



ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO)

EXPLANATORY MEMORANDUM

FIFTY-SEVENTH ANNUAL SESSION

TOKYO, JAPAN

8TH to 12TH OCTOBER 2018

I. INTRODUCTION

The Provisional Agenda has been prepared following Rule 11(1) of the Statutory Rules. It may be recalled that until the Forty-First Annual Session of the AALCO, held in Abuja, Nigeria (2002), all the substantive items on the Organization's agenda were deliberated in the Annual Sessions and the Secretariat prepared reports on all the agenda items. However, before the Forty-Second Annual Session held in Seoul, Republic of Korea (2003), the Host Government of that Session proposed to the Secretary-General to divide all the items on the agenda into deliberated and non-deliberated items with a view to allocating more time for the exchange of views and experiences and intensive discussion on the deliberated items apart from discussion on organizational items. This approach was implemented for the first time during the Forty-Second Annual Session, held in Seoul (2003) and is being continuously followed since then.

Further, since the Forty-Ninth Annual Session held in Dar es Salaam, Tanzania (2010), the non-deliberated agenda items were being published in a single volume and the same were also placed for consideration of the Member States. During the past several years Member States have recommended austerity measures to be adopted by the Organization, including cutting down costs on its publications. In compliance with this observation, since the Fifty-Third Annual Session held in Tehran, Islamic Republic of Iran (2014) the Secretariat is not publishing the report on the non-deliberated agenda items.

Furthermore, since the Fifty-Fourth Annual Session held in Beijing, People's Republic of China (2015), sub-theme of the respective agenda for substantive matters has been introduced in an effort to have focused discussions among Member States. At the forthcoming Fifty-Seventh Annual Session, to be held at Tokyo, Japan from 8th to 12th October 2018, apart from the consideration of items on Organizational matters, the deliberations would focus upon some of the important substantive items on AALCO's current agenda. These include: (i) "Selected Items on the Agenda of the International Law Commission (ILC)"; (ii) "Law of the Sea"; and (iii) International Trade and Investment Law. It needs to be mentioned that a Working Group Meeting on "International Law in Cyberspace" will also be held.

An additional agenda item proposed by Japan, on the topic “Peaceful Settlement of Disputes”, may also be discussed during the Session.

It may be noted that from this Session onwards the practice of adopting resolutions on substantive matters will be discontinued. It shall be replaced by recommendations, if necessary, on the deliberated items. Resolutions shall only be adopted on organizational and financial matters.

The registration for the Session would begin on Monday, 8th October (12 noon to 6.00 PM), and continue on Tuesday, 9th October 2018 before the Inaugural Session.

During the session, AALCO publications namely, Yearbook of the Asian-African Legal Consultative Organization; and Newsletter, would also be launched.

II. PROCEDURAL MATTERS

Chairing of the Session

Rule 3(1) of AALCO’s Statutory Rules provides that the President of the previous Session shall preside until the Member States elect a new President for the current Session. Accordingly, the President of the Fifty-Sixth Annual Session from the Republic of Kenya shall preside over the Inaugural Session and the First Meeting of the Delegations of AALCO Member States during the Fifty-Seventh Annual Session.

Composition of Delegations and Credentials

Rule 12(1) provides that at the Annual Session of the Organization, the Delegation of each Member State shall be composed of the Head of Delegation (Member), Alternate Members and Advisers.

Rule 12(2) provides that the official communication addressed to the Secretary- General shall serve the purpose of credentials for the delegations and observers. The communication shall be authenticated by a competent authority in the Ministry of Foreign Affairs or by the Diplomatic Missions of the concerned States. For the same purpose, an official communication from the relevant Organization addressed to the Secretary-General would serve as credentials for the Organizations in the UN system, inter-governmental organizations and other international institutions.

Adoption of Agenda

Rule 11(3) provides that the provisional agenda shall be placed before the Meeting of the Delegations of Member States for consideration. The Meeting may, at its discretion, delete any item included in the provisional agenda. A new item may be included on the proposal of one or more delegations, if the Meeting is of the opinion that the matter is one of urgency and there are sufficient reasons on account of which the item could not have been included in the provisional agenda. All decisions in this regard shall be taken by consensus. In the event that consensus

cannot be reached after all efforts have been exhausted, a decision may be taken by two-third majority of those present and voting in secret ballot.

Rule 11(4) provides that the provisional agenda upon its approval by the Meeting of the Delegations of Member States shall be adopted as the agenda of the Session.

Admission of New Members

Rule 4 provides that the Organization may by a decision supported by a two-third majority of the Member States admit the participation of an Asian or African State, if such a State by written communication addressed to the Secretary-General of the Organization intimates its desire to participate in the Organization and its acceptance of the Statutes and the rules framed there under. Such decision may be taken by means of a resolution adopted in any of its sessions or by circulation if the period between the date of such application for admission and the next Session exceeds two months. In the latter case, the responses of the Participating States should be given within six weeks. If no response is received from any Participating State within the stipulated period, it shall be assumed that the concerned Participating State has no objection to the admission of the applicant State. The result will be communicated by the Secretary-General both to the Participating States and to the applicant State.

Admission of Observers

The admission of Observers is governed by Rule 18, and will be taken up by the Meeting of Delegations of Member States. According to the Organization's present practice, there are three categories of observers, namely: (i) observers representing non-member Asian-African States; (ii) observers representing States other than those in the Asian-African region; and (iii) observers representing United Nations, its organs and specialized agencies, other inter-governmental organizations and other international institutions.

In addition to these three categories, in accordance with the decision taken at AALCO's Twenty-Second Annual Session held in Colombo, Sri Lanka (1981), Australia and New Zealand enjoy Permanent Observer Status.

Observer delegations have the right to attend all meetings, except those which are declared closed meetings and attended exclusively by Delegations of Member States, and do not have the right to vote.

Election of the President

Rule 3(1) provides that at each Annual Session, the Organization shall elect a President. It has been the practice that the President of the Organization is elected from among the dignitaries of the Member State hosting the Session.

Election of the Vice-President

Rule 3(3) concerning the election of the Vice-President provides that in the election of the President and Vice-President, regional representation will be taken into consideration to the extent possible. In accordance with the established practice, if the President is from the Asian region, the Vice-President may be elected, preferably from a Member State in the African region.

III. ORGANIZATIONAL MATTERS

Report of the Secretary-General

Following Rule 20(7) of the Statutory Rules, the Secretary-General shall present an annual report to the Member States on the work of the Organization. The Report for the Fifty-Seventh Annual Session covers the activities of the Organization since its Fifty-Sixth Annual Session, including the substantive, organizational, financial and administrative matters.

Document: AALCO/57/TOKYO/2018/ORG 1

Financial Report and Proposed Budget for the Year 2019

In accordance with Rule 24(4), the AALCO's Proposed Budget for the year 2019, was presented during the 341st Meeting, held on 15 December 2017 and revised during the 344th meeting held on 21st June 2018. Liaison Officers discussed the budget proposal at the 342nd, 343rd and 344th meetings held on 15th February, 26th April, and 21st June 2018 respectively. The same shall be submitted to the Meeting of the Delegations of Member States of the AALCO at the Fifty-Seventh Annual Session for approval and final adoption.

Document: AALCO/57/TOKYO/2018/ORG 2

Report on the AALCO's Regional Centres for Arbitration

A report on the activities of the AALCO's Regional Arbitration Centres located in Kuala Lumpur, Cairo, Lagos, Tehran and Nairobi respectively, is to be submitted for consideration at the Fifty-Seventh Annual Session.

Document: AALCO/57/TOKYO/2018/ORG 3

IV. GENERAL DEBATE

At this Fifty-Seventh Annual Session, the Second General Meeting is meant for the General Statements to be delivered by the Hon'ble Ministers and Heads of the Delegations of Member States and Observers. It is recommended that general statements could be focus on the overarching theme "Global Governance and International Rule of Law". *Heads of Delegations are requested to kindly consider limiting their speech to 10 minutes due to paucity of time, so that the general statements could finish within the stipulated time.* However, if they wish to give a longer

statement, the same could be handed over to the Secretariat for reproduction in the Verbatim Record of the Session.

Submission of Statements

The Delegations wishing to make statements (General statements, and Statements on organizational and substantive matters) are kindly requested to read the statement at a reasonable speed and to handover three copies of their statement well in advance to the Secretariat. This would enable the interpreters (Arabic and English) to provide quality interpretation and ensure that the impact of the statements of the delegations is equally clear in all languages. It would be highly appreciated if soft copies of the statements could also be made available to the Secretariat.

For the accurate and speedy preparation of the Verbatim Record of the Annual Session, it would be highly appreciated if the Arab member States could provide an English version of their General Statement during the Annual Session.

Venue of the Upcoming Annual Session (Fifty-Eighth)

According to sub-rule (1) of Rule 10 of the Statutory Rules, the regular Annual Session of the Organization shall, in accordance with Article 4 of the Revised Statutes of AALCO, be held once in a year and such meetings shall, to the extent possible, be held in one of the Member States by geographical rotation. Those member States interested in hosting the next Annual Session are encouraged to inform the Secretariat at the earliest.

V. SUBSTANTIVE MATTERS

The Law of the Sea

It may be recalled that the agenda item “The Law of the Sea” was taken up for consideration by the AALCO at the initiative of the Government of Indonesia in 1970. Since then it has been considered as one of the priority items at successive Annual Sessions of the Organization.

AALCO Secretariat’s Report prepared for the Fifty-Seventh Annual Session presents *four* issues of salience, highlighting the relevant concerns and the pertinent legal developments that have taken place thereupon during the intervening period between the Fifty-Fifth and Fifty-Seventh Annual Session of AALCO (the item was not taken up for consideration last year at the Fifty-Sixth Annual Session held in Nairobi). The *first* topic delves into AALCO’s role in hailing the legal regime pertaining to the EEZ. The evolution of the regime has been chalked and the issue of fishing management in the EEZ discussed. The *second* topic pertains to the nuances of exploitation of mineral resources in deep seabed under the scheme of the upcoming ISA regulations. The *third* topic focuses on a normative discussion on the mandates, function and jurisdiction of the ITLOS and analyses recent cases in the forum; and the *fourth* topic gauges the possibility of charting a new treaty regime for the governing of marine biodiversity beyond national jurisdiction.

Peaceful Settlement of Disputes¹

The preliminary study on ‘Peaceful Settlement of Disputes’ has been prepared by the AALCO for discussion during the Fifty-Seventh Annual Session of AALCO to be held in Tokyo, Japan. Given its broad and all-encompassing nature, the topic in the view of the Secretariat requires a general overview that appreciates the role of peaceful settlement of disputes in contemporary international law at this stage. To this extent, the study is a prelude to a continuous long term engagement with the subject if such a requirement emerges from the Annual Session. Keeping this objective in mind, the study seeks to give a broad overview of the topic with special focus on both diplomatic and judicial modes of dispute settlement with specific thrust on the latter. The methodological approach of the study is both descriptive and analytical.

The dispute settlement mechanisms offered by the ICJ, WTO and the ICC are some of the specific thematic international institutions covered in the study. Effort has been made to specifically incorporate contemporary developments pertaining to dispute settlement in these bodies. The study takes the position that peaceful settlement of disputes is a non-negotiable global imperative which should be adopted by all States consistent with adequate flexibility being offered by International law on the specific method of dispute settlement. It also notes the friendly approach of many states towards judicial means of dispute settlement, a trend that is expected to stay its course in the times to come. However, it is also crucial to bear in mind that any proposition that does not factor in the sovereignty of States is unlikely to be sustainable in the long run and hence the need to balance this requirement is essential for the healthy growth and evolution of international law.

Document: AALCO/57/TOKYO/2018/SD/Additional Agenda item

International Law Commission

For this Annual Session, the Secretariat has prepared the document “Report on Matters relating to the Work of the International Law Commission at its Sixty–Ninth Session”. In accordance with Article 1 (d) of the AALCO’s Statutes, the Organization is mandated to “examine subjects that are under consideration by the International Law Commission (ILC or the Commission) and to forward the views of the Organization to the Commission; to consider the reports of the Commission and to make recommendations thereon, wherever necessary to the Member States”.

¹ An additional agenda item/ new topic, i.e. Peaceful Settlement of Disputes, has been proposed Japan by submitting the concept note No.11/1/18, dated 28 June 2018. The concept note was forwarded to all the Member States vide Note Verbale No.178/2018/57/AS/AALCO dated 3 August 2018.

In pursuance of this mandate, the Report on the Work of the International Law Commission at its Annual Session is taken up for consideration at the AALCO's Annual Sessions. In keeping with this long-standing practice, the Secretariat document for the Fifty-Seventh Session contains an overview of the ILC's work during its Sixty-Ninth Session.

The brief of the Secretariat for this year would provide a general overview of the progress of work achieved by the ILC at its Sixty-Ninth Session (2017) on topics relating to: Protection of the Atmosphere; *Jus Cogens*; Immunity of State Officials from Foreign Criminal Jurisdiction; Succession of States in respect of State Responsibility; Identification of Customary International Law; Protection of Environment In Relation to Armed Conflict; Provisional Application of Treaties; and Crimes against Humanity. The comments of Member States of AALCO delivered at the UN General Assembly Sixth Committee in its Seventy Second Session held in 2017 are also incorporated where available.

Please note that the Seventieth Session of the ILC is underway at the time of preparing the brief and the documents on the topics discussed therein shall only be publicly available in the coming months of 2018. Hence Member States are requested to note that the content of this brief is limited to the topics and deliberations of the Commission at its Sixty-Ninth Annual Session in 2017 for which statements and comments have been incorporated. In light of the aforesaid limitations, every effort shall be made by the Secretariat to update the Member States on the work of the Commission at its Seventieth Session in 2018 in the form of an Addendum to this Report.

Document: AALCO/57/TOKYO/2018/SD/S1

International Trade and Investment Law

AALCO has been actively involved in legal matters pertaining to international trade and investment, with respect to every issue that has been of interest to its Member States.

It has dealt with the topic "WTO as a Framework Agreement and Code of Conduct for the World Trade", including the WTO Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS), from the time when the Uruguay Round negotiations were completed in 1994 and had culminated in the establishment of the World Trade Organization (WTO) in 1995. This item continued to remain on the agenda of the Organization. At the Fifty-Fifth Annual Session of AALCO, in 2016, where the outcome of the 2015 Nairobi Ministerial Conference was discussed between Member States, the Secretariat was mandated 'to organize seminars or workshops to facilitate the exchange of views by Member States on issues currently under negotiation within the WTO and capacity building programs'.

At the Tokyo Session in 1974 AALCO endorsed the recommendations of its Trade Law Sub-Committee, and after subsequent Studies on the part of the Secretariat in this regard, AALCO entered into Agreements between the Governments of Malaysia, Arab Republic of Egypt, Nigeria,

Islamic Republic of Iran, and the Republic of Kenya, to establish Regional Arbitration Centers (RACs) therein.

AALCO has also long associated itself with the issue of a congenial investment environment, and actively worked towards the direction of having an appropriate investor-State relation. The Secretariat after the Twenty First Annual Session of AALCO in Jakarta, Indonesia, in 1980 prepared the tentative draft of a model bilateral agreement on investment protection intended to be applicable between the countries of the region to serve as a basis for preliminary discussions by an Expert Group. Thereafter AALCO decided to transmit to Member Governments the three Models of bilateral agreements for promotion and protection of investments. More recently on 2 March 2016, AALCO Secretariat organized a Seminar on “*International Investment and WTO*” at its Headquarters. The Seminar discussed topics like “Investor State Dispute Resolution: Current Challenges for Asian and African Countries”.

The Brief prepared for this Session provides the following three sub-topics:

Regional Trade Agreements and Effect on WTO: The negotiations under the GATT regime had soon begun to lose momentum and beginning in the early 1990s some countries seem to have given up on the Rounds. Since the early 2000s, these RTAs – as allowed under WTO rules – have really flourished. Interestingly, this development has taken place in the context of minimal progress in multilateral trade negotiations. There are divergent views on the economic implications of RTAs: that is, whether RTAs are stumbling blocks or building blocks toward future multilateral liberalization. Economic theory has long predicted that it could go either way.

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

The subject of the TRIPS Agreement is witnessing considerable new developments and challenges today. At the multilateral level, negotiations are under way in WTO to refine and expand certain areas of TRIPS agreement whereas in several Free Trade Agreements, there is already a process underway to introduce new provisions.

AALCO’s Regional Arbitration Centers: AALCO’s Regional Arbitration Centers RACs offer, facilitate, and assist for the conduct of arbitral proceedings, including the enforcement of awards made in the proceedings held under the auspices of the Centre.

In the year 2017 Global FDI flows fell by 23 percent to \$1.43 trillion. Investment treaty making has thus, reached a turning point. Today we are witnessing the continuance of the asymmetric structure of the International Investment Regime (IIR), in which economically powerful

enterprises impose investment arbitration on other nations in a one-sided manner. The ISDS is a defining and crucial characteristic of the investment regime. Scholars on the subject are again of the view that while the current ISDS mechanism may work well from the perspective of international investors, it entails considerable risks for host country governments.

Document: AALCO/57/TOKYO/2018/SD/S 13

VI. Working Group Meeting on International Law in Cyberspace

During the Annual Session a Working Group Meeting to discuss the “Report on the Future Work Plan of Action of the Working Group Meeting” prepared by Prof. Zhixiong Huang, Special rapporteur of the AALCO Working Group on the topic International Law in Cyberspace, as well as the three comments received from the Member States will be discussed.

The report has been prepared pursuant to the resolution AALCO/RES/56/S17 adopted at the 56th Annual Session of AALCO on 5 May 2017 which, among others, “directs the Rapporteur of the Open-ended Working Group on International Law in Cyberspace to prepare a report on the basis of discussions that have taken place thus far among the Member States, and the Special Study prepared by the Secretariat, laying down a future plan of action for the Working Group”.

VII. Side Events:

1. The 14th United Nations Congress on Crime Prevention and Criminal Justice 2020, proposed by Japan
2. Law of the Sea, proposed by Japan
3. 20th Anniversary of the ICC Rome Statute, proposed by Japan