ongoing Uruguay Round negotiations under the GATT auspices related to Trade Related Intellectual Property Rights (TRIPs). GATT is strictly speaking not the forum for discussing the question of intellectual property for which there are separate fora such as WIPO. The reason why the US was nevertheless interested in bringing intellectual property into GATT is because by linking it with trade, it gives the US the possibility of retaliatory action which would not have been possible in other fora.

Patenting, the most familiar form of IPR, until very recently only applied to inventions which were applicable in industry. Earlier even in the western countries, society had prevented this kind of monopolization of knowledge being extended to important areas such as treatment of diseases and agriculture. But over the years, the idea of intellectual property has started being extended to plants also. A special type of property right adapted to plants was created which is known as plant breeders' rights (PBRs). With the takeover of the seed companies by the multinational corporations and the coming of biotechnology, there is now a demand for a stronger monopoly of Plant Breeder Rights. Under these rights the farmers will be prevented from using the variety to develop new varieties for 20 years for which the right might be granted. Since patents give the possibility of making unlimited number of claims, it gives the multinationals the opportunity to claim not only individual varieties but also charactertstics and even species and genera. Already patents have been given for plants in the US and Europe; in 1985 in the US and 1989 in Europe. The home countries of these multinationals have taken a stand supporting the Plant Breeders Rights in various fora. In the TRIPs negotiations as well as in the WIPO, the US has been arguing for the stronger form of monopolies represented by PBRs to be made applicable to plants and animals.[5] Developing countries should take a concerted stand against these developments lest agricultural development is allowed to take place in a particular direction which will be principally in the interest of multinational corporations.

Another issue of vital importance relates to the question of financial resources and the financing mechanism for the application of the Convention nationally and internationally. The basic principles of each Contracting State providing financial support for its national activities related to conservation and sustainable use of biodiversity and the commitment of the developed country Parties to provide new and additional resources for meeting the agreed incremental costs to the developing country Parties in

5. Usha Menon "Intellectual Property Rights and Agriculture Development", *Economic and Political Weekly* (New Delhi) July 6-13, 1991;
UPOV. Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants, Geneva, March 4 to 19, 1991.

fulfilling their obligations under the Convention have been enshrined in the Convention. However, the incremental costs and a list of developed countries have and their scale of contributions have as yet to be established by the Conference of the Parties.

Similarly, the financial facility which will administer the funds to the developing countries has still to be agreed on by the Conference of the Parties. Pending the finalization of these arrangements, the Global Financial Facility (GEF) of the UNDP, UNEP and the World Bank has been instituted as the financial facility for the interim period. The GEF was established in 1990 with a funding of US $ 1300 million to provide grants on highly concessional resources to developing countries to meet the costs of well appraised conservation projects in four sectors; global warming, biological diversity, pollution of international waters and depletion of the protective ozone layer. Subsequently, at the insistence of the developing countries, land degradation problems, primarily in desertification and deforestation, that are tied to one of the four other problem, areas were made eligible for funding.

At present, the industrialised countries that have made contributions to the GEF control approval of projects. The UNDP and the UNEP supply the technical and scientific expertise to evaluate projects and the World Bank manages them when approved. The Convention, however, insists that before the GEF becomes the funding mechanism for the interim period it would be necessary to make it more transparent and democratic in its functioning. Recently, 15 developing countries including China, India and Brazil negotiated with the United States, West European nations and Japan at a two-day meeting in Washington in May 1992.[6] It has been agreed to expand the membership and to share power in the GEF. Revised procedures are being prepared, under which decisions will be taken by consensus and if a vote is called for, developing countries as a group or industrialized countries as a block can veto a project.

6. US Information Sevice, New Delhi. *Economic News from USA* (June 1992).

IX. International Trade Law Legal Aspects of Privatization

(i) Introduction

It was noted by the standing Sub-Committee on International Trade Law Matters at the thirtieth session of the AALCC (Cairo, 1991) that in the economies of most of the Member States of the AALCC, public sector enterprises or undertakings (PSEs or PSUs) played an important role and that their econimies were dominated by such enterprises. It was further noted that in recent years, various multilateral financial and monetary institutions had put pressures on developing countries tc go in for privatization of these undertakings, making it virtually a precondition for the grant of financial assistance and the extent thereof. The Sub-Committee, taking note of these developments, requested the AALCC Secretariat to commence a study on the legal issues involved in the matter of privatization with the final objective of preparation of a guide on legal aspects of privatization in Asia and Africa. The principal aim of such a guide would be to assist the Member Governments in carrying out their privatization programmes in a manner which would be consistent with their national economic interests.

Since the preconditions, basic methods and procedures for privatization and the legal issues involved would vary from one country to another, the view was expressed that it would be necessary for the Secretariat first to collect the relevant information from the Meamber Governments so that it is able to identify the policy and legal issues involved before commencing a study on the topic. Consequently, the Secretariat prepared a questionnaire requesting the Member Governments to furnish the required information. That questionnaire was circulated by the Secretary-General vide his letter dated the 39th of July 1991 requesting the relevant authorities in the Member Governments to respond to the questionnaire as early as possible.

The Thirty-first Session of the AALCC was held in Islamabad (Pakistan) in January-February 1992. Before the Islamabad Session only the Governments of Singapore and Thailand had responded to the questionnaire. Consequently, only a preliminary study was presented at the Islamabad Session. At that session, the topic was discussed in the Trade Law Sub-Committee. The Sub-Committee noting that the topic of privatization had acquired immense importance for the developing countries in view of the far reaching structural changes taking place in the global economy having impact on national economies, adopted a recommendation that the Plenary urge the Member Governments which had not responded to the Secretariat questionnaire to do so and/or furnish relevant documentation to the Secretatiat at the earliest.

The Governments of Indonesia, Turkey and Kuwait have recently sent in useful information in response to the Secretariat Questionnaire. The Government of Cyprus has communicated that since "The driving force in the economy of Cyprus is the private sector which owns or controls almost the totality of business and enterprises in Cyprus, the issue of privatization has not arisen in Cyprus". The Government of Indonesia has sent in comprehensive information, but Secretariat was unable to make use of it as it is in their national language. In addition to this, the Secretariat has been able to collect some useful information from other sources such as the World Bank, UNIDROIT and the Economic Commission for Europe (ECE).

In view of the lack of adequate information from several Member Governments about their privatization programmes, underway or contemplated, it is difficult for the Secretariat to prepare any comprehensive study on the topic. However, in view of the topical importance of this matter for the developing countries in general and with a view to facilitating discussion at the Kampala session, the Secretariat submitted a preliminary study revised in the light of the information received.

The information sent in by the Governments of Kuwait, Singapore, Thailand and Turkey are reproduced as Annexes I, II, III and IV of the following study on 'Privatization.

Thirty-second Session: Discussions

The Assistant Secretary-General Mr. Essam A.R. Moh'd introduced the Secretariat Study on this topic and pointed out that this study was prepared by the Secretariat in the light of the information provided by some Member Governments such as Indonesia, Kuwait, Singapore, Thailand and Turkey and International Institutions like the World Bank, the Economic Commission

for Europe (ECE) and the UNIDROIT. He clarified that unless more Member Governments responded to the questionnaire of the Secretariat, it would be extremely difficult to undertake the task of preparing a guide on legal aspects of privatization in Asia and Africa. He therefore requested the Committee to urge the Member Governments who had not done so, to resopnd to the Secretariat's questionnaire at their earliest.

He thanked the Government of Japan and Uganda for providing comprehensive information through the Secretariat's questionnaire, at the current Session.

The Committee, recognising the significance and importance of this topic, particularly for the developing countries, adopted the following Decisions.

(ii) Decision on 'Privatization'

Adopted on 5.2.1993

The Asian-African Legal Consultative Committee

Having considered the Secretariat brief on the 'Legal Issues involved in the matter of Privatization of State-owned Enterprises' contained in document No. AALCC\XXXII\Kampala\93\13;

1. *Expresses* its appreciation to the Secretary-General for the lucid and comprehensive study;
2. *Thanks* the Member Governments which have, in response to the Secretariat's questionnaire, furnished the requisite information;
3. *Requests* the Member Governments which have not so far responded to the Secretariat's questionnaire to do so at their earliest convenience;
4. *Urges* all Member States and Observer Delegations to make available to the Secretariat information relating to privatization plans or programmes, underway or contemplated, in their countries and the legal framework under which such plans or programmes are being implemented or are to be implemented, to enable the Secretariat to complete its task of formulation of a Guide on Legal Aspects of Privatization in Asia and Africa with particular reference to Member States of the AALCC; and
5. *Decides* to place this item on the agenda of its Thirty-third session.

(iii) Secretariat Study : Legal Issues Involved in the matter of Privatization of State-Owned Enterprises

Background

Most of the developing countries in Asia and Africa achieved their political independence in the 1950s and 1960s as a culmination of the process of decolonisation set in motion by the United Nations soon after its inception in 1945. After attaining political emancipation, one major challenge before the newly independent States was to select a development model which could revitalize their depressed economies since little, if any, meaningful development had taken place in these countries during the colonial era. The development model that was chosen by most of these countries was that of a mixed economy consisting of the public sector and the private sector. Primacy was given almost invariably to the public sector. All basic strategic and infrastructural industries were entrusted to the public sector while the private sector was intended to play a complementary role. The rationale for giving primacy to the public sector was that the State should have a definite say in shaping economic policies and that welfare of the masses could be achieved only through socialism.

India became the chief proponent of this development model and it inspired a number of other developing nations in the region to adopt economic systems based on this model. To begin with, India, in 1951, had only five central public sector enterprises (PSEs) with an investment of Rs. 290 million.[1] Since then the public sector has registered a phenomenal

1. Venkateswaran, R.J. "Aspects of Privatization – The Public Sector" the *Hindustan Times*, New Delhi, dated 23 November 1991.

growth. By March 1988, the number of PSEs had risen to 231 with an investment of Rs. 712,990 million.[2] At present, nearly 55 per cent of the PSE investment is in steel, coal, minerals and metals, electricity and petroleum.[3]

Althouth this model of development had the advantage of industrializing the country and making it largely self-reliant, it is now being realized that the overall performance of the public sector has been far from satisfactory. In 1990, India had a total of 248 central public enterprises, out of which 103 had incurred losses to the tune of Rs. 17, 450 million during 1989-90. Out of these loss-making units, 40 were chronically sick and their revamping required writing off losses worth Rs. 62,000 million while fresh investments in only 28 units (which were to be rehabilitated) were expected to involve additional outlays of Rs. 33,000 million.[4] In addition thereto, compensation in the event of closure was to involve a similar amount.

How badly the Indian public performed in the fiscal year 1991-1992 is brought out in a study of Government-owned industrial corporations prepared by the Central Statistical Organisation (CSO) recently. The CSO Study of 81 selected Central PSUs indicates that the overall index of industrial production for these enterprises went up by 2.13 per cent in 1991-92 over the previous year; large segments performed poorly with output and capacity utilisation coming down sharply. The output of National Textile Corporation (NTC) and its subsidiaries slumped by nearly 10 per cent; production of medium and light engineering goods came down by 7.5 per cent; petroleum production declined by 3.8 per cent; and the output of heavy engineering goods shrunk by 3.6 per cent. The manufacture of consumer goods also declined by over 2 per cent.

The segments of the public sector which performed well, according to the CSO, were : chemicals and pharmaceuticals; saleable steel and alloy steel; coal; minerals and metals and transport equipment. Despite the creditable record of these sectors, the overall scenario was quite bleak; a detailed analysis of 170 production lines of these selected 81 PSUs shows that only in the case of 92 production lines did production and capacity utilisation record positive rates of growth. Put another way, in 88 out of 170 production lines output and capacity utilisation declined.

The Government of India is attempting to follow a two-pronged strategy

2. Prabhu, A.N. "Privatization – How to make it work here," the *Hindustan Times*, New Delhi, 2nd June 1991.

3. Dutt, R.C. *"State Enterprises in a Developing Country - The Indian Experience 1950-90"* (New Delhi 1991).

4. Mitra Chenoy, Kamal A. "Privatizing India," *Mainstream* (New Delhi) Vol. XXIX No. 41 dated 3 August 1991.

to tackle the problems of the public sector-One, by setting up the National Renewal Fund to retire, retrain and relocate workers of terminally ill units; and two, by referring cases of sick PSUs to the Board for Industrial Reconstruction (BIFR) for formulating rehabilitation packages. Both these moves have, however, got bogged down in uncertainty. The National Renewal Fund, for all intents and purposes, is a non-starter since no sick PSU has actually downed shutters and retrenched its workers. And the BIFR has said that no proper rehabilitation package can be worked out unless the concerned PSUs provide their audited accounts for the last financial year. This is because the legislation enabling the BIFR to review cases of PSUs came into effect only from December 28, 1991.

Against this backdrop, the CSO study indicates how sickness spread across many public sector units during a year of recession which saw industrial production in the country coming down for the first time after a gap of 12 years.[5]

In other countries of the region, the experience has not been dissimilar. By early 1980s, PSEs accounted an average of 17 percent of GDP in sub-Saharan Africa; 12 per cent in Latin America and a modest 3 per cent in Asia (excluding India, China and Myanmar) compared to 10% of GDP in mixed economies worldwide. Subsequently, between 1989 and 1991, PSE losses as a percentage of GDP reached 9 percent in Argentina and over 5 per cent, on average in a sample of sub-Saharan African countries. In the 1980s about half of Tanzania's more than 350 PSEs made losses, and in at least one year the losses were of such a magnitude that the entire sector was in deficit. In 1991, about 30 per cent of all PSEs in China were loss-making. In Turkey, the operating surplus of the sector has been deteriorating since 1985, and the marginal efficiency of PSE capital is half that of the private sector.[6]

In many countries, PSEs have become an unsustainable burden on the national budgets and the banking system, absorbing scarce public resources. Government transfers and subsidies to PSEs amounted to more than 3 per cent of GDP in Mexico in 1982, 4 per cent of GNP in Turkey in 1990. In Ghana, in the last half of the 1980s, the average outflow from the Government to 14 core PSEs constantly exceeded the mearge flows-in the form of dividends and taxes-from the PSEs to the State.[7]

The reasons that have been advanced for the overall failure of the

5. Thakurta, Paranjoy Guha. "CSO Study of 81 PSUs' Performance in 1991-92", *The Indian Express*, New Delhi, 8th November, 1992.

6. World Bank, *Privatization : The Lessons of Experience* (Washington, 1992).

7. *Ibid.*

public sector are along the following lines :

(i) Some of the PSEs have virtually become social welfare organisations with no accent on efficiency and productivity. They have become breeding grounds for corruption, patronage, inefficiency and bureaucracy, guzzling huge resources from the larger economy.

(ii) The PSEs are incurring continuous and stagerring losses on account of their producing goods and services at high cost and of indifferent quality.

(iii) Their freedom of operation is severely curtailed due to excessive interference by Government bureaucrats.

(iv) They have bred a culture of no work and no accountability.

Since the PSEs have become a drain on the exchequer, of late pressures are being brought to bear on the governments to diminish the role of the public sector and increase the role of the private sector through restructuring and privatization. Since most of the governments in the region have been suffering from increasing budgerary gaps year after year while at the same time facing mounting external indebtedness, pressures are being exerted on them, in particular, by the international financial and monetary institutions to close down the chronically sick PSEs and reorganize or privatize the remaining ones if they wish to be favourably considered for developmental assistance. Since governments would face the prospects of industrial unrest in ordering closure of sick units, they are being promised by these agencies financial assistance to enable them to meet the cost of retrenchment and other monetary benefits to to be given to the workers of such units.

It is in reponse to these pressures coupled with the overall unsatisfactory performance of the public sector that in the last two decades virtually all developing countries have adopted reform programmes-short of ownership transfer-to remedy the causes of poor PSE performance. These reforms are aimed at (i) removing PSE pretection from domestic and external competition and ending preferential treatment: (ii) eliminating easy PSE access to credit from the budget and the banking system and instituting a hard budget constraint: (iii) increasing PSE autonomy and freeing managers from government interference in day-to-day operational decision-making and from non-commercial goals : and (iv) developing institutional mechanisms such as contract plans (memoranda of understanding) and performance evaluation systems to hold managers accountable for results.

Pursuant to these reform programmes, some performance improvements did indeed take place, but it has been found to be difficult to sustain performance improvement over time.

8. The Goverment of India has been promised $ 1 billion on this score by the World Bank.

A number or PSEs that were judged in the *World Development Report of 1983* to be well on way to performance improvement, for example, the Sengalese bus company, fertilizer PSEs in Turkey and manufacturing PSEs in Pakistan, have either not improved in performance or suffered deterioration.[9]

In many Asian countries, too, PSE reforms have not been sustained. For three years after the introduction of a performance evaluation system and other reforms in the Republic of Korea in 1986, no PSE in the system recorded loss. But losses have now reoccurred and in 1990 had reached 26, 570 million *won*. Between 1981 and 1988, Bangladesh carried out a reform pregramme for industrial PSEs aiming at increased managerial autonomy, financial restructuring of PSEs and employment and wage changes. Despite these reforms, PSEs' performance deteriorated throughout 1980s. In China, a restructuing programme was launched in 1980s to stem PSE losses and improve their efficiency by enacting a legislation and introducing competition from private enterprise. The reforms led to a rapidly growing private sector (the share of PSEs in industrial production dropped from nearly 70% in 1986 to 53% in 1990) and the introduction of a 'responsibility system' led to performance improvements in at least some PSEs. However, close to 30 per cent of all PSEs still incur losses that absorb a sixth of the government's budgetary expenditures. In Japan, despite five separate attempts at full-scale reform, the performance of the Japanese National Railway, Japan's largest PSEs, had continually deteriorated prior to its privatization in 1987 [10].

Frustrated with the high cost and poor performance of the public sector and faced with the modest and unenduring nature of reforms not involving ownership change, many governments have turned to privatization in the hope that new private owners will increase the efficiency of the resources employed and decrease the financial demands made by PSEs on strained government budgets. Governments have also privatized to increase the size and dynamism of the private sector; distribute ownership more widely in the population at large; encourage and facilitate private sector investment for modernization and rehabilitation from both domestic and foreign sources; generate revenue for the State; and reduce the administrative burden of the State.

There have been other factors which have spurred this development. Firstly, the successful British experience. Mrs. Thatcher, former Prime Minister, privatized over the dozen PSEs including giants in steel, air and telecom services and showed that there was no panacea save for trusting the

9. World Bank. *The World Development Report 1983*. (Washingron, 1984).
10. Workd Bank. *Privatization : The Lessons of Experience* (Washington, 1992).