
# ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

## REPORT OF TWENTY-THIRD, TWENTY-FOURTH AND TWENTY-FIFTH SESSIONS HELD IN TOKYO (1983) KATHMANDU (1985) AND ARUSHA (1986)


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# INTRODUCTION

The Asian Legal Consultative Committee, as it was originally called, was constituted in November 1956 by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria to serve as an advisory body of legal experts and to facilitate and foster exchange of views and information on legal matters of common concern among the member governments. In response to a suggestion made by the then Prime Minister of India, the late Jawaharlal Nehru, which was accepted by all the then participating governments, the Committee's name was changed to that of Asian-African Legal Consultative Committee as from the year 1958, so as to include participation of countries in the African continent. The present membership of the Committee is as follows:

*FULL MEMBERS*: Arab Republic of Egypt, Bangladesh, People's Republic of China, Cyprus, The Gambia, Ghana, India, Indonesia, Islamic Republic of 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, Qatar, Senegal, Sierra Leone, Singapore, Somali Democratic Republic, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen Arab Republic,.

*ASSOCIATE MEMBERS*: Botswana, and Saudi Arabia.

The Committee is governed in all matters by its Statutes and Statutory Rules. Its functions as set out in Article 4 of its Revised Statutes* are:

(a) To examine questions that are under consideration by the International Law Commission and to arrange for the view of the Committee to be placed before the Commission; to consider the reports of the Commission and to make recommendations thereon to the governments of the participating States;

(b) To communicate with the consent of the governments of the participating States, the points of view of the Committee on

*Revised Statutes came into force on 12 January 1987

international legal problems referred to it, to the United Nations, other institutions and international organizations;

(c) To consider legal problems that may be referred to the Committee by the participating States and to make such recommendations to governments as may be thought fit;

(d) To exchange views and information on matters of common concern having legal implications and to make recommendations thereon, if deemed necessary; and

(e) To undertake, with the consent of or at the request of participating States, such other activities as may be deemed appropriate for fulfilment of the functions and purposes of the Committee.

## 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 as and when necessary. The AALCC has so far met in twenty-six 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, (1978), twentieth in Seoul (1979), twenty-first in Jakarta (1980), twenty-second in Colombo (1981), twenty-third in Tokyo (1983), twenty fourth in Kathmandu (1985) twenty-fifth in Arusha (1986) and twenty-sixth in Bangkok (1987) . 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 and Justice. A large number of non-member Asian and African countries, countries from outside the Asian-African region, United Nations, its agencies and other inter-governmental organisations are usually represented by their legal experts in the capacity of observers at the AALCC sessions. Australia and New Zealand have been accorded permanent observer status.

## Relationship with other organisations

As early as 1960 the AALCC had entered into official relations with the International Law Commission which maintains such links with other



regional organisations, like the European Committee on Legal Co-operation and the Inter-American Juridical Committee. The AALCC also maintains official relationship with the various United Nations organs and agencies, such as the United Nations Secretariat, UNCTAD, UNCITRAL, UNIDO, UNHCR, UNEP, ECA, ECE, ESCAP, FAO and IMO. At its thirty-fifth session the United Nations General Assembly by its Resolution 35/2 adopted on 13 October 1980 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.

## Training Scheme

A training programme has been established in the AALCC Secretariat since the year 1970 to offer facilities for officers of the member governments to gain experience in research and handling of international law problems by being attached to the AALCC Secretariat for a period of six to nine months. The Commonwealth Fund for Technical Co-operation (CFTC) offers financial grant to officers from Commonwealth member governments in Africa to avail of this internship programme. The scheme has so far been availed of by officers deputed by the governments of Arab Republic of Egypt, Ghana, Iraq, Nepal, Nigeria, Republic of Korea, Syria, Tanzania, Uganda and Yemen Arab Republic.

## Overview of the 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 (ILC) and to arrange for the views of the AALCC to be placed before the Commission.

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 ILC 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 three or four 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 concering 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 Legality of 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 International Court of Justice in the **South-West Africa Cases** and the **Status of South-West Africa.** The AALCC also examined the ILC'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 Vienna Conference on the Law of Treaties 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 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 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 practice 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 specialised 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 finalised after another couple of years of efforts in 1980 at the AALCC's Jakarta Session. 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.

Another question of 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 options but to accept such arbitrtion clauses. The AALCC had made certain important recommendations in this regard which led to the formulation of a Draft Model Law on International Commercial Arbitration by UNCITRAL as well as to the establishment of two Regional Centres of Arbitration, one in Kuala Lumpur (April 1978) and another in Cairo (January 1979), under the auspices of the AALCC. 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 include several broad-based objectives such as co-ordination of activities of national institutions within the region served by the Centres, 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 Centres have started making their impact and a number of agreements have since been signed that provide for settlement of disputes under the auspices of these Centres. 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.

Agreements have also been concluded for mutual co-operation with several national arbitration institutions such as American Arbitration Association, the Korean Commercial Arbitration Board, the Indian Council of Arbitration, the Japan Commercial Arbitration Association, the Indonesian Commercial Arbitration Board and national arbitration institutions in Australia, Morocco, Spain and Jordan.

The AALCC has also taken steps to sponsor two Regional Seminars jointly with the Secretariat of the UNCITRAL. The first Regional Seminar was held in New Delhi during March 1984 on International Commercial Arbitration; the second entitled "Asian-Pacific Regional Trade Law Seminar" was held in Canberra in November 1984 in association with the Australian-Attorney General's Department.

Since its Jakarta Session held in 1980, the AALCC has embarked on another significant venture i.e., the development of a legal framework for co-operation amongst the member countries in the field of industries in the context of realization of some of the objectives of the New International Economic Order. It was felt necessary to identify the content 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 two-day Ministerial Meeting on Regional Co-operation in Industries was held in Kuala Lumpur in December 1980 with the object of devising a possible pattern of regional co-operation in the economic field, particularly in regard to industrialization. The important areas for such co-operation were identified to be as follows: (i) Downstream activities in relation to petroleum and gas including processing, transportation and marketing; (ii) Iron and steel and non-ferrous industry; (iii) Engineering and machine tools; (iv) Energy other than petroleum such as coal; and (v) Food and agro-industries. The Ministerial Meeting was followed by a three-day meeting of officials for in-depth consideration of certain specific issues indicated by the Ministerial Meeting.

Another Ministerial Meeting held in Istanbul in September 1981 recommended that medium and small scale projects such as cement, fertilizers and building material plants should be brought within the framework of the required co-operation. The need was emphasized for



exchange of information on industrial policies and plans for industrial development as well as the relevant laws and regulations concerning investments in the region in order to promote joint-ventures. Also recommended was the preparation of general guidelines on a tentative framework for co-operation in industrial projects which could be applicable in collaboration arrangements as well as organization of training programmes in technical and managerial fields.

Progress has been achieved in the matter of exchange of information on laws and regulations in the field of industry investment opportunities as also on training facilities. Fifteen member governments have so far furnished the required information which has been duly circulated. The preparation of draft guidelines for joint venture arrangements in the industrial sector has now been taken in hand.

Another step taken by the Committee towards promotion of the economic co-operation was to bring together prospective investors and representatives of its member governments in periodic dialogues as practical means of promoting investments in the developing countries. The AALCC had arranged two such meetings in New York in 1984 and 1985.

## AALCC'S Contribution to the Commemoration of the Fortieth Anniversary of the United Nations

Since 1982, the Committee's work supportive of the efforts of the United Nations has proceeded in three directions, namely:-

(i) inclusion of certain items and topics under consideration of the United Nations in the work programme of the AALCC;

(ii) Assistance rendered to governments in their consideration of the agenda items before the Sixth Committee and some of the topics in the humanitarian and economic fields through preparation of briefs and studies by the Secretrait; and

(iii) Strengthening of the United Nations through promotion, ratification and implementation of major conventions as well as through initiatives for improvement of functional modalities of the General Assembly and other organs including the World Court.

Whilst the work in the first two areas have to be undertaken on a continuing basis, the major work in the third area has been brought to a successful conclusion in the course of the past three years.

In regard to the Committee's initiatives in the improvement of the functioning of the United Nations, attention was initially focussed on the working modalities of the Sixth Committee and in promoting the wider use of the International Court of Justice. At a meeting of the Legal Advisers of the AALCC Member States held in November 1983, an informal paper on the rationalisation of the work of the Sixth Committee was prepared on the basis of discussions at that meeting. This was circulated as an official document of the United Nations during the Thirty-eighth Session of the General Assembly at the request of 76 delegations.* The paper generated wide interest and considerable support during the 39th and 40th Sessions of the General Assembly and the recommendations contained therein were taken into account by the Sixth Committee in formulating its programme of work.

The meeting of Legal Advisers had recommended that the Secretariat should prepare a study on the question of possible wider use of the International Court of Justice under a compromise when the parties so agree and with special reference to the revised rules of the Court on the availability of chamber procedures. The promotion of the role of the World Court was one of the topics that was identified as an item where co-operation between the United Nations and the AALCC might be fruitful. The Secretariat had accordingly prepared a study on the subject and presented it at the Kathmandu Session for consideration of the Committee. The study focussed attention on the advantages to be obtained by using the Court or its special chamber in preference to using ad hoc arbitral tribunals. In accordance with the decision taken at the Kathmandu Session the study was circulated as a General Assembly document** during its fortieth session in 1985 which attracted wide interest. As a further follow-up a colloquium on the future role of the Court was organised at the United Nations Headquarters under the auspices of the AALCC on the 8th of October 1986. The purpose of the colloquium was to provide opportunities for indepth explanation of the available procedure under the revised rules of the Court for resolving disputes in matters referred under special agreements with special reference to hearing of cases by a chamber of the Court at the request of the parties. The colloquium was chaired by the then President of the Court, Dr. Nagendra Singh. It was attended by representatives of nearly 120 governments from all regions of the world. The representative of Tanzania as the then President of the Committee opened the colloquium which was addressed by the then Secretary-General of the AALCC, the Chairman of the Sixth Committee; the Legal Counsel of the United Nations and Judge M. Bedjaoui of the International Court of Justice.

* A/C.6/38/8
** A/40/682



The AALCC Secretariat also prepared a study on "Strengthening the Role of the United Nations through rationalisation of functional modalities with special reference to the General Assembly". The study presented an overall assessment of the functioning of the United Nations over the past 39 years, focussing attention on certain specific matters and issues. An open-ended meeting under the auspices of AALCC was convened in September 1985 at United Nations Headquarters to discuss the modalities for consideration of the suggestions made in the study. Pursuant to the consensus arrived at that meeting and at the request of 52 delegations drawn from all regional groups, the study was circulated as a document of the General Assembly*. Further discussions took place in the meeting of a Working Group which met in New York during April and June 1986 and prepared a set of recommendations on the improvement of the functioning of the General Assembly. That set of recommndations was made available to the Group of High-level Inter-Governmental Experts to Review the Efficiency of the Adminstrative and Financial Functioning of the United Nations and was subsequently circulated as a document of the General Assembly at its forty-first session.**

**Report of the Twenty third, Twenty fourth and Twenty fifth Sessions of the Committee.**

The present Report contains a review of the work of the Committee at its twenty-third, (Tokyo, 1983), twenty-fourth (Kathmandu, 1985) and twenty-fifth (Arusha, 1986) Sessions. There were as many as thirteen items on the agenda for consideration before these three Sessions. The Committee, however, was able to complete its work on two of these items, namely, Mutual Assistance for the Service of Process, Issue of Letters Rogatory and Taking of Evidence in Civil and Commercial Matters and the Model Drafts on Promotion and Protection of Investments. It also made substantial progress in regard to its work on Exclusive Economic Zone - Optimum Utilization of the Fishery Resources. The present Report contains detailed information concerning these three items. On other items, brief notes have been included to indicate the stage of progress and the direction of Committee's work in these areas.

* A/40/726 and Corr 1, Annex.
** A/41/437.

# LAW OF THE SEA

## Introduction

The subject "Law of the Sea, including questions relating to the sea-bed and ocean floor lying beyond the limits of national jurisdiction" was included in the programme of work of the AALCC at the initiative of the Government of Indonesia and had been under its active consideration since its Colombo Session (1971).

In the initial stages the role of the AALCC has been envisaged to be assisting its member governments through preparation of studies and arranging in-depth discussion. Later, however, the AALCC emerged as a global forum for a dialogue between the developing and developed countries through participation of observers at the AALCC's Sessions. The participation of high level experts from all over the world during a period of ten years enabled the AALCC to play a major role. Some of the concepts which found a place in the finally adopted Convention had originated in the deliberations of the AALCC, namely, the exclusive economic zone and archipelagic States.

The AALCC had followed the progress of negotiations before the United Nations Sea-bed Committee and later at the UNCLOS III itself. It had first devoted itself to the consideration of issues such as territorial waters, passage through straights used for international navigation, the exclusive economic zone, the continental shelf, the archipelagic States and fishery resources, since 1976, however, the AALCC mainly focused on issues pertaining to the regime for the international seabed area.

After nine years of protracted negotiations the United Nations Convention on the Law of the Sea was adopted on 30th April 1982. It was opened for signature on 10 December 1982. The Convention will enter into force twelve months after its ratification or accession by sixty States.

At the Tokyo Session held in 1983, the Law of the Sea was one of the main items on the agenda. The discussions centred on a general assessment of the 1982 United Nations Convention on the Law of the Sea and it's future implementation. The AALCC Secretariat had prepared a comprehensive Note analysing the implications of the

various provisions of this Convention. In the course of the debate several delegations stressed the need to ensure that the Convention entered into force as early as possible.It was also pointed out that the Convention constituted one integrated whole and did not admit of any partial or selective application. Some delegations emphasised that pending entry into force of the Convention, states which had signed it were expected to act in a manner that would not defeat its object and purpose. A view was expressed that certain principles or rules incorporated in the new Convention should be considered as binding as customary or conventional rules of international law on all States including those which did not ratify or accede to the Convention. The other view, however, was that the Convention could neither have general application after its entry into force nor imply any binding effect before its entry into force. It was explained that, to the extent the Convention codifies the existing international law, it could loosely be said to be binding on non-parties, not because such rules were contained in the Convention but because it was already part of customary international law.

Some delegations expressed their dissatisfaction over certain provisions of the Convention. The delegations from landlocked States were particularly unhappy with the stipulations on their rights and interests in the Exclusive Economic Zone. A few others expressed their concern regarding Part XI of the Convention relating to the Area.It was suggested that the AALCC should involve itself in assisting its member States for implementation of the Convention in the areas such as exchange of information and formulation of modalities and standards.

At the conclusion of the discussion, the Committee approved the future work programme under the following broad heads:-

i) Steps towards ratification of the Convention;
ii) Assistance to Governments;
iii) Undertaking of studies from time to time on specific matters or issues of practical importance to member governments for the purposes of the implementation of the Convention.
iv) Assitance to governments in regard to the work of the Preparatory Commission (Hereinafter the PREPCOM).

In addition, the Committee also decided that its future work would include the question of practical implementation of the provisions of the Convention on landlocked States both in regard to the right of access (Articles 124 to 132) as also their rights and interests in the living resources of the exclusive economic zones (Article 69 to 72) on the proposal of the delegation of Nepal.



Following the recommendations of the Tokyo Session, the Secretariat drew a programme of work which included preparation of studies on the following topics:

i) Matters relatable to the work of the PREPCOM;
ii) Delimitation of the Exclusive Economic Zone and the Continental Shelf;
iii) Right of Transit for Landlocked States; and
iv) Determination of the Allowable Catch in the Exclusive Economic Zone.

All the four topics had been placed on the agenda of both Kathmandu and Arusha Sessions. A review of progress that has since been made is given below:-

**i) Matters relatable to the work of the PREPCOM**

The Secretariat prepared and presented a paper before the Special Commission 2 on Enterprise in March 1984 including the framework for co-operative arrangements and joint ventures between pioneer investors and the Enterprise. Discussions were held between the Secretary-General and the Chairman of the Special Commission on the Law of the Sea Tribunal concerning formulation of the Rules for the Tribunal. Studies were also initiated on other items included in the work programme of the Committee.

At the Second Session of the PREPCOM a proposal was introduced by Austria suggesting the constitution of an agency (Joint Enterprise for Research and Development) as a Joint Venture with the PREPCOM to assist in preparing for the Enterprise. The Secretariat examined the Austrian proposal and submitted its views on legal competence of the PREPCOM to enter into contractual arrangements, including undertaking of financial obligations in the context of the provisions of Resolutions I and II. The Secretariat paper was circulated among member governments in July 1984 prior to the PREPCOM'S Geneva Meeting.

At the Kathmandu Session, some brief comments were made on the progress of the work of the Preparatory Commission during its first two sessions. A view was expressed that the functions of PREPCOM had been carefully and clearly defined so as to avoid any conflict with the substantive functions of the International Sea-Bed Authority and the Enterprise, its operational arm, under the relevant provisions of the Law of the Sea Convention. It was pointed out that the activities intended in the pioneer area were not co-extensive with the activities intended in

the Area in the substantive provisions of the Convention and consequently, the PREPCOM could not promote any activity that was inconsistent with those to be undertaken by a pioneer investor under Resolution II. It was further stated that in terms of Resolutions I and II the definition of resources was restrictive and therefore PREPCOM could not deal with a pioneer investor in matters which fell outside the scope of its powers in relation to pioneer activities which were limited to polymetallic nodules.

Another view was that the Special Commission 3 which was dealing with the elaboration of the deep sea bed mining code would be in a crucial position to influence countries which hesitated to participate in the development of exploration and exploitation activities under the system envisaged by the Convention. On the question of Pioneer Investment Protection System (PIP) created by Resolution II, it was stated that, in a way, the resolution has created a "Mini-system" for the interim administration of the use of deep sea-bed mineral resources during the time before the Convention entered into force.

One delegate stresed that the Enterprise should be helped in obtaining expertise, technology and finances. In his view, states should participate in the organisation of the training programmes for the Enterprise and should not leave it to any private entity. Furthermore, there should be financial stability for the Enterprise and for that the international community as a whole should make a commitment in that regard.

Another delegate pointed out that the conclusion of an agreement regarding deep sea areas by a group of advanced countries was directed to undermine equitable, mutually beneficial international co-operation in developing the Oceans and it was regretable that some States signatories to the Convention had also become parties to that separate agreement.

At the Arusha Session, after introductory remarks by the Assistant Secretary General, Dr. Mostafa Ranjbaran, on the progress of the work of the PREPCOM, including its Declaration adopted on 30 August 1985, general comments were made by some delegations.

The Representative of the UN office of the Law of the Sea elaborating the details of the Declaration stated that it emphasized two major points; (i) the only regime for exploration and exploitation of the Area and its resources was that established by the UN Convention on the Law of the Sea and related resolutions adopted by UNCLOS-III; and (ii) any claim, agreement or action regarding the Area and its resources undertaken outside the PREPCOM was incompatible with the Convention and its related resolutions and regarded such activities as wholly illegal.



One delegate regretted that some States inspite of the universal acceptance of the Convention were trying to undermine it and to introduce a parallel illegal regime for the activities in the Area. Another delegate also voicing his concern said that such subversive activity with respect to the Convention and the PREPCOM was being conducted inspite of the repeated appeals of the UN General Assembly and the Declaration adopted by the PREPCOM proclaiming such activity as totally illegal.

As regards the work of PREPCOM, one view was that the first task towards the implementation of the regime concerning the sea-bed resources established by the Convention would be the earliest registration of the rules, regulations and procedures for the sea-bed Authority and Tribunal. It was stressed that the newly created bodies should be economically viable and should not become an unjustifiable burden on member states.

Another delegate touched upon the ongoing efforts to develop the procedure for conflict resolution concerning the overlapping claims of the four pioneer investors, namely, France, India, Japan, and the USSR.

### (ii) Delimitation of the exclusive economic zone and the continental shelf

Pursuant to a decision taken at the Tokyo Session, the AALCC Secretariat initiated preparation of a study on the question of delimitation of the Exclusive Economic Zone and the Continental Shelf between States with opposite or adjacent coasts in order to assist member governments in their negotiations on the question of delimitation in the context of Articles 74 and 83 of the United Nations Convention on the Law of the Sea, 1982. It was observed that the text adopted in those two Articles, which were identical, could give rise to complexities by lending themselves to differing interpretations. It was, however, recognised that the provisions of those Articles were flexible enough within the framework of which more concrete norms could be developed in the light of State Practice that could provide some guide in regard to the practical methods to be applied in the matter of delimitation. It was felt that a study undertaken by the Secretariat would also have the utility of placing before member governments some

possible options that could be adopted for delimitation within the broad framework of Article 74 in relation to exclusive economic zone and Article 83 in relation to continental shelf.

As a first step towards the preparation of a preliminary study on this subject, a Seminar was held at the Committee's Secretariat in February 1984. The Seminar was addressed by Mr. Gilbert Guillaume, Counsellor of State and Legal Adviser to the Ministry of External Relations, Republic of France, on various practical aspects of the problem.

The discussion at the Seminar centred around such questions as the objectives to be achieved through conclusion of agreements on delimitation, the applicable rules, techniques of delimitation and the practical difficulties that are experienced in the course of negotiations of delimtation agreements. Views were expressed that conclusion of agreements on delimitation of maritime bounderies involved a long and arduous process and was always a delicate task due to preponderance of national interests which were at issue. It was felt that the matter was likely to be further complicated in regard to the delimitation of the continental shelf under the new Convention, especially, as the task of locating precisely the external edge of the continental margin, as defined in Article 76, would involve a complicated process. This was in view of the fact that it would depend a great deal on the state of progress made in regard to the knowledge of the geological structure of the sea-bed and the completion of the procedures provided for in Annex II of the Convention.

In the light of the discussion at the Seminar, a preliminary study on the delimitation of the maritime zones was prepared by the AALCC Secratariat and was presented at its Kathmandu Session.

During the course of the discussion in the Plenary, some delegations regretted that the Law of the Sea Convention failed to provide specific criteria on the question of delimitation of the continental shelf and the exclusive economic zone. In addition, state practice varied from region to region and the jurisprudence of the International Court of Justice offered no clear guidelines.

A view was expressed that since the majority of States had followed the median equidistance line principle which indicated that this criteria was more popular in state practice especially in Asian region and should therefore be accorded priority. Another view was that distinction should be made between adjacent and opposite States while dealing with the question of delimitation. It was felt that the three basic issues of immediate concern were:



(i) whether delimitation should be effected in accordance with the median line principle or the equitable principle in light of special circumstances; (ii) what, pending a final solution or agreement, ought to be the provisional arrangements; and (iii) what ought to be the mechanism or mode of dispute settlement in the event of a dispute. It was suggested that the principle of equidistance or median line should be primarily applied but at the same time it should not exclude consideration of special circumstances. It was the totality of circumstances in a given case that would be relevant to judge as to what would be the equitable solution contemplated as the end result of delimitation. Further, it was pointed out that the circumstances enumerated in the Secretariat study were not necessarily exhaustive; and instead of strictly conceptualising the methods they should be explored in order to seek peaceful solutions.

The matter was further discussed in an open-ended Working Group on the Law of the Sea which recommended to the Committee to request the Secretariat of the AALCC to monitor the developments in the light of State practice and judicial decisions and to provide information to member governments.

The Committee, at its Arusha Session (1986), had before it a Working Paper* on "Delimitation of the Exclusive Economic Zone and the Continental Shelf" prepared by the Secretariat which inter alia focussed on the relevance of concept of "special circumstances". When the matter came up in the Plenary, there were a few specific comments. A view was expressed that the Secretariat should not deviate from the mandate given for the preparation of studies on this topic. It was felt that any attempt by the Secretariat to analyse the delimitation instruments and practice would inevitably lead to controversy in the Committee on account of the contentious nature of the subject and the complexity. It was suggested that in view of the conflicting opinions, it would be difficult to tighten the governing law in this area in the near future.

The matter was further discussed in the Sub-Committee on the Law of the Sea which was constituted during the Session. On the basis of the recommendations of the Sub-Committee, it was decided that the

* The Secretariat before preparing the above Working paper sought the co-operation of Member States to furnish it with the relevant material, especially in regard to: (a) any bilateral/regional agreements signed since 1958 for delimiting the exclusive economic zone and continental shelf; and (b) any other relevant material showing the State practice regarding the principles applied in regard to delimitation. A few States had responded to the letter and provided the Secretariat with the relevant documents.

Secretariat should continue its work on monitoring the developments in the field of delimitation of the exclusive economic zone and the continental shelf by examining general principle of international law, State practice and judicial decisions relating to the delimitation of the EEZ and the continental shelf taking into consideration the application of the relevant or special circumstances in each case.

**(iii) Determination of the allowable catch of the living resources in the Exclusive Economic Zone in relation to the landlocked States.**

This subject was taken up by the AALCC upon a reference made by His Majesty's Government of Nepal. A preliminary study which was prepared in accordance with the Committee's usual practice, was considered at the Kathmandu Session.

During the brief discussion, a view was expressed that due to lack of knowledge many developing coastal states were not able to determine the Total Allowable Catch (TAC) or to plan the measures for management and conservation of the fishery resources. Moreover, the calculation of Maximum Sustainable Yield (MSY) and TAC was further complicated by the multispecies composition of the stock of fish in tropical countries and the consequent pathological and biological interactions within the fishery.

Another view was that landlocked States should not be deprived of the rich natural resources of the oceans. It was suggested that the Secretariat should prepare a detailed study on the question of modalities, to be developed in association with the coastal States, landlocked states and international institutions, to secure resources by the landlocked States in relation to determination of the total allowable catch, technological know-how and allied factors in that area.

Another delegate inter alia pointed out that the accommodation of landlocked State's interests in respect of the living resources of the EEZ was a task which must be viewed not merely in the particular context of bilateral negotiations and arrangement, but also in the wider context of the relevant regional and sub-regional context.

The topic came up for discussion at the Arusha Session both in the Plenary and in the meeting of the Sub-Committee on the Law of the Sea. In the course of discussions in the plenary, it was stated that although there were certain lacunae in the Law of the Sea Convention in regard to this matter, a compromise should be found between the interests of different countries of the same region or sub-region and, to evolve



practical solutions in order to implement the provisions of the Convention in its true spirit.

Another delegate stressed that although the coastal State has the right and duty to determine the total allowable catch (TAC) in its own zone, the problem for the developing countries was how to achieve that particular objective. In his view, lack of sufficient knowledge concerning the stocks of fish or the breeding grounds and the migratory habits of fish found within the zone make it extremely difficult for the developing coastal States to determine the TAC. In addition, the delegate stated that if the determination of the allowable catch was arbitrarily established, it would be detrimental to the "full utilization principle" under which the optimum use of fish stocks was to be encouraged.

The Representative of the UNIDROIT pointed out the practical difficulties involved in the determination of the allowable catch of the living resources of the EEZ which, according to him, were primarily due to the vagueness of the rules governing the access of third State users to the EEZ and the wide discretion granted to the coastal State in fixing the Total Allowable Catch (TAC) and the surplus. He pointed out that because of the vagueness of the Convention rules and the wide discretion granted to the coastal State, many disputes would arise in the future, but these disputes did not fall within the ambit of the provisions of Part XV of the Convention relating to conciliation procedure. And since the conciliation commission could not substitute its discretion for that of the coastal State, the Representative felt that it reconfirmed the full discretion of the coastal State.

Another Observer referring to the provisions of Articles 61 and 62 of the Law of the Sea Convention said that while they did not indicate any positive obligation on the part of the coastal State to determine the allowable catch and its own harvesting capacity, at least from the treaties in force, each coastal State party to such treaties, would have to make such determination in good faith. He was of the view that the lack of an enforcement mechanism in respect of Articles 61 and 62 and the clear discretion given to the coastal State in making determination did not detract from the fundamental requirement of good faith.

Another delegate observed that the Exclusive Economic Zone was a new concept and there were no precedents on the question of determination of the allowable catch and on the question of permitting the landlocked States of the region to harvest the surplus of the allowable catch. Moreover, he added, the very question of the

determination of the allowable catch was a technical matter which should be dealt with by the coastal State with the assistance of a specialized body like the FAO.

A view was, however, expessed that since the rights of the landlocked States were not adequately reflected in the Law of the Sea Convention because the Convention was the result of a compromise, interpretation of the relevant provisions of the Convention should also be in that context bearing in mind the spirit of the Convention and provisions of other parts of the Convention especially of Part XI.

The subject was further discussed in the Sub-Committee on the Law of the Sea which recommended:

i) a further study of the subject by the Secretariat with a view to formulating guidelines for coastal and landlocked States in respect of the terms and modalities for bilateral, sub-regional or regional arrangements taking into consideration the appropriate provisions of the UN Convention on the Law of the Sea;

ii) that Member land-locked States may enter into negotiations with neighbouring coastal States with a view to entering into agreements for participation in the exploitation of the living resources of the Exclusive Economic Zone of the coastal States within the framework of the UN Convention on the Law of the Sea and that such States may, if they deem necessary, seek assistance of the AALCC Secretariat in the conduct of such negotiations;

iii) That within the framework of UN Convention on the Law of the Sea, States or their nationals may apply for licences to exploit the living resources of the exclusive economic zones of other States which have already adopted domestic legislation permitting exploitation of such resources by foreign States.

**(iv) Right of Access of landlocked States to and from the Sea and Transit through coastal states**

This topic was first included in the agenda of the Kathmandu Session on the basis of a reference made by His Majesty's Government of Nepal.

It was however not a new subject for the AALCC. At the New Delhi



Session in 1973, the Committee had Constituted a Study Group on Land-Locked States to examine the question of rights and interests of landlocked states in relation to the Law of the Sea. The Study Group after several meetings had, inter alia, presented some formulations which have found place in the UN Convention on the Law of the Sea without much modifications.

At the Kathmandu Session held in 1985 after a brief discussion, an open-ended Working Group was formed to discuss the subject. The Working Group recommended to the Committee to request the Secretariat to prepare additional documentary information on bilateral, regional and sub-regional arrangements on the right of access of landlocked States to and from the Sea and freedom of transit through coastal States. The recommendations of the Working Group were subsequently approved in the plenary.

At the Arusha Session held in 1986, a view was expressed that the right to access of landlocked States to and from the sea had been established under State practice and international law. It was suggested that the Committee should concentrate its work on regional modalities to be developed and followed in the Asian-African region. Further the Secretariat should be asked to prepare a study on the unrestricted navigational rights and facilities to and from the Sea of the landlocked States.

There was further discussion in the Sub-Committee on the Law of the Sea which recommended that:-

"The Secretariat be requested to examine bilateral, sub-regional or regional agreements concerning the exercise of freedom of transit in the region, if any, and to prepare an appropriate working paper in due time."

This recommendation of the Sub-Committee was subsequently approved in the plenary.

# OPTIMUM UTILISATION OF THE RESOURCES OF THE EXCLUSIVE ECONOMICZONE

## Introduction

One of the major developments of far reaching importance in the negotiations at the Third United Nations Conference on the Law of the Sea has been the emergence of the concept of Exclusive Economic Zone which is now embodied in Part V of the United Nations Convention on the Law of the Sea, 1982 (Articles 55 to 75). Notwithstanding the controversies at the initial stages of the negotiatioins, the concept of exclusive economic zone had found wide acceptance in the practice of States even before the adoption of the Convention and may now well be regarded as part of general International Law. 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 exclusive economic zones.

In the light of the developments that had been taking place in the practice of States 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 Utilisation of its Fishery Resources - Regional and Sub-regional Co-operation" for consideration at the Committee's Seoul Session held in February 1979.

The Secretariat study, while recognising the positive trend towards general acceptability of the concept of Exclusive Economic Zone, made a number of suggestions both in regard to possible national efforts and AALCC's programme of assistance to meet the objectives of optimum utilisation of the resources of the EEZ.

The Secretariat study was examined in depth in the Plenary as well as in a Working Group.

As a follow up an Expert Group was convened in December 1979 to discuss the scope of the work to be undertaken by the Secretariat. The Committee decided that to begin with the AALCC's own programme of work should be related to the optimum utilization of the fishery

resources. This was in view of the fact that the prevailing State practice at that time had revealed that most of the claims for extended jurisdiction related to fisheries. The Committee also decided that its 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 objective 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.

The three-day Expert Group Meeting was chaired by Mr. Toslo 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 praticipants 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 utilisation 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.

At the twenty-first Session held in Jakarta in April-May 1980, the Secretariat placed before the Committee the tentative draft guidelines for a legislation on fisheries, the tentative draft of a model bilateral agreement on access to foreign fishing as also a detailed note concerning the various types of joint venture arrangement that could be contemplated. The matter was taken up in the Plenary and after general exchange of views the Committee directed that another Expert Group should be convened as early as possible to examine the drafts.

Pursuant to the decision of the Jakarta Session, an Expert Group meeting composed of legal and fisheries experts was held at the Committee's Secretariat in February 1981 under the Chairmanship of the Secretary-General. 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 other matters due to the time factor.

At the Colombo Session held in May 1981, the Secretariat, had placed before the Committee the draft of the model agreement on foreign fishing as finalised by the Expert Group, two tentative drafts for possible joint venture arrangements and a comprehensive note on regional and sub-regional co-operation. In addition to general discussions in the Plenary, an Expert Group under the Chairmanship of Mr. A. Fernando (Sri Lanka) gave detailed consideration to the Secretariat draft on joint venture arrangements. The Committee decided in favour of convening another Expert Group meeting for detailed consideration of the drafts on the joint venture arrangements as also to discuss the question of regional and sub-regional co-operation for optimum utilisation of the fishery resources.

An Expert Group Meeting was accordingly convened which met at the Secretariat from the 2nd to the 4th of August, 1982 under the Chairmanship of Mr. Glenn Knight (Singapore) and attended by participants from 23 Governments and the Food and Agriculture Organisation (F.A.O.). The Expert Group finalised the texts for the model drafts for two possible types of joint venture arrangements. It also discussed generally various modalities for regional or sub-regional co-operation.

At the Tokyo Session held in 1983, delegations of Republic of Korea, Japan, Iraq, India and Malaysia made brief comments on certain provisions of the drafts. The Committee decided that the draft guidelines for legislation on fisheries as also the model agreement on fishing by foreign nationals and the models of joint venture arrangements should be submitted to governments for their consideration and subsequently examined by an Expert Group. Further, the Secretariat was asked to prepare some alternative models for joint venture arrangements, and to examine the question of promoting regional or sub-regional co-operation taking into account the interests of landlocked and geographically disadvantaged states.

**A. Draft Guidelines for Legislation on Fisheries**

**Explanatory Note**

Even though State practice now recognizes that a Coastal State has certain exclusive rights and jurisdictions in its Exclusive Economic Zone it is clear that a State which wishes to exercise those rights or jurisdiction would have to do so by appropriate legislative measures.

In regard to the control, regulation and management of fishery resources such legislative measure may conceivably take three alternative forms or a combination of them, namely:-

a) Enactment of a comprehensive legislation together with rules and regulations promulgated under the Act;

b) Promulgation of regulations under an existing legislation; and

c) Insertion of new sections in the existing law by way of amendment.

Having regard to the complexity of the matter and the vast areas of the sea which would come under the Exclusive Economic Zone of a State which had hitherto been considered as high seas for all purposes, it would seem to be preferable to undertake a comprehensive legislation regarding the conservation, management and exploitation of the fishery resources of the Zone. This may be necessary all the more in view of the fact that the existing fisheries law was enacted in many countries during the colonial rule and is outmoded in several respects, and it may be difficult and cumbersome to rectify the same through amendments.

The main objective to be achieved through a legislation on fisheries, in regard to the Exclusive Economic Zone, is the optimum utilization of the fishery resources and development of national fishing efforts through appropriate means, so that the available stock can progressively be harvested through national efforts. This is particularly necessary to meet the needs of food of the population, to provide new areas of employment and also to have a source of foreign exchange earning for the nation.

The first and foremost requirement is therefore for each government to formulate its policy through which these objectives could be achieved and to give effect to such policies and programmes through appropriate legislative means. It may not be difficult to enunciate the government's policy in broad general terms, but to concretize the programme for national action and initiatives, it would be necessary to undertake collection of a good deal of data and formulation of a plan which could be reviewed periodically. The plan necessarily would depend to a large extent on the available data concerning the resources and technical expertise in order to assess the national development potential which could be reached in stages. The collection of data in the initial stages about the fishery resources may present some problem since fishing in the areas now falling within



the Exclusive Economic Zone has mostly been done by foreign fishermen. Apart from collection of data, the government would have to determine the conservation measures necessary for protection of the stock against harmful acts and over exploitation. Furthermore, in the formulation of policy, a matter of special importance would be the extent to which foreign fishermen would be permitted to fish in the water consistent with the needs of national fishing industry and the terms and conditions on which foreign fishing will be permitted.

Section 2 in Part I contains certain defintions which are by and large based on provisions in recent legislations in various countries.

In part II of the draft guidelines, provision has been made for the government to formulate and declare the policy of the State (Section 4). This is essentially a governmental function and must rest with the highest authority. Furthermore, one relevant consideration for the developing countries may be the extent of the assistance which it may require from foreign fishing enterprises in regard to identification of the resources, the development of its own national fishing industry and requirement of fish for the local population which could not be provided through fishing activities of national fishermen.

In part III of the guidelines for legislation the suggested administrative set up has been indicated taking into consideration that the functions to be performed would relate to three broad areas:

a) Identification of stocks, survey, ear-marking of zones and conservation measures including seasonal closure;

b) Licensing of local and foreign fishermen, surveillance and enforcement; and

c) Development of local fishing industry including joint ventures, marketing, processing and storage.

It is envisaged that the functions enumerated in (b) would be performed through a governmental machinery to be headed by a Director-General. The functions enumerated in (a) would also be performed by the Director-General but perhaps on the basis of guidelines indicated in the plan and the advice of an Advisory Council. The functions indicated in (c) could be appropriately entrusted to a Fisheries Development Authority having regard to the technical nature of the functions. The enormous resource potential as well as the varied activities connected with the development of the national fisheries industry to undertake the exploitation of these resources on its own at

the quickest possible time would need the attention of bodies acting directly under the Authority of the Minister which could be entrusted specifically with this task. The suggestion for establishment of a fisheries Development Authority may be one of the ways of meeting this requirement. As a matter of fact it has been envisaged that in matters pertaining to technical fields, the government may need the advice of a body which could be expected to give detailed consideration to the various aspects of the matter. The governmental policy might stipulate the national fisheries development programme through local efforts either solely or in association with foreign entities in the shape of joint ventures; broad guidelines relating to foreign fishing activities; reservation of certain fishery areas or zones exclusively for local fishermen and the priority to be given to fishery development in the context of national development programmes.

Section 5 of the draft envisages preparation of a plan so that the policy guidelines on a long term basis could lead to conservation of the stock and their optimum utilization as also progressive development of national efforts. If a plan is prepared, which necessarily would have to be reviewed from time to time, the governmental action particularly in regard to licensing and permissible limits of foreign fishing, declaration of zones or fishing areas would be greatly facilitated. In the preparation of the plan, the long term, medium term and short term interests of the country could be adequately considered. The formulation of the plan would necessarily vest in the government which may, if it considers fit, appoint a special planning body for the purpose but the manner in which the plan should be prepared would necessarily be for each government to decide.

Section 6 of the Draft as also the whole of the Chapter VII are on foreign fishing. The extent to which foreign fishing is to be permitted and the terms and conditions on which this is to be allowed is one of the most crucial issues which a government would have to consider. The foremost consideration of course in this matter is the stock and the needs of national fishing industry. However, any regional or sub-regional arrangements or international treaties and conventions in force would have to be taken into practice of several governments to set up development authorities of this kind when it has undertaken a new venture of vast magnitude and potential such as the development of the steel industry or shipbuilding.

Part IV deals with development, conservation and management of fishery resources; Part V contains provisions on the development of national fishing industry; Part VI is on Licensing; Part VII contains detailed provisions on Foreign Fishing; Part VIII enumerates the prohibited acts; Part IX, X and XI deal with Enforcement, Criminal and Civil Liability. Part XII contains provisions on Processing and marketing and Part XIII has certain general provisions.



The governments will no doubt consider whether matters concerning development of National fishing industry (Part V) as also those relating to Processing and Marketing (Chapter XII) should find place in a legislation on fisheries or whether they should be incorporated in other legislations.

**Statement of Objects and Reasons**

In several countries the legislative text in the form of Bill for introduction in Parliament or the Legislature is usually accompanied by a Statement of Objects and Reasons. This document generally sets out the objectives of the legislation and the methods through which the same is sought to be achieved. Where such practice is followed, it might be appropriate to state in the Statement of Objects and Reasons that international law and State practice now recognises that a coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and sub-soil and the superjacent waters, and jurisdiction inter alia in regard to marine environment in an area beyond and adjacent to the Territorial Sea which may extend upto 200 nautical miles from the baselines from which the breadth of the Territorial Sea is measured to be known as the Exclusive Economic Zone. It may then be stated that the intended legislation seeks to deal with the exercise of the sovereign rights and jurisdiction in the Exclusive Economic Zone in regard to conservation, management, exploration and exploitation of the fishery resources. Where the legislation seeks to manage and regulate fishery activities within its territorial sea and internal waters it might be so stated. Mention might also be made of some of the principal objectives of the legislation which may include the need to intensify and develop the national fishing efforts; to regulate the fishery activities of foreign entities and foreign fishermen in an appropriate manner and the development of national fishing industry with a view to enable the exploitation of the living resource to the maximum extent through the national effort.

**Some suggestions in respect of National Fisheries Legislation**

**Long title:**

A law to regulate fishing and other related activities in the Exclusive

Economic Zone and matters pertaining thereto.

**Preamble:**

A brief summary of the objectives of the Legislation as set out in the Statement of Objects and Reasons might be incorporated in a preamble where it is considered appropriate.

## PART I
## PRELIMINARY

**Section 1- Short title and commencement**

(1) This act may be cited as the (Exclusive Economic Zone) Fisheries Act of _____.

(2) It shall come into force on such date as the Government (Ministry) may appoint by notification in the official gazette.

**Section 2 - Definitions**

In this Act, unless the context otherwise requires:-

a) *authorised officer*- means any fisheries officer; any police officer not below the rank of _____, any customs officer, any commissioned officer of the armed forces or any other officer authorised by the Director-General to perform any duties or functions under the provisions of this Act or any regulations made thereunder, and for the purpose only of enforcing the provisions of this Act or any regulations made thereunder, any health inspector appointed under the Public Health Act;

b) *closed season* - refers to the period during which fishing is prohibited in a specified area or areas in the fisheries waters, or to the period during which the catching of specified species of fish or the use of specified fishing gears to catch fish is prohibited;

c) *Director-General* - means the officer appointed by the Government/Minister under Section _____ of the Act and shall include a Deputy Director General.



d) *Exclusive Economic Zone*-means the exclusive economic zone of _____ as declared in Act. No. _____ Proclamation/Notification dated _____

e) *fish*-means fish or shell fish of any description found in marine or fresh waters and their young or fry or eggs or spawn and includes crucstaceans, acquatic molluses, holothurians, sea weed, coral and other acquatic life, but does not include marine mammals and birds.

f) *fishery*- (i) means one or more stocks of fish that can be treated as a unit for the purposes of conservation and management; (ii) and any fishing for such stocks;

g) *fishing*- (i) means fishing for catching, taking or harvesting of fish; (ii) engaging in any activity relating to the taking of any fish, including (interalia) any activity involving the preparation, supply, storage, refrigeration, transportation or processing any fish;

h) *fishing vessel*-means any vessel, boat, ship or any other craft which is used for, equipped to be used for, or of a type which is normally used for (i) fishing; or (ii) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including but not limited to, preparation, supply, storage, refrigeration, transportation or processing, but does not include any vessel used for the transportation of fish or fish products as part of a general cargo;

i) *fisheries waters*- means the area of the sea extending upto 200 nautical miles measured from the appropriate baselines;

j) *foreign fishing vessel*- means any fishing vessel other than a vessel registered in _____;

k) *licensing authority*-means the officer authorised under this Act to issue licences or permits;

l) *master*-in relation to a fishing vessel, means the person for the time being having command or charge of the vessel;

m) *Minister*-means the Minister for the time being responsible for the administration of this Act;

n) *owner*- in relation to a fishing vessel, includes any body of

persons, whether incorporated or not, by whom the vessel is owned and any charterer, sub-charterer, lessee or sub-lessee of the vessel;

o) *processing*- in relation to fish, includes cleaning, filleting, icing, freezing, canning, salting, smoking, cooking, picking, drying or otherwise preserving or preparing fish by any method;

p) *processing* establishment- means any premises or vessel on or in which any fish are processesd or stored, but shall not include any hotel, restaurant or eating house, or any premises where fish are prepared or stored for sale by retail to the public;

q) *take*- in relation to fish, includes;

i) to take, catch, kill, attract or pursue by any means or device for trading or manufacturing purposes; and
ii) to attempt to do any act specified in sub-paragraph (i) of this definition;

r) *territorial waters*- means the territorial waters of _____ as defined in Act _____ or in Proclamation/Notification dated _____;

**Section 3 - Territorial application**

This act applies to the territories of _____ and the areas of the sea extending upto 200 nautical miles from the baselines from which the territorial seas are measured as more fully set out in Schedule I and hereinafter referred to as "Fisheries waters".

## PART II
## FISHERIES POLICY AND PLANNING

**Section 4- Declaration of fisheries policy**

The Government (Minister) may from time to time formulate and declare the policy of the State concerning fishing and other related activities in the fisheries waters including the extent of such activities by foreign vessels and fishermen with a view to ensure the conservation, rational management and optimum utilization of the fishery resources and to promote and accelerate the integrated development of a national fishing industry.



**Section 5- Preparation of a plan**

The Government (Minister) may authorize the preparation of a plan for the purpose of development, conservation and management of the fishery resources which, inter alia, may provide for:-

a) Identification of the resources and preparation of an estimate, in so far as practicable, of the potential average annual yields and an estimate of the total annual catch that may be permitted for each species of fish.

b) Identification of the areas and zones in which fishing activities may be permitted including areas or zones reserved exclusively for local fishermen.

c) Specification of the conservation and management measures to be taken for the protection of fishery resources against harmful acts and over exploitation.

d) Specification of measures to promote utilization of the fishery resources to conform to national development policies and programmes.

e) Assessment of the existing and future potential of the local fishing activities and specification of measures to be taken to promote the accelerated growth and development of a national fishery industry with a view to enable optimum utilization of the fishery resources through national efforts.

f) Formulation of a scheme or schemes to provide for fiscal and other incentives for the development of the national fishing industry.

g) Measures for development of infra-structure, processing and marketing of fish and fish products.

**Section 6- Foreign Fishing**

The Government (Minister) may from time to time determine the extent to which foreign fishing activities would be permitted in the fisheries waters taking into account, as far as practicable, the fishery resources, the needs of local fishermen and national fishing industries, regional or sub-regional arrangement, international treaties and Conventions in force and other relevant factors including assistance

rendered or to be rendered by foreign fishing enterprises in the development of national fishing industry.

**Section 7- Regional or Sub-Regional Co-operation**

The Government (Minister) may with a view to ensuring the closest practicable harmonization or co-ordination of their respective fisheries management and development programme enter into consultations with the Governments of neighbouring States of the region, especially the States which share the same or inter-related stocks. Such consultations may include exchange of data or carrying on of joint surveys and other activities for assessment of stocks and their protection.

**Section 8 - International Agreements**

The Government (Minister) may promote the negotiation and conclusion of bilateral or multilateral agreements relating to fishing rights and development of fisheries and related other matters.

## PART III
## ADMINISTRATION

**Section 9 - Appointment of Officers**

(1) The Government (Minister) may appoint a Director General for fisheries and such other officers as may be deemed necessary for carrying out the purposes of this Act.

(2) The Director General shall be responsible to the Minister for supervision, management and development of fisheries and the implementation of this Act.

(3) The Director General may with the approval of the Minister assign to officers appointed in pursuance of this section such specific powers and duties exercisable under this Act as may be determined from time to time.

**Section 10- Fisheries Development Authority**

The Government (Minister) may, if deemed fit, establish a Fisheries Development Authority for the purposes inter alia of implementing the State policy or programme in regard to development of national fisheries industry.



**Section 11- National Fisheries Development and Co-ordination Council**

(1) The Government (Minister) may by notification constitute a National Fisheries Development and Co-ordination Council composed of _____ members, at least _____ of whom shall be drawn from fisherman's organizations and the commercial fisheries sector.

(2) The Council may invite such other person as it may think fit to attend its meetings in a technical advisory capacity or to take part in its deliberations on any particular item of business under consideration.

(3) The functions of the Council shall be to advise the Government (Minister) on all matters relating to the development, conservation and management of fisheries and in particular on the co-ordination of activities of governmental agencies and other bodies.

## PART IV
## DEVELOPMENT CONSERVATION AND MANAGEMENT OF FISHERY RESOURCES

**Section 12- Measures for Development, Conservation and Management of Fisheries**

(1) The Director General shall in consultation with the National Fishery Development and Co-ordination Council and such other authorities as may be deemed appropriate, promote the development, conservation and rational management of the resources of the fisheries waters.

(2) The management, conservation and development measures shall conform as far as practicable to the national standards of fishery conservation and management as may be laid down from time to time and the criteria that may be prescribed in the plan prepared under Section 5, taking into account the basic principles set out hereinafter, namely:-

a) Conservation and management measures shall be so taken as to achieve the optimum yield from each fishery and to prevent over exploitation of the resources.

b) To the extent practicable an individual stock of fish shall be

managed as a unit throughout its range and inter-related stocks of fish shall be managed as a unit or in close co-ordination.

c) Conservation of stock through prevention of harmful acts.

**Section 13- Research and Dissemination of Information**

With a view to facilitate effective measures for development, management and conservation of the fishery resources, the Director General shall encourage:-

a) The conduct or co-ordination of research and survey activities in the fisheries waters and in relation to the stocks.

b) Dissemination of information concerning stocks, migratory habits of fish, fishing methods and other related matters.

**Section 14**

The Director General shall cause to be maintained appropriate registers and catch statistics which shall be furnished by all persons licensed to fish within the fisheries waters. Such statistics shall include particulars about species, size, weight and age of fish caught as also the quantity of catch and the time spent during each fishing operation. The Director General shall also have custody of all records pertaining to resource activities carried on in the fisheries waters.

**Section 14A- Development and Aqua-culture**

The Director General shall promote the development of aqua-culture through appropriate means.

## PART V
## DEVELOPMENT OF NATIONAL FISHING INDUSTRY

**Section 15-** _____

(1) The Government (Minister) shall in consultation with the Fisheries Development Authority, the National Fisheries Development and Co-ordination Council and such other Government Departments, bodies or institutions, as may be considered appropriate, promulgate measures for development of a national fisheries industry and other



related industries including vessel construction and repair, manufacture of fishing gear, processing, storage, transport and marketing.

(2) The measures taken under the preceeding sub-section may include:-

a) Provision of financial and other incentives to local fishermen including credit facilities;

b) Provision of technical assistance including maintenance of experimental and demonstration centres and fish breeding stations;

c) Ensuring availability of vessels, fishing gear and other necessary implements of trade;

d) Dissemination of information and training to local fishermen;

e) Provision of adequate infrastructure including port and landing facilities, storage, collection centres and transportation;

f) Promotion of co-operative societies and joint stock companies for undertaking fisheries activities including deep sea fishing;

g) Promotion of schemes for guarantees and insurance;

h) Development of markets for fish and fish products; and

i) Development of fish meal and fertiliser industries.

**Section 16-Fisheries Loan and Development Fund**

(1) The Government (Minister) may establish a Fisheries Loan and Development Fund with a view to assist the growth and development of the national fishing industry.
(2) The Government (Minister) shall promulgate regulations concerning administration of such fund including the criteria on which assistance from the fund may be made available.

**Section 17-Joint Ventures**

The Government (Minister) may authorize entering into joint venture

arrangements where appropriate with a view to speedy development of the local fisheries industry and such other arrangements providing for joint participation in fishing to facilitate effective transfer of technology and training of local personnel.

## PART VI
## GRANT OF LICENCES

### Section 18-Application of this part

The provisions of this part shall apply to all fishing licences and vessel permits other than those to which the provisions of Part VII apply.

### Section 19-Fishing Licences and Vessel Permits

(1) No person other than those falling within the exempted categories shall engage in fishing or other related activities except under a valid fishing licence and vessel permit and in accordance with the terms and conditions thereof.

(2) The Government (Minister) may from time to time by regulations or rules made under this Act, prescribe the guidelines concerning grant, renewal, suspension, cancellation and transferability of fishing licences and vessel permits including the terms and conditions subject to which such licences or permits may be issued and the class or classes of cases where exemption from the requirement of obtaining licences or permits may be granted.

### Section 20-Application for Licences and Permits

Application for fishing licences and vessel permits shall be made in the prescribed form to the licensing authority designated in respect of the area or zone in which the fishing operations are sought to be carried out.

### Section 21-Power to grant or renew Licences or Permits

(1) The licensing authority shall in determining the question of grant or renewal of the fishing licences conform to the provisions of this Act, the regulations or rules made thereunder and the Fisheries Management and Conservation Plan, if any.



(2) The Licensing Authority shall in exercising his powers under the preceeding sub-section give due preference to local fishermen who have been habitually fishing in the area or the zone and co-operative societies of local fishermen.

### Section 22-Terms and Conditions of Licences and Permits

Any fishing licence or vessel permit shall be subject to such terms and conditions as may be prescribed in this Act, the regulations or rules made thereunder and such other terms and conditions which may be endorsed upon such licence or permit by the licensing authority.

### Section 23-Variations of the Terms and Conditions of Licence

The licensing authority shall have power to vary the terms and conditions of the licence or the permit where he is satisfied that it is necessary or expedient so to do for the proper regulation of fishing within the area or the zone.

Provided that due notice of such variations shall be given to the holder of the licence or permit.

### Section 24-Power of Suspension and Cancellation

The licensing authority shall have power to suspend or cancel the licence or permit for breach of the provisions of this Act or the rules and regulations made thereunder or the terms and conditions of the licence or permit.

Provided however that before an order is made under this section an opportunity of being heard be given.

### Section 25-Appeals

Any person aggrieved by an order made by the licensing authority under this part may prefer an appeal to the Director General within a period of thirty days and the decision of the Director General thereon shall be final.

### Section 25A- _____

Any person acting in contravention of Section 19 of this Act shall be liable to a fine not exceeding _____

## PART VII
## FOREIGN FISHING

**Section 26-Entry of Foreign Vessels into Fisheries Waters**

(1) No foreign fishing vessel shall enter the fisheries waters unless so authorized under a permit issued pursuant to the provisions contained in this part and in accordance with the terms and conditions thereof.

(2) The provisions of the preceeding sub-section shall not apply to a vessel entering the fishery waters for the sole purpose of innocent passage or by reason of **force majeure** or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress or for any other purpose directly connected with the safety of navigation.

Provided however that the vessel entering the fisheries waters for such a purpose shall carry its fishing gear in stowed position and conform to such regulations as may be made under this Act relating thereto.

**Section 27-Fishing by Foreign Fishing Vessels in Fisheries Waters**

No foreign fishing vessel shall take fish or attempt to or prepare to take fish, or transfer fish to or receive fish from any vessel within the fisheries waters, except under a permit issued under the provisions of this part and in accordance with the terms and conditions thereof.

**Section 28-Issue of Permits**

The Director General may open the written application made for the purpose in the prescribed form issue a permit in respect of any foreign fishing vessel authorizing it to enter the fisheries water or a specified area or zone thereof and to engage in one or more of the following activities:-

a) fishing activities within the waters;

b) loading, unloading or transhipment of fish and supplies;

c) processing fish and fish products;



d) utilizing port facilities;

e) research and resource survey; and

f) any other activity which the Director General may deem fit to allow.

**Section 29-Exercise of Power by the Director General**

The Director General shall in considering the application for a permit by a foreign fishing vessel take into account the policy guidelines laid down by the Government (Minister), the conservation and management plans, if any, and such other matters as may be deemed relevant including the following:-

a) the total allowable catch in the fishery zone or area and the portion allocated thereof for foreign fishing;

b) the previous fishing activities which the applicant had carried on in the fishery waters;

c) the contribution of the applicant or the State of his nationality in fisheries research, identification of fish stocks and in the conservation, management and development of fishery research, fishery resources within the zone;

d) the assistance provided by the applicant or the State of his nationality in the training of local personnel and the transfer of technology to the local fishing industry; and

e) the terms and relevant bilateral or multilateral agreements in force.

**Section 30-Conditions of Permit**

(1) Any permit issued under the preceding section shall be valid for such period or time as may be specified therein and shall be subject to the provisions of this Act, the rules and regulations made thereunder and the terms and conditions endorsed on the permit.

(2) The terms and conditions subject to which the permit is issued may include *interalia* the following:-

a) the fees, royalties, charges or any other payments;

b) specification of areas in which fishing is authorized;

c) the seasons, times and particular voyages during which fishing is permitted;

d) the species, size, age and quantities of fish that may be taken;

e) the methods by which fish may be caught;

f) the types and size of fishing gear that may be used or carried and the modes of storage of gear when not in use;

g) the use, transfer, transhipment, landing and processing of fish taken;

h) statistical and other information required to be given by the fishing vessel to the Director General, including statistics relating to catch and reports relating to the positions of the vessel;

i) the conduct by the fishing vessel of specified programmes of fisheries research;

j) the display on board the vessel of the licence issued in respect of it;

k) the marking of the vessel and other means for its identification;

l) entry of the vessel to ports, whether for the inspection of its catch or for other purposes;

m) compliance with the directions, instructions or other requirements given or made by warships, Government ships or aircraft;

n) the placing of observers on the vessel and the reimbursement of the costs thereof;

o) the installation and maintenance in working order of a transponder or other equipment for the fixing of the vessel's positions or its identification and of adequate navigational equipment to enable it to fix its positions itself;



p) the carriage on board the vessel of specified nautical charts; and

q) the compensation payble to citizens or to the Government in the event of any loss or damage caused by the vessel to other fishing vessels or their gear or catch or to fish stocks.

**Section 31-Training of Local Personnel**

The Director General may require foreign fishing vessels to undertake training of local personnel in the method of fishing, processing and other related activites.

**Section 32-Security and Appointment of Local Agents**

The Director General may require a foreign fishing vessel in respect of which a permit has been issued to provide adequate security for due performance of its obligations and to appoint a local agent.

**Section 32A**

Notwithstanding anything contained in the provisions of this part, vessel permits or licences to be issued in pursuance of a bilateral treaty of agreement with a foreign state shall be in conformity with provisions of such treaty or agreement in regard to the procedures to be followed for the issue of permit or licence as also the terms and conditions on which such permit or licence is issued.

## PART VIII
## PROHIBITED ACTS

**Section 33- Fishing with Explosives, Poisons or other Prohibted Methods**

(1) No person shall:-

a) use or attempt to use any explosive, poison or any other noxious substance for the purpose of killing, stunning, disabling or catching fish or use any method which may endanger the stock or render such fish more easily caught; or

b) use or attempt to use any apparatus utilizing an electric current, generated by any means whatsoever to catch, stun or kill fish.

(2) No person shall carry or have in his possession or control any explosives, poison or other noxious substance or apparatus fitted for or capable of utilizing current, with the intention of using such explosive, poison or other noxious substance or apparatus for carrying out any of the prohibited acts referred to in the preceding sub-section.

(3) Any explosive, poison or other noxious substance or apparatus found on board any vessel shall be presumed, unless the contrary is proved, to be intended for such use.

(4) Any person who acts in contravention of provisions of this section shall be punishable (with imprisonment which may extend upto one year) or a fine upto a maximum of _____ or both.

**Section 34- Possession of Prohibited Gear. etc.**

Any person who uses for fishing or possess or has on board any ishing vessel:-

a) any fishing net, the mesh size of which is less than the minimum mesh size for the type of net prescribed in any regulation made under this Act; or

b) any other net fishing gear or fishing appliance prohibited under any regulations made under this Act; shall be punishable with a fine upto a maximum of _____

**Section 35-** _____

Any person who lands, sells, receives or is found in possession of any fish, knowing or having reasonable cause to believe them to have been taken in contravention of the provisions of the preceding section shall be liable to a fine not exceeding _____.

**Section 36-**

Prohibition of Importation or Exportation of Fish or Fishery/Aquatic Products.

No person shall import or export any fish or fishery/aquatic product, whether adult or young, fry or fish eggs, for propagation or for any other purpose, without a permit obtained for the purpose and payment of inspection and other fees.



## PART IX
## ENFORCEMENT

**Section 37- Powers of Authorized Officers to stop, board and inspect, etc.**

For the purpose of ensuring compliance with the provisions of this Act, any authorized officer may:-

a) stop and board any fishing vessel within the fisheries waters, other than a foreign fishing vessel outside such waters and make any examination and enquiry concerning that vessel, its equipment, fishing gear, crew or fish carried on board that vessel;

b) stop and inspect within the fisheries waters any vessel or vehicle transporting fish;

c) require to be produced and examine any fishing gear or fishing appliance whether at sea or on land;

d) examine any fishing stakes;

e) require to be produced, examine and take copies of any licence, permit, certificate or other document required under this Act or any regulations made thereunder.

**Section 38-Powers of Hot Pursuit, Entry, Seizure and Arrest**

(1) Any authorized officer, where he has reasonable ground to believe that an offence has been committed against the provisions of this Act or any regulation made thereunder, may:-

a) stop, board and search any foreign fishing vessel outside the fisheries waters, where he has reason to believe that the offence was committed by such vessel and pursuit to the vessel was commenced, within the fisheries waters and bring such vessel and its crew within those waters;
Provided that:

i) where the vessel is pursued into waters falling withing the Territorial sea (or Exclusive Economic zone) of another State, the pursuit and exercise of enforcement powers is

permitted by the terms of any treaty in force, regional or sub-regional arrangements.

b) enter any premises not used exclusively as a dwelling house, in which he has reason to believe that an offence has been committed, or fish taken in contravention of such provision are being stored and search such premises;

c) take samples of any fish found in any vessel or velicle inspected or any premises searched under the provisions of this Act;

d) arrest any person whom he has reason to believe has committed such offence;

e) seize any vessel (including its fishing gear, furniture, appurtenances, stores and cargo), vehicle, fishing gear or fishing appliance which he has reason to believe has been used in the commission of such offence, or in relation to which the offence has been committed;

f) seize any fish which he has reason to believe have been caught in the commission of such offence or are possessed in contravention of Section 35;

g) seize any explosive, poison or other noxious substance or apparatus which he has reason to believe have been used or possessed in contrvention of Section 33.

(2) A written receipt shall be given for any article or thing seized under sub-section (1) and the grounds for such seizure shall be stated in such receipt.

(3) Any person arrested under the provision of this section shall be produced before a Court within twenty-four hours of the arrest if made on land or within twenty-four hours of the arrested person being brought ashore where the arrest has been made at sea.

(4) Any vessel seized under sub-section (1) and the crew thereof shall be taken to the nearest or most convenient port and dealt with in accordance with the provisions of this Act.



**Section 39-Fish and other perishable Articles seized may be sold**

Any fish or other articles of a periahsble nature seized under the provisions of Section 38 may, with the approval of the Director General be sold, and the proceeds of sale shall be held and dealt with in accordance with the provisions of this Act.

**Section 40-Obstruction of Authorized Officers**

Any person who:

a) wilfully obstructs any authorized officer in the exercise of any of the powers conferrd on him by this Act; or

b) fails to comply with any lawful order or request made by any authorized officer for information connected with any investigation or enquiry under this Act;

shall be punishable in accordance with the provision of this Act.

**Section 41-Identification of Authorized Officers**

(1) An authorized officer whilst exercising any of his powers or duties under this Act, shall, on demand, produce to any person who may be directly concerned, such identification papers or written authorisation as may be reasonably sufficient to establish his identity.

(2) It shall not be an offence for any person to refuse to comply with any reqest, demand or order made by any authorized officer, if such officer refuses or fails on demand being made by such person to produce the requisite identification papers or written authorisation.

**Section 42-Non-liability of Authorized Officers**

No action shall be brought against any authorized officer in respect of anything done or omitted to be done by him in good faith in the execution of his powers and duties under this Act.

## PART X
## OFFENCES, PENALTIES AND LEGAL PROCEEDINGS

**Section 43-Offences against the Act or Regulations**

(1) Any person who fails to comply with the provisions of this

Act or any regulations or rules made thereunder or acts in contravention thereof shall be liable to be punished under this Act.

(2) If no specific penalty has been provided for the particular offence, the person convicted of such offence shall be liable to a fine not exceeding _____ [or to a term of imprisonment which may extend upto a period of _____ or to both.]

**Section 44-Wilful Damage to Fishing Vessels, etc**

Any person who causes damage to any fishing vessel, fishing stakes, fishing gear, net or other fishing appliance in the ownership or possession of another person, either wilfully or through gross negligence, shall be liable to a fine not exceeding _____ [or to imprisonment for a term not exceeding a period of _____or to both.]

**Section 45-Destroying Incriminating Evidence**

Any person who destroys or abandons any fish, fishing gear, net or other fishing appliance, explosive, poison or other noxious substance or any other object or thing with intent to avoid their seizure or the detection of an offence against this Act or any regulations made thereunder, shall be liable to a fine not exceeding _____ [or to imprisonment for a term which may extend upto_____ or to both.]

**Section 46-Master liable for Offance committed on his Vessel**

When an offence against this Act or any regulations made thereunder has been committted by any person on board a fishing vessel, the master of such vessel shall also be liable for such offence.

**Section 47-Companies and partnerships**

Where any offence against this Act or any regulations made thereunder has been committed by a company or by any member of a partnership, firm or business, every Director or Principal Officer of that Company directly connected with the activity or any other member of the partnership on the person concerned with the management of such firm or business shall be liable for such offence unless he proves to the satisfaction of the Court:



a) that he used the diligence to secure compliance with this Act; or

b) that such offence was committed without his knowledge, consent or connivance.

**Section 48-Compounding of offences**

The Director General may, at any stage of the proceeding, compound any offence against this Act or any regulations made thereunder for a sum of money not less than one-fourth of the maximum fine provided for such offence.

**Section 49-Forefeiture of Vessels. etc.**

(1) Any vessel, fishing gear, net or other fishing appliance, fish or the proceeds of sale of fish, explosive, poison or other noxious substance or other article or thing seized under the provisions of this Act shall be held pending the outcome of the prosecution in a Court of law.

Provided, however, that the Court may order the release of any fishing vessel, fishing gear, net or other fishing appliance so seized upon furnishing of a bond or other security to the satisfaction of the Court by any person claiming such property.

(2) If the owner of the property cannot be found and by reason thereof a prosecution cannot be launched, the property seized shall be held for a period of one month at the end of which it shall be deemed forfeited unless a claim is received to such property within the aforesaid period.

(3) Upon receipt of such claim the Director General shall refer the matter to the competent Court for adjudication and the property shall be held pending the conclusion of such proceeding.

Provided however that the Court shall have power to order the release of the property upon furnishing a bond or other security by the person claiming such property.

**Section 50-Power of Court to Order Forfeiture**

Where any person is convicted of an offence against this Act or any

regulations made thereunder, or where the Court, on referral of any claim under Section 49, finds that such an offence has been committed, the Court, in addition to any other penalty that may be imposed:-

a) may order that any fishing vessel (including its' fishing gear, furniture, appurtenances, stores and all cargo), fishing gear, net, or other fishing appliance used in the commission of such offence be forfeited and that any licence or permit issued under this Act or any regulations made thereunder be suspended for such period of time as the Court may think fit, or be cancelled; and

b) shall order that any fish caught in the commission of such offence or the proceeds of sale of any such fish, any explosive, poison or other noxious substance used in the commission of such offence, any fishing net or other fishing gear or fishing appliance possessed or carried on board any fishing vessel in contravention of Section 33 be forfeited; and

c) shall order, in the case of any offence against Section 34 that any fishing gear, net or other fishing appliance carried on board the offending vessel, be forfeited.

**Section 51-Second or Subsequent Offence**

In the case of any second or subsequent offence against this Act or any regulation made thereunder:-

i) the maximum penalty to be imposed may extend upto twice the limit of the fine [or imprisonment] as prescribed for that offence under the Act; and

ii) where the offence relates to a violation of Sections 33 and 34 of the Act, the Court shall order, the forfeiture of the offending vessel (including its fishing gear, furniture, appurtenances, stores and all cargo) unless it considers that circumstances do not so justify.

**Section 52-Disposal of things declared Forfeited**

Any vessel (including its fishing gear, furniture, appurtenances, stores and all cargo), fishing gear, net or other fishing appliance, explosive, poison or other noxious substance, and any fish or the proceeds of sale of fish deemed or ordered forfeited under 49, 50 or 51 shall be disposed of in such manner as the Director General may think fit.



**Section 53-Return of seized Vessel, etc. if no Forfeiture Ordered**

Where the proceedings in respect of an offence have resulted in an acquittal or where the seized fishing vessel or goods or any proceeds realized from a sale thereof are not ordered to be forfeited, the vessel or the goods shall be returned and the proceeds shall be paid to the owner or to the person from whom the fishing vessel or goods were taken; Provided that in the case of conviction where a fine has been imposed the vessel or the goods may be detained until the fine is paid, or be sold in satisfaction of or towards realisation of the fine.

**Section 54-Presumption and Proof of Cause of death, etc. of Fish**

(1) All fish found on board any fishing vessel which has been used in the commission of an offence against this Act or any regulations made thereunder shall, unless the contrary is proved, be presumed to have been caught in the commission of such offence.

(2) In any prosecution where the cause of death, stunning, disabling or other injury to any fish is in question, a certificate signed by the Director General or such other officer authorized on his behalf shall be prima facie evidence in any Court as to the cause of such death, stunning, disabling or other injury.

**Section 55-Jurisdiction of the Courts**

Any offence against the provisions of this Act or the regulations made thereunder committed within the fisheries waters by any person, or any such offence committed outside such waters by any citizen of or person ordinarily resident in _____ or by any person on board any local fishing vessel, shall be triable in a Court having territorial jurisdiction at the place where the person accused of the offence is apprehended or the place where he is brought ashore if the arrest has been made at sea.

## PART XI
## CIVIL LIABILITY

**Section 56-_____**

(1) Where by reason of any Act or omission prohibited under this law, damage is caused to any person or property or the

natural resources within the fisheries waters or the territory of_____, the owner or the operator of the vessel, device or any other structure causing such damage shall be liable, except as otherwise provided under this Act.

(2) Without prejudice to the generality of the provision of sub-section (1) such liability shall cause:-

a) for any damage caused to a person, vessel, gear, facility or other structure used in any activities connected with the exercise of the rights of _____ in the fisheries waters, including fishing and related activities, policing and surveillance, environmental protection and shipping;

b) for any damage caused in the fisheries waters or in the territory of _____ by contamination resulting from such act of omission and the consequent expenditure incurred on measures taken for clearing the environment of the contaminant and the effects of the contamination.

**Section 57-_____**

No action to enforce a claim in respect of a liability incurred under section 56 shall be entertained by any court in _____ unless action is commenced not later than one year after the claim arose.

**Section 58-Special Defences**

A person against whom an action is brought for damages under section 56 shall not incur any liability under that section if he proves that the damage caused:-

a) was due wholly to an act or omission of another person, not being the servant or agent of the owner; or

b) was due wholly to the negligonce or wrongful act of a government or other authority in exercising its function of maintaining lights or other navigational aids for the maintenance of which it was responsible.

**Section 59-Jurisdiction**

Any action under the provisions of Section 56 shall be maintainable in a Court having territorial jurisdiction at the place where the defendant or its agent is ordinarily resident or at the place where the offender or the offending vessel is brought to port.



## PART XII
## PROCESSING AND MARKETING

**Section 60-Marketing Regulation Schemes**

(1) The Minister may, by regulation formulate schemes for marketing of fish and establishment of fish markets in a specified area or areas with a view to maintenance of supply and distribution of fish in an equitable and orderly manner.

(2) Such schemes may include provisions for regulating the landing of fish in the notified area, the auctioning or other sale of fish and registration of dealers.

**Section 61-Processing Establishments**

(1) The Director General may upon application being made in the prescribed form issue to any person a Licence to operate a fish processing establishment.

(2) The owner or operator who operates or causes to operate any such establishment otherwise than under and in accordance with the conditions of a valid licence shall be punishable under this Act.

(3) The provisions of this section unless otherwise specified by notification by the Government (Minister) shall not apply to any fish processing establishment where fish is preserved solely by means of smoking or drying by traditional means.

**Section 62-Control and Regulation of Fish Processing Establishments**

The Minister, in consultation with the appropriate bodies or authorities responsible for public health may issue directions concerning the location, construction and operation of fish processing establishments and may require the inspection of the establishment and fish products. Any such directions may relate also to establishing quality standard methods of analysis and testing for fish and fish products.

**Section 63-Processor's Carrier Permit**

The Director General may upon application made for the purpose issue a transport permit in respect of a vessel owned or operated by

any person engaged in the processing of fish and used exclusively to transport fish to the shore processing facility specified in the permit.

## PART XIII
## GENERAL PROVISION

### Section 64-Power to make Regulations

(1) The Government (Minister) may make regulations for the carrying out of or giving effect to the purposes and provisions of this Act.

(2) Every regulation made under this Act shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the notification.

(3) Every such regulation shall be laid before the Parliament/ Legislature.

### Section 65-Power to frame Rules

The Government (Minister) may make rules for the administration of the provision of the Act and the regulations made thereunder.
Such rules shall be published in the official Gazette.

### Section 66-Licence and Permit Registers

Registers showing particulars of the licences and permits issued under the Act shall be maintained and kept at such place or places as the Director General shall specify.

### Section 67-Environment Protection

Where, under the laws governing environmental protection for the time being in force, any application is made for a licence to emit, discharge or deposit wastes into any fish bearing waters, the Director General shall be consulted as to the possible effect of such emission, discharge or deposit on fish and other aquatic living resources before any such licence is granted.

### Section 68-Fishing for Research, Experimental, Scientific and Sporting purposes

The Director General may, by order, exempt any person or vessel



from all or any of the provisions of this Act or any regulations made thereunder for the purposes of fisheries research, experimentation, scientific investigations for the proper management and development of fisheries resources or sport, within the fisheries waters, subject to such conditions as the Minister, may think fit to impose.

### Section 69-Protection of Fishermen

(1) No dery, flat or other boat whatever shall set out from any vessel engaged in deep-sea or bank fishing or be launched with hooks and lines, trawls of other similar appliances, or with intent that the same shall be used in so fishing, or with intent that the same shall be used in so fishing, or for the purpose of examining trawls, set lines or other similar appliances for fishing, unless there is placed in such boat, to be retained therein during absence from such vessel, a mariner's compass, nor unless there is placed in such boat at least two quarts of drinking water and two pounds of solid food for each man of the crew of such boat.

(2) The owner of such vessel shall supply the vessel at the commencement of its voyage with as many serviceable mariner's compasses as it carries boats, in addition to the vessel's compass and also with the necessary utensils for holding water and with a serviceable fog-horn or trumpet.

(3) The Coast Guard shall not grant a clearance to such vessel or allow it to go to sea unless the master thereof has a certificate from an officer authoruzed by the Minister to give such certificates that the vessel is properly equipped with a mariner's compass and suitable utensils for holding water for such boat carried by the vessel and with a serviceable fog-horn or trumpet.

### Section 70-Offences by Authorised Officers

Any officer employed in connection with the enforcement of this Act or any regulation made thereunder who aids, abets or connives at any violation of this Act or of any regulations made thereunder, is liable upon summary conviction to imprisonment which may extend upto a period of six months or to a fine upto a maximum of _____ or both.

### Section 71-Operation of Radio Communication facilities on Board Fishing Vessels

The Radio Control Office shall, upon application, issue a permit and

assign a preset frequency to a qualified applicant for the installation and operation of radio transceivers on board fishing vessels and home-based stations subject to the rules and regulations prescribed by said office and consistent with the requirements of national security. Provided, further, that _____ Coast Guard shall be informed by the Radio Control Office of the preset radio frequencies assigned to fishing vessel operators.

## B. Model Draft of an Agreement Relating to Foreign Fishing in the Exclusive Economic Zone/Fisheries Waters of a Coastal State and Co—operation in the Conservation and Management of the Fishery Resources Therein

### Explanatory Note

The Model of a Draft Umbrella Agreement concerning the fishing activities by foreign nationals in the fisheries waters and/or exclusive economic zones of a Coastal State has been prepared with a view to assist member governments in their negotiations concerning fishery activities in their exclusive economic zones by foreign fishermen. An attempt has been made to put together in this Draft certain suggestions which could form an appropriate basis for such negotiations.

The background on the basis of which the preasent Draft has been prepared is that at present many developing countries have not been able to develop an adequate fishing capacity in order to harvest the optimum catch from the fisheries resources of their Exclusive Economic Zones. In the circumstances they might consider it beneficial to draw on the assistance and co-operation from other States in regard to identification of resources and their exploitation as also in taking of conservation measures. It has been observed in the course of discussions in the Committee that there are certain states which had been fishing in the waters now falling withing the Exclusive Economic in this regard. Furthermore, foreign fishing in the Exclusive Economic Zones would be carried out in an orderly manner if the terms and conditions on which such fishing would be permitted could be regulated through bilateral agreements. Such agreements would pave the way for mutually beneficial co-operation between the Coastal State and those states with well developed fishing industries.

In the preparation of this Model of a Draft Agreement, the rights of the Landlocked and Geographically Disadvantaged States in respect of the living resources of the Exclusive Economic Zones of coastal states of the region or sub-region have not been considered. As such this Draft Agreement is not meant to be an Agreement between the Coastal and neighbouring Landlocked and Geographically Disadvantaged States. It is envisaged that the Coastal, Landlocked and Geographically Disadvantaged States would enter into bilateral, sub-regional or regional agreements whereby the special rights of the Landlocked and Geographically Disadvantaged States would be taken into account.



### Model Draft of an Agreement Relating to Foreign Fishing in the Exclusive Economic Zone/Fisheries Waters of a Coastal State and Co—operation in the Conservation and Management of the Fishery Resources Therein*

The Government of_____(hereinafter referred to as the Coastal State) and the Government of _____(referred to as the other State party).

**HAVING REGARD** to the negotiations that have taken place between the two governments relating to the fishing activities of the nationals of the other State party in the waters specified herein and in the matter of co-operation between the two States for conservation and management of fishery resources therein, as also the development of the fishing industry of the Coastal State;

**REAFFIRMING** their desire to develop and maintain co-operation in the field of fisheries for their mutual benefit and thereby to strengthen the close and friendly relations that exist between them and their peoples;

**DESIROUS** of establishing the terms and conditions under which fishing vessels of the other State party may be allowed access to the fisheries in such waters and matters relating to co-operation between the two governments including the development of the fisheries sector of the Coastal State;

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* This draft is not intended to be a model of an agreement between Coastal and neighbouring Landlocked and Geographically Disadvantaged States (see Explanatory Note).

**HAVE** agreed as follows:-

### *ARTICLE 1**

The Coastal State will, pursuant to the provisions of this agreement, allow fishing activities within its fisheries waters/exclusive economic zone by fishing vessels and nationals of the other state party subject to its laws and regulations and/or terms and conditions as may be established on the basis of the under-standing/agreement reached between the two parties in the matter of assistance to be rendered to the Coastal State by the other State Party and its nationals in the development of the Coastal States fishing industry and co-operation in the conservation and rational utilization of the fishery resources.

### *ARTICLE 2*

The competent authorities of the States parties shall consult among themselves with a view to determining the number of vessels and their specifications (tonnage and size) permitted to operate during each year, the allocation of catch (by species if desirable), the fishing areas and other regulatory measures.

### *ARTICLE 3*

The designated agency of the other State Party shall transmit applications to the Government of the Coastal State for a permit for each fishing vessel that intends to engage in fishing in the fishery waters of the Coastal State pursuant to this agreement. Such applications shall conform to the requirements set out in the laws and regulations of the Coastal State. *

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* It is envisaged that there would be a memorandum which would be annexed to this agreement or a separate agreement which would incorporate the terms and conditions agreed upon between the parties in the matter of assistance to be rendered to the Coastal State by the other State and/or its nationals. Such arrangement might include provision of service of experts and periodic consultations between the appropriate government departments of the two parties in order to assist the Coastal State in building up of its fishing industry. It might be possible to include within such arrangements construction and setting up of storage and refrigeration plants, a canning industry or a processing plant for the benefit of the Coastal State fishing industry by the other State or its nationals including associations of process or bodies corporate who are permitted to fish in the fisheries waters. The assistance could also be in the matter of marketing facilities for the fishing industry of the Coastal State. Arrangements in regard to transfer of technology in processing, storage and

*** Explanatory Note to Article 3**

The particulars which are normally required to be given in applications for permits by foreign fishing entities are the following:-

a) the name and official number or other identification of each fishing vessel for which a permit is sought, together with the name and address of the owner and operator thereof;

b) the tonnage, capacity, horse power, processing equipment, type of fishing gear and such other inforamtion relating to the fishing characteristics of the vessel as may be requested;

c) a specification of target, specie and fishing ground in which the vessel wishes to fish;

d) the amount of fish or tonnage of catch by species contemplated for each vessel during the time such permit is in force;

e) the ocean areas in which and the season or period during which, such fishing would be conducted;

f) such information as may be required under the laws and regulations of the Coastal State; and

g) such other relevant information as may be requested, including desired transhipping areas.

*** Explanatory Note to paragraph 1 of Article 4**

The terms and conditions on which a permit in respect of foreign fishing is issued may inter alia include the following:-

a) payment of royalties, charges and fees;
b) supply of fish for consumption in the Coastal State;
c) transfer of information and data regarding fisheries; and
d) measures for conservation of fishery resources.

If only a particular kind of fish is contemplated under an agreement then the following formulation might be used:

"This Agreement shall apply to the Fishery (say) of shrimp or tuna (to be followed in each case by the names of the various species covered by the Agreement)."



### *ARTICLE 4*

1. The Coastal State upon being satisfied about the technical feasibility of the fishing activities proposed to be carried on and the suitability of the vessel for the purpose shall issue a permit specifying the terms and conditions upon which the permit is issued. *

(2. The Coastal State shall communicate to the other state party the reasons in the event of an application being refused.)

### *ARTICLE 5*

Subject to the availability of facilities the Coastal State shall allow the fishing vessels which have been granted permits to enter designated ports in accordance with its laws, regulations and administrative instructions for the purpose of purchasing bait, supplies or outfits or effecting repairs or such other purpose directly connected with the fishing activities of the vessel as may be determined by the Government of the Coastal State.

### *ARTICLE 6*

The nationals and fishing vessels of the other State party permitted to fish by virtue of this agreement shall not be entitled to catch or take any of the species specified in Schedule I. **

### *ARTICLE 7* *

In exercise of its sovereign rights the Government of the Coastal State shall determine annually, subject to adjustment when necessary to meet unforeseen circumstances:

(a) the total allowable catch for individual stocks or complexes of stocks, taking into account the conservation requirements, the harvesting capacity of the Coastal State and the need to develop its fishing industry;

(b) the maximum permissible catch allocated to nationals and fishing vessels of the other State party.

### *ARTICLE 8*

The Government of the other state party shall ensure that in the conduct of the fisheries under this Agreement:

(a) the authorizing permit for each vessel is prominently displayed in the wheelhouse of such vessel;

(b) appropriate position-fixing and indentification equipment, is installed and maintained in working order on each such vessel;

(c) designated Coastal State observers are permitted to board any such vessel, who shall be accorded the equivalent rank of ship's officer while aboard such vessel. The Government of the Coastal State shall be reimbursed by the owner or operator of such vessel for the costs incurred in the utilization of Observers;

(d) the Master and crew of each vessel shall co-operate fully in such enforcement action as may be undertaken pursuant to the laws and regulations of the Coastal State;

(e) agents are appointed and maintained within the Coastal State possessing the authority to receive and respond to any legal process issued in the coastal state arising out of fishing activities under this Agreement;

(f) all necessary measures are taken to ensure the prompt and

* Some participants were of the view that this provision was not necessary as it was covered by Article 2.



adequate compensation of Coastal State citizens for any loss of or damage to their fishing vessels, fishing gear or catch that is caused by any fishing vessel of the other State party as determined under the applicable laws of the Coastal State;

(g) all data referred to in Schedule II which constitutes an integral part of this Agreement shall be reported to the designated representative of the Coastal State in accordance with the time frame referred to therein;

(h) each vessel upon entry into exclusive economic zone/fisheries waters of_____ shall communicate its location to the designated officer of the Coastal State each day by a method to be agreed upon by consultation between the two parties, until such vessel leaves the said zone;

(i) the owners or operators of vessel shall make available to the Government of the Coastal State the general description of the equipment and methods to be used in fisheries in the area as well as other relevant information about the technology to be used for the detection, pursuit and catch of fish in the area; and

(j) fishing vessels shall stow their fishing gear in such position as to conform to the laws and regulations of the Coastal State in the waters where they are not authorized to conduct fishing activities.

### *ARTICLE 9*

Each vessel permitted to fish by virtue of this Agreement shall carry an agreed number of trainees to be trained on board the vessel and their salaries and other emoluments be paid by the owners or operators of the vessel.

### *ARTICLE 10*

The fishing vessels operating in the area pursuant to permits issued under this agreement shall comply with the laws and regulations of the Coastal State as specified in Annex III relating inter alia to the size of fish which may be fished for or retained on board, the size of the vessel, the mesh size and types of nets and gears that may be used for any fishing activity in the area as well as any matter relating to or connected with the conservation of the living resources in the area including regulations for closed areas and closed seasons.

### *ARTICLE 11*

1. Where the fishing vessels or the owners or operators violate the terms and conditions of any permit issued hereunder or the provisions of any laws or regulations of the Coastal State, the Coastal State may impose appropriate penalty in accordance with its laws, regulations and procedures including forefeiture of vessels, gear and catch; and order suspension or cancellation of permit.

2. In case of seizure and arrest of a vessel or its crew by a competent authority of the Coastal State, notification shall be given promptly through diplomatic channels informing the Government of the other State party of the action taken and of any penalties subsequently imposed.

3. Arrested vessels and their crews shall be promptly released, subject to such reasonable bond or security as may be determined by the competent authority of the Coastal State.

### *ARTICLE 12*

The Government of the other State party shall co-opertate with the Government of the Coastal State in order to ensure, by appropriate measures, that its nationals and fishing vessels refrain from fishing activities in the fisheries waters/exclusive economic zone of the Coastal State except in conformity with the laws and regulations of the Coastal State and in particular that its nationals and fishing vessels authorized to carry on fishing activities in pursuance of this agreement comply with the provisions of the permits issued by the Coastal State.

### *ARTICLE 13*

The Government of the Coastal State and the Government of the other State party undertake to co-operate in the collection, compilation and exchange of scientific data and information required for the purpose of management and conservation of the living resources off the coasts of the Coastal State. The modalities for such co-operation shall be settled by agreement between the parties.

### *ARTICLE 14*

1. The Government of the Coastal State and the Government of the other State party shall carry out periodical bilateral consultations regarding the implementation of this Agreement and the



development of further co-operation in the field of fisheries of mutual concern.

2. This Agreement shall be approved by each State in accordance with its constitutional procedures. It shall enter into force through an exchange of notes on a date to be mutually agreed upon thereafter between the Government of the Coastal State and the Government of the other party and shall remain in force until _____ unless terminated sooner by either Government after giving notification of such termination _____ months in advance.

3. This Agreement shall be subject to review by the two Governments two years after its entry into force and thereafter every two years unless the parties otherwise agree.

4 This Agreement will be subject to the conclusion of a multilateral treaty resulting from the Third United Nations Conference on the Law of the Sea.)*

In witness whereof, the undersigned, being duly authorized by their respective Governments have signed this Agreement.
Done at _____ on the _____ 19_____, in duplicate in the English and _____ languages, both equally authentic.

For the Government of _____

For the Government of _____

* One of the participants considered the inclusion of this provision to be appropriate.

## C. DRAFT GUIDELINES FOR AN EQUITY JOINT VENTURE ARRANGEMENT BETWEEN AN ENTITY IN THE COASTAL STATE (GOVERNMENT UNDERTAKING, CORPORATION, COMPANY OR INDIVIDUAL) AND A FOREIGN ENTERPRISE OR ENTITY

### Explantory note

Equity joint ventures contemplate the incorporation of a company which would undertake the main activities provided for in the agreement. The company would be a national company of the Coastal State and will be incorporated under its laws. The agreement would basically follow the pattern of an agreement between the promoters of a company but would have additional provisions concerning certain assistance to be rendered by the foreign party in regard to technical assistance, training programmes etc.

It would depend upon the administrative structure in the Coastal State and its policies as to whether the development of fishing and fishery industries should be in the public or private sector. The entity in the coastal state which should be a party to the joint venture agreement, whether state entity, government undertaking, corporation, company or individual would depend upon the governmental policy. It is unlikely that the Government as such would be a party to a joint venture agreement, and in cases where the governemt itself is concerned directly with fishing and fishery activities, such functions should be carried out through a government corporation or a state agency. It is contemplated that the foreign party with which joint venture arrangements might be entered into would be one which has either some past experience in fishing in the waters now encompassed within the economic zone or a party which has in its possession the necessary data and/or technical know-how and is ready and willing to assist in the fishing activities and/or in the establishment of industries connected with fishing, e.g. storage, refrigeration and processing plants, as also in the marketing of fish and fish products even when a state agency or a government undertaking is a party to a joint venture agreement, it would be desirable to keep in perspective the distinction between the regulatory and policy making functions of the government on the one hand and the contractual functions of a government agency on the other.

It may be stated that the essential feature of an equity joint venture from the point of view of the host country is the employment of foreign capital and technology in its project whilst the interest of the foreign party is basically to obtain an adequate return on its capital investment and payment for employment of its technology.



## C. Draft Guidelines for a Equity Joint Venture Arrangement between an Entity in the Coastal State (Government Undertaking, Corporation, Company or Individual) and a Foreign Enterprise or Entity

### DRAFT MODEL TEXT

This Agreement entered into on _____
between _____
(Coastal State enterprise)
hereinafter referred to as the 'first party' and _____
_____ hereinafter
(foreign entity)
referred to as the 'second party', Witnesseth as follows:-

### RECITALS

Whereas the Government of _____ (hereinafter referred to as the 'Government') has declared its intention to encourage the development of its national fishery industry with the object of optimum utilization of the fishery resources of its exclusive economic zone in progressive stages (and in building up of plants for the purpose of storage, preservation and processing of fish) through co-operation with and assistance of nationals or entities in other states;

Whereas the Government has through its laws, regulations or administrative orders specified areas where fishing activities can be undertaken by its nationals and foreign fishermen and has also notified the terms and conditions subject to which fishing activities would be permitted;

Whereas the Government has offered various incentives in its laws, regulations and policy declarations for foreign collaboration in the fisheries sector in the shape of tax relief, exemption from customs duties, repatriation of profits and other relevant matters;

Whereas a sample survey conducted by _____ in _____ of the exclusive economic zones of
(specify areas)
_____ has identified the existence of stocks suitable for commercial exploitation which has been followed by undertaking if a feasibility study and environmental impact assessment;

Whereas the second party has expressed its desire to collaborate in the establishment of a fishing and other allied industries in _____ in association with the first party and has agreed to provide technical assistance on terms and conditions set out herein;

And Whereas the Government has given its approval and consent to the execution of this agreement (and has also given its assurance in regard to the grant of facilities and assistance in the fulfilment of the objectives of this agreement;)

## PART I

1. The parties shall take steps to promote and bring into being a body corporate to be known as _____ which shall be incorporated under the laws of _____.

2. The objectives of the company to be established shall include:-

   a) Organization and undertaking of fishing activities within the waters of the exclusive economic zone of _____ in areas as specified by the Government;

   b) To acquire technology, vessels, equipment and gear for the purpose of fishing activities, employment of technicians, experts and other personnel ;

   c) To undertake research activities in regard to fisheries related to the commercial operations of the company and to arrange training programmes;

   d) To erect, construct, maintain or arrange for shore facilities as may be necessary for the commercial operations of the company;

   e) To undertake directly or through its subsidiaries the erection, construction and establishment of storage, refrigeration and processing plants for fish and manufacture of fishery products;

   f) To undertake or arrange for marketing of fish and fish products for local consumption and export.

3. The authorized capital of the company shall be _____and its initial subscribed capital shall be _____ to be divided between _____ ordinary shares and _____preferernce shares.

4. The first party hereby agrees to subscribe _____ ordinary shares in the company and the second party shall subscribe _____ ordinary shares. (The remaining shares



shall be offered for public subscription.)

*5. Each of the parties shall nominate two persons on the Board of Directors. The Managing Director shall be appointed by agreement of parties and be subject to approval of the Government.

6. The general policy to be adopted by the Company in regard to declaration of dividends and distribution of profits shall be that_____. The debt equity ratio shall be _____.

The draft memorandum and articles of association of the company to be formed are annexed to this Agreement which shall be filed with the Registrar of Companies at (place) within a period of _____ days from the execution of this Agreement.

### Notes to Clauses 1 to 7

(i) The essential element in an equity joint venture is the formation of a company and the agreement accordingly provides for promotion of a company. The incorporation of the company would take place in accordance with the provisions of the local laws of the country where it is to be incorporated, namely, the coastal state.

(ii) The objectives of the company would be set out in the memorandum of association; nevertheless it would be desirable to specify the basic elements in the agreement between the promoters.

(iii) It would be desirable for the promoters to agree upon the authorized capital of the proposed company and its initial subscribed capital as also its distribution. It is envisaged that the promoters would subscribe to the entire share capital of the company in agreed proportions. However, it is possible to contemplate a position where a certain proportion of the shares would be offered for public subscription. It may be mentioned that the laws of many developing states place a limit in regard to equity participation by foreign nationals and the number of shares to be acquired by the second party (the foreign entity) would have to conform to such laws and regulations.

* This provision is based on the shareholding in the proposed company being on an equal footing. In cases where the shareholding is not equal, the number of Directors to be nominated by each party may be based on the ratio of share capital contributed. In some countries appointment of the Directors requires the approval of the Government.

(iv) It is the normal practice for the promoters of a company to have their nominees on the Board of Directors. In the case where the company's activities relate to a sector of vital importance to national economy, it is desirable that the appointment of managing Director should receive the approval of the Government. In some countries appointment of all Directors may require Government approval.

(v) The distribution of profits by way of dividends will be governed by company law and the provisions of articles of association. Nevertheless it would be desirable to incorporate a provision in the agreement setting forth the general policy to be adopted by the company in regard to declaration of dividends and distribution of profits. The principles concerning the debt equity ratio shall also be set out.

(vi) It is the normal practice in agreements between promoters to have the draft of the memorandum and articles of association to be annexed to the agreement and the same pattern is followed here.

(vii) The operational activities by the company for fulfilment of its objectives would naturally be in accordance with the local laws and regulations but it is considered unnecessary to make a specific provision in respect of the same in the joint venture agreement.

## PART II

8. The second party undertakes to render all necessary assistance to the company in the acquisition of vessels and supportive equipment under hire or purchase for the commercial operations to be undertaken by the company in accordance with the schedule annexed to this agreement.

   Where any vessel or equipment are taken on hire or purchase from any party to this agreement or from a company or firm affiliated to any party, such hire or purchase shall be effected at competitive world market prices and on best prevailing terms. Any second hand vessel or equipment purchased by the company shall be subject to evaluation by an independent valuer.

9. The second party shall render assistance to the company in arranging loans and advances for acquisition of vessels and equipment and shall arrange for suitable guarantees for the purpose on terms and conditions to be agreed upon by the parties.

10. The second party shall make available to the company all relevant



data in its possession or which may come into its possession during the currency of this agreement concerning the stock in the areas where fishing activities are contemplated. It shall also make its best endeavour to obtain such data from the fishery agencies in the state of its nationality and where possible from other relevant sources.

11. The second party shall make available to the company the technical and managerial personnel required for operation of the company's fishing fleet and other activities contemplated under this agreement in the categories and on the terms and conditions to be agreed upon between the parties taking into account the programme for progressive introduction of local personnel at all levels.

12. The second party shall arrange at its cost, suitable training programmes_____ for the technical personnel of the company
    Number
    not exceeding number per year in the second party's establishment or in such other establishment as may be mutually agreed upon with the company. It shall also assist the company in the establishment of an appropriate training programme for the company's personnel.

13. The second party undertakes to render assistance to the company or its subsidiaries in the establishment of storage and refrigeration plants as also in regard to plants for processing of fish and manufacture of fishery products. Where any contract for the establishment of such plants is entered into by the company with any party to this agreeemant or with any company or firm affiliated to a party to this agreement, such contract shall be entered into on the best prevailing terms and conditions in the world market and at competitive market prices. Any second-hand equipment purchased under any such contract shall be subject to evaluation by an independent valuer.

14. The marketing of fish and fish products intended for export shall be undertaken by the second party in accordance with the marketing agreement as annexed to this agreement. The second party shall assist the company in the development of its own marketing expertise.

**Notes to Clauses 8 to 14**

(i) Whilst Part I of the Draft Agreement deals with promotion of a national company, Part II includes certain related matters where the foreign party's collaboration is deemed essential for fulfilment

of the objectives of the proposed company. This relates mainly to acquisition of vessels and equipment on purchase or hire, arrangements for loans through which vessels and equipment may be acquired, provision of data and technical expertise and training programmes. The obligations of the foreign party are set out in this part which would constitute the main consideration for a coastal state in allowing a foreign entity to participate in an equity joint venture in the fisheries sector.

(ii) It is sometimes the case that the party from the developed country in a joint venture agreement itself makes available the vassels and equipment needed for fishing on hire with an option for purchase. It is necessary to ensure that when vessels or equipment are purchased or taken on hire from the foreign party or its affiliates that transaction is made on competitive prices and on best available terms.

(iii) Since it might be difficult for a company incorporated in a developing county to arrange for loans or advances for acquisition of vessels and equipment, it would be desirable to place an obligation on the foreign party to render assistance in the matter.

(iv) One of the objectives for entering into joint venture arrangements may well be acquisition of data concerning the fishery resources without which fishing activities on an appreciable scale would be difficult. The foreign fishermen who had been previously fishing in the waters now encompassed within the exclusive economic zone in many cases are in possession of such data and if joint venture arrangements are entered into with such a party, it may be possible to acquire the necessary data. A provision in respect thereof is accordingly made in this agreement.

(v) A difficulty experienced by developing states is in regard to technical and managerial personnel. It is therefore necessary to provide that the foreign party should arrange for the services of such personnel to the extent necessary and upon such terms and conditions as may be agreed upon. However, progressive employment of local personnel in all categories shall clearly be kept in perspective.

(vi) One of the important considerations that may promote developing countries to enter into joint venture agreements in the fisheries sector is the need for establishment of allied industries such as in regard to storage and processing of fish. It might be difficult to find a foreign party with expertise in fishing which may have directly in its possession the technical knowhow for preservation or processing of fish. Nevertheless foreign entities which are engaged in fishing have close connections or collaboration with the companies which undertake such activities. It would therefore be



reasonable to provide that the foreign party to this agreement should render suitable assistance for obtaining collaboration in this field. The foreign party would itself have a vested interest in arranging for such collaboration since it would be a substantial shareholder in the local company which would undertake these activities either directly or through its subsidiaries.

(vii) The training programme constitutes one of the main elements in joint venture arrangements. Such training programme would be facilitated if a certain number of trainees are taken by the foreign party in its own establishments or establishments maintained by its collaborators in other countries.

(viii) Marketing of fish and fish products constitutes another important element. It would be reasonable to provide that the foreign party should render assistance in this field.

## PART III

**Applicable Law**

15. This agreement shall be governed by the laws of _____ (coastal state).

**Duration and termination**

16. (i) The first part of this agreement shall be deemed to have been performed upon the incorporation of the company and acquisition of the shares by the respective parties. If within a period of 12 months the performance of Part I of the agreement has not been completed, the entire agreement shall be terminated unless the parties by mutual consent have agreed upon the extension of the period of time for the performance of Part I of this Agreement.

(ii) Subject to the provisions of Clause 1, Part II of this agreement shall remain in force for a period of _____ years and shall not be terminated by either party except for breach of contract or upon dissolution or winding up of one of the parties. The duration of this part may be extended by a period of _____ years by agreement of the parties.

**Force Majeure**

17. Any failure by any of the parties to carry out any of its obligations under this agreement shall not be deemed as a breach of contract or default if such failure is caused by force majeure.

**Settlement of Disputes**

*18. Any dispute between the parties arising out of or in relation to this agreement shall be settled by arbitration in accordance with the provisions of the UNCITRAL Rules, 1976.

It was suggested that the arbitration may be held under the laws of the coastal state since the performance of the contract will primarily be in that state.

## D. DRAFT GUIDELINES FOR A CONTRACTUAL JOINT VENTURE ARRANGEMENT BETWEEN AN ENTITY OF THE COASTAL STATE (GOVERNMENT UNDERTAKING, CORPORATION OR COMPANY) AND A FOREIGN ENTERPRISE OR ENTITY

### Explanatory note

The Draft Guidelines for a Contractual Joint Ventre Arrangment between an entity in the coastal state and a foreign enterprise or entity have been formulated on the premise that a developing coastal state desirous of achieving the objective of optimum utilization of the fishery resources in its exclusive economic zone would wish to encourage its own national companies or enterprises in the public or private sector to obtain assistance through joint venture arrangements with foreign parties. There may be several variants in such contractual joint venture arrangements both in regard to the scheme and sharing of profits. This would depend upon what the parties may agree. The draft guidelines have beer. prepared on broad general terms in regard to one possible pattern of joint venture arrangements.

### DRAFT MODEL TEXT

This Agreement entered into on ---------- between ----------
(coastal state enterprise)
hereinafter referred to as the 'first party' and---------- hereinafter
(foreign entity)
referred to as the 'second party', Witnesseth as follows:-

### RECITALS

Whereas the first party is desirous of obtaining certain assistance and technical collaboration which the second party has agreed to provide within the framework of a joint venture arrangement;

*Whereas a sample survey conducted by ---------- in ----------of the exclusive economic zone of _____
(specify areas)
---------- had identified the existence of stocks suitable for commercial exploitation which has been followed by understanding of a feasibility study and an environmental impact assessment;

Whereas the Government has declared its intention to encourage

* This provision would be appropriate where a resource survey and a feasibility study has been undertaken prior to the conclusion of a joint venture agreement.



the development of its fishery industry through collaboration with nationals or entities, public or private, in other states and has in its laws, regulations and administrative orders offered incentives for this purpose;

And Whereas the Government has given its approval and consent to the execution of this agreement.

### Notes on the Recitals

In most developing countries collaboration with foreign parties is permitted only upon the approval of the Government and to the extent they conform to the Government policy. Foreign parties are usually attracted to enter into joint venture arrangements mainly on the basis of adequate resources being available. However, incentives in the shape of tax relief, facilities for repatriation of capital are important elements as also any assurance on the part of the Government that they would render assistance in the execution of the project with a view to avoidance of administrative delays.

1. The parties hereby agree to undertake in collaboration with each other fishing and other related activities in accordance with the terms and conditions provided for under this agreement.

2. The fishing operations under this agreement shall be undertaken in the areas specified in the Schedule to this agreement within the waters in the exclusive economic zone of ---------- in accordance with the laws and regulations of the coastal state and the plan of work agreed up on between the parties which is annexed to this agreement.

3. The second party shall employ ---------- vessels of ----------
(size and tonnage)
the particulars in respect whereof are described in the Schedule to this agreement certified to be seaworihy by a recognized surveyor agreed upon by the parties.

4. The first party shall have the option at the expiry of a period of ---------- years to purchase one or more of the vessels provided by the second party and employed in fishing operations under this agreement at the written down value of the vessel/at the value to be determined by a recognised valuer agreed upon by the parties.

5. The first party shall have the option to acquire on purchase or hire, vessels other than those provided by the second party not exceed-

ing ---------- of the size and tonnage for addition to the operational (number)
fleet.

**Notes to Clauses 3,4 and 5**

In a contractual joint venture arrangment, it would be reasonable to provide that some of the vessels to be utilized in fishing operations and research activities should be provided by the foreign party. This practice has been followed in several contractual joint venture arrangements between parties in the United States and those in Latin America. This would relieve the coastal state of a major burden of large capital employment in purchase of vessels. Even if the vessels were to be taken on hire, operational expenses will be heavy.

It is, however, possible that a coastal state may desire that vessels should be purchased or taken on hire by its own entity or the national company in order to progressively build up a fishing fleet and that the operational activities of such vessels should be undertaken by the foreign party. Since this will require a large capital outlay, it is conceivable the coastal state might like to contemplate purchase of vessels within or outside the framework of the joint venture agreement in progressive stages.

6. The vessels employed by the second party shall fly the flag of the state where it is registered/be registered in the coastal state and fly its flag.

**Note to clause 6**

It may be desirable to register the vessels provided by the foreign party in the coastal state. This will depend upon the laws and regulations of the state concerned. However, experience has shown that it is extremely difficult to change the registration of vessels in view of the fact that vessels are often purchased under hire-purchase agreements or mortgaged to banks and lending institutions who have given loans or advances for the purchase of the vessels.

7. The second party shall be responsible for ensuring that the operations are carried out in accordance with the laws and regulations of the coastal state and the approved plan of work. The day-to-day operation of the vessels employed in the fishing activities shall be subject to the direction and control of the second party and the master of the vessel shall be deemed to be its agent.

8. The second party undertakes that ---------- of the crew



members of the vessels employed in fishing including officers shall be nationals of the coastal state whose terms of employment shall be agreed upon by the parties.

**Note to clause 8**

It is necessary to provide that part of the crew members should be nationals of the coastal state since this would not only offer employment opportunities but facilitate transfer of technology.

9. The second party also undertakes to employ not less than ---------vessels for the purpose of carrying out survey operations /training within the fisheries waters on the basis of a programme included in the agreed plan of work approved by the coastal state. The second party shall accept on board such vessels and provide facilities for persons from the coastal state to be nominated by the first party to be associated in survey operations/training programmes which number shall not be less than ---------- to be progressively increased to ----------.

**Note to clause 9**

Undertaking of research and training facilities constitutes one of the major objectives of joint venture arrangements. This provision has accordingly been included in these guidelines.

10. The first party shall be responsible for obtaining licences and permits that may be necesary for carrying out the fishing activities by the vessels employed in the operations.

**Note to clause 10**

It would be reasonable to provide that the licences which are to be obtained from the coastal state for undertaking fishing operation should be responsibility of the local party.

11. The second party undertakes that a Register containing data of catch shall be maintained by each vessel in the appropriate form and manner prescribed by the coastal state and that such data shall be made available to the first party. The second party further assures that full information and particulars in regard to survey operations including the results of such operation shall be furnished forthwith to the first party.

**Note to clause 11**

Obtaining of data concerning the stock and results of research

programme carried out would seem to constitute one of the important considerations for entering into joint venture arrangements. The data of catch would give an indication about the breeding grounds, habits of fish and the species to be found in each area where fishing activities are undertaken under such arrangements.

12. The entire catch shall be landed at the designated port or ports of the coastal state as may be agreed upon between the parties from time to time.

**Alternative**

---------- percent of the catch shall be landed at the designated port or ports of the coastal state and the remaining portion shall be trans-shipped to the vessels provided by the second party under the joint supervision of both the parties.

**Note to clause 12**

It is conceivable to provide that the entire catch should be landed at the designated port or ports of the coastal state. On the other hand it has been the practice in some cases that a portion of the catch should be landed in tha coastal state and the remaining portion should be allowed to be taken by the foreign party for its own purposes. Whatever arrangements is to be made would depend on the one hand upon the needs of the coastal state as food for its own populations as also the storage and processing facilities in the coastal state, and on the other hand the interest of the foreign party in entering into the arrangements. It may be stated that in some cases the main consideration of a foreign party for entering into contractual joint ventures has been the possibility of its being allowed to retain a part of the catch for consumption and marketing in its own country.

13. The parties shall consult from time to time about the amount of fish which should be sold in the local market, the quantity that should be earmarked for processing and the amount that is to be exported in conformity with the laws and regulations of the coastal state. The first party shall make the necessary arrangements for marketing of that portion of the fish and fish products that is earmarked for the local market. The second party shall make suitable marketing arrangements in regard to the fish and fish products which are to be exported.

**Note to clause 13**

This cluase is closely linked with the provisions of clause 12. It



would depend upon the arrangements that are made in regard to the amount of the catch that should be landed and quantum, if any, which the foreign party should be allowed to take for its own purpose.

14. The second party shall undertake to construct shore facilities appropriate for use of the vessels employed under this agreement and also for landing of the catch.

**Note to clause 14**

In some cases provisions are made for the foreign party to construct shore facilities but it is not invariably the case. This is a matter for consideration by each coastal state whether it would itself undertake construction of shore facilities or whether assistance of the foreign party should be sought in the matter.

15. The parties shall enter into arrnagements for construction of storage and refrigeration plants for preservation of the fish at a place not more than ---------- kilometers in distance from the designated ports where the catch is to be landed. The capital required for construction of such plants shall be provided by the parties in the proportion of ---------- for the first party and ---------- for the second party. The second party shall arrange for and/or provide the technology and the technical personnel necessary for the purpose on terms and conditions which are annexed to this agreement.

**Note to clause 15**

It would be useful to provide in a joint venture arrangement a stipulation concerning construction of storage and refrigeration plants because it is in this area that the facilities in most of the developing coastal states are lacking. The construction of such plants is essential in order to regulate supplies to ensure adequate price for fish and to prevent loss or deterioration which inevitably must occur if the fish could not be stored under proper conditions. The most appropriate method in regard to construction of such plants could well be for the local and the foreign party to share in the capital expenditure in agreed proportions together with an undertaking on the part of the foreign party to provide or arrange for the technology upon terms and conditions which may be incorporated in an annex to the agreement.

16. The operational costs of the vessels provided by the second party including survey operations/training programme costs shall be borne wholly by the said party. The operational costs of vessels purchased or taken on hire by the first party shall similarly be borne by that party.

17. The sale proceeds of the quantity of catch allowed to be exported by the second party shall be retained by that party.

**Alternative**

The sale proceeds of the fish, which shall take place in the open market and at competitive prices, shall be deposited by the party or parties undertaking marketing arrangements in an account in a recognized bank or banks to be opened in the joint names of both the parties which would be shared in such proportions as have been agreed upon in the schedule of financial arrangements annexed to this agreement. A bank guarantee or a letter of credit shall be furnished/ opened by the party exporting the fish for the approximate value of such export.

**Notes to clause 16 and 17**

The Expert Group considered that there could be possibilities of working out several types of financial arrangements, for example, the parties could agree that the profits after deducting the entire costs of the operation should be shared between the parties in certain proportions. Another alternative method was that the foreign party shall meet the entire costs of the operation and give to the local party a certain percentage of profits. In this connection it was mentioned by way of example that in one joint venture arrangement, the foreign party provided the vessel, equipment and gear and it was allowed to take away the entire catch subject to its remitting 15% of the sale proceeds calculated at prevailing market rates and furnishing a bank guarantee for that amount before the fish was exported. Under this arrangement the first party obtained the required licences, paid the licence fees, arranged for the bank guarantee and met the wages of local personnel. Another form of financial arrangement where both the parties provided vessels for the operation was discussed. The Expert Group was of the view that financial arrangements may depend at times upon the policy of the coastal state such as whether its objective was to get the fish or to earn foreign exchange. The Expert Group considered that the financial arrangements would be such which ought not to give rise to possible disputes between the parties regarding the accounting of expenditure or computation of profits and in this context clauses 16 and 17 were incorporated as being one possible example of appropriate financial arrangements.

18. This arrangement shall be governed by the laws of -----------

19. This arrangement shall enter into force on ---------- and shall remain effective for a period of ---------- years there from and shall be subjected to extension for a period of---------- years by agreement of parties.



20. This agreement shall terminate on the dissolution or winding up of either of the parties. The agreement may also be terminated by either party upon giving of a notice which shall not be less than ---------- prior to the date of the proposed termination.

21. This agreement has been entered into on the basis of mutual trust and confidence between the parties and the rights and obligations hereunder shall not be transferable by any party except with the consent of the other party.

22. Any failure by any of the parties to carry out any of its obligations under this agreement shall not be deemed as a breach of contract or default if such failure is caused by force majeure.

23. Any dispute between the parties arising out of or in relation to this agreement shall be settled by arbitration in accordance with the provisions of the UNCITRAL Rules, 1976*.

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* It was suggested that the arbitration may be held under the laws of the coastal state since the performance of the contract will primarily be in that state.

# ENVIRONMENTAL PROTECTION

## Introduction

The topic "Environmental Protection" has been under consideration of the Committee since its Tokyo Session held in 1974. After conclusion of the basic preparatory work of a preliminary nature and general exchange of views at the Committee's Sessions held in Tehran (1975), Kuala Lumpur (1976), Baghdad (1977) and Doha (1978), an Expert Group Meeting was convened in December 1978 in order to identify areas and issues where efforts were most needed for protection of the environment in the context of the situation and the needs of the developing countries in the Asian-African region. A programme of work, which could be usefully undertaken by the AALCC to assist its member government's was drawn up by the Expert Group and later approved at the Committee's Seoul Session held in early 1979. It was, however, decided that having regard to the vastness of the subject to be covered, the work should be undertaken in stages.

Another Expert Group which met in December 1979 recommended that priority should be given to the question of protection of the marine environment. These recommendations were subsequently endorsed at the Committee's Jakarta Session held in 1980. Views were also expressed that the Committee's work should be so organised as to complement the activities of other major international organisations engaged in this field with a view to avoid duplication and also to harmonise the activities of the major agencies for the greater benefit of the countries of the region. At the Colombo Session, held in 1981, it was suggested that the Committee should accord priority to matters concerning:

i) Promotion of ratification of or accession to some of the major conventions in the field of marine environment, and

ii) Regional Seas Programmes co-ordinated by the UNEP which were relatable to the Asian-African region.

As a follow-up of the Colombo Session, the Committee's Secretariat prepared a Study which, inter alia, set out a brief review of the major

IMO Conventions on prevention and control of marine pollution with a view to promote their wider acceptance by the States in the Asian-African region.

Another Expert Group Meeting was convened in New Delhi in July 1982. In that Meeting, besides a general review of the relevant IMO Conventions in the field of protection of the marine environment, attention was focussed on the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC, 1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund, 1971) since some major revision to both these Conventions were already under contemplation.

The Meeting also discussed in considerable detail the question of accession to and ratification of the CLC (1969) and the Fund (1971) Conventions by the States in the Asian-African region and the advantages that were likely to accrue to the States by becoming parties to these Conventions.

The Expert Group recognised that there were several Conventions which directly or indirectly had a bearing on question relating to oil pollution, it was suggested that among the Conventions in question there were three which were particularly crucial in this respect; namely the International Convenion for the Safety of Life at Sea. 1974, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and the International Convention on the Prevention of Pollution from Ships 1973, as amended by the Protocol of 1978 thereto.

In respect of the first two of these Conventions, it was suggested that, while they did not directly deal with marine pollution, they were nevertheless essential in any effort aimed at avoiding pollution: the first dealt in essence with the fundamentals of ship design, ship equipment and navigation, and the second set out minimum requirements in respect of training, certification and watchkeeping. Both were, therefore, directly concerned with ensuring the safety of operation of ships.

It was suggested that the AALCC Secretariat might perhaps prepare background documents in respect of the IMO Conventions so as to help dispel the concerns which still existed in the competent ministries of many countries over the implications of participation in these Conventions.



The Meeting further took note of the fact that in recent years pollutants from landbased sources have constituted one of the major factors in marine pollution and that the UNEP had accordingly attached priority to combating this source of marine pollution. It recognized that in the progressive stages of implementation of the regional seas programmes in the Asian-African region suitable arrangements would have to be worked out between the States concerned for prevention and control of pollution from landbased sources and it would be necesssary also for the governments to undertake supportive legislations for regulatory and enforcement measures within thier territories for effective implementation of any regional or sub-regional arrangements.

The Meeting was of the view that whilst the relevant protocols for establishing co-operation in emergency situations were being negotiated, it would be desirable if pilot studies could be undertaken to ensure speedy progress towards implementation of plans and programmes for combating emergency situatious. By way of illustration, it was mentioned that such pilot studies could include identification of risks in relation to tanker routing, sensitivity of particular areas of the coastlines, adequacy of existing organizational arrangements, availability of equipment, and the use of aircraft for surveillance of oil and control of operations.

At the Tokyo Session held in 1983, the Secretary-General introduced the Report of the Expert Group Meeting of 1982 and invited attention to the recommendations made therein. The delegate of Bangladesh expressed concern over the increasing threat of marine pollution in the Indian Ocean region. While the delegate of Iraq recognised the role of Kuwait Convention in the protection of the marine environment, the delegate of Iran regretted that it had not yet met with success. The delegate of Indonesia urged to conduct further studies concerning implementation of Part XII of the Law of the Sea Convention on the Protection and Preservation of the Marine Environment. The Committee took note of the Report of the Expert Group and decided to convene another meeting of the Expert Group to consider matters concerning the revision of the Civil Liability Convention of 1969 and the Fund Convention 1971 prior to the IMO Diplomatic Conference scheduled to meet in April-May 1984. It was also agreed that the AALCC Secretariat would work in collaboration with the Government of Indonesia in the future study of matters relating to marine pollution.

As a starting point the Government of Indonesia in collaboration with the AALCC convened the Expert Group Meeting in Jakarta from 5th to 7th March 1984. The Jakarta Meeting heid extensive discussions on

the various proposals put forward in the IMO and other fora in the context of the revision of the CLC (1969) and the Fund Convention (1971).

Environmental Protection was not included in the agenda of the Kathmandu Session as the ESCAP had convened a Ministerial Meeting on Environmental Protection around the same time.

At the Arusha Session, the Committee discussed the agenda item Environmental Protection in conjunction with the item on Nuclear Free Zone in Africa. The Secretariat had submitted separate studies on those two items. As regards Environmental Protection, the Secretariat study besides identifying the environmental problems in the African continent in general, drew attention to the marine pollution in the East African region in particular.

The study on "Nuclear Free Zone in Africa" reviewed the developments since the adoption of the Organisation of African Unity (OAU) Declaration on Denuclearisation in 1964. While suggesting a framework for an international convention on denuclearisation of Africa, it examined the relevance of the Treaty for the Prohibition of Nuclear Weapons in Latin America, 1967 and the South Pacific Nuclear Free Zone Treaty 1985. Finally, it referred to the special situation arising out of the attitude of South Africa in that context.

During the general debate some delegations welcomed the idea of establishment of a nuclear free zone in Africa. One delegation called for the liquidation of bases from the Mediterranean region as a first step towards the creation of zone of peace in that area. Another delegate while advocating creation of nuclear free zone in the Korean Peninsula, urged the AALCC to evolve a suitable legal framework governing rights and obligations of states in respect of nuclear free zones. The observer for Australia elaborated the salient features of the South Pacific Nuclear Free Zone Treaty. Another delegate referred to the International Convection for the Prevention of Pollution from ships 1973 as modified by the protocol of 1978 (MARPOL 73/78) especially its provisions concerning "specified areas". He felt that since the Indian Ocean provided the main route for most of the shipping relating to oil, it should have been given better protection. He asked the Secretariat to examine the possibility of suggesting a total prohibition of oil dumping by ships. He also called for a ban or prohibition of nuclear waste as part of the garbage that might come into Ocean. While endorsing the Secretariat suggestion for the preparation of a study relating to establishment of reception facility for the Eastern African region, he said that the Secretariat should undertake a feasibility study concerning the



economic and engineering viability of the project so that the Committee could make the necessary recommendations to the countries in the region for the establishment of the reception facility.

At the conclusion of the general debate, it was decided that the Committtee would continue consideration of these topics and the Secretariat was accordingly asked to prepare studies for submission at the next Session.

# ECONOMIC, SCIENTIFIC AND TECHNICAL CO-OPERATION IN THE USE OF THE INDIAN OCEAN

The government of Sri Lanka by a reference made on the 29th May 1981, under Article 3(b)* of the Committee's Statues, had requested the Commitee to initiate a study on the Economic, Scientific and Technical Co-operation in the use of the Indian Ocean and to inscribe the item on the agenda of the Committee's twenty-third Session.

The background in which the proposed study was contemplated had been set out in the Explanatory Memorandum annexed to the Referance in the following terms:

"The Indian Ocean is an area in which, more than in any other, the interests of Asia and Africa converage. Lying as it does in tropical and sub-tropical latitudes, it unites the two continents. The littoral and hinterland States of the Indian Ocean share a common history of colonial exploitation and today include some of the world's least developed countries. It was in order to ensure to the Indian Ocean States the peace and security needed for their economic development that the idea of declaring the Indian Ocean a Zone of Peace was first conceived. While these efforts proceed under the auspices of the United Nations the Asian-African Legal Consultative Committee should carry out a study of the ways and means of promoting economic, scientific and technical co-operation for mutual benefit among Asian and African States, in the exploration, exploitation, conservation and rational use of the Indian Ocean and its resources. It is believed that a study of this nature would benefit not only the Indian Ocean States but AALCC's membership as a whole".

By way of elaboration on the objectives of the proposed study, it was stated that the Convention on the Law of the Sea, adopted by the United Nations Conference on 30th April, 1982 after nine years of protracted negotiations, had set in motion a new legal order for the oceans recognising exclusive rights and jurisdictions of the coastal states over the resources of the sea adjacent to their coasts and

* Revised Statues, Article 4 (c)

extending to a limit of 200 nautical miles. Similarly, the Convention had recognised the right of each state in the resources of its continental shelf which may extend upto a limit of 350 miles or even beyond under certain circumstances. The immense resource potential, both living and non-living, if properly explored, exploited and conserved could help to bring about vast improvements to the economies of the countries bordering the Indian Ocean and the living standards of their poeple. furthermore, in the areas of the ocean lying beyond national jurisdictions, the discovery of polymetallic nodules had given rise to mankind's hope of a common heritage in the wealth of the oceans in concrete terms.

It was pointed out that whilst national efforts must constitute the key in any programme for development, there would appear to be considerable need for evolving a system of co-operation and co-ordiantion of activities between the States of the region to reap the optimum benefit. In the first place, the geo-physical characteristics of the Indian Ocean made it practically impossible for any one State to take effective measures by itself to gather accurate data about the resources or for their conservation and protection as also in the matter of preservation of the marine environment. Furthermore, in the prevailing situation where the coastal states bordering the Indian Ocean are faced with the shortage of capital, skilled manpower and technology, it would be most conducive to evolve a system of co-operation in which pooling of information, avoidance of duplication and joint efforts on specific projects can be contemplated.

In accordance with the normal practice of the Committee, the item was included in the agenda of the Tokyo Session held in May 1983 and a priliminary study was prepared by the Secretariat for the purposes of discussion. A brief outline of the resource potential of the Indian Ocean, prepared on the basis of available estimates and data, was included in the preliminary study. Mention was also made in the study of the programme initiated during the past two decades by various United Nations Agencies in relation to the Indian Ocean and its resources such as in the fields of oceanography, fisheries and protection of marine environment. In this connection, the programme initiated by the Intergovernmental Oceanographic Commission (IOC), the Food and Agricultural Organisation (FAO), the United Nations Environment Programme (UNEP), the International Maritime Organisation (IMO), the Economic and Social Commission for Asia and the Pacific (ESCAP) as also the work of the Asian-African Legal Consultative Committee were set out for information of member governments. The preliminary study had also indicated the suggested modalities of approach for further study of the matter. As a first step in the process, it was suggested to



have a broad exchange of views between interested governments to identify on a tentative basis the field and areas where a system of co-operation might become possible in effective and practical terms. Further, it was pointed out that after the basic information has been collected, it would be possible for the interested governments to dis - cuss in concrete terms the plans the modalities for co-operation. It was felt that research, survey, collection of data, and exchange of informa - tion will perhaps be the most important in the present stage of development and knowledge of the Indian Ocean since collection and exchange of information and data on a systematic basis would constitute a vital link in any plan for co-operation of training programme, joint action on management and conservation of the living resources may well be some of the matters on which co-operation might be envisaged during early states. Finally it was suggested that a special meeting might be convened at the invitation of a member government in co-operation with and assistance of the AALCC to give further consideration to the Indian Ocean Programme. Such a meeting may well serve the purpose of providing the initial contact between interested governments and facilitate exchange of views concerning practical feasibility of promoting co-operation between the Indian Ocean States as also the fields and areas where programme for co-operation are likely to be most conducive.

The Secretariat study was taken up for consideration by an Informal Working Group during the Tokyo Session held in 1983. The Working Group had expressed the view that it would be desirable to revise and elaborate the outline prepared by the Secretariat after consultations with the organs and agencies of the United Nations who are concerned in the field as a next step in the programme of study of the subject before a governmental meeting was contemplated. The main purpose of such consultations was to provide governments with a clearer picture about the plans and programmes undertaken or to be undertaken by the concerned offices and agencies of the United Nations, to obtain their views about the methods of implementation of such programmes and the needed government action for the purpose. It was felt that a good deal of the ground concerning the Indian Ocean and utilisation of its resources might well be covered through a systematic and co-ordinated effort to implement such programmes under the auspices of the United Nations. The recommendations of the Working Group were later generally endorsed at the Plenary by the delegations of Sri Lanka, India, Indonesia and Malaysia.

In accordance with the aforesaid recommendations, the Secretary-General consulted with the various United Nations Offices, organs and

agencies, namely the Inter-governmental Oceanographic Commission (IOC), the Food and Agricultural Organisation (FAO), the Economic and Social Commission for Asia and the Pacific (ESCAP), the United Nations Environment Programme (UNEP), the Ocean, Economics and Technology Branch (OETB), the United Nations Development Programme (UNDP), the United Nations Commission on Trade and Development (UNCTAD), the Economic Commission for Africa (ECA), the Office of the Legal Affairs and the Office of the Law of the Sea, at the United Nations Secretariat. A two day meeting was thereafter arranged at the United Nations Headquarters in New York on the 17th and 18th September 1984 for exchange of views on the subject at the invitation of the Secretary General of the AALCC. The meeting was attended by the representatives of the UNESCO, IOC, FAO, IMO, OETB, UNDP, the Office of the Legal Affairs and the Office of the Law of the Sea. After a general exchange of views, it was decided that the various offices and agencies participating in the meeting would send written memoranda about the programmes that are contemplated by the various agencies in relation to the Indian Ocean.

At the Kathmandu Session, in the course of the discussions on this topic, the delegate of Sri Lanka informed the Committee that his government following consultations with various United Nations agencies had decided to convoke an international conference on the Indian Ocean in Colombo in the middle of 1985. The first phase of the conference on Indian Ocean Co-operation in Marine Affairs was accordingly held in Colombo in July1985.

This item was not included in the agenda of the Arusha Session. The delegation of Sri Lanka, however, while referring to the out come of the first phase of the Colombo conference expressed the hope that the Committee would continue its close association with the initiative taken by his Government.

# LAW OF INTERNATIONAL RIVERS

## INTRODUCTION

The subject "Law of International Rivers" had originally been taken up by the AALCC upon two references made by the Governments of Iraq and Pakistan under Article 3(b) of the Committee's Statutes*. Iraq's primary interest appeared to be related to two basic questions, namely:-

i) Definition of the term "International Rivers;

ii) Rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes not connected with navigation.

Pakistan's primary concern also appeared to be with regard to the uses of waters of international rivers, and more particularly, the rights of lower riparians. One of the major issues which arose in the course of discussions at the Ninth Session of the Committee held in New Delhi in 1967, was how far the rules developed and practised by European nations would be applicable to the problems which arose in the Asian-African regions having regard to the different geophysical characteristics of the rivers and the needs of the people for varying uses of the waters.

The Committee, at its Tenth Session held in Karachi in 1969, took note of the views and opinions expressed by jurists and experts on various issues, the decisions of the Permanent Court of International Justice, national courts and arbitral tribunals as well as the work already done by such institutions and bodies as the International Law Association and the Institute of International Law. It also considered the relevant provisions of treaties and conventions with regard to international rivers in Asia, Africa, Europe and the Americas. A Sub-Committee was appointed to prepare a set of draft articles on the law of international rivers, "particularly in the light of experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems" for the consideration at the next Session.

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* Revised statues, Article 4 (c)

Thereafter the matter was discussed at the Eleventh Session (Accra, 1970), the Twelfth Session (Colombo, 1971), Thirteenth Session (Lagos, 1972) and the Fourteenth Session (New Delhi, 1973)*. At the New Delhi Session, the Committee decided to defer consideration of the item to one of its future sessions.

Subsequently, at the suggestion of the Government of Bangladesh, the subject was placed on the agenda of the Twenty-third session of the Committee held in Tokyo in May 1983. The matter for consideration at the Tokyo Session was whether the topic should be taken up by the Committee for further study and, if so, what should be the scope of its work taking into account the progress made by the International Law Commission (ILC). In the course of the general debate, a view was expressed that the resumption of the work by the Committee on this topic would not in any way hamper the progress of the work in the ILC or in any other forum. It was felt that the Committee should avoid any duplication of work. A suggestion was made that the Committee might prepare some guidelines for a regional system agreement for discussion at the next session. At the conclusion of the discussions it was agreed that a preliminary study should be prepared by the Secretariat for further consideration at its next Session. It was also indicated that the preliminary study should be undertaken with a view: (i) to identify the areas which were not likely to be covered by a work of the ILC and where it was deemed desirable that the Committee should undertake a study; (ii) to examine the provisions of the Articles provisionally adopted by the ILC and (iii) to submit a tentative programme of work for consideration of the Committee.

At its Kathmandu Session, the Committee considered the Preliminary Report and an outline on tentative programme of 'work' prepared by the Secretariat. The Preliminary Report had *inter-alia* included a summary of the progress of work in the International Law Commission; some general comments on the Draft Articles contained in the second report of the then Special Rapporteur, Mr. Evensen; and had indicated the areas not covered by the International Law Commission and had listed five areas wherein work might be undertaken by the Committee viz.

i) An examination of the draft articles after they are adopted by the ILC and to furnish comments thereon for consideration of the

* For details see reports of the Eleventh, Twelfth, Thirteenth and Fourteenth Sessions of the Committee, published by the AALCC Secretariat.



Sixth Committee and possibly for a Diplomatic Conference;

ii) Development of norms and guidelines for the legal appraisal of the validity or otherwise of any objection that may be raised by one watercourse State in relation/regard to projects sought to be undertaken by another watercourse State;

iii) Study of the matter relating to navigational uses of, and timber floating in, international watercourse;

iv) Study of other uses of international rivers such as agricultural uses* economic and commercial uses** and, domestic and social uses***, and

v) Study of the State practice in the region of user agreements and examing the modalities employed in the sharing of waters of such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

During the general debate there were few suggestions for the future course of the work of the Committee on this topic. A view was expressed that the Committee should decide its course of work on the subject keeping in view the exercise of the International Law Commission in this respect and that a study of the navigational uses of international rivers be made. On the other hand one delegation was of the view that the rules relating to the navigational uses of international watercourses were already well established and recognised and proposed that the Secretariat of the Committee should render its assistance to the International Law Commission for completing its study. Yet another delegation suggested that the Secretariat should undertake the preparation of a study based on certain principles including, *inter alia*, the equitable apportionment of waters; prohibition against activities causing appreciable harm to other riparians; environmental protection and the pacific settlement of disputes. Another suggestion was for the preparation of a study on the State practice in the region of user agreements and the modalities

* Irrigation, Drainage, Waste Disposal Aquatic Food Production, Development of Fisheries.

** Energy Production/Power Generation (Hydroelectric, mechanical and nuclear); other than Navigation; Waste Disposal; and Extractive .

*** Consumptive (Drinking, Cooking, Washing, Laundary etc; Waste Disposal; Recreational (Swimming, Sports; Fishing, Boating etc),

employed in the sharing of international watercourses in Africa and Asia. One delegate was of the view that the Committee should defer its work on the subject until after the International Law Commission had concluded its work on the draft articles on the Non-navigational uses of International Watercourses. At the end of the debate there was, however, no clear decision in regard to the future work of the Committee.

For the Arusha Session, the brief prepared by the Committee was restricted to monitoring the progress of work in the ILC. In the course of the discussions a view was expressed that it would be appropriate to reconsider the subject of international rivers in the light of the progress registered in recent years. It was pointed out that whilst the ILC had considered the subject from the viewpoint of the bilateral and multilateral agreements for non-navigational uses of international rivers, recent practices reveal the creation and functioning of international commissions and organisations for the sharing of water resources of such international rivers as the Senegal, Niger, Rio Moni and La Plata.

One delegation proposed that the Committee could undertake preparation of studies in the following areas:

i) Some guidelines for a regional and sub-regional agreement concerning the establishment of International commissions and the organisations for non-navigational uses of international rivers in Asian-Afrian region;

ii) Some characterisation, and if possible, revision of the provision of the texts of ILC Part II of Draft Articles on the Law of Non-Navigational Uses of International Watercourses provisionally adopted by ILC in its work programme;

iii) Some comparative exposition of law of international commissions and organisations concerning non-navigational uses of international rivers.

A view was expressed that the historic rights of a State to the waters of an international watercourse and the principle of apportionment according to a special agreement were non-controversial principles. Another view was that it was for the co-riparian states to negotiate and



agree upon what was beneficial to all of them.

At the close of the discussion, it was decided that the Committee's Secretariat would continue monitoring the progress of the work in the International Law Commission.

# STATUS AND TREATMENT OF REFUGEES

## INTRODUCTION

The item "Status and Treatment of Refugees" was originally taken up by the Committee at the request of the Government of Egypt in 1964. The deliberations at the Committee's Sessions in Cairo (1964) and Baghdad (1965) culminated in the formulation of a set of AALCC's recommendations concerning the treatment of refugees. These Principles known as "Bangkok Principles" adopted at the Bangkok Session in 1966, have been widely applied in the practice of States and have also formed the basis of the UN Declaration on Territorrial Asylum in 1967. Further, at the Accra Session in 1970, the Committee adopted an Addendum to the Bangkok Principles.

The item was again placed on the agenda of the Tokyo Session in 1983 at the suggestion of the United Nations High Commissioner for Refugees (UNHCR). At that Session, after a general exchange of views, it was decided that the AALCC Secretariat should prepare a preliminary study on the principles of burden-sharing and state responsibility in relation to the problems of refugees concentrating on the legal aspects of the matter. Accordingly, the Secretariat prepared a study and submitted it for consideration at the Kathmandu Session.

During the general debate several delegations recognised that the refugee problem was an international issue and it required efforts at the international level to solve it. It was felt that the international community should not only give humanitarian assistance in this regard but also strive towards an approach to the fundamental resolution of the problem and to prevent new exodus of refugees in any part of the world. It was stressed that due regard had to be given to alleviate the burden on the host state so as to avoid international disputes and strains. It was suggested that voluntary repatriation could contribute towards a durable solution of the problem. It was, however, pointed out that as a prerequisite, conditions of peace and security must be created in the country of origin to enable expeditious return of refugees to their hearths and homes in peace and honour. A view was expressed that burden sharing being a practical expression of the principle of

international solidarity had become the spring-board for international action in favour of refugees. Another view was that the elaboration of the concept of State responsibility might positively contribute to the final solution of the problem of refugees. It was suggested that while considering the question of Sate responsibility a distinction should be drawn between refugees as such and those who were forcibly expelled from their homeland ignoring humanitarian norms and in violation of the 1966 Covenant on Civil and Political Rights.

Finally, a suggestion was made to examine the legal framework for safety zones that could be created in the home of origin so as to encourage voluntary return of refugees.

At the close of the discussions, a consensus was reached that the Secretariat should prepare another addendum to the Bangkok Principles and submit the same for consideration at the next session.

For the Arusha Session, the Secretariat accordingly submitted a further study dealing with burden sharing and a set of principles which could be considered for adoption as an addendum to the Bangkok Principles. Another topic which had been included in the agenda of the Arusha Session in the context of the discussion on refugees was a review of the international conference on the situation of Refugees in Africa held in Arusha in 1979 and the follow-up measures taken thereon.

In the course of the general discussions, the Representative of the UNHCR stated that the work of the Committee, especially in the development and strengthening of the "Bangkok Principles" concerning treatment of refugees had been of great importance in the promotion and devlopment of international law. He considered that the 1979 Arusha Conference on Refugees was a landmark particularly in the progressive development of norms and principles relating to the treatment of refugees and in the dissemination of awareness of the special problems and needs of refugees. He said that several follow-up actions had been undertaken by the OAU in consultation with the UNHCR. In his view, the 1979 Arusha Conference and its follow-up measures provided an example of a "regional approach" to refugee problems. He felt that the approach, which had been successful in Africa,could also be undertaken in Asia. Further, on the question of international solidarity and burden sharing, he recognised that from the practice of States it was obvious that the international burden sharing applied to all aspects of the refugee situations and took place at the bilateral, regional and global levels. He stressed that such a practice was firmly established and States should be called upon to continue



and indeed improve their efforts in that respect.

Some delegations held the view that the status and treatment of refugees was a complex issue with both political and legal dimensions. Moreover, the massive exodus of refugees not only imposed heavy economic and social burden on the international community and the third world countries in particular, but also destabilised the international situation.

One delegation drew attention to the problem of mass exoduses caused by the natural and manmade factors. While recognising international solidarity as a necessary condition for solving the escalating refugee problem it was, however, stressed that international solidarity and its two underlying concepts of State responsibility and burden sharing would yield the desired result only when earnest efforts were made to identify and tackle the root causes of the refugee problem. In his view the adherence to regional and international covenants on human rights, respect for sovereignty and territorial integrity of other States and implementation of various United Nations resolutions against racial discrimination and violation of human rights were some of the measures to prevent the arising of the refugee situations. He felt that there was no need to create new organs to deal with situations producing mass exoduses and the better alternative would be to enhance the capability of the UNHCR in that respect.

Another delegate emphasised that the solution to refugee problem could be found only when its source and adverse effects were identified first. In his view, the term "solidarity" had to be given a broad interpretation, and should include economic assitance, non-intervention in the internal affairs and concerted move to deal with the racist regimes.

One delegation suggested that the AALCC Secretariat should consider the problem of State responsibility and prepare a comprehensive study of the subject. Furthermore, it should also examine the difference between the legal status of those who had become refugees through their own volition and those who had been illegally expelled from their country. In his view, elimination of the root causes of the problem of refugees such as presence of alien forces, racism, zionism, *apartheid* and State terrorism was of great importance.

Another delegation while recognising the need to devise institutional arrangements to implement principles of international solidarity and burden sharing urged the AALCC Secretariat to study matters concerning the proper forum and the modalities in that context.

One delegation drew attention to the specific problem of involuntary or forced situations of large inflow of refugees and suggested that the Secretariat should study the legal issues concerning this problem.

Another delegate stressed the need for evolving such principles which might result in effective burden sharing by the international community and the international organisations in a manner of self-working procedure of rendering assistance to the refugee receiving states.

One delegation suggested that the Secretariat should prepare a study on the establishment of safety zones for refugees or displaced persons in their country of origin. It was felt that such safety zones would create a lesser burden for the international community than the exodus of refugees to neighbouring countries and their resettlement in third countries. It was suggested that the Secretariat in initiating its study might take into account the following general guidelines: Firstly, circumstances under which safety zones might be established in the home country of refugees or displaced persons?Secondly, who would control the safety zones? Should it be under the management of international organisations? Thirdly, what regime should be applied to the safety zones? The minimum standard should be neutralized zone where any kind of fighting must be prohibited.

The Secreatry-General, while summing up the discussions, said that the Committee had completed consideration of the topic "Burden Sharing" and a draft report on the same would be submitted for consideration. The draft report, however, could not be finalised at the Arusha Session and its adoption was deferred until the next Session. As regards the topic of State Responsibility and the proposal concerning the establishment of safety zones it was decided that the Secretariat would prepare further studies for consideration at the next session.

# VIII. MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE TAKING OF EVIDENCE BOTH IN CIVIL AND CRIMINAL MATTERS

# MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS, ISSUE OF LETTERS ROGATORY AND THE TAKING OF EVIDENCE BOTH IN CIVIL AND CRIMINAL MATTERS

## Introduction

The topic concerning mutual assistance for the service of process, taking of evidence or obtaining of information both in civil and criminal matters had been undertaken by the Committee's Secretariat with a view to preparation of the Draft for a regional or sub-regional Convention on the model of the Inter-American Convention on Letters Rogatory (1975) in pursuance of the Committee's decision taken at its Seventeenth Session held in Kuala Lumpur in June 1976.

This was in the context of the need felt to promote judicial cooperation as between the countries of the region in view of their wider involvement in trade, commerce and industrial development in recent years. Extensive investments had been made in the developing countries of the region in projects of national importance by countries both within and outside the region which have led to employment of technicians and other personnel from the investing countries in addition to vast movement of labour to the Middle East from overpopulated areas. These increasing contacts made it incumbent that proper judicial process should be available to facilitate protection of rights and enforcement of obligations of the parties involved which could not be achieved without adequate cooperation between the countries concerned. It was felt that a beginning in this direction could be made with the assistance being rendered in the service of process and taking of evidence abroad as these were considered to be areas where it might be relatively easy to achieve concrete results within a reasonable time frame.

The Committee's Secretariat had accordingly prepared the draft for a proposed multilateral Convention and this was placed before the Twentieth Session of the AALCC held in Seoul in February 1979. The Draft of the Convention dealing with civil and criminal matters was further considered at the Committee's Jakarta (1980) and Colombo (1981) Sessions. 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 or commercial matters and the other relating to assistance in criminal proceedings. The Committee also decided that the two drafts when prepared, should be considered by an Expert Group during the inter-sessional period.

The Expert Group which met at the Committee's Secretariat in New Delhi in August 1982 expressed the view that it would be preferable initially to contemplate bilateral arrangements for mutual assistance in judicial matters in order to promote contacts between the States of the region which could eventually provide a solid basis for a multilateral Convention on the pattern which had found acceptance in other regions. The Expert Group accordingly prepared the drafts of two model arrangements for judicial assistance on bilateral basis-one related to civil or commercial matters and the other on letters rogatory relatable to criminal proceedings. The draft models were placed before the Tokyo Session of the AALCC in May 1983 where the matter was extensively discussed.

The Plenary endorsed the approach of the Expert Group that it would be more productive at this stage to contemplate judicial assistance on bilateral basis and comments were accordingly invited from member governments on the two draft model arrangements. The modality of bilateral arrangements appeared to be generally acceptable to member governments and the comments received from governments on the drafts were either of a drafting nature or related to technical details.

At the Kathmandu Session, it was decided that the draft model for bilateral arrangements on mutual assistance for the service of process and the taking of evidence abroad in civil or commercial matters should be finalised by an Expert Group in the light of the comments received and that thereafter it be submitted to governments as the final recommendations of the Committee on the subject. There however, appeared to be some difference in views about the scope of the model arrangements on letters rogatory relatable to criminal proceedings.

A Working Group with the participation of the Hague Conference on Private International law, the Commonwealth Secretariat, the League of Arab States together with the representatives of ten governments met at the Hague from the 24th to 26th June 1985 and finalised the draft of the model bilateral arrangements for mutual assistance relatable to civil and commercial matters.

The model text was thereafter examined and approved with some changes at the Arusha Session. The model text as finally approved has

been sent to member governments. It is felt that the member governments might find the model useful in assisting them to negotiate bilateral arrangements with interested governments. It may be mentioned that a country which is a party to a multilateral or regional convention is not precluded in any manner from entering into bilateral arrangements with countries which are not parties to such convention. Indeed there is nothing in the AALCC draft model bilateral arrangement which is inconsistent with the Hague Conventions or the Regional Conventions in force.

## MODEL FOR BILATERAL ARRANGEMENTS ON MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS AND THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

### Preamble

The States Parties to the present Arrangements, desirous of bringing about closer co-operation in the matter of mutual assistance for service of process, taking of evidence and other related functions in aid of judicial proceedings relating to civil or commercial matters,

Have agreed as follows:

## CHAPTER I
### General Provisions

#### *Article 1*

### Use of terms

For the purposes of these Arrangements:

(a) *Process*: means any notice, writ, summons or any other type of document, which is required to be served on a party or witness in judicial proceedings relating to civil or commercial matters;

(b) *Requesting State*: means the State which requests the service of process in the territory of another State or the State from which a request to take evidence, obtain information or perform some other judicial act emanates;

(c) *Requested State:* means the State in which the service to be effected or the State in which the request is to be executed for taking of evidence, or performing some other judicial act or obtaining information;



(d) *Central Agency*: means the authority which is empowered:

(i) to transmit to a Central Agency of the other Contracting State requests or letters of request for the purpose of service of process or for taking of evidence, or performing some other judicial act, or obtaining of information, emanating from a competent authority of its own State; and

(ii) to receive and to take action on requests or letters of request transmitted by a Central Agency of the other Contracting State.

#### *Article 2*

### Scope of the Arrangements

1. The Contracting States undertake to afford each other, in accordance with and subject to the provisions of these Arrangements, mutual assistance with regard to service of process, taking of evidence or performing some other judicial act, or obtaining of information, by means of requests or letters of request issued for the purpose, addressed by a competent authority in one State Party to a competent authority of the other State in civil or commercial proceedings.

2. Letters of request shall not be used for taking of evidence which is not intended for use in judicial proceedings.

3. The expression 'other judicial act' does not cover the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

#### *Article 3*

### Execution of request or letter of request non-commitment to recognition of the judgment

Execution of the request or the letter of request shall not imply ultimate recognition of the jurisdiction of the authority issuing it or a commitment to recognize the validity of the judgment it may render or to enforce it.

#### *Article 4*

### Central Agency

1. Each Contracting State shall designate or establish a Central Agency through which requests or letters of request to the other Contracting State shall be transmitted. Requests or letters of request from the other Contracting State shall be received by the

Central Agency which shall forward them to the competent authorities in its own State for taking action.

**Note**: Federal States shall be free to designate or establish more than one Central Agency and this paragraph would need to be adapted accordingly.

2. Each Contracting State shall inform the other Contracting State the name and address of the Central Agency (or Agencies) designated or established in accordance with the provisions of this Article.

### *Article 5*

**Legalisation**

The request or the letter of request shall be presumed to be duly legalised in the requesting State when the same is signed and bears the seal or stamp of a Central Agency.

### *Article 6*

**Language**

1. The request or the letter of request and the appended documentation shall be drawn up in the _____ language(s) or be accompanied by a translation into that language/those languages.

2. The reply shall be prepared and transmitted in the language(s) specified in paragraph 1 or be accompanied by a translation.

3. Any translation accompanying a request or a letter of request shall be certified as correct, by a person qualified for this purpose under the law of either State.

### *Article 7*

**Time-limits**

The competent authority issuing the request may indicate a time-limit for the service of process or taking of evidence, obtaining of information or performing some other judicial act in the requested State. The competent authority shall briefly state the reasons for establishing such time-limit. The Central Agency of the requested state shall communicate with the Central Agency of the requesting State if any



difficulty is experienced in adhering to the time-limit. The competent autnority of the requesting State shall have the option to indicate a further period of time for taking action on the request.

### *Article 8*

**Compliance with the Arrangements**

If the Central Agency of the requested State considers that the request or the letter of request does not comply with the provisions of the present Arrangements it shall promptly inform the requesting Central Agency and specify its objections.

### *Article 9*

**Grounds for non-compliance with the request or the letter of request**

1. The execution of a request or of a letter of request may be refused if the requested State considers that its sovereignty, security, public policy or other essential interests (ordre public) would be prejudiced thereby.

2. The execution of a letter of request may also be refused if:

(a) the execution of the letter of request does not fall within the functions of the judiciary or any other competent organ of the requested State; or

(b) the requested State considers that the execution of the letter of request might prejudice the fundamental rights of any person; or that the letter of request concerns information held in confidence the disclosure of which is prohibited by law;

(c) [the letter of request seeks to obtain

(i) a statement from any person of the documents relevant to the proceedings to which the request relates which are or have been in his possession, custody or power; or

(ii) the production of any documents other than particular documents specified in the request as being documents appearing to the competent authority in the requesting Sate initiating the request to be, or to be likely to be, in his possession, custody or power.] * or

(d) [the letter of request relates to taking of evidence prior to judicial proceedings or in "pre-trial discovery of documents" as known in the common law system.] *

* In negotiating these Arrangemens Governments may choose to include either sub-paragraph (c) or (d) These sub-paragraphs cover the same ground i.e. they allow the refusal of letters of request, issued in the context of pre-trial discovery of documents, which seek to obtain testimony on, or production of, unspecified documents ("fishing expeditions").

3. [Execution of a request or of a letter of request may not be refused solely on the ground that under its internal law the requested State claims exclusive jurisdiction over the subject-matter of the proceedings or that its internal law would not permit the bringing of the proceedings to which the request or letter of request relates.]

4. In any case in which the execution of a request or a letter of request is refused, the Central Agency of the requested State shall promptly inform the requesting Central Agency and state the grounds for such refusal.

## CHAPTER II

## Service of Process

### *Article 10*

**Form of Request**

1. The authority competent under the law of the requesting State shall forward a request for the service of process to its own Central Agency for transmission to the requested State.

2. The request for the service of process shall be drawn up in accordance with form 'A' appended to the present Arrangements and the document to be served or a copy thereof shall be annexed to it. The request and the document shall both be provided in duplicate.

### *Article 11*

**Execution of request for service**

1. The authorities of the requested State shall effect service of the process on the person to be served by any method prescribed or permitted by its internal law.

2. Where the competent authority of the requesting State has indicated any particular method of service, an endeavour shall be made to comply with such request provided that the same is not inconsistent with the laws of the requested State.



3. A summary of the document to be served, drawn up in accordance with form 'C' appended to the present Arrangements, shall be served together with the document.

### *Article 12*

**Certificate of the executing authority for service of process**

The Central Agency of the requested State or any authority which it may have designated for that purpose, shall complete a certificate in form 'B' appended to the present Arrangements.

### *Article 13*

**Costs**

The requested State shall be entitled to be reimbursed by the requesting State:

(a) the fees or charges paid for effecting service as authorised under the law of the requested State; and

(b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.

### *Article 14*

**Service of process by diplomatic or consular officers**

A diplomatic or consular officer of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, effect service of judicial documents upon his own nationals provided no measures of compulsion be applied.

### *Article 15*

**Service of process by post and other modes***

Subject to any objection on the part of a Contracting State:

(a) each Contracting State may send judicial documents by postal channels, directly to persons in the other Contracting State;

(b) the judicial personnel, officials or other competent persons in a

* The Contracting Parties whilst negotiating may consider which of these modes, if any, are to be included in the bilateral Arrangements.

Contracting State may effect service of judicial documents directly through the judicial personnel, officials or other competent persons in the other Contracting State; and

(c) any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial personnel, officials [legal practitioners] or other competent persons in the other Contracting State.

## CHAPTER III

## Taking of Evidence

### *Article 16*

### FORM OF REQUEST

1. The authority or Judicial officer competent under the law of the requesting State shall forward to its own Central Agency a letter of request for taking of evidence or performing some other judicial act of an analogous nature with the request to transmit it to the Central Agency of the requested State. The letter of request shall be drawn up in form 'D' appended to the present Arrangements.

2. The relevant authorities in the requesting State shall ensure that its formalities and procedures prescribed by its laws for the admissibility of validity of the requests made in the letter of request are fully complied with before taking any action under this article.

### *Article 17*

### Execution of letters of request

1. The authority responsible for the execution of letters of request shall apply its internal law as to the methods and procedures to be followed.

2. However, it shall follow any special method or procedure specified in the letter of request unless that procedure conflicts with the internal law of the requested State or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.



3. [If the requesting State desires witnesses or experts to give evidence on oath, it shall expressly so state, and the requested State shall comply with the request if its internal law does not prohibit the same.]

4. In the execution of the letter of request, the authorities of the requested State shall not require any person to give evidence in respect of any matter where he has a privilege or duty to refuse to give such evidence under the law of the requested State or of the requesting State.

5. The requested State may transmit original or certified copies of records or ducuments requested.

### *Article 18*

### Notice to the requesting authority regarding time and pla - ce of the execution of the request

1. On the express request of the requesting authority the requested State shall inform that authority of the time when, and the place where, the proceedings will take place. The requested State shall endeavour to send such information directly to the parties when the authority of the requesting State so desires.

2. The officials designated by the requesting State and parties concerned may be present or be represented at the proceedings, if the same is not inconsistent with the internal law.

### *Article 19*

### Application of the measures of compulsion by the autho - rity

[In the execution of the letter of request, the requested authority shall apply appropriate measures of compulsion in the instances and to the same extent as are provided for by its inernal law.]

### *Article 20*

### Costs

1. The requested State shall be entitled to be reimbursed by the requesting State:

(a) the fees or charges paid to experts, witnesses, interpreters or any

other person as authorised under the law of the requested State; and

(b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.

2. [The requested State whose law obliges the parties themselves to secure evidence may, after having obtained the consent of the requesting Central Agency, appoint a suitable person to execute the letter of request. When seeking such consent the requested Central Agency shall indicate the approximate costs which would result from following of this procedure. If the requesting Central Agency gives its consent the requesting State shall reimburse the costs incurred; without such consent the requesting Sate shall not be liable for the costs.]

### *Article 21*

### Taking of evidence by diplomatic or consular officers

1. A diplomatic or consular officer of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, take the evidence of nationals of his home State in aid of proceedings commenced in the courts of that State, without application of any compulsion.

2. If an attempt to obtain evidence in the manner provided for in paragraph 1 of this Article fails, it shall not prevent a letter of request being subsequently sent to the Central Agency of the requested State in accordance with Article 16 of these Arrangements.

### *Article 22*

### Taking of evidence by commissioner

The Commissioner appointed by a judicial authority in a Contracting State to record the evidence of a witness or expert, for the purposes of proceedings pending before it, may take such evidence in the other Contracting State, provided a competent authority of that State has given its endorsement or authorisation on the warrant of commission and subject to such terms and conditions as may be specified in the endorsement or authorisation.



## CHAPTER IV

## Request for Information and Documents

### *Article 23*

### Request for information on laws and regulations

The Contracting States agree to furnish each other with information on their laws and regulations relating to civil or commercial matters, both substantive and procedural, whenever a request is made by a Contracting State.

### *Article 24*

### Requests for judicial records

1. Upon the request made by a judicial authority of the requesting State transmitted through the Central Agency, extracts from and information relating to judicial records shall be made available to the same extent and in like manner as these are available as between the judicial authorities in the requested State.

2. The requesting authority shall specify the purpose for which the extract or information referred to in paragraph 1 is required and may not use such extract or information for any other purpose.

3. If compliance with any request made under this Article involves expense for the requested State, it may obtain reimbursement of such expense from the requesting State.

## CHAPTER V

## Final Provisions

### *Article 25*

### Entry into force of the Arrangements

1. [The present Arrangements shall be subject to ratification]

2. [The Arrangements shall enter into effect _____ days

after the date of exchange of instruments of ratification and shall remain in force for a period of ——— years]

*Article 26*

**Other international agreements, practices or arrangements**

Except as may be specified herein, nothing in these Arrangements shall affect existing or future bilateral or multilateral agreements, practices or other arrangements between the Contracting States which relate to matters dealt with in these Arrangements.

Note: If certain existing bilateral or multilateral agreements, practices or arrangements are to be replaced or superseded, in whole or in part, and those agreements or arrangements so permit, this should be specified in a second paragraph to this Article.

*Article 27*

**Difficulties arising in operation of the Arrangements to be settled through negotiation**

Any difficulties which may arise between Contracting States in regard to the interpretation or application of these Arrangements shall be settled through negotiation.

*Article 28*

**Revision of the Arrangements**

At the request of any Contracting State, the State Parties shall enter into negotiations with a view to examine the provisions of these Arrangements and to consider the advisability of a revision or of an enlargement of the scope of these Arrangements.

*Article 29*

**Denunciation of the Arrangements**

Either Contracting State may denounce these Arrangements by means of a notification communicated to the other State Party. Denunciation shall take effect six months after the date of receipt of such instrument of denunciation.

Note: The Committee decided that the provisions in regard to which



some differences of view had been expressed should be placed within square brackets [ ] so that the governments may give special consideration to those articles whilst negotiating agreements.

**APPENDIX**

The delegate of Pakistan suggested that the following articles be included in the draft:

**Provisions relating to equality of treatment in judicial matters**

*Article X*

The nationals of a Contracting Party shall, in the territory of the other Party, be entitled to legal protection for their persons and property and to bring actions or defend themselves under the same conditions, including charges and costs, and shall enjoy the same rights as the nationals of the other Contracting Party.

*Article Y*

The nationals of a Contracting Party resident in the territory of the other Party shall not be constrained to effect any payment as security for court costs which the nationals of the other Party are not obliged to deposit or pay.

*Article Z*

The nationals of a Contracting Party shall, in the territory of the other Party, enjoy free legal aid on the same basis as the nationals of the latter.

## ANNEX TO THE DRAFT OF MODEL BILATERAL ARRANGEMENTS ON MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS AND THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

### FORMS

i. Request for Service - Form 'A'
ii. Certificate - Form 'B'
iii. Summary of the Document to be served - Form 'C'
iv. Request for Taking of Evidence - Form 'D'

**FORM 'A'**

### ANNEX TO THE ARRANGEMENTS* REQUEST FOR SERVICE**

1. REQUESTING CENTRAL AGENCY:

   ADDRESS

2. RECEIVING CENTRAL AGENCY:

   ADDRESS

3. REFERENCE: Of the requesting authority

4. SUBJECT OF THE REQUEST:Service abroad of documents (documents listed below**enclosed in duplicate)***

5. ADDRESSEE OF THE DOCUMENT:
   (A) NAME (In Capitals):

   (B) Where applicable, further details for identification of the address:

   (C) ADDRESS:

   (D) COUNTRY:

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* As referred to in Article 10 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.

** This form must be drawn up in duplicate, one being the original, the other the copy.

*** In the event of service of summons on an action instituted, a copy of the complaint or statement of claim shall be provided.



6. METHOD OF SERVICE REQUESTED:
   (a) in accordance with the method prescribed by internal law of the requested State:-
   (b) in accordance with the following method:-

7. IDENTITY AND ADDRESS OF THE ADDRESSEE:
If the requested authority requires additional information for effecting service, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished:_____. The document sent with the this request should however be retained with the requested authority pending supply of the additional information by the requesting authority.

8. TIME-LIMITS:
The document should be served before_____(Date). The reasons for fixation of the time-limit are the following: _____. If it is not possible to effect service by the dates specified, the document should be returned unserved/it should be served whenever possible.*

The authority is requested to return or arrange to have returned to the requesting authority a copy of the documents - and of the annexes - with a CERTIFICATE as provided in Form 'B'.

List of documents _____Done at_____,_____the _____

_____Signature and/Seal_____

*Delete whichever is inapplicable.

**FORM TO BE RETURNED 'FORM 'B'**
**CERTIFICATE**

The undersigned authority has the honour to certify, in conformity with the provision of the Arrangements.

1. THAT THE REQUEST HAS BEEN COMPLIED WITH:
ON (DATE)_____
AT (Place, Street, Number)_____
In one of the following methods:
(a) in accordance with the methods prescribed by internal law of the requested State:-
(b) in accordance with the following method:-
The documents referred to in the request have been delivered to:
(identity and description of person) _____
relationship to the addressee _____
(family business or other ) _____
2. THAT THE REQUEST HAS NOT BEEN COMPLIED WITH FOR THE FOLLOWING REASONS:
3. ANNEXES
   (a) Statement of Costs
   (b) Documents establishing the service
   (c) Documents returned

Done at _____, the _____

Signature and/Seal*

*Article 12 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.



**IMPORTANT**

**THE ENCLOSED DOCUMENT IS OF A LEGAL NATURE AND MAY AFFECT YOUR RIGHTS AND OBLIGATIONS. THE 'SUMMARY OF THE DOCUMENT TO BE SERVED' WILL GIVE YOU SOME INFORMATION ABOUT ITS NATURE AND PURPOSE. YOU SHOULD, HOWEVER, READ THE DOCUMENT ITSELF CAREFULLY. IT MAY BE NECESSARY TO SEEK LEGAL ADVICE.**

**FORM 'C'**

**SUMMARY OF THE DOCUMENT TO BE SERVED***

1. NAME AND ADDRESS of the Requesting Authority:

2. Particulars of the parties**.

3. Nature and purpose of the document:

4. Nature and purpose of the proceedings and, where appropriate, the amount in dispute:

5. Court or legal authority; date and place for entering appearance.***

6. Court which has given judgment:***

7. Date of judgment:***

8. Time-limits stated in the document:***

* Article 11 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Aborad in Civil or Commercial Matters.

** If appropriate, identity and address of the person interested in the transmission of the document.

*** Where applicable.

FORM 'D'

## ANNEX TO THE ARRANGEMENTS
## REQUEST FOR TAKING OF EVIDENCE*

1. Requesting Central Agency:

   Address

2. Receiving Central Agency:

   Address

3. Authority to whom the intimation about the execution of the request is to be sent. (address)

4. (a) Requesting judicial authority (address)

   (b) The competent authority of requested State

5. Names and addresses of the parties and/or their representatives in the proceedings.

* As referred to in Article 16 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.



6. Nature and purpose of the proceedings and summary of the facts.

7. Evidence to be obtained/other judicial act to be performed.
   (Items to be completed where applicable)

8. Identity and address of any person to be examined.

9. Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined (as set out in the attached sheet).

10. Documents or other property to be inspected.
    (Specify whether it is to be produced, copied, valued, etc.)

11. [Any requirement that the evidence be given on oath or affirmation and any special form to be used.]
    (in the event that the evidence cannot be taken in the manner requested, specify where it is to be taken in such manner as provided by local law for the formal taking of evidence.)

12. Special methods of procedure to be followed.

13. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified.

14. Request for attendance or participation of personnel from the requesting State at the execution of a request.

15. Specification of privilege or duty to refuse to give evidence under the law of the requesting State.

16. The fees and costs incurred which are reimbursable under the Arrangements will be borne by: (address)

17. If the requested authority requires additional information for executing the request, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished.
    (The documents sent with this request should, however, be retained with the requested authority pending supply of the additional information by the requesting authority.)

18. Time-limits: The request should be executed before:
The reasons for fixation of the time-limits are the following:

19. Certificate by Competent Authority of the requesting State that the required formalities under their municipal laws for the issue of the letter of request has been complied with.

If it is not possible to execute the request by the dates specified, the request should be returned unexecuted/it should be executed whenever possible.*
Done at _____, the _____

Signature and seal of the requesting authority.

*Delete whichever is inapplicable.



## EXPLANATORY NOTES ON THE PROVISIONS OF THE MODEL BILATERAL ARRANGEMENTS FOR MUTUAL ASSISTANCE IN CIVIL OR COMMERCIAL MATTERS

# CHAPTER I

### General Provisions

#### *Article 1*

This Article is intended to state the meanings given to the various terms used in the text of these Arrangements. The definitions attributed to the terms in Clauses (a), (b), (c) and (d) are self-explanatory and are "for the purposes of these Arrangements" only. The expression 'person' used in the Model has not been defined but it is to be understood as required in the context and may include individuals and Corporate entities also.

#### *Article 2*

This Article determines the scope of these Arrangements. It contains the formal undertaking on the part of the Contracting States to afford each other mutual assistance with regard to: requests issued for the service of process for the purpose of performance of procedural acts of a formal nature such as service of documents, summons or subpoenas abroad; or letters of request issued for the purpose of taking of evidence; performing some other judicial act abroad; or obtaining information in civil or commercial proceedings.

These Arrangements stipulate that requests or letters of request must emanate from a competent authority of one of the States Parties to these Arrangements to the competent authority of the other Contracting State. Since the structure of competent judicial authorities varies considerably from one State to another, it has not been found practicable to set out the types of authorities who would be deemed competent for the purpose of the Arrangements. A person interested in the service of process etc. has therefore to approach the competent authority in his own State.

Paragragh 2 refers to "judicial proceedings". It may be clarified that there need not necessarily be an action actually in progress in the requesting State when the letter of request is issued; for instance, a letter of request could be entertained for the purpose of "perpetuation of testimony" of an aged or dying witness.

Paragraph 3 of this Article specifically excludes the issuance of any

process for the enforcement of judgments or orders or for provisional or protective measures from the scope of the expression "other judicial act" as such matters are normally covered in agreements for reciprocal enforcement of judgements.

The term 'other judicial acts' is not defined in the Arrangements. It refers to acts analogous to the taking of evidence which under the domestic law and practice of the State of execution fall within the function of the judiciary. Paragraph 2 of this article specifically excludes the issuance of any process for the enforcement of judgements or order for provisional or protective measures from the scope of the expression 'other judicial act' as such matters are normally covered in agreements for reciprocal enforcement of judgements.

### *Article 3*

This Article has been specifically incorporated with a view to avoid any confusion that might arise by reason of the assistance rendered by the requested State in the execution of the request for service of process or the letter or request for taking of evidence. This is in consonance with the objectives and purposes of these Arrangements which are confined to service of process and taking of evidence only. This provision is of a clarificatory nature.

### *Article 4*

This Article deals with the transmission of the requests or the letters of request from the requesting State to the requested State by designation or establishment of a Central Agency which is generally becoming the normal practice. The concept of Central Agency has become extremely useful as it relieves the requesting State from finding out which authority in the requested State is competent to give effect to the request for assistance. Moreover, it enables the requested State to scrutinise the requests or the letters of request coming from abroad, by permitting an examination by that authority of the regularity of the request or letter of request and to ensure their compliance.

Paragraph 1 contemplates that each Contracting State will designate or establish a Central Agency, in accordance with its own law which will perform a twofold function: firstly, to receive requests or letters of request emanating from its own competent authorities for transmission to a Central Agency abroad; secondly, to receive requests or letters of request coming from the other Contracting State and to give effect to them. The Central Agency is thus intended to be a "receiving" authority and also a "transmitting" authority.



These Arrangements envisage that the requesting State should regulate the issuance of requests or letters of request, under its internal law, by its competent authorities and their transmission abroad. In other words, the Contracting State is obliged to direct that every request or letter of request emanating from its courts or tribunals must be sent to its own Central Agency for transmission to a Cental Agency abroad.

The internal organisation of the Central Agency is left to the Contracting State designating it to be determined in accordance with its own laws. The Central Agency, whether newly created or already in existence, should either be a Government department or other high level body; for example, the Ministry of Justice or the Foreign Ministry which may take the place of the Ministry of Justice in some States for the transmission of requests or letters of request. The reason for designating high authority as the Central Agency is that the task of Central Agency is not limited to receiving or forwarding requests but also includes checking their consistency with public poiicy as also in the matter of compliance with the provisions of these Arrangements.

The note to paragraph 1 of Article 4 takes care of those Contracting States having a federal system of Government. Such States may designate or establish more than one Central Agency with identical functions for each constituent unit of the federation.

Paragraph 2 provides that each Contracting State shall communicate to the other Contrating State the name and address of the Central Agency (or Agencies) designated or established, including any subsequent changes made, so as to facilitate speedy and effective working of these Arrangements.

### *Article 5*

Under this Article when requests or letters of request are signed and bear the seal or stamp of a Central Agency they are presumed to be duly legalised in the requesting State. The main purpose of legalisation is the formality of authenticating the request or the letter of request and the accompanying documents. Some views were however expressed that the requested State should have the option to ask for some other method of legalisation but the same did not find favour with the Working Group.

### *Article 6*

The Article concerns the language or languages in which the req-

uests or the letters of request and the documentation annexed, if any, as also the reply are to be drawn up or translated. Paragraphs 1 and 2 of this Article leave it to the Contracting States to mutually decide about the language or languages.

Paragraph 3 provides that any translation accompanying a request or a letter of request must be certified as correct by a person qualified for the purpose under the law of either the requesting or the requested State. A sworn translator would be the typical example of such a qualified person. Other examples include diplomatic or consular officers.

### *Article 7*

This Article provides that the competent authority issuing the request or the letter of request may indicate a time limit for the service of process or taking of evidence, obtaining of inforamiion or performing some other judicial act. The purpose for such a provision is to draw attention to the urgency of the request for the requested State to act accordingly. It also ensures that the person concerned is not adversely affected through the document being served on him too late. Although one of the main objects of these Arrangements is to ensure speedy procedures, the fact cannot be lost sight of that the time taken for the execution of request or letter of request by the requested State would always be more than the time taken for such matters within the territory of the requesting State by application of its internal law. It is further ensured that any prescription of a time limit is justified by the circumstances by making it obligatory on the competent authority of the requesting State to briefly state the reasons for establishing such time limit. Furthermore, the competent authority has the option to indicate a further period of time if the Central Agency of the requested State expresses any difficulty in adhering to the time limit.

### *Article 8*

A ticle 8 contemplates that the Central Agency of the requested State after examining the request or the letter of request may enter "objections" if the same does not comply with the provisions of these Arrangements. It is one of the functions of the Central Agency to ensure regularity of the request or letter of request required to be executed in the requested State. The Central Agency which receives the request cr the letter of request should promptly inform the Central Agency of the requesting State of the errors or defects to permit correction and amendment if possible.



For instance, the errors or defects would include cases where the request does not fall completely within the scope of the arrangements or technical irregularities like the failure to comply with the rules concerning language or the omission of any information which is necessary for the execution of requests or letters of request, or the absence of the complete address of the addressee of the documents or other information prescribed in the request form, as well as omission to enclose the documents desired to be served.

The Central Agency must specify its objections to the request or the letter of request with reasons, as it will permit the requesting authority to remedy the error more easily. This is also intended to prevent any arbitrary refusal by the requested State of the request or the letter of request for mutual assistance.

### *Article 9*

This Artcle enumerates the grounds for non-compliance with the request or the letter of request by the requested State. These are in fact, exceptions to the general obligation placed on the requested State to take action on the request for assistance. The Central Agency of the requested State can hold up the transmission of the request or the letter of request to the appropriate tribunal for execution if there are any objections on the grounds specified in this Article.

Paragraph 1 provides that a request or letter of request may be refused to be executed if it has the effect of interfering with the sovereignty or security of the requested State. This may happen, for example, when information is being sought to be obtained directly or indirectly through the recording of evidence of a person concerning matters which fall within the sovereign functions of the requested State or relating to its security such as movement of its armed forces or installations of strategic importance. The requested State may also refuse if the public policy or other essential interests, including economic interests, are likely to be prejudiced through obtaining of information by way of evidence.

Paragraph 2 adds three further grounds for refusal, the third of which appears in two alternative versions, i.e. sub-paragraphs (c) and (d). These grounds for refusal do not apply, however, to Chapter II (Requests for service), and IV (Requests for information) but only to Chapter III (Letters of request for the taking of evidence or the performance of some analogous judicial act abroad).

Sub-paragraph (a) of paragraph 2 is self-explanatory and provides

that a letter of request for taking of evidence may be refused if it does not fall within the functions of the judiciary or any other competent organ of the requested State.

Sub-paragraph (b) concerns the protection of the rights of the individual. This not only allows the requested State to refuse execution when it might be harmful to the rights of the individual, but also if the very fact of collecting information might be prejudicial to him such as information which may be of a self-incriminating nature. The expression "information held in confidence" allows the requested State to refuse execution when the information sought is such that the person concerned is obliged to refuse its disclosure under the internal law or accepted notions of morality.

Sub-paragraphs (c) and (d) cover the same ground, i.e. they allow the refusal of letters of request for the taking of evidence issued in the context of pre-trail discovery of documents. This is a method of collecting evidence which is known in common law countries and which has become of great importance particularly in the United States. In the United States, a party may obtain discovery from the other party or even from third persons, regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, including the existence, description, nature and location of documents. In the 1970 Hague Evidence Convention, at the request of the United Kingdom delegation, a reservation was included according to which a Contracting State may "declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents known in Common Law countries". Sub-paragraph (d) reflects this formula.

However, when the practical operation of the Hague Evidence Convention was studied by a group of experts, in 1978 and again in 1985, there was a large agreement among those experts that the formula of Article 23 of the Hague Evidence Convention was too broad. In fact, the United Kingdom, when making the Article 23 reservation of the Hague Evidence Convention, qualified it by a declaration which excludes only requests for certain categories of unspecified documents. Sub-paragraph (c) is inspired by this declaration made by the United Kingdom.

Paragraph 3 is self-explanartory and has been added with a view to facilitate assistance to the requesting State and not to refuse it merely because the subject-matter of the request either falls within the jurisdiction of the requested State or that its internal law would not permit any action on it. As there were differences of view on this matter the provision has been placed in square brackets.



Paragraph 4 acts as a check on the powers of the requested State to refuse to execute the request in an arbitrary manner, because it imposes the obligation on it to notify the requesting State, as soon as possible, with reasons for not complying with the request or the letter of request.

## CHAPTER II

### Service of Process

Articles 10 to 15 in Chapter II of these Arrangements make provision to ensure speedy and efficient service of process abroad.

#### *Article 10*

Article 10, paragraph 1, stipulates that the request is to be sent by the authority competent under the law of the requesting State, i.e. the court or the judicial officer, as the case may be, to its own Central Agency as provided under Article 4 paragraph 1, with the request to transmit it to the Central Agency of the requested State, for the service of process. Paragraph 2 provides that the request for the service of process shall be drawn up in accordance with Form 'A' as appended to these Arrangements. It further provides that the documents required to be served, whether original or copy, must accompany the request. The request and the document must be provided in duplicate so that the receiving Central Agency can keep one set and transmit the other set to the executing authority.

The requested State has at times to face the problem of inadequate information. Besides, the difficulties of interpretation over legal terminology used in various systems may also arise. It is with a view to obviate such problems and difficulties that the model form is suggested, the use of which is in the interest of both the requesting and the requested States. Their use is essential for the successful execution of the request and are designed to operate as a check list of all information necessary for such execution.

#### *Article 11*

This Article regulates the modes of service to be used, and the possibility of using a particular method or procedure requested by the Central Agency of the requesting State.

Paragraph 1 provides for service by the Central Agency of the requested State according to the methods prescribed or permitted by

its internal law. Normally the Central Agency will effect service according to its own procedures, i.e. following the same methods which will be used for internal service in the requested State.

Paragraph 2 contemplates that if the requesting State desires the service to be effected in any particular way the requested State should endeavour to effect service in that manner. This, however, is subject to the condition that the method suggested does not conflict with the internal laws of the requested State. For example, the internal laws of a State may not permit the service of certain categories of documents through any process of compulsion and if a request were to be received for service through a procedure much conflicts with that position the requested State may well refuse to comply.

And paragraph 3 simply provides that the summary of the document to be served shall also be served with the document, in accordance with the model form 'C' annexed to these Arrangements.

### *Article 12*

Article 12 provides for the certificate of service to be completed by the Central Agency or any other competent authority designated for the purpose. It further provides that the certificate is to be drawn up in accordance with the model Form 'B' annexed to these Arrangements.

### *Article 13*

Article 13 entitles the requested State to claim reimbursement of the costs, such as, the fees or charges paid for the service of court officials or other government agencies which may be involved in the execution of the request for service of process. The charges shall be such as are authorised under the law of the requested State. Paragraph 1 (b) further provides for reimbursement of the costs occasioned by adoption of a special procedure at the request of the requesting State under Article 11(2) of these Arrangements. The model provides that the requested State may claim reimbursement of the costs from the requesting State. This does not exclude, of course, that the requesting State charges the applicant for those costs.

### *Article 14*

Article 14 recognises the competence of the diplomatic representative or consular officer to effect service of judicial documents upon nationals of the State or States which he represents in the State of his accreditation. It may be stated that it is the law of the State which



he represents that will determine whether he has the power to effect service as part of his functions.

The Diplomatic or Consular channel had previously been one of the most commonly used in practice. Although these Arrangements contemplate the Central Agency as being the principal channel for effecting service of documents, the Diplomatic or Consular channels have also been retained since it has its own advantage. For example, Consular channel might be particularly useful when the precise details are lacking about the person on whom the document is to be served and the Consul might be in a better position to trace the addressee on the basis of information in his possession. The Consul may act only in the area in which he exercises his consular functions. He may effect service without using any form of compulsion. There was however some difference of opinion whether this provision should be retained.

### *Article 15*

Paragraph (a) of this Article makes provision for the use of postal channels for the purpose of sending documents directly to the addressee abroad, provided there is no objection on the part of either State. This subsidiary method of transmission constitutes an important advance, for the sake of simplicity, which is the underlying policy of these Arrangements. The expression "postal channels" includes service by ordinary or registered letter, with or without receipt, as well as by telegram.

As regards objection to the use of postal channel, it may either be general or even partial. A partial objection may limit the use of the post either to certain categories of addressees on the basis of their nationality, or to certain categories of documents having regard to their contents.

Paragraph (b) provides that service may be effected by direct communication between the "judicial personnel officials or other competent persons" in the two countries, again subject to any objection by any of the Contracting States. Although capable of wider application, this mode is essentially for use in those countries which have professional process servers (huissier). The applicant in one such State can approach the professional server in his State who will forward the documents to a professional colleague in the other State for service.

And paragraph (c) provides, subject to any objection by any of the Contracting States, that a party to, or any other person "interested in" a

judicial proceeding may directly serve documents through "the judicial personnel, officials (legal practioners) or other competent persons". This in fact is a variant of the last mode, provided under paragaph (b). Here the party or his legal adviser makes a direct approach to the professional process-server (huissier) or the legal practitioner in the other State where service is to be effected. There was a difference of view on the question whether service may be effected through a legal practitioner. As some States may have difficulties in allowing one or more of the methods of service listed in article 15, in each case the Contracting States, while negotiating the draft Arrangements, may consider which of these modes, if any, are to be included in the bilateral Arrangement in question.

## CHAPTER III

### Taking of Evidence

Articles 16 to 22 in Chapter III of these Arrangements contain provisions concerning the taking of evidence abroad. The primary mode contemplated is by means of transmission of letters of request through the Central Agency but other channels such as taking of evidence by diplomatic and consular personnel or by a Commissioner are also provided for in Articles 21 and 22.

#### *Article16*

Article 16 stipulates that the letter of request is to be sent by the authority, competent under the law of the requesting State, i.e. a Court or judicial officer to its own Central Agency as provided under Article 4 pargraph 1, with the request to transmit it to the Central Agency of the requested State.

The letter of request has to be drawn up in a manner provided for in Form 'D' appended to the Arrangements. This is with a view to evolve some kind of uniformity and to ensure that all necessary particulars and information requested for the purpose of recording of evidence are duly communicated to the requested State.

A suggestion made by the delegate of Singapore which was generally acceptable in principle required a provision to be made in the text that the relevant authorities in the requesting State shall ensure that all formalities and procedures prescribed by its law for issue of the letter of request had been complied with. There was however a difference of view whether the provision should be made in Article 16 itself or in Form D.



#### *Article 17*

This Article regulates the modes and procedures to be followed by the competent authority responsible for the execution of letters of request.

Paragraph 1 contains the general rule that the evidence shall be recorded according to the internal laws and procedures applicable in the requested State.

Paragraph 2 provides for situation where the requesting State makes a request to the requested State to follow a special method or procedure for taking of evidence. The requested State may, however, decline such request if, (i) the procedure is in conflict with its internal laws; (ii) it is impossible of performance by reason of its internal practice and procedures; or (iii) there are practical difficulties. The reason for incorporation of the provision in paragraph 2 is that the requested State should assist to the extent possible in making available the recorded evidence in the manner commonly used in the proceedings before the courts and tribunals of the requesting State.

There can be numerous instances where the requested State might find it difficult or impossible to have the evidence taken in the particular manner required. This primarily arises on account of wide divergence in the procedures applied in various systems. For example, in some countries it is the normal practice to follow the adversary procedure where the witness is examined by counsel and cross-examined on his evidence before a Judge, but in some other countries it is the Judge alone who records the evidence and himself puts questions to the witness. Then again, in the practice of some States evidence is recorded verbatim in the question-answer form whilst in others the evidence would be recorded in the narrative or summary form as dictated by the Judge. Besides, some systems permit the Court to appoint a Commissioner to record the evidence in order to save the time of the Court but in other systems this would clearly not be permissible.

Paragraph 3 provides that if the evidence of witness or experts are to be taken on oath, it should be expressly so stated by the requesting State. The requested State has to honour such request unless the same conflicts with its internal laws. As there were some differences of views on this paragraph, it has been put within square brackets.

Paragraph 4 recognises the right of the individual to refuse to testify in respect of a matter which he cannot be compelled to disclose by reason of the privilege enjoined under the law of the requesting State or

of the requested State. Such matters would often include disclosure of any fact or information which might be of a self-incriminating nature or matters which have been disclosed to him in confidence, such as, in the case of doctors, lawyers, journalists etc. The provision of this paragraph further contemplates that no evidence should be requested in regard to any matter where the witness has a duty to refuse to give evidence, such as the information in his possession on official matters covered by the Official Secrets Act. It is presumed that when the witness has a privilege or duty to refuse to give evidence, he will claim such privilege or invoke the provisions of law under which he has a duty to refuse to give evidence at the time when the evidence is recorded.

Paragraph 5 gives an option to the requested State to transmit either the original or certified copies of records or documents taken as evidence.

### *Article 18*

Paragraph 1 deals with the matters of notice to be given regarding the time and place of recording of evidence to the requesting State and also to the parties to the proceedings in aid of which the evidence is required. It is recognised that no such notice would be necessary unless the requesting State so desires. The procedure for communication of the notice would naturally vary from country to country. Whilst some countries may prefer to channelise such communications through the Central Agency, others could well agree to such notice being sent by the concerned judicial authority directly to a designated official of the requesting State and or the parties to the proceedings.

Paragraph 2 contemplates that any official or officials designated by the requesting State as also the parties to the proceedings should be enabled to be present at the time when the evidence is recorded. This, however, is subject to any prohibition contained in the internal law of the requested State.

### *Article 19*

Article 19 deals with the question of application of the measures of compulsion by the authority recording the evidence in execution of the letter of request. Since there were certain differences of views, the provisions of this Article have been retained within square brackets. The objective behind this Article is that judicial assistance in the matter of recording of evidence should not be frustrated by the refusal of the witness to appear to give evidence or his refusal to answer questions



and also to produce documents or other tangible objects. It is therefore contemplated that the requested State should assist in the matter by employing the same degree of compulsion as it would under its internal laws in regard to domestic proceedings of the same nature.

### *Article 20*

The provisions of this Article deal with the question of reimbursement of costs incurred by the requested State in the execution of the letter of request in the various circumstances and subject to conditions specified in this Article. It was stated in the course of discussions at the Working Group that the reimbursement of the costs should be done by the requesting State but it would be open to that State to recoup the costs from the party for whose benefit the evidence was obtained.

### *Article 21*

This Article recognises the competence of the diplomatic or consular officer to take evidence of the nationals of his home State in aid of proceedings commenced in the courts of that State. It may however be clarified that the power of the diplomatic or consular officer to take such evidence would be governed by the laws of the State which he represents. What this article contemplates is that if the diplomatic or consular officer is authorised under the laws of his home State to take the evidence, the other State will permit him to exercise such functions. This is subject to the condition that the diplomatic or consular officer shall not apply any method of compulsion whilst recording evidence.

Although these Arrangements contemplate recording of evidence through issue of letters of request transmitted through the Central Agency as being the principal mode, the use of diplomatic or consular channels is also permitted. In some cases it may be simpler to apply that procedure, such as in cases where evidence by means of a sworn affidavit would be sufficient or the witness is ready and willing to give evidence without the need of any compulsion. There was some difference of view as to whether this provision was suitable.

The provisions of paragraph 1 clarify the powers and functions of a diplomatic or consular officer in the matter, namely (i) he may act only in the area in which he exercises his functions; (ii) he may take evidence subject to the willingness of the witness, that is, without compulsion; (iii) he may take evidence only with respect to the proceedings which are pending in the courts of a State which he represents; (iv) he may take the evidence only of nationals of his home State.

Paragrah 2 of this Article is intended to clarify that if an attempt to obtain evidence through the diplomatic or consular channels fails, it would not prejudice any subsequent effort to obtain evidence through employing the mode of the issue of a letter of request through the Central Agency. Such cases may happen where the witness may refuse to respond to a notice sent by the diplomatic or consular officer or where it may appear that the evidence could not be obtained without some measure of compulsion.

### *Article 22*

Article 22 recognises an alternative method for recording of evidence which has often been used among neighbouring countries or countries having the same system of law and procedures. Although the Arrangements contemplate the principal mode for recording of evidence as being the one through the issue of letters of request channelised through the Central Agency, it was felt that the system of taking of evidence by a Commissioner should also be retained since this could be speedy and more attuned to the proceedings in aid of which the evidence is required. Nevertheless, it is to be appreciated that many countries of the Asian-African region may not be familiar with this type of procedure which had been in vogue in common law system principally among the countries of the British Empire. The provisions of this Article specify the circumstances and the conditions subject to which the Commissioner may take evidence, namely (a) the Commissioner shall be appointed by a judicial authority to record the evidence of a witness or expert for the purpose of proceedings pending before that judicial authority; (b) the State in which the evidence is to be recorded shall give its endorsement or authorisation to the Commissioner to record such evidence; and (c) the authorisation shall be subject to such terms and conditions as may be specified.

## CHAPTER IV

### Requests for Information and Documents

### *Articles 23 and 24*

Chapter IV, consisting of Articles 23 and 24, deals with the question of mutual assistance between the States Parties to the bilateral arrangements. Whilst the provisions of Chapter II (Service of Process) and Chapter III (Taking of Evidence) are concerned with matters which are initiated principally at the instance of a party to a pending judicial proceeding, the provisions of Chapter IV are more concerned with furnishing of documents, judicial records and information which a State or a State functionary may require.



Article 23 accordingly, provides that the States Parties to the Arrangements should upon the request of each other furnish information on their laws and regulations relating to civil or commercial matters both substantive and procedural. The main objective behind this provision is that the States, which agree to enter upon Arrangements for judicial assistance, ought to be informed about the laws and regulations in force both substantive and procedural in each others territory.

Article 24 is concerned with requests for furnishing of judicial records. It is well-known that by reason of comity of courts within a country judicial records are freely made available by one court to another upon its request. The same principle is extended in regard to the courts of the Contracting States Parties to the bilateral Arrangements. These, however, have been made subject to two conditions, namely: (i) that the request should be channelised through the Central Agency which should specify the purpose for which the records or the information have been requested; and (ii) that the information or records so furnished shall not be used for any other purpose. Paragraph 3 provides for reimbursement of costs which may arise under this article. Nothing prevents the requesting State from charging the litigants in the requesting State for the expenses.

## CHAPTER V

### Final Provisions

### *Articles 25 to 29*

Chapter V contains the final provisions which are generally incorporated in International Conventions or bilateral agreements.

Article 25 has the usual provisions concerning entry into force of the bilateral Arrangements. Some views have been expressed that ratification should not be required in this type of agreement which are basically in the nature of Executive arrangements. The article has therefore been placed within brackets.

Article 26 is rather important and it needs consideration of Member Governments. What is intended to be provided here is that the present bilateral Arrangements should not affect the existing or any future bilateral or multilateral agreements or other Arrangements between the Contracting States except to the extent specified. The objective behind this provision is basically two fold. Firstly, that co-operation through reciprocal assistance in judicial matters should be encouraged in

whatever form they are brought about and the possiblity of there being more than one set of arrangements for the purpose could be contemplated. Secondly, it is intended to safeguard the provisions of other present or future international, bilateral or multilateral instruments, containing regulations in certain fields concerning matters covered by the present Arrangements. So far as the future is concerned, the underlying idea of these Arrangements is to permit the Contracting States to conclude agreements supplementing its provisions or facilitating the application of the principles it contains.

The note in the text refers to the possibility that the bilateral Arrangement may be in conflict with existing instruments or practices.

To the extent that the bilateral Arrangements are in conflict with existing multilateral agreements to which both Contracting States are Parties, these States should first consider whether the multilateral agreement in question allows them to depart from the provisions of that multilateral agreement. If the multilateral agreement does not allow such a departure, the bilateral Arrangements should be adapted accordingly. If the multilateral agreement does give the States Parties to it freedom to provide for different solutions, the Contracting States may freely enter into the bilateral Arrangements.

To the extent that the bilateral Arrangements are in conflict with existing bilateral instruments or practices binding both Contracting States, the Contracting States will have to make a choice between the draft bilateral Arrangements and the existing practice. They may choose to maintain the existing provisions; in that case the conflicting provisions should not be included. Or they may prefer the provisions of the bilateral Arrangements; in that case they should specify that the provisions of the existing instrument or practices are replaced or superseded by the bilateral Arrangements.

Article 27 provides for the settlement of any difficulties which may arise under these Arrangements through negotiations.

Article 28 deals with the question of revision of these Arrangements. It was felt that in view of certain important innovations introduced in the text of these Arrangements, it would be desirable to allow States Parties to assess the working of the Arrangements on the basis of practical experience and to revise any of the provisions that may be considered necessary.

Article 29 deals with the question of denunciation of these Arrangements.



**Appendix**: Certain suggestions made by the representative of Pakistan at the Working Group Meeting have been reproduced in the Appendix in order to bring them to the notice of Governments. Although the Working Group did not feel inclined to incorporate the suggestions in the Model text of the bilateral arrangements it was felt that some of the Governments may find them useful for inclusion in bilateral arrangements with certain countries.

# PROMOTION AND PROTECTION OF INVESTMENTS

## Introduction

The question of promotion and protection of investments on a reciprocal basis was first discussed at the Jakarta Session held in April 1980 in the context of regional co-operation in the field of industry among the countries of the Asian-African region. This was followed by more intensive discussion of the matter at the Ministerial Meeting held in Kuala Lumpur in December 1980 under the auspices of the Government of Malaysia in collaboration with the AALCC. That 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. The participants at the Ministerial Meeting generally agreed that the investment climate should be promoted through adequate provisions for protection of investments, repatriation of capital and profits as also a procedure for settlement of disputes. The meeting examined the various modalities which had hitherto been employed for protection of investments and in the light of the discussions, indicated the desirability of formulation of the draft of a model umbrella investment protection agreement for consideration by member governments.

A meeting of officials which followed the Ministerial Meeting at Kuala Lumpur discussed the guidelines for preparation of a model umbrella investment protection agreement and in this connection the meeting identified the relevant elements which could be incorporated in the proposed draft. It was agreed that the model agreement should be prepared on broad general terms which could be suitably adjusted to the needs and requirements of each State. It was generally the view that investment incentives which were offered by various governments 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 special provisions which would help to promote investments from developing countries. The meeting 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 Secretary-General had accordingly prepared the tentative draft

of a model bilateral agreement on investment protection intended to be applicable between the countries of the region to serve as a basis for preliminary discussions by an Expert Group. The Secretariat draft was taken up for consideration during the Committee's Colombo Session held in May 1981 by its Trade Law Sub-Committee. The Sub-Committee had raised a number of important issues on the contents of the tentative draft for the purposes of further study. The report of the Trade Law Sub-Committee was thereafter placed before another Ministerial Meeting on Regional Co-operation in Industries held in Istanbul in September 1981 at the invitation of the Government of Turkey in collaboration with the AALCC. The meeting generally discussed some of the more important issues indicated by the Trade Law Sub-Committee and expressed the view that the comments of the Governments should be invited in order to enable the Secretariat to study the matter further. The Ministerial Meeting was further of the view that there should be an understanding that special treatment and incentives should be offered for investments from developing countries and it would be a matter for each Government to decide as to the modalities through which this should be effected, namely, under their municipal legislations or under bilateral treaties or under joint venture agreements as might be appropriate.

Subsequent to the Istanbul Meeting, the Secretray General had carried out extensive consultations with a view to preparation of a revised study so that the recommendations of the Committee, which might ultimately emerge, could be of practical value to meet the desired objectives. These consultations revealed a good deal of divergence in State practice and the attitude of States towards bilateral umbrella investment protection agreements as also in the matter of treatment of foreign investments. As a result of the overall survey of the position held by various Governments within the Asian-African region, it became apparent that a uniform approach in the matter of promotion and protection of investments through the formulation of a single draft of a bilateral treaty, however desirable, might not result in an adequate response in practical terms. It was therefore felt that the AALCC's study on the subject could perhaps contemplate preparation of models for three different types of bilateral agreements.

This approach was considered to be particularly suited in the context that the main purpose of AALCC's study, pursuant to the mandate of the Kuala Lumpur Meeting, was to promote flow of investments between the countries of the region. It therefore seemed that the primary objective should be aimed at creating a climate in which Governments would be prepared to accept the concept of promotion and protection of investments under bilateral arrangements. It was felt that through the



preparation of various alternative drafts it might be possible to promote such agreements in the manner acceptable to the Governments concerned based on terms and conditions suited to their needs. Furthermore, having regard to the divergence of State practice as also the commitments already made by some of the Governments in their bilateral agreements with industrialized States it seemed difficult to come out with a single text which would meet the needs and interests of all Governments.

It may be observed that a single model text incorporating a set of provisions which may represent a common standard acceptable to a group of States and basically reflecting their negotiating position is extremely useful when the model agreement is intended for use by a small group of nations having indentity of interest and approach on economic issues. It is also possible to work out a model for those countries who would be prepared to enter into bilateral agreements on the basis of certain norms and standards set out therein either generally or for a class of investments. Neither of these approaches appeared to be suitable to meet the present objectives of the study since a common position had yet to emerge in regard to investments which would make it possible for the Governments of the region to accept a uniform set of norms. Furthermore, if the AALCC were to recommend a text only for those countries which were prepared to accept it, that would derogate from the wider objectives of promoting investment protection agreements as between a substantially large number of countries of the region. One possible method in a single text might have been the inclusion of alternative formulations on the various issues and topics but the exercise would be extremely cumbrous and its utility minimal since such a draft could merely serve the purpose of placing at the disposal of Governments some material for their consideration which might be useful in negotiating bilateral agreements.

It was recognized that if three different models for bilateral agreements were to be formulated and recommended, complete uniformity of approach towards investments from developing countries could not be achieved, but at the same time it is to be appreciated that the formulation of a single text is not likely to produce any better result since that text might not be acceptable to a number of Governments in the practical realities of the situation with divergent views being held by different States or groups of States.

A revised study prepared by the Secretariat in November 1982 accordingly contained the suggestion that an endeavour be made to prepare the texts of three model agreements even though much of the material to be used in each of the texts would be common. The tentative

formulations in regard to the three possible model agreements were included in the study, namely:

Model A: Draft of a bilateral agreement basically on similar pattern as the agreements entered into between some of the countries of the region with industrialised States with certain changes and improvements particularly in the matter of promotion of investments.

Model B: Draft of an agreement whose provisions are somewhat more restrictive in the matter of protection of investments and contemplate a degree of flexibility in regard to reception and protection of investments.

Model C: Draft of an agreement on the pattern of Model 'A' but applicable to specific classes of investments only as determined by the host State.

A meeting of an open-ended Expert Group was thereafter convened for examination of the study prepared by the Secretariat. The Expert Group met at the Committee's Headquarters in New Delhi from the 5th to the 7th January 1983. The Meeting was attended by representatives of twenty-four Governments and the Kuwait Fund for Arab Economic Development.

The Expert Group endorsed the Secretary-General's suggestion that the Committee's approach should be towards formulation of alternative models in the matter of promotion and protection of investments rather than pursue a single model approach which had been attempted earlier and found to be impracticable in the light of the difficulties pointed out by the Trade Law Sub-Committee during its meeting in Colombo in May 1981. The Expert Group examined the tentative drafts prepared by the Secretariat. The text of Models 'A' and 'C' was revised by the Expert Group with a view to its submission to the Twenty-third Session of the AALCC. The text of Model 'B' was also discussed in considerable detail and the Secretriat was requested to revise its draft in the light of the discussions and observations made at the Expert Group Meeting.

The matter was thereafter discussed at the AALCC's Twenty-third Session held in Tokyo in May 1983 and it was decided that the drafts should be further examined by another Expert Group in order to ensure their wider acceptability to the countries of the region. An Expert Group Meeting at official level was accordingly convened which met in New Delhi during January-February 1984. The meeting was attended by participants from twenty-three Governments as also by the



representatives of the Inter-Arab Investment Guarantee Corporation, the World Bank and the European Communities. The Meeting examined the provisions of the drafts and finalised its recommendations in the form of the three models for submission to governments for observation and comments.

The Report of the Expert Group was placed before the Kathmandu Session for further consideration by the Committee. No comments of a substantive nature were made by any Member Government. However the delegation of Kuwait put forward certain suggestions for incorporation in an addendum to be annexed to Model 'A'.

The Committee, after taking note of various observations made in the course of its deliberations, decided to transmit to Member Governments the three Models of bilateral agreements for promotion and protection of investments, as finally adopted together with explanatory notes with the request that these model bilateral agreements be brought to the notice of the appropriate authorities and government departments.

## REVIEW OF PROBLEMS AND ISSUES

### Some basic observations

1. Foreign investments both in the form of capital and technology are needed by practically all developing countries in the Asian-African region for their developmental programmes. The needs of each country however varies depending upon its own resources, the development plans and the priorities attached to different sectors. Generally speaking, the sectors where foreign assistance is most needed are industry, infrastructure, including power generation and communication systems, mining, modernisation of agriculture and fishery development. With the exception of major oil producing countries, the capital investments needed by the developing countries are extensive which are obtained by way of assistance, lending programmes of international institutions or consortia of States, individual governments as also the private sector. Investment is made in the shape of loans (both tied and untied credits), acquisition of shares in companies, capital participation in projects or joint venture undertakings. Investments in technology take place through use of technical processes in industrial plants provision of know-how and the services of technicians and experts. Investments both in capital and technology have hitherto been obtained largely from industrialized States even though assistance from socialist

countries has not been insignificant.

2. Many of the developing countries in the Asian-African region have themselves become investors during the past decade. In addition, some of the more developed of the developing countries of the region have developed and perfected technology in less sophisticated fields which can be more easily absorbed by developing countries. These are being progressively invested within the region through joint venture projects or other types of arrangements. Investments are also being made by developing countries in the building of roads, cement or fertiliser factories, textiles and synthetics in other developing countries. This form of investment by one developing country into another is likely to assume a distinct pattern within the foreseeable future.

3. It would be in the interest of the countries of the region, particularly in the present context of world economic situation, to encourage greater flow of capital and technology among themselves and to create favourable conditions in which this could be achieved. Capital investment from within the region has one distinct advantage as there would be little possibility of their being tied to any particular or specific source for supply of technology. Furthermore, the technology to the extent they are obtainable from within the region is likely to be more suitable for adaptation and use in developing countries.

4. No investor, whether from a developed or developing country, would be likely to invest unless it is satisfied of certain basic conditions. It is therefore a matter of fundamental importance that a degree of stability in the relations between the investor and the host government must be foreseen, particularly where long-term arrangements are concerned. The basic conditions which the investors do seem to expect relate generally to favourable conditions concerning repatriation of capital and income, adequate compensation in the event of nationalisation or expropriation as also the assurance that the terms and conditions on which it has agreed to invest should remain operative for the period of investment and that nothing should be done by the host government to the detriment of the investor. It is nevertheless conceived that a certain degree of flexibility should be retained since it may well happen over the life of an investment that what was fair and equitable at the beginning may no longer be so in the light of changed circumstances. In such a case, revision or re-negotiation



could be jusified. As a matter of fact many long term agreements have been revised in favour of host countries sometimes as the result of voluntary re-negotiation; in other cases by unilateral government action but ultimately accepted by the investor.

5. Promotion and protection of investments in the context of furtherance of regional co-operation would include a combination of four basic factors, namely, (i) an element of reciprocity; (ii) encouragement given by government to their nationals and companies to invest in the developing countries of the region; (iii) creation of favourable conditions by host governments for reception and treatment of such investments; and (iv) adequate and effective provision for settlement of disputes as an important element in creating stability and confidence for attracting investments. These basic conditions would naturally need to be reflected in the recommendations and the instruments that are prepared by the AALCC under the present programme.

It may be stated that a provision on reciprocity has invariably been included in almost all bilateral investment agreements concluded between the developing conuntries and industrialized nations but the practical impact of such a provision except in regard to agreements with the major oil producing countries is not substantial. This is in view of the fact that the investments made by other developing countries in the industrialised States are almost neglegible. However, in investment protection ageements between the countries of the region, the element of reciprocity would be a major consideration since the concept of harnessing of their resources is an essential *sina qua non* in a programme of regional co-operation.

In regard to promotion of investments by nationals and companies of one developing country in another, it may be stated that whilst the attitude of the host governments would constitute an important element, efforts would equally be needed by the host governments to stimulate the flow and to create a climate in which such investments are encouraged. This would be particularly necessssary In the initial stages to create a psychological orientation in the investor to diversify his investments and gradually channelize some of them to developing countries. It may be stated that most of the industrialized nations offer guarantee schemes to their nationals and companies against non-commercial risks to promote investments in developing countries. Similar guarantee schemes or insurance covers could possibly be contemplated by some of the countries of the region to promote

investments by their nationals and companies in developing countries. Furthermore, concessionary rates of taxation of other forms of tax incentives as well as relief against double taxation might possibly be contemplated.

As regards the treatment to be accorded by host governments to investments emanating from developing countries, it has already been envisaged in the two Ministerial meetings that such investments should receive the most favourable treatment both in regard to incentives as also in the matter of protection of investments and repatriation of capital and profits.

In so far as the question of settlement of disputes is concerned, it may be stated that resolution of disputes and differences through fair and expeditious procedures constitute an integral part of any investment protection mechanism, since stability and confidence of the investor largely depend on the adequacy and effectiveness of the system. It has been pointed out in a recent study commissioned by the UNIDO that the arbitral institutions which had originated during the colonial period were inadequate and unsuitable for resolution of north-south industrial conflicts; it would seem to be equally so in promotion of south--south relations. A study of the existing bilateral investment protection agreements reveals that the most suitable manner in which conflicts can be resolved between the investor and the host governments is thourgh recourse to the International Convention on Settlement of Investment Disputes or the Additional Facility Rules of ICSID wherever possible. In other cases and also by way of an alternative, recourse to ad hoc arbitration under the UNCITRAL Rules could be contemplated since those Rules have been recommended by the General Assembly and have already received wide acceptance by the international community. The AALCC's scheme on settlement of disputes is primarily based on the acceptance of these two modalties. Through establishment of its Regional Centres for Arbitration at Kuala Lumpur and Cairo, the AALCC has already made provision for administration of the UNCITRAL Rules. Under two specific agreements between the ICSID and the AALCC arrangements have now been made for the proceedings under the ICSID Convention to be held in Kuala Lumpur or Cairo instead of Washington if the parties so desire. It is felt that the three possible modalities, namely, the procedures under the ICSID Convention, the Additional Facility Rules introduced by ICSID and conciliation or arbitration under the UNCITRAL Rules should be appropriate in settlement of disputes between the investor and the host government in a scheme for regional co-operation. It may be added that the success of the ICSID's scheme is demonstrated by the fact that a large number of agreements have incorporated a clause for arbitration



under the ICSID Convention but only eighteen disputes have so far arisen thus demonstrating the effectiveness of the ICSID clause in creating stability and confidence in the investments.

**Attitude of Asian-African States towards investment protection**

The attitude of the States within the Asian-African region in regard to the mode and manner of investment protection and the extent to which promotional incentives are offered appear to vary to a considerable extent.

In the Charter of Economic Rights and Duties of States, it is provided that each State has the right to regulate and exercise authority over foreign investments within its national jurisdiction, in accordance with its laws and regulations and in conformity with its national objectives and priorities. The State has also the right to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.*

Several developing countries in the Asian-African region have, however, in the exercise of their sovereignty entered into bilateral investment protection agreements with industrialized States such as the United Kingdom, France, the Netherlands, Belgium, Federal Republic of Germany, Switzerland, Italy and Sweden, for promotion and protection of investments. The basic pattern followed in most of the agreements concluded with the countries in Western Europe by the

* See Article 2.2 of the Charter of Economic Rights and Duties of States adopted by the General Assembly on 12 December 1974.

The relevant provisions of paragraph 2 of Article 2 are in the following terms:-

"(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investments;

(c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking in to account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means".

ASEAN countries, Sri Lanka, Egypt, Republic of Korea and a few others provide for most-favoured-nation treatment, full freedom in the matter of repatriation of capital and profits, adequate and effective compensation (full market value) in the event of expropriation or nationalisation and provisions for settlement of disputes. Some of the agreements such as an agreement between Japan and Egypt as also the agreements between the Netherlands with Malaysia and Singapore seem to further provide, that the investments of the contracting parties shall not only be provided most-favoured-nation treatment but also treatment no less favourable than accorded to their nationals. In the recent British draft of investment protection agreement a similar pattern is contemplated, that is to say, a treatment which would be no less favourable than accorded to the nationals of the host State as also to the nationals of any third State. Some agreements also provide for treatment in accordance with international law such as in the most recent agreement between Egypt and the United States. In the course of Euro Arab dialogue for conclusion of a model multilateral convention, the Arab States have, however, been reluctant to concede the national standard of treatment although they have been willing to accept other terms such as most-favoured-nation treatment, full freedom in the matter of repatriation of capital and return, full market value as compensation and a provision for settlement of disputes.

It may be reasonable to presume that the States which have expressed their willingness to enter into bilateral investment protection agreements and accord most-favoured-nation treatment to western investments should have no difficulty in concluding similar agreements with the countries of the region. Four such agreements have so far been concluded namely, between Japan with Egypt and Sri Lanka, and the agreements of Sri Lanka with Singapore and the Republic of Korea.

On the other hand, there are some States which are reluctant to enter into investment protection agreements and prefer to rely upon the provisions of their Constitution and the laws for taking a position that those are sufficient for protection of the investments in their countries. Some of these countries have, by now become investors themselves in the developing countries of the region and it is therefore possible that they might be interested in concluding investment protection agreements with the countries of the region on a bilateral basis for the promotion and protection of their own investments.

There is yet another group of countries such as the States parties to the Lome' Convention who accept in principle the need for protection of investments and this is clearly recognized in the Lome' Convention itself as also in the Declarations adopted therewith. These countries are



however reluctant to enter into bilateral investment protection umbrella agreements as such but favour investment protection agreements in regard to specific project on such sectors as mining, power generaton etc.

In addition, there are also some states which without entering into bilateral government to government umbrella aggrements have accepted the major elements relatable to investment protection in specific agreements concerning individual investments or classes of investments.

**AALCC's Model Drafts**

As regards the contents of the models of three investment protection agreements the following elements are of importance:-

(i) Desirability of entering into bilateral agreements;

(ii) Principle of reciprocity and non-discrimination;

(iii) Promotion of investments by contracting States in the territory of each other—financial guarantees and tax incentives;

(iv) Reception and registration of investments including the provision that the terms and conditions on which investments were made shall remain unaltered;

(v) Investments in national companies or corporations;

(vi) Most-favoured-nation treatment;

(vii) National standard of treatment;

(viii) Repatriation of capital and return;

(ix) Compensation for losses suffered;

(x) Conditions on which expropriation and nationalisation can take place including principles for compensation;

(xi) Value of investments—effect of inflation and variation in exchange rates;

(xii) Training programmes and transfer of technology and marketing arrangements;

(xiii) Past investments;

(xiv) Settlement of disputes as between the investor and the host government; and

(xv) Settlement of disputes between the two governments.

These points are briefly discussed below although some of the more important elements have already been referred to in the earlier part of the note.

**(i) Desirability of entering into bilateral agreements**

Investments abroad are generally made by corporations and State entities and at times even by individuals. Direct investments by governments are not very common. Experience has shown that an investor is usually reluctant to invest unless he is guarnteed certain safeguards for his investment such as in regard to repatriation of capital and return as also full compensation in the event of nationalisation or expropriation. Even though several countries offer such safeguards under their constitution or laws, there is a better psychological impact when the investment is made under government to government umbrella agreements. This method has proved to be very effective in recent years and many developed countries accordingly consider such bilateral investment protection agreements to be of considerable importance. The Ministerial Meeting at Kuala Lumpur held under the auspices of the AALCC in December 1980 recognized the importance of such investment protection agreements in the context of co-operation between the countries of the Asian-African region.

**(ii) Principle of reciprocity and non-discrimination**

This is an element which is generally incorporated in bilateral investment protection agreements even through the reciprocity provision in agreements between developing and developed countries are not of much practical significane. However, this is an element which would be meaningful in agreements between the countries of the region.

**(iii) Promotion of investments by contracting States in the territory of each other—financial guarantees and tax incentives**

Many developed countries provide investment guarantees or insurance schemes as incentives for their nationals and companies to invest abroad. Several countries also offer various kinds of reliefs in



taxtion to their nationals and companies in regard to their income, profit or gain derived from investments abroad. It is felt that if the countries of the region were to offer some attractive incentives in the form of tax concessions for investments in the developing countries of the region, it would greatly help to promote flow of investments between developing countries *inter se.* It may however not be practicable for most of the countries of region as yet to initiate investment guarantee schemes.

**(iv) Reception and registration of investments including the terms and conditions thereof**

It is felt that foreign investments in certain categories of cases should be registered in the host country to facilitae their identification in relation to discharge of the host government's obligations especially in regard to repatriation of capital and return as also protection of the investment. Many States allow foreign investors various incentives including concessionary taxation. It is felt that such incentives should be offered to the maximum extent in regard to investments emanating from the countries of the region. It is also important that the terms and conditions on which the invesment is received should remain unaltered for the period of the investment.

**(V) Investment in national companies or corporations**

Capital participation or investment in national companies or corporations by foreign parties are regulated by local laws; several countries allow such participation to the extent of a specific percentage of share capital and subject also to various terms and conditions. It is considered that such matters should be liberalised to the extent possible in so far as the investment from the countries of the region are concerned.

**(vi) Most-favoured-nation treatment**

Almost all bilateral agreements on promotion and protection of investments, which have been entered into by developing countries with industrialized nations contain provisions concerning most-favoured-nation standard of treatment. This means that whatever treatment that State accords to a third State, the same treatment would have to be applied to the nationals and companies of those industrialised States also. This necessarily creates some problems for those States who have already entered into such agreements in considering the standard of treatment for investments between developing countries *inter se* Nevertheless, it is important that a most-favoured-nation treatment clause should be incorporated in bilateral

agreements between the countries of the region.

**(VII) National standard of treatment**

Some of the existing bilateral investment protection agreements entered into by the developing countries with industrialized States provide that the foreign investor should be accorded treatment no less favourable than is accorded to the nationals and companies of the host State. However, some of the countries of the region do not consider application of national standard of treatment to foreign investments to be appropriate. Even though it may be desirable to apply this standard for investments from developing countries among themselves, its impact has to be judged in the light of existing agreements with industrialized nations.

**(viii) Repatriation of capital and return**

Most of the existing bilateral agreements contemplate full freedom in the matter of repatriation of capital and profits subject to reasonable restrictions being imposed by host governments to meet exceptional financial or economic situations. Some countries however stipulate that a portion of the profits should be re-invested and also impose conditions concerning repatriation of capital. It is necessary that such conditions should be negotiated at the time of the reception of the investment and clearly specified at that time.

**(ix) Compensation for losses suffered**

Most bilateral agreements provide for restitution or compensation for losses suffered by the investor under various circumstances.

**(x) Conditions for expropriation and nationalisation including principles for compensation**

Several investment protection agreements recognize that an investment can be nationalised or expropriated for a public purpose related to the internal needs and national interest of the host State. These agreements also provide for prompt payment of the full market value as compensation. However, there are some countries in the region who consider that the compensation should be computed on equitable principles.

**(xi) Value of investments—effect of inflation and variation in exchange rates**

Some of the countries of the region who have investments in the



western countries have contended that compensation should be payable for loss in the value of investments by reason of the effect of inflation and variation in exchange rates. It is for consideration whether this principle should be suitable for adoption in regard to investments made by the developing countries in other developing countries of the region.

**(xii) Training programmes, transfer of technology and marketing arrangements**

Several developing countries would desire the investor to arrange for suitable training programmes and transfer of technology as also some share in marketing arrangements. Such conditions should be negotiated and specified at the time of reception of investments.

**(xiii) Past investments**

It is very often a matter of debate whether past investments should be covered in bilateral umbrella investment protection agreements. One view is that only future investments should be the subject matter of such agreements, whilst the other view is that past investments made within a specified period should also be covered provided they are registered with the host government within a reasonable period from the time when the umbrella agreement comes into force.

**(xiv) Settlement of disputes as between the investor and the host government**

A provision for settlement of disputes between the host government and the investor is invariably incorporated in bilateral investment protection agreements. This is important in order to create stability and confidence in the transaction. The most appropriate modality for such purposes is the ICSID Convention or "The Additional Facility Rules" of ICSID, if applicable. Otherwise UNCITRAL Arbitration and Conciliation Rules might be appropriate.

**(xv) Settlement of disputes between the Governments Parties to the Agreement**

Specific provisions are invariably included in bilateral agreements which follow the normal pattern for settlement of Government to Government disputes such as through negotiations or arbitrations.

## * MODEL AGREEMENT FOR PROMOTION AND PROTECTION OF INVESTMENTS MODEL-A

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

The Government of _____ and the Government of _____

*Recognising* in particular 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;

*Also Recognising* that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

*Desirous* to create conditions in which the 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'***

***(Alternative 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;

* The model agreement is intended to provide a possible negotiating text for consideration of governments. It is merely a model and not an adhesive text. The possibility that the text would be modified or altered in the course of bilateral negotiaions to suit the needs of the parties is clearly contemplated.



(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, and loans;

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

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

***(Alternative B)***

*'Investment'* includes every kind of asset such as

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money, and loans;

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

(iv) rights with regard to patents, trade marks and any other industrial property; and

(v) contractual rights relating to exploration and exploitation of natural resources.

***(Alternative C)***

*'Investment* means:

(i) in respect of investment in the territory of (First Party) _____ ;

(ii) in respect of investment in the territory of (Second Party) _____

***(b) 'National'***

***(Alternative A)***

*'National'* in respect of each Contracting Party means a natural person who is a national or deemed to be a national of the Party under its Constitution or relevant law.

***(Alternative B)***

*'National'* in respect of *(First Party)* means _____ and in respect of (Second Party) means _____.

***(c) 'Companies'***

***(Alternative A)***

*'Companies'* means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws (and includes such entities in which nationals of a Contracting Party have substantial interest and majority shareholding.)

***(Alternative B)***

*'Companies'* means in respect of the (First Party) _____ and in respect of the (Second Party ) _____.

***(d) 'State Entity'*** means a department of government, corporation, institution or undertaking wholly owned or controlled by government and engaged in activities of a commercial nature.

***(e) 'Returns'*** includes profits, interests, capital gains, dividends, royalties or fees.

***(f) 'Host State'*** means the country in whose territory the investment is made.

***(g) 'Territory'*** means:

(i) In respect of the (First Party) _____;
(ii) In respect of the (Second Party) _____.

***Article 2***

**Promotion and encouragement of Investments**

(i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.

(ii) Each Contracting Party shall create favourable conditions to encourage the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.



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

(iv) *(Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other contracting Party.)

***Article 3***

**Reception of Investments**

(i) Each Contracting Party shall determine the mode and manner in which investments are to be received in its territory.

(ii) The Contracting Parties may determine that in a specified class of investments, a national, company or State entity of a Contracting Party intending to make investment in the territory of the other Contracting Party including collaboration arrangements on specific projects, shall submit its or his proposal to a designated authority of the Party where the investment is sought to be made. Such proposals shall be processed expeditiously and soon after the proposal is approved, a letter of authorisation shall be issued and the investment shall be registered, where appropriate, with the designated authority of the host State. The investment shall be received subject to the terms and conditions specified in the letter of authorisation.

(iii) The host State shall facilitate the implementation and operation of the investment projects through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation or permits for importation of goods, employments of consultants and technicians of foreign nationality in accordance with its laws and regulations.

***Article 4***

**Most-Favoured-Nation Treatment**

(i) Each Contracting Party shall accord in its territory to the

* There were some differences of views on the need for inclusion of this clause.

investments or returns of nationals, companies or State entities of the other contracting Party treatment that is not less favourable than that 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 that it accords to the nationals or companies or State entities of any third State in regard to the managment, use, enjoyment or disposal of their investments including management and control over business activities and other ancillary functions in respect of the investments.

### *Article 5*

**National Treatment**

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

(ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.

### *Article 6*

**Repatriation of capital and returns**

(i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracing Party are allowed full facilities in the matter of the right to repatriation of capital and returns on his or its investments subject, however, to any condition for re-investment which may be stipulated at the time of the reception of the investment and subject also to the right of the host State to impose reasonable restrictions for temporary periods in accordance with its laws to meet exceptional financial and economic situations (as determined in the light of guidelines generally applied by the IMF or such other criteria as may be

* Some countries do not favour 'National Treatment" for foreign investments.



agreed upon by the parties). The capital and returns allowed to be repatriated shall include emoluments and earnings accruing from or in relation to the investment as also the proceeds arising out of sale of the assets in the event of liquidation or transfer.

(ii) In the event of exceptional financial or economic situations as envisaged in paragraph (i) of this article, the host State shall exercise its power to impose reasonable restrictions equitably and in good faith. Such restrictions shall not extend ordinarily beyond a period of _____. Any restriction in operation thereafter shall not impede the transfer of profits, interests, dividends, royalties, fees, emoluments or earnings; as regards the capital invested or any other form of returns, transfer of a minimum of 20 per cent in each year shall be guaranteed.

(iii) Repatriation shall be permitted ordinarily to the country from which the investment orginated and in the same currency in which the capital was originally invested or in any other currency agreed upon by the investor and the host State at the rate of exchange applicable on the date of transfer upon such repatriation unless otherwise agreed by the investor and the host State.

### *Article 7*

**Nationalization, expropriation and payment of compensation in respect thereof**

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

(ii) Such compensation shall be computed on the basis of the value of the investment immediately prior to the point of time when the proposal for expropriation had become public knowledge to be determined in accordance with recognized principles of valuation such as market value. Where the market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account *inter alia* the capital invested, depreciation, capital already repatriated and other relevant factors. The compensation shall include interest at a normal commercial

rate from the date of expropriation until the date of payment. The determination of the compensation, in the absence of agreement being reached between the investor and the host State, shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

(iii) Where a Contracting Party nationalises or expropriates the assets of a company which is incorporated or constituted under the laws 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 rapatriated by the owners of the shares in the other Contracting Party. Such compensation shall be determined on the basis of the recognized principles of valuation such as the market value of the shares immediately prior to the point of time when the proposal for nationalisation or expropriation had become public knowledge. The compensation shall include interest at a normal commercial rate from the date of nationalisation or expropriation until the date of payment. If any question arises regarding the determination of the compensation or its payment, such questions shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State.

### *Article 8*

### Compensation for losses

*[ (i) Nationals, companies or State entities of one Contracting Party whose material assets in the investments in the territory of the other 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 it accords to (its own nationals, companies or State entities or to) nationals, companies or State entities of any third State.]

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* Several participants had reservations on the provisions of this paragraph



(ii) Nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other Contracting Party resulting from:

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

(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*

### Access to courts and tribunals

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning any investment including judicial review of measures relating to expropriation or nationalisation, determination of compensation in the event of expropriation or nationalisation, or losses suffered and any restrictions imposed on repatriation of capital or returns.

### *Article 10*

### Settlement of Investment Disputes

(i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other Contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.

(ii) If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which can not be resolved within a period of_____ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration unless the investor has chosen to avail himself or itself of local remedies.

(iii) Unless the parties have reached agreement to refer the disputes to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965, conciliation shall take place under the UNCITRAL Conciliation Rules 1980 and the assistance of_____ may be enlisted in connection with the appointment of Conciliator (s).

(iv) Where the concilation proceedings have failed to resolve the dispute as also in the event of agreement having been reached to resort to arbitration, the dispute shall be referred to arbitration at the instance of either party to the dispute within a period of three months.

(v) Any reference to arbitration shall be initiated under the provisions of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 or "the Additional Facility Rules" of ICSID, whichever may be appropriate.
In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules 1976, and the appointing authority for the purposes of such rules shall be_____.

(vi) Neither Contracting Party shall pursue through diplomatic channel any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

***Article 11***

**Settlement of disputes between Contracting Parties**

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

(ii) If such disputes and differences cannot thus be settled, the same shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(iii) An arbitral tribunal shall be composed of three members. Each



Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to appointment of the chairman of the tribunal within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment. The chairman so appointed shall not be a national of either Contracting Party.

(iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give directions in regard to the costs of the proceedings.

***Article 12***

**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 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 13***

**Exceptions**

Neither Contracing 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 regional arrangment on economic co-operation to which such a State may be a party.

***Article 14***

**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 State (in accordance with its laws) within a period of _____ from the date of entry into force of this Agreement.]

### *Article 15*

**Entry into force**

**(This Agreement shall enter into force on signature.)

or

**(This Agreement shall enter into force as from _____.)

or

**(This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification.)

### *Article 16*

**Duration and Termination**

This Agreement shall remain in force for a period of _____. 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 _____ years after the date of termination.)

In Witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at ....., this .....day of.....198. (In the _____ and _____languages, both texts being equally authoritative.)

For the Government of the _____

For the Government of the _____

---

* There were some differences of views about the past investments being covered.

** Alternative provisions.

*** There were some differences of views whether past investments should be covered.



## ADDENDUM TO MODEL 'A'

## SUGGESTIONS OF THE DELEGATION OF KUWAIT

1. **Article 2 (Promotion and encouragement of investments)** Paragraph (iv) should be expanded to read as follows (additions underlined):

   "Each Contracting Party shall at all times ensure fair and equitable treatment to the investments of nationals, companies or State entities of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals, companies or State entities of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures.

   Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other Contracting Party."

2. **Article 6 (Repatriation of capital and return)** It is proposed that the following paragraph be added to Article 6.

   "(iv) The Contracting Parties undertake to accord to transfers referred to in paragraphs (i), (ii) and (iii) of this Article a treatment as favourable as that accorded to transfers originating from investments made by nationals, companies and State entities of any third Party."

3. **Article 11 (Settlement of disputes between Contracting Parties).**

   Paragraph (iii) of Article 11 should be expanded to read as follows (additions underlined).

   .....either Contracting Party may approach the President of the International Court of Justice to make the appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

## 4. Suggested Additional Articles

There are two additional Articles that should be incorporated into the agreement. There are related to the relations between governments and to the application of other rules.

***Article***

**Relations between Governments**

"The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties."

***Article***

**Application of Other Rules**

"Notwithstanding the provisions of this agreement, the relevant international agreements which bind both contracting parties may be applied with the consent of both parties".



## *MODEL AGREEMENT FOR PROMOTION AND PROTECTION OF INVESTMENTS

### MODEL B

AGREEMENT between the Government of_____
and
the Government of_____for Promotion, Encouragment and Reciprocal Protection of Investments.

The Government of _____and the Government of_____

*Recognising* in particular 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;

*Also Recognising* that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

*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'*

***(Alternative A)***

*'Investment'* means every kind of asset and in particular, though not exclusively, includes:

---

* The model agreement is intended to provide a possible negotiating text for consideration of governments. It is merely a model and not an adhesive text. The possibility that the text would be modified or altered in the course of bilateral negotiations to suit the needs of the parties is clearly contemplated.

(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 and loans;

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

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

***(Alternative B)***

*'Investment'* includes every kind of asset such as:

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money and loans;

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

(iv) rights with regard to patents, trade marks, and any other industrial property; and

(v) contractual rights relating to exploration and exploitation of natural resources.

***(Alternative C)***

*'Investment'* means:-

(i) in respect of investment in the territory of _____ (First Party).

(ii) in respect of investment in the territory of (Second Party). _____



(b) *'National'*

***(Alternative A)***

*'National'* in respect of each Contracting Party means a natural person who is a national or deemed to be a national of the Party under its constitution or relevant law.

***(Alternative B)***

*'National'* in respect of (First Party) means _____ and in respect of (Second Party) means_____.

(c) *'Companies'*

***(Alternative A)***

*'Companies'* means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws (and includes such entities in which nationals of a Contracting party have substantial interest and majority shareholding.)

***(Alternative B)***

*'Companies'* means in respect of the (First Party) _____and in respect of the (Second Party) _____.

(d) *'State Entity'* means a department of government, corporation, institution or undertaking wholly owned or controlled by government and engaged in activities of a commercial nature.

(e) *'Returns'* includes profits, interest, capital gains, dividends, royalties or fees.

(f) *'Host State'* means the country in whose territory the investment is made.

(g) *'Territory'* means:

(i) in respect of the (First Party)_____;
(ii) in respect of the (Second Party)_____.

*Article 2*

**Promotion and encouragement of investments**

(i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments, through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.

(ii) Each Contracting Party shall create favourable conditions for the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.

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

(iv) *(Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies of State entities of the other Contracting Party.)

*Article 3*

**Reception of Investments**

(i) A national, company or State entity of a Contracting Party intending to make investment in the territory of the other Contracting party including collaboration arrangements on specific projects, shall submit his or its proposal to a designated authority of the Party 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 investment shall be registered where appropriate, with the designated authority of the host State.

(ii) The investment shall be received subject to the terms and conditions specified in the letter of authorisation. Such terms and conditions may include the obligation or requirement concerning

* The were some differences of views on the need for inclusion of this clause.



employment of local personnel and labour in the investment projects, organisation of training programmes, transfer of technology and marketing arrangements for the products.

(iii) The host State shall facilitate the performance of the contracts relatable to the investments through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.

(iv) The Contracting Parties shall make every endeavour through appropriate means at their disposal to ensure that their nationals, companies or State entities comply with the laws and regulations of the host State and also carry out in good faith the obligations under taken in respect of the investments made in accordance with the terms and conditions specified by the host State.

*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 it accords to the investments or returns of nationals, companies or State entities of any third State.

(iii) 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 that 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 ancillary functions in respect of the investments.

*Article 5*

**National 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 it accords to the investments or returns of its own nationals, companies or State entities.

* Some countries do not favour 'National Treatment' for foreign investments.

(ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than that it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.)

***Article 6***

**Repatriation of capital and returns**

(i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed facilities in the matter of repatriation of capital and returns on his or its investments in accordance with the terms and conditions stipulated by the host State at the time of the reception of the investment.

(ii) Such terms and conditions may specify:-

(a) the mode and manner of repatriation of profits and returns as also the requirement, if any, concerning re-investment;

(b) the extent to which the capital invested may by allowed to be repatriated in each particular year;

(c) any requirmement concerning the currency in which repatriation is to be made and the place or places of such repatriation;

(d) the nature of restrictions that may be imposed by the host State on repatriation of capital and returns in its national interest during any period of exceptional financial or economic situations.

(iii) The stipulations concerning repatriation of capital and returns shall be set out in the letter of authorisation referred to in Article 3. The terms and conditions so specified shall remain operative throughout the period of the investment and shall not be altered without the agreement of the parties.

***Article 7***

**Nationalisation, expropriation and payment of compensation in respect there of**

(i) ***(Alternative 1)***

A Contracting Party may exercise its sovereign rights in the matter



of nationalisation or expropriation in respect of investments made in its territory by nationals, companies or State entities of the other Contracting Party upon payment of appropriate compensation, subject however, to the provisions of its laws. The host State shall abide by and honour any commitments made or assurances given both in regard to nationalisation or expropriation and the principles for determination of appropriate compensation including the mode and manner of payment thereof.

***(Alternative 2)***

Investments of nations, companies or State entities of either Contracting party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except (for a public purpose) (in national interest) of that party and against prompt payment of appropriate compensation.

(ii) ***(Alternative 1)***

*(Unless stipulations are made to the contrary at the time of the reception of the investment, the expression 'appropriate compensation' shall mean compensation calculated on the basis of recognised principles of valuation).

***(Alternative 2)***

Unless stipulations are made to the contrary at the time of the reception of the investment, the expression "appropriate compensation" shall mean compensation determined in accordance with equitable principles taking into account the capital invested, depreciation, capital already repatriated and other relevant factors.

***Article 8***

**Compensation for Losses**

The nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other Contracting Party resulting from:

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

(b) destruction of their property by its forces or authorities which

* Some delegations had reservations on this provision.

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*

### Access to courts and tribunals

#### *(Alternative 1)*

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals, both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning an investment including judicial review of measures relating to nationalisation or expropriation, determination of compensation in the event of nationalisation or expropriation or losses suffered and any restrictions imposed on repatriation of capital or returns. The local remedies shall be exhausted before any other step or proceeding is contemplated.

#### **(Alternative 2*

Any difference or dispute between the investor and the host State in relation to any matter concerning an investment including those relating to nationalisation or expropriation, determination of compensation in the event of nationalisation or expropriation or losses suffered and any restrictions imposed on repatriation of capital and returns shall be settled through recourse to appropriate courts and tribunals, judicial or administrative and other authorities competent under the local laws of the host State. Neither Contracting Party shall pursue through diplomatic channel any such matter until the local remedies have been exhausted.)

### *Article 10*

### Settlement of investment disputes

(i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other

* Several participants considered this provision to be inappropriate.



Contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.

(ii) If any dispute or difference should arise between a Contracting Party and national, company or State entity of the other Contracting Party, which cannot be resolved within a period of _____ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration after the local remedies have been exhausted.

(iii) Conciliation shall take under the UNCITRAL Conciliation Rules 1980 unless the parties have reached agreement to refer the dispute to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965.

(iv) Where the conciliation proceedings have failed to resolve the dispute, it shall be referred to arbitration at the instance of either party to the dispute within a period of three months.

(v) Any reference to arbitration shall be initiated under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States, 1965 or "The Additional Facility Rules" of ICSID, whichever may be appropriate. In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules of 1976, and the appointing authority for the purposes of such rules shall be_____.

(vi) Neither Contracting Party shall pursue through diplomatic channel any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

### *Article 11*

### Settlement of disputes between Contracting Parties

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

(ii) If such disputes and differences cannot thus be settled, the same shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(iii) An arbitral tribunal shall be composed of three members. Each Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to appointment of the chairman of the tribunal, within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment.

(iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give directions in regard to the costs of the proceedings.

*Article 12*

**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 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 13*

**Exceptions**

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 regional arrangement on economic co-operation to which such a State may be a party.

*Article 14*

**Application of the agreement**

The provisions of this agreement shall apply to investments made after the coming into force of this agreement.



*Article 15*

**Entry into force**

*(This Agreement shall into force on signature.)

or

*(This Agreement shall enter into force as from _____.)

or

*(This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification).

*Article 16*

**Duration and termination**

This agreement shall remain in force for a period of _____ 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 _____years after the date of termination.)

In Witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at ..... this ..... day of .....198 (in the _____and _____languages, both texts being equally authoritative.)

For the Government of the_____

For the Government of the_____

* Alternative provisions.

## MODEL AGREEMENT FOR PROMOTION AND PROTECTION OF INVESTMENTS

### MODEL C

*Note*

The provisions for incorporation in the text of this model draft would be identical with the provisions set out in Model 'A' with the exception of the definition of 'Investment' in Article 1 (a) and the text of Article 14. The suggested texts for these provisions are as follows:-

***Article 1***

**Definitions**

(a) *'Investment'* means:

capital and technology employed in projects or industries in specified sectors of national importance as set out in the schedule to this Agreement and includes the following in relation there to :

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money and loans;

(iii) rights with regard to patents, trade marks and any other industrial property; and

(iv) contractual rights relating to exploration and exploitation of natural resources.

***Article 14***

**Application of the Agreement**

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement where the investments has been made in specified sectors set out in the schedule to this Agreement.

# X. JURISDICTIONAL IMMUNITY OF STATES

# JURISDICTIONAL IMMUNITY OF STATES

## Introduction

At the Tokyo Session of the Committee in May 1983, one of the matters that was decided to be taken up at the meeting of the Legal Advisers of the Member States of the AALCC was the question concerning the practical implication of the restrictive manner in which the principle of sovereign immunity was being applied in certain countries as this had been causing a good deal of concern to the developing countries of the region. The main focus of attention in this connection was the United States Foreign Sovereign Immunities Act of 1976 and more particularly the way in which the provisions of that legislation was being interpreted and applied by the American Courts. This was in view of the fact that the governments in many developing countries found themselves engaging in activities which in some way or other attracted the long arm jurisdiction of the United States Courts under the aforesaid legislation on the basis of some kind of nexus even though somewhat remote at times. A good deal of concern was expressed in this connection about the manner in which the jurisdiction of the courts in the United States was sought to be invoked in the case of *Verlinden* Vs *Central Bank of Nigeria* in respect of a dispute concerning sale of cement by a Dutch company to the Nigerian Government which had no connection with the United States except that the bank guarantee was opened by the Central Bank of Nigeria through the Morgan Guarantee Trust Company in New York. The judgement of the United States Supreme Court in that case was delivered soon after the Tokyo Session on 23 May 1983, which affirmed the validity of the legislation on the jurisdiction of the United States Courts in regard to suits even by foreign plaintiff. This decision was referred to at the Meeting of the Legal Advisers held in New York in November 1983 as also a number of decisions where the actions were said to be "causing direct effect in the United States" within the meaning of the 1976 Legislation.

At the Meeting of the Legal Advisers, views were expressed that in the light of the divergence of State practice, and the growing trend towards enactment of national legislations in certain countries restricting State immunity, it was desirable that the law on the subject should be authoritatively settled through the work of the International



Law Commission in order to achieve a uniform approach towards application of sovereign immunity. The general consensus that emerged out of the discussions were as follows:-

i) The principle of reciprocity might appropriately be the governing factor in the matter of application of jurisdictional immunity and the International Law Commission might be requested to consider incorporating a provision to that effect in the draft articles.

ii) The Secretariat of the AALCC should endeavour to monitor the future application and interpretation of the United States Sovereign Immunities Act through appropriate means and, in this connection, it was felt that requests may also be made to Member Governments to communicate to the Secretariat such information as they may have or may obtain through their Diplomatic Missions in Washington.

iii) Whilst expressing its concern about the recent application of the US legislation the Meeting was of the view that the AALCC would be in a better position to examine and comment upon that legislation as also to advise on possible reciprocal legislation in Member States after the International Law Commission had made some further progress on its work on jurisdictional immunities. It was accordingly agreed that the matter be placed before the Committee at one of its regular sessions with a view to making of appropriate recommendations soon after the Commission had adopted provisionally the draft articles on the subject. It was also felt that the Secretariat in the meantime may consult with and obtain information on the recent trends in countries of other regions.

iv) Member Governments might consider the possibility of incorporating arbitration clauses in their contracts such as those under the ICSID Convention so as to preclude exercise of jurisdiction by the national courts.

v) The AALCC Secretariat should render advice to Member Governments upon request regarding modalities to be adopted in individual cases such as possible approach to the Department of Justice through the State Department for filing of suggestions or for facilitating representation before the Courts.

The Report of the Legal Advisers was placed before the Committee at

its Kathmandu Session in 1985. The Committee, whilst taking note of the recommendations held a general debate on the topic of sovereign immunity and the work of the International Law Commission with the participation of ILC's Special Rapporteur Dr. Sompong Sucharitkul. The Committee also discussed the scope and effect of the United States Legislation of 1976 and the United Kingdom State Immunity Act, 1978 which had many similar provisions as in the United States legislation. At the conclusion of the debate it was decided that the topic should be taken up as a substantive item for consideration of the Committee at its Twenty-fifth Session. The Secretariat accordingly prepared a comprehensive study setting forth the law and practice in respect to immunitly of States in various regions of the world. Extensive discussion took place on the basis of that study at the Twenty-fifth Session held in Arusha in 1986. In the course of the general debate, the Observer for Australia stated that the Foreign States Immunities Act 1985, enacted by the Australian Parliament, whilst following the general international trend by adopting the restrictive doctrine introduced some innovations. The structure of the Act while providing that a foreign State would be immune from the jurisdiction of an Australian Court, enumerated specific exceptions from the rule of general immunities. Such exceptions included, *inter alia*, proceedings concerning a commercial transaction; proceedings concerning a tort committed in Australia, and proceedings concerning employment contracts relating to foreign embassies and consular missions covered by the Vienna Conventions, he added. Turning to the question of immunity from execution, he stated that the Act stipulated that the property of a State would not be subject to any process or order of the Courts for the satisfaction or enforcement of the judgement and that this immunity, however, would not apply to commercial property. He said that the Act also provided for service of process which had to be through the diplomatic channel or in accordance with the agreement with the foreign State concerned.

One delegation referred to the American action of freezing his Government's assets. He said that the US action was contrary to and violative of Article VI of the Articles of Agreement of the International Monetary Fund and that the American Act of 1976 which allowed the freezing and confiscation of assets of other States violated the concept of jurisdictional immunities of States.

The Observer for UNIDROIT said that the expansion of the activities of States into the economic area demonstrated why the long standing concept of absolute immunity of States had been surpassed in the main industrialised countries by the prevailing concept of limited immunity. He observed that limited immunity is a simple criterion or general



principle that acquires a concrete quality only when the legal relationship in respect of which State cannot claim immunity from the local jurisdiction has been identified.

Another delegate was of the view that the principle of State jurisdictional immunity was a substantive norm of international law and the exercise of compulsory jurisdiction by the Courts of any country over a foreign sovereign State was violative both of the sovereignty of that latter State and the norms of the contemporary international relations. He emphasized that his government neither recognized such jurisdiction nor did the Courts in his country hear cases against other foreign sovereign States. He said that his government draws a distinction between sovereign acts of State owned enterprises or other economic entities. As regards civil law suits arising from commercial activities of State owned enterprises or companies in their capacity as independent legal persons, the delegate said that his governement was in principle not in favour of their enjoying immunity from the jurisdiction of a competent foreign Court.

One delegate addressing himself to the recommendations of the Legal Advisers meeting said that the first recommendation viz. the presentation of an *aide memoire* to the State Department of the US was a weak step and could not be effective. He was of the view that the second recommendation viz, the incorporation of arbitration clauses in contracts, too would not yield appropriate results. He pointed out that such a clause would not always ensure that the Department of Justice would file a suggestion in the court, or that the court refuse the assumption of Jurisdiction or that the courts would always accept the suggestion, if any, of the Department of Justice. Referring to the difficulties and obstacles surrounding the other recommendations, he was of the view that the best suggestion enumerated in the Secretariat study was the constitution of a panel of experts. He was of the view that the experts must be drawn from independent developing countries and should work out a decisive stand.

Another delegate referred to the existence of two schools of thought concerning the question of immunity besed upon the distinction between *ex jure gestionis* and *jure gestionis* he pointed out that views differed on what exactly constitutes the concept of *ex jure gestionis* i.e. of commercial non-sovereign or less essential activity. He was of the view that while it was no longer tenable to hold to sovereign immunity in regared to activities which were of a purely commercial nature and the doctrine of restrictive immuniy should not be applied in a manner encroaching upon the jurisdiction of other States. He felt that whereas it was easy to register a trend towards the restrictive principle of

immunity, it was as yet difficult to agree on a principle which would satisfy the criteria of uniformity and consistency required for the crystallization of a rule of customary international law.

One delegation felt that US Foreign Immunities Act had, *inter alia*, violated the Charter of the United Nations and the long arm jurisdiction of the US Courts reached everyone and affected the political and economic independence of all peoples and States.

The Secretary General in his concluding remarks stated that the Secretariat study on the Jurisdictional Immunities of States would be elaborated in the light of the views expressed by various delegations and the topic would be taken up as a priority item at the twenty-sixth Session of the Committee.

# XI. THE CONCEPT OF PEACE ZONE IN INTERNATIONAL LAW AND ITS FRAMEWORK

# THE CONCEPT OF PEACE ZONE IN INTERNATIONAL LAW AND ITS FRAMEWORK

## Introduction

His Majesty's Government of Nepal by a reference made under Article 3(b) of the Statutes* had requested the Committee to undertake a study on "The Concept of Peace Zone in International Law and its Framework." In response to that request the Secretariat prepared a study which, while tracing the development of the concept of peace zone, pointed out that the peace zone as a concept as such did not appear to find specific mention in any treaties on international law as they basically reflected the traditional norms and practices that were developed and recognized among the European nations through the middle ages and until the early years of the present century. The law of nations did recognise war as a means for settlement of conflicts and developed norms and rules for regulating warfare. The law equally recognised the right of a State to "neutrality and also the concept of a "neutralised State" upon a collective guarantee, either by treaty or a declaration. Ano her concept, which international law recognised in the context of warfare, was "demilitarisation", namely, an agreement between two or more States which restricted establishment of military installations or stationing of troops in a particular zone or zones with a view to deescalate war and promote conditions for peace. The Charter of the United Nations had brought about a new dimension in the future growth and development of international law on an universal basis centered around the key-stone that war was outlawed as a legitimate means for settling disputes and reiterating the concept of collective security that had earlier found expression in the Covenant of the League of Nations. In the context of the Charter, maintenance of peace and security and promotion of friendly relations among nations had become the prime objective of international relations to be fostered and strengthened through progressive development of legal principles suited to the purpose. It was, therefore, not surprising that a trend in favour of bilateral treaties of peace and friendship gained wider acceptance during the fifties. The theme of peaceful co-existence and development of friendly relations came to be widely accepted in the wake of the cold war, the more notable among them being the *Panch*

* Article 4(c) of the Revised Statutes



*Shila*, The Bandung Declaration, the Movement for Non-alignment and the principles adopted by the United Nations Special Committee on Friendly Relations. The concepts such as "Zone of Peace", "Nuclear Free Zone" and "demilitarisation" could be said to have emerged in this context.

The ASEAN foreign ministers in their Kuala Lumpur Declaration, adopted on the 27th November 1971, had described South-East Asia as a "zone of peace, freedom and neutrality". Also in that same year, a proposal was brought before the United Nations for Declaration of the Indian Ocean as a zone of peace. Further, in a speech on the occasion of his coronation in 1975, His Majesty the King Birendra of Nepal had proposed that his country be declared as a zone of peace.

Against this background, the Secretariat study examined the extent to which the principles underlying the traditional concepts like "neutrality" or "neutralised States" could be applied to the concept of a "peace zone". Furthermore, the applicability of the various declarations, concepts and norms that have emerged since the second world war as also the extent to which new principles would need to be developed and incorporated as part of international law were also considered relevant in the framework of the Secretariat Study.

In accordance with the Committee's normal practice, the item was accordingly placed for preliminary discussion at the Committee's Kathmandu Session.

In the course of the discussions, the delegate of Nepal, in his detailed statement, elaborated the intent of his government's proposal to declare Nepal as a zone of peace. It was explained that while the customary principles and practices such as neutrality, neutralized zones etc., were relatable wholly to belligerency, acts of war and the right of a State to remain aloof in such conflicts, the concepts of peace zone derived its source of origin from the concept of peace as initiated by the Charter of the United Nations and developed through such international endeavours as the Bandung Declaration, the 1970 Declaration on Friendly Relations and Co-operation Among States and the Non-aligned Movement. While referring to the UN Resolution declaring Indian Ocean as a Zone of Peace* it was stressed that through that resolution the UN had accepted the concept as a legally valid principle of international law and if the concept was valid in respect of a region or sub-region, it could be equally valid to declare the territory of a single state as a zone of peace.

*U.N. General Assembly Resolution adopted on 16 December 1971.

It was recognised that the concept of zone of peace involved not only the obligations to be undertaken by the States which wished to declare its territory as such but also reciprocal obligations on the part of other States to respect the Status of the Zone of Peace. Nepal, on its part agreed to undertake following obligations:

1. It would adhere to the policy of peace, non-alignment and peaceful co-existence and would constantly endeavour to develop friendly relations with all countries of the world, regardless of their social and political system, and particularly with its neighbours, on the basis of equality and respect for each other's independence and sovereignty.

2. It would not resort to the threat or use of force in any way which might endanger the peace and security of other countries.

3. It would seek peaceful settlement of all disputes between it and other State or States.

4. It would not interfere in the internal affairs of other States.

5. It would not permit any activities on its soil that were hostile to other States supporting its proposal and in reciprocity, States, supporting its proposal could not permit any activity hostile to Nepal.

6. It would continue to honour the obligations under all the existing treaties which it had concluded with other countries as long as they remained valid.

7. It would not enter into military alliance nor would it allow the establishment of any foreign military base on its soil. In reciprocity, other countries supporting its proposal would not allow establishment of military base on their soil directed against Nepal.

As regards the views of other delegations, there were at least three different shades of opinions. Some delegations while generally endorsing the validity of the concept of peace zone stated that Nepal's proposal conformed to the basic principles of international law. Another view was that the peace zone concept was not at the time being crystallized, it was probably because it could have different contents in different parts of the World and it was upto the interested countries in each case to define that content. Accordingly, there might be different types of peace zone and instead of defining a peace zone either in abstract or in general, it would be more practical to identify the main



possible features of peace zones to be established on a case by case basis.

Yet another view, held by India, however, was that the concept of Peace Zone was a new idea in international law without any precedent. It was stated that although several proposals have been made for declaring certain regions and sub-regions as zones of peace, there were only two relevant precedents. The first was the Kuala Lumpur Declaration of 1971, which basically was a political declaration emanating from a political conference. The second example was concerning the Declaration on the Indian Ocean as a Zone of Peace. Both the Declarations were adopted in the context of big power rivalry and were aimed at preventing escalation, expansion and removal of military presence of big powers from a region or sub-region. Furthermore, encouraging the fragmentation of the search for peace, when the Charter of the United Nations itself stressed on collective efforts for peace, could lead to a situation where individual countries, within the limited option of their own specific interest begin to unilaterally propose themselves as Zones of Peace resulting in as many zones as there were members of the United Nations. It was stressed that if the concept of zone of peace was to be developed along healthy lines and aimed at greater acceptability, it was essential that the basic features of the proposal to declare the Indian Ocean as a Zone of Peace should broadly guide any proposal of this kind. It would be advisable not to radically depart from the framework and thrust of the Indian Ocean proposal because that was made after considerable prior consultation and understanding amongst those most interested in it and those who would be its biggest beneficiaries.

At the Arusha Session, there was a brief discussion on this topic. The delegate of Nepal streassed that it was not correct to say that his country's proposal was somehow against the idea of the Indian Ocean as a zone of peace and that it would be a fragmentation of the proposal of the Indian Ocean as a Zone of Peace. He did not accept that Nepal's proposal was in any way against the established norms of international law or that it went against the principles of Non-alignment and the Bandung Declaration. While rejecting the argument that a single country zone of peace would fragment the zone of peace concept over a larger area, he asked whether on the same ground it could not be argued that Indian Ocean as Zone of Peace concept would fragment and distort the concept of world peace. The delegate of India reiterated his government's point of view in this respect.

It was decided that any further discussion on this topic would be held in a working group which would be constituted at the Twenty-sixth session of the Committee. The Working Group might consider the contents and implication of various proposals on the establishment of Peace Zone made within and outside the United Nations.

# ORGANISATION OF LEGAL ADVISORY SERVICES ON INTERNATIONAL LAW

## Introduction

At the Karachi Session of the AALCC held in January 1969, it was decided that the Committee should consider the question of organization of Legal Advisory Services on International Law at one of its subsequent sessions. The idea underlying the decision was that an exchange of views and information on this matter would be useful and would enable the Asian-African Governments to benefit from each others experience in the field. The subject was generally discussed in the Plenary at the Committee's New Delhi Session held in January 1973 and a decision was taken at that Session for holding of periodic meetings of Legal Advisers of the Member States under the auspices of the Committee in order to promote a free and frank exchange of views on professional, organisational and technical aspects of the system of Legal Advisory Services on International law followed by Member Governments of the Committee. A two-day Meeting of Legal Advisers was accordingly held in January 1978 immediately after the Committee's Doha Session which was followed by another meeting of Legal Advisers in February 1979 during the Seoul Session.

Subsequently, another Meeting of Legal Advisers was held in New York in November 1983 during the Thirty-eight session of the General Assembly.

The topics for discussion intended to be taken up at the New York Meeting were the following:-

## I. ORGANIZATIONAL PATTERN:

Relative merits of the systems obtaining at present in various countries:

a) As part of the General Legal Services of the Government;

b) As part of the Regular Foreign Service;

c) As a specialist division in the Foreign Office;

d) Creation of a small section in the Foreign Office whilst vesting

the ultimate responsibility for legal advising on international legal questions in the Attorney-General's Department.

## II. NATURE OF WORK IN THE INTERNATIONAL LAW DIVISION

a) Advisory work on international law problems, method of seeking advice and the stage at which advice is generally sought; weight attached to such advice;

b) Treaty-making, drafts interpretation and implementation-stage at which legal advisers are generally associated with the negotiations and drafting of treaties; implementation of treaties through domestic legislation;

c) Preparation of full powers and other instruments;

d) Preparation for court cases involving international law questions; International Court of Justice, International Arbitral Tribunals; Tribunals or Committees constituted by International Organisations; National courts and tribunals; Issue of Certificates on International Law questions;

e) Codification and development of internationl law and Trade Law-Preparation for International Conferences dealing with international legal questions; Sixth Committee of the U.N. General Assembly; International Law Commission; UNCITRAL and UNCTAD; Other international and regional organisations engaged in the field.

## III. ROLE OF LEGAL ADVISERS IN POLICY MAKING

Status and independence; Association of the Legal Advisers in formulation and execution of foreign policy.

## IV. RECRUITMENT AND TRAINING OF PERSONNEL FOR THE INTERNATIONAL LAW ADVISORY SERVICES, CONDITIONS OF SERVICE

Methods of recruitment; academic qualifications and experience; Basic training; Conditions of service.

## V. RELATIONSHIP OF THE LEGAL DIVISION WITH THE VARIOUS GOVERNMENT DEPARTMENTS



## VI. ADVISE FROM OUTSIDE SOURCES

Seeking advice from University Professors and eminent lawyers; weight of their advice; their inclusion in Government delegations to international conferences.

## VII. LIBRARY FACILITIES

The need for a good library; indexing of back papers; Development of a technique for maintenance of treaty records.

Due to the lack of time, the Legal Advisers were, able to discuss only the first topic, namely, the organisational pattern of legal advisory services. The Meeting took note of the fact that two previous Meetings of Legal Advisers held in 1978 and 1979, had examined in some detail the organisational pattern of legal advisory services obtaining in Member States. The Chairman summed up the discussions at the New York Meeting as follows:

"Every country will adopt the system of legal advisory services in the light of its tradition, experience and needs. Where a system has already been established, it may not be possible, even though desirable, to make substantial changes therein. However, exchange of views concerning the working of the system in different countries may give examples of problems faced and solutions found by them and this may be helpful to them in reviewing or modifying their own system.

Where such systems have not yet been established, the exchange of views which has been held may be found very useful in establishing a system which meets with their needs and requirements.

In many cases, the important elements which should be highlighted and emphasised in establishing or modifying the system of legal advisory services may be the following:-

i) The legal advisory services should be system-oriented rather than be individual-oriented so that, whereas individual officers may come and go, a reliable legal advisory service system will remain available to the country concerned.

ii) The system should ensure continuity. Transfers from the division or department for assignments in unrelated fields such as diplomatic positions should be the minimum.

iii) The system should give due place to the acquisition of

specialised knowledge not only about traditional international law but also about the newer fields of international law, such as the Law of the Sea, Law of Outer Space, Trade Law, International Economic Relations Law, and so forth. Skills should also be developed in the field of comparative legislation and the unification of law, particularly in the commercial and economic field.

iv) The system should devote special attention to the building up of adequate legal materials as well as to giving their officers requisite field experience in newer fields of international law by associating them in bilateral negotiations and promoting their participation in international conferences.

v) A system of co-ordinated advice should be promoted. Thus, proper procedural and other device should be developed which harmonize the questions of international law with the questions of constitutional or internal law, and deal properly with mixed questions of law and the law in commercial, industrial and economic fields, where skills are developed in Ministries of Justice and the Attorney General's office.

vi) Legal advisers must remain in close touch with foreign service officers and should have a good grip of elements of diplomacy and international relations.

vii) Members of the Legal Advisory Service should be ensured reasonable non-discriminatory Career prospects."

It was felt that these conclusions were extremely useful and might well constitute the subject matter of recommendations by the AALCC to its Member States. It was accordingly decided that the matter should be brought up before the Twenty fourth session of the Committee with a view to further consideration. The Meeting also recommended that the remaining matters on this topic should be discussed at the next meeting of the legal advisers.

The Report of the Meeting on the first topic was placed before the Committee at the Kathmandu Session. The Committee approved the Report and asked the Secretariat to transmit the same to all Member States.

# XIII. ECONOMIC AND INTERNATIONAL TRADE LAW MATTERS

# ECONOMIC AND INTERNATIONAL TRADE LAW MATTERS

It has been the practice in the Committee to take up the international trade law matters in the Standing Sub-Committee established since the Accra Session held in 1970. The Sub-Committee which normally meets five to six times during the session, subsequently submits its report to the Plenary for final adoption. During the Tokyo, Kathmandu and Arusha Sessions, the Committee continued this practice. A brief review of the work of the Trade Law Sub-Committee during the three sessions is as follows:

## Tokyo Session

At the Tokyo Session, the discussion on trade law matters was concentrated on the work of UNCITRAL, including the consideration of the draft Convention on International Bills of Exchange and International Promissory Notes as proposed by Working Group on International Negotiable Instruments. The Sub-Committee generally reviewed the progress of work in UNCITRAL on the subjects of liquidated damages and penalty clauses, electronic funds transfer and international commercial arbitration. On the question of liquidated damages and penalty clauses, the main issue for consideration was whether the law relating to that matter should be formulated in the form of a Convention or in the form of a Model Law. The participants had different views. A large number of them favoured a Convention, whereas some of them favoured a Model Law. One of the representatives preferred a Model Law against a Convention on the ground that a high cost was involved in adopting a Convention whose subject matter was rather limited and, also, some members of the AALCC itself had supported the idea of Model Law on the subject. In contrast, the representatives who favoured a Convention pleaded that the question whether there should be a Convention or a Model law should not be decided on the basis of involvement of high cost. However, they felt that the problem of high cost involved in convoking a meeting of plenipotentiaries for the adoption of the Convention might be resolved through adoption of such a Convention by a resolution of the General Assembly.

On the subject of electronic funds transfer, one of the representatives expressed the view that this subject was of growing importance. He emphasised that the countries of Asia and Africa should have more interest in the study of this subject. The necessity of preparing a legal guide on electronic funds transfer was also stressed.



On the subject of international commercial arbitration, special mention was made of the uniform rules adopted by UNCITRAL and regional centres for arbitration established by the AALCC. One of the representatives felt the desirability of having a uniform arbitration law in addition to the uniform arbitration rules. Another representative suggested that the AALCC Secretariat should prepare its own commentaries on the clauses of the Model Arbitration Law as prepared by UNCITRAL and should suggest what was in the best interest of the Member States.

### The Draft Convention on International Bills of Exchange and International Promissory Notes

The Sub-Committee examined the issues involved in the Draft Convention on International Bills of Exchange and International Promissory Notes. The views expressed by the representatives were as follows:

#### Definition of "Money" or "Currency" (Articles 1(2) (b) & (3) (b), 4 (11) & 6)

One of the representatives expressed the view that there should be a distinction between two situations. First, in order to meet a situation where instruments are drawn in SDRs but are to be paid in a specific domestic currency, there was a need for incorporating this possibility into the Convention. Also, the Convention should take care of a situation where instruments are drawn in SDRs and are to be paid in SDRs as well. In his view, further study was needed especially in the latter situation.

#### Completion of an Incomplete Instrument (Article II)

One representative expressed the view that the existing text in the Draft Convention should be retained, since that appeared to be a fair solution as to the question who should bear the loss arising out of the observance of the original agreement.

#### Forged Endorsements (Article 23)

It was the view of one of the representatives that the existing text be acceptable, since he considered it a good compromise. Nevertheless, he suggested that this text could provide, as in Articles 41(2) and 64, that the damages that the person to whom the instrument was directly transferred by the forger has to pay should be limited to the amount referred to in Article 66 or 67.

**Shelter Rule (Article 27)**

That the existing text should be retained was the view of one of the representatives and this view was generally accepted by members of the Sub-Committee.

**Protected Holder (Article 28)**

The existing text was considered satisfactory by one of the representatives. But he suggested that the requirement of regularity in Article 4(7) should be deleted since it was a vague concept which is not accepted in the present UCC.

**Material Alteration (Article 31)**

This position was generally acceptable but a decision to delete this provision was said to be another solution of resolving this problem.

**Drawer's Power to Limit or Exclude His Liability (Article 34(2))**

Supporting the existing text, one of the representatives expressed the view that even to the civil law countries this text is acceptable.

**Incomplete Instruments (Article 38 (1))**

This provision was considered necessary and it was felt that some sort of rule should be provided in case of the guarantor.

**Qualified Acceptance (Article 39 (2))**

One representative emphasised that there was a clear distinction in the text between the qualified acceptance in which the holder has no option and the partial acceptance. This solution was generally acceptable.

**The Guarantor (Article 42 (5) )**

This solution was preferred because another solution which provided that in the case of a bill the person for whom he has become guarantor is the drawer before acceptance, the holder would be at a loss because he usually does not know when the guarantor made the guarantee, and hence it would lead to practical problems of verification.



**Domiciled Bills (Article 45 (2) (c))**

One of the representatives expressed the view that the text was acceptable to him, although it might give rise to difficulties to commercial practices of ULB countries. No contrary view was expressed.

**Excuse for Delay in Presentment for Acceptance (Article 48)**

According to Article 48(b), presentment for acceptance is dispensed with. Therefore, the holder in this case is allowed to take recourse action immediately. This solution was considered preferable.

**Guarantor of the Drawee (Article 53 (3))**

Considering the nature of the International Bills of Exchange, one reperesentative felt that it would be a good idea to have a guarantor who has primary obligation on the instrument.

**Instruments payable in a Currency other than that of a place of Payment (Articles 71 & 72)**

One of the representatives considered the text acceptable and noted that damages from loss caused for the holder was recoverable in accordance with Article 71 (3).

On the issue whether there should be two separate Conventions on the International Bills of Exchange and International Promissory Notes on the one hand and International Cheques on the other, one representative expressed the view that two separate Conventions might be preferable. He supported his view on the ground that one Convention which covers everything will have too many provisions and will be complicated. This view was supported by several delegations.

**(II) Kathmandu Session**

The Sub-Committee on International Trade Law matters, during the Kathmandu Session while mainly focussing its deliberations on UNCITRAL's Model Law on International Commercial Arbitration, also generally reviewed the progress concerning the Draft Convention on International Bills of Exchange and International Promissory Notes and UNCITRAL's work relating to New International Economic Order (NIEO).

## a) UNCITRAL's Model Law on International Commercial Arbitration

The Sub-Committee examined the UNCITRAL's text of the Model Law article by article. The discussions were as follows:

### *Article 1*

### *Scope of Application*

(1) The Sub-Committee noted that the first paragraph of this article sets forth the definition of 'international' but did not define the term 'commercial' and instead the text had provided in a footnote an illustrative list of commercial relationships. The Sub-Committee decided to recommend that a definition of the term "commercial" should be included within and made an integral part of the Model Law. As regards the question whether this definition should be illustrative or exhaustive, one view favoured an illustrative definition, the other preferred an exhaustive one.

(2) The Sub-Committee also agreed to recommend a drafting change in Article 1(1), namely, "which has effect in this State" to be replaced by the expression "which is in force in this State".

(3) It was noted that the Model Law did not contain any provision on the territorial scope of application. The Sub-Committee considered the question whether the Model Law should contain such a provision. After deliberation, it decided that the Model Law should not incorporate territorial limit.

### *Article 2*

### *Definitions and Rules of Interpretation*

(1) This Article sets forth definitions of certain terms as also rules of interpretation. The Sub-Committee decided to recommend that the definitional provisions and provisions relating to rules of interpretation should be divided into the independent articles entitled "Definitions" and "Rules of Interpretation", respectively. It was also agreed that it would be appropriate to locate the 'Interpretation' article towards the end of the Model Law.

(2) It was suggested by one representative to include a definition of the term "party" to the effect that that term included natural



or juridical persons or entities who had concluded an arbitration agreement irrespecive of whether the persons or entities were named or identified in the Arbitration Agreement.

### *Article 4*

### *Waiver of Right to Object*

Article 4 estoppes a party from later invoking non-compliance with a procedural requirement laid down in a non-mandatory provision of the Model Law, or in the arbitration agreement, if that party does not object thereto without delay. The Sub-Committee felt that the term "without delay" was vague and it would be appropriate if some time-limit was indicated.

### *Article 5*

### *Scope of Court Intervention*

(1) The Sub-Committee agreed with the suggestion made by one representative that the title of this article was inappropriate and should be amended to "Limitation of Court Intervention."

(2) One representative was of the view that this Article should either be deleted or exact circumstances should be specified in which the Court could intervene.

### *Article 6*

### *Court for certain functions of Arbitration, Assistance and Supervision*

(1) This Article requires the State adopting the Model Law to designate a specific court to perform certain functions referred to in specified provisions of the Model Law. On the suggestion of one representative, the Sub-Committee took the view that designated courts by the national authority should have the jurisdiction to deal with matters concerning the Model Law.

(2) The Sub-Committee recommended reformulation of this article as under:

*Courts with jurisdiction to perform the functions provided in the Model Law*

"The Courts with jurisdiction to perform the functions provided in the Model Law shall be....."

### *Article 7*

### *Definition and Form of Arbitration Agreement*

(1) The Sub-Committee agreed recommending that this Article should be split into two articles, one dealing with the definition of arbitration agreement and the other with the form of arbitration agreement.

(2) It was also agreed to recommend substitution of the expression "defined legal relationship" in paragraph (1) of this Article by "defined legal issues" or "defined legal disputes".

(3) Paragraph (3) of this Article provides that "An agreement is in writing if it is contained in a document signed by the parties". The question was raised whether the signature on the document should be hand written or could be effected by mechanical means. The Sub-Committee agreed to recommend that the mode of signature should be left to the national laws.

### *Article 8*

### *Arbitration Agreement and Substantive claim before Court*

(1) The last part of paragraph (1) of this Article reads: "Unless it finds that the agreement is null and void, inoperative or incapable of being performed". It was agreed to suggest deletion of the words "incapable of being performed" as they were deemed to be superfluous.

(2) Paragraph (2) of this Article permits continuance of arbitral proceedings while the issue of jurisdiction is pending with the court. The Sub-Committee recommended reformulation of this provision as follows:

"Where in such cases, arbitral proceedings have already commenced, the arbitral tribunal shall continue its proceedings unless the Court grants an interim order to suspend the proceedings."

### *Article 10*

### *Number of Arbitrators*

The Sub-Committee considered a suggestion that failing agreement by the parties; an arbitration should be conducted by a sole arbitrator



for the sake of economy and expediency. Another view considered was that unless the parties agreed on number of arbitrators, there should be three arbitrators. The majority of Sub-Committee members recommended retention of the present text.

### *Article 14*

### *Failure or impossibility to act*

In view of the suggested reformulation of Article 6, it was noted that certain consequential amendments would need to be incorporated in this Article, viz. "the Court specified in Article 6" would need to be substituted by "the Courts specified according to Article 6".

### *Article 14 Bis*

The Sub-Committee recommended the deletion of the opening words of this article, namely "The fact that" as they were considered to be superfluous.

### *Article 16*

### *Competence to rule on own Jurisdiction*

(1) It was noted under this Article although the tribunal had the power to rule on its jurisdiction, it was not final and conclusive but ultimately subject to court control and as such a positive ruling could be contested only in an action for setting aside the final award on merits. One representative expressed the view that the question of jurisdiction of the arbitral tribunal should be settled first before it could go into the merits of a claim and further stated that the para (3) of Article 16 be substituted as follows:

(3) "Whenever the question of jurisdiction of the arbitral tribunal arises before it within the period specified by the tribunal as referred to in paragaph (2) of this Article, the arbitral tribunal shall rule on the question of jurisdiction before entering into the merits of the case."

The Sub-Committee, however, decided to retain the present text.

(2) The Sub-Committee agreed to recommend that this Article be entitled "Competence".

### *Article 18*

### *Power of Arbitral Tribunal to order Interim Measures*

(1) The Sub-Committee agreed to recommend that the title of this Article be as follows: "Interim Measures".

(2) The Sub-Committee recommended the reformulation of this Article as below:

"Unless otherwise agreed by the parties, the arbitral tribunal may at the request of one of the parties, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide security for the cost of such measures".

(3) One representative expressed the view that the provision concerning security for the cost of interim measures could not be accepted unless it was subject to the prior agreements of the parties.

### *Article 19*

### *Rules of Procedure*

(1) Under Article 19, the procedural rules, unless laid down by the Model Law itself, are determined either by the parties or failing agreement, by the arbitral tribunal. It was suggested that the right of the parties to lay down in detail the procedural rules unless they had chosen the rules of an arbitral institution should be limited and wider discretion should be given to the arbitrators who would normally be more experienced than the parties. After deliberation, the Sub-Committee did not retain this suggestion.

(2) Paragraph (2) of this Article confers on the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of any evidence. One representative was of the view that the words "materiality" and "weight" were redundant. The Sub-Committee, however, favoured retention of all the four qualifying terms considering that each one of them had different connotations although to some extent overlapping.



### *Article 20*

### *Place of Arbitration*

(1) This Article lays down the rule that the place of arbitration may be agreed upon by the parties, and failing agreement, the arbitral tribunal may determine the place. Some representatives felt that although, seemingly, the rule looked sound, fair and reasonable, in actual practice it had worked to a great disadvantage of the parties particularly from the developing countries. The parties from the developed countries invariably insisted on the venue of arbitration to be either in Europe or America and the other party to the contract being in a weaker position had no choice but to agree to such a stipulation. The venue of arbitration in all such cases, although seemingly a matter of choice, turned out to be nothing but an imposition on the parties from the developing countries.

(2) There was a good deal of discussion on this matter during which the following suggestions were made: (a) There was no way to tackle this problem within the text of the Model Law as the freedom of the parties as to the selection of the venue of arbitration could not be fettered; (b) The venue of arbitration as a rule should be in the respondent's country; (c) Failing agreement, the venue should be fixed by the arbitral tribunal taking into account the wishes of the parties and circumstances of the case; (d) When the arbitral tribunal is to choose the venue of arbitration in a dispute between a party from a developing country and a party from a developed country, the venue should be in a developing country; (e) An addition of the sentence in Article 20(1): "While choosing the venue of arbitration in such case, the Arbitral Tribunal may, however, give priority to the venue of the party from the relatively less developed country in economical sense". However, it was felt by some other representatives that this suggestion was not realistic or practical.

(3) The Sub-Committee, after deliberation, decided that the best practical solution should be: First, that a footnote be appended to paragraph (1) of Article 20 as follows: "The Asian-African countries are recommended to include in their agreements the use of Cairo and Kuala Lumpur Arbitration Centres and any other Centre established by the AALCC, as a venue of arbitration. Second, that the AALCC recommend its Member Governments to use its Regional Centres as the venue of arbitration.

### *Article 22*

### *Language*

The Sub-Committee agreed to recommend expansion of paragraph (1) of this Article to provide for the situation where failing agreement by the parties, the arbitral tribunal does not choose the language of one of the parties for use in the arbitral proceedings. In this situation, this party should have the right to have translations of the proceedings in his own language at his own expense.

### *Article 23*

### *Statements of Claim and Defence*

(1) The Sub-Committee agreed to recommend the reformulation of paragraph (2) of this article to be as follows:

"Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to the other party or any other circumstances".

(2) The Sub-Committee also agreed to recommend addition of a third paragraph to this article stating:

"In any case the court may fix a date before which parties shall present their documents and their final statements".

### *Article 24*

### *Hearings and Written Proceedings*

Since paragraph (4) or this article was not clear as to whether documents supplied to the arbitral tribunal were required to be submitted to the other party in original or copies thereof and whether the other party had the right to examine them, the Sub-Committee recommended deletion of reference to documents or document from that paragraph and addition of the following provision as paragraph (5):

"Each party shall have the right to examine any document presented by the other party to the arbitral tribunal. Unless otherwise decided by the arbitral tribunal, copies of such documents shall be communicated by the supplying party to the other party".



### *Article 25*

### *Default of a party*

With regard to sub-paragraph (c) of this Article, a view was expressed that while the arbitral tribunal in the case of a default in appearance before the tribunal had the right to continue the proceedings, it must take into account the possible arguments the defaulting party would have advanced had it been present. It was pointed out that this was the practice in the Common Law countries and was also in accord with international commercial arbitration practice. The Sub-Committee, however, decided to retain the present text.

### *Article 27*

### *Court assistance in Taking Evidence*

The Sub-Committee recommended substitution of the second sentence in paragraph (1) of this Article, viz. "The request shall specify" with "The request shall be in conformity with the rules accepted before the Court and shall specify":

### *Article 28*

### *Rules applicable to substance of dispute*

This Article obliges the arbitral tribunal to decide the dispute in accordance with the "Rules of Law" agreed by the parties. If the parties have not so agreed, the arbitral tibunal is only permitted to apply the law as determined by the conflict of law rules which it considers applicable. The view was expressed by one representative that the arbitral tribunal should be permitted to apply only the substantive rules it considered appropriate. The majority, however, decided to retain the present text.

### *Article 29*

### *Decision-making by Panel of Arbitrators*

The Sub-Committee recommended the title of this Article to be as follows: "Decision-making".

### *Article 30*

### *Settlement*

(1) The Sub-Committee took the view that if the parties settled the

dispute during the arbitration proceedings, they must be obliged to notify the arbitral tribunal and only upon receipt of such notification, the arbitral tribunal should terminate the proceedings. Paragraph (1) of this Article, therefore, needed to be amended accordingly.

(2) The Sub-Committee considered a suggestion that paragraph (1) should provide that parties settle the dispute through negotiation, conciliation or any other means. It was pointed out that conciliation was ruled out in this case as the arbitral proceedings had already commenced and that negotiations and conciliation were conceptually different from arbitration. After deliberation, the Sub-Committee decided to recommend retaining the present text.

### *Article 31*

### *Form and contents of Award*

It was agreed to recommend that since paragraph (1) of this Article used the wording "Arbitrator or Arbitrators", the same wording would have to be used in paragraph (4) as well.

### *Article 33*

### *Correction and Interpretation of Awards and Additional Awards*

(1) Under paragraph (2) of this Article, the arbitral tribunal has been given competence to correct errors in the awards rendered by it at its own initiative within 30 days of the date of the award. The view was expressed by one representative that no time-limit should be stipulated for this purpose. The Sub-Committee, however, took the view that in international commercial arbitrations it would be proper to have a time-limit for such purposes.

(2) The Sub-Committee was further of the view that where an arbitral tribunal contempated correction of an award *suo moto*, it should be obliged to notify the parties concerned. The Sub-Committee therefore recommended modification of paragraph (2) accordingly.

(3) Paragraph (3) enables a party to request the arbitral tribunal for an additional award as to the claims presented, but somehow



omitted from the award. The Sub-Committee took the view that in such cases the arbitral tribunal should first decide on the admissibility or otherwise of the request within a time-limit and only after it had convinced itself of the admissibility of the request should it reopen the proceedings to deliver an additional award. The Sub-Committee therefore recommended incorporation of the following formulation in paragraph (3):

"The arbitral tribunal shall decide on the admission or rejection of the request within 30 days of the receipt of such request. If the arbitral tribunal considers the request to be justified, it may initiate the necessary proceedings to deliver an additional award within sixty days."

(4) The Sub-Committee agreed to recommend the deletion of opening words "The provisions of" from paragraph (5) of this Article.

### *Article 34*

### *Application for setting aside as Exclusive Recourse against Arbitral Award*

This Article sets forth, *inter alia*, the procedural modalities for setting aside an award. It requires an application to be made for this purpose within three months. The three-month pariod was regarded to be somewhat long. The Sub-Committee was, however, of the view that the three-month period could be retained subject to the qualification "unless the parties have agreed otherwise".

### *Article 35*

### *Recognition and Enforcement of Awards*

One representative suggested to add "for the parties concerned" after "recognized as binding" in paragraph (1) of this article.

### *Article 36*

### *Grounds for Refusing Recognition or Enforcement*

It was noted that this Article listed the same grounds for refusing recognition or enforcment as does Article V of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The Sub-Committee considered a suggestion that the reference to *public policy* in paragraph (2) of this Article might be replaced by a

reference to "international public order". In support of this suggestion it was stated: (i) the term 'public policy' had been understood and interpreted in differing fashions depending upon the legal systems of the countries concerned; and (ii) an upcoming trends had been that inernational transactions were now being subjected to less strict standards than purely domestic transactions and distinction was now increasingly being made between international public order and domestic public order of a State where recognition and enforcement of an international award was sought. After deliberation, the Sub-Committee decided to retain the present text.

**Costs:-**

The Sub-Committee considered a suggestion made by two of the representatives as follows:

"The Model Law does not contain any provisions dealing with the cost of the arbitration proceedings. As it stands, the arbitral tribunal has no power to determine the costs of the proceedings. Further there is a question whether costs, if awarded by the tribunal, would form part of the "award" which is enforceable.

In order to ensure the attractiveness of arbitration as an alternative to litigation in the courts, it would be necessary for the Model Law (which when accepted would be enacted as the national law on arbitral proceedings) to deal with this issue. It is not necessary for the Model Law to provide specifically for the cost of each aspect of the proceedings, but it should *at least:*

(a) give the tribunal power to determine the costs of the proceeding;

(b) ensure that costs form part of the award which is enforceable; and

(c) give more guidelines as to who should bear the costs."

Some other representatives were, however of the opinion that it would be advisable to leave the matter of costs to be regulated by national procedural laws rather than dealing with it in the Model Law. It was also pointed out that in arbitration practice although the widely acceptable principle was that arbitration costs were borne by the losing party, in some jurisdictions the costs would be equally shared by the parties and in some instances, the arbitral tribunal had the competence to reduce the costs usually borne by the losing party after taking into



account the nature of the dispute and the situation of the losing party. Since procedural laws differ from one State to another these representatives felt that the question of costs might better be left to the national procedural laws.

THE SUB-COMMITTEE, decided:

(i) To request the UNCITRAL secretariat to prepare an official Commentry on the Model Law on international commercial arbitration with a view to assist the developing countries in the uniform application and interpretation of the different provisions of the model law; and

(ii) To draw the attention of UNCITRAL to the utmost importance of costs in the matter of international commercial arbitration and to provide an explanation in the official commentary for a lack of provision in the model law on costs.

**(b)UNCITRAL'S DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES**

Since the UNCITRAL's Draft Convention on International Bills of Exchange and International Promissory Notes had been examined article by article during the Twenty-third Session of the AALCC held in Tokyo (May 1983), the Sub-Committee limited its discussion to general observations. One representative suggested that the construction of the draft text needed reformulation in some provisions, for example Article 1 on Sphere of Application and Form of the Instrument should be split into two independent articles entitled "Sphere of Application" and "Form of the Instrument".

Another representative noted that the Draft Convention includes legal concepts which are not familiar in the legal systems of some of the member countries of the AALCC, for example, the concept of protected holder does not exist in their legal system.

One representative expressed the view in regard to Article 11 that the amount and date must be indicated in the bill of exchange or promissory note for its validity and completion.

The sub-committee taking into account the study prepared by the secretariat in document no. AALCC/XXIV/14 and noting the fact that the present text of the draft convention on international bills of exchange and international promissory notes was to be revised in the light of the comments and observations made by

governments and international organisations, recommended that UNCITRAL in revising the text of the draft convention should reflect the norms and principles underlying the Common and Civil Law systems relatable to negotiable instruments.

**(c.) UNCITRAL'S WORK ON NEW INTERNATIONAL ECONOMIC ORDER (NIEO)**

The Sub-Committee reviewed UNCITRAL's work relating to New International Economic Order (NIEO) on the basis of a working paper presented by the Secretariat. The working paper had suggested that "the practical utililty of the UNCITRAL'S Legal Guide would be considerably increased if it is addressed also to the issues and legal problems that confront the developing countries and their enterprises whilst negotiating and concluding joint venture arrangements in respect of industrial works, involving not merely the construction of an industrial plant or project but also its joint running and management for a stipulated period after construction by the parties."

After hearing the views expresssed by some of the participants and noting with satisfaction and appreciation the progress which UNCITRAL had thus far made in the preparation of the legal guide through its working Group on the New International Economic Order.

The Sub-Committee recommended that UNCITRAL should consider the preparation of an annex to the legal guide dealing with legal issues related to joint ventures arising in the context of industrial contracts, in view of the practical and legal difficulties that may arise out of these arrangements particularly for parties in developing countries;

The Sub-Committee also recommended that UNCITRAL consider taking up item 6 of its programme of work on NIEO-Concession Agreements and other agreements in the field of natural resources in the near future as that topic had gained certain urgency for the developing countries on account of the shift in the pattern of mineral exploration from developing to developed countries.



**(iii) Arusha Session**

At the Arusha Session, the Sub-Committee on International Trade Law Matters generally considered the work of UNCITRAL and other organisations concerned with international trade law. The Secretariat had also submitted a study on the Legal Framework for Joint Ventures in the Industrial Sector. The study dealt with the salient features of contractual and equity joint ventures, the suitability of equity joint ventures for the countries of the region, the legal structure of joint venture arrangements, the diverse legal regimes in which the joint ventures have to operate and some of the potential problems that arise from the actual operation of joint ventures. The Secretariat sought the direction of the Sub-Committee whether its future work on the topic should concentrate on developing a model of an equity joint venture or preparation of appropriate guidelines on the common legal clauses that are embodied in such agreements so as to assist parties from the countries of this region in negotiating and concluding such arrangements. In the course of the disussions in the Sub-Committee the following observations were made:

First and foremost, it was generally agreed that the basis of industrial co-operation, whether among the countries of the region or between a developing and developed country should be through equity joint ventures rather than contractual joint ventures.

As regards the future work of the Secretariat in this respect, those who supported the idea of preparation of appropriate guidelines on the various legal clauses of a joint venture arrangement and resolving the difficulties encountered in that regard felt that preparation of a model joint venture arrangement would not be appropriate because of the inherent difficulty of including in the model the infinite number of combinations of possible terms and conditions which are possible in a joint venture arrangement. Not only the terms and conditions would depend upon the subject matter of the joint venture arrangement to another , they would also vary depending upon in which host country they would have to operate. The attention of the Sub-Committee was drawn to the fact that there was a great deal of diversity in the investment laws and codes in the countries of the region. However, in view of the practical and real difficulties experienced by the parties from the countries of the region in the negotiation and conclusion of joint venture arrangements which were compounded by the lack of any precedents or models available in this regard, it was finally agreed that the Secretariat should attempt to draft a few sample models taking into account the diverse types of joint ventures in use in the countries of the region. While formulating these models, the Sub-Committee directed the

Secretariat to include therein legal clauses covering all possible terms and conditions accompanied by extensive commentaries and to ensure that the terms are fair and equitable to all the partners of a joint venture. In this entire exercise stress should be laid on establishing standards which are balanced and fair to all the parties, whether they be from developing or industrialized countries. The Sub-Committee requested the Secretariat in the meanwhile to collate the information pertaining to the joint venture arrangements concluded or in operation in the region as also models for such arrangements in use anywhere for transmission to the Member Governments.

In this context, attention was drawn to the problem of protectionism resorted to by some of the industrialized countries towards the products of industrial ventures of the developing countries, which often made such ventures non-viable. It was pointed out that once industrial ventures in the countries of the region started producing products comparable in quality and standards to those of the industrialized countries, market access was denied to them in the industrialized countries by raising protectionist barriers. Apart from an attempt to deal with this problem in the legal framework of joint ventures, the Sub-Committee recommended that the AALCC should address itself to this problem at a suitable time and that by way of a beginning the Secretariat should prepare a study monitoring the work of all institutions and agencies within or outside the U.N. system set up for the promotion of free trade in order to ascertain whether they have been effective in attaining their goals, particularly in relation to developing countries. The Committee should also study and recommend ways and means to enable the products of industrial ventures of developing countries to enjoy greater market access throughout the world. The Committee should also collect information about the work done by these institutions to tackle the problem of protectionism and the recommendations they have made for transmission to the Member Governments. The Sub-Committee felt that this would enable the Member Governments to consider the steps that the Committee should take to make those recmmendations effective.

Attention of the Sub-Committee was drawn to the fact that most of the countries in the region have enacted legislation on foreign investment offering competitive protection and incentives to attract foreign investors which have led to certain disadvantages to these countries, and it was proposed for its consideration whether an attempt should be made to harmonize these codes and laws. A suggestion made in this regard was that the Secretariat should attempt to formulate a Model Statute on Investments and Joint Ventures to assist in achieving some degree of unification in this area. The Model Statute could include provisions on applicable law, feasibility studies, formation



of contract, variation of the contract, interpretation of contract, transfer of technology, transfer of property, drawings and descriptive documents, supply of raw materials and industrial output, passing of risk, delays and remedies, damages and limitation of liability, training and acquisition of skills, maintenance and spare parts, price and revision of price; payment conditions, performance guarantees, insurance, customs duties and taxes, termination of contract etc.

## WORK OF UNCITRAL AND OTHER ORGANIZATIONS CONCERNED WITH INTERNATIONAL TRADE LAW

The Sub-Committee heard a statement by the Secretary of UNCITRAL on the current activities of that body of particular interest to the member States of the Committee. These had included the recent adoption of UNCITRAL's Model Law on International Commercial Arbitration, the Draft Legal Guide on drawing up of Major Industrial Works, which was oriented to the purchasers of such works, namely the developing countries, and the UNCITRAL-UNCTAD promotional effort to secure ratifications of the UN Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) which was in the interest of the developing countries.

The Sub-Committee noted with appreciation the current work programme of the UNCITRAL and commended the UNCITRAL for its serious attention to subjects of international trade law which were of importance to States from all regions, and in particular to the developing States of Asia and Africa. Noting that the U.N. Convention on the Carriage of Goods by Sea, 1978 had not yet come into force, the Sub-Committee requested the Committee to recommend to the member States to consider the desirability of ratifying that Convention.

In respect of the UNCITRAL's Model Law on International Commercial Arbitration, the Sub-Committee expressed its satisfaction with the response of UNCITRAL to the concerns expressed by the Committee at its Kuala Lumpur Session in 1976. It recalled that the draft of the Model Law had been discussed by the Committee at its Kathmandu Session in 1985 as well as at the Regional Seminar on International Commercial Arbitration held in New Delhi in March 1984 under the joint auspices of the UNCITRAL Secretariat and the AALCC. The views expressed by the AALCC on the draft had been before the UNCITRAL and had been actively taken into account during the adoption of the final text.

The Sub-Committee noted that the Model Law not only responded to the concerns expressed by it in 1976 but also provided a modern law for international commercial arbitration. This was of particular importance

to the developing countries since they had seldom been the seat of such arbitrations, in part because the domestic law of arbitration often contained rules which were appropriate for domestic arbitration but were inappropriate for international commercial arbitration. The Sub-Committee was of the view that one of the important steps which could be taken by the Member States of the AALCC to promote the holding of arbitrations in the Asian-African region was the adoption, by those States, of the Model Law.

The Sub-Committee recommended the Committee to request its Member States to consider the desirability of reviewing their law governing international commercial arbitration with a view to considering adoption of the UNCITRAL Model Law on International Commercial Arbitration as it appears in Annex I of the Commission's report on its eighteenth session (A/30/17).

The report of the Trade Law Sub-Committee was adopted by the plenary of the Committee.

**Debt Burden of Developing countries**

The item "Debt Burden of developing countries" had been included in the programme of work of the Committee pursuant to a decision taken at the Kathmandu Session. The Secretariat accordingly submitted a preliminary study for consideration at the Arusha Session. The study outlined the dimensions of the external indebtedness of the developing countries on the basis of the data collected from various sources and highlighted the problems faced by those countries on account of the debt burden. It also dealt with the causative factors and forces which had brought about the international debt situation and referred to the various proposls which had been advanced in the various international fora. These had included *inter alia:* (i) Debt restructuring or rescheduling-a process in which the repayment of a debt is deferred when it reaches maturity; (ii) Declaring a moratorium on the repayment of debts; (iii) Ceiling on the rate of repayment, i.e. the repayment of the debt should be limited to a certain percentage of the total value of exports; (iv) Repudiation of the existing debts; and (v) Debt redemption, i.e. to restrict repayment to the borrowed capital precluding the accummulated interest. The main suggestion offered by the study for alleviating the debt burden of the developing countries was to convene an international conference of creditor and debtor nations together with commercial banks and international lending agencies.

The Committee took up this item for consideration at the fourth Plenary meeting. In the course of the general discussions, a view was



expressed that the debt burden could be alleviated, first by replacing the existing international monetary, financial and trade systems by a new international economic order; and secondly by the adoption of wise and far sighted policies and guidelines by the creditor nations and international lending agencies in consultation with the debtor nations. It was felt that the developed countries should help promote the debt service of the debtor nations through the latter's development instead of asking them to curtail outlays and to repay their debts before achieving development. It was observed that although the impact of the debt burden was devastating for the developing countries, the creditor nations and institutions would also not remain unaffected because the world was now more interdependent than at any other time in history. While recognising the need for concerted international efforts and international solidarity for alleviating the burden of the debtor nations, it was felt that the problem, had remained intractable because it had been approached in a piecemeal fashion rather than being addressed globally and indepth. For this reason, it was suggested to convene a global conference under the auspices of the United Nations which would bring together the debtor and creditor nations, private commercial banks and international agencies and consider the various ways and means of resolving this problem.

One delegation noted with satisfaction that the debtor nations were now joining forces as a negotiating front which was evident from the creation of the eleven-nation Cartagena Group in June 1984 which had made it clear that no effort on the part of the indebted countries alone would be sufficient without the co-operative efforts of the developed countries and from the OAU's Addis Ababa Declaration calling upon the developing countries to coordinate their activities with respect to their debts. In this context, he also referred to the Baker Plan presented at the World Bank-IMF Meeting held in Seoul in October 1985 according to which creditor nations, commercial banks and international lending institutions would assure the debtor nations of adequate flow of money to finance their economic growth. He pointed out that although the Plan had been favoured in certain quarters, it had been criticized in the debtor nations for its failure to deal with high interest rates, low commodity prices and protectionsm in the export markets. Finally, he stressed that the developing countries must agree on a joint programme of action and at the same time both developing and developed countries must co-operate with one another with a view to restructuring the international financial and trade systems so that the debt crisis might be brought to an end.

It was suggested that the Committee should convene an expert group meeting in New Delhi with the mandate to prepare an indepth study suggesting practical solutions to the problem.

The Committee took note of the various suggestions and requested the Secretariat to prepare another study on the topic with the help of experts in this field.