Since the question of International Commercial Arbitration was split into two specific questions relating, first, to the adoption of a protocol to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, secondly, the Establishment of Regional Arbitration Centres, these two are treated as separate subjects and discussed separately in the following notes.

(A) *Adoption of a Protocol to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

In relation to the resolution adopted at the Kuala Lumpur Session, the Trade Law Sub-Committee confirmed the following at the Baghdad Session (1977) :

(a) That the formal resolution of the AALCC should be considered in the light of the text of the report of the Sub-Committee at that session which led to that resolution;

(b) The sub-paragraphs (a) and (b) in paragraph 3 of that resolution were inter-related; and

(c) That the primary intention of sub-paragraph (c) was to prevent a governmental agency from invoking sovereign immunity, at all stages of arbitration, including the stage of recognition or enforcement of the arbitral award.

Further, in view of the importance of the proposals contained in the resolution for the promotion of commercial arbitration in the Asian-African region as an effective means of settling disputes, the Sub-Committee recommended that the AALCC should be represented at the tenth session of UNCITRAL at which this matter was to be taken up, to reflect the views of the AALCC fully before that forum, and that the delegations to that session of UNCITRAL from member States of the AALCC should be properly briefed in regard to the AALCC's resolution so that it could be effectively discussed by UNCITRAL. The recommendations of the Sub-Committee were endorsed by the plenary of the AALCC.

The AALCC's proposals were considered by UNCITRAL at its tenth session (1977) and the AALCC was represented at that session by its Secretary-General. There was agreement in the Commission that the matters which the AALCC had brought to the attention of the Commission raised important issues in the context of international commercial arbitration and justified further consideration by the Commission. The predominant opinion in the Commission was that if it were decided at a later stage to implement the proposals of the AALCC, the preparation of a protocol to the 1958 Convention might not be an appropriate approach. Various suggestions were made about the appropriate means to implement the proposals of the AALCC including the possibility of having a separate convention in simpler terms. Another suggestion was about the possibility of preparing a new international convention containing a uniform law on arbitration which could draw upon the 1961 and 1966 European Conventions.

In regard to the AALCC's recommendation for exclusion of sovereign immunity, a view was expressed that an optional model clause might be drafted which could be used in conjunction with the UNCITRAL Arbitration Rules under which States, State-owned agencies and entities of public law which enter into transactions with private firms would expressly agree not to invoke sovereign immunity in connection with arbitration and possible enforcement of the award. Some reservations were also expressed that as a matter of principle, in so far as States and governments are concerned, the issue of sovereign immunity was a part of a more general and complex problem having an obviously political and public international law character.

The Commission requested its Secretariat to consult with the AALCC and other interested international organisations and to prepare studies on the matters raised by the AALCC.

The UNCITRAL Secretariat, accordingly, submitted two reports to the twelfth session (1979) of the Commission. One analyzed over 100 court decisions concerning the application and interpretation of 1958 New York Convention (A/CN.9/168).

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The report concluded that the Convention, despite a few minor lacunae, had satisfactorily met the general purpose for which it was adopted. The second report (A/CN.9/169) discussed the need for greater uniformity of national laws on arbitral procedure and the desirability of establishing standards for modern and fair arbitration procedures. The report suggested that the Commission commence work on a model law on arbitral procedure which could help overcome most of the problems identified in the above survey and meet the concerns expressed in the recommendations of the AALCC. Having considered these reports, the Commission was agreed that there was no need to alter or amend, by way of protocol or revision, the 1958 Convention. At the same time, it was agreed that a model law could assist States in reforming and modernising their laws on arbitral procedure and would thus help to reduce the divergencies encountered in the interpretation of the 1958 Convention. The Commission directed its Secretariat to prepare (a) an analytical compilation of the provisions of national laws pertaining to arbitral procedure; and (b) a preliminary draft of a model law on arbitral procedure.

At its fourteenth session (1981), the Commission considered a report prepared by its Secretariat entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207). The first part of the report dealt with the concerns which should be met by the proposed model law and with the principles which could underlie it. The second part attempted to identify all those issues which could be dealt with in the proposed model law. The conclusion of the report was "The preparation of a model law on international commercial arbitration is desirable in view of the manifold problems encountered in present arbitration practice..... It also seems to be the appropriate time for such an undertaking since international arbitrations are increasing and there are intentions in a number of States to adopt legislation geared thereto". This conclusion was endorsed by the Commission subject to two conditions, namely (i) that the scope of application of the draft model law be restricted to international commercial arbitration; and (ii) that due account be taken of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

and the 1976 UNCITRAL Arbitration Rules. The Commission was also agreed that the report (A/CN.9/207) setting forth the concerns, purposes and possible contents of the draft model law would provide a useful basis for the preparation of the model law. However, in view of the complexity of the issues and the work involved in the preparation of draft model law, the Commission decided to entrust the Working Group on International Contract Practices with that task.

The Working Group met in New York from 16 to 26 February 1982 for its first session and commenced its work of preparing a draft model law. The Working Group met for its second session in Vienna from 4 to 15 October 1982.

The follow-up action in the Commission on the AALCC's recommendations is being kept under constant review by the AALCC and it is represented as an Observer in the meetings of the Working Group on International Contract Practices.

(B) Establishment of Regional Arbitration Centres

During the Kuala Lumpur Session (1976), the Trade Law Sub-Committee noted that while many arbitral institutions were located in the developed countries in the West, only a few were in the Asian-African region. Although some of the countries in the region did have chambers of commerce providing arbitration facilities, their use was mainly confined to settlement of disputes between local parties. It was felt that even the use of the UNCITRAL Arbitration Rules would be enhanced if this region could provide assistance in administering *ad hoc* arbitrations through the establishment of a regional centre or centres with adequate facilities. It was also felt that the promotion of inter-institutional arrangements for effective cooperation among existing institutions in the region through a regional arbitration centre could also create an atmosphere that international commercial arbitration proceedings need no longer be confined to the West. The Sub-Committee, therefore, decided to request the Secretariat to investigate the feasibility and usefulness of establishing regional arbitration centres and to ascertain the means of attaining effective inter-institutional co-operation among the existing arbitral institutions in the region.

In pursuance of the Trade Law Sub-Committee's request, a study was prepared by the AALCC's Secretariat after extensive discussions with the officials of UNCITRAL, certain organisations of trade, arbitral institutions and experts in the field. The study contained a general survey of the existing pattern of international commercial arbitration, the phenomenal increase in the number of such arbitrations in which governments and government undertakings were involved, the need to promote arbitral institutions within the region and the support that could be expected from various quarters to the taking up of the project. The conclusions made in the study were in favour of establishment of six arbitration centres in the region located one each in six sub-regions, namely East Asia, South-East Asia, West Asia, North Africa, East Africa and West Africa. It was, however, pointed out that the scheme could initially work with two centres and other centres could be established in the light of experience and volume of work. This study was placed before the Baghdad Session of the AALCC (1977).

At the Baghdad Session, the Trade Law Sub-Committee after extensive deliberations made the following recommendations :

"1. That two arbitration centres be established within the region, one in Asia and one in Africa;

2. That the functions of the centres be, *inter alia*,

(a) Promoting international commercial arbitration in the region;

(b) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the region;

(c) Rendering assistance in the conduct of *ad hoc* arbitrations, particularly those held under the UNCITRAL Arbitration Rules;

(d) Assisting the enforcement of arbitral awards; and

(e) Providing for arbitration under the auspices of the centre where appropriate.

3. That in order to implement the proposals noted above, the Secretary-General of the Committee be requested :

(a) To approach Governments and existing arbitral institutions with a view to obtaining suitable facilities with the necessary finances for the projected centres;

(b) To take the necessary steps to establish the centres at appropriate locations and to assist in providing a suitable administrative structure for the independent functioning of the centres; and

(c) To assure that the centres carry out the functions listed in sub-paragraph (2) above as they become practicable."

In pursuance of the aforesaid decision, the AALCC's Secretariat prepared a scheme for the establishment of two arbitration centres together with a Memorandum which was transmitted to all member governments in March 1977. Although several governments generally evinced their interest in having the centre in their countries, concrete proposals were made by two governments, namely the Arab Republic of Egypt in regard to the centre to be located in Africa and the Government of Malaysia in regard to the centre to be located in Asia.

During the Doha Session (1978) of the AALCC, the Trade Law Sub-Committee reviewed the question of establishment of regional centres for commercial arbitration in the region on the basis of a progress report presented by the Secretary-General of the AALCC. The Sub-Committee approved the establishment of two centres in Kuala Lumpur and Cairo respectively and requested the Secretary-General to examine the po sibility of establishing a third centre in other regions, such as West or East Africa.

As a follow-up of the above recommendations, a Regional Centre for Commercial Arbitration was established in Kuala Lumpur on 16 October 1978 and another Centre in Cairo following an agreement concluded on 28 January 1979 between the Government of the Arab Republic of Egypt and the AALCC.

The broad functions allocated to these Centres included the following :

(i) Promotional functions as the co-ordinating agency in relation to countries in their respective regions-rendering of assistance in the promotion and growth of national arbitral institutions;

(ii) Assistance and provision of facilities for holding of arbitration proceedings in *ad hoc* arbitrations;

(iii) Assistance in the enforcement of awards;

(iv) Rendering of advice and assistance to parties who may approach either of the Centres; maintenance of an international panel of arbitrators to assist the parties; and

(v) Rendering of administrative services and assistance upon request to other institutions with whom appropriate arrangements have been made in regard to arbitration proceedings under the auspices of those institutions.

The establishment of the two Centres was followed by conclusion of agreements between the AALCC, the respective Centre and the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for mutual cooperation in the conduct of arbitration proceedings for settlement of disputes arising out of foreign investments. The agreement in relation to the Kuala Lumpur Centre was signed on 5 February 1979 and that in relation to the Cairo Centre on 6 February 1980. The agreements provided that in cases of disputes and differences arising between a government and a foreign investor, where the parties agree to have such disputes and differences settled under the 1965 International Convention for the Settlement of Investment Disputes, the proceedings may be held wholly or in part at the Kuala Lumpur/Cairo Centre, as the case might be, thus obviating the necessity for the governments of the region to pursue their cases in Washington. The agreements further provided that ICSID will accord facilities for the

conduct of arbitration proceedings and recording of evidence in arbitrations held under either of these Centres.

Seoul Session (1979)

At the twentieth session of the AALCC held in Seoul (February 1979), the Trade Law Sub-Committee discussed the question of the appropriate rules which should be applied by the Regional Centres in arbitrations held under their auspices. The Sub-Committee recalled that it had earlier decided that the Centres would in the first place seek to administer arbitration under the UNCITRAL Arbitration Rules. The question which engaged the particular attention of the Sub-Committee was whether the UNCITRAL Arbitration Rules should be modified so as to include provisions relating to administration or whether those Rules should remain unchanged and be complemented by internal or administrative rules of the Centres. A further question was whether the UNCITRAL Rules were designed solely to be applied in *ad hoc* arbitrations, or whether they could also serve in institutional or administered arbitrations. After deliberation, the Sub-Committee reached the view that since the Centres would also administer arbitration between parties of which one would have his place of business outside the region, it was important that the UNCITRAL Rules remained unchanged, unless modified by the parties. Such modification would be achieved if the parties had agreed to have their arbitration conducted under the auspices of a Regional Centre to the extent that the administrative rules of the Centre modify the UNCITRAL Rules. Furthermore, it had always been the view of UNCITRAL that arbitral institutions would play a role in arbitrations under the UNCITRAL Rules. In most cases, it would be achieved when the parties, in their arbitration clauses, designated an arbitral institution to serve as the 'appointing authority'. The Sub-Committee noted that a number of existing arbitral institutions had already made arrangements to serve as appointing authority and to administer arbitrations under the UNCITRAL Rules. Since those rules conferred certain functions on the appointing authority, those functions would automatically be exercised by the Centres. For this it was necessary that the arbitration clause

agreed to by the parties contained a reference to the UNCITRAL Arbitration Rules and to the administrative rules of the Centres under whose auspices the arbitration would take place.

With the above understanding, the Sub-Committee requested the Secretariat to prepare a draft model arbitration clause which would ensure arbitration in accordance with the UNCITRAL Arbitration Rules under the auspices of, and administered by, a Regional Arbitration Centre, and a draft set of administrative rules in accordance with which such a Centre would administer the arbitration. The Secretariat was further requested to submit the draft model arbitration clause and the draft set of administrative rules to the member governments of the AALCC for observations. The Sub-Committee decided to consider the draft texts in the light of the observations received from Governments at an inter-sessional meeting to be held at Kuala Lumpur in July 1979.

Accordingly, the Trade Law Sub-Committee held its inter-sessional meeting in Kuala Lumpur on the 2nd, 3rd and 6th July 1979. It was attended by fifteen member governments, namely Arab Republic of Egypt, Indonesia, Japan, Kenya, Republic of Korea, Kuwait, Malaysia, Pakistan, Philippines, Singapore, Somali Democratic Republic, Sri Lanka, Thailand, Turkey and Yemen Arab Republic. Lesotho and UNCITRAL were represented as Observers.

The Sub-Committee finalized and adopted the rules for arbitration of the Kuala Lumpur Regional Arbitration Centre for cases where the arbitration is held under the auspices of that Centre. The Sub-Committee also finalized the model arbitration clauses applicable to such cases. It was agreed that the rules and model arbitration clauses in relation to the Cairo Centre should be in identical terms.

(C) *UNCITRAL Draft Conciliation Rules*

Conciliation is broadly defined as "a procedure to achieve an amicable dispute settlement with the assistance of an independent third party". Conciliation differs from arbitration

or court proceedings in that while an award or decision is binding on the parties, conciliation has for its purpose the recommending of possible settlement terms. These terms become binding on the parties after they have agreed to them.

Arbitration is generally preferred by the business community to court proceedings. But, of late, arbitration is increasingly becoming a costly and time-consuming proposition. Conciliation, by providing a flexible, effective and expeditious solution to business disputes, therefore, presents itself as a viable alternative to arbitration.

One particular advantage in conciliation is said to be its non-adversary character. While it cannot be said with certainty that arbitration impairs business relations by virtue of its adversary character, it cannot be gainsaid that conciliation is conducive to the preservation of good business relations. In fact, conciliation appeals to business partners who have long standing relations and who wish to maintain them despite one time difference. There is a growing tendency in many countries to settle disputes by conciliation. Moreover, it has been found useful in regions and countries where it is well-known and frequently used.

Legal considerations also point in favour of conciliation. Procedural laws and rules obstruct arbitrators and judges from promoting amicable settlements. Certain matters may not be arbitrable under the applicable law or because parties lack the legal capacity to arbitration. Uncertainty about the applicable law may deter the parties from submitting to arbitration or litigation. On the other hand, conciliation could profitably be employed in matters which are less judicial than technical. Conciliation may even be preferred in areas governed by legal provisions for the very reason that it lessens the severity of such rules. Thus, conciliation has a wider scope of application than any juridical procedure which is limited to certain subject-matters regulated by definite rules.

But conciliation has certain potential disadvantages as well. Conciliation, if unsuccessful, could lead to additional

costs and time being spent by the parties. An abortive conciliation may adversely affect the interests of the parties in later adversary proceedings. However, these drawbacks may be offset by the following considerations. Parties resort to conciliation only when they have firm expectations about the certainty of an amicable settlement. If parties during the conciliation proceedings realize that a settlement agreement is not possible, they will discontinue the conciliation proceedings and so avoid further expense. However, these considerations could be effective in eliminating the drawbacks of conciliation only if conciliation rules are drafted accordingly, e.g. by requiring consent at the start of the proceedings and not foreclosing other procedures should conciliation become infructuous, by ensuring inexpensive and speedy proceedings, such as rules for the possibility of written proceedings, appointment of a single conciliator as a general rule and reasonably short periods for submission of documents.

It was with the aforesaid considerations in mind and the objective of making it worthwhile for the parties to attempt a settlement through conciliation that the UNCITRAL Secretariat had drafted a preliminary set of Conciliation Rules and presented before its twelfth session (June 1979). There was agreement in the Commission that the procedure envisaged in the Conciliation Rules should be simple, flexible and expeditious; that the parties should be free to modify the rules and to terminate the proceedings at any time; that the conciliator should have an active role and have wide discretion in the conduct of proceedings; and that the Conciliation Rules should contain clear provisions so that later resort to arbitration would not be influenced by what had happened in conciliation. The Commission approved certain draft rules, but in respect of others it suggested modifications. The Commission's Secretariat prepared a revised text of these rules in consultation with international organizations and arbitral institutions, including the ICCA and ICC and the revised text was submitted to governments for observations.

The revised Draft Rules on Conciliation were examined by the Trade Law Sub-Committee during the twenty-first session

of the AALCC held in Jakarta (April-May 1980). The Sub-Committee welcomed the initiative taken by UNCITRAL in preparing these rules and expressed the hope that their adoption would be conducive to the expeditious settlement of disputes in international commercial transactions. Although there was a general consensus that the draft Rules as a whole were worthy of support, there were a few divergent views on some of the provisions.

The first concerned Article 3 on number of conciliators. Some delegates felt that the number of the conciliators should never be even as this might lead to difficulty in reaching a recommendation. Others felt that the number of the conciliators should be one unless the parties decided otherwise.

The second observation related to the appointment of conciliators. Some delegates felt that the parties should agree on the appointment of the conciliator(s) because there was the underlying suspicion of the partiality or bias where each party appointed his own conciliator. This view was not shared by other delegates who thought the underlying principle in conciliation was the impartiality of the conciliator(s). Therefore, Article 4 should be retained in its present form.

The third observation related to Article 13(3). Some delegates felt that the provision should be carefully examined. In the first place, to the extent that it appeared to lay down the rule that such a settlement agreement was binding in the same way as any other contract, this provision stated the obvious. Secondly, the provision might be misconstrued as laying down the rule that such an agreement was enforceable in the same way as a final and binding judgment or arbitral award. Other delegates, however, thought that it was useful to retain this paragraph of Article 13.

There was some question as to the wisdom of prohibiting the conciliator from acting as an arbitrator or witness in future arbitral or judicial proceedings as envisaged in Article 19. The reason was that, firstly, since the conciliator was not a party to the conciliation agreement, this rule would not bind him; and,

secondly, these were matters regulated by the applicable procedural rules.

In regard to Article 20 on admissibility of evidence in other proceedings, the view was expressed that the list of matters excluded from being introduced in subsequent arbitral or judicial proceedings was too restrictive, and that it should be expanded to documents prepared specifically for the purpose of the conciliation proceedings, e.g, statements submitted under Article 5.

(IV) REGIONAL CO-OPERATION IN THE CONTEXT OF THE NEW INTERNATIONAL ECONOMIC ORDER

Introductory

Although the role originally assigned to the Asian-African Legal Consultative Committee (AALCC) lay primarily in the field of public international law, its activities had from time to time been widened to keep pace with the needs and requirements of its member governments consistent with the AALCC's broader objectives as a forum for Asian-African co-operation. This trend has particularly been evidenced in the field of economic relations and also in regard to some of the major issues before the United Nations where concerted action on the part of the countries of the Asian-African region was deemed necessary.

Thus, with the adoption of the first U.N. Development Decade in 1960, the AALCC at its third session held in Colombo in 1960, at the initiative of the Government of India, decided to take up for examination various questions and issues concerning the international sale of goods and commodities in view of the expected changes in the trading pattern of the countries of the region consequent upon the achievement of their political independence. At its fourth session

held in Tokyo in 1961, the AALCC approved of a plan of work aimed at assisting the member governments in enactment of suitable legislations in the field of trade and commerce including foreign investments, customs regulation and foreign exchange control to suit the needs of their development programmes.

The AALCC's involvement in the economic field led to the establishment of official relations with UNCTAD in 1968, and one of the important initiatives which the AALCC was able to take within the framework of UNCTAD's programme in the field of shipping, was to help in the consolidation of the position of developing nations in regard to the adoption of a Code of Conduct for Liner Conferences. At its eleventh session held in Accra in 1970, the AALCC decided upon the establishment of a standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities, and official relations were established with UNCITRAL the following year which has since resulted in fruitful and effective collaboration between the two organisations in several areas. These areas have included international sale of goods, international commercial arbitration, international shipping legislation and international payments. UNCITRAL's current work on legal aspects of the new international economic order is based on a programme suggested by the AALCC.

At its seventeenth session held in Kuala Lumpur in 1976, the AALCC recommended the adoption of two standard contract forms for sale transactions in commodities (agricultural produce and minerals) which are normally exported from the countries of the region with a view to replacing the standard terms and conditions of sale drawn up by trading institutions in the West and oriented to the needs of a colonial economy. These terms and conditions worked unfavourably to the exporters in the developing countries and needed to be reviewed considering the fact that the primary commodities constitute the wealth of the new nations in Asia and Africa. The AALCC subsequently developed another standard contract form relating to durable consumer goods and light machinery in view of the

fact that the more developed of the developing countries of the region had begun manufacturing such goods and exporting the same.

But perhaps the more spectacular and tangible achievement of the AALCC in the economic field was the adoption of its integrated scheme for settlement of disputes in economic and commercial fields with a view to creating stability and confidence in economic transactions within the region. The scheme which was elaborated through deliberations at the Kuala Lumpur (1976), Baghdad (1977) and Doha (1978) Sessions of the AALCC envisages development of national arbitral centres under the auspices of the AALCC and making available the services of specialised arbitral institutions to the countries of the region within the framework of the integrated scheme. Two regional centres, one in Kuala Lumpur and the second in Cairo, have already been established and a third centre to be located in Lagos is in the course of formation. The World Bank's Centre for the Settlement of Investment Disputes (ICSID) has concluded formal agreements with the AALCC in relation to its regional centres in Kuala Lumpur and Cairo for mutual cooperation and assistance thus recognising the useful role the AALCC's centres could play in bringing about stability and confidence in the field of foreign investments.

Another important area on which the AALCC has embarked upon pursuant to a decision taken at its twentieth session held in Seoul in February 1979, relates to the optimum utilization of the resources of the exclusive economic zone. The international acceptance of the concept of a 200-mile economic zone has brought within national jurisdictions vast resources, both living and non-living. The conservation, management and optimum utilization of this new source of economic wealth is therefore a matter of vital concern to the developing countries of this region. Consequently, the AALCC has adopted a programme of work in order to assist the member governments in the context of the urgent need for conservation, development and exploitation of the fishery resources of the exclusive economic zones. The work accomp-

lished so far includes : (i) Draft Guidelines for Legislation on Fisheries; (ii) Model Draft of an Agreement relating to Foreign Fishing in the Exclusive Economic Zone/Fisheries Waters of a Coastal State and Cooperation in the Conservation and Management of the Fishery Resources Therein; and (iii) Draft Guidelines for an Equity/a Contractual Joint Venture Arangement between an Entity in the Coastal State (Government Undertaking, Corporation, Company or Individual) and a Foreign Enterprise or Entity.

It has been, however, felt that there are some other areas where the AALCC can play a positive role towards the economic growth of the developing countries of the region by generating new ideas and new policy approaches and by formulation of appropriate legal framework through which the objectives could be achieved. The most important of these is in the field of industrialization. The AALCC has within its membership all the major oil producing countries of the region who are now in a position to reshape the pattern of industrial growth and location of industries through undertaking downstream activities in relation to their petroleum resources and assist the developing countries in that process. There are within this region industrialized countries with sophisticated and highly advanced technology. There are also a number of countries which may be regarded as the developed of the developing which have acquired skill and technology in certain fields which could be more easily shared with other developing countries of the region for their mutual benefit. Several developing countries have enormous natural resources and mineral wealth, some of which is yet to be exploited. There is also abundance of manpower in certain areas. There is thus considerable scope for arrangements for co-operation between the countries of this region, which could have as their objective the harnessing of the available resources for the economic growth of the developing countries.

A study on some of these aspects was prepared by the AALCC Secretary-General to provide a basis for discussion at the twentieth session of the AALCC held in Jakarta (April-May 1980). The full text of the study is given below :