguard the rights of parties with an interest in the ship, the Convention provides for the issuance of two instruments: a notice of judicial sale (article 4) and a certificate of judicial sale (article 5). It also establishes an online repository of those instruments which is freely accessible to any interested person or entity (article 11).[56]

110. The Convention regime is "closed", in the sense that it applies only among States Parties (article 3), but "not exclusive", in the sense that it does not displace other bases for giving effect to judicial sales, for instance under more favourable domestic law regimes (article 14).[57]

C. The World Investment Report, 2023 and the recent developments in the work of the United Nations Conference on Trade and Development (UNCTAD) in relation to the International Investment Agreements Regime

1. The UNCTAD's World Investment Report, 2023 and International Investment Agreements and Policies

111. On 5 July 2023, the UNCTAD released its much-anticipated report in the series of reports titled the World Investment Report. This year, the World Investment Report, 2023 (hereinafter 'the Report') titled 'Investing in sustainable energy for all' focused on investment in renewable energy in furtherance of the sustainable development goals addressing last year's key concerns which was rising prices of energy. The report analyses how a push in many countries for greater energy security did not lead to a reversal in the trend away from investment in fossil fuels and towards renewable energy. It also notes that investment numbers and values in extractive industries remained stable in 2022, while the number of new renewable energy projects reached

[55] UNCITRAL, 'Judicial Sale Ships' < https://uncitral.un.org/en/judicialsaleofships> accessed 19 September 2023
[56] Ibid
[57] Ibid

a record high. However, the report also brings into focus the key fact that the bulk of the investment has flowed into developed economies.[58]

112. In relation to International Investment Agreements, the report contextualizes several notable developments that took place in 2022, continuing the reform of international investment agreements at the bilateral, regional and multilateral levels. These include new types of investment-related agreements, the termination of bilateral investment treaties (BITs) and continued multilateral discussions on the reform of the ISDS mechanisms.[59]

113. Regarding the developments in the conclusion and termination of IIAs in 2022, the report identifies that 15 new agreements were concluded and states that for the third consecutive year, the number of effective treaty terminations exceeded that of new IIAs, with 84 terminations.[60]

114. The Report notes that in the year 2022, at least 15 new IIAs were concluded out of which 10 were bilateral and 5 were treaties containing investment provisions. With these additions the total size of publicly available investment agreements comes close to 3,265. Further the Report also presents figures of agreements that entered into force whose tally increased to 2584 with 17 being added in 2021.

115. It is noted in the Report that a number of new agreements have been concluded over the years. The Report states that a majority of agreements remain the old generation of investment agreements without provisions for sustainable development or considerable policy space.[61]

116. Over 88 per cent of IIA relationships are based on IIAs signed before 2012, and the IIA networks of all but eight economies contain such old-generation IIAs. In addition, at least 40 per cent of the relationships created by new-generation IIAs coexist with an earlier one between the same economies. This is the case also for the majority of relationships created by megaregional

[58] UNCTAD, 'World Investment Report, 2023: Investment in Sustainable Energy for All- Overview' (5 July 2023) <https://unctad.org/system/files/official-document/wir2023_overview_en.pdf> accessed 14 August 2023
[59] UNCTAD, 'World Investment Report, 2023: Investment in Sustainable Energy for All' (5 July 2023) 71-77 <https ://unctad.org/system/files/official-document/wir2023_en.pdf> accessed 14 August 2023
[60] Ibid 71
[61] Ibid 89

agreements such as the Regional Comprehensive Economic Partnership (2020) and the Comprehensive and Progressive Agreement for Trans- Pacific Partnership (2018).

117. In relation to termination at least 58 IIAs were effectively terminated, of which 54 were by mutual consent, 1 was unilateral and 3 were replacements (through the entry into force of a newer treaty. Most terminations by mutual consent were based on the agreement to terminate intra-EU BITs, which became effective in 2022 among all 23 EU Member States that had signed it. By the end of the year, the total number of effective terminations reached at least 569, with about 70 per cent of IIAs terminated in the last decade.[62]

118. The Report groups treaties signed in 2022 that contain investment provisions into two categories. First one being agreements with obligations commonly found in BITs, such as substantive standards of investment protection for e.g. the New Zealand–United Kingdom FTA and the Pacific Alliance (Chile, Colombia, Peru)–Singapore FTA.

119. The second category identified by the Report being agreements with limited investment provisions (e.g. market access, national treatment and most-favoured-nation treatment with respect to commercial presence, investment promotion, facilitation and cooperation) for e.g. the Australia–India Economic Cooperation and Trade Agreement, the India–United Arab Emirates Comprehensive Economic Partnership Agreement and the Indonesia–United Arab Emirates Comprehensive Economic Partnership Agreement.

120. The report notes that IIAs signed since 2020 feature many reformed provisions aimed at safeguarding States' right to regulate and reforming ISDS. However, it remains to be seen whether they are sufficiently robust to support and not hinder countries' implementation of legitimate measures and their efforts towards achieving the SDGs. The Report further states that less than half of the IIAs reviewed contain proactive provisions that promote and facilitate investment and only 13 per cent include investor obligations.

[62] Ibid 73

121. The report further flags problems arising from the limited depth of these reforms, which are compounded by the fact that most recent IIAs continue to bind countries for long periods, with an initial period of validity of 10 years or more, automatic renewal and a survival clause. Based on these finding, the Report concludes that this could limit countries' ability to adapt to changing economic realities and new regulatory imperatives, such as the urgency of addressing climate change and other global challenges.

122. In relation to other developments relating to investment rulemaking, the Report states that the trend towards reforming the international investment regime and highlighted the growing need for its adaptation to meet emerging global objectives and challenges has continued. Increased including attention to investment facilitation and climate change has also been paid.

123. The year was marked by the conclusion of negotiations of several investment governance instruments that contain proactive investment facilitation features and pay greater attention to responsible investment and to the right of host States to regulate in the public interest. African Heads of State and Government adopted the African Continental Free Trade Area (AfCFTA) Investment Protocol, recognizing UNCTAD's work on IIA reform in its preamble. At the same time, multilateral efforts to amend the ECT reached a stalemate, highlighting the difficulty of reforming the existing agreements.

2. The World Investment Report, 2023 and ISDS Cases

124. The Report records that the total universe of known ISDS cases count reached 1,257 by the end of 2022, with 46 new arbitrations initiated that year. The 1994 Energy Charter Treaty continued to be the most frequently invoked IIA which according to the Energy Charter Treaty Secretariat has been invoked 150 times.[63] According to the Report as of 1 January 2023, the total number of publicly known ISDS claims had reached 1,257. Till the time of the publication of the Report i.e. July 2023, it states that 132 countries and one economic grouping are known to have been respondents to one or more ISDS claims.

[63] As on 1 June 2022, the ECT Secretariat has recorded that the 1994 Energy Charter Treaty has been invoked 150 times. Energy Charter Treaty, 'List of Cases' <https://www.energychartertreaty.org/cases/list-of-cases/> accessed 14 August 2023.

125. As regards the year 2022, the Report specifies that 46 known treaty-based ISDS cases were initiated, constituting the lowest annual case number since 2010 and significantly lower than the average of the last decade of 75 cases per year (2012–2021).

126. It goes on to state that claimants filed 46 new publicly known ISDS cases under II, as the lowest annual number of known cases since 2010 and significantly below the 10-year average of 75 cases per year. As a word of disclaimer the Report recognized that some disputes may have been kept confidential and thus the actual number of disputes filed in 2022 was likely to be higher.

127. The data with respect to respondent States that is presented in the Report is that new claims were instituted against 32 countries with Mexico, Romania, Slovenia and Venezuela being the most frequent respondents, with three new known cases each. Two countries – Portugal and Sweden – faced their first known ISDS claims. However, the Report records that overarching trend of developing countries being the usual respondents has continued with 65 per cent of the claims in 2022 being filed against them.

128. The Report also presents data to conclude that the trend with respect to the claimant home States has also continued with about 65 per cent – of the 46 known claims in 2022 being instituted by claimants from developed States.

129. The Report specifies that highest numbers of cases were brought by developed-country claimants from the United States with 8 claims, the Netherlands with 5 claims and the United Kingdom with 4. However, in a trend which has been the increasing and is confirmed by the Report, 4 claims were instituted by claimants from the People's Republic of China. In all the Report records that between 1987 and 2022, claimants from five countries – the United States, the Netherlands, the United Kingdom, Germany and Spain initiated about 45 per cent of the 1,257 known ISDS cases.

130. As stated before, most of the claims were brought under the old generation treaties signed during the decade of the 1990s or earlier which the Report states comprises about 80 per cent of

the claims in 2022. The Report goes on to provide details that the 1994 Energy Charter Treaty was most frequently invoked in 2022, with 10 cases, followed by 1992 North American Free Trade Agreement, the 1992 Netherlands–Venezuela BIT and the 1982 Panama–United States BIT, with two cases each. The Report also concludes that collectively between 1987 and 2022 the 1994 Energy Charter Treaty and the 1992 North American Free Trade Agreement have accounted for 20 percent of the total cases.

131. Finally with respect to the decisions and outcomes in 2022 the Report records in 2022, ISDS tribunals rendered at least 44 substantive decisions in investor–State disputes, 25 of which were in the public domain at the time of the publication of the Report.

132. 10 of the public decisions were principally concerned with cases where objections to jurisdiction were upheld while the remaining 15 public decisions were rendered on the merits. In all, the Report states that 12 cases were decided against the States holding them liable for IIA breaches and in 3 cases none of the claims of the investor were upheld.

133. In addition, eight publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID) wherein the decision not to inference with the award was taken in all of them. The Report records that by the end of 2022, at least 890 ISDS proceedings had been concluded contributing only a marginal increase.

D. Report on the work of the International Institute for the Unification of Private Law (UNIDROIT)

134. The 102nd session of the Governing Council of UNIDROIT was held in Rome from 10-12 May 2023. The topics discussed during the session were (i) Model Law on Warehouse Receipts, (ii) Model Law on Factoring, (iii) Principles on Digital Assets and Private Law, (iv) Best Practices for Effective Enforcement, (v) Bank Insolvency, (vi) Legal Structure of Agricultural Enterprises, (vii) Private Art Collections, (viii) Principles of Reinsurance Contracts, (ix) Proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and

Transfers of Digital Assets and Tokens, (x) Legal nature of Voluntary Carbon Credits, (xi) Legal nature of Voluntary Carbon Credits, and (xii) International Interests in Mobile Equipment.[64]

1. Model Law on Warehouse Receipts

135. At its 102nd session the Governing Council of the UNIDROIT took note of the progress made on the joint UNCITRAL/UNIDROIT Model Law on Warehouse Receipts Project since its 101st session, as well as of the proposed next steps concerning the drafting of the Guide to Enactment. The final version of the draft Model Law on Warehouse Receipts was unanimously adopted and it was agreed that it was ready for submission to UNCITRAL for state negotiations and completion.

2. Model Law on Factoring

136. At its 102nd session the Governing Council of the UNIDROIT adopted the UNIDROIT Model Law on Factoring and requested the Secretariat to undertake final proofing in order for both English and French language versions of the instrument to be published in 2023. At the meeting the excellent quality of the instrument was highly commended and the Secretariat was mandated to design and execute a promotion and implementation campaign for the UNIDROIT Model Law on Factoring. The Governing Council also requested that the Model Law on Factoring Working Group begin work on its corollary Guide to enactment.

3. Principles on Digital Assets and Private Law

137. At its 102nd session the Governing Council of the UNIDROIT approved the UNIDROIT Principles on Digital Assets and Private Law. At the meeting special appreciation was expressed towards all members and observers of the Working Group, as well as to the Steering Committee established for the development of the Project. Thereafter, the Governing Council mandated the Secretariat to work towards the final publication of the instrument, to commence the process of

[64] UNIDROIT, 'Summary Conclusions of the 102nd session of the Governing Council of UNIDROIT' (10-12 May 2023) <https://www.unidroit.org/wp-content/uploads/2023/06/C.D.-102-Misc.-2-Summary-Conclusions.pdf> access -ed 20 August 2023

preparing the instrument in French, and to promote the instrument in different jurisdictions to facilitate its implementation.

4. Best Practices for Effective Enforcement

138. The Deputy Secretary-General of UNIDROIT presented a report on the progress of the work on the topic since the previous 101st meeting of the Governing Council of UNIDROIT. Apart from providing a brief summary of the key issues involved he referred to the topic of online auctions in the context of enforcement and highlighted the presentation made by the representative of the Expert Group for the European Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) concerning a set of upcoming pan-European guidelines on electronic auctions. Further the Secretary-General of the Hague Conference on Private International Law underscore the complementarity between the topic and various instruments of the HCCH, including the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, due to enter into force 1 September 2023. At its 102nd meeting the Governing Council of the UNIDROIT took note of the important progress made by the Working Group on Best Practices for Effective Enforcement since the Governing Council's 101st session.

5. Bank insolvency

139. At its 102nd session the Governing Council of the UNIDROIT took note of the impressive progress made by the Working Group on Bank Insolvency since the Governing Council's 101st session and agreed to provide the Secretariat with flexibility to continue the project for an additional year, if needed, to finalise the Legislative Guide. At the meeting the Governing Council heard statements from the Secretariat on the progress of the work and the Chairman of the Working Group as well as about the work of the drafting committee which was working to finalize the legislative guide. It was also indicated that several bank failures that underscored the

contemporary importance of the project as was evident from the interest of States and institutional observers which had reached a total of thirty-nine.[65]

6. Legal Structure of Agricultural Enterprises

140. At its 102nd session, the Governing Council of the UNIDROIT took note of the developments relating to the joint project with the Food and Agricultural Organization and the International Fund for Agricultural Development for the preparation of a Guide on the Legal Structure of Agricultural Enterprises, and agreed with the proposal to change its working title to "Collaborative Legal Structures for Agricultural Enterprises", to reflect the content that was actually being developed.

7. Private Art Collections

141. At its 102nd meeting the Governing Council, the UNIDROIT took note with satisfaction of the progress made since the upgrading of the project with a focus on orphan objects to medium priority. It welcomed the Memorandum of Understanding signed with the *Fondation Gandur pour l'Art* and the Art-Law Centre of the University of Geneva, and endorsed the preparatory work done.

8. Principles of Reinsurance Contracts

142. At its 102nd meeting, the Governing Council of the UNIDROIT took note of the good progress made on the project on Principles for Reinsurance Contracts which was nearing completion as presented in the Secretariats Report. At the meeting the Deputy Secretary-General of UNIDROIT provided an update of the work done since the previous 101st session of the Governing Council. It was stated that two in-person Working Group sessions with the participation of international experts and representatives of the relevant industries had been successfully held: the 10th session in Bad Homburg (Germany) in July 2022 and the 11th session

[65] UNIDROIT, 'Summary Conclusions of the 102nd session of the Governing Council of UNIDROIT' (10-12 May 2023) <https://www.unidroit.org/wp-content/uploads/2023/08/C.D.-102-25-Report.pdf> accessed 20 August 2023

at the seat of UNIDROIT in January 2023. With particular regard to the 11th session, the Deputy Secretary-General reported that the Working Group had reviewed and discussed drafts on the rule on retention, the back-to-back clause, and special termination.

9. UNIDROIT Principles of International Commercial Contracts and Investment Contracts

143. At its 102nd meeting, the Governing Council of the UNIDROIT took note of the preparatory work undertaken by the Secretariat in cooperation with the International Chamber of Commerce's Institute of World Business Law for the project on the UNIDROIT Principles of International Commercial Contracts (UPICC) and International Investment Contracts. The Council authorised the Secretariat to establish a Working Group and granted it flexibility to establish a consultative committee (similar to the one set up, as Steering Committee, in the Digital Assets project) if deemed convenient.

10. Legal nature of Voluntary Carbon Credits

144. At its 102nd meeting, the Governing Council of the UNIDROIT welcomed the update provided by the Secretariat on the preparatory work as well as the exploratory, consultative workshop organised in collaboration with the World Bank Group and the International Swaps and Derivatives Association (ISDA) on the topic. The urgency with which this issue needed to be addressed, as expressed by the World Bank and generally by participants in the workshop, was noted and underscored, and the establishment of a Working Group to examine the Legal Nature of Voluntary Carbon Credits was welcomed. The Council also considered the coordination in this area with other international organizations.

11. International Interests in Mobile Equipment

145. At its 102nd meeting, the Governing Council of the UNIDROIT noted of the activities regarding the Cape Town Convention and the Aircraft Protocol. In this regard the Secretary-General informed the Governing Council that although the aviation sector had been facing the

ongoing, overlapping crises of the Covid-19 pandemic, inflation in the price of petroleum, and international armed conflicts and concomitant sanctions, the Cape Town Convention had proven to be resilient in protecting access to credit and providing increased legal certainty while not undermining airline viability, and for this reason the Convention and the Aircraft Protocol continued to attract more States Parties.

146. As regards the implementation and status of the Luxembourg Rail Protocol and of the Space Protocol, at its 102nd meeting, the Governing Council of the UNIDROIT noted the updates provided by the Secretariat on the recent activities undertaken to implement the Luxembourg Rail Protocol and the Space Protocol, in particular welcoming the Secretariat's report that the Luxembourg Rail Protocol was expected to come into force in late 2023.

E. Report on the work of the Hague Conference on Private International Law (HCCH)

147. The Council on General Affairs and Policy (hereinafter the CGAP) of the Hague Conference on Private International Law (hereinafter the HCCH) held its meeting from 7 to 10 March 2023 and witnessed participation from 450 participants representing 80 member States, 8 non-member States, 7 intergovernmental organizations, 9 international non-governmental organizations, as well as members of the permanent bureau of the HCCH. Out of the participants 186 delegates participated online in the meeting. As regards the substantive work of the CGAP it considered the work relating to possible new legislative instruments as well as the post-convention work. As part of the work relating to possible new legislative instruments the following matters were considered (i) Parentage/Surrogacy (ii)Jurisdiction (iii) Insolvency (iv) Intellectual Property (IP) and (v) Digital Economy. Further the CGAP also followed up on its post-convention work on a number of topics as well as work on its governance which was open only to members.[66]

[66] HCCH, 'Conclusions and Decisions of the Council on General Affairs and Policy, 7 -10 March 2023) <https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf> accessed 5 September 2023

1. Work relating to possible new legislative instruments

(i) Parentage/Surrogacy

148. The CGAP welcomed the Final Report of the Experts' Group on the feasibility of one or more private international law (PIL) instruments on legal parentage and with the conclusion of the work of the Group, CGAP expressed its gratitude to the Chair of the Experts' Group. Further the CGAP established a Working Group on PIL matters related to legal parentage generally, including legal parentage resulting from an international surrogacy arrangement. The CGAP also provided details regarding its mandate which aimed at to provide greater predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights, including, for children. It was also reiterated that any work done by the HCCH in relation to surrogacy should not be understood to be supporting or opposing it.

(ii) Jurisdiction

149. The CGAP took note of the Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation and its progress made towards developing a draft convention. The Permanent Bureau were invited to convene two Working Group meetings were before CGAP 2024, the first in the second half of 2023 and the second preferably in January 2024, with inter-sessional work as required.

(iii) Insolvency

150. The CGAP welcomed the cooperation between the Permanent Bureau of the HCCH and the Secretariat of the UNCITRAL on matters relating to applicable law in insolvency proceedings, and to civil asset tracing and recovery in insolvency proceedings. Subject to available resources the PB was mandated to continue cooperation with the UNCITRAL and UNIDROIT Secretariats on insolvency-related projects as well as to continue to monitor

developments with respect to private international law issues in insolvency, including issues relating to the treatment of digital transactions and digital assets in insolvency proceedings.

(iv) Intellectual Property

151. The CGAP noted the work carried out on the intersection of intellectual property and private international law, including the cooperative work between the Permanent Bureau and the International Bureau of the World Intellectual Property Organization (WIPO). The CGAP invited the Permanent Bureau to continue monitoring developments subject to available resources, and in light of the work programme relating to the digital economy.

(v) Digital Economy

152. With respect to the topic of Digital Economy, the CGAP noted the outcomes of the 2022 HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference), and invited the Members to identify outcomes of the CODIFI Conference with the highest desirability and feasibility for potential future normative work. Further in this regard the CGAP mandated the Permanent Bureau to continue, subject to available resources: a. monitoring developments with respect to artificial intelligence (AI), digital platforms and automated contracting, in partnership with subject-matter experts and with the UNCITRAL as well as monitor developments with respect to the digital economy, with a view to identifying private international law issues for potential future work. The Permanent Bureau was also mandated to develop activities concerning topics falling under the purview of the HCCH International Commercial, Digital and Financial Law Division and work with other organisations in the field, such as the UNCITRAL and the UNIDROIT.

153. As regards the Central Bank Digital Currencies (hereinafter CBDCs) the CGAP mandated the Permanent Bureau, in partnership with relevant subject-matter experts and Observers, to study the private international law implications of CBDCs and to prepare for and organise an online colloquium on this topic, subject to available resources.

154. Regarding the HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens, the CGAP welcomed the cooperation between the Permanent Bureau and the Secretariat of the UNIDROIT on matters relating to digital assets. The Permanent Bureau was mandated to examine, jointly with the UNIDROIT Secretariat and in light of work already completed at the UNIDROIT as well as decisions that may be taken by the UNIDROIT Governing Council, the desirability of developing coordinated guidance and the feasibility of a normative framework on the law applicable to cross-border holdings and transfers of digital assets and tokens, covering relevant private law aspects, through the HCCH-UNIDROIT Digital Assets and Tokens Project. The Permanent Bureau was also mandated to report on the results of the Project to CGAP at its 2024 meeting, including suggestions on the desirability and feasibility of continuing work on this topic through the establishment of a joint Experts' Group.

III. Observations and Comments of the AALCO Secretariat

155. Asian-African voices rung loud and clear in brokering deals at the MC12, and persistent efforts 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.

156. While the comprehensive disciplines on fisheries subsidies are being negotiated, the time is apposite for each concerned AALCO Member State to articulate their point/s of view on the matter, particularly in the context of the State's unique economic development trajectory.

157. Certain AALCO Member States had taken the lead in furthering the interests of the developing world's populace on vaccine accessibility. Further work remains to be done on extending the accessibility to COVID-19 therapeutics and diagnostics.

158. AALCO could serve as an appropriate forum for further deliberations on the issues of public stockholding for food security purposes and review of the moratorium on e-commerce,

especially in view of these issues' relevance to the developing countries. Simultaneously, suggestions towards the overall reform of the WTO could be adduced with particular attention to needs and concerns of AALCO's Asian-African membership.

159. AALCO Member States are urged to utilize this forum to deliberate and exchange views on ways to restore the multilateral dispute settlement system of the WTO, which will enable them to settle their disputes in a rule-based manner.

160. Further in relation to the WTO Agreement on Fisheries Subsidies which is the first WTO agreement to focus on the environment, the first broad, binding, multilateral agreement on ocean sustainability, and only the second agreement reached at the WTO since its inception, the AALCO Secretariat suggests that Member States seeking to make progress towards the attainment of their sustainable development goals may consider depositing their instruments of accession with the WTO. In addition the AALCO Secretariat encourages Member States to deliberate and consider outstanding issues contained in the draft text of the Chair of the Negotiating Group on Rule of the "second wave" of negotiations that aims to develop disciplines on subsidies contributing to overcapacity and overfishing.

161. With the adoption of the Code of Conduct for arbitrators and the taking note of the Code of Code of Conduct for judges by the UNCITRAL, the question that remains for the consideration of the Member States is the all-important question of enforcement. While the Commission referred to the possibility of the inclusion of the Code in the proposed multilateral instrument on ISDS reform, a number of ways remain open for the enforcement of the Code.

162. Taking into consideration that the Code was prepared after much study of the existing work on the topic by other international organizations and institutions, the code could be directly incorporated by parties in their future investment agreements and would not conflict with existing obligations. Further, arbitration institutions and chambers of commerce in respective countries could also take the route of including the code within the scope of their institutional rules, standard form contracts and encourage the observance of the code in ad-hoc arbitrations.

163. AALCO Member States are encouraged to deliberate and exchange views on the means and ways in which the Code of Conduct could be implemented and how that would be impacted by the work products of the UNCITRAL on the standing multilateral mechanism for investment disputes as well as the single instrument for ISDS reform.

164. While the UNCITRAL has focussed its attention on the procedural aspects of ISDS, the UNCTAD has been channelling its efforts towards the reform of the substantive elements of IIAs for more than a decade. It has been a constant endeavour to reform the treaty making process with a view to securing policy space for States to take measures to attain sustainable development goals. The World Investment Report, 2023 continues to take an in-depth look at the entire landscape of investment treaties, and assesses the trends in the making of investment treaties, national policies and investment disputes whether or not they are aligned with the attainment of the sustainable development goals. The AALCO Member States are urged to share their experience with negotiation of IIAs, defending claims under IIAs and their national policies, legislation and judicial decisions that concern the interplay of investment obligations *vis a vis* the attainment of sustainable investment goals. The topic remains most germane and timely for the AALCO Member States to present their suggestions and views at a time when multilateralism is facing grave challenges. Regarding the Beijing Convention on the Judicial Sale of Ships which aims to promote legal certainty and predictability at the international level by creating a uniform regime for the international effects of "judicial" sales of ships, the Secretariat suggests that the Member States wishing to strengthen the international legal framework for shipping and navigation may consider becoming a party to the convention.

165. As regards, the work of the UNIDROIT and the 102nd meeting of its Governing Council earlier this year in May, a number of important instruments were adopted and the on-going work in a number of projects was taken note of. While the UNIDROIT has an illustrious record of more than a century of work on the unification of private law, it has focussed its attention on areas of law on new and emerging technology. It is evident that in the past few decades the rapid development in science and technology has fundamentally transformed the world, however, in many areas it is also the case that legal regulation has not been able to keep pace. In this light, the AALCO Secretariat urges Member States to share their views and experience on forging

international cooperation on the cross-border regulation of matters that have arisen due to new and emerging technology.

166. As an intergovernmental organization with unique mandate the HCCH has been a leading the way for the progressive unification and harmonisation of the rules of private international law. Since its establishment more than a century ago in 1893 it has taken great strides towards the establishment of effective frameworks and cooperation mechanisms for the ensuring respect for the rule of law at the international and domestic levels. Over the years its work has come to the aid of individuals, families, international commercial entities and institutions to deal with concerns arising out of cross border application of legal regimes. At its CGAP meeting earlier this year a number of pressing issues were considered, it included long standing issues such as cross border insolvency, recognition of judgments, choice of law principles as well new and emerging issues such digital assets, CBDCs and surrogacy. There is no doubt that the sharing of experiences by AALCO Member States on the implementation of instruments developed by the HCCH as on ways and means in which the wider adoption and implementation of those instruments may be encouraged shall enrich the deliberations at the annual session.

IV. Annexures

A. Annexure I

The UNCITRAL code of conduct for arbitrators in investment dispute resolution[67]

Article 1 - Definitions

For the purposes of the Code:

(a) "International investment dispute (IID)" means a dispute between an investor and a State or a regional economic integration organization (REIO) or any constituent subdivision of a State or agency of a State or an REIO submitted for resolution pursuant to an instrument of consent;

(b) "Instrument of consent" means:

[67] UNCITRAL, 'Draft code of conduct for arbitrators in investment dispute resolution: Note by the secretariat' UN Doc. A/CN.9/1148 (28 April 2023) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V23/030/32/PDF/V2303032.pdf?OpenElement> accessed 30 August 2023

(i) A treaty providing for the protection of investments or investors;
(ii) Legislation governing foreign investments; or
(iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO,
upon which the consent to arbitrate is based;
(c) "Arbitrator" means a person who is a member of an arbitral tribunal or an International Centre for Settlement of Investment Disputes (ICSID) ad hoc Committee, who is appointed to resolve an IID;
(d) "Candidate" means a person who has been contacted regarding a potential appointment as an Arbitrator, but who has not yet been appointed;
(e) "Ex parte communication" means any communication concerning the IID by a Candidate or an Arbitrator with a disputing party, its legal representative, affiliate, subsidiary or other related person, without the presence or knowledge of the other disputing party (parties) or its legal representative; and
(f) "Assistant" means a person who is working under the direction and control of an Arbitrator to assist with case-specific tasks.

Article 2 – Application of the Code

1. The Code applies to an Arbitrator in, or a Candidate for, an IID proceeding, or a former Arbitrator. The Code may be applied in any other dispute resolution proceeding by agreement of the disputing parties.
2. If the instrument of consent contains provisions on the conduct of an Arbitrator, a Candidate or a former Arbitrator, the Code shall complement such provisions. In the event of any incompatibility between the Code and such provisions, the latter shall prevail to the extent of the incompatibility.

Article 3 – Independence and impartiality

1. An Arbitrator shall be independent and impartial.
2. Paragraph 1 includes the obligation not to:
(a) Be influenced by loyalty to any disputing party or any other person or entity;

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

(c) Be influenced by any past, present or prospective financial, business, professional or personal relationship;

(d) Use his or her position to advance any financial or personal interest he or she has in any disputing party or in the outcome of the IID proceeding;

(e) Assume any function or accept any benefit that would interfere with the performance of his or her duties; or

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

Article 4 – Limit on multiple roles

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:

(a) The same measure(s);

(b) The same or related party (parties); or

(c) The same provision(s) of the same instrument of consent.

2. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same measure(s) unless the disputing parties agree otherwise.

3. For a period of three years, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same or related party (parties) unless the disputing parties agree otherwise.

4. For a period of one year, a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same provision(s) of the same instrument of consent unless the disputing parties agree otherwise.

Article 5 – Duty of diligence

An Arbitrator shall:

(a) Perform his or her duties diligently;

(b) Devote sufficient time to the IID proceeding; and

(c) Render all decisions in a timely manner.

Article 6 – Integrity and competence

An Arbitrator shall:

(a) Conduct the IID proceeding competently and in accordance with high standards of integrity, fairness and civility;

(b) Possess the necessary competence and skills and make all reasonable efforts to maintain and enhance the knowledge, skills and qualities necessary to perform his or her duties; and

(c) Not delegate his or her decision-making function.

Article 7 – Ex parte communication

1. Unless permitted by the instrument of consent, the applicable rules, the agreement of the disputing parties or paragraph 2, ex parte communication is prohibited.

2. Ex parte communication is permitted when a Candidate engages in a communication with a disputing party that has contacted him or her regarding a potential appointment as a party-appointed Arbitrator for the purpose of determining the Candidate's expertise, experience, competence, skills, availability and the existence of any potential conflict of interest.

3. When permitted under this article, ex parte communication shall not, in any case, address any procedural or substantive issues relating to the IID proceeding or those that a Candidate or an Arbitrator can reasonably anticipate would arise in the IID proceeding.

Article 8 – Confidentiality

1. Unless permitted by the instrument of consent, the applicable rules or the agreement of the disputing parties, a Candidate or an Arbitrator shall not:

(a) Disclose or use any information concerning, or acquired in connection with, the IID proceeding; or

(b) Disclose any draft decision in the IID proceeding.

2. An Arbitrator shall not disclose the contents of the deliberations in the IID proceeding.

3. The obligations in paragraphs 1 and 2 shall survive the IID proceeding.

4. An Arbitrator may comment on a decision rendered in the IID proceeding only if it is publicly available.

5. Notwithstanding paragraph 4, an Arbitrator shall not comment on a decision while the IID proceeding is pending or the decision is subject to a post-award remedy or review.

6. The obligations in this article shall not apply to the extent that an Arbitrator, a Candidate or a former Arbitrator is legally compelled to disclose the information in a court or other competent body or needs to disclose such information to protect or pursue his or her legal rights or in relation to legal proceedings before a court or other competent body.

Article 9 – Fees and expenses

1. Fees and expenses of an Arbitrator shall be reasonable and in accordance with the instrument of consent or the applicable rules.
2. Any discussion concerning fees and expenses shall be concluded with the disputing parties as soon as possible.
3. Any proposal concerning fees and expenses shall be communicated to the disputing parties through the institution administering the proceeding. If there is no administering institution, such proposal shall be communicated to the disputing parties by the sole or presiding Arbitrator.
4. An Arbitrator shall keep an accurate record of his or her time and expenses attributable to the IID proceeding and shall make such records available when requesting the disbursement of funds or upon the request of a disputing party.

Article 10 – Assistant

1 Prior to engaging an Assistant, an Arbitrator shall agree with the disputing parties on the role, scope of duties and fees and expenses of his or her Assistant.
2. An Arbitrator shall make all reasonable efforts to ensure that his or her Assistant is aware of and acts in accordance with the Code, including by requiring the Assistant to sign a declaration to that effect, and shall remove an Assistant who does not act in accordance with the Code.
3. An Arbitrator shall ensure that the Assistant keeps an accurate record of his or her time and expenses attributable to the IID proceeding.

Article 11 – Disclosure obligations

1 A Candidate and an Arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.
2. Regardless of whether required under paragraph 1, the following information shall be disclosed:

(a) Any financial, business, professional or close personal relationship in the past five years with:

(i) Any disputing party;

(ii) The legal representative(s) of a disputing party in the IID proceeding;

(iii) Other Arbitrators and expert witnesses in the IID proceeding; and

(iv) Any person or entity identified by a disputing party as being related or as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder;

(b) Any financial or personal interest in:

(i) The outcome of the IID proceeding;

(ii) Any other proceeding involving the same measure(s); and

(iii) Any other proceeding involving a disputing party or a person or entity identified by a disputing party as being related;

(c) All IID and related proceedings in which the Candidate or the Arbitrator is currently or has been involved in the past five years as an Arbitrator, a legal representative or an expert witness;

(d) Any appointment as an Arbitrator, a legal representative, or an expert witness by a disputing party or its legal representative(s) in an IID or any other proceeding in the past five years; and

(e) Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding.

3. An Arbitrator shall have a continuing duty to make further disclosures based on new or newly discovered circumstances and information as soon as he or she becomes aware of such circumstances and information.

4. For the purposes of paragraphs 1 to 3, a Candidate and an Arbitrator shall make all reasonable efforts to become aware of such circumstances and information.

5. A Candidate and an Arbitrator shall err in favour of disclosure if he or she has any doubt as to whether a disclosure shall be made.

6. A Candidate and an Arbitrator shall make the disclosure prior to or upon appointment to the disputing parties, other Arbitrators in the IID proceeding, any administering institution and any other persons prescribed by the instrument of consent or the applicable rules.

7. The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality.

Article 12 – Compliance with the Code

1. An Arbitrator and a Candidate shall comply with the Code.

2. A Candidate shall not accept an appointment and an Arbitrator shall resign or recuse himself or herself from the IID proceeding, if he or she is not able to comply with the Code.
3. Any challenge or disqualification of an Arbitrator or any other sanction or remedy is governed by the instrument of consent or the applicable rules.

Text of the annexes to the draft code of conduct

Annex 1 (Candidates/Arbitrators)

Declaration, disclosure and background information

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code of Conduct") and I undertake to comply with it.
2. To the best of my knowledge, there is no reason why I should not serve as an Arbitrator in this proceeding. I am impartial and independent and have no impediment arising from the Code of Conduct.
3. I attach my current curriculum vitae to this declaration.
4. In accordance with article 11 of the Code of Conduct, I wish to make the following disclosure and provide the following information:
[INSERT AS RELEVANT]
5. I confirm that as of the date of this declaration, I have no further circumstance or information to disclose. I shall make further disclosures based on new or newly discovered circumstances and information as soon as I become aware of such circumstances and information.

Annex 2 (Assistants)

Declaration

1. I have read and understood the attached UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (the "Code of Conduct") and I undertake to act in accordance with it.
2. I confirm that at the date of this declaration, I am not aware of any circumstance that would preclude me from acting in accordance with the Code of Conduct.

B. Annexure II

The UNCITRAL provisions on investment mediation[68]

Draft provision 1 (Availability and commencement of mediation)

1. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the "mediator") lacking the authority to impose a solution upon the parties to the dispute.

2. The parties should consider mediation to settle an international investment dispute amicably.

3. The parties may agree to engage in mediation at any time, including after the commencement of any other dispute resolution proceeding.

4. A party may invite the other party in writing to engage in mediation in accordance with draft provision 2 (the "invitation").

5. The other party should make all reasonable efforts to accept or reject the invitation in writing within 30 days of receipt of the invitation. If the inviting party does not receive an acceptance within 60 days of receipt of the invitation, that party may elect to treat it as a rejection of the invitation.

6. The mediation shall be deemed to have commenced on the day on which the other party accepts the invitation.

7. The parties shall agree to conduct the mediation in accordance with these draft Provisions and:

(a) The United Nations Commission on International Trade Law (UNCITRAL) Mediation Rules;

(b) The International Centre for Settlement of Investment Disputes (ICSID) Mediation Rules;

(c) The International Bar Association (IBA) Rules for Investor-State Mediation; or

(d) Any other rules.

8. Unless provided otherwise in the rules agreed by the parties pursuant to paragraph 7:

(a) The parties shall appoint a mediator within 30 days of the commencement of the mediation. If a mediator is not appointed within that period of time, the parties shall agree on an institution or a person that shall assist them in appointing a mediator; and

[68] UNCITRAL, 'Draft UNCITAL model provisions on investment mediation: Note by the Secretariat' UN Doc, A/CN.9/1150 (25 April 2023) <https://daccess-ods.un.org/tmp/7109920.97854614.html> accessed 30 August 2023

(b) The mediator shall convene a meeting with the parties within 15 days after the appointment and the parties shall attend that meeting.

9. The parties may at any time agree to exclude or vary any of these draft Provisions.

10. Where any of these draft Provisions is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, including any applicable instrument or court order, that provision of the law shall prevail.

Draft provision 2 (Information required in an invitation)

The invitation to engage in mediation referred to in draft provision 1(4) shall contain at least the following information:

(a) The name and contact details of the inviting party and its legal representative(s) and, if the invitation is made by a legal person, the place of its incorporation;

(b) Government agencies and entities that have been involved in the matters giving rise to the invitation;

(c) A description of the basis of the dispute sufficient to identify the matters giving rise to the invitation; and

(d) A description of any prior steps taken to resolve the dispute, including information on any pending claim.

Draft provision 3 (Relationship with arbitration and other proceedings to resolve the dispute)

1. Upon the commencement of the mediation, a party shall not initiate or continue any other proceeding to resolve the dispute until the mediation is terminated.

2. If the mediation commences while another proceeding to resolve the dispute is in progress, the parties shall request the suspension of that proceeding pursuant to the rules applicable to that proceeding.

Draft provision 4 (Use of information in other proceedings)

A party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation.

Draft provision 5 (Settlement agreement)

The parties should consider whether the settlement agreement resulting from mediation meets the requirements set forth in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018).

Annotations to the draft provisions on mediation

1. General considerations

Considering that mediation was still being underutilized to resolve investment disputes, the Working Group reiterated the need to encourage parties to conduct mediation where appropriate without creating an obligation. In view of the existing mediation rules (both institutional and ad hoc) that comprehensively address all aspects of the mediation proceeding, the draft provisions on mediation have been prepared to reflect existing treaty language and to allow the parties to choose from and refer to existing mediation rules for the conduct of mediation.

Draft provision 1 — Availability and commencement of mediation

Draft provision 1 reflects the voluntary, consensual, and flexible nature of mediation. It provides for a clear legal basis for mediation, including for the commencement of mediation.

Paragraph 1 includes the definition of mediation as found in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation").

Paragraph 2 emphasizes the usefulness of mediation without imposing an obligation upon the parties to mediate and encourages parties to consider mediation as a means to settle international investment disputes amicably.

Paragraph 3 signals the availability of mediation, and that the parties may agree to engage in mediation at any time.

Paragraph 4 notes that a party may invite the other party or parties to engage in mediation in writing.

Paragraph 5 provides a time period (within 30 days of receipt of the invitation) for the other party to make all reasonable efforts to respond to the invitation in writing. If a party does not

respond within 60 days of the receipt, the inviting party may treat the absence of a response as a rejection of the invitation to mediate.

Paragraph 6 provides a default rule on the commencement date, which is the day on which the other party accepts the invitation. Parties are free to agree that the mediation commences on a different date.

Paragraph 7 lists available mediation rules, which can be incorporated by reference. The current version of the mediation rules are the UNCITRAL Mediation Rules 2021; the ICSID Mediation Rules 2022; and the IBA Rules for Investor-State Mediation 2012. These rules address several procedural issues and therefore need not be addressed in the draft provisions. For example, the Working Group decided to not address the issues of confidentiality in the draft provisions as they were generally dealt with in mediation rules.

Subparagraph 8(a) provides the default rule on the appointment of the mediator – that the parties shall agree on the mediator within 30 days and that in case they are not able to agree on the mediator, they shall agree to an institution or a person to assist them. Subparagraph 8(b) requires the mediator to convene a first meeting within 15 days after his or her appointment and requires all parties to attend that meeting. Both subparagraphs are subject to any mediation rules agreed by the parties.

Paragraph 9 provides that the parties are free to exclude or vary any of the draft provisions at any time.

Paragraph 10 provides a conflict clause to ensure the coherent interaction between the draft provisions and provisions in the applicable mediation laws from which the parties cannot derogate. In such a case the provisions of the law prevail.

Draft provision 2 — Information required in an invitation

Draft provision 2 lists the information to be included in an invitation to engage in mediation, in order to enable the other party to obtain an overview of the matters at issue as well as to understand and assess them efficiently.

Draft provision 3 — Relationship with arbitration and other dispute resolution proceedings

Draft provision 3 addresses the question how the parties' agreement to engage in mediation would impact other dispute resolution proceedings, such as arbitration or domestic court proceedings. The provision aims to avoid concurrent proceedings.

Paragraph 1 obliges the parties to not initiate or continue any other proceeding to resolve the dispute upon the commencement of mediation and until it is terminated.

Paragraph 2 addresses a situation where the mediation commences while another proceeding to resolve the dispute is already in progress. In such cases, the parties are required to notify the arbitral tribunal or the court in writing to request for a suspension of the proceeding. However, the suspension would be determined pursuant to the rules applicable to that proceeding.

Draft provision 4 — Use of information in other proceedings

Draft provision 4 ensures that the active engagement in mediation does not prejudice any legal position of a party participating in a mediation in any other dispute resolution proceeding. Views, proposals, admissions, or willingness to settle expressed during the mediation proceeding should not be used to the detriment of the party who made them in other proceedings, unless such information or document is independently available.

Draft provision 5 — Settlement agreement

Draft provision 5 draws the attention of the parties to the formal requirements set forth in the Singapore Convention on Mediation and aims to facilitate the enforcement of the settlement agreement in any State Party to the Singapore Convention on Mediation. It would also be possible to enforce a settlement agreement to which a State is a party to the mediation in that State, if that State did not formulate the reservation provided for under article 8(1)(a) of the Singapore Convention on Mediation.