Mr. Eric Haythorne, the World Bank Expert, addressed the key question of post privatization regulatory framework. He stressed that the design of the appropriate framework, if any, should be considered at the outset of any specific privatization transaction. In the event that country conditions were market-friendly with a legal framework supportive of private sector activity and the enterprise to be privatized operates in a competitive market, there would be no requirement for enterprise specific regulation and privatization of the enterprise might thus proceed swiftly. When, however, country conditions were not as supportive of private sector activity, creating the basic legal framework, including economy-wise competition laws, and staffing the relevant institution should come first. Regardless of country conditions, whenever a monoply or public utility was to be privatized, significant advance planning was required so as to ensure that the appropriate post-privatization regulatory mechanism, was in place when the privatization took place. Typically a license, franchise or concession would be needed in order to ensure an appropriate on-going balancing of the interests of the public and the newly privatized enterprise.

Several points were raised during the discussions that could be summarized, thus:

(a) That in situations where the legal and economic environment was not market-friendly, the process of privatization might have to be preceded by a fairly prolonged period of preparation of the enterprise to be privatized;

(b) That an effective privatization programme should avoid situations where privatized public sector enterprises continued to enjoy favoured treatment by governments;

(c) That the post-Privatization era required the existence of a strong judicial system working in an environment of strong commercial laws that were supportive of private sector activities;

(d) That Member States should consider adopting UNCITRAL Model Law on arbitration as an additional measure to enhance the legal environment for privatization.

The Chinese delegate briefed the meeting on his country's efforts in the field of market economy. He stated that China had lifted price controls, liberalized trade, encouraged foreign investment, established effective competition mechanisms, all with the primary purpose of creating an enabling legal and economic environment to facilitate market economy. In this connection, he expressed the view that the legal framework for privatization should include all the laws that govern market-oriented economic activities.

The document, 'Legal Guidelines for Privatization' is appended to this report.

Legal Guidelines For Privatization Programmes

Background

The objective of this paper is to provide guidance to policy-makers in addressing legal issues likely to arise once a governmental decision has been made to proceed with a programme for the privatization of state assets or enterprises. Such a programme may entail the privatization of substantially all state enterprises in the tradeable sectors of a country, sectoral privatization or the privatization of selected medium or large enterprises. The paper does not, however, discuss small-scale privatization of the retail or service sectors or mass privatization programmes involving the distribution to the general public of vouchers or similar instruments.

A "privatization transaction" for the purposes of these guidelines is one in which ownership or control of a public body (state, government, ministry, department, enterprise or corporation) or its major assets or shares held by a public body in a company representing a controlling interest are to be transferred from the government or a government-controlled entity to the private sector.

"Private sector" would exclude an entity which is owned or controlled, directly or indirectly, by a public body. So the sale of an enterprise to a public body, whether of the host state or another state, is not a privatization for the purposes of these guidelines.

A privatization law serves a valuable purpose in defining the legal authority for a country's privatization programme, the key principles on which it will be based, and the institutional arrangements for policy-making and implementation. Other supporting laws provide for the legal steps in preparation for privatization and to consummate the transaction, as well as forming part of the business environment in which the newly-privatized enterprises will operate.

Privatization Law

The choice of whether or not to enact a privatization law depends upon the legal and individual circumstances of the country concerned. In some cases, a privatization law to authorize the sale of state assets may be a constitutional requirement. Even if a separate privatization law is not mandatory, such a law can serve a variety of purposes, such as to :

— define the government's objectives and establish commitment to the privatization process;

— make amendments to existing laws which otherwise would be an obstacle to privatization, e.g. laws preventing private sector participation in what were previously thought of as "strategic" activities;

— create institutions with the authority to implement privatization;

— avoid the "vacuum of authority" which can lead to spontaneous or unauthorized privatization;

— allow for the financial restructuring of enterprises prior to sale and permit liabilities to be cancelled, deferred or swapped for equity;

— define the methods of privatization and any limitations on potential bidders; and

— provide for the allocation of sale proceeds.

A principal function of a privatization law is to define the scope of the programme and any exclusions of specific sectors or enterprises. Though the law may list the enterprises to be privatized, the disadvantage of doing so is that the listing becomes inflexible, with the resulting difficulty of either removing or adding enterprises as the programme evolves. Other alternatives are to:

(a) adopt a "negative list" approach, so that all state enterprises are eligible for privatization other than named exceptions; or

(b) require a high-level political decision on a case-by-case or sectoral basis to transfer an enterprise to the privatization agency for disposal.

The privatization law can provide for employee preferences to be available on the sale of an enterprise. Preferences should be in the form of a right to acquire a small proportion (normally not more than 10 per cent) of the shares of the enterprise. Payment may be deferred for a limited period, with transfer of ownership of the shares delayed until payment has been made. Employee consortia should also be eligible to participate in the full bidding process on a basis of parity with other bidders.

Other Supporting Laws

The legal framework of the country should support privatization in two respects: first, laws may be required to govern the process of preparing enterprises for privatization and undertaking the transactions; and second, the overall legal environment must be one in which the newly-privatized businesses can obtain access to land and finance, enter into enforceable contracts for their inputs and outputs, and compete on a basis of equality with one another and with the residual state sector.

The conversion of enterprises into corporations under a modern corporations law is an effective prelude to privatization. Corporatization enables the assets and liabilities of the business to be identified; allows for the appointment of a transitional board of directors to oversee the management; and provides for the issue of shares to the government, allowing flexibility in the sale of partial interests if required. The corporations law should also include procedures for the liquidation or dissolution of enterprises, thereby releasing the assets of a corporatized state entity for sale to the private sector.

Prior to the sale of certain heavy polluting enterprises, it would be advisable to perform an environmental audit of those industries to determine the requirements for any environmental and occupational health cleanup. This audit can be performed in accordance with any existing domestic or international environmental and occupational health standards. Based on that audit, the seller can decide whether to absorb the costs of existing environmental degradation, while requiring the buyer to meet future environmental liabilities.

Labour restructuring is commonly required before privatization to reflect the change from a government agency to a profit-oriented enterprise. Labour laws should define the entitlement of redundant employees to severance or other benefits, while recognizing the right of the employer to reorganize the labour force to meet changing needs.

Privatized enterprises are most likely to operate efficiently when they are exposed to competitive forces. A competition law is desirable to:

— allow for the review of the potential cartel effects of purchase of former state enterprises by domestic or foreign entities with market power in the same or related sectors;

— prohibit restrictive or unfair trade practices.

If the enterprise is a public utility, a regulatory regime should be created by law so that the regulator can protect the public interest in output pricing and the quality of services and support future entry by competitors.

If foreign investors are expected to participate in the privatization programmes, the laws of the country should guarantee fair and equitable treatment to those investments according to generally acceptable international standards.

Institutional Arrangements

Privatization requires institutional arrangements to manage the programme that ensure transparency and consistency in implementation.

Yet the conduct of privatization transactions differs from traditional bureaucratic activities, in that:

(a) the process must be as open as possible.

(b) privatization cuts across existing areas of influence and political and bureaucratic control.

(c) the agency controlling privatization must itself operate in a professional manner, as it will be dealing with private domestic and foreign buyers and with investment banks and other professional advisers.

These factors suggest the need for a central unit or agency responsible for overall guidance of the privatization programme. The agency should have a single mandate: to sell the assets and enterprises in accordance with the policy principles on which the programme is based. A clear mandate to privatize, sufficient autonomy, minimal bureaucracy, ready access to top decision-makers, and a small nucleus of quality staff are conditions for success. Responsibility for managing the enterprises prior to sale should rest, if possible, with the governing board of the enterprise.

The agency should desirably be given sole authority to:

— recommend to the appropriate political decision-maker the enterprises or classes of enterprise to be included in the privatization programme;

— decide upon any necessary financial restructuring of the enterprise prior to sale;

— determine the timing and method of sale;

— control the preparation and issue of bid invitations and the pre-qualification of bidders, if required;

— require government-appointed members of the governing board of each enterprise to resign at or prior to settlement of the sale; and

— recommend the acceptance of the winning bid.

Though design, policy-making and supervision of the process is best centralized, transaction management and implementation should be decentralized to accelerate the process and reduce the workload of the central unit. Responsibility for implementation can be delegated to holding companies or institution-specific groups of experts and stakeholder representatives, assisted by investment banks, lawyers or other professional advisers as required.

Transparency

Transparency must be maintained in every privatization transaction. This can be ensured by having a precise, detailed and publicly announced process for carrying out privatization transactions consisting of clearly defined competitive bidding procedures; clear and simple selection criteria for evaluating bids; disclosure of the final purchase price and buyer; well-defined institutional responsibilities, and adequate monitoring and supervision of the programme.

Lack of transparency can lead to a perception of unfair dealing—even where it does not exist—and to criticism that can threaten not only privatization, but reform in general.

Competitive bidding ensures both transparency and fairness and can help maximize sales proceeds if qualified bidders participate and if the process is properly structured and carefully implemented. The dual objective of competitive bidding is to draw all potential buyers into the bidding process, and to avoid the risk of collusive dealing (or the appearance of it) inherent in closed bidding procedures. Competitive bidding also eliminates the need for the seller to devote time and resources to obtaining a market valuation of the assets to be sold.

Methods of Privatization

The choice of the method of privatization would be determined, in the case of each transaction, according to the following main criteria:

(a) the objectives pursued by the government;

(b) the enterprise's performance record and economic prospects;

(c) the size of the company to be sold and the ability to mobilize private funds, whether from a core domestic or foreign investor or from the general public.

Even within the same transaction, a variety of privatization methods may be used; for example, sale of a tranche of shares to employees, followed by the sale of a core shareholding to a long-term investor, and finally a public offering of the balance of the shares.

For the sake of transparency, to minimize the influence of special interests and to protect the integrity of the privatization programme, the choice of privatization methods should normally be limited to:

(a) sale of assets or shares through public auction or tender;

(b) public offering of shares on the stock-exchange;

(c) employee/management buy out;

(d) concession, lease or management contracts; or

(e) a mix of these four methods.

Subject only to existing legal obligations, such as preemptive rights of existing shareholders, no direct sale or negotiation with a single party should occur, except after the failure of a public bid process, and then only with the approval of a high-level government body such as the Cabinet or Council of Ministers.

The following paragraphs provide general guidelines for the sale of assets through public auction or tender and through public offering of shares.

Public Auction and Public Tender

The public auction technique should be reserved for selling individual assets, such as land, cars, and pieces of equipment and similar assets as well as small or less important businesses. It consists of convening a public forum at a pre-specified date and location at which one or more companies or simple assets are bid upon by interested, and sometimes, pre-qualified buyers and sold to the highest price bidder. The process of sale mandates that the assets or companies to be sold are described in public announcements and the opportunity to inspect the assets prior to the auction is allowed.

In contrast to public auction, public tender is usually in the form of a sealed bid submitted to the managers of the tender process. Preparation of the request for bids requires careful thought and attention to be certain that the concerns which the government may wish bidders to address are specified. The general principles for a public tendering process are:

(a) the tender notice should be widely publicized and should provide summary information on the assets, should fix the date of bidding and should invite prospective bidders to obtain the tender document;

(b) interested parties should submit letters of interest to receive the tender document and should be invited to visit the enterprise being sold to inspect its operations and finances;

(c) bids should be sought on a cash basis, accompanied by a deposit;

(d) bids should remain valid for a period after the closing date to allow careful evaluation and possible negotiation with the top bidder; and

(e) the privatization agency should have the right to reject any bids which do not conform to the general bidding guidelines, or to reject all bids if none are adequate.

The criteria for evaluating the tenders received could differ from one case to another. Desirably, tenders would be evaluated solely on the basis of price, i.e. the cash and other financial aspects of the bid (such as the assumption of liabilities by the bidder) would be assessed on a net present value basis, using a standard and consistent discount rate. The highest value bid would be selected.

The inclusion of non-price criteria can be justified in certain cases, though the bid evaluation process is made more complex. Examples of possible criteria are;

(a) Consistency with privatization principles and objectives

— New Capital investment proposed in the bidder's offer;

— The bidder's commitment to continue operating the business;

— Extent to which the proposal offers job protection or retrenchment to employees;

— Budgetary impact;

— Bidder's intention to offer expanded or related services; and

— Bidder bringing in foreign exchange for the investment.

(b) Operational considerations and constraints

— Feasibility of the bidder's proposed business plan;

— The financial standing of the bidder;

— Aspects related to contract implications, asset transfers, personnel transfers and the transitional implications to the government;

— Costs related to environmental cleanup.

Non-price criteria should so far as possible be dealt with in the pre-qualification process to avoid the need to attribute financial "weights" to these factors. When factors such as investment or employment maintenance promises are included as tender criteria, rather than simply pre-qualification assurances, it will be necessary to include legally-binding terms to give effect to these promises in the contract with the successful bidder. The privatization agency would also need to maintain an effective monitoring and enforcement capacity during the post-privatization period.

Public Offering of Shares

Approval of an offering prospectus by the relevant capital markets authority according to its normal requirements and criteria contained in the securities market law is necessary before any public offering of shares can be made. Steps for public offering of shares typically include:

(a) preparation of the prospectus, which should include relevant information concerning; the price; a detailed description of the securities offered; the use of the proceeds from the issue; the plan of distribution of the securities; the risk factors that the investor should take into account; the business of the company; its legal and financial structure; a description of its main assets and important pending legal proceedings. The prospectus would also contain audited historical financial statements of the most recent three years and state the name of the auditor. The prospectus should be full, true and clear so the investor has all relevant information necessary before making a decision whether or not to buy the securities being offered;

(b) determination of offering price and timing of sale;

(c) organization of a selling campaign and distribution of the prospectus as widely as possible; and

(d) distribution and collection of applications for buying shares.

Allocation of Proceeds

When state assets are sold, the general budget law may determine how the sales proceeds are to be dealt with. If the existing laws do not do so, the privatization law itself should specify that proceeds should be applied;

— first, to meet the costs of sale, which may include a fixed percentage of the proceeds as a contribution to the operating costs of the privatization agency;

— second, towards liabilities of the enterprise retained by the state;

— third, towards outlays which benefit the economy at large or large segments of the population.

Since the restructuring of enterprises for privatization can frequently lead to one-time labour costs for the severance and retraining of redundant labour, a fixed proportion of the amounts remaining after payment of sale costs and enterprise liabilities may be applied to a special fund set up for this purpose.

The Privatization Transaction

In addition to the broad legal issues having application across the entire privalization programme, individual privatization transactions will give rise to a variety of legal issues needing to be dealt with on a case-by-case basis in reliance upon legal advice.

Specific transactional legal issues are most readily resolved in the context of

a clear and consistent set of publicly announced guidelines for each step of the process, from evaluation through implementation. These guidelines should include the following principles;

(a) Public enterprises should be divested into markets open to competition. For public enterprise operating in commercially-oriented sectors, purchasers should not obtain an intact or unregulated monopoly and should not be accorded special protection or privileges such as market protection, concessional or differential input prices, public sector financing, loans or loan guarantees.

(b) All appropriate regulatory issues should be dealt with prior to or simultaneously with privatization. In the tradeable, commercially-oriented sectors, regulatory provisions entailing the deregulation/liberalization of imports, prices and market and the removal of other barriers to competition should be introduced. In the non-tradeable, utilities sectors which generally require large investment (such as electric power and water supply), the establishment of regulatory mechanisms dealing with entry and pricing policies is essential to ensure the confidence of private investors, and to protect the interests of users.

(c) In cases where the government retains a minority shareholding; it should not be entitled to any special or extraordinary voting rights, except in certain cases in the "strategic" non-tradeable sector, where a golden share could be retained. Such a golden share could permit the government to veto the resale of a controlling interest if that would not be in the interests of the country.

(d) The consideration received by the government in privatization transaction should be cash or the assumption of public debt (in the case of debt conversion). Where shares are to be transferred to the workforce of the enterprise and are to be paid for over-time, the government should receive payment for those shares in full at the time ownership is transferred. The ultimate beneficiaries may finance their share purchase from the financial markets in such manner as they may arrange, or alternatively the shares may be held by a trustee until payment has been made.

(e) There should be no restrictions on participation (local or foreign) either as owner, manager, shareholder or otherwise in the privatization process. The government may however decide, as an exception, to reserve a tranche of shares for domestic investors only.

B. Debt Burden of Developing Countries

(i) Introduction

The item "Debt Burden of Developing Countries" has been on the agenda of the Asian-African Legal Consultative Committee (AALCC) since Kathmandu Session (1985). Subsequently, in view of its increasing importance, this matter was under active consideration by the Expert Group Meeting at New Delhi in 1986 as well as by the successive sessions of the Committee. The Secretariat, considering its relevance in the Asian-African context, initiated several studies on this item encompassing various aspects of the issue of debt burden. The study entitled "Legal Aspects of the International Loan Agreements" submitted to the Singapore Session (1988) was, at the behest of the Committee, distributed to the entire membership of the Group of 77. This study has already been reproduced in the recent combined report of the AALCC (1987-91).

As mandated by the Nairobi Session (1989), the Secretariat prepared a study dealing with the legal aspects of rescheduling of loans and debt relief with a view to formulating workable legal guidelines for rescheduling and debt relief. The Committee, while considering this study at the Beijing Session (1990), directed the Secretariat to continue to update the study. During the Cairo (1991) and Islamabad (1992) Sessions, this study could not be taken up for comprehensive discussion due to lack of time.

During the Kampala Session, (1993), the Committee briefly considered the item "Debt Burden of Developing Countries; Guidelines for Rescheduling". The study, *inter alia*, considered primarily the whole problem of debt, its solution, effect on the economic development and other ramifications in the context of Asian-African countries. While examining this problem, the study briefly dealt with the factors which had been playing a crucial role in shaping the global economic relations. During the Kampala Session there were several references to the issue of debt burden in the general statements made by various delegations. The specific references to the debt problem were made by Indonesia and Uganda in the context, urging greater exchange of views and experiences in debt management. Accordingly, it was decided at the session to initiate necessary dialogue with other members of the international community, including various international agencies to find a durable and workable solution to the debt problem.

Thirty-third Session: Discussions.

The Assistant Secretary-General Mr. Asghar Dastmalchi introduced the agenda item entitled "Debt Burden of Developing Countries" and stated that the item had been on the agenda of the Committee since Kathmandu Session held in 1985. He briefly outlined the developments and mentioned about the studies prepared since then. He informed the Committee that due to lack of time the study prepared on the Debt Burden could not be taken up for discussion at the Committee's Cairo and Islamabad Sessions in 1991 and 1992. He also noted the serious view taken of the increasing burden of debt of the developing countries at the AALCC's Kampala Session in 1993. he made a particular reference to the emphasis laid down by the President of Uganda in this regard.

While outlining the focus of the study, he pointed out that the study attempted to evaluate and update the efforts initiated in the recent times to mitigate the effects of debt burden, and referred to the major factors which were responsible in shaping the global economy. He made a particular reference to Uruguay, Round of Multilateral Trade Negotiations under the auspices of General Agreement on Tariffs and Trade (GATT) which brought into focus a completely new global economic order. He noted that the increasing liberalization of trade and market access might not immediately help developing countries.

He also stated that the debt burden of developing countries had recently shown some signs of amelioration. In this regard, he referred to a study prepared by the Economic Commission for Africa. Further, he outlined the measures for an effective debt relief and debt management; which *inter alia*, included various terms of debt relief. He also referred to the various components of the effective debt management strategy. He observed that the Secretariat study considered briefly some recent developments which had a positive impact on the debt reduction strategies. While welcoming these strategies, he concluded, that in the majority of the developing countries, particularly in Africa, the debt problem was viewed as a multi-dimensional problem necessitating an integrated approach.

(ii) Decisions of the Thirty-third Session Agenda item: "Debt Burden of Developing Countries"

(Adopted on January 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session:

Taking note of the study prepared by the Secretariat on the item "Debt Burden of Developing Countries: An Overview of Recent Developments" (Doc. No. AALCC/XXXIII/Tokyo/94/14)

1. *Notes* with concern the continuing debt burden of developing countries and further necessity of concrete measures towards the solution of the external debt problems of a large number of developing countries;

2. *Reiterates* the need to address and solve the problem of debt burden through effective debt-relief measures, bearing in mind in this context, the special and critical situation of the most indebted developing countries of Africa;

3. *Calls* for the creation of a supportive international economic environment, particularly in regard to terms of trade, commodity prices, improved market access, trade practices, exchange rates and international interest rates;

4. *Expresses* concern at the growing burden of debt and debt service constituting a major obstacle to the revitalization of growth and development, despite the often strenuous economic reforms undertaken by many developing countries;

5. *Calls* upon the member states to explore ways to implement additional