

project company and terms of transfer of infrastructure to the host Government in BOT projects; and

(e) To elaborate in Chapter-XII (Governing Law), on the possibility and limitations of choice-of-law clauses and arbitration agreements taking into account the specific nature of the various contractual arrangements involved.

### **Consideration of draft chapters**

The Commission considered the initial drafts on Chapters I, II and V, as prepared by the Secretariat and made the following recommendations as to the future work on the subject:

As to Chapter I on the 'Scope, purpose and terminology of the guide', the Commission suggested that the guide should avoid generating the impression that it dealt only with infrastructure projects exclusively financed with private funds. Hence, the need to highlight the role of local capital providers and investors in the development of infrastructure projects was stressed upon. It was also suggested this chapter must make it clear that infrastructure projects could also be carried out by entities in which the host Government participated, as long as these entities were subject to substantially the same legal regime that applied to the operations of private entities. With reference to projects related to construction and operation of power plants, there were instances where project companies were granted the right to exploit some natural resources - as an ancillary activity for producing fuel for operating the concession. Such transactions, it was suggested should not be excluded to the extent it was ancillary to a main, infrastructure project.

As a general comment on Chapter -II, relating to 'Parties and phases of privately-financed infrastructure project' the Commission suggested that more emphasis should be given to the implications of internal approval and licensing requirements of the host Government and the need for co-ordinating with all agencies involved in the process. It might also address the legal risks faced by prospective concessionaires during the pre-contractual phase (eg. unsuccessful negotiations; subsequent avoidance of contract, etc.); and

consider issues arising out of renegotiating of the terms of concession or as a result of its transfer to another concessionaire.

On 'Preparatory Measures' dealt with in Chapter -V the Commission stressed the need to adopt a flexible approach to meet the requirement of individual projects, while discussing the preparatory steps for the implementation of the projects. The preparatory steps involves: the acquisition of land for the construction of the facility; establishment of the consortium that would build and operate the facility; issuance of licenses and approvals and ensuring co-ordination among governmental entities for, necessary for carrying out the project activities. As regards the acquisition of a site for the project company it was suggested to give attention to the position and interests of the owners of property that might be expropriated for the purpose of building the infrastructure.

### **Future Work**

The Commission approved the line of work proposed by the Secretariat and requested it to seek the assistance of outside experts, as required, for facilitating the work on this subject. Governments were invited to identify experts who could be of assistance to the Secretariat in this task.

### **Comments**

With the changes ushered by the ongoing phenomenon of liberalization, the private sector has come to play a major role in the economic development of a number of States. For many underdeveloped and developing economies, their relatively recent involvement with the private sector makes it an innovative experiment for them. As the increase in international trade warrants active participation of hitherto marginalised economies, it is imperative that they are sufficiently acquainted with the modalities of seeking capital from private sources. In this context, the efforts towards preparing a legislative guide on privately-financed infrastructure projects, is a step worthy of being considered on a priority basis and accomplished expeditiously.

Besides the wide range of issues involved, the varied requirements / of States at different levels of development does not easily lend itself to



formulating uniform legislative and commercial practices in this area. Hence, the decision to opt for a legislative guide - which provides room for flexibility and offers various alternatives - has the distinct utility of enabling States to become conversant with the working of privately financed infrastructure projects.

In the view of the AALCC Secretariat, the work of the UNCITRAL at the current session, is a good beginning in identifying the issues to be incorporated in the draft legislative guide. Besides developing a favourable legal framework to assist States in implementation privately financed infrastructure projects. The interests of developing States would be well served with the enunciation of definite rules on such issues as: (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 the provision of services.

## **II. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(UNCTAD)**

### **Introduction**

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat.

Held every four years, the Conference is the organization's highest policy-making body. - It formulates policy guidelines and decides on the programme of work. Nine Conferences have been held so far: Geneva(1964), New Delhi(1968), Santiago(1972), Nairobi (1976), Manila(1979), Belgrade(1983), Geneva(1987), Cartagena de Indias, Colombia(1992) and Midrand(1996).

## **UNCTED IX : FINAL DOCUMENT**

It might be recalled that the Ninth session of the United Nations Conference on Trade and Development(UNCTAD IX) was held at Midrand (South Africa) in 1996. The outcome of the session is reflected in the Midrand Declaration and the final document titled " A Partnership for Growth and Development", adopted by the Conference. The final document sets priorities for development action in a globalizing world economy. The Conference reiterated the comparative advantages of UNCTAD as a focal point for tackling trade-related development issues, viz., trade, finance, technology, investment and sustainable development. Towards this end, it was agreed that UNCTAD should continue to facilitate the integration of developing countries and countries in transition with the international trading system. Its work should be action-oriented and provide guidance on national policies, with special focus on LDCS.

Outlining the priorities for UNCTAD, until the next session , the Conference decided to pay more attention in its analytical and deliberative work on the following areas:-

- Globalization and development;
- International trade in goods and services, and commodity issues;
- Investment, enterprise development and technology; and
- Services infrastructure for development and trade efficiency

In the process of restructuring and streamlining the organisation, the UNCTAD-IX established the following subsidiary bodies of the Trade and Development Board: (i) the Commission on Trade in Goods and Services. and Commodities; (ii) the Commission on Investment, Technology and Related Financial Issues; and (iii) the Commission on Enterprise Business Facilitation and Development. These Commissions will adopt a integrated approach in their respective areas of competence and will meet once a year, unless otherwise decided by the Board. In order to benefit from higher level of technical expertise, each Commission may convene expert meetings of short duration. Technical matters discussed at the expert level would be reported to the relevant parent body, which may transmit them to the Board as appropriate.



### III Working of the Commissions:-

With the advent of WTO, the focus of the UNCTAD work programme has shifted from the traditionally specific themes like primary commodities, transfer of technology, competition policies, etc. to a broad and integrated approach. The UNCTAD is currently working in coordination with the WTO on issues like investments and competition policy. The emphasis of UNCTAD following its Midrand Session is mostly in terms of analysing the impact of the Uruguay Round Agreements on development and working out modalities for enhancing capacities of developing countries for participation in the multilateral trading system.

This part seeks to provide an overview of the activities of the three Commissions.

#### **Commission on Trade in Goods and Services, and Commodities:-**

In consonance with the decision of UNCTAD-IX, the Trade and Development Board at its thirteenth executive session held in July 1996 adopted the agenda for the first session of the Commission on Trade in Goods and Services and Commodities. The following two items were taken up at the first session of the Commission held on 19-21 February 1997:-

(1) Enabling countries to respond to the opportunities arising from the Uruguay Round Agreements so as to derive maximum available benefit by: analysing the impact of Uruguay Round Agreements on development and enhancing capacities for participation in the multilateral trading system; and

(2) Integrating trade, environment and development: Recent Progress and Outstanding issues.

The first session of the Commission discussed the issues relating to tourism, environment and development; role of direct foreign investment in the transfer of environmentally friendly technology; ecolabelling, etc. Pursuant to the decision of the Commission to convene two expert group meetings, the

following meetings were held:

(a) Meeting of Experts on Strengthening the Capacity and Expanding Exports of Developing Countries in the Services Sector: Health Services (16-18 June 1997).

(b) Experts Meeting on Vertical Diversification in the Food Processing Sector in Developing Countries (1-3 September 1997).

The recommendations adopted by the two expert group meetings forwarded to the second session of the Commission held in November 1997. The Commission endorsed the recommendations of the two expert group meetings, and decided to convene three expert meetings on the following topics, in 1998:-

(a) Examination of the effectiveness and usefulness for commodity dependent countries of new tools in commodity markets: risk management and collateralized finance;

(b) Strengthening the capacity for expanding the tourism sector in developing countries, with particular focus on tour operators, travel agencies and other suppliers; and

(c) Strengthening capacities in developing countries to develop their environmental services sector.

#### **B. Commission on Investment, Technology and Related Financial Issues:-**

The agenda as adopted by the Board for the first session of the Commission on Investment, Technology and Related Financial Issues contained the following items:

(1) Developments in International Investment: Interaction between investment and trade and its impact on development.



(2) Issues related to competition law of particular relevance to development.

It may be recalled that UNCTAD has been active in the field of competition and restrictive business practices since the early 1970s. As of date the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as formulated by UNCTAD and adopted by the General Assembly in its resolution 35/63 of 5 December 1980 is the only multilateral instrument on competition in existence. Recalling the past work of UNCTAD on this subject, an Expert Meeting on Competition Law and Policy which met from 13 to 15 November 1996 recommended that the Commission at its first session should consider convening expert level meeting on the subject in 1997.

The first session of the Commission held from 18 to 22 November 1996, endorsed the recommendations of the Expert Meeting on Competition Law and Policy. Besides, the Commission recognised the need expressed by many developing and least developed countries for empirical studies to shed further light on the impact on development of liberalising domestic investment regimes. Following the conclusion adopted at the first session of the Commission, the below mentioned meeting of expert groups were convened:

- (a) Expert Meeting on Existing Agreements on Investment and their Development Dimensions, 28-30 May 1997.
- (b) Expert Meeting on Investment Promotion and Development Objectives, 24-26 September 1997; and
- (c) Expert Meeting on Competition Law and Policy, 24-26 November 1997

The report of the expert level meetings held in May and September 1997 were forwarded to the Commission which met at its second session in 29 September - 3 October 1997. Taking note of the reports by the expert meetings the Commission called for work to elucidate the elements of appropriate competition policy and the modalities of achieving coherence

between FDI liberalization, trade policy and competition policy. The Commission was of the view that it was important to continue work on the development dimension of international investment agreements and accordingly recommended to the Board that the following meetings at the expert level be held:

- (i) Examination and review of existing regional and multilateral investment agreements and their development dimensions;
- (ii) Environmental accounting;
- (iii) Competition law and policy;
- (iv) The growth of domestic capital markets, particularly in developing countries, and its relationship with foreign portfolio investment.

The work of this Commission assumes more significance in the light of the interlinkages established by the WTO Singapore Ministerial Meeting, 1996 between UNCTAD and WTO to jointly study the issues of investments and competition policy. It might be recalled that the Singapore WTO Ministerial Meeting had established two working groups: one to study the relationship between trade and investments and the other to study issues relating to the interaction between trade and competition policy. Such a coordinated approach, it is hoped, would effectively draw upon the specific expertise and complementary mandates of UNCTAD and WTO.

### **C. Commission on Enterprise, Business Facilitation and Development:**

The agenda for the first session of the Commission on Enterprise, 'Business Facilitation and Development as adopted by the Board in July 1996, included the following items,

- (1) Enterprise: Issues relating to an enterprise development strategy.
- (2) Services Infrastructure for Development and Trade efficiency Assessment.

At its first session held in January 1997, the Commission recognised