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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 topics of World Trade Law and International Investment Law, although closely interrelated, have traditionally been dealt with separately in the work programme of AALCO, due to the different legal regimes applicable to them. It was only at 57th Annual Session of AALCO (2018) held from 8-12 October in Tokyo, Japan that the two topics were considered together in the same general meeting dealt with in the same brief as a combined topic having common concerns and synergies in discussion. As such, a background on these topics included in the work program of AALCO over the years would be desirable to inform the deliberations on the topic at the 58th Annual Session of AALCO to be held in Dar-es-Salaam, United Republic of Tanzania from 21-25 October 2019.

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

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

4. At the Forty-Second Annual Session of AALCO (2003) held in Seoul, 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. In 2010, the Centre for Research and Training (CRT) in the AALCO Secretariat organized a five-days training program titled "Basic Course on the World Trade Organization (WTO)" from 1- 5 February 2010. 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 World Trade Organization 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 World Trade Organization, the WTO Basic Principles and Exceptions, General Agreements on Trade in Services (GATS) as well as Trade Related Aspects of Intellectual Property Rights (TRIPS).

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

6. As regards the work on International Investment Law, although the topic is of recent interest to States, AALCO has a long standing association with it since the days of the New International Economic Order and the nascent days of the development of the field of law as we know it today. Although the topic did not receive stand-alone consideration, the featured in the program of work titled as 'the treatment of aliens' and was a prominent part of the topic 'Regional Cooperation in the Context of the New International Economic Order.'

7. The topic "Promotion and Protection of Investment on a reciprocal basis" was first discussed at the Twenty-First Annual Session of AALCO held in Jakarta, Indonesia from 24 April to 1 May 1980 in the context of proposal by the Secretary-General on regional co-operation in the field of industry among States of the Asian-African region. Later that year, discussions were followed up by intensive focused engagement on the matter in the Ministerial Meeting convened in Kuala Lumpur, Malaysia on from 10- 12 December 1980 by the Government of Malaysia and then Asian-African Legal Consultative Committee (AALCC).

8. The meeting recognized the need to create stable but flexible relations between investors and host government particularly in the context where investments were made by nationals or corporations of one developing country in another. After examining a number of domestic regulations in force and some bilateral agreements that a few Member States had entered into, certain elements were identified that were ripe for codification in the form of a Model Umbrella Investment Agreement to which due consideration may be given by Member States in the formation of their own investment policy. Among the elements identified was the fair and equitable treatment, right to repatriate profits, as well as settlement of disputes by arbitration.

9. Accordingly, the Secretariat, prepared a tentative draft of the Model Umbrella Investment Agreement that could serve as a basis for preliminary discussion by the Expert Group. At the Twenty-Second Annual Session of AALCO held in Colombo, Democratic Socialist Republic of Sri Lanka from 25-30 May 1981 the draft Model Agreement was placed for consideration before the Trade Law Sub-Committee for comments and suggestions.

10. On the invitation of the Government of the Republic of Turkey, in collaboration with the AALCC another Ministerial Meeting was organized in Istanbul in September 1981 which took note of the report of the Trade Law Sub-Committee. It was recommended that in view of the divergent practices and opinions of the Member States three models may be drafted with certain common elements that may be acceptable to all, while being cognizant of the requirements of all Member States.[1] The revised Secretariat's Study was thereafter published in November 1982 containing the texts of the three model agreements. The texts of the model agreement thereafter received the endorsement of the open-ended Expert Group and the same

[1] The tentative formulations with regard to the three possible model agreements were as follows, (See, AALCC Secretariat, 'Report of the twenty-third, twenty-fourth, and twenty-fifth sessions held in Tokyo (1983), Kathmandu (1985) and Arusha (1986)' (AALCC 1988) <http://www.aalco.int/23rdsession/Part%209.pdf> accessed 3 September 2019.

Model A: Draft of a bilateral agreement similar to the agreements entered into between some States in the region with industrialized States, along with certain modifications and improvement in relation to the protection and promotion of investments.

Model B: Draft of an agreement that is restrictive in the matter of protection of investment and contemplates a degree of flexibility regarding the protection of investments.

Model C: Draft of an agreement on the pattern of Model A but applicable to specific classes of investments only as predetermined by the host state.

was placed before the Member states at the Twenty-Third Annual Session at Tokyo, Japan in 1983 for adoption together with explanatory notes and a request for those to be brought to the notice of the appropriate authorities and government departments.

11. Renewed interest in the topic of International Investment Law was shown by Member States who participated in the Seminar titled "International Investment and WTO" held on 2 March 2016 at the AALCO Headquarters in New Delhi, that *inter alia* had presentations and discussion on sub-topics such as current challenges faced by Asian and African Countries with respect to Investor State Dispute Resolution.

12. Recently, in collaboration with the African Institute of International Law (AIIL), the UNCITRAL and the Ministry of Foreign Affairs of People's Republic of China, a Seminar on "Reviewing International Reforms to the Investment Regime and to the Investor-State Dispute Settlement Mechanism: perspectives from the Asian-African regions" was held from 19-21 November 2019 at Arusha, United Republic of Tanzania. The presentations on the Seminar focused on a number of common areas of concern for AALCO Member States that related to the substantive and procedural aspects of reforming Investor-State Dispute Resolution.

B. Issues for focused deliberation at the Current Annual Session

1) WTO Reforms
2) Investment Disputes Mechanisms Reform Initiative
3) Mediation in Investment Disputes

II. Deliberation at the Fifty-Seventh Annual Session of AALCO (Tokyo, Japan, 9-12 October 2018)

13. The Deputy Secretary-General of AALCO delivered the introductory statement on the subject. She explained in brief how AALCO had dealt with the topics International Trade and Investment law since the time of its inception. She remarked that even though a number of relevant developments have taken place in the areas of international trade and investment law, due to constraints of time the following issues would be discussed in the session:
a) Regional Trade Agreements and effect on WTO, b) Intellectual Property and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights, and c) AALCO's Regional Arbitration Centres. She further informed the meeting that with the objective of improving the investment climate within Member States and to raise the profile of Asian-African States as investment destinations, AALCO would be organizing a seminar on reviewing reforms to the international investment regime and to the investor-state dispute settlement mechanism from 19-21 November 2018, at Arusha, United Republic of Tanzania.

14. The first speaker, Amb. Dr. Hussein A. Hassouna, Member, UN International Law Commission in his statement on the impact of regional trade agreements on the WTO, spoke about how the shift towards regional trading is changing the landscape of international trade. He stated that the proliferation in regional trade agreements coincides with the diminishing success of multilateral trade negotiations. On the question of whether regional trade agreements constitute building blocks or stumbling blocks to multilateral trade, he stated that a way forward would entail actions by both multilateral and regional trading systems. The regional trade agreements must firstly ensure that they complement WTO's multilateral trading system, and secondly, that they should work to make their agreements open to accession by third parties. Thus, the task before the international community is to maximize the benefits of each system and seek to harmonize the various standards and rules.

15. The second speaker, Amb. Hong Thao Nguyen, Member, ILC in his presentation on perspective of the Intellectual Property (IP) and the Agreement on Trade Related Aspects of IPR (TRIPS), focused his attention on the TRIPS Agreement as being a "package deal" with "minimum standards" for the availability, scope, and use of seven forms of intellectual property. He further focused on three important matters in connection of the amendment of the TRIPS Agreement: (i) Extending the transitional period of implementation of the TRIPS

Agreement; (ii) the relation between the TRIPS Agreement and the Convention on Biodiversity (CBD); and (iii) e-commerce. Regarding extending the transitional period of implementation of the TRIPS Agreement, he stated that there is still conflicting interests between developed and developing countries on protection of IPR, as developing States want to easily access new inventions and patents for public interest. Regarding the TRIPS Agreement and CBD, he stated that the TRIPS Agreement has not yet settled the conflict between IPRs and obligations in the CBD. Regarding e-commerce he stated that one of the shortcomings of the TRIPS Agreement is that it does not deal with several new developments, such as the Internet, digital copyright issues and e-commerce.

16. Thereafter the third speaker, Prof. Dr. Sundra Rajoo, Director, Asian International Arbitration Centre (AIAC) took the floor to present his views on the role of AALCO Arbitration Centres in promoting international trade and investment within the region of Asia and Africa. At the outset, he emphasized that the five Arbitration Centres stand united by the ideals of friendship and collaboration, and the ideals of AALCO, of promoting trade and investment in the AALCO region. He noted that the centres would be an important step towards the achievement of equilibrium between the industrialized and developing countries with regard to arbitration. He thereafter spoke in brief on the AIAC, which was founded in 1978, and was the first of its kind established under the auspices of AALCO. He stated that since the establishment of AIAC, there has been a massive increase in inward foreign direct investment into Asia. Africa has also enjoyed very impressive growth rates in terms of FDI. This tremendous growth has contributed to the prosperity in the region.

17. He further remarked all the five countries in which AALCO Arbitration Centres are located are UNCITRAL Model law countries, and the contribution of the New York Convention to the region has also been instrumental. This ensures investor confidence in such countries and in the region as a whole, as investors feel confident in choosing such jurisdictions as the arbitral seat for international disputes. All five AALCO Arbitration Centres are helping build capacity in Alternate Dispute Resolution (ADR) in the region, and have organized multiple programs, seminars, and training working tirelessly to achieve their goals. He concluded his remarks by stating that owing to the importance of the Regional Arbitration Centres in the region, effective collaboration between them is likely to assume even more significance in the future.

18. Thereafter, the President of the Fifty-Seventh Annual Session of AALCO, H.E. Mr. Masahiro Mikami opened the floor for comments by Member States and observers.

19. The delegate of the Republic of Uganda, informed the meeting that the topic was very important topic considering Uganda's consistent policy on regional integration and trade liberalization since the 1990s. The meeting was also informed that due to the paucity of time the statement would only focus on the aspect of Regional Trade Agreements and AALCO's Arbitration Centres, which was only one of the sub-topics on the agenda.

20. As regards, Regional Trade Agreements (RTA) the meeting was informed that Uganda viewed them as building blocks for multilateral liberalization and not stumbling blocks, in as much as it subscribed to the view that that advancement of regional economic relations in turn may be understood as the advancement of global economic relations. It was also expressed that regional blocs could in fact facilitate future WTO negotiations by enabling the members to speak with a single voice.

21. The next statement was delivered by the delegate of the Kingdom of Thailand who acknowledged in his speech international trade and investment as the cornerstone the inter-dependent global economy. To this end, the meeting was informed that Thailand was a party to 36 bilateral investment treaties, 3 free trade and economic partnership agreements, 9 regional partnership agreements with investment chapters and was also a participating country of the Regional Comprehensive Economic Partnership (RCEP).

22. The statement focused on certain crucial aspects of Investment Treaty Arbitration such as the lack of a system of precedent, inconsistency in arbitral awards, as well as the significant costs of defending multiple claims. In this regard, the importance of subsequent agreements as an interpretative tool contained in Article 31 (3) (a) of the Vienna Convention on the Law of Treaties, 1969 and joint interpretative statements that seek to clarify the intended jurisdictional and substance scope of the investment agreement were also highlighted. Further, with a view to ensure the sustainability of investment agreements, Thailand encouraged States to modernize its investment agreements so that a balance between investment protection and the right to regulate for policy objective can be restored.

23. The delegate of the People's Republic of China thereafter took the floor, and emphasized the firm support of China for the multilateral trading system the cornerstone of which is the WTO which unpins the sound and orderly development of global trade. It was also informed to the Member States that China opposes unilateralism and protectionism which it expressed as intensifying globally as a trend of thought.

24. As regards regional trade agreements, the meeting was apprised that China supports the integration of the regional economy and towards that end has signed 17 free trade agreements with 25 countries and is conducting free trade zone negotiations with 27 countries including the RCEP Agreement and the China-Japan-Korea FTA.

25. With respect to the issues of Intellectual Property Rights (IPR) and TRIPS, the delegate of the People's Republic of China stated that after joining the WTO, China had actively revised intellectual property laws and regulations, strengthened enforcement and fulfilled the obligations incumbent upon it by the TRIPS Agreements. The Meeting was also informed that on 23 January 2017, the revision of the TRIPS Agreement officially entered into effect that facilitates the export of generic drugs to States that lack pharmaceutical production capacity to address public health problems. China had accepted the amendment as early as 2007 and had urged other Members to approve the agreement on the TRIPS Council.

26. The delegate of Malaysia thereafter proceeded to make her intervention which was in response to the recommendations presented by the AALCO Secretariat to three areas of focus in the report. As regards, the first recommendation it was expressed that Malaysia did not have any objection to the recommendation to organize a seminar subject to availability of resources. In that regard it specially expressed that more analysis is needed to better understand and showcase potential conflicts that RTAs introduce alongside the existing multi-pronged commitments under the WTO framework.

27. With respect to the recommendation of the Secretariat to enhance the liberalization of trade through regional instruments that is compatible with the multilateral regulation under the WTO, Malaysia expressed its intention to constantly uphold the WTO level commitments when embarking upon the negotiation of new RTAs. The meeting was also informed of the various obligations that Malaysia had undertaken as a signatory to the CPTPP as well as those it advocated as an active participant in the negotiation of the Regional Comprehensive

Economic Partnership. Further respect to the aspect of Intellectual Property Rights the delegate of Malaysia took note of the Secretariat's recommendation to hold workshops, seminar or inter-sessional meetings on the review of the TRIPS Agreement and did not have an objection to the optimal use of the flexibilities in the TRIPS agreement for access to technology. The meeting was also informed of the close work between the Government of Malaysia and the Asian International Arbitration Centre (AIAC) in the promotion of rulemaking and practice in ADR, as well as Malaysia's support to coordinated activities between AALCO's Regional Arbitration Centres.

28. Emphasizing on the need to maintain and strengthen a free and open international economic system based on the Rule of Law, the delegate of Japan apprised the meeting of the fact that free trade has been the engine of growth for the country in the post-war period, and that Japan has been strenuously advancing negotiations on Mega-FTAs, such as TPP (Trans-Pacific Partnership), Japan-EU EPA (Economic Partnership Agreement) and RCEP. It was noted that comprehensive, high standard and balanced broad economic partnerships, such as bilateral or regional initiatives, could be useful in complementing the multilateral trading system institutionalized in the WTO, and that the role of FTAs as a potential source of rule-making in the WTO ought to be further explored. Appreciating the role played by the TRIPS Agreement in harmonization of global IP system, the country's commitment to continue its active participation in discussions on IP systems under TRIPS Agreement was highlighted.

29. The delegate of the Republic of Indonesia invited AALCO Member States to work together to find the solution for a number of issues that arise as the effect of implementing multilateral trade agreement. The meeting was informed that Indonesia had ratified WTO Trade Facilitation Agreement (TFA) through Law Number 17 Year 2017, and considered some prominent issues, such as overfishing, overcapacity and fight against Illegal, Unregulated and Unreported (IUU) Fishing, without taking aside the obligation to subsidize the agriculture industries. Indonesia had initiated the negotiation of Preferential Trade Agreement (PTA) with 3 African countries, namely Mozambique, Tunisia and Morocco in 2018. As regards e-commerce, Indonesia took the position that the moratorium on ecommerce should apply to electronic transmission, and not to any product transmitted electronically.

30. Support was expressed for the work of AALCO's Regional Arbitration Centres to facilitate and assist the conduct of arbitral proceedings, including the enforcement of awards made in the proceedings held under the auspices of the Centres. ICSID had launched an amendment process of the rules and regulations in October 2016 and invited its Member States to suggest topics that merited consideration and, for that process, Indonesia's concerns and suggestions brought to the notice of the meeting. The reasons behind the decision of the State in 2014 to terminate all its bilateral investment treaties were iterated. After terminating all its bilateral investment treaties, Indonesia had been re-negotiating bilateral treaties with a number of countries such as United Arab Emirates and Singapore on the basis of the new Model Treaty- covering elements which could be acceptable to not only investors but also host countries.

31. The delegate of the United Republic of Tanzania recently cited the recently enacted laws including the National Wealth and Resources (Permanent Sovereignty Act 2017), the National Wealth and Resources (Revenue and Re-negotiation of Unconscionable Terms) Act 2017, and other related trade and investment legislations, which aim to create a friendly and conducive environment to investors to harmonize dispute resolution mechanisms and to ensure mutual benefits to both parties. The initiative of AALCO in organizing and conducting seminars on international trade and investment law was commended and the then upcoming seminar on trade and investment and dispute resolution, to be held in Arusha, Tanzania, from 19-21 November, 2018 was notified.

III. General Discussion and Recent Developments

A. WTO Reforms

32. Multilateralism has been defined as "an institutional form which coordinates relations among three or more states on the basis of "generalized" principles of conduct- that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence."[2] In relation to the international economic order, the multilateral trading regime has been institutionalized in the WTO, a "member-driven"[3] organization engendered to liberalize trade. Created in 1995, the WTO ushered in major changes to the dispute settlement system that had previously governed international trade disputes under the General Agreement on Tariffs and Trade (GATT). The noteworthy changes that resulted from the Uruguay Round of negotiations included the replacement of the positive consensus rule with a negative consensus rule such that to block establishment of a panel or adoption of a panel report, all WTO members have to agree not to establish or not to adopt the report; and the creation of a standing Appellate Body (AB) of seven persons.

33. The dispute settlement mechanism of the WTO, often referred to as the "crown jewel" of the system, establishes a rule-based adjudicatory process with compulsory jurisdiction over all WTO member countries, a broad jurisdictional scope over almost all of the WTO Agreements, a right of appeal to the AB, and procedures for assessing damages and authorizing retaliation if a member country maintains its breach of substantive trade rules. The WTO norms that have effectively governed trade disputes for two decades hinge on three major principles: acceptance of multilateral adjudication, prohibition on counterretaliation, and the regulation of remedies.

34. However, the dispute settlement mechanism of WTO is presently facing unprecedented crisis. It is now plagued by political divisiveness and malaise; and the threat of return of a power-based world economic order, which allows big players to act unilaterally and use

[2] John Ruggie, 'Multilateralism: The Anatomy of an Institution' (1992) *Int'l Org.* 46: 562, 571.

[3] John H. Jackson, 'The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited (2001) 4 Journal of International Economic Law 67, 72.

retaliation to get their way, looms large. The enforcement norms of WTO have significantly been undermined by the policies of a WTO member,[4] and the unilateral responses adopted by certain others.[5] A perusal of the state of play of WTO dispute settlement reveals certain persistent substantive and procedural issues.

WTO Impasse: Substantive and Procedural Issues

35. With the legislative function of WTO essentially breaking down, and it becoming a litigation-based organization, concerns about sovereignty and the proper functioning of the system have been important since at least 2002.[6] Concerns have existed on several substantive and procedural issues, which include, *inter alia,* an assessment of whether panels and the AB have respected the limitations contained in Articles 3.2 and 19.2 of the Dispute Settlement Understanding (DSU) not to create rights or obligations; the issuance of advisory opinions on issues not raised or not necessary to the resolution of the dispute; actions of the AB that permit deviation from the DSU without affirmative authorization by the Dispute Settlement Body (DSB); and, former AB members continuing to be involved in cases after their term has expired.

36. A crucial challenge arises from the legal culture of the AB, which seems to have viewed its role expansively, as bearing a responsibility to complete international trade law by clarifying ambiguities and filling gaps in WTO agreements. Conflicting perspectives on the role of the AB is the cause of this impasse. DSU Article 3.2 suggests the AB should "clarify the existing provisions" of the WTO agreements, while also providing that that AB rulings "cannot add to or diminish the rights and obligations" in WTO agreements. Clarity on the nature of approach to be adopted by the AB- expansive or deferential and restrained- is

[4] There are at least three ways in which American policies have violated WTO enforcement norms and prompted other countries to similarly abandon these norms: Section 301 of the U.S. Trade Act of 1974 actions for alleged engagement in unfair trade practices with regards to intellectual property and state subsidies; Section 232 of the Trade Expansion Act of 1962 actions in the name of national security, and the block on the Appellate Body appointments; Rachel Brewster, 'Can International Trade Law Recover? WTO Dispute Settlement: Can We Go Back Again?' (2019) *AJIL Unbound* 113:61, 63.

[5] For example, the EU, Canada and Mexico.

[6] Terence P. Stewart, 'Addressing (Or Not) Widespread Concerns with the WTO', (2018) ASIL Proceedings: Revisiting the Multilateral Trading System, 321.

missing. This is problematic because the AB often substitutes its judgment for rules that otherwise would be a product of sensitive political negotiations. This judicial lawmaking is particularly problematic in so far as the AB has systematically privileged liberalization over interpretations that accept the political and social importance of WTO exceptions and trade remedies.[7]

37. The AB is challenged by the near complete breakdown of WTO as a negotiating forum, evidenced by the inability to conclude a trade round since its establishment. The breakdown of WTO as a legislating institution means that gaps in multilateral trade law have grown wider over the past twenty years. It has also been argued that due to AB overreach, the dispute settlement process may be eroding the negotiation function of WTO.[8] One consequence of this negotiating deadlock is that WTO members resort to bilateralism or plurilateralism, while gaps in multilateral trade law continue to grow.

38. Another substantive challenge is posed by WTO's "constitutional flaw":[9] unlike functional national judicial systems, there is no effective legislative check on or balance against AB decisions that WTO members find politically unacceptable.

39. The two procedural difficulties, i.e., the failure of the WTO members to agree on the appointment of new AB members, and the terms under which "outgoing" members continue to serve on appeals to which they had been assigned before the expiry of their term,[10] have been deemed to be related. It may be that more AB members are carrying over their caseloads after the expiry of their terms because no new ones have been appointed, and also because appeals are taking much longer than the sixty to ninety days foreseen in the DSU.[11]

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[7] Richard H. Steinberg, 'The Impending Dejudicialization of the WTO Dispute Settlement System?' (2018) ASIL Proceedings 316.

[8] Kathleen Claussen, 'Introduction: Anatomy of the WTO Impasse', (2018) ASIL Proceedings 315, 316.

[9] Claude Barfield, 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization', (2001) 2 Chicago Journal of International Law 403 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1420&context=cjil> accessed 15 August 2019

[10] The AB Working Procedures provide that an AB member "may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member …." (Rule 15).

[11] Kathleen Claussen, 'Introduction: Anatomy of the WTO Impasse', (2018) *ASIL Proceedings* 315.

A Stock-taking of the Solutions Proposed

40. A provision in Article 16.4 of the DSU does not allow WTO members to adopt findings of a panel, thus rendering them binding, until the appeal filed by a party to the dispute is completed. Most importantly, the WTO member whose benefits under WTO law are damaged cannot retaliate against an infringing WTO member unless there is a binding panel ruling. Consequently, after December 2019, without a functioning AB, any WTO member facing an unfavorable panel ruling can block the adoption of the panel report simply by filing an appeal. This outcome resembles the GATT system where a party to the dispute could veto the adoption of the GATT panel report.

41. In order to avoid this consequence, certain solutions, other than changes to DSU procedures, have been suggested.

42. *Firstly,* to avoid the blockage that shall ensue if an appeal is filed under Article 16.4 of the DSU, it has been suggested that the AB could introduce a new provision in its Working Procedures stating that an appeal shall be considered automatically completed as soon as it is filed unless the AB decides otherwise.[12] The findings of the panel would thus become final. While the AB cannot deprive WTO members of the right to file an appeal per Article 16.4 of the DSU, it can amend its own Working Procedures, in line with its Article 17.9.

43. However, there are at least two concerns about this solution. First, the AB is required to address the issues raised on appeal according to Article 17.12 of the DSU. It is questionable whether the automatic completion of the appeal would satisfy this requirement. Second, such unprecedented activism by the AB might not be politically acceptable to the WTO members.

[12] Steve Charnovitz, 'How to Save WTO Dispute Settlement from the Trump Administration' 3 November 2017 at <https://ielp.worldtradelaw.net/2017/11/how-to-save-wto-dispute-settlement-from-the-trump-administration.html>; endorsed by Pascal Lamy, see Tom Miles, 'WTO is most worrying target of Trump's trade talk: Lamy,' Reuters, November 14, 2017 at <https://www.investing.com/news/economy/wto-is-most-worrying-target-of-trumps-trade-talk-lamy-858199>.

44. *Secondly*, a resort to arbitration proceedings under Article 25 of the DSU as a substitute for appellate review[13] may allow members to settle their disputes through *ad hoc* arbitration within WTO subject to certain conditions. The main advantages of using Article 25 of the DSU are that an *ad hoc* arbitration does not depend on the composition or existence of the AB and does not require any action by WTO members as a whole, since awards are automatically binding for the parties to the dispute. However, arbitration proceedings must be consistent with the object and purpose of the DSU. Additionally, according to Article 25.4 of the DSU, the rules on retaliation envisaged in the DSU would generally apply to arbitration awards.

45. However, with a statistical analysis of WTO disputes confirming that complainants predominantly win,[14] *ad hoc* appeal-arbitration would be limited to cases where both WTO members see an equal chance of winning at the panel level and want to retain a possibility of appeal. Moreover, in any given dispute two parties may always compromise and even agree on arbitration outside of the WTO framework instead of an appeal.

46. A *third* solution, again of *ad hoc* nature, suggests that parties to the dispute should simply agree to abstain from an appeal vide *ex ante* bilateral procedural agreements.[15] *Ex ante* plurilateral protocols have been suggested as a solution to deal with other imperfections in the DSU beyond the current AB crisis and may be worthwhile for the WTO membership to explore.[16]

47. *Fourthly*, instead of an *ad hoc* agreement to refrain from appeals, WTO members could adopt a temporary waiver on appellate review. The WTO experience in adopting waivers is very limited for the same procedural reasons as the adoption of authoritative interpretations.

[13] Scott Anderson *et.al., Using Arbitration under Article 25 of the DSU to Ensure the Availability of Appeals*, (2017) CTEI Working Paper CTEI-2017-17, Centre for Trade and Economic Integration; Jens Hillebrand Pohl, 'How to Break the Impasse over Appellate Body Nominations,' Maastricht University blog, 29 September 2017 at https://www.maastrichtuniversity.nl/blog/2017/09/how-break-impasse-over-appellate-body-nominations.

[14] Louise Johannesson and Petros C. Mavroidis (2016), *The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics,* EUI Working Paper RSCAS 2016/72.

[15] Luiz Eduardo Salles, 'Bilateral Agreements as an Option to Living through the WTO AB Crisis' International Economic Law and Policy blog, 23 November 2017.

[16] Robert McDougall, 'Making Trade Dispute Settlement More Accessible and Inclusive,' Centre for International Governance Innovation, 2 November 2017.

Article IX:3 of the Marrakesh Agreement requires a three-fourths majority, but in practice waivers are adopted by consensus.

48. *Fifthly,* the current AB crisis has been described as an emergency that justifies the appointment of AB members by a qualified majority vote and not by consensus, with the general voting rules in the Marrakesh Agreement (Article IX:1) overriding the consensus rule in Article 2.4 of the DSU.[17] However, apart from diplomatic constraints, this solution appears impossible from a legal standpoint.

49. A *sixth* alternative suggests that the major trading partners could form a coalition and replicate the AB procedure or the whole WTO dispute settlement mechanism in a separate agreement outside the WTO framework.[18] This agreement, however, would not apply to disputes involving the non-member/s to that coalition. This solution has been deemed to lack both political and legal underpinnings and might amount to an admission of a complete failure of the WTO dispute settlement system.[19]

B. Mediation in Investment Disputes

50. Arbitration has generally been the most preferred means for resolution of investment disputes between foreign investors and States for more than a Century. Although negotiation and mediation have also been available to the parties to investment disputes for a long a period of time their utilization for resolving disputes as opposed to arbitration has been rare. Among other factors for the popularity of arbitration was the ability of the process to depoliticize the dispute, and provide a neutral, reasoned, binding award that is capable of enforcement in any jurisdiction in which the award-debtor possesses assets.[20] Due to these

[17] Jan Pieter Kuijper, 'The US Attack on the Appellate Body', International Economic Law and Policy blog, 15 November 2017.

[18] Jan Pieter Kuijper, 'The US Attack on the WTO Appellate Body', (2017) Amsterdam Law School Research Paper No. 2017-44 and Amsterdam Center for International Law No. 2017-29.

[19] Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', (2018) Policy Brief, Peterson Institute for International Economics.

[20] C.N. Brower and S. Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52 Columbia Journal of Transnational Law 689; T.J. Stipanowich, 'Arbitration: The New Litigation' (2010) University of Illinois Law Review 1; K.J. Vandevelde,

benefits, the use of investment arbitration has proliferated and till date close to 942 cases are known out of which 602 have concluded while more 300 disputes are pending resolution.[21]

51. As the number of disputes proliferated, it leads to rising concerns for State parties to the plethora of Bilateral Investment Protection Agreements (BIPA) or Bilateral Investment Treaties (BIT) that conferred jurisdiction on arbitration tribunals either *ad hoc* or institutional in nature. Although some treaties provided for the exhaustion of local remedies (i.e. permitted by the ICSID Convention), as well as 'cooling-off' periods in order to facilitate an amicable settlement of the dispute, it was invariably committed to arbitration due to the apparent irreconcilable nature of interests of the stakeholders. It was in such an environment that a number of scholars, states, arbitral institutions and international organization focused their attention to finding alternative avenues for settlement of investment disputes, promoting the use of other Alternative Dispute Resolution (ADR) Mechanisms.[22]

52. Although arbitration provided a number of advantages, the rising costs and long periods of time involved revealed that it was not the most appropriate method of settling investment disputes on all counts. Other methods such as negotiation, mediation or conciliation offered key advantages in terms of efficient allocation of costs and time, and also provided certain other benefits such as a tailor-made solution for the parties that arbitration could not provide, which *per se* as an adjudicative processed is a product of purely legal considerations.

53. As the regards, the consensual methods of alternate dispute resolution namely negotiation, conciliation, and mediation Sylacuse has observed that as the parties move towards more adjudicatory methods of dispute settlement the solution falls more and more

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'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal 201; L Helfer and A-M Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 California Law Review 899, 917.

[21] UNCTAD, 'Investment Policy Hub- Investment Dispute Settlement Navigator' <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 5 September 2019.

[22] W. von Kumberg, 'Making Mediation Mainstream: An Application for Investment Treaty Dispute' in S.D. Franck and A. Joubin-Brett (eds) *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2011) 71; S.M. Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible?'(2007) 22 ICSID Review-Foreign Investment Law Journal 237; S.D. Franck and A. Joubin-Brett, 'Investor-State Mediation- A Simulation' (2014) 29 ICSID Review-Foreign Investment Law Journal 90.

outside the direct control of the parties and within the hands of a third party.[23] The ability of the process to yield to specific requirement of the parties increasingly diminish as the process tends towards becoming more adjudicatory in nature and less consensual, ranging from negotiation to arbitration.

54. While the process of investment arbitration tends to become more unpredictable due to inconsistencies between arbitral awards exacerbating the divergence in opinions between arbitrators relating to interpretation of standard protection clauses, States have shown a desire to take control of the process, which is possible through adopting mediation among other dispute resolution procedures.[24] In fact, a number of scholars have suggested the amendment of investment treaties that states have entered into to provide for resort to arbitration only after serious attempts to arrive at a mediated settlement have failed.[25] It has been expressed that an in-depth understanding of the facts coupled with assistance from area specific experts can go a long way in containing the dispute to a few specific issues and may even provide reasons for the parties conclude their dispute with a mutually acceptable settlement.[26]

55. On the other hand, the innovative mechanism of med-arb, wherein a mediator may change his orientation and continue to deal with the parties in the role of arbitrator if the parties so desire possessing the advantage of being cognizant with the facts and issues, and hence reducing time and costs.[27] It is observed that mediation may not only serve the interests

[23] J.W. Sylacuse, 'Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution' (2007) 31 Fordham International Law Journal 401.

[24] S. Constain, 'Mediation in Investor State Dispute Settlement: Government Policy and the Changing Landscape' (2014) 29 ICSID Review-Foreign Investment Law Journal 25.

[25] R. Echandi and P. Kher, 'Can International Investor-State Disputes be Prevented? Emperical Evidence from Settlements in ICSID Arbitration' (2014) 29 ICSID Review-Foreign Investment Law Journal 41.

[26] N.A. Welsh and A.K. Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harvard Negotiation Law Review 71; R, Echandi, 'Investor-State Conflict Management: A Preliminary' (2014) Transnational Dispute Management < https://www.transnational-disputemanagement.com/article.asp?key=2083> accessed 5 September 2019.

[27] J.J. Coe, Jr., 'Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress' in S.D. Franck and A. Joubin-Brett (eds) *Investor-State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2011) 43.

of the parties as a stand-alone procedure but can also aid the parties in the settlement of their disputes in conjunction with other forms of dispute settlement. [28]

56. Recently, a number of institutions have revised their rules and guidelines in order to better facilitate the growing need for institutionalized mediation from State and investors. This burgeoning trend can only be explained by looking at some of the following key advantages that mediation as process offers over arbitration.[29]

1. Removing obstacles: The mediation process although party oriented in nature envisages a key role of the mediator to remove barriers to effective communication and agreement between the parties. By acting as trusted neutral third party, he helps the parties in expressing their underlying interests and exposes unsupported assumptions that the parties may believe against each other.

2. Saves time and costs: It has been observed that mediation takes far less time and involves much fewer costs than investor-state arbitration that has in recent years become notorious for long period of arbitration, voluminous records, and high arbitrator and counsel fees. Since parties are at all times in control of the mediation process they have full control of the time and costs aspect in the mediation.

3. Preserving a commercial relationship: The most important difference between mediation and arbitration is that the former is more likely to preserve or in some cases even strengthen the commercial relationship between the parties. Specially in cases of investor-state arbitration where it is found that parties have made long term commitments in often ill-liquid assets, a dispute in one area of cooperation is often felt in other areas as well. Mediation as discussed not only contains the dispute, but preserves the relationship between the parties maintaining the trust required for other areas of cooperation to continue avoiding the multiplication of disputes.

[28] C.A. Ludington, 'Med-Arb: If the Parties Agree' (2017) Transnational Dispute Management <https://www.transnational-dispute-management.com/article.asp?key=2410> accessed 17 September 2019.

[29] Editorial Board, 'Mediation of Investor-State Conflict' (2014) 127 Harvard Law Review 2543; L. Reed, 'Ultimate Thule Prospects for International Commercial Mediation' (NUS Centre for International Law Working Paper 19/03, 18 January 2019) < https://cil.nus.edu.sg/publication/ultima-thule-prospects-for-international-commercial-mediation/> accessed 15 August 2019.

4. Confidentiality: As calls for transparency become stronger, the confidentiality aspect of the investor-state arbitration is being tempered to a great extent, with most investment awards ultimately being published. As opposed to the wishes of one party, the discretion of the tribunal also plays an important role in the decision as to what degree to maintain confidentiality of the proceedings. In spite of best efforts negative publicity is often the by-product of an investment dispute, hardening the already opposing positions of the parties. Mediation on the other hand allows parties to speak candidly without prejudicing their legal position in a subsequent arbitration or litigation, creating an environment of trust and openness where parties can address the pressing issue that is the cause of the dispute.

57. It is in light of these reasons that private international institutions such as the International Bar Association (IBA) and the International Chamber of Commerce (ICC) have revised their rules to facilitate investor-state mediation.[30] The UN Commission on the International Trade Law (UNCITRAL) as well as the International Centre for the Settlement of Investment Disputes (ICSID) have also revised their rules to accommodate the promote the use of mediation between investors and States to settle disputes arising out of investment contracts and treaties.[31]

58. Although, the legal framework in the form of rules for mediation or conciliation has been present for a long period of time, they were rarely ever put to use. Only handful of investor state mediation instances have been brought to light by scholars, who identify a lacking enforcement mechanism as one of the main reasons for its lack of popularity.[32]

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[30] IBA Rules for Investor-State Mediation (International Bar Association, October 2012) < https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx> accessed 5 September 2019; ICC Mediation Rules (International Chamber of Commerce, January 2014) < https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/> accessed 5 September 2019.

[31] See, for the amendment proposed by the ICSID Secretariat in its 3rd Working Paper on the matter, ICSID, 'Proposal for Amendment of the ICSID Rules- Working Paper 3' (Vol 1, ICSID 2019) < https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf> accessed 15 September 2019.

[32] A. Ubilava and L. Nottage, 'ICSID's New Mediation Rules: A Small but Positive Step Forward' <https://icsid.worldbank.org/en/Documents/Ubilava_Notage_10.17.2018.pdf> accessed 15 August 2019> accessed 17 August 2019.

59. The recently, opened for the signature UN Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention'),[33] squarely addresses this issue, and implements a uniform standard for recognition and enforcement of settlement agreement. The Singapore Convention provides that State parties shall enforcement settlement agreements of a commercial nature and international in character in all cases unless the agreement is afflicted by one of the infirmities provided for in Article 5 modelled on Article V of the New York Convention[34] and Article 36 of the UNCITRAL Model Law on International Commercial Arbitration.[35] It is believed that universal ratification of the Singapore Convention shall provide the much needed impetus for mediation to flourish specially in cases of investment dispute where it provides numerous benefits to the parties.

60. In light of these observations, the AALCO Secretariat provides the following recommendations:

1. Member states should adopt mediation procedures in their respective Free Trade Agreements, Bilateral Investment Treaties as well as Investment Contracts in order to benefit from the process and promote the timely the cost-effective settlement of investment disputes.

2. Member States are encouraged to consider the signature and ratification of the UN Convention on International Settlement Agreements Resulting from Mediation in order to create an environment of stability and certainty for the enforcement of settlement agreements arising out of disputes concerning investments among others.

C. Investment Disputes Mechanisms Reform Initiative

61. As discussed in the previous chapter, investment disputes in the last decade have grown at an exponential rate with more than 900 known disputes till date involving claims filed by

[33] UNGA, 'UN Convention on International Settlement Agreements Resulting from Mediation' UN Doc. A/RES/73/198 (11 January 2019).

[34] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) 33 UNTS 38.

[35] UNCITRAL Model Law on International Commercial Arbitration, 1985 with amendments as adopted in 2006 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf> accessed 14 August 2019.

investors against States for breach of investment treaties. With the first award rendered in 1990[36] that held the home state responsible for breach protections granted in a Bilateral Investment Treaty, a new era in investment arbitration was ushered in permitting investors direct access to arbitral tribunals. Since then a number of key developments have taken place in international investment law and policy involving States that have attempted to regain control over the process.

62. Measures such as denunciation of treaties, re-negotiation, joint interpretative statements, and publication of model investment agreements have been resorted to by States belonging to different, economic, social and legal systems, from across the various regions. States as well as publicists, following the development of a body of case-law growing exponentially, concerns such as inconsistency between arbitral awards, parallel proceedings, ethical issues involving arbitrators, increasing costs, and lack of review mechanisms voice concerns regarding the legitimacy of the Investor-State Dispute Settlement Mechanism (ISDSM). Some scholars have characterised this phenomena a 'Backlash against Investment Treaty Arbitration' although this backlash has not taken place in a uniform manner with some states taking recourse to harsh responses than others.[37] While individual states have taken measures to bring in reform in their respective agreements and treaties, only recently has this resulted in collective institutionalized action at various multilateral fora.

63. As the work of the UNCITRAL ('Commission') on transparency in international arbitration came to a close with the recommendation to the States for the adoption of a treaty, the question arose whether the same *modus operandi* may be adopted to address the question of wider reform to the ISDSM. Accordingly, the Commission in collaboration with the Geneva based Centre for International Dispute Settlement (CIDS) conducted research in that regard and placed its findings before the Commission on whether the Mauritius Convention

[36] *Asian Agricultural Products Ltd v. Sri Lanka* (27 June 1990) ICSID Case no. ARB/87/3.

[37] L.T. Wells, 'Backlash to Investment Arbitration: Three Causes' in M. Waibel et al. (eds) *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 341; M. Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness', in C. Brown and K. Miles (eds), *Evolution in Investment Law and Arbitration* (2011) 631.

on Transparency in Treaty-based Investor-State Arbitration could serve as a model for further reforms of the ISDSM?[38]

64. At the forty-ninth session of the Commission in New York (2016) the Commission considered the report of the UNCITRAL Secretariat on the aforesaid question and also heard an oral presentation which provided a preliminary analysis of the issues that would need to be considered if a reform of the ISDSM were to pursue at multilateral level. The report considered two options in-depth (i) a permanent international dispute settlement body providing direct access to private parties and States for investment related matters and, (ii) an appeal mechanism for investor-State arbitral awards.[39]

65. While comments were made that accepting that the permanent dispute settlement body or an appellate body would bring more coherence as compare to the current system of ad hoc arbitral tribunals, questions were raised regarding the restriction of the question only to issues procedural in nature. In that regard, suggestions were made that a 'phasing approach would be preferable in order to make progress, avoiding the more complicated process of how the substantive protection standards could be reformed.[40]

66. Having considered the proposals of the Secretariat as well as the comments made by the States in consultations regarding the topic, at its fiftieth session held in Vienna (2017) the Commission conferred Working Group II with a broad mandate to work on the possible reform of the ISDSM. The mandate states that the Working Group would proceed to (1) first, identify and consider concerns regarding ISDS, (ii) second, consider whether reform was desirable in light of any identified concerns, and (iii) third, if the Working Group were to

[38] 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?' (3 June 2016, Centre for International Dispute Settlement) <https://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf> accessed 15 September 2019.

[39] UNCITRAL, 'Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement' (24 May 2016) UN Doc. A/CN.9/890.

[40] UNCITRAL, 'Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)' (20 April 2019) UN Doc. A/CN.9/917.

conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[41]

67. During the session, the Working Group III deliberated a number of proposals from States for reform limited to procedural issues such duration and costs, third party funding, forms of the ISDSM, and transparency.[42] Thereafter, these issues were further discussed in the working group at the fifty-first session of the Commission in New York (2018) and other issues were also introduced for discussion such as early dismissal mechanism, counterclaims, coherence and consistency between arbitral awards, review mechanisms, and conflicts of interest of arbitrators and counsel.[43]

68. At the next meeting of the Working Group III at the fifty-second session of the Commission held in Vienna (2018) deliberated on the pressing issues of unjustifiable divergence in interpretation of substantive standards, lack of a framework to address multiple proceedings, inconsistency and incorrectness of arbitral awards, apparent lack of independence and impartiality of arbitrators, limitations in existing challenge mechanisms, lack of diversity among arbitrators, qualifications of arbitrators. The Working Group also recalled the importance of inclusivity in its government-led process which benefited from the participation of developing and developed States. In that context, it was also recalled that the European Union as well as the Swiss Agency for Development and Cooperation have made contributions to the UNCITRAL trust fund in order to allow participation of developing State in the deliberations of the Working Group.[44]

[41] UNCITRAL, 'Report of the UNCITRAL on the Work of its Fiftieth Session' (3-21July 2017) UN Doc. A/71/17 (1 August 2016).

[42] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session' Part I (Vienna, 27 November-1 December 2017) (19 December 2017) UN Doc. A/CN.9/930/Rev.1; UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session' Part II (Vienna, 27 November-1 December 2017) (26 February 2018) UN Doc. A/CN.9/930/Add.1/Rev.1.

[43] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session' (New York, 23-27April 2018) (14 May 2018) UN Doc. A/CN.9/935.

[44] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (Vienna, 29 October-2 November 2018) (6 November 2018) UN Doc. A/CN.9/964.

69. At fifty-third session of the Commission held at New York (2019), the Working Group III apart from the issues of third party funding and counter-claims new topics that were deliberated upon included means other than arbitration to resolve investment dispute as well as dispute prevention methods, exhaustion of local remedies, third party participation, regulatory chill and calculation of damages. As regards the topic of third party funding the Working Group concluded that it was desirable that reforms should be developed by the Commission in order to address concerns related to the definition and to the use of regulation of third party funding in the ISDSM. Further, in relation to the issue of regulatory chill it was agreed that it would not be addressed at this stage as a separate concern by the Working Group, but it would guide its work on ISDSM reform.[45]

70. With a view to develop the project schedule to include the discussion on solutions in addition to the discussions on the structural reforms, the Working Group agreed to move forward with the following steps:[46]

1. Step 1 envisaged the submission of solutions to the Secretariat by 15 July 2019 so that the concerns identified in the meetings and collated by the UNCITRAL Secretariat in tabular form annexed to document A/CN.9/WG.III/WP.149 could be updated.
2. Step 2 related to the discussion of the proposals and taking a decision as how many of the solutions the Working Group wished to discuss as a matter of capacity and scheduling.
3. Step 3 involved the final task of elaboration and development of potential solutions to be recommended to the Commission in accordance with the mandate of the Working Group.

71. Further, the UNCITRAL Secretariat was requested to conduct a number of preparatory works for the following session of the Commission including but not limited to the establishment of an advisory centre on international investment law to assist developing States, undertake further studies on topics such as a code of conduct (to be jointly prepared with ICSID), indirect claims, claims by shareholders and reflective loss (to joint prepared

[45] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session' (New York, 1-5 April 2019) (9 April 2019) UN Doc. A/CN.9/970.

[46] *Ibid*, 15.

with OECD), selection and appointment of adjudicators (in cooperation with the Academic Forum) and third party funding.

72. The next session being the 38th Session of the Working Group III shall be held in Vienna from 14-18 October 2019 and shall deliberate upon the reform options available to address the various concerns outlined in the previous meetings that comprised of the following broad categories:

(a) Lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals
(b) Arbitrators and decision makers
(c) Cost and duration of ISDS proceedings
(d) Third-party funding

73. Further, the Working Group would also consider solutions to these identified concerns that as on date (17 September 2019) have been submitted by fourteen states and the European Union.

IV. Observations and Comments of the AALCO Secretariat

74. In the present circumstances, the best solution to the current crisis appears to be constructive discussion and negotiations on chalking out the way forward. WTO members should agree on new procedures for the AB to submit issues of legal uncertainty arising on appeal to respective WTO committees for further discussion and negotiation among WTO members. The AB that is less judicialized and more sensitized to the political climate could catalyze WTO members to negotiate new substantive rules that fill the legal chasms that have emerged over the past two decades.

75. Such "legislative remand" procedures would create a productive link between the dispute settlement function and the role of the WTO as a forum for permanent negotiations. If a consensus cannot be reached in those negotiations, WTO members should invoke the latent tool of "authoritative interpretations," authorized by a three-fourths vote of the members, to clarify the issue under dispute. This process would return the WTO to its essential focus on negotiations, with WTO countries rather than AB members interpreting and augmenting WTO trading rules.

76. Certain institutional reforms at the AB level, which include, *inter alia,* providing for a single term of 6 years without reappointment of the AB members, composing the AB on the basis of legal qualification and taking note of geographical representation, might be considered.

77. Out of the 48 Member States of AALCO, 39 are members of the WTO, and 7 are observers.[47] Therefore, AALCO could be an apposite platform for deliberation to determine the way forward in amidst the present crisis. Moreover, emerging economies, which have long standing concerns about the WTO rules limiting the national policy space, may utilize negotiations to bargain for more favourable rules that address the domestic political challenges and ensure greater freedom to use trade remedy laws and WTO exceptions as sociopolitical escape valves to help address social dislocations.

[47] Iraq, Islamic Republic of Iran, Lebanon, Libya, Somalia, Sudan and Syria.

78. In relation to Mediation of Investment Disputes, it can be observed that States and investors have both recognized the significant advantages that mediation as means of investment dispute resolution offers over other modes of dispute settlement. Saving of time and costs, control over the proceedings, as well as the preservation of the commercial relationship between the parties are some of the significant advantages that Mediation can offer. It should also be recalled that mediation is an interest-based mode of dispute resolution as opposed other adjudicatory ones such as arbitration and litigation which are rights-based. In the context of investment disputes, it serves the interests of both parties that disputes are resolved quickly, in a cost effective manner and are capable of enforcement without delay in any jurisdiction, therefore mediation is presents itself as the most appropriate form for resolution of investment disputes.

79. In relation to the topic of Investment Disputes Mechanism Reform Initiative, the Secretariat observes that the topic holds an important place in the contemporary discourse on international investment law. Keeping with its mandate, the process of reform taking place in the Working Group III of the Commission is a government-led process with inputs from other stakeholders, and as such as captured all the relevant concerns that have been raised in relation to the prevailing system of resolution of investment disputes. While the Secretariat observes that the Commission has agreed to restrict the scope of deliberation only to procedural issues, further reform of substantive provisions are also needed as emphasized by some States in the working group. Further the grouping of concerns in the schedule form along with some of their solutions as proposed is a positive development as it focusses the deliberations on streamlining the solutions so that consensus on the final work product can be achieved in a timely manner.

80. The AALCO Secretariat requests Member States of AALCO to contribute to the deliberations and submit their positions so that the views of all States in particular developing ones may also be taken due note of by the Commission, and the final outcome achieved is agreeable to all States. The pressing need for this topic to attain finality at the earliest cannot be emphasized further, especially in light of the recent issues faced by States in defending a plethora of investment claims filed against them.