

Sub-Committee. The Sub-Committee noting that the topic of privatization had acquired immense importance for the developing countries in view of the far reaching structural changes taking place in the global economy and which had an impact on national economies, adopted a recommendation that the AALCC urge the Member Governments which had not responded to the questionnaire to do so and/or furnish relevant documentation to the Secretariat at the earliest.

The Governments of Indonesia, Turkey and Kuwait sent in useful information. The Government of Cyprus wrote to say that the issue of privatization had not arisen in Cyprus". In addition, the Secretariat had also collected some useful information from other sources such as the World Bank, the Economic Commission for Europe, UNIDROIT and the International Development Law Institute (IDLI).

In view of the lack of adequate information from the bulk of Member Governments about their privatization programmes, underway or contemplated, it was not possible for the Secretariat to prepare a meaningful study on the topic. However, given the importance of this matter for the developing countries in general and Member States of the AALCC in particular, a preliminary study revised in the light of the information received by the Secretariat was submitted to the Thirty-second of the AALCC held in Kampala (Uganda) in February 1993. At that session, the delegations of Japan and Uganda presented their country responses to the Secretariat's questionnaire. After the Kampala Session, the Secretariat renewed its request to the Member States in a communication addressed to them on 25th of May 1993. In response thereto, useful information was received from the Governments of Mongolia, Pakistan, the Philippines and Sri Lanka. Thus, the overall response received were those from Indonesia, Japan, Kuwait, Mongolia, the Philippines, Pakistan, Singapore, Sri Lanka, Thailand, Turkey and Uganda.

As it was felt that adequate information had not yet been received from all the Member Governments, it was decided that the Secretariat should participate as an observer in the second session of the UNCTAD *Ad Hoc* Working Group on Comparative Experiences with Privatization which was scheduled to be convened in Geneva from 7 to 11 June 1993. This Working Group had been established by the Trade and Development Board of UNCTAD to deal with the issues related to privatization and to enable the participating countries to share each other's experience with privatization. The Working Group had attracted broad participation from the developing countries. Amongst the AALCC Member States which had made national presentations on privatization before the Working Group (up to its second session) included China, Egypt, Indonesia, Japan, Jordan, Malaysia, Nigeria, Pakistan, the Philippines, the Republic of Korea, Sri Lanka, Tanzania,

Thailand and Turkey. The overall information available to the Secretariat enabled it to prepare a comprehensive study entitled "Legal and Institutional Framework governing Privatization in Asia and Africa".

Subsequently, it was proposed by some Member States that since developing countries in general and Afro-Asian States in particular were attaching growing importance to the privatization of public sector undertakings, demonopolization and administrative de-regulation of economic activities in the context of ongoing economic restructuring programmes, the AALCC as a wider forum of Afro-Asian co-operation and consultation in the fields of law and economics should take the initiative of convening a special meeting to provide a forum for interaction between invited experts and legal advisers and/or senior officers of the AALCC Member States engaged in the implementation of privatization programmes in their respective countries. Through such joint endeavours, legal and institutional guidelines for privatization and post-privatization regulatory framework could be developed to provide an added impetus to the process of orderly privatization in Africa and Asia.

In response to this proposal, a Special Meeting on Developing Institutional and Legal Guidelines on Privatization and Post-Privatization Regulatory Framework was convened in Tokyo from 18 to 20 January 1994 during the Thirty-third Session of the AALCC held there from 17 to 21 January 1994. Twenty-four Member States of the AALCC and six observer delegations participated in the Special Meetings. The basic working papers prepared for the Special Meeting included :

- (i) a study prepared by the AALCC Secretariat entitled "Legal and Institutional Framework governing Privatization in Asia and Africa".
- (ii) "Draft General Procedures and Guidelines for Privatization" prepared by the World Bank at the request of the AALCC; and
- (iii) "Legal Guidelines for Privatization Programmes" a Working Paper prepared by the World Bank at the request of the AALCC which was introduced at the start of the Special Meeting.

Other papers submitted to the Special Meeting included:

- (i) "A Structural Framework for Privatization" by Ms. Rumu Sarkar, General Counsel, USAID;
- (ii) "Korea's Policy on Public Enterprises for Strengthening National Competitiveness" by Mr. Nam Shun-Woo, Director, Economic Planning Board, Government of the Republic of Korea;
- (iii) "Sri Lanka's Current Divestiture Strategies" by Mr. Tissa Jayasinghe,

Director, Commercial Division, Ministry of Finance, Government of Sri Lanka, and

- (iv) Presentation on Privatization of the Japan National Railway System by Mr. Katsuhiko Hara, a senior officer of the Japanese Ministry of Transport.

At the request of the AALCC the World Bank had placed at the disposal of the Special Meeting the expertise of two of its Senior Legal Counsels who served as resource persons throughout the deliberations of the Special Meeting. Their assistance was invaluable to the success of the Special Meeting. These resource persons introduced the discussions on the following themes before the Special Meeting :

- (i) Micro-economic and legal issues involved in privatization;
- (ii) Privatization strategies and techniques;
- (iii) Legal reform procedures for restructuring and privatization of public sector undertakings; and
- (iv) Post-Privatization regulatory framework.

At the end of its deliberations, the Special Meeting recommended the text of the Legal Guidelines for Privatization Programmes, for consideration of the Member Governments of the AALCC. This report was subsequently endorsed by the Committee.

It is hoped that these Guidelines will assist the Governments in the Afro-Asian region in particular and other countries in general, which have already undertaken or are contemplating to undertake privatization programmes in their respective countries, in carrying out such programmes in a manner which would be consistent with their national interests.

Thirty-third Session : Discussions

The Report on the Special Meeting on Privatization was introduced in the seventh plenary meeting of the AALCC held on 21st of January 1994 by Mr. Raul I. Goco, Chairman of the Special Meeting on Privatization.

The President thereafter invited the comments of the Member Delegations on the Draft Decision related to this Report which was as follows:

Draft Decision on the Report of the Special Meeting on Privatization

The Asian-African Legal Consultative Committee

Taking Note of the Report of the Special Meeting on Developing Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory

Framework which was held in Tokyo from 18 to 20 January 1994 within the organizational framework of the AALCC:

1. *Commends* the Secretary-General for his timely initiative in organizing such a meeting on a topic which is of utmost importance to the developing countries in general and in particular for the developing nations in Asia and Africa;
2. *Compliments* the Chairman of the Special Meeting on Privatization and all the participants for having accomplished the difficult mandate entrusted to that meeting within the limited time that was at its disposal;
3. *Commends* the World Bank for its financial assistance and for putting at the disposal of the Special Meeting the expertise of two resource persons whose contribution has contributed immensely to a greater understanding and enlightenment on the subject of Privatization;
4. *Notes* the contents of Report which faithfully describes the discussion during the meetings on vital legal issues on privatization; the concerns expressed thereto are the consensus arrived at by the participants including the essential points covered in the presentation of the two resource persons from the World Bank;
5. *Considers* as constituting part of the Report the text of the Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory Framework already appended to the Report for consideration of member states;
6. *Requests* the Secretary-General to arrange to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto to ensure its widest dissemination in the Afro-Asian region;
7. *Directs* the Secretary-General to report to the 34th Session on reactions, comments or suggestions, if any, of member states to the Report and the guidelines annexed thereto.

The Delegate of *Indonesia* proposed the substitution of the word '*Endorses*' by '*Approves*' in paragraph 4 so that it would read "Approves the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization" and deletion of the rest of the wordings. She also proposed deletion of paragraphs 5, 6 and 7 as in her view the Guidelines were already in the hands of the Member Delegations and the exchange of views thereon did not require the mediation of the Secretary-General.

The Delegate of *Thailand* endorsed the suggestion of the Delegate of *Indonesia* to modify paragraph 4.

The *Secretary-General*, however, emphasized the retention of paragraphs 5,

6 and 7 as he was of the view that the publication and dissemination of the background papers and the Guidelines on Privatization would be extremely useful as the topic of privatization had acquired worldwide interest. He also clarified that the publication of these materials would have no financial implications for the AALCC as the World Bank had already agreed to provide funds for that purpose.

The Delegate of *India* stated that since the Guidelines annexed to the Report had not been properly considered by the Committee, they should be treated as Draft Guidelines. Consequently, paragraph 5 of the Draft Decision should reflect that they were draft guidelines only. As regards paragraph 6, which provided for the publication and broad publicity to be given to the Guidelines, he was opposed to its circulation outside the Member States since the Guidelines had not been formally adopted by the AALCC. He sought a clarification on the reference in paragraph 2 as regards "complimenting the Chairman and participants for having accomplished the difficult mandate". He suggested deletion of paragraph 4 which in his view was a repetition of the preambular paragraph of the Draft Decision.

The Chairman of the Special Meetings on Privatization was then invited to give his views on the suggestions mooted by the Delegations. He explained that the Special Meeting had been convened with the specific mandate of developing legal and institutional guidelines on privatization and consequently submission of the guidelines by the Special Meeting as appended to its Report was execution of that mandate in terms of paragraph 2. As regards the Status of the Guidelines, he clarified that the document containing these Guidelines had been provided to the participants before the Special Meeting and the discussions during the meetings of the Special Meeting had revolved around or based upon these guidelines. As to the concern expressed by the Delegate of *Indonesia* over the binding nature of the guidelines, it had been sufficiently clarified in the Special Meeting that they were not binding on the Member States. He, therefore, concurred with the view of the Secretary-General that paragraphs 5, 6 and 7 be retained. He asked the Director of the AALCC Secretariat, who was in-charge of the Special Meeting, to further clarify the matter.

The Director (Mr. Mohil) stated that a background study and a set of guidelines prepared by the World Bank at the request of the AALCC Secretariat, had been circulated to the Member States about two months before the Special Meeting. Just before the Special Meeting, a revised and shorter version of these Guidelines had been presented so as to facilitate the deliberations in view of the limited time at the disposal of the Special Meeting. The discussions in the Special Meeting were primarily based on these two documents. It was, however, true that the Guidelines appended to the Report had not been formally adopted and that was

the reason the Report of the Special Meeting had recommended the text of the Guidelines for the consideration of the Member Governments.

The President enquired from the Delegate of *India* whether he was prepared to accept the term 'accomplished' in paragraph 2 of the Draft Decision.

The Delegate of *India* stated that if this implied that the Guidelines was an AALCC's document and had acquired the authoritative stand of the AALCC and hence of his Government which, according to him, was not the case, he could not accept this suggestion.

The Delegate of *Malaysia* expressed his opposition to paragraph 4 as amended in the light of the suggestion made by the Delegate of *Indonesia*. According to her, it created difficulties for her Delegation as the reference made in the Report of the Special Meeting to the effect that golden shares had a negative impact on potential investors, was not acceptable to her Delegation. She, therefore, favoured the suggestion made by the Delegate of *India* that paragraph 4 be deleted in its entirety.

However, at the suggestion of the Chairman of the Special Meeting, it was agreed to retain paragraph 4 with the following wording:

"Endorses the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization;"

The Delegate of *Indonesia*, who had earlier proposed deletion of paragraph 5, expressed her agreement for retaining this paragraph provided the Guidelines appended to the Report of the Special Meeting were referred to as Draft Guidelines as suggested by the Delegate of *India*. However, as proposed by the Delegate of *India*, it was agreed to rephrase paragraph 5 as under :

"Commends the Report which contains the text of the draft Legal and Institutional Guidelines on Privatization and Post-Privatization Regulatory Framework for consideration of Member States;

It was agreed to retain, paragraph 6 of the Draft Decision with the following wording:

"Requests the Secretary-General to endeavour to obtain funds from the World Bank to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto to ensure its widest dissemination in the Afro-Asian region;"

It was decided to delete paragraph 7 of the Draft Decision.

The text of the Decision as finally adopted by the Committee is set out next in this Chapter.

**(ii) Decisions of the Thirty-third Session
Agenda item: Report of the Special
Meeting on Privatization**

(Adopted on January 21, 1994)

The Asian-African Legal Consultative Committee at its Thirty-third Session

Taking Note of the Report of the Special Meeting on Developing Legal and Institutional Guidelines on Privatization and post-Privatization Regulatory Framework which was held in Tokyo from 18 to 20 January 1994 within the organizational framework of the AALCC;

1. *Commends* the Secretary-General for his timely initiative in organizing such a meeting on a topic which is of utmost importance to the developing countries in general and in particular for the developing nations in Asia and Africa;
2. *Compliments* the Chairman of the Special Meeting on Privatization and all the participants for having accomplished the difficult mandate entrusted to that meeting within the limited time that was at its disposal;
3. *Commends* the World Bank for its financial assistance and for putting at the disposal of the Special Meeting the expertise of two resource persons whose contribution has contributed immensely to a greater understanding and enlightenment on the subject of privatization;
4. *Notes* the contents of the Report which faithfully describes the discussion during the meetings on vital legal issues on privatization;
5. *Commends* the Report which contains the text of the draft legal and

institutional guidelines on privatization and post-Privatization regulatory framework already appended to the Report for consideration of member states;

6. *Requests* the Secretary-General to endeavour to obtain funds from the World Bank to publish and give broad publicity as expeditiously as possible, the proceedings and Report of the Special Meeting including the guidelines annexed thereto ensure its widest dissemination throughout the Afro-Asian region.

(iii) Report of the Special Meeting on “Developing Institutional and Legal Guidelines for Privatization and Post-Privatization Regulatory Framework” Held in Tokyo, Japan, 18-20 January 1994

During its Thirty-third Session, held in Tokyo, Japan, from 17th to 21st January 1994, the Asian-African Legal Consultative Committee convened a three-day Special Meeting on the theme, “Developing Institutional and Legal Guidelines for Privatization and Post-Privatization Regulatory Framework”.

At the first session, Mr. Raul I. Goco, Solicitor-General, Government of the Philippines, was elected as the Chairman of the Special Meeting on Privatization and Mr. Ralph W. Ochan from Uganda as the Rapporteur, by acclamation. Twenty member countries and four observer delegations participated in the Special meeting.

At the request of the AALCC, the World Bank placed at the disposal of the Special Meeting the expertise of two of its Senior Legal Counsels, Mr. Peter Kyle and Mr. Eric Haythorne, who acted as resource persons throughout the deliberations of the Special Meeting.

The AALCC Secretary-General, Mr. F.X. Njenga, delivered the keynote address at the special meeting in which he underscored the importance of privatization as vital instrument in the quest for efficiency in the management of economic and wealth generating activities and institutions in all countries, developed and developing alike. He outlined the scope of privatization worldwide and noted that privatization is now a global trend. He, however, noted with regret that in spite of the visible evidence of the success of privatization, there is still some hesitation in this region with regard to the adoption of the policy of

privatization. The Secretary-General called upon member states of the AALCC to open their minds to this global trend. While he did not advocate a blind adoption of the policy, he urged member states to study all aspects of the concepts with the view to evolving policies appropriate to their different national circumstances. The Secretary-General concluded that it was in that context that the AALCC found it necessary to organize the Special Meeting to deal with the legal and institutional aspects of privatization.

At the first substantive session, Mr. Essam Mohamed, Deputy Secretary-General, introduced a working document prepared by the AALCC Secretariat entitled Draft General Procedures and Guidelines for Privatization, together with an amended and more concise revision entitled "Legal Guidelines for Privatization Programmes". These two documents served as background material for the subsequent two substantive sessions which were held on the 18th and 19th of January of 1994.

After Mr. Essam Mohamed's introduction of the discussion paper, Mr. Peter Kyle led the first substantive discussion session. He addressed the theme, "Macro-economic and Legal Issues involved in Privatization". He defined privatization as the process by which ownership of an enterprise is transferred from public to private. He outlined the optimum legal, environmental and institutional arrangements that should be put in place once the policy decision to privatize had been made by a country. He further outlined the various techniques available for implementation of the process of privatization.

Views expressed in the open debate included the following:

- (a) that before consideration of the legal and institutional regime of privatization could be discussed, the question of whether to privatize or not as a matter of policy should first be resolved by the member state;
- (b) that there was no set formula for privatization applicable to all situations in all countries. There was, therefore, need to develop privatization strategies to suit situations existing in particular countries;
- (c) that foreign investment, while often an integral part of the privatization process, should be carefully rationalized with the need of maintaining national sovereignty;
- (d) that a clear policy decision and a firm commitment by the government and the agencies involved in the privatization process was fundamental to the success of the policy of privatization;
- (e) that social considerations must be taken into account in adopting and implementing privatization strategies especially with reference to any planned privatization of public utilities;

(f) that effective privatization strategy must be conducted in an open, accountable and transparent manner.

During the Second session, Mr. Peter Kyle led the discussion on the procedure for restructuring state-owned enterprises in preparation for privatization. He stressed the importance of ensuring that public enterprises are transformed into legal entities, perceived as separate and independent from the government, and are capable of being transformed legally to new owners. In the discussion that ensued, the Chairman found it necessary to allay the fear of some delegates on the nature and objectives of the special meeting. He clarified that the primary purposes of the meeting was to share experience, exchange of views and to expose members to the various options open to them and to alert them to fundamental steps that needed to be taken in terms of legal and institutional arrangements if a country chose to privatize. The guidelines or document prepared by the Secretariat of the AALCC was not a draft treaty document that aimed to bind any country to a particular course of action.

In the ensuing discussions the following important points were made:

- (a) that in preparing enterprises for privatization, it was preferable to treat each enterprise on its own merits and peculiar circumstances or on a case-to-case basis;
- (b) that during the privatization process it was necessary to address quickly the problems or concerns of labour including retraining;
- (c) that it was usually better to sell smaller enterprises as they were (as it was) rather than to restructure them first;
- (d) that the use of "golden shares" in the privatization process might have a negative impact on potential buyers of public enterprises as such shares were perceived to allow a continued government control of the enterprise.

In the course of the last meeting, a special presentation on the privatization of the Japan National Railway (JNR) System was made by a senior official of the Japanese Ministry of Transport, Mr. Katsuhiko Hara. Mr. Hara outlined the success achieved in the privatization of the Japan National Railway. Mr. Hara's presentation was followed by a brief discussion in the course of which he clarified that as a result of the reform of Japan National Railways, a large number of workers were pensioned off and paid generous parting packages. It was also pointed out that the reform of JNR constituted a good example of how a public enterprise could be efficiently privatized gradually. The presentation also highlighted the real need to address the social factors such as employee displacement, retirement and possible dislocation resulting from the process of privatization.