South West Africa. It is supposed to create a Constituent Assembly, to maintain law and order, and to transfer territory on attainment of independence to people. It appears to me that the U.N. Council is, in a sense, a parallel Government, established by the United Nations in respect of which I suggested many difficulties. The U.N. Council itself may be nonplussed where to begin and how to begin its work. You have, I think, members of that Council and they may be able to enlighten you further. On the other hand, there have been the Ovambo terrorist operations and they attempted to liberate Anemdia in respect of which 37 of the leaders have been arrested and the fight is going on as to how to get them liberated. The United Nations has appointed a Commissioner, Mr. Constantin A. Stavropoulos, an he will probably be able to report to the United Nations about the operations, which may begin.

Now I have, in this short talk to you, attempted to outline the various means that are open, the difficulties that attend them, and the possible repercussions that may take place. It is not for me to give you any advice. Therefore, I have purposely refrained from giving any except where I thought it was necessary to caution against any particular action. I do not think that I should take more of your time in this opening talk. We shall have occasion to get into discussion later and I only assure you that I hold the highest regard for the Afro-Asian Legal Consultative Committee and its distinguished delegates, and I thank them most heartily for the honour that they have done me in inviting me this morning again.

CEYLON

Mr. President, Mr. Justice Hidayatullah, distinguished leaders of delegations and learned colleagues. At this stage of our discussion on the question of South West Africa we just had the benefit of a considered talk by a distinguished professional man, as Justice Hidayatullah. Mr. President, you have invited delegations to make any further remarks they wish to make on this question. I think at this stage we should limit

ourselves in regard to the question : what are the prospects for the future ? We have, therefore, to reflect both upon the future of the International Court and the future of South West Africa. The dismay expressed, sometimes in terms of great vehemence, has not been limited to that of Africans. Criticism has also been widely voiced by white opponents of *apartheid* and by those who had hoped for a judicial role in the supervision of the Mandate. They have been joined in their criticism by those who denigrate the significance of international law and who see the Court's Judgment as further proof of the irrelevance of international law in the contemporary world. Thus, both those whose reaction is dismay, and those whose reaction is cynical satisfaction, are united in their response to the Court's Judgment. Mr. President, I do not suggest that the Court in giving its Judgment should have been guided by considerations of whether it would be "well received" or "badly received". The Court must, of course, should give considerations solely to the law as it exists, but it is idle to think that there are not objective grounds for anxiety that the Court has not in fact done so, and that, as Judge Jessup put it in his dissenting opinion, it has given a judgment, "completely unfounded in law."

Mr. President, it is, of course, not justifiable to disparage the Judgment of the Court by stressing the size of the majority. But one has to face the likely result that the developing nations will be less inclined than ever to use the Court, even if its composition becomes less European. Complete antagonism to the International Court and to the employment of legal means to resolve disputes is likely to result. One is now required to promote a system whereby years of legal arguments and expense will not necessarily lead to a pronouncement on the substantative issues. If a large number of Western observers see the Judgment as an attempt to dodge inconvenient questions, an even larger number of Africans and Asians must see it as a denial by white men of the use of the legal process to the coloured nations. The prospects of the use of the Court—the inadequate use of the Court has been a long standing problem, are thus exceed-

ingly gloomy, and the work to be done in expanding those areas where international rules are already accepted and the hopes of building a universal legal order have received a severe set-back.

Mr. President, some significant alteration of the situation has arisen as a result of the revocation of the Mandate. Even the question of an advisory opinion from the Court, that Justice Hidayatullah dwelt upon, is not likely to receive much favour from the Africans and the other States now dissatisfied with the action of the Court. Just as much as political questions cannot in my submission be settled judicially, similarly I venture to submit that an essentially judicial question, which is what judicial supervision of the mandate involved, cannot, in wisdom, be decided politically.

Mr. President, and distinguished delegates, being but a judge, and in this body merely one other professional man, I shrink from intruding an opinion on the political action which unhappily now seems inevitable when judicial decision has proved abortive. Thank you.

GHANA

Mr. President, Mr. Justice Hidayatullah. I am sorry that I was not able to participate in the discussion on South West Africa when it last came up, but the alternate delegate from Ghana suggested that as it is a purely legal consultative committee and as the United Nations have already taken action on this question, the best that this Committee can do is to keep the matter on the agenda and watch developments in the United Nations. It may very well be that at a future date a legal problem may arise which will need the opinion and advice of this Committee.

This question was brought before this Committee by the Delegation from Ghana at the Conference at Bangkok and it was brought under Article 3 (c) of the Statute of this Committee which limited this Committee to discuss and exchange views on

the topic and make recommendations, where necessary. The question today is whether it is necessary for any recommendations to be made at this stage. The Ghana Delegation feels after having listened to the learned and lucid exposition of the subject by Mr. Justice Hidayatullah and the various alternatives that have been put to this Committee that at this present moment we do not think that it would be fair on us to press this Committee to take any action in the matter except to keep it on the agenda and discuss it at a later stage.

I must end by thanking Mr. Justice Hidayatullah for having spared the time to assist both this Committee and all the other countries in Africa by first coming to this Committee to address us and also by publishing a book in which he has analysed the problem in exemplary lucidity and conscientiousness. Thank you.

INDONESIA

Mr. President and distinguished delegates : First of all, I would like to thank the distinguished Justice Hidayatullah for the lucid way in which he has put the case of South West Africa and the various ways in which it is possible to solve this problem in the future. I do not think that at present we have to decide to follow any of the suggestions he has mentioned. As a legal consultative committee of Afro-Asian countries, I highly appreciate the idea which has been proposed by Mr. President to keep this item on our agenda, and for the rest, I think, I have to agree completely with the courses expressed by our fellow Delegate of Ghana. Further, I do not think I have any other comments to make, and I thank you once again for the way this question of South West Africa has been tackled.

INDIA

We would like to associate ourselves with the remarks made by the other distinguished Delegates regarding the deep

appreciation of the admirable analysis given by the distinguished invitee, Mr. Justice Hidayatullah, as regards not only the history and background but also the possible courses of action that could be resorted to. But in view of the fact that this item was moved by the distinguished Delegate from Ghana at the Eighth Session, and that he has now suggested that this Committee should not take any action for the present, in view of the fact that action has already been taken in the matter by the United Nations, it would be more prudent to await developments. The best course we could suggest or offer is that the various courses open will already be on record and we may, therefore, agree to the proposal of the distinguished Delegate from Ghana, and just keep it on the agenda next year, and meanwhile watch for developments in the United Nations.

IRAQ

Mr. President : The Iraqi Delegation associates itself with the other distinguished delegates in thanking Justice Hidayatullah for his remarks. My delegation has expressed its views on the issue in a previous statement. At the present time while we associate ourselves with the remarks that have been made this morning by the distinguished delegates before me, we cannot help but to find out at the present time that legal action is not possible at this stage since the decision of the Court is final. But since at the present stage only political course is open on the issue and in this regard United Nations has already taken a decision, we are also of the view that we should watch the developments. This does not mean that we should forget the issue on the legal level. We should keep the item on the agenda to be discussed again, as soon as we are able to find out the developments as they take shape politically, and as soon as the decision of the United Nations is known and the degree to which it is being carried out. Thank you.

JAPAN

Mr. President : I associate myself with other delegates in

thanking Mr. Justice Hidayatullah for his presence and his clear statement on the matter. As you know, in my statement the other day, I stated not only the case of South West Africa, but also the Law of the United Nations General Assembly and as also the view of the International Court of Justice and there I explained exhaustively what we are contemplating at this moment. So I have, therefore, no further comment on the matter. We support whole heartedly the suggestion made by the Chair concerning the future course which our Committee should take on this matter.

PAKISTAN

I also associate myself in giving most warmly my thanks to Mr. Justice Hidayatullah for his address and for giving expression to his very agreeable views on the pros and cons of the Judgment. On a previous occasion he made exhaustive comments in regard to the merits of the Judgment. So I do not think any further discussion is called for. At best, it would be an academic exercise. After having heard the learned discourse of Mr. Justice Hidayatullah, the conclusion seems to be that no legal action is possible. That being so, there is nothing that we can do about it.

If any political action is possible, then that is a different problem. In these circumstances, the situation is one of helplessness. I would agree with the proposal that the subject should remain on the agenda and we should keep a watch and see further developments. If at a later stage the situation develops and legal consideration is warranted, we shall further consider the matter and give expression to our views.

UNITED ARAB REPUBLIC

I have listened with great interest to the wise *expose* delivered by Mr. Justice Hidayatullah for which I associate myself with the other delegates in thanking him. But since the

United Nations General Assembly is engaged on this matter, I believe that a talk of any solution should not be anticipated at this stage. So I uphold the suggestions made by the other fellow delegates to keep this matter pending for the coming session.

RELIEF AGAINST DOUBLE TAXATION AND FISCAL EVASION

REPORT OF THE COMMITTEE & BACKGROUND MATERIALS

I. INTRODUCTORY NOTE

The subject of "Relief against Double Taxation and Fiscal Evasion" was referred to this 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 held in Tokyo (1961) 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 topic. The Committee also directed the Secretariat to draw up the Topics of Discussion and transmit the same to the Governments of the participating countries.

At the Sixth Session of the Committee held in Cairo 1964), 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 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 its 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 of the Committee held in Baghdad (1965), 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 it consideration at its next Session.

At the Eighth Session held in Bangkok (1966), 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.

Accordingly, at the Ninth Session held in New Delhi in December 1967, the Committee considered both these Reports and the Delegations present at the Session expressed their views on the principles for avoidance of double or multiple taxation embodied in these two reports. The Committee then drew up and adopted its Final Report on the subject and decided to submit the same to the Government of India and the Governments of other participating countries.

II. STUDY PREPARED BY THE SECRETARIAT FOR ITS CONSIDERATION AT THE FOURTH SESSION

INTRODUCTION :

Double or multiple taxation on the same transaction arising out of exercise of powers of taxation by two or more States by reason of some "nexus" between the State and the taxable event is considered to be one of the important obstacles to the development of international trade and the free flow of international investment. Since the end of the Second World War more emphasis has been given on the desirability of freeing foreign trade and investment from avoidable encumbrances. The fresh emphasis placed in the United Nations Charter on economic development lends added importance to all measures apt to stimulate the opening of new trade channels to and from underdeveloped countries and the direction of new investment capital into their economies.[1] Since, international trade and investment operations are likely to be subjected to as many tax liabilities as the countries they cover, the problem of multiple taxation assumes practical urgency.

The problem of international multiple taxation extends to many tax categories, property taxes, estate taxes, excises etc., but it is most urgently felt by foreign traders and investors in the field of income taxation. It is here that most of the studies and most of the remedial measures can be found, and it is to this problem that the following discussion will be limited.

The problem of double taxation arises when the jurisdic-

[1] The basic provision incorporated in Article 55 of the U. N. Charter was buttressed by the unanimous adoption by the General Assembly of resolution 304 (IV) of 10 November, 1949, endorsing an expanded programme of technical assistance for economic development.

tion of the tax autority of the country in which income arises overlaps the jurisdiction of the tax authority of the country where the taxpayer resides. This overlapping of jurisdiction occurs, when the same income becomes, at one and the same time, the taxable subject of two different taxing countries, one claiming tax as the country in which the income arises and the other as the country of residence of the tax payer. Some countries recognise that the country in which the tax payer is resident retains the paramount power to assess his whole income from whatever source derived whereas others feel that the jurisdiction of the country in which the income arises is exclusive and the country of residence should exempt such income from its tax. In fact "double taxation would never have arisen and the course of international investment would have flowed more freely and beneficially" if all countries had not stretched their claims to tax income created outside their jurisdiction.[2] Moreover the policy of many States to tax incomes on the basis of "nexus" gives rise to many such cases of double or multiple taxation[3].

Most writers on the subjet hold the view that the problem calls for elaboration of a set of legal and economic rules which should guide Governments in determining the legitimate limits of their tax jurisdiction, by allocating to each the power to tax those activities and income categories to which under some basic principle it could lay special claim.

> The 1923 report of the League of Nations stated : "The starting point of the modern theory must therefore be the doctrine of economic allegiance....The problem consists in ascertaining where the true economic

[2] See Appendix V—*Report of the Commission on Taxation of International Chamber of Commerce* (Feb. 1955).

[3] Both India and Australia apply the theory of nexus in respect of their taxing power, i.e. if the income in question has any territorial connection with the taxing state, it would be subject to tax in that State. See the decision of the Privy Council in the Case of *Wallace Bros.* Vs. *Commr. of Income-Tax*, 75 *Indian Appeals*, p. 86.

> interests of the individual are found....The problem of the ideal division of the tax is a little different from that of the actual remission of the tax.
>
> "There may be a conflict between fiscal principle arrived at on purely theoretical grounds and the desirable financial or economic expedients, having regard to the state of the national budget in each country."[4]

Such broad principles, however, can only offer effective guidance to governments which are in a position to implement their policies within the framework of their economic structure. The decision must always be guided by the frequently conflicting answers to two questions : which of the countries can better afford the loss of tax revenue resulting from a partial or a total renunciation of taxing power over the assets in questions; which of the countries has a greater stake in the preservation and promotion of the activity which is endangered by the imposition of multiple taxation.

In this respect, the traditional approach has been based exclusively on the second aspect of the problem. In his *Memorandum on Double Taxation* to the Provisional Economic and Financial Committee of the League of Nations, Sir Basil B. Blakett stated :

> "If relief from double taxation is given, it is probable that it will be afforded by the country of origin (of the income), for reasons of wider import than the mere amount of tax received. Encouragement of the investment of the marginal amount of foreign capital referred to above may be paramount for national purposes. The loss of the tax on the entire foreign going yield may be much more than off-set by the increased prosperity resulting from the additional capital secured from foreign sources."[5]

[4] League of Nations doc. No. E.F.S. 73 F. 19, p. 8, 1923.

[5] *Memorandum on Double Taxation*, League of Nations document No. E.F. 16 A/16, 1921, p. 41.

This idea was also expressed in a paper by Gilpin and Wells on "International Double Taxation of Income," which stated : "From an equitable standpoint, it would seem that the debtor nations, being the ones in need of capital, should be willing to make some concessions to obtain the needed funds.[6]

In practice, this view has been abandoned everywhere. The need of capital importing countries for expanded tax revenue is generally recognised. The major burden of financing the economic development of underdeveloped countries has been assumed by the capital exporting countries. In the tax field this implies that between countries at different levels of development, the elimination of multiple taxation will be effected through the renunciation of tax revenue on the part of the more highly developed capital exporting countries.[7] The readiness of the capital exporting countries to assume a growing share of the resulting tax sacrifice has been manifested in unilateral income tax relief measures included in the national laws of these countries for the encouragement of foreign trade and investment.

Some of the capital importing countries do also provide unilateral relief in respect of taxes paid abroad on the same income. The purpose of such relief in the case of capital-importing countries is to give an inducement to local firms to open foreign branches in the fields like banking, insurance etc., and to facilitate the expansion of trade and commerce abroad.

Methods Of Relief From International Multiple Taxation

Relief from multiple taxation has today become the rule rather than the exception. Highly refined methods are used both in the mechanics by which tax jurisdiction is distributed among the countries concerned and in the instruments through

[6] *The effects of Taxation on Foreign Trade and Investment;* Chapter II, Fiscal Division; Department of Economic Affairs, United Nations, (Publication No. 1950 XVI. I.)

[7] *Ibid.,*

which such distribution is put into effect. The latter are of two types : *Unilateral Measures* consisting of a relief either through a system of so-called credits against tax or through an exemption from tax on income from foreign sources under the taxing law and concerted action through *International Agreements.*

(1) Unilateral Relief : A summary of the tax laws relating to relief from double taxation of some of the important countries of the world is given in the following paragraphs :

(a) Non-Member Countries :

The countries of the world may be divided into those which in principle subject overseas income of residents or domiciled companies and individuals to income-tax and those which do not. Twenty-four countries do not tax such income. These countries are : Aden, Argentina, Brazil, Costa Rica, Domican Republic, Equador, El Salvador, Gibralter, Guatemala, Haiti, Honduras, Lebanon, Luxembourg, Malaya, Morocco, Netherlands, Antilles, Nicaragua, Panama, Paraguay, Thailand, Union of South Africa (with a few exceptions), Uruguay, Venezuela, and Southern Rhodesia.

Tangier, Bermuda and the Bahamas have no income-tax at all.[8]

(i) Canada :

In Canada, certain types of companies having income derived almost wholly from abroad receive favourable treatment ; and dividends received by parent companies in Canada from subsidiaries abroad are exempt from tax. *Tax paid in another country on income arising there is allowed as a credit against the Canadian tax on that income.*

(ii) Australia :

In the case of Australia, income (other than dividends)

[8] *Taxation and Foreign Investment*—National Council of Applied Economic Research—Delhi, 1958.

derived by a person resident in Australia from sources outside Australia is exempt from Australian tax, provided (1) the income is not exempt from income-tax in the country from which it is derived or (2) the tax payer pays a royalty or export duty in any country. Tax credits are given for foreign taxes on dividends derived from abroad : for an amount equal to the foreign tax where the dividend is paid wholly out of sources outside Australia ; for a proportion of the foreign tax in other cases. The credit may not exceed the Australian tax attributable to the income qualifying for relief.[9]

(iii) Denmark :

In Denmark the tax payer's liability in respect of income derived from foreign sources is unlimited but there may be deferment of tax on income held in blocked currency. *The tax on the total income of a company is reduced by the proportion which the income from a business enterprise abroad bears to total income.*[10]

(iv) United Kingdom :

In 1957, the United Kingdom enacted legislation according to which a class of corporations called the "British Overseas Trading Corporations" which are controlled and managed in Britain but operate abroad are exempted from income-tax and profits-tax on their overseas trading profits. When, however, such corporations pay dividends or make other distributions to share-holders out of those trading profits, those dividends are liable to United Kingdom income-tax, and if they are received by a United Kingdom company to profits-tax as well. *Full tax credit relief is available to the United Kingdom resident in accordance with the 1953 legislation.*[11] Under this legislation United Kingdom residents are in a

9 Royal Commission on the Taxation of Profits and Income—*Final Report*, June, 1955.

10 See Appendix V—Report of the Commission on Taxation.

11 Finance Act, 1953, Sec. 26.

position to credit taxes paid to any foreign country on income arising therein upto the full amount of their United Kingdom tax liability on this foreign income. Previously credit for taxes levied by a country with which the United Kingdom had no tax agreement was limited to one-half or if it were a Commonwealth country-three quarters of that tax or of the corresponding United Kingdom tax, whichever was less.

(v) Netherlands :

Individuals resident in the Netherlands and companies incorporated or having their central management in the Netherlands are liable to income tax on profits from abroad. A company which owns not less than 25 per cent of the paid-up share capital of another company is not liable to income-tax on dividends it receives from that company. This exemption applies to dividends from foreign companies if they are liable to income-tax abroad. The exemption also applies even where the shareholding is less than 25 per cent, if the revenue authorities decide that the holding is part of the normal exercise of the business, or that it serves the national interest. In granting unilateral relief the tax on total income is reduced by the tax which would be payable on an income equal to the amount derived from a foreign trade, employment etc.

(vi) New Zealand :

Income-tax in New Zealand is charged on income arising abroad with the exception that ; (1) income from a country within the British Commonwealth, which is liable to tax there, is exempt from New Zealand tax (This income is, however, taken into account in computing the rate of tax on other income) ; and (2) A company resident in New Zealand which carries on business exclusively in islands of the Pacific which are not British possessions is liable to income-tax only on that part of its income which is received in New Zealand. *No relief for foreign taxes is available in this country other than by treaty.*