NOTES :

(i) The Delegations of Iraq and Pakistan were of the view that a refugee should generally be granted the standard of treatment applicable to the nationals of the country of asylum.

(ii) The Delegation of Indonesia reserved its position on paragraph 3 of the Article.

(iii) The Delegations of Indonesia and Thailand reserved their position on paragraph 4 of the Article.

Article VII

Obligations

A refugee shall not engage in subversive activities endangering the national security of the country of refuge, or in activities inconsistent with or against the principles and purposes of the United Nations.

NOTES :

(i) The Delegations of India, Japan and Thailand were of the view that the words "or any other country" should be added after the words "the country of refuge" in this Article. The other Delegations were of the view that such addition was not necessary.

(ii) The Delegation of Iraq was of the view that the inclusion of the words "or in activities inconsistent with or against the principles and purposes of the United Nations" was inappropriate as in this Article what was being dealt with was the right and obligation of the refugee and not that of the State.

Article VIII

Expulsion and deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

NOTES :

(i) The Delegations of Ceylon, Ghana and Japan did not accept the text of paragraph 1. In the view of these Delegations the text of this paragraph should read as follows :—

"A State shall not expel or deport a refugee save on grounds of national security or public order, or a violation of any of the vital or fundamental conditions of asylum".

(ii) The Delegations of Ceylon and Ghana were of the view that in paragraph 2 the words "as generally applicable to aliens under such circumstances" should be added at the end of the paragraph after the word "necessary".

Article IX

Nothing in these articles shall be deemed to impair any higher rights and benefits granted or which may hereafter be granted by a State to refugees.

APPENDIX

PRINCIPLES CONCERNING ADMISSION AND TREATMENT OF ALIENS

(Adopted by the Committee at its Fourth Session)

Article 1

Definition of the term Alien

An alien is a person who is not a citizen or national of the State concerned.

NOTE :

In a Commonwealth country the status of the nationals of other Commonwealth countries shall be governed by the provisions of its laws, regulations and orders.

Article 2

(1) The admission of aliens into a State shall be at the discretion of that State.

(2) A State may—

(i) prescribe conditions for entry of aliens into its territory ;

(ii) except in special circumstances, refuse admission into its territory of aliens who do not possess travel documents to its satisfaction ;

(iii) make a distinction between aliens seeking admission for temporary sojourn and aliens seeking admission for permanent residence in its territory ; and

(iv) restrict or prohibit temporarily the entry into its territory of all or any class of aliens in its national or public interest.

NOTE :

(1) The Delegation of Japan is of the view that in sub-clause (iv) of Clause (2) of this Article the words "armed conflicts or national emergency" should be substituted in place of the words "national or public interest."

(2) The Delegation of Indonesia stated that his Delegation preferred Clause (2) of Article 2 as adopted by the Committee at its Third Session in Colombo.

Article 3

A State shall not refuse to an alien entry into its territory on the ground only of his race, religion, sex or colour.

Article 4

Admission into the territory of a State may be refused to an alien—

(i) who is in a condition of vagabondage, beggary or vagrancy ;

(ii) who is of unsound mind or is mentally defective ;

(iii) who is suffering from a loathsome, incurable or contagious disease of a kind likely to be prejudicial to public health ;

(iv) who is a stowaway, a habitual narcotic user, an unlawful dealer in opium or norcotics, a prostitute, a procurer or a person living on the earnings of prostitution ;

(v) who is an indigent person or a person who has no adequate means of supporting himself or has no sufficient guarantee to support him at the place of his destination ;

(vi) who is reasonably suspected to have committed or is being tried or has been prosecuted for serious infractions of law abroad ;

(vii) who is reasonably believed to have committed an extraditable offence abroad or is convicted of such an offence abroad ;

(viii) who has been expelled or deported from another State ; and

(ix) whose entry or presence is likely to affect prejudicially its national or public interest.

Article 5

A State may admit an alien seeking entry into its territory for the purpose of transit, tourism or study, on the condition that he is forbidden from making his residence in its territory permanent.

Article 6

A State shall have the right to offer or provide asylum in its territory to political refugees or to political offenders on such conditions as the State may stipulate as being appropriate in the circumstances.

Article 7

(1) Subject to conditions imposed for his admission into the State, and subject also to the local laws, regulations and orders, an alien shall have the right—

(i) to move freely throughout the territory of the State; and

(ii) to reside in any part of the territory of the State.

(2) The State may, however, require an alien to comply with provisions as to registration or reporting or othewise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.

NOTE :

The Delegation of Indonesia expressed preference for the text adopted at the Colombo Session in Clause (1) of this Article.

Article 8

Subject to local laws, regulations and orders, an alien shall have the right—

(i) to freedom from arbitrary arrest ;

(ii) to freedom to profess and practise his own religion ;

(iii) to have protection of the executive and police authorities of the State ;

(iv) to have access to the courts of law ; and

(v) to have legal assistance.

NOTE :

(a) The Delegation of Ceylon was of the view that in Clause (ii) the expression "to freedom of religious belief and practice" should be substituted.

(b) The Delegations of Burma and Indonesia suggested retention of Clause (2) of the Draft adopted at the Colombo Session which provides that "Aliens shall enjoy on a basis of equality with nationals protection of the local laws."

The Delegations of Iraq and Japan had no objection to the retention of this clause.

Article 9

A State may prohibit or regulate professional or business activities or any other employment of aliens within its territory.

NOTE :

The Delegation of Iraq was of the view that the words "shall be free to" should be inserted in place of the word "may". The Delegation of Pakistan wished to keep its position open.

Article 10

An alien shall not be entitled to any political rights, including the right of suffrage, nor shall he be entitled to engage himself in political activities, except as otherwise provided by local laws, regulations and orders.

Article 11

Subject to local laws, regulations, and orders and subject also to the conditions imposed for his admission into the State, an alien shall have the right to acquire, hold and dispose of property.

NOTE :

The Delegation of Indonesia, whilst accepting the provisions of this Article, stated that according to the new laws of Indonesia aliens cannot acquire title to property though they can hold property.

Article 12

(1) The State shall, however, have the right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders.

(2) The State shall also have the right to dispose of or otherwise lawfully deal with the property of an alien under orders of expulsion or deportation.

NOTE :

(i) The Delegation of Japan did not accept the provisions of this Article. According to its view "just compensation" should be paid for all acquisition, nationalisation or expropriation and not "compensation in accordance with local laws, regulations and orders." The Delegation could not accept the provisions of Clause (2) as such a provision would be contrary to the laws of Japan.

(ii) The Delegation of Indonesia reserved its position on Clause (2) of this Article.

(iii) The Delegation of Pakistan stated that though it accepted the provisions of this Article, the view of the Delegation was that acquisition, nationalisation or expropriation should be in the national interest or for a public purpose.

Article 13

(1) An alien shall be liable to payment of taxes and duties in accordance with the laws and regulations of the State.

(2) An alien shall not be subjected to forced loans which are unjust or discriminatory.

NOTE :

(i) Clause (1) of this Article was accepted by all Delegations except that of Japan. The Delegation of Japan wished a proviso to that clause to be inserted to read as follows :

"Provided that the State shall not discriminate between aliens and nationals in levying the taxes and duties."

(ii) Clause (2) was accepted by the Delegations of Burma, India, Indonesia and Iraq.

The Delegation of Ceylon wished the words "or discriminatory" to be deleted. The Delegate of Japan wished the clause to be drafted as "An alien shall not be subject to forced loans." The Delegation of Pakistan suggested the following draft : "An alien shall not be subjected to loans in violation of the laws, regulations and orders applicable to him." The Delegation of the United Arab Republic was of the view that the draft should be as follows : "An alien shall not be subjected to forced loans."

Article 14

(1) Aliens may be required to perform police, fire-brigade or militia duty for the protection of life and property in cases of emergency or imminent need.

(2) Aliens shall not be compelled to enlist themselves in the armed forces of the State.

(3) Aliens may, however, voluntarily enlist themselves in the armed forces of the State with the express consent of their home State which may be withdrawn at any time.

(4) Aliens may voluntarily enlist themselves in the police or fire-brigade service on the same conditions as nationals.

NOTE :

The Delegation of Indonesia reserved its position on the whole Article.

The Delegation of Iraq reserved its position on Clause (3) of this Article.

The Delegation of Japan wished Clause (3) of this Article to be deleted.

Article 15

(1) A State shall have the right in accordance with its local laws, regulations and orders to impose such restrictions as it may deem necessary on an alien leaving its territory.

(2) Such restrictions on an alien leaving the State may include any exit visa or tax clearance certificate to be procured by the alien from the authorities concerned.

(3) Subject to the local laws, regulations and orders a State shall permit an alien leaving its territory to take his personal effects with him.

NOTE :

(i) The Delegate of Pakistan reserved his position on Clause (3).

(ii) The Delegates of Ceylon and United Arab Republic wished the following clause to be retained in this Article :

"An alien who has fulfilled all his local obligations in the State of residence, shall not be prevented from departing from the State of residence."

Article 16

(1) A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders.

(2) The State shall, unless the circumstances warrant otherwise, allow an alien under orders of explusion or deportation reasonable time to wind up his personal and other affairs.

(3) If an alien under order of expulsion or deportation fails to leave the State within the time allowed, or, after leaving the State, returns to the State without its permission, he may be expelled or deported by force, besides being subjected to arrest, detention and punishment in accordance with local laws, regulations and orders.

Article 17

A State shall not refuse to receive its nationals expelled or deported from the territory of another State.

NOTE :

The Delegation of Pakistan suggested the addition of the word "normally" before the word "refuse."

Article 18

Where the provisions of a treaty or convention between any of the signatory States conflict with the principles set forth herein, the provisions of such treaty or convention shall prevail as between those States.

V. RELIEF AGAINST DOUBLE TAXATION AND FISCAL EVASION

(I) INTRODUCTORY NOTE

The subject " Relief against Double Taxation and Fiscal Evasion" was referred to the Committee by the Government of India under Article 3 (c) of the Committee's Statutes for exchange of views and information between the participating countries.

The Committee initially considered this subject at its Fourth Session and appointed a Sub-Committee to examine in what manner the Committee should deal with the problem of avoidance of double taxation and fiscal evasion. At that Session, the Committee in accordance with the recommendations of the Sub-Committee, decided that the Governments of the participating countries be requested to forward to the Secretariat the texts, if any, of the agreements relating to avoidance of double taxation and fiscal evasion to which they are parties and the texts of the provisions of their national laws on this question. The Committee also directed the Secretariat to draw up the Topics of Discussions (Questionnaire with short comments) and transmit the same to the Governments of the participating countries.

At the Sixth Session of the Committee, the subject was further considered and a Sub-Committee was appointed to go into the question. The Sub-Committee after a preliminary exchange of views concluded that though bilateral taxation agreements provided a practical solution to the problems which arose from the economic intercourse of nations, it was desirable to have an exchange of views on the question of conclusion of a multilateral convention. Since the views of some of the participating States were not before the Sub-Committee, the Committee, accepting the recommendations of the Sub-Committee, decided to postpone consideration of the subject to the next Session and directed the Secretariat to prepare a

fuller compilation of the rules, regulations and practices of the participating States and the agreements concluded by them.

At the Seventh Session the subject was again considered by a Sub-Committee. The Sub-Committee was somewhat handicapped in its work as all the material and information which it required was not available, but having regard to the importance of the subject to the developing countries of Asia and Africa, it was deemed proper to make a beginning by formulating certain broad principles on the subject. The Sub-Committee accordingly drew up a Report containing its recommendations on these broad principles for consideration of the Committee. The Committee took note of the report and decided to give consideration to it at its next Session.

At the Eighth Session held in Bangkok, the subject was again considered by a Sub-Committee. The Sub-Committee prepared and presented a report on the topics which were not dealt with by the Sub-Committee appointed at the Seventh Session. The Committee took note of that Report and directed that the same along with the Report of the Sub-Committee of the Seventh Session be placed before it for consideration at its Ninth Session.

(II) REPORT OF THE SUB-COMMITTEE APPOINTED AT THE EIGHTH SESSION

The subject "Relief against Double Taxation and Fiscal Evasion" was taken up for consideration in the Fourth, Sixth and Seventh Sessions of the Asian-African Legal Consultative Committee. The Sub-Committees appointed in the Fourth and Sixth Sessions to examine this problem were not able to make any concrete recommendations for want of complete information regarding the laws, practices and bilateral agreements of the participating countries and, therefore, further consideration of the subject was deferred to the Seventh Session.

At the Seventh Session held in Baghdad, the subject was again referred to a Sub-Committee for further examination. That Sub-Committee had to contend with the same difficulties as its predecessors because of want of complete information, but in view of the importance of the subject to the Member Countries it decided to make a beginning by formulating certain broad principles on the subject of double taxation. The Committee took note of that report and decided to give consideration to it in the present Session in which this Sub-Committee has been constituted.

The task before this Sub-Committee is to consider and report on certain aspects of the subject which were left out of consideration by the Sub-Committee appointed in the last Session. It, therefore, becomes necessary to briefly outline the recommendations made by that Sub-Committee. Its most important recommendations were (1) that the laws of the participating countries should contain provisions empowering their Governments to enter into bilateral or multilateral agreements to grant relief against double or multiple taxation; (2) that bilateral agreements which take care of the special relations between contracting States afford the most practical method of

avoidance of double taxation; (3) that such bilateral agreements should be on the basis of allocation of sources of income in respect of categories of activities where the loss or gain would be substantially equal, having regard to the state of trade relations between the two countries; and (4) that in other cases, where the same income is taxable in the two countries, systems of tax credit or tax rebate should be introduced.

This Sub-Committee is also of the same view as its predecessor that the principle of allocation, under which the exclusive taxing power of each type of income is allocated to one of the two contracting States in conformity with certain tax criteria such as situs, source, residence or domicile, affords the most satisfactory and practical method of giving relief against double taxation. This implies that when income from a particular source is chargeable to tax both in the country of the source of the income and also in the country within which the tax payer is resident, the income will be taxed by the taxing authorities of the country to which that particular source is allocated and relief against double taxation will be given to the tax payer by the other contracting States either by exempting that income from local tax or by giving credit for the tax paid in the country of source. This principle has been recommended because as between countries which are more or less at an equal level of economic development, each country would give up substantially the same amount of revenue that it would gain through corresponding relinquishment by the other country. The categories of income and the countries to which such income should be allocated are given in the previous Sub-Committee's Report at page 130 and 131 of Volume II of the Brief of Documents and they are therefore not reproduced here. That Sub-Committee was, however, unable to make any recommendation in the matter of avoidance of or relief against double taxation of income arising from trade, business, industry and other profits, and it was this aspect of double taxation that was deferred to the present Session of the Committee. The present Sub-Committee, therefore, addressed itself to an

examination of the problem of double taxation on the following types of income, that is to say (a) income from industrial and commercial enterprises; (b) income from movable capital and (c) income from capital gains.

INCOME FROM INDUSTRIAL AND COMMERCIAL ENTERPRISES

In the most of the bilateral agreements concluded between different countries for avoidance of double taxation the concept of Permanent Establishment has been adopted. This means that the industrial and commercial profits accruing to an enterprise which is resident in one of the contracting States will be chargeable to tax in the other contracting State only if it carries on its business through a Permanent Establishment located in that other State. All fixed places of business having a productive character such as head offices, branches, factories, workshops, warehouses, mines, oil wells, installations etc. have been considered as Permanent Establishments. On the other hand, establishments like store-houses, purchase offices, information bureaus etc., which are not directly engaged in actual productive operations, are not included in the expression "Permanent Establishment" although they render general or particular services to the enterprise having no definite connection with the profit earned by it.

An agent acting in one of the contracting States for or on behalf of the commercial or industrial enterprise of the other contracting State has also been deemed to be a Permanent Establishment in the former State if he (1) habitually acts in the name of the enterprise concerned as a duly accredited agent and enters into the contracts on its behalf or (2) acts as a salaried employee of the enterprise and habitually contracts business on its account or (3) habitually holds for purchase or sale stocks of goods belonging to the enterprise. However, most of the bilateral agreements also provide that an independent broker or a commercial agent who merely acts as an interme-

diary between the enterprise of one of the contracting States and a prospective customer in the other contracting State is not deemed to be a Permanent Establishment of that other State. Similarly, the existence in one of the contracting States of a company which is a subsidiary of a company resident in the other contracting State will not make the subsidiary company a Permanent Establishment of the parent company, the reason being that for the purpose of taxation the subsidiary company is itself a distinct and separate legal entity.

As already stated, the concept of Permanent Establishment has been adopted in most of the bilateral agreements concluded between member countries *inter se* or between non-member countries or between member countries and non-member countries for the purpose of avoidance of double taxation on income arising from industrial or commercial enterprises. The Sub-Committee realises that the taxation of income from industrial and commercial activities which are carried on in more countries than one having conflicting interests and different tax structures, differing methods of computation of the taxable income or of the tax chargeable, affords a difficult and complex problem and the Sub-Committee has also not found it feasible or possible to make a detailed study of the taxing provisions of different States. However, having considered the provisions contained in the bilateral international agreements reproduced in the Vol. II of the Briefs of Documents, this Sub-Committee would recommend the acceptance by the Member countries of the concept of Permanent Establishment in the matter of taxation of income earned from industrial and commercial enterprises. A tentative definition of Permanent Establishment has been given in the *Annexure* for the consideration of the Committee.

INCOME FROM MOVABLE CAPITAL

Income from movable capital generally includes dividends paid by a company, interest on bonds, securities, notes or debentures issued by Government and other public or private

bodies or companies. According to the Secretariat of the Asian-African Legal Consultative Committee, the tax agreements do not follow any general principle in regard to taxation of movable capital. It is said that the conflict of interests between capital exporting countries and capital importing countries makes this one of the most difficult problems arising in connection with avoidance of double taxation. The interests of the capital exporting countries are served best by taxing the income from capital investments "at home of the creditor or beneficiary" while those of the capital importing countries, by taxation at home of the debtor, that is, where the investment is used or the income is paid. "The practical solution of the problem depends in most cases on the extent to which each of the contracting States is willing to limit its right of taxation in order to facilitate international investment". The Sub-Committee is of the view that in the interest of expansion of trade and business and flow of capital amongst participating countries, the income from capital investments should be taxed in the country of residence of the debtor, in other words, in the country in which the investment is used in priority to the country of residence of the recepient of such income. Thus dividends declared in a country should be treated as dividends from sources taxable within that country, interest on bonds, loans, securities and such other forms of indebtedness issued by Government or local authorities or other corporate bodies of one of the contracting States should be taxed by that State as income from source within that State.

INCOME FROM CAPITAL GAINS

The bilateral tax agreements which the Sub-Committee has examined adopt the principle that gains derived from the sales, transfer or exchange of immovable property are taxable in the country in which the property is situated. As regards the gains derived from the sale of capital assets other than immovable property, certain agreements reserve the right of tax to the State in which the person earning the capital gain is a

resident. Other agreements stipulate that such gains may be taxed only in the country in which the capital asset is situated at the time of the sale, exchange or transfer.

The Sub-Commitee would recommend that the capital gains derived from the sale or exchange of property or of any other capital asset may be taxed in the country of source, that is to say, in the country in which the capital asset is situated.

METHODS OF AVOIDING DOUBLE TAXATION

The bilateral agreements concluded between various countries adopt the principle that the country of the source of income has the right to tax that income in priority to any claim by the country of residence of the tax payer. However, in granting relief against double taxation of foreign income, the countries of residence exercising their residual power of taxation do not follow a uniform practice. In some cases the foreign income is included in the total income of the tax payer and tax is charged thereon in the same manner as on the domestic income, and credit is allowed for the tax paid in the country of source of the income against the tax payable on the total income. This is the tax credit method. In other cases the foreign income is taken into account only for the purpose of ascertaining the rate of tax applicable to the domestic income, but thereafter no tax is charged on the foreign income. This is the exemption method. Some of the bilateral agreements, particularly those concluded between India and Pakistan, and India and Ceylon, follow a simplified pattern of allocation of sources. Certain incomes from personal services, income from securities and from immovable property are exclusively taxable in one of the contracting countries on the basis of source, situs or accrual as laid down in the schedules of these agreements. Other kinds of income such as income from goods manufactured in one country and sold in the other or metal ores, mineral oils etc. extracted in one country and sold in the other are partly taxable by one country and partly by the other according to an agreed proportion. If either country

charges more than what is specified in the schedules to those agreements, that country allows an abatement equal to the lower of the amount of the tax attributable to such cases in either countries. Under the agreement concluded between India and Japan the bulk of income comes under the tax credit method.

The Sub-Committee considers that if an accord can be reached between contracting States in the matter of allocation of sources of income between the States, the exemption method makes for a complete elimination of double taxation. The tax credit method involves intricate procedure of calculating foreign tax to be credited against domestic tax on the total income including foreign income of the tax payer and even fails to give adequate relief from double taxation owing to differences of methods of computation of taxable income in the country of source and in the country of residence. In the Report of the Commission on Taxation of the International Chamber of Commerce, it is pointed out that the system of taxing foreign income and giving credit for foreign tax on it often fails to give adequate relief from double taxation owing to differences in the types of taxes levied in the country of residence and in the country of source, "in the base of assessment of income tax and owing to the existence of subordinate taxing authorities in addition to the central government." In the opinion of that Commission the only sure method of avoiding double taxation in the country of residence is to exempt foreign income from any proportional or progressive taxes. This Sub-Committee is likewise of the view that the exemption method makes for simplicity and is the simplest way of avoiding double taxation particularly in countries which are more or less at an equal level of economic development.

LOCAL TAX CONCESSION

If, however, the tax credit method is preferred as a means of giving relief against double taxation, this Sub-Committee would like to reiterate the principle formulated by the previous Sub-Committee in clause (6) of the General

principles on page 128 of Volume II of the Brief of Documents. The Sub-Committee feels that in granting relief by tax credit the scheme of relief should provide for giving credit for the tax *spared*. Certain countries give special tax concession by special incentive measures designed to promote economic development. If the countries of residence which tax foreign income at the ordinary rate of tax and then give credit only for the actual amount of the foreign tax charged in the country of source, the relief by way of tax concessions which the capital importing countries give to foreign capital invested in their enterprises merely ensures for the benefit of the capital exporting countries, it is not fully enjoyed by the persons who invested the capital but is expropriated by their government. For example, the law in India contains provisions for reduction of tax as special incentive measures designed to promote economic development in that country, such as provisions relating to exemption from tax of interest payable on money borrowed abroad, provisions relating to development rebate or relating to partial exemption from tax of any newly established industrial undertaking or hotels. The agreement between India and Japan incorporates a scheme by which the Indian tax has been reduced under the aforesaid provisions for promoting economic development is *deemed to have been paid* by the tax payer and credit for that amount is allowed against the Japanese tax. It appears to this Sub-Committee that this would be a useful pattern to follow in the future agreements between the participating countries.

SUMMARY OF CONCLUSIONS

To sum up, the Sub-Committee recommends :-

(1) that industrial and commercial profits accruing to the enterprise or one of the contracting States should be charged to tax only if that enterprise carries on trade or business in the other contracting States through a Permanent Establishment situated therein.

(2) Income from movable capital such as dividends declared and paid by companies, interests on bonds, loans securities or debentures issued by governments, local authorities or other corporate bodies should be taxed in the country where the investment is made and not on the country of residence of the recepient of such income.

(3) Capital gains derived from the sale, exchange or transfer of immovable property or other capital assets should be taxed by the country in which such assets are situated.

(4) As a means of removing double taxation the contracting States may as far as possible adopt the exemption method in preference to the tax credit method.

(5) In case where relief is preferred to be given by tax credit the scheme of relief should provide for affording credit to the tax *spared*.

In conclusion, the Sub-Committee wishes to place on record its appreciation of the work done by the Secretariat in collecting very useful material documented in the Second Volume of the Briefs of Documents which has been of great assistance to the Sub-Committee in its deliberations.

Sd/- R.M. Mehta
Sd/- Tadao Araki
Sd/- Wichian Watanakun