

AAIL's Intervention at the 61st AALCO Annual Session

Mr President, distinguished delegates, this is the first time the Asian Academy of International Law takes the floor. AAIL thanks AALCO for inviting AAIL as an observer to participate in this Annual Session. We would also like to express our sincerest appreciation for the excellent papers that have been prepared by the Secretariat. As an observer to UNCITRAL Working Group III, AAIL attended the 46th Session of the Working Group III held in Vienna from 9 to 13 October 2023. We would like to share some thoughts on three matters relating to the ISDS reform: mediation for international investment disputes, and the two topics that were discussed in Vienna, the Advisory Centre and the Draft Provisions for Procedural and Cross-Cutting Issues.

At its 56th Commission Session held at Vienna in July 2023, the UNCITRAL Commission adopted the UNCITRAL Model Provisions on Mediation and the UNCITRAL Guidelines Mediation for International Investment Disputes. AAIL welcomes this reform as it is entirely consistent with the Asian and African culture of collaboration as well as the conciliatory nature of the Asian and African people. Investment, by its very definition, is long term. Preservation of a good working relationship working to achieve the common goal is pertinent to the success of the project. Using mediation to resolve disputes achieves the above objects and creates a win-win situation. The International Organization for Mediation once established will, no doubt, further this goal of the peaceful settlement of international investment disputes. Indeed, AAIL has also been active in providing capacity building programmes on international investment law and mediation with its partners such as ICSID since 2018. With the new Model Provisions and Guidelines on international investment mediation, AAIL would welcome the opportunity in further providing such capacity building programmes hopefully together with AALCO, and also in working on specific projects to explore how States can better utilise this dispute settlement mechanism.

Turning then to the discussions at Working Group III on the setting up of the Advisory Centre. Amongst various discussions conducted, two, in our view are particularly relevant to AALCO. First is who the beneficiaries of the Advisory Centre should be. Most developing States considered that SMEs (Small and Medium Enterprises) should not be a category of beneficiary of technical and legal advice (which includes representation in a specific case). It would appear, and rightly so, SMEs should be able to participate in capacity building or experience sharing activities of the Centre. After all disputes are better avoided than resolved. Another potential category of beneficiary of the services of the Advisory Centre is non-Member States. The benefit of providing such services would be to attract the LDCs (Least Developed Countries) to ultimately join as members of the Advisory Centre. This will achieve the access to justice for all in the long run. This of course is entirely a matter for the States and the answer will not be difficult if one recalls the original purpose and object of looking into the need of establishing an advisory centre.

The second matter that is germane to the utility of the advisory centre is its location or locations. As the main group of beneficiaries is intended to be the developing States, it is advisable, is it not, to have the Advisory Centre or its branches located in regions within or in the proximity of developing States. The paper suggests the location should have access to talent pool, and AAIL would suggest that the location should perhaps be one where talent pool can easily access. Locating such centres in developing States or in their region or proximity will likely bring about the inevitable effect of exposing the local legal fraternity to developments on international investment law and investment protection, thereby enhancing the more

sustainable growth of a local talent pool conversant with this area of law and the dispute resolution mechanism. Financing is no doubt a controversial issue but where there is a will there is a way. The Draft Provisions have concluded its first reading and it is hoped that it will be ready for recommendation for adoption by the Commission in July 2024. Views of AALCO must be conveyed in time so that the interests of developing States are well taken into account.

The third area we would like to comment on is the new topic to be addressed in Working Group III: the Draft Provisions on Procedural and Cross-Cutting Issues. There are only 25 draft provisions, but for some of them, there may be no easy way to get consensus. For instance, the provision on damages assessment is prioritised by many developing States, but there is also a view that it should not be considered in Working Group III as it is a substantive law as opposed to a procedural law issue. Bearing in mind the magnitude of damages that have been ordered by tribunals against host States, it is not difficult to understand the concerns of the developing States on how damages should be assessed and to even consider whether a cap should be introduced. This is not just a matter of interest to host States but should also be of concern to investors. After all two important elements of the rule of law is predictability and foreseeability. A discussion on damages assessment, whether it be procedural or substantive law, may be relevant if viewed in the context of upholding the international rule of law. In preparation of being ready for the discussion, States should be conversant on the concepts of assessing damages, the formulation of the Discounted Cashflow, how to assess the Net Present Value and Internal Rate of Returns or such like. The counterfactuals involved can vary but may also be pivotal to the amount of damages to be awarded. AAIL believes that it may be beneficial if a capacity building course can be conducted so that States are better prepared for their discussion at Working Group III and AALCO will be well placed to provide the same. AAIL will be happy to assist where it can.

Another matter that should be considered is the escalation clauses in Section A of the Draft Provisions. Due weight must be given to the desirability of using mediation as a cost-effective means to resolve the dispute or prevent it from escalating to one that necessitates the use of the more adversarial means of arbitration. Provisions must therefore be introduced to counter the undesirable effect of concepts of admissibility as opposed to jurisdiction which would preclude a party from engaging the use of mediation before arbitration is commenced.

There are other provisions that necessitate a good review and, as it is planned that it would not be recommended for adoption prior to 2025, there would probably be time to properly address them. Yet the time for provision of capacity building for the assessment of damages, and possibly also looking at the State's right to regulate, a matter closely concerned by a number of States, cannot wait.

Mr President, the ISDS reform is an opportunity to address the issues that have been viewed by some as unsatisfactory. The current discussion on the ISDS reform provides a prime opportunity for AALCO Member States, many of whom are host States of foreign investments, to reshape the dispute resolution mechanism and to correct the current international investment regime. AAIL is willing and prepared to work with AALCO and its Member States on capacity building programmes.

With that, I thank the President for allowing us to have the floor, and I thank the Secretariat and the host State, Indonesia, for a very good conference. Thank you very much!

19 October 2023