

the subject should also include issues relating to jurisdiction, applicable laws and dispute settlement mechanisms.

Referring to the work of the Commission on receivable financing, he observed that one outstanding issue relating to effect of assignments on third parties, especially on creditors and administrators needs to be resolved. He also called for a closer examination of the idea that registration should be the basis for the determination of time of assignment. His delegation generally approved the line of work proposed by the UNCITRAL Secretariat on the topic of "privately financed infrastructure projects". He appreciated the Secretariat efforts towards monitoring the implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Finally, he reiterated his country's support to the work of the UNCITRAL and said that India, upon its re-election for the next term, would constructively contribute to the work of UNCITRAL in further development of international trade law.

The President welcomed the Deputy Secretary General for Political Affairs of the Commonwealth Secretariat, Dr. Srinivasan and invited him to address the Committee. He stated that both the AALCC and Commonwealth dealt with many similar subjects and hoped that co-operation between the two bodies could be intensified in the future.

The Deputy Secretary General of the Commonwealth Secretariat, Dr. Srinivasan observed that the Commonwealth Secretariat pursued similar issues as discussed within the AALCC framework. He enumerated the work of the Commonwealth in areas like mutual assistance in extradition, trans-border criminality and exchange of prisoners; preservation of cultural heritage, assistance in legal matters arising from the law of the sea, WTO, ICC, refugee law, money laundering and drug trafficking etc., Reciprocating the sentiments expressed by the President, he looked forward to closer cooperation with AALCC on matters of mutual interest.

The Deledate of Ghana acknowledging the role of the private sector in the evolving liberalization process, said that the preparation of a legislative

guide on privately financed infrastructure projects is one that needs to be completed on a priority basis. He expressed the hope that the UNCITRAL Model Law on Cross Border Insolvency will help to deal effectively with instances of crossborder insolvency and promote the objectives as set out in the preamble to the Model Law. His delegation was of the view that the interests of developing countries would be well served with the enunciation of definitive rules on: (i) the obligation of the private investor to transfer technology and managerial skills to local personnel; and (ii) matters relating to competition policy and monopoly in provision of services. He also stressed the importance of extending increased training and technical assistance, in matters relating to international trade law, for lawyers in developing countries.

The Delegate of the Islamic Republic of Iran informed that his country's membership in UNCITRAL had been renewed by the General Assembly at its 52nd session in 1997. He stated that, following the 36th session of the Committee, the Iranian Consultative Assembly had ratified the UNCITRAL Model Law on International Commercial Arbitration in September 1997. This, in his view, could provide legal safeguards to resolve commercial disputes and also encourage foreign traders to conclude commercial agreements with Iranian nationals.

The Deputy Secretary General Ambassador Dr. W. Z. Kamil introduced the Secretariat brief on WTO and stated that the Secretariat document focussed on the substantive and procedural aspects of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, in the light of the experience gained by the Dispute Settlement Body (DSB), since its establishment. He informed the meeting that the WTO Understanding had introduced many innovative proceedings which would render the dispute settlement process more effective, timely and automatic. In this regard, he drew attention to the negative consensus rule for decision making, stringent time limits for various stages of dispute resolution process interm review and appellate review procedures. He made a reference to paragraph 24 of the Understanding which laid down the general rule that "at all stages of the determination of the causes of the dispute and of dispute settlement procedures involving a least developed country Member, particular consideration shall be given to special situation of least developed countries."

He called for an exchange of individual country experiences with the WTO dispute settlement body. He observed that, one, particular area that could be focussed during the Committee's deliberations were the specific modes by which both the WTO Members and the panel had extended special and differential treatment contemplated for developing and least developed countries.

The President underscored the importance of the subject for the Asian-African States and wished that more time was available to discuss the subject. Besides the dispute settlement mechanism, there were some other equally important areas within the WTO framework bearing potential implications on the trade interests of the AALCC's Member States. To ensure a comprehensive and meaningful exchange of views on these topics, he proposed the convening of an inter-sessional meeting of the AALCC during the current year.

The Delegate of Pakistan while affirming the practical importance of the subject, expressed his appreciation for the commendable work done by the Secretariat in presenting the salient features of the WTO dispute settlement mechanism. The procedure involving panels, appellate bodies and the Dispute Settlement Body (DSB), he felt, had developed a streamlined system of dispute resolution. Noting the increasing number of disputes brought to the WTO dispute settlement forum, he declared that the WTO framework inspired more confidence than its predecessor, the GATT system. With the entry into force of the General Agreement on Trade in Services (GATS) and Agreement on Trade Related Intellectual Property Rights (TRIPS), he lauded the initiative of the Committee in taking up the subject of WTO as timely.

He proposed that this subject needs to be given priority in the AALCC's work programme. He called for an indepth study to be undertaken by the Secretariat towards identifying legal rules and norms applicable to dispute resolution. Emphasising the utility of a co-ordinated response by developing countries in protecting their trade interests, he felt that the Secretariat could arrange for exchange of information between AALCC Member States. He also supported the President's proposal for a inter-sessional meeting or an expert group meeting on the subject.

He said the successful outcome of the dispute in favour of India regarding the grant of patent in respect of certain plants in USA, which were traditionally grown in India was a heartening development for the countries in this region. He also informed the meeting as to the efforts of India and Pakistan in challenging the grant of patent in the United States to M/s. Ricotech Inc. in respect of basmati rice. In this context, he stated that the underlying philosophy of a grant of patent was to ensure exclusive economic exploitation of an invention for the inventor for a specified period of time, and not to ensure him the exclusive rights to exploit the name of a well-known, naturally -grown product of a specific region other than that of the inventor. In his view, such a course would amount to "passing off" which was a tortuous act under common law.

The Delegate of People's Republic of China thanked the Secretariat and the Secretary General for the three valuable reports on WTO. Dispute Settlement Mechanism, Legislative Activities of UN Agencies relating to Trade Law and on the AALCC's Regional Centres for Arbitration.

He informed the Committee that though China is not a member of WTO, and is now in the process of acceding to WTO, his delegation welcomed the opportunities including the AALCC forum, to exchange views and information, on WTO with other countries. He characterised the 'dispute settlement mechanism' as the key element in the WTO legal framework, towards ensuring that the obligations under WTO agreements are fully honoured. He said that China was the tenth biggest country in terms of trade in goods and twelfth in terms of trade in services. Highlighting the fact that China as a developing economy is also one of the biggest emerging markets in the world, he underscored the significance of China's joining the WTO as a Member. In the light of the fact that China is one of the biggest developing countries in terms of people living under poverty line, it was his delegation's view that the objectives of WTO i.e. promoting economic growth and raising the standards of living, including those in LDCs, would be impaired and rule-making in the WTO would not be soundly based, unless full account is taken of the experience and practices of China which has more than one-fifth of the world population.

As regards the topic of AALCC's Scheme on Regional Centres for Arbitration, he welcomed the efforts of AALCC in promoting the effective functioning of the regional arbitration centres and the establishment of new centres. providing an overview of the efforts made in his country, he stated that China had acceded to the New York Convention in 1986. The Law of Arbitration in China had taken effect in 1994, from then on, more than 100 local arbitration commissions have been established. He also recalled the role of the Chinese International Economic and Trade Arbitration Commission (CIETAC) in promoting arbitration as a mode of dispute resolution, since its establishment in the early 1950s. With the growing pace of economic globalization, he foresaw the emergence of complex commercial disputes requiring speedy, informal and convenient methods of dispute resolution. In this regard, he drew attention to the mechanism of "alternative dispute resolution" (ADR) and urged the Committee to study the role that ADR can play in the Asian-African region.

The Delegate of India thanked the Secretariat for the informative brief of documents on the subject. Referring to the salient features of the WTO dispute settlement process, which includes: an integrated dispute settlement framework, automaticity of decisions, and strict deadlines for various phases of the dispute resolution procedures, he stated that the WTO dispute resolution mechanism marked a sharp deviation from the GATT practice.

Offering an overview of India's experience with the WTO dispute settlement mechanism, more particularly with the TRIPS regime, he identified certain aspects which might be of concern to all Asian-African States. Firstly, he underscored the ambiguity of the WTO provisions concerning how the dispute resolution panels received and treated municipal law. In a recent dispute before WTO involving India, the panel and appellate panel reports had held that the consistency of certain administrative measures regarding the grant of patent protection with the Indian laws could be examined by the WTO dispute settlement bodies. Rejecting the arguments by India, it was held that it was open to the WTO dispute settlement body to interpret the national laws for the purpose of examining the consistency of any measures.

Secondly, he informed that the principle of 'res judicata' was not

being applied by the WTO bodies. In this connection, he referred to the dispute between US and India on compliance with the provisions of the TRIPS Agreement. Following the panel's finding that India had to comply with the agreement, India undertook to implement the decision. At this stage the European Communities (EU) had filed a complaint on the same subject matter, which was opposed by India.

Thirdly, he felt that the stricter time limits in the dispute resolution process posed difficulties for developing countries in presenting their written statements within a short period. Moreover, topics like TRIPS are sensitive, requiring wider consultations among developing countries before they could present their position to the WTO panel.

Fourthly, he pointed out that the WTO Understanding provided for representation from developing countries in the panels, where the dispute involved a developed and developing country Member. He stated that it was unfortunate that no similar arrangement existed in the constitution of an appellate body.

The President, in this context, referred to the practice of the International Court of Justice, wherein ad hoc judges chosen by the disputing parties were appointed to sit in the bench for hearing a particular dispute. He suggested that a similar arrangement could be considered within the WTO dispute resolution framework. With reference to the observations made by the delegate of India, he said that the role of "res judicata" principle in WTO needs to be examined, as multiplicity of complainants on the same subject would impose heavy financial burdens on the developing countries.

The Delegate of Sri Lanka expressed his appreciation to the Secretariat for the admirable briefs of documents relating to the WTO dispute settlement mechanism, legislative activities of UN bodies concerning trade law and the report on AALCC's regional arbitration centres. He was of the view that the recent developments in international trade law, particularly the establishment of the WTO has shifted the focus of international trade policies from protectionism to a more tight-knit partnership among countries. The growing interdependence among States on trade issues is manifested by the effects of

the Asian financial crisis on the Western economies. In this context, he said that the AALCC had an important role to play in facilitating regional cooperation between and among Asian and African States. He proposed that the AALCC could undertake the following tasks: (i) publish a handbook setting out treaty provisions, GATT rulings and local legislation concerning international trade Law; (ii) publish a regular journal aimed at dissemination of information and views on trade law; and (iii) convene seminars and workshops on matters related to international trade law.

He expressed appreciation for the wide range of activities undertaken by the AALCC's regional arbitration centres. He endorsed the suggestion of the President for convening an intersessional meeting on the subject of WTO.

The Delegate of Somalia stated that it was his view that with many new institutional -regimes being created, States must be fully aware of the effects and consequences of acceding to such bodies. He felt that AALCC could serve as a forum for discussion and exchange of views for enabling Member States to study the implications of various multilateral treaties which are constitutive in nature.

Referring to the current work being undertaken by the OECD for concluding a Multilateral Agreement on Investments (MAI), he felt that it could have a pronounced effect on developing countries, and hence need to be considered by the Committee.

(ii) Decision on A."The Progress Report Covering the Legislative Activities of The United Nations and other International Organisations concerned with International Trade Law"

(Adopted on 18.4.98)

The Asian-African Legal Consultative Committee at its Thirty-seventh Session

Having taken note of the Report concerning the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law contained in Doc. No. AALCC/XXXVII/New Delhi/98/S 10;

Having heard the comprehensive statement of the Assistant Secretary General;

Having heard also the statement of the Observer for UNIDROIT and views of member delegations;

1. **Expresses** its appreciation for the brief of documents prepared by the Secretariat on the recent developments in the field of International Trade Law;

2. **Also expresses** its appreciation for the continued co-operation with the various international organizations competent in the field of international trade law and hopes that this co-operation will be intensified in the future;

3. **Urges** the Member States of the AALCC to favourably consider the UNCITRAL Model Law on Cross-Border Insolvency, as they reform or enact their legislation on cross-border aspects of insolvency ;

Also urges Member States to consider adopting, ratifying or acceding to the other texts prepared by the United Nations Commission on International

Trade Law (UNCITRAL);

5. **Requests** the Secretariat to continue to monitor the developments in the area of international trade law and present a report thereon to its thirty-eighth session.

B. "The World Trade Organisation: Dispute Settlement Mechanism"

(Adopted on 18.4.98)

The Asian-African Legal Consultative Committee at its Thirty-seventh Session

Having taken note of the Secretariat study on "World Trade Organization: Dispute Settlement Mechanism" contained in Doc. No. AALCC/XXXVII/New Delhi/98/S 11;

Having heard the comprehensive statement of the Deputy Secretary-General;

Acknowledging the importance of the issues raised in the Secretariat study for the Member States;

1. **Calls upon** the Secretariat to intensify co-operation with international organizations and specialized agencies, working in the field of international trade law;

2. **Directs** the Secretariat to continue to monitor the developments related to the working of the WTO dispute settlement mechanism, with particular attention to the special requirements of developing countries

3. **Directs** the Secretariat to monitor the developments relating to the Second WTO Ministerial Meeting, scheduled to be held at Geneva in May 1998;

4. **Directs the Secretary General** to convene an inter-sessional meeting of the AALCC with a view to enable an indepth study of the matters arising out of the establishment and the functioning of the World Trade Organization; and

5. **Decides** to place the item on the agenda of the its thirty-eighth session.

**(iii) Secretariat Study : A. PROGRESS REPORT
COVERING THE LEGISLATIVE ACTIVITIES OF THE
UNITED NATIONS AGENCIES AND OTHER INTERNATIONAL
ORGANIZATIONS**

**I. Report on the work done by the United Nations Commission
on International Trade Law at its Thirtieth Session, VIENNA,
1997**

Introduction

The General Assembly, by its resolution 2205 (XXI) in 1966, established the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL or 'the Commission') as the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. This resolution also mandates the Commission to submit an annual report to the General Assembly, as to the tasks accomplished at its yearly sessions. The thirtieth session of UNCITRAL was held in Vienna from 12 to 30 May 1997. It had on its agenda five substantive topics for consideration:

- (i) Cross-Border Insolvency: draft UNCITRAL Model Legislative Provisions;
- (ii) Privately-Financed Infrastructure Projects;
- (iii) Electronic Commerce;
- (iv) Assignments in Receivables Financing: draft UNCITRAL Convention; and
- (v) Monitoring of the Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

Although the Commission considered all these items, its major accomplishment at this session was in the area of cross-border insolvency. The Commission completed its consideration of the draft text of the Model provisions¹, prepared by the Working Group and adopted the UNCITRAL Model Law on Cross-Border Insolvency. A detailed consideration of the Model Law is provided in Part 11 of this document.

On the topic "Privately -Financed Infrastructure Projects", the Commission had for its consideration a table of contents setting out the proposed topics to be dealt under the "Draft Legislative Guide" and annotations concerning the issues to be discussed therein². This document was prepared by the Secretariat in response to the Commission's decision in 1996 to prepare a legislative guide to assist States in preparing or modernising legislations relevant to implementation of privately-financed infrastructure projects. The Commission generally approved the line of work proposed by the Secretariat, and invited the co-operation of Governments to identify experts who could be of assistance to the Secretariat in the accomplishment of its further work programme. An overview of the deliberations at the current session on this topic is found in Part III of this document.

As regards the subject of "Electronic Commerce", the Commission considered the report of the Working Group on Electronic Commerce³, which had been mandated to provide the Commission with sufficient elements for a decision to be made as to the feasibility and scope of preparing uniform rules on issues of digital signatures and certification authorities. The Working Group had reached a consensus on the importance and feasibility of undertaking such harmonization measures. Besides, the Working Group also identified a host of related areas of study that could possibly be addressed in its future work, which includes: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting. After due consideration of the Report,

¹ A/CN.9/435.

² A/CN.9/438

³ A/CN.9/437

the Commission endorsed the conclusions of the Working Group and entrusted it with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. The Commission stressed the need for the uniform rules to be prepared to be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce.

On the subject of "Assignment in Receivables Financing", the Commission considered the reports of the twenty fifth⁴ and twenty-sixth⁵ sessions of the Working Group on International Contract Practices, which had been mandated to prepare uniform law on assignment in receivables financing. The Working Group had reached agreement on a number of issues including, the validity of bulk assignments of present and future receivables, the time of transfer of receivables, no-assignment clauses, representations of the assignor and protection of the debtor. The main outstanding issues were the effects of the assignment on third parties, viz., creditors of the assignor and the administrator in the insolvency of the assignor, as well as scope and conflict-of-laws issues. The Commission was of the view that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates. Hence, the Commission expressed its hope that the Working Group would proceed with its work expeditiously, so as to submit the draft Convention for consideration by the Commission at its thirty-second session in 1999.

While considering the item "Monitoring of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards", the Commission reviewed the progress made in monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and called upon States parties to the Convention that had not yet replied to the questionnaire of the Secretariat, to do so. In the light of the special commemorative meetings to celebrate the fortieth anniversary of the 1958 New York Convention, scheduled to be held during the next session of the Commission, in June 1998 a number of

⁴ A/CN.9/432

⁵ A/CN.9/434

suggestions as to the specific aspects to be deliberated therein, were proposed. These ranged from a discussion of possible work towards a new convention or additions to the UNCITRAL Model Law on International Commercial Arbitration; the possible revision of the 1927 Geneva Convention; and a few additions to the New York Convention concerning written form requirements, interim measures of protection, and court assistance for the taking of evidence. In the backdrop of the initiative offered by the AALCC in formulating the UNCITRAL Model Law on International Commercial Arbitration and also the close working relationship between both these organisations on this subject, it would be worthwhile to formulate an appropriate agenda for the AALCC'S work programme for the current year, towards contributing to the commemoration of the fortieth anniversary of the 1958 New York Convention.

Since the work on the topics of Electronic Commerce and Assignments in Receivables Financing, are still in the formative stages, the following note is focussed only on Model Law on Cross-Border Insolvency and Privately-Financed Infrastructure Projects.,

II. Model Law On Cross-Border Insolvency

The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made at the UNCITRAL Congress under the theme, "Uniform commercial law in the twenty-first century" held in 1992. Subsequently, in order to assess the desirability and feasibility of work in this area and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held two Colloquia in April 1994 and March 1995. The outcome of these Colloquia was a general consensus for the Commission to provide a legislative framework, by way of model legislative provisions, for judicial co-operation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. The Commission at its twenty-eighth session in May 1995, endorsed this opinion and entrusted the task of preparing such uniform provisions to one of the Commission's three intergovernmental Working Groups, which, for this, project was named the Working Group on Insolvency Law. Reviewing the proceedings of the UNCITRAL at its twenty-eighth session, the AALCC Secretariat had pointed out that the incidence of cross-

border insolvency is likely to increase appreciably on account of the emerging trend towards integration of national economies with the world economy, and hence welcomed the initiative of the Commission, to be in the right direction.

The Working Group devoted four two-week sessions to the work on the subject. At its eighteenth session (30 October- 10 November 1995) the Working Group considered possible issues to be covered under the proposed legislative framework. At its nineteenth session (1-12 April, 1996), it considered the question on the form of the instrument to be prepared and finally decided to work on a draft Model Provisions. At the close of its twenty-first session (20-31 January 1997), the Working Group noted that it would have wished to have some more time available for completing its review of the draft. Yet, in deference to the hope expressed by the Commission at its twenty-ninth session, the Working Group decided to submit the draft UNCITRAL Model Provisions on Cross-Border Insolvency to the Commission at its thirtieth session in 1997.

After the twenty-first session of the Working Group, the UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held from 22 to 23 March 1997 in conjunction with the Fifth World Congress of the International Association of Insolvency Practitioners (INSOL). The Colloquium recognised the high degree of cooperation achieved within the Working Group on Insolvency Law during the preparation of the draft. Participants hailed the draft Model Provisions for providing the necessary legislative basis for foreign insolvency administrators to have easier and quicker access to courts; and the provisions for granting statutory authority to judges for enhancing judicial co-operation - where each jurisdiction would defer to the concerns of others.

After its substantive consideration of the draft Model Provisions, the Commission reviewed the draft articles prepared by the drafting group. It approved the suggestion that the draft text should bear the title "Model Law" rather than "Model Provisions", in line with the other pieces of model legislation prepared by the Commission. At its meeting on 30 May 1997, the Commission finally adopted the UNCITRAL Model Law on Cross-Border Insolvency.

The Model Law: An Overview

The UNCITRAL Model Law on Cross-Border Insolvency (hereinafter referred to as "Model Law") consists of a Preamble and 32 Articles, placed under five chapters.

Chapter I - General Provisions (Articles 1 to 8)

Chapter II - Access of Foreign Representatives and Creditors to Courts in the State (Articles 9 to 14)

Chapter III- Recognition of a Foreign Proceeding and Relief (Articles 15 to 24)

Chapter IV - Co-operation with Foreign Courts and Foreign Representatives (Articles 25 to 27)

Chapter V - Concurrent Proceedings (Articles 28 to 32)

The Preamble states the purpose of the Law is, to provide effective mechanisms for dealing with cases of cross-border insolvency, so as to promote, inter alia, the objectives of co-operation between States on matters of cross-border insolvency; ensuring fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and the protection and maximisation of the value of the debtor's assets

Chapter I, (Articles 1 to 8) sets out the general provisions on scope of application; definitions and rules of interpretation; designating the competent court and authorisation of a person or body to administer liquidation under the law of the enacting State to act in a foreign State; and public policy exceptions. Article 1 on 'Scope of Application' states that this Law is applicable where: (i) assistance is sought in the enacting State, by a foreign court or foreign representative in connection with a foreign proceeding, or (ii) assistance is sought in a foreign State in connection with a proceeding under the laws of the enacting State, or (iii) a foreign proceeding and a proceeding in the enacting State are concurrently taking place, as regards the same debtor, or (iv) creditors