ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT OF THE TWENTIETH, TWENTY-FIRST AND TWENTY-SECOND SESSIONS HELD IN SEOUL (1979), JAKARTA (1980) AND COLOMBO (1981)

Prepared & Published by
THE SECRETARIAT OF THE AALCC.
27 Ring Road, Lajpat Nagar-IV,
New Delhi-110 024 (India)

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I. INTRODUCTION

The Asian-African Legal Consultative Committee (AALCC), established in 1956, serves as a forum for consultation and co-operation amongst its Member States in the field of international law and economic relations, especially in matters under consideration of the United Nations, its various organs and agencies. The AALCC now has thirty-nine participating States, including two Associate Members, from Asia and Africa. A large number of other States from all parts of the world attend the AALCC's annual sessions and special meetings as observers. The AALCC maintains official relations with the United Nations and other major international organisations. Since 1980, the AALCC enjoys Permanent Observer status with the United Nations.

Historical perspective

With over one hundred States regaining their independence in the two decades following the Second World War and the establishment of the United Nations, these countries in the Asian-African region began to play an important role in international affairs, in an effort to redress the imbalances which had taken firm root during successive centuries of colonial rule. This could only be achieved through a collective effort in which the newly independent States co-operated closely and acted together in the pursuit of this goal. The first effective step towards such fruitful co-operation among the Asian-African States was the convening of the Bandung Conference in 1955 which led to the evolution of the five principles of peaceful co-existence which were to govern their relations with their neighbours. The success of the Bandung Conference inspired the countries of the region to take effective measures for regional co-operation in various fields of activity including the progressive development and codification of international law. Much had to be done in this field especially in view of the fact that traditional international law

was primarily a product of the colonial powers of Western Europe of the sixteenth, seventeenth and eighteenth centuries. These norms and principles, in the creation of which over a hundred newly independent States of Asia and Africa and Latin America had no say, whatsoever, had to be examined, reviewed and reformulated to meet the requirements of the social, economic and political framework of the second half of the twentieth century. It was against this backdrop that in November 1956, following the recommendations of the meeting of the Heads of Delegations of Asian-African countries held in Bandung, seven Asian States (Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria) took the initiative of forming a Consultative Committee, to be known as the Asian Legal Consultative Committee, to assist the governments of the region in formulating a common approach and a common policy towards the progressive development and codification of international law which had been undertaken by the various agencies of the United Nations.

The Asian Legal Consultative Committee held its first session in New Delhi in 1957. The then Prime Minister of India, Pandit Jawahar Lal Nehru, in the course of his inaugural address expressed his sentiments for the future functioning of this body as an effective forum for regional co-operation and suggested that its membership should embrace participation of not only Asian States, but African States as well. The suggestion of the Indian Prime Minister was accepted and as from 19 April 1958 the Statute of the Committee was amended and it was renamed as the "Asian-African Legal Consultative Committee." Since then, the membership of the AALCC has continued to increase and at present thirty-nine Asian and African Governments participate in the work of the AALCC. They are as under :

Full Members : Arab Republic of Egypt, Bangladesh, Cyprus, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libyan Arab Jamahiriya, Malaysia, Mauritius, Mongolia, Nepal, Nigeria, Oman, Pakistan, Philippines, Qatar, Senegal, Sierra Leone, Singapore,

Somali Democratic Republic, Sri Lanka, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen Arab Republic.

Associate Members : Botswana and Saudi Arabia.

Functions

The functions of the AALCC and the scope of work of its Secretariat are governed by Article 3 of the AALCC's Statutes and directions given by the AALCC from time to time at its various sessions. In the light of this, the work of the AALCC and its Secretariat broadly falls under the following heads :

(a) Consideration of specific legal problems referred by any member government;

(b) Examination of matters which are before the International Law Commission and other U.N. agencies in the fields of international law and trade law, such as UNEP, UNCITRAL and UNCTAD with a view to making recommendations thereon to assist member governments.

(c) Preparation of background material and arranging exchange of views on matters of common interest and on important questions which are to come up before diplomatic conferences;

(d) Collection of material and rendering of advice on a confidential basis by the Secretariat on any question of interest to a member government upon request;

(e) Undertaking of publications on matters of common interest which may be authorised by the AALCC.

(f) Preparation of standard/model contracts suited to the needs of the region and promotion of their use as widely as possible.

(g) Promotion of the institution of arbitration as an effective means for the settlement of international commercial disputes and to establish regional centres of commercial arbitration in the various parts of the Asian-African region towards that end.

(h) Training of officers of member governments in the technique of research and handling of international legal questions.

Sessions of the AALCC

The AALCC holds its regular sessions annually by rotation in the various member countries. The Sub-Committees and Working Groups appointed by the AALCC also meet during the inter-sessional periods when necessary. The AALCC has so far met in twenty-two sessions. The first session was held in New Delhi (1957), second in Cairo (1958), third in Colombo (1960), fourth in Tokyo (1961), fifth in Rangoon (1962), sixth in Cairo (1964), seventh in Baghdad (1965), eighth in Bangkok (1966), ninth in New Delhi (1967), tenth in Karachi (1969), eleventh in Accra (1970), twelfth in Colombo (1971), thirteenth in Lagos (1972), fourteenth in New Delhi (1973), fifteenth in Tokyo (1974), sixteenth in Teheran (1975), seventeenth in Kuala Lumpur (1976), eighteenth in Baghdad (1977), nineteenth in Doha (State of Qatar) (1978), twentieth in Seoul (1979), twenty-first in Jakarta (1980) and twenty-second in Colombo (1981). At the sessions member countries are represented by high level delegations which have included Chief Justices, Cabinet Ministers, Attorneys-General, Judges and senior officials of the Ministries of Foreign Affairs and of Law & Justice. A large number of non-member Asian and African countries, countries from outside the Asian-African region as well as inter-governmental organisations are usually represented by their legal experts in the capacity of observers at the AALCC sessions.

Office bearers of the AALCC and its Secretariat

During the twentieth session held in Seoul from 19th to 26th February 1979, the AALCC elected H.E. Dr. Pyong-Choon Hahm, Special Assistant to the President of the

Republic of Korea for Foreign Affairs and Mr. Frank X. Njenga, Under Secretary, Legal Division, Ministry of Foreign Affairs, Government of Kenya, respectively, as the President and Vice-President of the AALCC for the year 1979-80.

During the twenty-first session held in Jakarta from 24th April to 1st May 1980, the AALCC elected H.E. Mr. Mudjono, Minister of Justice of Indonesia and Hon'ble Chief R.O.A. Akinjide, Minister of Justice of Nigeria, respectively as the President and Vice-President of the AALCC for the year 1980-81.

During the twenty-second session held in Colombo from 25th to 30th May 1981, the AALCC elected Hon'ble N.D.M. Samarakoon Q.C., Chief Justice of Sri Lanka and Mr. Yusuf Elmi Robleh, Chief State Counsel of the Somali Democratic Republic, respectively as the President and Vice-President of the AALCC for the year 1981-82.

The Secretariat is headed by Mr. B. Sen, Secretary-General, which is an elective post. The Deputy Secretary-General and Assistant Secretaries-General are the other principal officers who are assisted by administrative and technical personnel. Each member State accredits a Liaison Officer to the Secretariat and all decisions on policy matters are taken by the Secretary-General in consultation with the Liaison Officers.

Relationship with other organisations

As early as 1960 the AALCC had entered into official relations with the International Law Commission which maintains such links only with two other regional organisations, namely the European Committee on Legal Co-operation and the Inter-American Juridical Committee. The AALCC also maintains official relationship with the various United Nations organisations and agencies, such as the United Nations Secretariat, UNCTAD, UNCITRAL, ECA, ECE, ESCAP, UNEP, IMO, FAO and UNHCR. At its thirty-fifth session, the United Nations General Assembly decided to accord Permanent Observer status to the AALCC in view of the importance of its

work. As a result of these arrangements, the AALCC is invited to be represented at all conferences and meetings convened by the United Nations or its agencies in the field of law. The representatives of those bodies also attend the AALCC sessions from time to time.

Apart from the United Nations and its agencies, the AALCC also maintains official relations with various regional organisations and certain specialized inter-governmental organisations. These include the League of Arab States, the Commonwealth Secretariat, the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), the Latin American Economic System (SELA), the Inter-American Juridical Committee of the OAS and the European Committee on Legal Co-operation of the Council of Europe.

Resume of work done by the AALCC

One of the functions assigned to the AALCC at its inception was the examination of questions that were under consideration of the International Law Commission and to arrange for the views of the AALCC to be placed before the Commission. The International Law Commission had a large number of topics included in its programme of work embracing a variety of issues. It was considered important to place before that body the Asian-African viewpoints so that such views could be taken into account in the course of deliberations of the Commission which would ultimately lead to the codification and progressive development of international law.

An equally important task entrusted to the AALCC was to consider legal problems referred to it by any of its member governments and to make such recommendations to governments as it thought fit. This advisory role of the AALCC was particularly important in its early years as the newly independent States in the Asian-African region were faced with many difficult problems having an international legal content and were anxious to take a concerted approach on those issues and for this purpose were keen to be guided by the views of

an expert body composed of the leading jurists of the region. As a result, at its inception there were as many as twelve different subjects which the member governments wanted the AALCC to consider. These included questions concerning Restrictions on the Immunity of States in respect of Commercial Transactions; Extradition of Fugitive Offenders; Status and Treatment of Aliens including the question of Diplomatic Protection and State Responsibility; Dual Nationality; Law of the Sea; Reciprocal Recognition and Enforcement of Foreign Judgments in Matrimonial Matters; and Legal Aid.

By the time the AALCC held its third session in Colombo in 1960, it was already in a position to make its recommendations on the question of Diplomatic Immunities and Privileges on which a United Nations Conference of Plenipotentiaries was due to convene the following year. The AALCC's recommendations on this subject not only dealt with the draft articles prepared by the International Law Commission, but included certain draft formulations of its own. At the United Nations Conference on Diplomatic Relations held in Vienna in 1961, the AALCC's recommendations on the subject were officially circulated as a conference document, and some of its recommendations were incorporated in the Convention that was adopted at that conference.

For the next seven or eight years beginning with its Tokyo Session held in 1961, the AALCC's programme of work followed a uniform pattern. It continued to meet annually for a period of two weeks with the participation of eminent jurists from member countries and was able to make substantial progress on the subjects referred to it by the member governments. The AALCC's recommendations on several of these subjects were finalised and reports submitted. Among the various subjects dealt with by the AALCC during this period, particular mention may be made of its recommendations on the question of the Legality of Nuclear Tests adopted at its Cairo Session held in 1964; the Principles concerning the Status and Treatment of Aliens finalised at the Tokyo Session in 1961; and the Principles concerning the Rights of Refugees, adopted at its Bangkok Session in 1966, which paved

the way for the United Nations Declaration on Territorial Asylum the following year. The AALCC's recommendations on nuclear tests, which were in the nature of a pioneering work, attracted the attention of the United Nations and later of the International Court of Justice in the complaint filed before it by Australia and New Zealand against France. Recommendations were also finalised on the question of Immunity of States in respect of Commercial Transactions; Principles for Extradition of Fugitive Offenders; Free Legal Aid; Arbitral Procedure; Dual Nationality; Reciprocal Enforcement of Foreign Judgments, the Service of Process and the Recording of Evidence among States, both in Civil and Criminal cases; and Relief against Double Taxation. In addition, the AALCC at its New Delhi session held in 1967 discussed the merits of the judgment of the World Court in the *South-West Africa Cases* and the status of South-West Africa. The AALCC also examined the International Law Commission's work on the Law of Treaties; the Law of International Rivers; the Revision of the United Nations Charter; Codification of the Principles of Peaceful Co-existence; and the Law of Outer Space.

A major change in the AALCC's programme of work and the method of its functioning came about in 1969 when it was decided that the AALCC should, in addition to its advisory role to its member governments, assist its member States in the preparations for international conferences of plenipotentiaries convened by the United Nations. The initiative in this respect came from Dr. T.O. Elias, the then Minister of Justice of Nigeria and now a Judge of the International Court of Justice, during the Vienna Conference on the Law of Treaties. That was the first major law-making conference which was attended by a large number of delegations from the newly independent States of Asia and Africa. Dr. T.O. Elias, who was the Chairman of the Committee of the whole at that Conference and also the Chairman of the Afro-Asian Group, suggested that the AALCC should prepare a study on some of the important questions and arrange for a meeting which would enable the Asian and African delegations to have full and frank exchange of views on the crucial issues on the

subject. The Karachi Session of the AALCC held in 1969, on the eve of the second session of the Vienna Conference on the Law of Treaties, was utilized for this purpose and the discussions at that session paved the way for the settlement of the outstanding issues and the successful conclusion of the Convention on the Law of Treaties.

In December, 1970, the United Nations General Assembly decided to convene the Third Conference on the Law of the Sea. A suggestion was made that the AALCC should take up this subject with a view to assisting its member governments and other governments of the region in the preparations for the proposed conference, having regard to the significant role played by the AALCC in connection with the Conference on the Law of the Treaties. From then onwards, the Law of the Sea has continued to remain a priority item on the AALCC's programme of work as well as the agenda of its annual sessions beginning with the twelfth session held in Colombo in 1971. The AALCC Secretariat has assisted its member governments and other governments in the region by preparing useful studies and discussion papers. Apart from this, inter-sessional consultations on a regular basis have been carried on through meetings of its sub-committees and working groups.

Almost at the same time as the AALCC addressed itself to the consideration of the Law of the Sea, it was felt that it should also include in its programme of activities consideration of legal questions in the field of international trade and development in view of the establishment of UNCTAD and UNCITRAL which were expected to take up on a long-term basis the formulation of the international law and practices relating to such matters. Official relationships were established with these two bodies and a section in the AALCC Secretariat was created to deal with international trade law matters.

Since the legal rules governing international trade had been a product primarily of the industrial nations of Western Europe and consequently oriented to safeguard the interests of their trading communities, it became necessary for the Asian and African States to take an active role in the examination and formulation of such rules under the auspices of

the specialized bodies of the United Nations. This was particularly so in the fields of shipping legislation, international commercial arbitration and formulation of uniform laws in regard to international trade transactions. The AALCC's work had, therefore, to be directed towards preparation of studies and papers to assist the countries of this region to play an effective role in the deliberations of organs and bodies like UNCITRAL and UNCTAD as also in conferences of plenipotentiaries that were being convened to draw up conventions or codes of conduct regulating trade law matters. Work of this nature dealt with by the AALCC and its Secretariat has been in relation to the Convention on a Code of Conduct for Liner Conferences adopted in 1974, the Convention on the Carriage of Goods by Sea and the Convention on Contracts for the International Sale of Goods which have been adopted at the Plenipotentiaries Conferences held at Hamburg and Vienna in 1978 and 1980, respectively. Preparatory work in respect of the Convention on Liner Conferences had been undertaken by UNCTAD and in respect of Carriage of Goods by Sea and Contracts for International Sale of Goods by UNCITRAL.

Following a proposal that the AALCC should also take up specific issues relating to questions which were of special interest to the region, the AALCC undertook the formulation of model or standard contracts for use in international transactions in regard to commodities and raw materials which are primarily exported from the countries of the region. It was found that most of the transactions in regard to such commodities continued to be made on terms and conditions drawn up by trading associations and institutions in London and some of the leading centres in Western Europe. Such terms and conditions were heavily weighted in favour of the European buyers and needed to be reviewed in order to have more balanced contractual provisions which would effectively take care of the interests of both the buyer and the seller. After five years of consultations with the governments and trading organisations of the region and the United Nations agencies like the UNCITRAL and ECE, the AALCC was able to evolve two standard contracts, one based on F.O.B. and

the other on F.A.S. terms, applicable in respect of such commodities. The C.I.F. model contract form was finalized after another couple of years of efforts in 1980 at the AALCC's Jakarta Session and C&F model contract form is nearing finalization. Steps are now being taken to promote the use of these model contracts so that they can gradually replace the outmoded standard forms drawn up by private trading associations.

As regards formulation of other standard contracts suited to the needs of the region, the AALCC has entrusted its Secretariat with the task of the preparation of drafts in respect of the following :—

(a) Consultancy agreements, particularly those relating to the preparation of feasibility studies, engineering design and supervision of execution of projects;

(b) Construction contracts, particularly those relating to plant and machinery;

(c) The transfer of technology and know-how licensing agreements; and

(d) Contracts for grant of concessions in regard to exploitation of natural resources and mineral deposits.

Another question of very great importance to this region was to find ways and means by which disputes of a commercial nature arising out of trading and other types of private law transactions could be settled expeditiously and through adoption of fair procedures. It was noted that most of the contracts governing such transactions between Asian-African parties including governments and governmental corporations and the parties in other regions provided for settlement of disputes by arbitration under the auspices of chambers of commerce or arbitral institutions located in Western Europe. It was found that the procedures adopted by some of these institutions at times worked inequitably for the developing countries, but their weaker bargaining positions left them with no option but to accept such arbitration clauses. The AALCC

has made certain important recommendations in this regard which include adoption of a protocol to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards to provide for the non-enforcement of awards which are made under procedures which do not work fairly to one of the parties, as well as the establishment of two regional centres for commercial arbitration, one in Asia and the other in Africa. Pursuant to these recommendations two Regional Centres for Commercial Arbitration have been established, one in Kuala Lumpur and the other in Cairo.

The establishment of these Centres represents an unprecedented landmark in the system of settlement of disputes in the Asian-African region. These Centres are the first of their kind and are unique in the sense that they represent an effort on the part of a group of countries at an inter-governmental level, to provide for the first time a machinery for settlement of disputes on an integrated pattern in regard to international transactions of a commercial nature. The Centres are not merely envisaged to provide facilities for arbitration under their own auspices but their principal functions will include several broad-based objectives such as co-ordination of activities of national institutions within the region served by the Centre, providing facilities for *ad hoc* arbitration as also in arbitrations held under the auspices of other institutions; and rendering of assistance in the enforcement of awards. The Kuala Lumpur Centre has started making its impact and a number of agreements have since been signed that provide for settlement of disputes under the auspices of that Centre. Formal agreements have also been signed with the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for mutual co-operation and assistance between these Centres and ICSID.

Since its Jakarta Session held in 1980, the AALCC has embarked on one of the most significant of its ventures i.e., the development of a legal framework for co-operation amongst the member countries in the field of industries in the context of materialization of the New International Economic Order. It was felt necessary to identify the contents as well

as the areas in which such co-operation was feasible before developing a legal framework. As a follow-up of the Jakarta Session, a Ministerial-level meeting followed by an Expert Group meeting was held in December 1980 at Kuala Lumpur. In this meeting, besides identification of areas of co-operation like downstream petro-chemical industries, steel etc., the importance of issues relating to investment promotion and protection were highlighted. A recommendation was made for the development of a model investment protection agreement indicating its important elements. A model investment promotion and protection agreement was accordingly, prepared and the same was considered at the AALCC's Colombo Session held in 1981. Another Ministerial meeting was held in Istanbul in September 1981. This meeting considered the model investment protection agreement and the observations made at the Colombo Session of the AALCC and recommended the expeditious finalization of the model agreement. Besides, the meeting made a number of recommendations including a programme for exchange of information amongst the member countries in respect of industrial policies, plans, investment laws, areas with prospects for joint ventures with other member countries and training facilities in managerial and technical fields. The Secretariat pursued this programme vigorously. Summarised information in these areas in respect of ten or eleven member countries has already been prepared by the Secretariat and circulated to Member States.

Current and future programme of work

The current programme of work of the AALCC includes the Law of the Sea, and also matters like optimum utilization of the resources of the Exclusive Economic Zones, Environmental Law, Reciprocal Assistance in regard to Prevention and Investigation of Economic Offences, State Succession in respect of matters other than Treaties, Draft Conventions on International Bills of Exchange and Cheques, Transfer of Technology, Regional Co-operation for Industrial Development including Protection of Investments, Joint Ventures, Programme for Exchange of Information etc. The other subjects which

are pending consideration of the AALCC on which research work will be undertaken in the future include :

1. Status and Treatment of Aliens;
2. Law relating to International Rivers;
3. Rights of Refugees;
4. Law of Outer Space;
5. Revision of U.N. Charter;
6. Codification of the Principles of Peaceful Co-existence;
7. Questions concerning the Service of Process, Issue of Letters Rogatory and the Recording of Evidence;
8. Questions concerning Transportation of Goods by Air;
9. State Responsibility; and
10. Transnational Corporations.

Publications

The AALCC Secretariat publishes a report on the proceedings of each of its annual sessions, and in addition the Secretariat has brought out five special reports on the following subjects :

1. The Legality of Nuclear Tests;
2. Reciprocal Enforcement of Foreign Judgements, the Service of Process and the Recording of Evidence, both in Civil and Criminal Cases;
3. The Right of Refugees;
4. Relief against Double Taxation and Fiscal Evasion; and
5. The South-West Africa Cases, 1966.

The AALCC had also published two voluminous studies on the Constitutions of Asian and African States, respectively in 1968 and 1972. Since many of the Constitutions have either been abrogated or amended, publication of supplements to these compilations is contemplated.

The AALCC Secretariat had undertaken publication of a quarterly bulletin from January 1976. The bulletin initially contained current information in respect of the following matters : (i) work of the AALCC during the preceding quarter; (ii) important conferences and meetings in the field of international and trade law; (iii) agreements, treaties and conventions of interest to member governments; and (iv) national legislations and proclamations of interest to member governments. The coverage of the bulletin has since been expanded to include developments in the field of international law and trade law including treaties and conventions entered into by them, index of legislation and summaries of judicial decisions which have a bearing on current international law and practice.

The AALCC also intends to bring out special issues of the bulletin which will be devoted exclusively to the following matters :

(a) Index of treaties and conventions entered into by Asian-African countries during the past five years with summaries;

(b) Brief notes on judicial decisions on international legal questions rendered by superior courts and tribunals during the past ten years; and

(c) Summaries of economic laws of member countries and other Asian African countries.

II. LAW OF THE SEA

LAW OF THE SEA

Introductory

The item "Law of the Sea, including questions relating to the sea-bed and ocean floor" was included in the programme of work of the AALCC at the initiative of the Government of Indonesia and has been under its active consideration since the twelfth session of the AALCC held in Colombo in 1971. The AALCC's work on this subject was in the initial stages organized and carried out with a view to assisting member governments and other Asian-African governments in their preparations for the Third United Nations Conference on the Law of the Sea. However, as the Conference advanced from one session to the other, the AALCC's work was oriented to encourage and facilitate the search for compromise solutions to the unresolved questions before the Conference. Since 1974, the AALCC has undertaken, with this objective in mind, a series of initiatives at its annual sessions, meetings of the Sub-Committee and special meetings of experts.

The AALCC's deliberations at the Colombo, Lagos, New Delhi and Tokyo Sessions held from 1971 to 1974 focussed largely on the issues before the Second Committee of the Conference on which, at that time, the Conference was sharply divided, especially those relating to the breadth of the territorial sea, the exclusive economic zone, straits used for international navigation, archipelagos and the questions relating to the rights of access of landlocked States to the high seas and the resources of the exclusive economic zones of neighbouring coastal States, marine pollution and scientific research. Even at that early stage considerable work was done on the issues relating to the exploitation of the mineral resources of the international sea-bed area, although the more significant contributions of the AALCC in regard to these issues were made during more recent years.

At the meeting of the Working Group of the AALCC on the Law of the Sea held in Geneva in 1971, the AALCC requested its members to prepare working papers on the then existing problem areas relating to the new Law of the Sea which included subjects such as the international regime for sea-bed area beyond national jurisdiction, fisheries, archipelagos, economic zones, straits used for international navigation, and the problems of landlocked States. In response to this request a number of important papers were presented for consideration of the AALCC. Some of these papers contained submissions and proposals which later formed the basis of certain important concepts which were developed within the framework of the United Nations Conference. Special mention should be made in this connection of the paper. "The exclusive economic zone concept" submitted by Mr. Frank Njenga of Kenya; the working paper submitted by the Delegation of Indonesia on the "Concept of Archipelago"; the Malaysian paper entitled "International Straits"; "preliminary draft and outline of the Convention on the sea-bed and ocean floor and subsoil thereof beyond national jurisdiction", prepared by the then Rapporteur of the Sub-Committee on the Law of the Sea, Mr. C.W. Pinto of Sri Lanka; a position paper on the landlocked States submitted by Ambassador Tabibi of Afghanistan; and a paper on the "proposed regime concerning fisheries on the high seas" submitted by the Government of Japan.

One of the principal objectives of the AALCC is to provide a forum for the Governments of Asian and African States to discuss important international legal and related socio-economic issues with a view to developing common approaches and stands which could safeguard the interests of the countries in the region. Such common approaches are then adopted at international conferences, especially those convened by the United Nations. It is indeed gratifying that the AALCC has been able, through the process of consultation, discussion and negotiation, to make a modest contribution towards the successful resolution of some of the most difficult issues that have arisen at international legal conferences. In this connection, mention might be made of the numerous efforts that the

AALCC made towards finding acceptable solutions to some of the principal issues before the Second Committee of the Law of the Sea Conference.

Inspired by the outcome of these initiatives, the AALCC resolved to focus greater attention on a priority basis to the issues then unresolved before the Law of the Sea Conference, including especially those relating to the establishment of a legal regime for the international sea-bed area.

Following the third session of the Law of the Sea Conference held in Geneva in 1975 which produced the Informal Single Negotiating Text (SNT) the AALCC prepared a detailed study of these texts for consideration at the meeting of the Sub-Committee of the Whole held in New Delhi in February 1976.

This meeting was held to examine the provisions contained in the SNT and to discuss common strategies for safeguarding the interests of the Asian-African States and to examine possible amendments to the provisions of the SNT which might be made to achieve the objective at the following sessions of the Conference. The documentation prepared by the Secretariat for this meeting focussed on the provisions of the SNT which fell short of the recommendations of the AALCC made at its previous sessions and suggested recommendations for improvements of these parts of the text.

The New Delhi meeting of the Sub-Committee of the Whole was followed by the fourth session of the U.N. Conference on the Law of the Sea held in New York in the spring of 1976. At this session the SNT was revised and a Revised Single Negotiating Text (RSNT) which also included the new text of provisions relating to settlement of disputes was released. Following these developments the AALCC Secretariat prepared a detailed study of the RSNT which formed the basis of discussions at the seventeenth session of the AALCC held in Kuala Lumpur in June-July 1976.

At this session the AALCC considered in detail several questions that arose out of the revision of the SNT. These

matters were discussed in the Plenary and in the Sub-Committee of the Whole and special attention was focussed on the provisions relating to the exploitation of the international sea-bed area which many delegations felt were inadequate to give affect to the principle of the common heritage of mankind.

The Kuala Lumpur Session of the AALCC was followed by the fifth session of the U.N. Conference on the Law of the Sea held in New York during August-September 1976. In an effort to speed up the process of negotiations, the First Committee established at that session a Workshop chaired by two co-Chairmen in order to conduct negotiations informally and freely on the important matters before them. The Workshop, however, was able to examine only some of the provisions relating to the system of exploitation of the international sea-bed area. They had before them three papers submitted by the Group of 77, U.S.A. and U.S.S.R. reflecting the different stands taken by them on the First Committee issues. The Second and the Third Committees too had informal and formal negotiations on some key issues including the question of interests of landlocked and other geographically disadvantaged States, regime of passage through straits used for international navigation, the status of the exclusive economic zone, scientific research and transfer of technology while the Plenary continued with its discussions on settlement of disputes.

For the eighteenth session of the AALCC held in Baghdad in February 1977, the AALCC Secretariat prepared a further study which outlined the progress of the negotiations at the fifth session of the U.N. Conference. In that study certain tentative suggestions concerning a suitable interim regime for sea-bed exploitation were made for consideration of the AALCC.

At the sixth session of the U.N. Conference on the Law of the Sea held in New York in June-July 1977, much of the discussions in the First Committee centred around a compromise interim regime on the system of exploitation of sea-bed mineral resources. The Second and Third Committees and the

Plenary continued with negotiations, *inter alia*, on the issues relating to the rights and interests of landlocked and geographically disadvantaged States, the status of the exclusive economic zone, pollution prevention, and settlement of disputes. At the conclusion of that session, it was decided that the President should undertake, jointly with the Chairmen of the three main Committees, the preparation of an Informal Composite Negotiating Text (ICNT) which would bring together in one document the draft articles relating to the entire range of subjects and issues covered by Parts I, II, III and IV of the RSNT. The Conference also agreed that the ICNT so produced would be informal in character and would have the same status as the SNT and RSNT and would, therefore, serve purely as a procedural device and only provide a basis for further negotiations without affecting the right of any delegation to suggest revisions in the search of a consensus.

For the nineteenth session of the AALCC held in Doha (Qatar) from 16 to 23 January 1978, the Secretariat prepared a study which focussed on some of the crucial issues that were likely to form the subject-matter of negotiations at the seventh session of the U.N. Conference on the Law of the Sea, which was to commence shortly thereafter.

Following the Doha Session, a four-day inter-sessional meeting was convened in New Delhi from 31 July to 3 August 1978 which was attended by participants from seventeen countries, namely, Argentina, Canada, Egypt, Federal Republic of Germany, Ghana, India, Indonesia, Jamaica, Japan, Kenya, Mauritius, Norway, Poland, Thailand, United Kingdom, U.S.A. and USSR. Observers from twenty-one other countries also attended. That meeting concentrated on issues relating to the financial arrangements of the International Sea-bed Authority and the financial terms of contracts with the Authority. The results of this meeting were contained in the documents prepared for the Seoul Session.

Seoul Session (1979)

At the Seoul Session, the Law of the Sea was discussed in three Plenary meetings and three meetings of the Sub-

Committee of the Whole. The discussions both in the Plenary and the Sub-Committee of the Whole were primarily centred on the following matters :—

1. System of exploration and exploitation of the International Sea-bed Area and resource policy.
2. Financial arrangements of the Authority and the Enterprise and financial terms of contract for exploration and exploitation.
3. Organs of the Authority-their composition, powers functions.

In addition, matters relating to exclusive economic zone, optimum utilization of its resources, regional and sub-regional co-operation as also the rights and interests of landlocked and geographically disadvantaged States with particular reference to the resources of the exclusive economic zone were also discussed.

On the system of exploration and exploitation and resource policy, some doubts were expressed as to whether a parallel system would become workable, and if not, whether consideration should be given to reverting back to the original position of the developing countries. In this connection it was recalled that the parallel system as incorporated in the RSNT emerged out of the proposal of developed countries. The Group of 77 had, during the Sixth Session of the Conference, after considerable discussions, agreed to proceed on the basis of the parallel system for a period of 20 years, provided, the Authority would also be undertaking sea-bed mining activities within the same time-frame as the contractors. Most of the delegations were of the view that progress would be retarded if negotiations were placed on any other basis at this stage of the Conference and expressed the view that it would be better to continue the negotiations on the basis of a parallel system focussing attention on ways and means by which the areas reserved for the Authority could be exploited simultaneously with those of the contractors. Views were expressed that in order to do so, the Authority should have sufficient finances and technology. In regard to the finances

it was felt that one of the practical means by which this could be achieved would be by obtaining from the contractors an initial payment as had been envisaged in one of the proposals. However, if this was not acceptable, other avenues needed to be explored which would make the Enterprise viable. Finances through borrowing was not considered to be an appropriate means of establishing a viable Authority. It was felt that a system of joint ventures, either on the rotation system or on a compulsory or incentive oriented basis might be considered in this regard. If this was to be regarded as a proper approach, further consideration would need to be given to finding ways and means by which the Authority would enter into joint ventures on acceptable terms and conditions.

With regard to the question of ensuring the viability of the Enterprise, the view was expressed that the proposal for incorporating a system which would promote the further exploration by private parties and States, after a specified number of mine sites had been put into operation by such entities, might be subject to the condition that the sites banked with the Authority for exploitation by the Enterprise will also be put into operation, should be given serious consideration. It was felt that this would ensure that in practice the production control mechanism would operate upon volumes of production to be available on both sides of the parallel system. With regard to the modalities for undertaking such operations by the Enterprise, it was stated that such activities can, at the initial stages at least, be undertaken as joint ventures or under similar arrangements.

A view was expressed that the benefits to be disbursed by the Authority should be distributed only to the developing countries as the developed countries would reap adequate direct benefits from their exploitation of mine sites.

On the financial arrangements of the Authority and the Enterprise and financial terms of contract for exploration and exploitiation, there appeared to be broad agreement on the need to continue the negotiations at the Law of the Sea Conference within the broad framework of the discussions that had taken place at the sixth and seventh sessions of the

UNCLOS III and also taking into account the compromise formulae contained in the proposals of the Chairman of Negotiating Group II, Ambassador T.T.B. Koh of Singapore. The main thrust of the negotiations at the forthcoming session of the Conference, it was felt, should be to find a way to strike a balance between the investors' need to ensure a reasonable profit on their investments and the international community's need to ensure that the common heritage principle was given effect to for the benefit of mankind. Reference was also made to the proposal which had been discussed at several sessions of the Conference which required the contractors to pay a certain sum of money at the outset to be calculated at the rate of $ 1 per ton of dry nodules which would be extracted from the international seabed area as a means by which the Enterprise could be made viable. It was said that this payment may not in fact be as burdensome as some are inclined to think in view of the fact that it constitutes a relatively small proportion of the total investment that the contractors would be making with regard to the sea-bed mining activities, as well as the fact that this sum will, in any event, be capitalized, and as such, would ultimately be recovered by the investor. One delegation stated that they were unable to accept this proposal as it constitutes a heavy front-end burden on the contractor.

Referring to the specific provisions of Ambassador Koh's proposal, some delegates expressed the view that with regard to the quantum of attributable net proceeds, the question should be resolved having regard to the larger question of the value that ought to be attached to the nodules, instead of relating it to the costs involved in the various stages of operation, such as extraction, transportation and processing. In this connection the view was expressed that the figure of 40% referred to in Ambassador Koh's draft may not adequately reflect the value to be attached to the resources of the international sea-bed area. One delegation, on the other hand, was of the view that Ambassador Koh's proposal of 40% was too high and unrealistic.

On the question of the composition of the Council and its decision-making power there was general agreement that its powers should be such as to ensure that no interest group

would be vested with what amounted to a veto power in the Council. In this connection reference was made to the discussions that were held in Mexico and Geneva since the conclusion of the last session of the Conference, especially the proposal made by the Jamaican Delegation which contemplated a three tiered system of voting: a simple majority for procedural matters; a two-thirds majority of those present and voting on substantive matters; and for five or six identifiable critical matters, a vote of two-thirds of those present and voting provided there were less than nine negative votes cast. In this connection, it was pointed out that there was considerable difficulty in identifying a small group of five or six matters in respect of which the third system of voting would apply. Views were also expressed that this third requirement may not be workable. Opinion was also expressed that the requirement of nine negative votes was too high.

The view was expressed that as the Assembly was the supreme organ of the Authority all the residuary powers will vest in it.

Jakarta Session (1980)

For the twentieth session of the AALCC held in Jakarta, the Secretariat brought out a comprehensive document outlining the progress of the negotiations at the United Nations Conference thus far and the contributions of the AALCC. At the Session extensive discussions took place on matters relating to joint ventures in regard to exploitation of sea-bed resources and composition and voting powers of the decision-making organ of the Sea-bed Authority. In addition, the AALCC considered at length the US proposal submitted at the closure of the eighth session of the Conference relating to the establishment of a Preparatory Commission and an advanced site designation system with a view to protect investments already made. These matters were taken up for intensive discussions at an inter-sessional meeting of experts held in New Delhi in February 1981. That meeting considered in detail the constitution, powers and functions of the Preparatory Commission and the system of protection of preparatory investments as proposed in the US paper.

The participants of the expert group meeting were of the view that the United States proposal for advance designation of mine sites, particularly in the context of the unilateral legislations enacted or sought to be enacted by industrialized nations, was unacceptable. Several participants considered that designation of advance mine sites went against the principles and purposes of the proposed Convention which have emerged as a result of protracted negotiations over a number of years. Such advance designation of mine sites, it was felt, would tilt the balance in favour of industrialized countries and multinational corporations as against the Enterprise. Furthermore, it was felt that the functions sought to be entrusted to the Preparatory Commission in regard to this matter were not consistent with the normal concept of a Preparatory Commission. Some of the participants also expressed dissatisfaction with the type of threat implied in the United States proposal regarding the prospective miners proceeding on the basis of the unilateral national legislations in the event the proposal for advance designation of mine sites was not accepted. The participants also reaffirmed the position of the Group of 77 against promulgation of unilateral legislations by any State.

The participants, however, recognized the need for incentives for the continuation of prospecting, research and other forms of preparatory work during the interim period between the adoption of the Convention and its coming into force so long as such incentives did not deviate from the basic principles embodied in the Convention in maintaining a balance between the activities of the prospective miners and those of the Enterprise. They also recognized that certain preparatory work during the interim period could be conducive to accelerating production of sea-bed minerals soon after the Convention came into force.

Several participants considered that sufficient incentives already existed in the provisions of the Draft Convention such as those in regard to the production limits during the first five years, the anti-monopoly provisions as also the provision contained in Annex III, Article 7(3)(c). Some participants also expressed the view that if the incentives of the type contemplated in the United States proposal were to be conceded,

it would encourage promulgation of unilateral legislations. Nevertheless, most of the participants were of the view that some further incentives could be contemplated by adopting a procedure basically on the following lines :—

(i) Upon the establishment of the Preparatory Commission, the prospective miner would furnish to a competent organ of the Commission, detailed information concerning the activities undertaken by it in relation to preparatory work concerning a mine site such as research, designing of equipment, etc. and the quantum of investments made by it from the time of adoption of the Convention. Such information would be collated and transmitted to the Authority together with the report of the Preparatory Commission envisaged in the Draft Resolution.

(ii) The Authority will examine and take into account such information concerning the work done and the investments made whilst entertaining applications under Rule 6 of Annex III and in granting of preference to the applicant on the basis of its investments and preparatory work in a suitable manner to be provided for under the rules.

(iii) If the preparatory work undertaken by the applicant has involved exploration and development of the area which it offers, the applicant would be reimbursed of the proportionate costs in respect of half of the area which would constitute the reserved area for the Enterprise in the event of the contract being awarded by the Authority to the applicant.

This method of approach, it was felt, would provide adequate incentives to potential miners and in practical terms would achieve the objective of promoting investments.

The participants expressed the view that the United States proposal could not be considered in its present form. In this context it was also emphasized by several participants that if the proposal were to be considered, certain basic changes would be

necessary. Such changes should in particular ensure that States and multilateral corporations would not have any advantage over the Enterprise. Some participants suggested that in order for the matter to be considered, the following minimum requirements should be contemplated :—

(a) The Preparatory Commission may entertain applications for advance designation of mine sites at the expiry of a period of six months after the conclusion of the preparation of draft rules relatable to Article 17 of Annex III provided that not less than thirty States have ratified the Convention by that time.

(b) The applicant applying for permission by the Preparatory Commission shall not receive any licence under the national legislation of a State, which is inconsistent with the Convention. Both the applicant and the State of his nationality shall also undertake not to invoke any national law which is inconsistent with the provisions of the Convention.

(c) The Preparatory Commission in entertaining such applications for advance designation of mine sites with a view to creating priorities in favour of the applicants shall limit itself to the number of areas which are likely to be taken up by the Authority in the initial stages on the basis of a time based programme, having due regard to production control limitations, equitable distribution of areas and the needs of the Enterprise.

(d) The priority accorded to an applicant through advance designation of a mine site in respect of a State or entity sponsored by it would lapse at the end of a period of three years if the State has not ratified the Convention by that time.

(e) The applicant in whose favour a priority has been created shall develop that part of the area earmarked for the Enterprise in the same manner and within the same time-frame as the area in respect of which priority has been created in favour of the applicant.

The applicant shall also give an undertaking to enter into joint venture arrangements with the Enterprise in regard to the area designated for the Enterprise if a contract in respect of the area in respect of which priority has been created is given in favour of the applicant by the Authority when it comes into existence and the Enterprise expresses its willingness to enter into such joint venture arrangements.

(f) The applicant upon designation of an area in its favour for the purpose of according priority shall make appropriate arrangements for introducing training programmes for personnel of the developing countries as also such other categories of personnel as may be determined by the Preparatory Commission.

(g) All costs incurred in processing of applications including obtaining of technical advice by the Preparatory Commission shall be payable by the applicant as a condition prerequisite to entertaining such applications.

(h) The decision in the Commission concerning advance designation of mine sites shall be taken by consensus.

The meeting, however, was not in a position to give consideration to these suggestions.

As regards the Preparatory Commission, the participants were agreed that such a Commission should be established through a resolution of the Conference. The participants were of the view that the Commisson shall be composed of one representative of each State which is either a signatory to the Convention or has acceded to it. As regards the commencement of functions of the Preparatory Commission, the following views were expressed :—

(a) The Commission shall be convened as soon as possible after fifty States have signed or acceded to the Convention. Provisions of paragraph 10 of the Draft Resolution were accordingly acceptable.

(b) The Commission should be competent to take up its normal preparatory functions so soon after its constitution as may be practicable concerning the various organs of the Authority including the Enterprise.

(c) In regard to the additional functions contemplated in paragraph 5 of the Draft Resolution concerning making of studies and preparation of draft rules, regulations and procedures relatable to Article 17 of Annex III of the Convention, the work should be taken up at a point of time when its membership becomes adequately representative of various interest groups and geographic regions.

In regard to (c) views were expressed that the Commission should be sufficiently representative of geographical regions and interest groups in order to ensure adequate expertise in the formulation of the draft rules which would facilitate adoption of such rules by the Authority. The suggestion was also made that the Commission should have a membership of at least half the number of States which had participated in the Conference before it takes up the work of preparation of draft rules relatable to Article 17 of Annex III.

In regard to the question of finances of the Commission the meeting was of the view that the expenses of the Commission should be met out of the regular budget of the United Nations. There was general agreement that the Commission should establish its own rules of procedure and also such subsidiary bodies as may be required. Regarding the duration of the Commission, there was general agreement that the Commission shall remain in existence until the Convention enters into force and the Assembly and the Council are being convened and thereafter until such time as the Assembly may decide. In regard to the crucial issue of the functions of the Commission these were discussed under two broad heads, namely :—

(a) Normal functions of the Preparatory Commission; and

(b) The additional functions contemplated in paragraph 5 of the Draft Resolution concerning preparation of draft rules relatable to Article 17 of Annex III.

In regard to the preparatory work to be done by the Commission for the establishment of the Seabed Authority, it was pointed out that the enumeration of the functions in paragraph 4 of the Draft Resolution should not be taken as exhaustive but merely as illustrative. Attention was drawn to the preamble of the Draft Resolution that the purpose of establishing the Commission was to take all possible measures to accomplish expeditious commencement of effective operation of the International Seabed Authority and to provide the necessary arrangements for the performance of its functions and duties. It was felt that the functions of the Commission should embrace all activities which would ensure achievement of the objectives set out in the preamble. In particular, mention was made that the work of the Preparatory Commission should relate to preparatory work in regard to the establishment of the Enterprise so that the same is in a position to go into operation soon after the Convention comes into force.

By way of illustration it was pointed out that the work of the Preparatory Commission in relation to the Seabed Authority might include the following :—

(i) Preparation of draft rules of procedure of the Assembly and the Council.

(ii) Draft rules and regulations concerning the organs of the Council.

(iii) Matters relating to agreements with the United Nations and other international organizations.

(iv) Draft of staff regulations.

(v) Preparation of recommendations concerning the budget for the first financial period.

(vi) Draft financial regulations.

Similarly, the functions of the Preparatory Commission that could be envisaged in regard to the Enterprise could *inter alia* include the following matters :—

(i) Preparation of drafts of rules, regulations and procedures.

(ii) Draft of staff regulations.

(iii) Preparation of studies and recommendations concerning the budget for the first financial period.

(iv) Formulation of financial regulations in connection with finances for the first mine site.

In so far as the preparatory functions concerning the Law of the Sea Tribunal were concerned, it was felt that the provision of paragraph 7 of the Draft Resolution needed to be clarified. That provision is in the following terms :—

> "The Commission shall make arrangements for the convening of the Law of the Sea Tribunal and such other arrangements as may be required for the establishment of lists of conciliators and arbitrators as provided under annexes IV, VI and VII to the Convention."

Views were expressed that the Preparatory Commission should not undertake the task of establishment of lists of conciliators and arbitrators as provided under Annexes IV, VI and VII of the Convention but that its work should be limited to making preparations towards compilation of such lists.

It was felt that the work of the Preparatory Commission in regard to the Law of the Sea Tribunal could perhaps include the following :—

(i) Preparation of draft rules for the Tribunal.

(ii) Preparation of staff regulations for the staff of the registry of the Tribunal.

(iii) Studies concerning the establishment of the headquarters of the Tribunal except in the matter of any recommendation concerning the location of the headquarters.

The participants were of the view that the type of functions contemplated in paragraph 5 of the Draft Resolution concerning preparation of draft rules relatable to matters enumerated in Article 17 of Annex III could be usefully undertaken by the Preparatory Commission even though the same did not fall within the normal functioning of a Preparatory Commission. This was in view of the desirability of ensuring commencement of sea-bed activities at the earliest possible time after the Convention comes into force. It was, however, emphasized that the draft of the rules formulated by the Preparatory Commission should only have the status of a draft and shall have no provisional application pending the adoption of the rules by the Authority.

When the tenth session of the United Nations Conference resumed its work in March-April 1981, it was the general expectation that it would be the final working session of the Conference as only four issues remained outstanding, namely :—

(i) Composition, powers and functions of the Preparatory Commission;

(ii) Protection of interim investments;

(iii) Participation in the Convention by international organizations and liberation movements; and

(iv) Delimitation of maritime zones between opposite and adjacent States.

However, shortly before the commencement of the tenth session, the Reagan Administration announced its decision to review the progress of negotiations held thus far, and expressed its inability to participate in the Conference pending such a review.

Colombo Session (1981)

The Colombo Session held in May 1981 was therefore utilized to discuss the impact of the US decision on the ongoing negotiations. The discussions were held in the plenary

and in informal meetings with the participation of all major interests including the United States. The AALCC, following a comprehensive exchange of views :—

1. Considered the success of the Conference through achieving early conclusion and entry into force of a global Convention on the Law of the Sea on the basis of the current draft contained in document A/CONF.62/WP.10 Rev.3, to be of fundamental importance to the interests in the oceans of all States and to the maintenance of confidence in the system of multilateral negotiations as a whole;

2. Endorsed fully the Programme of Work of the Conference as set forth in Conference document A/CONF.62/BUR.3 Rev.1; and

3. Urged the fullest co-operation to adhere to that Programme at the resumed Tenth Session in Geneva in August 1981, by resolving pending issues of interest to all participants as defined in Conference document A/CONF. 62/BUR.3 Rev. 1 through negotiations and appropriate informal discussions.

III. EXCLUSIVE ECONOMIC ZONE : OPTIMUM UTILIZATION OF THE FISHERY RESOURCES

EXCLUSIVE ECONOMIC ZONE : OPTIMUM UTILIZATION OF THE FISHERY RESOURCES

Introductory

The emergence of a new legal regime of the Exclusive Economic Zone (EEZ) is one of the major developments of far reaching importance emanating from the Third United Nations Conference on the Law of the Sea. In response to a request made by several Member Governments, the AALCC Secretariat had presented, at its Seoul Session held in February 1979, a comprehensive study indicating the possible areas of action which could be contemplated with a view to assisting Member Governments in the optimum utilization of the living resources of their EEZs through preparation of the legal framework for various measures which would need to be taken to achieve the desired objectives.

The general acceptance of the concept of the EEZ by the international community is a matter of particular satisfaction to the AALCC and its Member States since this had originated in a proposal made by Mr. Frank Njenga, the Delegate of Kenya, at the Colombo Session of the AALCC in 1971 and later developed and crystallised through deliberations in the subsequent sessions of the AALCC and its Sub-Committee meetings which resulted in concrete proposals being put forward before the United Nations Sea-Bed Committee and the acceptance of that concept by the OAU Council of Ministers as also by the Fourth Summit Conference of Non-Aligned Nations.

The concept was initially put forward with a view to finding a possible via media to accommodate the interests of countries who claimed a considerably wider breadth than the 12-mile limit for their territorial sea. Recognizing that such claims, especially in Latin America were motivated by economic considerations, it was felt that an attempt might be made to find a compromise

solution by providing for an EEZ while fixing the breadth of the territorial sea at 12 nautical miles which at that time was found to be generally acceptable to a large number of States. This concept gradually gathered momentum and was found to be attractive to many of the developing States in Asia and Africa and proposals in this regard were introduced before the U.N. Sea-bed Committee in 1972, firstly by Kenya, followed thereafter by a group of African States. A very similar proposal setting forth the concept of patrimonial sea based on the Santo Domingo Declaration adopted by the Caribbean States in June 1972 was also introduced before the Sea-bed Committee by three Latin American States, namely, Colombia, Mexico and Venezuela.

Initially the Asian-African sponsors of the concept of the EEZ had certain reservations regarding the possible limits of the zone but very soon during the deliberations in the Sea-bed Committee itself they accepted the Latin American proposal for a 200-mile limit as envisaged in their patrimonial sea concept. The proposal for establishment of the EEZ thus gained the unanimous support of the Group of 77 and a good deal of discussion ensued before the Sea-bed Committee regarding the scope, content, the rights and duties of coastal and other States in that zone. Finally, it emerged as a zone of exclusive jurisdiction for exploitation of the resources and other matters connected therewith and secured the acceptance by and large of all the States represented in the Law of the Sea Conference. Even though many of the developed countries were initially opposed to this concept, the issue seemed to be quite settled by the time the Caracas Session of the UNCLOS III was concluded. It is, however, interesting to note that no sooner had this concept gathered momentum, some of the developed nations, which had initially opposed the idea were amongst the first to claim areas of the seas adjacent to their coasts as their EEZs. A large number of States, almost over a hundred, have already taken legislative or administrative measures to claim jurisdiction and competence over the resources of their EEZs.

The new legal regime of the EEZ which is embodied in Part V of the Convention on the Law of the Sea (Articles 55 to

75) envisages, *inter-alia*, the exercise of sovereign rights by coastal States over a belt of the sea extending upto 200 nautical miles in width measured from the baselines used for measurement of the territorial sea, for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and the sub-soil and the superjacent waters, and with regard to other economy-related activities, such as the production of energy from water, currents and winds. The coastal State has jurisdiction in the zone, not only to exercise and protect these sovereign rights, but also with regard to the establishment of artificial islands, installations and structures, marine scientific research and the preservation of the marine environment. The coastal State is also required to undertake certain duties and responsibilities in relation to the zone with regard to artificial islands and regarding conservation of living resources.

Seoul Session (1979)

In the light of the developments that had been taking place in the practice of States since the Caracas Session of UNCLOS-III held in 1974, in regard to the claims for extended fisheries jurisdiction, the Secretariat of the AALCC, at the request of some of its Member Governments, had presented a study on "Exclusive Economic Zone—Optimum Utilization of its Fishery Resources—Regional and Sub-Regional Co-operation" at the Seoul Session held in February 1979. The Secretariat study had pointed out that as on 1 April 1978, 85 States had claimed fisheries jurisdiction beyond 12 miles and 67 of them had claimed such jurisdiction upto a limit of 200 miles. In that context and also taking into consideration that the provisions relating to the EEZ had virtually remained unaltered through the successive Negotiating Texts for a Convention on the Law of the Sea, the Secretariat study had drawn the conclusion that there was a positive trend towards general acceptability of the concept of EEZ. A number of suggestions were accordingly made both in regard to possible national efforts and AALCC's programme of assistance to meet the objectives of optimum utilization of the resources of the EEZ.

In many coastal States of the Asian-African region, the existing machinery for the development of fishery resources might not be adequate to undertake fishing and other connected activities on a large scale in order to take maximum benefit from the extended zones of resource jurisdiction. Evidently most of the coastal States of the region would need to re-examine their respective national fisheries policies and adopt strategies required to optimise the benefit from their exclusive economic zones. The study indicated that action on a national or a regional level might be considered *inter alia* in the following areas :

1. Promoting the national awareness of rights in the EEZ and its potential for overall national development;
2. Establishment of machinery for collection of data regarding the nature and extent of the resources in the zone;
3. The formulation of national policies of marine resources development;
4. The establishment of new institutions to handle the conservation, management and development of resources in the zone and/or strengthening of the existing machinery for the purpose;
5. Establishing a strategy for the development of resources within the zone by mobilising both local and foreign expertise and capital;
6. Establishment of machinery for surveillance and policing of the zone;
7. Establishment of infrastructure for processing, storage, transport and marketing of resources;
8. Enactment of national legislation for the conservation, management and development of the resources within the zone; and
9. Fostering bilateral, sub-regional, regional and international co-operation for the development of the resources within the region and the legal framework for such co-operation.

At the Seoul Session, discussions were held at considerable length on the programme outlined in the study in the Plenary as well as in a Working Group. Whilst generally endorsing the suggestions contained in the study, the AALCC decided that, to begin with, the Secretariat should proceed with the collection of material and preparation of studies analysing information regarding measures taken by countries within, as well as outside the region for development and exploitation of the living resources in the 200-mile zone. This was in view of the fact that most of the claims for extended jurisdiction related to fisheries. It was also agreed that the work programme should be aimed at assisting Member Governments in practical terms through preparation of the legal framework for various measures which needed to be taken to achieve the desired objectives of optimum utilization of the fishery resources. The programme accordingly included:

(a) Preparation of guidelines for national legislation;

(b) Preparation of drafts of model agreements for exploitation of the living resources, including joint ventures; and

(c) Promotion of regional and sub-regional co-operation.

Two delegations expressed the view that their governments did not recognize the concept of the EEZ which was the subject of negotiations in the Law of the Sea Conference. They, however, had no objection to the AALCC's initiative being confined to fishery resources in the 200-mile maritime zones of countries in the region. There was general agreement that the matters relating to exploitation of the other resources should not be taken up for the time being.

Immediately after the Seoul Session, the Secretary-General of the AALCC consulted with a number of Member Governments, fishing industries and scientific research institutions. The purpose of these consultations was to ascertain the needs of developing coastal States, their attitude towards foreign fishing and joint venture arrangements generally and also in the light of assistance that may be generated among the countries of the region, so that the legal framework for national legislation to

be prepared by the AALCC Secretariat could be suitably oriented so as to meet their requirements in a practical fashion.

The fishery legislations in force, in most of the countries, were virtually outmoded and were hardly suited to application in relation to the waters of the EEZ even with amendments. Many States preferred the idea of introducing comprehensive legislation and they welcomed AALCC's initiative to provide suitable guidelines for the purpose.

Even though the extension of the waters to 200 nautical miles had brought under the jurisdiction and control of the coastal States vast resources and resource potential, including stocks which has hitherto been exploited mainly by foreign fishermen, most coastal States in the region did not have the capital or technical and managerial know-how to exploit them or to undertake fishing operations on an appreciable scale in areas beyond their territorial seas. Furthermore, the lack of knowledge concerning the stock of fish or the breeding grounds and the migratory habits of fish found within the zone made it extremely difficult for them to determine their allowable catch or to plan measures for management and conservation of the fishery resources. The concept of optimum utilization denotes that a certain quantity of fish is needed to be harvested during a particular period in order to maintain ecological balance and that if no harvesting was done it could almost be as harmful as overharvesting. In that context several coastal States were prepared to allow in the initial stages fishing activities by foreign nationals on certain terms and conditions but they were opposed to unlimited access to foreign fishermen as being detrimental to a country's economy and as defeating the very purpose for which the EEZ was conceived. The general attitude of the developing coastal States was towards development of their harvesting potential through gradual building up of a national fishery industry, including infrastructure, if necessary with foreign assistance.

It had been found that the statistics and data available with some countries and even with international institutions regarding the fishery resources were at times not fully accurate as they were based on certain assumptions and this had

accounted for some States estimating their fishery resources at a higher figure than the actual position would justify. It was recognised that a more reliable source for a correct estimate of the resources was perhaps the data on the catch kept by some States under their laws in regard to fishing activities of their own nationals over a number of years. But at the same time it was appreciated that it might be difficult to obtain such data except under arrangements with a State or States concerned whose nationals had been fishing in those waters. It was also felt that since living resources were renewable and the habits of fish change, it would be essential to encourage and undertake research activities for the purpose but that the developing coastal States could be in no position to undertake such a task without some assistance at least in the initial years.

It was felt that there were several ways through which the assistance required by developing coastal States in regard to assessment of the resources, harvesting of fish as also in the matter of development of national fishing potential could be organised. One of the possible ways considered was through joint venture arrangements between the government, a State agency or a national enterprise of a developing coastal State with a foreign entity; another possibility was through arrangements for joint operation and resource survey over a limited period; and a third alternative was through permitting foreign fishing on certain terms and conditions relating to furnishing of data, transfer of technology, training of personnel and assistance in building up of the national fishing industry. A combination of two or more of these methods was also considered feasible. Technical assistance through technical cooperation arrangements with international organizations or States with long experience of fishing was also considered as a possibility.

In the light of the above, the AALCC Secretariat commenced its work on the preparation of draft guidelines for national legislations, the draft of a possible model for a bilateral Government to Government umbrella agreement relatable to fishing by foreign nationals as also the drafts for model joint venture arrangements.

In December 1979, an Expert Group Meeting on Optimum Utilization of Fisheries Resources in the Exclusive Economic Zone was convened to discuss generally the scope of the study on national legislations, model arrangements on foreign fishing and joint venture arrangements as also the question of regional and sub-regional co-operation on the basis of the outlines and the list of topics prepared by the AALCC Secretariat. The three-day Expert Group meeting was chaired by Mr. Tosio Isogai (Japan) and attended by participants from twenty Member Governments. The discussions at the meeting were so channelised as to provide the practical inputs for the studies to be undertaken by the Secretariat. In that context, the participants outlined the prevailing position in their respective countries regarding the fisheries policies, institutional framework as also the legislations in force for the development of fishery resources in their national waters. Indications were also given about the measures that were planned or undertaken for establishing an adequate machinery for the optimum utilization of the fishery resources in the extended zones of national jurisdiction and about the requirements in the matter of data collection and research surveys to ascertain the resource potential.

With regard to the national legislations, the Expert Group was of the view that it might be preferable for States in the region to consider enacting a separate law dealing with fisheries in deep sea area and in this connection the possible contents of such legislation were discussed in some detail, especially in regard to the provisions on control of foreign fishing, prohibited acts, licensing procedures, offences, penalties and enforcement measures.

Jakarta Session (1980)

At the Jakarta Session held in April-May 1980, the Secretariat placed before the AALCC two drafts namely : (i) draft guidelines for legislation on fisheries; and (ii) draft of a model bilateral agreement on access to foreign fishing and other related matters. It also submitted a detailed note concerning the various types of joint venture arrangements that could

be contemplated. These drafts had been prepared on the basis of the discussions and material made available during the Expert Group meeting held in December 1979.

During the discussions in the Plenary at that session, the observer for FAO indicated about FAO's Programme of assistance to developing countries in the management and development of the fisheries of their EEZs as one of the high priority areas of FAO. The EEZ Programme of FAO, he said, had two main objectives, namely, to promote rational management and full use of fishery resources in the zones and to enable the developing States as part of their efforts to establish the New International Economic Order, to secure a greater share of living marine resources. Assistance to developing countries on legal and institutional implications of the new ocean regime at the national level concentrated on the five main topics and in each case the programme consisted of research and information dissemination and technical assistance systems. He elaborated the five main topics, namely : (i) revision of fisheries legislation; (ii) management implementation systems, surveillance and enforcement; (iii) the role of parastatal bodies in fishieries development; (iv) joint venture, licensing and other commercial arrangements in fisheries; and (v) small-scale fisheries.

The right of fishing by landlocked and geographically disadvantaged States in the EEZ was also mentioned by some of the delegations. It was argued that the concept of the EEZ had deprived the landlocked and geographically disadvantaged States of their historic rights of fishing in areas where they traditionally fish without any benefit in return. Credit was given to the African States because they made adequate arrangements for the landlocked States in their regions and other coastal States were urged to emulate the example. Lastly, the view was expressed that instead of developing coastal States granting rights of fishing in their waters to developed countries as a barter, they should use such arrangements for developing their own technologies in this area. After a general exchange of views on the subject, due to shortage of time, the AALCC directed that another Expert

Group meeting should be convened as early as possible to examine the drafts.

In connection with the *draft guidelines for model legislation*, in May 1979, the Secretariat had addressed a communication to all Member Governments and various organizations engaged in the field of fisheries requesting for material which could assist the Secretariat in the preparation of the model legislation on fisheries suited to the objective of optimum utilisation of the fishery resources in the EEZs. A number of international organisations, including the F.A.O. had very willingly placed a good deal of material at the disposal of the Secretariat which had enabled it to examine as many as 30 legislations. These, however, reflected, with a few exceptions, the legislative pattern obtaining in countries outside the Asian-African region. The response from Member Governments was not adequate but the gap was filled through the information given and views expressed at the Expert Group meeting held in December 1979.

In the preparation of the guidelines for legislation, the Secretariat had considered that the most convenient method would be to set out the relevant provisions in the form of a legislative text and accordingly such a draft was prepared consisting of 71 sections grouped in XIII parts. In the formulation of the text, however, emphasis had been placed on the need to put together the substantive elements rather than on drafting techniques, especially as this would vary from country to country according to their own legislative practice.

The premable to the draft guidelines was drafted with a view to set out a brief summary of the objectives of the legislation, as had been provided in the Statement of Objects and Reasons, where it was considered appropriate. Part I contained preliminary provisions applicable to the draft legislation as a whole; Part II dealt with fisheries policy and planning; Part III indicated the suggested administrative set up; Part IV dealt with development, conservation and management of fishery resources; Part V contained provisions on the development of national fishing industry; Part VI was on grant of

licences; Part VII contained detailed provisions on foreign fishing; Part VIII enumerated the prohibited acts; Parts IX, X and XI dealt with enforcement, criminal and civil liability; Part XII contained provisions on processing and marketing; and Part XIII had certain general provisions.

The preparation of a *model bilateral umbrella agreement on access to foreign fishing* on terms and conditions acceptable to the developing coastal States as also the distant water fishing interests was conceived in the light of consultations with governments immediately following upon the Seoul Session and the subsequent discussions at the Expert Group Meeting held in December 1979. The tentative draft for the model agreement was prepared by the AALCC Secretariat after examination of more than twenty agreements which were made available to the Secretariat by the F.A.O. and some governments outside the region.

The main objective behind this project was that many developing countries, which had yet to develop an adequate fishing capacity in order to exploit the resources of their EEZs, might consider it necessary to draw on the assistance and co-operation from other States, especially those which had been habitually fishing in their waters, for the purpose of identification of the resources, their optimum utilization as also in the taking of conservation measures. It was felt that if such arrangements could be worked out under Government to Government umbrella agreements, foreign fishing could be carried out in a more orderly fashion in the interest of both the coastal States and the foreign party. It was also felt that such agreements would pave the way for mutually beneficial co-operation through which the developing coastal States could be assisted in the development of their national fishing industry.

Pursuant to the decision of the Jakarta Session, an inter-sessional Expert Group meeting composed of legal and fisheries experts was held at the Secretariat of the AALCC from 19th to 21st February, 1981, under the Chairmanship of the Secretary-General. The meeting was attended by participants from eighteen countries, namely, Arab Republic of Egypt, Bangladesh,

Burma, Cyprus, India, Indonesia, Iran, Democratic People's Republic of Korea, Malaysia, Mauritius, Nepal, Oman, Philippines, Republic of Korea, Singapore, Thailand, Turkey and Australia. The purpose of the meeting was to consider the draft of a model bilateral umbrella agreement concerning fishing activities by foreign nationals in the fisheries waters/ EEZs of coastal States, and the draft of the guidelines for fishery legislation and also to discuss the modalities for regional and sub-regional co-operation. The Expert Group finalised the model draft of the bilateral agreement concerning fishing activities by foreign nationals but was not in a position to take up the draft of the guidelines for fishery legislation.

The Expert Group generally exchanged views on the question of regional and sub-regional arrangements for optimum utilization of the fishery resources in the EEZs and in this connection attention was invited to the text of the Draft Convention of the South Pacific Forum Fisheries Agency. It was felt that the Secretariat should collect further information on regional or sub-regional arrangements and that the matter should be further discussed at the Colombo Session.

As regards the rights of landlocked and geographically disadvantaged States in regard to the EEZ some of the participants expressed the view that the coastal, landlocked and geographically disadvantaged States should enter into bilateral, sub-regional or regional agreements whereby their special rights will be effected and taken care of.

Colombo Session (1981)

At the Colombo Session held in May 1981, the Secretariat had placed before the AALCC the draft of the model agreement on foreign fishing as finalised by the Expert Group, two tentative drafts for possible joint venture arrangements for the optimum utilization of the fishery resources and a comprehensive note on regional and sub-regional arrangements in respect of fisheries.

The AALCC at that session had examined the Secretariat drafts in some depth in the Plenary as well as in an Expert

Group. Several of the delegations were of the view that the model bilateral agreement on foreign fishing finalised at the last inter-sessional expert group meeting (1981) of the AALCC was acceptable to them as a useful model. They further stated that most developing countries lacked the expertise, capital and technology as also the knowledge concerning stocks of fish and their migrating habits. They felt that the rational management and optimum utilization of the fishery stocks in the EEZ might be carried out through appropriate joint venture arrangements. It was suggested that the guidelines set out in the Secretariat paper might be given careful consideration in the Expert Group. A view was expressed that joint venture arrangements could be very useful whereby the developing States could gain experience and expertise from the foreign partner. The question as to whether a developing coastal State would wish to enter into joint venture arrangements in the fisheries sector was essentially a question of policy depending upon the national programmes and objectives which they might seek to achieve. One delegate was however of the view that as different countries had different interests, it was not possible to apply any uniform model to suit all circumstances. He suggested that the model drafts on bilateral agreement, joint ventures and national legislation would need to be appropriately modified.

As regards the regional and sub-regional arrangements, most of the delegations fully supported in principle the idea of regional and sub-regional co-operation, in particular matters relating to conservation of stocks and management of the resources. In this connection the Observer for FAO, during the course of discussions, briefly outlined the activities of his organization in matters relating to the implementation of the EEZ programme and the assistance given by the FAO to developing countries for the optimum utilisation, development and management of fisheries in their EEZs.

In addition to general discussion in the Plenary, an Expert Group was constituted under the Chairmanship of Mr. A. Fernando (Sri Lanka) which comprised of representatives from Bangladesh, India, Japan, Malaysia and Sri Lanka for the detailed consideration of the drafts on joint venture

arrangements. The Group had before them for their consideration the models of joint venture arrangements between a developing State entity and a foreign entity. One of the drafts contained the model of an equity joint venture while the other was in regard to a contractual joint venture. The Group was of the view that the draft Equity Joint Venture Agreement formed an acceptable legal framework for the countries of the African-Asian region and had made certain recommendations in regard to the text of the model arrangements.

The Group concluded that while those drafts provided a useful legal basis for joint venture arrangements for the countries of the region, it would also be beneficial for these countries to have broad guidelines relating to the subsidiary agreements to be entered into under the main joint venture agreements in order to ensure the optimum utilization of the fishery resources in the EEZ. The AALCC took note of the recommendations and directed that the drafts should be further considered and finalised in another Expert Group Meeting as also to discuss the question of regional and sub-regional co-operation for optimum utilisation of the fishery resources.

IV. ENVIRONMENTAL LAW

ENVIRONMENTAL LAW

Introductory

The subject "Environmental Law" was inscribed in the work programme of the AALCC on the proposal of the Government of India presented before the Tokyo Session of the AALCC held in 1974. The Government of India had desired that the AALCC should initiate a study concerning the development of international law relating to human environment. A preliminary study prepared by the Secretariat served as a basis of discussions at the Tehran Session of the AALCC held in 1975. At that session a number of delegations made general observations regarding the future work programme of the AALCC on the topic.

At the Kuala Lumpur Session held in 1976, the deliberations were focussed on identifying legal issues concerning prevention and control of environmental pollution and preservation of the environment as well as the work done by other organizations. At the end of the deliberations, it was decided that the Secretariat should prepare a comprehensive questionnaire to elicit information from the member governments regarding their environmental problems and the legislative and administrative measures taken to deal with such problems. The questionnaire prepared by the Secretariat was approved at the Baghdad Session of the AALCC held in 1977, and thereafter it was circulated to member governments and other interested States.

The questionnaire covered the following areas relating to environmental pollution :

(i) Environmental pollution problems and main sources of pollution.

(ii) Laws and regulations in force and the proposed legislation concerning :

(a) Air pollution;
(b) Water pollution;
(c) Protection from noise;
(d) Conservation of land and soil;
(e) Conservation of forests, flora and fauna;
(f) Protection of wildlife;
(g) Regulation of use of chemicals;
(h) Regulation of discharge of wastes;
(i) Protection from radiation;
(j) Human settlement; and
(k) Protection of cultural property and monuments.

(iii) National agencies and institutions responsible for administration and implementation of environmental legislation.

(iv) Specific provisions dealing with implementation/ enforcement of environmental legislation.

(v) Environmental impact assessment.

(vi) Trans-frontier pollution.

(vii) International drainage basin concept.

(viii) Prevention and control of marine pollution.

(ix) Liability for pollution damage.

(x) Polluter pays principle.

The questionnaire evoked very good response as the Secretariat received replies from 25 governments : Australia, Bangladesh, The Gambia, Ghana, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Malaysia, Maldives, Mauritius, Nepal, New Zealand, The Philippines, Qatar, Republic of Korea, Sri Lanka, Sierra Leone, Tanzania, Thailand, Turkey and United Arab Emirates.

At the Doha Session of the AALCC held in 1978, it was decided to convence an Expert Group meeting to evaluate the material collected on the basis of replies received in response to the questionnaire. Pursuant to this decision, the Secretary-General convened a meeting of the Expert Group at the

AALCC's Headquarters in New Delhi from the 18th to 21st December, 1978.

The primary objective of the meeting was to assist the member governments in identifying areas in which environmental protection measures were urgently needed and in the formulation of their national policies through appropriate legislative and administrative measures. The Expert Group after extensive discussions identified the following environmental problems as common to the Asian-African region which needed urgent attention :

1. **Human Settlements**

(i) Rapid urbanisation-town and country planning;
(ii) Housing and the impact of building codes;
(iii) Traffic and transport system-control of exhaust fumes;
(iv) Waste disposal and treatment;
(v) Public health service schemes;
(vi) Migration and trans-migration.

2. **Land Uses**

(i) Modernization of agriculture;
(ii) Deforestation;
(iii) Marginal rangelands ecology and expanding human activities;
(iv) Land use practices, soil erosion and degradation, livestock, national parks, public works.

3. **Mountain Ecology**

4. **Industrialization**

(i) Rapid industrialization;
(ii) The industrial component in the pollution of resources.

5. **Marine Pollution**

(i) Land-based sources;

(ii) Vessel sources;

(iii) Off-shore mining and drilling, including oil storage and transportation.

The Expert Group recommended that in regard to each of the above sources of pollution, the consequences should be examined with regard to :

(i) Air;

(ii) Soil, flora and fauna and

(iii) Water.

The Expert Group considered that it would be useful for member governments to formulate their own national environmental policies taking into account their immediate and future requirements as well as their national priorities, and in the context of such policies to undertake on an organised basis the enactment as well as the updating of already existing legislations including rules, regulations and statutory orders. An aspect, which needed to be examined in this connection, was the requirement of an environmental impact assessment as a tool for the enforcement of environmental standards.

As regards principles underlying the legislations, the Expert Group suggested that the governments might give consideration to the question of providing in their environmental protection legislation, principles of liability as well as forms of compensation to ensure that a person injured by harmful effects of pollution would be adequately compensated. In that connection. the Expert Group recommended that the member governments might give consideration, as far as possible, to provide in any legislation which they might undertake, principles defining the minimum standards, guidelines and practicable measures to be observed in the various fields of environmental protection; machinery to ensure observance of those standards and suitable compensation for the victims suffering from loss or injury because of the non-observance of those standards.

The Expert Group, requested the Secretariat to collect data, material and other relevant information regarding legislations

obtaining in countries within the Asian-African region and outside and to formulate guidelines to assist member governments in the establishment of a legislative framework for the implementation of their own environmental policies. In addition, it suggested that the Secretariat should establish a panel of experts who might be made available to member governments to assist in the formulation of national policies and the drafting of legislation, upon request from member governments.

The Expert Group also considered the nature and scope of the enforcement machinery which might be appropriate for the countries of the Asian-African region. The types of enforcement machinery discussed were : the system of courts, administrative tribunals and compensation boards. It was suggested that the Secretariat should prepare studies on this aspect of the problem so that appropriate recommendations could be made to member governments at a later stage.

The Expert Group while recognizing that several countries had already established or were in the process of establishing environmental policies, stressed the need for establishing a co-ordinating authority in each country. This authority could be entrusted with the task of initiating action in regard to formulation of a national policy and to organize and supervise its implementation. The Expert Group was of the view that the implementation of the policies should be carried out through governmental machinery at local levels, namely, State Governments in cases of federations, municipalities and local boards, town planning authority etc.

Some participants of the Expert Group stressed the need for the establishment of an agency which would be specially charged with the land planning having regard to the fact that systematic development of land in the Asian-African countries would greatly facilitate the task of prevention and control of environmental pollution.

In regard to the possible areas of regional and sub-regional co-operation for prevention and control of pollution, the Expert Group was of the view that such co-operation could be usefully developed in the areas concerning :

(a) The oceans;

(b) International watercourses;
(c) Weather;
(d) Nuclear weapon tests and atmospheric pollution;
(e) Preservation of the wildlife;
(f) International trade in chemicals, pesticides and other toxic substances;
(g) Natural calamities;
(h) Environmental education and training; and
(i) Human settlements, financing and management.

Recognising the important contributions made by numerous regional and international conventions dealing with various environmental matters, a suggestion was made that the AALCC might take up the question of ratification of these conventions with its member governments.

The Expert Group's discussion on marine pollution centered on three major sources of pollution, namely, vessel source pollution, land-based pollution and pollution arising out of exploitation of resources in off-shore areas.

In regard to vessel-based pollution, the Expert Group suggested three specific areas for consideration, namely :

(i) Pollution arising out of oil spills and cleaning of tankers in the seas, which affect the coastal areas, more particularly in the narrow-enclosed and semi-enclosed seas and straits used for international navigation;

(ii) Pollution arising out of accidents to oil tankers; and

(iii) Dumping of wastes and vessel pollution in the high seas which affect the coastal areas and the economic zones.

In regard to the first, it was felt that the problem should be dealt with through appropriate national legislation designed to protect the resources of the economic zones in accordance with new international norms and principles relating to Law of the Sea.

In regard to cases of pollution through accidents, the Expert Group was of the view that the damage through such sources could be substantially reduced if emergency posts could be established in the region which would be provided with necessary equipment and trained personnel to deal with emergency situations arising from accidents. The Expert Group was of the view that the Secretariat should examine questions concerning an appropriate legal framework for the establishment and operation of such emergency posts and the means of financing them.

The Expert Group requested the Secretariat to prepare a case study of the blow outs and other accidental pollution from this source in the world, including the method and equipment used for cleaning pollution and the cost of clearing up and damage involved. In addition, the financial aspects of safety and other preventive measures and monitoring etc. would require detailed consideration. The Secretariat was also asked to formulate some guidelines or model legislation that might be used by the member governments.

In regard to marine pollution from exploration and exploitation of the off-shore resources, the Expert Group stressed the need to study preventive as well as remedial measures for controlling pollution from the installations and equipment used for exploration of the off-shore resources, storage facilities and pipelines used for transportation of petroleum.

The Expert Group stressed that the regional arrangements would be most useful to control pollution from oil spills and accidents.

In regard to the control of pollution affecting fishery resources in the economic zones and coastal States in the region, the Expert Group suggested that, at an appropriate stage, legislative measures might be taken by States for the control of such pollution within the framework of the principles that were being developed in the Law of the Sea Conference relating to exclusive economic zones and prevention and control of marine pollution.

The Expert Group also discussed the need for establishing a system of regional co-operation for the management of the resources of the oceans, especially the fishery resources of the areas within national jurisdiction as well as the flora along the coasts. In this connection, the pollution of the oceans caused by land-based sources such as the discharge of chemicals and other wastes through rivers was specially mentioned.

The Expert Group emphasized the importance of establishing regional mechanisms for dealing with marine pollution problems of transnational character. It suggested that the AALCC could promote a dialogue among coastal States on regional basis to deal with such problems.

Lastly, the Expert Group recognised the need for the AALCC to usefully participate in an international endeavour to promote environmental protection through increasing national awareness of environmental problems and the formulation of national legislations in this field and the establishment of co-ordinating agencies at the highest national level to supervise and implement national policies in regard to environmental protection.

Seoul Session (1979)

At the Seoul Session the topic came up for discussion at the fourth plenary meeting held on 22nd February 1979.

The observer for *IMCO* stressed the need for continuing co-operation with the AALCC. He appreciated that the AALCC was not duplicating the work of the other international organizations engaged in this field. He reiterated the support and assistance of IMCO to the AALCC and its member States particularly in regard to marine pollution matters.

The representative of *UNEP* stressed that the concept of environment was no longer regarded as a mere process of pollution control or preservation of environment but as a resource management. He commended the suggestions of the

Expert Group relating to the setting up of an advisory group to be available for advice to countries on request and the clearing house of information and urged co-ordination with ESCAP and similar organizations. He pointed out that there were many areas in regional co-operation which might require assistance of the legal bodies like the AALCC.

One of the delegates, while supporting the Expert Group report as a starting point for developing and enhancing environmental law, suggested that the Secretariat should conduct the study with a view to identifying some general principles which might guide the development of environmental law in general. He supported the idea of establishment of an advisory group to provide possible practical assistance to member governments with respect to preparation of national legislation.

Another delegate, while endorsing the recommendations of the Expert Group meeting, stressed the need to harmonise national laws and regulations with the provisions of international conventions to which Asian-African countries might become parties. He supported the proposal to establish an expert panel for assisting member governments to enact their national legislations in close collaboration with organizations like the UNEP and ESCAP which might be able to make available their financial and other resources.

Yet another delegate suggested that the AALCC should take up as a priority item the study of the problem of marine pollution from the exploration and exploitation of offshore resources particularly petroleum and natural gas, as in that field very limited information was available for preventing and controlling pollution. In his view, the AALCC should collect and make available to its member countries information on the preventive and remedial measures in regard to pollution arising from : (a) the installation and equipment used for exploitation of the off-shore resources; (b) the storage tankers and other facilities and (c) pipelines used for transportation of petroleum and natural gas. He suggested that the AALCC could study in detail the information collected by it and attempt to formulate some guidelines or model legislation that might be used by the governments in the Asian-African region.

An observer drew attention of the AALCC to the Convention on the Protection of the Marine Environment of the Baltic Sea Area which takes into account the whole spectrum of the marine environment and its protection. This, he felt, could usefully be followed in other parts of the world.

One of the delegates stressed the need to establish an institutional framework for exchange of information and material on environmental protection. He recognised the close relationship between economic development and environmental protection and stressed the need for proper harmonization of these conflicting elements as the different political, economic, social and cultural backgrounds of Asian-African States would have to be taken into account while at the same time safeguarding sovereignty of each country.

Another delegate said that, while considering the development of legal framework for the preservation of environment, the AALCC should not only suggest appropriate administrative and legislative measures to be taken within the country but also bear in mind the following basic principles :

"(a) Consistent with the principles of sovereign equality of all States and mutual respect for each other, a State shall give due regard to the preservation of the environment of the other;

(b) One State must not utilize its national resources so as to cause injury to the health, hygiene and sanitation of the people of other State;

(c) Provision for indemnification or compensation of the aggrieved parties should be made for injury caused to the environment of that State;

(d) There should be provision and machinery for peaceful and compulsory settlement of disputes arising under the environmental law;

(e) There should be provision for mandatory and mutual consultation and agreement when new method or change of utilization of shared natural resources is undertaken or planned."

The delegate stressed the inter-relationship between water resources and environment and said that the AALCC should strive for urgent solution of such problems within the framework of legal rules and principles. He pointed out that if the natural flow of an international river was impeded it would produce harmful effects on the environment and thus pose a threat to the ecological balance of the lower riparian State.

At the end of the discussion it was decided that in view of the vast scope of the subject, the work on environmental protection should be undertaken on a long term basis for three to five years. It was agreed that the AALCC Secretariat should continue its work on the basis of the report of the Expert Group and convene another meeting of the Expert Group before the next session.

In the light of the above directions, the Secretariat as a first step prepared a list of environmental legislations which are in force in the countries of the Asian-African and Pacific regions. The Secretariat also prepared two detailed notes on 'prevention and control of offshore pollution' and the 'Marine Pollution Combating Centres', as those topics were considered to be of special interest to member governments.

The Secretary-General convened another meeting of the Expert Group in December 1979 in order to afford an opportunity for an exchange of views on the question of prevention and control of marine pollution, especially the pollution stemming from exploration and exploitation of petroleum and gas resources in off-shore areas and to explore the possibility of establishing emergency posts to combat pollution arising from oil spills and other disasters.

The Expert Group expressed the view that the AALCC had an important role to play in suggesting to member governments various measures that might be taken by them either individually or through co-operative efforts of countries within the region or a sub-region for the protection and preservation of the marine environment. It was of the view that in examining issues relating to marine pollution consideration should

be given to various sources of pollution, such as pollution stemming from vessel sources, off-shore drilling activities and installations as well as from pollutants flowing into marine areas through land-based sources including pollution through rivers. It was suggested that the AALCC, in the preparation of such suggestions and plans, should take into account work done by global and regional institutions engaged in matters relating to prevention and control of marine pollution.

The Expert Group stressed the need to co-ordinate national and regional activities aimed at protection and preservation of the marine environment within the broad framework of generally accepted international standards, rules and regulations. It appreciated the contribution of international organisations such as IMCO and UNEP in this field.

National legislation for the prevention and control of marine pollution

In regard to national legislation for the prevention and control of marine pollution, the Expert Group suggested the formulation of guidelines for the drafting of comprehensive national laws dealing with vessel source pollution, pollution resulting from off-shore industrial activities and pollution resulting from the flow of wastes into the marine areas from activities on land including the flow of industrial wastes. It was of the view that each country should draft the specific provisions of national laws taking into account its special problems. This, however, would not obviate the need for the formulation of general guidelines for the assistance of member governments.

The Expert Group, besides focussing its discussion on the general content of legislation, dealt with specific matters such as safety standards, penalties, principles of liability and measures for the control of off-shore pollution. It, however, felt that other specific matters such as environmental impact assessment, contingency planning and monitoring should also be considered in detail.

The Expert Group also recommended the broad framework for the preparation of guidelines for the legislation to prevent and control marine pollution.

The Expert Group was of the view that implementation and enforcement of the rights of a coastal State with regard to the prevention and control of marine pollution in the exclusive economic zone might pose several difficult problems such as definition of zones under national jurisdiction, hot pursuit and acceptance of the coastal State jurisdiction. These matters, however, were under consideration at the Third Law of the Sea Conference.

Regional and sub-regional co-operation

On the question of regional and sub-regional co-operation, the Expert Group's discussion centered on an identification of areas in which co-operation was desirable, the machinery for giving effect to such co-operation and ways and means of financing activities for the prevention and control of pollution on a regional or sub-regional basis.

The Expert Group was of the view that in formulating a scheme for regional and sub-regional co-operation for the prevention and control of marine pollution, all possible sources of pollution should be taken into account such as pollution from vessel-based sources, pollution stemming from off-shore activities and installations as well as pollution from land-based sources.

The Expert Group was of the view that the AALCC should consider the formulation of a legal instrument which would be most suitable for promoting such co-operation between countries in the Asian-African region.

The Expert Group was of the view that the waters beyond the territorial seas in the South Asian region constituted one of the areas most suited for sub-regional co-operation especially in view of the large volume of tanker traffic.

Establishment of emergency posts

The Expert Group supported the idea of establishing emergency posts equipped with trained personnel, scientific equipment and transport facilities to deal effectively with oil pollution arising out of accidents. It was suggested that the AALCC should clearly indicate the stages through which sub-regional co-operation could be effected taking into account the costs of such an initiative. A suggestion was made to examine a scheme providing for a system of pooling of the resources between coastal States and users of the ocean. The rationale for such a scheme of proportional contributions was based on the fact that marine pollution resulted not only from vessel-based sources. The specific proportion of the contributions would need to be decided upon after further consideration of the feasibility of such a scheme and an examination of the documents relating to funds which have been established under international conventions dealing with oil pollution damage. An insurance scheme for vessels, the levy of charge on vessels, coastal State contributions and user State contributions might provide possible means of obtaining the financial resources necessary for the establishment and maintenance of emergency posts.

Sea routes customarily used for international navigation through national waters

The Expert Group also discussed questions concerning the threat of pollution arising from the passage of vessels, especially oil tankers, along sea routes running through national waters such as internal waters, archipelagic waters and territorial seas. Some representatives informed the meeting of the steps taken by their governments for the establishment of traffic separation schemes in consultation with the IMCO. It was recognised that responsibility for the prevention and control of marine pollution in these waters fell under the sovereignty and exclusive jurisdiction of the coastal State and users should comply with the regulations that were promulgated by the coastal State for the control of such pollution. It was stressed that such regulations should take into account the generally

accepted international standards, rules and regulations. The Expert Group, while recognising the importance of matters relating to the prevention and control of pollution in the straits used for international navigation, however, noted that these were still under negotiation.

In the light of the recommendations of the two Expert Group meetings and discussions held at the AALCC's Doha and Seoul Sessions, the Secretariat drew up a work programme which consisted of :

(i) Examination of the work of international and regional organisations including international conventions promoted by them with a view to focussing attention of member governments to a particular area or areas of primary interest and concern to the countries of the region; promoting initiatives, if necessary, on such matters at national levels and also through regional or sub-regional co-operation.

(ii) Preparation of studies on specific topics and guidelines for legislations with a view to assisting member governments in the formulation of their national policies through legislative and administrative measures.

(iii) Promoting initiatives for regional or sub-regional co-operation in matters of special interest to member governments with the co-operation and assistance, if necessary, of one or more of other international or regional organisations engaged in the field.

On the question of regional co-operation to deal with prevention and control of marine pollution, the AALCC recognised that whilst regional seas programmes on a comprehensive basis might be the ultimate objective through which marine pollution could be effectively prevented or controlled, it might be preferable, to begin with, to attempt something on a simpler scale where co-operation could be more easily achieved and the costs will be considerably less. It was felt

that the AALCC could assist in bringing about sub-regional co-operation by formulating the draft of a scheme as a possible sample. With this end in view, the Secretariat prepared certain tentative outlines of a scheme for sub-regional co-operation for prevention, control and combating of pollution, particularly in emergency situations. This draft was placed before the Twenty-first Session of the AALCC held in Jakarta in 1980.

Jakarta Session (1980)

At the Jakarta Session the AALCC considered the topic at the fifth and sixth Plenary meetings held on the 30th April and 1st May 1980.

The observer from *the Inter-Governmental Maritime Consultative Organisation* (IMCO) said that the AALCC had rightly identified the subject of inter-State co-operation as one of the pressing and relevant areas for discussion in the wider context of preservation of the marine environment. He assured IMCO's full co-operation with the AALCC and individual governments in promoting, organising and operation of programmes for the prevention and control of marine pollution and for controlling and/or dealing with marine pollution incidents. He gave an account of IMCO's activities in the field of prevention and control of marine pollution especially from ships. He said that IMCO had embarked on a comprehensive programme of technical assistance to the developing countries of Asia, Africa and Latin America involving the use of multi-disciplinary advisers, experts and consultants at IMCO's headquarters and selected centres in these regions. He felt that IMCO and the AALCC could co-operate more closely in working out practical arrangements to deal with various problems concerning prevention and control of marine pollution.

One of the delegates observed that UNEP's work in the legal field had been largely confined to co-ordinating efforts for development of international conventions with respect to specific environmental problems. He stressed that the new environmental law should be "Resource-oriented Law" and

concentrate on the regulation and protection of natural resources. In his view, the AALCC's long term work programme on Environmental Law might include : a survey of international customary rules on environmental protection in Asian-African States; concepts in development of international environmental law underlying environmental policies in the Asian-African region; a study on conventional law of the environment particularly in the Asian-African region; the work of the UNEP and a sectoral study on the environmental law of the ocean, including marine pollution law on which the AALCC had already done a good deal of work.

Another delegate endorsed the approach taken by the AALCC in identifying the issues relating to protection and preservation of the marine environment. He recognised IMCO's valuable assistance in the formulation of Traffic Separation Scheme for the Malacca Straits. He also welcomed the AALCC's proposal to establish Regional Oil Pollution Combating Centres as an institutionalized form of regional co-operation for combating oil pollution. In his view, the AALCC should also urgently consider the need to tackle other forms of transfrontier pollutants that were released, not only in the marine environment but also in the atmosphere.

Yet another delegate said that the AALCC had already prepared a firm ground for regional and sub-regional co-operation in matters concerning prevention and control of marine pollution based on the extensive preparatory work carried out during the last four years. In his view, the proposal outlined in the study prepared by the Secretariat appeared to be practical and easy to put into practice after some elaboration. In regard to 'financial provisions' of the scheme, he felt that a distinction ought to be made between the operation of a conventional and emergency fund. In his view, the participating States and international organisations might share among them the conventional fund needed for acquisition of equipment and conventional operations whilst the users of the sea should bear all the revolving fund needed for emergency operations. The delegate suggested that the AALCC should encourage States of the Asian-African region to participate more actively in the

international marine preservation plans and in the activities of organisations such as UNEP and IMCO. He proposed that the Member States might strengthen their co-operation in such fields as exchange of information, joint training of personnel and reporting on domestic measures taken by each State. He cautioned against the imposition of unbearable burden on the industries in Asian-African States in the preparation and enforcement of plans to preserve the marine environment.

The view was expressed by one delegate that the AALCC should examine pollution problems in relation to international rivers.

The delegate of *Sri Lanka* expressed concern about the danger of oil spills from the growing oil tanker traffic through the southern coast of Sri Lanka. He informed the AALCC about the measures his Government was undertaking to deal with such problems. He supported the AALCC's scheme for sub-regional co-operation for prevention, control and combating of pollution particularly in emergency situations. In his view, the concept of establishment of emergency posts equipped with technical personnel, scientific equipment and other facilities to deal effectively with oil pollution arising out of accidents, was particularly invaluable to developing countries in the Asian-African region, which lacked the financial resources and the technological capability to deal with such situations.

At the conclusion of the discussion, it was decided that the Secretary-General should hold consultations with IMCO, UNEP and other interested organisations on the matters concerning the establishment of marine pollution combat centres.

Pursuant to this directive, the Secretary-General had a number of meetings with the Secretary-General of the IMCO and other senior officials at the IMCO headquarters in London. The discussions centered around the question of sub-regional co-operation for prevention, control and combating of pollution in emergency situations in the context of the tentative outlines of a scheme prepared by the AALCC's Secretariat as also the existing arrangements and schemes which have been

sponsored by the IMCO and the UNEP in respect of certain sub-regions. The question of financing of such initiatives was also discussed. A good deal of discussion took place about the best possible way in which co-ordination could be achieved between the AALCC, the IMCO and the UNEP with a view to avoiding duplication of work and also about the manner in which the AALCC, as an advisory body of its member governments, could assist in generating interest for implementation of the work programmes of various organisations engaged in the field of marine environment so that optimum results could be achieved through co-ordinated efforts. It was suggested that the AALCC should take up with member governments the question of ratification of or accession to some of the more important international conventions in the field of marine environment. It was felt that one of the major tasks of the AALCC in the field of environment could conceivably be to focus attention of governments to particular areas where urgent action was needed to be taken by governments both within and outside the programme of activities of competent international organisations.

Due to heavy work programme of the AALCC as also of other international organisations engaged in the field of marine environment, it was not found practicable to convene an Expert Group meeting during the intersessional period. It was however decided in consultation with the Liaison Officers that the Expert Group meeting be held along with the Twenty-Second Session of the AALCC from 27th May to 30th May, 1981 at Colombo.

The invitations for the Expert Group meeting had been sent to all member governments, the UNEP, the IMCO and such other organisations whose participation at the meeting was considered to be important for a fruitful outcome of the discussions in practical terms. Out of the organisations invited only a few expressed their willingness to participate, but many others including the UNEP and the IMCO were not in a position to attend due to other meetings which had been fixed on dates which overlapped those of the Colombo Session. In these circumstances, the Secretariat decided to postpone the

Expert Group meeting to a future date after the Colombo Session.

Colombo Session (1981)

At the Colombo Session, the AALCC considered the topic at its fifth Plenary meeting held on 29th May, 1981. The Secretary-General outlining the progress made by the AALCC in this field stated that the AALCC and the IMCO had identified the following five areas of co-operation between them :

(i) Use of good offices of the AALCC to take up with the member governments the question of ratification of or accession to some of the important international conventions in the field of marine environment.

(ii) Examination of the Regional Seas Programme under the consideration of UNEP with a view to focussing attention to the areas of urgent need and the stages of implementation.

(iii) The question of legislations in the field of marine environment - consideration of the guidelines prepared by the IMCO and the drafts to be prepared by the AALCC, particularly in the areas not covered by the IMCO guidelines.

(iv) Arrangements for joint meetings.

(v) Joint efforts for securing the required finances.

The delegate of *Sri Lanka* said that the question of pre-preservation of the marine environment was of particular importance to his country due to heavy tanker traffic in the region. He informed the meeting of the measures undertaken by his government to protect the marine environment. These measures included, legislation for the establishment of a Marine Pollution Prevention Authority, preparation of a contingency plan to deal with marine pollution emergencies, implementation of a traffic separation scheme off the coast of Dondra

and organisation of a regional conference and seminar to discuss these matters.

Another delegate endorsing the suggestion of convening another Expert Group meeting by the AALCC stated that, besides study of major conventions in the field of marine environment, the agenda for the proposed Expert Group meeting should include consideration of the Regional Seas Programme under the co-ordination of UNEP focussing attention to the Asian-African region. He felt that the Manila Declaration adopted on 30th April, 1981 was a major step towards the implementation of East Asian Regional Seas Programme.

A view was expressed that the work of the AALCC should be carried out in a manner that avoids any duplication of work already being carried out by IMCO, UNEP and other regional bodies.

V. MUTUAL ASSISTANCE FOR SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE RECORDING OF EVIDENCE ABROAD, BOTH IN CIVIL AND CRIMINAL CASES

MUTUAL ASSISTANCE FOR SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE RECORDING OF EVIDENCE ABROAD, BOTH IN CIVIL AND CRIMINAL CASES

Introductory

The subject "Mutual Assistance for Service of Process, Issue of Letters Rogatory and the Recording of Evidence Abroad both in Civil and Criminal Cases", was taken up by the AALCC at its Seventeenth Session held in Kuala Lumpur in June 1976 at the initiative of the delegate of Iran with a view to the preparation of a draft of a Regional or Sub-Regional Convention.

The need for international judicial assistance[1] which a country might render to another for suppression of crimes and for proper adjudication of rights of individuals arises both in criminal and civil proceedings, with the object of facilitating the expeditious disposal of a trial, *inter alia*, by such means as:

1. the use of letters rogatory for the examination of witnesses or experts in foreign countries;
2. the service of official documents, writs and of records of judicial verdicts;
3. service of summons for personal appearance of witnesses, experts or persons in custody and transmission of extracts from judicial records.

There is no rule of public international law which obliges a State to render assistance to another State in such matters. Save for some international (regional) conventions, each of

1. Writers in Civil Law countries use the term "International Judicial Assistance", a term little known in Common Law parlance.

which was binding on a few members of the AALCC who were parties to them, mutual assistance in this field between judicial and administrative authorities of different States in the Asian-African region was based mainly on informal or *ad hoc* arrangements or upon bilateral agreements which have been promoted by practical necessity and international courtesy.

International co-operation in judicial matters has assumed increasing importance in the Asian-African region during the past decade in view of wider involvement of the countries in the region in trade, commerce, know-how and personnel as also employment of labour in industrial projects. For example, some of the member States of the AALCC have recently acquired substantial assets including interests in larger industrial undertakings in other States. Extensive investments have been made in developing countries of the region in projects of national importance by countries both within and outside the region necessitating employment of technicians and other personnel from the investing countries. Furthermore, shortage of manpower in some of the countries of the region has led to vast movement of labour from the over populated areas in search of employment. These increasing contacts make it incumbent that proper judicial processes are available to facilitate protection of rights and enforcement of obligations of the parties involved in this movement towards the economic growth of the countries in the Asian-African region. These objectives cannot be achieved without adequate co-operation between the countries concerned.

For these reasons and the persistent legislative and judicial trends which have been observed in several member countries to broaden the scope of international judicial assistance, the AALCC earlier included in its programme of work the question relating to "Reciprocal Enforcement of Judgments, Service of Process and Recording of Evidence among States both in Civil and Criminal Cases" which was referred to the AALCC under Article 3(b) of its Statutes by the Government of Sri Lanka (Ceylon as it was known then) with a view to formulating a uniform set of rules to ensure reciprocal recognition and enforcement of foreign judgments and to facilitate

the service of process and recording of evidence in foreign countries.

At the Sixth Session of the AALCC held in Cairo in 1964, the subject was considered by a Sub-Committee consisting of the representatives of Sri Lanka, India, Iraq and the Arab Republic of Egypt, on the basis of the memoranda submitted by the delegations of Sri Lanka and Egypt, and a comprehensive study prepared by the Secretariat. The AALCC at its Seventh Session in 1965 took up for consideration the Report of the Sub-Committee and adopted the Model Rules for the Service of Judicial Process and Recording of Evidence in Civil and Criminal Cases.[2]

Since the AALCC had finalised its report on the recognition and enforcement of foreign judgments, for this reason this topic has been left out of the present study.

The Sub-Committee of Experts examined various aspects of the problem relating to service of process, issuing of letters rogatory and recording of evidence. It was observed that Asian-African countries have adopted either the Common Law or Civil Law system with regard to the determination of the applicable rules of private international law. As far as is known, there is no indigenous system of laws on this subject in the region. A correct assessment of the current position is made some what difficult by the fact that the available material does not usually indicate actual State practice in this field. One of the principal objects of the Sub-Committee was to bridge differences arising from the application of Common Law and Civil Law systems among the member countries.

The draft agreement for service of judicial process in civil and criminal cases submitted by the Sri Lanka delegation suggested, however, in addition to the usual method of serving process through the regular channels of the State, service by a Consular Officer or other agents of the requesting State and also service through postal channels.

2. The Report of the Sub-Committee is contained in the AALCC publication entitled "Reciprocal Recognition and Enforcement of Foreign Judgments".

After careful consideration of the constitutional and other aspects of such procedures, the Sub-Committee decided to include a provision in the Model Rules, confining it to the method of service of process through the officials of the State in which it was to be affected except in the case where nationals of the requesting State were concerned where service by the Consular agent was permissible.

The Sub-Committee also considered the probability of evidence being taken by a person specially designated in the letter of request or where such evidence would be taken without the intervention of the State Authority, by a person directly appointed for the purpose by the court of the requesting State. This method did not find favour in the Sub-Committee, and accordingly the Model Rules proposed the recording of evidence only through the competent authority of the State requested to record such evidence.

At the Seventeenth Session of the AALCC held in Kuala Lumpur (1976), it was decided, at the initiative of the Delegate of Iran, that this topic, "The Service of Process, Issue of Letters Rogatory and the Recording of Evidence both in Civil and Criminal Cases", should be taken up by the AALCC with a view to the preparation of a study and the draft of a Convention for the Asian-African region, to facilitate international co-operation in the administration of justice in the Asian-African countries and also to formulate a uniform set of rules and procedure for this purpose.

The Secretariat examined the subject-matter in detail after reviewing the State practice as well as the Conventions, both bilateral and multilateral. It also carefully examined the various aspects of the problem, including the question of how many and what kind of legal instruments were to be elaborated. It felt that a single composite international instrument, unlike other regional conventions, covering the "Service of Process, Letters Rogatory and Taking of Evidence, both in Civil and Criminal Cases", was not only feasible and proper but also preferable. Various regional organisations have, however, dealt with this subject separately, both from the point of view

of civil and criminal matters as well as with regard to service of process on the one hand and taking of evidence on the other. In the light of the earlier work done by the AALCC and the adoption of Model Rules at its Seventh Session (1965), the Secretariat felt that, a common integrated and comprehensive approach might be most appropriate.

The main preoccupation of the Secretariat had been to fill the gaps between existing international conventions and at the same time to avoid overlapping them so as to establish a coherent conventional framework on which international judicial assistance between the member States of the AALCC could be based. It may be noted that in this field as in others, statistics of the use made of existing procedures are not necessarily accurate or appropriate indicators of the usefulness of these procedures. In this area, knowledge of the ability to effect service must tend to encourage voluntary settlements, so that the mere existence of facilitating arrangements was of value, even if the arrangements were seldom invoked.

Seoul Session (1979)

In accordance with the mandate, a detailed and comprehensive study was prepared by the Secretariat which was placed before the AALCC at its Twentieth Session held in Seoul in February 1979. That study contained the following aspects of the topic : general aspects, historical perspective, State practice of the Asian-African States, a summation of international regional conventions[3] concerning the topic and

3. There are several multilateral conventions which have been concluded on regional basis, though those to which a member country of this Committee is a party are very few :—
   (i) The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965).
   (ii) The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1968).
   (iii) European Convention on the Service Abroad of Documents Relating to Administrative Matters (1977).
   (iv) European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (1978).
   (v) European Convention on Mutual Assistance in Criminal Matters (1959) and Additional Protocol (1978).

finally the draft of a proposed multilateral convention on mutual assistance for the issue of letters rogatory, the service of process and the recording of evidence abroad, both in civil and criminal cases.

The proposed draft convention substantially revised and modernised the techniques for letters of request and service of process, and, in addition it widened the scope of the use of consuls for the taking of evidence and introduced the concept of the use of "Commissioners" to take evidence. Other significant features of the draft were new rules on language, the introduction of the institution of a Central Authority as a "receiving" and "sending" authority, provisions for the privileges and immunities of witnesses etc. As regards criminal matters, the draft convention was separate from the conventions dealing with extradition. Mutual assistance had to be independent of extradition, in that it was to be granted even in cases where extradition was refused and it might be granted in cases of proceedings against nationals of the requested country. The objective of the AALCC's initiatives with regard to service of process was to facilitate the expeditious disposal of cases when the individual concerned does not live in the territory of the State in which the case was instituted and to ensure that a defendant received notice of proceedings being taken against him in good time so as to enable him to defend himself.

The basic principles applied were that the methods of procedure must be *tolerable* to the requested State, but the evidence obtained must be utilizable in the courts of the requesting State. In addition, fundamental principles of "judicial sovereignty" in the State of execution must be respected, as well as the diametrically different approaches in

(vi) Inter-American Convention on Letters Rogatory (1975) and Protocol (1979).

(vii) Inter-American Convention on the taking of Evidence Abroad (1975).

(viii) Agreement relating to Writs and Letters of Request of the League of Arab States (1953).

(ix) The Commonwealth Practice.

the Common Law and Civil Law countries must be overcome. The draft convention was flexible enough to take within its scope all existing procedures in any State which provide judicial co-operation on a basis more liberal or less restrictive than the provisions contained in it. In fact, the draft convention expressly preserved any prior conventions to which signatory States were parties. As regards the future arrangements, the underlying idea was that the draft convention permitted the Contracting States to conclude agreements supplementing its own provisions or facilitating the application of the principles it contained.

The draft convention was divided into four chapters containing 39 Articles in all. Chapter I which included Articles 1-20, dealt mainly with general provisions, regarding use of the terms; establishment of Central Authority, letters rogatory, their form, scope and the manner of execution. It also dealt with duties and privileges of witnesses, experts and persons in custody and their immunities, language to be used; costs and special expenses and grounds for refusal to comply with the request.

The scope of the draft Convention was to render mutual assistance to the Contracting States by means of letters rogatory issued for the purpose of service of process and taking of evidence or obtaining information abroad, addressed by an authority or judicial officer of the requesting State, to the competent authority of the requested State, both in civil and criminal proceedings. The Convention, however, did not apply to arrests, the enforcement of verdicts or offences under military law which were not offences under ordinary law.

Chapter II, which included Articles 21-25, dealt with other channels of transmission of letters rogatory, such as by consular agents, diplomatic agents and commissioners, the limits of their powers and functions; the procedure applied, the extent to which the approval and consent of the requested State might be required; the extent of compulsion to be exercised against the witness.

Chapter III included Articles 26-30 and dealt with request and supply of information and documents. It provided for exchange of information from judicial records also. Information laid by one Contracting State with a view to proceedings in the courts of another State shall be transmitted between the Central Authorities unless a Contracting State availed itself of the option provided in Article 24, paragraph (3).

Chapter IV contained the final provisions, included in Articles 31-39. It dealt with entry into force of the draft Convention, revision, accession by a non-member State, reservations, denunciation and territorial scope of the draft Convention, and, lastly, it provided for the functions of the depository of the draft Convention.

Finally, the draft Convention provided uniform and binding solutions to a number of fundamental problems connected with mutual assistance both in civil and criminal matters which had previously been dealt with partially and miscellaneously in bilateral agreements. It would not, however, be correct to say that the draft Convention offered perfect solutions to all the problems that might arise in mutual assistance. It was in fact a compromise which kept in mind the conflicting judicial systems of various States.

The study prepared by the Secretariat was discussed in the fourth plenary meeting of the session held in Seoul. There was, however, no detailed discussion on the various provisions of the draft Convention but only preliminary matters were discussed in general. It was pointed out that for the first time a single composite international draft Convention, unlike other regional conventions, covering the "Service of Process, Issue of Letters Rogatory and Taking of Evidence Abroad, both in Civil and Criminal Cases", had been prepared and included in the study.

One of the delegates pointed out that as international judicial assistance was transnational in character, that is to say, a request emanated from the "requesting State" to the "rendering State", it had to be rendered in compliance with the laws and criminal policy of the rendering State, which should have

discretionry power to refuse a request. The request for judicial assistance should not impinge upon the sovereignty of a rendering State, and assistance may be granted under condition of reciprocity. Another delegate was of the view that further study should be made regarding the transfer of prisoners from one country to another to alleviate and mitigate human sufferings.

At the Seoul Session the delegates who participated in the discussions on this subject endorsed the views expressed in the Secretariat's study and suggested that the Secretariat should prepare explanatory notes to the proposed draft Convention and should collect further material and information concerning actual practices of States, which are widely different in procedure and also the State legislations along with bilateral, subregional agreements and other regional conventions, in view of diverse political, economic, social and cultural backgrounds of the countries in the Asian-African region, to facilitate further consideration of this subject.

Many of the member States of the AALCC appear to have provided facilities for the taking of evidence in their territories required in proceedings in foreign courts. Such countries have provisions in their laws empowering their courts to assist foreign courts in the taking of evidence. The request may come from any country, the courts are not required to restrict their assistance to the courts of particular countries. But assistance for the service of foreign process is available, in the case of most member countries, to the courts of certain specified countries only and not to the courts of all foreign countries.

Jakarta Session (1980) and Colombo Session (1981)

At the Twenty-First Session of the AALCC, held in Jakarta in 1980, the Secretariat submitted a Progress Report. The AALCC took note of the progress made by the Secretariat on the subject.

After the Jakarta Session the Secretariat prepared yet another study on the subject which was placed before the

Twenty-Second Session of the AALCC held in Colombo in May 1981, for discussion. That study contained, *inter alia*, a detailed introductory note, topics for discussion, text of the proposed draft Convention and article-wise explanatory notes thereto. It also included relevant extracts from the information sent by some of the member governments in response to the request made by the Secretariat in this connection and comments of the Hague Conference on Private International Law on the AALCC's proposed draft Convention. The study suggested the following topics of practical value relatable to the proposed draft of a regional or sub-regional convention for consideration at the Colombo Session :

(1) Scope of the draft Convention

  (i) Application of the draft Convention to proceedings of civil or criminal nature.

  (ii) Judicial Authority.

(2) The concept of Central Authority.

(3) Modes of service; Forms of request

(4) Language

(5) Costs

(6) Refusal to comply and duty to reply

(7) Privileges and duties of witnesses and experts

(8) Measures of compulsion

(9) Other channels of transmission

  (i) Service of process by post

  (ii) Execution of letters rogatory by diplomatic officers, consular agents and commissioners.

At the Colombo Session, discussion mainly centered around three pertinent issues basic to the proposed draft Convention which were candidly focussed in the Secretariat's study requiring consideration, namely : (i) the practicability of acceding to the two Hague Conventions; (ii) the need for a separate Afro-Asian Convention and (iii) the feasibility of having one single Convention dealing with both civil and criminal matters.

It may be stated that the Hague Conference on Private International Law had devoted itself ever since the beginning of this century to bring about some kind of uniformity in regard to judicial assistance between the member States of the Conference. Thus, a Convention on Civil Procedure was promoted by the Hague Conference in the year 1905 which was revised in 1954. The Hague Conference adopted a Convention on Legalisation of Documents in 1961, a Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters in 1965 and a Convention on Taking of Evidence Abroad in 1970. These Conventions have been signed, acceded to or ratified by a number of members of the Conference which included three member States of the AALCC. There has been a recent trend for non-member States of the Conference to accede to Conventions drawn up by the Hague Conference since it has been made known to other States that it was open to them also to become parties to the Conventions. It was pointed out during the course of discussions at the Colombo Session that accession to the Hague Conventions would in no way prejudice the conclusion of regional, sub-regional or bilateral arrangements between States which may become parties to the Hague Conventions.

Most of the delegates were of the view that it would not be practicable to have one Convention dealing both with civil and criminal matters. They pointed out that due to existence of various legal systems, practices, social backgrounds and criminal jurisdictions among Asian-African States, there were so many difficulties regarding mutual assistance in criminal cases which required a very careful study before drafting any specific rules. Therefore, the view was expressed that it would not be practicable to have one Convention dealing with judicial assistance both in civil and criminal matters. As regards mutual judicial assistance in civil matters, it was felt desirable for the member States of the AALCC to consider the possibility of becoming a party to, or at least making use of the Hague Conventions.

While participating in the discussion, the Observer for the Hague Conference on Private International Law informed the

Plenary that they were going to make their conferences relating to private international law questions open to all the States. He indicated the various features of the two Hague Conventions which make them flexible in operation. He said that despite the establishment of a Central Authority under the Convention it does permit the use of traditional systems for receiving and sending letters of request. In commercial matters, he said, one can use any traditional system. He further said that accession to the Hague Conventions does permit the signatory States to have regional or sub-regional arrangements between them. He termed the Hague Conventions system as a "basic system" and expressed his willingness to co-operate and provide the know-how in preparing regional or sub-regional arrangements. He said that mutual assistance and enforcement of foreign judgments in civil or criminal matters were different things and it was better to deal with the question of mutual assistance in judicial matters and the enforcement of foreign judgments in separate conventions.

Some of the delegations informed the Plenary that their countries had bilateral agreements with other countries and some countries also had national legislations on the subject. They were of the view that a draft Convention on a regional or sub-regional basis would be most useful because at present no such arrangements existed in the region. On the other hand, some of the delegates emphasised that the AALCC should promote co-operation among Asian-African States for concluding bilateral agreements among themselves for mutual assistance in judicial matters.

At the Colombo Session views were expressed by a number of delegations that it would be preferable to have separate drafts, one to deal with civil and commercial matters and the other relating to assistance in criminal proceedings. The AALCC also decided that the two drafts should be considered by an Expert Group during the inter-sessional period.

VI. ECONOMIC AND TRADE LAW MATTERS

(I) STANDARD/MODEL CONTRACTS SUITED TO THE NEEDS OF THE ASIAN-AFRICAN REGION

Introductory

During the eleventh session of the AALCC held in Accra in 1970 when the UNCITRAL's work on Uniform Law on International Sales (ULIS) and its draft of 'General' General Conditions were being discussed, the representative of the UNCITRAL Secretariat suggested that the AALCC could usefully undertake the preparation of standard/model contracts or general conditions of sale in respect of commodities of particular interest to the Asian-African region on the same pattern as was being followed by the Economic Commission for Europe (ECE). In the course of discussion at that session it was pointed out that the bulk of trade in regard to agricultural produce and other primary commodities was being carried on under standard contracts drawn up by trading institutions in the West which were not evenly balanced and which often worked unfavourably to the sellers who primarily came from the developing countries in Asia and Africa. Most of the member governments of the AALCC and various trade organisations in the region who were consulted in the matter expressed the view that the AALCC should prepare new standard contract forms which would be more evenly balanced. The suggestions concerning the commodities to be covered by such contract forms specifically mentioned the following: rubber, timber, textiles, light machinery, oil, minerals including bauxite and iron ore, animal products, hides, paper, maize, wheat, bananas, jute and jute products and cocoa.

Since the commodities recommended were too numerous to be covered by any single contract form, it was decided to proceed with this work in stages. To begin with, the draft of a standard contract form based on F.O.B./F.A.S. terms was prepared intended to be applicable to sales of agricultural

produce in respect of which the countries in the region were primarily exporters. The draft was submitted to Asian-African governments and trading organizations in the region and the suggestions received were incorporated in the draft. The draft was thereafter considered by the Standing Sub-Committee on International Trade Law Matters during the thirteenth session of the AALCC held in Lagos in 1972. The Sub-Committee drew up a report suggesting certain amendments to it.

On the same lines the Secretariat prepared the draft of a second model contract form together with general conditions of sale relating to the purchase of durable consumer goods and light machinery in respect of which most of the countries in Asia and Africa are mainly buyers.

The drafts prepared by the Secretariat were then considered by the Sub-Committee on International Trade Law Matters during the sixteenth session of the AALCC held in Teheran in 1975 and the drafts finalized at that session were :

(1) Standard Form of Contract on F.O.B. basis applicable in respect of certain types of agricultural produce and other commodities which are generally exported by countries in the Asian-African region;

(2) Standard Form of Contract on F.A.S. basis applicable to the commodities covered by the F.O.B. contract but which are of perishable nature;

(3) Standard Form of Contract on C.I.F. basis applicable to light machinery and durable consumer goods which are generally imported by the countries in the Asian-African region; and

(4) General Conditions of Sale on C.I.F. (Maritime) basis applicable to light machinery and durable consumer goods as an alternative to the corresponding standard contract.

The AALCC, however, decided to submit these drafts together with explanatory notes, to be prepared by the Secretariat, to the member governments, a few non-member governments and trading organisations in the region, U. N. organs and international organisations concerned with trade law for their comments. The AALCC also decided that these drafts should be submitted, together with the comments received, to a Special Meeting of Experts to be convened under the auspices of the AALCC during 1976. The comments received included those from the Commonwealth Secretariat and the Economic Commission for Europe which had constituted an informal group of experts to study the drafts finalised at Teheran.

Pursuant to the decision taken at the Teheran session, a Special Meeting of Experts was convened in Kuala Lumpur in July 1976 after the closure of the regular session. The Experts finalised the F.O.B. and F.A.S. contract forms but due to lack of time could not take up the C.I.F. contract and the corresponding General Conditions.

At the eighteenth session held in Baghdad in February 1977 the AALCC approved the F.O.B. and F.A.S. contract forms which had been finalised by the Meeting of Experts at Kuala Lumpur and directed that another meeting of experts be convened immediately after the nineteenth session to consider and finalise the drafts of the standard form of C.I.F. contract and the corresponding General Conditions applicable in respect of light machinery and durable consumer goods.

Pursuant to the decision taken at the Baghdad Session, a Special Meeting of Experts was convened in Doha from 24 to 26 January 1978 to consider and finalise the drafts of the C.I.F. (Maritime) Standard Contract and the corresponding General Conditions applicable to light machinery and durable consumer goods which had been approved by the Sub-Committee on International Trade Law Matters during the Teheran Session (1975). The Special Meeting was, however, unable to complete the consideration of the draft texts and decided to resume its consideration of those texts at its next meeting.

Seoul Session (1979)

In terms of the above decision, the Expert Group met in Seoul on 25 and 27 February 1979 in conjunction with the

twentieth regular session of the AALCC. Its meetings were chaired by Prof. Dr. Jisu Kim of the Republic of Korea, and Prof. Kazuaki Sono of Japan continued as the Rapporteur. In order to carry out its mandate expeditiously, the Expert Group decided to confine itself to an examination of the draft of a C.I.F. contract form prepared and presented by the Rapporteur. This draft not only reflected the conclusions reached at the Doha Meeting, but also contained provisions on certain new issues and suggestions for formalistic modifications to conform with the F.O.B. and F.A.S. standard contracts already finalized by the AALCC. After completing its examination of the Rapporteur's draft, the Expert Group unanimously adopted a final form of the "AALCC Standard Form of C.I.F. Contract and recommended this contract form for use in the Asian-African region for sales transactions in light machinery and durable consumer goods.

The C.I.F. Contract, as finalised by the Expert Group at Seoul, was placed before the Sub-Committee on International Trade Law Matters at its inter-sessional meeting held in Kuala Lumpur in July 1979 for formal adoption. The inter-sessional meeting also had before it certain proposals and comments relating to the C.I.F. contract presented by the Delegate of Pakistan. The Sub-Committee, however, could not address itself to these matters for lack of time.

Jakarta Session (1980)

During the twenty-first session of the AALCC held in Jakarta in April 1980, the Sub-Committee on International Trade Law Matters considered a proposal of Pakistan to amend Part II of the draft of the C.I.F. Standard contract form adopted by the Group of Experts at the twentieth session of the AALCC. After deliberation the Sub-Committee appointed a working group consisting of the representatives from Pakistan, the Arab Republic of Egypt, Japan, Singapore and Ghana to prepare a compromise draft. The recommendation of the Working Group was to replace Part II of the draft form by the following :

"PART II : LICENCES AND PERMITS

Alternative A

It shall be the duty of the seller to obtain at his expense any licence, permit or other authorisation required for the purpose of the sale or export in the country of exportation. The buyer shall obtain at his expense any such authorisation required for the purpose of purchase or import in the country of importation. Each party shall render at the other's request, risk and expense, every assistance which may be required to fulfil the other party's duty under this provision.

Alternative B

1. It shall be the duty of the seller to obtain at his expense any licence, permit or other authorisation required for the purpose of the sale or export in the country of exportation. The buyer shall obtain at his expense any such authorisation required for the purpose of purchase or import in the country of importation.

2. The seller shall obtain such authorisation by the..... (date) and the buyer by the.....(date). Such dates may be altered by mutual agreement. Each party shall render at the other's request, risk and expense, every assistance which may be required to fulfil the other party's duty under paragraph 1.

3. If either party, after using his best endeavours, fails to obtain aforementioned authorisation before the dates herein specified, or if obtained, it is subsequently withdrawn by the competent authorities through no fault of the party concerned, the contract shall automatically terminate. In that event neither party shall have any right of recourse against the other, provided that the party who fails to obtain such authorisation promptly informs the other party of such failure.

4. Where such authorisation is obtained for part of the contractual quantity only, the party so obtaining them shall

immediately notify the other party of the fact. In such notification a time-limit shall be fixed for acceptance of such partial quantity. If the party obtaining the authorisation as aforesaid does not give the notice required above, or the other party does not accept the partial quantity, the effect shall be the same as on a failure to obtain the authorisation by the party notifying as provided in paragraph 3."

After accepting the recommendation of the Working Group, the Sub-Committee adopted the C.I.F. Standard Contract Form as thus amended.

In response to another proposal of Pakistan, the Sub-Committee requested the Secretariat to prepare a draft of C&F Standard Contract form taking into account all the views expressed in the Sub-Committee and maintaining the basic approach as contained in the C.I.F. Standard Contract form for consideration at its next session.

Colombo Session (1981)

In pursuance of the directions of the Trade Law Sub-Committee the Secretariat drafted a standard form of C & F Contract intended to be applicable to sale transactions in light machinery and durable consumer goods which was examined by the Trade Law Sub-Committee during the twenty-second session of the AALCC held in Colombo (1981).

Discussions on the draft contract were concentrated principally on two issues, namely (i) whether the Sub-Committee should examine only the draft provisions on insurance or should review all the provisions; (ii) whether it should postpone consideration of the draft in view of the fact that recent changes in the field of international trade and transport law, in particular, the adoption of the U.N. Convention on Contracts for the International Sale of Goods in April 1980, which had achieved unification of a major area of international sale of goods, had not been reflected in the draft.

Those who favoured the adoption of the draft model contract with minor modifications as proposed by the Secretariat justified it on the ground that the C & F Contract permitting the buyer to provide for marine insurance on terms deemed appropriate by him would be beneficial, not only to the buyers but to the developing countries themselves in the context of the following considerations : (i) unreasonable rates of insurance premia demanded and unreasonable terms imposed by the insurance companies in the western world; (ii) savings of otherwise scarce foreign exchange reserves: and (iii) patronage being extended to national insurance companies. These representatives did not accept the proposition that the adoption of the Convention on Contracts for the International Sale of Goods which is likely to come into effect in the near future, had supplanted or obviated the need for model contract forms. According to them, the Convention had clearly recognized the supremacy of the contract terms agreed to by the parties over the Convention provisions and that the Convention would certainly not be applicable in respect of those States which did not accede to or ratify the Convention.

The representatives who advocated postponing considering of the draft contract justified it on the ground *inter alia* that the innovations and contributions in the field of international trade law made by the U.N. Convention on Contracts for the International Sale of Goods had not been reflected in the draft contract. The draft of the Convention had been comprehensively examined by the Sub-Committee at the Seoul Session (1979) and many of the recommendations by the Sub-Committee which were endorsed by the Plenary Committee, were duly taken account of at the Vienna Conference on the Intenational Sale of Goods.

In this context it was pointed out that some of the provisions of the draft contract had adopted a different approach as compared to the Convention, e.g. provisions relating to "exemptions" and "passing of risk." It was also suggested that the words "customs duties" be included in the text of paragraphs 1,2 and 3 of Part III of the draft contract in order to conform with the title.

At the end of the discussion, the Sub-Committee recommended that the Secretariat should carry out further

studies so as to reflect the current developments in the field of international trade and transport law in the draft contract and that the matter should be taken up at a future session of the AALCC.

The recommendations of the Trade Law Sub-Committee were endorsed by the Plenary Committee on 29th of May, 1981.

(II) INTERNATIONAL SALE OF GOODS

Introductory

The United Nations Commission on International Trade Law (UNCITRAL), at its first session held in 1968, included the subject of the International Sale of Goods as a priority item in its programme of work. The Commission also agreed to consider revision of the two Hague Conventions of 1964, namely the Hague Convention relating to Uniform Law on the International Sale of Goods (ULIS) and the Hague Convention on the Formation of Contracts in the International Sale of Goods (ULF), as falling within the scope of that subject. The drafts of these Conventions had been prepared by the International Institute for the Unification of Private Law (UNIDROIT). Although these Conventions had been adopted after a great deal of preparatory work, they did not attract wide acceptance, particularly among the Third World countries as they had taken no part in the conclusion of those Conventions. However, since the Conventions represented unification of a very wide area of the international sale of goods, the Commission decided to undertake revision of these Conventions to enhance their usefulness. Accordingly, the Commission at its second session held in 1969, established a Working Group and requested it to ascertain which modifications of these Conventions might render them capable of wider acceptance to countries of different legal, social and economic systems, and to elaborate, if necessary, new draft Convention/Conventions reflecting these modifications.

The Working Group devoted its first seven sessions, held between 1970 and 1976, to the revision of the ULIS and the

text of a Draft Convention formulated by it was adopted by the Commission at its tenth session (1977).

The Working Group devoted its eighth and ninth sessions, held in 1977, to the revision of the ULF and formulated a draft text of a Convention.

At the eleventh session held in 1978, the Commission, while considering the Draft Convention on Formation prepared by the Working Group, decided to integrate it with the Draft Convention on Sales, and a single text entitled "Draft Convention on Contracts for the International Sale of Goods" was adopted. It was on the basis of this text that a U.N. Conference held in Vienna in March-April 1980 adopted the text of the Convention on Contracts for the International Sale of Goods.

Work of the AALCC

At the Baghdad Session (February 1977), the Sub-Committee had recommended that the Draft Convention on the International Sale of Goods, which was then to be finalized by UNCITRAL at its tenth session (1977), will be a suitable item for consideration at its next session.

Pursuant to the above decision, the AALCC's Secretariat prepared a study on the Draft Convention on the International Sale of Goods adopted by UNCITRAL at its tenth session, with a view to assist the Trade Law Sub-Committee in its examination of the Draft Convention at the Doha Session of the AALCC. The study set forth the genesis of each article followed by a detailed analysis of its provisions. Also, wherever possible, a brief summary of the divergent views expressed in respect of any particular provision either in the meetings of the Working Group or at the tenth session of UNCITRAL was given in order to give a complete picture of the preparatory process through which these articles had passed.

During the Doha Session (1978), the Sub-Committee on International Trade Law Matters examined the Draft Convention article by article on the basis of the study prepared by

the AALCC's Secretariat. The Sub-Committee was, however, able to consider Articles 1 to 23 only and therefore decided to continue its consideration of the draft Convention at the next session of the AALCC and to concentrate its consideration on those articles on which Delegations would submit comments.

Seoul Session (1979)

Whilst the Draft Convention on the International Sale of Goods adopted by the Commission at its tenth session (1977) had been partly examined by the Trade Law Sub-Committee at the Doha Session (1978), the entire Draft Convention on Contracts for the International Sale of Goods, which had consolidated the rules on Formation and on Sales in a single text was examined by the Trade Law Sub-Committee during the Seoul Session (1979). After an article by article examination of the Draft Convention, the Sub-Committee took the view that although the Draft Convention taken as a whole was generally acceptable some of its provisions which affected the rights of the parties to a sale transaction ought to be reviewed having regard to the principles underlying the New International Economic Order. The comments and proposals made by the Trade Law Sub-Committee were as follows :

"(a) *Article 1, paragraph 1* : It should be specified that the requirement of having places of business in different States should obtain at the time of the conclusion of the contract and that the Convention would apply even if that requirement was no longer met when a dispute between a buyer and a seller actually arose.

(b) *Article 9 (Article 10 of the Convention)* : It was noted that, unlike the Convention on the Limitation Period in the International Sale of Goods adopted in 1974, the draft Convention did not set forth a definition of the term 'party'. The Sub-Committee was of the opinion that, in view of the participation of State agencies in international trade, the draft Convention should contain such a definition.

(c) *Articles 12 and 51 (Articles 14 and 55 of the Convention)*: The Sub-Committee noted that paragraph (1) of Article 12 provides that a proposal for concluding a contract is sufficiently definite so as to constitute an offer if, among other things, it expressly or implicitly fixes or makes provision for determining the price. On the other hand, Article 51, which deals with the calculation of the price, provides a means for determining the price when the contract does not state a price or does not expressly or implicitly make provision for its determination. The views expressed in the Sub-Committee were two-fold. Firstly, Articles 12 and 51 were in contradiction. Secondly, there was a strong current of opinion in the Sub-Committee that a contract of sale, in order to be capable of conclusion, should state the price or should itself expressly or implicitly make provision for its determination. According to this view, the provision in Article 51 that in the absence of a fixed or determinable price the contract price would be that generally charged by the seller at the time of the conclusion of the contract was not acceptable.

(d) *Article 28 (Article 30 of the Convention)* : The Article states, *inter alia* that the seller must "transfer the property in the goods as required by the contract and this Convention". It was noted that the draft Convention did not set forth any provision concerning the transfer of property. Accordingly, the article should be redrafted in such a way so as to impose an obligation on the seller to take such steps as are necessary to transfer the property in the goods.

(e) *Article 37 (Article 39 of the Convention)* : (1) The Sub-Committee was of the view that Article 37 was one of the key provisions of the draft Convention in that it affected the basic right of the buyer to avail himself of the remedies under the Convention (e.g. avoidance of the contract for fundamental breach, claim for damages, and reduction of the price) in case the goods did not conform to the contract. Two main observations were made. It was noted that Article 37, paragraph (1), stated that the buyer "loses the right" to rely on a lack of conformity if he did not give notice to the seller within a reasonable time. The view was expressed that

failure to give notice should not result in loss of the right but should give rise to damages which the buyer should pay to the seller in cases where he (the seller) suffered damages because of the failure of the buyer to give notice. Instead, the article should establish the presumption that if the seller did not receive, within a reasonable time", notice that the goods were defective, he was entitled to assume that the goods had been handed over to the buyer in conformity with the contract. In such a case, the burden of proof that the goods were delivered in a defective state should then fall on the buyer. In this connection, it was suggested that the revision of the rule could be inspired by a similar provision in the U.N. Convention on the Carriage of Goods by Sea adopted in Hamburg in 1978 (Article 19).

(2) The Sub-Committee was of the view that the termination of the right of the buyer to rely on lack of conformity as provided for in paragraph (2) of Article 37 was not acceptable in that the provision did not sufficiently protect the buyer's right to rely on latent defects which, particularly in the case of complicated machinery, could become evident only after a period of time had passed. The two-year time-limit was considered not to be sufficient, and the Committee therefore suggested that consideration be given at the Conference of Plenipotentiaries to the possibility of extending the period of two years to four years. In this connection, the Sub-Committee noted that under the Prescription Convention (Articles 8 and 10) the buyer must commence judicial proceedings against a seller within four years of the date on which the goods were actually handed over.

(f) *Articles 39(2) and 40(3) (Articles 41(2) and 42(3) of the Convention)*. The Sub-Committee was of the view that the same approach suggested under (e)(1) above should be adhered to with regard to the effect of the failure of the buyer to give notice under Articles 39 and 40.

(g) *Article 42 (Article 46 of the Convention)*. The Sub-Committee noted that this Article gave the buyer the right to require the seller to perform the contract as originally agreed.

The view was expressed that the Convention should grant the seller, in cases where subsequent performance by him would not constitute a serious inconvenience to the buyer, a right to remedy non-performance and that therefore the buyer should have the right to avoid the contract only after the seller did not perform the contract at the request of the buyer. It was noted in this respect that Article 45(2) enabled the buyer to recover any damages he may have suffered.

(h) *Article 44 (Article 48 of the Convention)*. The Sub-Committee was of the view that, although the right of the seller to cure failure to perform was, under the article, subject to certain restrictions, it should nevertheless be kept in mind that the right to cure was against the terms of the contract. Thus, if the seller delivered on 15 January instead of 1 January, the late delivery, though intended as a remedy of the failure to perform, did not cure his failure to deliver on 1 January. In view of this, the Sub-Committee was of the opinion that the provisions of paragraph (2) of this article, which penalized the buyer who did not comply with the seller's request within a reasonable time, was too harsh. Accordingly, this provision should be re-examined with a view to finding a rule that would take account of the legitimate interest of the buyer.

(i) *Article 61 (Article 65 of the Convention)*. The Sub-Committee noted that Article 61 was intended to apply in situations where the buyer, though obliged to do so under the contract, failed to specify the quality of the goods or some aspect thereof, on an agreed date. The Article gave the seller the right to provide, at his choice, the specification himself, and, if the buyer failed to react to the seller's specification, made such specification binding. The view was expressed that this approach was not reasonable and that in such situations the buyer should not be obliged to receive goods which were possibly of no use to him. It was argued that, instead the seller should have recourse to the rights available to him under the Convention where there was a breach of contract by the buyer.

(j) *Article 62 (Article 71 of the Convention)*. The Sub-Committee noted that under paragraph (1) of this article, a

party could suspend performance if after the conclusion of the contract serious deterioration of the party's ability to perform or in his creditworthiness gave good ground to conclude that the other party would not perform a substantial part of his obligations. The Sub-Committee was of the view that this paragraph placed too much trust in the ability of one party to judge the other party's ability to perform. It was the general view that, for the purposes of the suspension of performance, a more objective test was needed, for instance by using the test of insolvency. Moreover, the article did not specifically state whether a party who suspended his performance, but who could not substantiate this, was liable to the other party for any damage that the other party suffered.

(k) *Article 65 (Article 79 of the Convention).* (1) There was strong opposition in the Sub-Committee against the use in paragraph (1) of this article of the term "impediment beyond his control" in order to indicate a situation where a party is exempted from liability for a failure to perform because of *force majeure.* Though the Sub-Committee was aware of the different connotations which the term *force majeure* had in various legal systems, it was of the view that *force majeure* as a concept was so well known in international trade practices that the use of any other term might give rise to misunderstandings. Furthermore, it was not immediately clear what was implied by the notion of 'impediment'. For instance, did this notion include factors which were personal to a party such as illness, and was it possible to speak of an 'impediment' beyond the control of a party if the circumstances under which he originally concluded his contract had changed to his detriment ? The Sub-Committee agreed that the wording of this paragraph should be reconsidered.

(2) The view was expressed that paragraph (5) should state more clearly that the exemption from liability under this article prevented the other party from exercising only his right to claim damages but that all other rights were available under the Convention to the buyer or seller, such as avoidance of the contract, reduction of the price, or demand for performance.

(l) *Article 69(1) (Article 84 of the Convention).* The Sub-Committee noted that this article did not specify at which rate interest was to be paid by the seller who was under obligation to refund the price. One possibility would be to indicate that the rate of interest payable would be the rate current at the seller's place of business since the obligation to pay interest was part of the seller's obligation to make restitution.

The general observation was made that, under Islamic law, a party could not be requested to pay interest. Therefore, a party of the Islamic faith would be obliged to make use of the faculty under Article 5 of the Convention, namely to "derogate from or vary the effect of any of its provisions". Alternatively, interest could be reflected in certain 'charges'.

(m) *Article 70-72 (Articles 74 to 76 of the Convention)* : It was noted that Articles 70, 71 and 72 provided the means of calculating damages in certain cases. The suggestion was made that these articles should set forth a special provision for the case where a party suffered damage because of non-performance by another party of a monetary obligation under the contract. In such a case damages should be limited to the payment of interest by the party in breach and should not extend to such additional damages as he might actually have suffered. It was further noted that the notion of foreseeability was difficult to apply in practice and that not all legal systems recognized this principle. Moreover, in some legal systems which did recognize the principle of the limitation of damages to those which were foreseeable, the principle was not applicable if non-performance was due to the fraud of the non-performing party. Accordingly, the Sub-Committee was of the opinion that Article 70 should be reconsidered at the Conference of Plenipotentiaries.

(n) *Article 79(1) (Article 67 of the Convention)* : Article 79 contains a rule regarding the passage of risk where the contract involves the carriage of goods and where the parties have not provided in their contract a different rule in respect of risk. In such a case, the rule is that if the contract provides

for carriage from the seller's place of business but does not require the seller to hand them over to the buyer or to the carrier at any place other than the place at which carriage begins "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer". The Sub-Committee was of the view that this rule could give rise to different interpretations, particularly in cases where the seller must arrange for carriage to a port from which the goods were to go by ship. It was suggested in this connection that the insertion of the words "in accordance with the contract" might possibly facilitate interpretation of the article.

(o) *Article 80 (Article 68 of the Convention)* The Sub-Committee noted that the purpose of this article was to determine at what point of time the risk passed in respect of goods sold in transit. Under Article 80, the risk passed retroactively at the time when the goods were handed over to the carrier who issued the document controlling their disposition. There was strong support for the view that a rule under which the risk of loss passed prior to the making of the contract was unacceptable. Thus, it was difficult to comprehend why a buyer of goods in transit that had been damaged before the conclusion of the contract should bear the risk. Accordingly, the Sub-Committee strongly suggested that the rule should be modified to the effect that the risk of loss would be deemed to have passed at the time the contract was concluded.

Finally, the Sub-Committee, having completed its consideration of the Draft Convention on Contracts for the International Sale of Goods, was of the general view that the draft Convention, intended as it was for the International Sale of Goods, would be of easier and more predictable interpretation if certain issues at present left to the subjective assessment of a party would instead be governed by more objective criteria. Thus, the use of terms such as 'reasonableness', 'good grounds', 'substantially', 'ought to have known' or 'foreseeable' might well give rise to subjective interpretations by a party of his rights, and thereby lead to unnecessary controversies and litigation between the parties. Therefore, the

Sub-Committee strongly recommended that the Conference of Plenipotentiaries pay special attention to these matters.

(III) INTERNATIONAL COMMERCIAL ARBITRATION

Introductory

The AALCC during its thirteenth session held in Lagos (1973) proposed that apart from following up the work of UNCITRAL in the field of International Commercial Arbitration, it should make an independent study of some of the more important practical problems relating to the subject from the point of view of the Asian-African region. The AALCC Secretariat thereupon conducted an extensive survey with regard to current arbitration law and practice and based on this survey prepared a detailed and comprehensive study covering the following topics : (i) Institutional arbitration and *ad hoc* arbitration; (ii) Constituting the arbitral tribunal; (iii) Venue of arbitration; (iv) The applicable law; (v) Procedure in arbitration; (vi) Arbitral awards; and (vii) The enforcement of foreign arbitral awards.

The Secretariat's study was considered by the Trade Law Sub-Committee during the Tokyo Session (1974) of the AALCC and certain preliminary comments were made on the topics covered by the study. The AALCC decided that the Secretariat should prepare a revised study on the same topics to enable the Trade Law Sub-Committee during one of its future sessions to formulate principles or model rules for consideration of member governments with a view to their incorporation in the municipal laws or adoption of a regional convention.

The Secretariat prepared a revised study for consideration of the Trade Law Sub-Committee during the Kuala Lumpur Session (1976). The study suggested the following questions of practical value for consideration of the Trade Law Sub-Committee :

(1) Promotion of arbitral institutions or centres in the Asian-African region—inter-institutional co-operation,

the types of disputes where institutional arbitration might be resorted to and disputes where *ad hoc* arbitration would be preferable.

(2) Considering that in institutional arbitration the proceedings are to be governed by the rules adopted by the arbitral institutions, what practical measures might be adopted to ensure that the rules of the institutions concerned conform to the minimum safeguards which are necessary to protect the interests of developing countries and their nationals.

(3) Formulation of principles concerning the constitution of arbitral tribunals, venue of arbitration, the applicable law governing the rights and obligations of the parties, procedure in arbitration and the award for possible incorporation in municipal laws or model rules.

(4) Examination of the UNCITRAL model rules for optional use in *ad hoc* arbitration and other model rules.

(5) Considering that the municipal laws of various countries have direct impact on arbitration proceedings which may be at variance, what suitable means could be adopted to bring about a certain degree of uniformity in the matter of arbitration proceedings—possibility of adoption of a regional convention.

(6) Enforcement of foreign arbitral awards—consideration of the provisions of the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The points raised in the Secretariat's study were discussed by the Trade Law Sub-Committee during the Kuala Lumpur Session (1976) and based on the recommendations of the Trade Law Sub-Committee, the AALCC adopted the following resolution :

"*The Asian-African Legal Consultative Committee*

1. *Recommends* to the States of the Asian-African region which have not ratified or acceded to the 1958 U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards to consider the possibility of ratification of or accession to the Convention.

2. *Commends* the United Nations Commission on International Trade Law for the successful conclusion of its work on the UNCITRAL Arbitration Rules and recommends the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations.

3. *Invites* the United Nations Commission on International Trade Law to consider the possibility of preparing a protocol to be annexed to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards with a view to clarifying, *inter alia*, the following :

(a) Where the parties have adopted rules for the conduct of an arbitration between them, whether the rules are for *ad hoc* arbitration or for institutional arbitration, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in municipal laws and the award rendered should be recognized and enforced by all Contracting States;

(b) Where an arbitral award has been rendered under procedures which operate unfairly against either party, the recognition and enforcement of the award may be refused;

(c) Where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement".

The resolution was transmitted to the UNCITRAL Secretariat.

Since the question of International Commercial Arbitration was split into two specific questions relating, first, to the adoption of a protocol to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, secondly, the Establishment of Regional Arbitration Centres, these two are treated as separate subjects and discussed separately in the following notes.

(A) *Adoption of a Protocol to the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

In relation to the resolution adopted at the Kuala Lumpur Session, the Trade Law Sub-Committee confirmed the following at the Baghdad Session (1977) :

(a) That the formal resolution of the AALCC should be considered in the light of the text of the report of the Sub-Committee at that session which led to that resolution;

(b) The sub-paragraphs (a) and (b) in paragraph 3 of that resolution were inter-related; and

(c) That the primary intention of sub-paragraph (c) was to prevent a governmental agency from invoking sovereign immunity, at all stages of arbitration, including the stage of recognition or enforcement of the arbitral award.

Further, in view of the importance of the proposals contained in the resolution for the promotion of commercial arbitration in the Asian-African region as an effective means of settling disputes, the Sub-Committee recommended that the AALCC should be represented at the tenth session of UNCITRAL at which this matter was to be taken up, to reflect the views of the AALCC fully before that forum, and that the delegations to that session of UNCITRAL from member States of the AALCC should be properly briefed in regard to the AALCC's resolution so that it could be effectively discussed by UNCITRAL. The recommendations of the Sub-Committee were endorsed by the plenary of the AALCC.

The AALCC's proposals were considered by UNCITRAL at its tenth session (1977) and the AALCC was represented at that session by its Secretary-General. There was agreement in the Commission that the matters which the AALCC had brought to the attention of the Commission raised important issues in the context of international commercial arbitration and justified further consideration by the Commission. The predominant opinion in the Commission was that if it were decided at a later stage to implement the proposals of the AALCC, the preparation of a protocol to the 1958 Convention might not be an appropriate approach. Various suggestions were made about the appropriate means to implement the proposals of the AALCC including the possibility of having a separate convention in simpler terms. Another suggestion was about the possibility of preparing a new international convention containing a uniform law on arbitration which could draw upon the 1961 and 1966 European Conventions.

In regard to the AALCC's recommendation for exclusion of sovereign immunity, a view was expressed that an optional model clause might be drafted which could be used in conjunction with the UNCITRAL Arbitration Rules under which States, State-owned agencies and entities of public law which enter into transactions with private firms would expressly agree not to invoke sovereign immunity in connection with arbitration and possible enforcement of the award. Some reservations were also expressed that as a matter of principle, in so far as States and governments are concerned, the issue of sovereign immunity was a part of a more general and complex problem having an obviously political and public international law character.

The Commission requested its Secretariat to consult with the AALCC and other interested international organisations and to prepare studies on the matters raised by the AALCC.

The UNCITRAL Secretariat, accordingly, submitted two reports to the twelfth session (1979) of the Commission. One analyzed over 100 court decisions concerning the application and interpretation of 1958 New York Convention (A/CN.9/168).

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(a) That the formal resolution of the AALCC should be considered in the light of the text of the report of the Sub-Committee at that session which led to that resolution;

(b) The sub-paragraphs (a) and (b) in paragraph 3 of that resolution were inter-related; and

(c) That the primary intention of sub-paragraph (c) was to prevent a governmental agency from invoking sovereign immunity, at all stages of arbitration, including the stage of recognition or enforcement of the arbitral award.

Further, in view of the importance of the proposals contained in the resolution for the promotion of commercial arbitration in the Asian-African region as an effective means of settling disputes, the Sub-Committee recommended that the AALCC should be represented at the tenth session of UNCITRAL at which this matter was to be taken up, to reflect the views of the AALCC fully before that forum, and that the delegations to that session of UNCITRAL from member States of the AALCC should be properly briefed in regard to the AALCC's resolution so that it could be effectively discussed by UNCITRAL. The recommendations of the Sub-Committee were endorsed by the plenary of the AALCC.

The AALCC's proposals were considered by UNCITRAL at its tenth session (1977) and the AALCC was represented at that session by its Secretary-General. There was agreement in the Commission that the matters which the AALCC had brought to the attention of the Commission raised important issues in the context of international commercial arbitration and justified further consideration by the Commission. The predominant opinion in the Commission was that if it were decided at a later stage to implement the proposals of the AALCC, the preparation of a protocol to the 1958 Convention might not be an appropriate approach. Various suggestions were made about the appropriate means to implement the proposals of the AALCC including the possibility of having a separate convention in simpler terms. Another suggestion was about the possibility of preparing a new international convention containing a uniform law on arbitration which could draw upon the 1961 and 1966 European Conventions.

In regard to the AALCC's recommendation for exclusion of sovereign immunity, a view was expressed that an optional model clause might be drafted which could be used in conjunction with the UNCITRAL Arbitration Rules under which States, State-owned agencies and entities of public law which enter into transactions with private firms would expressly agree not to invoke sovereign immunity in connection with arbitration and possible enforcement of the award. Some reservations were also expressed that as a matter of principle, in so far as States and governments are concerned, the issue of sovereign immunity was a part of a more general and complex problem having an obviously political and public international law character.

The Commission requested its Secretariat to consult with the AALCC and other interested international organisations and to prepare studies on the matters raised by the AALCC.

The UNCITRAL Secretariat, accordingly, submitted two reports to the twelfth session (1979) of the Commission. One analyzed over 100 court decisions concerning the application and interpretation of 1958 New York Convention (A/CN.9/168).

The report concluded that the Convention, despite a few minor lacunae, had satisfactorily met the general purpose for which it was adopted. The second report (A/CN.9/169) discussed the need for greater uniformity of national laws on arbitral procedure and the desirability of establishing standards for modern and fair arbitration procedures. The report suggested that the Commission commence work on a model law on arbitral procedure which could help overcome most of the problems identified in the above survey and meet the concerns expressed in the recommendations of the AALCC. Having considered these reports, the Commission was agreed that there was no need to alter or amend, by way of protocol or revision, the 1958 Convention. At the same time, it was agreed that a model law could assist States in reforming and modernising their laws on arbitral procedure and would thus help to reduce the divergencies encountered in the interpretation of the 1958 Convention. The Commission directed its Secretariat to prepare (a) an analytical compilation of the provisions of national laws pertaining to arbitral procedure; and (b) a preliminary draft of a model law on arbitral procedure.

At its fourteenth session (1981), the Commission considered a report prepared by its Secretariat entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207). The first part of the report dealt with the concerns which should be met by the proposed model law and with the principles which could underlie it. The second part attempted to identify all those issues which could be dealt with in the proposed model law. The conclusion of the report was "The preparation of a model law on international commercial arbitration is desirable in view of the manifold problems encountered in present arbitration practice..... It also seems to be the appropriate time for such an undertaking since international arbitrations are increasing and there are intentions in a number of States to adopt legislation geared thereto". This conclusion was endorsed by the Commission subject to two conditions, namely (i) that the scope of application of the draft model law be restricted to international commercial arbitration; and (ii) that due account be taken of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

and the 1976 UNCITRAL Arbitration Rules. The Commission was also agreed that the report (A/CN.9/207) setting forth the concerns, purposes and possible contents of the draft model law would provide a useful basis for the preparation of the model law. However, in view of the complexity of the issues and the work involved in the preparation of draft model law, the Commission decided to entrust the Working Group on International Contract Practices with that task.

The Working Group met in New York from 16 to 26 February 1982 for its first session and commenced its work of preparing a draft model law. The Working Group met for its second session in Vienna from 4 to 15 October 1982.

The follow-up action in the Commission on the AALCC's recommendations is being kept under constant review by the AALCC and it is represented as an Observer in the meetings of the Working Group on International Contract Practices.

(B) Establishment of Regional Arbitration Centres

During the Kuala Lumpur Session (1976), the Trade Law Sub-Committee noted that while many arbitral institutions were located in the developed countries in the West, only a few were in the Asian-African region. Although some of the countries in the region did have chambers of commerce providing arbitration facilities, their use was mainly confined to settlement of disputes between local parties. It was felt that even the use of the UNCITRAL Arbitration Rules would be enhanced if this region could provide assistance in administering *ad hoc* arbitrations through the establishment of a regional centre or centres with adequate facilities. It was also felt that the promotion of inter-institutional arrangements for effective cooperation among existing institutions in the region through a regional arbitration centre could also create an atmosphere that international commercial arbitration proceedings need no longer be confined to the West. The Sub-Committee, therefore, decided to request the Secretariat to investigate the feasibility and usefulness of establishing regional arbitration centres and to ascertain the means of attaining effective inter-institutional co-operation among the existing arbitral institutions in the region.

In pursuance of the Trade Law Sub-Committee's request, a study was prepared by the AALCC's Secretariat after extensive discussions with the officials of UNCITRAL, certain organisations of trade, arbitral institutions and experts in the field. The study contained a general survey of the existing pattern of international commercial arbitration, the phenomenal increase in the number of such arbitrations in which governments and government undertakings were involved, the need to promote arbitral institutions within the region and the support that could be expected from various quarters to the taking up of the project. The conclusions made in the study were in favour of establishment of six arbitration centres in the region located one each in six sub-regions, namely East Asia, South-East Asia, West Asia, North Africa, East Africa and West Africa. It was, however, pointed out that the scheme could initially work with two centres and other centres could be established in the light of experience and volume of work. This study was placed before the Baghdad Session of the AALCC (1977).

At the Baghdad Session, the Trade Law Sub-Committee after extensive deliberations made the following recommendations :

"1. That two arbitration centres be established within the region, one in Asia and one in Africa;

2. That the functions of the centres be, *inter alia*,

(a) Promoting international commercial arbitration in the region;

(b) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the region;

(c) Rendering assistance in the conduct of *ad hoc* arbitrations, particularly those held under the UNCITRAL Arbitration Rules;

(d) Assisting the enforcement of arbitral awards; and

(e) Providing for arbitration under the auspices of the centre where appropriate.

3. That in order to implement the proposals noted above, the Secretary-General of the Committee be requested :

(a) To approach Governments and existing arbitral institutions with a view to obtaining suitable facilities with the necessary finances for the projected centres;

(b) To take the necessary steps to establish the centres at appropriate locations and to assist in providing a suitable administrative structure for the independent functioning of the centres; and

(c) To assure that the centres carry out the functions listed in sub-paragraph (2) above as they become practicable."

In pursuance of the aforesaid decision, the AALCC's Secretariat prepared a scheme for the establishment of two arbitration centres together with a Memorandum which was transmitted to all member governments in March 1977. Although several governments generally evinced their interest in having the centre in their countries, concrete proposals were made by two governments, namely the Arab Republic of Egypt in regard to the centre to be located in Africa and the Government of Malaysia in regard to the centre to be located in Asia.

During the Doha Session (1978) of the AALCC, the Trade Law Sub-Committee reviewed the question of establishment of regional centres for commercial arbitration in the region on the basis of a progress report presented by the Secretary-General of the AALCC. The Sub-Committee approved the establishment of two centres in Kuala Lumpur and Cairo respectively and requested the Secretary-General to examine the po sibility of establishing a third centre in other regions, such as West or East Africa.

As a follow-up of the above recommendations, a Regional Centre for Commercial Arbitration was established in Kuala Lumpur on 16 October 1978 and another Centre in Cairo following an agreement concluded on 28 January 1979 between the Government of the Arab Republic of Egypt and the AALCC.

The broad functions allocated to these Centres included the following :

(i) Promotional functions as the co-ordinating agency in relation to countries in their respective regions-rendering of assistance in the promotion and growth of national arbitral institutions;

(ii) Assistance and provision of facilities for holding of arbitration proceedings in *ad hoc* arbitrations;

(iii) Assistance in the enforcement of awards;

(iv) Rendering of advice and assistance to parties who may approach either of the Centres; maintenance of an international panel of arbitrators to assist the parties; and

(v) Rendering of administrative services and assistance upon request to other institutions with whom appropriate arrangements have been made in regard to arbitration proceedings under the auspices of those institutions.

The establishment of the two Centres was followed by conclusion of agreements between the AALCC, the respective Centre and the World Bank's International Centre for Settlement of Investment Disputes (ICSID) for mutual cooperation in the conduct of arbitration proceedings for settlement of disputes arising out of foreign investments. The agreement in relation to the Kuala Lumpur Centre was signed on 5 February 1979 and that in relation to the Cairo Centre on 6 February 1980. The agreements provided that in cases of disputes and differences arising between a government and a foreign investor, where the parties agree to have such disputes and differences settled under the 1965 International Convention for the Settlement of Investment Disputes, the proceedings may be held wholly or in part at the Kuala Lumpur/Cairo Centre, as the case might be, thus obviating the necessity for the governments of the region to pursue their cases in Washington. The agreements further provided that ICSID will accord facilities for the

conduct of arbitration proceedings and recording of evidence in arbitrations held under either of these Centres.

Seoul Session (1979)

At the twentieth session of the AALCC held in Seoul (February 1979), the Trade Law Sub-Committee discussed the question of the appropriate rules which should be applied by the Regional Centres in arbitrations held under their auspices. The Sub-Committee recalled that it had earlier decided that the Centres would in the first place seek to administer arbitration under the UNCITRAL Arbitration Rules. The question which engaged the particular attention of the Sub-Committee was whether the UNCITRAL Arbitration Rules should be modified so as to include provisions relating to administration or whether those Rules should remain unchanged and be complemented by internal or administrative rules of the Centres. A further question was whether the UNCITRAL Rules were designed solely to be applied in *ad hoc* arbitrations, or whether they could also serve in institutional or administered arbitrations. After deliberation, the Sub-Committee reached the view that since the Centres would also administer arbitration between parties of which one would have his place of business outside the region, it was important that the UNCITRAL Rules remained unchanged, unless modified by the parties. Such modification would be achieved if the parties had agreed to have their arbitration conducted under the auspices of a Regional Centre to the extent that the administrative rules of the Centre modify the UNCITRAL Rules. Furthermore, it had always been the view of UNCITRAL that arbitral institutions would play a role in arbitrations under the UNCITRAL Rules. In most cases, it would be achieved when the parties, in their arbitration clauses, designated an arbitral institution to serve as the 'appointing authority'. The Sub-Committee noted that a number of existing arbitral institutions had already made arrangements to serve as appointing authority and to administer arbitrations under the UNCITRAL Rules. Since those rules conferred certain functions on the appointing authority, those functions would automatically be exercised by the Centres. For this it was necessary that the arbitration clause

agreed to by the parties contained a reference to the UNCITRAL Arbitration Rules and to the administrative rules of the Centres under whose auspices the arbitration would take place.

With the above understanding, the Sub-Committee requested the Secretariat to prepare a draft model arbitration clause which would ensure arbitration in accordance with the UNCITRAL Arbitration Rules under the auspices of, and administered by, a Regional Arbitration Centre, and a draft set of administrative rules in accordance with which such a Centre would administer the arbitration. The Secretariat was further requested to submit the draft model arbitration clause and the draft set of administrative rules to the member governments of the AALCC for observations. The Sub-Committee decided to consider the draft texts in the light of the observations received from Governments at an inter-sessional meeting to be held at Kuala Lumpur in July 1979.

Accordingly, the Trade Law Sub-Committee held its inter-sessional meeting in Kuala Lumpur on the 2nd, 3rd and 6th July 1979. It was attended by fifteen member governments, namely Arab Republic of Egypt, Indonesia, Japan, Kenya, Republic of Korea, Kuwait, Malaysia, Pakistan, Philippines, Singapore, Somali Democratic Republic, Sri Lanka, Thailand, Turkey and Yemen Arab Republic. Lesotho and UNCITRAL were represented as Observers.

The Sub-Committee finalized and adopted the rules for arbitration of the Kuala Lumpur Regional Arbitration Centre for cases where the arbitration is held under the auspices of that Centre. The Sub-Committee also finalized the model arbitration clauses applicable to such cases. It was agreed that the rules and model arbitration clauses in relation to the Cairo Centre should be in identical terms.

(C) *UNCITRAL Draft Conciliation Rules*

Conciliation is broadly defined as "a procedure to achieve an amicable dispute settlement with the assistance of an independent third party". Conciliation differs from arbitration

or court proceedings in that while an award or decision is binding on the parties, conciliation has for its purpose the recommending of possible settlement terms. These terms become binding on the parties after they have agreed to them.

Arbitration is generally preferred by the business community to court proceedings. But, of late, arbitration is increasingly becoming a costly and time-consuming proposition. Conciliation, by providing a flexible, effective and expeditious solution to business disputes, therefore, presents itself as a viable alternative to arbitration.

One particular advantage in conciliation is said to be its non-adversary character. While it cannot be said with certainty that arbitration impairs business relations by virtue of its adversary character, it cannot be gainsaid that conciliation is conducive to the preservation of good business relations. In fact, conciliation appeals to business partners who have long standing relations and who wish to maintain them despite one time difference. There is a growing tendency in many countries to settle disputes by conciliation. Moreover, it has been found useful in regions and countries where it is well-known and frequently used.

Legal considerations also point in favour of conciliation. Procedural laws and rules obstruct arbitrators and judges from promoting amicable settlements. Certain matters may not be arbitrable under the applicable law or because parties lack the legal capacity to arbitration. Uncertainty about the applicable law may deter the parties from submitting to arbitration or litigation. On the other hand, conciliation could profitably be employed in matters which are less judicial than technical. Conciliation may even be preferred in areas governed by legal provisions for the very reason that it lessens the severity of such rules. Thus, conciliation has a wider scope of application than any juridical procedure which is limited to certain subject-matters regulated by definite rules.

But conciliation has certain potential disadvantages as well. Conciliation, if unsuccessful, could lead to additional

costs and time being spent by the parties. An abortive conciliation may adversely affect the interests of the parties in later adversary proceedings. However, these drawbacks may be offset by the following considerations. Parties resort to conciliation only when they have firm expectations about the certainty of an amicable settlement. If parties during the conciliation proceedings realize that a settlement agreement is not possible, they will discontinue the conciliation proceedings and so avoid further expense. However, these considerations could be effective in eliminating the drawbacks of conciliation only if conciliation rules are drafted accordingly, e.g. by requiring consent at the start of the proceedings and not foreclosing other procedures should conciliation become infructuous, by ensuring inexpensive and speedy proceedings, such as rules for the possibility of written proceedings, appointment of a single conciliator as a general rule and reasonably short periods for submission of documents.

It was with the aforesaid considerations in mind and the objective of making it worthwhile for the parties to attempt a settlement through conciliation that the UNCITRAL Secretariat had drafted a preliminary set of Conciliation Rules and presented before its twelfth session (June 1979). There was agreement in the Commission that the procedure envisaged in the Conciliation Rules should be simple, flexible and expeditious; that the parties should be free to modify the rules and to terminate the proceedings at any time; that the conciliator should have an active role and have wide discretion in the conduct of proceedings; and that the Conciliation Rules should contain clear provisions so that later resort to arbitration would not be influenced by what had happened in conciliation. The Commission approved certain draft rules, but in respect of others it suggested modifications. The Commission's Secretariat prepared a revised text of these rules in consultation with international organizations and arbitral institutions, including the ICCA and ICC and the revised text was submitted to governments for observations.

The revised Draft Rules on Conciliation were examined by the Trade Law Sub-Committee during the twenty-first session

of the AALCC held in Jakarta (April-May 1980). The Sub-Committee welcomed the initiative taken by UNCITRAL in preparing these rules and expressed the hope that their adoption would be conducive to the expeditious settlement of disputes in international commercial transactions. Although there was a general consensus that the draft Rules as a whole were worthy of support, there were a few divergent views on some of the provisions.

The first concerned Article 3 on number of conciliators. Some delegates felt that the number of the conciliators should never be even as this might lead to difficulty in reaching a recommendation. Others felt that the number of the conciliators should be one unless the parties decided otherwise.

The second observation related to the appointment of conciliators. Some delegates felt that the parties should agree on the appointment of the conciliator(s) because there was the underlying suspicion of the partiality or bias where each party appointed his own conciliator. This view was not shared by other delegates who thought the underlying principle in conciliation was the impartiality of the conciliator(s). Therefore, Article 4 should be retained in its present form.

The third observation related to Article 13(3). Some delegates felt that the provision should be carefully examined. In the first place, to the extent that it appeared to lay down the rule that such a settlement agreement was binding in the same way as any other contract, this provision stated the obvious. Secondly, the provision might be misconstrued as laying down the rule that such an agreement was enforceable in the same way as a final and binding judgment or arbitral award. Other delegates, however, thought that it was useful to retain this paragraph of Article 13.

There was some question as to the wisdom of prohibiting the conciliator from acting as an arbitrator or witness in future arbitral or judicial proceedings as envisaged in Article 19. The reason was that, firstly, since the conciliator was not a party to the conciliation agreement, this rule would not bind him; and,

secondly, these were matters regulated by the applicable procedural rules.

In regard to Article 20 on admissibility of evidence in other proceedings, the view was expressed that the list of matters excluded from being introduced in subsequent arbitral or judicial proceedings was too restrictive, and that it should be expanded to documents prepared specifically for the purpose of the conciliation proceedings, e.g, statements submitted under Article 5.

(IV) REGIONAL CO-OPERATION IN THE CONTEXT OF THE NEW INTERNATIONAL ECONOMIC ORDER

Introductory

Although the role originally assigned to the Asian-African Legal Consultative Committee (AALCC) lay primarily in the field of public international law, its activities had from time to time been widened to keep pace with the needs and requirements of its member governments consistent with the AALCC's broader objectives as a forum for Asian-African co-operation. This trend has particularly been evidenced in the field of economic relations and also in regard to some of the major issues before the United Nations where concerted action on the part of the countries of the Asian-African region was deemed necessary.

Thus, with the adoption of the first U.N. Development Decade in 1960, the AALCC at its third session held in Colombo in 1960, at the initiative of the Government of India, decided to take up for examination various questions and issues concerning the international sale of goods and commodities in view of the expected changes in the trading pattern of the countries of the region consequent upon the achievement of their political independence. At its fourth session

held in Tokyo in 1961, the AALCC approved of a plan of work aimed at assisting the member governments in enactment of suitable legislations in the field of trade and commerce including foreign investments, customs regulation and foreign exchange control to suit the needs of their development programmes.

The AALCC's involvement in the economic field led to the establishment of official relations with UNCTAD in 1968, and one of the important initiatives which the AALCC was able to take within the framework of UNCTAD's programme in the field of shipping, was to help in the consolidation of the position of developing nations in regard to the adoption of a Code of Conduct for Liner Conferences. At its eleventh session held in Accra in 1970, the AALCC decided upon the establishment of a standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities, and official relations were established with UNCITRAL the following year which has since resulted in fruitful and effective collaboration between the two organisations in several areas. These areas have included international sale of goods, international commercial arbitration, international shipping legislation and international payments. UNCITRAL's current work on legal aspects of the new international economic order is based on a programme suggested by the AALCC.

At its seventeenth session held in Kuala Lumpur in 1976, the AALCC recommended the adoption of two standard contract forms for sale transactions in commodities (agricultural produce and minerals) which are normally exported from the countries of the region with a view to replacing the standard terms and conditions of sale drawn up by trading institutions in the West and oriented to the needs of a colonial economy. These terms and conditions worked unfavourably to the exporters in the developing countries and needed to be reviewed considering the fact that the primary commodities constitute the wealth of the new nations in Asia and Africa. The AALCC subsequently developed another standard contract form relating to durable consumer goods and light machinery in view of the

fact that the more developed of the developing countries of the region had begun manufacturing such goods and exporting the same.

But perhaps the more spectacular and tangible achievement of the AALCC in the economic field was the adoption of its integrated scheme for settlement of disputes in economic and commercial fields with a view to creating stability and confidence in economic transactions within the region. The scheme which was elaborated through deliberations at the Kuala Lumpur (1976), Baghdad (1977) and Doha (1978) Sessions of the AALCC envisages development of national arbitral centres under the auspices of the AALCC and making available the services of specialised arbitral institutions to the countries of the region within the framework of the integrated scheme. Two regional centres, one in Kuala Lumpur and the second in Cairo, have already been established and a third centre to be located in Lagos is in the course of formation. The World Bank's Centre for the Settlement of Investment Disputes (ICSID) has concluded formal agreements with the AALCC in relation to its regional centres in Kuala Lumpur and Cairo for mutual cooperation and assistance thus recognising the useful role the AALCC's centres could play in bringing about stability and confidence in the field of foreign investments.

Another important area on which the AALCC has embarked upon pursuant to a decision taken at its twentieth session held in Seoul in February 1979, relates to the optimum utilization of the resources of the exclusive economic zone. The international acceptance of the concept of a 200-mile economic zone has brought within national jurisdictions vast resources, both living and non-living. The conservation, management and optimum utilization of this new source of economic wealth is therefore a matter of vital concern to the developing countries of this region. Consequently, the AALCC has adopted a programme of work in order to assist the member governments in the context of the urgent need for conservation, development and exploitation of the fishery resources of the exclusive economic zones. The work accomp-

lished so far includes : (i) Draft Guidelines for Legislation on Fisheries; (ii) Model Draft of an Agreement relating to Foreign Fishing in the Exclusive Economic Zone/Fisheries Waters of a Coastal State and Cooperation in the Conservation and Management of the Fishery Resources Therein; and (iii) Draft Guidelines for an Equity/a Contractual Joint Venture Arangement between an Entity in the Coastal State (Government Undertaking, Corporation, Company or Individual) and a Foreign Enterprise or Entity.

It has been, however, felt that there are some other areas where the AALCC can play a positive role towards the economic growth of the developing countries of the region by generating new ideas and new policy approaches and by formulation of appropriate legal framework through which the objectives could be achieved. The most important of these is in the field of industrialization. The AALCC has within its membership all the major oil producing countries of the region who are now in a position to reshape the pattern of industrial growth and location of industries through undertaking downstream activities in relation to their petroleum resources and assist the developing countries in that process. There are within this region industrialized countries with sophisticated and highly advanced technology. There are also a number of countries which may be regarded as the developed of the developing which have acquired skill and technology in certain fields which could be more easily shared with other developing countries of the region for their mutual benefit. Several developing countries have enormous natural resources and mineral wealth, some of which is yet to be exploited. There is also abundance of manpower in certain areas. There is thus considerable scope for arrangements for co-operation between the countries of this region, which could have as their objective the harnessing of the available resources for the economic growth of the developing countries.

A study on some of these aspects was prepared by the AALCC Secretary-General to provide a basis for discussion at the twentieth session of the AALCC held in Jakarta (April-May 1980). The full text of the study is given below :

SECRETARY-GENERAL'S SUGGESTION FOR A POSSIBLE INITIATIVE ON REGIONAL CO-OPERATION FOR RAPID INDUSTRIALIZATION THROUGH HARNESSING OF THE RESOURCES OF THE REGION AND INVESTMENT PROTECTION

The need to give serious consideration to the question of regional co-operation with the object of promoting rapid industrialization and optimum utilization of the natural resources in the developing countries of the Asian-African region assumes urgency and importance in the context of slow progress of negotiations between the devoloped and developing countries in world forums and the widening of gap between their economies.

It would be recalled that most of the countries in the Asian-African region had been subjected to a colonial economic system which followed a basic pattern under which industrial activities were primarily concentrated around the metropolitan capitals with the colonies providing the raw material as also serving as ready markets for finished products of the home-based industries. Furthermore, processing and marketing of agricultural produce as also the exploitation of the mineral wealth were retained in the hands of companies or individuals in metropolitan centres. With the achievement of political independence, it was to be hoped that the economic emancipation would follow but even though more than two decades had elapsed since the process of decolonization had set in, the economic order continued to proceed on the same pattern. As a matter of fact, the economies of the newly independent nations followed a deteriorating trend primarily on account of low price level in commodity markets whilst the prices which the new nations had to pay for acquiring plant and machinery and know-how for their developmental projects as also consumer goods were sky-rocketed. These among certain other causes led to an alarming economic situation which had necessitated the convening of the Sixth Special Session of the General Assembly in the spring of 1974. That Session adopted the Declaration and Plan of Action on the establishment of a New International Economic Order (Resolution Nos. 3201

(S VI) and 3202 (S VI) which was followed by the adoption of the Charter on the Economic Rights and Duties of States later in the same year. [General Assembly Resolution No.3281 (XXIX)].

The Declaration on the New International Economic Order was conceived on a theme of new norms and practices for transforming a colonial economy into a balanced economic structure to suit the needs of the changing pattern of the world community, the major areas requiring immediate attention being the basic problems of raw material, the industrial growth of developing countries and transfer of technology. In the global consultations which followed the adoption of this Declaration, the importance of industry as a dynamic instrument of growth essential to rapid economic and social development was emphasized. Thus, the Lima Declaration and Plan of Action, adopted at the General Conference of the UNIDO in March 1975, contemplated that industrialization in the developing countries should be intensified to the maximum possible extent and as far as possible increased to at least 25% of the total world industrial production by the year AD 2000. This was unequivocally endorsed at the Seventh Special Session of the General Assembly held in September 1975. A meeting of Eminent Persons on Industrial Co-operation was thereafter convened by the Executive Director of UNIDO in Vienna in September 1976 to identify the means through which such co-operation could be achieved.

A series of consultations and negotiations have taken place during the past four years to translate into reality the objectives of the new international economic order in the field of industrialization as amplified in the Lima Declaration and Plan of Action both within the framework of UNCTAD and in various North-South dialogues. The Group of 77 as also the Non-Aligned Nations have given active and serious consideration to this issue in their ministerial meetings and have adopted declarations and programmes of action. These have helped to identify the areas where urgent and concerted international action was called for and to indicate the modalities through which this could be achieved. Despite these series of major

initiatives, the results achieved so far have fallen short of the expectations of the developing countries. At times serious doubts have arisen about results being at all achieved through a continuing dialogue between the developing and developed nations in global platforms. This has particularly been so following upon the scant progress made in UNCTAD V in Manila in May 1979 and the near failure of the Third General Conference of the UNIDO held in New Delhi in January-February 1980. This lack of progress could conceivably be due to the fact that too many matters and issues are attempted to be tackled at the same time within the world forums and also perhaps due to the magnitude of the problem when issues are sought to be resolved on a global scale. Whatever be the cause, it seems to be clear that the developing countries cannot be expected to wait indefinitely for advancement of their economic growth. It is in this light that the possibility of promoting co-operation between the countries of the region *inter se* could be conceived and earnestly pursued.

It may not be out of place to mention that regional efforts in other regions have become extremely fruitful such as those between the member States of the EEC and COMECON. In Latin America, regional co-operation has assumed considerable importance as evidenced by the establishment of Inter-American Development Bank in 1959 and the adoption of the Convention establishing the Latin American Economic System (SELA) on October 17, 1975. In the Caribbean, economic co-operation has been envisaged in the Treaty establishing the Caribbean Community on July 4th, 1973, the Caribbean Development Bank in 1970 and the Caribbean Investment Corporation in 1973.

A general survey of the economic structure and growth of the countries in the Asian-African region would go to show that their economies in many respects are complementary, as their resources, their needs and also their technological advancement take a varied form and pattern and this may augur well for the success of any scheme which is based on co-operation between them. It is with this objective that a brief analysis of the economic needs of the countries of the

region, the possible pattern of their economic growth and the measure of assistance that may be rendered by them to each other has been attempted. For this purpose, it might be appropriate to classify the countries in five broad categories, namely :— (A) Major oil-producing States, (B) Industrialized nations, (C) The developed of the developing, (D) The developing countries, and (E) The less developed.

In this paper greater emphasis has been placed on the role which the major oil-producing countries can play in a pattern of regional co-operation as they would appear to hold the key to any effective system which could translate into reality the purposes of the New International Economic Order in practical terms so far as the countries of the Asian-African region are concerned. The possible roles of nations falling in the other four categories are briefly discussed (and they would be elaborated in further papers to be prepared on this subject during the current year) hereunder.

A. *Major oil-producing countries*

Even though the prices which the consumer has to pay for petroleum are in a large measure attributable to the profits made by the internationally based oil companies, the oil-producing countries, members of the AALCC, have today sizeable funds at their disposal through a legitimate price obtained for the crude, which in the case of many of these countries constitute their only valuable natural resource. This group of nations through their control over the primary sources of energy and the funds at their command are today in a position to re-shape the location, distribution and growth of industries through a proper organisation of downstream activities in relation to their petroleum resources. They could therefore play a very crucial role in any scheme for co-operation aimed at the industrial growth and economic prosperity of the countries in Asia and Africa.

Under the existing pattern of organization of petroleum industry, the crude is normally sold in bulk to the major oil companies owned and controlled by industrialized nations in

the west. The crude is then processed in refineries set up locally by the oil companies themselves or transported for processing in their refineries located mainly in Europe or the United States. The transportation of crude or processed petroleum invariably takes place in tankers owned or chartered by them. The entire produce is then marketed at prices fixed through cartel arrangements between the groups of major oil companies. It will thus be seen that the entire downstream activities in the field of petroleum are now in the hands of oil companies whose profits have continued to soar over the years. This has primarily accounted for the present level of petroleum prices even though it has been usual, more often than not, to put the finger at the increase in the price of crude.

It is true that the major oil-producing States have derived substantial revenues from the sale of crude. A part of these has been employed in their own countries in building up infrastructure like roads, buildings, aerodromes, bridges and improving the system of communication as also in setting up small and medium scale industries to the extent economically feasible, whilst a part of the funds has been invested in the west in acquiring real estates and shares in industrial concerns. Consistent with their role as members of the Afro-Asian community, these States have assisted several countries in the region in their development programmes including building of infrastructure through concessionary lendings or by way of direct aid and assistance. Furthermore, some part of the investments made by them in the west have indirectly trickled down to the region in the shape of western sponsored economic assistance programmes. These are, however, small benefits as compared to what can be achieved through re-orientation of the policies and programmes by the major oil-producing countries towards their long-term benefits and certain consequential advantages for the developing countries of the region.

Now that almost seven years have elapsed since the oil-producing countries in the Asian-African region had succeded in obtaining a share in the benefits accruing from exploitation of their natural resources in the shape of petroleum deposits, which had been denied to them so long under a colonial

economy, it would perhaps be opportune to focus their attention to the possibility of achieving some long-term objectives which would be of lasting benefit to their people and at the same time assist in the economic growth of the developing countries of the region. Such long-term objectives could basically have three possible approaches, namely :—

(i) Undertaking some of the downstream activities in relation to their petroleum resources which are at present almost solely in the hands of the major oil companies;

(ii) increasing the industrial potential within their countries; and

(iii) diversification of investments.

The considerations which might weigh in favour of a new orientation in their policies and programmes are :—

(a) the need to create tangible income yielding assets or sources of income for the future in order to sustain their economic growth and revenue earnings and to offset the effects of any future decrease in earnings from the sale of crude whether due to the exhaustion of the petroleum resources in certain fields, the location of new oil bearing areas in the exclusive economic zones of other countries or the development of alternative sources of energy as substitute for oil; and

(b) the investment potential in traditional fields in western countries considering the fact that the saturation point for deriving optimum benefits from such investments has already been reached and also the political elements which are being introduced even in the matter of investments.

Downstream activities in relation to petroleum

If the major oil producing countries are therefore inclined to take a fresh look in the matter, nothing could be more promising than their undertaking some portion of the activities in the field of processing, transportation and marketing

of petroleum which are at present under the near monopolistic control of the major oil companies. This, no doubt, would have to be attempted progressively in stages and with the assistance of one or more of the technologically advanced countries whether within or outside the region. Undertaking of such a programme, even on a comparatively modest scale in the beginning, is bound to set in motion an entire chain of activities which would not only be beneficial to the oil producing countries themselves but to the other countries of the region as well. It would help to reduce siphoning of major share of profits to western countries, which is still the case, through control of processing and markets by the major oil companies. The organization, distribution and location of several classes of industries could be effectively oriented through this process. For example, the setting up of a refinery would not only help in the growth and location of a number of allied industries using petroleum by-product or petroleum waste in the vicinity but would also encourage the establishment of other industrial undertakings in the area due to lesser cost of petroleum consequent upon savings on transportation. The creation of such an industrial belt around the area where a refinery or processing plant is located would automatically help in building up the necessary infrastructure and also ensure the employment of a large number of people.

If the suggestion for undertaking a part of the downstream activities, which are currently in the hands of major oil companies, appeals to the oil producing member States of the AALCC or at least to some of them, it would be appropriate to begin with to reserve a certain portion of the crude raised within their countries for processing, distribution and marketing through a machinery under their control. It may not be practicable in the initial stages to take up such operations in regard to the entire supply of crude but the proportion to be reserved for the downstream activities by the oil producing States themselves could be progressively increased.

Location of Refineries

The oil producing States concerned may consider setting up of a refinery or processing plant within their own countries

to be managed by State-owned organizations. The capital required for such a project could probably be found from their own resources but assistance in the shape of technology and manpower would no doubt be necessary for construction, erection and commissioning of the plant and also for its operation. Some of this might need to be obtained from industrialized countries in the west but a great deal could be made available by the countries within the region particularly the countries which are developed or the developed of the developing. Obtaining of assistance through these sources might work out considerably cheaper and also assist in the progress of regional co-operation.

If the establishment of a refinery or processing plant within a particular oil producing country is not considered feasible economically or otherwise, or if it is felt that the construction of a refinery to serve the needs of more than one oil producing country would be economically more viable, the country or countries concerned may consider location of a refinery or refineries in a country or countries within the region for processing of crude which could be transported from countries participating in the project. Such a project could be conceived as a joint venture arrangement between one or more of the oil producing countries in association with the country where the refinery is sought to be located. These refineries could also serve the needs of other developing countries of the region whose oil deposits are not substantial and also the future needs of those whose exclusive economic zones may reveal the existence of oil bearing areas. The developed of the developing countries, which may have acquired some skill or technology in the field, countries with free trade zones, or those with stable political climate and liberal laws and regulations could provide appropriate location for such ventures.

As already indicated, the location of refineries or processing plants would give rise to the establishment of a number of complementary industries based on petroleum by-product or petroleum waste such as methanol plants, plants for manufacture of plastics and fertilizers as also certain other types

of chemical. In some cases it might be practicable to include such activities into an integrated programme under the control of a State-owned organization of the oil producing country where the refinery is located or as a part of the joint venture arrangement. In any event, establishment of such industries would assure a market for the by-products or the wastes and it would certainly be to the advantage of the country where the refinery is located by adding to their sources of export earnings and in increasing opportunities for employment. The location of other industries in the area due to availability of oil at cheaper rates, whether undertaken by the nationals of the State or by multinational corporations, would enure to the benefit of the countries where the refineries are located in several ways. These factors are bound to make the location of a refinery extremely attractive to the country where it is to be set up. There is therefore no doubt that if such a refinery were to be set up through joint venture arrangements in a third country the government is bound to take those advantages into account in creating stable conditions and affording protection for the investment.

Transport

Petroleum would naturally need to be transported whether in the form of crude to a refinery or as saleable products for the market. If preference can be given to utilizing the available tanker tonnage within the region and the oil producing countries themselves consider acquiring some tankers through purchase or hire, it would lead a step forward towards the organization of a transport system owned and controlled by the oil producing countries jointly with other countries of the region. Nevertheless, to begin with, a good deal of reliance would be necessary on industrialized countries for transportation, but here again separate arrangements for transport for the crude of petroleum processed by the oil producing countries in refineries under their management and control would not result in diversion of profits to the extent as obtains at present with the entire downstream activities concentrated in the hands of the oil companies.

Marketing

As already explained, marketing of petroleum now is done by the major oil companies and prices are fixed through cartel arrangements between them. It should be possible to arrange for marketing through this source in the initial stages in view of the fact that the oil producing States in the beginning would possibly contemplate undertaking downstream activities in regard to a portion of their petroleum resources. However, it might not be too difficult to create a regional market for sale of the product in the neighbouring countries.

To sum up, what would seem to be feasible in the immediate future is for the major oil producing countries to consider undertaking a part of processing activities under their control in regard to the crude through the setting up of a certain number of refineries in their own countries and/or in other developing countries of the region by way of joint arrangements between one or more of oil producing countries in association with the country in which the refinery may be located. This will help to accelerate the industrial growth of the countries of the region through attracting allied and ancillary industries and creation of greater opportunities for manpower employment and at the same time this would provide a lasting source of revenue for the oil producing countries themselves. One of the possible modes of such joint arrangements could be through the establishment of a company with equity participation by the joint venture partners with the management and control being shared between them. The State in which the refinery may be located could possibly share in the venture by providing land, infrastructure and port facilities and other ancillary requirements in the shape of water and power for the project. Technology and manpower could be arranged under contracts to be entered into with the company which is floated for the purpose. This aspect of the matter would be elaborated further if the suggestions for the establishment of refineries within the region under the management and control of oil producing countries in association with other developing countries appeal to them in principle.

Industrialization within the country

The extent to which industrial projects could be undertaken in some of the oil producing countries may have some limitation due to the economic factors caused by non-availability of raw material or manpower within the country. However, in countries where this problem does not exist, their needs in the field of industrialization and the manner through which the same could be achieved would be identical with the problem of other developing countries except in regard to capital outlay. In any event industrial output for local consumption, which would do away with the need for importation of finished products in certain fields, could be foreseen as a long term perspective and activities in relation thereto will possibly be undertaken to the optimum limit. As a matter of fact, a number of countries are already engaging their attention on this matter and they have set up factories for cement and other building material which are badly required for building of houses and infrastucture. Some countries have even embarked on Iron and Steel Industry in collaboration with the industrialized countries including those from within the region. However, industrial activity in the field of production of goods for export purposes where raw material and/or manpower has to be obtained from abroad may become uneconomic for the present as it would be difficult to recoup the high costs of production in competitive export markets. Nevertheless, in relation to certain industries where the cost of energy represents a major component in the overall cost of production, such as aluminium, the undertaking of export oriented projects might be fruitful. Some part of the technology and manpower required for this purpose could well be made available by the countries of the region under appropriate bilateral agreements or commercial contracts.

Diversification of investments

Although fairly substantial sums from major oil producing countries have been put into some of the developing countries of the region for the purposes of their development projects and bu lding of infrastructure through direct aid and assistance

as also concessionary lendings, the question of investments in the developing countries of the region by the oil producing States in the true sense has not been given serious consideration —what is meant here is investment with the object of creating tangible assets for securing a source of income or profits for the investor. Whilst the present trend of assisting countries of the region on the existing pattern based on certain criteria would possibly continue, attention needs to be focussed on the question of possible investments being made by major oil producing countries in the other developing countries of the region for their mutual benefit. Such investments may well provide lasting sources of revenue for the investor country which would at the same time meet the needs of the developing countries including the developed of the developing in respect of their capital requirements for industrialization. Such investments in the present economic climate of the region could usefully be made in government projects under a government to government agreement or even in the private sector under an umbrella agreement with the government of the country where the industrial activity is to be undertaken.

The possibility of investing a part of the available funds in the developing countries of the region might well be looked at from the point of view of the advantage that might be gained in securing partnership in the industrial activities in a country of the region which could provide a steady and recurring source of income for the future and also the consideration that a judicious diversification in investments may prove to be more beneficial in the overall picture. From the point of view of developing countries, such investments are likely to be more beneficial to them than obtaining economic assistance in the shape of tied credits from countries outside the region.

There are several areas where direct investment or participation in industrial projects might be fruitful, such as those which may be oriented to produce goods and material needed for consumption in the country of the investor. In addition, investments may also be worthwhile in export oriented industries for which the economic conditions in a particular developing country are favourable in the shape of ready access to

raw material or cheaper labour. Projects which have as their objective the exploitation of the mineral wealth of a country and their processing is a field where the investments are bound to be profitable; investments could also be made by way of participation in tripartite ventures where the location of an industry in a particular developing country may be considered economic due to raw material supply and manpower but capital as well as technology has to be obtained from abroad due to the sophisticated type of process involved and the need for larger capital employment. Such type of industry, which may include Iron and Steel, manufacture of machinery or motor cars, electronic goods, shipbuilding, etc., which are confined at present primarily to industrialized countries are bound to be profit-yielding and participation therein is likely to prove to be profitable for the future.

B. *Industrialized nations*

Japan is the only major industrialized country in the Asian-African region which has developed advanced technology in various fields. The Republic of Korea is another country which has also been able to make remarkable strides in this direction within a short time span. They are now in a position to assist the developing countries in the region in the exploitation of their natural resources as also in the process of industrialization by imparting technology through technical assistance or joint ventures. Furthermore, both these countries have almost reached or are about to reach optimum point in the field of industrialization in their own countries and they could well benefit by participating in the industrial activities and developmental programmes in other countries of the region by transferring progressively to developing countries those industrial activities relating to production of intermediate materials, processing of raw material and manufacture of consumer goods for which the economic conditions in several of the developing countries are potentially better in the shape of cheaper labour and availability of raw material. Such a programme would at the same time be greatly beneficial to the developing countries themselves as this will set in motion a process of industrialization in the fields suited to their economies and this may also

help to resolve their continuing problems of balance of payments and unemployment in a more positive way than initiatives in spectacular areas. This would also be a means through which technology could be gradually and effectively transferred. It is a matter of satisfaction that some progress in these directions is already underway but there is a great deal of room for extending such spheres of co-operation. The contribution of the developed countries in a programme for regional co-operation could therefore conceivably cover three distinct and viable areas :—

(i) Imparting of technology and provision of skilled manpower to developing countries;

(ii) Participation in joint or tripartite ventures by employing capital or technology or both;

(iii) Transfer of industrial activity concerning intermediate products, etc.

C. *Developed of the developing countries*

There are by now within the region a number of countries which may be termed as the developed of the developing, which have acquired skill in manufacturing goods of international standards in certain fields such as consumer goods, light machinery as also in the manufacture of chemicals, fertilizers, cement, etc. Some of them are rapidly progressing in their own industrialization programmes and are embarking in the field of heavy industry such as Iron and Steel, shipbuilding and also in sophisticated fields like electronics, car manufacture etc. Their real handicap in most cases is however the lack of availability of ready capital and they are therefore still dependant a great deal on tied credits from industrialized nations in other regions. Nevertheless, they seem to be in a position to assist the developing countries and those which are less developed by transferring progressively through joint venture arrangements the expertise in certain less sophisticated fields which can be more easily absorbed by the developing countries of the region. Assistance is also being rendered by these countries in

regard to construction of roads, buildings, civil works for factories and other forms of infrastructure. It may well be expected that with the inflow of capital and transfer of sophisticated technology, these countries would be in a position to intensify their progress in the field of industrialization and to render greater assistance to the countries of the region which are developing or less developed. It would however be of great advantage if some kind of an understanding could be reached between the developing countries themselves including the developed of the developing by way of regional co-operation to demarcate areas of industrial activity with a view to eliminate competition and to complement each others efforts.

The western economic assistance programme on which the developing countries including the developed of the developing are still dependent, whether from individual governments or a consortium of governments, generally follow a basic pattern of tied credits, that is, allocation of particular sums covering the foreign exchange components of the expenditure on the approved projects. This is invariably subject to the condition that the goods and services to be obtained for the project should be from the country providing the credit. The same pattern is also followed in regard to assistance obtained from the industrialized countries in eastern Europe. This necessarily limits the choice of the developing countries undertaking an industrial project in the matter of selection of the process of the type or machinery as also in the matter of selection of the contractors for erection and commissioning of the plants with the result that the best available technology in a particular field cannot always be availed of. This has a certain degree of retarding effect on the industrial progress of the developing countries and particularly in the developed of the developing. These shortcomings could be largely eliminated if the capital required for a project could come by way of capital participation from the sources in the major oil producing countries in the region as joint venture partners or equity participants in industrial undertakings.

D. *The developing countries*

The majority of the countries of the region are those which

may be termed as developing, some of them having abundance of raw material or unexploited natural resources. There is also abundance of manpower in certain areas especially in the category of semi-skilled or unskilled for whom opportunities of employment need to be considerably enhanced by progressive industrialization. The problems faced by these countries are again lack of technology and capital. Assistance would therefore need to be generated in both these areas from other countries of the region. The fields of industrial activity which could be promoted in these countries with optimum benefit may be the following :—

(a) Fertilizers, pesticides and agricultural implements;

(b) Cement;

(c) Processing of raw material, both agricultural and mineral and canning;

(d) Storage and refrigeration;

(e) Power generation;

(f) Consumer goods including textiles, synthetics and metal using items;

(g) Intermediate products like car bodies and machine parts, rubber tyres, etc.;

(h) Infrastructure: roads, railways, bridges, airport (civil works).

E. *Less developed countries*

There are some countries in the region which fall in this category not because they lack raw material but primarily due to the fact that their agricultural or mineral wealth has remained unexploited. The main reasons for this state of affairs is lack of an adequate communication system, absence of infrastructure as also urgent need of capital and technology. The assistance in these fields have to be generated as a matter of urgency not only by attracting investments but through direct aid and assistance as also through concessionary lendings. The fields in which industrial activities could be concentrated in so

far as these countries are concerned could legitimately fall under the following broad heads :—

(i) Exploitation of mineral wealth;

(ii) Raw material processing;

(iii) Forest industry; and

(iv) Building of infrastructure like roads, railways, bridges, airports, etc.

Conclusion

On the above survey of the needs and requirements of the various countries of the region falling under five broad categories and considering the role these countries could play in a system of co-operation for economic growth of the region as a whole, there would seem to be considerable scope for progress through harnessing the resourcess of the countries of the region. If the governments could be persuaded to orient their programmes and policy approaches on the lines indicated above, greater results could be achieved than through the continuing dialogue between the developed and developing countries in world forums.

INVESTMENT PROTECTION

In any programme for mutual assistance, whether through location of petroleum refineries or capital participation by way of investments in industrial undertakings in developing countries, or joint venture arrangements for imparting or transfer of technology, the question of protection of investments is a fundamental factor which would need to be taken into account. It is legitimate to expect that no investor or entrepreneur, whether from a developed or a developing country, would embark on a long-term investment project unless he can be assured of the protection of the investment and reasonable profits therefrom as also repatriation of capital and income. Attention therefore has to be focussed on the need and urgency of promoting an adequate system of investment guarantees to provide against situations in which the

investor may be deprived of his substantial rights. Such situations may arise in various circumstances but the normal investment protection mechanisms are generally intended to cover : (i) Confiscatory or expropriatory measures and the risk of nationalization; and (ii) restrictions that may be imposed on repatriation of investment or profit.

Whilst the commercial risks involved in an investment have legitimately to be borne by the investor, protection against deprivation of rights through the laws and regulations or executive action by the State in which the investment is made, would appear to be a *sine qua non* if the flow of investments particularly between the developing countries of the region is to be accelerated for their mutual benefit. The investments by a developing country in another developing country for their mutual benefit, investments which promote economic co-operation among the countries of the region and the investments which are in the national interest of the developing country where it is made, would appear to fall in a special category and on a different footing than the normal investments by industrialized nations and multinational corporations primarily for their own benefit. It is therefore important that protection of this special class of investments should be viewed in a new perspective.

A number of countries in the Asian-African region have enacted laws and regulations and some of them have even provisions in their constitutions for protection of investments. It is, however, well recognized that there can be no fetter on the right of a State to amend such legislative provisions through their own constitutional procedures. A provision contained in a contract or assurance given against nationalization, even though creating some kind of a moral obligation, is not legally binding on a government and much less on any successor government. Furthermore, according to well settled principles of international law, proceedings have to be taken before local judicial or administrative forums if contractual obligations are breached and only after exhaustion of such remedies, action may be taken, where appropriate, at international level. Experience has shown that if a government or a

party having the support of the government has committed a breach of its contractual agreement or when a government has nationalized or expropriated property, there are few practical measures one can take, and even such measures which are permissible are extremely time-consuming. It may, however, be pointed out that most governments have by and large been known to honour their commitments in order not to tarnish their image and to maintain their reputation in the investment market. Nevertheless, the anxiety of an investor for safeguarding of his investment needs to be appreciated and acceptable solutions have to be found.

During the past two decades several modalities have been evolved and measures taken for protection of investments in developing countries, no doubt with varying objectives. These include insurance schemes by private institutions, insurance by State agencies in the country of the investor, bilateral investment guarantee agreements at government to government level, insurance schemes under the auspices of international economic institutions as also multilateral agreements and joint declaration by a group of States. These would be briefly discussed hereunder.

Private insurance

Some of the larger insurance or reinsurance companies have evolved schemes for issuing policies to cover risks on investments against nationalization and other forms of governmental action through which the investor may be deprived of his substantial rights with respect to the investment. These are essentially meant to protect the interests of private investor, whether individual or body corporate. The premium payable on such insurance policies depends not only on the quantum of the investment but also on the country where the investment is made in order to assess the risk element that needs to be covered. This is generally costly and ultimately it is the developing country which has to bear the burden because the premium is in the usual course passed on as a part of the costs involved in the investment.

This form of private insurance might not be suitable in regard to investments between the developing countries *inter se*, except perhaps in some categories of cases, since substantial sums in the form of premia would be siphoned away to insurance companies which are at present owned or controlled by industrialized nations. Furthermore, the possibility of some kind of interference by these companies in the shape of assessing risks or computation of compensation cannot be altogether ruled out.

Insurance by State agencies in the country of the investor

The most modern method which some of the western countries have adopted for safeguarding investments is a form of compulsory insurance cover provided by a State agency or corporation. This is quite recent in origin and has been successfully tried out in some countries, particularly the United States of America, Canada, France, United Kingdom and the Federal Republic of Germany. These schemes appear to have been elaborated with a two-fold objective, namely, the protection of the investment by the private investor and also to encourage the promotion and continuance of such investments by their nationals which is considered to be in the interest of the State from political as well as economic aspects. In the United States, following upon large scale expropriation of American property in certain developing countries in the mid-fifties and the sixties the public at large and even some of the multinational corporations expressed their extreme reluctance to get into investment involvements abroad. As this was likely to be detrimental to American economy generally and also to the United States role in world affairs, the government evolved certain schemes to be administered by State corporations in order to provide a form of guarantee to the investor against his loss of investment. Under those schemes, if loss was suffered by the investor due to any act or omission by the State where the investment is made, the investor could lodge a claim before the State corporation without having to pursue what is often regarded as fruitless litigation before the local courts. Investment guarantees were also given by the United States under the Mutual Security Act of 1954. In France, shortly

after the promulgation of nationalization decrees in one of its former colonies, a law was passed making it compulsory for investors or contractors doing business abroad to take out a policy of insurance issued by a State agency (COFACE). In Britain the scheme is known as ECGD and in the Federal Republic of Germany as HERMES. In Canada, investment guarantees are provided by the Export Development Corporation on behalf of the State. The premium paid on such insurance is usually included in the price quoted or the interest rate and the same is normally passed on to the recipient of the credit. The State providing such risk cover, and thus making itself liable to compensate the investor in case of loss, would normally take over the rights of the investor in regard to accrual of any claim arising from the loss suffered through bilateral investment protection agreements with the governments of the countries where the investments are made.

It is very doubtful whether this pattern of investment protection would be suitable for developing countries of the region at this stage in view of the fact that private investments made by their nationals are not likely to be of such magnitude as to justify the adoption of a system which is full of complexities.

Bilateral investment protection agreements

The United States of America has entered into as many as 44 investment protection agreements with the developing countries in the Asian-African region over a period of 20 years, namely, from 1954 to 1973.[1] The agreements generally follow

1. The United States has entered into investment protection agreements with the following countries :

   Egypt (1973), Afganistan (1957), Botswana (1968), Burundi (1969), Central African Republic (1965), Chad (1965), Congo (1962), Cyprus (1963), Dahomey (1965), Ethiopia (1962), Gabon (1963), Gambia (1967), Ghana (1958), Greece (1963), Indonesia (1967), Ivory Coast (1961), Jordan (1963), Kenya (1964), Republic of Korea (1960), Lesotho (1967), Liberia (1960), Malagasy (1963), Malaysia (1959), Malawi (1967), Mauritania (1969), Mauritius (1970), Morocco (1963), Nepal (1960), Niger (1962), Nigeria (1962), Pakistan (1955), Senegal

one basic pattern under which the two governments agree to consult between themselves at the request of either of them concerning investment projects in the developing country by the nationals of the United States of America with regard to which investment guarantees can be given by the United States under its laws and regulations. The Government of the United States under these bilateral agreements agrees that it will not issue any guarantee with regard to a project unless it is approved by the developing country in which the investment is to be made. The host government in its turn agrees that where such guarantees are given by the United States and payments are made in accordance with such guarantees, it will recognize the right of the United States to any claim or cause of action or the right of the investor arising out of any situation which led to payments being made in terms of the guarantee. A provision for settlement of disputes is also included in all these agreements.

Canada has entered into investment protection agreements with four developing countries of the region between the years 1971 to 1976.[2] These agreements provide for guarantees being given by the Government of Canada through its agent, the Export Development Corporation, in respect of Canadian investments in the developing country concerned, transfer of the rights of the invester to the government where payments have been made under the guarantee as also modalities for settlement of disputes.

The Federal Republic of Germany has concluded agreements with 26 developing countries in the Asian-African region between the years 1963 to 1973.[3] These agreements follow a basic

(1970), Sierra Leone (1961), Singapore (1966), Somalia (1964), Sri Lanka (1966), Sudan (1959), Swaziland (1970), Togo (1962), Tunisia (1963), Uganda (1965), Upper Volta (1965), Zaire (1962) and Zambia (1966).

2. Canada has entered into investment protection agreements with the following countries :

   Gambia (1976), Indonesia (1973), Malaysia (1971), and Singapore (1971).

3. The Federal Republic of Germany has entered into investment protection agreements with the following countries :

pattern under which provisions are made concerning the treatment of the nationals of the Federal Republic of Germany and companies registered therein, security of investments, protection from expropriation, payment of adequate compensation in tangible form in the event of nationalization, repatriation of capital and profits as also settlement of disputes.

The eight agreements concluded by *the Netherlands* with the developing countries of the region, entered into between the years 1964 to 1973,[4] also follow the same pattern as the agreements with the Federal Republic of Germany, in that they provide for protection of Netherlands nationals, repatriation of capital and profits, adequate and effective compensation in the event of nationalization and settlement of disputes.

This pattern is also adopted in sixteen agreements entered into by *Switzerland* with the developing countries of the region between the years 1962 to 1974,[5] as also in the agreements concluded by France with Tunisia (1972), Indonesia (1973) and Mauritius (1974). The three agreements entered into by Indonesia with Belgium (1972), Denmark (1968) and Norway (1969) also contain similar provisions.

Cameroon (1963), Central African Republic (1968), Chad (1968), Congo (1967), Ethiopia (1964), Gabon (1971), Ghana (1972), Indonesia (1971), Ivory Coast (1968), Kenya (1964), Republic of Korea (1967) Liberia (1967), Malagasy (1966), Malaysia (1963), Mauritius (1973), Morocco (1968), Niger (1966), Pakistan (1962), Senegal (1966), Sierra Leone (1966), Sri Lanka (1966), Sudan (1973), Tunisia (1966), Uganda (1968), Zaire (1970) and Zambia (1966).

4. The Netherlands have entered into investment protection agreements with the following countries :

   Cameroon (1966), Indonesia (1971), Ivory Coast (1966), Kenya (1970), Singapore (1972), Sudan (1973), Tunisia (1964) and Uganda (1970).

5. Switzerland has entered into investment protection agreements with the following countries :

   Egypt (1974), Cameroon (1964), Chad (1967), Congo (1964), Dahomey (1966), Gabon (1972), Ivory Coast (1962), Republic of Korea (1971), Malagasy (1966), Niger (1962), Senegal (1964), Sudan (1974), Togo (1964), Tunisia (1964), Upper Volta (1969) and Zaire (1972).

Insurance schemes under the auspices of international economic institutions

World Bank's initiative

In February 1972, the International Bank for Reconstruction and Development (IBRD) prepared a scheme for establishment of an international investment insurance agency in order to provide an adequate machinery for protection of investments in developing countries with a view to accelerate the flow of investments to those countries to meet their needs of development and industrialization. The types of risk which were proposed to be covered through an insurance scheme related *inter-alia* to :

(i) expropriation, confiscation or any other type of governmental action or inaction which deprives the investor of effective control over or the benefits of his investments;

(ii) governmental restrictions on conversion and transfer of assets and profits; and

(iii) armed conflict or civil unrest.

The investments proposed to be covered under this scheme were those made in the territories of a developing country and approved for the purposes of insurance by the developing country in which the investment is made. The investment also needed to be sponsored by a State member. The finances for the insurance agency were to be provided from a premium income, a common working capital fund and a provision for loss sharing between the States which had sponsored proposals for insurance of investments. Although the Executive Directors of the Bank had approved of the recommendations the scheme for establishment of the investment insurance agency could not be brought into being as it was difficult to reconcile the conflicting positions of member States on some of the important issues. The scheme had therefore to be abandoned. The World Bank's initiative, if accepted, could have provided an effective guarantee for investments through a system of insurance in which the developing countries could have confidence.

Inter-Arab Investment Guarantee Corporation

An Inter-Arab Investment Guarantee Corporation has been established under a Convention to which 18 Arab States had acceded upto September 1977. The purpose of the corporation is to provide insurance coverage to Arab investors in investments between contracting States in the form of reasonable compensation for losses resulting from risks which are not of a commercial nature. These include measures taken by public authorities in the host country whereby the investor is deprived of substantial rights in respect to investments including confiscatory or expropriatory measures and nationalization as also restrictions imposed on the investor to repatriate the principal of his investment and earnings. The capital of the corporation, to be subscribed by the contracting States in certain agreed proportions, has now been fixed at 25 million Kuwaiti Dinars. The income of the corporation is mainly to be derived from fees and premia paid on insurance.

Inter-American Development Bank

The Inter-American Development Bank has issued a Memorandum on 31st October 1979, proposing a major new approach to stimulate the development of Latin America's energy and mineral resources. The initiative has arisen from the increasing concern regarding the substantial decline in new investments in this sector throughout Latin America. The Bank is therefore proposing that there be established an Inter-American Energy and Minerals Fund to facilitate the commitment of new investment and technical skills in this sector. The resources of the fund would be utilized in two ways :—

(i) to provide eligible investors with insurance against expropriation and risk of inconvertability of currency;

(ii) to provide guarantees for third party loans in approved projects.

Member States of the Bank will be invited to pledge contributions to the fund and the fund will not come into existence

until at least 11 member States have pledged to contribute an aggregate of at least 750 million U.S. Dollars to be utilized for insurance operations and at least 350 million U.S. Dollars to be used for guarantee operations. The participating nations will be expected to execute an agreement establishing the Fund. The proposal is based on the expectation that the multilateral character of the fund coupled with the regional focus and experience of the Bank will not only encourage investment flows but also minimize disputes with host governments arising out of such investments. The insurance on guarantee cover under the scheme will be available only to nationals of countries which are members of the Fund and businesses under the effective control of such countries in regard to projects which involve exploration, exploitation, development, mining or other extraction and processing of petroleum, gas or any other mineral which take place in the territory of a developing country which is a member of the Inter-American Development Bank. The finances for the scheme will consist of :

(a) Pledges of member countries;

(b) Sums actually paid to the fund by member countries;

(c) Premium earnings; and

(d) Salvage from claims paid by the Fund.

It would be noticed that insurance schemes under the auspices of international economic institutions have not made much progress so far. The Inter-Arab Insurance Guarantee Corporation covers a very limited area, that is, investments between the 18 contracting Arab States in regard to each other's investments. It does not cover investments made in Arab countries by other States or their nationals nor does it cover Arab investments in countries which are not parties to the Convention.

The formulation of a scheme for insurance for investments in the context of regional co-operation in Asia and Africa will not only be difficult but a time consuming process even if this form of investment guarantee is considered suitable. It may be possible to approach economic institutions like the Asian

Bank, the African Bank, the Islamic Bank or the I.F.C. in Washington but having regard to the vast resources necessary for operation of such a scheme and complexities involved much progress cannot be expected within a reasonable time-frame.

Multilateral conventions

The only multilateral convention which is at present in force regarding protection of investments is the Convention between the 18 Arab States establishing the Arab Investment Guarantee Corporation. If the scheme formulated by the Inter-American Bank is approved, it will also be under cover of a multilateral convention.

It may be observed that the multilateral conventions in regard to investment protection are not likely to provide a suitable pattern for the Asian-African region due to the fact that the region as a whole consists of a large number of countries whose economic systems, needs and requirements are bound to be different. Consequently, a bilateral approach should be considered as more suitable at the present stage.

The Organization for Economic Co-operation and Development (OECD) had formulated the draft of a Convention on the Protection of Foreign Property. The Council of the OECD however decided that rather than going through the process of adoption of a multilateral convention, it would follow a simpler method of adopting the principles contained in the draft convention through a resolution reaffirming the adherence of member States to the principles embodied in the draft convention. These basically cover the question of treatment of foreign property, observance of undertakings given by member States, payment of fair and effective compensation on taking of property, free transfer of assets and income and settlement of disputes.

Conclusion and recommendations

On a broad survey of the investment protection mechanisms which have been tried out, it would seem that bilateral investment protection agreements might perhaps provide the best

practicable solution for the present in the matter of protection of investments in the countries of the region even though this may not be a wholly satisfactory method. Such agreements could be made applicable in regard to investments which are approved and registered in the host country. The agreements might generally provide for repatriation of capital and income and adequate and effective compensation as also provision for some notice in the case of nationalization for a public purpose. In addition, the AALCC could consider adoption of certain principles in the form of recommendations in respect of a special category of investments. This special category might consist of :

(a) Investments declared by the host government to be in their national interest;

(b) Investments which promote economic co-operation among the countries of the region; and

(c) Investments by one developing country in another developing country.

All such investments would need to be approved and registered in the host country as falling within the special category. Furthermore, the agreements for investment must contain a provision for settlement of disputes through fair, inexpensive and speedy procedures acceptable to both the parties.

LEGAL FRAMEWORK

Whilst the climate for accelerating investments in the countries of the region *inter se* by way of regional co-operation can be promoted through consultations between the governments of the region towards adoption of certain basic norms and policies, it might not be practicable at this stage to conceive of any legal instrument like a multilateral convention providing for the framework and modalities for economic co-operation between the countries of the region. On the other hand, if some kind of understanding can be arrived at on the basic approaches and norms, bilateral negotiations between interested governments on substantive projects is likely to

produce the best practical results in the immediate future. The legal framework which could be contemplated at present to achieve the desired objectives may fall under four broad categories :

(i) Bilateral or multilateral arrangements between interested governments for undertaking a major industrial project like a petroleum refinery or shipbuiding with the participation of two or more governments or State agencies.

(ii) Bilateral arrangements for participation by one government in State owned projects of another government.

(iii) Bilateral umbrella agreements setting forth the terms and conditions on which investments may be made by the nationals of the contracting States including bodies corporate in the territories of each other, both in the public and the private sectors.

(iv) Commercial agreements in respect of joint venture projects as also other forms of investment. Such agreements would be of several kinds depending upon the subject-matter of the agreement and modalities sought to be employed.

It may be pointed out that if investments are made under government-to-government agreements in respect of State owned projects or joint ventures between governments, or under umbrella agreements in respect of private investments, the same will facilitate effective protection of investments in a practical manner.

The AALCC has already undertaken the preparation of certain model agreements which would be consistent with the principles underlying the basic concept of the international economic order as also in the context of regional co-operation through harnessing the resources of the region in the shape of technology, manpower, raw material supplies as well as

capital. This had been taken up as a priority project in the hope that such model agreements might focus the attention of the governments to the need and utility of regional co-operation and also with the object of assisting them in the conclusion of contracts in the economic field.

Jakarta Session (1980)

At the Jakarta Session, since many of the member governments had not included economic experts in their delegations, it was agreed to discuss the Secretary-General's report with respect to the following aspects only : (i) Possible pattern of legal framework for regional economic co-operation; (ii) Investment protection and guarantees; and (iii) Settlement of disputes.

One Delegate was of the view that the topic of the New International Economic Order should be taken up by the AALCC in limited aspects only and particularly those which had a bearing on promoting regional co-operation among the countries of the region. He considered investment protection and guarantees as an antiquated concept imposed by foreign corporations on the poor developing countries which tended to compromise their independence and sovereignty. In his view, investment guarantees threatened the interests of the developing countries and that history was full of such instances.

Another Delegate felt that although the matters raised by the Secretary-General were already before bodies like UNCTAD, UNIDO and even before the special session of the General Assembly, slow progress made in those forums fully justified the AALCC's initiative with regard to these matters with its objective of promoting co-operation. However, he stressed that before the AALCC could consider a legal instrument to provide for the modalities of regional economic co-operation, the fundamentals of such co-operation should be sufficiently identified. For this, he stated, an inter-sessional meeting should be convened to make an in-depth study of the matters, the date and venue of which could be left to the Secretary-General to decide in consultation with the member governments.

Another Delegate, however, felt that in respect of investment protection, a distinction should be made between such protection in the context of regional co-operation and that under the general law of investment. Since the work of the AALCC was essentially of a legal nature, he was of the view that the AALCC should concentrate on a strategy for a suitable legal framework for investment protection on a global basis and also evolve model bilateral or multilateral agreements for the purpose.

Another delegate welcomed the initiative taken by the Secretary-General which he considered to be a practical means to translate the NIEO into practice. He endorsed the suggestion regarding the convening of an inter-sessional meeting for an in-depth study of the matters raised by the Secretary-General.

One of the Delegates commended the AALCC for the practical work done by it towards the establishment of a NIEO as demonstrated by its formulation of standard contract forms for use in international sale transactions, the establishment of regional centres for commercial arbitration and the preparation of model clauses for insertion in industrial contracts. He urged the AALCC to take up on a priority basis the question of drafting guidelines or model forms or national legislation or bilateral agreements which set forth therein main principles of co-operation among developing countries for counteracting the adverse influence of the activities of transnational corporations on the economy of the developing countries. He expressed the hope that the AALCC in its work on NIEO would take into account the experience of countries with different economic and social systems including the CMEA countries.

In the view of another Delegate although the Group of 77 had articulated the hopes and aspirations of the developing countries concerning the NIEO in various international forums, nothing contrete had been achieved. Even so, he suggested, that the AALCC should study the various instruments adopted by the Group of 77 such as the Manila Declaration, the Arusha

Charter etc. to derive inspiration for its work. He was, however, of the view that a distinction should be maintained between the activities of the AALCC and those of the Group of 77 concerning regional co-operation. On investment protection and guarantees, he suggested that an investment gurantee scheme should be devised for the Asian-African region so that countries of the region could derive full benefits from foreign investments.

One of the Delegates commended the Secretary-General for his proposals on regional co-operation aimed at rapid industrialization through harnessing the resources of the region and investment protection. He considered it timely for the AALCC to take the initiative of expediting the process of establishing the NIEO since efforts made in that direction in the various international forums had ended in failure. The Delegate, however, found it difficult to accept the classification of countries into five groups set forth in the Secretary-General's study as he felt that it was not easy to make a clear distinction between the developed of the developing countries and the developing ones. He was of the view that countries of the region should be classed into three categories, namely, oil producing, developed and developing countries and that his country should be treated as a developing country. That, however, did not mean, he clarified, that his country was unwilling to participate in regional co-operation schemes.

The representative of the *International Centre for Settlement of Investment Disputes* (ICSID) observed that there were three possible approaches to the problem of protection of investments against political risk. The first approach was for the investor to obtain insurance, either national or international. Even though most of the national schemes issued insurance with the host countries's consent, in his view, they could be objected on the ground that the capital exporting country providing such insurance to their nationals' investment abroad would base their decisions on their own national interest which might or might not serve the priority needs of the host country. This objection, he said, would not apply to an international scheme.

The second approach was for the investor and the host country to conclude an agreement spelling out the terms of the agreement and the extent to which these terms would be immune from governmental action. If such an agreement contained a dispute settlement clause under the ICSID Convention, permitting application of the principles of international law, that would afford effective protection against the host government's actions in that regard.

The third approach consisted in the conclusion of multilateral or bilateral treaties to regulate foreign investments. He pointed out that so far there was not a single multilateral agreement although there were numerous bilateral agreements mostly concluded with the countries of Asia and Africa.

Referring to the Secretary-General's proposals, he said that they represented useful refinements of the international law approach and a worthwhile programme for evolving a requisite legal framework suited to the needs of the region.

One Delegate observed that although there had been numerous developments in the field of international economic relations during the last three decades leading to the proposed establishment of a new international economic order, the role of the AALCC in those developments had not been very comprehensive. He believed that the AALCC could not undertake intensive studies in this area mainly because of its preoccupation with the Law of the Sea negotiations, but now that the work on the Law of the Sea was nearing completion, the AALCC should adopt a comprehensive programme of action for the 1980s concentrated on regional economic co-operation. Restructuring of international economic relations was being discussed in various regional and international forums and a growing picture was emerging on the legal aspects of this cooperation. The AALCC should make an exhaustive study of these developments so as to bring the legal aspects of these developments to the attention of the member governments.

Expressing his approval of the proposals presented by the Secretary-General on the new international economic order,

the Delegate suggested that the AALCC should concentrate on three aspects : namely (i) regional cooperation in industrial matters; (ii) protection of investments and (iii) settlement of disputes. In taking up these projects, the AALCC should not start in vaccum but should take into account the numerous industrial collaboration, joint venture, and technical assistance agreements that had been concluded between the countries of the region, evolving a comprehensive legal framework for economic co-operation in the region. The AALCC should undertake a study of this growing legal framework and the practices that have been established as also the problems encountered in that context covering the entire region and draw up certain conclusions. The Delegate suggested the following procedure for the Secretariat to go about its task : (i) on regional industrial cooperation, the Secretariat should prepare a questionnaire to elicit the requisite information from member governments for the eventual preparation of guiding principles or model contract forms; (ii) Promotion of investment protection—protection of contributions to joint ventures, sharing of technology, training of personnel, labour protection etc. and (iii) Settlement of disputes—how joint ventures could be related to the regional arbitral centres for dispute settlement.

Another Delegate observed that in the face of dangers in the world economy threatening the political and economic stability of nations, it was appropriate that the AALCC should serve as a forum for exchange of views on regional co-operation in the context of the new international economic order. He endorsed the proposals of the Secretary-General for a possible initiative in regard to regional co-operation. The Delegate was also of the view that the new international economic order should eventually be based on legal norms and standards governing the behaviour of States, transnational enterprises and other subjects of international law. Since the Declaration on new international economic order and the Charter of the Economic Rights and Duties of States lacked the enforceability of law, his country had proposed consideration of the progressive development and codification of the norms and principles of international law relating to global economic relations at the thirtieth session of the General Assembly. He expressed the

hope that this item would be discussed in the AALCC at some future time within the legal framework of economic co-operation among the countries of the region.

Another Delegate welcomed the efforts of the AALCC to contribute to the establishment of a new international economic order. He was of the view that the Secretary-General's proposals on the topic would positively assist in the establishment of the new order. Investments must be encouraged within the region and he considered the suggstion for umbrella agreements for investment protection as sound and valid. The preparation of model clauses by the AALCC for insertion in industrial contracts would also be a positive contribution to the establishment of the new order.

Yet another Delegate stated that although the new international economic order could not be realized without the cooperation of the industrialized nations, an effort on the part of the Third World countries on a regional basis could surely lay the foundation of the same. Since the AALCC had already worked on certain aspects of international economic law, he felt convinced that regional co-operation could be achieved through this body.

Expressing his satisfaction on the AALCC's dispute settlement system and the establishment of the two regional arbitration centres, he said that it should be ensured that the procedures adopted by these centres were expeditious and simple while at the same time effective and capable of imparting justice so that confidence was generated among the industrialized nations in those centres.

Considering regional co-operation for industrialisation as an important component of the concept of self-reliance, the Delegate said that the areas in which co-operation could be promoted should include all inputs required namely, equipment, raw material, technology, capital and managerial skill. Since such co-operation presupposed exchange of information between the countries of the region, arrangements for the same should be institutionalized through the AALCC.

Regarding co-operation in the field of investment and industrialization in order to protect the rights as well as to determine the obligations of the potential investor of one country in another country of the region, the Delegate suggested that a regional "investment protection agreement" should be drafted. Such an agreement might consider granting Most-Favoured-Nation treatment to all signatories to the agreement to make it more attractive for investors to operate within the region rather than outside. In this context, the Delegate pointed out that presently most of the surplus capital in some of the countries of the region was being recycled back to the advanced countries. Since opportunities for investment already existed in this region, in his view efforts should be made to redirect a major portion of those resources to the requirements of the developing countries.

On transfer of financial resources and technology, the Delegate said that this involved contractual arrangements, but most of the developing countries had little potential to develop legal concepts suited to their interests. This was for three reasons : (a) an absence of institutions corresponding to the powerful and well-funded industrialized country institutions; (b) educational and academic dependence; and (c) the absence of communication and opinion-building mechanisms. The result was the contracts were frequently loaded against the developing countries. In this context, he felt that there was a need for an international body designated with the task of providing alternative legal concepts, disseminating the relevant information on international practices of industrial contracting and assisting in preparing guidelines, model contracts, uniform terms and multilateral conventions.

The Delegate pointed out that industrial countries often insisted on incorporating clauses in the agreements compelling the other parties to submit to the jurisdictions chosen by them. In order to meet the needs for satisfactory arbitration, a proposal for setting up regional arbitration centres to serve as a forum to articulate developing countries' concepts was considered by UNIDO III. However, those centres could not be brought into being on account of lack of consensus between the

developed and developing countries. Although the AALCC's centres were in line with the proposal before UNIDO III, these centres should be further strengthened and possibilities should be worked out for setting up one or two more centres in view of their importance to the developing countries.

The Delegate proposed the setting up of a panel of legal consultants or experts to assist the developing countries in solving disputes, in the formulation of a system of industrial development and technical issues involved in that context.

One of the Delegates stated that his country attached the highest importance to foreign investments in its new economic development programme, and had established a free trade zone and was now negotiating bilateral investment protection agreements with a number of countries. These agreements provided guarantees for the free transfer of capital and returns, compensation for losses, MFN treatment and nationalization only on grounds of public utility subject to strict legal criteria and the payment of prompt, effective and adequate compensation. The agreements provided for ICSID arbitration procedure in case of any investment dispute. The Delegate, in the light of the above background, supported the AALCC's initiatives and its future programme of work.

In regard to organization of future work on this topic, the Secretary-General proposed that in accordance with the suggestions made by the several delegations, appropriate inter-sessional meetings might be convened for an in-depth study of the proposals contained in the Secretariat papers as also the issues raised by the delegations. This was agreed to on the understanding that the dates and venues of such meetings should be fixed in consultation with the interested governments.

The Ministerial Meeting on Regional Co-operation on Industries, Kuala Lumpur, 8 to 9 December 1980

The topic "Regional Co-operation in the context of the New International Economic Order" was further discussed at a ministerial level meeting held in Kuala Lumpur on 8th and

9th of December 1980 under the auspices of the Government of Malaysia and the AALCC. The countries represented in the meeting included Arab Republic of Egypt, Bangladesh, Indonesia, Iran, Iraq, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Nepal, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, Sierra Leone, Somalia, Sri Lanka, Syria, Thailand and Turkey. The meeting was chaired by the Right Hon'ble Dr. Mahathir Mohamad, Acting Prime Minister of Malaysia.

The meeting proceeded to discuss a possible pattern of regional cooperation in the economic field, particularly in regard to industrialization on the basis of a working paper presented by the Secretary-General of the AALCC. The participants were agreed about the need and feasibility of promoting co-operation between the countries of the region particularly in the context of industrialization. They took note of the fact that the economies of the countries of the region in many respects were complementary as their resources, their needs and also their technical advancement took a varied form and pattern which was conducive to regional co-operation based on the harnessing of their resources.

The meeting was of the view that co-operation at sub-regional level had been extremely fruitful between the countries of ASEAN and it also took note of the recent experience in certain sub-regional groupings in West Africa. It was felt that promotion of mutual trust and confidence between the countries of the region was a necessary *sine qua non* for bringing about co-operation between them. The meeting was of the view that sub-regional co-operation on the basis of the experience of ASEAN would be a productive method through which co-operation could be achieved where the economic conditions made the same feasible.

The meeting was further of the view that apart from such sub-regional arrangements the possibility of co-operation between the countries of the region through bilateral or tripartite arrangements be intensified which would have as their objective the harnessing of their resources. In this connection it was

felt that specific projects should be examined on the basis of their economic feasibility and the important areas where co-operation could be brought about might include the following:

(a) Downstream activities in relation to petroleum and gas including processing, transport and marketing;

(b) Iron and steel and non-ferrous industry;

(c) Engineering and machine tools;

(d) Energy other than petroleum such as coal; and

(e) Food and agro industries.

The major area of industrial co-operation on a regional basis was identified as downstream petroleum development. Apart from the ready availability of crude on a Government to Government basis to developing countries, the petroleum and capital from the oil rich nations could be invested in other developing member States of the AALCC which offer the ready markets, infrastructure, labour and export marketing potential. This would ensure that the oil rich nations maintain control of not only their oil resources but also the downstream activities including transportation and marketing. At the same time this would assist the developing nations (including the least developed nations) to enjoy benefits of economic growth which these projects would engender.

The meeting took note of the fact that a pattern of regional co-operation had been developing during the past decade as set out below :

(i) *Loan assistance or concessionary lendings made in respect of specific industrial ventures or for building of infrastructure given by a State or a State agency such as a Fund or development corporation in favour of another State or a State agency*—These arrangements generally contain favourable terms for the countries assisted and are not tied to any particular source of supply of material or technology.

(ii) *Location of industries by a developed or near developed country in the territory of a developing country of the region at*

the invitation or encouragement given by the latter : Although the industrial activities in these cases seem to remain solely in the hands of the management with no technical assistance or training programme attached, the country or countries in which such industries have come to be located have derived substantial benefits by finding employment for their labour force including technicians and also in contributing to the general industrial growth of the country with consequential benefits flowing therefrom in the shape of revenues, marketing etc.

(iii) *Outright contracts for building of roads and civil works for infrastructure and factory premises :* These are mainly labour intensive where the contractor provides the labour and in some cases also material for outright payment under the contract. Such contracts have provided opportunities for private sector undertakings and commercial firms of developing countries in new areas of activity, as also employment of surplus labour and sources for earning of foreign exchange.

(iv) *Outright contracts in regard to more sophisticated areas of infrastructure like telephone system* : Such contracts have generally been granted in favour of companies or corporations in developed or near developed countries of the region through which developing countries have been able to avail of the expertise and technical assistance from a country of the region.

(v) *Contracts for erection and commissioning of plants with an element of training programme :* Such contracts are also generally with companies or corporations in the developed or near developed countries.

(vi) *Joint ventures in less sophisticated industries* : These are generally between two developing countries, one of which is usually a country which may be termed as developed of the developing. Such arrangements are generally carried out as commercial contracts between State owned corporations or private companies. This form of co-operation has appeared to be extremely fruitful in transferring technology in less sophisticated fields which can be readily absorbed by developing countries. The arrangements normally provide for employment of local personnel and include a programme of training.

(vii) *Joint ventures in more sophisticated areas :* These are comparatively few having regard to the fact that the technology in this field is available only with Japan and a few of the countries which may be considered as near developed.

(viii) *Technical assistance programmes :* Even though programmes of technical assistance availed of by the countries of the region are fairly large, most of them are offered by countries outside the region.

The participants were, however, of the view that the number of projects on which co-operation had been developed on this pattern were still comparatively limited and they needed to be further encouraged and intensified.

Some of the participants pointed out the difficulties that could be encountered in rapid industrialization in the countries of the region so that they could be taken note of and solutions found in any system of regional co-operation. These included : (a) the quality of finished products and their marketing; (b) lack of infrastructure and communications; (c) lack of skilled technicians; and (d) technology. A view was also expressed that some of the developing countries might find it difficult to absorb technology which was not appropriate. The meeting was agreed that special consideration should be given to the least developed countries.

The meeting was also of the view that in the programme of regional co-operation exchange of information was a vital factor and in this connection it was recommended that the member-governments of the AALCC be requested to furnish to the AALCC's Secretariat the relevant information concerning the contracts and agreements which they had concluded including joint venture arrangements as also their national laws and regulations in the economic field. This would facilitate development of some kind of uniformity in the terms and conditions through which co-operation could be achieved and accelerated.

The meeting also recommended that the member governments consider the possibility of setting up sub-regional institu-

tions with a view to provide training facilities for personnel in the technical and managerial fields.

The participants were of the view that the initiative taken through the present meeting should be pursued in a suitable manner so as to ensure fruitful and tangible outcome of the objectives of industrial growth in the countries of the region. In this connection the following modalities were recommended for consideration of Governments :

(a) Formation of a nucleus or an informal group of technical experts in the legal and economic fields drawn from the delegations of the member governments of the AALCC participating in the global negotiations whose activities could be coordinated either through a member government or the AALCC. The functions of this informal group which would be open-ended might include examination of the proposals which may be put forward in the course of the negotiations.

(b) The possibility of organizing periodic expert group meetings to consider in detail matters concerning promotion of bilateral or tripartite arrangements on specific projects.

(c) To convene another ministerial meeting, if possible, within a period of six months on the pattern of the present meeting to be hosted by another member government of the AALCC.

The meeting recognized the need to create stable but flexible relations between the investor and the host government, particularly where the investments were made by one developing country in another. It was also generally agreed that investment climate could be promoted through adequate provisions for the protection of investments, repatriation of capital and profits and a procedure for settlement of disputes.

It was agreed that the meeting of officials/experts should examine various 'umbrella' investment protection agreements that have been concluded by governments with a view to formulating the draft of a model agreement which could be

considered by member governments. It was also agreed that the expert group could also prepare draft formulations applicable to certain special categories of investments, particularly the investments made by developing countries.

The Meeting of Officials on Regional Co-operation in Industries, Kuala Lumpur, 10 to 12 December 1980

The ministerial level meeting was followed by an official level meeting to give in-depth consideration to certain specific issues arising out of the decisions taken at the ministerial meeting. These were (a) scope and content of model bilateral umbrella agreements for protection of investments; (b) possible formulation of principles for investment protection applicable to certain special categories of investments, particularly the investments made by a developing country in another developing country of the region; (c) appropriate legal framework for bringing about economic co-operation between the countries of the Asian-African region; and (d) special consideration to be given to the least developed countries in the formulation of draft instruments for regional co-operation.

The meeting was chaired by Mr. Zakaria bin Mohd. Yatim, Solicitor-General of Malaysia and participating States included Arab Republic of Egypt, Bangladesh, India, Indonesia, Iran, Iraq, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Nepal, Pakistan, Philippines, Singapore, Sierra Leone, Somalia, Sri Lanka, Syria, Thailand and Turkey.

The meeting gave consideration to the question of drawing up of guidelines for preparation of umbrella investment protection agreements and in this connection examined the provisions of the investment protection laws in various countries and some of the bilateral agreements which had been entered into by member States of the AALCC with the developed countries. It was agreed that the model agreement should be prepared on broad general terms which could be adjusted to the needs and requirements of particular countries. It was generally the view that investment incentives which were offered by various countries under their laws should normally not be

incorporated in the investment protection agreements. The meeting was further of the view that model agreements should include certain provisions which would be applicable to investments by developing countries. The meeting identified the following elements for incorporation in the umbrella investment protection agreements :

1. *Definitions*

   (a) Investments

   (b) Nationals

   (c) Or any other definition or the definition of any other term deemed appropriate between the host country and the investing country.

2. *Reception or Classification of the Investment*

   (a) Whether there is to be a registration of the investment.

   (b) Reception by a specific authority of the host country in order to categorise the investment as approved projects.

   (c) Reception by way of licensing.

3. *The Promotional Aspects of the Agreement—whether a protection is afforded to Foreign Investment*

   (a) Provision relating to the rule of fair and equitable and a non-discriminatory treatment between nationals and entities of the host country and the nationals and companies of the investing countries.

   (b) A most-favoured-nation treatment.

   (c) Repatriation of capital and surplus earnings, profits etc.

   (d) Exemption from customs duties and local taxes.

   (e) Special conditions for sale of products.

4. *A Safeguard for Foreign Investment*

(a) Measures that are taken in the host country that result in the deprivation of the investment of nationals and companies of the investing country to be governed by certain conditions.

(b) Measures taken in public interest and in accordance with the due process of law.

(c) Measures are not discriminatory.

(d) Measures are effected with provisions for the payment of adequate and effective compensation.

5. *Guarantees*

The principle of subrogation in the event that the Contracting Party makes payment to any of its nationals or companies under a guarantee.

6. *Settlement of Disputes*

(a) Settlement of disputes by arbitral proceedings.

(b) The appointment of the Chairman of the Tribunal.

(c) Enforcement of awards.

7. *General Provisions*

(a) Amendments

(b) Duration of the Agreement

(c) Determination of the Agreement

(d) Continuation of the investment protection for a certain period of years after termination.

(e) Any other matter related to coming into force of the Agreement.

The meeting also generally discussed the possible contents of the agreement relatable to each of the above-mentioned

elements. It requested the Secretary-General to prepare the Draft of a Model Umbrella Agreement in the light of the discussions held during the meeting for consideration of an Expert Group to be convened prior to the next ministerial meeting.

The meeting next considered the question of formulation of principles for protection of special category of investments, particularly investments by developing countries. Some doubts were expressed as to whether it was necessary to formulate a set of principles apart from the draft of the model umbrella investment protection agreement. Some views were expressed that the investments from developing countries could be provided with incentives in the shape of tax concessions and other benefits under national laws but it might be difficult to draw up a separate set of principles in regard to protection of the investments. The meeting also discussed the question as to whether it would be appropriate to set out principles concerning a regional standard of investment protection in the form of recommendations or a declaration. Since different views were held by participants on this question it was decided that the Secretary-General should examine this matter further and place his proposals at the next meeting of the Expert Group for consideration.

In regard to appropriate legal framework to bring about regional co-operation it was generally agreed that it would be difficult to have a multilateral instrument applicable to the whole of the Asian-African region. Some of the participants were of the view that it would be useful to prepare a model agreement for sub-regional co-operation in the light of the ASEAN and sub-regional groupings in West Africa. The meeting took note of certain types of bilateral agreements and commercial contracts which would be suitable for economic co-operation between two or more parties on the principle of harnessing of their resources. A view was expressed that priority should be given to preparing a model contract for transfer of technology to developing countries along with preparation of guidelines for developing countries in drafting licensing agreements or contracts for transfer of technology.

It was felt that it would be extremely useful if the contracts and joint venture agreements which had been entered into by member States or their nationals could be collected and information relating thereto be exchanged between member governments. It was agreed that further consideration be given to preparation of model contracts and agreements at the next meeting of the Expert Group. It was also agreed that member governments be requested to exchange a list of their priority projects through the AALCC Secretariat in order to facilitate bilateral consultations on economic co-operation.

Colombo Session (1981)

Following the recommendations of the Ministerial Meeting on Industries and the subsequent meeting of officials held in Kuala Lumpur in December 1980, which had envisaged bilateral investment protection agreements between the countries of the Asian-African region for greater economic co-operation among them, the draft of a Model Agreement was prepared by the AALCC Secretariat. The Model Agreement was examined by the Trade Law Sub-Committee* during the Colombo Session of the AALCC. Its text alongwith the views expressed thereon were as follows :

A. Draft Text of Model Agreement

Title

Agreement between the Government of.....and the Government of.....for Promotion, Encouragement and Reciprocal Protection of Investments.

* The Trade Law Sub-Committee was attended by the Delegates of the Arab Republic of Egypt, Bangladesh, India, Indonesia, Japan, Republic of Korea, Malaysia, Mongolia, Nepal, Nigeria, Oman, Pakistan, Sierra Leone, Sri Lanka, Thailand, Turkey, United Arab Emirates and the Observers from the People's Republic of China, Hague Conference on Private International Law, International Centre for the Settlement of Investment Disputes and the United Nations Commission on International Trade Law.

Preamble

The Government of.....and the Government of .....

Recognizing the need to promote wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries of the region;

Desirous to create conditions in which investments by each other and their nationals would be facilitated and thus stimulate the flow of capital and technology within the region;

Have agreed as follows :

Article 1

Definitions

For the purpose of this Agreement

(a) *"*"*Investment*" means

(i) direct or indirect contributions of capital, technology and any other kind of assets invested or reinvested in projects approved by the host government in the field of agriculture, industry, mining, forestry, communications or tourism including shares acquired in companies engaged in such projects;

(ii) investment in the shape of assets acquired through monies brought in or out of return on its investments

* In the definition of investments a comprehensive approach has been adopted. It may however be pointed out that in some countries assets acquired by foreign nationals are treated on a different footing from investments in classified industries or projects for the purpose of investment protection. In the draft, investments in projects which are sought to be protected within the purview of the agreement have been restricted to approved projects to conform to the national laws and regulations of several member states.

in the host country. Such assets shall include movable and immovable property and any other property rights such as mortgages, liens or pledges; shares, stocks and debentures of companies or interest in the property of such companies.

(iii) title to or claims of money or to any performance under contract having an economic or financial value;

(iv) copyrights, patents other industrial property rights including technical processes or know-how, trade marks, trade names and good will;

(v) such business concessions acquired (under a contract or) under a public law including concessions regarding the prospecting for, or the extraction or minning of natural resources, as give to their holder a legal position of some duration.

(b) "*National*" in respect of each contracting State means a natural person who is a citizen of that State under its constitution or nationality law;

(c) "*Companies*" means

corporations, firms or associations incorporated, constituted or registered in the contracting State in accordance with its laws.

(d) *"*State Entity*" means

A government department, corporation, institution or undertaking wholly owned and controlled by government and exclusively engaged in activities of a commercial or private law nature.

(e) "*Returns*" means

the amount yielded by an investment and in particular include profits, interests, capital gains, dividends, royalties or fees.

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* In the developing countries of Asia and Africa investments, whether in the shape of capital or technology, are likely to be made at times by State entities which cannot be appropriately brought within the expanded definition of companies.

(f) "*host government*" means

the government of the country in whose territory the investment is received.

Article 2

Promotion and encouragement of investments

(i) Each Contracting Party shall take steps to promote investments in the territories of the other Contracting Party and encourage its nationals and companies to make such investments through offer of appropriate incentives including tax concessions and investment guarantees wherever possible.

(ii) Each Contracting Party shall encourage and create favourable conditions for the nationals, companies or State entities of the other Contracting Party to invest capital, technology and other form of assets in its territory through according of fair and equitable treatment and ensuring full protection and security in conformity with the provisions of this agreement.

(iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territories of each other in various sectors such as industry, mining, communications, agriculture and forestry where investments from one contracting State into the other may be most beneficial in the interest of both the parties.

Article 3

Reception of investments

(i) A State entity, company or national of a Contracting State intending to invest or enter into collaboration arrangements in respect of a project in the other Contracting State shall submit its or his proposal to the appropriate government department of the State where the investment

is sought to be made. Such proposals shall be examined expeditiously and so soon after the proposal is approved a letter of authorisation shall be issued and the investment shall be registered with a designated authority of the host State.

(ii) The investment shall be received subject to terms and conditions specified in the letter of authorization. Such terms and conditions may not be altered to the prejudice of the investor, except in circumstances where the conditions are so radically altered as to justify a reappraisal.

(iii) The host government may in the interest of its economy specify conditions concerning the marketing of products of any industrial venture or the commodities including minerals which are obtained through any activity in which the investments have been made.

(iv) The host government shall offer to the investor from the other Contracting State the most favourable terms permissible under its laws at the time when the investment is received in the matter of tax concessions and customs duties on importation of goods for purposes of investment. Such incentives may be specified in the letter of authorisation issued for the reception of the investment which shall not be withdrawn for a period of.....years or upon adequate notice to the investor.

Article 4

Most-favoured-nation treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that which it accords to the investments or returns of nationals, companies or State entities of any third State.

(ii) Each Contracting Party shall also ensure that the nationals, companies or State entities of the other Contracting Party are accorded treatment not less favourable than it accords to the nationals or companies or State entities of any third State in regard to the management, use, enjoyment or disposal of their investments including management and control over business activities and other ancilliary functions in respect of the investment.

Provided however that neither Contracting Party shall be obliged to extend to the nationals or companies or State entities of the other, the benefit of any treatment, preference or privilege which may be accorded to any other State or its nationals by virtue of the formation of a customs union, a free trade area or any other similar arrangement to which such a State may be a party.

Article 5

**National standard of treatment*

Each of the Contracting Parties shall endeavour to extend to the nationals, companies or State entities of the other Contracting Party the same standard of treatment as it accords to its own nationals and companies in regard to the management, control, use, enjoyment and disposal in relation to investments which have been received in its territory; and for this purpose the Contracting States shall initiate appropriate legislative and administrative measures within a period of .....from the date of conclusion of this agreement.

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* In several countries in the Asian-African region the conditions of investment by foreign nationals differ from those applicable to investments by their nationals. It would be desirable if national standard of treatment could be accorded to those categories of foreign investments which have been permitted by the host government from other developing countries of the region. In order to effectuate this certain amendments in local legislation may be necessary.

Article 6

Repatriation of investments and returns

Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed full freedom and facilities in the matter of repatriation of capital and return on its investments including fees, emoluments and earnings accruing from or in relation to such investments subject however to the right of the Contracting State to impose reasonable restrictions for temporary periods to meet exceptional financial or economic situations.

Article 7

Nationalization or expropriation

(i) Investments of nationals, companies or State entities of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose related to the national interest of the expropriating party and against prompt, adequate and effective compensation provided that such measures are taken on a non-discriminatory basis and in accordance with law.

(ii) Such compensation shall be determined on equitable principles taking into account *inter alia* the capital invested, depreciation, return from investments already repatriated and other relevant factors which shall be subject to review by an independent judicial or administrative tribunal or authority. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

(iii) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in its territory and in which nationals or companies or State entities of the other Contracting Party own shares, it shall ensure that prompt, adequate and

effective compensation is received and allowed to be repatriated in respect of such investments.

Article 8

(i) Nationals, companies or State entities of one Contracting Party whose investments in the territory of another Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by that Contracting Party treatment regarding restitution, indemnification, compensation or other settlement, no less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(ii) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in paragraph (i) suffer losses in the territory of another Contracting Party resulting from :

(a) requisitioning of their property by its forces or authorities;

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded restitution or adequate compensation and the resulting payments shall be allowed to be repatriated.

Article 9

Settlement of disputes

Each Contracting Party shall consent to submit any disputes or differences that may arise out of or in relation to investments made by a national, company or a State entity of the other Contracting Party to conciliation or arbitration in

accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 at the request of such national, company or State entity.

Alternative

Each Contracting State shall consent to submit any disputes and differences that may arise out of or in relation to any investment made by a national, company or State entity of the other Contracting State for settlement by arbitration under the UNCITRAL Rules 1976.

Article 10

(i) Disputes or differences between the Contracting Parties concerning the interpretation or application of this agreement shall be settled through negotiations.

(ii) If such disputes and differences cannot thus be settled it shall upon request of a Contracting Party be submitted to an arbitral tribunal to be composed of three members. Each Contracting Party shall nominate one member of the tribunal and the third member shall be appointed jointly by agreement between the parties failing which by the President of the International Bank for Reconstruction and Development at Washington/President of the International Court of Justice at The Hague.

Article 11

Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognize :

(a) the assignment, whether under the law or pursuant to a legal transaction, of any right or claim from the party indemnified to the former Contracting Party or its designated Agency; and

(b) that the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

Article 12

Application of the agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement and the investments previously made which are approved and registered by the host government within a period of twelve months from the date of entry into force of this Agreement.

Article 13

Entry into force

This Agreement shall enter into force upon signature.

Article 14

Duration and termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from any date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination.

B. Views Expressed by the Trade Law Sub-Committee

Article 1 : Definitions

(a) *Definition of 'investment'*—It was generally agreed that the definition as set out in the model Agreement was inappropriate as it combined the concept of 'investment' with

the notion of 'approval'. The requirement of 'approval' should be delinked from the definition of 'investment'. The Sub-Committee suggested that the Secretariat may consider modelling its definition on the basis of proposals set out below :

Model A

"Investment" means every kind of asset and in particular, though not exclusively, includes :—

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value;

(iv) copyrights, industrial property rights (such as patents for inventions, trade-marks, industrial designs), know-how, trade names and goodwill; and

(v) business concessions conferred by law or under contract including concessions to search for, cultivate, extract or exploit natural resources".

Model B

"Investment" includes every kind of asset including :—

(a) shares, other types of holdings of companies;

(b) claims to any performance under any contract having financial value and claims to money;

(c) rights with respect to movable and immovable property;

(d) patents and inventions, rights with regard to trade-marks, labels and any other industrial property; and

(e) concessionary rights including exploration and exploitation of natural resources".

(b) *Definition of 'National'*—It was suggested to amend the definition of 'national' so as to make it also applicable to countries not having the concept of citizenship.

(c) *Definition of 'Companies'*—It was suggested that 'firms' be replaced by 'partnerships' and to dispense with the requirement of registration of companies.

(d) *Definition of 'State entity'*—It was suggested to replace the term 'Government Department' by 'State Department' as the former expression could imply Central Government. It was also suggested to delete the word 'exclusively' and 'or private law' from the text of the definition.

(e) *Definition of 'returns'*—It was suggested that the words "amount yielded by the investment and in particular include" may be deleted.

(f) *Definition of 'Host Government'*—This was generally acceptable subject to the substitution of the word 'made' in place of 'received'.

Article 2 : Promotion and encouragement of investments

It was noted that Article 2 provides for favourable treatment, Article 4 provides for most-favoured-nation treatment and Article 5 provides national treatment. The suggestion was made that Article 2 should be suitably amended *vis-a-vis* Articles 4 and 5 so that the various standards provided by the Model Agreement could be easily identified.

Article 3 : Reception of investments

It was generally agreed to delete paragraphs 3 and 4 as the limitations and restrictions which these paragraphs contemplated could be set out in the letter of authorization. The view was expressed that there may be investments which do not require approval or registration. Hence, this article should refer only to admission of investments by the host country.

Article 4 : Most-favoured-nation treatment

It was recognized that this provision posed a difficult problem. On the one hand, co-operation between developing countries might imply, under the traditional approach, the inclusion of a MFN clause in bilateral treaties. It was noted, however, that a large number of developing countries in the AALCC region have already concluded investment protection treaties (mostly with industrialized countries) which grant the investor a greater degree of protection than that provided by the Draft Model Agreement. For these countries, the inclusion of Article 4 in the Model Agreement would appear to make that Agreement illusory since every new treaty partner would be entitled to demand the treatment accorded by the earlier treaties with industrialized countries. It was further recognized that the seriousness of this unintended effect of Article 4 would depend on the extent to which the Draft Model Agreement would differ in substance from the past bilateral investment protection treaties. A view was expressed that the MFN clause should be available on the basis of reciprocity.

Article 5 : National standard of treatment

Article 5 obliged the contracting States to enact appropriate legislative and administrative measures so as to extend to the investors national standard of treatment. Since Article 2 already covered this obligation it was felt that this obligation should not find place in Article 5.

Article 6 : Repatriation of investment and returns

Article 6 assures full freedom in the matter of repatriation of capital and returns on investments. It was pointed out in this connection that since in actual practice States permit repatriation of capital and returns on investments upto a specified limit, would it not be appropriate to set a standard in this regard. It was also suggested that some of the returns out of investments could be re-invested so as to accelerate industrial development. Another question posed was whether repatriation of capital or returns should be allowed only to

the country of the nationality of the investor or could it also be to a third country. One view was that ordinarily repatriation should be allowed only to the country of the nationality of the investor. Another view was that since the Model Agreement covered only investments between developing countries *inter se*, repatriation of capital and returns to a third developing country should not be excluded.

Further, Article 6 permitted the host country to curtail the 'freedom of repatriation' for temporary periods to meet exceptional financial or economic contingencies. The view was expressed that the exceptional situations necessitating the host State to curtail this freedom should be framed in terms of an acceptable standard, for example, the standards set in the IMF Charter.

Article 7 : Nationalization or expropriation

There was a suggestion regarding the advisability of using one word in the title in place of two. However, it was also observed that the interjection of the word 'or' in between the two words—achieves the same objective.

The principal issues identified under this article were the following :

(a) the respective advantages and disadvantages of the use of broad general language as in Article 7 (1) or a more detailed definition of the conditions under which nationalization or expropriation could occur;

(b) the question whether the provisions of Article 7 (ii) would be any more acceptable to capital exporting developing countries than to the industrialized countries which had rejected them in the North-South discussions, and if compensation should be general or whether the amount should become ascertainable by reference to specific standards; and

(c) the question of setting forth guidelines in Article 7 (iii) for determining the compensation payable to the shareholders of a company in the event of its nationalization.

Article 8

This article was generally acceptable. It was noted that this article did not have a heading unlike the other articles, hence it was suggested that a heading should be given to this Article.

Articles 9 & 10 : Settlement of disputes

Consideration was given as to the desirability of preceding these two articles by a separate new article which would state explicitly that the parties to disputes either under Article 9 or Article 10 could agree to conciliation under the UNCITRAL Conciliation Rules 1980 prior to invoking the respective arbitration provisions of Articles 9 and 10. The view was also expressed that such a provision was especially appropriate for disputes between Contracting States and might be inserted in Article 10.

With respect to Article 9 it was suggested that parties might be given three choices of forum for arbitration. If both the host State and the national State of the investor are parties to the 1965 Convention on the Settlement of Investment Disputes, the first paragraph of Article 9 would provide the appropriate solution. If neither State is a party to that Convention, the second paragraph entitled 'Alternative' would be appropriate. If one of the States concerned is but that other is not a party to the 1965 Convention, parties to the dispute might be given the option of either the UNCITRAL Arbitral Rules or the 'Additional Facility Rules' of ICSID which provide an institutional framework for this kind of situation.

With respect to Article 10, various alternatives were explored as to the appointing authority in the event of failure of the parties to agree on the third member of the arbitral tribunal. There was also discussion of the rules which would govern the procedure. It was felt that these might be left to be decided by the arbitral tribunal or be set forth in some detail in the Model Agreement as has been done in the standard text of investment protection agreement used by Sri Lanka.

Article 11 : Subrogation

It was agreed to delete from sub-paragraph (a) the following wording "whether under the law of or pursuant to a legal transaction" as it made the text vague.

Article 12 : Application of the agreement

It was felt that this article which deals with the application of the Agreement was misplaced and should be located towards the beginning of the text.

As presently worded, Article 12 was designed to have both retrospective and prospective application. The view was expressed that the agreement should have prospective application only. However, if it was to have retrospective application as well, a schedule listing the existing investments to which the protection of the agreement would be available might be annexed to the Agreement.

Article 13 : Entry into force

The main issued discusse concerning this article was whether the Agreement should enter into force upon signature or by exchange of instruments of ratification. One view was that since exchange of ratifications usually takes a long time, the Agreement should come into effect on a signature, at least provisionally. Another view was that since in certain countries, compliance with the constitutional requirements was a condition precedent to enforcing such an Agreement, it was appropriate to provide that it would enter into force upon exchange of instruments of ratification. It was agreed that the Agreement should provide for both the alternatives.

Article 14 : Duration and termination

Ten years was considered too long a period for the Agreement. It was suggested that this be reduced to five years. Similarly, in respect of investments made during the subsistence of the Agreement, it was felt that these should be governed by the Agreement only for the duration of the remaining period of the Agreement.

Other suggestions

Other suggestions put forward were to the effect that the Agreement should provide for the right of the national companies to have access to the Courts of the Contracting States; entry of nationals of Contracting States in the context of approved investments; a provision on applicable law; a definition of 'territory'. A suggestion was also made that an attestation clause may be provided in the Model Draft.

As the Delegates did not have sufficient time to study the document and consult the concerned authorities of their governments, it was decided that detailed and considered suggestions would be sent to the Secretariat later which will also be taken into consideration in the preparation of the revised draft for further examination.