ASIAN AFRICAN LEGAL CONSULTATIVE COMMITTEE

REPORT
AND
SELECTED DOCUMENTS
OF THE
THIRTY-SEVENTH SESSION
NEW DELHI, INDIA
(13 April-18 April, 1998)

THE AALCC SECRETARIAT

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

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Prepared & Published by
The AALCC Secretariat
27, Ring Road, Lajpat Nagar-IV, New Delhi-110024
(1998)

Printed in India by:
Sachdeva Print Arts Pvt. Ltd.
44, Rajasthani Udyog Nagar, G.T.K. Road,
Delhi-110 033.Ph.: 7221294,7462839-40.

Preface

The Asian African Legal Consultative Committee has proven its utility as a forum for consultation and cooperation on some of the major issues before the United Nations and has expanded, over a period of time, its activities to include economic cooperation and international trade law.

Notwithstanding the small membership of the Organisation during the initial period, it gathered momentum in the work of formulation of legal principles and rendering of advisory opinions to its Member States which almost immediately attracted the attention of the international community. The Committee's activities primarily as envisaged in its statutes, were directed towards progressive development of international law, consideration of legal problems referred to it by the Member States, follow-up of the work of the International Law Commission and the United Nations.

Inspite of a being regional Organisation committed to the service of its Member States, it has never followed a policy of regionalism in isolation. This has been a unique feature in the character of this organisation. Observers from Non-member States are welcomed at its annual sessions from all over the world including International Organisations. The participation of the other regions in the deliberations of the sessions has proved to be beneficial not only in drawing upon their expertise and experience but also in projecting the interest of the Asian-African region within the broad framework of the international community as a whole.

The Thirty-seventh Session of the AALCC was held in New Delhi, India from 13th to 18th April, 1998. The Session was widely attended with 39 Member states, 15 Non-Members 11 Organisations including the UN, and its Specialized Agencies. A Special Meeting on the Reservation to Treaties was organised during this session and experts were invited to participate and make presentations.

The present volume "Report and Selected Documents of the Thirty-seventh Session (New Delhi, 1998)" is another contribution of the Asian African Legal Consultative Committee towards achieving the aims and objectives of the United Nations Decade of International Law.

Almost all the reserch papers prepared by the Secretariat for the New Delhi Session along with the background information and the decisions adopted have been exhaustively given in this publication.

To attain the objectives of encouraging study, dissemination and wider appreciation of International Law, the Committee continues to print its research oriented reports of its annual sessions. The emphasis in the work programme of the UN Decade of International Law has encouraged the AALCC to reproduce its papers on various subjects and issues which have a direct bearing on current topics of International Law.

I would like to express my appreciation for the expertise shown by my colleague Mr. Mohammad Reza DABIRI, the Deputy Secretary General who was entrusted with this immense task. He has successfully executed it with the poise which stems from dedication and directorial skills. With the technical assistance and meticulous handling of compiling and proof-checking jobs by Mrs. Neelam V. Mathur, the publication has been brought out in record time.

Tang Chengyuan
Secretary General

New Delhi
1 March, 1999

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I. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

(i) Introduction

The Asian African Legal Consultative Committee was brought into being in November 1956 by only seven Member States, i.e. Burma, Japan, India, Indonesia, Iraq, Sri Lanka and the United Arab Republic. With its competence in the field of international law it has blossomed into a major international organisation composed of the following membership of 44 States: Bahrain, Bangladesh, China Cyprus, Egypt, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates and Yemen. Botswana is an associate Member. Its activites have equally been expanded to serve as an effective forum for Asian African co-operation on some of the major issues before the United Nations as also in the field of economic relations. The impetus provided by its annual sessions helped to strengthen the organisation even further, as a uniting force between the countries of the two continents of Asia and Africa. It is imperative that such solidarity and co-operation would be further strengthened in order to solidify further the role of the AALCC in promoting the interests of developing countries in general and the Asian and African countries in particular, through active participation in the process of international legislation.

The Thirty-seventh regular Session of the AALCC was held in New Delhi, India from 13 to 18 April 1998. The Session was attended by the delegations of Member States, Non-member States, Observers, Representatives of the United Nations, its subsidiary bodies and the Specialised Agencies such as the International Law Commission, the UNEP, UNHCR and UNESCO, other International and Regional Organisations such as the Commonwealth Secretariat, UNIDROIT, OIC, Arab Fund for Economic and Social Development, Saudi Fund for Development, World Wide Fund for Nature, Asian Committee for Peace, Solidarity and Human Rights.

Dr. P.S. Rao, Joint Secretary (L&T) and Legal Adviser to the Ministry of External Affairs, India was unanimously elected as the President of the Thirty-Seventh Session. Mr. Martin A.B.K. Amidu Deputy Minister of Justice and Deputy Attorney General of the Government of Ghana was elected as the Vice-President.

Agenda of the Thirty-Seventh Session, New Delhi 13-18 April, 1998

The Agenda for the New Delhi Session (13-18 April, 1998) was as follows :

I Matters under Article 4(a) of the Statutes : Matters Relating to the International Law Commission

1. Report on the work of the International Law Commission at its forty-ninth session.

II Matters under Article 4(c) of the Statutes : Matters Referred to the Committee by the Member States

1. Status and Treatment of Refugees
   (a) Report on the Expert Group meeting to be held in Tehran on 11th and 12th March 1998

2. Deportation of Palestinians in Violation of International Law particularly the fourth Geneva Convention of 1949 and the Massive immigration and Settlement of jews in Occupied Territories.

3. Legal Protection of Migrant Workers

4. Law of the Sea

5. International Rivers

6. Extra-Territorial Application of National Legislation : Sanctions Imposed Against Third Parties

III Matters under article 4(d) of the Statutes : Matters of Common Concern having Legal Implications

1. The United Nations Decade of International Law

2. The Establishment of an International Criminal Court

3. The United Nations Conference on the Environment and Development : Follow up

IV Trade Law Matters

1. Progress Report concerning the Legislative Activities of the United Nations and other International organisations in the Field of Interrnational Trade Law

2. Report on the AALCC's Regional Arbitration Centres : Commemoration of the Twentieth Anniversary of the AALCC's Integrated Scheme for the Settlement of Disputes Arising from Economic and Commercial Tranactions

3. WTO : Dispute Settlement Mechanism

V Any other Matters :

Special Meeting on the Reservation to Treaties

(ii) AALCC's Representation at the United Nations

(a) Representation at Fifty-second Session of the General Assembly of the United Nations

The Secretary General Mr. Tang Chengyuan and the AALCC's Permanent Observer in NewYork, Mr. Bhagwat Singh, represented the AALCC at the 52nd session of the General Assembly of the United Nations. During his stay in NewYork the Secretary General called on Mr. Kofi Annan, Secretary General of United Nations, Mr. Hans Corell, the United Nations Legal Counsel and other UN Officials. In his meeting with the UN Secretary General the Secretary General of the AALCC expressed his gratitude and appreciation to the United Nations for its continued support to the AALCC's work. Expressing his satisfaction over the good relationship with the United Nations especially with the United Nations Office of Legal Affairs he hoped to do more in promoting cooperation in legal matters in the future. Mr. Kofi Annan praised the contribution of the AALCC in the legal matters and expressed his willingness to consider giving more opportunity to the AALCC to be involved in the United Nations work especially in the Afro-Asian region.

(b) Secretary General's Participation at the Sixth Committee Meeting

The Secretary General addressed the Sixth Committee on 30th October 1997. Since the agenda of the Sixth Committee on that day was on the work of the International Law Commission, he focussed his statement on the close co-operation between the AALCC and the Commission. He also apprised the meeting of the current activities of the AALCC against the backdrop of its Tehran Session.

(iii) Meetings/Seminars Organised under the auspices of the AALCC

(a) AALCC's Legal Advisers Meeting held at New York, 29th October, 1997

A meeting of the AALCC's Legal Advisers was held at the United Nations Headquatters in New York on 29 October 1997. The Meeting was chaired by the then President of the AALCC Dr.M.Javad Zarif, Deputy Foreign Minister for Legal and International Affairs of the Islamic Republic of Iran. Representatives of 15 AALCC Member States namely, China, Cyprus, Democratic People's Republic of Korea, Egypt, India, Islamic Republic of Iran, Japan, Kuwait, Malaysia, Pakistan, Philippines, Republic of Korea, Singapore, Uganda and Tanzania and observers from Australia, Ethiopia and New Zealand participated in the Meeting. In addition, the President of the International Court of Justice, the Chairman of the Sixth.Committee, the Chairman of the International Law Commission, the Chairman of the PREPCOM on the Establishment of International Criminal Court and the Chairman of the Working Group on the United Nations Decade of International Law also participated. The AALCC was represented by its Secretary General and the Permanent Observer in New York.

The items on the Agenda of the Meeting included:

(i) Measures to mark the closure of the United Nations Decade of International Law including the Third International Peace Conference; and

(ii) Special Meeting on the Reservation to Treaties.

The President in his opening remarks recognised the role of the AALCC in providing a forum for exchange of views on developments in the field of international law. The Secretary General elaborated on the items before the Meeting. The President of the ICJ recalled the contribution of the AALCC in promoting the role of the ICJ. The Chairman of the Sixth Committee

apprised the Meeting of the progress in the Sixth Committee. The Chairman of the ILC drew attention to the work of the ILC particularly on the item "Reservation of Treaties". The Chairman Of the Working Group on Decade of International Law and the Chairman of the PREPCOM on the Establishment of the International Criminal Court gave an account of the work in their respective Working Groups. Statements were also made by the representatives of Australia, China, Cyprus, India, Islamic Republic of Iran and Tanzania.

(b) Seminar on the Extra-Territorial application of National Legislation : Sanctions Imposed Against Third Parties, held in Tehran, the Islamic Republic of Iran on 24th and 25th January, 1998.

At the 36th Session of the AALCC held in Tehran, the Islamic Republic of Iran, in May 1997, the AALCC, *inter alia,* recognized the significance, complexity and implications of "Extra-Territorial Application of National Legislation:, Sanctions Imposed Against Third Parties" and requested the Secretariat to convene a seminar or a meeting of experts on the subject. Pursuant to that mandate the Secretariat in collaboration with the Government of the Islamic Republic of Iran convened a two-day Seminar in Tehran in January 1998.

Senior Government officials, eminent academics and distinguished international lawyers from 16 Member States of the AALCC, viz.: Bangladesh, China, Cyprus Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Jordan, Pakistan, Sierra Leone, Sudan, Syria, Thailand, Turkey and Yemen and 8 Observer States viz. Australia, Canada, Cuba, France, Guinea, Kyrgyzstan, Mexico and United Kingdom actively participated in the Seminar.

The objective of the seminar, Chaired by Dr. M. Javad Zarif, the Deputy Foreign Minister for Legal and International Affairs of the Government of the Islamic Republic of Iran and the President of the AALCC, was to promote a free and frank exchange of views on the subject.

The Secretariat had prepared a Background Note on the

"Extraterritoroal Application of National Legislation : Sanctions imposed against Third Parties". At the request of the participants, this Priliminary Study was circulated as a Seminar Document.

The deliberations at the Seminar focused on a broad range of legal and policy aspects of the subject mainly in relation to twoUS enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act,1996 (commonly referred to as the Helms Burton Act) and Iran and Libya Sanctions Act, 1996 (generally referred to as the Kennedy D'Amato Act) although references were also made to some of the earlier US laws such as the anti-trust legislation, the US regulations concerning Trade with USSR,1982, and the National Defence Authorisation Act, 1991 i.e. the Missile Technology Control Regime (MTCR Law). The legality of the two 1996 US enactments were examined in terms of their conformity with the peremptory norms of international law; the law relating to counter-measures; the law relating to intrnational sanctions; principles of international law; the law of liablity of states for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basic human rights of the people of the target State; and issues of conflicts of laws such as the non-recognition, *forum de non-convenience* and other aspects of extra-territorial enforcement of national laws.

The deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and unilateral imposition of sanctions through extra territorial application domestic legislation in general. In this regard references were made of the response of the Inter-American Juridical Committee and the European Union. The deliberations revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra-territorial applications and national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that the Helms-Burton Act and the Kennedy D'Amato Act in many respects contravened these basic norms. The right to development and the permanent sovereignty over natural resources were specifically mentioned.

There was general Agreement that counter measures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized.

The discussion revealed divergence of 'Views on three main issues viz. (1) whether the .subject should be confined to secondary sanctions through extraterritorial application of national laws; (ii) the distinction between,the prescriptivejurisdiction and the enforcement jurisdiction of every State; and (iii) the applicability' of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the Kennedy D'Amato Act in their extraterritorial application.

(c) Expart Group Meeting on the Status and Treatment of Refugees, Held at Tehran, 11-12 March, 1998

At the invitation of the Government of the Islamic Republic of Iran a meeting of Experts was convened with the, financial and technical assistance of UNHCR at Tehran on 11 and 12 March 1998. To facilitate deliberations at the Expert Group Meeting, two background papers, one by the AALCC Secretariat and the other by the UNHCR were prepared.

The Meeting was attended by 29 Member States, along with officials from the AALCC and the UNHCR Secretariat. The Expert Group Meeting was inaugurated by Dr. M. Javad Zarif. In his inaugural address, he stated that the Bangkok Principles together with its Addenda aptly reflected the humanitarian traditions of Asia and Africa in hosting and protecting refugees.

The Secretary General of AALCC, Mr. Tang Chengyuan, stated that the Experts Group Meeting might consider what form the Manila recommendations would take within the AALCC framework. The conclusions to be reached at this meeting, he observed, would provide the necessary feedback to the AALCC Secretariat in its future work on the subject.

The Representative of the Office of the UNHCR, Ms. Erika Feller in her statement recognized that the Bangkok Principles had served as valuable points of reference for States seeking to develop standards to apply in meeting the refugee challenge. Though these principles remain essentially sound, she underscored the need to include new reference points to achieve full relevance to the problems of the present and flexibility to deal with the problems of the future.

The agenda for the Expert Group Meeting as adopted included four themes: (a) definition of refugees; (b) asylum and standards of treatment; (c)durable solutions; and (d) burden sharing. The meeting held extensive discussions in particular on the agenda item "definition of refugees" in the light of recommendations made at the Manila Seminar. As directed, the Secretariat has prepared a comprehensive summary record of discussions. The 'draft' would be sent to the participants in the Expert Group Meeting with a view to invite their comments. Once these comments were received, the Secretariat is to prepare the final record as well in depth study as recommended by the Expert Group Meeting. A paper containing revised proposals for the Bangkok Declaration has also been included in the brief prepared for the thirty-seventh Session. This has been prepared taking into account the recommendations of the Manila Seminar and the views express at the Expert Group Meeting in Tehran.

(IV) AALCC's Regional Centres for Arbitration

(a) Kuala Lumpur Regional Centre for Arbitration :

An Agreement was signed between the Government of Malaysia and the Asian-African Legal Consultative Committee relating to the Kuala Lumpur Regional Centre for Arbitration on 29 February 1996. The Agreement amongst other things. confers certain functional privileges and immunities on the Centre and its officials, as provided in the Malaysian International Organisation (Privileges and Immunities) Act, 1992. In 1997, the Centre undertook a number of inquiries and referrals, wherein it administered or acted as appointing authority in 5 international and 8 domestic cases. The year also witnessed

revision of the Centre's Arbitration Rules. New rules provide for confidentiality of arbitration proceedings and exclusion of the liability for the Centre and Arbitrators from legal proceedings. These revised Arbitration Rules have come into effect on 1 January 1998.

As regards 'Conciliation and Mediation Rules', the same have been revised to be taken as synonymous. Parties desirous can avail these revised Conciliation/Mediation Rules, which incorporate many Provisions on UNCITRAL Conciliation Rules. These Rules too, have taken effect on 1 January 1998.

The Centre has signed 15 co-operation agreements with other Centres for promotion and popularisation of arbitration proceedings. The recent ones include:

(i) the Sri Lanka Arbitration Centre of the Institute for the Development of Commercial Law and Practice;

(ii) the Commercial Arbitration Association. Taipei; and

(iii) the Chartered Institute of Arbitrators, England.

(b) Cairo Regional Centre for International Commercial Arbitration (CRCICA)

The period under review (1997-1998) witnessed 110 international arbitration cases being handled by the Alexandria branch of CRCICA. Fifty-five per cent of the cases before CRCICA involved foreign parties. The disputes involved construction contracts, import/export matters, supply contracts, management and operation contracts, insurance issues, petroleum investments and spatial emission matters. The year also witnessed the CRCICA concluding a number s of cooperation agreements with regional and international institutions these include :

(i) Cooperation Agreement with the Indian Council of Arbitration

effective since January 1997;

(ii) Cooperation Agreement with Ghana Arbitration Centre, March 1997;

(iii) Cooperation Agreement with the Association of Arbitrators(South Africa);

(iv) Cooperation Agreement with Commercial Arbitration Centre, Harare, April 1997;

(v) Cooperation Agreement with Stuftung Netherlands Arbitrage Institute April, 1997;

(vi) Cooperation agreement with the London Court of International Arbitrators (LCIA), May 1997;

(vii) Cooperation Agreement with the Cameroon Committee of Arbitration of Douala May 1997; and

(viii) Cooperation Agreement with WIPO Arbitration and Mediation Centre, October 1997.

Besides, a ninth cooperation agreement is being drafted which may be signed shortly with the Permanent Court of Arbitration, attached with the Chamber of Economy, Slovenia.

The year also witnessed amendments of CRCICA Arbitration Rules by way of adopting institutional services to the changing needs of users. The new Arbitration rules came into effect in January 1998.

(c) Lagos Regional Centre for International Commercial Arbitration

The Lagos Centre is presently located at Ikoyi, Lagos. As the seat of the Government has shifted to Abuja the permanent location of the Centre is being considered by the Federal Ministry of Justice. In April 1997, the Centre organised a five day National Workshop on International Arbitration and AOR, organised jointly with the Centre for African Law and Development Studies. The Arbitration and Conciliation Law, 1988, which is based on the UNCITRAL Model Law on International Commercial Arbitration, Provides favourable legal framework for settlement of arbitral dispute.

(d) Tehran Regional Centre for Arbitration

During the Arusha Session (1986),the Delegate of the Islamic Republic of Iran had proposed the establishment of a Regional Centre for Arbitration in Tehran under the auspices of the AALCC, on the same pattern as the existing Centres. After examination of the proposal in the Secretariat, it was felt that such a Centre could in due course prove to be a viable project, particularly in relation to; oil arbitration. After consultations held between the Secretariat and the competent authorities in Tehran, a draft agreement (to be concluded between the Government of the Islamic Republic of Iran and AALCC) was submitted by the AALCC Secretariat to the Government of the Islamic Republic of Iran, for consideration. On 3 May 1997, the Agreement was concluded between the Iranian Government and the AALCC, for the establishment of a Regional Centre for Arbitration in Tehran

The Agreement, among other things, provides that the Centre would function under the auspices of the AALCC. The Government of Islamic Republic of Iran would respect the independent functioning of the Centre, and have conferred certain privileges and immunities to the Centre, as may be necessary for the purpose of executing its functions. The Centre would be administered by a Director who shall be a national of the Islamic Republic of Iran and would be appointed by the Govermnent in consultation with the Secretary General of the AALCC. Until such time that the Centre becomes financially independent, the Govertunent would make available premises and make an annual grant for the purposes of the functioning of the Centre. The Agreement concluded between the AALCC and the Government of the Islamic Republic of Iran has been placed before the Parliament (Majlis) for Approval.

(V) Publications

The AALCC Secretarial has been bringing out a Quarterly Bulletin regularly for the last twenty-two years. The Bulletin has served as a tool for wider dissemination of information about the activities of the AALCC and the developments in field of international law. In order to enhence its legal academic character so as to render better service in relations to issues, it has been felt that the Bulletin should also include some reserch articles and papers contributed

mainly by the that the Bulletin should also include some reserch articles and papers contributed scholars from the Asian and African region. Against this background from the year 1997, instead of bringing it quarterly, the Bulletin is being published half yearly and it has been renamed as "AALCC Bulletin". The first issue (volume 21) was brought out in 1997. The Secretary General hopes that the Member Governments would encourage scholars in their respectives Universities and academic institutions to contribute articles for the Bulletin.

Two recent publications include: The Report of the Special Meeting on the Inter-related aspects between the International Criminal Court and International humanitarian Law and the report of the Manila Seminar to Commemorate the 30th Aniversary of the Bangkok Principles on the Status and Treatment of Refugees. The publication " Report and Selected Documents of the 36th Session held in Tehran (3-7 May 1998) the Islamic Republic of Iran has been brought out and widely distributed. The report contains most of the research studies prepared by the Secretariat during the year along with the background information and the decisions adopted. It has been commended as a great contribution towards achieving the objectives of the UN Decade of International Law.

II. LAW OF THE SEA

(i) Introduction

The subject Law of the Sea was initially taken up, at the initiative of the Government of Indonesia in 1970 and has remained a priority item at successive Sessions of the AALCC. Initially conceived as a programme of rendering assistance to Asian-African governments to prepare themselves for the Third United Nations Conference on the Law of the Sea (hereinafter called UNCLOS - III) through preparation of background papers and provision of opportunities for in depth discussions, the AALCC gradually emerged as a useful forum for a continuing dialogue on some of the major issues of this subject. The subject matter is one in which all the Member States of the AALCC are deeply interested and it has also been the subject of discussion at inter-sessional and Working Group Meetings.

Following the adoption of the United Nations Convention on the Law of the Sea, 1982 (hereinafter referred to as the Law of the Sea Convention, 1982 or simply the Convention) the AALCC at its 23rd Session held in Tokyo in 1983, approved the future work programme on this subject. This included a comprehensive set of issues among which were : (i) the encouragement of taking steps towards ratification of the Convention (ii) 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; (iii) assistance to Governments in regard to the work of the Preparatory Commission; and (iv) the examination of the question of promoting regional or subregional co-operation taking into account the interests of landlocked and geographically disadvantaged States.

The item was also considered at the 36th Session of the AALCC held in Tehran in May 1997. The study perpared for that session inter alia, furnished an overview of developments since the entry into force of the Law of the Sea Convention including the Meeting of the States Parties to the Convention; the work of the International Seabed Authority (hereinafter referred to as ISBA); and the establishment of the International Tribunal for the Law of the Sea. It

had also contained an overview of the 1996 Global Programme of Action for the Protection of the Marine Environment from Land based activities.

At this session the AALCC, inter alia, urged its Member States, who had not already done so, to consider ratifying the Convention on the Law of the Sea. The AALCC also urged the full and effective participation of the Member States in the International Seabed Authority (ISBA) so as to ensure and safeguard the legitimate interests of the developing countries and for the progressive development of the principle of the Common Heritage of Mamkind.

The AALCC at its 36th session reiterated its call to the member States to give consideration to the need for adopting a common policy and strategy for the interim period before the commercial exploitation of the deep seabed minerals becomes feasible. To this end, the AALCC urged member States to adopt an "initial function" of the Authority so as to make the International Seabed authority useful to the international Community and the developing countries during this initial period.

It directed the Secretariat to continue to cooperate with such internationl organizations as are competent in the field of ocean and marine affairs and to consider assisting Member States in their representation at the ISBA. The AALCC at that Session inter alia decided to inscribe on the agenda of its 37th Session an item entitled "implementation of the Law of the Sea Convention, 1982" The brief for the thirty seventh session seeks to furnish an overview of some recent developments in the matters relating to the Law of the Sea.

Thirty Seventh Session : Discussion

Introducing the item the Assistant Secretary General Mr.A. Dastmalchi stated that the item had been on the agenda of the AALCC since 1970 and been considered at successive sessions. The item was last considered at the 36th Session of the Committee held in Tehran and that the brief of documents for the 37th session listed the developments since then and was progress report based on documentation available with the Secretariat. This document sought to furnish an overview of recent developments in the matters relating to the

law of the sea, in particular with respect to: (i) the consideration, by the General Assembly of the item relating to the Law of the Sea and Ocean Affairs; (ii) the meeting of the States Parties to the UN Convention on the Law of the Sea; (iii) the work of the International Seabed Authority; (iv) the International Tribunal for the Law of the Sea; and (v) the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities. It also provided an overview of the Special Session of the General Assembly or the Review of the Implementation of Agenda 21.

He recalled that the United Nations Convention on the Law of the Sea 1982, entered into force on November 16, 1994 and the 52 nd Session of the General Assembly had expressed satisfaction at the increase in number of States Parties to the Convention and the Agreement relating to the implementation of Part XI of the Law of the Sea Convention. In order to achieve the goal of universal participation the General Assembly Resolution 52\26, inter alia, had renewed its call to all States that had already not done so to become parties to the Convention and the Agreement Relating to the Implementation of Part XI of the Convention . The General Assembly called upon State to harmonize legislation with the provisions of the Convention and to ensure consistent application of those provisions. The General Assembly also reaffirmed its decision to undertake an annual consideration and review of the overall developments pertaining to the implementation of the Convention and other developments relating to the Law of the Sea.

He further stated, that the General Assembly at its recently concluded session had welcomed the establishment of the Commission on the Limits of the Continental Shelf during the course of the Sixth Meeting of the States Parties to the Convention. It also expressed satisfaction at the progress of work in the International Seabed Authority including the approval, during the third session of the Authority in 1997, of the Seven Plans of work for exploitation in the Area. The AALCC Secretariat, he said, did not have access to the detail of these plans of work during the time of preparation of this brief of documents and hence were therefore not reflected therein.

The General Assembly at its 52nd Session, he said, had also expressed satisfaction at the progress being made by the legal and technical commission

towards the formulation of a Draft Mining Code. The brief of documents prepared by the Secretariat provided an overview of the Draft Mining Code. The Committee during the current session, he said, might wish to consider mandating the Secretariat to make a concerted study of the draft Mining Code and to this end approve of the representation of the AALCC Secretariat at the meetings of the International Seabed Authority. The Secretariat had in. the past been represented at the Sessions of the PREPCOM.

The Assistant Secretary General recalled that by its resolution 51\189 the General Assembly had endorsed both the Washington Declaration on Protection of Marine Environment from land based Activities and the Global Programme of Action for the Protection of Marine Environment from Land Based Activities. More recently it had called upon States to implement that resolution (Resolution 51\189) and to strengthen the implementation of the existing international and regional agreements on Marine Pollution.

Finally, he said that at the instance of the UNESCO the General Assembly had declared the year 1998 as the year of the Oceans and committee would perhaps consider the role of the AALCC in the course of the year ahead.

The Delegate of Egypt expressed the view that the subject Law of the Sea had been important since its adoption of the convention in 1982. At present the subject matter had changed to the establishment by International Sea Bed Authority of different commissions, which would implement the convention. He was of the view that within the stipulated 5-10 years period when the sea bed mining would actually start, the developing countries would find their position to be very different from the developed countries, therefore it was of paramount importance that the AALCC Member States joined hands to get to co-ordinated stances, this would be possible by an exchange of their experiences, and for this task the AALCC was the required and desired forum.

The Delegate of People's Republic of China was pleased to note that the Law of the Sea Convention had been broadly accepted by the international community, especially developing countries. The Convention with its comprehensive provisions, had founded a new regime of International Law.

i.e. the International Seabed Authority, the International Tribunal for the law of the Sea and the Commission on the limits of the Continental Shelf. He then briefly outlined the role of these bodies.

He informed the meeting that China had actively'participated in the codification process of the Convention and had become a Party to the Convention on 15 June 1996 and was involved in the recent developments of the Law of the Sea. The Chinese candidate, Prof. Zhao Iihai, was elected as a Judge of the Tribunal. Three experts from China were elected as Members of the Legal and Technical Commission, the Financial Commission of the International Seabed Authority and the Commission of the Outer Limits of the Continental of developing countries had been emphasised.

He stated that his Govermnent had taken significant steps on domestic legislation on the law of the Sea in an effort to establish a national legal system, compatible with the convention. It had also adopted the Law on the Territorial Sea and the Contiguous Zone on 25 February, 1992.

He concluded by stating that the Law of the Sea issues, are, deeply connected with the interests of all the countries, cooperation among relevant states on these issues, needed to be stressed and strengthened, especially, in the fields of maritime scientific research, maritime environment protection, fishery activities on the high sea, utilisation of resources of international seabed etc. for the developing countries of Asian and Africa, the AALCC in his view provided a proper forum for discussing co-operation and legal issues arising from this field.

The Delegate of India recalled that important matters concerning Law of the Sea have been on the agenda of the AALCC with the ensuing discussions always proving useful to the Member States. A case in point, he said was the Third UN Conference on the Law of the Sea. He expressed his appreciation to the Secretariat for preparing an excellent and comprehensive report on the topic.

He said the initiation of the operational phase of the International Sea Bed Authority (hereinafter ISBA) with the approval of the Plans of Work of

seven Registered Pioneer investors according to Part XI of UNCLOS was landmark achievement. Speaking on the substantive work of the ISBA, he said it is presently confined to the work of the Legal and Technical Commission in the preparation of the Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, also called the Draft Mining Code. In this regard, he further stated that during the fourth session of the ISBA, a Working Group of the Group of 77 had been established to examine the Draft Code. The complex issues to be dealt in this Code, he averred, were those relating to the protection and preservation of marine environment, confidentiality and the terms of contract which the ISBA will have to enter with the Registered Pioneers Investors, whose Plans of Work have already been approved.

As regards, the role AALCC could play, he expressed the view that it may like to examine the Draft Code, as the Code is related not only to registered pioneer investors or potential investors, but also to states who had tremendous opportunities to realise the benefits from the Convention, especially in areas pertaining to the establishment of suitable offshore and onshore facilities, transportation and technology development. He felt that it was necessary to understand the scope of the Mining Code, and the extent of the area beyond the limits of national jurisdiction, viewed in context with other provision of the UNCLOS . In this regard, he said the UNCLOS contains provisions which enable states to delineate the continental margin, even beyond the 200 nautical mile Exclusive Economic Zone, by fulfilling certain geographical criteria, besides prescribing a 10 year time limit, from the date of ratification of UNCLOS, by the concerned State. He felt that, as the area beyond national jurisdiction would begin from the outer edge of the continental margin, , there would be a time gap which would create uncertainty as to which area may fall under national jurisdiction or within purview of ISBA. Bearing in mind that the area beyond 60 degree South latitude is governed by theAntarctic Treaty, certain jurisdictional areas where the Mining Code would be applied, need to be examined and further harmonised.

Furthermore, recalling the decision to declare 1998 as the "International Year of the Oceans" by the General Assembly, he felt that Member States who have not yet ratified UNCLOS, should consider doing so. Hailing UNCLOS as the constitution of oceans, he expressed the desire that the

presence of a number of other ocean related conventions, called for a issue based study, relating to the difficulties encountered by States in their implementation of ocean related conventions.

Dwelling on the disputes settlement mechanism provided in UNCLOS, he said apart from the International Tribunal for the Sea, arbitration and conciliation were also provided for. As states had the option to appoint conciliators and arbitrators in the panel maintained by the UN Secretary General, he felt Asian-African States could play a vital role in the areaconflict resolution. In this regard he spoke of the dispute between St. Vincent and Grenadines Vs. Guinea, relating to vessel "M.V.Saiga"- the first case that came up before the Tribunal.

Finally commenting on the suggestions to commemorate the International Year of the Oceans, he said these included converting another UNCLOS at the turn of the century or creation of new institutional bodies. In this regard, he expressed the view of his delegation that the UNCLOS being product of lengthy negotiations, must not be diluted.

The Vice President summed up the item, stating that 1998 had been declared the "Year of the Oceans" Keeping the relevance of the topic in mind he felt that the Committee mandated the Secretariat to continue to study the subject and explore areas of interest to the Member countries and report to the next session.

(ii) Decision on "The Law Of The Sea"

(Adopted on 18.4.98)

The Asian African Legal Consultative Committee at its thirty-seventh Session

Having considered the Secretariat Brief of Documents on "The Law of the Sea", Document AALCC\,XXXVII\ New Delhi \98\S.6

1. **Notes** with great satisfaction that the United Nations Convention on the Law of the Sea entered into force on 16 November 1994;

2. **Notes also** the work of the International Seabed Authority on the formulation of the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area;

3. **Notes with satisfaction** the reference of a dispute to the Inteniational Tribunal for the Law of the Sea;

4. **Urges the Member States** which have not already done so to consider ratifying the Convention on the Law of the Sea;

5. **Reminds** Member States to give timely consideration to the need for adopting a common policy and strategy for the interim period before the commercial exploitation of the deep seabed minerals becomes feasible, and for this purpose urges Member States to take an evolutionary approach especially to the "initial function" of the International Seabed Authority so as to make the ISBA useful to the international community and developing countries;

6. **Urges** the full and effective participation of the Member States in the ISBA so as to ensure and safeguard the legitimate interests of the developing countries, and for the development of the principle of the Common Heritage of Mankind;

7. **Also urges the Member States** to consider making written

declarations choosing from among the means concerning the settlement of disputes listed in article 287 of the United Nations Convention on the Law of the Sea ;

8. **Urges** Member States to cooperate in regional initiative for the securing of practical benefits of the new ocean regime;

9. **Directs the Secretariat** to consider assisting Member States in their representation at the ISBA and monitor the progress of work of the International Seabed Authority on the Formulation of the of the Regulations on Prospecting and Exploration of Polymetalic Nodules in the Area and to report thereon at the next session of the Committee ;

10. **Directs** the Secretariat to continue to cooperate with such international organizations as are competent in the fields of ocean and marine affairs; and

11. **Decides** to inscribe on the agenda of its thirty-eighth-Session an item entitled "Implementation of the Law of the Sea Convention, 1982".

(iii) Secretariat Study : Law Of The Sea

Consideration in the General Assembly

The item "Law of the Sea" has been on the agenda of the General Assembly since its 37th session (1982) when the General Assembly, *inter alia* approved the assumption, by the Secretary General, of the responsibilities entrusted to him under the UN Convention on the Law of the Sea, 1982 and the related resolution adopted by UNCLOS and has thereafter been considered at successive sessions. In the course of consideration of the item at its 50th Session the General Assembly *inter alia* emphasized the universal character of the United Nations Convention on the Law of the Sea 1982.*

By its resolution 5 1\34 the General Assembly called upon all States that had already not done so to become parties to the Convention and to ratify, confortn formally or accede to the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 1994 (hereinafter referred to as the 1994 Agreement) in order to achieve the goal of universal participation. The General Assembly while reaffirming the unified character of the Convention called upon all States to

* As of December 1997, 123 States had ratified, acceded or succeeded to the Convention. These States are : Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Barbados, Belize Benin, Bolivia Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Cape Verde, Chile, China, Comoros, Cook Islands, Costa Rica, Cote d' Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Equatorial Guinea, Fiji, Finland, France, Gambia, Gautemala, Georgia, Germany, Ghana , Greece, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras,Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Korea Republic of Kuwait, Lebanon, Macedonia (former Yugoslav Republic of),Malaysia, Mali, Malta, Marshall, Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Myanmar, Namibia Nauru, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Palau panama, Papua New Guinea, Paraguay, Philippines, Portugal, Romania , Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands Somalia South Africa Spain, Sri Lanka, Sudan, Sweden, Togo, Tonga; Trinidad and Tobago, Tunisia, Uganda,United Kingdom of Great Britain and Nothern Ireland, United Republic of Tanzania, Uruguay, Vietnam, Yemen, Yugoslava Zambia and'Zimbabwe.

harmonize their national legislation with the provisions of the Convention and to ensure consistent application of those provisions. At its 51st Session the General Assembly also called upon States to ensure that any declarations or statements that they had made or make when signing, ratifying or acceding are in conformity with the Convention.[1] It 'reaffirmed its decision to continue to undertake an annual consideration and review of the overall developments pertaining to the implementation of the Convention and other developments relating to the Law of the Sea and Ocean Affairs.

The provisions of the Convention have, since its adoption, been developed, in two implementing agreements viz.

(a) The Agreement Relating to the Implementation of Part XI of the Convention adopted in 1994; and

(b) The Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddliig Fish Stocks and Highly Migratory Fish Stocks, adopted in 1995.

(a) The Agreement Relating to the Implementation of Part XI of the Convention) adopted in 1994;

The Agreement Relating to the Implementation of Part XI of the Convention (hereinafter called the 1994 Agreement) was adopted by General Assembly Resolution 48\263 on July 28, 1994 and was open for signature until July 28, 1995. It has since been signed by 78 States[2]

[1] See Law of the Sea A\5 1 \L. 21, 19 November 1996.

[2] The States signatories to the agreement are : Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Brazil, Burkina faso, Cameroon, Canada, Cape Verde, China, Coted'Ivoire, Cyprus, Czech Republic, Denmark, Egypt, Fiji, Finland, France, Gabon, Germany, Greece, Grenada, Guinea, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan Lao People's Democratic Republic, Luxembourg, Malaysia, Maldives, Malta; Mauritania, Micronesia (Federated States of), Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand,Nigeria, Pakistan, Paraguay, Philippines, Poland, Portugal, Republic of Korea. Samoa, Senegal Seychelles, Slovakia , Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Yugoslavia, Zambia and Zimbabwe.

and one international organization.[3] The Agreement entered into force on 28 July 1996[4] The General Assembly., at its 51st Session called upon States not done so to become parties to the 1994 Agreement.[5]

The Secretary General of the United Nations, Mr. Kofi Annan has said that "the entry into force of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the Convention has led the United Nations to redesign its programme of information, advice and assistance in the field."[6]

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[3] European Community.

[4] As of March 31, 1997 the 78 States that had consented to be bound by the Agreement are Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belize, Bolivia, Brunei Darussalam, Bulgaria, China, Cook Islands, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Fiji, Finland, France, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Haiti, Iceland, India, Ireland , Italy, Jamaica , Japan, Jordan, Kenya, Lebanon, Malaysia, Malta, Mauritania, Mauritius, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Myamnar, Namibia, Nauru, Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan Palau, Panama, Paraguay, Republic of Korea, Romania, Russian Federation, Samoa, Saudi Arabia Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Sri Lanka, Sweden, the former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Uganda, Yugoslavia, Zambia and Zimbabwe. Be that as it may, pending its entry into force the Agreement was, in accordance with paragraph 1 of Article 7, being provisionally applied by 126 States. For these States their consent to be bound by the Agreement is subject to ratification.

[5] The Agreement is to be interpreted and applied together with the Convention as a single instrument. In the event of any inconsistency between the Agreement and Part XI of the Convention, the provisions of the Agreement are to prevail. After the adoption of the Agreement, any ratification or accession to the Convention represents also consent to be bound by the Agreement, and no State or entity can establish its consent to be bound by the Agreement unless it has previously established or establishes, at the same time, its consent to be bound by that Convention. States that were parties to the Convention prior to the adoption of the Agreement are now required to establish their consent to be bound by the Agreement, separately, by depositing an instrument of ratification or accession. For a detailed account of the 1994 Agreement SeeAALCC\XXXIV\Doha\95\5. Reprinted in the *Asian African Legal Consultative Committee :Report and Selected Documents of the Thirty Fourth Session, Doha*, Qatar.

[6] Kofi A. *Annan: Renewal and Transition : Annual Report on the Work of the Organization, 1997* (United Nations, New York 1997) para 146 page 59.

(b) The Agreement for the Implementation of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in 1995.

The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species was adopted on August 4, 1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.[7] That Conference also adopted two resolutions.[8]

The Agreement on the Conservation and Management of Straddling Fish. Stocks and Highly Migratory Fish Stocks has been signed by 58 States including 11 Member States of the AALCC and one international organization[9]and will enter into force 30 days after it has been ratified by 30

[7] See A.\Conf.164\33.

[8] Resolution 1 underscored the significance of early and effective implementation of the Agreement and inter alia called upon States and other entities to apply the Agreement provisionally. Resolution 11 adopted by the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, inter alia, recognizing the significance of periodic consideration and review of developments relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks recommended to the General Assembly that it review developments relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, on the basis of a report to be submitted by the Secretary-General at the second session following the adoption of the Agreement and biennially thereafter. See the *Final Act of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks A\CONF. 164\38.*

[9] As of October 15 1997 the 58 States signatory to the UN Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks are: Argentina, Australia, Austria, Bangladesh, Belgium, Belize, Brazil, Burkina Faso, Canada, China, Cote d'Ivoire, Demnark, Egypt , Fiji, Finland, France, Gabon, Gennany, Greece, Guinea Bissau, Iceland, Indonesia, Iriland, Israel, Italy, Jamaica, Japan, Luxembourg, Maldives , Marshall Islands, Mauritania, Micronesia (Federated States of); Morocco, Namibia Netherlands, New Zealand, Nine, Norway, Pakistan, Papua New Guinea, Philippines, Portugal, Republic of Korea, Russian Federation, Saint Lucia, Samoa, Senegal, Seychelles, Spain , Sri Lanka, Sweden, Switzerland Tonga, Uganda, Ukraine, United Kingdom the United States of America and Vanuatu. In. addition it has been signed by the European Union.

signatory States[10]The Agreement is a separate instrument and greatly elaborates upon the general provisions of the Convention on the Law of the Sea. It is to be interpreted and applied in a manner consistent with that Convention. There is no link or nexus between this Agreement and the Convention in establishing a consent to be bound by these two instruments.

The Assembly at its 51st Session had *inter alia*, emphasized the importance of the early entry into force[11] and effective implementation of the 1995 Agreement and called upon all States and other entities referred to in article 1 paragraph 2(b) of the Agreement to sign and ratify or accede to it and to consider applying it provisionally. It also decided to include under the item " Oceans and Law of the Sea a sub-item entitled "Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks"[12]

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[10] The Agreement has been ratified or acceded to by 15 States viz. Bahamas, Fiji, Iceland, Mauritius, Micronesia, Nauru, Norway, Russian Federation, Saint Lucia, Samoa, Senegal, Solomon Islands, Sri Lanka, Tonga and the United States of America.

[11] Although, many states were expected to apply the Agreement provisionally in tunewith Resolution 1 on the Early and Effective Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as adopted by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, no State had until *15th October 1997* agreed to a provisional application of the Agreement. See Oceans And The Law Of The Sea : Agreement For- The Implementation Of The Provisions Of The United Nations Convention On The Law Of The Sea Of 10 December 1982 Relating To The Conservation And Management Of Straddling Fish Stocks And Highly Migratory Fish Stocks.. A/52/555.

[12] See Law of the Sea: Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks. A\51\L. 28.

The *Agenda For Development*, adopted by the General Assembly encourages countries" to become parties to the Agreement for the Implementation of the Provisions of The United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and to implement this Agreement."[13]

MEETING OF STATES PARTIES TO THE CONVENTION

The Convention on the Law of the Sea, it will be recalled, does not provide for a regular conference of Parties. It did, however, stipulate Meetings of States Parties to establish the International Tribunal for the Law of the Sea (ILTOS) and the Continental Shelf Commission. It also provided for subsequent meetings as necessary e.g. to conduct elections periodically and to adopt the budget of the Tribunal. The meeting of States Parties may thus be regarded as an important component of the new system of ocean institutions.

It may be recalled that the Preparatory Committee for the Establishment of the International Sea Bed Authority and the International Tribunal for the Law of the Sea (PREPCOM) at its session held in August 1994 had recommended that the SecretaryGeneral convene an ad hoc meeting of the State Parties to the Convention soon after the entry into force of the Convention. Following this recommendation of the PREPCOM an ad hoc meeting of States Parties to the Convention on the Law of the Sea was convened in New York in November 1994.

The sixth and seventh Meetings of States Parties to the Convention were held in New York from 10 to 14 March 1997, and from 19 to 23 May 1997. The Sixth Meeting was devoted primarily to the election of the 21 members of the Commission on the Limits of the Continental Shelf, and the Seventh Meeting to the budget of the Tribunal. The Secretariat of the AALCC was not represented at these and other meetings of the Law of the Sea Institutions.

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[13] *Agendafor Development*, (United.Nations, New York, 1997) para 151 at pp 58-59.

THE INTERNATIONAL SEABED AUTHORITY (ISBA)

The International Seabed Authority (hereinafter referred to as ISBA) established by the Convention, with its seat at Kingston, Jamaica, is the organization through which its Member States organize and conduct activities of exploration for and exploitation of the deep seabed and ocean floor and the sub soil thereof. It comprises all the States Parties to the Convention as well as those States which have agreed to the provisional application of the 1994 Agreement on the Law of the Sea. As of September 1997 there were 115 members of the Authority, including 15 members on a provisional basis. It may be stated,that at the request of 18 Member States, including 3 Member States of the AALCC,[14]the General Assembly at its 51st Session considered an item entitled "Observer Status for the International Seabed Authority in the General Assembly"[15]and ' by its resolution 51/6 invited " the Seabed Authority to participate in the deliberations of the General assembly in the capacity of observer."

On March 14, 1997 the Secretary General of the United Nations and that of the ISBA signed the **Agreement Concerning the Relationship between the United Nations and the International Seabed Authority. The** Agreement is "intended to define the terms on which the United Nations and the Authority shall be brought into relationship."[16] The Agreement stipulates that the United Nations recognizes that the Authority is the organization for organizing and controlling activities in the seabed and ocean floor and subsoil thereof in the Area and that the Authority shall function as an autonomous international organization . The Authority on its part shall promote peace and international cooperation. The provisions of Article 4 of the Agreement requires

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[14] The 18 Member States were Australia, Brazil, Cameroon, Fiji, Finland, Germany, Iceland,India, Indonesia, Italy, Jamaica, Japan, New Zealand,, Portugal, Samoa, Sweden, Trinidad and Tobago, and the United Kingdom of Great Britain and Northen Ireland.

[15] See A\5 1\250\ and Add. 1.

[16] See Article 1 entitled "Purpose of the Agreement " of the Agreement Concerning the relationship between the United Nations and the International Seabed Authority UN Document A/52/260, Annex, July 28, 1997. Reproduced in 36 I.L.M 1492 (1997).

the Authority to provide the Security Council with information and assistance needed to maintain or restore international peace and security. Article 5 stipulates that the "Authority agrees, subject to the provisions of this Agreement relating to the safeguarding of confidential material , to provide any information that may be requested by the International Court of Justice in accordance with the Statute of the Court. At its recently concluded 52nd Session the General Assembly approved the Agreement.[17]

(i) Council of the International Sea-bed Authorily

It may be recalled that according to the 1994 Agreement on the Law of the Sea, the Council is to consist of 36 Members representing five groups of States reflecting 4 main elements viz. (i) States with a Special interest in deep seabed mining such as the largest consumers or largest producers of the categories of minerals to be mined from the seabed (ii) States that have pioneered large investments and activity in the international seabed area; (iii) developing States with special interests such as land locked or populous States; and (iv) an equitable geographical representation as well as a balance between developed and developing States.

Group A has 4 Members from among those States Parties which during the last 5 years have either consumed more than 2 percent, in value terms of total world consumption or have had net imports of more than 2 percent in value terms of total world imports of commodities produced from the categories of minerals to be derived from the international seabed area - "the "Area". Of these, one should be the State with the largest economy in Eastern Europe in terms of gross domestic product. At its second session held in March 1996 the ISBA elected the 4 States in this category. The States so elected are Japan, Russian Federation, the United Kingdom and the United States of America.[18]

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[17] *See Oceans And The Law of The Sea .. Lawof The Sea, A/52/L.27*

[18] While Japan and United Kingdom have been elected for a 4 years term, the Russian Federation and the USA have been elected for a 2 year term with the understanding that either of them could be re-elected for another term of 4 years, if it so wishes

Group B has 4 Members from among the State Parties which have made the largest investments in preparation for and in the conduct of activities in the area. As its second session the ISBA elected the People's Republic of China, France, Germany and India to represent Group B States in the Council.[19]

Group C representative of the States Parties which, on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the area including at least 2 developing States whose exports of such minerals have'a substantial bearing upon their economics, is to have 4 seats on the Council. Accordingly theISBA at its Session in March 1996 elected Australia, Chile, Indonesia and Zambia.[20]

Group D of States had agreed to divide the 6 seats available equally among the 3 regional groups represented viz. the African Group, the Asian Group and the Latin American and Caribbean Group of States. 6 States viz. Bangladesh, Oman, Cameroon, Nigeria, Brazil and Trinidad and Tobago have accordingly been elected from among the developing states and represent States with large populations, land locked or geographically disadvantaged

[19] While China and France have been elected for a 4 year term each, Germany and India have been elected for a 2 year term each. It is understood that while Germany would be reflected in 1998 for a 4 year term. India will be re-elected in 2000 for a 4 year term and that the Netherlands will be elected in 1998 for a 4 year term. It is also understood that other States eligible to represent Group B can contest any vacant seat in 2000.

[20] While Australia and Chile have been elected for 2 years terms, Indonesia and Zambia have been elected for 4 years terms. With regard to the latter 2 States viz. Indonesia and Zambia however it is understood that they would after 2 years relinquish their seats to Poland and Gabon to complete the remaining part of the term viz. 2 years. It is further understood that Indonesia, Zambia and indeed any other State eligible to be represented in Group C can, after 2 years, contest the 2 seats to be vacated by Australia and Chile.

States, Island States and States which are major importers of categories of minerals to be derived from the area.[21]

The last group, Group E was to have 1 9 members elected on the basis of equitable geographical distribution, provided that each geographical region shall have at least one member elected. For this purpose, the geographical regions are Africa, Asia, Eastern Europe, Latin America and the Caribbean, and the Western Europe and Other States. Pursuant to that understanding the following have been elected to represent Group E of States in the Council:-

(i) Asian Group: Republic of Korea, Malaysia, and Philippines.[22]

(ii) African Group:Egypt,, Kenya, Namibia, Senegal, South Africa, Sudan and Tunisia.[23]

[21] Among the Asian Group of States Bangladesh and Oman have been elected for a 2 years and a 4 year term respectively. Among the African Group of States Cameroon has been elected for a 2 year term and Nigeria for a 4 year term. Nigeria has been elected for a 4 year term with the understanding that it will serve only during the first 2 years and thereafter relinquish the scat to Sudan to serve for 2 years such as to complete the 4 year term. Brazil has been elected for a 4 year term and Trinidad and Tobago will serve in the Council for a total period of 4 years and Paraguay for a total period of 2 years. For this purpose, Trinidad and Tobago elected to serve a 1 year term in Group D against a 2 year seat is thereafter to replace Paraguay in Group E for the remaining 3 years. Trinidad and Tobago will be replaced in Group D by Jamaica for the remaining 1 year. Paraguay, after serving 1 year in Group E will take an additional seat in Group E for 1 year vacated by the Western European and Others Group.

[22] Republic of Korea is elected for a 2 year term; Philippines is elected for a 4 year term but in the fourth year (1999) it will occupy the seat in which it will participate in the deliberation of the Council without the right to vote; and Malaysia is elected to a 2 year term.

[23] Sudan is elected for a 2 year term (after which it 'will replace Nigeria in Group D for the remaining 2 years of the 4 year term in which Nigeria is elected; South Africa is elected fora 2 year term; Senegal is elected for 4 year term; Tunisia is elected for a 2 year term; Kenya is elected for a 4 year term and Namibia is elected for a 4 year term.

(iii) Eastern Europe: Poland and Ukraine[24]
(iv)Latin America and Caribbean States, Argentina, Cuba and Paraguay.[25]
(v) Western Europe and other States: Austria, Italy and Netherlands[26]

It would have been observed that 14 Member States of the AALCC are represented on the 36 Member Council of the ISBA. The Member States of the AALCC represented on the Seabed Council are: Arab Republic of Egypt, Bangladesh, People's Republic of China, India, Indonesia, Japan, Kenya, Republic of Korea, Malaysia, Nigeria, Oman, Philippines, Senegal, and Sudan. The Council of the ISBA elected Mr. Lennox Ballah of Trinidad and Tobago as its first Chairman.

(ii) Legal and Technical Commission

Paragraph 1 (b) of Article 163 of the Convention on the Law of the Sea envisaged the establishment of a Legal and Technical Commission . The States Parties to the Convention have accordingly established a 22 member Legal and Technical Commission comprising the nominees of Bahamas, Cameroon, China Costa Rica, Cote d'lvoire, Cuba, Egypt, Fiji, Finland, France, Gabon, Germany, India, Italy, Japan, Republic of Korea, Namibia,

[24] Poland is elected for a 2 year term and Ukraine is elected for a 4 year term.

[25] Argentina is elected for a 4 year terin; Paraguay is elected for a 4 year term, with the understanding that it will serve only the first year, after which it will relinquish the seat to Trinidad and Tobago for the remaining 3 years ; and Cuba is elected for a 2 year term.

[26] Italy is elected for a 4 year tenn, but will relinquish its seat in the third year to Belgium and will resume it in the 4th year; Austria has been be elected for a 2 year term, but in the framework of the rotation agreement, will relinquish its seat in the second year. Austria has been designated to participate in the deliberations of the Council without the right to vote during this second year; and The Netherlands will be elected for a 2 year term, but will relinquish its seat in the second year to Belgium. As of 1998 the seat reverting to the Western European and others Group in Group E will be occupied by Austria in the first year and by Belgium in the second year.

Norway, Poland, Russian Federation, Ukraine, and the United States of America[27]

The functions of the Legal and Technical Commission as enumerated in Article 165 of the Convention on the Law of the Sea *inter alia* include (i) making recommendations, upon the request of the Council, with regard to the exercise of the Authority's functions; (ii) review formal plans of work for activities in the Area and to submit appropriate recommendations to the Council. The Legal and Technical Commission of the International Seabed Authority took a step towards the fulfilment of its functions by preparing a set of **Draft Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area** hereinafter referred to as the Draft Regulations). The Draft Regulations prepared by the Legal and Technical Commission of the International Seabed Authority comprise 32 regulations arranged in seven (7) Parts viz (i) Introduction (Regulation 1) ; (ii) Notification of Prospecting (Regulations 2-5); (iii)Applications For Approval Of Plans of Work for Exploration to Obtain a Contract (Regulations 6- 19); (iv) Contracts for Exploration (Regulations 20-27) ; (v) Protection and Preservation of the Marine Environment (Regulation 28-30); (vi) Confidentiality (Regulation 31) ; and (vii) Settlement of Disputes (Regulation 32). Part II of the draft Regulations entitled "Applications For Approval Of Plans of Work for Exploration to Obtain a Contract " (Regulations 6-19) consists of four sections viz. (1) General Provisions (Regulations 6-7) (2) Content of Applications (Regulations 8-15) ; (3) Fees (Regulation 16); and (4) : Procedures for Applications (Regulation 17-19)[28]

[27] Bahamas (Stewart, George P.), Cameroon (Betah,Samuel Sona), China (Li, Yuwei), Cote d` Ivoire (Guehi, Robert), Costa Rica (Conejo, Jose de J.), Cuba (Preval Paez, Luis Giotto), Egypt, (Hanafi, Waguihi) Fiji (Simpson, A).,Finland (Winterhalter Boris), France (Lenoble, Jean-Pierre), Germany (Amann, Hans),Gabon'(Mve-ebang, Marcellin), India (Rajan, H.P.), Italy (Rosa, Giovanni), Japan (Sakasegawa, Toshio), Norway (Bjorlykke, Arne), Namibia (Shimutwikeni, H), Polaud (Kotlinski, Ryszard), Republic of ,Korea (Kang, Jung-Keuk), Russian Federation (Ivan F, Glumor),Ukraine (Schhyptsov, Olexander A.) and United States of America (Morgan, Charlges Lowell)

[28] *SeeTheProvisional Text of the Draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area prepared by the Legal and Technical Commission* Doc. ISBA/3LTC/WP.1/Rev3

Appended to the draft regulations are four annexures relating to (i) Notification of Intention to Engage in Prospecting ; (ii)Application for Approval of a Plan of work for Exploration To Obtain a Contract; (iii) Contract for Exploration ; and (iv) Standard Clauses for Exploration Contract.

It would have been observed that Part III (Applications For Approval of Plans of Work for Exploration to Obtain a Contract, Regulations 6-19) and Part IV (Contracts for Exploration , Regulations 20-27) of the draft regulations.read together with Annexes 2, 3 and 4 thereof are the very core of the proposed contract regime for the exploration of polymetallic nodules in the Area. The work of the Commission reflects the "extensive consideration it gives to 3 key areas that it had identified" viz. (i) the protection and preservation of the marine environment; (ii) annual reporting and the transfer of data bv contractors to the Authority; and (iii) Confidentiality of the information submitted.[29]

(iii) The Finance Committee

It may be recalled that the 1994 Agreement *inter alia* stipulates that the Assembly shall elect 15 Members of the Finance Committee from candidates nominated by States Parties, taking into account equitable geographical representation and special interests. The 5 categories of Council Members shall be represented on the Finance Committee by at least one member and until the Authority remains dependent on assessed contributions, the 5 largest contributors to the budget of the United Nations will also be represented on the Committee. The remaining 5 members are to be elected from among the other States Parties. The ISBA at its resumed session held in August 1996, inter alia, elected its Finance Committee.[30]

[29] Oceans and the Law of the Sea : Law of the Sea , op cit , supra note

[30] The final agreement on the composition of the Committee is understood to have been reached after the various regional and interest groups arrived at an understanding on the allocation of seats and the duration of terms. 7 Members of the Finance Committee are nominees of developed countries and 8 those of the developing countries. The Committee reviewed the proposed budget of the Authority submitted by the Secretary-General of the Authority, and on the basis of its recommendations, which were endorsed by the Council, the Assembly adopted a budget of the Authority for 1997.

The Members of the Finance Committee are China; France; Germany; India; Italy; Jamaica; Japan; Mexico; Russian Federation; South Africa; Tunisia;Uganda; United Kingdom; United States of America; and Uruguay.[31] The Committee reviewed the proposed budget of the Authority submitted by the Secretary-General of the Authority, and on the basis of its recommendations, which were endorsed by the Council, the Assembly adopted a budget of the Authority for 1997. The Committee reviewed the proposed budget of the Authority submitted by the Secretary-General of the Authority, and on the basis of its recommendations, which were endorsed by the Council, the Assembly adopted a budget of the Authority for 1997.

VI. COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF

Article 76 of the Convention envisages the establishment of the Commission on the Limits of the Continental Shelf (hereinafter referred to as the Continental Shelf Commission).The Continental Shelf Commission established in conformity with Annex 11 of the Convention consists of 21 members, serving in their personal capacity as experts in the field of geology, geophysics or hydrography, elected by States Parties to the Convention from among their nationals, having due regard to the need of ensuring equitable geographical representation.

The first election, in accordance with Article 2 paragraph 2 of Annex 11 of the Convention, was to have been held within 18 months after the date of entry into force of the Convention i.e. before 16 May 1996. It had however been agreed at the Meeting of the States Parties, held in New York during

[31] Lou Hong (china), Jean-Pierre Levy (France), Jobst Holborn (Germany), S. Rama Rao (India), Demenico Da-Empoli (Italy), Coy Roache (Jamaica), Tadanori Inomata (Japan), Issac Klipstein Margulis (Mexico), Serguey P. Ivanov (Russian Federation), Craig John Daniell (South Africa), Samia Ladgham (Tunisia), David Etuket (Uganda), Michael C.Wood (U.K), M. Deborah Wynes (U.S.A), and Ernesto Belo Rosa (Uruguay).

November-December 1995, that the election of the members of the Continental Shelf Commission be postponed until March 1997. The members of the Continental Shelf Commission were elected at the sixth meeting of the State Parties held in March 1997. The 21 States, including 8 member States of the AALCC, represented on the Continental Shelf Commission are Argentina; Brazil; Cameroon; China, Croatia ; Egypt, France; Germany; India; Ireland; Jamaica; Japan; Republic of Korea ; Malyasia; Mauritius. Mexico; New Zealand ; Nigeria; Norway; Russian Federation; and Zambia.[32] It may be mentioned that at its first session held in June 1997 the Continental Shelf Commission elected Mr. Yuri B. Kazmin (Russian Federation) as its Chairman. It also elected Mr. O.P. Astiz (Argentina); Mr. L.C. Awosika(Nigeria) and Mr K.S.R. Srinivasan (India) Vice-Chairmen and Mr. P. F. Croker (Ireland) as Rapporteur

The functions of the Commission would be (i) to consider the data submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles , and to make recommendations in accordance with Article 76 of the Convention and the statement of understanding adopted by UNCLOS IIIon 29 August 1980 ; and (ii) to provide scientific and technical advice if requested by the coastal State concerned during the preparation of such data.

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The States Parties to the Convention at their fifth meeting held in New York from 24 July to 2 August 1996 elected 21 Judges of the International

[32] Astiz, Osvaldo Pedro (Argentina), Albuquerque, Alexandre Tagore Medeiros De (Brazil), Betah, Samuel Sona (Cameroon), Lu, Wenzheng (China), Juraacic, Mladen (Croatia) Beltagy, Aly I (Egypt), Rio, Daniel (France), Hinz, Karl H.F. (Germany), Srinivasan, K.R. (India), Croker, Peter F. (Ireland), Francis, Noel, Newton St. Claver (Jamaica), Hamuro, Kazuchika(Japan), Park, Yong-Ahn (Republic of Korea), Jaafar, A. Bakar (Malaysia) Chan Chim Yuk, Andre, C.W. (Mauritius), Carrera Hurtado, Galo (Mexico), Lamont, Lain C. (,New Zealand), Awosika, Lawrence Folajimi (Nigeria), Brekke, Harald (Norway), Kazmin, Yuri Borisovitch (Russian Federation), M'Dala, Chisengu Leo (Zambia).

Tribunal for the Law of the See[33] In accordance with the understanding that no regional group would have less than three seats. The geographical renresentation of the elected members of the Tribunal is as follows: African Group5 [34] Asian Group5, [35] Latin American and Caribbean Group, 4[36] Eastern European Group, 4[37] and Western European and other States Group, 4[38] It may be mentioned that one third or 7 members of the Tribunal haye been elected for 3 year terms[39] and two thirds or 14 members for 6 year terms.[40]

During its first executive session, held in the Free and Hanseatic City of Hamburg, in October 1996 the seat of the Tribunal, the Judges were sworn in and elected Judge Thomas A. Mensah (Ghana) to serve as the first President of the Tribunal and Judge Rudiger Wulfrum (Germany) was elected Vice President. On October 21, 1996 the Judges of the Tribunal appointed Mr. Gritakumar (Sri Lanka) as the first Registrar of ITLOS, and Mr. Philippe Gautier (Belgium) as the Deputy Registrar.

During its first session the ITLOS, apart from such organizational matters as the elections of the President, Vice President, Registrar and Deputy Registrar, considered: (i) the provisions of the Tribunal relating to matters of

[33] The Judges elected are:-D.H. Anderson,Hugo Caminos, Gudmundur Erikson, Paul Bamela Engo, A. Joseph, Anatoly Lazarevich Kolodkin, Edward A. Laing, Rangel Vicente Marotta, Mohamed Mouldi Marsit, Thomas A Mensah, Tafsir Malick Ndiaye, L. Dolliver Nelson, Choon-Ho Park, P. C. Rao, Tullio Treves, Budislav Vukas, Joseph Sinde Warioba, Rudiger Wolfrum, Soji Yamamoto, Alexander Yankov, and Lihai Zhao.

[34] Cameroon; Ghana; Senegal; Tanzania; and Tunisia.

[35] China;India; Japan Republic of Korea; and Lebanon.

[36] Argentina; Belize; Brazil;and Grenada.

[37] Bulgaria; Croatia and Russian Federation.

[38] Germany; Iceland; Italy; and United Kingdom of Great Britain and Northern Ireland.

[39] The Judges elected for three year terms are: Paul B. Engo (Cameroon); A. Joseph (Lebanon); A.L.Kolodkin (Russian ' Federation); V.Marotta angel (Brazil); P.C.Rao (India); J.S.Warioba (Tanzania) and R. Wolfrum (Germany);.

[40] D.H.Anderson (United Kingdom); Hugo Caminos (Argentina); G.Eiriksson (Iceland); E.A.Laing (Belize); M.M.Marsit (Tunisia); T.A.Mensah (Ghana);T.M.Ndiaye (Senegal); L.Dolliver Nelson (Grenada); C.H.Park (Republic of Korea); T.Trevos (Italy); Budislav Vukas (Croatia); S.Yamamoto (Japan); Alexander Yankov (Bulgaria); and L.Zhao (China).

urgency; (ii) matters pertaining to the staff of the Tribunal; (iii) the principles and criteria relating to incompatible activities of members of the Tribunal; (iv) establishment of Chamber of Summary proceedings; (v) problems relating to the current budget and exchange of views about the 1998 budget; (vi) issues concerning the relations between the Tribunal and the United Nations, practical matters relating participation .in the United Nations Common System, including the UN Joint Staff Pension Fund; (vii) the draft Headquarters Agreement; and (viii) planning of sessions of the Tribunal in 1997, as well as the organization of the intersessional work of the Members of the Tribunal.

It may be stated in this regard that the General Assembly at its 51 st Session, *inter alia*, welcomed the establishment of the ITLOS. The programme for activities for the final term (1997-1998) of the United Nations Decade of International Law adopted by the General Assembly at its 51st Session inter alia takes note of the "establishment of the International Tribunal for the Law of the Sea in October 1996 in accordance with the United Nations Convention on the Law of the Sea" and encourages the States and other entities referred to in Article 20 of Annex VI of the Convention to consider making use of the Tribunal for the peaceful settlement of disputes in accordance with Article 21 of Annex VI of the Convention.[41]

At its 51st Session the General Assembly also asked Stated Parties to the Convention to consider making a written declaration choosing from the means set out in Article 287 of the Convention for the Settlement of Disputes concerning the interpretation or application of the Convention.

During the course of 1997 the members of the Tribunal decided the Tribunal would apply the draft Rules of the Tribunal, prepared by the PREPCOM , on a provisional basis. It also decided to give paramount consideration to ensure that the Rules be user friendly. It also established three standing chambers in addition to the Seabed Disputes Chamber. The three Chambers established are the(i) Chamber of Summary Procedure;(ii)

[41] See *United Nations Decade of International Law.. Report of the Sixth Committee Doc.* No.A\5 1\625 and A\C.6\5 1\L. 1 1.

Chamber for Fisheries Disputes, [42]and (iii) Chamber for Marine Environnent Disputes.[43]

On 4 December 1997 the International Tribunal for the Law of the Sea delivered its first judgment in "The MIV "Saiga " Case (Saint Vincent and the Grenadines vs. Guinea). In its first case the Tribunal unanimously found that it had jurisdiction under Article 292 of the Convention on the Law of the Sea to entertain the Application filed by Saint Vincent, and the Grenadines on 13 November 1997. By a vote of 12 to 9 the Tribunal [44] found that the Application was admissible. The Tribunal ordered that Guinea release the *MIV* Saiga and its crew from detention and decided that the release shall be upon the Posting of a reasonable bond or security. In further decided in this regard that the security shall consist of (i) gas oil discharged from the *MIV* Saiga; and (2) the amount of US $ 400,000 , to be posted in the form of a letter of credit or bank guarantee or , if agreed by the parties, in any other form.

THE GLOBAL PROGRAMME OF ACTION FOR THE PROTECTION OF THE MARINE ENVIRONMENT FROM LAND BASED ACTIVITIES

At its 51st Session the General Assembly by its resolution 51/189 of December 16, 1996 endorsed the Washington Declaration on the

[42] The Members of the Tribunal selected to serve on the Chamber for Fisheries Disputes are D.H Anderson; H. Carninos; G.Eiriksson; P.B.Engo ; E.A.Laing; P.C.Rao; and S.Yamamoto.

[43] The Members of the Tribunal selected to serve on the Chamber for Marine Environment Disputes are the Vice President, Judge R. Wo.lftum;A.L.Kolodkin; M.M.Marsit; Choon-Ho Park; J. S.Warioba ; S. Yamamoto ; and A. Yankov .

[44] The Judges who vote against the admissibility of the Application were the President Mensah, the Vice President Wolfrum) and Judges Yamamoto , Park, Nelson, P..C.Rao, Anderson, Ndiaye and Vukas.

Protection of the Marine Environment From Land Based Activities.[45] The Global .Programme Of Action For The Protection Of The Marine Environment From Land Based Activities (hereafter referred to as the GPA) adopted by the Washington Conference comprises 5 parts viz.(i) Introduction;(ii) Action at the National Level;(iii)Regional Cooperation; (iv)International Cooperation; and (v) Recommended Approaches by Source Category.[46]

The GPA reflects that States face an increasing number of commitments flowing from Agenda 21 and related Conventions the implementation of which would require new approaches by,and new forms of collaboration among, Governments, Organizations and institutions with responsibilities and expertise relevant to marine and coastal areas at all levels - national, regional and global including the promotion of innovative financial mechanism to generate the needed resources.

The second part of the GPA addressed to **Actions at the National Levels** identifies the basis for action, objectives and finally the actions. The six actions recommended are : (i) identification and assessment of problems; (ii) establishment of priorities; (iii) setting management objectives for priority problems; (iv) identification, evaluation and selection of strategies and measures; (v) criteria for evaluating the effectiveness strategies and measures,; and (vi) programme support elements.

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[45] The Washington Declaration on the Protection of the Marine Environment from Land Based Activities was adopted by the Inter-govemmental Conference to Adopt a Global Programme of Action for the Protection of the Marine Environment from Land Based Activities , held in Washington from 23 October to 3 November 1995. The Conference was convened by the Executive Director of the UNEP pursuant to the request made in Chapter 17 of Agenda 21 for the purpose of adopting a programme of action for the protection of the marine environnent from land based activities. The Conference affirmed the need to preserve the marine environment for the present 'and future generations and reaffirmed the relevant provisions of Chapters 17, 33 and 34 of Agenda 21 as well as the Rio Declaration on Environment and.Development.

[46] A\5 1 \ 1 16\ dated 16 April, 1996

Part Four recognizes **International Cooperation** as being important for the successful and cost-effective implementation of the GPA and forms its central role in enhancing capacity building, technology transfer and cooperation as well as financial support. Apart from the fact that effective implementation of the GPA would require efficient support from appropriate international agencies, international cooperation is necessary to ensure regular review of the implementation of the programme and its further development and adjustment. Accordingly, the four major activities enumerated in this part relate to (i) capacity building; (ii) mobilization of financial resources; (iii) International Institutional Framework; and (iv) Additional areas of international arrangements.

The final part of the GPA recommends approaches by pollutant source category. The pollutants identified are (a) sewage; (h) persistent organic pollutants (POPS); (c) Radio active substances; (d) Heavy metals; (e) Oils (hydrocarbons); (f) Nutrients; (g) sedicutation mobilization; (h) litter; and (i) physical alterations and destruction of habitats. This part of the GPA provides guidance as to the actions that States need to consider at national, regional and global levels, in accordance with their national capacities, priorities and available resources, and with the cooperation of the UN and other relevant organizations as well as with the international cooperation for building capacities and mobilizing resources identified in the preceding part on "International Cooperation.

Finally, it may be stated in this regard that the Secretary General of the United Nations has in his report to the General Assembly pointed out that while this GPA has no binding character, it rests on a firm international legal basis, in particular, the UN Convention on the Law of the Sea and is expected to contribute substantially to the progressive development of international law, including the Law of the Sea.

REVIEW OF THE IMPLEMENTATION OF CHAPTER 17 OF AGENDA 21

Chapter 17 of Agenda 21 adopted by the United Nations Conference on Environment and Development (hereinafter called the UNCED) rests on

the foundation furnished by the Convention on the Law of the Sea. The Nineteenth Special Session of the General Assembly, held in June 1997, to Review and Appraise the Implementation of Agenda 21 inter alia recommended that Governments "take advantage of the challenge and opportunity presented by the International Year of the Oceans in 1998". To address the need for improving global decision-making on the marine environment the Programme of Action for the Further Implementation of Agenda 21 adopted by the Special Session called for periodic intergovernmental reviews by the Commission on Sustainable Development of all aspects of the marine environment and its related issues, as described in Chapter 17 of Agenda 21, for which the overall legal framework is provided by the Convention on the Law of the Sea.

The Programme of Action also emphasized the need for concerted action by all states and for improved cooperation to assist developing countries in implementing all relevant decisions and instruments in order to participate effectively in the sustainable use, conservation and management of their fishery resources, as provided for in the Convention and other international legal instruments and to achieve integrated coastal management.

The General Assembly noted that progress has been achieved since the UNCED in the negotiation of agreements and voluntary instruments for improving the conservation and management of fishery resources and for the protection of the marine environment. Furthermore, progress has been made in the conservation and management of specific fishery stocks for the purpose of securing the sustainable utilization of these resources. It, however, expressed concern about the decline of many fish stocks, high levels of discards, and rising marine pollution It recognized the need to continue to improve decisionmaking at the national, regional and global levels.

To address the need for improving global decision-making on the marine environment, there is an urgent need for Govemmqnts to implement decision 4\ 1 5 of the Commission on Sustainable Development[47] in which the Commission,

[47] *See Official Records ofthe Economic and Social Council, 1996, Supplement No. 8* (E\1996\28). Chapter 1 Section C, decision 4\15, para 45 (a). The CSD at its fourth session in 1996 had in its review of Chapter 17 of Agenda 21 welcomed the important

inter alia, called for a periodic intergovernmental review by the Commission of all aspects of the marine environment and its related issues, as described in Chapter 17 of Agenda 2 1, and for which the overall legal framework was provided by the United Nations Convention on the Law of the Sea. There is a need for concerted action by all countries and for improved cooperation to assist developing countries in implementing the relevant agreements and instruments in order that they may participate effectively in the sustainable use, conservation and management of their fishery resources, as provided for in the Convention and other international legal instruments, and achieve integrated coastal zone management. The Resolution adopted at the Nineteenth Special Session of the General Assembly emphasized the need for:

(a) All Governments to ratify or to accede to the relevant agreements as soon as possible and to implement effectively such agreements as well as relevant voluntary instruments;

(b) All Governments to implement General Assembly Resolution 51/189 of 16 December 1996, including the strengthening of institutional links to be established between the relevant intergovernmental mechanisms involved in the development and implementation of integrated coastal zone management. Following progress on the United Nations Convention on the Law of the Sea, and bearing in mind Principle 13 of the Rio Declaration on Environment and

advances made in the area since 1992 and made the following recommendations: (a) The establishment of institutional arrangements for the implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities and for periodic intergovernmental review; (b)The introduction of periodic, intergovernmental review of all aspects of the marihe environment and its related issues; (c) Reporting to the Secretary-General on the imp lementation of international fishery instruments and on "progress made in improving the sustainability of fisheries" (d) A review of the ACC Subcommittee with a view to improving its status and effectiveness. including the need for closer inter-agency links (by the Secretary-General); (e) A review of the Joint Group of Experts on the Scientific Aspects of marine Pollution (GESAMP) with a view to improving its effectiveness and comprehensiveness while maintaining its status as a source of agreed, independent scientific advice and (f) Ongoing review of the need for additional measures to address the issue of degradation of the marine environment from offshore oil and gas development.

Development, there is a need to strengthen the implementation of existing international and regional agreements on marine pollution, with a view in particular to ensuring better contingency planning, response, and liability and compensation mechanisms;

(c) Better identification of priorities for action at the global level to promote the conservation and sustainable use of the marine environment, as well as better means for integrating such action;

(d) Further international cooperation to support the strengthening, where needed, of regional and sub-regional agreements for the protection and sustainable use of the oceans and sea

(e) Governments to prevent or eliminate over fishing and excess fishing capacity through the adoption of management measures and mechanisms to ensure the sustainable management and utilization of fishery resources and to undertake programmes of work to achieve the reduction and elimination of wasteful fishing practices, wherever they may occur, especially in relation to large sca le industrialized fishing. The emphasis given by the Commission on Sustainable Development at its fourth session to the importance of effective conservation and management of fish stocks, and in particular to eliminating over fishing, in order to identify specific steps at national or regional levels to prevent or eliminate excess fishing capacity, will need to be carried forward in all appropriate international forums including, in particular, the Committee on Fisheries of the Food and Agriculture Organization of the United Nations;

(f) Governments to take actions, individually and through their participation in competent global and regional forums, to improve the quality and quantity of scientific data as a basis for effective decisions related to the protection of the marine environment and the conservation and management of marine living resources; in this regard, greater international cooperation is required to assist developing countries, in particular small island developing States, to operationalise data networks and clearing houses for informationsharing on,occans. In this context, particular emphasis must be placed on the collection of biological and other fisheries-related information

and the resources for its collation, analysis and dissemination.[48]

ROLE OF INTERNATIONAL ORGANIZATIONS

The General Assembly at its 49th session, it will be recalled, had invited all the competent international organizations to assess the implications of the entry into force of the Convention in their respective fields of competence and to identify additional measures that may need to be taken as a consequence of the entry into force of the Convention with a view to ensuring a uniform, consistent and coordinated approach to the implementation of the provisions of the Convention throughout the United Nations system. It requested the Secretary General, in that regard, to prepare a comprehensive report on the impact of the entry into force of the Convention on related existing or proposed instruments and programmes throughout the United Nations syst em and to submit a report thercon to the General Assembly at its 51st session.

General Assembly Resolution 49\28 had also invited the competent international organizations, as well as developmental and funding institutions to take specific account in their programmes and activities of the impact of the entry into force of the Convention on the needs of States, especially developing States, for technical and financial assistance and to support,sub-regional or regional initiatives aimed at cooperation in the effective implementation of the Convention.

In order to avoid potential confusion regarding which organization or organizations are primarily responsible for the activities set forth in the specific provisions of the Convention the Division for Ocean Affairs and the Law of the Sea of the office of legal Affairs, acting as the Secretariat responsible for the United, nations Convention on the law of the Sea, has now prepared a table to assist States and to contribute to a better understanding of the implications of the Convention for the organizations and bodies both within and outside the UN system dealing with marine affairs within their respective fields of competence.

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[48] *See Programme for the Further Implemention of Agenda 21, General Assembly Resolution A/RES/S-19/2*adopted, without a vote, on June 28, 1997, Annex, para 36.

The table lists 12 subjects[49] in the Sequence in which they appear in the Convention, together with the names of 18 "competent international organizations" in such subject areas. The Organizations identified are the FAO; the IAEA; ICAO; IHO; ILO, IMO, IOC, ISBA, IWC; UNCTAD; UNDP; UNEP; UNESCO; UNIDO; WHO; WIPO; WMO: and the WTO. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs has, however, clearly indicated that the table is indicative and not authoritative. It has clarified that some organizations may become "competent" in the future with respect to certain provisions of the Convention, while others not formally named but considered to be competent in an advisory or another capacity may cooperate with the organizations listed."[50]

MERGING ISSUES

Article 319 (2) (a), of the Law of the Sea Convention requires the Secretary General of the United Nations to report to all States Parties, the International Seabed Authority and competent international organizations on issues of a general nature that have arisen with respect to the Convention. The Secretary General had in a report, drawn the attention of States Parties, the Authority and competent international organizations, to three issues which in his opinion have arisen and which warrant their consideration.[51]The issues identified were: (i) Protection of the underwater cultural Heritage; (ii) Marine and Coastal Biodiversity; and (iii) Rules of origin.

[49] The subjects listed are (i) Territorial Sea and Contiguous zone,. (ii) Straits used for International Navigation; (iii) Archipelagic States, (iv) Exclusive Economic Zone; (v) Continental Shelf; (vi) High Seas, (vii) Enclosed or Semi Enclosed seas; (viii) The Area (ix) Protection and Preservation of the Marine Environment; (x) Marine Scientific Research; (xi) Development and Transfer of Marine Technology;,and (xii) Settlement of Disputes.

[50] .SeeLawof theSea Bulletin No.31UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 1996\p.79 para 3.

[51] .Report of the Secretary General under Article 319 of the United Nations Convention on the Law of the Sea.. SPLOS/6. Such reports are in accordance with article 319 (3), to be transmitted also to those States which are listed in article 156 as observers of the Authority.

As regards the matter of the protection of underwater cultural heritage attention was drawn to the work of the UNESCO on the possible drafting of an international standard-setting instrument for the protection of the underwater cultural heritage. It was pointed out that the UNESCO General Conference had called upon UNESCO to consult with the United Nations Office on Law of the Sea matters, as well as the IMO on such aspects as salvage, and to organize a meeting of experts. Comments were invited on the findings of the experts, and a final report submitted to the General Conference at its twenty-ninth session in 1997, for it "to determine whether it is desirable for the matter to be dealt with on an international basis and on the method which should be adopted for this purpose".

Apropos coastal biodiversity the attention of Member States was drawn to the developments in the field of marine and coastal biodiversity and to the implications thereof for the Law of the Sea. It has been pointed in this regard that the Second Meeting of the Conference of Parties to the Convention of Biological Diversity had declared a new global consensus on the importance of marine and coastal biological diversity.[52]The Conference of Parties had, in a resolution, requested the secretariat of the Convention on Biological Diversity, in consultation with the Division for Ocean Affairs and the Law of the Sea of the United Nations, "to undertake a study of the relationship between the Convention on Biological Diversity and the United nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed, with a view to enabling the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to address at future meetings as appropriate, the scientific, technical and technological issues relating to bio-prospecting of genetic resources on the deep seabed."

The topic touches not only on the protection and preservation of the marine environment, including that of the international seabed area, but also on such other matters as the application of the consent regime for marine scientific research, the regime for protected areas in the exclusive economic zone, the duties of conservation and management of the living resources of the high seas, and the sustainabledevelopment of living marine resources generally.

[52] Resolution II\ 10 on the "Conservation and Sustainable Use of Marine and coastal Biological Diversity"

The specific issue of access points to the need for the rational and orderly development of activities relating to the utilization of genetic resources derived from the deep seabed area beyond the limits of national jurisdiction. In addition to the questions that may be raised concerning applicable or relevant international law and the possible development of generally accepted international rulesand regulations, a number of concerns exist as to the appropriate intergovernmental forum for consideration of the issues now raised, as well as other institutional issues, including coordination among treaty bodies and the competent international organizations.

The entry into force of the Convention has brought new attention to all areas affected, or potentially affected, by the Law of the Sea. Attention is now focussed by the World Trade Organization (WTO) and the World Customs Organization on the possible need to formulate special provisions as to "rules of origin" to deal with products (both living and non-living) originating or derived from the various maritime zones. In addition to clarifying the concepts and the jurisdictional aspects of the territorial sea, the high seas, the continental shelf, the exclusive economic zone and the international seabed area, the Division for Ocean Affairs and the Law of the Sea has brought a broad range of issues to the attention of the Technical Committee of the World Customs Organizations and the WTO Committee on Rules of Origin, which are charged with further legal development under the Agreement on Rules of Origin.

COMMENTS AND OBSERVATIONS

The International Community has, since the entry into force of the Law of the Sea Convention in November 1994 devoted its attention to the establishment of the institutions that instrument had envisaged. The establishment of the new treaty system of ocean institutions is now almost complete and what is more it has begun functioning. The conclusion of an Agreement concerning the relationship between the United Nations and the International Seabed Authority , the work of the Legal and Technical Commission on the draft regulations governing the exploration of polymetallic nodules in the Area and the first judgment of the Tribunal for the Law of the Sea in *The MIVI/ "Saiga"* are all pointers to that end .

The General Assembly has repeatedly called on States to harmonize their national legislation with the provisions of the Convention and ensure their consistent application. A persistent inconsistency with the Convention are the claims of 15 States[53] for a territorial sea extending beyond 12 miles and the claim of one coastal State for a contiguous zone exceeding 24 nautical miles.

With its entry into force and with new prospects for its universal acceptance the Convention on the Law of the Sea is attracting renewed and widespread interest among governments and, intergovernmental and nongovernmental organizations. The Convention is being increasingly recognized as providing the mechanism for addressing all ocean related issues, and by clearly defining the terms of international cooperation serves to enhance coordination and promote coherence of action. In the words of the Secretary-General of the United Nations "the Convention provides a universal legal framework for rationally managing marine resources and an agreed set of principles to guide consideration of the numerous issues and challenges that will continue to arise from navigation and over flight to resource exploration and exploitation conservation and pollution and fishing and shipping, the Convention provides a focal point for international deliberation and for action."

[53] Angola, Benin, Cameroon, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Nigeria, Panama, Peru, Sierra Leone, Somalia Syrian Arab Repblic, and Togo.

III. THE UNITED NATIONS DECADE OF INTERNATIONAL LAW

(i) Introduction

The item "The United Nations Decade of International Law" was placed on the agenda of the 29th Session of the AALCC held in Beijing in 1990 following the adoption by the General Assembly of Resolution 44\23 declaring the Decade of the Nineties as the United Nations Decade of International Law. The main objectives of the Decade were : (i) to promote acceptance of and respect for the principles of international law; (ii) to promote methods and means for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice; (iii) to encourage the progressive development and codification of international law; and (iv) to encourage the teaching, study, dissemination and wider appreciation of international law.

At the 29th Session of the AALCC the Secretary-General had observed, *inter alia,* that it was appropriate that the Committee addressed itself to and responded to the Resolution 44\23 of the General Assembly. The AALCC at its 29th Session after due consideration of the Secretariat Note mandated the Secretariat to prepare a comprehensive study on the United Nations Decade of International Law.

In pursuance of the above mandate the Secretariat prepared and forwarded to the Office of the Legal Counsel of the United Nations its observations and views on the Decade which were reproduced in the Report of the Secretary-General of the United Nations on the item "The United Nations Decade of International Law". The item has thereafter been considered at each successive sessions of the General Assembly of the United Nations as well as the AALCC. The matter has also been discussed at the meetings of the Legal Advisers of the Member States of the AALCC.

At the thirty sixth session of the AALCC, inter alia reaffirmed that many of the political, economic and social problems which riddle the member States of the international society can be resolved on the basis of the rule of

law. Reiterating the significance of strict adherence to the principles of law as enshrined in the Charter of the United Nations the AALCC requested its member States to give serious attention to the observance and implementation of the Decade. It requested the Secretary General to urge the Member States to ratify the relevant international conventions and apprise the Secretary General of the United Nations of the initiative taken by the AALCC Secretariat in that regard. It also directed the Secretariat of the AALCC to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law.

Meeting of The Legal Advisers of Member States of The AALCC

The proposal for the periodic meetings among the Legal Advisers of the Member States of the AALCC for exchange of views on current problems and issues was initiated and approved at the Committee's Tokyo Session held in 1974. Since then a number of meetings of the Legal Advisers of Member States of the AALCC have been held.

It may be mentioned that speaking at a panel discussion on the UN Decade of International Law: Progress and Promises organized by The American Society of International Law Ambassador Andreas J. Jacovides, Ambassador of Cyprus to the United States of America, had inter alia referred to

"the very useful practice of such regional organizations as the Asian African Legal Consultative Committee (AALCC) to hold meetings of their respective countries representatives in New York, at the same time as the ILC debate in the Sixth Committee. These meetings are often addressed by personalities visiting New York at the same time, such as the President and other members of the International Court of Justice. This practice, in addition to the annual sessions of the AALCC and other regional organizations, such as the European Committee on Legal Cooperation and the Inter-American Juridical Committee, certainly contributes positively to the objectives of the Decade."*

* See the remarks of Ambassador Andreas J. Jacovides, Ambassador of Cyprus to the United States America in the *American Society of International Law; Proceedings of the 89th Annual Meeting* April 5-8 1995. page 172 at 174-175

The Committee at its 36th Session held in Tehran, 1997 had directed the Secretariat to convene a meeting of the Legal Advisers of Member States at the United Nations Headquarters in New York.

Pursuant to that mandate a meeting of the Legal Advisers of Member States of the AALCC was convened at the UN Office in New York in October 1997. This meeting was chaired by Dr. Javad M. Zarif, Deputy Foreign Minister for Legal and International Affairs, Government of the Islamic Republic of Iran, and the then president of the AALCC. Representatives of Member States and senior officials of the United Nations participated in that meeting which was addressed by the President of the International Court of Justice Mr. Stephen M. Schwebel ; the Chairman of the Sixth Committee Ambassador Tomka,; the Chairman of the International Law Commission , Professor Alain Pellet , the Chairperson of the Working Group on the United Nations Decade of International Law, Ambassador Ms. Socorro Flores and the Chairman of the Preparatory Committee on the Establishment of an International Criminal Court, Ambassador Mr. Adrian Bos.

The discussions at the meeting were based on a Background Note prepared by the Secretariat wherein two items had been identified for an informal exchange of views among the Legal Advisers of Member States : (i) the United Nations Decade of International Law; and (ii) the Reservation to Treaties.

In his address to the Legal Advisers of the Member States the Secretary General said that the Secretariat did not expect the Legal Advisers to give detailed comments on the above mentioned subjects but merely sought their opinion and policy guidance as to which of these items the Legal Advisors of Member States would desire the Secretariat to take up as a matter of priority. The Legal Advisers approved the convening of a Special Meeting at the 37th Session of the AALCC, on the Reservation To Treaties.

Development, there is a need to strengthen the implementation of existing international and regional agreements on marine pollution, with a view in particular to ensuring better contingency planning, response, and liability and compensation mechanisms;

(c) Better identification of priorities for action at the global level to promote the conservation and sustainable use of the marine environment, as well as better means for integrating such action;

(d) Further international cooperation to support the strengthening, where needed, of regional and sub-regional agreements for the protection and sustainable use of the oceans and sea

(e) Governments to prevent or eliminate over fishing and excess fishing capacity through the adoption of management measures and mechanisms to ensure the sustainable management and utilization of fishery resources and to undertake programmes of work to achieve the reduction and elimination of wasteful fishing practices, wherever they may occur, especially in relation to large sca le industrialized fishing. The emphasis given by the Commission on Sustainable Development at its fourth session to the importance of effective conservation and management of fish stocks, and in particular to eliminating over fishing, in order to identify specific steps at national or regional levels to prevent or eliminate excess fishing capacity, will need to be carried forward in all appropriate international forums including, in particular, the Committee on Fisheries of the Food and Agriculture Organization of the United Nations;

(f) Governments to take actions, individually and through their participation in competent global and regional forums, to improve the quality and quantity of scientific data as a basis for effective decisions related to the protection of the marine environment and the conservation and management of marine living resources; in this regard, greater international cooperation is required to assist developing countries, in particular small island developing States, to operationalise data networks and clearing houses for informationsharing on,occans. In this context, particular emphasis must be placed on the collection of biological and other fisheries-related information

and the resources for its collation, analysis and dissemination.[48]

ROLE OF INTERNATIONAL ORGANIZATIONS

The General Assembly at its 49th session, it will be recalled, had invited all the competent international organizations to assess the implications of the entry into force of the Convention in their respective fields of competence and to identify additional measures that may need to be taken as a consequence of the entry into force of the Convention with a view to ensuring a uniform, consistent and coordinated approach to the implementation of the provisions of the Convention throughout the United Nations system. It requested the Secretary General, in that regard, to prepare a comprehensive report on the impact of the entry into force of the Convention on related existing or proposed instruments and programmes throughout the United Nations syst em and to submit a report thercon to the General Assembly at its 51st session.

General Assembly Resolution 49\28 had also invited the competent international organizations, as well as developmental and funding institutions to take specific account in their programmes and activities of the impact of the entry into force of the Convention on the needs of States, especially developing States, for technical and financial assistance and to support,sub-regional or regional initiatives aimed at cooperation in the effective implementation of the Convention.

In order to avoid potential confusion regarding which organization or organizations are primarily responsible for the activities set forth in the specific provisions of the Convention the Division for Ocean Affairs and the Law of the Sea of the office of legal Affairs, acting as the Secretariat responsible for the United, nations Convention on the law of the Sea, has now prepared a table to assist States and to contribute to a better understanding of the implications of the Convention for the organizations and bodies both within and outside the UN system dealing with marine affairs within their respective fields of competence.

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[48] *See Programme for the Further Implemention of Agenda 21, General Assembly Resolution A/RES/S-19/2*adopted, without a vote, on June 28, 1997, Annex, para 36.

The table lists 12 subjects[49] in the Sequence in which they appear in the Convention, together with the names of 18 "competent international organizations" in such subject areas. The Organizations identified are the FAO; the IAEA; ICAO; IHO; ILO, IMO, IOC, ISBA, IWC; UNCTAD; UNDP; UNEP; UNESCO; UNIDO; WHO; WIPO; WMO: and the WTO. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs has, however, clearly indicated that the table is indicative and not authoritative. It has clarified that some organizations may become "competent" in the future with respect to certain provisions of the Convention, while others not formally named but considered to be competent in an advisory or another capacity may cooperate with the organizations listed."[50]

MERGING ISSUES

Article 319 (2) (a), of the Law of the Sea Convention requires the Secretary General of the United Nations to report to all States Parties, the International Seabed Authority and competent international organizations on issues of a general nature that have arisen with respect to the Convention. The Secretary General had in a report, drawn the attention of States Parties, the Authority and competent international organizations, to three issues which in his opinion have arisen and which warrant their consideration.[51]The issues identified were: (i) Protection of the underwater cultural Heritage; (ii) Marine and Coastal Biodiversity; and (iii) Rules of origin.

[49] The subjects listed are (i) Territorial Sea and Contiguous zone,. (ii) Straits used for International Navigation; (iii) Archipelagic States, (iv) Exclusive Economic Zone; (v) Continental Shelf; (vi) High Seas, (vii) Enclosed or Semi Enclosed seas; (viii) The Area (ix) Protection and Preservation of the Marine Environment; (x) Marine Scientific Research; (xi) Development and Transfer of Marine Technology;,and (xii) Settlement of Disputes.

[50] .SeeLawof theSea Bulletin No.31UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York, 1996\p.79 para 3.

[51] .Report of the Secretary General under Article 319 of the United Nations Convention on the Law of the Sea.. SPLOS/6. Such reports are in accordance with article 319 (3), to be transmitted also to those States which are listed in article 156 as observers of the Authority.

As regards the matter of the protection of underwater cultural.heritage attention was drawn to the work of the UNESCO on the possible drafting of an international standard-setting instrument for the protection of the underwater cultural heritage. It was pointed out that the UNESCO General Conference had called upon UNESCO to consult with the United Nations Office on Law of the Sea matters, as well as the IMO on such aspects as salvage, and to organize a meeting of experts. Comments were invited on the findings of the experts, and a final report submitted to the General Conference at its twenty-ninth session in 1997, for it "to determine whether it is desirable for the matter to be dealt with on an international basis and on the method which should be adopted for this purpose".

Apropos coastal biodiversity the attention of Member States was drawn to the developments in the field of marine and coastal biodiversity and to the implications thereof for the Law of the Sea. It has been pointed in this regard that the Second Meeting of the Conference of Parties to the Convention of Biological Diversity had declared a new global consensus on the importance of marine and coastal biological diversity.[52]The Conference of Parties had, in a resolution, requested the secretariat of the Convention on Biological Diversity, in consultation with the Division for Ocean Affairs and the Law of the Sea of the United Nations, "to undertake a study of the relationship between the Convention on Biological Diversity and the United nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed, with a view to enabling the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to address at future meetings as appropriate, the scientific, technical and technological issues relating to bio-prospecting of genetic resources on the deep seabed."

The topic touches not only on the protection and preservation of the marine environment, including that of the international seabed area, but also on such other matters as the application of the consent regime for marine scientific research, the regime for protected areas in the exclusive economic zone, the duties of conservation and management of the living resources of the high seas, and the sustainabledevelopment of living marine resources generally.

[52] Resolution II\ 10 on the "Conservation and Sustainable Use of Marine and coastal Biological Diversity"

The specific issue of access points to the need for the rational and orderly development of activities relating to the utilization of genetic resources derived from the deep seabed area beyond the limits of national jurisdiction. In addition to the questions that may be raised concerning applicable or relevant international law and the possible development of generally accepted international rulesand regulations, a number of concerns exist as to the appropriate intergovernmental forum for consideration of the issues now raised, as well as other institutional issues, including coordination among treaty bodies and the competent international organizations.

The entry into force of the Convention has brought new attention to all areas affected, or potentially affected, by the Law of the Sea. Attention is now focussed by the World Trade Organization (WTO) and the World Customs Organization on the possible need to formulate special provisions as to "rules of origin" to deal with products (both living and non-living) originating or derived from the various maritime zones. In addition to clarifying the concepts and the jurisdictional aspects of the territorial sea, the high seas, the continental shelf, the exclusive economic zone and the international seabed area, the Division for Ocean Affairs and the Law of the Sea has brought a broad range of issues to the attention of the Technical Committee of the World Customs Organizations and the WTO Committee on Rules of Origin, which are charged with further legal development under the Agreement on Rules of Origin.

COMMENTS AND OBSERVATIONS

The International Community has, since the entry into force of the Law of the Sea Convention in November 1994 devoted its attention to the establishment of the institutions that instrument had envisaged. The establishment of the new treaty system of ocean institutions is now almost complete and what is more it has begun functioning. The conclusion of an Agreement concerning the relationship between the United Nations and the International Seabed Authority , the work of the Legal and Technical Commission on the draft regulations governing the exploration of polymetallic nodules in the Area and the first judgment of the Tribunal for the Law of the Sea in *The MIVI/ "Saiga"* are all pointers to that end .

The General Assembly has repeatedly called on States to harmonize their national legislation with the provisions of the Convention and ensure their consistent application. A persistent inconsistency with the Convention are the claims of 15 States[53] for a territorial sea extending beyond 12 miles and the claim of one coastal State for a contiguous zone exceeding 24 nautical miles.

With its entry into force and with new prospects for its universal acceptance the Convention on the Law of the Sea is attracting renewed and widespread interest among governments and, intergovernmental and nongovernmental organizations. The Convention is being increasingly recognized as providing the mechanism for addressing all ocean related issues, and by clearly defining the terms of international cooperation serves to enhance coordination and promote coherence of action. In the words of the Secretary-General of the United Nations "the Convention provides a universal legal framework for rationally managing marine resources and an agreed set of principles to guide consideration of the numerous issues and challenges that will continue to arise from navigation and over flight to resource exploration and exploitation conservation and pollution and fishing and shipping, the Convention provides a focal point for international deliberation and for action."

[53] Angola, Benin, Cameroon, Congo, Ecuador, El Salvador, Liberia, Nicaragua, Nigeria, Panama, Peru, Sierra Leone, Somalia Syrian Arab Repblic, and Togo.

III. THE UNITED NATIONS DECADE OF INTERNATIONAL LAW

(i) Introduction

The item "The United Nations Decade of International Law" was placed on the agenda of the 29th Session of the AALCC held in Beijing in 1990 following the adoption by the General Assembly of Resolution 44\23 declaring the Decade of the Nineties as the United Nations Decade of International Law. The main objectives of the Decade were : (i) to promote acceptance of and respect for the principles of international law; (ii) to promote methods and means for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice; (iii) to encourage the progressive development and codification of international law; and (iv) to encourage the teaching, study, dissemination and wider appreciation of international law.

At the 29th Session of the AALCC the Secretary-General had observed, *inter alia*, that it was appropriate that the Committee addressed itself to and responded to the Resolution 44\23 of the General Assembly. The AALCC at its 29th Session after due consideration of the Secretariat Note mandated the Secretariat to prepare a comprehensive study on the United Nations Decade of International Law.

In pursuance of the above mandate the Secretariat prepared and forwarded to the Office of the Legal Counsel of the United Nations its observations and views on the Decade which were reproduced in the Report of the Secretary-General of the United Nations on the item "The United Nations Decade of International Law". The item has thereafter been considered at each successive sessions of the General Assembly of the United Nations as well as the AALCC. The matter has also been discussed at the meetings of the Legal Advisers of the Member States of the AALCC.

At the thirty sixth session of the AALCC, inter alia reaffirmed that many of the political, economic and social problems which riddle the member States of the international society can be resolved on the basis of the rule of

law. Reiterating the significance of strict adherence to the principles of law as enshrined in the Charter of the United Nations the AALCC requested its member States to give serious attention to the observance and implementation of the Decade. It requested the Secretary General to urge the Member States to ratify the relevant international conventions and apprise the Secretary General of the United Nations of the initiative taken by the AALCC Secretariat in that regard. It also directed the Secretariat of the AALCC to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law.

Meeting of The Legal Advisers of Member States of The AALCC

The proposal for the periodic meetings among the Legal Advisers of the Member States of the AALCC for exchange of views on current problems and issues was initiated and approved at the Committee's Tokyo Session held in 1974. Since then a number of meetings of the Legal Advisers of Member States of the AALCC have been held.

It may be mentioned that speaking at a panel discussion on the UN Decade of International Law: Progress and Promises organized by The American Society of International Law Ambassador Andreas J. Jacovides, Ambassador of Cyprus to the United States of America, had inter alia referred to

"the very useful practice of such regional organizations as the Asian African Legal Consultative Committee (AALCC) to hold meetings of their respective countries representatives in New York, at the same time as the ILC debate in the Sixth Committee. These meetings are often addressed by personalities visiting New York at the same time, such as the President and other members of the International Court of Justice. This practice, in addition to the annual sessions of the AALCC and other regional organizations, such as the European Committee on Legal Cooperation and the Inter-American Juridical Committee, certainly contributes positively to the objectives of the Decade."*

* See the remarks of Ambassador Andreas J. Jacovides, Ambassador of Cyprus to the United States America in the *American Society of International Law; Proceedings of the 89th Annual Meeting* April 5-8 1995. page 172 at 174-175

The Committee at its 36th Session held in Tehran, 1997 had directed the Secretariat to convene a meeting of the Legal Advisers of Member States at the United Nations Headquarters in New York.

Pursuant to that mandate a meeting of the Legal Advisers of Member States of the AALCC was convened at the UN Office in New York in October 1997. This meeting was chaired by Dr. Javad M. Zarif, Deputy Foreign Minister for Legal and International Affairs, Government of the Islamic Republic of Iran, and the then president of the AALCC. Representatives of Member States and senior officials of the United Nations participated in that meeting which was addressed by the President of the International Court of Justice Mr. Stephen M. Schwebel ; the Chairman of the Sixth Committee Ambassador Tomka,; the Chairman of the International Law Commission , Professor Alain Pellet , the Chairperson of the Working Group on the United Nations Decade of International Law, Ambassador Ms. Socorro Flores and the Chairman of the Preparatory Committee on the Establishment of an International Criminal Court, Ambassador Mr. Adrian Bos.

The discussions at the meeting were based on a Background Note prepared by the Secretariat wherein two items had been identified for an informal exchange of views among the Legal Advisers of Member States : (i) the United Nations Decade of International Law; and (ii) the Reservation to Treaties.

In his address to the Legal Advisers of the Member States the Secretary General said that the Secretariat did not expect the Legal Advisers to give detailed comments on the above mentioned subjects but merely sought their opinion and policy guidance as to which of these items the Legal Advisors of Member States would desire the Secretariat to take up as a matter of priority. The Legal Advisers approved the convening of a Special Meeting at the 37th Session of the AALCC, on the Reservation To Treaties.

Thirty Seventh Session : Discussion

The Assistant Secretary General Mr. Asghar Dastmalchi while inviting attention to the AALCC Study recalled that the General Assembly had at its 44th session declared the Decade of the Nineties as the United Nations Decade of International Law and outlined the objectives of the decade. The item entitled "The United Nations Decade of International Law has been on work programme of the AALCC since its 29th Session held in Beijing in 1990. The item was included in the agenda of that session of the Committee. on the initiative of the Secretary-General. in accordance with Article 4(d) of the Revised Statutes of the Committee.

The Committee at that Session directed the Secretariat to continue its work on the subject and to include the item on the agenda of the next Session of the Committee. The item has thereafter been considered at successive sessions of the Committee.

The 36th Session of the AALCC, reaffirmed that many of the political, economic and social problems of the international society can be resolved on the basis of the rule of law. Reiterating the significance of strict adherence to the principles of law as enshrined in the Charter of the United Nations the AALCC at its 36th session requested its Member States to give serious attention to the observance and implementation of the Decade. It also directed the Secretariat to continue its efforts towards the realization of the objectives of the United Nations Decade of International Law.

He noted, that following a recommendation made at the Meeting of the Legal Advisers of Member States held in New York in November 1996 a Special Meeting on the Inter-related Aspects between the International Criminal Court and International Humanitarian Law had been organized during the 36th Session. The Secretariat has already published the Report of that Special Meeting on the Inter Related Aspects between the International Criminal Court and International Humanitarian Law.

He gave a brief account of the 52th Session of the General Assembly which had inter alia reviewed the United Nations activities forthe progressive

development of international law and its codification and considered work in the fields of human rights, disarmament, outer space, economic development, crime prevention and criminal justice, the environment, international trade, and the law of the Sea. It also addressed the relevant Work of the Sixth Committee and the International Law Commission. The Permanent Representative, of Mongolia to the United Nations requested the, inclusion in the agenda of the 52nd session of the General Assembly an item entitled "Draft Guiding Principles for International Negotiations" as a sub item under the item entitled United nations Decade of International Law. The text of the Mongolian reference made to the General Assembly at its 52nd Session is given as Annex IV of the Brief of Documents in this Chapter.

The General Assembly at its 52nd session emphasized the importance of conducting effective negotiations in managing international relations and the peaceful settlement of disputes and in the creation of new international norms of conduct of States and decided to continue the consideration of this sub item in the Working Group on the United Nations Decade of International Law during the 53rd. session of the General Assembly and invited all States and relevant international organizations to submit in writing to the SecretaryGeneral, before 1 August 1998, comments and proposals on the content of the "Draft guiding principles for international negotiations". The text of the draft resolution on the "Draft guiding principles for international negotiations" has been reproduced in Annex III of the Secretariat study in this Chapter. The Committee may, perhaps, wish to consider the Mongolian The Committee may, perhaps, wish to consider the Mongolian reference on principles of international negotiation.

He then recalled that at its 51st the Sixth Committee of the General Assembly had considered a proposal related to the "1999 Action dedicated to the centennial of the first International peace Conference and to the closing of the United Nations Decade of International Law" submitted by the Governments of the Netherlands and the Russian Federation. More recently, the General Assembly at its 52nd Session considered the Programme of Action for the Celebration of the Centennial of the First International Peace Conference as drawn up pursuant to General Assembly Resolution 51\159 of 16 December 1996 by the Russian Federation and the Netherlands.

The General Assembly at its 52 ndSession welcomed the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Governments of the Kingdom of the Netherlands and of the' Russian Federation aiming to contribute to the further development of the themes of the first and the second International Peace Conference and which could be regarded as a third International Peace Conference. The Assembly invited (1) the Governments of the Kingdom of the Netherlands and of the Russian Federation to proceed with the implementation of the Programme of Action; (ii) all States to participate in the activities set out in the Programme of Action, as well as to initiate such activities and to coordinate their efforts in this respect at the global level, as well as at the regional and national levels; and (iii) All States to take appropriate measures to ensure universal participation in the activities pursuant to the Programme of Action, with special consideration for the participation of representatives of the least developed countries.

The Assistant Secretary General Stated that the AALCC could give directions as to the role of the AALCCin the "1999 action dedicated to the centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law. In its consideration of the role of the Secretariat, it was recalled that the "first and the second international peace Conferences as well as the League of Nations and the United Nations subsequently had significantly encouraged of the progressive development of international law and thereby contributed to the maintenance of international peace and security.

Finally, he wished that, the AALCC at this session was given direction as to role of the AALCC Secretariat in the 1999 action dedicated to the centennial of the first international Peace Conference and to the closing of the United Nations Decade of International Law.

The Delegate of Egypt stated that the "Decade of International Law" had achieved a number of landmarks in the codification of International Law, which could be judged from the number of conventions adopted during the period and the increase in number of ratification and accessions to various multilateral conventions such as the Convention on the Law of the Sea, the

Conventions relating to Enviromnent and the Establishment of the WTO. He added that it could be said with a sense of satisfaction that the 3rd phase of the Decade (1997 - 1999) had been a success in realizing the aims of the Decade, and the AALCC had indeed played an active part in assuming a supportive role to the work of the United Nations. This he said, was evident from the number of Seminars, and Workshops which were organized by the AALCC to study topics of importance to the Member States, including the ones which pertained to the Inter related aspects between International Humanitarian Law and the International Criminal Court, Seminar to Commemorate the 30th Anniversary of the Bangkok Principles, Expert Group Meeting on the Extra - Territorial Application of National Legislation: Sanctions Imposed Against Third Parties, Expert Group Meeting on Status and Treatment of Refugees. He expressed the view that the AALCC activities would go on intemet. He was also supportive of the idea of holding the first International Peace Conference towards the end of the United Nations Decade of International Law and wanted the AALCC to continue a dialogue with its Member States to elicit views o n how AALCC could participate in the Peace Conference.

The Vice President concluded with the comment that the AALCC had an important role to play in realizing the aims of the Decade of International Law, and had succeeded in realising the objectives of the Decade The United Nations had also noted with appreciation the decision of the AALCC to participate actively in the programrre of the UN Decade of International Law. Therefore, the Secretariat should continue to liaise with the Member States in order to effectively participate, in the last phase of the Decade, and report to the next Session.

(ii) Decision on the "The United Nations Decade of International Law"

(Adopted on 18.4.98)

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

Having taken note of the Report of the Secretary -General on the United Nations Decade of International Law set out in Doc.No. AALCCXXXVII\New Delhi \98\S.2;

1. **Reaffirms** that many of the political, economic and social problems which riddle the Member States of the international society call be resolved on the basis of the rule of law;

2 **Reiterates** the importance of strict adherence to the Principles of International Law as enshrined in the Charter of the United Nations;

3. **Requests** Member States to continue to give serious attention to the observance avid implementation of the Decade;

4. **Also requests** the Secretary-General to apprise the Secretary- General of the United Nations of the initiatives taken by the Committee in this regard;

5. **Directs** the Secretariat to continue its efforts towards the realization of the objectives of the UN Decade of International Law;

6. **Decides** that the item be given serious attention and that it be placed on the agenda of the Meeting of the Legal Advisers of Member States of the Committee to be convened at the UN Office in New York during the Fifty-third Session of the General Assembly;

7. **Approves** of the Secretary General's proposal to hold seminars relevant to the objectives of the United Nations Decade of International Law; and

8. **Decides** to place the item "United Nations Decade of International Law" on the agenda of its Thirty -eighth Session.

(iii) Secretariat Study : The United Nations Decade of International Law

The Fifty-Second Session of The General Assembly

The General Assembly at its 51st Session had adopted the programme of activities for the third term of the UN decade of international Law (1997-99)[1] At its Fifty-second Session the General Assembly considered the Note of the Secertary General on the United Nations Decade of International Law.[2] That Note reviewed United Nations activities for the progressive development of international law and its condification and considered work in the fields of human rights, disarmament, outer space, economic development, crime prevention and criminal justice, the environment, international trade, and the Law of the Sea. It also addressed the relevant work of the Sixth Committee and the International Law Commission.

In a letter addressed to the Secretary General the Permanent Representative of Mongolia to the United Nations requested the inclusion in the agenda of the 52nd session of the General Assembly an item entitled "Draft Guiding Principles for International Law.[3]

The explanatory memorandum calling for the inclusion of the sub-item "Draft Guiding Principles for International Negotiationg' inter alia stated that the rejection of the use or threat of use of force implied greater recourse to cooperation and negotiation . International negotiations , as the most flexible and effective means of cooperation between States plays an important role in the management of contemporary international relations and the peaceful settlement of disputes as well as the creation of new international norms of conduct While the role of international negotiations would continue to grow in the future the conduct of international negotiations remained unregulated.

Accordingly, Mongolia believed that it was "necessary and timely for

[1] See General Assembly resolution 51/157 of 16 December 1996.

[2] See the United Nations Decade of International Law - Note by the Secretary General, Doc. No.A\52\363.

[3] See A/52/141 dated 18 June 1997. Reproduced in Annexure IV. For detail see infra.

the international community to identify and elaborate a set of principles to guide States in the conduct of international negotiations." These principles , it was suggested, could be embodied in an international document in the form of a code of conduct of States or guiding principles containing a set of generally agreed rules necessary for the conduct of international negoations, in conformity with the principles and norms of contemporary international law.[4]

The General Assembly at its fifty second session noting that the identification and harmonization of guiding principles for international negotiations could contribute to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations and could offer a frame of reference for negotiations, underscored the importance of conducting effective negotiations in managing international relations and the peaceful settlement of disputes and in the creation of new international norms of conduct of States It decided to continue the consideration of this sub-item in the Working Group on the United Nations Decade of International Law during the fifty-third session of the General Assembly and invited all States and relevant international rganizations to submit in writing to the Secretary-General , before 1 August 1998, comment and proposals on the content of the "Draft guiding principles for international negotiations."[5]

It will be recalled that at its 51sdsession the General Assembly had considered a proposal sponsored by the Netherlands and Russian Federation on action in 1999 to mark the closing of the Decade and the centennial of the first International Peace Conference. It had then requested the Governments of Netherlands and Russian Federation to discuss with other States on the substantive content of the proposed 1999 action.[6]At its recently concluded 52nd Session the General Assembly considered the Programme of Action For the Celebration of the Centennial of the First International Peace Conference as drawn up pursuant to General Assembly Resolution 51/159 of 16 December 1996 by the Russian Federation and the Netherlands. [7]

[4] *Ibid.* pp. 2-3

[5] For details see United Nations Decade ofinternational Law, Report of the Sixth Coinmittee,A/52/647 dated 25 November 1997.

[6] For details see General Assembly Resolution 51/159 of 16 December 1996 Third International Peace Conference, Reproduced in AALCC/XXXVI/Tehran /97/S2. Annex III.

[7] Doc. No. A/C.6/52/3 dated 15 October 1997. Reproduced in Anne

Acceptance of And Respect For The Principles of International Law

Pursuant to the mandate of the 36th Session of the AALCC held in Tehran the Secretariat has continued to urge Member States, which have not already done so to consider ratifying or acceding to relevant multilateral codification conventions.

At its 52nd Session the General Assembly, *inter alia*, encouraged States to consider ratifying or acceding to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It also encouraged international organizations that have signed the Convention to deposit an act of formal confirmation of the Convention and other international organizations entitled to do so to accede to it. It may be recalled in this regard that the AALCC was represented at the Vienna Conference on the Law of Treaties -between States and International Organizations or between International Organizations.[8]

The Secretariat of the AALCC in fulfilment of its advisory and recommendatory functions will endeavour to promote the acceptance of and respect for the principles of international law by urging its member States that they ratify or accede to codifying international instruments.

In the sphere of international economic and trade law matters, the AALCC at its 1997 session expressed, its appreciation for the continued cooperation with the various international organizations competent in the field of international trade law and expects that this cooperation will be intensified in the future. It considered a Secretariat study on the WTO as a Framework Arrangement and Code of Conduct for World Trade. The Secretariat will continue to monitor the developments related to the conduct of World Trade and the settlement of disputes in the field.

[8] The AALCC is a signatory to the Final Act of the Vienna Conference.

Peaceful Settlement of Disputes

Theprogramme for the activities for the final term (1997-99) of the United Nations Decade of International Law had *inter alia* invited "States, the United Nations System of organizations and regional organizations, including the Asian-African Legal Consultative Committee," to study the means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice.

The AALCC has always attached great significance to the cardinal principle of the peaceful settlement of disputes. The Secretariat proposes to continue to monitor the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization with regard to the peaceful settlement of disputes.

It may be recalled in this regard that to encourage the wider use of the role of the International Court of Justice and its wider use in the peaceful settlement of disputes, the AALCC Secretariat had organized an International Seminar on the "Work and Role of the International Court of Justice". The Seminar had been organized with the dual objective of commemorating the 50th Anniversary of the Sitting of the ICJ and to promote the awareness about the Court as a part of the Commemoration programme in the Asian Region.

In matters relating to the Law of the Sea the General Assembly at its 5Ist Session welcomed the establishment of the International Tribunal for the Law of the Sea, the Council of the International Seabed Authority its Legal and Technical Commission and Finance Committee, and its resolution encouraged States parties to the Convention to consider making a written declaration choosing from the means set out in article 287 of the Convention for the settlement of disputes concerning the interpretation or application of the Convention.[9] It may be stated in this regard that the General Assembly at its 5 1 st Session, inter alia, welcomed the establishment of the International Tribunal for the Law of the Sea under the United Nations Convention on the

[9] See Law of the Sea , A\5 1 \L. 21 of 19th November 1996

Law of the Sea as a new means of settlement of disputes. The programme for activities for the final term (1997-1998) of the United Nations Decade of International Law adopted by the General Assembly at its 51st Session took note of the "establishment of the International Tribunal for the Law of the Sea in October 1996 in accordance with the United Nations Convention on the Law of the Sea" and encouraged "the States and other entities referred to in Article 20 of Annex VI of the Convention to consider making use of the Tribunal for the peaceful settlement of disputes in accordance with Article 21 of Annex VI of the Convention".[10]

As regards disputes stemming from international economic and trade law matters the AALCC Secretariat shall continue to exhort and urge member States to resolve their differences in accordance with the arbitration and or conciliatory rules framed by the UNCITRAL. The AALCC shall also endeavor to expand and enlarge the activities of its Regional Centers of Arbitration functioning at Cairo, Kuala Lumpur , Lagos and Tehran . The Lagos Regional Center for International Commercial Arbitration was reactivated recently and has facilities for handling arbitration. The Center provides secretarial support services which may be availed by parties and arbitrators alike. Steps have been initiated to establish and make operational a similar center at Nairobi for serving the countries in Eastern and Southern Africa.

The World Trade Organization (WTO) has been actively involved in the settlement of disputes among its Member States. An overview of the dispute settlement mechanism of the WTO as well as the dispute settled thereby set out in the brief of document on WTO: Dispute Settlement Mechanism .[11] The WTO Secretariat has *inter alia* conducted special courses on dispute settlement mechanisms to train and enable the experts of its Member States to be better acquainted in that regard.

[10] See United Nations Decade of International Law, Report of the Sixth Committee Doc.A\51\625 of 3rd December 1996 Also see A\C.6\5 1 \L. 11.

[11] See Document No.AALCC\XXXVII\New Delhi \98\S

Progressive Development And Codification Of International Law

The AALCC at its 36th session had requested the Secretary General of the AALCC to convey to the ILC its earnest expectation of the completion of the draft articles on the "Code of Crimes Against the Peace and Security of Mankind" and the first reading of the draft articles on "State Responsibility" at its session in 1996. It may be recalled that the AALCC at its 35th session had requested the Secretary-General to convey to the General Assembly and the ILC its interest that the ILC include in its agenda the topic "Diplomatic Protection". That item is currently on the agenda of the ILC.

It may be recalled that at the meeting of the Legal Advisers of Member States held in New York in 1996 a view had been expressed that there was a need to examine the humanitarian law aspects of the ICC as also the code of Crimes Against the Peace and Security of Mankind. It was also suggested in this regard that the Treaties related to International Humanitarian Law need to be updated. The Secretariat, working closely with the International Committee of the Red Cross (ICRC) , organized a Special Meeting on the Inter-related Aspects between the International Criminal Court and International Humanitarian Law during the 36th Session of the AALCC.

The Special Meeting furnished a forum for an informal exchange of views on both the Work of the Preparatory Committee on the Establishment of an International Criminal Court as well as the issues and problems in the implementation of the Four Geneva Conventions of 1949 and the two Protocols of 1971 thereto. At that Session the AALCC had, inter alia, urged Member States to take part actively in the Preparatory Committee Meetings on the Establishment of the International Criminal Court.[12]

The AALCC Secretariat shall continue to furnish assistance to the member States of the Committee to facilitate their participation in the process of multilateral treaty making, their adherence thereto and the implementation thereof in accordance with their national legal systems.

[12] For details See Doc. AALCC\XXXVI\Tehran\97\S8.

In the matters relating to Environment and Development the AALCC at its 33rd session held in Tokyo in 1994 had inter alia directed the Secretariat to continue to monitor the progress in environmental matters particularly towards the implementation of Agenda 21. Thereafter the AALCC at its 36th session had emphasized the significance of the work of the Commission on Sustainable Development in the implementation of Agenda 21 and directed the Secretariat to continue to monitor the progress in environmental matters particularly towards the implementation of Agenda 21 as well as the recent multilateral instruments relating to the environment. The AALCC at its 35th Session had invited the UNEP to collaborate with it in the follow up of the UNCED and to continue to participate actively in the work of the AALCC.

In partial fulfilment of its mandate the AALCC Secretariat had undertaken steps to assist its Member States in their representation at the "Special Meeting of the General Assembly for the purpose of an overall review and appraisal of the implementation of Agenda 21 " held in 1997. It may be recalled that the item had been placed on the agenda of the meeting of the Legal Advisers of Member States of the AALCC held at the United Nations Headquarters in New York in October 1996. Thereafter, the Secretary General represented the AALCC at the Nineteenth Special Session of the General Assembly held in June 1997.

In the field of refugee law the AALCC at its 35th session had decided, to organize, with the financial and technical assistance of the UNHCR, a meeting of experts on the Status and Treatment of Refugees to commemorate the 30th Anniversary of the Principles Concerning Treatment of Refugees ('Bangkok Principles') adopted by the AALCC in Bangkok in 1966. Pursuant to the mandate of the 36"' Session of the AALCC held in Tehran in May 1997 a two day seminar to consider the recommendations of the seminar to commemorate the 30th Anniversary of the Bangkok Principles convened in Manila, Philippines in December 1996.

The two fold aim of the commemoration of the 30th Anniversary of the Bangkok Principles was: (a) "The promotion of the knowledge of the Bangkok Principles; and (b) their re-examination in the light of the regional development in law and practice since 1966, with a view to recommending

further action within the AALCC context." The Manila Seminar made substantive recommendations in respect of four issues viz.(i) the definition of refugees; (ii) standards of treatment; (iii) durable solutions ; and (iv) burden sharing and in recognition of the universal dimension of the refugee problem, recommended that the AALCC ensure that the discussion of the refugee item at the 36th and subsequent sessions be fed into, and influence, broader initiatives for the development of international law and principles at the universal level, particularly under the auspices of the United Nations.[13]

The report of the Manila seminar was thereafter considered at the 36th Session of the AALCC held in Tehran in May 1997, where the Committee requested the Secretariat to convene a meeting of experts to conduct an in-depth study of the recommendations of the seminar as well as the views and comments thereon. The Government of the Islamic Republic of Iran offered facilities to hold the meeting of experts in Tehran and in fulfilment of its mandate the Secretariat in collaboration of the UNHCR convened a two- day meeting of experts in Tehran in March 1998. A report of the Meeting of Experts held in Tehran was placed before the 37th session of the AALCC.

The AALCC Secretariat shall continue to study the progress of work of both the ILC and the UNCITRAL and to prepare notes and comments thereon by way of facilitating their consideration by the member States. These comments have hitherto been a part of its modest contribution to the progressive development and codification of international law. The AALCC attaches great significance to the items currently on the agenda of the ILC, as they are of particular relevance to its members. During the period under review the Secretariat prepares notes and comments on the Work of the International Law Commission at its 49th Session [14]as well as the work of the UNCITRAL at its 30th Session.[15]

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[13] For a detailed account of the recommendations of the Seminar see the Report of the Seminar to commemorate the 30th Anniversary of the Bangkok Principles held in Manila, Philippines 11 - 13 December 1996 document No. AALCC\XXXVI\Tehran\97\S\5

[14] For details see Doc.AALCC\UNGA\L.I\96\2

[15] Ibid.

In the context of the Meeting of the Legal advisers of Member States of the AALCC held in New York during the 52nd Session of the General Assembly a reference was made to the Reservation to Treaties. Following the views expressed at that meeting of the Legal Advisers the AALCC Secretariat convened a Special Meeting on that subject within the administrative arrangements of the forthcoming 37th session as the matter is of interest to all the Member States. It may be recalled in this regard that an item entitled "The Law and Practice Relating to the Reservation to Treaties" is currently on the agenda of the ILC. The Special Meeting was organized with the technical assistance of the UN Office of Legal Affairs.

Promotion Of Teaching, Study, dissemination And Wider Appreciation Of International Law

Apropos the objective of encouraging teaching, study, dissemination and wider appreciation of international law, the AALCC Secretariat continues to print the reports of its annual sessions and the verbatim records, thereof. The Report of the 36th Session held,in Tehran, Islainic Republic of Iran, in May 1997 is in the press. A noteworthy feature of these volumes is that the brief of document prepared by the AALCC Secretariat for the annual session of the AALCC on some select topics are reproduced therein. The Secretariat has taken steps to ensure the widest possible dissemination of the aforementioned reports in the Afro-Asian region.

The Seminar convened with financial and technical assistance of the UNHCR to commemorate the 30th Anniversary of the Bangkok Principles had recommended that the working documents, presentations and reports and recommendations of the Seminar be published, under the auspices of AALCC and UNHCR, and that these institutions, as well as Member States, adopt the necessary measures for the widest possible dissemination of such publication. The Secretariat has in the course of the year published a report on the proceedings of the Manila Seminar.

In the period since the Tehran session the Secretariat has brought out a printed report on the Special Meeting on the Interrelated Aspects Between the International Criminal Court and International Humanitarian Law organized

within the framework of the 36th session of the AALCC

Third International Peace Conference

Paragraph 3 of General Assembly Resolution 44\23 adopted on 17 November 1989 it may be recalled , had requested the Secretary-General to seek the views of Member States and appropriate international bodies, as well as non-govemmental organizations working in the field, on the programme for the Decade and an appropriate action to be taken during the Decade, including the possibility of holding a third international peace conference or other suitable international conference at the end of the Decade, and to submit a report thercon to the Assembly at its 45th session.

In his report to the General Assembly, the Secretary-General of the United Nations had, inter alia, observed that while "there was support for the international conference at the end of the Decade to reaffirm the primacy of international law in the maintenance of peace and,security and the importance of the peaceful settlement of disputes in international relations"[16] it had been emphasized that such a conference would require careful planning and preparation so as to make it truly useful and important and to draw the widest participation.

On the other hand, a view had been expressed that the decision on the convening of such a conference depended on the agreement of States and that it was premature at that stage to take a decision on whether or not such a Conference would be the best way to mark the end of the Decade.[17]It had then been suggested that a mid-term review (1995) of the programme would

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[16] See A\45\430 p. 12

[17] At the 35th Session of the AALCC a view was expressed in this regard that whether the confeerence was needed and how it could turn out to be an international conference lay in its expected objectives and substantive results. The view was as also expressed that a feasibility study of the need for a third Peace Conference was required to be made.

be appropriate to permit the assessment of the progress made during the Decade.

At its 51st Session the Sixth Committee of the General Assembly considered a proposal related to the 1999 Action dedicated to the centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law" submitted by the Governments of the Netherlands and the Russian Federation. It recommended that the General Assembly invite the Governments of the Russian Federation and the Netherlands to arrange a preliminarily discussion with other interested Member States on the substantive content of 1999 action and to seek in this respect the cooperation of the International Court of Justice, the Permanent Court of Arbitration relevant intergovernmental organizations, as well as other relevant organizations.[18] The Sixth Committee also recommended that the General Assembly call upon the competent United Nations organs, programmes and specialized agencies to study the possibilities of providing assistance to that end. Finally, the Sixth Committee recommended that the Assembly include in the provisional agenda of its 52nd session, under the item "United Nations Decadeof International Law" a sub-item entitled " 1999 Action dedicated to the Centennial of the.First International peace Conference and to closing of the United Nations Decade of International Law".

It was against this backdrop that the Sixth Committee considered the Programme of Action for the Celebration of the Centennial of the First International Peace Conference proposed by the Russian Federation and the Netherlands. The proposal envisaged that the three main themes viz. (1) the armament question; (ii) humanitarian law and the laws, and customs of war; and (iii) the peaceful settlement of disputes , on the agenda of the First Peace Conference would feature on the agenda of the 1999 celebration of the centennial of the first Hague Peace Conference.[19]

[18] *See United Nations Decade of International Law.. Report of the Sixth Committe* Doe.A\5 1 \625 dated December 1996. Also See A\C.6\51\5

[19] See A/52/

The General Assembly at its 52nd Session welcomed the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Governments of the Kingdom of the Netherlands and of the Russian Federation aiming to contribute to the further development of the themes of the first and the second International Peace Conference and which could be regarded as a third International Peace Conference. The Assembly invited (i) the Governments of the Kingdom of the Netherlands and of the Russian Federation to proceed with the implementation of the Programme of Action; (ii) all States to participate in the activities set out in the Programme of Action, as well as to initiate such activities and to coordinate their efforts in this respect at the global level, as well as at the regional and national levels; and (iii) All States to take appropriate measures to ensure universal participation in the activities pursuant to the Programme of Action, with special consideration for the participation of representatives of the least developed countries.[20]

The AALCC at its 37th Session may, perhaps wish to consider this issue and give directions as to role of the AALCC Secretariat in the 1999 action dedicated to the centennial of the first International peace Conference and to the closing of the United Nations Decade of International Law. In its consideration of the role of the Secretariat, the AALCC may wish to recall that the "first and the second International peace Conferences as well as the League of Nations and the United Nations subsequently have significantly encouraged the progressive development of international law and thereby contributed to the maintenance of international peace and security.

Further it may be recalled in this regard that an item entitled "Cooperation.Between the United Nations and the Asian African Legal Consultative Committee " was placed on the provisional agenda of the 53rd Session of the General Assembly and that in its resolution on the " "Cooperation

[20] It called upon the competent United Nations organs, subsidiary organs, programmes and specialized agencies, including the International Court of Justice, the International Law Commission and the Secretariat, within their respective mandates, competencies and budgets as well as upon other international organizations to cooperate in the implementation of theProgramme ofaction and to coordinate their efforts in this respect,. and to consider participation in the activities envisaged in the Programme of action.For Details see Action to be taken dedicated to the 1999 centennial of thefirst Peace Conference and to the closing of the United Nations Decade of International Law reproduced in Annexure

Between the United Nations and the Asian African Legal Consultative Committee" adopted on 4 November 1996 the General Assembly had inter alia noted with appreciation the decision of the AALCC to participate actively in the programmes of the United Nations Decade of International Law.[21]

Comments And Obeservations

It will be recallled that the AALCC was constituted in November 1956 and has over the years established itself as a major forum for international cooperation and its work programme has accordingly been attuned to meet the needs of an expanding membership. In the words of former Secretary-General of the Committee "from a small beginning composed of a membership of no more than seven Governments emerging as an outcome of the historic Bandung Conference, the Committee had gradually established itself, over the years, as a major forum for international cooperation. Its Work programme has also been suitably oriented to meet the needs of an expanding membership which now includes 44 States embracing the two continents of Asia and Africa".

The United Nations Decade of International Law, which had initially been called for by the non-aligned movement countries has witnessed move success than had been anticipated at the time of the adoption of the General Assembly Resolution 44\23. The increasing number of ratification and accessions to various multilateral conventions such as the convention on the Law of the Sea, the Conventions relating to the Environment, the establishment of WTO following the conclusion of the Uruguay Rounds of talks are among some of the pointers underscoring the success of the Decade.

The successful attainment of the programmes of activities of the Decade owes much to the cooperation of the States, inter-institutional cooperation and general internationalcooperation. The AALCC has hitherto made its modest contribution to the attainment of the objectives of the United Nations Decade of International Law and the success attributable to the organizations of work relating to the United Nations Decade of International Law.

[21] See General Assembly resolution 5 1 /1 1 of 4 November 1996

Finally, it may be stated that the Secretariat of the AALCC shall continue to liaise and cooperate with other competent regional organizations and specialized agencies of the United Nations in the fulfillment of the activities and programme of work during the third term of the Decade (1 997-99) aimed at realizing the objectives of the United Nations Decade of International Law. The AALCC at its Thirty-seventh Session in New Delhi may wish to give further specific directive as to the further role of the Secretariat during the last phase of the United Nations Decade of International Law.

Fifty-second Session
Agenda item 146

ANNEX-I.

UNITED NATIONS DECADE OF INTERNATIONAL LAW

Report of the Sixth Committee[1]

DRAFT RESOLUTION I

United Nations Decade of International Law

The General Assembly,

Recalling its resolution 44/23 of 17 November 1989, by which it declared the period 1990-1999 the United Nations Decade of International Law,

Recalling also that the main purposes of the Decade, according to resolution 44/23, should be, inter alia:

(a) To promote acceptance of and respect for the principles of international law;

(b) To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;

(c) To encourage the progressive development of international law and its codification;

(d) To encourage the teaching, study, dissemination and wider appreciation of international law,

Recalling further its resolution 51/157 of 16 December 1996, to which was annexed the programme for the activities for the final term (1997-1999) of the Decade, and its resolution 51/158 of 16 December 1996, entitled "Electronic treaty database",

[1] A/52/647 dated 25 November 1997.

Expressing its appreciation for the note submitted by the Secretary-General,[2] and having considered the note,

Recalling that the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986[3] is one of the Conventions adopted under the aegis of the United Nations which have codified the Law of treaties, and recalling also its impact on the practice of treaties concluded between States and international organizations or between international organizations,

Recalling also that at the forty-fifth session of the General Assembly the Sixth Committee established the Working Group on the United Nations Decade of International Law with a view to preparing generally acceptable recommendations on the programme of activities for the Decade,

Noting that at the fifty-second session the Sixth Committee reconvened the Working Group to continue its work in accordance with resolution 51/157 and all previous resolutions on the question,

Having considered the oral report of the Chairman of the Working Group to the Sixth Committee.[4]

1. Expresses its appreciation for the work done on the United Nations Decade of International Law at the current session, and requests the working group of the Sixth Committee to continue its work at the fifty-third session in accordance with its mandate and methods of work;

2. Also expresses its appreciation to States and international organizations and institutions that have undertaken activities in implementation of the programme for the final term (1997-1999) of the Decade, including sponsoring conferences on various subjects of international law;

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[2] A/52/363.

[3] A/CONF. 129/15.

[4] See A/C.6/52/SR.30.

3. Invites all States and international organizations and institutions referred to in the programme to provide, update or supplement information on activities they have undertaken in its implerfientation, as appropriate, to the Secretary-General for inclusion in the report requested under paragraph 8 of resolution 51/157;

4. Encourages States to disseminate at the national level, as appropriate, information contained in the note submitted by the Secretary-Generat.[5]

5. Encourages States to consider ratifying or acceding to the Vienna Convention on the Law of organizations or between International Organizations, international organizations that have signed the Convention to deposit an act of formal confirmation of the Convention and other international organizations entitled to do so to accede to it at an early date;

6. Encourages States parties and international organizations or agencies, including depositories, in order to further facilitate implementation of the obligation laid down in Article 102 of the Charter of the United Nations to provide, where available, a copy of the text of any treaty in disk or other electronic. format and to consider providing where available translations in English or French or both as may be needed, for the purposes of assisting with the timely publication of the United Nations Treaty Series;

7. Invites the Secretary-General to apply the provisions of article 12, paragraph 2, of the Regulations to give effect to Article 102 of the Charter of. the United Nations to multilateral treaties falling within the terms of article 12, paragraph 2 (a) to (c),

8. Encourages the Office of Legal Affairs of the Secretariat to continue in its efforts to facilitate access to information concerning United Nations activities in the field of international law and to bring up to date the publication of the *United Nations Juridical Yearbook;*

[5] United Nations, Treaty Series, Vol. 859/860, p. VIII

9. Encourages the Secretary-General to continue developing a policy of providing Internet access to the United Nations Treaty Series and the *Multilateral Treaties Deposited with the Secretary General,* keeping in mind especially the needs of developing countries, in recovering the costs thereof,

10. Requests the Secretary-General to proceed to translate and publish in the form a report issued in the official languages of the United Nations a list of the titles of the treaties appearing in the publication *Multilateral Treaties Deposited with the Secretary-Genercil;*

11. Also requests the Secretary-General to ensure that hard copies of the publications mentioned in paragraph 9 above continue to be distributed to permanent missions free of charge in accordance with their needs;

12. Appeals to States, international organizations and non-governmental organizations working in the field of international law and to the private sector to make financial contributions or contributions in kind for the purpose of facilitating the implementation of the programme;

13. Once again requests the Secretary-General to bring to the attention of States and international organizations and institutions working in the field of international law the programme annexed to resolution 51/157;

14. Notes with appreciation the activities undertaken by the International Committee of the Red Cross in the field of international humanitarian law, including with regard to the protection of the environment in times of armed conflict;

15. Decides to include in the provisional agenda of its fifty-third session the item entitled "United Nations Decade of International Law".

ANNEX II

DRAFT RESOLUTION II

Action to be taken dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law

The General Assembly,

Reaffirming once again the commitment of the United Nations and its Member States, as well as the States parties to the Statute of the International Court of Justice, to the goals of the United Nations Decade of international Law, expressed by the General Assembly in resolutions under that item of its agenea,[6]

Mindful of the long and well-established tradition of progressive development and codification of international law, marked by the first and the second International Peace Conferences, held at The Hague in 1899 and 1907 respectively,

Recalling also the proposal by the Russian Federation for a third international peace conference with a view to considering international law and order in the post-cold-war world at the threshold of the twenty-first century, referred to in General Assembly resolution 51/159 of 16 December 1996, and the initiatives undertaken by the Kingdom of the Netherlands with regard to the commemoration of the first International Peace Conference;

Recalling further that in the same resolution the General Assembly invited the Governments of the Russian Federation and the Netherlands to arrange, as a matter of urgency, a preliminary discussion with other interested Member States on the substantive content of action to be taken in 1999 and to seek, in that respect, the cooperation of the International Court of Justice,

[6] Notably resolutions 44/23 and 51/157.

the Permanent Court of Arbitration, relevant intergovernmental organizations, as well as other relevant organizations,

Noting, in this respect, that a meeting of the 'Friends of 1999' was held on 22 April 1997 at the Peace Palace, The Hague, to which representatives of 20 States from all regions of the world, The International Court of Justice, the Permanent Court of Arbitration, the International Committee of the Red Cross and the coalition of non-governmental organizations Hague Appeal for Peace were invited for consultations on proposals for a draft programme of action for the centennial of the first International Peace Conference,

Noting with satisfaction that the realization of all those proposals in the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Netherlands and the Russian Federation,[7] is consistent with the goals of the United Nations Decade of International Law,

Noting also that the Programme of Action, inter alia, calls for the presentation of the results of the centennial discussions to the General Assembly at its fifty-fourth session, at the closing of the United Nations Decade of International Law,

Noting further that the Programme of Action does not entail budgetary implications for the United Nations,

1. Welcomes the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Government of the Netherlands and the Russian Federation, which aims at contributing to the further development of the themes of the first and the second International Peace Conference and could be regarded as a third international peace conference;

2. Encourages:

(a) The Governments of the Netherlands and the Russian Federation to proceed with the implementation of the Programme of Action;

[7] A/C.6/52/3.

(b) All States to participate in the activities set out in the Programme of Action, as well as to initiate such activities and to co-ordinate their efforts in this respect at the global level, as well as at the regional and national levels;

(c) All States to take appropriate measures to ensure universal participation in the activities pursuant to the Programme of Action, with special consideration for the participation of representatives of the least developed countries;

3. Encourages the competent United Nations organs, subsidiary organs, programmes and specialized agencies, including the International Court of Justice, the International Law Commission and the Secretariat, within their respective mandates, competencies and budgets, as well as other international organizations:

(a) To cooperate in the implementation of the Programme of Action and to coordinate their efforts in this respect,

(b) To consider participation in the activities envisaged in the Programme of Action;

4. Requests the Secretary-General ' to ensure consistency of the Organizations activities relating to the closing of the Decade of International Law with the Programme of Action and to direct his efforts accordingly;

5. Decides to include in the provisional agenda of its fifty-third session, under the item entitled "United Nations Decade of International Law", a sub-item entitled 'Progress in the action dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law".

ANNEX III

DRAFT RESOLUTION III

DRAFT GUIDING PRINCIPLES FOR INTERNATIONAL NEGOTIATIONS

The General Assembly,

Recalling the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of cooperation among States, as well as Article 13, paragraph 1, of the Charter of the United Nations, whereby the General Assembly is called upon to initiate studies and make recommendations for the purpose of promoting international cooperation,

Taking into account the objectives of the United Nations Decade of International Law,

Reaffirming the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[8]

Bearing in mind that in their negotiations States should be guided by the relevant principles of international law,

Bearing in mind the important role that constructive and effective negotiations can play in attaining the purposes of the Charter of the United Nations by:

- contributing to the management of international relations ,
- the peaceful settlement of disputes ,
- the creation of new international norms of conduct of States,

Noting that the identification and harmonization of guiding principles for international negotiations could contribute to enhancing the predictability of negotiating parties, reducing uncertainty and promoting an atmosphere of trust at negotiations and could offer a frame of reference for negotiations,

[8] Resolution 2625 (XXV), Annex.

Having considered the sub-item entitled "Draft guiding principles for international negotiations",

1. Underlines the importance of conducting effective negotiations in managing international relations and the peaceful settlement of disputes and in the creation of new international norms of conduct of States;

2. Takes note of the "Draft guiding principles for international negotiations" contained in document A/52/141 and the comments and proposals made during the consideration of the sub-item, including the need for its further consideration;

3. Decides to continue the consideration of this sub-item in the Working Group on the United Nations Decade of International Law during the fifty-third session of the General Assembly;

4. Invites all States and relevant international organizations to submit in writing to the Secretary-General, before 1 August 1998, comments and proposals on the content of the "Draft guiding principles for international negotiations";

5. Requests the Secretary-General to transmit the comments and proposals mentioned in paragraphs 2 and 4 above to the Working Group for its consideration,

6. Decides to include in the provisional agenda of its fifty-third session under the item entitled "United Nations Decade of International Law" the sub-item entitled "Draft guiding principles for international negotiations".

ANNEX IV

DRAFT GUIDING PRINCIPLES FOR INTERNATIONAL NEGOTIATIONS[9]

(Draft resolution)

Guiding principles for international negotiations

The General Assembly,

Recalling the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of cooperation among States,

Bearing in mind that, according to its Charter, the United Nations is to serve as the centre for harmonizing the actions of nations in attaining its purposes,

Reaffirming the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Recalling Article 13, paragraph 1 (a), of the Charter of the United Nations, in which the General Assembly is called upon to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification,

Proceeding from the fact that in their negotiations States are guided in general by the principles of contemporary international law,

Bearing in mind the increasing role that constructive and effective negotiations are playing in attaining the noble purposes of the Charter of the United Nations by contributing to the management of international relations,

[9] Reproduced from *Request For the Inclusion of an item in the Provisional Agenda of the Fifty Second Session, Letter dated 12 June 1997 from the Permanent representative of Mongolia to the United Nations addressed to the Secretary General* A/52/141 dated 18 June 1997.

the peaceful settlement of disputes and the creation of new international norms of conduct of States,

Convinced. that identification and harmonization of guiding principles of international negotiations would contribute to enhancing predictability for negotiating to conducting effective negotiations irrespective of their level, field or form, as well as setting general criteria against which the conduct of parties at the negotiations could be assessed,

Convinced also that setting a minimum standard of conduct for negotiating parties would induce them to act in accordance therewith, as well as offer them some leverage for requiring other parties to act likewise,

1. Declares the following as guiding principles for the conduct of international negotiations:

(a) The sovereign equality of States, irrespective of their size, level of development, political or military power and their economic or political systems;

(b) Non-interference in the internal or external affairs of States in any form whatsoever;

(c) The right of States to initiate or call for negotiations;

(d) Displaying the necessary political will to attain the intended purpose of negotiations;

(e) The duty of States to negotiate in good faith and to strive for a just, equitable and early conclusion of negotiations and to reach mutually acceptable agreement or solution;

(f) Non-discrimination and the right of States to participate in negotiations affecting their vital interests or those of the international community as a whole;

(g) Compatibilitiy of the purpose and object of negotiations with

the principles and norms of contemporary international law, including the Charter of the United Nations;

(h) The duty of States to adhere strictly to the agreed principles and rules of conducting given negotiations;

(i) The duty of States to refrain from direct or indirect recourse to military, political, economic or any other types of coercion or force aimed at impeding the exercise of their sovereign rights by other States;

(j) The duty of States to cooperate in the various spheres of international relations in order to maintain international peace and security, and to promote mutually beneficial cooperation, social progress and the general welfare of nations.,

(k) The duty of States to refrain from any action that might jeopardize the negotiations themselves or the general atmosphere at or around the negotiations;

(l) The duty of States to refrain from impeding negotiations by imposing irrelevant preconditions for the commencement, pursuit or conclusion of such negotiations, including raising issues unrelated to the actual object of the negotiatiions;

(m) The duty of States to continue to exert determined efforts aimed at arriving at negotiated solutions even in the event of failure of negotiations at some point;

(n) Any negotiations conducted under the use or threat of use of force are neither just nor lawful and the results of such negotiations shall be considered null and void;

2. Also declares that the above guiding principles are interrelated and their interpretation and application each principle should be construed in the context of the other principles;

3. Further declares that strict observance of the above mentioned principles is of paramount importance in the conduct of genuine negotiations, and consequently appeals to all States to be guided by these principles in their negotiations.

ANNEX V

UNITED NATIONS DECADE OF INTERNATIONAL LAW: ACTION TO BE TAKEN IN 1999 DEDICATED TO THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE AND TO THE CLOSING OF THE UNITED NATIONS DECADE OF INTERNATIONAL LAW

Netherlands and Russian Federation: Draft Resolution

Action to be taken dedicated to the 1999 centennial of the First International Peace Conference and to the closing of the United Nations Decade of International Law

The General Assembly

Reaffirming once again the commitment of the United Nations and its Member States, as well as the States party to the Statute of the International Court of Justice, to the goals and aspirations of the United Nations Decade of International Law, expressed by the General Assembly in subsequent resolutions under that item of its agenda,

Mindful of the long and well-established tradition of progressive development and codification of international law, marked by the first and the second International Peace Conference, held at The Hague in 1899 and 1907 respectively,

Recalling that the third International Peace Conference, which was meant to be held at The Hague in 1915, did not take place,

Recalling also the proposal by the Russian Federation for a third international peace conference with a view to considering international law and order in the post-cold-war world at the threshold of the twenty-first century, referred to in resolution 51/159 of 16 December 1996, and the initiatives undertaken by the Kingdom of the Netherlands with regard to the commemoration of the first International Peace Conference,

Recalling further that in the same resolution, the General Assembly invited the Govermnent of the Russian Federation and the Netherlands to arrange, as a matter of urgency, a preliminary discussion with other interested Member States on the substantive content of action to be taken in 1999 and to seek, in this respect, the cooperation of the International Court of Justice, the Permanent Court of Arbitration, relevant intergovernmental organizations as well as other relevant organizations,

Noting in this respect, that a meeting of the "Friends of 1999" took place on 22 April 1997 at the Peace Palace, The Hague, to which representatives of 20 States from all regions of the world, the International Court of Justice, the Permanent Court of Arbitration, the International Committee of the Red Cross and the coalition of non-govemment organizations Hague Appeal for Peace were invited for consultations on proposals for a draft of Action for the, centennial of the first International Peace Conference,

Noting with satisfaction that the realization of all those proposals in the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Netherlands and the Russian Federation, is consistent with the goals and aspirations of the United Nations Decade of International Law,

Noting also that the Programme of Action does not entail budgetary implications for the United Nations,

1. Welcome the Programme of Action dedicated to the centennial of the first International Peace Conference, presented by the Governments of the Kingdom of the Netherlands and of the Russian Federation, which aim at contributing to the further development of the themes of the first and the second International Peace Conference and could be regarded as a third International Peace Conference;

2. Invites :

(a) The Governments of the Kingdom of the Netherlands and of the Russian Federation to proceed with the implementation of the Programme

of Action;

(b) All States to participate in the activities set out in the Programme of Action, as well as to initiate such activities and to coordinate their efforts in this respect at the global level, as well as at the regional and national levels;

(c,) All States to take appropriate measures to ensure universal participation in the activities pursuant to the Programme of Action, with special consideration for the participation of representatives of the least developed countries;

3 . Calls upon the competent United Nations organs, subsidiary organs, programmes and specialized agencies, including the International Court of Justice, the International Law Commission and the Secretariat, within their respective mandates, competencies and budgets, as well as upon other international organizations:

(a) To cooperate in the implementation of the Programme of Action and to coordinate their efforts in this respect;

(b) To consider participation in the activities envisaged in the Programme of Action;

4. Requests the Secretary-General to ensure consistency of the Organization's activities relating to the closing of the Decade of International Law with the Programme of Action and to direct his efforts accordingly;

5. Decides to include in the provisional agenda of its fifty-third session, under the item entitled "United Nations Decade of International Law", a sub-item entitled "Progress in the action dedicated to the 1999 centennial of the first International Peace Conference and to the closing of the United Nations Decade of International Law".

IV. ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

(i) Introduction

The efforts to evolve a legal mechanism for the exercise of an international criminal jurisdiction with regard to 'dangerous' crimes defined as 'International crimes or offences' began soon after the 2nd World War. The UN very much aware of and concerned by the atrocity of crimes perpetrated during this war had directed the International Law Commission (ILC) in November, 1947, *inter alia, 'to prepare a draft code of offences against the peace and Security of Mankind'*, a Mandate which was achieved in 1954.But due to 'conflicting positions' concerning the definition of 'aggression', the General Assembly (GA) decided to postpone consideration of this draft code. It was only in 1981 that the ILC resumed its work in the draft code and adopted the first reading of the draft Articles on the Code of Crimes in 1991.

This was the first phase in the evolution of an 'International Criminal Jurisdiction'. The second phase started in 1991 during the 46th Session. The GA, (on the initiative of Trinidad and Tobago in the context of transnational crimes such as Drug Trafficking) 'invited the ILC to consider and analyse the establishment of an International Criminal Court (ICC) or other trial mechanism' taking into consideration the proposals made in the GA while discussing the question of an 'International Criminal Jurisdiction'.

The ILC had constituted in 1992 a Special Working Group and then 3 sub-groups each one dealing with a specific 'topic'. The three sub-groups established dealt with (i) Jurisdiction and Applicable Law; (ii) Investigation and Prosecution; and (iii) Cooperation and Judicial Assistance. After 3 years of intensive work, it submitted in 1994 the Draft Statute to GA.

During the 49th session (1994) the General Assembly considered the Draft statute and many delsegations pointed out that the draft statute needed deeper consideration to 'fill the gaps' Accordingly the sixth committee constituted an Ad hoc coommittee which met in April and August 1995 (GA resolution 49/53 of 9 December, 1994) with a mandate 'review the majer sub-

arrangements for convening an International Conference of Plenipotentiaries. Despite the fact that the Ad Hoc Committee made considerable progrees during its two sessions it was noted that ' States still had different views on major substantive and administative issues.

The General Assembly in its resolution 50/46 of 11 December 1995, decided to establish a "preparatory Committee" for the establishment of an international criminal court to discuss the major substantive and administrative issues arising out of the draft Statute prepared by the International Law Commission in 1994 and to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a confernce of plenipotentiaries.

The Preparatory Committee on the Establishment of an International Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time it discussed further the issues arising out of the draft Statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court. The Prepcom during these meeting had made a lot of progress on vital issues and a broad areas of consensus emerged on the other hand these were areas which called for further harmonizaation.(The details of which are set out in the secretariat study).In its resulution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 is order to complete the drafting of a text for submission to the diplomatic conference of plenipotentiaries.

The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time it continued to prepare a widely acceptable consolidated text of the convention.

In its resuluition 52/160 of 15 December 1997, the General Assembly accepted with deep appreciation the generous offer of the Government of Italy to act as host to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC and decided to hold the conference in Rome from 15 June to 17 July 1998. In the same resulution the Prep com was requested by the GA to continue its work in accordance with resulution 51/207 and at the end of its sessions to transmit to the conference the text of a draft convention on the establishment of an ICC.

The Deputy Secretary General Ambassador Dr. Wafiq Zaher Kamil while introducing the subject gave an overview of the activities of the PREPCOM and its predecessor the Ad hoc Committee on the Establishment of an International Criminal Court, as also the role of the AALCC.

He stated that the Diplomatic Conference of Plenipotentiaries, would.be held just after two months. The process itself had taken about eight years i.e. from 1990 to 1998. The idea for the establishment of an ICC came into being after the world witnessed the horrors of World War 11. It, however, gained momentum after the atrocities were committed in former Yugoslavia and Rwanda.

Commenting on the work of ILC he stated that, the ILC resumed work on the question of an international criminal jurisdiction in 1990, the real push for. proceeding rapidly with the idea of a permanent court came in 1992. Having adopted the draft Statute in 1994, the ILC decided to recommend to the General Assembly that it convene a Conference of Plenipotentiaries to study the Draft Statute and to conclude a Convention on the Establishment of an International Criminal Court.

He observed that the General Assembly decided to establish an Ad hoc Committee to review the major substantive and administrative issues arising out of the Draft Statute. The Ad hoc Committee met twice for two weeks each in 1995. Despite tremendous work done in the Ad hoc Committee, the deliberations reflected enormous gaps between the positions of the UN Member States. It was then that the General Assembly decided to establish a Preparatory Committee (PREPCOM), to discuss further the issues arising out of the draft statute and preparing the text of a convention on the establishment of an ICC. The PREPCOM met twice in 1996 and discussed the major issues involved in the establishment of the court i.e. jurisdiction, organisational and procedural matters, complementarity, relationship of the ICC with the Security Council.

He further stated that PREPCOM convened four more meetings, the last one was held in March - April 1998. He noted that the PREPCOM

made significant progress under the able direction of the Chairman Mr. Adrian Bos. The most important development before the last PREPCOM was the Inter-sessional meeting in January 1998 held in Zutphen, Netherlands. In this meeting a consolidated text of the draft statute was prepared which was the basis of the last PREPCOM.

He recalled that the AALCC had closely followed the work of the PREPCOM and had held two Special Meetings, one each in Manila (35th Session) and Tehran (36th Session) which had provided very useful inputs to the Member States. The meeting held in Manila had been attended by the Chairman of the PREPCOM, Mr. Adrian Bos.

He observed that on the eve of the Diplomatic Conference there was still a lot of work to be accomplished before a consolidated text could be produced. A number of square brackets still and these political and legal issues were to be dealt with at the highest levels. He noted that the participation of Member States in the PREPCOM was not upto the level needed, and it was of utmost importance that the AALCC States fully participated in the Plenipotentiary Conference, to ensure the creation of an effective, independent and impartial ICC.

The Deputy Secretary General concluded with the remark that the AALCC fully supported the creation of an ICC., as this could put an end to the kind of horrors the world had suffered over the past eighty years. The international community, he stated, owed-such an institution to its future generations for whom there was need to build, develop and find the ways and means to face the enormous problems of our planet, like hunger, desertification, natural disasters, terrorism, the ascendant graph of crimes, drug trafficking etc.

Dr. Rama Rao speaking on behalf of the Chairman of the PREPCOM gave an overview of the development relating to the drafting of the statute for ICC since 1992 and on the work of the PREPCOM in March-April 1998. He recalled that an intersessional meeting was convened in January 1998, in Zutphen and the recent meeting of the PREPCOM held in March April 1998 was aimed at advancing the consensus arrived at that intersessional meeting.

He said that the March April meeting of PREPCOM dealt with the composition and administration of the Court, relationship between the ICC and the United Nations and the part relating to final clauses. While speaking on substantive issues, he dealt with the issue of core crimes, treaty related crimes of drug trafficking and terrorism and crimes against humanity. He said that the Diplomatic Conference was to decide on the number of ratifications required for the Convention to come into force. Proposals put forward call for 20-65 ratifications.

As regards the financing of the court, monies could be drawn from the regular budget of the U.N, exclusively by states appearing before the court., voluntary contributions and initial funding by UN and later on by States. He called upon Member States of AALCC to actively participate at the Diplomatic Plenipotentiary Conference in Rome in June 1998.

The Delecate of Egypt expressed appreciation for the initiative taken by Dr. M. Javad Zarif, while he was the President of the Sixth Committee In mobilising support towards the idea of the establishment of an ICC.

As regards crime of aggression, he was of the view that the Security Council with its main function as maintenance of international peace and security could intervene without compromising the independence of the Court. Supporting the principle of complementarity he expressed the opinion that priority should be given to national jurisdiction without taking away the jurisdiction of the ICC if the national legal system is ineffective or unavailable. He was of the view that the prosecutor of the proposed court should only proceed with cases brought by States and not by other non governmental organizations.

Thereafter, he called upon co-ordination between AALCC Member States to foster commonalities so that an Asian African view is placed before the Diplomatic Plenipotentiaries conference.

The Delegate of Ghana thanked the Secretariat for- preparing comprehensive but concise documents and the addendum. Recalling the work of the ILC, he said the establishment of the ICC has reached a final stage for

concluding long. standing efforts. However, he expressed his Govemment's reservations on certain key areas where the AALCC can play an effective role in collating views and representing an Asian African stand at the Rome Conference. Further more, he added that the jurisdiction of the proposed court should be based on crimes provided in. the statute. He called for more detailed provisions in the ICC statute on relationship between ICC and states, rules of evidence, powers and responsibilities of arrest and surrender of accused persons and relationship between national laws and statute of the ICC. He also called upon a clear division between the prosecutorial and investigative role of the Prosecutor. On the financial aspect of the court, he was of the view that budgetary provisions can be drawn upon from the regular budget of the United Nations. He expressed dismay that a 'Copy of the cosolidated text of the draft statute of the ICC was not available, he opined that the day long discussions during. the 37th Session had helped them to sufficiently prepare for the Conference in Rome in June 1998.

The Delegate of the Islamic Republic of Iran thanked the Secretary General, his colleagues and the Secretariat for preparing an excellent study on ICC. The hard core issues, in the opinion of his Government were jurisdiction of ICC, the relationship between the ICC and national jurisdiction, and the relation between the proposed court and the Security Council. As regards the scope of jurisdiction, he said genocide, crimes against humanity and war crimes were valid inclusions. Aggression too, should be included he felt, complementarity alone should decide, the relationship between ICC jurisdiction, and national jurisdiction. Furthermore he was of the view that Security Council's role of maintenance of international peace and security was well demarcated and hence the ICC should play a judicial role adjudicating on the basis of legal principles. He expressed the view that based on the President's suggestion, AALCC Member States should meet in Rome to project a definite Afro-Asian view at the Diplomatic Plenipotentiaries conference on the establishment of an ICC.

The Delegate the People's Reoublic of China while thanking the President for his comments, also appreciated the introductory statement on the topic by Dr. Kamil, Deputy Secretary General, AALCC. While appreciating the statement of Dr. Rama Rao made on behalf of the Chairman

of PREPCOM, he thanked the Secretariat for the valuable report prepared for the session. Furthermore, he was of the view that China fully supported the establishment of an ICC, though the issue at hand is legally and technically complex. In this regard, he called upon Member States to bear in mind the important facets of universality, independence and impartiality of the proposed ICC. Supporting the principle of complementarity he expressed the view that ICC must deal with 'core crimes' the definition of which must be explicitly provided in the Statute.

Furthermore, on the issue of jurisdiction of the Court, a view was expressed that 'inherent jurisdiction of the ICC' should not be provided in the statute, as it contradicted the principle of complementarity. He reiterated his Governments' stand that the court's jurisdiction be optional, as provided in the ICJ statute. Commenting upon the statute having reached its final stage, he said universality of the statute was necessary which would reflect mainstream customary international law.

The Delegate of India at the outset gave a brief outline of the core issues concerning the establishment of an ICC. These ware the principle of complementarity, crimes of 'serious concern' to the international community to be included in the ICC statute, as well as independence, impartiality, professional competence and, effectiveness of the Court. Furthermore, he was of the view that 'double jeopardy should not be allowed if jurisdiction of the proposed court, was to be based on the principle of complementarity. The ICC, he averred should be an independent body, supplementary to national legal systems. Jurisdiction in his governments view was to be based on respect of sovereignty and consent of states. He found no objection to the inclusion of 'international terrorism. As regards drug trafficking, there is lot of confidential information, which States may feel hesitant to share with the ICC. He expressed concern on the inclusion of 'non international armed conflicts' as war crimes in the statute as these offences are treaty based and only Parties, he felt could be bound by treaty provisions of the Geneva Conventions. In this regard, he further added that common Article 3 of the Geneva Conventions, had not yet attained the status of customary international law. He cautioned that the 'role of the Prosecutor' as provided by the draft statute of ICC should not interfere with the - mechanism provided under the statute, as States alone have right to

move Prosecution. Commenting on the role of the Security Council, he said it should uphold its task the role of maintaining international peace and security and not interfere with the judicial function of the court. The main role of the ICC, he said is to bring to trial individuals responsible for Criminal acts, and hence the Security Council had no role to play. Recalling the Chinese statement on the topic, he suggested that AALCC Member States should focus on commonalities and if possible, meet every week during the Rome conference.

The Delegate of Uganda said that one needed to look at the implications of State sovereignty by the establishment of an ICC. Appreciating the efforts of Dr. Rama Rao,delegate of India for his presentation, he felt that involving the Security Council in the trigger mechanism would be intrusive of with the independence, impartiality and effectiveness of the court. Hence he supported the suggestion made by earlier delegations, for shaping a concrete Afro-Asian view on ICC. He reiterated his country's support for the establishment of an International criminal Court. In the light of the past experiences in his own country which had witnessed heinous crimes being perpetrated by political leaders, he was of the view that the establishment of a court to try such persons for the crimes would offer hope for the future generations against such occurrences.

He also called for limiting the jurisdiction of ICC to core crimes of serious nature and the elaboration of the constituent elements of such crimes.This definition precision, was required to ensure that the international court functions effectively within the contours of 'complementarity' principle. He opposed the proposals for inclusion of crimes like "drug trafficking" as they were best handled by national courts.

To avoid any complicity among States in the prosecution of the alleged criminal, he called for an "independent investigation" to be conducted by the Prosecutor. Calling attention to the types of punishment provided for in the draft statute on ICC, (which does not provide for death penalty) he pointed out that the existence of stringent penalties including death penalty in some national criminal systems would result in different levels of punishment for the same category of persons accused of similar criminal activities.

The Delegate of the Republic of Korea expressed appreciation for Secretariat work on this subject. He informed that his country had been actively participating in the efforts towards the establishment of an International Criminal Court.He expressed satisfaction with the progress made at the recent meeting (March - April) of the Preparatory Cmmittee (PREPCOM) which culminated in the formulation of a single consolidated document on the establishment of ICC.

He extended his delegation's support for the early establishment of an independent International Criminal Court As regards the trigger mechanism, he was of the view that consent of states, should be the basis for involving jurisdiction of the court. Supporting the views expressed by the delegate of Uganda he called for ensuring the independent role of the Prosecutor in conducting investigations. On the relationship between ICC and the Security Council, he supported the rationale for involving the Security Council, in activating the trigger mechanism, without compromising on the independence of the ICC. Supporting the principle of complementarity, he felt that the Diplomatic Conference in Rome, should indicate the conditions timing and procedures regarding complementarity very precisely.

The Delegate of Saudi Arabia, commended the role of the Committee in placing such an important topic, like the ICC on its agenda. He was of the view that jurisdictio n of the court should be restricted to core crimes as listed by the ILC draft statute. Furthermore, he expressed the view that complementarity should be the principle of the jurisdiction of the proposed court, as it preserves the sovereignty of States in the exercise of their national criminal jurisdiction. Emphasis was laid on the need for the establishment of a neutral and impartial court for its effective functioning and wider acceptance.

The Delegate of Iraq congratulated the host government for the warm hospitality accorded to them. He also appreciated the sincere efforts of the Secretariat for preparin excellent background documents. Speaking on substantive matters relating to the draft lccg Statute, he was of the view that the composition ofjudges of the proposed Court, should ensure adequate geographical representation for all regions. Agreeing that crimes of genocide, crimes against humanity and war crimes were serious crimes, he felt international

terrorism ' could also be included as a serious or grave offences. Furthermore, he expressed the view that complemexitarity and consent were the main basis of jurisdiction and the Security Council being a political body, could not interfere in the functioning of a judicial body, like the ICC. This would ensure the independence and impartiality of the Court.

The Delegate of Inddonesia appreciated the efforts of the AALCC for taking up an important topic like ICC on the agenda for the 37" Session.Expressing support of his Government to ourt inus t be free from political influences, permanent and should meet only when a complaint is made to it.. The jurisdiction of the court crime must be 'precisely listed' and clarified n t e statute. He endorsed the view that coriiplementarity was the basis of jurisdiction. In this regard, he stated that internal court should have priority in criminal jurisdiction, unless the legal system is unavailable or ineffective. Furthermore, 'inherent jurisdiction', he felt was contrary to the role of complementarity, The Security Council, in the view of his Government could not serve as the 'trigger mechanism' as the Council's decisions are often influenced by political motivations.

The Delegate of Kuwait affirmed the importance of the early establishment of an International Criminal Court. He supported the view of restricting the list of crimes to the four crimes of genocide, crimes against humanity, grave breaches of the four Geneva Conventions of 1949, serious violations of laws and customs applicable in armed conflicts. He agreed with the concerns as expressed by other speakers, that the exercise of jurisdiction by ICC should not infringe the authority of national criminal jurisdictions. The need to uphold the independence of the proposed court as an impartial judicial body was felt to be fundamental for the effective functioning and credibility of the court.

The Delegate of Pakistan offered his felicitaions to the President and Vice-President on their assumption of the office of the Committee and wished them success in the discharge of their functions. He was of the view that it would be ambitious to expect the court to become operational in the near future, as there were many outstanding issues to be resolved, which included: definition and scope of crimes, complementarity the jurisdiction of the court,

the relationship of the court with the Security Council, role of the Prosecutor, etc. He proposed that while defining the offence that would come within the purview of the court, the struggle of well recognized movements for the realisation of the right of self-determination of people under alien rule should be taken into account. Whether it is the offence of aggression or it is a war crime, special care should be taken of this point. In fact, the definition of the term aggression adopted by the U.N. General Assembly in 1974 does take it into account and so does the common Article 3 of the Geneva Convention and Protocol 11 adopted subsequently by referring to the non-international armed conflicts in the context of application of the laws of war to such situations. Since the countries of Asia and Africa have special interest in this point in the light of their historical experience, they should take a united stand on this issue.

The Delegate of Nigeria recalling the statement of the delegate of Ghana stated that ICC should be in conformity with national sovereignty. He added that the trigger mechanism of the Security Council should not be used for meeting political ends. He supported the earlier views of delegates that the AALCC should not only play an advisory role but a dominant role to represent Member Governments views at the Rome conference.

The Delegate of Senegal congratulated the President for his election, as he was speaking for the first time. He recalled the meeting in Dakar on the proposed African Criminal Court, which was attended by a large number of African States being Member States of the AALCC, Supporting the apprehensions raised by the delegate of Uganda, he was of the view that the proposed ICC should be impartial and independent, free from interference by political consideration.

The Observer from Germany said that while the main building blocks for an ICC had already been formulated and discussed, the major principles which the EU partners supported, would be discussed by him briefly.

Referring to the principle of complementarity, he stated that the ICC can only act when national courts are unable or unwilling to prosecute a given serious crime. He noted that the ICC's jurisdiction be limited only to four universally punishable core crimes: genocide, crimes against humanity, war

crimes and the crime of aggression. It was his delegation's idea that aggression be included with in the courts ambit.

With regard to the question of trigger mechanism, he favoured the approach whereby the court has jurisdiction over genocide, crimes against humanity and war crimes based on the principle of universal jurisdiction over these core crimes. In his view, the ICC's Prosecutor should be empowered to start investigations suo moto.

He noted that the courts' independence will have to be protected against political influence by countries or by the UN Security Council, while fully respecting the Security Council's responsibility under the United Nations Charter.

He concluded on a rather pessimistic note that it was still not clear whether and when a truly effective ICC will be established, as the concern for legal and political hurdles could not be under estimated.

The Obsever form Yugoslavia extended the greetings of his government and congratulated the President on his election to the 37" Session of the AALCC. Expressing his support for the establishment of an ICC he was of the view that perpetrators of serious crimes must be punished. Furthermore he stated that his Government had expressed serious doubts on the legality of the Ad hoc tribunals established for Yugoslavia, by a Security Council resolution as this would amount to misuse of the tribunal for meeting political ends. With respect to the role of the Prosecutor provided under the statute he expressed apprehension that a large number of people afflicted by crimes could themselves be victims. On the issue of financing of the court, he expressed the view that an independent body free from political compulsions should do the job. He felt that the prosecutor's office should comprise qualified people having sufficient knowledge on criminal laws and different criminal legal systems.

(ii) Decision on "The Establishment of an International Criminal Court"

(Adopted on 18.4.98)

The Asian African Legal Consultative Committee at its thirty-seventh Session,

Having considered Doc. No.AALCC/XXXVII/New Delhi/98/S-13 on the Establishment of an International Criminal Court;

Noting the progress in the work of the Preparatory Committee for the Establishment of an International Criminal Court, including the completion of its last meeting and preparation of the Single Consolidated Text of the Draft Statute;

Taking into account the views expressed by States Members of the AALCC on the issues relating to the establishment of an international criminal court;

Mindful of the forthcoming United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, scheduled to be held in Rome from 15 June to 17 July, 1998;

1. **Urges** active participation of the Members of the AALCC in the Rome Conference;

2. **Stresses** that the International Criminal Court should be an independent, impartial and efficient judicial institution based *inter alia* on the principles of complementarity, State sovereignty, non-intervention in internal affairs of States;

3. **Emphasizes** that the Statute of the Court should be such as to attract wide acceptability of States so that the Court be established as a universal institution;

4. Requests the Secretary General of the AALCC to approach the United Nations for necessary conference facilities for holding of the meetings

of the Member States of the AALCC during the Rome Conference;

5. **Further** requests the Secretary General to monitor and report the developments and outcome of the Conference to the Thirty-eighth Session of the AALCC: and

6. **Decides** to place the item "Establishment of an International Criminal Court" on the agenda of the Thirty-eighth Session of the AALCC.

(iii) Seceretariat Study : Establishment of the International Criminal Court

During the 49th Session (1994) the General Assembly considered the Draft Statute and many delegations pointed out that the draft statute needed deeper consideration to 'fill the gaps'. Accordingly the Sixth Committee constituted an *Ad Hoc Committee* which met in April 1995, in August, 1995 *(GA,RES. 49/53 of 9 December., 1994)* with the mandate 'to review the major substantive and administrative issues arising out of the draft statute' and consider arrangements for convening an International Conference of Plenipotentiaries. " Despite the fact that the *Ad Hoc* Committee made considerable progress during its two sessions it was noted that 'States still have different views on major substantive and administrative issues. Therefore the GA went a step further and adopted its Resolution 50/46 in December 1995 in which the GA decided to establish a 'Preparatory Committee open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further, the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal, court as a next step towards consideration by a conference of plenipotentiaries.

And as decided the PREPCOM met from 25 March to 12 April and from 12 to 30 August, 1996 and submited its report to the GA at its 51 Session.

The mandate to the PrepCom, as expressed in paragraph 368 of its report (A/51/22, vol. 1),was to deal with the following, namely-

"(i) Definition and elements of crimes

(ii) Principles of criminal law and penalties

(iii) Organization of the Court;

(iv) Procedures

(v) Complementarity and trigger mechanism

(vi) Cooperation with the States

(vii) Establishment of the International Court and its relationship with the United Nations

(viii) Final clauses and financial matters

(ix) Other matters.".

The strong feeling which emerged after 2 meetings of the PREPCOM was the real interest the member countries of the UN present in these meetings had manifested in their discussions. Despite the fact that the 'tempo' was quite slow, the PREPCOM in the course of its work has made a lot of progress on vital issues and a broad areas of consensus emerged at the end of the meetings which could be summarized as :

(a) There was unanimity on the need for the establishment of the ICC.

(b) There was general support for the view that the Court should be an independent judicial institution. However, while some have favoured an autonomous independent body, others preferred that the Court should form part of the UN.

(c) To establish the Court by a multilateral treaty, as recommended by the ILC, seemed to enjoy general support, as the treaty could provide the necessary independence and authority for the Court. Thus, the idea of amending the Charter was put aside.

(d) A close relationship between the Court and the UN was considered essential and a necessary link to the universality and standing of the Court, though such a relationship should in no way jeopardize the

independence of the Court.

(e) There was a general agreement on the importance of procedural questions, fair trial and rights of the accused and the need to elaborate further the relevant provisions. It was recognised that respect for the rights of the accused were fundamental and reflected the credibility of the Court and that there was already a large body of international law on the subject. A commonly shared view seemed to be that fundamental or substantive principles of evidence should figure in the statute itself while secondary and subsidiary rules could appear in the Rules of the Court or other instruments.

(f) As for the method of decision-taking in the Trial Chamber, it was generally accepted that it should be by a majority of judges, although very few supported the unanimity rule (at least in case of a conviction).

On the other hand, in the Preparatory Committee meetings there were areas which called for further harmonization. These areas were :

(a) On the question of the scope of jurisdiction of the international criminal court, there was general agreement, as indicated in the second paragraph of the preamble, that the jurisdiction of the court should be limited to the most serious crimes of concern to the international community to avoid trivializing the role and functions of the court and interfering with the jurisdiction of the national courts. The second paragraph of the preamble to the draft statute emphasizes that 'such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community s a whole'. Proposed Article 20 dealing with crimes within the jurisdiction of the international criminal court provides thus :

"The court has jurisdiction in accordance with the Statute with respect to the following crimes:

(a) the crime of genocide

(b) crimes against humanity

(c) the crime of aggression ;

(d) serious violations of the laws and customs applicable in armed conflicts;

(e) grave breaches of the four Geneva Conventions of 12 August 1949 and

grave breaches of article 3 common to the four Geneva Conventions of 12 August 1949."

There was general agreement that genocide met the jurisdictional standard referred to in the second paragraph of the preamble.

As respects the inclusion of the crime of aggression, there were different views. While some delegations were of the view that aggression should be included to avoid a significant gap in the jurisdiction of the court, as aggression was one of the most serious crimes of concern to the entire international community, some others expressed the view that it should not be included because there was no generally accepted definition of aggression for the purpose of determining individual criminal responsibility. Still some others expressed support for providing review mechanism under which aggression might be added at a later stage to avoid delaying the establishment of the court pending the completion of a generally accepted definition.

There was general agreement that serious violations of the laws and customs applicable in armed conflict could qualify for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble. There were different views, however, as to whether this category of crime should include violations committed in international or non-international armed conflicts. Different views were also expressed concerning the direct applicability of the law of armed conflict to individuals in contrast to states.

Mention must also be made of the view expressed by several delegations that grave breaches of the Geneva Conventions had attained the status of customary law and should be combined with other serious violations

of the laws and customs applicable in armed conflict under sub-paragraph (c), with attention being drawn to the new definition proposed for the draft code in contrast to the Yugoslav Tribunal Statute and a proposal being made to amend the title of this category of crime accordingly.

There was general agreement that crimes against humanity met the jurisdictional standard referred to in the second paragraph of the preamble. It was opined that the definition of this category of crime should include a list, of exceptionally serious, grave or inhumane acts which shocked the conscience of humanity, as, for example, murder, extermination, enslavement deportation, imprisonment, torture, rape, persecution on political,, racial or religious grounds, other inhumane acts, etc.

Support was expressed for including various treaty-based crimes which, having regard to the conduct alleged, constituted exceptionally serious crimes of international concern as envisaged in article 20, paragraph (e). The importance of the principle of complementarity was emphasized with respect to these crimes.

While a number of delegations were of the view that international terrorism qualified for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble, a number of other delegations expressed the view that international terrorism did not deserve to be so included because there was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the court..

While a number of delegations were of the view that international terrorism qualified for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble, a number of other delegations expressed the view that international terrorism did not deserve to be so included because there was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the court.

Some delegations supported inclusion of apartheid and other forms of racial discrimination as defined in the relevant conventions. Some others supported inclusion of torture, as also of the Hostage Convention, of serious

drug trafficking offences which involved an international dimension, and of serious threats to environment.

Proposal was made to reformulate Articles 17 to 20 which define 'crimes'. It was felt that the Article 20, in particular, should be reformulated along the lines of the draft Code with each crime being defined in a separate article identifying the essential elements of the offences and the minimum qualitative and quantitative requirements.

The principle of complementarity to be defined as an element of the competence of the Court ; the conditions timing and procedures for invoking this principle need to be clearly indicated. Some delegations supported inclusion of apartheid and other forms of racial discrimination as defined in the relevant conventions. Some others supported inclusion of torture, as also of the Hostage Convention, of serious drug trafficking offences which involved an international dimension, and of serious threats to environment.

To examine the aspects relating to the effective functioning of the Court vis-a-vis the primary responsibility of the Security Council for the maintenance of international peace and security.

Outlining of final clauses for the transitional arrangement for the transfer of cases from the ad 'hoc tribunals to the Court to avoid concurrent or parallel jurisdiction.

There was broad agreement that the fundamental principles of criminal law should be applied to the crime punishable under the statute should be clearly laid down in the statute in accordance with the principle of legality, *nullum crimen sine lege,, nulla poena sine lege*. The articulation of the fundamental principles of criminal law in the statute was considered consistent with the prerogative of legislative competence of sovereign States. It would give potential States parties a clear understanding of the obligations entailed. It would also provide clear guidance to the court and promote consistent jurisprudence. Furthermore, it would ensure predictability and certainty in the application of law, which would be essential for the protection of the rights of the accused.

It was suggested that, in order to satisfy the requirements of fairness, transparency, consistency and equality in criminal proceedings, not only the fundamental principles of criminal law, but also the general and most important rules of procedure and evidence should be articulated in the statute. It was also suggested that the principle of procedural legality and its legal consequences should be firmly established in the statute itself.

The principle of non-retroactivity was considered fundamental to any criminal legal system and, therefore, having regard to the substantive link between this concept and article 39 of the statute (*nullum crimen sine lege*), this principle was sought to be clearly and concisely set out in the statute, even though some of the crimes referred to in the statute were recognized as crimes under customary international law. It was also noted that the principle of *nulla poena* sine lege also required that the principle of non-retroactivity be clearly spelled out in the statute and that the temporal jurisdiction of the court should be limited to those crimes committed after the entry into force of the statute.

A general view was that since there could be no criminal responsibility unless *mens rea* was proved, an explicit provision setting out all the elements involved should be included in the statute. The need for including a provision setting out an age limit at which an individual could be regarded as not having the requisite *mens rea* was widely supported.

On the question of cooperation between the court and national jurisdiction. it was widely agreed that since the proposed international criminal court would not have its own investigative or enforcement agencies, the effectiveness of the court would depend largely upon the cooperation, of national jurisdiction in obtaining evidence and securing the presence of accused persons before it. It was considered essential, therefore, that the statute provide the court with a sound, workable and predictable framework to secure the cooperation of States. There was the position that the legal framework governing cooperation between the States and the court should be broadly similar to that existing between the State on the basis of extradition and legal assistance agreements. This approach would ensure that the framework of cooperation would be set forth explicitly and the procedure in which each

State would meet its obligations would be controlled by its national law, although there would be instances in which a State must amend its national law in order to be able to meet those obligations. There was also the position, however, that the statute should provide for an entirely new regime which would not draw upon existing extradition and legal assistance conventions, since the system of cooperation between the court and the States was fundamentally different from that between States, and extradition existed only between sovereign States. The obligation to cooperation imposed by the statute on State parties would not prevent the application of national laws in implementing such cooperation.

The principle of complementarity was considered particularly important in defining the relationship and cooperation between the court and the States. It was suggested that the principle called for the establishment of a flexible system of cooperation which would allow for special constitutional requirements of States, as well as their obligations under existing treaties.

There was general support for the view that all basic elements of the required cooperation between the court and states should be laid down explicitly in the statute itself, while the list of such elements need not be exhaustive.

The draft statute on international criminal court outlines the requirements for a fair trial. For this purpose, applicable law, as outlined in article 33, relates to (a) statute itself., (b) applicable treaties and the principles and rules of general international law; and (c) to the extent applicable, any rule of national law. In the circumstance, though it is difficult to outline the elements of fair trial, there was general agreement on the importance of matters concerning procedural questions and fair trial and rights of the accused, but divergent views were expressed on how best to meet this need. It was stressed that the procedural rules should maintain a balance between different penal systems of States 'and draw from their positive elements and that, therefore, an international criminal court should draw upon the practice of any system that could assist it in the performance of its functions. It should not be used as a standard to test the credibility of penal systems of individual States.

In fact,, there was an overwhelming view, at least among some Asian-

African countries, that, in the interest of economy, extensive pre-trial investigations should be left to the charge of the complainant State and not be taken over or initiated suo moto by the prosecutor's office. This, it was believed, would facilitate in keeping the prosecutor's office as a professional body, and not merely an investigating agency, without in any manner interfering in the sovereign and domestic jurisdiction of a State.

State consent, for instance, becomes crucial in matters relating to 'arrest' and 'surrender'. Arrest of a suspect will always be carried out by a State pursuant to the judicial assistance which it renders to the court under para 7 of the draft statute. In the case of pre-trial detention as enunciated in article 29, the predominant view seems to be that it should only be confined to situations in which the accused is being detained by the court pending trial and not by the State party pending a transfer to the court. At this stage, matters concerning the grant of bail, the legality of detention and the conditions of detention should be wholly left to the purview of the detaining State and should not be subject to the control of the court.

Although the complexities involved in surrendering the accused by a State to the court were addressed, this subject deserves further consideration. There could be internal legal impediments or a constitutional bar against surrender of nationals to any foreign forum. The question of extradition or dual criminality, i.e., the conduct alleged to be a crime, must be regarded as a crime by the requested State also needs further consideration. Apart from the legal or constitutional bar, the other grounds for refusal to surrender need examination. For these reasons, it would be necessary to take into account national laws and procedures and harmonize them to the extent possible. The procedures incorporated in the national laws, for instance, become particularly important while evolving the rules of evidence.

The procedural laws which could be adopted from the national laws could also be identified. There are, for instance, , notification of indictment, establishment of *prima.facie case*, right to legal assistance for the suspect, scope for objections of jurisdictional as well as merits phase, fair and expeditious trial (with full respect to the rights of the accused trials should generally be open to public), presumption of innocence until proven guilty, *non bis in idem*

(rule against double jeopardy), consideration of aggravating or mitigating factors in award of punishment, appeal and review for material error of law or miscarriage of justice or manifest disproportion in sentencing, revision on the basis of a new material fact, rule of speciality (prohibition of trial for any offence other than that for which accused was surrendered), and pardon and parole or commutation of sentence under appropriate circumstances.

(i) On the question of financing the Court it was suggested that it could be from the regular budget of the UN. On the other hand, according to some suggestions the independence of the Court required States parties to finance it through their own contributions on the basis of the scale of assessments of the UN.

(i) On the role of the Prosecutor *vis-a-vis* on-site investigations spectrum of views were expressed. For instance, such investigations should only be conducted with the consent of the State concerned to ensure respect for its sovereignty with the possible exception of situations in which the national criminal justice system was not fully functioning.

While concluding the meeting, the Preparatory Committee noted the usefulness of its discussions and the cooperative spirit in which the debates took place. Further, considering the progress made, and also considering the commitment of the international community to the establishment of an ICC the Preparatory Committee proposed to meet three or four times up to a total of 9 weeks before the Diplomatic Conference in 1998. With a view to allow the widest possible participation of States, it decided to continue the work in the form of open ended working groups, concentrating on the negotiation of proposals to facilitate producing a widely acceptable draft consolidated text of a convention to be submitted to the diplomatic conference.

On the basis of this recommendation the GA in its 5 1 th Session adopted the resolution 51/207 dated 17 December, 1996, in which the GA,

Decided to reaffirm the mandate of the Preparatory Committee, and directs it to proceed in accordance with paragraph 368 of its report;

Decided also that the Preparatory Committee shall meet from 1 1 to

21 February, 4 to 15 August and 1 to 12 December 1997, and from 16 March to 3 April 1998, in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference of plenipotentiaries, and requests the Secretary-General to provide the Preparatory Committee with the necessary facilities for the performance of its work;

Decided further that a diplomatic conference of plenipotentiaries shall be held in 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court ;...

Decided to include in the provisional agenda of its fifty-second session the item entitled 'Establishment of an international criminal court' in order to have the necessary arrangement made for the diplomatic conference of plenipotentiaries to be held in 1998, unless the General Assembly decides otherwise in view of relevant circumstances.

PREPCOM held from 11 to21 February,1997

The Preparatory Committee met in New York in February, 1997. At that session an open ended Working Group was constituted on General Principles of Criminal Law and Penalties. The open ended working group considered several proposals on such key issues as (i) the definition of 'crimes' and 'war crimes' ; (ii) crime of terrorism ; (iii) crime of aggression ; (iv) criminal (individual) responsibility (v) crimes against humanity ; (vi) alternative to the review mechanism; (vii) command responsibility.

In the open ended Working Group particular, drafts on 'crimes of terrorism' and 'crimes of aggression'l' were suggested, discussed and approved. This meeting was inconclusive and no substantial progress was made on any of the important issues.

The Working Groups also recommended to the PrepCom the text of a number of articles concerning general principles of criminal law, as a first draft for inclusion in the draft consolidated text of the Convention for an international criminal court. The text dealt with the following subject matters : *nullem crimen sine lege* (no crime without law) ; non retroactivity ; irrelevance

of official position ; individual criminal responsibility and command responsibility *mens rea* (mental elements of crime) ; *actus rea* (act and/or omission) ; mistake of factor of law ; age of responsibility and end of statute of limitation.

In the course of the deliberations of the Working Group, it was generally believed while the ICC should definitely be an independent court, a careful balance between the different responsibilities of the ICC and the Security Council will have to be found. Further, the establishment of the ICC should not alter or diminish the competence of the Security Council, one of the main Organs of the United Nations.

Recalling that the General Assembly at its 51st session had expressed its deep appreciation for the renewed Offer Of the Government of Italy to 'host a Conference on Establishment of an International Criminal Court in June 1998 the PREPCOM at the conclusion Of its February Session recommended that the General Assembly accept Italy as host of plenipotentiary conference, on the establishment of the Proposed court, in Rome in June, 1 998.

PREPCOM held from 4 to 5 August 1997

At the August 1997 meeting the PREPCOM considered the reports of the two working groups on (i) complementarity and trigger mechanisms and on (ii) procedural matters. One working group Presented texts corresponding with articles 21 to 25 and article 35, dealing with the issues Of complementarity and the trigger mechanism and recommended their inclusion in the draft consolidated text of the Statute of the Proposed court.

(a) Complementarity

The issue of complementarity involves the relationship between the international criminal court and national jurisdiction. The third preambulatory paragraph of the draft Statute of the ICC adopted by the ILC emphasizes that the international criminal court is intended to be complementary to national criminal justice systems in cases where such trial Procedures may not be available or may be ineffective. A view was, therefore, expressed that complementarity should reflect the jurisdictional relationship between the

international criminal court and national authorities including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States. Different views were expressed on how, where, to what extend and with what emphasis complementarity should be reflected in the statute.

It has been suggested that the principle of complementarity be defined as an element of competence of the court and that the conditions, timing and procedure for invoking this principle be clearly indicated. It was Proposed in this regard that the person named in the submission to the court or the State party invoking this principle should provide supporting information. It has further been suggested that consideration be given to how thecomplementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes.

It was noted that oesides the third preambulatory paragraph the principle of complementarity involved a number of articles of the statute central among which was article 35 on admissibility. It was said that the principle of *non bis in idem* (rule against double jeopardy), set out in article 42, was closely linked with the issue of complementarity and that, therefore, this article should apply only to *res judicata* and not to proceedings discontinued for technical reasons It was argued that the principle of *non his in idem* should not be construed in such a way as to permit criminals to escape any procedure A view was expressed that provisions of articles 26 and 27 adequately reflected the issue of complementarity and avoided the risk of 'double jeopardy'.

(b) Trigger Mechanism

Trigger mechanism refers to the question of what, or which actors, could initiate or 'trigger' court proceedings, i.e., Member States, the United Nations, Security Council and/or the Court prosecutor. The issue of trigger mechanism touches upon two main clusters of issues : acceptance of the court's jurisdiction, States consent requirements and the conditions for the exercise of jurisdiction (article 21 and 22) ; and who can trigger the system and the role of the prosecutor (article 23 and 25).

As regards the acceptance of court's jurisdiction, view was expressed that the inherent jurisdiction of the court should not be limited to genocide but should extend to all the core crimes as well. It was noted that the question of acceptance the court's jurisdiction was inextricably linked to the question precondition for the exercise of that jurisdiction, or consent, as well as to the question of who might bring complaints. As regards the requirement of consent of the State where the crime was committed, it was suggested that article 21(1)(b)(ii) be modified to cover situations where the crime might have been committed outside the territory of any State, such as on the high seas. It was also noted that the court could not exercise jurisdiction in relation to States not party to the statute. This, it was also noted, could become a particularly difficult issue when the State party was the custodial state or its cooperation was indispensable to the prosecution.

On the question of the trigger mechanism it was generally agreed that the statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the place and to acts of aggression and the obligation of Member States to accept and carry out the decision of the Council under Article 25 of the Charter would remain unchanged. However, the following three concerns were voiced, namely:

(i) that it was important, in the design of the statute, to ensure that the international system of dispute resolution - and in particular the role of the Security Council would not be undermined;

(ii) that the statute should not confer any more authority on the Security Council that already assigned to it by the Charter; and

(iii)that the relationship between the Court and the Council should not undermine the judicial independence and integrity of the sovereign equality of States.

On the question of the role of the Prosecutor, some delegations found

that the role of the posecutor, under article 25, was too restricted and that States or the Security Council, for a variety of political reasons, would be unlikely to lodge complaint. It was therefore urged that the Prosecutor should be empowered to initiative investigations ex officio or on the basis of information obtained from' any source.

In order to prevent any abuse of the process by any of the triggering parties it was proposed that in the event of a complaint being lodged by a State or an individual or initiated by 'the Prosecutor, the Prosecutor would first have to satisfy him self or herself that *Prima facie* case against an individual existed and that the requirements of admissibility had been satisfied. Some delegations did not however agree with the notion of an independent power for the Prosecutor to institute a proceeding before the court as, in their view, such an independent power would lead to politicisation of the court and allegations that the Prosecutor had acted for political motives.

The other group presented consolidated text on the following subjects; notification of the indictment ; trial in presence of the accused proceedings on an admission of gulit ; investigation of alleged crimes, functions and power of the chamber : commencement of Prosecution ; presumption of innocence; right of the accused ; and protection of the victims and witnesses.

The Chairman of the PREPCOM, Mr Adriaan Bos (Netherlands) said the work of the Working Group on procedural matters had established a firm basis for future discussions. There was a possibility of arranging some inter-sessional activity to prepare for the session in December.

PREPCOM held from 1 to 12 December 1997

During the PREPCOM session held from 1 to 12 December, 1997, the following five Working Groups were constituted by the Preparatory Committee at its 54th Meeting held on 1 December 1997 namely:

(a) Working Group on Definitions and Element of crimes, chaired by Mr. Adriaan Bos ;

(b) Working Group on General Principles of Criminal Law, chaired by Mr. Per Saland;

(c) Working Group on procedural Matters, chaired by Ms. Silvia Feernandez de Gurmendi ;

(d) Working Group on International Co-operation and Judicial Assistance, chaired by Mr. Pieter Kruger; and

(e) Working Group on Penalties, chaired by Mr. Rolf Fife.

The Preparatory Committee, on 12 December, 1997 took note of the reports of the above Working Groups. It also noted that, pursuant to paragraph 7 of the General Assembly resolution 51/207 of 17 December 1996 a trust fund was established for the participation of the least developed countries in the work of the Preparatory Committee and in the diplomatic conference of plenipotentiaries, and in the said resolution States were called upon to contribute voluntarily to the said trust fund. By August 1977 contributions to the fund had been made by 7 States viz. Belgium, Canada, Denmark, Finland, the Netherlands, Norway and Sweden and 12 States had utilized the Trust Fund to facilitate their participation in the December session.

(a) Working Group on Definitions and Elements of Crimes

In the report of the Working Group on Definitions and Elements of Crimes, it was recommended that, in supersession of the existing text, the text of the article concerning the definition of war crimes contained in document A/AC.249/1997/WG.I/CRP.9 be included in the draft consolidated text of the convention from international criminal court.For the Purposes of the Statute, 'war crimes' are defined to mean the crimes listed in article 2O C, which is divided is sections A, B, C and D. The new article also states that, without Prejudice to the application of the Provisions of the Statute, nothing in this part of the statute shall be interpreted was limiting or prejudicing in any way existing or developing rules of international law.

(b) Working Group on General Principles of Criminal Law

The Working Group on General Principles of Criminal Law recommended to the Preparatory Committee the text of the articles concerning general principles of Criminal law as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court.

(C) Working Group on Procedural Matters

The Working Group on Procedural Matters has recommended to the Preparatory Committee the text of the articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court. In order to facilitate the Working Group deliberations at the March-April ' 1998 session of the PREPCOM, individual delegations presented draft revised abbreviated compilations on relevant articles.

(d) Working Group on International Cooperation and Judicial Assistance

The Working Group on International Cooperation and Judicial Assistance recommended to the Preparatory committee the text of the articles concerning international cooperation and judicial assistance as a first draft for in the draft consolidated text of the convention for an international criminal court.

(e) Working Group on Penalties

The Working Group on Penalties has recommended to the Prepacatory Committee the text of the, provisions concerning penalties as a first draft for inclusion in the draft consolidated text of a convention for an intemational,criminal court. The issue of the death penalty was not discussed by the working group' which recommended that the text concerning the death penalty be included in the draft consolidated text. The issue of the effect of the judgment, compliance and implementation was not discussed by the working group, which suggested that it be dealt with in the context of enforcement of sentences.

Inter Sessional Meeting held from 19 to 30 January, 1998

An intersessional meeting was held at the initiative of the Chairman of the Preparatory Committee Mr. Adriaan Bos in Zutphen, the Netherlands, from 19 to 30 January, 1998. The purpose of the meeting was to facilitate the work of the last session of the Preparatory Committee from 16 March to 3 April, 1998, by performing the following tasks :

(a) considering the structure of the Statute and the placement of the articles;

(b) identifying relationships between articles, including possible overlaps and inconsistencies; and

(c) considering the required degree of detail in the articles and whether some articles or their more detailed versions could be placed in an instrument other than the Statute.

The Group participating in this intersessional meeting included the members of the Bureau, Chairs of different Working Groups, Coordinators and the Secretariat. The Group found it useful to place before the last session of the Preparatory Committee a complete set of articles so as to provide an overview of the Statute as a whole, as also to identify more easily the relationship between the articles. This document also contains proposals on articles which have not been discussed in the Preparatory Committee in 1997 in an attempt to present a practical working document for the discussions in March/April, 1998, session.

The substance of the articles has not been changed. In some places, the wording of the texts has been slightly modified for the purposes of consistency or of reflecting discussions in the PREPCOM.

The Group has suggested that the Statute be entitled 'Statute for the International Criminal Court' and be divided as follows : Preamble. Part 1 (Establishment of the Court). Part 2 (Jurisdiction, admissibility and applicable law). Part 3 (General principles of criminal law). Part 4 (Composition and

administration of the Court). Part 5 (Investigation and Prosecution). Part 6 (The Trial). Part 7 (Penalties). Part 8 (Appeal and review). Part 9 (International cooperation and judicial assistance). Part 1 0 (Enforcement). Part 1 1 (Final clauses).

The Group was of the view that it would be useful to attempt, to the extent possible, to have a balanced Statute in terms of the level of detail in the articles of various parts. The Group believes that in a number of articles, the Principles of the issues with which they deal sould be placed in the Statute. while details could more usefully be addressed elsewhere such as in the Rules.

In the working document for the March-April, 1998, session, the articles have been renumbered and the text and the footnotes adjusted accordingly. Throughout the text, the Previous numbers of the parts and articles appear in square brackets next to the new number.

For ease of reference, the report also includes a draft final act and a draft resolution for the establishment of a Preparatory Committee contained in document A/AC. 249/1998/L.11 for consideration by the Preparatory Committee.

PrepCom to he held from 16 March to 3 April, 1998 : Issues proposed to be discussed

(a) Financing the Court

This subject covers the following issues : States parties, the United Nations, others, voluntary funding: States, individuals and other entities.

(b) Organizational matters

This subject covers the following issues : (A) Relationship of the Court with the United Nations : Possible alternatives ; matters to be addressed. (B) Privileges and immunities (C) States Parties meetings and their organizations. (D) Preparatory Commission. (E) Oversight mechanisms for dealing with administrative and financial matters. (F) Headquaters Agreement. (G)

Representation at the United States. (H) Matters pertaining to personnel (staff reguiations , Pension, appeals).

The documents relating to the aforestated meeting of the PREPCOM were not available to the AALCC Secretarial.As soon as the relevant documents became available the Secretariat would circulate an addendum explaining the documents *

Assessment and Conclusion of AALCC Secretariat

The AALCC Secretariat is of the view that the establishment of an independent judicial body at the international level to try Well-defined international crimes is very crucial for the members of the Afro-Asian Community. The AALCC Secretariat notes with some sense of success that Prepcoms in 1997-98 had come to sufficient agreement to be able to call a Conference of Plenipotentiaries in June, 1998. The March-April Session of the Perpcom was expected to have a determining impact on the convening and success of such diplomatic conference, and, therefore, must necessarily be goal-oriented. A genuine and disciplined drafting effort was necessary in 1997-98 in order to fully exploit the opportunities offered by the General Assembly's positive mandate to PrepCom.

The AALCC Secretariat is also of the view that the Working Draft produced at the Intersessional Meeting held from 19 to 30 January, 1998, was a positive step to meet this agenda, though open-ended multiple Working Groups were still likely to hinder a successful drafting of the Statute which meets the satisfaction of all Member-States. There was still no consolidated text produced at the intersessional session. The report, however, consolidated the proposals as narrowly as it could , in the circumstances, possible. Indeed, it has endeavoured to place before the last session of the Prepcom a complete set of articles so as to provide an overview of the Statute as a whole, as also to identify more easily the relationship between the articles. It was earnestly hoped that, at the March-April session, the participating Member-States Make a positive and genuine drafting effort to consolidate various proposals complied into the working draft at the intersessional meeting.

* The Addendum has since been issued by the secretariat

In any event, the AALCC Secretariat has found it encouraging that most of the Member-States by now had become fully aware of the issues involved in the creation of an international criminal court. The lack of adequate representation, more particularly from the less developed countries due to obvious reasons, the most prominent being lack of sufficient personnel and costs of attending Prepcom, notwithstanding.

The AALCC Secretariat hopes, that with this brief of documents and the useful deliberations during the 37th session, all Members States would be fully acquainted with the importance of the establishment of a fully independent international criminal court, and would have their respective positions *vis-a-vis* all the pending issues in full light of their interests on the eve of the International Diplomatic Conference of Plenipotentiaries, to be held in Rome in June 1998.

V. REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

(i) Introduction

The International Law Commission(ILC) established by General Assembly 174 (III) of 21st September 1947 is the principal organ to promote the progressive development and codification of international law. The Commission held its forty-ninth session in Geneva from May 12 to July 18,1997. There were four substantive topics on the agenda of the aforementioned Session of the Commission:

(I) State Responsibility;

(II) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by Intemational Law;

(III) Reservations to Treaties; and

(IV) State Succession and its Impact on the Nationality of Natural and Legal Persons.

The General Assembly at its 51st Session had by operative paragraph 4 of its resolution 51\160 of December 16, 1996, recommended, inter alia that the International Law Commission continue its work on the topics in its current programme.

By its operative paragraph 13 of Resolution 51/160 the General Assembly had invited the Commission to further examine the topics Diplomatic Protection" and "Unilateral Acts of States" and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee on the report and any written comments that Governments may wish to submit. The Planning Group established by the Commission at its current session deemed it desirable that a work plan and detailed outline be prepared by Working Groups on the topic

of Diplomatic Protection and of Unilateral Acts of States.

The Commission at its Forty ninth Session considered all the above mentioned items and some notes and comments on these topics may be found in the latter part of this Chapter.

As regards State Responsibility the A ssembly had drawn the attention of the Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1998, as requested by the Commission. The Commission at its Forty ninth session decided to establish a Working Group. The Working Group on State Responsibility, *inter alia*, proposed that the Commission appoint a Special Rapporteur for the topic and the Commission accordingly appointed Mr. James Richard Crawford, Special Rapporteur for the topic. The Report of the Working Group and the Commission's future programme of work on this subject is given in Part III of this Chapter.

The Commission at its 48th Session had decided to transmit the report of the Working Group on "International Liabiliiy for Injurious Consequences Arising out of Acts not Prohibited by International Law", consisting of a set of 23 draft articles. The General Assembly at its fifty first session had urged Governments to provide their comments and observations in writing on the report of the Working Group on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International law annexed to the report of the International Law Commission in order that the Commission may, in the light of the report of the Working Group and such comments and observations as may be made by Governments and those that have been made in the Sixth Committee, consider at its forty-ninth session how to proceed with its work on the topic and make early recommendations thereon. The Commission at its forty ninth session resumed its work in order to complete the first reading of the draft articles relating to the activities that risk causing transboundary harm and established a Working Group which *inter alia* recommended that the Commission appoint a Special Rapporteur. The Commission accordingly appointed Dr. P. S Rao, Special Rapporteur, for

"Prevention of Transboundary Damage from Hazardous Activities" Details of the Report of the Working, Group and the decision of the Commission at its current Session is given in this Chapter.

On the question of the Reservations to Treaties the General Assembly had invited States and International Organizations, particularly those that are depositaries, to answer the questionnaire concerning reservations to treaties prepared by the Special Rapporteur on the topic. It may be recalled that the Commission at its forty eighth session had had to defer consideration of the Second Report of the Special Rapporteur. At its forty ninth Session the Commission considered the second report of the Special Rapporteur, Mr. Alain Pellet. The Commission at its forty ninth Session adopted a Resolution on "Reservations To Normative Multilateral Treaties Including Human Rights Treaties".

Notes and comments on the Second Report of the Special Rapporteur and the Resolution on Reservations to Treaties adopted by the Commission at its forty ninth session are also set out in Part IIIof this Chapter.

As regards the subject of State Succession and its Impact on the Nationality of Natural and Legal Persons, it will be recalled that General Assembly Resolution 51/160, had taken note of the completion of the preliminary study of the topic "State Succession and its impact on the nationality of natural and legal persons", and requested the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States". The Assembly had also invited Governments to submit comments on the practical problems raised by Succession of States affecting nationality of legal persons. The Planning Group established for the forty ninth session had recommended that the Commission endeavour to complete its first reading of the draft articles on the topic. At its forty ninth session the Commission considered the Third Report of the Special Rapporteur, Mr. Vaclav Mikulka,, which contained a set of draft articles together with commentaries thereto. After considering the Third Report of the Special Rapporteur the Commission adopted on first reading, a draft preamble and a set of 26 draft articles on "Nationality of Natural Persons in Relation to the Succession of States." The Commission decided to transmit the draft articles to Governments for comments

and observations.Details of the draft articles as adopted in first reading by the ILC are given in part III of this Chapter.

Apropos Diplomatic Protection it had been suggested that work on this topic would complement the Commission's work on State Responsibility and would be of interest to all the Member States . The Commission at its forty ninth Session established a Working Group composed of Mr. M. Bennouna (Chairman); Mr. J. Crawford; Mr. N. Elaraby ; Mr. R. Goco; Mr. G. Hafner ; Mr. M. Herdocia Sacasa; Mr. J. Kateka; Mr. 1. Lukashuk; Mr. T. Melescanu; Mr. G. Pambou-Tchivounda; Mr. B. Sepulveda; Mr. R. Rosenstock; Mr. B.Simma; and Mr. Z.Galicki (ex-officio member). On the recommendation of the Working Group the Commission at its forty ninth session appointed Mr. M. Bennouna Special Rapporteur for the topic Diplomatic Protection. Mr. Bennouna is to submit, at the Commission's fiftieth session, a preliminary study based on the outline of the scope and content of the topic as approved by the Commission. Some notes and comments on the item on the work programme of the ILCare given in Part III of this Chapter.

The Commission had considered the "Unilateral Acts of States" appropriate for immediate consideration as it is a well delimited topic and has been the subject of several doctrinal works but has not yet been studied by an international body. Although it has been touched by several judgments of the ICJ, especially the Nuclear Test Cases, the celebrated dicta leave room for questions and uncertainties. Another reason is that States have abundant recourse to unilateral acts and their practice can be studied with a view to drawing general legal principles. Finally, it had been felt that although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts of States could be approached.

At its forty ninth session recalling the mandate given to it by the General Assembly the Commission established a working Group comprised of Mr. E. Candioti (Chairman); Mr. J. Baena Soares; Mr. J. Dugard ; Mr. C. Economides ; Mr. L. Ferrari Bravo; Mr. N. Elaraby ; Mr. G. Hafner ; Mr. Qizhi He ; Mr. 1 Lukashuk ; Mr. V. Rodriguez Cedeno ; Mr. B. Sepulveda and Mr, Z. Galicki

(ex-officio member). On the recommendation of the Working Group the Commission at its forty ninth Session appointed Mr. V. Rodriguez Cadeno Special Rapporteur for the topic " Unilateral Acts of States" who, in 1998, is to submit an initial report for discussion by the Commission. Some notes and comments on the Working Group are also given in the latter part of this Chapter.

Long-term Programme of Work of the Commission

A Planning Group established by the Commission for the current Session considered the Work Programme of the Commission for the present quinquennium . The Planning Group, composed of Mr. J. Baeba Soares (Chairman), Mr. M.Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. L. Illueca, Mr. J. Kataka, Mr. 1. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou- Tchivounda, Mr. A. Pellet, Mr.B. Sepulveda, Mr. B. Simma, Mr. D. Thlam and Mr. Z. Galicki (ex-officio member) took the view that substantial progress should be made on those topics on which substantive work had already been undertaken and that it would be desirable to complete the first or the second reading, as the case may be, of those topics within the present quinquennium. It invited the Working Groups on the respective topics to consider the matter and to make recommendations.

The Planning Group established a Working Group on the Long Term Programme Of Work to consider the topics which may be taken up by the Commission beyond the present quinquennium. The Working Group on the long term programme of work was composed of Mr. 1. V. Lakashuk (Chairman); Mr. J Baena Soares; Mr. lan Brownl'e; Mr. C. Dugard; Mr. L. Ferrari Bravo; Mr. R. Goco; Mr. Qizhi He; Mr.A.Pellet; Mr. B.Simma; Mr. Chusei Yamada and Mr. Z. Galicki (ex officio member) The Working Group while emphasizing the role of the General Assembly in the selection of topics recommended that the selection of topics particularly within the Commission should. be guided by the following criteria:-

(a) that- the topic should reflect the requirements of States in respect of the progressive development and codification of international law;

(b) that the topic is sufficiently advanced in stages in termsof State practice to permit progressive development and codification;

(c) that the topic is concrete and feasible for progressive

development and codification.

It also proposed that the Commission should not restrict itself to traditional topics but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

While a process for the selection of topics within the Commission was outlined the selection of topics , on the basis of the above mentioned criter 'a ' would be made at the fiftieth session of the Commission and the selected topics would be presented to the fifty third session of the General Assembly, in 1998, together with an indication of how the Commission intends to proceed with the study of each topic.

Thirty Seventh Session : Discussion .

The Secretary General while introducing the item stated that the functions of the Committee include the examination of questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the Commission. The functions of the Committee include also the consideration of the Reports of the Commission and to make recommendations thereon to the Governments of the Participating States. In keeping with the Statutory requirements the Secretariat of the AALCC has monitored. the progress of work of the International Law Commission at its annual sessions and submitted notes and comments thereon to each successive Session of the Committee. Over the years strong ties of cooperation have been forged between the AALCC and the ILC and it has been customary for the Chairman or Vice Chairman of the International Law Commission to represent the Commission at the Committee's Session. He said that the Secretariat had prepared a brief of documents on the report of the ILC on the work of its 49th session held in Geneva from May 6 to July 26th, 1997,

The Secretary Genreal further stated that there were as many as seven substantive topics on the agenda of the 49th Session of the ILC. These had included : (i) State Responsibility; (ii) The Draft Code of Crimes Against the

Peace and Security of Mankind; (iii) International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law; (iv) The Law and Practice Relating to Reservations to Treaties; (v) State Succession and its Impact on the Nationality of Natural and Legal Persons; (vi) Diplomatic Protection ; and (vii) The Unilateral Acts of States. The Commission at its 49th Session considered all these items and brief notes and comments, on the work of the Commission at its last session, prepared by the Secretariat can be found in the brief of Document prepared for the New Delhi Session and given in this chapter.

'The Representative of the International Law Commission (Ambassador C. Yamada)speaking on behalf of the Commission presented an account of the work of the Commission at its 49th Session.

The Delegate of the Arab Republic of Egypt 'congratulated Ambassador : Chusei Yaamada and Dr. P.S. Rao for their work in the Commission and also thanked Secretary General for his report. On the substantive matters which were before the 49th session of the ILC, he hoped that the Commission would conclude its second reading of the draft articles on State Responsibility. Recalling that the topic had been on the agenda of the Commission for the last twenty years , he expressed the view that the issue of liability and damages would also be looked into carefully. On the topic of "Nationality of Natural Persons" , he felt that as the Commission has completed its first reading , AALCC Member Governments should promptly answer the ILC Questionnaere on the issue of "Reservation to Treaties" a view was expressed that Vienna regime of treaties was comprehensive and flexible. He however added that the legal competence of the monitoring bodies should be studied.

The Delegate of Republic of India thanked the Secretarv General for his introductory statement on the work of ILC and expressecl his appreciation for the thoughtful remarks of the representative of ILC Amb. Yamada on the topic of 'nationality of natural person'. He congratulated the work of ILC, especially that of Rapporteur Mikulka for successfully adopting 27draft articles in a single meeting. He appreciated the flexibility of this work as it provides enough options for states to adopt the ILC draft and also lessens the rigors of

a strict private law approach to the subject. He also called upon AALCC Member Governments to provide responses on this issue. The topic on 'injurious liability', he felt the title was confusing tilotl.P,11 the substance was very clear. Appreciating the work of Special Rapporteur, Dr. P.S. Rao on the sub-title "prevention of transboundary damage", he was of the view that issues of liability and compensation should not be overlooked. 'Diplomatic protection', the other topic before the ILC, the delegate felt should be limited to international wrongful acts, as suggested by Amb. Chusei Yamada. Furthermore on the topic 'unilateral acts of States', he expressed the view that it is of great topical importance. With regard to singling out only legal effects of unilateral acts, the delegate felt that though it is theoretically correct, in practical life these contain certain political acts.

The Delegate of Myanmar commenting on counter measures which appear in the topic "State Responsibility" stated that the draft articles on this part dealt with the most difficult and controversial aspects of the whole regime. She expressed the view that in case of a wrong doing by a state which caused injury to the other state, the first simple and straight forward counter measure which the injured state could take was not to comply with one or more of its obligations towards the wrongdoing State. Secondly the injured State should not resort to counter measures based on its unilateral assessment. From this premise it follows that if the assessment was incorrect, the state taking counter measures was taking a risk for which it could incur responsibility for a wrongful act. This assessment from the standpoint of the state making the unilateral assessment would be good, but the same did not hold good for a neutral state, which would be asked to pass a judgement, an acceptable solution was still evasive. She also observed that the right of an injured State to resort to counter measures was circumscribed by permissible functions, an aim sought to be achieved by such measures. She felt that a proper valuation of the subject was still required.

The Delegate of Japan at the outset commended the Secretariat for having prepared a well-organized report on the topic. She appreciated the remarkable achievements of the ILC during the 49th Session, especially the completion of the first reading of the draft articles on nationality in relation to the succession of States in a single session and the adoption of the preliminary

conclusion by the ILC to normative multilateral treaties including Human Rights Treaties. This had been possible because of intensive discussions among members of the Commission, the Reports of the Special Rapporteurs and assistance from the Secretariat. As regards the progress on the work on the topic articles of "State Responsibility", she stated that the Commission had decided to complete the second reading by 2001. The commission would begin the second reading of draft articles at its 50th session. Her delegation was also appreciative of the enormous efforts of the ILC for having completed the first reading and noted that the comments and observations by Government would be more useful in order to make the draft article more consistent with the state practice. She added that comments due to be sent by Japan to the ILC had taken into consideration recommendations of a group of twelve scholars of international law, and comments of other members of the AALCC would further contribute. to accelerate the process.

She noted that the ILC had commemorated its 50th anniversary last year, but the mandate given to it in the field of progressive development and codification of international law, is as valid as before. The Commission, she added, is expected to select new topics for the long term programme and in selecting such topics it is of paramount importance that there was co-ordination and co-operation between governments, which would ensure that needs of the international community were properly taken into account. She finally stated that to this end it was necessary that AALCC Member States actively participate in discussions of the General Assembly and the Sixth Committee and provide the ILC with appropriate guidance.

The Delegate of Sudan thanked the Secretary General and the representative of the ILC Mr. Yamada for their succinct and informative presentation on this item. It was his view that the AALCC could make useful contributions to the work of the ILC on the subjects of 'diplomatic protection' and 'unilateral acts of States'. These two topics were recently referred to the ILC by the General Assembly for examination and the Commission is in the process of delineating the scope and content of the proposed work to be undertaken in these areas. On the subject of 'diplomatic protection' he was of the opinion that the stipulation of the Hague Convention of 1930 that a State may not accord diplomatic protection to one of its nationals against a

State whose nationality such person also possesses , is still applicable. Given the increasing trend towards exchange of persons and commerce across States which encourages bearing of two or more nationalities, he felt that any departure from the established principle could result in unforeseeable consequences. Though as a matter of principle, claims should be espoused by a State on behalf of its nationals only, he stated that the cases of claims of non-nationals forming a minority in a group national claimants might be considered by the ILC provided that such claims shall not be allowed against national States of such individuals. Calling for the exclusion of the aspect on "protection claimed by international organisations on behalf of their agents" from the ILC study, he underscored the distinction that underlies the following two categories. While the espousal by a State of an injury suffered by its national is designed to circumvent the lack of direct access for individuals in the international sphere, there was no such comparable deficiency regarding international organisations as they were already subjects of international law capable of directly seeking redress at the international level.

On "Unilateral Acts of States" his delegation was in agreement with the work of the ILC. He reiterated that the objective of the Commission should be to identify the constituent elements and effects of unilateral legal acts of states and formulate rule generally applicable to them.

(ii) Decision on the "The Work Of The International Law Commission"

(Adopted on 18.4.98)

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

Having taken note with appreciation of the Report of the Secretary-General on the work of the International Law Commission at its Forty-ninth Session (Doc.No.AALCC\XXXVII\New Delhi \98\S. 1)

Expresses its appreciation on the comprehensive statement made by the Representative of the ILC H.E.Ambassador Chusei Yamada, on the work of the Commission;

1. **Expresses** its satisfaction on the work of the International Law Commission at its Forty-ninth Session;

2. **Affirms** the significance of the contribution of the ILC to the progressive development of international law and its codification;

3. **Requests** the Secretary-General to bring to the attention of the International Law Commission at its 50th Session the views expressed on different items on its agenda during the Thirty-seventh Session of the AALCC , in particular the views of the Committee developed in the Special Meeting on the subject of 'reservations to multilateral treaties'

4. **Takes note** that the ILC has commenced work on some new topics and set priority for the completion of the topics on State Responsibility and International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law;

5. **Decides** to inscribe on the agenda of its Thirty-eighth session an item entitled "The Report on the Work of the International Law Commission at its Fiftieth Session".

(iii) Secretariat Study : Report On The Work Of The International Law Commission -At Its Forty Ninth Session

1. State Responsibility

The object of the work of the ILC on the topic "State Responsibility" has been to codify the customary rules governing State Responsibility *stricto sensu*, as a general and independent topic. The basis of the ILC's work were, and have generally been (i) to not limit its study of the topic to any particular areas, such as responsibilities for injuries to the person or property of aliens: (ii) to codify the rules governing international responsibility without engaging in the definitional and codification of the primary rules whose breach entails , or would entail, responsibility for an internationally wrongful act. The Commission. has, accordingly, concerned itself with the progressive development and codification. of what may be termed as "secondary rules" aimed at determining whether a breach of the obligations imposed by the primary rules has taken place and, in the event that it has, what the consequences of that breach should be.

It will be recalled that the General Assembly had by its resolution 3071 (XXVII) of 30 November 1973 *inter alia* recommended that the Commission should continue, on a priority basis, its work on State Responsibility with a view to the preparation of a set of draft articles on responsibility of States for internationally wrongful acts and that it should, at an appropriate time, undertake a separate study of the topic of International Liability for Injurious Consequences Arising Out of the performance of other activities.[1] Accordingly, the set of draft articles developed by the Commission deal solely with the responsibility of States for internationally wrongful acts not relatable to lawful or even risk creating activities which are not, otherwise, wrongful. It may be recalled that the ILC has also prepared a set of draft articles on the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law".

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[1] SeeThe Work of the Intemational Law Commission,No.7,4th ed,1988, p.95.

Work of the Commission at the Forty Eighth Session

In accordance with its plan of work the Cmmission had at its 48th Session adopted a set of 60 draft articles arranged in Three Parts and Two Annexes thereto. Part One of the draft articles comprising 35 draft articles addressed the issue of the origin of international responsibility, and dealt with such issues as determining the grounds and circumstances in which a State may be held to have committed an international wrongful act. It may be recalled that a set of 35 draft articles relatable to the origin of international responsibility was adopted, on first reading, by the ILC in 1980 with a view towards its possible adoption in the form of a Convention. The Commission proposes to commence the second reading of these draft articles during its next session.

Part One of the Draft Articles

Part One of the draft articles as adopted, on first reading together with commentaries thereto, in 1980 is in principle divided into five chapters. Chapter 1 entitled General Principles comprising 4 articles is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements - subjective and objective - of an internationally wrongful act. Chapter 11 of Part One of the draft articles on the Act of State under International Law is concerned with the subjective element of the internationally wrongful act, and the provisions of draft articles 5 to 15 are addressed to the determination. of the conditions in which particular conduct must be considered as an "Act of State" under international law. The various aspects of the objective element of international wrongful obligation are dealt with by the provisions of draft articles 16 to 26 comprising Chapter III and termed Breach of an Internalional Obligation. Chapter IV on the implication of a State in the International Wrongful Act of another State deals with cases in which a State participates in the commission by another State of an international offence and the cases in which responsibility is placed on a State other than the State which committed the, internationally wrongful act. Finally draft articles 29 to 35 comprise the Chapter Circumstances precluding Wrongfulness define such 'circumstances as; prior consent of informed State; legitimate application of counter-measures in respect of an internationally wrongful act; *force majeure* and fortuitous

event; distress; state of necessity; and self defence ; may have the effect of precluding wrongfulness.

Part Two of the Draft Articles:

Part Two of the draft articles as adopted on first reading by the ILC in 1996 is designed to deal with matters relating to the content, forms and degrees of international responsibility. The text of draft articles 36 to 53 comprising Part Two are divided into four Chapters. Chapter 1 comprising the text of draft articles 36 to 40 spell out the General Principles relating to the content, form and degree of international responsibility. Draft Article 36 on the Consequences of an Internationally Wrongful Act forms the link between Parts One and Two. Paragraph 2 of Article 36 stipulates that the legal consequences of internationally wrongful acts are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

Paragraph 2 of Article 36 states the rule that where as a result of an internationally wrongful act a new set of relations is established between the author State and the injured State, the previous relationship does not ipso facto disappear and that even if the author State complies with its secondary obligation it is not relieved of its duty to perform the obligation which it has breached. Chapter 11 of Part Two of the draft articles is addressed to the Rights of the Injured State and Obligations of the State which has committed An Internationally Wrongful Act. The provisions of draft articles 41 and 46 stipulate such obligations as cessation of wrongful acts and Assurances and Guarantees of NonRepetition, Draft articles 42, 43, 44 and 45 provide for such rights as Reparation: Restitution in Kind; Compensation; and Satisfaction respectively for the injured State.

Chapter IIIof Part Two of the draft articles on Counter Measures deals *inter alia* with such issues as conditions relating to resort to countermeasures proportionality and prohibited counter measures. The four draft articles comprising this part deal with not only the most difficult but also controversial aspect of the whole regime. of State Responsibility. The basic notion of countermeasures is the entitlement of the injured State not to comply

with one or more of its obligations towards the wrongdoing State.The fundamental perquisite for any lawful countermeasure - unilateral reaction - is the existence of an internationally wrongful act infringing a right of the consequently injured State. An injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment. The right of an injured State to resort to countermeasures is circumscribed by the permissible functions or aims to be achieved by such measures. In practice injured State resorting to countermeasures may seek the cessation of the wrongful conduct, in the case of a continuing wrongful act; reparation in a broad sense, inclusive of satisfaction, as well as guarantees of non-repetition.

Finally, Chapter IV of Part Two of the draft articles entitled "International Crimes" addressed such vital issues as the consequences of an international crime; specific consequences; and obligations for all States.

Part Three of the Draft Articles

It will be recalled that the former Special Rapporteur, Mr. Roberto Ago in his fifth report presented in 1984, had submitted that the Commission should give its consideration at an early stage to the possible content of Part Three of the draft articles concerning "Implementation of State Responsibility" would influence the way in which Part Two would be elaborated. He had expressed doubts as to whether States would be willing to accept the rules elaborated in Part One of the draft articles as binding upon them if there were no guarantees for an impartial assessment of the facts and the interpretation or application of the primary rules. Several members of the Commission had stressed the link between Parts Two and Three and emphasized the relevance of "Implementation provisions" in the elaboration of Part 2 of the draft articles or at least in respect of some of the articles.

During its 47th Session the Commission adopted a set of 7 draft articles and two annex thereto. The seven draft articles and the Annex are addressed to the Settlement of Disputes and now form Part Three of the proposed instrument on State Responsibility. It may be recalled that the present

Special Rapporteur Mr. Arangio Ruiz, had in his fifth report presented to the ILC at its 45th Session proposed "general compromissory clauses" of the future convention on State Responsibility. The settlement obligation procedures proposed, it was then stated, would complement, supersede or tighten up tiny obligations otherwise existing between the injured State and the wrongdoing state in any given case of an alleged breach of international law. The proposed draft articles had envisaged a threestep third party dispute settlement procedure which would come into play after a countermeasure had been resorted to by an injured State and a dispute had arisen with regard to its justification and lawfulness. The three steps of the dispute settlement procedure then proposed were conciliation, arbitration and Judicial settlement. Subsequently, the Drafting Committee added Negotiation and Good Offices and Mediation to the dispute settlement procedure proposed by the Special Rapporteur.

It may be stated that Article 1 of the Annex I (The Conciliation Commission) to draft articles of Part Three of the articles on State Responsibility is addressed to the issue relating to the appointment of a five member conciliation commission, its rules of procedure, method of work, and decision making. Article 2 of the Annex II on the Arbitral Tribunal provides for the establishment of a five member arbitral tribunal, its rules of procedure, decision making and related matters.

Work of the Commission at the Forty Ninth Session

At its forty ninth Session the International Law Commission established a Working Group to address matters dealing with the second reading of the draft articles on the topic. The Working Group which met twice under the Chairmanship of Mr. J. Crawford,[2] decided to limit its discussion on three procedural and methodological issues viz.

(i) the work plan of the topic within the present quinquennium (1997-2001);

(ii) identification of areas; if any, where more work was required in the light of developments since the provisional adoption of the draft articles; and

(iii) the procedure to be followed for the second reading.

The Working Group, it may be mentioned, decided to confine itself to methodological and procedural issues because the topic deals with a number of important and delicate issues and Governments of Member States of the United Nations had not yet responded to the request for written comments. It may be recalled in this regard that General Assembly Resolution 5 1\ 1 60 adopted on December 16, 1996 had *inter alia* drawn the attention of Governments to the importance, for the International Law Commission, of having their views on the draft articles on State Responsibility adopted on first reading by the Commission and had urged States to present in writing their comments and observations by January 1, 1998, as requested by the Commission.

As regards the work plan on the subject, the Working Group agreed that the Commission design its work plan with a view to allowing the completion of the second reading of the draft articles on State. Responsibility by the end of the present quinquennium. It recommended that the Commission accord priority to this topic during its current term.

With regard to the identification of areas, if any, where more work was required in light of the developments since the provisional adoption of the draft articles on State Responsibility, the Working Group agreed that The Commission should consider in -1999, if possible, the character of the draft articles. The proposed consideration, in 1999, of the draft articles is to take into account the written comments of Governments and with due regard to the significant links which exist between various key issues.

On the basis of the recommendations of the Working Group the Commission decided :

(i) to design its work plan for the quinquennium with a view to allowing the completion of the second reading of the topic

[2]. The other members of the Working Group were: Mr. Ian Brownlie; Mr. J. Dugard; Mr. Q.He; Mr. P.Kabatsi; Mr. J. Kateka, Mr. T. Melescanu; Dr. D. Opertti-Badan; Mr. G. Pambou-Tchivounda; Mr. R. Rosenstock; Mr. B. Simma; Mr. C. Yamada and Mr. Z. Galicki (ex-officio member).

of State Responsibility by the end of its quinquennium;

(ii) taking into account comments by the Governments and having regard to the significant links which exist between various key issues to consider in 1999, if feasible, the character of the draft articles;

(iii) to follow the usual practice of the appointment of a Special Rapporteur to prepare reports for consideration by the Commission, bearing in mind that a significant amount of inter-sessional work will be required;

(iv) to proceed to the appointment of a Special Rapporteur, for the topic, at the present Session;

(v) to follow the usual practice of debates in the plenary followed by reference of the draft articles to the Drafting Committee; to expedite its work on the topic, to establish working groups to consider and report on key issues;

(vi) that comments by Governments are of particular relevance as regards the treatment of key issues; and

(vii) that an examination of case law and literature could also serve as a useful guide in determining whether there are any lacunae in the draft articles, or whether particular draft articles may require modification in the light of recent developments in international law.

The Working Group recalled that the latter had been found to be relevant to the draft articles of Part One completed in 1980.

The Commission at its forty ninth session appointed Mr. James Richard Crawford Special Rapporteur for State Responsibility. At its Fiftieth Session in 1998 the Commission is expected to consider the First Report of the Special Rapporteur , Mr. J. Crawford , dealing with review of Part I of the draft

articles, except draft article 19 (overview of issues relating to State Crimes).

2. International Liablity for Injurious Consequences arising out of acts notprohibited by Interrnational Law

At its 48th Session the Commission had considered the twelfth report of the then Special Rapporteur[3] Mr. Julio Barboza. That report had furnished a review of various liability regimes proposed by the Special Rapporteur in his previous reports. At that session the ILC *inter alia* established a Working Group[4] under the Chairmanship of the Special Rapporteur, to consolidate work already done on the topic and to seek solutions to some unresolved questions with a view to producing a single text for transmission to the General Assembly. It had then been felt that it would then be possible for the Commission at its 49th Session to take informed decisions as to consideration of the topic during the next quinquennium.

The Working Group in its report to the Commission had *inter alia* pointed out that in view of priorities attached during the 48th Session of the ILC to the completion of draft articles on other topics it had neither been possible for the draft articles to be discussed by the Drafting Committee, nor were they debated in detail by the plenary during the session. The Working Group recommended that it would be appropriate for the Commission to annex to its report to the General Assembly the report of the Working Group and to transmit it to Governments for comments as a basis for future work of the Commission, on the topic.' In its opinion the "Commission would not be committing itself to any specific decision on the course of the topic, nor to particular formulations, although much of the substance of Chapter I and the whole of Chapter II have been approved by the Commission in earlier sessions.

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3. See A/CN.4/475.

4. The Working Group consisted of Mr. Julio Barboza (Special Rapporteur and Chairman); Mr. Hussain Baharana; Mr. Mehmoud Bennouna; Mr. James Crawford; Mr. Gudmundur Eiriksson; Mr. Salifou Fomba; Mr. Kabatsi; Mr. Igor 1. Lukashuk; Mr. Patrick L. Robinson; Mr. Robert Robinson; Mr. Albert Szekley and Mr. Fran Villagran Kramer.

The Working Group in its report had observed that the draft articles fomulated on the topic are limited in scope and residual in character. To the extent that existing rules of international law, whether customary or conventional, prohibit certain conduct or consequences those rules will operate within the field of State Responsibility and will fall outside the scope of the present draft articles. Attention was drawn in this regard to draft article 8. On the other hand, the field of State Responsibility for wrongful acts is separated from the scope of the present draft articles by the permission to the State of Origin to pursue the activity at "its own risk".

The Working Group expressed the view that the present topic is addressed to an issue different from that of responsibility. The key elements of the difference are (i) the prevention of transboundary harm arising from acts not prohibited by international law or, in other words prevention of certain harmful effects outside the field of State Responsibility and; (ii) the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. Thus, the first element covers prevention in a broad sense, including notification of risks of harm whether these risks are inherent in the operation of the activity or arise, or are appreciated as. arising at some later stage.

The other element, in the opinion of the Working Group, is the principle that States, on the one hand are precluded from carrying out activities not prohibited by international law, notwithstanding the fact that there may be a risk of transboundary harm arising from those activities. However on the other hand their freedom of action in that regard is not unlimited and may give rise to liability for compensation or other relief, notwithstanding the characterization of the acts in question as lawful. The Working Group had also emphasized the significance of the principle that the victim of transboundary harm should not be left to bear the entire loss.

The 22 draft articles recommended by the Working Group are arranged in three chapters. Chapter I.(draft articles 1 to 8) delimits the scope of the draft articles as a whole, defines 4 terms used therein and states the applicable general principles equally in the context of prevention of and liability for transboundary harm. Chap ter II (draft articles 9 to 19) is primarily concerned

with the implementation of the principle of prevention stipulated in draft article 4 including the issues of notification, consultation etc. Finally, Chapter III (draft articles 20 to 22) deals with the compensation which may be available before the national courts of the State of origin or which may flow from arrangements made between that State and one or more other affected States. In that much it is concerned with implementation of the general principle of liability stipulated in draft article 5.

Work of the Commission at the Forty Ninth Session

At its 49th session the International Law Commission established a Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law to consider the question of how the Commission should proceed with its work on the topic and to make recommendations to that effect. The Working Group met twice under the chairmanship of Ambassador Chusei Yamada[5] during which it reviewed the Commission's work on the topic since 1978.

The Working Group noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group, in its report, pointed out that the topic dealt with two distinct but interrelated issues viz. (i) prevention , and (ii) international liability. The Working Group was of the view that the two issues should be dealt with separately.

Introducing the report of the Working Group , Ambassador Chusei Yamada stated that as the work of the Commission on Prevention was already at an advanced stage and many draft articles had been provisionally adopted by the Commission the Group had been of the opinion that the Commission could proceed with that work and possibly complete its consideration on

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[5]. The other Members of the Working Group were Mr. E.Addo. Mr. E. Candioti, Mr. L.Ferrari Bravo, Mr.G.Hafner, Mr.Q.He, Kateka, Mr. I.Lukashuk, Mr.T. Melescanu, Mr.G.Pambou-Tchivounda, Dr. P.S.Rao, Mr. B. Simma and Mr.Z Galicki

first reading of the draft articles on prevention in the next few years. It believed that any decision on the form and nature of the draft articles on "prevention" should be decided at a later stage.

As regards "international liability" while a majority of the Group's members had been of the view that it was the core issue of the topic as originally conceived and that the Commission should retain that subject.

There had been no unanimity on that point but the Group had agreed that the Commission needed to await further comments from Government before it could make any decision on the issue. The Group also noted that the title of the topic might need adjustment when a decision was taken on the scope and contents of the draft articles

The Group concluded that the Commission should proceed with its work on prevention under the sub-title "Prevention of transboundary damage from hazardous activities" and that a Special Rapporteur for this sub-title should be appointed as soon as possible with the aim of completing the first reading of the draft articles by 1999. It may be stated that though the report of the Group did not specify the timing of the appointment of a Special Rapporteur, the Chairman of the Group, Ambassador Chusei Yamada in his oral presentaion stated that if it was done at the Commission's spring session in Geneva in 1998 the Commission would be in a position to complete its consideration of the draft articles on first reading by 1999. The question of the appointment of a Special Rapporteur should be decided within the overall framework of the Commission's work programme for the current quinquennium.

The Working Group had recommended that the Commission proceed with it on international liability for injurious consequences arising out of acts not prohibited by international law , undertaking first prevention of transboundary damage from hazardous activities. It recommended also the appointment of a Special Rapporteur as soon as possible. The Working Group also recommended that the Commission reiterate its request for comments by Governments in the Sixth Committee or in writing.

The Commission at its 49th session appointed Dr. P.S. Rao, Special Rapporteur for the subtitle "Prevention of Transboundary damage from Hazardous Activities". At its next session the Commission expects to consider the first report of the Special Rapporteur.

3.RESERVATIONS TO TREATIES

At its 48th session the Commission had before it the Second Report of the Special Rapporteur, Mr. Alain Pellet.[6] In addition to the Second Report, the Special Rapporteur had also prepared a "non-exhaustive bibliography on the question of reservation to treaties ."[7] However , owing to the priority attached to the completion of the second reading of the articles on the Draft Code of Crimes Against the Peace and Security of Mankind as well as the first reading of the draft articles on State Responsibility the consideration of the Second Report of the Special Rapporteur on Reservations to Treaties had had to be deferred. The Commission at its forty ninth Session considered that Report which presented an overview of the study of the question of reservation to treaties.

Chapter I of the Report of the Special Rapporteur , Mr. Alain Pellet, formulated an overview of the study in three sections. It referred to the Commission's earlier work on Vienna Convention on the Law of Treaties, 1969; the Vienna Convention on Succession of States in respect of Treaties, 1978; and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986. The first section entitled "the First Report on Reservation to Treaties and Outcome" (Paragraphs I- 8) summarized' the conclusions' that the Special Rapporteur had drawn from the debate both in course of the consideration of that report in the Commission during the course of its 48th Session as well as the debate on the item in the Sixth Committee at its fiftieth session.

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[6]. See A\CN.4\477

[7] See A\CN.4\478.

The Special Rapporteur, Mr. Alain Pellet, recalled that the General Assembly in its resolution 50\45, *inter alia*, invited the Commission to "Continue its work along the lines indicated in the reports".[8] The report also pointed out that the General Assembly had also invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur, on the topic concerning reservation to treaties".

Presenting his report during the 49th session the Special Rapporteur pointed out that although thirty States had sent their replies to the questionnaire sent to States Members o the United Nations or of Special Agencies or parties to the Statute of the International Court of Justice., none of the States with a national in the Commission had responded to the questionnaire. Replies had also been received the Special Rapporteur had added, from international organizations.

The second section of Chapter 1 of the Report was addressed to the 'Future work the Commission on the topic of Reservation to Treaties' (Paragraphs 9 - 50). This was divided into three parts viz. (i) Area covered by the study (Paragraphs 9-17) ; (ii) Form of the study (Paragraphs 18-32); and (iii) General outline of the study (Paragraphs 33-50).

The Special Rapporteur pointed out that although the regime established by the Vienna Conventions worked satisfactorily there existed some ambiguities and gaps in the provisions relating to reservations. As regards the Area covered by the Study the Special Rapporteur identified five topics which required a careful study because of the gaps that continued to exist. The issues identified included:

(a) The question of the definition of reservation;
(b) The legal regime governing interpretative reservations;
(c) The effect of reservations which clash with the purpose and object of the treaty;
(d) Objections to reservations; and
(e) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

[8] See General Assembly Resolution 50\45 of 24 January 1996 operative paragraph 4.

This list of questions does not limit the Commission's scope of enquiry regarding reservation to treaties. One would agree with the Special Rapporteur's assertion that while devoting attention to questions of importance and recalling the applicable rules as codified by existing conventions or resulting from practical application it seems "logical to take account of the broader picture in considering questions relating to reservations which are imperfectly addressed or not addressed at all by existing conventions". Moreover this list of questions would need to be supplemented by other questions relating to the existence of rival institutions of reservations, aimed at modifying participation in treaties, such as additional protocols, selective acceptance of certain provisions and the like which while modifying participation in treaties put to risk the universality of the international instrument in question. The point was made that there is no denying that "considered in themselves, such approaches are not part of the field of study in that they are reservations. However, to the extent that they have similar aims and comparable consequences, it would seem useful to take account of them, if only, to draw the attention of States to the options which they offer in certain cases.

The rival techniques can, in the opinion of the Special Rapporteur, prove to be useful alternatives to the employment of reservations when recourse to the latter meets objections of a legal or political nature.

Form of the Study

Addressing the issue of the form of the study, the Special Rapporteur had recalled that the ILC at its 47th Session had decided in principle to draw up a "guide to practice in respect of reservations" and taken the view that there were insufficient grounds for amending the relevant provisions of the existing international instruments. The Commission had also decided that the guide to practice in respect of reservations would ' necessary,, be accompanied by model clauses. The Special Rapporteur, had addressed four issues in his Second Report These included (a) Preserving what has been achieved (b) Draft articles accompanied by commentaries (c) Model Clauses; and (d) Final form of the guide to practice.

(a) Preserving what has been achieved

The Special Rapporteur pointed out that the decision to preserve what has been achieved by the Vienna Conventions of 1969, 1976 and 1986 while providing a firm basis for the future work of the Commission was a constraint in that the Commission must ensure that the draft articles eventually adopted by it conform , in every respect, to the provisions with regard to which it should simply clarify any ambiguities and fill in any gaps. He therefore deemed it advisable to quote the actual text of the existing provisions at the beginning of each chapter of the draft guide to practice in respect of reservations.

(b) Draft articles accompanied by commentaries

The text of the articles shall be followed by a statement of additional or clarificatory regulations which would comprise the actual body of the Commission's work on the subject and would be presented in the form of draft articles whose provisions would be accompanied by commentaries".

(c) Modol Clauses

The Special Rapporteur proposed that the draft articles be followed by model clauses be phrased in such a way as to "minimize disputes in the future". Emphasizing the function of these model clauses needed to be clearly understood the Special Rapport pointed out that the proposed "guide to practice" should consist of general rules designed to be applied to all treaties, regardless of their scope, in cases where the treaty provision are silent. Like the actual rules of the Vienna Convention and the customary norms which they enshrine, the rules relating to reservations would be purely residual where the part concerned have no stated position. These rules cannot be considered binding and the State Parties will always be free to disregard them. The negotiators need only to incorporate speci fic clauses relating to the reservations into the treaty.

The Special Rapporteur pointed out that in its Advisory Opinion regarding Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide"[9] the ICJ had, *inter alia*, noted the disadvantages that could result from the profound divergence of views of States

[9] ICJ Reports (1951) p. 26.

regarding the effects of reservations and objections asserted that "an article concerning the making of reservations could have obviated such disadvantages".

Attention was also drawn to the recommendation of the General Assembly that the organs of the United Nations , specialized agencies and States should, in the course of preparing multilateral conventions , consider the insertion of provisions relating to inadmissibility of reservations and the effect to be attributed to them.[10]

The three fold functions which the model clauses may have would be to (1 refer to the rules articulated in the three Conventions explicitly or implicitly by reproducing the wording of their provisions ; (ii) fill in gaps and clarify ambiguities by simplifying obscure points not addressed in those Conventions; and (iii) derogate from the "Vienna rules by stipulating a special regime in respect of reservations which contracting parties would consider more suitable for the purposes of the particular treaty they had concluded.' The sole aim of the model clauses to be appended to the draft articles, however, would be to encourage States to incorporate in. specific treaties the model clauses concening reservations, which derogate from general law and are better adapted to the special needs of these treaties or the circumstances in which they are concluded. This approach would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances and thus preserve its flexibility without calling in question the unity of the law applicable to reservation to treaties.

(d) Final Form of the study

In the opinion of the Special Rapporteur the guide to practice in respect of reservations which the Commission intends to prepare could take the form of a set of draft articles with commentaries accompanied, if necessary, by model clauses be divided into six Chapters. The chapters could, in his opinion, take the following form :(i) a review of the relevant provisions of the Vienna Conventions of 1969,1978 or 1986; (ii) Commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein;

[10] See General assembly Resolution 598(VI)

(iii) draft articles aimed at filling the gaps or clarifying the ambiguities; (iv)commentary to the draft articles; (v) model clauses which could be incorporated in specific treaties and derogating from the draft articles; and (vi) commentary to the model clauses.

The provisional general outline of study, which the Special Rapporteur had stated may require to be "adapted, supplemented and revised in the course of further work" which could uncover new difficulties or reveal the artificial nature of some of the problems anticipated, envisaged six segments viz. (i) Unity or Diversity of the Legal Regime For Reservations to Multilateral Treaties; (ii) Definition of Reservations ; (iii) Formulation and Withdrawal of Reservations, Acceptance and Objections, (lv) Effects of Reservations, Acceptance and Objections; (v) Fate of Reservations, Acceptance and Objections in the Case of Succession of States; and (vi) the Settlement of Disputes Linked to the Regime of Reservations.

(I) Unity or Diversity of the Legal Regime For Reservations To Multilateral Treaties

Unity or diversity of the legal regime for reservations to treaties is one of the general question of determining whether the legal regime for reservations, as established under the Convention on the Law of Treaties 1969 is applicable to all treaties regardless of their object. The Special Rapporteur had enumerated three reasons for conducting a separate preliminary study, viz.: (i) the terms, of the problem are, partially the same, regardless of the provisions in question; (ii) its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done in limine ;and (iii) the question is related to reservations to human rights treaties,which justifies placing the emphasis on the consideration of the specific problems that concern them.

It also involves one of the main difficulties which were stressed by both members of the Commission at its 47th session as well as the representatives of States in Sixth Committee at the fiftieth session of the General Assembly.

II. Definition of Reservations:

The question of the definition of reservations is linked to the difference between reservations and interpretative declarations and to the legal regime for the latter.It seems useful to link the consideration of this question to that of other procedures, while not constituting reservations, are, like them, designed to and do enable States to modify obligations under treaties to which they are parties, is a question of alternative reservations, and recourse to such procedures may likely make it possible, in specific cases to overcome some problems linked to reservations.

The Special Rapporteur had proposed to deal with reservations to bilateral treaties in connection with the definition of reservations. The initial question posed by reservations to bilateral treaties is whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Although consideration of the question relating to the unity or diversity of the legal regime reservations could have been envisaged, it appears at first glance that the question relates to a different problem.

III. Formulation and withdrawal of reservations, acceptances and objections

The Special Rapporteur has emphasized that save for some issues relating to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions, this part does not appear, to involve questions giving rise to serious difficulties. it is nevertheless necessary to include it in the study as it is a matter of practcal question which arises constantly, and one could hardly conceive of a "guide to practice" which did not include developments in this regard.

IV. Effects of Reservations, Accptances and Objections

Effects of reservations, acceptances and objections is, without any doubt, most difficult aspect of the topic. This is also the aspect with regard to which apparently irreconcilable doctrinal trends have been expounded while none denies that some reservations are prohibited, as is, clearly stipulated in

article 19 of the 1969 and 1986 Vienna Conventions. Disagreement arises with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either permissible (or impermissible), or necessary (or superfluous). This is at the heart of the opposition between the schools of "admissibility" or "permissibility" on the one hand, and "opposability" on the other. In the opinion of the Special Rapporteur, it would be premature to take a position at this stage.

The general outline does not take any position, even implicitly, on the theoretical questions that divide doctrine. Assuming that there are, without any doubt, permissible and impermissible reservations, the Special Rapporteur felt that the most "neutral" and objective method would be to deal separately with, the reservation is permissible on the one hand and when it is non-permissible on the other, since it is necessary to consider separately two specific problems which, prima facie, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves.

V. Fate of reservations, acceptances and objections in the case of succession of states

The Vienna Convention on Succession of States in respect of Treaties 1978 left numerous gaps and questions with regard to the problem on fate of reservations, acceptance and objections in the case of Succession of States. Article 20 of that Convention deals with only as concerns the case of newly independent States without addressing the question of the fate of the acceptances of the predecessor States's reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

VI. The Settlement of Disputes linked to the regime for reservations

Although the Commission does not provide, the draft articles that it elaborates, with clauses relating to the settlement of disputes, the Special

Rapporteur expressed the view that there is no reason a priori to depart from this practice in most cases. Inhis opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration and strictly speaking gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. In his opinion, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated in the form of an optional protocol, for example, in the body of codification conventions.

As some members of the Commission pointed out during the debate on the subject at the 47th session, although there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty. Moreover, when such mechanisms exist as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations.

Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for either in standard clauses that States could insert in future treaties to be concluded by them or in an additional optional protocol that could be added to the 1969 Vienna Convention on the Law of Treaties.

Chaipter II of the Second Report of the Special Rapporteur on the Reservation to Treaties dealt with two substantive questions, that of the unity or diversity of the rule applicable to reservations to treaties and that of the reservations to human rights treaties 'These questions while closely linked, the Special Rapporteur had observed, were "highly sensitive and controversial." The Special Rapporteur stated that he had made an attempt to answer two questions. First, whether the reservations regime should be adapted to take account of the object and/or nature of the treaty concerned and second whether specific regimes regarding reservations need to be applied in the case of human rights treaties. He was of the view that the reservations regime was and should

remain homogenous. It follow that there was no reason to exempt human rights instruments front the general rule governing reservations.

It was pointed out in this regard that a perusal of provisions of articles of Vienna Conventions of 1969 and 1986 laid down specific conditions governing the validity of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations. This indicated that the authors of the 1986 Convention had been aware of the problem of the unity or diversity of the applicable rules and had not hesitated to differentiate the reservations regime where it was deemed appropriate. Normative treaties it was said must be understood as referring in reality to treaties in which normative provisions (provisions that were neither contractual nor reciporcal) prevailed in quantitative and qualitative terms. In most cases a treaty contained both "contractual clauses", in which states recognized mutual rights and obligations, and "normative clauses"

At its 49th Session the ILC adopted a set of Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties. In the course of the consideration of the Preliminary conclusions a view was expressed that the Commission was faced with a contradiction in that it was just commencing its work on the topic and did not know where that work might take it.

Paragraph 1 of the set of preliminary conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the Commission at its 49th session reiterates that articles 19 to 23 of the Vienna Convention on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the object and purpose of the treaty is the most important criteria for determining the admissibility of reservations. The Commission considered the flexibility of that regime to be suited to all treaties, of what ever nature or object, as one that strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty.

The Commission considered the objectives, of the preservation of the integrity of the text of the treaty and universality of participation in the

treaty,applicable equally in the case of reservations to normative multilateral treaties including treaties in the area of human rights and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. However, the establishment of monitoring bodies by many human rights treaties had given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.

Paragraph 5 of the Preliminary Principles recognizes that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to them.. Several members of the Commission disagreed with the Principle incorporated in paragraph 5 of the preliminary conclusions.

The competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties , on the one hand , in accordance with the provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.

The Commission suggested providing specific clauses in multilateral normative treaties , including human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was noted in this regard that the legal force of the finding made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers to them for the performance of their general monitoring role.

The Commission called upon States to cooperate with monitoring bodies and give due consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

The Commission has invited comments on the preliminary conclusions adopted on the Reservations to Normative Multilateral Treaties , including human rights treaties It has also invited the monitoring bodies set up by the relevant human rights treaties to comment on these conclusions.

4. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

At its 45th Session in 1993, the Commission decided to include this item in its agenda and the General Assembly at its 48th Session endorsed the Commission's decision on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to it (the General Assembly). Thereafter, at its 46th Session the Commission appointed Mr. Vaclav Mikulka Special Rapporteur for the topic. The Commission considered the Special Rapporteur's first report at its 47th Session.

At its 48th Session the Commission had considered the second Report of the Special Rapporteur, Mr. Vaclav Mikulka. The purpose of that report was to enable the Commission to complete its preliminary study of the topic and to thus comply with the request of the General Assembly. The report was designed to facilitate the task of the Working Group on the topic, which the Commission had established at its 47th Session and had decided to reconvene at the 48th Session, in its preliminary consideration of the questions of the nationality of legal persons, the choices open to the Commission in the substantive study of the topic and a possible timetable.

Chapter II of that report had dealt with the Nationlity of Natural Persons and summarized the result of the work undertaken on that aspect of the topic. It had classified the problems and issues relating to the nationality of natural person in two broad categories viz. "General Issues" and "Specific Issues" and identified the legal material for analysis at a later stage of the Commission's work.

It may be recalled that while the protection of human rights and the

principle of effective nationality were the two general issues dealt with in the second report, the Special Rapporteur had emphasized 7 specific issues viz. (i) the obligation to negotiate in order to resolve by agreement problems of nationality resulting from State Succession; (ii) granting of the nationality of the Successor State; (iii) withdrawal or loss of the nationality of the predecessor State; (lv) the right of option, (v) criteria used for determining the relevant categories of persons for the purpose of granting or withdrawing nationality or for recognizing the right of option; (vi) non-discrimination; and (vil) the consequences of non-compliance by States with the principles applicable to the withdrawal or the granting of nationality.

The Nationality of Legal Persons dealt with in Chapter III of that report was intended to be the main focus of the Working Group at the 48th Session. Accordingly that Chapter had outlined the scope and characteristics of the subject and its many complexities including the various forms that legal persons could take. It was pointed out that apart from State Succession the problem of the nationality of legal persons arose mainly in the areas o conflicts of laws, the law on alien and diplomatic protection and in relation to State Responsibility. At the 47th Session of the ILC, the Special Rapporteur had, advocated focussing on the nationality of natural persons and, for the present time setting aside the issue nationality of legal persons.

In the Recommendations concerning- future work on the topic set out in Chapter IV of his second Report the Special Rapporteur had proposed dividing the subject into two parts viz. "Succession of States and its impact on natural persons" and "Succession of States and its impact on legal persons". He had emphasized that the former be studied first but cautioned that the division did not mean that the Commission should ignore certain links between both parts of the topic. He had also recommended leaving the question of the rule of continuity of nationality for further consideration within the framework of the topic "Diplomatic Protection" especially as the Commission was considering proposing that topic as a future agenda item.

Apropos the form which the outcome of the work might take the Special Rapporteur had indicated his favour of elaborating a declaratory instrument made up of articles together with commentaries thereto.

Work of the Commission at its forty ninth session

At its forty ninth Session the Commission had before it the Third Report of the Special Rapporteur[12], containing a set of 25 draft articles together with commentaries on the "Nationality of Natural Persons in Relation to the Succession of States." The draft article were divided into two parts. Part I of the draft articles on "General Principles Concerning Nationality in Relation to the Succession of States consisted of a set of 16 draft articles and the commentaries thereto. The provisions incorporated in Part Iof the draft articles set out the general principles which would be applicable to all cases of State succession. Part 11 of the draft articles on the "Principles Applicable in Specific Situations of Succession o States". As the title suggests Part 11 of the draft articles dealt with the principles governing specific cases of State succession and was divided into 4 sections viz. (i) "Transfer Part of the Territory"; (ii) the "Unification of States"; (Iii) the "Dissolution of States ; and (lv) the "Separation of Part of the Territory."

Introducing his third report at the forty ninth session the Special Rapporteur said, among other things, that the draft articles "incorporated the conclusions of the Working Group , which had met during the past two sessions relating to the main principles or rules which constituted the subject of the draft articles and the overall structure." The Commission after due consideration of the Third Report of the Special Rapporteur referred the same to the Drafting Committee. Thereafter it considered the report of the Drafting Committee and adopted on first reading a draft preamble and a set of 27 draft articles on Nationality of Natural Persons in Relation to the Succession of States." The Commission at its forty ninth session decided to transmit the draft articles to Governments for comments and observations.

Following the scheme proposed by the Special Rapporteur the Commission at its 49th Session adopted a preamble and a set of 27 draft articles. The draft articles adopted on first reading by the ILC are divided in 'to two parts. Part 1 of the draft articles which incorporates the text of draft articles 1-18 sets out the General Provisions and Part II consisting of the text of

12. See A/CN.4/ 480 and Add. 1

draft article 19-26 sets out the Provisions Relating To Specific Categories of Cases. The Commission also adopted the text of a draft article 27 but has left the decision on its final placement for the second reading.

The first of the eight preambular paragraphs indicates the *raison d'etre* of the draft articles , the concern of the international community as to the problems of nationality arising from succession of States. It emphasizes that nationality is essentially governed by internal law within the limits set by international law. The third preambular paragraph affirms that the legitimate interests of both States and individuals should be considered. The next three paragraphs recall international instruments of relevance. Paragraph six corresponds to the Special Rapporteur's formulation on Guarantee of the human rights of persons concerned and expresses concern about the protection of human rights of persons whose nationality may be affected by a succession of States. It emphasizes that the rights of such persons must be fully respected.

Part 1 , General Provisions of the draft articles as adopted by the Commission on first reading addresses such issues as (i) right to nationality; (ii) use of terms; (iii) prevention of statelessness;(lv) presumption of nationality; (v) legislation concerning nationality and other connected issues; (vi) effective date; (vii) attribution of nationality to persons concerned having their habitual residence in another State; (viii) renunciation of the nationality of another state as a condition for attribution of nationality; (1x) loss of nationality upon the voluntary acquisition of the nationality of another state; (x) respect for the will of persons concerned; (xi) unity of family; (xli) child born after the succession of states; (xiii) status of habitual residents; (xiv) non-discrimination; (xv) prohibition of arbitrary decisions concerning nationality issues; (xvi) procedures relating to nationality issues; (xvii) exchange of information, consultation and negotiation; and (xviii) other States.

Needless to say, draft article 1 on the Right to Nationality is the key provision concerned with the right to nationality in the exclusive context of State succession. It confers on every individual the right to the nationality of at least one of the "States concerned". This provision, however, is given further specific form in subsequent provisions and cannot therefore be read in isolation. The mode of acquisition of the predecessor's State's nationality has no effect

on the scope of the right to nationality of the individual. It is irrelevant whether the nationality of the predecessor State was acquired by jus soli or jus sanguinis or by naturalization or even as a result of a previous succession of States.

Draft article 2 on the Use of Terms sets out the definitions of seven terms viz. (a) succession of States; (b) predecessor State; (c) successor State; (d) State concerned; (e) third State; (f) person concerned ; and (g) date of the succession of States. Five of these definitions are identical to the respective definitions embodied in Article 2 of the Vienna Conventions on the Succession of States. The Commission decided to leave them unaltered so as to ensure consistency in the use of terminology. While these may require little or no consideration, the definitions of the terms "State concerned" and "person concerned" have been added for the purpose of the present subject.

Sub-paragraph d of draft article 2 defines the term State concerned to mean, depending upon the type of territorial changes, the states involved in a particular succession of States. These are the predecessor State in the case of a transfer of part of the territory;[13] the successor state alone in the case of unification of States[14]; two or more successor States in the case of dissolution of States[15]; and the predecessor State and one or more successor State in the case of a separation of part of the territory[16]. The term "State concerned" has nothing to do with the concern that any other State may have about the outcome of a succession of States in which its own territory is not involved.

The term " person concerned " is defined in draft article 2 as an individual who had the nationality of the predecessor State and whose nationality may be affected by such succession. The term encompasses only individuals who, on the date of succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession. It includes neither the nationals of third States nor stateless persons who were present 'in the territory of any of the States concerned.

13. See draft article 20
14. See draft article 21
15. See draft articles 22 and 23.
16. See draft articles 24 to 26.

These two terms to some extent, implicitly determine the scope of the draft articles. They delimit the scope ratione personae of the draft articles what is more the term "person concerned" also determines the scope ratione materiae. Accordingly, the draft articles deal both with the loss and acquisition of,nationality although in the exclusive context of State succession . In that respect, following the right to nationality provided for in draft article I, it also detemines the scope of the draft articles ratione temporis.

Draft article 3 on the Prevention of statelessness is a corollary of the right of the persons concerned to a nationality. It may be stated that draft article 2 as formulated by the Special Rapporteur in his third report to the Commission had been termed "Obligation of States concerned to take all measures to avoid statelessness."

Draft article 4 on the Presumption of nationality addresses the problem of time lag between the date of succession of states and the adoption of legislation or the conclusion of a treaty between States concerned on the question of nationality of persons following the succession. Since such persons run the risk of being treated as stateless during this period the Commission deemed it important to express as a presumption the principle that on the date of the succession of States the successor state attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. While it is a rebuttable presumption and its limited scope is clear from the restrictive formulation of the provision, it underlies the solutions envisaged in Part II for different types of succession of States.

Draft article 3 addressed to Legislation concerning nationality and other connected issues as proposed by the Special Rapporteur in his third report to the Commission comprised two paragraphs. The text of these two paragraphs proposed by the Special Rapporteur has furnished the basis of draft articles 5 and 6 as adopted on first reading by the International Law Commission. Introducing the draft article the Special Rapporteur had observed that it presupposed that nationality was essentially an institution of the internal laws of States and that the international application of the notion of nationality in any particular case had to be based on the internal laws of the State in question. Draft article 5 Legislation concerning nationality and other connected

issues is based on the recognition of that fact. Its main focus , however, is on timeliness of internal legislation. It sets to a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay"

The Special Rapporteur had in his report pointed out that if " the legislation enacted after the date of the succession of States did not have a retroactive effect statelessness, if only temporary, could ensue"[17] The Commission while recognizing theprinciple of non-retroactivity of legislation considered that in the case of succession of States the benefits of retroactivity justify an exception to that general principle. While draft article 6 on Effective Date, is thus closely connected to the issue dealt with in dealt with in draft article 5, it has a broader scope of application as it covers "attribution of nationality" not only on the basis of legislation but also on the basis of a treaty. The retroactive effect of legislation or treaty extends to the acquisition of nationality following the exercise of option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of exercise of such option. Draft article employs the term "attribution of nationality' for the first time. The Commission preferred using this term rather than the term " granting" as it felt that the former expression best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization.

Draft articles 7 and 8 as adopted by the Commission must be read as exception to the basic premise concerning the attribution of nationality. Draft article 7 on attribution of nationality to persons concerned having their habitual residence in another State corresponds to paragraph 1 of draft article 4 as proposed by the Special Rapporteur place clear limitations on the power of the successor State to attribute its nationality to person concerned. Paragraph 2 of the draft article likewise restricts. the power of a successor State to impose its nationality on persons who had their habitual residence in another state against the will of such persons, unless such persons would become stateless.

17. See Third Report On Nationality in Relation to The Succession of States. Document A/CN.4/480 p.45

Draft article 8 entitled Renunciation of the nationlity of another State as a condition for attribution of nationality addresses the issue of elimination dual and multiple nationality. Introducing this draft article the Special Rapporteur had observed that "While it was not for the Commission to suggest which policy States should pursue in the matter of dual / multiple nationality , its concern should be the risk of statelessness related to the requirement of prior renunciation by the person concerned of his or her current nationality as a condition for the granting of the nationality of the successor State."

Draft article 9 on the Loss of nationality upon the voluntary acquisition of the nationality of another State incorporates a provision that derives from a rule of general application adapted to the case of succession of States. It recognizes that a successor or a predecessor State is entitled to withdraw its nationality from persons concerned who in relation to the succession of States voluntarily acquire the nationality of another State. The provisions of draft article 9 would apply in all types of succession of States save that of unification where the successor State remain the sole State concerned. For reasons of clarity the rights of the predecessor and the successor State are spelled out separately. It does not however deal with the question as to when the loss of nationality should become effective and also leaves aside the question of the voluntary acquisition of the nationality of a third State.

Draft article 10 on Respect for the will of the persons concerned establishes the general framework of the right of option and the consequences of the exercise of that right. The provisions of this draft article correspond to the Special Rapporteur's proposals on "the right of option" and " Granting and withdrawal of nationality upon option". The provisions of this draft article are in essence based on a number of treaties regulating nationality for questions in relation to the succession of States as well as national laws which provided for the right of option or an analogous procedure enabling the individuals concerned to establish their nationality by choosing either between the nationality of the predecessor State and that of the successor State or between the nationalities of two or more successor States.

The principle of family unity, in relation to the succession of States, is recognized by the draft articles as adopted on first reading which set out a

general obligation. Draft article 11 entitled the Unity of family provides that where the acquisition or loss of nationality would impair the unity of a family States concerned are to take "appropriate measures" to allow that family to remain together or to be united.

In dealing with the problem of children born to persons concerned after the date of the succession of States the Commission recognized the need to make an exception from the rigid definition ratione temporis of the draft articles. Draft article 12 entitled Child born after the succession of States corresponding to paragraph of draft article 1 as proposed by the Special Rapporteur envisages that a child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

The place of habitual residence is an important criterion for the determination of nationality particularly in specific categories 'of State succession. Draft article 13 on the Status of habitual residents, as adopted on first reading, incorporates the rule that the status of habitual residents is not affected by the succession of states. In other words persons concerned who are habitual residents on the date of the succession retain their status. In specific cases, addressed in paragraph 2 , where succession of States is the result of events leading to the displacement of a large number of the population the State concerned is to take all necessary measures to ensure the effective restoration of the status of habitual residents .

The principle of' Non-discrimination set forth in draft article 14 seeks to prohibit discrimination on "any ground" resulting in the denial of the right of a person to a Particular nationality or to an option. The forms of discrimination, the Special Rapporteur had observed, vary considerably.

The principle of Prohibition of arbitrary decisions concerning nationality issues set out in draft Irticle 15 had first been included in the Universal Declaration on Human Rights. In its present application to the specific situations of succession of States it contaions two elements viz.(i) the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from, persons

concerned who were entitled to retain such nationals following the succession of States and of the arbitrary refusal by the successor State attribute its nationality to persons concerned who were entitled to acquire such nationality; and (ii) the prohibition of the arbitrary denial of a person's right of option, that is an expression of the right of the person to change his or her nationality.

Draft article 16 sets out the Procedures relating to nationality issues and the States concerned to process applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right to option without undue delay and to issue relevant written decisions . The processing of applications is to be open to effective administrative and Judicial review. The provision represents minimum requirements in procedural matters.

The provisions on the Exchange of information, consultation and negotiation set out in draft article 17 incorporates the obligation of States concerned in this regard in very general terms. The precise scope of the questions which are to be the subject of `consultations between States concerned is not indicated. The aim of the Special Rapporteur was to provide for the obligation to consult and through negotiations seek a solution a broad spectrum of problems not merely statelessness. The recommendation of the Working Group to expand the scope of the negotiations to such questions as dual nationality; the separation of families; military obligations; pensions and other social security benefits; and the right of residence had met with the approval of the Commission. It is to be noted however that the obligation to negotiate to seek a solution does not exist in the abstract and it is not presumed that every negotiation must lead to the conclusion of an agreement.

Draft article 18, the last of Part I of the draft articles as adopted on first reading, 'is concerned with the problem of the attitude of Other States where a State concerned did not cooperate.with the others concerned and where the effects of its legislation conflicted with the provisions of the draft articles. Paragraph 1 of draft article 18 safeguards the right of and requires other States not to give effect to nationality attributed by a State concerned in disregard of the requirement of an effective link. In this it sets out the principle of non-opposability of nationality acquired or retained following succession of States.

Introducing Part II of the draft articles the Special Rapporteur had said that it set out the principles applicable in specific situations of succession of States. in contrast to the draft formulations of Part I, which applied in all cases of State succession. The specific cases of State succession envisaged were : (i) "Transfer of Part of the Territory"; (ii) the "Unification of States"; (iii) the "Dissolution of States ;and (lv) the "Separation of Part of the Territory." Part, II of the Draft articles termed Provisions Relating to Specific Categories of Succession of States as adopted by the Commission comprises the text of 9 draft articles draft articles 19 -26) and is divided into the above mentioned four sections. This typology followed is in principle that of the Vienna Convention on the Succession of states in respect of State Property, Archives and Debts, 1983.

Whilst draft article 19 relates to the application of Part II of the draft articles, the draft articles 20 - 26 are intended to furnish guidance to states concerned both in their negotiations as well as in the elaboration of national legislation in the absence of a treaty.

Section 1, the Transfer of Part of the Territory of Part IIof the draft articles consists of a single draft article incorporating the rule relating to the Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State. Draft article 20 provides that when part of the territory of a State is transferred by that State to another State, the successor State shall attribute to, and the predecessor State shall withdraw its nationality from, persons concerned who have their habitual residence in the transferred territory unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

Section 2 , Unification of States , of Part II of the draft articles whilst consisting of one article spells out the two possible scenarios i.e. where following the unification of two or more States the successor State (i) is a new State; or (ii) has a personality identical to that of one of the States which have united . Draft article 21 provides that in either case in principle the successor State shall attribute its nationality to all persons who, on the date of the succession of States had the nationality of a predecessor State. The provision however makes an exception in respect of persons who have their habitual residence in

another State and also have the nationality of that or any other State. This exception is borne out by the use of the phrase "Without prejudice to the provisions of Article 7".

The specific case of Dissolution of a State is dealt with in Section 3 of part II of the draft articles. The case of dissolution of States has been carefully distinguished from that of the separation of part or parts of the territory. This is by reason of the fact that the nationality of a State is extinguished or disappears with the dissolution of that State. On the other hand, in the case of a separation of part of the territory both the predecessor State and its nationality continue to exist.

The texts Of draft articles 22 and 23 together with commentaries thereto comprise this section. While draft article 22 deals with the issue of theAttribution of the nationality of the successor State, by the successor State, the provisions of draft article 23 relate to the Granting of the right of option by the successor State. Read together these provisions provide for the attribution of nationality of the successor State to persons concerned and the granting of the right of option to certain categories of persons concerned. The core body of nationals of each successor State has been defined by reference to the criterion of habitual residence. Rules have also been formulated for the attribution of the nationality of States to persons concerned having their habitual residence outside the territory of the successor state. The criterion employed is an "appropriate legal connection with a constituent unit of the predecessor State" that has become a part of the successor State.

The fourth and last section of Part II of the draft articles addresses the issue of the Separation of Part or Parts of the Territory. Section 4 consists of 3 draft articles. Draft article 24 on the Attribution of nationality of the successor State lays down the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. For the rest it follows the formulation of draft article22.

As a corollary to the acquisition of the nationality of the successor State, draft article 25 deals with the question of Withdrawal of the nationality of the predecessor State. The withdrawal of the nationality of the predecessor

State is subject to two conditions viz. (i) that the persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State ; and (ii) that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. It aims at reducing statelessness, howsoever, temporarily which could result from withdrawal of nationality.

Draft article 26 on the Granting of the right of option by the predecessor and the successor State. It covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities between two or more successor States.

Finally draft article 27 identifies the Cases of succession of States covered by the present draft articles . It will be recalled that article 6 of the Vienna Convention on the Succession of states in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts explicitly limit the scope of their application to succession of States occurring in conformity with international law. Although it is very evident that the present draft articles address the question of nationality of natural persons in relation to the succession of States which take place in conformity with international law, the Commission decided for the purposes of consistency with the aforementioned Conventions, to include a similar provision in the present draft articles. As mentioned earlier the Commission has deferred the decision on its final placement In the draft articles, until the second reading.

5. DIPLOMATIC PROTECTION

In the report on the work of its forty eighth session the International Law Commission had proposed to the General Assembly that the item Diplomatic Protection be included as a topic for progressive development and codification of international law. By its resolution 51/160 the General Assembly inter alia invited the ILC to examine the topic "Diplomatic Protection " and to indicate its scope and content.

At its forty ninth session the Commission established a Working Group to further examine the topic of" Diplomatic Protection" and "to indicate the scope and content of the topic in light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit."

The Working Group in its consideration of the scope and content of the topic took the view that subject Diplomatic Protection was "appropriate" for consideration by the C mmission . In its consideration of the item the Working Group had been mindful of the customary origins of diplomatic protection whose exercise had been characterized by the Permanent Court of International Justice as 'an elementary principle of international law".[18] In its report to the Commission the Working Group observed that:

"Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest."

The Working Group attempted to (1) clarify the scope of the topic to the extent possible ; and (11) identify issues which should be studied in the context of the topic. It did not take a position on issues which require careful study of State practice, Jurisprudence and doctrine.

While recommending that the study could follow the traditional pattern of articles and commentaries thereto the Working Group left for future decision the question of its final form. Thus, the outcome of its the Work Of the Commissionon the subject may the form of a convention or guidelines.

The topic Diplomatic Protection, in the view of the Working Group, is primarily concerned with the basis, conditions modalities and consequences of claims claims brought by States on behalf of their nationals against another State. It observed that a similar mechanism has been extended by analogy to

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[18] Mavrommatis Palestine Concessions Case, Series A, No.2, 30 August 1924.

claims by international organizations for the protection of their agents. Thus the scope of the topic does not cover damage derived from direct injury caused by one State to another. It would only address indirect harm i.e. harm caused to natural or legal persons whose case is taken up a State. The study would not cover direct harm or harm caused directly to the State or its property.

The Working Group was agreed that the title "Diplomatic Protection" should remain for it has become a "term of art" in all official languages of the United Nations. It drew distinction between diplomatic protection properly so called, i.e. a formal claim made by State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged in article 3 of the Vienna Convention on Diplomati Relations, 1961 and article 5 of the Vienna Convention on Consular Relations, 1963.

Scope and Content of the Study

The Commission endorsed the recommendation of the Working Group that the study of diplomatic protection should focus on the consequences of an internationally wrongful act - whether of omission or commission - which has caused an indirect injury to the State , usually because of injury to its nationals. Thus, the topic will be limited to the codification of secondary rules of international law.

While addressing the requirements of an internationally wrongful act of the State as a prerequisite the study will not address the specific content of the international, customary or treaty legal obligation which has been,violated

Diplomatic Protection has been defined by international jurisprudence as a right of the State. Historically, the link of nationality has furnished the basis of a right of protection by the State although in some cases a State has, by means of an international agreement, been invested with the right to represent another State and act for the benefit of its nationals.

The Working Group recalled that the Hague Convention of 1930 stipulates that State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses" and pointed out

that the question may arise as to whether this rule is still applicable and whether the criterion of effective nationality should not also be applied in this case.[19] The situation in the opinion of the Working Group, may change in case of protection claimed by international organizations. In the Reparations case the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization [20] Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

A number of issues identified by the Working Group need to be considered These include whether diplomatic protection is based solely on Jurisdiction ratione personae over the beneficiary. A related question is whether a State can exercise diplomatic protection even when an individual declines such protection from its State of nationality. Yet another issue identified by the Working Group in this regard is whether diplomatic protection may be exercised at the discretion of the State or whether there is a right of a national to diplomatic protection. Consideration needs also to be given to the question whether the topic should cover forms of protection other than claims and whether the rules of diplomatic protection in instances of State succession should be included in the purview of the study.

The injury suffered by a national which is espoused by a State is termed indirect in as much as such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State intervenes "to ensure, in the person of its subjects, respect for the rules of international law"[21] When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on his behalf (to protect his rights), without prejudice to the possibility of the national State acting for his benefit by virtue of diplomatic protection.

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[19] Iran-United States case, Series A, No. 18, 6 April 1984

[20] I.C.J., Advisory Opinion 1 1 July 1949, "Reparations for Injuries Suffered in the Service of the United Nations" 1949, I.C.J. Reports.

As to the type of injury for which an international Organization is allowed to exercise protection. in the Reparations Case the International Court of Justice limited the injury for which the organization could demand repartation to one arising form a breach of an obligation designed to help an agent of the organization perform his or her duties The Working Group did not take a position on whether the topic of "diplomatic protection"should include protectionclaimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another on its inclusion in the topic.

The espousal of the claim by the State of nationality of the person gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

As regards the content of the topic, the Commission has accepted the view of the Working Group that diplomatic protection deals with at least four major areas:

(i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection;

(ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom;

(iii) the conditions under which diplomatic protection may be exercised; and

(iv) the consequences of diplomatic protection.

The Working Group has identified a number of issues under each of the four main areas for study by the Commission.. The outline of the study prepared by the Working Group is as follows:

A. Natural persons.

1. Nationals, continuous nationality

2. Multiple nationals: dominant nationality, genuine link, effective nationality, bonafide nationality:

(a) As against third States

(b) As against one of the States of nationality

3. Aliens in the service of the State

4. Stateless persons

5. Non-nationals forming a minority in a group of national claimants

6. Non-nationals with long residence in the State espousing diplomatic protection

7. Non-nationals in the framework of international organizations of integration.

B. Legal persons

1. Categories of legal persons

(a) Corporations, and other associations in varying forms in different legal systems

(b) Partnerships

2. Insurers

3. Right of espousal in multiple nationality and in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircrafts, spacecrafts. etc.)

D. Transferability of claims

Chapter Two: Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International Organizations ("functional" Protection)

C, Regional economic integration Organizations

D. Other entities

Chapter Three: The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence Of violation of an international obligation by.a State

2. The "clean hands" rule

3. Proof of nationality

4. Exhaustion of local remedies

(a) Scope and meaning

(b) Judicial, administrative and discretionary remedies

(c) Exception to the requirement of exhaustion of local remedies

(i) Demonstrable futility in utilizing local remedies

(ii) Absence of safety for the claimant in the site where remedies may be exercised

(iii) Espousal of large numbers of Similar claims

5. Lis alibi pendens (non-Proliferation of the same action in diverse fora)

6. The impact of the availability of alternative international remedies

(a) Right of recourse to human rights bodies

(b) Right of recourse to international tribunals in the field of foreign investment

(c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim

1 The relevance of damage as an incidence of the claim

2. The rule of nationality of claims

C. The circumstances under which a State is deemed to have espoused a claim for diplomatic protection

D. Renunciation of diplomatic protection by an individual

Chapter Four: Consequences of diplomatic protection.

A. Accord and satisfaction

B. Submission to a jurisdiction to determine and liquidate claims

C. Lump-sum settlements

D. Elimination or suspension of private rights

E Effect on settlements of subsequent discovery of mistake, fraud, etc.

Future Work of The Commission

Whilst endorsing the Report of the Working Group the Commission took the view that the topic should be considered in such a way that the first reading of a draft articles may by completed within the present quinquenniurn. To this end the Commission appointed Mr. M. Bennouna Special Rapporteur for the topic and recommended that he present at the next session a preliminary report on the basis of the outline proposed by the Working Group.

Finally, in response to paragraph 14 of General Assembly Resolution 51/160 the Commission has invited comments on the proposed outline in general and on four specific issues. The specific issues on which the Commission has invited Governments comment upon are:

(i) the scope of the topic

(ii) who can claim diplomatic protection with respect to whom and against whom;

(iii) whether this topic should include protection claimed by international organizations on behalf of their agents; and

(iv) any other issue which should be included in the proposed outline.

6. UNILATERAL ACTS OF STATES

In the report on the work of its forty eighth session the International Law Commission had proposed to the General Assembly that the law of unilateral acts of States be included as a topic for progressive development and codification of international law. By its resolution 51/160 the General Assembly inter alia invited the, ILC to examine the topic "Unilateral Acts of States" and to indicate its scope and content.

At its 49th session the Commission established a Working Group on the topic. The Working Group in its consideration of the scope and content of the topic took the view that the consideration by the Commission, of the Unilateral Acts of States, was advisable and feasible". In its report to the Commission the Working Group observed:

"In their conduct in the international sphere, states frequently carry out unilateral acts with the intent to produce legal effects. The significance, of such unilateral acts is constantly growing as a result of the rapid political;, economic and technological changes taking place in the international community at the present time and, in particular , the great advances in the means for expressing and transmitting the attitudes and conduct of States;

"State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts, there is thus sufficient material for the Commission to analyse and systematize;

In the interest of legal security and to bring about certainty, predictability and stability to international relations and thus strengthen the rule of law , an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law."

Scope and Content of the Stud

It may be recalled that in the General Scheme submitted to the General

Assembly the Commission'had characterized the subject of study as unilateral acts of States that have consequences relating specifically to the sphere of international law.The Working Group accordingly, determined that the topic is the " unilateral acts of States " that are intended to produce Legal effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations. State activities which do not have legal consequences would be ouside the purview of the study. Likewise the questions pertaining to the definition and consequences of internationally wrongful acts, in as much as they are studied under the heading international responsibility, would be beyond the scope of the study.

The fundamental characteristic of unilateral legal acts is their unilateral nature.. They emanate from a single side or from one or several subjects of international law acting unilaterally and the participation of another party is not required While this characteristic leaves Plurilateral international legal acts , such as treaties, outside the scope of the study it does not exclude the collective or joint acts. The collective or joint acts are within the scope of the study in as much as they are performed by a plurality of states not with an intention to regulate their mutual relations but to express as a unitary block the same willingness to produce certain legal effects without any need for the participaation of other subjects or parties in the form of acceptance, recipricity and the like

The title of the topic Unilateral Acts of States implies ruling out from the purview of the study unilateral acts carried out by other subjects of international law particularly "the very important and varied category of such acts by international organizations". Excluded, however, from the scope of the study are such unilateral acts of States as are governed by the law of treaties and do not need to be dealt with further or such acts as have a treaty base.

While the internal acts of States that do not have any effect at the international plane (laws, decrees, regulations etc.) are also proposed to be excluded from the purview of the study such internal acts as have effects on the international plane (Such as those fixing the extent of the various kinds of rnaritirne jiurisdiction) are to be included to the extent that such unilateral acts

create legal situations which are opposable to other States and are permitted by international law.

As regards the content of the study the Working Group considered that the main objective of the study is to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rule that might be relevant for particular types or categories of such acts. The outline of the study prepared by the Working Group is reproduced below.

Outline for the study of unilateral legal acts of States

Chapter 1. Definition of unilateral legal acts of States: Determination of their basic elements and characteristics:

(i) Attribution of the act to a State as a subject of international law;

(ii) Unilateral nature of the act;

(iii) Normative content: expression of will, with intent to produce international legal effects;

(iv) Publicity of the expression of will;

(v) Binding force recognized by international law.

Chapter II. Criteria for classifying unilateral legal acts of States;

(i) In terms of their substantive content and their effects;

(ii) In terms of the addressee (acts addressed to one, several or all subjects of international law);

(iii) In terms of form (written or oral, explicit or tacit).

Chapter III. Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice.

(i) Unilateral promise or engagement;

(ii) Unilateral renunciation;

(iii) Recognition;

(iv) Protest;

(v) Others.

Chapter IV. General rules applicable to unilateral legal acts:

(a) Forms:

(i) Declarations, Proclamations and notifications, written or oral

(ii) Conduct.

(b) Effects:

(i) Binding nature of the unilateral act for the author State;

(ii) Creation of rights for other States;

(iii) Renunciation Of rights of the author State;

(iv) Situations Of opposability and non-opposability.

(c) Applicable rules of interpretation.

(d) Conditions of validity.

(i) Capacity of State organs or agents to perform unilateral legal acts;

(ii) Effects in the international sphere (as opposed to purely internal acts);

(iii) Lawfulness under international law;

(iv) Material possible content;

(v) Publicity;

(vi) Absence of defects in the expression of will.

(e) Consequences of the invalidity of an international legal act:

(i) Nullity;

(ii) Possibility of validation.

(f) Duration, amendment and termination:

(i) Revocability, Limitation on and conditions of the power of revocation and review;

(ii) Amendment or termination because of external circumstances: Termination as a result of fundamental change of circumstances; Termination as a result of impossibility of application; Existence of a new peremptory norm;

(iii) Effects of a succession of States.

Chapter V. Rules applicable to specific categories of unilateral legal acts of States.

Future Work of The Commission

Whilst endorsing the Report of the Working Group the Commission took the view that the topic should be considered in such a way that the first reading of a draft articles may by completed within the present quinquennium. To this end the Commission appointed Mr. V. Rodiriguez - Cedeno Special Rapporteur for the topic and entrusted to him the task of preparing a general outline of the topic which would be included in an initial report to be submitted for discussion in 1998 and which would contain :

(i) a brief description of the practice of States with examples of the main types of unilateral legal acts that are relevant to the study;

(ii) a survey of the consideration of this category of acts by international courts and of the opinions of writers who have dealt with the topic; and

(iii) a detailed scheme for the substantive development of the topic.

Finally, in response to paragraph 14 of General Assembly Resolution 51/160 the Commission has identified four specific issues and invited comments thereon. For proving effective guidance for its further work' on the item Unilateral Acts of States the Commission has invited comments by Governments of Member States on the following matters

(i) the general approach proposed by the working Group to deal with subject matter ;

(ii) the scope and content of the study to be undertaken;

(iii) the plan of work; and

(iv) the final form of the study to be undertaken (whether it should result doctrinal study followed by draft articles and commentaries, general conclusions or recommendations, a guideline for the conduct of States or a combination of these - or other alternatives.

ANNEXURE

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Report of the Sixth Committee[1]

The General Assembly,

Having considered the report of the International Law Commission on the work of its forty-ninth Session[2]

Emphasizing the importance of furthering the progressive development of international law and its codification as a means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[3]

Emphasizing also the role of the International Law Commission in the fulfilment of the objectives of the United Nations Decade of International Law,

Recognizing the desirability of referring legal and drafting questions to the Sixth Committee, including topics that might be submitted to the International Law Commission for closer examination, and of enabling the Sixth Committee and the Commission further to enhance their contribution to the progressive development of international law and its codification,

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1. A\52\648, 25 November 1997.
2. Offcial Records of the General Assembly, Fifty-second Session. Supplement No. 10 (A\52\1 0).
3. Resolution 2625 (XXV), Annex.

Recalling the need to keep under review those topics of international law which, given their new or renewed interest for the international community, may be suitable for the progressive development and codification of international law and therefore may be included in the future programme of 'work of the International Law Commission,

Stressing the usefulness of structuring the debate on the report of the international Law Commission in the Sixth Committee in such a manner that conditions are Provided for concentrated attention to each of the main topics dealt with in the report.

Wishing to enhance further the interaction between the Sixth Committee as a body of govermment representatives and the International Law Commission as a body of independent legel experts, with a view toImproving the dialogue between the two organs,

1 Take note of the report of the International Law Commission on the work of its forty-ninth session and expresses, its appreciation to the Commission for the work accomplished at that session, in particular for the completion of the first reading of draft articles on nationality of natural persons in relation to the succession of States and for the preliminary conclusions on reservations to normative multilateral treaties, including human right treaties;

2. Draws the attention of Governments to the importance, for the International Law Commission, of having their view on all the specific issues identified in chapter III of its report and in particular on:

(a) The draft articles on nationality of natural persons in relation to the succession of States adopted on first reading by the Commission, and urges them to submit their comments and observations in writing by 1 October 1998;

(b) The Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties, including human rights treaties;

3. Recommends that taking into account the comments and

observations of Governments, whether in writing or expressed orally in debates in the General Assembly, the General Assembly, International Law Commission should continue its work on the topics in its current programme;

4. Takes note of the invitation by the International Law Commission to all treaty bodies set up by normative multilateral treaties that may wish to do so to provide, in writing, their comments and observations on the preliminary conclusions of the International Law Commission on reservations to normative Multilateral treaties, including human lights treaties, and takes note of the views expressed by Member States on the matter,

5. Invites Governments to submit comments and observations on the Practical problem raised by the succession of States affecting the nationality of legal persons in order to assist the International Law Commission in deciding on its future work on this Portion of the topic of "Nationality" in relation to the succession Of States";

6. Recalls the importance for the International Law Commission of having the views of Governments on the draft articles on State responsibility adopted on first reading by the Commission at its forty-eighth session in 1996;[4]

7. Takes note of the decision by the International Law Commission to proceed with its work on "International liability for injurious consequences arising out of acts not prohibited by international law", undertaking, as a first step, the issue of prevention, and to reiterate its request to Governments to provide in writing, if they have not previously done so, their comments and observations on the topic of international liability, including the draft articles prepared by the Working Group of the International Law Commission at its forty-eighth session in 1996,[5] in order to assist the Commission in its work on that topic;

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4. Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 and corrigendum (A\51\10 and Corr.1), chap. III, sect.D.

5. Ibid, annex I.

8. Endorses the decision of the International Law Commission to include in its agenda the topics "Diplomatic protection" and "Unilateral acts of States"[6]

9. Welcomes with appreciation the steps taken by the International Law Commission in relation to its internal matters, and encourages it to continue enhancing its efficiency and productivity taking into consideration the discussion held by the General Assembly at its fifty second session;

10. Takes note of the comments of the International Law Commission on the question of a split session for 1998, as presented in paragraphs 225 to 227 of its report;

11. Takes note also of the position of the International Law Commission contained in paragraph 228 of its report on the duration of its future sessions;

12. Ruqests the International Law Commission to continue to pay special attention to indicating in its annual report, for each topic, those specific issues, if any, on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work;

13. Takes note with appreciation of the Commission's ongoing review of its cooperation and relationship with other bodies concerned with international law, and requests the Commission, in consultation with the Secretary-General, to consider further the implementation of article 16, paragraph (e), and article 26, paragraph 2, of its statute;

14. Notes that consulting with national organizations and individual experts concerned with international law may assist Government in considering whether to make comments and observations on drafts submitted by the Commission and in formulating their comments and observations;

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[6] Ibid., Fifty-Second Session, supplement No. (A\52\10), para.221.

15. Reaffirms its Previous decisions concerning the role of the Codification Division of theOffice of Legal Affairs of the Secretariat and those concerning the summary records and other documentation of the International Law Commission;

16. Once again expresses the wish that seminars will continue to be held in conjunction with the sessions of the International Law Commission and that an increasing number of participants from developing countries will be given the opportunity to attend those seminars, appeals to States that can do so to make the voluntary contributions that are urgently needed for the holding of the seminar, and requests the secretary-general to provide the seminars with adequate services, including interpretation, as required;

17. Reuests the Secretary General to forward to the International Law Commission, for its attention, the records of the debate on the report of the Commission at the fifty-second session of the General Assembly, together with such written statements as delegations may circulate in conjunction with their oral statements, and to prepare and distribute a topical summary of the debate, following established practice;

18. Expresses its appreciation to the secretary-general for the organization of a colloquium on the progressive development and codification of international law which was held on 28 and 29 October 1997 in commemoration of the fiftieth anniversary of the establishment of the International Law Commission;

19. Welcomes the decision of the International Law Commission to hold a two-day seminar at Geneva on 22 and 23 April 1998 to celebrate the fiftieth anniversary of the Commission;

20. Recommends that the debate on the report of the International Law Commission at the fifty-third session of the General Assembly commence on 26 October 1998.

VI. THE LAW OF INTERNATIONAL RIVERS

(i) Introduction

The item "Law of International Rivers" was first taken up for consideration by the Asian-African Legal Consultative Committee following a reference made by the Governments of Iraq and Pakistan during the Eighth Session (Bangkok, 1966) of the AALCC. The following year, at the Ninth Session held in New Delhi (1967), the delegate of Iraq in his statement indicated the areas which necessitated a closer scrutiny, viz. (a) the definition of the term "international rivers"; and (b) the rules relating to utilization of waters of international rivers by the States concerned for agricultural, industrial and other purposes, not connected with navigation. At the Tenth Session (Karachi, 1969) after extensive deliberations the AALCC decided to set up a Sub-committee of all Member Governments 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.

The Sub-committee comprising the representatives of the Member Governments of Ghana, India, Indonesia, Iraq, Japan, Jordan, Pakistan, Sierra Leone and Sri Lanka met in New Delhi in December 1969. At that meeting the delegations of Pakistan and Iraq placed before the Sub-committee a set of draft principles consisting of 21 articles. In the subsequent sessions of the AALCC, the sub-committee could not finalize these draft articles due to a few unclear provisions. However, the draft articles were referred to the Member Governments for their consideration. The matter was thereafter discussed at the Eleventh, Twelfth, Thirteenth and Fourteenth Sessions of the Committee. At the Fourteenth Session of the AALCC held in New Delhi in 1973 it was decided that since the International Law Commission (ILC) was actively engaged in considering this topic, its examination could be deferred.

At the request of the Government of Bangladesh the item was reinstated on the agenda of the Twenty-third session of the Committee (Tokyo, 1983). The Government of Bangladesh, in its reference, had proposed that the AALCC could resume the consideration of the item excluding the areas

which were under consideration by the ILC. A view was expressed, on the other hand, that the AALCC could initiate studies relating to regional system agreements concerning the international rivers. However, some Member Governments were of the view that the AALCC should await the finalization of the ILC's work, in order to avoid duplication of work and they were also keen to follow the progress of work in the ILC. In order to accommodate all these views, the AALCC decided to continue the study in the following areas: (a) to identify the areas which were not likely to be covered by the work of the ILC and where it was deemed desirable for the AALCC to undertake a study; (b) to examine the Articles provisionally adopted by the ILC; and (c) to submit a tentative programme of work for the consideration of the Committee.

During the Twenty fourth session, in Kathmandu (Nepal, 1985) the AALCC considered the Secretariat's preliminary report which *inter alia,* indicated five areas for consideration, namely (i) an examination of the draft articles after they were adopted by the ILC and to furnish comments thereon for consideration of the Sixth Committee and possibly before 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 the matter relating to navigational uses and timber floating in international watercourses; (iv) study of other uses of international rivers such as agricultural and navigational purposes; and (v) study of state practice in the region of user agreements and examining the modalities employed in the sharing of waters such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

The AALCC Secretariat continued to monitor the ILC deliberations and presented a report on the ILC's progress of work for the consideration of the Committee at its Twenty-fifth Session (Arusha, 1986). At that Session it was decided that the consideration of this item be confined to the monitoring of the work done by the ILC. At the subsequent Sessions held in Bangkok (1987), Singapore (1988), Nairobi (1989) Beijing (1990) and Cairo (1991) the AALCC Secretariat presented studies which were accordingly confined to the examination of draft articles adopted by the ILC. During the Thirty-first Session (Islamabad, 1992) the Committee considered the Secretariat study

analyzing the ILC draft articles adopted by the Commission on first reading. The Thirty- second Session (Kampala, 1993) considered a study entitled, "The Law of International Rivers: A Preliminary Study Relating to River System Agreements" The Committee then directed the secretariat to examine crucial areas relating to the utilization of freshwater resources.

It may be recalled that the Commission adopted at its Forty eighth session whilst adopting a set of draft articles on second reading also adopted a resolution concerning confined ground waters, that is groundwater not related to an international watercourse,, whereby it recognized the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater and expressed the view that the principles contained in its draft articles on the law of non-navigational uses of watercourses may be applied to transboundary confined groundwater. The resolution recognized that confined groundwater, was also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems. Accordingly, the AALCC Secretariat presented to the Thirty-third Session held in Tokyo in 1994 a study, entitled, "The Law of International Rivers: Normative Approaches to the Sustainability of Freshwater Resources". That brief of documents had dealt with the legislative measures both at the national and international level, to preserve freshwater resources.

The Committee at that session (1994) after consideration of the Secretariat brief of documents expressed its concern at the growing misuse of freshwater resources which constituted only 2 per cent of the global water resources. It also noted with satisfaction the progress of work on the item "Non-navigational Uses of International Watercourses" during its second reading in the ILC.

The Secretariaat brief for the 34th Session (held in Doha, Qatar) 1995 furnished a summary and comments on the draft articles adopted by the ILC after completing the second reading: The major part of the ILC Is discussion and disagreement stem from the extent and definition of "unrelated confined groundwater".

The Secretariat brief had also drawn attention to the resolution on "Draft Articles on the Law of the Non-navigational Uses of International

Watercourses" adopted by the General Assembly at its 49"' Session whereby it had , among other things, taken note of the existence of a number of bilateral treaties and regional agreements and also invited States to submit, not later than 1 July 1996, written comments and observations on the draft articles adopted by the ILC. Further, Resolution 49\52 of 8 December 1994 of the General Assembly had also decided that at the beginning of the 51 " session, the Sixth Committee should convene as a Working Group of the Whole, for three weeks to elaborate a framework Convention on the Law of the Non-Navigational Uses of International Watercourses on the basis of the draft articles adopted by the ILC The Working Group of the Whole was to be open to States Members of the United Nations or members of Specialized Agencies , and fulfilment of its mandate was , apart from the draft articles adopted by the ILC, take into consideration the written comments and observations of States and views expressed in the course of the debate at the forty-ninth session of the General Assembly.

The AALCC at its Thirty-fourth Session *inter alia*. commended the ILC on the adoption of the draft articles on the Non-navigational uses of International Watercourses and urged Member States to consider utilizing the Secretariat Studies and commentaries in furnishing before July 1996 their comments and observations on the draft articles to the United Nations. The Committee requested the United Nations General Assembly to consider adopting a Convention on the Law of the Non-Navigational uses of International Watercourses on the basis of the draft articles adopted by the International Law Commission and the comments made thercon by the Member States. It also directed the AALCC Secretariat to report to the 36"' Session of the Committee of the outcome of the consultations at the Fifty-first Session of the General Assembly.

The Secretariat study prepared for the Thirty sixth Session held in Tehran, in May 1997, among other things recounted the history of consideration of the item by the Committee and furnished an overview of the work of the Working Group of the Whole on the Draft Framework Convention on the Non Navigational Uses Of International Watercourses established by the Sixth Committee.

The Committee at that session took note of the Secretariat report . At the request of the Delegate of Bangladesh the Committee directed the Secretariat to continue to monitor the progress in respect of the Framework Convention on the Non Navigational Uses Of International Watercourses as adopted by the Working Group of the Whole established by the Sixth Committee.

Thirty Seventh Session : Discussion

The Assistant Secretary General Mr. Asghar Dastmalchi introduced the above topic and stated that the item "Law of International Rivers" had been on the agenda of the Committee since 1966, following a reference made to the Committee at the Eighth Session by the Goveniments of Iraq and Pakistan. Subsequently, a reference was made to outline the areas which needed closer scrutiny namely (a) definition of the terms "International Rivers", and (b) rules relating to utilizatioin of waters of International Rivers by the States concerned for agricultural industrial and other purposes not connected with navigation. A Sub-Committee had been constituted at the Tenth session to prepare draft articles on this item in the light of experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilization and legal systems. However, these draft articles could not be finalised due to lack of conscnsus on some of the provisions.Meanwhile, the International Law Commission was actively engaged in considering this topic and it was therefore decided that Committee defer the examination of the topic.

Thereafter in 1983 at the Tokyo Session, this item was again placed on the agenda of the Committee at the request of the Government of Bangladesh. In its request the Government of Bangladesh had suggested that the Committee could resume the consideration of the item excluding the areas which were under consideration by the ILC. Following this request, the AALCC Secretariat undertook the preparation of a number of briefs of documents for consideration at the sessions of the Committee.

Upon a decision taken at the 25th Session of the Committee, (Arusha, 1986) the Secretariat confined itself to monitoring the progress of the

ILC. Accordingly, the Secretariat prepared studies analysing the ILC draft articles till the 31st Session. It may be mentioned that at the 32nd Session of the AALCC held in Kampala following the consideration of the brief on River System Agreements the AALCC directed the Secretariat to examine crucial areas relating to the utilization of freshwater resources.

The item was also considered at the 36th Session of the AALCC held in Tehran in 1997. The brief, among other things, recounted the history of consideration of the item by the Committee and furnished an overview of the work of the Working Group of the Whole on the Draft Framework Convention on the Non Navigational Uses of International Watercourses.

At the 36th Session Ambassador Chusei Yamada, the Chairman of the Working Group of the Whole had reported that the Working Group had concluded its work and agreed on the text of the draft convention on the subject. The Committee at that session took note of the report prepared by the Secretariat and at the request of the Delegate of Bangladesh, directed the Secretariat to continue to monitor the progress in respect of the Framework Convention on the Non Navigational Uses of International Watercourses as adopted by the Working Group of the Whole established by the Sixth Committee.

The Assistant Secretary General also stated that the Convention aimed at guiding States in negotiating agreements on specific watercourses was adopted by the General Assembly by its resolution 51\229 of 21 May 1997. By a vote of 103 for 3 against and the 28 abstentions the General Assembly inter alia invited States and regional economic integration organizations to become parties to it. The Convention shall be open for signature by all States and by regional economic integration organizations until 20th May 2000 at the United Nations Headquarters in New York.

He also said that the Convention governs the non-navigational uses of international watercourses, as well as measures to protect, preserve and manage them. "Throughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles. It may be

stated in this regard that the work of the Commission on the International Watercourses has had a major influence on the development of law in other fields, in particular, the ongoing work of the International law Commission on the subject of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law". The draft articles on the Non Navigational Uses of International Watercourses as adopted by the International Law Commission have influenced the drafting of such specific agreements as the 1995 Protocol on Shared Watercourse Systems in the South African Development Community Region and the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River basin.

Outlining some of the salient features of the Convention he stated that the preamble to the Convention, inter alia, expresses the conviction that a "framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations.."

Viewed as a framework Convention, it provides general principles and rules to guide States in negotiating future agreements on specific watercourses. It is understood, however, that the Convention is to serve as a guideline for future watercourse agreements and unless such future watercourse agreements provide otherwise the Convention will not alter the rights and obligations provided therein. The concept of preservation as referred to in Article 1 of the Convention, relating to the "Scope of the Convention", is understood to include also the concept of conservation. The Convention addresses such issues as flood control, water quality, erosion, sedimentation, saltwater intrusion and living resources' ' One of the many statements of understanding that the Chairman of the Working Group of the Whole took note of during the course of elaboration of the Convention on the Law of the Non-Navigational uses of International Watercourses is that the Convention is inapplicable to the use of living resources that occur in international watercourses, except to the extent provided for in Part IV and except insofar as other uses affect such sources.

The Convention defines the term "Watercourse" broadly as a system

of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus" and then goes on to define an international watercourse to mean a "watercourse parts of which are situated in different States". While this definition is in accord with hydrological reality and calls the attention of States to the inter-relationship among all parts of the system of surface and underground waters that make up an international watercourse and suggesting thereby that an affect on one part of the watercourse system would be transmitted to the other, two States cited the inclusion of groundwater as a reason for abstaining from the vote on the draft Convention.

Article 2 of the Convention defines the term watercourse State" to mean a State Party to the Convention "in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated". In the Working Group of the Whole it was understood that the term "watercourse States" is employed in the Convention as a term of art. "It was recognized that although it is stipulated that both States and regional economic integration organizations can fall within the definition nothing in that paragraph could be taken to imply that regional economic integration organizations have the status of States in international law.

Finally, he stated that, the adoption of the Convention, had made a significant contribution to the progressive development of international law and its codification. Such elements of the Convention as equitable and reasonable utilization, no harm, and prior notification reflect the codification of some existing norms.

The Delegate of India while commenting on the framework Convention on NonNavigational uses of Inteniational Watercourses as adopted by the Working Group on the Whole established by the Sixth Committee stated that the status of the convention can be compared at best with a Model Legislation which is available for utilization according to each States own particular requirements. In his view this Framework Convention is not a properly balanced piece of legislation. He specifically commented on Articles 3, 5, 32

and 33., Article 3 he felt had deviated from the principle of freedom of autonomy. Article 5 had not been drafted in clear terms, and would thus present difficulties in implemenation of the Convention. Article 32 according to him presupposes economic integration of States, and should not have been included in the Convention. His most substantive comment was on Article 33 which dealt with the dispute settlement mechanism, according to him the creation of a fact finding commission, curtailed to a large extent the option by which parties could mutually agree upon who could settle their disputes and in effect this third party dispute settlement would in effect be a settlement without (the consent of the States Parties to the dispute. On ground of Article 33 his country had abstained from voting for the Convention. The Delegate expressed the view that now when the United Nations had adopted the framework. Convention, there was no need for tile AALCC to study the subject any further.

The Delegate of Nepal congratulated the President and Vice President on their election and thanked the Government of India for hosting the 37th Session of the Committee. He also paid tribute to Dr. M. Javad Zarif for his excellent contribution as President for the 36th Session. While supporting the views of the Delegate of India he said that the Convention had not gained wide support from the U.N. Member States and this was clear due to the fact that only 103 States had voted for the convention. The number of ratifications required for the convention to come into force was 35 which meant only 18% of the total membership of the UN. Thus he felt there was need for the Asian African States to be very cautions while becoming parties to the Convention.

The Delegate of Egypt supported the views expressed by Indian Delegate and said that any framework convention \ agreement provided only guidelines to Member Countries to be able to conclude bilateral or multilateral agreements. He agreed witli the views expressed by the Delegate of Nepal and cited his country's reason for abstention from the convention, they were also based on Articles 3, 5 and 33. He expressed the view that as the Framework Convention had been adopted, for the present, he did not see any further role for the AALCC. But if need arose in future, he felt, the subject could always be studied again.

The Vice President while summing the debate on the item stated that because a Framework Convention had been adopted, it was for each Member State to take its position individually. Therefore it was decided to remove the item from the agenda.

(ii) Decision on the "The Law of International Rivers"

(Adopted on 18.4.98)

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

Taking note of the Report of the Secretary General on the item "Law of International Rivers" set out in Doc.No.AALCC\XXXVII\ New Delhi \98\ S.8;

Having heard the comprehensive Statement of the Assistant Secretary General

Taking cognizance of the resolution of the General Assembly adopted at its 51st Session on the Convention on the Non-navigational Uses of International Watercourses;

1. **Commends** the General Assembly for having adopted the Convention on the NonNavigational uses of International Watercourses;

2. **Expresses appreciation** for the work of the Secretariat on the item;

3. **Decides** to conclude the work on the subject.

(iii) Secretariat Study : Law of International Rivers

The Working Group Of The Whole

It may be recalled that the General Assembly at its 49th Session noting that the ILC had, inter alia, recommended the elaboration of a Convention, by the Assembly or by an international conference of plenipotentiaries, on the basis of the draft articles on the law of nonnavigational uses of international watercourses, had decided that at the Fifty-first Session of the General Assembly, the Sixth Committee should convene as Working Group of the Whole for three weeks to elaborate a Framework Convention on the Law of Non-Navigational Uses of International Watercourses. It also decided that the item be included in the provisional agenda of its fifty-first session.[1]

At that session the General Assembly also decided that the Working Group of the Whole follow the methods of work and procedures outlined in the Annex to its resolution.. The Annex to resolution 49\52 had stipulated that the draft articles prepared by the ILC shall be the basic proposal before the Working Group of the Whole (hereinafter simply referred to as the Group). The Assembly had recommended that the Group start with a discussion of the draft articles on an article-by-article basis, without prejudice to the possibility of considering simultaneously closely connected articles, and to reserve its decisions on draft article 2 "Use of terms", for the concluding stages of the work. The Group was to establish a Drafting Committee to which each article or group of articles was to be referred for examination in the light of the discussion. The Drafting Committee was to make its recommendations to the Working Group of the Whole in relation to each article or group of articles. It was also to prepare, for approval by the Working Group, a draft preamble and a set of final clauses. The Working Group was to endeavour to adopt all texts by consensus failing which it was to take its decisions in accordance with the rules of procedure of the General Assembly.

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[1]. See General Assembly Resolution 49/52 of 9 December 1994.

In accordance with paragraph 3 of resolution 49\52 the Sixth Committee at its 51st session convened as a Working Group of the Whole, open to States Members of the United Nations or Members of Specialized Agencies to elaborate a framework Convention on the Law of Non-Navigational uses of International Watercourses on the basis of draft articles adopted by the ILC and in the light of written comments and observations of States as well as views expressed in the debate at the forty ninth session.

The Working Group functioned for three weeks from 7th to 25th October 1996. At its first meeting the Working Group inter alia elected Ambassador Chusei Yamada (Japan) as Chairman and Ambassador Lammers (Netherlands) as the Chairman of the Drafting Committee. Mr. Robert Rosenstock who had been the Special Rapporteur when the ILC had adopted the draft articles on the topic had, in accordance, with General Assembly Resolution 49\52, been invited by the Secretary General to takea place at the Committee table as an expert consultant.

It may be stated that the division of labour between the Working Group and the Drafting Committee was quite clear. While the former was to establish general principles the latter was to concentrate on drafting the provisions. Following informal consultations with the representatives of the Permanent Missions to the United Nations , convened by the Legal Counsel , it had been agreed that to facilitate the work of the Working Group no simultaneous meetings of the Working Group and the Drafting Committee should be held.

It may be recalled that the set of 33 draft articles on "The Law of the Non-Navigational Uses of International Watercourses" together with commentaries thereto, adopted by the ILC on second reading had been arranged in six parts. Part 1 of the draft articles entitled **"Introduction"** comprised draft articles 1 to 4. Part II of the draft articles addressed the **"General Principles"** of the Law of the Non-Navigational uses of International Watercourses and comprised draft articles 5 to 10. Part IIIof the draft articles embodied the text of draft articles 1 1 to 19 and addressed the question of "**Planned Measures**". The provisions relating to the **"Protection, Preservation and Management"** of Non-Navigational Uses of International Watercourses were set out in draft articles 20 to 26 and

constituted Part IV of the draft articles. The text of two draft articles 27 and 28 addressed to "**Harmful Conditions and Emergency Situations**" comprised Part V of the draft articles. Finally Part VI of the draft articles comprising of draft articles 29 to 33 set forth the "**Miscellaneous Provisions**".

It may be stated in this regard that the AALCC Secretariat has provided a commentary on these draft articles. Since Arusha Session of the AALCC in 1986, apart from commenting on the draft ILC articles the Secretariat has been preparing studies on the various legal aspects of the non-navigational uses of the international watercourses. It has also provided as and when necessary, detailed commentaries.[2]

The Working Group deemed it prudent to divide the draft articles into clusters for the purpose of discussions in the Working Group. Accordingly, the Working Group appears to have divided the 33 draft articles adopted by the ILC into five clusters viz.;cluster I comprised of draft articles 1, 3 and 4: cluster II comprising draft articles 5 to 10; cluster III consisting of draft articles 11 to 19 and 33; cluster IV consisting of draft articles 20 to 28 and cluster V comprising draft articles 29 to 32 and 2.

Part I of the draft articles referred to as cluster I by the Working Group addressed the question of the protection of international watercourses from the adverse effects of human activities. This cluster of draft articles addressed the scope of the draft articles (Article 1), the "Use of Terms" (Article 2); "Watercourse agreements (Article 3); and "Parties to watercourse agreements" (Article 4).

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[2]. Following are the studies prepared by the AALCC Secretariat since the resumpation of the Tokyo (1983) session: The Law of International Rivers: Normative Approaches to Sustainability of Fresh Water Resources (Tokyo, 1994) The Law of International Rivers: A Preliminary Study Relating to River System Agreements (Kampala, 1993) The Law of International Rivers(Islamabad, 1992) The Law of International Rivers: A Preliminary Report and an outline on Tentative Programme of Work (Arusha, 1986)

In the course of deliberations in the Working Group it was pointed out that draft article 1 on the scope of the articles (i) excluded the navigational uses of such watercourses; (ii) did not establish rules on conservation and management of living resources of international watercourses; and (iii) was non-protective. However, though Article 1 of the draft article rightly omitted the question of navigational uses, paragraph 2 of draft article 1 touched on the issue by stipulating that the use of international watercourses for navigation uses be included in the scope if "other uses affect navigation or are affected by navigation". Such an approach gave priority to the draft articles in the application of rules related to mixed uses involving both navigation and other water uses simultaneously. To avoid complications it may be preferable to either exclude the navigational issue altogether or to ensure that the problems of mixed use stipulated in paragraph 2 did not fall solely within the scope of the draft articles. It was proposed that the term "protection" be inserted before the phrase "Conservation and management" in paragraph 1 of that draft article to reflect the nature of the measures covered by Part IV of the draft articles relating to the protection, conservation and management of international watercourses

As regards draft article 3 on Watercourse Agreements it was pointed out that while it took into account the possibility that "Watercourse states may enter into one or more watercourse agreements" the relationship between such watercourse agreements and the draft articles i.e. the draft framework convention remained unclear. It was unclear whether the framework convention would apply only to watercourse agreements concluded prior to the entry into force of the proposed framework convention. The purpose of the framework convention was not to supplement existing agreements but to facilitate their implementation. To eliminate any ambiguity in this regard it was proposed that a separate article entitled "Relation to other International Agreements" be included in the draft articles. The proposed article, would read "This convention shall not alter the rights and obligations of States that arise from other bilateral, regional or subregional agreements already in force between them".

As to conservation and management of living resources such as fish it was pointed out that had the draft articles intended to establish rules on the conservation and management it would have included numerous regulatory

provisions for such activities. The view was expressed that conservation and management of living resources did appear to fall within the broad definitional scope of article 1 paragraph 1. It was proposed that a paragraph be added to draft article 1 to clarify the issue. The proposed addition read "This convention does not apply to the conservation and management of living resources that occur in international watercourses except to the extent provided for in Part IV and except insofar as other uses affect such resources".

As regards the Second cluster of articles, Articles 5 - 10, comprised Chapter II on the General Principles of the draft articles as adopted by the ILC, it was stated that it was important to codify the most recent developments in international law in the area Of sustainable development and that the Principle Of sustainable development should be set forth in that article. The delegates of Finland, Germany, Hungary, Netherlands and Portugal, South Affica, and Venezuela shared the view that thePrinciple Of sustainable development should be incorporated into the draft articles.

As to Cluster IV (Articles 20 - 28) the articles had been drafted with a view to both dealing with existing Pollution and Preventing pollution in the future. Article 22 did not deal with the introduction of all alien or new species into a watercourse, but only with those that might have a detrimental effect on the watercourse ecosystem. In article 24, where the concept of Sustainable Development was introduced, "management" was not obligatory. Articles 25 and 26 stressed the importance Of cooperation in regulating water flow and Protecting installations.

With regard to the third cluster of articles, (Articles 1 1 to 32) intended to ensure that there was a reasonable flow of information and reasonable opportunities for consultation and negotiation, a view was expressed that the Procedure outlined in Part III of the draft articles was too rigid. It was stated in this regard that it would benefit from being flexible, interactive and participotry as agreements between watercourse States could not be expected to coincide with the procedural steps outlined in the draft articles. Thus while one delegate deemed the obligations laid down in that part to be inflexible as in his opinion the obligations concerning notification and information could be interpreted differently by different countries. others, however, were of the view that this

Part of the draft articles established some of the least burdensome obligations in the field of environmental law and opposed attempts to further narrow the scope of these provisions.

The spirit of compromise among watercourse States might not always be present when a dispute arose, the draft articles should provide for a system of compulsory third-party settlement. Arbitration or other Judicial settlement procedures should not be subject to further agreement between the States concerned.

The question of the peaceful settlement of disputes was considered to be of vital importance for the codification and progressive development of international law, especially in cases where States, because of geographical or other reasons, shared a natural resource. Article 3, paragraph 2, and articles 11 to 19 of the draft dealt with situations in which a new activity planned by one or more watercourse States threatened to cause significant harm to other watercourse States. Several delegations had suggested that the fixed period for notification in such cases should be replaced by a reasonable period of time; an independent third party would clearly be in the best position to assess whether a given period was reasonable. That issue must be resolved rapidly and satisfactorily; otherwise, a watercourse State could block the legitimate uses of a watercourse by other States for an indefinite period.

Three-step procedure was proposed consisting of first, consultations and negotiations; second, if such consultations and negotiations did not take place within a fixed period of time, each State party could unilaterally initiate a conciliation procedure; and third, if the conciliation procedure failed to resolve the dispute within a given period, and if all States parties to the dispute had accepted the jurisdiction of the International Court of Justice, -the earliest petitioner could submit the dispute to the Court. Otherwise, that same party could unilaterally initiate an arbitration proceeding, the details of which would be worked out at a later stage.

Despite its best efforts, the Working Group could not in the time allocated to it complete its consideration of the entire set of draft articles and

submitted its report to the Sixth Committtee. Following consideration of the Report of the Working Group the General Assembly inter alia decided to convene a Second Session of the Working Group of the Whole of the Sixth Committee for a period of 2 weeks from 24 March to 4 April 1997 to elaborate a framework convention on the law of non-navigational uses of international watercourses. It also decided that on the completion of its mandate the Working Group of the Whole shall report directly to General Assembly.

Pursuant to the aforementioned resolution of the General Assembly adopted at its 51st Session the second session of the Working Group of the Whole of the Sixth Committee was convened in New York from 24 March to 1997 to elaborate the framework Convention on the Law of Non-Navigatioial uses of International Watercourses. It held 12meetings during the period and the Drafting Committee held 6 meeting from 24th to 27th March 1997.

Convention on the Law Of the Non-Navigational Uses of International Watercourses

The Convention on the Law of the Non-Navigational uses of International Watercourses aimed at guiding States in negotiating agreements on specific watercourses was adopted by the General Assembly by its resolution 51/229of 21 May 1997. By a vote of 103[3]

[3]. Albania, Algeria, Angola, Antigua and Barbuda, Armenia, Australia, Austria, Bahrain Bangladesh, Belarus, Botswana, Brazil, Brunei Darussalam,Burkina Faso, Cambodia, Cameroon, Canada, Chile, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti,Estonia, Federated States of Micronesia, Finland, Gabon, Georgia, Germany, Greece,Guyana, Haiti, Hondurass, Hungary,Iceland, Indonesia, Iran, Ireland,Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lao Peoples Democratic Republic, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Malta, Marshall Islands Mauritius,Mexico, Morocco, Mozambique,Namibia, Nepal, Nehterlands, New Zealand, Norway, Oman, Papua New Guinea,Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania,Russian Federation, Samoa, San Marino, Saudi Arabia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Sudan, Suriname, Sweden, Syria, Thailand Trinidad and Tobago, Tunisia, Ukraine,United Arab Emirates, United Kingdom, United States, Uuguay, Venezuela Viet Nam, Yemen and Zambia.

economic integration organizations to become parties to it. The Convention shall be open for signature by all States and by regional economic ingration to 3[4] and 28 abstentions[5] the General Assembly inter alia invited States and regionalorganizations until 20thMay 2000 at the United Nations Headquarters in New York[6]

Paragraph 1 of Article 36 of the Convention stipulates that it will "enter into force on the ninetieth day following the date of deposit of the thirty -fifth instrument of ratification acceptance approval or accession with the Secretary General of the United Nations. " Although this figure was settled upon after a debate and indicative vote in the Working Group[7], a view has been expressed that the number of 35 represents a mere 18 per cent of the Organization's current membership of 185 States and that it represented a figure that was even lower if regional economic integration organizations were taken into accounts[8]

The set of 37 articles and the Annex thereto comprising the Convention on "The Law of the Non-Navigational Uses of International Watercourses" as adopted by the General Assembly is arranged in seven parts. Part 1 of the Convention entitled "**Introduction**" comprises articles 1 to 4. Part II of the Convention addresses the **"General Principles"** of the Law of the Non-Navigational uses of International Watercourses and comprises articles 5 to 10. Part 111 of the Convention addresses the question of **"Planned Measures"**and embodies the text of articles 11 to 19 . The provisions relating

[4]. The three States which voted against were Burundi, china and Turkey

[5]. Andorra, Argentina, Azerbaijan Bolivia, Bulgaria, Colombia, Cuba, Ecuador, E gypt France,Ghana, Guatemala,India,Israel, Mali, Monaco, Mongolia Pakistan, Panama, Paraguay, Peru,Rwanda, Spain,United Republic of Tanzania,Uzbekistan.The following were absent: Afghanistan, Bahamas, Barbados, Belize, Benin, Bhutan, Cape Verde, Comoros,Democratic People's Republic of korea, Dominican Republic, El Salvador, Eriteria, Fiji, Guinea, Lebanon, Mauritania, Myanmar,Niger, Nigeria, Palau, Saint Kitts and Saint Lucia, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Sri Lanka, Swaziland, Tajikistan, former Yugoslav Republic of Macedonia, Turkmenistan, Uganda Zaire and Zimbabwe

[6] Press Release GA/9248

[7] The options before the Working Group were 22, 30, 35or 60 ratifications.

[8] For details see the statement of the representative of the United Republic of Tanzania made at the 99th Plenary Meeting of the 52nd Session of the General Assembly on 21 May 1997.

to the "**Protection, Preservation and Management**" of Non-Navigational Uses of International Watercourses are set out in articles 20 to 26 and constitute Part IV of the Convention. The text of articles 27 and 28 address the issues of "**Harmful Conditions and Emergency Situations**" and comprise Part V of the Convention. Part VI of the Convention comprising articles 29 to 33 set forth the Miscellaneous Provisions . Finally Part VII sets out the "Final Clauses" of the Convention on the Law of Non-Navigational Uses Of International Watercourses. The Annex to the Convention makes provision for resolution of disputes and sets forth procedures to be employed in the event that the parties to a dispute have agreed to submit it to arbitration.

The Convention, based on the draft articles prepared by the International Law Commission[9] governs the non-navigational uses of international watercourses, as well as measures to protect, preserve and manage them. It may be stated in this regard that the work of the Commission on the International watercourses has had a major influence on the development of law in other fields , in particular, the ongoing work of the international Law Commission on the subject of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law." The draft articles on the non navigational uses of international watercourses as adopted by the International Law Commission have influenced the drafting of such specific agreements as the 1195 Protocol On Shared Watercourse Systems in the South African Development Community Region and the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin[10]

The preamble to the Convention, *inter alia,* expresses the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and

[9] The Report to theWorking Group to the General Assembly points out that "Throughout the elaboration of the draft Convention, reference has been made to the commentaries to the draft articles prepared by the to clarify the contents of the articles." *See Convention on The Law of The Non- Navigational Uses of International Watercourses : Report of the Sixth Committee as the Working Group of the Whole, A/51/869.*

[10] For the text of the Agreement see 34 International *Legal Materials* (1995) p864

the promotion of the optimal and sustainable utilization thereof for present and future generattions.."

Viewed as a framework Convention, it provides general principles and rules to guide States in negotiating future agreements on specific watercourses. It is understood , however, that the Convention is to serve as a guideline for future watercourse agreements and unless such future watercourse agreements provide otherwise the Convention will not alter the rights and obligations Provided therein . The concept of preservation as referred to in Article 1 of the Convention, relating to the "Scope of the Convention ", is understood to include also the concept of conservations[11] It addresses such issues as flood control, water quality, erosion, sedimentation, saltwater intrusion and living resources. One of the many statements of understanding that the Chairman of the Working Group of the Whole took note of during the course of elaboration of the Convention on the Law of the Non-Navigational Uses of International Watercourses is that the Convention is inapplicable to the use of living resources that occur in international watercourses , except to the extent provided for in Part IV and except insofar as other uses affect such sources[12].

The Convention defines the term " Watercourse" broadly as a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus [13] and then goes on to define an international watercourse to mean a "watercourse parts of which are situated in different States[14]. While this definition is in accord with hydrological reality and calls the attention of States to the inter-relationship among all parts of the system of surface and underground waters that make up an international watercourse and suggesting thereby that an affect on one part of the watercourse system would be transmitted to the other, two States viz. Pakistan and Rwanda cited the inclusion groundwater as a reason for abstaining from the vote on the draft Convention.

[11] *See Convention on The Non- Navigational Uses of'International Watercourses Report of the .Sixth Committee as the Working Group of the Whole, A/51/869.*

[12] Ibid.

[13] See Article 2(a) of the Convention.

[14] See article 2 (b) of the Convention.

Article 2 (c) of the Convention defines the term "watercourse State" to mean a State Party to the Convention "in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated." In the Working Group of the Whole it was understood that the term "watercourse State" is employed in the Convention as" a term of art. " It was recognized that although it is stipulated that both States and regional economic integration organizations can fall within the definition nothing in that paragraph could be taken to imply that regional economic integration organizations have the status of States in international law.

The adoption of the Convention, it is felt, makes a significant contribution to the progressive development of international law and its codification. Such elements of theConvention as equitable and reasonable utilization[15] no harm",[16] and prior notification[17] reflect the codification of some existing norms. While paragraph 1 of Article 5 on "Equitable and reasonable utilization and participation" sets forth the cornerstone of the law on the subject, the provisions of Paragraph 2 thereof reflect the acceptance of a new concept of equitable and reasonable participation.[18]

Although the Convention is, at the present time, the only Convention of a universal character on international watercourses, the representative of a number of States, who abstained or voted against the text of the Convention drew attention to a lack of consensus on several of its key provisions. For one, the representatives of some States were of the view that the Convention does not adequately balance the rights and obligations of the upstream and downstream riparian States. The view was expressed that while a framework

[15] See Article 5of the Convention on Equitable and reasonable utilization and participation

[16] See Article 7 of the Convention on the Obligation not to cause significant harm.

[17] See Part III of the Convention in particular Articles 1 1 and 12

[18] Paragraph 2 of Article 5 stipulates " Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation shall includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention."

convention should provide general principles, the present Convention had deviated from that approach. In this regard attention was drawn to the provisions governing dispute settlement. Secondly, it was felt that a Framework Convention should not incorporate compulsory rules regarding the settlement of disputes, but should be left to the discretion of States concerned.

VII. RESERVATION TO TREATIES

(i) Introduction

The item "Reservation To Treaties' was placed on the provisional agenda of the Thirty seventh session of the AALCC in accordance with Article 4 (d) of the Statutes of the Committee. At a meeting of the Legal Advisors of Member States held in New York in October 1996, during the Fifty first session of the General Assembly, a view was expressed that the AALCC Secretariat consider convening a Seminar on the Law of Treaties. The proposal was advanced in view of the consideration of the question of" The Law and Practice Relating to the Reservation of Treaties" on the work program of the International Law Commission(ILC). The Secretary General had in his Report on the Organizational, Administrative and Financial Matters submitted to the 36th Session of the Committee, (Tehran) indicated that the Secretariat proposed to convene a Seminar on the Question of Reservation to Treaties.

The item was thereafter placed on the agenda of the Meeting of the Legal Advisers of Member States of the AALCC convened at the United Nations Office in New York on 29th October 1997. The Background Note prepared by the Secretariat for that meeting pointed out that the Commission at its 49th Session had adopted a set of Preliminary Conclusions on Reservations to normative Multilateral Treaties Including Human Rights Treaties. In the course of the consideration of the Preliminary Conclusions a view had been expressed that the Commission was faced with a contradiction in that it was just commencing its work on the topic and did not know where that work might take it.

The set of preliminary conclusions on Reservations to Normative Multilateral Treaties including Human Rights Treaties adopted by the Commission at its 49th session reiterates that articles 19 to 23 of the Vienna Convention on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the object and purpose of the treaty is the most important criteria for determining the admissibility of reservations. The Commission has taken the view that the regime of the Vienna Conventions strikes a balance

between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty. It accordingly considered the flexibility of that regime to be suited to all treaties, of what ever nature or object.

At the Meeting of the Legal Advisers of Member States held in New York in October 1997 one Legal adviser expressed the view that the Vienna treaty regime was complete and flexible. The customary law of reservation to treaties, it was stated, provided sufficient basis to append reservations to treaties when a sovereign State considers that its interests are affected. Apropos, the monitoring mechanism of human rights instruments the view was expressed that while conducting periodical review appeared to be a reasonable and effective system there was no apparent unacceptable or gross flaw.

Another Legal Adviser while expressing support for an in depth study of the question of reservation of treaties wondered why only the question of reservations to normative treaties including human rights treaties had been taken up by the ILC. There was general support for a seminar or special meeting on subject of the reservation to treaties.

Accordingly the Secretariat proposed to convene a Special Meeting on the question of Reservations to Treaties during the course of the Thirty seventh session of the AALCC. The Special Meeting was proposed to be organized in collaboration with the Office of the Legal Counsel of the United Nations, the Treaties Division of the United Nations and the International Law Commission. It may be recalled in this regard that Special Meetings on the Establishment of an International Criminal Court and the Inter-related Aspects Between the International Criminal Court and International Humanitarian Laws were organized during the 35th and 36th Sessions of the AALCC held at Manila in (1996) and Tehran (1997) respectively and had been considered to be quite useful.

[1] For Details see The Report of the Secretary General on the Meeting of the Legal Advisers of Member States. Doc.*No*. AACC/XXXVII/New Delhi/98/S3

The views of Member States on the issue of reservation to treaties expressed during the Special Meeting together with any report or recommendation that the Committee may adopt at its 37th Session could be forwarded to the ILC which had invited comments on the preliminary conclusions adopted on the Reservations to Normative Multilateral Treaties, including human rights treaties.

A Historical Setting

The traditional rule was that a State could not make a reservation to a treaty unless the same was accepted by the States which had signed or adhered to the treaty. Thus generally speaking reservations could only be made with the consent of other States involved in the treaty making process. This was to preserve the unity of approach and to minimize deviations from the text of the treaty.

A reservation to a bilateral treaty is in effect a new proposal reopening the negotiations between the two States concerning the terms of the treaty and unless agreement can be reached about the terms of the agreement, no treaty will be concluded. In the case of a multilateral treaty the problem is more complicated since the reservation may be accepted by some States and rejected by others.

In1927 the League of Nations had adopted the following approach to reservations with regard to multilateral treaties:

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void"[2]

[2] See the Report of League of Nations Experts For The Progressive Codification Of International Law 8 L.N.O.J. (1927) p.880 and 881 quoted in D. J. Harris: Cases and Materials on International Law 3rd edition p.586 (1983).

To begin with the Secretary General of the United Nations applied the somewhat rigid system which followed the practice of the Secretary General of the League of Nations. Where there existed an organ capable of determining the effects of a reservation, the Secretary General referred the text to it for interpretation. Thus, in 1948 the Secretary General informed the States Parties to the Constitution of the World Health Organization (WHO), that he was unable to decide whether the United States of America had become a party to that Convention by depositing an instrument containing a reservation. He had also pointed out that the World Health Assembly was competent to interpret the Constitution of the WHO.[3]

The question of determination of the legal effects of reservations to a treaty and the objections to reservations first arose when the Secretary General of the United Nations found it difficult to determine whether or not the Convention on the Prevention and Punishment of the Crime of Genocide[4] would enter into force in accordance with the provisions of Article XIII thereof[5]. The Secretary General reported the difficulty to the General Assembly which at its fifth session invited the ILC in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary General is the depository. The report of the Commission was to be considered by the General Assembly at its sixth session. The General Assembly also requested the International Court of Justice for an advisory opinion.[6]

[3] The Secretary General later announced that the United States had become a party to the Convention since theWorld Health Assembly had unanimously recognized that the reservation was not incompatible with the Constitution of the World Health Assembly

[4] The Convention was adopted by General Assembly Resolution - of 9 December 1948.

[5] The Convention was to have entered into force on the 19th day after the date of deposit of the 20th instrument of ratification or accession. However, a number of the 20 instruments of ratification had contained reservations as to various articles of the Convention to the substance of which

[6] General Assembly Resolution 478(V) of 16 November 1950. The text of the resolution is reproduced in Annexure I

It may be mentioned that the request of the General Assembly had been posed in the following terms :

> "In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:
> "I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
> "II. If the answer to question is in the affirmative, what is the effect of the reservation as between the reserving State and:
> "(a) The parties which object to the reservation?
> "(b) Those which accept it?
> "III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:
> "(a) By a signatory which has not yet ratified?
> "(b) By a State entitled to sign or accede but which has not yet done so?";

In its Advisory Opinion of 28th May 1951 the International Court of Justice[7] inter alia said that

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

On Question I

That a State which has made and maintained a reservation which has

[7] The Opinion was rendered by a vote of seven to five The Judges in the majority were President Basdevant; Judges Hackworth: Waniarski,Zoricie;deVisscher; Klaested and Badawi Pasha. The dissenting judges were VicePresident Guerrero; Judges Alvarez; Sir MeNair, Read and Hsu Mu.

been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to theConvention.

On Question II.

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to *Question I* only upon ratification.Until that moment it merely serves as a notice to the other State of the eventual attitudeof the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

Thus the traditional or "restrictive" approach to reservations was rejected by the International Court of Justice in its advisory opinion in the *Reservations to the Genocide Convention case*, where the Court held that "a State which had made and maintained a reservation which has been objected to by one or more parties to the Convention but not by others, can be regarded as being a party to the convention if the reservation is compatible with the object and purpose of the Convention[8] otherwise , that State cannot be regarded as being a party to the Convention.

[8]. Compatibility in the Court's opinion could be decided by States individually, since it stated that "if a party to the convention objects to a reservation which it considers incompatible with the object and purpose of the convention it can in fact consider that the reserving State is not a party to the Convention".

Thereafter the General Assembly by its resolution 598 (V1) inter alia recommended that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them. It also recommended to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951; By its operative paragraph 3 the General Assembly requested the Secretary-General:

"(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depository:

(i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each state to draw legal consequences from such communications."

Thirty-Seventh Session : Discussion
Report Of The Special Meeting On Reservation To Treaties Held On 14th April, 1998

The Special Meeting on the 'Reservation To Treaties' was convened during the Thirty Seventh Session of the AALCC. The Special Meeting was chaired by the President Dr. P.S. Rao and it was understood that the Bureau of the thirty seventh session would also be the Bureau of the Special Meeting .Thus, Mr.Martin A.B.K Amidu, the Deputy Minister of Justice and the Deputy Attorney General of Ghana, who had been elected the Vice

President of the Thirty Seventh Session was the Vice-President of the Special Meeting. The Special Meeting appointed Deputy SecretaryGeneral, Dr. W.Z.Kamil, as the Rapporteur.

The Secretary General welcomed the delegates and experts who in response to the invitation of the Secretariat lent their consent to make presentations and steer the discussions in the Special Meeting. He further stated it was the third Special Meeting to be organized by the Secretariat within the annual sessions of the Committee. He recalled that during the Thirty fifth Session of the Establishment of an International Criminal Court and that during the Thirty Sixth Session a Special Meeting had been convened to consider the Interrelated Aspects Between the International Criminal Court and International Humanitarian Law. A large number of delegates to the 35th and 36th Sessions of the Committee had considered the two Special Meetings to be useful.

The Secretary General stated that when the International Law Commission, at its 49th Session, adopted a set of Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, the Secretariat proposed the convening of a Special Meeting on the Law of Treaties in particular the question of Reservations to Treaties during thecourse of the 37th Session of the AALCC. The Secretariat proposal to convene a Special Meeting was considered at a meeting of the Legal Advisers of Member States of the Committe,. held during the 52th session of the General Assembly in New York.

He stated that the Secretariat had prepared a Background Note on the subject to facilitate the deliberations on the Preliminary Conclusions on Reservations to Multilateral Treaties, and invited the Deputy Secretary General,Dr. W.Z.Kamil, to introduce the Secretariat's Brief of Documents.

Inviting attention to the Note of the Secretary General prepared for the Special Meeting the Deputy Secretary General Dr.Kamil , recalled that the Special Meeting on the Establishment of an International Criminal Court and the Interrelated Aspects Between the International Criminal Court and International Humanitarian Law organized during the 35 and 36 Sessions of

the AALCC had been considered useful.

He pointed out that the Preliminary Conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the ILC at its 49th Session reiterate that articles 19 to 23 of the Vienna Conventions on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the "object and purpose of the treaty" is the most important criteria for determining the admissibility of reservations. The Commission has taken the view that the regime of the Vienna Conventions strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty. It accordingly considered the flexibility of that regime to be suited to all treaties, of what ever nature or object.

The Commission is of the opinion that the twin objectives (i) of the preservation of the integrity of the text of the treaty, and (ii) universality of participation in the treaty are equally applicable in the case of reservations to normative multilateral treaties including treaties in the area of human rights, and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. It has further taken the view that the establishment of monitoring bodies by many human rights treaties had, however, given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.The Deputy Secretary General stated further that the Preliminary Conclusions adopted by the Commission recognize that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the Human Rights Treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to their Several members of the Commission had however disagreed with this principle as incorporated in paragraph 5 of the preliminary conclusions.

The Commission, suggested that the competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, in accordance with the provisions of the Vienna

convention of 1969 and 1986 and, where apporpriate by the organs for settling any dispute that may arise concerming the interpretation or application of the treaties.

The Commission has proposed providing specific clauses in multilateral normative treaties, including human rights treaties, or elaborating protocols to existing treaties of States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was pointed out in this regard that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers vested in them for the performance of their general monitoring role. It has also called upon States to co-operate with monitoring bodies and give due consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

Finally, he stated that the ILC had invited comments on the Preliminary Conclusions adopted on the Reservations to Normative Multilateral Treaties, including Human Rights Treaties and consideration could be given to forwarding the views of Member States of the AALCC on the issue of reservation to treaties expressed during the Special Meeting together with any report or recommendation that the Committee may adopt at this Session.

The discussions during the Special Meeting revolved largely around the presentations made by a group of experts specially invited to make presentations. These included Mr. B.Sen (Member of UNIDROIT Governing Body and former Secretary General of The AALCC); Professor (Ms) S.K. Varma (Dean, Faculty of Law, University of Delhi); Professor M.K. Nawaz (Visiting Professor, National Law School, Bangalore);Professors R.P. Anand; V.S Mani and Y.K. Tyagi (all of the School of International Studies, Jawaharlal Nehru University). A paper on "Reservations to Normative Multilateral Treaties and Human Rights Treaties" written by Professor M.K. Nawaz was circulated during the Meeting.

It may be stated that Ambassador Chusei Yamada, Member of the International Law Commission represented the Chairman of the Commission and Special Rapporterur of the topic Professor Alain Pellet.

Following the presentations by the six Special Experts, delegates of 8 Member States, one observer State and two international organizations made statements. These included China, Egypt, Ghana, India, Islamic Republic of Iran, Kuwait, Sri Lanka and Sudan from among the Member States;Sweden from among the Observer States; and the International Law Commission and the Organization of Islamic Conference from among the International organisations.

The Special Meeting considered the relevant provisions of the Vienna Conventions of the Law of Treaties, 1 969 viz. Articles 19 to 23. It also took note of the relevant provisions of the 1978 Convention and the 1986 Convention on the subject. The Special Meeting also considered the Preliminary Conclusions on Reservation to Multilateral Normative Treaties including Human Rights Treaties adopted by the International Law Commission. The Meeting also recalled that the General Assembly at its 52nd Session had drawn the attention of Governments to the importance for the International Law Commission, of having their views on the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties.

The view was expressed that while the Vienna Regime of Reservations to Treaties was based on the assumption that a multilateral treaty is in effect a combination of several bilateral treaty relationships there were a certain category of treaties which, by the very nature of the subject matter addressed by them did not admit of any reservations. Treaties relating to the protection and preservation of the Enviromnent , Disarmament Treaties and Human Rights Treaties were identified as the category of treaties which are applicable and binding upon not only the States Parties but on all members of the international society. . The United Nations Convention on the Law of the Sea, 1982 was yet another example of a treaty which by the nature of being a "package deal" did not admit of reservations.

The Special Meeting considered the functions and role as well as the competence of the monitoring bodies to appreciate or determine the admissibility of a reservation. The view of the Commission that the legal force of the findings made by such bodies in.the exercise of their functions could not

exceed those resulting from the powers given to them, met with approval. However, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation met with resistance.

Many of the participants addressed themselves, to the provisions of the international instruments on human rights. The right to religion, the right to work, right to health and the right to compulsory education were among those that were cited and debated. Several views were expressed on the specific provisions of human rights treaties and the reservations thereto. While some identified the lack of resources, unrealistically high international human rights standards, among others, some participants listed the different sociol-economic, cultural and political backgrounds of the people and states as the reasons for the formulation of reservations to human rights treaties. It was pointed out that the provisions of some of human rights treaties could be sub classified as those (i) requiring intervention of States; and (ii) those not requiring any action or intervention by States parties.

Points of Convergence

The deliberations in the Seminar revealed convergence of views on a wide range of issues. These included:-

(i) The law of reservation ushered in by the Vienna Convention has, by and large, served well the needs of the international community of States. It may be unwise to derail the Vienna regime on reservations. The provisions of the Vienna Convention on Treaties had been and continue to enjoy wider acceptance. In as much as these provisions had stood the test of time they should not be tampered with. There was no need to amend or alter them.

The majority of participants were of the view that the right to formulate and express reservations to one or more provisions of a convention is an attribute of State sovereignty and power to make or express reservation can only be restricted by a treaty.

(ii) The existing regime of reservations as incorporated in Articles 19 to 23 of the Vienna Convention on Law of Treaties, 1969 were sufficiently flexible and whilst recognizing the inherent right of a State to make a reservation merely restricted that right by stipulating that the reservation or declaration made by a state be "compatible with the object and purpose of the treaty concerned". In this regard it was pointed out that the Commission itself had in paragraph I of the Preliminary Conclusions on Reservations to Normative Multilateral Treaties including Human Rights Treaties had recognized that "Articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that in particular, the object and purpose of the Treaty is the most important of the criteria for determining the admissibility of reservations." It (the Commission) "considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty. and universality of participation in the treaty."

One view was that a monitoring body lacked the competence to adjudge the admissibility or legality of a reservation unless it had been specifically authorized to do so by the treaty itself. The view was also expressed that a strict regime of reservations with a monitoring body at its apex would impair the objective of universality of participation in the treaty. The treaty regime including the regime of reservations should aim at promoting the objective of universality of participation rather than hinder the process of ratification.

(iii) Although one expert had categorised treaties as (a)Treaties valid erga omnes; (b) constitutive treaties; (c) Humanitarian Conventions/ Treaties; and (d) Codification treaties, the majority view was that while such a classification was useful no distinction needed to be drawn between Human Rights Treaties and other Treaties with respect to the regime of reservations. One expert raised the question whether reservations to human rights treaties were any different from reservations to other nominative treaties. Almost all treaties stipulate normative and contractual obligations. The question was also posed whether human rights treaties deserve to be classified in the category of treaties which admit of no reservations. It was pointed out in this regard

that the Human Rights Covenants had been adopted a good two years before the Conference of Law of Treaties' was convened in 1968 and that the Vienna Conference on the Law of Treaties had not deemed it necessary to differentiate human rights treaties from any other set of normative treaties. It was stated in this regard that what the conference of plenipotentiaries had not done the International Law Commission could not do because what can not be done directly can not be done indirectly.

(iv) In so far as paragraph 3 of the Preliminary Conclusions adopted by the Commission sought to differentiate between normative treaties and treaties in the field of human rights the participants in the Special Meeting could not agree with the formulation or text of paragraph 3.

(v) Most participants could not accept paragraph 5 of the Preliminary Conclusions adopted by the International Law Commission relating to the role of the monitoring bodies of human rights treaties. One expert took exception to the use of term 'monitoring body' since the term monitor implied an element of surveillance. He therefore proposed the use of the term "'supervisory body" in lieu of the present term "monitoring body" employed by the Commission.. Yet another expert was of the view that the proposed role of the monitoring bodies was a dangerous proposition. It was stated in this regard that the passing of value judgements on the admissibility of reservations and the practice of States, by a monitoring body, would be unacceptable to States. A third expert characterised the proposed role and function of monitoring bodies, as regards the admissibility of reservations to human rights treaties, as the opening of Pandora's box . A participant from one member state expressed the view that formulation of a reservation constitutes sovereign right of the States and the provision embodied in paragraph 5 of the Preliminary Conclusions is in contradiction with this cardinal principle of the Law of Treaties.

(vi) The view was also expressed that while the monitoring bodies ought not to make value judgements on the validity or otherwise of a reservation to a treaty they could , however, make recommendations as to the effect of a reservation.

(vii) Paragraph 10 of the Preliminary Conclusions was considered by some to be a "creeping" clause and one that may be amenable to misuse. It was stated in this regard that the Commission should avoid handing out political handles which could result in the defeating the very object of universality of participation in a treaty.

Recommendations__

A number of recommendations were made in the course of the Special Meeting. The proposal advanced included :

(i) One view suggested that the International Law Commission undertake an empirical study of state behaviour and study the reservations to treaties and if feasible the motives thereof. It could thereafter seek to develop the reservation regime by way of interpretative codification".

(ii) Another view emphasized the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on, the existing provisions of the Vienna Convention. He favoured the preparation of a guide to state practice rather than the formulation of model clauses or a protocol.

(iii) It was recommended that the ILC consider concluding its work on this topic not on the basis of "intuitive feeling" but on the basis of an empirical study of the behaviour of States .

(iv) The Commission should approach its future work on the subject with due caution and not be guided by the European precedents which may not always be relevant or appropriate to the universal context . One view was that a realistic stance would require taking note of the different political, social economic and cultural milieu of the States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

The Secretariat reported the debate of the Special Meeting to the International Law Commission . It also requested the Representative of the

International Law Commission to report his findings to the Commission at its 50th Session.

(ii) Decision on the 'Reservation to Treaties'

(Adopted on 18.4.98)

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

Having considered the Note of the Secretary General on the Reservation to Treaties Doe. No AALCC/XXXVII/New Delhi/ 98/ SP.1;

Having considered also the Preliminary Conclusions on the Reservations to Multilateral Treaties including Human Rights Treaties adopted by the International Law Commission at its 49th session

Recalling General Assembly Resolution 52/ 156 on the report of the International Law Commission on the work of its forty ninth session ;

Recognizing the significance and complexity of Reservation to Multilateral Treaties including Human Rights Treaties;

1. **Expresses its gratitude** to the Government of the Republic of India for hosting the Special Meeting on the Reservation to Treaties;

2. **Expresses its appreciation** to the Secretary General for the Background Note;

3. **Also expresses Its appreciation** to the experts for their contribution in the consideration of the item

4. **Requests the Secretariat** to continue to monitor and study developments in regard to the Reservation to Treaties;

5. **Requests** the Secretary General to convey to the International Law Commission the views of the Committee on the Preliminary Conclusions on the Reservations to Multilateral Treaties including Human Rights Treaties.

(iii) Secretariat Study : Special Meeting on the Reservation to Treaties

The Work Of The International Law Commission On The Law Of Treaties

It will be recalled that the General Assembly had by its resolution 478(V) invited the ILC *to inter alia* "study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon especially as regards multilateral conventions....."

In its report to the General Assembly theCommission had stated that the criterion of compatibility of a reservation with the object and purpose of a convention - as applied by the international Court of Justice in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* - would not be suitable for application to multilateral conventions in general. It also said that while no single rule uniformly applied could be wholly satisfactory , a rule suitable for application in the majority of cases could be found in the practice, with some modifications, therefore followed by the Secretary General.

Be that as it may , in the opinion of the current Special Rapporteur , Mr. Alain Pellet, the topic has a long history starting in 1950 with the consideration ofthe first report of the then Special Rapporteur, Mr. Jaines Brierley, and ending in 1986 with the adoption of the Vienna Convention on Treaties between States and International organizations or, between International Organizations. In his opinion , the five important stages in that process have been the (i) Advisory Opinion of the International Court of Justice in1951on *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide;* (ii) first report of the then Special Rapporteur, SirHumphrey Waldock, in 1962 which had led to the Commission's adoption of a flexible system; (iii) adoption in 1969 of article 2 Paragraph 1(d) and articles 19 to 23 of the Vienna Convention onthe Law

of Treaties; (iv) adoption in 1978 of article 20 of the Vienna Convention on theSuccession of States in respect Of Treaties[1] (iv) adoption in 1978 of article 20 of the Vienna Convention on the Succession of States in respect of Treaties[2] ; and finally (v) adoption in 1986 Of articles of theVienna Convention on the Law of Treaties between International Organizations[3] which essentially reproduced the corresponding Provisions of the Vienna Convention on the Law of Treaties 1969.

The provisions of Articles 19-21 of the Vienna Convention on the Law Of Treaties, 1969[4] while following the principles laid down by the ICJ in the *Genocide case*[5] made a concession to the supporters of the traditional rule by recognizing that every reservation is incompatible with certain types of treaty unless accepted unanimously. Article 19 of the Convention stipulates that reservations may be made when signing, ratifying, accepting, approving or acceding to a treaty, but they cannot be made where the reservation is prohibited by the treaty or where the treaty provides that only specified reservations may be made not including the reservations in question, or where the reservations not compatible with the object and purpose of the treaty. Article 20 provides that where a reservation is possible the traditional rule requiring acceptance by all States would apply where "it appears from the limited number of the negotiating States and the object and purpose of the

1. The Vienna Convention on the Law of Treaties,1969 entered into force on 27th January 1980. As of 31st December 1996 81 States including 15 member States of the AALCC are parties to that Convention.
2. The Vienna Convention onSuccession of States in Respect to Treaties, 1978 entered into force on 6th November 1990. As of 31st December 1996 15 States including 2 member States of the AALCC are parties to the Convention.
3. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 is yet to enter into force. Cyprus is the sole member State of the AALCC among the 23 parties to the Convention. The AALCC is a signatory to the Final Act of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, held in Vienna in March 1986.
4. For the text of the relevant articles of the Convention on the Law of Treaties 1966 see Annexure IV, infra.
5. *ICJ* Reports 1951 .

treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty."[6]

Paragraph 4 of Article 20 thereafter outlines the general rules to be followed with regard to treaties not within Article 20(2) and not constituent instruments of international organizations.[7] The flexible approach was designed to permit the maximum scope for reservations while preserving the binding character of the treaty.[8]

Article 21 of the Convention sets out the effect of reservations. A reservation established with regard to another party modifies for the reserving State in its relations with the other party the provision of the treaty to which the reservation relates, to the extent of the reservation. The other party is likewise affected in its relations with the reserving State. The reservation does not, however, modify the provision of treaty for the other parties to the treaty as between themselves.

In general reservations are deemed to have been accepted by States that have raised no objections to them at the end of a period of twelve months after notification of the reservation by the date on which consent to be bound by the treaty was expressed whichever is later.[9]

6. Article 20 paragraph 2 of Convention on the law of treaties, 1969.

7. Article 20 paragraph 4 of the Convention stipulates 4 "in cases not falling under the preceding paragraphs and unless the treaty otherwise provides: (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) an objection by another contracting State to a reservation does independent States without addressing the question of the fate of the acceptances of the predecessor States' reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting States. (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

8. International Law, it has been said, has preferred increasing the number of parties to international treaties to maintaining the unilateral consistency of the treaty itself. See M. Shaw *International Law.*

9. See Article

The Vienna Convention on Succession of States in respect of Treaties 1978 left numerous gaps and questions with regard to the problem on fate of reservations, acceptance and objections in the case of Succession of States. Article 20 of that Convention deals with only as concerns the case of newly independent States without addressing the question of the fate of the acceptances of the predecessor States' reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

The Provisions of the Vienna Convention on the Law Of Treaties between States and International Organizationsor between International Organizations essentially reproduced the provisions of the Convention on the Law of Treaties, 1969.

Solutions had in the ast, in the opinion of Alain Pellet the current Special Rapporteur,been arrived at the cost of "judicious ambiguities" and there had been a clear development in favour of an increasingly strong assertion of the right of States to formulate reservations to the detriment to the right of other contracting States to oppose such reservations,even of the right of other contracting States to oppose on an individual basis the entry into force of the treaty between themselves and the reserving State was maintained. The Convention on the Succession Of States in respect Of Treaties, 1978 by express referral and the Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986 by virtually reproducing the provisions of the Convention on the Law of Treaties, 1969 had strengthened the system established by the 1969 Convention and which given its many ambiguities and gaps had little that was systematic about it.

PRACTICE RELATING TO RESERVATIONS

Various methods have been tried to overcome the complications caused by reservations.These have included (i) the provision of a special clause in the

Convention that no reservations at all are permissible,[10] (ii) or none with regard to certain important provision[11]; and (iii) the normal stipulation that reservations and exceptions may be made provided they are not contrary or inimical to the object and purpose of the treaty itself.

Law of the Sea: The Geneva Convention on High Seas, 1958 made no mention of reservation at all. The Geneva Convention on the Continental Shelf allowed no reservation as to the provisions of Articles 1 to 3.

Article 309 of the United Nations Convention on the Law of the Sea, 1982 entitled 'Reservations and Exceptions' stipulates " NO reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention." (Emphasis added) .Article 310 of that Convention on Declarations and Statements however, provides that "Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention from making declarations or statements, however phrased or named with a view , inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State."

The 1994 Agreement Relating to the Implementation of Part XI of the Convention adopted by the General Assembly[12] does not contain a provision relating to reservations.

Human Rights: Article 20 of the Racial Discrimination Convention which States that a reservation is "incompatible or inhibitive if at least two thirds of the contracting parties object to it, uses a "mathematical" test for determining whether a reservation is incompatible with its object and purpose.

[10] Article 39 of the Convention on Damage caused by Foreign Aircraft to third parties on the Surface, 1952.

[11] The Geneva Convention on the Continental Shelf allowed no reservation as to articles 1 to 3.

[12] See General Assembly Resolution 48/263 of July 28, 1994. The Agreement entered onto force on 28th July 1996.

Genocide Convention : It has been suggested that the most controversial reservations to the Genocide Convention are those made by a number of States not accepting Article IX of the Convention which provides for the compulsory jurisdiction of the International Court of Justice in disputes arising under the Convention. Objections to such reservations have been registered by a number of States.

In the field of International Environment Law many Conventions clearly and explicity stipulate that no reservation may be made. The Vienna Convention for the Protection of the Ozone Layer, 1985[13]and the 1987 Protocol thereto[14] the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1991;[15] the Convention to Combat Desertification;[16]the Basel Convention on the Transboundary Control of Hazardous Wastes, 1989;[17]157the United Nat!ons Framework Convention on Climate Change;[18]the Convention on Biological Diversity[19] fall in this category of Conventions.

[13]See Article 18 of the Convention which prides that no reservations may be madetothis Convention.

[14]See the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987. No reservations may be made to this Protocol.

[15]Article 26, paragraph 1 of this Article does not preclude a State when signing, or acceding to this Convention, from making declarations or statements, however phrased or named" with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State.

[16]See Article 37 "Reservations" No reservations may be made to this Convention.

[17]See Article 26, Reservations and Declarations, No reservation or exception may be made to this Convention.

[18]See Article,"Reservations" No reservations may be made to the Convention.

[19]See Article 37, on "Reservations" No reservations may be made to this Convention.

In the field of International Trade Law While the United Nations Convention on Contracts for the International Sale of Goods, 1994[20] the United Nations Convention on International Bill of Exchange and International Promissory Notes, 1988,[21] the United Nations Convention on the Carriage of Goods by Sea, 1978,[22] and the United Nations Convention on International Multimodal Transport of Goods, 1980,[23] admit of no reservations.

Owing to the Special Character of the Conventions of the International Labour Organization (hereinafter called the ILO), it is recognized that Labour Conventions are incapaable of being ratified subject to reservations. These conventions may in certain circumstances be conditionally ratified. Moreover, a State while ratifying an ILO Convention may couple its ratification with explanations of any limitations upon the manner in which it intends to execute the convention.

A declaration by a signatory as to how the treaty will be applied, which does not alter the obligations of that treaty vis-a-vis other signatories is not a reservation properly so called. Thus in 1959 the Assembly of the Inter-Govemmental Maritime Consultative Organization (IMCO) agreed that India's acceptance of the Convention establishing the Organization, subject to her right to adopt measures aimed solely at developing her maritime industries was not a reservation but a declaration of policy.

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[20] The text of Article 98 of that Convention reads: No reservations are permitted except those expressly authorized in this Convention.

[21] The text of Article 88 of that Convention stipulates, No reservations are permitted except those expressly authorized in this Convention.

[22] The text of Article 29 of that Convention provides, No reservations may be made to this Convention.

[23] The text of Article 35 of that instrument reads: No reservation may be made to this Convention.

Recent Work of the International Law Commission on Reservation to Treaties

The General Assembly had by its resolution 47\33 *inter alia* requested the ILC to consider planning of its activities and programme for the term of office of its members bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles. The Commission acting in pursuance of that request had at its forty-fifth session proposed *inter alia* to incorporate in its agenda the topic "The Law and Practice relating to Reservations to Treaties". Thereafter the General Assembly at its forty-eighth session had by its resolution 48\31 endorsed the decision of the Commission to include in its agenda the above, understanding that the final form to be given to the work on this topic shall be decided after a preliminary study is presented to the General Assembly. Pursuant to the aforementioned endorsement the Commission at its forty-sixth session, among other things, appointed Mr. Alain Pellet (France) Special Rapporteur for the topic "The Law and Practice relating to Reservations to Treaties."

FORTY SEVENTH SESSION OF THE ILC

At its forty seventh session the Commission considered the First Report of the Special Rapporteur, Mr. Alain Pellet[24]. The report comprised an introduction and three Chapters the first of which dealt with the Cornmission's previous work on reservations and the outcome. Chapter II contained a brief inventory of the problem of the topic and the third chapter discussed the possible scope and form of the Commission's future work on this topic.

The introduction to the Report emphasized that it had no doctrinal pretensions, and made an endeavour to enumerate the main problems raised by the topic, without in any way prejudging the Conimission's possible response regarding their substance. The Special Rapporteur outlined that in view of the wish of the General Assembly to have a preliminary study to determine, the final form to be given to the work on the topic , the report sought to furnish an overview of the earlier work of the ILC and proposed solutions that would

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[24] See A/CN.4/470 and Corr. 1. and 2.

not jeopardize earlier advances and yet allow for the progressive development and codification of the law on reservation to treaties.

Inventory of the Problem of the Topic

Chapter II of the report entitled 'Brief Inventory of the Problem of the Topic' was divided into two sections viz. (i) 'the ambiguities of the provisions relating to reservations in the Vienna Convention on the Law of Treaties'; and (ii) the 'gaps in the provisions relating to reservations in the Vienna Convention on the Law of Treaties'. The Special Rapporteur began with the premise that the three Vienna Conventions have allowed major uncertainties to persist with regard to the legal regime applicable to reservations and emphasized that such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries.

Permissibility of Reservations

On the issue of permissibility of reservations the Special Rapporteur posed the question whether the permissibility or impermissibility of a reservation can be decided objectively and in the abstract or does it depend in the end on a subjective determination by the contracting State. By way of an example the Rapporteur posed the question whether a reservation which obviously clashes with the object and purpose of the treaty or even a reservation prohibited by the treaty but accepted by all the other parties to the treaty can be described as an impermissible reservation. Obviously such a reservation is impermissible and the question of opposability arises only at a later stage and only in respect of permissible reservation. There is thus a presumption in favour of the permissibility of reservations and this is consistent with the text of article 19 of the Vienna Convention. However this presumption in favour of permissibility of reservations is not invulnerable and fails if the prohibition is prohibited explicitly or implicitly by the treaty or if it is incompatible with the object and purpose of the treaty. It remained to be seen, how to determine whether these conditions are met on the one hand, and what the effects may be of a reservation which would be impermissible according to those criteria on the other.

Doctrinal Differences \ Conflicting View Points \ Permissibilists vs. Opposabilists

In Chapter II of his report the Special Rapporteur had listed a long list of questions which in his opinion, posed problems and had sought suggestions on the order in hierarchical importance in which they might be placed. Many of these problems have their roots in the opposing schools of permissibility and opposability to reservations to treaties. The proponents of the permissibility school consider that a reservation contrary to the object and purpose of the treaty was void, *ipso facts* and *ab-initio* regardless of the reactions of the contracting States. On the other hand, the adherents of the opposability school held the view that the sole test as to the validity of a reservation consisted of the objections of the other States.' The Special Rapporteur had argued that if the "permissibilists" were right the nullity of a reservation incompatible with the object and purpose of the treaty could be invoked before an international tribunal or even before a municipal court even if the State causing the nullity of the reservation had not objected to it (the reservation). If, on the other hand, the "opposabilists" were right a State could not avail itself of a reservation contrary to the object and purpose of the treaty even if the other States had accepted it.

Identification of Issues

The Special Rapporteur raised "a number of thorny questions" related to: (i) the effect of an impermissible reservation; (ii) the question of objections to reservations; (iii) interpretative declarations; (iv) the effect of reservations on the entry into force of the Convention; (v)the fate of objections to reservations in the event of State succession; (vi) the specific objects of certain treaties or provisions; and (vii) the rival techniques of reservation.

(i) Impermissible Reservations

Apropos the effect of an impermissible reservation the question was posed whether it (an impermissible reservation) entailed the nullity of the expression of consent of the reserving State to be bound (by the treaty), or only nullity concerning the reservation itself. (It was pointed out in this regard

that the case law of international human rights protection agencies revealed that the answers to these issues had considerable effect.)

(ii) Objection to Reservations to Treaties

On the matter of objection to reservations the question is whether in formulating a reservation a State should be guided by the principle of its (the reservation's) compatibility with the object and purpose of the treaty or could the State exercise its own discretion. On this question also the debate between opposability and permissibility was obvious. The Rapporteur asked that consideration be given to the effects of an objection to a reservation if, as Article 21 paragraph 3 of the 1969 and 1986 of the Vienna Conventions permitted, the State objecting to the reservation had not opposed the entry into force of the treaty or between the reserving State and itself.

(iii) Interpretative Declarations

The Special Rapporteur drew attention to the distinction between reservations and interpretative declarations which States resort to with increasing frequency and on which the Conventions are silent. He pointed out that an "interpretative declaration" must be taken as a genuine reservation if it is consistent with the definition accorded to the latter term in the Conventions. On the other hand, several otherjudicial decisions however testify to the fact that it is extremely difficult to make a distinction between "qualified interpretative declarations" and mere interpretative declarations". What is more the legal effects of the latter remained unclear.

(iv) Effects of Reservations and Objections on the Entry Into Force of a Treaty

Discussing the effect of reservations and objections on the entry into force of a treaty the Special Rapporteur observed that this "important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant Conventions". It was pointed out that the practice followed by the Secretary General in his capacity as depositary had been the subject of rather harsh criticism. Attention was invited to the

opinion of the Inter-American Court of Human Rights that a treaty entered into force in respect of a State on the date of deposit of the instrument of ratification or accession whether or not the State had formulated a reservation. It was recalled that while this position was accepted in some circles, others doubted whether it was compatible with the provisions of Articles 20 paragraphs 4 and 5 of the Vienna Convention.

(v) Do Successor States 'Inherit' Reservations to Treaties? Reservation Provisions of the Vienna Convention of 1978.

The Vienna Convention of 1978 was silent on the fate of reservations in the event of State succession and called for consideration to be given to the question whether the successor State inherited the objections formulated by the predecessor State and whether it could express its own new objections.

(vi) Issues and Problems arising from the specific object and nature Of certain treaty

On the problems connected with the specifc object of certain treaties provisions it was observed that because of their *general* nature codification Conventions neglect the particular problems driving from the specific object and nature of certain treaties. This was particulary true of constituent instruments of international organizations, human rights conventions and codification treaties themselves. In the existing regime of reservations and objections to reservations in these specific areas may need consideration. If the system provided for under the 1969 Convention was deemed unsatisfactory the ways and means of its modification would also need to be examined. Certain other areas, such as environment and disarmament, needed to be recognized as calling for special treatment.

Rival Techniques Formulating Reservations to Treaties

Would it be deemed appropriate at some stage to consider rival techniques of reservations whereby States parties to the same treaty could codify their respective objections by means of additional Protocols, bilateral

arrangements or optional declarations concerning the application of a particular provision.

Scope and form of the Commission's future Work on the Subject

Chapter III of the report of the Special Rapporteur dealt with the scope and form of the Commission's work and constituted the essence of what needed to be considered and discussed on the matter of scope of the future work the Commission was not on *terra incognito*.Much had been written on the subject and three, Conventions had been adopted - and they had proved their worth. The debate in the Sixth Committee on the inclusion of the topic in the Commission's agenda had emphasized *inter alia* that a second look at the three Vienna Conventions of 1969, 1978 and 1986, should be taken before calling into question the past work of the Commission and to which States were attached. What has hither to been achieved must be preserved, regardless of possible ambiguities. The rules on reservations set forth in the Vienna Conventions on Treaties operated fairly well and the potential abuses had not occurred and even if States did not always respect the rules they regarded them as a useful guide. The rules in question had now acquired customary force. The Commission, it was hoped, would not begin questioning what had been achieved and would, instead, seek to determine such new rules as may be complementary to the 1969, 1978 and 1986 rules without throwing out the old ones which were certainly not obsolete.

Were the Commission to adopt norms incompatible with articles 19 to 23 of the 1969 and 1986 Vienna Conventions on Law of Treties or even article 20 of the 1978 Vienna Convention on State Succession, States which had ratified, or would in the future ratify those Conventions would be placed in an extremely delicate position. Some of them would, perhaps, have accepted the existing rules and would be bound by them, while others would be bound by the new rules that would be incompatible with the rules already adopted. Yet others could even be bound by both. If recourse were had to a legal fiction it would be possible, of course, "to circumvent the situation exemplified, almost caricatured", by the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982. In the case of reservations to treaties there was no need for such an upheaval in the

law. In sum, it was proposed that the Provisions of the existing articles of the Vienna Conventions be treated as sacrosanct unless during the course of work on the topic they proved to be wholly impracticable. Where possible and desirable ambiguities should be removed and an attempt made to fill any gaps, if only to avoid anarchic developments.

Apropos the form that should be given to the Commission's work, in the opinion of the Special Rapporteur, the possibilities open to the Commission included: (i) the treaty approach; (ii) the drawing up of a guide on the practice of States and international organizations; and (iii) proposing model clauses.

(i) The treaty approach

The treaty approach could take two different forms including drafting a Convention on reservations that would reproduce the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions subject only to clarifications and completion where necessary. The second possibility was to adopt one or three protocols that would supplement, but not conflict with the existing 1969, 1978 and 1986 Conventions. The mere fact of repeating the existing rules would in either case, preclude any likelihood of incompatibility and would not prevent the Commission from submitting draft articles together with commentaries.

(ii) Drawing up of a guide on the practice of States and International organizations

The second option listed was the drawing up of a guide on the practice of States and international organizations on the matter of reservations to treaties. Such a guide could take the form of an article by article commentary to provisions on reservations in the three Vienna Conventions prepared in the light of developments since 1969 and destined to preserve what had been achieved, along with the requisite clarifications and additions.

(iii) Formulation of Model Clauses

The third approach open to the Commission was to propose model

clauses into which negotiators could delve and draw inspiration from depending upon the purpose of a particular treaty. This approach, if adopted, would make for flexibility and be of great use to States. Model Clauses offered two advantages. First, by furnishing a variety of clauses of-derogation it would counterbalance the general trend towards precision by providing for more flexibility. Second, there were at the present time fairly strong tensions which were reflected in the challenging of existing rules in certain areas. This was particularly true of human rights and there was no certainly that the problems which arose concerning the Human Rights Conventions could be resolved simply by interpreting the existing rules. Model clauses for human rights treaties would, therefore, in the opinion of the Special Rapporteur, provide a viable solution for the future.

It would however be difficult to draw up an exhaustive list of all the clauses relating to reservations incorporated in the existing multilateral conventions. A catalogue of such clauses, it was suggested could be made on the basis of a sufficiently representative sample of the various areas covered by Conventions such as those on human rights, disarmament, international trade etc. The drafting of model clauses could thus be a useful complement to the Commission's basic task.

Having emphasized that there are several ways of achieving the basic objective consolidated draft articles, a guide to practice of States and international organizations model clauses or a combination of these approaches, the Special Rapporteur had concluded by observing that "it is up to the Commissign in close consultation with the Sixth Committee, to determine which are the most appropriate"[25]

[25] It may be stated that the Special Rapporteur had sought urgent assistance and orientation from the Commission on the following 4 questions: (1).Did the Commission agree to change the title of the topic to 'Reservations to Treaties'; (2).Did it agree not to challenge the rules contained in article 2 paragraph 1 (d) and articles 19 and 23 of the Vienna Conventions of 1969 and 1986 and article 20 of the Vienna Convention of 1978 and to consider them as presently formulated and to clarify and complete them only as necessary ? (3)Should the result of the Cornmission's work take the form of a draft convention, a draft protocol(s), a guide to practice, a systematic commentary, or something else?; and (4) Was the Commission in favour of drafting model clauses that could be proposed to States for incorporation in future multilateral conventions in keeping with the field in which those conventions would be concluded?

Forty Eighth Session of the Commission

At its 48th session the Commission had before it the Second Report of the Special Rapporteur, Mr. Alain Pellet[26].The Report presented an overview of the study of the question of reservation to treaties and formulated an overview of the study in three sections. In the first section entitled "the First Report on Reservation to Treaties and Outcome" the Special Rapporteur summarized 'the conclusions' that he had drawn from the debate both in course of the consideration of that report in the Commission during its 48th Session as well as the debate on the item in the Sixth Committee at its fiftieth session. He recalled that the General Assembly had *inter alia*, noted the beginning of the work on the topic and invited the Commission to "continue its work along the lines indicated in the reports'[27] and had invited "States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur, on the topic concerning reservation to treaties"[28]

The second section of the Report addressed to the 'Future work of the Commission on the topic of Reservation to Treaties'was divided into three parts viz. (i) Area covered by the study; (ii) Form of study; and (iii) General outline of the study.

[26] See *A\CN.4\477* In addition to the Second Report, the Special Rapporteur had also prepared"non exhaustive bibliography" on the question of reservation to treaties" , *see A\CN\478*

[27] See General Assembly Resolution 50\45 of 24 January 1996 '?perative paragraph 4.

[28]Twelve States viz. Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland,the United Kingdom and the United States of America had sent their r.eplies to the questionnaire prepared by the Special Rapporteur, and sent to States Members of the United Nations ,or of Special Agencies or parties to the Statute of the International Court of Justice.A similar questionnaire was then proposed to be sent to international organizations which are depositaries of multilateral treaties.

(i) Area of Study

As regards the Area covered by the Study the Special Rapporteur identified five topics which required a careful study. The issues identified included : (a) the question of the definition of reservation ; (b) the legal regime governing interpretative reservations ; (c) the effect of reservations which clash with the purpose and object of the treaty; (d) objections to reservations; and (e) the rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties. The Special Meeting could give consideration to these issues.

(ii) Form of the Study

Addressing the issue of the form of the study, the Special Rapporteur recalled that the ILC at its 47th Session had decided in principle to draw up a "Guide to practice in respect of reservations" and taken the view that there were insufficient grounds for amending the relevant provisions of the existing international instruments. The Commission had also decided that the guide to practice in respect of reservations would, if necessary, be accompanied by model clauses.

The Special Rapporteur, Mr. Alain Pellet, in his Second Report addressed the following issues, viz. (a) Preserving what has been achieved; (b) Draft articles accompanied by commentaries and (c) Model Clauses; and (d) Final form of the Guide to practice.

(a) Preserving what has been achieved

The Special Rapporteur pointed out that the starting point i.e. the preservation of what has been achieved by the Vienna Conventions of 1969, 1976 and 1986 was a constraint in that the Commission must ensure that the draft articles eventually adopted, by it, conform, to in every respect, to the provisions with regard to which it should simply clarify any ambiguities and fill in any gaps. He therefore deemed it advisable to quote the actual text of the existing provisions at the beginning of each chapter of draft guide to practice in respect of reservations.

Be that as it may, the Commission at its 49th Session *inter alia* reiterated that articles 19-23 of the Conventions on Treaties of 1969 and 1986 govern the regime of reservations to treaties.

(b) Draft articles accompanied by commentaries

The articles shall be followed by a statement of additional or clarificatory regulations which would comprise the actual body of the Commission's work on the subject and would be presented "in the form of draft articles whose provisions would be accompanied by commentaries".

(c) Model Clauses

The Special Rapporteur proposed that the draft articles be followed by model clauses phrased in such a way as to "minimize disputes in the future". Emphasizing that the function of these model clauses needed to be clearly understood, the Special Rapporteur, pointed out that the "guide to practice" which the Commission intends to draw up would consist of general rules designed to be applied to all treaties, regardless of their scope, in cases where the treaty provisions are silent. Like the actual rules of the Vienna Convention and the customary norms which they enshrine, the rules relating to reservations would be purely remedial where the parties concerned have no stated position. These rules cannot be considered binding and the States Parties will always be free to disregard them. The negotiators need only to incorporate the specific clauses relating to the reservations into the treaty.

The sole aim and functions of the model clauses would be to encourage States to incorporate in certain specific treaties clauses concerning reservations which derogate from the general law and are better adopted to the special nature of the treaties or the circumstances in which they are considered. This approach would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances and thus preserve its flexibility without calling in question the unity of the law applicable to reservation to treaties.

(d) Final Form of the guide to practice

In the opinion of the Special Rapporteur the guide to practice in respect of reservations which the Commission intends to prepare could be divided into six Chapters covering (i) a review of the relevant provisions, of the Vienna Conventions of 1969,1978 or 1986; (ii) commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein;(iii) draft articles aimed at filling the gaps or clarifying the ambiguities; (iv)commentary to the draft articles; (v) model clauses which could be incorporated in specific treaties and derogating from the draft articles ; and (vi) commentary to the model clauses.

(iii) Final Form of the Study

Unity or diversity of the legal regime for reservations to multilateral treaties is one of the general, question of determining whether the legal regime for reservations, as established under the Convention on the Law of Treaties, is applicable to all treaties regardless of their object.

The Special Rapporteur had enumerated three reasons for conducting a separate preliminary study, viz : (i) the term of the problem are, partially, the same regardless of the provisions in question ; (jj) its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done *in limine*,. and (iii) this question is related to reservations to human rights treaties, which justifies placing the emphasis on the consideration of the specific problems that concern them.

Defination of Reservations:

The question of the definition of reservations is linked to, the difference between reservations and interpretative declarations and to the legal regime for the latter and it seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations, are, like them, designed to and do enable States to modify obligations under treaties to which they are parties, is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome

some problems linked to reservations.

The Special Rapporteur proposed to deal with reservations to bilateral treaties in connection with the definition of reservations. The initial question posed by reservations to bilateral treaties is whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Although consideration of the question relating to the unity or diversity of the legal regime for reservations could have been envisaged, it appears at first glance that the question relates to a different problem.

Formulation and withdrawal of reservations, acceptances and objections

Save for some issues relating to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions, this part does not appear, to involve questions giving rise to serious difficulties. It is nevertheless necessary to include it in the study as it is a matter of practical question which arises constantly, and one could hardly conceive of a "guide to practice" which did not include developments in this regard.

Effects of Reservations, Acceptances and Objections

Effects of Reservations, Acceptances and Objections is indubitably the most difficult aspect of the topic. This is also the aspect with regard to which apparently irreconcilable doctrinal trends have been expounded while none denies that some reservations are prohibited, as is, clearly stipulated in article 19 of the 1969 and 1986 Vienna Conventions. Disagreement arises with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either premissible (or impermissible), 'or necessary (or superfluous). This is at the heart of the opposition between the schools of "admissibility" or " permissibility" on the one hand, and "opposability" on the other. In the opinion of the Special Rapporterur, it would be premature to take a position at this stage.

The general outline did not take any position, even implicitly, on the theoretical questions that divide doctrine. Assuming that there are, without any doubt, permissible and impermissible reservations, the Special Rapporteur felt that the most "neutral" and objective method would be to deal separately with the reservation when it is permissible on the one hand and when it is nonpermissible on the other since it is necessary to consider separately two specific problems which, prima facie, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves.

V. Fate of reservations, acceptances and objections in the case of succession of states

The Vienna Convention on Succession of States in respect of Treaties 1978 left numerous gaps and questions with regard to the problem on fate of reservations, acceptance and objections in the case of Succession of States. Article 20 of that Convention deals with only as concerns the case of newly independent States without addressing the question of the fate of the acceptances of the predecessor States' reservations and objections that had been,made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

VI. The Settlement of Disputes linked to the regime for reservations

Although the Commission does not provide the draft articles that it elaborates with clauses relating to the settlement of disputes, the Special Rapporteur expressed the view that there is no reason a *priorito* depart from this practice in most cases. In his opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration and strictly speaking gives rise to useless debates and is detrimental to efforts to

complete the work of the Commission within a reasonable period. If States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated in the form of an optional protocol, for example, in the body of codification conventions.

FORTY NINTH SESSION OF THE ILC

Owing to the priority attached to the completion of the second reading of the articles on the Draft Code of Crimes Against the Peace and Security of Mankind as well as the first reading of the draft articles on State Responsibility the consideration of the Second Report of the Special Rapporteur on Reservations to Treaties presented at the 48th Session of the Commission had had to be defered. The Commission at its forty ninth Session considered that Report which presented an overview of the study of the question of reservation to treaties.

At its 49th Session the ILC adopted a set of **Preliminary Conclusions on Reservations to Normative Multilateral Treaties**.[29] In the course of the consideration of the Preliminary conclusions a view was expressed that the Commission was faced with a contradiction in that it was just commencing its work on the topic and did not know where that work might take it.

Paragraph 1 of the set of preliminary conclusions on Reservations To Normative Multilateral Treaties Including Human Rights Treaties adopted by the Commission reiterates that articles 19 to 23 of the Vienna Convention on Treaties of 1969 and 1986 govern the regime of reservation to treaties and that the object and purpose of the treaty is the most important criteria for determining the admissibility of reservations. The Commission considered the flexibility of that regime to be suited to all treaties, of what ever nature or object, as one that strikes a balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty.

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[29]. For the full text of the Preliminary Conclusions on Reservations to Normative Multilateral Treaties i Including human Treaties as adopted by the Commission at its 49th Session see Annexure VII, *infra.*

The Commission considered the objectives, of the preservation of the integrity of the text of the treaty and universality of participation in the treaty, applicable equally in the case of reservations to normative multilateral treaties including treaties in the area of human rights, and consequently the general rules enunciated in Articles 19 to 23 of the Vienna Convention of 1969 and 1986 govern reservations to such instruments. However, the establishment of monitoring bodies by many human rights treaties had given rise to legal questions that had not been envisaged at the time of drafting those treaties connected with appreciation of the admissibility of reservations formulated by States.

The Preliminary Principles adopted by the Commission recognize that where human rights treaties are silent on the subject of the formulation of reservations the monitoring bodies, established by the Human Rights Treaties, are competent to comment upon and express recommendations with regard to the admissibility of reservations by States in order to carry out the functions assigned to them. Several members of the Commission had however disagreed with this principle as incorporated in paragraph 5 of the preliminary conclusion

The competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties in accordance with the provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties.

The Commission has proposed providing specific clauses in multilateral normative treaties, including human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation. It was noted in this regard that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers to them for the performance of their general monitoring role. The Commission has called upon States to cooperate with monitoring bodies and give the consideration to any recommendation that they may make or to comply with their determination if such bodies were granted competence to that effect.

The Commission has invited comments on the preliminary conclusions adopted on the Reservations to Normative Multilateral Treaties , including human rights treaties. It has also invited the monitoring bodies set up by the relevant human rights treaties to comment on these conclusions.

VI. WORK OF THE AALCC

A Sub-Committee on the Law of Treaties appointed at the Tenth Session of the AALCC held in Karachi in January 1969 had proposed that the definition of the term "reservation" in subparagraph (d) of paragraph 1 of Article 2 as drafted by the International Law Commission may be maintained. The Sub-Committee did not find acceptable an amendment , moved by Hungary at Vienna which "intended to include under the concept of "reservation" a totally different category of legal acts which are mere 'declarations' ". The Delegate of the United Arab Republic pointed out that declarations do not exclude or vary the legal effect of certain provision of a treaty and that interpretative statements clarifying a State's position cannot be considered as "reservations" within the meaning of the original text[30].

Considering the important and complex questions raised by draft Articles 16 and 17 (corresponding to Articles 19 and 20 of the Convention on the Law of Treaties, 1969) and keeping in view the necessity of maintaining a balance between the principle of integrity of treaties and the principle of freedom of State to make reservations, the Sub-Committee had agreed that :

(i) Article 16, (now article 19 of the Convention) as unanimously approved by the Committee of the Whole at Vienna, was acceptable. The Second Sub-Committee had considered an amendment submitted by Japan, Philippines and the Republic of Korea proposing a collegiate system for determining the compatibility of a reservation with the object and purpose of a treaty as containing a useful innovation in the law of treaties. While the majority had supported this amendment in principle, the Delegate of India was, however,

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[30] See Report of the Second Sub-Committee on the Law of Treaties in Asian African Legal Consultative Committee..Report of the Tenth Session, Karachi, 1969, p 357 at 361-62

not clear as to how it will function in view of the provisions of Article 17(4) (a) now article 20 (4) (a)}3)[31].

(ii) With regard to Article 17, the Second Sub-Committee had expressed support for the deletion of the words "or impliedly" from paragraph 1 as they introduce a subjective element and could give rise to uncertainties[32]

(iii) The majority of the members opposed the amendment moved at Vienna seeking to replace the words "the treaty" where it first occurs, by the words "a general multilateral treaty or other multilateral treaty, with the exception of cases provided for in paragraphs 2 and 3" on the ground that such formulation would re-introduce the doctrinal and unnecessary distinction between "general multilateral treaties" and "restricted multilateral treaties".

(iv) The Second Sub-Committèe was not in favour of the joint amendment, tabled at Vienna , seeking to replace the original text of Article 17, paragraph 2 by another formulation referring explicitly to the concept of "restricted . multilateral treaty" which requires, as in the case of reservations to a bilateral treaty, acceptance by all the contracting States. The non-acceptance of the joint French-Tunisian amendment was a logical consequence of the aforementioned attitude of the Sub-Committee regarding the inadvisability of introducing a definition of the term "restricted multilateral treaty" in Article 2.

(v) The majority of the members of the Second Sub-Committee was not in favour of the joint amendment moved at Vienna to delete, paragraph 3 of Article 17 dealing with reservations to treaties which are constituent instruments of international organizations. The provisional text of paragraph 3 as suggested by the Drafting Committee and as amended by the Committee of the Whole, is acceptable.

[31] *Ibid. p.*
[32] *Ibid.*

(vi) The majority of the Second Sub-Committee did not favour the proposed amendment to paragraph 4 of Article 17 embodying the principle that a treaty enters into force between a reserving State and an objecting State, unless the objecting State expressly declares to the contrary. In its opinion the original text of paragraph 4 (b) prevented the creation of a complex situation with regard to the application of treaties by assuming that the objection to a reservation precludes, in principle, the entry into force of the treaty between the objecting and reserving State[33]

(vii) The Second Sub-Committee unanimously approved the amendment to insert the words "unless the treaty otherwise provides" in paragraph 5 of Article 17. This amendment introduces a certain flexibility missing in the International Law Commission's text, as it gave to the negotiating States the power of stipulating in the treaty itself a period shorter or longer than twelve month.[34]

SUMMATION

The Special Rapporteur has observed that in its Advisory Opinion regarding *Reservations to the Convention on the Prevention and Punishment of Crimes of Genocide'*.the ICJ had, *inter alia,* noted the disadvantages that could result from the profound divergence of views of States regarding the effects of reservations and objections and asserted that "an article concerning the making of reservations could have obviated such disadvantages". Attention was also drawn to the recommendation of the General Assembly that the. organ of the United Nations , Specialized Agencies and States should, in the course of preparing multilateral conventions, consider the insertion of provisions relating to the inadmissibility of reservations and the effect to be attributed to them.[36]

[33] *Ibid*
[34] *Ibid.*
[35] *I CJ Reports (1 95 1) p.26*
[36] See General Assembly Resolution 598 (VI).

Whilst introducing the Report of the International Law Commission on the Work of its Forty Ninth Session at the recently concluded 52nd Session of the General Assembly the Chairman of the Commission stated *inter alia* that the preliminary conclusions on the reservation to treaties adopted by the Commission were intended to help clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights. The Commission had also decided that the result of its work would be to adopt a guide to practice on the topic of reservations to treaties in the form of a set of draft articles with commentaries.

A number of issues arise from the preliminary conclusions on the reservation to treaties adopted by the Commission. On the one hand it has been stated that that the Vienna regime is rather deficient on a number of subjects dealing with reservations to treaties in as much as clear and precise criteria for judging the admissibility of reservations was wanting. In this regard it is expected that the principles that the Commission had enunciated would clarify the reservations regime applicable to normative multilateral treaties. On the other hand . it has been pointed out that the Vienna legal regime was universally applicable to all treaties without any distinction aimed at excluding a particular type, of treaty, including human rights treaties. It has been clearly stated that there is no necessity for a separate regime for human rights treaties. States alone are competent to freely determine the extent to which they would be bound by international contractual obligations. It is a sovereign attribute of every State to negotiate with other States and decide on the extent to which it committed itself to the obligations it would enter into with other States.

At the 52nd session of the General Asseynbly the view was expressed that some of more important questions remained unanswered in the Commission's conclusions or in the Vienna regime, viz. (i) to which normative treaties did the principles apply; and (ii) did,the right of treaty monitoring bodies to judge a reservation apply when a treaty was silent on the role, of the monitoring bodies or when it was silent on reservations as a whole?

Several delegates emphasized that the competence of treaty-monitoring bodies to judge reservations could only be assessed with respect to the rights given to them by State parties. If those bodies were established by State

parties, they could not judge the admissibility of reservations and they should not be handed such power now. That power would run counter to the rights of States to decide on their own accord the admissibility or inadmissibility of reservations to treaties. If monitoring bodies were allowed to make conclusions on reservations, States might be discouraged from becoming party to treaties in general. Thus, any overstepping of their competence would be counter productive.

Thus the view was expressed at the 52nd Session of the General Assembly that, insofar as the existing general regime could accommodate changes, a separate regime on reservations for human rights treaties would not be a viable option in practice Besides , since several bodies and agencies dealt with human rights within the United Nations system, conferring additional powers on those bodies with respect to reservations could further complicate matters in the present reservations regime. It was suggested that the Commission study the proposals that would have States indicate the parameters for non-application of a provision of a human rights treaty and define the exact nature of human rights monitoring bodies. A system of collaboration between States and monitoring bodies within an expanded framework of the Vienna regime, it was suggested, could be a workable solution.

Human rights treaty-monitoring bodies, it was pointed out , were solely for the purposes for the functions ascribed to them by the States parties and those bodies could only exercise the functions that their constitutive treaties entrusted to them. In accordance with the Vienna Conventions, it was up to the State that made the reservation to determine whether its reservation was consistent with the purposes and objects of the treaty. States parties should be the ones that determined the consequences of reservations and the kind of treaty relationship between them.

The view was also expressed that while treaty-monitoring bodies could comment and express recommendations with regard to the admissibility of reservations made by States in order to oversee the implementation of the treaties they however had no competence to make legal determinations on the validity of particular reservations unless otherwise specifically authorized to do so by the express provisions of the treaties. The basic rule of consent by

ANNEXURE II

EXCERPTS FROM THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 28TH MAY 1951[1]

THE COURT IS OF OPINION

In so far as concerns the Convention on the Prevention and Punishment of the ,Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification,

On Question 1.

by seven votes to five,

That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II.

by seven votes to five,

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

[1] I.C J. REPORTS, 1951 p.29

On Question III.

by seven votes to five,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

ANNEXURE III

GENERAL ASSEMBLY RESOLUTION 598 (V1)

598.(V1) Reservations to Multilateral Conventions

The General Assembly,

Bearing in mind the provisions of its resolution 478 (V) of 16 November 1950, which (1) requested the International Court of Justice to give an advisory opinion regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and (2) invited the International Law Commission to study the question of reservations to multilateral conventions,

Noting the Court's advisory opinion[1] of 28 May 1951 and the Commission's report,[2] both rendered pursuant to the said resolution.

1 . *Recommends* that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them;

2. *Recommends* to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951;

3. *Requests* the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951;

(b) In respect of future conventions conventions under the auspices of the United Nations of which he is the depositary;

[1] See document A\ 1 874.

[2] See Official Records of the General Assembly, Sixth Session, Supplement No. 9.

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications

360th plenary meeting,
12 January 1952

ANNEXURE IV

VIENNA CONVENTION ON THE LAW OF TREATIES, 1969 PART 1

INTRODUCTION

Article 2

USE OF TERMS

1.For the purpose of the present Convention

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and what ever its particular designation;

d) "reservation" means a unilateral statement, however phrased or named , made by a State, when signing , ratifying, accepting, approving or acceding to a treaty , whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

PART 11

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SEC RION 2: RESERVATIONS

Aricle 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object ' and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a, party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expres sed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation,

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservation

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2 Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed.

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

VIENNA CONVENTION ON SUCCESSION OF STATES IN RESPECT OF TREATIES, 1978

PART 1
GENERAL PROVISIONS

Article 2
USE OF TERMS

1. For the purpose of the present Convention

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and what ever its particular designation;

(j) "reservation" means a unilateral statement, however phrased or named , made by a State, when signing , ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty , whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State,

PART III
NEWLY INDEPENDENT STATES

SECTION 2 MULTILATERAL TREATIES

Article 20
Reservation

1 When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of

States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as *that reservation.*

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

VIENNA CONVENTION ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS, 1986

PART 1

INTRODUCTION

Article 2
USE OF TERMS

1. For the purpose of the present Convention :

(a) "treaty " means an international agreement governed by international law and concluded in written form :

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instrwnents and what ever its particular designation;

(d) "reservation" means a unilateral statement, however phrased or named , made by a State or an international organization when signing , ratifying , formally confirming , accepting, approving or acceding to a treaty or when making a notification of succession to a treaty , whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization ;

PART 11
CONCLUSION AND ENTRY INTO FORCE

SECTION 2: RESERVATIONS

Article 19

Formulation of reservation

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organization or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides.

(a) acceptance of a reservation by a contracting State or by a contracting Organization constitutes the reserving State or international Organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or Organization and for the accepting State or organization;

(b) an objection by a contracting State or by contracting organisation does not preclude the entry into force of the treaty as between the objecting State or international Organization and the reserving State or Organization unless a contrary intention is definitely expressed by the objecting State' or Organization;

(c) an act expressing the consent of a State or Of an international Organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23

procedure regarding reservations

1. A reservation, an express acceptance of a reservation and, an objection to a reservation must be formulated in writing and communicated to the contracting State and. contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal conformation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its conformation.

3. An express acceptance of, or an objection to, a reservation made previously to conformation of the reservation does not itself require conformation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

ANNEXURE VII

TEXT OF THE PRELIMINARY CONCLUSIONS OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES.[1]

The International Law Commission has considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations. The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes -to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the Treaty is the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Conunission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

[1] Reproduced from the *Report of The International Law Commission on the work of itsforty-ninth session 12May-J8July*1997A/52/10. p.125

4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to, comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them; reservation so as to eliminate the inadmissibility, or withdrawing its reservation or foregoing becoming a party to the treaty;

6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the implementation of the treaties;

7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect;

10. The Commission notes also that, in the event of inadmissibility

of a reservation, it is the reserving State that has the responsibility of taking action. This action may consist, for example, in the State either modifying its

11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in' the area of human rights;

12. The Commission emphasizes that the principles enunciated above are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

VIII. STATUS AND TREATMENT OF REFUGEES

(i) Introduction

The Subject 'Status and Treatment of Refugees' has been on the agenda of the Asian African Legal Consultative Committee (AALCC) since its sixth session held at Cairo in 1964. At its eighth session (Bangkok), the AALCC adopted a set of Principles Concerning the Status and Treatment of Refugees, 1966 (commonly referred to as the 'Bangkok Principles'). Subsequently in 1970 and 1987, the Committee adopted two addenda on the right of refugees to return and the norm of burden-sharing respectively. The work of the AALCC in these areas has been carried out in consultation and active support of the Office of the United Nations High Commissioner for Refugees (UNHCR).

At the Thirty-fifth Session of the AALCC held in Manila (1996), the UNHCR Representative, recalled that the year 1996 marked the 30th anniversary of the adoption of the Bangkok Principles.and felt that, the commemoration of this occasion would afford a good opportunity for the AALCC Member States to take stock of the experience acquired during these thirty years. In this context, she expressed the willingness of UNHCR to co-sponsor with the AALCC a seminar or colloquium on refugee law whose point of departure will be a review of the Bangkok Principles. At the conclusion of its deliberations, the Committee took note of this proposal and requested the AALCC Secretariat, "to organize in collaboration with the financial and technical assistance of the UNHCR a seminar in 1996, on the Status and Treatiment of Refugees to commemorate the 30th Anniversary of the Principles of Refugees adopted by the AALCC at its 8th Session in Bangkok in 1966.

In pursuance of that decision, a Preparatory Meeting of the AALCC Member States was held in New Delhi in September 1996 to consider the agenda and other matters concerning the Commemorative Seminar. The Preparatory Meeting proposed that the Seminar should be held from 11 to 13 December 1996 at Manila, Philippines. The aim of the commemorative event should be (a) the promotion of the knowledge of these principles, and (b) their

re-examination in the light of developments in law and practice in the Afro-Asian region since 1966, with a view to recommending further action. The four subjects identified for focussed consideration at the Manila Seminar included" (i) the definition of refugees, (ii) asylum and standards of treatment, (iii) durable solutions, and (iv) burden-sharing.

COMMEMORATIVE SEMINAR AT MANILA 1996

The Commemorative Seminar, held at Manila, from 11 to 13 December 1996, was attended by representatives of 26 Member States,[1] 2 Observer States[2] officials of the AALCC Secretariat and the Office of UNHCR. The AALCC-UNHCR Joint Secretariat had prepared four background papers on the four subjects identified at the Preparatory Meeting, which served as the basis for discussions at the Seminar. The Seminar was inaugurated by .Mr. Teofisto Guingona, Secretary of Justice, Government of Philippines, and the then President of the AALCC.

In his address, the President recalled that the Bangkok Principles were adopted at a time when the law of refugees was in its nascent stage, and proposed that the Bangkok Principles be reviewed and revised in the light of numerous international instruments dealing with refugees, as well as State practices, which were evolved thereon during the last 30 years. Four Working Groups were constituted to consider the four issues identified viz. definition of. refugees, asylum and standards of treatment, durable solution and burden sharing. The working groups met in parallel sessions, and the deliberations were guided by the Moderators. The Working Groups adopted reports on their respective subjects, which were then presented to the Plenary Session. The recommendations as adopted at the Plenary Session marked general consensus on some issues including some textual changes in the text of Bangkok Principles. On some other issues, there was no convergence of the views.

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1. Arab Republic of Egypt, Bangladesh, Botswana, China, Cyprus, India, Indonesia, Iran, Iraq, Japan, Republic of Korea, Malaysia, Myanmar, Nepal, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Senegal, Singapore, Sri Lanka, Thailand, Turkey, Uganda and the United Arab Emirates.
2. Canada and Holy See

Thirty-sixth Session of the AALCC, Tehran,(1997)

At The thirty-sixth session of the Committee held in Tehran in May 1997, the AALCC Secretariat presented a report entitled "Report of the Seminar to Commemorate the 30th Anniversary of the Bangkok Principles held in Manila, Philippines", which set forth a summary of the proceedings at Manila; the text of the background notes prepared for the deliberations and the recommendations of the Manila Seminar.

During the deliberations at the Tehran Session, the delegates welcomed the recommendations of the Manila Seminar. While reiterating the importance of the Bangkok Principles, they called for focussed efforts towards addressing certain specific issues. Some delegates were,of the view that a restatement of the Bangkok Principles might start with a review of the refugee definition in a manner as to be in conformity with the current developments and other international instruments on this subject. While some delegates recognized the need to encourage regional and subregional co-operation in resolving refugee problems, others were of the view that where the magnitude of the refugee crisis was too complex and burdensome to be addressed within regional contexts, the burden should be shared by all members of the international community. In this context, the relevance of the concepts of international solidarity and burden-sharing should be applied to all aspects of the refugee problem in order to help the refugee-receiving States. The need for further reflection on the responsibility of States in solving the refugee problem was also emphasized. More particularly, the responsibility of the refugee-producing countries to pay compensation for refugees was mentioned as a key element in this regard.

Recalling the useful work accomplished at the Doha Session on the legal framework on the establishment of safety zones, a suggestion was made that the concept of safety zones for displaced persons in the country of origin could be re-examined by the Committee.

Following the proposal of the Representative of UNHCR suggesting the establishment of a Working Group to study the matter the Committee, in

its resolution on the subject[3] acknowledged the importance of the recommendations adopted at the Manila Seminar and requested the Secretary General to convene as appropriate, a meeting of experts in order to conduct an in-depth study of the issue, in light of the recommendations of the Manila Seminar as well as the comments thereon at this session and report to the thirty-seventh session."

Thirty Seventh Session : Discussion

The Deputy Secretary General, Mr.Ryo Takagi while Introducing the item Status and Treatment of Refugees stated that the36th Committee had considered the reommendations of the AALCC-UNHCR Seminar to commemorate the 30th Anniversary of the Bangkok Principles, held at Manila in December 1996. Following its deliberations, the Committee had mandated the Secretary General to "convene a meeting of experts in order to conduct an indepth study of the issue, in light of the recommendations of the Manila Seminar, as well as the comments thereon at the current session and report to the Thirty-seventh Session." In fulfilment of this mandate, a two-day Expert Group Meeting was convened at Tehran, on the invitation of the Government of the Islamic Republic of Iran.

He thanked the Government of the Islamic Republic of Iran for hosting the Expert Group meeting . He also thanked the Government of Japan and the Office of the United Nations High Commissioner for Refugees for the financial and technical assistance towards the successful conduct of this initiative.

The Expert Group meeting was attended by 29 Member States. The meeting discussed four broad themes: (i) definition of refugees; (ii) asylum and standards of treatment; (iii) durable solutions; and (iv) burden-sharing. The deliberations reviewed the Manila recommendations and focussed on specific issues, with a view to carrying forward the process started at Manila.

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3. Resolution No. 36/3. For full text see Report of Thirty -Sixth Session held in Tehran (3-7May 1997) pp.67-68

He briefly stated the outcome of the Expert Group Meeting as follows: "As regards the refugee definition there was consensus that the updating and expanding of the refugee definitions on the basis of broader humanitarian considerations would more appropriately reflect the nature of present day refugee movements. It was agreed that any revision of the refugee definition should reflect the characteristics of forced displacement experienced in the region of AALCC Member States."

As regards the topic, "Asylum and Treatment of Refugees" the meeting reviewed the recommendations of the Manila Seminar and suggested specific textual changes to the Bangkok Principles. Special attention was also drawn to the particular needs of vulnerable refugees such as women, children and the elderly.

On the topic "durable solutions", the meeting reiterated the Manila recommendations on 'voluntary repatriation' being the preferred solution to the refugee problem. The role of 'comprehensive approaches' towards effective solutions for return of refugees was also acknowledged. The responsibility of the country of origin to allow safe and dignified return of refugees and affording ways and means for their long term and sustainable reintegration was also highlighted.

The Deputy Secretary General also stated that on the subject of 'burden sharing', the meeting reaffirmed the Maanila Seminar recommendations on integrating the descriptions of burden-sharing as contained in the AALCC's second Addendum to the 1966 Bangkok Principles. While recognizing the need to tackle the root causes giving rise to forcible displacement, the meeting recognised that the primary responsibility for refugee protection must rest on the states of asylum.

The Expert Meeting asked the AALCC Secretariat to prepare an indepth study of the refugee issue in the region and to formulate a draft of proposals for the Bangkok Principles to reflect the contemporary regional characteristics as expressed in the recommendations of the Manila Seminar and the Tehran Meeting of Experts.

The Deputy Secretary General also said that theSecretariat undertook this work on the basis of the deliberations of the Session, and had submitted a set of proposals for a revised version of the Bangkok Principles, incorporating the recommendations of the Manila Seminar and of the Tehran Meeting. The report of the Rapporteur and the summary proceedings of the Tehran Meeting had also been presented in the Secretariat brief. The Committee considered these proposals and gave guidelines to enable the AALCC Secretariat to undertake further work on the subject.

(ii) Decision On "The Status and Treatment of Refugees"

(Adopted on 18.4.98)

The Asian African Legal Consultative Committee and itsThirty Seventh Session

Having considered the item Status and Treatment of Refugees and the Secretariat Document No AALCC\XXXVII\New Delhi \ 98\ S4

Recalling the Secretariat report entitled "Report of the Seminar to Commemorate the 30th Anniversary of the Bangkok Principles held in Manila, the Philipplincs", submitted to the 36th Session;

Recalling also the Resolution adopted by the 36th Session which, after taking note of the said Report, requested the Secretariat to convene a Meeting of Experts in order to conduct an in-depth study of the issues covered by the Report, in light of the recommendations of the Manila Seminar and the comments thercon made at the 36th Session, and to report to the 37th Session;

Having considered also the report of the Secretary-General on the Tehran Meeting of Experts together with its attachment which contains a consolidation of proposals made to revise the 1966 Principles concerning Treatment of Refugees, known as the "Bangkok Principles", this consolidation having been prepared by the Secretariat at the request of the Meeting of Experts to reflect the recommendations of the Manila Seminar as well as those of the Meeting of Experts;

1. **Expresses** appreciation to the Secretariat for convening the Meeting of Experts, to the Office of the United Nations High Commissioner for Refugees for providing technical and material support to the Meeting of Experts, to the Government of the Islamic Republic of Iran for hosting it, and to the Government of Japan for providing the necessary Financial support;

2. **Takes note** with interest the report of the Secretary General and of the consolidated text of proposed revisions to the Bangkok Principles prepared by the Secretariat:

3. **Requests the Secretary General** to undertake consultations with Member States and with the Office of the United Nations High Commissioner for Refugees.in particular on the consolidated text, with a view to submitting to the 38th Session recommendations on the revisions to the Bangkok Principles.

(iii) Secretariat Study : Status And Treatment of Refugees

Expert Group Meeting Held At Tehran, The Islamic Republic Of Iran 11-12 March, 1998

In partial fulfilment of the mandate and at the invitation of the Government of the Islamic Republic of Iran, a Meeting of Experts was convened with the financial and technical assistance of UNHCR at Tehran form 11 to 12 March 1998. Towards facilitating further deliberations at the expert meeting, two background papers, one each by the AALCC Secretariat and the UNHCR were prepared.

The Meeting was attended by 29 Member States besides officials from the AALCC and UNHCR Secretariat and was inaugurated by Dr. M.Javad Zarif, Deputy Minister of Foreign Affairs for Legal and International Affairs and President for the Thirty-Sixth Session of the AALCC. In his inaugural address,he stated that the Bangkok Principles together with its Addenda aptly reflected the humanitarian traditions of Asia and Africa in hosting and protecting refugees.

The Secretary General of AALCC, Mr.Tang Chengyuan stated that the Expert Group Meeting might consider what form the Manila recommendations would take within the AALCC framework. The conclusions reached at this meeting would provide the necessary feedback for the AALCC Secretariat in its future work on the subject.

The representative of the Office of UNHCR, Ms.Erika Feller in her statement recognized that the Bangkok Principles have served as valuable points of reference for states seeking to develop standards to apply in meeting the refugee challenge. Though these principles remain essentially sound, she underscored the need to include new reference points to achieve full relevance to the problems of the present and flexibility to deal witlh the problems of the future.

The agenda for the expert meeting as adopted included four themes: (a)definition of refugees,(b) asylum and standards of treatment , (c) durable

solutions; and (d) burdensharing. The meeting held extensive discussions in particular on the agenda item 'definition of refugees' in the light of recommendations made at the Manila Seminar. As directed, the Secretariat has prepared a comprehensive summary record of the discussions. The 'draft' will be sent to the participants in the Expert Group Meeting with a view to invite their comments. Once these comments are received, the Secretariat will prepare the final record as well as an in-depth study as recommended by the Expert Group Meeting. A paper containing revised proposals for the Bangkok Declaration has also been included in this study. This has been prepared taking into account the recommendations of the Manila Seminar and the views expressed at the Expert Group Meeting in Tehran.

Proposals Submitted At The Experts Group Meeting In Tehran

1. Egypt

The Delegation of Egypt proposed that an expanded definition should include in its "exceptions" part the "crime of terrorism". Moreover, the crime of terrorism should also be considered as one of the reasons for the loss of status as refugee.

2. Ghana

The Delegate of Ghana proposed a definition of refugee as follows: 'A. refugee is a person who.... is outside the country of his nationality and is unwilling or cannot, for the time being, return to his home country because his life, freedom or personal security would be at risk there; the risks emanating from a pattern of persecution on account of race, religion, nationality, membership of a particular social group or political opinion and/or from generalized violence (international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order) or from massive violations of human rights in the whole or part of the country of nationality".

3. Uganda

The Delegate of Uganda proposed to include 'colour' in the definition

of refugees i.e. "persecution as result of colour ethnicity..." etc.

4. Islamic Republic of Iran

Proposal made by the Delegate of the Islamic Republic of Iran concerning Article IV (right to return).

Taking into consideration that voluntary repatriation constitutes a right of the refugee, the importance of strengthening, extending and promoting the ways and means to facilitate conditions for voluntary return should be emphasized.

Revised Proposals for "Bangkok Principles"[1]

I. The Refugee Definition

Article I

Definition of the term "refugee"

1. A refgee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, *nationality, ethnic origin*[2], piolitical *opinion*[3] membership of a particular social group:

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[1] **In this draft, the parts in regular characters are from the Bangkok Principles, their *Exception, Explanations, Notes,* and Addenda. The texts in italics come from other sources, including recommendations of the Manila Seminar or the Tehran Meeting of Experts, and provisions of other international instruments. All sources other than Articles of the Bangkok Principles are *specified* in footnotes.**

[2] Both the Manila Seminar and Tehran Meeting of Experts strongly recommended adding the ground of "nationality". The Tehran Meeting of Experts recommended "ethnic origin".

[3] The term "opinion" is used in all the other international refgee definitions, instead of "belief".

(*a*) leaves the State of which he[4] is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; and[5]

(b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection.

2. *The term "refugee " shall also apply to every person who, owing to external aggression, occupation foreign domination or event seriously disturbing-public older in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*[6]

3 A person who was outside of the State of which he is a national or the Country of his nationality. or if he has no nationality, the State of which he is a habitual resident. at the time of the events which caused him to have a well founded fear of the above-mentioned persccution, and is unable or unwilling to return or to avail himself of its protcction shall be considered a refugee.[7]

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4. It may be preferable in these times to use, whenever appropriate, the formulas "he/she" and "his/her".

5. Recommended as a substitute for "or" in *Note* (iv) to Art. 1 of the Bankok Principles: this is also consistent with all other international refugee definitions.

6. Art. 1 (2) of the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. This addition was recommended both at the Manila Seminar and at the Tehran Meeting of Experts. This paragraph also reflects *Nole* (ii) to Art. 1 of the Bankok Principles which refers to "invasion" and occupying" of the State of origin, and para. 1 of the 1970 Addendum to the Bangkok Principles, which lists "foreign domination, external aggression or occupation". In conformity with the discussions at the Tehran Meeting of Experts, it does not include the formula of the 1983 Cartagena Declaration on Refugees which refers to "generalized violence, [...] internal conflicts, massive violation of human rights[...]" One participant at the Tehran Meeting of Experts was unfavourable to an expansion of the definition.

7. Note (vi) to Art. I of the Bangkok Principles.

4. The dependents of a refugee shall be deemed to be refugees.[8]

5. A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or Country of which he is a national.[9]

6. A refugee shall lose his status as refugee if.[10]

(i) he voluntarily returns to the State of which he was a national, or the Country of which he was a habitual resident; or

(ii) he has voluntarily re-availed himself of the protection of the State or Country of his nationality;

it being understood that[11] at the loss of status as a refugee *under this sub*[12] paragraph will take place only when the refugee has successfully re-availed himself of the protection of the State of his nationality[13]; or.

(iii) he voluntarily acquires the nationality of another State or Country and is entitled to the protection of that State' or Country; or

[iv] [...]he does not return to the State of which he is a national, or to the Country of his nationality, or if he has no nationality, to the State or Country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or Country after the circumstances in which he became a refugee have ceased to exist.

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8 Explanation of Art. I of the Bangkok Principles.

9 Exception (I) to Art. I of the Bangkok Principles.

10 This paragraph is Art. II (Loss of Refugee Status) of the Bangkok Principles, the latter's cessation provisions, with some modifications derived from the Notes to the same Article and from the 1951 Convention.

11 Stylistic Addition.

12 Idem.

13 This sentence is derived from Note (ii) to Art. II of the Bangkok Principles.

Privided that this paragraph shall not apply to a refugee [...] who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.[14]

7. A person[15] who, prior to his admission into the Country of refuge, has committed a crime against peace, a war crime against humanity as *defined in international instruments drawn up to make provisions in respect of such crimes*[16] or a serious non-political crime *out-side his country of the refuge prior to this admission to that country as a refugee*[17], or has committed acts country acts to the purposes and principles of the United Nations, shall not be a refugee.

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[14] Art. 1 C(5) of the 1 95 1 Convention.This sub-paragraph usefully complements the rest of the text, the core of which is protection, as repeatedly indicated at the Tehran Meeting of Experts.. It is also consistent with the recommendation of a participant at the Tchran Meeting that the chances justifying cessation of refugee status should be of a fundamental nature.

[15] This paragraph is derived from Exception (2) of the Bankok Principles. It is a set of Exclusion clauses recommended at the Tehran Meeting of Experts. The text is modified to correspond to the formulations of existing universal and regional instruments on refugees, as specified below. One participant proposed a specific reference to terrorism as a ground for exclusion. It was pointed out that, if properly applied, the exclusion clauses as stated in this paragraph and indeed in all the major international refugee instruments, should exclude a terrorist. While the problem of terrorism is not to be denied, it was deemed important to avoid giving the erroneous impression that all refugees are terrorists, which would in turn undermine the institution of asylum.

[16] Art. 1(5)(a) of the OAU Convention and Art. 1 F(a) of the 1951 Convention.

[17] Art 1(5)(b) of tile OAU Convention and Art. 1 F(b) of the 1951 Convention.

II.Asylum and Treatment of Refugees

Article III

Asylum to Refugee

1. *Everyone, without any distinction of any Kind is entitled to the right to seek and to enjoy in other countries asylum from persecution.*[18]

2. A State has the sovereign right to grant or to refuse asylum in its territory to a *refugee in accordance with its international obligations and national legislation.*[19]

3. *The grant of asylum to refugees is a peaceful and humanitarian act*[20] *It*[21] *shall be respected by all other States and shall not be regarded as an unfriendly act.*

4. *Member States shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.*[22]

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[18] Para. 23 of the 1993 Vienna Declaration on Human Right. An alternative formulation might be: "Everyone has the right to seek and to enjoy in other countries asylum from persecution[....]." (Art. 14(1) Universal Declaration of Human Rights).

[19] This insert was recommended by the Manila Seminar and amended by the Tehran Meeting of Experts from "domestic" to "national". One participant also proposed placing the word "its" in front of "national".

[20]. Art. II (2) of the OAU Convention and the preamble of the United Nations Declaration on Territorial Asylum. .

[21]. Stylistic substitution.

[22]. Art. II (1) of the OAU Convention. This proposed paragraph would indeed reflect the positive State practice in the Afro-Asian region in the past three decades.

Article III A[23]

Non- refoulement

1. No one seeking asylun in accordance with these principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin,[24] *membership of a particular social group or political opinion.*[25]

2. The provision as outlined above may not however be claimed by a person when there is reasonable ground to believe the person's presence is a danger to the security of the country in which he is, or whom having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[26]

3. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions it may deem appropriate, to enable the person thus endangered to seek asylum in another country.[27]

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[23] The Manila Seminar propose dremoving para. 3 from Art. III of The Bankok Principles and making it into a separate Article in two paragraphs, as per the first two paragraphs below. The third paragraph below is actually para. 3 of Art. III of the Bannkok Principles.

[24] The addition of "ethnic origin" in the *non-refoulement provision* was recommended at the Tehran Meeting of Experts. It is in any case consistent with the grounds in the refugee definition.

[25] Rephrasing of Art. III as per footnote (22) above.

[26] Idem.

[27] Para 3 of Art. III as per footnote (22) above.

Minimum standards of treatment

1. A State shall accord to refugees treatment no less favourable than that generally accorded to aliens in similar circumstances, *with due regard to basic human rights as recognised in generally accepted international instruments.*[28]

2. The standard of treatment referred to 'in *paragraph* I[29] shall 'include the rights relating to aliens contained in the Final Report of the Committee on the status, of aliens, to the extent they are applicable to refugees.

3. A refucee shall not be denied any rights on the ground that he does not fulfill requirements which by their nature a refugee is incapable of fulfilling

4. A refugee shall not be denied any rights on the ground that there is no reciprocity in regard to the grant of such rights between the receiving State or the Country of nationality of the refugee or, if he is stateless, the state or Country of his former habitual residence.

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[28] Insert recommended by the Manila Seminar. At the Tehran'Meeting of Experts, one participant suggested substituting "as regards" for "with due regard". No explanation was given. Another proposed substituting "international human rights conventions" for "generally, accepted international instruments." One participant in the Meeting of Experts complained that refugees were sometimes given a higher standard of treatment than nationals. Another doubted this, pointing out that the rules of operation were precisely, not to give the refugees higher treatment than the locals. On the contrary, the services made available to refugees in a given area are often extended, as necessary, to internally, displaced persons and the local population as well.

[29] As this is a restatement of para. 2 of this Art. VI, it had to be rephrased accordingly.

5. States undertake dertake to apply these principles to all refugees without distinction as to race, religion, nationality, ethnic origin, gender, membership of a particular social group or political opinions, in accordance with the principle of non-discrimination.[30]

6. States shall adopt effective measures for improving the protection of refugee women and,as appropriate, ensure that the needs and resources of refugee women are fully understood and integrated to the extent possible into their activities and programmes.[31]

7. States shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present principles and in other international human rights instruments to which said States are Parties.[32]

8. States shall give special attention to the protection needs of elderly refugees to ensure not only their physical safety, but also the full exercise of their rights, including their right to family reunification. Special attention shall also be given to their assistance needs, including those relating to social welfare, health and housing.

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[30]. Derived from Art. IV of the OAU Convention and Art. 3 (partially,) of the 1951 Convention. The grounds of "ethnic origin" and "gender" are added to reflect current international standards, the latter reflecting Art. 18 of the Vienna Declaration on Human Rights and foreshadowing the next paragraph. This clause reflects recommendation (d) of the Manila Seminar under "Points for Further Review".

[31]. See para. (a) of UNHCR Executive Committee Conclusion No. 64 (XL1) on Refugee Women and International Protection. At the Tehran Meeting of Experts, during the discussion of a possible provision on women, children and elderly refugees, one participant proposed a general provision on vulnerable groups as an alternative to, a separate one on each such group as in paragraphs 8, 9 and 10.

[32]. Art. 22 (1) of the 1989 Convention on the Right of the Child.

Article VIII

Expulsion and deportation

1 Save in the national or public interest or in order to *safeguard the population,*[33] the State shall not expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary and as applicable to aliens under such circumstances. [34]

3. A refugee shall not be deported or returned to a State or Country where his life or liberty would be threatened for reasons of race, colour, *nationality, ethnic origin,* [35] religion, political *opinion,*[36] or membership of a particular social group.

4. The expulsion of a refuge shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to

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[33]. This excerpt is taken from Art. 3 (2) of the UN Declaration on Territorial Asylum. It substitutes for "on the ground of violation of the conditions of asylum". Another alternative proposed in *Note* (I) to Art. VIII of the Bankok Principles would be: "save on ground of national security or public order, or a violation of the vital or fundamental conditions of asylum"; "national securit and public order" are the only grounds.
provided for by the 1951 Convention in Art. 32 (1).

[34]. The phrase "as applicable to aliens under the same circumstances" is taken from *Note* (2) to Art. VIII.

[35]. These additional grounds were recommended for the refugee definition by the Manila Seminar and the Tehran Meeting of Experts respectively. See footnote (2) above.

[36]. See footnote (3) above.

and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. [37]

III. Durable Solutions

Article IV

Right of return

1. A refugee shall have the right to return if he so chooses to the State of which he is a national or the country of his nationality and in this event it shall be the duty of such a State or Country to receive him.

2. This principle should apply to, *inter alia*,[39] any person who because of foreign domination, external aggression or occupation has left his habitual place of residence or who[40] being outside such place desires to return thereto.

3. It shall [...]be the duty of the Government or authorities in control of such place of habitual residence to facilitate, by all means at their disposal, the return of all such persons as are referred to in the foregoing paragraph, and the restitution of their property to them .[41]

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[37] Art. 32 (2) of the 1951 Convention. This paragraph is consistent with the recommendation of a participant of the Tehran Meeting of Experts that a refugee should not be expelled without due process of law. It is also in conformity with Art. 13 of the 1966 International Covenant on Civil and Political Ric,hts. In the national context, the refugee's right to due process of law in expulsion cases was reaffirmed in the January 1996 decision of the Supreme Court of India in the case of *National Human* Rights *Commission v. State of Arunachal Pradesh and Another* (1 996 [1] Supreme 295).

[38] This and the next two paragraphs are paras. (1), (2) and (3) of the 1970 Addendum to the Bangkok Principles. The incorporation of this Addendum was understood as appropriate in both Manila and Tehran.

[39] Stylistic addition.

[40] Idem.

[41] 1970 Addendum, para. 2.

4. This natural right of return shall also be enjoyed and facilitated to the same extent as stated above in respect of the dependants of all such persons as are referred to in paragraph I[42] above. [43]

Article V

Right to compensation

1. A refugee shall have the right to receive compensation from the State or the Country which he left or to which he was unable to return.[44]

2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authority of the state or country, public officials or mob violence.

3.[45] Where such person does not desire to return, he shall be entitled to prompt and full compensation by the Government or the authorities in control of such place of habitual residence as determined, in the absence of agreement by the parties concerned, by an international body designated or constituted for the purpose by the SecretaryGeneral of the United Nations at the request of either party.

4. If the status of such a person is disputed by the Government or the authorities in control of such place of habitual residence, or if any other

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[42]. Modified due to change in paragraph numbering.

[43]. 1970 Addendum, para.3.

[44]. While a Tehran Meeting of Experts participant called compensation a utopia, another called attention to its necessity when, for example, refugees' property has been confiscated. He was probably referring to historical cases of compensation and restitution from,Germany and from Uganda.

[45]. This paragraph and the next are paras. (4) and (5) of the 1970 Addendum. See footnote (37) above for explanation.

dispute arises, such matter shall also be determined, in the absence of agreement by the parties concerned, by an international body designated or constituted as specified in paragraph (3)[46] above.[47]

Article V(A)[48]

Voluntary repatriation [49]

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The county of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.

3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them thefull rights andprivileges of nationals of the country, and subject them to the same obligations.

4. Refugees who voluntarily return to their country shall in no way be penalizedfor having left it or for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the relevant universal and regional organizations [50] inviting refugees to return home without risk and to take up a normal and peaceful life without fear of being

[46] Numbering modified as per the new numbering of the paragraphs.

[47] 1970 Addendum, para. 5.

[48] Under "Durable Solutions" the Manila Seminar made detailed recommendations on voluntary repatriation which are reflected in this new Article taken from the OAU Convention.

[49] Art. V of the OAU Convention. Similar provisions are found in UNHCR's EXCOM Conclusion No. 40 (XXXVI) Voluntary Repatriation.

[50] This phrase is substituted for " the Administrative Secretary-General of the OAU"

disturbed and punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.

5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and inter-governmental organizations tofacilitate their return.[51]

Article V (B)[52]

Other solutions

1[53] Voluntary repatriation, local settlement or resettlement, that is, the traditional solutions. all remain viable and important responses to refugee situations, even while voluntary repatriation is the pre- eminent solution, To this effect, States should undertake, with the help of international governmental and nongovernmental organizations,[54] development measures which would underpin and broaden the acceptance of the three traditional durable solutions.

[51] This and the other paragraphs of this proposed Article should meet the requirements of the Tehran Meeting of Experts participants who called for "ways and means to facilitate return", for "the means of integration after return", and for "sustainable reintegration".

[52] While the Manila Seminar expressed the sense that the international climate was not ripe for a formal inclusion of local integration as a solution, it conceded that it had provided some positive experiences. As for third country resettlement, while the Seminar deemed it not a solution for the vast majority of refuges in the Afro-Asian region, it nevertheless agreed that the resettlement option needed to be left open. (Report of the Seminar, p. 6). At the Tehran Meeting of Experts, both views were expressed and several participants called attention to the need to preserve these three traditional solutions in light of positive experiences in specific refugee contexts. This proposed Article reflects these views.

[53] UNHCR's EXCOM Conclusion No. 61 (XLI) Note on International Protection, paras. (iv) and (v).

[54] Stylistic insertion.

2. States shall promote comprehensive approaches, including a mix of solutions involving all concerned States and relevant international organisations in the search for, and implementation of, durable solutions to refugee problems.[55]

3 The issue[56] of root[57] causes is crucial for solutions and international efforts should also be directed to the removal of the causes of refugee movements[58] and the creation of the political, economic, social, humanitarian and environmental conditions conducive to voluntary repatriation.[59]

(iv) Burden Sharing

Article IX[60]

1. The refugee phenomenon continues to be a matter of global concern and needs the support of international community as a whole for its solution and as such the principle of burden sharing should be viewed in that context.

2. The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for [...] refugees, whether within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing

[55] Manila Seminar (see Report of the Seminar, p. 6). At the Tehran Meeting, of Experts, one participant recommended the consideration of "regional approaches", which in fact are not at all excluded from the concept of "comprehensive approaches".

[56] The word "issue" is substituted for "aspect" for stylistic purposes.

[57] The word "root" is added to the text in order better to reflect the recommendation made at the Tehran Meeting of Experts.

[58] UNHCR's EXCOM Conclusion No. 40(XXXVI), para. (c).

[59] Addressing the root causes of refugee movements by ensuring "sustainable repatriation" was recommended at the Tehran Meeting of Experts.

[60] The Manila Seminar recommended that paras. 1 to IV of the 1987 Addendum be incorporated into the Bangkok Principles under the heading of "Burden Sharing and become a new Art. IX.

access to refugees in countries outside the region, due to political, social and economic considerations.

3. The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solutions and the support of international bodies with responsibilities for the protection and assistance of refugees.

4. International solidarity and cooperation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of States requiring assistance, whether through financial or material aid through resettlement opportunities.

5[61] *In all circumstances the respect for fundamental humanitarian principles is an obligation for all members of the international community. Giving practical effect to the principle of international solidarity and burden sharing considerably facilitates States' fulfillment of their responsibilities in this regard.*

[61] This paragraph is added to ensure a more complete statement of the principle of burden sharing and arises out of the discussions at the Tehran Meeting of Experts.

V. *Additional Provisions*[62]

Article X[63]

Rights granted apart from these Principles[64]

Nothing in these Articles shall be deemed to impair any higher rights and benefits granted or ehich may hereafter be granted by a state to refugees.

ArticleXI[65]

Cooperation with international organizations

States shall co-operate with the Office of the United Nations High Commissioner for Refugees and, in the region of its mandate, with the United Nations Relief and Works Agency for Palestine Refugees in the Near-East.[66]

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62. Title added for clarity.

63. This is the former Art. IX. The Manila Seminar had recommended that a new Art. IX be inserted under the rubric " Burden Sharing, " and that this text be renumbered Art. X.

64. Title added for clarity.

65. Under the heading of "Cooperation with international organizations", the Manila Seminar "expressed its appreciation to UNHCR as well as to UNRWA for their dedication to their duties on behalf of refugees." (Report of the Seminar, p.5)

66. On cooperation with UNHCR, see Art. VIII (1) of the OAU Convention, Art. 35 of the 1951 Convention, and Art. II of the 1967 Protocol relating to the Status of Refugees.

IX. DEPORTATION OF PALESTINIANS IN VIOLATION OF INTERNATIONAL LAW PARTICULARLY THE FOURTH GENEVA CONVENTION OF 1949 AND THE MASSIVE IMMIGRATION AND SETTLEMENT OF JEWS IN THE OCCUPIED TERRITORIES

(i) Introduction

The subject "Deportation of Palestinians in Violation of International Law, perpendicularly the Fourth Geneva Convention of 1949" was taken up by the AALCC consequent upon a reference made by the delegation of the Islamic Republic of Iran at the 27th Session of the Committee (Singapore). During that Session it was pointed out by the delegate of the Islamic Republic of Iran that: "the Zionist entity (Israel) had deported a number of Palestinians from Palestine as a brutal response to the upheaval by the people in the occupied territory. The deportation of people from the occupied territory, both in past and recent times constituted a severe violation of the principles of International Law and also violated the provisions of international instruments and Conventions such as the Hague Conventions of 1899 and 1907, the UN Charter, 1945 and the Geneva Convention relative to Protection of Civilian Persons in time of war, 1949 all of which prohibited deportation as a form of punishment of deterrent factor, especially in an occupied territory". After preliminary exchange of views the Islamic Republic of Iran had submitted to the AALCC Secretariat a memorandum and called upon to study the legal consequences of the deportation of Palestinians from occupied territories.

The topic was considered at the 28th and 29th Sessions of the Committee held at Nairobi and Beijing respectively. The study presented at the 28th Session concluded that the deportation of Palestinians did indeed constitute a flagrant violation of customary international law of armed conflicts as well as contemporary international humanitarian law, and hence the occupying powers were acting in flagrant violation of international law. It also affirmed the inalienable right of Palestinian people for self determination and the right to return to their land and directed the Secretariat to undertake a further study including the question of payment of compensation to Palestinians. Pursuant to that decision the study presented at the 29th Session tried to

establish that payment of compensation for deportation is both a matter of customary international law as well as an explicit stipulation of contemporary international law as codified in the Hague Convention of 1907, the Fourth Geneva Convention of 1949 and the 1977 Protocols thereto. The study also emphasised that not only had the Palestinian people been denied exercise of their fundamental human rights and freedoms but grave injustice had been perpetrated against them. After due consideration of the topic in Beijing (1990) the Secretariat was directed to follow up the subject with consideration of legal aspects, of the resettlement in violation of international law by the State of Israel, of a large number of Jewish migrants in Palestine.

The study presented at the 30th Session (Cairo 1991) focussed on the Israeli Settlements in the occupied territories. Since 1967 through expropriation of Palestinian lands and the issue of massive immigration of Jews from the former Soviet Union and their resettlement in the occupied territories of Palestine. The right of the Palestinian people to return to their homeland had also been discussed in the Secretariat study. During the Session concern was expressed at the continuing denial and deprivation of the inalienable human rights of the Palestinian People including the right to self-determination and the right to return and establishment of their independent State on their national soil. The committee requested the Secretary General to continue to monitor the events and legal developments in the occupied territories of Palestine and decided to include the item on the agenda of its 31st Session.

Thereafter, following the conclusion of a Co-operation Agreement with the League of Arab States, the Secretariat convened in conjunction with the office of the League of Arab States, a two-day workshop in New Delhi on the question of deportation of Palestinians and the Israeli policy and practice of immigration and settlement of Jews. The brief for the 32nd session (Kampala 1993), reflecting the developments included a report of the aforementioned workshop for which the Secretariat had prepared a working paper on the legal aspects of the Palestine Question. The brief of documents prepared for consideration at the AALCC's 32nd session established that the Hague Conventions of 1899 and 1907 are applicable to the territories occupied by the Israelis since 1967 as their occupation stems from acts of aggression and invasion. It also demonstrated that the 1949 Geneva Conventions are also

applicable to these occupied territories, particularly since Israel is a High Contracting Party to those conventions and that therefore the Palestinians in the occupied territories are protected persons by virtue of the applicability of the principles of International Humanitarian Law. Further, it demonstrated that contemporary International Law prohibits the deportation of the civilian population in occupied territories to the territory of the occupying power or any other State. It also pointed out that the International Law Commission had in its Draft Code of Crimes Against the Peace and Security of Mankind expressly stipulated that the deportation of people, and the resultant demographic changes, is a crime against humanity.

The study prepared for the 34th Session (Doha) reflected the events and developments following the Middle East Peace Process including the principles on Interim self Government Arrangement of September 1993 and, the 1994 Agreement on the Gaza Strip and Jericho area. At that Session, the Conunittee, inter alia. decided that this item be considered in conjunction with the question of the Status and Treatment of Refugees. After due deliberations the AALCC at its 35th (Manila 1996) Session took cognizance of the hardships suffered by the Palestinian refugees and directed the Secretariat to continue to monitor the developments in the occupied territories from the view point of relevant legal aspects. It also decided to place the item on the agenda of the 36th Session.

'The Secretariat monitored with great concern the important events which occurred in Palestine and the occupied territory within the context of this Agenda item-since Manila Session. It registered through these events and through the specialized comments and analysis contained in legal journals of international law the major developments concerning the deportaion of Palestinians and massive immigration of Jews topic.

The study prepared by the Secretariat had exposed to the AALCC Member States the current serious developments in the occupied territories which could lead to deterioration of the situation in the region and to resumed cycle of tension and violence, endangering peace and security not only in the Middle East but throughout the world.

Thirty Seventh Session : Discussion

The Deputy, Secretary General Dr. W. Z. Kamil while introducing the item "Deportation of Palestinians in Violation of International Law Particularly the Fourth Geneva Convention of 1949 and the Massive Immigration and Settlement of Jews in the Occupied Territories" stated that the item was included on the agenda of the Committee in 1988. It was referred to the Committee in the 27th Session held in Singapore by the Government of the Islamic Republic of Iran. From that time, the Secretariat has in its successive sessions monitored the subject, very carefully and added that the subject has gone through three phases:

He noted that during the first phase, it was concluded that the deportation of Palestinians did indeed constitute a flagrant violation of customary international law of armed conflicts as well as contemporary international law, and hence occupying powers were acting in flagrant violation of international law. The follow-up emphasized that not only had the Palestinian people been denied the exercise of their fundamental human rights and freedoms but grave injustice aimed at the destruction of these rights had been perpetrated against them by Israel. The Secretariat also underlined the massive immigration of Jews from the fomier Soviet Union and the Israeli practice of settlement of Jews in occupied Palestinian territories.

During the second phase the,intemational community saw a ray of hope, by virtue of the signing of agreements between the parties. The Study presented at the 34th Session held in Doha (1995) reflected the events and developments following the Middle East Peace Process including the Principles on Interim Self- Government Arrangements of September 1993 and the May 4, 1994 Agreement on the Gaza Strip and Jericho Area. At that Session, the Committee, inter alia decided that this item be considered in conjunction with the question of the Status and Treatment of Refugees.

The Deputy Secretary General stated that during the 35th Session Manila(1996) it was inter alia felt that the steps towards peace between the conflicting parties would hopefully settle all pending issues including the deportation of Palestinians in violation of International law, and would also

restore full respect and implementation of international instruments including the Fourth Geneva Convention and rules of international law.

After due deliberations at that Session AALCC in the resolution related to this item underlined the hardships suffered by the Palestinian people and directed the Secretariat to continue to monitor the developments in the occupied territories, from the viewpoint of relevant legal aspects.

He observed that a glance of hope which marked,the second phase almost vanished and third phase which set in, too soon, brought with it disappointment. The 36th Session of the AALCC held in Tehran, last year was particularly important, because it was held in the wake of difficulties being experienced in the implementation of the peace process. It was noticed that despite all documents, agreements and resolutions, the unlawful measures taken by the Israeli armed forces against innocent Palestinians was a flagrant contradiction to the principles of international law and needed to be strongly denounced. Further the Secretariat brief had brought to the knowledge of the AALCC Member States the serious developments in the occupied territories which could lead to a deterioration of the situation and to a resumed cycle of tcnsion and violence, endangering peace and security not only in the Middle East, but throughout the world.

The Secretariat had monitored the situation over the past one year and that the situation was far from satisfactory. The Israeli Government continues to evade the implementation of the agreements and commitments that have been agreed upon thus endangering the whole Peace Process, through building settlements, confiscating of land and the Judiasation of Jerusalem by imposing the policy of dictations and "fait accompli" on the ground, military escalation and threatening to reoccupy Palestinian Authority areas.

The decision which was taken by the Israeli Government to build a Jewish residential neighbourhood on Jabal Abu Ghneim, South of Arab Jerusalem, is a step which is considered a flagrant violation of the principles on which the peace process was based and of all international laws and resolutions in particular Security Council resolutions 242 and 338. He was of the firm view that these Israeli measures, which are inconsistent with the principles on

which the peace process was based need to be strongly condemned. These decisions are a violation of international law and are a threat to the peace process and could plunge the region once again into struggle, tension and instability. Furthermore, this systematic violation of the "Peace process" compelled the international community to take some decisive decisions on how to bring back peace to the region.

The General Assembly during its 52nd Session, in its resolutions 52/66 and 52/67 has expressed grave concern about the decision of the Government of Israel to resume settlement activities, including the construction of the new settlement in Jabal Abu Ghneim, in violation of international humanitarian law, relevant United Nations resolutions and agreements reached between the parties, as well as, about the dangerous situation resulting from actions taken by the illegal armed Israeli settlers in the occupied territory, as illustrated by the massacre of Palestinian worshippers by an illegal Israeli settler in AI-Khalilon.

The continuing violation of the human rights of the Palestinian people by Israel was a cause of concern, especially the use of collective punisliment, closure of areas, annexation and establishment of settlements and the continuing actions by Israel designed to change the legal status, geographical nature and demographic composition of the occupied Palestinian territory, including Jerusalem.

He felt that due to the fast deteriorating situation there is an urgent need to reach a final settlement on the question of Palestine that will allow Palestinian people to attain their legitimate rights, in keeping with international law and with the fundamental principles established at the Madrid and Oslo Conferences and subsequent Agreements which ensure security and stability for all in the region.

The Representative of the Office of United Nations High Commissioner for Refugees (Ms. Irene Khan) conveyed the wishes of Mrs. Sadaka Ogata, the United Nations High Commissioner for Refugees for the success of the 37th Session of the AALCC. Recalling the close relationship that has endured for the past four decades between AALCC and UNHCR,

she said that the process that started at New Delhi in September 1996 towards the updating of the Bangkok Principles was indicative of the keen and abiding interest of AALCC Member States in solving refugee problems. She cited the recent efforts of UNHCR to address refugee issues at regional level,more particularly in CIS countries and South West Asia. The association of AALCC and UNHCR in the updating of the Bangkok Principles, she felt, could ensure uniformity, consistency and predictability on the protection of refugees in the Asian-African region. Acknowledging the need for further reflection on the Manila Seminar and Tehran expert group recommendations, she hoped that the AALCC would endorse the recommendation for continued consultations between AALCC and UNHCR, on updating the Bangkok Principles. She also expressed the willingness of UNHCR to support this process.

The Delegate of Palestine appreciated the work undertaken within the Committee since 1964 on the suject of refugees. In the light of the special problems faced by Palestinian refugees, he called for a reformulation of Article IV paragraph 4 of the proposed revised version of Bangkok Principles submitted by the Secretariat, to include the rights of dependents and a wider scope for the term 'dependents'. Inviting attention to Article X of the Secretariat proposals, he underscored the financial constraints that hindered UNHCR assistance to Palestinian refugees, and appealed to AALCC Member States to help UNECR financially with a view to ensuring effective protection and assistance for the Palestinian refugees.

Turning to the aspect of Deportation of Palestinians, he appreciated the work undertaken by the Secretariat on this subject of vital importance. He stated that even after fifty years of suffering just and durable peace evaded the people of Palestine.

Even though the Palestinian Liberation Organization adopted all diplomatic ways and means on the path of peace, justice and rightness, the beam of light which appeared after the conclusion of the Madrid and Oslo Agreements had vanished due to the policies adopted by the Israeli Government. The policies adopted by the Israelis were in contravention of established principles of international law. Instead, Israel was attempting to place new principles and rules which in effect nullifies all agreements and the 'land for

peace' formula. The practice of these new policies not only was the cause of immense suffering for the Palestinian people but against the international community as a whole which rejected these practices.

The AALCC in his view provided a forum for exchange of views on this topic and could provide a united stance of justice and condemnation of violence perpetuated against the Palestinians. He suggested that the AALCC continue to monitor the developments to include all Israeli practices in violation of international law. He also drew attention to the General Assembly Resolutions adopted during the 52 nd Session which had called for the convening of a Conference of the Contracting Parties to see how the four Geneva Conventions could be applied to the Palestinian problem.

The Delegate of the Islamic Republic of Iran was of the view that refugee problems in the present context warranted new approaches and devising innovative institutional structures for confronting the evolving dynamics of refugee movements. Though the Bangkok Principles have served as valuable points of reference for States seeking to develop standards in meeting the refugee challenge. He highlighted the need to identify new reference points to achieve full relevance of the present problems and the flexibility to tackle future problems. In this connection, he welcomed the recommendations of the Manila Seminar and the Expert Group meeting at Tehran. His delegation was of the view that 'international protection' and 'burden sharing' were two pillars of international solidarity. On durable solutions, he acknowledged that 'voluntary repatriation' was a right of the refugee, and emphasized the importance of strengthening and promoting ways and means to facilitate voluntary, safe and dignified return of refugees. On the item "Deportation of Palestinians in violation of International Law' he recalled that the item was taken up by the Committee at its Singapore Session (1 988) upon the proposal of the Iranian Delegation. He said it was unfortunate that Palestinian people still continued to suffer and supported the proposal to continue to keep the item on the agenda of the AALCC.

The Delegate of Pakistan drew attention to the fact that most of the world's refugee population was hosted in third world developing countries of Asia and Africa. In this context, he emphasized the need for 'equitable burden sharing' to ensure the high international standards of refugee treatment. Hence

more focussed attention on 'burden-sharing' within the Bangkok Principles,framework was urged.

On the item "Deportation of Palestinians in Violation of International Law" he stated, that his country had, always considered that Deportation of Palestinians and establishment of Jewish Settlements in Palestine, were violative of the Hague Convention of 1907, the Fourth Geneva Convention of 1949 and 1977 Protocols. He also condemned these and other acts that are in violation of international law, UN Resolutions and international agreements that denied the Palestinians their rights, including the right of self-determination. He supported the retention of this item on the agenda of the Committee.

The Delegate of Tanzania pointed out that certain types of refugee situations are thrust on some states, by incidents that are not within the control of such states. He cited the examples of refugees fleeing civil wars, wars of external aggression, natural calamities such as drought, famine and floods. He detailed the commitment and practice in Tanzania, where the intricacies of refugee definition did not pose-any problem in the according of protection to refugees from neighbouring countries. He also appreciated the conduct of refugees in Tanzania, who had never claimed any privileged status but readily integrated with the local community. However, he pointed out that the scarce resources available was becoming a problem in according recognised international standards of treatment for refugees. He stressed the need to develop inward looking approaches in determination of refugee status and tackling mass exodus of refugees. Drawing a distinction between the refugee policies in Europe and other developed countries, he said that the Asian-African countries should develop responses to suit their special requirements. In this connection, he called for elaborating on the concept of burden-sharing. Possibly, the payment of compensation to the refugee victims could be explored. This can be developed by imposing an obligation on the country of origin that, wherever possible, it should share with the country of refugee the burden of its nationals who are in refuge. He stated that the amount of contribution would depend on the degree of fault on the part of the country of origin and the extent of its stability

The Delegaate of Ghana reiterating the importance of durable solutions

to refugee problems, expressed the view that States should create conducive conditions in their territory to prevent any refugee outflows and enable return of refugees in conditions of safety and dignity. Taking note of the views expressed at the Tehran Expert Group meeting he appreciated the work done within AALCC on the theme of "burden sharing" which in his view, required more attention in any updating or revision of the Bangkok Principles. Recalling the directives of the Tehran meeting he called upon the Secretariat to undertake an indepth study of the issues concerning the updating of Bangkok Principles and make a report to the next session. He requested the Secretariat to continue to monitor the situations in Palestine and to submit a report to the next Session of the Committee.

The Delegate from Syria highlighted the need to solve the Palestinian issue. Expressing hope that there would be a just and lasting solution to the Palestinian issue, he condemned Israel for disrupting the peace process. In this regard he mentioned the mandate of General Assembly Resolutions 242, 328 and 425 which had called for complete withdrawal of Jews from all Palestinian territories. The non compliance of these resolutions, showed disrespect and violation of established international law. The deportation of Palestinians and resettlement of Jews in his governments view, tantamount to violation of all international legal instruments applicable to the region. He warned that the situation had international complications and West Asia should be able to live as a zone of peace. He supported the view that the topic be placed on the agenda of the 38th Session of the AALCC.

The Delegate of Egypt reiterated the importance of the item for the Committee and supported the suggestion of the Representative of Palestine and the Delegate of Syria, that the Secretariat continue to monitor different dimensions of the matter and expand the scope of examination of the study.

On the item of "Status and Treatment of Refugees, he expressed his appreciation to the AALCC, UNHCR and the Government of the Islamic Republic of Iran, for convening an Expert Group Meeting on Status and Treatment of Refugees. He characterized the Meeting as a good starting point for concretising the unified aspirations of the Asian-African States towards

the issues of resolution of refugee problem. Welcoming the proposed changes to the definition of refugees, he stressed the need to distinguish between genuine refugees and terrorists. The updating of the Bangkok Principles should exclude persons alleged to have committed heinous crimes. In this regard, he called for a clear definition of the term 'political crimes'. Drawing attention to the UN Declaration on Suppression of International Terrorism, 1996 and Article 11 of the UN Convention on Suppression of Terrorist Bombing 1997, which deals with political crimes, he suggested that an analogous provision could be incorporated in the revised Bangkok Principles. His delegation concurred with the view expressed by many delegates that developing countries experienced special difficulties, in complying with the higher standards of treatment provided for in the 1951 Convention. In this context, he endorsed the need for further elaboration of the concept of burden sharing. Furthermore, he reiterated his country's understanding that voluntary repatriation was the ideal solution for the Asian-African region. Expressing his appreciation towards the Secretariat for the preparation of a comprehensive summary of the Tehran proceedings, he enquired whether the Egyptian proposal submitted at the Expert Group Meeting on 'definition of refugees' found place in the.Report produced by the Secretariat.

The Deputy Secretary General, Dr. W. Z. Kamil clarified that the proposal has been reflected in the Secretariat document. And -the Secretariat is presently studying the proposal and would report on the same to the 38th Session.

The Delegate of India outlined the liberal traditions of Asian-African countries in receiving and treating huge refugee populations. Citing the example of India, he stated that a consistent and voluntary protection extended by his country, is well acclaimed and met the best known international standards in this regard. He affirmed his country's stand that a universally recognized basis for determining the status of refugees is the well founded 'fear of persecution' and the importance of the principle of non-refoulement. Both these aspects, in his view, were adequately reflected in the Bangkok Principles . While appreciating the work of the AALCC in the review of Bangkok Principles, it was his view that the review process should consider the, direction taken by international refugee law, in particular and human rights law in general. The

process should also take into consideration the difficulties of States which includes scarcity of resources, socioeconomic problems and the security dimension arising out of mass influx of refugees.

In his delegation's view the inclusion of elements drawn from human rights law and humanitarian law, in the definition of refugees, would lead to duplication and congestion of provisions, besides distorting the desired orientation. It was his belief that the definition of refugees was inter-linked with the other three issues discussed at the Manila and Tehran meetings. More particularly, speaking on the relationship between the 'refugee definition' and 'burden sharing', he stated that a view had been expressed at the Tehran meeting that, "international burden-sharing would not be available from States which have accepted the conventional definition of refugees to States which have accepted the enlarged definition of refugees, because the perception of refugees is different for those States. He called for a deeper consideration of this point. It was his govemment's position that voluntary repatriation is the most preferred solution for refugee problems in the Asian-African region.

The Delegate of Uganda elaborating on the traumatic conditions of existence which refugees experienced in the countries of refuge, called for a new orientation in assisting. and protecting refugee populations. He was of the view that the responsibility of solving refugee problems should shift from the international community to the refugee producing countries. These countries, in his opinion, had an obligation towards their citizens and the international community to maintain and sustain conditions which are conducive to peace and stability within their territory. He urged that the Secretariat continue studying the topic of refugees and include in its work a study on the responsibilities of refugee producing States.

Turning to the subject "Deportation of Palestinians in Violation of International Law" he observed that his Government had supported the rights of Palestinians in every fora wherever discussed. He urged the Secretariat to continue to monitor the plight of the Palestinian people and prepare an appropriate brief for the next session.

The Representative from the Organisation of Islamic Conference (OIC) lauded the efforts of the Deputy Secretary General for,presenting an excellent background document on Deportation of Palestinians. Recalling that countries are celebrating the fiftieth anniversary of the Universal Declaration of Human Rights 1948, he bemoaned the fact that Palestinians are still suffering without a homeland. The Middle East Peace process in his view had reached a deadlock, as Israel refused to implement General Assembly resolutions calling for complete withdrawal from Palestinian lands. In this regard, he called for immediate cessation of hostilities, killing of women and children and freeing of over 5000 prisoners, held by Israel. He appealed to the AALCC and the international community to force Israel to implement General Assembly resolutions to ensure just and lasting peace in the Middle Eastern region.

The Representative of UNHCR (Mr. Fontaine) in his intervention sought to clarify on some issues raised by the delegates. Regarding the comments on terrorism by the delegate of Egypt, he said UNHCR shared his concern about the need to combat terrorism and to prevent the abuse of the asylum process to shield terrorists. However, as indicated at the Tehran meeting UNHCR was also concerned that including a specific reference to terrorism in the exclusion clauses might encourage people to equate refugees with terrorists, thereby undermining the protection regime. It is better to deal with that in international instruments specifically addressing the terrorism issue, not in the refugee definition of the Bangkok Principles. Indeed, the exclusion clauses of the refugee definition are already quite adequate and if applied properly, they will exclude a terrorist. Proper application of the inclusion clauses is what is needed.

Referring to the statement by the Delegate of India on the capacity to host refugees, he stated that the objective of refugee law is to identify who needs international protection and under what conditions it should be given, when and by whom. The capacity to host is a practical issue which is quite satisfactorily dealt with under burden sharing, not under the refugee definition.

In connection with the views of the Indian Deligate as to the danger of duplication between refugee law and humanitarian and human rights law, he stated that the principles at issue here are already part of refugee law. It was

therefore simply a question of updating the Bangkok Principles by including them therein.

On the reference to burden sharing made by the Delegate of India, he pointed out that the Tehran Meeting of Experts had strongly endorsed the recommendations of the Manila Seminar to incorporate into the Bangkok Principles - the substantive paragraphs of the second Addendum to the Bangkok Principles - UNHCR supports this, as this Addendum presents a good set of provisions to update the Bangkok Principles.

As regards, the proposal by the delegate of Uganda, that responsibility should be shifted from the international community as a whole to the country of origin, he said that UNHCR fully supports expanding responsibility from the country of asylum to include the country of origin. This is precisely what has been happening in the last decade or so and that countries in the Asian-African region have given the example in this respect. In this connection he drew attention to the Comprehensive Plan of Action (CPA) on Indo-Chinese Refugees which put great emphasis on the responsibilities of the country of origin. Under the CPA , the countries of origin fully co-operated with the international community not only in receiving their citizens in dignity and safety, but also in participating in drawing up the rules and regulations relating to the whole undertaking.

The Delegate of Egypt, While responding to the intervention by the representative of UNHCR, stated that the implication of his delegation's statement was not to find fault with the 1951 Convention but to highlight the discrepancies that have crept in while administering the 1951 Convention's exclusion clause to concrete cases within the domestic legal systems. It was the understanding of his delegation that the effect of the 1997 UN Convention on the Suppression of Terrorist Bombings was to address the issue at the following two levels: firstly, it prohibits the granting of asylum to a person alleged of committing a crime and secondly, where asylum was granted to a person, steps need to be taken to monitor that he does not abuse the right of asylum by indulging in criminal activities.

The Vice-President, while closing the deliberations on the two items

made the following observations. As regards, the item "Status and Treatment of Refugees", he said the deliberation at this session seemed to indicate a broad agreement on the need to review the Bangkok Principles. More specifically, he stressed on the importance of 'burden-sharing' in addressing refugee problems in the Asian African region. He stated that the Secretariat should in furtherance of the Tehran recommendations, carry out an indepth study on the proposed changes and present a working paper for consideration of the thirty-eighth session of AALCC.

On the item "Deportation of Palestinians" he recalled that the fact that the item had been on the agenda of the committee for a decade was reflective of the unfortunate conditions in which the Palestinian people had to exist. He said that the item should be retained on the agenda of the AALCC for consideration at its 38th Session. He reflected in his summary the views of most of the Delegations that the monitoring made by the Secretariat should be widened and sought the views of the delegates about modifying the item to read: "Deportation of Palestinians and other Israeli Practices among them the Massive Immigration and Settlement of Jews in the Occupied Territories in Violation of International law Particularly the Fourth Geneva Convention of 1949". When he did not notice or register any objection from the Assembly he announced its acceptance for the new scope of monitoring assigned to the AALCC Secretariat.

(ii) Decision on the "The Deportation of Palestinians In violation of International Law Particularly The Fourth Geneva Convention of 1949 and The Massive Immigration and Settlement of Jews In The Occupied territories"

(Adopted on 18.4.98)

The Asian African Legal Consultative Committee at its thirty-seventh session

Having considered Doc. No. AALCC/XXXVII/New Delhi/98/S9;

Having heard the comprehensive statement of the Deputy Secretary General;

Having also heard with great concern the comprehensive statement of the Head of Delegation of Palestine and other related statements;

Following with interest and hope the peace efforts being exerted for the achievement of a just and comprehensive solution of the question of Palestine on the basis of Security Council resolutions 242 (1967), 338 (1973) and 425 (1978) and the formula of "land for peace" and the legitimate rights of the Palestinian people;

Mindful of the difficulties being faced in the implementation of the peace process;

Taking cognizance of the hardships suffered by the Palestinian people;

1. Expresses the hope that a just and durable solution will allow Palestinian people to attain their legitimate rights;

2. Directs the Secretariat to enlarge the scope of monitoring the developments in the occupied territories from the view point of relevant legal aspects; and

3. Decides to Place the item "Deportation of Palestinians and other Israeli Practices among them the Massive Immigration and Settlement of Jews in the Occupied Territories in Violation of International Law Particularly the Fourth Geneva Convention of 1949" on the agenda of the Thirty eighth session.

(iii) Secretariat Study : Deportation of Palestinians In Violation of International Law particularly the Forth Geneva Convention of 1949 and the Massive Immigration and Settle ment of Jews in the Occupied Territories.

Pursuant to the resolution adopted at the Tehran Session the AALCC Secretariat monitored the developments on the subject. In the year that was, not a single day passed without a home or more being demolished by the Israeli occupation authorities in the occupied territories. Such a policy primarily aims at displacing the indigenous Palestinian population from their land. These acts of demolition and the expansion of jewish settlements on Palestinian occupied land are clearly policies designed to undo the "peace process" and continue to create a status quo.

These policies of the Israeli Govermnent have been adopted and implemented to deliberately destroy the agreements, thus reversing the path of Palestinian - Israeli reconciliation, and possibly bringing to an end the whole Middle East Peace Process. At the same time the perpetration of these acts which occur in line with the Government's policy are completely heterogeneous with the Declaration of Principles regulating all the steps to be taken during the transitional period. This Declaration should have led to a permanent settlement based on Security Council resolutions 242 and 338. These policies aim precisely at preventing such a final settlement through a total methodological violation of all the main components of the agreements on the transitional period. These main components can be summarized as follows:

(a) The first relates to the establishment and expansion of the jurisdiction of the Palestinian National Authority and the Palestinian elected council to all of the west Bank and Gaza, except Jerusalem, the Israeli Settlements and military locations. Linked to this is the withdrawal and successive redeployment of the Israeli army upto specified locations, the dissolution of the Israeli civil administration, and the withdrawal of the military Government.

(b) The second relates to the territorial integrity of the West Bank and Gaza, and linked to that, the safe passage between them, the freedom of movement of all persons and goods, and the need to preserve the lawful ownership of the land.

(c) The third relates to the improvement of living conditions of the Palestinian people, the development of the Palestinian economy, and co-operation between the two sides in economic fields, as detailed in the Paris Agreement.

(d) The fourth component relates to the postponement of negotiations on specific issues, such as Jerusalem and settlement, to the final status negotiations, which normally require that parties will not create new "facts on the ground", prejudging the outcome of these talks.

All of these components, as well as many other detailed and important elements of the agreements have been systematically and comprehensively disregarded and violated by the Israeli side. For instance, Palestinian Jurisdiction is still limited to a small percentage of the territory; Israeli redeployment to specified locations has not taken place; all kinds of restrictions on freedom of movement have been imposed; confiscation of lands and theft of natural resources continue, the living condition of the Palestinian people has sharply deteriorated; creation of new "facts on ground" has intensified, and attempts to change the demographic conditions and legal status of Jerusalem continues, as do illegal settlement activities. In addition, return of displaced Palestinians, totalling more than half a million people has been stopped. Finally, direct Israeli oppression against the Palestinian people goes on, including assassinations and demolition of their homes. This systematic violation of the "peace process" compelled the international community to take some decisive decisions on how to bring back peace to the region, some steps taken in this regard are mentioned below.

On 15 July 1997, the Tenth Emergency Special Session (ESS) of the General Assembly on illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian Territory was resumed. A resolution (ES-10/3), among the strongest ever, was adopted. The resumed tenth ESS was

convened following the presentation of a report by the Secretary General of the United Nations, in accordance with resolution ES-10/2. The report provided additional information on the illegal policies and practices of the Israeli government, especially with regard to Jerusalem and illegal settlement activities, as well as many, serious ramifications of these measures.

The report indicated that Israel, in rejection of the provisions of resolution ES- 10/2, has not ceased its construction of a new settlement at Jabal Abu Ghneim and emphasized the dangers of that settlement for demographic, economic and other reasons, as well as for its negative effects on the peace process. It stressed the fact that Israel continues its overall illegal settlement campaign, confiscating land, expanding existing settlements and building bypass roads, contrary to Security Council resolutions. Further, the Israeli government continues to implement illegal measures in Jerusalem aimed at altering the city's character, legal status and demographic composition, including attempts to deal with Palestinian Jerusalemites as "resident immigrants", subject to discriminatory immigration controls, a practice now threatening 60-80,000 Palestinian Jerusalemites.

The principle of territorial integrity, which was agreed upon in the Declaration of Principles, has been frustrated by the closure and severe Israeli restrictions on the movement of persons and goods, and that the government of Israel has not accepted the de jure applicability of the Fourth Geneva Convention of 1949 to all the territories occupied since 1967, in contrast to all other High Contracting Parties, who retain consensus on that applicability.

The practical elements of the GA Resolution ES-10/4 focussed on the prevention of support for any settlement activities, recommending to Member States that they actively discourage activities which directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, as these activities contravene international law. Another element including, recommending the convening of a Conference of the High Contracting parties to the Fourth Geneva Convention to consider measures to enforce the Convention in the occupied Palestinian Territory, including Jerusalem, and to ensure its respect in accordance with common article 1 of the Convention. The resolution affirms also the

responsibilities, including personal, arising from persistent violations and grave breaches of the Conventions.

Ministers Meeting in New York

In late September, 1997, the regular ministerial - level meeting of the Arab Group, Organization of the Islamic Conference (OIC), Non-Aligned Movement (NAM) and the Group of 77 (G 77) were held parallel to the general debate of the General Assembly, marking the start of the 52nd Session of the UNGA, with foreign ministers present, all four groups adopted strong positions in support of the Palestinian cause and the UN work in this regard.

The ministers expressed, inter alia, their deep concern over the serious deterioration of the Middle East Peace Process and the increased tension in the occupied Palestinian Territory, including Jerusalem and in the region as a whole as a result of the policies and actions of the current Israeli Government. The ministers also expressed their support for the recommendation contained in resolution ES-10/3 (10th Emergency Special Session) to convene a Conference of the High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the occupied Palestinian Territory, including Jerusalem, and to ensure its respect.

On 13 November, 1997 the 10th Emergency Special Session of the General Assembly (uniting for Peace Formula) was resumed for a second time to consider the continuation of illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian Territory. The resumption was a follow up of the results of the previous meetings of the ESS and to specifically consider the report of the Secretary General of the UN on the issue of the convening of a conference of the High Contracting Parties to the Fourth Geneva Convention of 12 August 1949, on measures to enforce the Convention in the occupied Palestinian Territory, including Jerusalem. the Session was also resumed in light of the complete non-compliance by Israel with the demands made by the General Assembly regarding the cessation of illegal settlements activities and illegal actions in Jerusalem, in particular the construction of the settlement in Jabal Abu Gheim to the south of Occupied East Jerusalem.

The text of the GA Resolution ES-10/4, entitled "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory"[1] contains three main issues. The first included reiteration of all the demands made in resolution ES-10/2 and ES-10/3, reiteration of the recommendations made for collective measures and condemnation of Israeli non-compliance. The second consisted of reiteration of the recommendation to convene a conference of the High Contracting Parties to the Fourth Geneva Convention and to take specific steps to convene the conference. The third included the need for the Assembly to express determination in case of continuous Israeli lack of compliance, to reconsider the situation and take additional appropriate collective measures. All three issues were incorporated in the final text of the adopted resolution, including the recommendation by the Assembly to the government of Switzerland, in its capacity as the depository of the Geneva Conventions, to undertake the necessary steps including the convening of a meeting of Experts of States Parties to the Fourth Geneva Conventions, as soon as possible with a target date not later then the end of February 1998, in order to follow up on the recommendation to convene a Conference. Both the meeting of experts and the conference to follow will represent the first time that such a meeting is convened since the Geneva Conventions entered into force. (Text of the Resolution is Annexure 1 to this brief)

By all counts, the resumed 10th ESS was a tremendous success. This success establishes the Session as a serious follow up process on the critical issue of illegal Israeli actions in occupied East Jerusalem and the rest of the occupied Palestinian Territory, particularly settlement activities. It puts us on the road to the convening of the conference on the enforcement of the Fourth Geneva Convention.

[1] GA Resolution ES-10/4, was adopted on 13 November 1997 by a vote of 139 in favor, 3 against and 13 abstentions. The draft resolution was introduced by Jordan (Chairman of the Arab Group for November) on behalf of its cosponsors, which included Algeria, Bahrain, Bangladesh, Brunei, Darussalam, Comoros, Cuba, Djibouti, Egypt, Indonesia, Jordan, Kuwait, Malaysia, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Sudan, Tunisia, United Arab Emirates, Vietnam and Yemen.

Debate During the 52nd Session of the General Assembly

The 52nd Session of the United Nations General Assembly witnessed an increase in positive votes on most resolutions related to the Question of Palestine and the Situation in the Middle East, which had already been receiving overwhelming support in the past. Of the twentytwo resolutions adopted, nineteen specifically concerned Palestinian issues.

The content of the resolutions was based on the resolutions adopted during the 51st Session, with changes made to reflect the current situation in the Occupied Palestinian Territory, including Jerusalem, and the Middle East Peace Process due to Israel's illegal practices and policies. Fundamental principles and positions contained in previous resolutions were reaffirmed by the Assembly, including the right of the Palestinian people to self-determination; the applicability of the Fourth Geneva Convention to the occupied palestinian Territory, including Jerusalem. the illegality of all Israeli actions aimed at changing the character and Status of Jerusalem; the illegality of Israeli Settlement, the right of Palestinian people to sovereignty over their natural resources; the right of Palestinian refugees to their properties and their revenues; the need to maintain the important and necessary work of the UNRWA; the illegality of Israeli practices and policies violating the human rights of the Palestinian people; and the principles for the peaceful Settlement of the Question of Palestine.

For Palestine, the outcome of the work of the General Assembly in its 52nd Session is important as it reiterates a clear message to the Israeli government about the unwavering positions of the international community with regard to the question of Palestine and the situation in the Middle East in all aspects. Such a reaffirmation by the General Assembly is an integral part of the permanent responsibility of the UN towards the Question of Palestine and in upholding international law and Security Council resolutions as well in this regard. When the matter was discussed in the fourth committee on the 26 of November, 1997, a draft resolution entitled "Israeli settlements in the occupied Palestinian territory, including Jerusalem, and the occupied Syrian Golan"[2], was discussed and adopted by 122 votes against 2 with four

[2] See annexure II "Draft Resolution on Israeli settlements in the occupied Palestinian territory, including Jerusalem, and the occupied Syrian Golan

abstentions. (Text of the resolution is annexed in this chapter).

Assessments

The Secretariat in this study on Deportation of Palestinians in Violation of International Law particularly the Fourth Geneva Convention of 1949 the massive Immigration and Settlement of Jews in the occupied Territory has exposed to the AALCC Member States the current most serious developments in the occupied territories which could likely lead to a deterioration of the situation in the region and to a resumed cycle of tension and violence, thereby endangering peace and security not only in the Middle East but throughout the world. There is therefore an urgent need to reach a final settlement of the question of Palestine that will allow Palestinian people to attain their legitimate rights, in keeping with international law and with the fundamental principles established at the Madrid Conference and in the Oslo and subsequent Agreements and to ensure security and stability for all in the Region.

In view of the deliberations and resolution of the 36th (Tehran 1997) Session as well as the developments thereafter, the AALCC at its forthcoming 37th Session to be held in New Delhi may wish to consider the future work of the Secretariat on this topic.

"Illegal Israeli Actions in Occupied East Jerusalem and The Rest of the Occupied Palestinian Territory"

The General Assembly

Having received the report of the Secretary General, submitted in accordance with paragraph 10 of its resolution ES- 10/3 of 15 July 1997.

Having received at an earlier date the report of the Secretary General submitted in accordance with paragraph 9 of its resolution Es- 10/2 of 25 April 1997.

Determined to uphold the purposes and principles of the Charter of the United Nations, international humanitarian. law and all other instruments of international law, as well as relevant General Assembly and Security Council resolutions.

Reiterating the demands made in resolutions ES-10/2 and ES-10/3,namely:

(a) The immediate and full cessation of the construction in Jabal Abu Ghneim and of all other Israeli settlement activities, as well as of all illegal measures and actions in Jerusalem.

(b) That Israel accept the de pure applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to all the territories occupied since 1967, and that it comply with relevant Security Council resolutions in accordance with the Charter of the United Nations.

(c) That Israel, the occupying Power, immediately cease and reverse all actions taken illegally, in contravention of international law, against Palestinian Jerusalemites.

(d) That Israel, the occupying Power, make available to Member States the necessary information about goods produced or manufactured in the illegal settlements in the Occupied Palestinian Territory, including Jerusalem.

Aware that Israel, the occupying Power, has not heeded any of the above mentioned demands and that it continues with its illegal actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory.

Having been informed by the report of the Secretary General of the responses by the High Contracting Parties to the Geneva Convention, and of the collective responses transmitted through letters from the President of the Coordinating Bureau of the Movement of Non-Aligned Countries, the Secretary General of the League of Arab States and the Presidency of the Council of the European Union, to the note sent by the Government of Switzerland in, its capacity as the depository of the Convention.

Reaffirming the permanent responsibility of the United Nations with regard to the question of Palestine until it is solved in all its aspects.

Having received a letter dated 20 August 1997 from the Permanent Observer Mission of Palestine to the United Nations, informing about specific cases of assistance by individuals for illegal settlement activities.

Gravely concerned at the continuing deterioration of the Middle East peace process and the lack of implementation of the agreements reached.

Reafirrning that all illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory, especially settlement activities, and the practical results thereof, cannot be recognized irrespective of the passage of time.

Rejecting terrorism in all its forms and manifestations, in accordance with all relevant United Nations resolutions and declarations.

1. Condemns the failure of the Goveniment of Israel to comply

with the provisions of resolutions Es-10/2 and ES/10/3, in particular the continuation of the building of a new settlement in Jabal Abu Ghneim to the south of Occupied East Jerusalem;

2. Reiterates its call for the cessation of all forms of assistance and support for illegal Israeli activities in the Occupied Palestinian Territory, including Jerusalem, in particular settlement activities;

3. Reiterates also its recommendation to the High Contracting parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to take measures on a national or regional level, in fulfillment of their obligations under article 1 of the Convention, to ensure respect by Israel, the occupying Power, of the Convention, as well as its recommendation to Member States to actively discourage activities which directly contribute to any construction or development of Israeli settlements in the Occupied Palestinian Territory including Jerusalem, as these activities contravene international law;

4. Reiterates its recommendation that the High Contracting Parties to the Geneva Convention convene a conference on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, and to ensure its respect in accordance with common article 1;

5. Recommends to the Government of Switzerland, in its capacity as the depository of the Fourth Geneva Convention, to undertake the necessary steps, including the convening of a meeting experts in order to follow up on the above-mentioned reconunendation, as soon as possible with a target date not later than the end of February 1998;

6. Requests the Government of Switzerland to invite the Palestine Liberation Organization to participate in the above mentioned conference and any preparatory steps for that conference;

7. Calls for reinjecting momentum into the stalled Middle East peace process and for the implementation of the agreements reached between the Govermnent of Israel and the Palestine Liberation Organization, as well as for the upholding of the principles of the process, including the exchange of land for peace;

8. Decides that, in case of the continuous lack of compliance by Israel, the occupying Power, with the provision of resolution ES-10/2 and ES-10/3, it shall reconsider the situation with a view to making further appropriate recommendations to the States Members of the United Nations in accordance with its resolution 377 A(V) of 3 November 1950;

9. Decides to adjourn the tenth emergency special session temporarily and to authorize the President of the most recent General Assembly to resume its meetings upon request from Member States.

DRAFT RESOLUTION III

Israeli settlements in the occupied Palestinian territory, including Jerusalem, and the occupied Syrian Gloan

The General Assembly

Guided by the principles of the charter of the United Nations, and affirming the inadmissibility of the acquisition of territory by force,

Recalling its relevant resolutions, including those adopted at its tenth emergency special session, as well as relevant Security Council resolutions including resolutions 242 (1967) of 22 November 1967, 446 (1979) of 22 March 1979, 465 (1980) of 1 March 1980 and 497 (1981) of 17 December 1981,

Reaffirming the applicability of the Geneva Convention relative to the protection of Civilian Persons in Time of War, of 12 August 1949, to the occupied Palestinian territory, including Jerusalem, and to the occupied Syrian Golan,

Aware of the Middle East peace process started at Madrid and the agreements reached between the parties, in particular the Declaration of Principles on Interim Self-Govemment Arrangements of 13 September 1993[3] and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995[4]

Expressing gave concern about the decision of the Government of Israel to resume settlement activities, including the construction of the new settlement in Jabal Abu Ghneim, in violation of international humanitarian law,

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3. A/48/486-S/26560, annex; see Official Records of the Security Council, Forty-eighth Year, Supplement for October, November and December 1993, document S/26560
4. A51/889-S/1997/357, annex.

relevant United Nations resolutions and the agreements reached between the parties,

Gravely concerned in Particular about the dangerous situation resulting from actions taken by the illegal armed Israeli settlers in the occupied territory, as illustrated by the massacre of Palestinian worshippers by an illegal Israeli settler in Al-Khalil on 25 February 1994,

Taking note of the report of the Secretary-General,[5]

1. Reaffirms that Israeli settlements in the Palestinian territory, including Jerusalem, and in the occupied Syrian Golan are illegal and an obstacle to peace and economic and social develpment;

2. Calls upon Israel to accept the de jure applicability of the Geneva Convention relative to the protection of Civilian Persons in Time of War, of 12 August 1949, to the occupied Palestinian territory, including Jerusalem, and to the occupied Syrian Golan and to abide scrupulously by the provisions of the Convention, in particular article 49;

3. Demands complete cessation of the construction of the new settlement in Jabal Abu Ghneim and of all Israeli settlement activities in the occupied Palestinian territory, including Jerusalem, and in the occupied Syrian Golan;

4. Stresses the need for full implementation of Security Council resolution 904 (1994) of 18 March 1994, in which, among other things, the Council called upon Israel, the occupying Power, to continue to take and implement measures, including inter alia, confiscation of arms, with the aim of preventing illegal acts of violence by israeli settlers, and called for measures to be taken to guarantee the safety and protection of the Palestinian civilians in the occupied territory.

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5. A/51/517

X. EXTRA-TERRITORIAL APPLICATION OF THE NATIONAL LEGISLATION : SANCTIONS IMPOSED AGAINST THIRD PARTIES - REPORT OF THE SEMINER HELD IN TEHRAN, ISLAMIC REPUBLIC OF IRAN, 24-25 JANUARY 1998

(i) Introduction

The item "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties on the work programme of the AALCC following a reference made, in accordance with the Statute of the Committee, by the Government of the Islamic Republic of Iran. The Explanatory Memorandum accompanying the reference had requested the Secretariat to carry out a comprehensive study concerning the legality of unilateral measures, taking into account the positions and reactions of various governments, including the positions of the Committee's Member States.

A preliminary study prepared by the Secretariat was thereafter considered at the 36th Session of the AALCC held in Tehran in May 1997. The preliminary study apart from referring to some more recent instances such as the United States : Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, (generally known as the Helms - Burton Act), and the Iran and Libya Sanctions Act, 1996 (commonly referred to as the D'Amato - Kennedy Act), made an endeavour to provide an overview of the limits imposed by international law on the Extra-territorial Application of National Law; and the response or reaction of the international community to such actions. The brief of documents inter alia recounted the various ways in which the international community had expressed its concern about the promulgation and application of laws and regulations whose extra-territorial application effects affect the sovereignty of other States, the legitimate interests of persons-both natural and legal (companies, corporations etc.) within their jurisdiction as also the freedom of trade and navigation.

The Secretariat study had also sought to demonstrate that the question of extra-territorial application of national legislation covered a wide spectrum of international relations viz. political, legal and trade. It had pointed out that the use of unilateral actions, in particular those, with extraterritorial effects can

impede the efforts of the developing countries in carrying out macro-economic and trade reforms aimed at sustained economic growth.

In the course of the debate on the subject at the Tehran session of the AALCC several Members and Observer delegates pointed out that the extra territorial application of national legislation *inter alia* violated : (i) the Principles of the Charter of the United Nations in particular the Principle of sovereignty; (ii) the principle of non-intervention; (iii) the Friendly Relations Declaration; (iv) the Declaration on the Right to Development; (v) the Vienna Declaration on Human Rights; and (vi) the Charter of Economic Rights and Duties of States.

At the 36th Session of the AALCC a view was expressed that in as much as the extra-territorial application of national legislation and sanctions against a third party is a violation of international law the AALCC as a legal body of Asian-African countries, could have its own legal opinion on this issue. It was suggested, in this regard , that a comperhensive study concerning the legality of such unilateral measures may be under taken by the AALCC. The formulation and enunciation of an opinion on the subject would be in keeping with the advisory and recommendatory functions of the AALCC. At the Tehran Session a view was also expressed that an examination of the item by the Committee should be based on legal analysis, and should not, to the extent possible, delve into the political dimension or not duplicate work done in the political fora.

Report Of The Seminar On The "Extra-Territorial Application Of National Legislation : Sanctions Imposed Against Third Parties" held in Tehran the Islamic Republic Of Iran, 24 and 25 January 1998.

The AALCC at its 36th Session held in Tehran, the Islamic Republic of Iran, in May 1997 inter alia recognized the significance, complexity and implications of "Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties" and requested the Secretariat to convene a Seminar or Meeting of experts on the subject.[1]

1. For details see Extraterritorial Application of National Legislation : Sanctions Imposed-Against Third Parties, Resolution 36/6 of 7 May 1997 in Asian African Legal Consultative Committee Report of the thirty Sixth Session.

Pursuant to that mandate the Secretariat in collaboration with the Iranian Government, which generously offered to host such a seminar, convened a two day Seminar in Tehran in January 1998.

Senior Government officials, eminent academics and distinguished international lawyers from 16 Member States of the AALCC viz. Bangladesh, China, Cyprus, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Jordan, Pakistan, Sierra Leone, Sudan, Syria, Thailand, Turkey and Yemen; and 8 observer States viz. Australia, Canada Cuba, France, Guinea, Kyrgyzstan, Mexico and United Kingdom actively participated in the Seminar The Secretary General, Mr. Tang Chengyuan, and Director Mr. K.J.S.R. Kapoor represented the Secretariat at the Seminar.

The objective of the Seminar, chaired by Dr. M. Javad Zarif, the Deputy Foreign Minister for Legal and International Affairs of the Government of the Islamic Republic of Iran and the then President of the AALCC, was to promote a free and frank exchange of views on the subject

In his inaugural address, Dr. M. Javad Zarif observed *inter alia* that although the rule of law, in international relations, required collective decision making and as far as possible even collective implementation yet there was a growing tendency among some powerful States to, insist on unilateral measures. He stated that the extraterritorial application of national legislation in the form of economic sanctions imposed against third parties was of the extreme forms of unilateral measures and that this becomes an instrument of foreign policy to advance national agenda. This practice he emphasized had not evolved around a consensus building process and could not create a legal norm or obligation for members of the international community. He described the criteria to test the extra-territorial effects of administrative, Judicial and legislative acts of states as "whether or not the act in question is compatible with universally accepted norms of international law."

Referring to the Impermissibility of Extraterritorial Sanctions the President stated that they contravened the Rules and Principles relating to (i) the Sovereignty and Territorial Integrity of States; (ii) Non-Intervention; (iii) Self Determination;(iv) Right to Development ; (v) Countermeasures; and (vi)

Dispute Settlement. He concluded by observing that the response of the community of states to the sanctions imposed against third parties had,hlitherto taken various forms of protection and counteraction including the enactment of "blocking "statutes and "claw back" provisions. He expressed the hope that the deliberations during the course of the seminar would shed more light on these and allied issues.

The Background Note on the "Extra-territorial Application of National Legislation : Sanctions Imposed Against Third Parties " prepared by the Secretariat for the seminar has been given in this chapter as Secretariat Study. At the request of the participants, the Preliminary Study prepared by the Secretariat for the 36th Session of the AALCC held in Tehran, in May 1997 was also circulated as a Seminar Document.

Welcoming the participants from among both Member and Non-Member States of the AALCC to the seminar, the Secretary General expressed his appreciation to the Special Experts, for the working papers/presentations that they had prepared. He said that the extraterritorial application of national legislation could be a major obstacle in the implementation of the provisions of the Charter of the United Nations and several other international instruments and is not conducive to the promotion of the primacy of the rule of law in international relations. He emphasized that the extra-territorial application of national legislation while necessary in some instances (such as the performance of consular functions or the control of illicit drug trafficking) could , in an increasingly interdependent world , affect developing and developed countries alike. He stated that the impact of such measures was however, far greater on the developing countries than it was on the developed States because they could not always "Claw Back." Referring to the consent of States as the basis of obligtions in international law he observed that "consent, if not consensus, remained and would remain the basis of obligation to observe the principles and norms of international law and that the enforcement of national legislation might be acceptable only in a small number of instances where the interest of the international community as a whole was sub-served. He pointed out that the Nineteenth Special Session of the General Assembly had emphasized that "international cooperation was needed and unilateralism should be avoided" in order to accelerate economic growth, poverty eradication

and environmental protection , particularly in developing countries.

Introducing the Background Note the *Secretary General* stated, among other things, that the AALCC had rightly taken the stance that it was a vital question on which the Committee could formulate an opinion to take a common position in opposing such unilateral measures as may affect their economic systems and the riglit to economic and social development. While it may perhaps be too early to gauge the over all effect and the long term ramifications of the extraterritorial application of national legislation there could be no denying that such measures could affect the process of development in the Asian and African region. The emphasis on the Asian African region, it was clarified was merely to underscore the fact that the membership of the Committee spans these two continents and was not intended to dilute or detract from the effects of such measures in other regions of the world.

Inviting attention to the legality of unilateral imposition of sanctions, in particular against third parties the question was raised whether the unilateral imposition of sanctions tenable? And if so, on what basis? Both the extra-territorial application of national legislation as well as the imposition of sanctions are bad in law and quite apart from being violative of several provisions of many international instruments, neither could be considered as being conducive to the establishment and promotion of good neighborly relations between the members of the international community.

It is somewhat difficult to reconcile the extra-territorial application of national legislation and the imposition of sanctions with the duty of States to cooperate in the various spheres of international relations in order to maintain international peace and security, and to promote mutually beneficial cooperation social and economic progress and the general welfare of nations. Nor does extra-territorial application of national legislation and the imposition of sanctions conform to the duty of States to refrain from direct or indirect recourse to political economic or any other type of coercion aimed at impeding the exercise of sovereign rights by other States

Several international instruments adopted since the Declaration on the Right to Development have reaffirmed the right to development and the Vienna

Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 had inter alia reaffirmed the "right to development ... as a universal and inalienable human right and an integral part of fundamental human rights. It had called upon states to cooperate with each other in ensuring development and eliminating obstacles to development. The Vienna Declaration had also observed that the international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development. More recently the Resolution on the Progress Achieved Towards meeting Objectives of The Earth Summit as adopted by the Nineteenth Special Session of the General Assembly had provided that in order to accelerate economic growth, poverty eradication and environmental protection, particularly in developing countries, there was need to establish macro -economic conditions that favoured the development of instruments enabling all countries to benefit from globalization . It had stated in this regard that "international cooperation is needed and unilateralism should be avoided." (Emphasis added).

The discussion during the substantive sessions of the Seminar revolved largely around the presentations made by a group of experts drawn from both member and nonmember states of the AALCC. These had included Professor James Crawford (Australia); Professor (Ms.) Brigitte Stern (France) ; Mr. Anthony Forson (Ghana) Professor V. S.Mani (India); Dr. A.A.Kadkhodaee (Islamic Republic of Iran)Professor Mohsen M.Sadeghi (Islamic Repulic of Iran); and Mr. David Stuart Sellers (UK) . The Seminar also took note of the research paper sent in by the former Secretary General of the AALCC, Professor Frank X. Njenga (Kenya), who was unable to attend the Seminar. Although Professor V S. Mani was appointed the Rapporteur of the Seminar the debate in the course of the seminar was informal in nature wherein all the participants spoke in their individual capacities and no formal conclusions or resolutions were adopted.

Professor James Crawford in his presentation reviewed the legal basis for the exercise of extra-territorial jurisdiction and the distinction between prescriptive and enforcement jurisdiction . The argument that the legal effects of the sanctions imposed, under the Helms-Burton Act and the D'Amato Kennedy Act, are frontier measures which do not extend beyond the US

border was not tenable For in essence the conduct being regulated under both Acts occurs outside and such prescriptive jurisdiction is clearly unreasonable. Neither Act could rely on any of the traditional bases for exercising extraterritorial jurisdiction such as those of nationality; passive personality; protective principle; universality; and the effects doctrine. Referring to countervailing measures it was pointed out that some States had taken steps towards countering the extraterritorial effects of the law.

Professor Brigitte Stern in the presentation of her paper "Can the United States set Rules For The World"stated that the Helms- Burton Act was a secondary boycott , using economic sanctions in order to foster a political objective. A secondary boycott is based on extra-territorial jurisdiction contrary to international law. It was pointed out that the US enactment can not be justified in law or ethics and shatters the bases of international community. She raised the question as to why should other countries respect international law if one State sets such a bad example? It was pointed out that the common will of States rather than the unilateral act of a State has hitherto been the basis of international law.

Professor V. S. Mani in the presentation of his working paper entitled "Unilateral Sanctions and Extra-territoriality of Domestic Laws : A Perspective of Public International Law" observed that a sovereign State's competence to make laws and enforce them is derived from its authority of *domaine* reserve as recognized by international law. It was pointed out that where the international validity of an act of a State is at issue, the relevant question is "whether the impugned act is attributable to any organ or agency constitutes a violation of international law." A national legislature, he pointed out, is not incapable of violating or authorizing violation of international law. A piece of legislation seeks to provide a legal framework for institutional action by State authorities. He then went on to examine the international legality of enforcement of the two 1996 United States enactments and stated that they violated three peremptory norms of international law viz. (i) sovereign equality; (ii) non intervention; and (iii) freedom of trade. In addition both the Helms Burton Act and the D'Amato -Kennedy Act violated the law relating to peacetime countermeasures.

Professor Mohsen Sadeghi in his presentation "Liability for Extraterritorial Application for Economically Harmful Legislation" in addressing the question whether a State was liable , under general international law, for the injurious consequences of the measures that it adopts against another State, expressed the view that a State engaged in harmful economic activities against another State was liable to that State and/or its nationals for any damages inflicted upon them resulting from those activities. Such liability, in his view , arises out of that State's breach of its international obligation vis a vis both the affected State and its nationals, as well as the third States whose trade with the affected State has been restrained. He emphasized that transnational economic activities of a harmful nature were violative of the acquired rights of both the affected State and its nationals . Such activities also impinge upon the sovereign rights of third States, affect basic human rights and run counter to the "multipolarized institutionalization embedded in the Charter of the United Nations."

Dr. A.A. Kadkhodaee in his paper"Legal Aspects of USA Sanctions on Foreign Companies : Violation of the Conventional Obligations" pointed out that while trade and economic related international organizations - such as the WTO and its forerunner the GATT - required their member States to ensure that all necessary steps were adopted in order to give effect to the rules established by the provisions of their constituent instruments, unilateral economic and trade embargoes continue to be the most common infringements of trade obligations, even though it has been established that economic sanctions should not be used in order to dictate political aims or cause economic changes in the target countries. It was pointed out that 'unlateral imposition of economic sanctions were incompatible with the GATT/WTO provisions relating to the liberalization of trade in goods and services. It was argued that the Helms-Burton Act and the D'Amato-Kennedy Act infringe such GATT provisions as Articles I, II, III, V, XI and XXII. In the context of the MFN Clause it was pointed out that " any embargo not mentioned in the field of General Exceptions set forth in GATT/WTO will be regarded as the infringement of its rules and provisions and consequently distorting freedom of trade."

Mr. Anthony Forson in his presentation "Extra-territorial Jurisdiction of National Legislation : Sanctions Imposed Against Third Parties" furnished

an overview of extraterritorial application of national legislation and the consequential exercise of 'jurisdiction by municipal courts in both civil and criminal cases. As regards the latter i..e the assumption of extraterritorial jurisdiction in criminal cases he drew attention to crimes against civil aviation. He pointed out that the topic of extra-territorial jurisdiction is on of inter-play or interaction between Public International Law and Private International Law.

The former Secretary General of the AALCC, Professor Frank Xavier Njenga, in his paper emphasized that jurisdiction was an attribute of state sovereignty and *inter alia* examined the bases on which a State may exercise Jurisdiction viz. (i) the territorial principle; (ii) the nationality principle ;(iii) the protective or security principle; (iv) the universality principle; and.(v) the passive principle. He pointed out that extra-territorial application of national legislation contravened such principles of international law as the (i) principle of non-intervention; (ii) principle prohibiting the use of coercive measures or to obtain economic objectives; (iii) act of state doctrine; and (iv) extra-territoriality principle.

Mr. David S. Sellers in his prefatory remarks observed that the "main aim of the AALCC is, of course , to consider the legal issues raised by sanctions and in particular sanctions which are purported to have extra-territorial effect. It is right that the legal aspects of these issues be addressed, by the AALCC and in due course the ILC." In his presentation of "Recent Developments : The Kennedy -D'Amato and the Helms Burton Acts " he said that three main objections apply to both the Acts. These included (i) the objection to sanction in general; (ii) an objection to the extraterritoriality of the sanctions ; and (iii) an objection that the sanctions violate the US free trade obligations under NAFTA, GATT And WTO. As regards the first it was stated that sanctions in general are unfocussed and do not really work because there can be no nexus between the sanction and the alleged acts at which they are directed. In his view the European Union opposes sanctions in general essentially on policy and self-interest grounds rather than on legal grounds. As to the objection to the extra territorial nature of sanctions the question was raised as to why should a State be permitted to sanction economic activities between foreign companies and third States which are perfectly legal under the law of the places where the investors are situated, and which have no connection with

the sanctioning State. The European Union it was said is ready to recognize sanctions imposed by the international community pursuant to Security Council Resolution which necessarily affect other States but not unilateral acts which affect third States.

From the foregoing account it would have been discerned that the discussions at the Seminar revolved around a broad srectrum of politico-legal issues . The Rapporteur, Professor V.S. Mani, in his report[2] said that the deliberations focussed on a broad range of legal and policy aspects of the subject mainly in relation to two US enactments, namely the Cuban Liberty and Domocratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Burton Act), and the Iran and Libya Sanctions Act 1996 (generally referred to as the Kennedy D'Amato Act) although references were also made to some of the earlier US laws such as the anti-trust legislation, the US Regulations concerning Trade with USSR, 1982, and the National Defence Authorization Act, 1991 (i.e. the Missile Technology Control Regime (MTCR Law). The legality of the two 1996 US enactments was examined in terms of their conformity with the peremptory norms of international law; the law relating to countermeasures; the law relating to international sanctions ; principles of international trade law; the law of liability of States for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basic human rights of the people of the target state; and issues of conflicts of laws such as non-recognition, *forum nonconvenience* and other aspects of extra-territorial enforcement of national laws.

The deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. In this regard references were made of the response of the Inter-American Juridical Committee and the European Union. The measures discussed encompassed 'blocking' legislation, statutes with 'claw -back' provisions and laws providing for compensation claims, at the national level. At the international level the responses noted included diplomatic protests negotiations for settlement of disputes, use of WTO avenues and measures to influence drafting of legislation in order to prevent its adverse extra territorial impact.

[2]. For the full text of the Report of the Rapporteur see Annex in this Chapter

The deliberations revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra territorial application of national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that the Helms-Burton Act and the Kennedy D'Amato Act in many respects contravened these basic norms. The right to development and the permanent sovereignty over natural resources were specifically mentioned.

While discussing the law relating to counter measures, it was generally agreed that the rules of prohibited counter measures as formulated by the International Law Commission in its draft articles on State Responsibility must be applied to determine the legality of counter measures purported to be effected by the extra- territorial application of the two aforementioned impugned statutes. These rules include the prohibition of injury to third states ; the rule of proportionality ; and the rules relating to prohibited counter measures incorporated in Article 13 of the draft articles on State Responsibility as framed by the International Law Commission.

While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion also highlighted the inter play between counter measures and non-intervention, and between counter measures and unilateral imposition of economic sanctions.

There was general agreement that counter measures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions' competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized.

The discussion in the seminar also revealed a divergence of views on three main issues viz. (i) whether the subject should be confined to secondary sanctions through extraterritorial application of national laws; (ii) the distinction

between the prescriptive jurisdiction and the enforcement jurisdiction of every state; and (iii) the applicability of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the Kennedy D'Amato Act in their extra-territorial application.

The Seminar of the group of experts also addressed the question of the future work to be undertaken and a number of proposals were advanced by the participants for the consideration of the AALCC. The proposals with regard to the future work on the subject include (i) further study on all aspects of the subject and (ii) the formulation of principles.

Apropos **further study of the subject of extra-territorial application of national legislation** it was suggested that AALCC undertake a study of:

(i) unilateral sanctions, counter measures and disputes settlement procedures offered by the WTO group of agreements;

(ii) the concept of abuse of rights in international law, preferably under the presiding norm of good faith, in the context of exercised extra territorial application of national laws in pursuit of national policy objectives ; and

(iii) the impact of unilateral sanctions on trade relations between States.

On the question of the **formulation of principles \ rules relating to the question of the extra-territoriality of national legislation** it was *inter alia* proposed that :

(i) the AALCC along with the International Law Commission undertake the formulation of principles and rules relating to extra-territorial *application of national laws* in all its implications ; and

(ii) there is need for a second look at the ILC formulation of principles concerning counter measures vis-a-vis sanctions.

As regards the examination of the principles concerning countermeasures vis a vis sanctions it was suggested that the ILC formulation of the provisions relating to counter measures seems to leave this aspect open. A State , it was stated , may violate (a) an obligation *erga omnes* or (b) an obligation *erga omnes* but injuring another state, or (c) an obligation vis-a-vis another state. Which of these situations would give rise to counter measures ? A clasification on this issue will help determine the permissible counter measures, and the relationship between them and sanctions. The view was also expressed that the relationship between counter measures and other peremptory norms of international law such as non-intervention and peaceful settlement of international disputes needs to be further examined.

In his closing remarks the President of the Committee, Dr. M. Javad Zarif expressed his appreciation for the participants , particularly the Experts, for their contribution. He was of the view that the some very important issues had been raised and discussed in the course of the seminar. The discussion had clearly shown that extra-territorial application of national legislation by way of imposing sanctions involved an element of intervention and coercion. The debate had also brought home the point that the subject required careful study and that the member States of the AALCC needed to play an active role in the further, study of the matter.

In his closing statement the *Secretary General* said that a detailed Report of the Seminar would be presented to the 37th Session of the AALCC scheduled to be held in New Delhi in April 1998 and that the Committee at its Session would , on its part, find the deliberations of the Seminar very useful in the determination of its future work on the subjects. The Secretariat would like to continue to be associated with the Experts, and their further work on this complex topic. The Secretary General further stated that the suggestions and the recommendations made at the Seminar would be duly communicated to the Committee at its 37th Session. This report of the seminar together with the views of the AALCC at its forthcoming session would thereafter be transmitted to the International Law Commission. Finally. recalling that the item "Cooperation Between the AALCC and the United Nations" was due for consideration at the 53rd Session of the General Assembly, he stated that he proposed to mention the work of the AALCC on the "Extraterritorial

Application Of National Legislation : Sanctions Imposed Against Third Parties", in particular the suggestions advanced at the seminar and the subsequent decision of the Committee at its Session in New Delhi , in his report to the General Assembly.

The *Secretary General* said that subject to the availability of funds the AALCC Secretariat will strive in the course of the year to publish the proceedings of the Seminar together with the text of the papers presented and the presentations made thereat.[3]

Thirty-Seventh Session : Discussion

The Assistant Secretary General Mr. Asghar Dastmalchi introduced the topic " Extra-Territorial Application of National Legislation : Sanctions Imposed Against Third Parties". While introducing the Secretariat brief on the subject he stated that the item was first placed on the work programme of the AALCC following a reference made by the Government of the Islamic Republic of Iran. The Explanatory Memorandum accompanying the reference had requested the Secretariat to carry out a comperhensive study concerning the legality of unilateral measures, taking into account the positions and reactions of various governments including the position of its member states. A preliminary study prepared by the Secretariat was there after considered at the 36th Session of the AALCC held in Tehran in May 1997.

The Secretariat study apart from referring to some more recent instances such as the United States: Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, and the United States Iran and Libya Sanctions Act, 1996 had made an endeavour to provide an overview of the limits imposed by international law on the Extra-territorial Application of National Law; and the reaction of the international community to such actions. The brief of documents *inter alia* recounted various ways in which the international community had expressed its concern about the promulgation and application of laws and regulations whose extra-territorial application effects affect the sovereignty of

[3]. The detailed Report of the seminar is under process of printing.

other States, the legitimate interests of persons both natural and legal (companies, corporations etc.) within their jurisdiction as also the freedom of trade and navigation. The Secretariat study had demonstrated that the question of extra-territorial application of national legislation covered a wide spectrum of international relations viz. political, legal and trade and had pointed out that the use of unilateral actions, in particular those, with extra-territorial effects can impede the efforts of the developing countries in carrying out macro-economic and trade reforms aimed at sustained economic growth.

The Assistant Secretary General recalled that in the course of the debate on the subject at the 36th Session of the AALCC several Member and Observer delegates pointed out that the extra territorial application of national legislation inter alia violated : (i) the Principles of the Charter of the United Nations in particular the Principle of sovereignty; (ii) the principle of nonintervention; (iii) the provisions of the United Nations Declaration on Friendly Relations; (iv) the Declaration on the Right to Development; (v) the Vienna Declaration on Human Rights; and (vi) the Charter of Economic Rights and Duties of States. The AALCC at its 36th Session inter alia recognized the significance, complexity and implications of "Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties" and requested the Secretariat to convene a seminar or a meeting of experts on the subject. The Committee at its 36th Session had requested the Secretary General to table a report of the seminar or meeting of experts at the 37th session of the Committee.

Pursuant to that mandate the Secretariat in collaboration with the Government of the Islamic Republic of Iran, which generously offered to host convened a two day Seminar in Tehran in January 1998. Senior Government officials, eminent academic and distinguished international lawyers from 16 Member States of the AALCC participated in the seminar chaired by Dr. M. Javad Zarif, the Deputy Foreign Minister for Legal and International Affairs of the Government of the Islamic Republic of Iran and the then President of the AALCC. The objective of the Seminar, was to promote a free and frank exchange of views on the subject. The Report of the two day seminar on the Extra-territorial Application of National Legislation Sanctions Imposed Against Third Parties held in Tehran in January 1998 , is set out in the brief of

documents.The discussion at the Seminar revolved largely around the presentations made by a group of experts drawn from both Member and non-member States of the AALCC. The Seminar took note of the research paper sent in by the former Secretary General of the AALCC, Professor Frank X. Njenga (Kenya), who was unable to attend the Seminar. Although a Repporteur was appointed , the debate in their course of the seminar was no formal in nature wherein all the participants spoke in their individual capacities and, no formal conclusions or resolutions were adopted.

The discussions at the Seminar revolved round a broad spectrum of politico-legal issues and focussed on a broad range of legal and policy aspects of the subject mainly in relation to two US enactments, namely the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, 1996 (commonly referred to as the Helms-Btirton Act), and the United States Iran and Libya Sanctions Act 1996 , (generally referred to as the Kennedy D'Amato Act) The Background Note prepared by the Secretariat for that seminar included an overview of the United States: Iran and Libya Sanctions Act of 1996. Although references were also made to some of the earlier US laws such, as the anti-trust legislation, the Regulations concerning Trade with USSR, 1982, and the National Defence Authorisation Act, 1991 The legality of the two 1996 US enactments was examined in terms of their conformity with the peremptory norms of international law; the law relating to counter-measures; the law relating to international sanctions ; principles of international trade law; the law of liability of States for injurious consequences of acts not prohibited by international law; impact of unilateral sanctions on the basic human rights of the people of the target state; and issues of conflicts of laws such as non-recognition, *forum non-convenience* and other aspects of extraterritorial enforcement of national laws.

The deliberations had also touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. References were made to the response of the Inter-American juridical Committee and the European Union and the measures discussed included 'blocking' legislation, statutes with 'claw-back' provisions and laws providing for compensation claims, at the national level. At the international

level, the responses noted included diplomatic protests, negotiations for exemptions \ waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues and measures to influence the the drafting of legislation in order to prevent its adverse extra territorial impact.

The deliberations revealed a general agreement that the validity of any unilateral imposition of economic sanctions through extra territorial application and national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, nonintervention, self-determination, and the freedom of trade. It was generally agreed that both the Helms-Burton Act and the Kennedy D'Amato Act contravened such basic norms. The right to development and the principle of permanent sovereignty over natural resources.

As regards counter measures, it was agreed that the rules of prohibited counter measures as formulated by the International Law Commission in its draft articles on State Responsibility must be applied to determine the legality of counter measures purported to be effected by the extra territorial application of the two afove mentioned impugned statutes. These rules include the prohibition of injury to third states ; the rule of proportionality ; and the rules relating to prohibited counter measures incorporated in Article 13 of the draft articles on State Responsibility as framed by the International Law Commission. While considering the issue of countermeasures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. The discussion also highlighted the inter play between counter measures and nonintervention, and between counter measures and unilateral imposition of economic sanctions.

Participants agreed that counter measures could not be a facade unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. It was argued that the differences between counter measures and sanctions of the nature of international sanctions should be recognized The seminar also revealed a divergence of views on three main issues viz. (i) whether the subject should be

confined to secondary sanctions through extra-territorial application of national laws; (ii) the distinction between the prescriptive jurisdiction and the enforcement jurisdiction of every state; and (iii) the applicability of WTO disputes settlement procedure,to resolve disputes relating to Helms-Burton Act and the Kennedy D'Amato Act in their extraterritorial application.

The Seminar also addressed the question of the future work to be undertaken and a number of proposals were advanced by the participants for the consideration of the AALCC. The proposals with regard to the future work on the subject include (i) further study on all aspects of the subject and (ii) the formulation of principles.

Apropos further study of the subject of extraterritorial application of national Legislation the Assistant Secretary General suggested that AALCC undertake a study of : (i) unilateral sanctions, counter measures and disputes settlement procedures offered by the WTO group of agreements; (ii) the concept of abuse of rights on international law, preferably under the presiding norm of good faith, with context of exercised extra territorial application of national laws in Pursuit of national policy objectives; and (iii) the impact of unilateral sanctions on trade relations between States.

On the question of the formulation of Principles \ rules relating to the question of the extra territoriality of national legislation it was inter alia proposed that : (i) the AALCC along with International Law Commission undertake the formulation of principles and rules relating to extra-territorial application of national laws in all its implications ; and (ii) there is need for a second look at the ILC formulation of principles concerning counter measures vis-a-vis sanctions.

Referring to the examination of the principles concerning countermeasures vis a vis sanctions he stated that it was suggested that the ILC formulation of the Provisions relating to counter measures seems to leave this aspect opens. A State it was said, may violate (a) an obligation erga omons or (b) an obligation erga omnes but injuring another state, or (c) an obligation vis-a-vis another state.Which of these situations would give rise to counter measures? A clarification on this issue will help determine the permissible

counter measures, and the relationship between them and sanctions. The view was also expressed that the relationship between counter measures and other peremptory norms of international law such as non-intervention and peaceful settlement of international disputes needed to be further examined.

The report of the Seminar was expected, Mr. Dastmalchi stated, to furnish an input not only in the consideration of the subject and the Committee's future work thereon, but also in the crystallisation of the opinion of the Asian African Legal Consultative Committee on the subject. The Committee at its 37th Session after consideration of this Report of the Seminar held in Tehran, the Islamic Republic of Iran, may direct the AALCC about future work of the Secreteriat on the subject.

The Delegate of China expressed the view that the topic was a complex one with legal, political and technical implications. Dwelling on the effects of globalization, he felt States not only apply measures against third States but also for their nationals, companies and trading and entities of such third States, which amounted to indirect sanctions. Furthermore, these coercive measures took the form of restrictions on trade practices and investments, which in turn have global ramifications. Recalling various international legal instruments and arrangements for facilitating free trade, he was of the view that sanctions would impede relations between states. The settlement of disputes, in his government's view should be in accordance with the principles of mutual respect for upholding sovereignty of States and non-interference in each others internal affairs.

The Delegate of the Islamic Republic of Iran expressed the view that extraterritorial application of national legislation in the form of economic sanctions had become an instrument of foreign policy of some powerful States. He added that the Helms-Burton Act and the Kennedy D'Amato Act which apply coercive sanction against Cuba, Libya and Iran respectively, had no basis in international law. These unilateral acts with extra-territorial effects, disrupt peaceful trade relations amongst States and have been denounced by States and regional organizations, like the European Community. He recalled the Seminar in Tehran on the topic, which had revealed a general agreement amongst States that unilateral imposition of economic sanctions undermined accepted norms of international law. Concluding his statement, he supported

the proposals of the Tehran seminar and called upon the AALCC and other international fora such as the ILC to attempt a formulation of principle and norms on this important issue.

The Delegate of Japan expressed the view that the topic of extraterritorial application of national legislation , should be dealt on a more general and broader basis without confining only to the two US Acts of Helms-Burton and Kennedy-D' Amato. Furthermore, he expressed the view that although this topic has linkages with other topics of intentional law such as countermeasures, State responsibility and dispute settlement mechanism the AALCC should focus upon finding and establishing a principle on the exercise of prescriptive jurisdiction. The AALCC, she asserted, could make a significant contribution by studying the legal effects and not 'political effects' of this, topic.

The Delegate of Sudan recalled that the Tehran Seminar had reached consensus that unilateral imposition of sanctions, through extra territorial application of national legislation, violated norms of customary international law. Furthermore, condemning the Helms-Burton and Kennedy D' Amato Acts of US Government, he was of the view that a similar sanction was imposed on Sudan on 4 November 1997. The Executive Order, which imposed this sanction, had frozen all assets and property of Sudanese and also blocked import of Sudanese goods in USA and exports from Sudan. He was of the firm view that the AALCC should study the topic of Extraterritorial application of national legislation as a sub-item entitled "Executive Orders Imposing Unilateral Economic Sanction on Targeted States".

The Delegate of India expressed the view that the subject was of topical importance involving economic, legal and political implications. Recalling the Seminar on the topic held in Tehran in January 1997, he felt that extraterritorial effects could be dealt at two levels. Firstly, judgements of municipal national courts and secondly, the evolution of unilateral acts which could include doctrinal aspects deduced from judgements of ICJ, General Assembly resolutions and state practice. In the latter context, he mentioned the judgement of ICJ in the AngloNorwegian Fisheries Case, which had dealt with the validity/invalidity of unilateral measures. Expressing his personal

opinion, he felt at the national level, a research could be undertaken with examination of extra - territorial effects of national legislations. At the international level, he was of the view that principles such as permanent sovereignty of natural resources, and other related issues of international customary law, would require a clinical examination. As regards national legislation having extra territorial effects, he was of the view that the study could focus on: basic standards of national legislation within the territory of a state, national legislation having geographical locus beyond territory of State and the object and purpose of national legislation with extra territorial effects.

The Delegate of the Arab Republic of Egypt highlighting the topical importance of the subject expressed the view that the AALCC should study only the specific legal dimensions. The application of extraterritorial legislation on third parties, in the view of his Government, contravened the UN Charter principles of sovereign equality and non-interference in the internal affairs of a State. Furthermore, he felt that trade issues, pertaining to dispute settlement under the WTO and counter measures which are related to imposition of economic sanctions, should be further looked into.

(ii) Decision on the Agenda Item : "The Exrta-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties"

(Adopted on 18.4.98)

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

Recalling the reference made by the Government of the Islamic Republic of Iran and its Resolution 36/6 of May 7, 1997;

Expresses its appreciation to the Government of the Islamic Republic of Iran for hosting the seminar on the Extra-territoriality of National Legislation : Sanctions Imposed Against Third Parties;

Appreciative of the Report of the Secretary General on the seminar on the subject as set out in Document No. AALCC\XXXVII\ New Delhi \98\ S.5;

Having heard the statement of the Assistant Secretary General as well as the interventions of the delegates of Member States and representatives of Observer States;

Recognizing the significance, complexity and the implications of the Extra-territorial Application of National Legislation: Sanctions Imposed Against. Third Parties;

1. Requests the Secretariat to continue to study the legal issues relating to the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties and to examine the issue of executive orders imposing sanctions against target States;
2. Urges Member States to provide relevant information and materials to the Secretariat; and
3. Decides to inscribe the item "Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" on the agenda of the Thirty-eighth session of the Committee.

(iii) Secretariat Study : "Background Note on the Extra-Territorial Application of National Legislation: Sanctions Imposed Against Third Parties, Prepared for the Seminar held at Tehran Islamic Republic of Iran on 24-25 January, 1998

The item"Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties" was first placed on the provisional agenda of the 36th session of the Asian African Legal Consultative Committee (AALCC) following upon a reference made by the Government of the Islamic Republic of Iran in accordance with Article 4 (c) of the Statutes and sub- Rule 2 of Rule 11 of the Statutory Rules of the Committee. In an Explanatory Note submitted to the Secretariat of the AALCC , the Government of the Islamic Republic of Iran had enumerated four major reasons for the inclusion of this item on the agenda of the AALCC. The reasons so identified and listed were: (i) that the limits of the exception to the principle of extra-territorial jurisdiction are not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of National Legislation; (iii) that extraterritorial measures infringe various principles of international law; and (iv) that extraterritorial measures, on the one hand, affect trade and economic cooperation between developed and developing countries and interrupt cooperation among developing countries, on the other[4] .

Having identified and enumerated the reasons for the inclusion of the item on agenda of the 36th session, the Explanatory Note inter alia requested the AALCC "to carry out a comprehensive study concerning the legality of such unilateral measures, taking into consideration the positions and reactions of various governments, including the positions of its Member-States".

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4. For the full text of the Explanatory Note of the Government of the Islamic Republic of Iran on the "Extraterritorial Application of National Legislation :Sanctions Imposed Against Third Parties" see Report and Selected Documents of The Thirty-Sixth Session, Tehran, Islamic Republic of Iran (3-7 May 1997)

The rationale for calling a comprehensive study of the legality of unilateral actions was that National Legislation with Extraterritorial Effect Violates the principles of International Law including the impermissibility of unilateral imposition of sanctions. In its Explanatory Note the Government of the Islamic Republic of Iran had maintained that " the actions of States to unilaterally exert coercive economic measures against other States had no foundation in international law. Various resolutions adopted by United Nations Organs affirmed this point." It also demonstrated that the imposition of "unilateral sanctions infringe upon the right to development" and that "the imposition of sanctions violated principle of non intervention."

THE SECRETARIAT PRELIMINARY STUDY

A preliminary study prepared by the Secretariat was considered at the 36th Session of the AALCC. Introducing the item at the Tehran session held in May 1997 the Assistant Secretary General Mr. Asghar Dastmalchi observed that although jurisdiction in matters of public law character was territorial in nature some States were however, known to give extraterritorial effect to their municipal legislation which had resulted in conflict of jurisdictions and resentment on the part of other States. Civil Law countries exercise jurisdiction over their nationals for offenses committed even while United Kingdom law allow such jurisdiction in select cases. The United States of America exercise jurisdiction in a wide variety of cases.

It has been suggested in some quarters that the exercise of such extraterritorial jurisdictions was desirable and, indeed inevitable, and claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction were often pressed. Conflicts had arisen in the context of economic issues when States sought to apply their laws outside their territory in a fashion which precipitated conflicts with other States.

The preliminary study prepared by the Secretariat had pointed out that in the claims and counter claims that had arisen with respect to the exercise of extra-territorial Jurisdiction the following principles had been invoked (i) principles concerning jurisdiction ;(ii) sovereignty -in particular economic sovereignty - and non-interference; (iii) genuine or substantial link between

the State and the activity regulated; (iv) public policy , national interest ; (v) lack of agreed prohibitions restricting States right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promotion of respect for law. Notwithstanding the national interests of the enacting State grave concern had been expressed on the promulgation and application of municipal legislation whose extraterritorial aspects affected the sovereignty of other States.

While a growing number of other States have applied their national laws and regulations on extra-territorial basis, such fora as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Countries, and the European Economic Community have in various ways expressed concern about promulgation and application of laws and regulations whose extraterritorial effects the sovereignty of other States and the legitimate interests of entities and persons under their jurisdiction, as well as the freedom of trade and navigation.

The preliminary study prepared by the Secretariat, apart from referring to some recent instances of extra-territorial application of national laws, (without resolving the other questions, including the question of economic counter measures), sought to furnish an overview of the limits imposed by international law on the extraterritorial application of national laws, and inter alia spelt out the response of the international community to such actions. It recounted how in various, ways express concern about the promulgation and application of laws and regulations, whose extraterritorial effects affect the sovereignty of other States and the legitimate interests of entities and persons on their jurisdiction as well as freedom of trade and navigation.

The study prepared by the Secretariat also drew attention to the opinion of such august bodies, as the Inter-American Juridical Committee, the Juridical Body of the Organization of American States[5] and the International Chamber of Commerce[6].

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[5] For details see 35 International Legal Materials (1996) p. 1322

[6] Dieter Lange And Gary Borne (Eds:') : The Extraterritorial Application of National Laws ICC Publishing S.A. 1987)

The preliminary study prepared by the Secretariat sought to demonstrate that the topic covered a broad spectrum of inter-State relations, that is to say, political, legal, economic and trade. It recalled in this regard that the AALCC Secretariat study on the "Elements of Legal Instruments on Friendly and Good-Neighbourly Relations Between the States of Asia, Africa and the Pacific" had inter alia listed 34 norms and principles of international law, conducive to the promotion of friendly and good neighbourly relations. The 34 principles enumerated inter alia had included : (i) independence and state sovereignty; (ii) territorial integrity and inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (viii) mutual cooperation.[7]

The Secretariat study had pointed out that the use of unilateral action, particularly those with extraterritorial effects, can impede the efforts of developing countries in carrying out trade and macro-economic reforms aimed at sustained economic growth. It can hardly be over emphasized that the use of such unilateral trade measures pose a threat to the multilateral trading system. Even where there is a case for exercising jurisdiction, the principles of comity suggest that forbearance is appropriate. Under these principles (of comity) States are obliged to consider and weigh the legitimate interests of other States, when taking action that could affect those interests.

The Declaration[8] and Programme[9] of Action adopted by the Sixth Special Session of the General Assembly the Charter of Economic Rights and Duties of States, 1974[10] the United Nations Convention on Law of the Sea,

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7. AALCC Secretariat Study on "Elements of a Legal instrument on Friendly and Good Neighborly Relations Between States of Asia, Africa and the Pacific " Reprinted in AALCC Combined Reports of the Twenty Sixth to Thirtieth Sessions (New Delhi, 1992) p. 192

8. Resolution 3201 , of May 1, 1974 Sixth Special Session

9. Resolution 3202 , of May 1,1974 Sixth Special Session.

10. Resolution 3281 XXIX Session

1982 and several other international ' instruments retain many of the traditional aspects of sovereignty. The economic sovereignty provisions of these instruments are re-affirmations of the rights and interests in natural resources within the expanded definition of State's territory.

The preliminary study prepared by the Secretariat had submitted that it may perhaps. be necessary to delimit the scope of inquiry into the issue of extra-territorial application of national legislation in determining the parameters of the future work of the Committee on this item. It had asked for consideration to be given to the question whether it should be a broad survey of questions of extra territorial application of municipal legislation and, in the process, examining the relationship and limits between the public and private international law on the one hand and the interplay between international law and municipal law on the other. It recalled in this regard that, at the Forty fourth Session of the International Law Commission, the Planning Group of the Enlarged Bureau of the Commission had established a Working Group on the long-term 'programme to consider topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission and that one of the topics included in the pre-selected lists was the Extra-territorial Application of National Legislation.

An outline on the topic Extra-territorial Application of National Legislation prepared by a Member of the Commission had inter alia suggested that "it appears quite clear that a study of the subject of Extraterritorial Application of National laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national study on international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions. Such a study could further complement the efforts of the Commission in the codification and progressive development of law in other areas, like Responsibility of States, Liability for Transnational Injury, Draft Code of Crimes and Establishment of an International Criminal Jurisdiction".[11]

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11. See A/CN.4/454,p71

The Secretaiat study had proposed that in determining the scope of the future Work on this subject, the Committee may recall that the request of the Government of the Islamic Republic of Iran is to carry out a comprehensive study concerning legality of such unilateral measures ' i.e. sanctions imposed against third Parties, "taking into consideration the position and reactions of various governments, including the Position of its Member States." It was proposed that in considering the future work of the Secretariat on this item Member-States may wish to consider sharing their experiences, with the Secretariat, on this matter.

THIRTY SIXTH SESSION OF THE AALCC

In the course of deliberations on the item at the 36th session of the AALCC one delegate expressed the view that sanctions can only be imposed by the Security Council after it had determined the existence of a threat to peace, breach of peace and act of aggression' and that unilateral sanctions are violative of the Vienna Declaration and Programme of Action of 1993[12] which inter alia, recognized the right to development. It was pointed put that unilateral sanctions are violative of the principle of non-intervention.

The view was also expressed that national laws having extra-territorial effect had no basis in international law and that such laws, primarily aimed at individuals or legal persons, were violative of the principle of non- intervention, political independence and territorial sovereignty enshrined in several treaties. Such acts it was observed are aimed at weaker developing countries.

One delegate expressed the view that extra-territorial application of national legislation would affect international trade. Another delegate was of the view that in a changing scenario of globalization of trade and privatization of economies extra-territorial application of national laws would affect interdependence.

12. The world Conference on Human Rights had reaffirmed the right to development as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

One delegate, stated that extra territorial application of national legislatation infringed the sovereign right of states, violated the principles of non-intervention and affected the economic and political relations amongst states. Elaborating that sanctions would disturb the North-South relations, he called upon the AALCC states to voice their protest.

One delegate recalled the United Nations General Assembly 'Friendly Relations Declaration' and stated that although no State has the right to intervene directly or indirectly in the internal or external Affairs of any other State and every State has an inalienable right to choose its political economic, social and cultural systems without interference in any form by another state, large and powerful States are using it as a weapon. He pointed out that a particular country had within a short span of four years imposed around sixty-four unilateral sanctions against thirty-five countries. In the present era, the notion of inter-dependency among states had become quite obvious and the principles of non-intervention and non-aggression, the two principles of the well known five principles of peaceful co-existence have become all the more obvious and are universally accepted by all nations, big or small rich or poor. He stated categorically that extra-territorial application of national laws has no basis whatsoever, legal moral or political. It blatantly violates the rules of international law and the rules of civilized law and amounts to infringement of internal affairs of other countries.

One delegate observed that the Helms-Burton Act relating to trade with Cuba. Kennedv-D'Amato Act relating to Libya, Iran and Iraq are examples of extra territorial application of national law in the form of sanction against third parties. Even though superficially one might think that these national laws relate to actions by individuals, their object is the imposition of sanctions against States. This is so if one looks to the substance rather than the form of the Acts or national laws having extra territorial application. These extra territorial national laws are contrary to international law, they usurp the role entrusted to the Security Council for imposing sanctions against Member States. They are unilateral, they affect the principles of sovereignty, the sovereign equality of States, they go against the principle of non interference in the affairs of other States, and non-intervention. Indeed they go against several instruments and declarations of the UN and other international organizations.

This development affects not only domestic economies of developing countries but also South-South Cooperation and relation between themselves and the developed countries. In his opinion AALCC States should present a unified position which could demonstrate member countries' rejection of such national laws which constitutes unilateral economic and political sanctions against other States.

It was pointed out that extra-territorial application of national legislation is not entirely a new thing, but has deep roots. It is the legacy of the colonial period. While the AALCC as a legal consultative body is not in a position to talk about political issues, underlying the extra-territorial application of national legislation it is however, in a position to consider the legality of such actions. Under the United Nations Charter and international law, the Member-States of the United Nations have the obligation to support and implement the sanction measures taken by the Security Council against the law-breakers, in accordance with Chapter VII of the United Nations Charter. But States do not have obligations to observe and implement national laws of any State, with sanctions against any third party.

The view was expressed that extraterritorial application of national legislation and sanctions against a third party is violation of international law. AALCC, as a legal body of Asian-African countries, could have its own legal opinion on this issue. For this purpose, a comprehensive study concerning the legality of such unilateral measures, be considered by the Committee. The AALCC should keep this issue under review and could support the inclusion of the item, Extra Territorial Application of National Laws, or Unilateral Acts and their Legal Effects in the future programme of work of the International Law Commission.

One delegate pointed out that the aspect of unilateralism is slightly different from extraterrioriality and though they appear to be identical they are not. Extraterritoriality of national jurisdiction, in terms of exercising one's criminal jurisdiction over one's own nationals while abroad is a very ancient one, otherwise well established, and not debatable as a negative aspect of law. He advised caution against hastening to conclude that unilateral acts, which are different from extraterritoriality, on the basis on which we are working. If we

want to deal with extra-territorial jurisdiction issues, there is good room to deal with it technically and professionally, But unilateral acts essentially are pertaining to state responsibility and essentially pertain to a different field of study altogether. A unilateral act means that a country pronounces certain commitments unilaterally, without anybody endorsing it, without anybody having to agree with it or disagree with it.

As to the future course of action to be followed by the AALCC, it was pointed out that due to the complexity of the topic of extraterritoriality, an overall study of the subject was ruled out. To this end, it was felt that organizing one or two seminars in the inter-sessional period would be very useful.

At its 36th Session held in Tehran in May 1997 the AALCC inter alia recognized the significance, complexity and implications of "Extra Territorial Application of National Legislation : Sanctions Imposed Against Third Parties". It requested the Secretariat to monitor and study developments in regard to the Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties and urged Member States to share such information and materials that may facilitate the work of the Secretariat. The AALCC also requested the Secretary General to convene a seminar or meeting of experts and, to ensure a scholarly and in-depth discussion, to invite a cross section of professionals thereto The AALCC further requested the Secretary General to table a report of the seminar or meeting of experts on the subject at the next session of the Committee; and decided to inscribe the item "Extra-territorial Application of National Legislation: Sanction Imposed Against Third Parties" on the agenda of the Thirty-seventh Session of the Committee.

Pursuant to that mandate the Secretariat of the AALCC proposed in collaboration with the Government of the Islamic Republic of Iran to convene a two day Seminar in Tehran in January 1998 . A group of experts was invited from both Member and Non-member States of the AALCC to present papers thereat.

OBSERVATIONS AND COMMENTS

The application of unilateral measures is at variance with numerous

international instruments, including the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States[13] and the Charter of Economic Rights and Duties of States[14]. The legality of the use or resort to countermeasures is linked closely to the recourse to dispute settlement procedures and considered as a core issue in the current work of the International Law Commission on State Responsibility. The ILC had taken the view that countermeasure cannot be taken prior to the exhaustion of all available dispute settlement procedures, except in certain specific circumstances.

The topic "Extra Territorial Application of National Legislation : Sanctions Impose Against Third Parties" clearly covers abroad spectrum of inter-state relations i.e. politico legal, economic and trade. The use of unilateral actions, particularly those with extraterritorial effects can impede the efforts of the developing countries in carrying out trade and macro economic reforms aimed at sustained economic growth. It can need hardly be over emphasized that the use of such unilateral trade measures poses a threat to the multilateral trading system.

To delimit the scope of the inquiry into the issue of extraterritorial application of national legislation consideration requires to be given to the question whether it should be a broad survey of the question of extra territorial application of municipal legislation and in the process examining the relationship and limits between public and private international law on the one hand and the inter play between international law and municipal law on the other. It would be gainful to carry out a comprehensive survey of the legality of such unilateral measures (i.e. sanctions imposed against third parties) "taking into consideration the positions and reactions of various governments" and regional economic groupings.

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13. GA Resolution2625(XXV)

14. G.A. Resolution 3281 (YXIX) Article 32 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly, also stipulates that no State may use, or encourage the use of, economic, political or any other type of measures to coerce another State, in order to obtain from it the subordination of its sovereign right.

It is recalled that a view had been expressed at the 36th session of the AALCC that the extraterritorial application of national legislation and sanctions against a third party is a violation of international law and that the AALCC as a legal body of Asian-African countries, could have its own legal opinion on this issue. For this purpose, it was suggested that a comprehensive study concerning the legality of such unilateral measures may be considered by the Committee.[15]

The view was also expressed that an examination of the item by the Committee should be purely technically, based on legal analysis, and should not , to the extent possible, step into the political arena. The United Nations, the non-aligned forum and other fora could delve into the political dimension of the matter and the AALCC should not duplicate their work The work of the AALCC it was emphasized required a different type of perspective to deal with this issue and that is the reason that the seminar of a group of experts from Member and non-Member States of the AALCC had been convened.

THE IRAN AND LIBYA SANCTIONS ACT OF 1996: AN OVERVIEW

In 1996, two legislations by the United States Congress, extended the jurisdiction of that State beyond its territory, by imposing sanctions against third States that invest in, or enter into business with Iran, Libya and Cuba. First , In March 1996, the Cuban Liberty and Democratic Solidarity Act of 1996 (generally known by the names of its principal co-sponsors as the Helms-Burton Act)[16] was signed by the United States President. The Act inter alia codifies the existing economic sanctions previously imposed against Cuba pursuant to executive orders.

15. It was also proposed that the AALCC should keep this issue under review and could support the inclusion of the item, Extra Territorial Applioation of National Laws, or Unilateral Acts and their Legal Effects in the future program of work of the International Law Commission. See the statement of the Delegate of the People's Republic of China made during the Fourth Plenary Meeting in the *Verbatim Record of Discussions* of the Thirty Sixth Session of the Asian African Legal Consultative Committee, Tehran, Islamic Republic Of Iran, May 1997.

16. For the full text of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act see 35 *International Legal Materials (1996) p.397*

Again, on August 5, 1996, the United States President signed theIran-Libya Sanctions Act of 1996 (generally known as the D'Amato Kennedy Act), imposing sanctions against foreign companies that make investments which contribute to Iran's ability to develop its petroleum resources.

The Preamble to the Iran and Libya Sanctions Act of 1996 (hereinafter called the Act) describes it as an Act to "impose sanctions on persons making investments directly and significantly contributing to the enhancement of the ability of Iran or Libya to develop its petroleum resources, and on persons exporting certain items that enhance Libya's weapons or aviation capabilities. or enhance Libya's ability to develop its petroleum resources, and for other purposes."[17]

In a memorandum circulated at the 51st session of the General Assembly the United States maintained that the Act will help to deprive both the Islamic Republic of Iran and the Libyan Arab Jamahiriya from a source of income which, it claimed , could be used to finance international terrorism and procure weapons of mass destruction. The memorandum had affirmed that with the Kennedy D'Amato Law, it aimed to put pressure on Libya to comply with Security Council resolutions.

The Act defines both Iran and Libya in identical terms as "including any agency or instrumentality" of Iran or Libya. It requires persons both natural or legal, association of persons, governmental and non-govemmental agencies to refrain from investing either in Iran or Libya any amount greater than US $ 40 million during a 12 month period. To that end the Act defines the term "investment" to mean :

(i) The entry into a contract that includes responsibility for the development of petroleum resources located in Iran or Libya or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract.

(ii) The purchase of a share of ownership, including an equity interest, in that development.

[17] See text of the Iran and Libya Sanctions Act, 1996

(iii) The entry into a contract providing for the participation in royalties, earnings,' or profits in that development , without regard to the form of participation. The term investment does not include the entry into, performance, or financing of a contract to sell or purchase goods, services, or technology.[18]

It may be stated that investments under contracts existing prior to August 5, 1996 are beyond the pale of the Act and are exempted. The term "petroleum resources" is to have a large connotation and includes petroleum and natural gas resources.

Section 3 of the Act sets out the Declaration of Policy Paragraph (a) of Section 3 called "Policy with Respect to Iran" reads :

> "The Congress declares that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran[19] This Declaration of Policy with respect to Iran is based on the Congress findings as set out in section 2 of the Act.[19]

To further the objectives of the Act Section 4 inter alia urges the President of the United States to "commence immediately diplomatic efforts, both in appropriate international fora such as the United Nations, and bilaterally with allies of the United States, to establish a multilateral sanctions regime against Iran, including provisions limiting the development of petroleum resources that will inhibit Iran's efforts" to carry out activities described in section 2 of the Act.

[18] See Section 14 (9) of the Iran and Libya Sanctions Act, 1996.

[19] The Policy with Respect to Libya is set out in paragraph (b),of the same section in the following terms "The Congress further declares that it is the policy of the United States to seek full compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations, including ending all support for acts of international terrorism and efforts to develop or acquire weapons of mass destruction."

Section 4 of the Act entitled "Multilateral Regimes" it has been suggested "provides for the integration of coercive economic measures into multilateral systems."[20] Section 4 (e) of the Act required the President to present, an interim report monitoring multilateral sanctions, not later than 90 days after the enactment of the Act to the Appropriate Congressional Committee;[21] on :

(1) whether the member States of the European Union, the Republic of Korea, Australia, Israel or Japan have legislative or administrative standards providing for the imposition of trade sanctions on persons or their affiliates doing business or having investments in Iran or Libya;

(2) the extent and duration of each instance of the applications of such sanctions; and

(3) the disposition of any decision with respect to such sanctions by the World Trade Organization or its predecessor organization.[22]

The President is thereafter to report to the "appropriate congressional committees" on the extent that diplomatic efforts, referred to above, have been successful. Each report is to include (i) the countries that have agreed to undertake measures to further the policy objectives with respect to Iran , together with a description of those measures; and (ii) the countries that have not agreed to undertake measures .

A. SANCTIONS

Section 6 of the Act called the Description of Sanctions stipulates that the sanctions to be imposed on a sanctioned person are;

1 . Export-Import Bank Assistance For Exports to Sanctioned Persons

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20. See the statement of the Representative of Iraq at the 67" PLENARY meeting of the 51 " Session of the General Assembly.

21. Section 14 (2) of the Act defines the term Appropriate Congressional Committee to mean the Committee on Finance, the Committee on Banking, Housing, and Urban Affairs, and the Committee on Foreign Relations of the Senate and the Committee on Ways and Means, the Committee on Banking and Financial Services, and the Committee on International Relations of the House of Representatives.

22. Section 4 (e) of the Act.

2. Export Sanction;
3. Loans from Financial Institutions;
4. Prohibitions on Financial Institutions;
5. Procurement Sanction; and
6. Additional Sanction.

1. Export -Import Bank Assistance For Exports to Sanctioned Persons

Under Section 6 paragraph 1 the President may direct the Export Import Bank of the United States not to give approval to the issuance of any guarantee , insurance, extension of credit, or participation in the extension of credit in connection with the export of any goods or services to any sanctioned person.

2. Export Sanction

Section 6 paragraph 2 stipulates that the President may order the United States Government not to issue any specific license and not to grant any other specific permission or authority to export any goods or technology to a sanctioned person under (i) the Export Administration Act of 1979; (ii) the Arms Export Control Act; (iii) the Atomic Energy Act of 1954; or (iv) any other statute that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services.

3. Loans from Financial Institutions

Pursuant to Section 6 (3) of the Act the United States Government may prohibit any United States financial institution from making loans or providing credits to any sanctioned person totaling more than US $ 1 0,000,000 in any 12 -month period unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities.-,

4. Prohibitions on Financial Institutions

It may be stated at this 'juncture that under the Act the term "financial

institution' includes (a) a depository institution[23] including a branch or agency of a foreign bank[24],(b) a credit union; (c) a securities firm , including a broker or dealer; (d) an insurance company , including an agency or underwriter and (e) any other company that provides financial services.

Paragraph 4 of Section 6 of the Act envisages two kinds of prohibitions that may be imposed against a sanctioned person that is a financial institution These are

(a) Prohibition on Designation As Primary Dealer; and

(b) Prohibition On Service As A Repository Of Government Funds.

As regards the prohibition on designation as primary dealer it is stipulated that neither the Board of Governors of the Federal Reserve System nor the Federal Reserve Bank of New York may designate , or permit the continuation of any prior designation of, such financial institution as a primary dealer in United States Government debt instruments.

As to the prohibition on service as a repository of Government Funds it is stipulated that a financial institution may not serve as an agent of the United States Government or serve as repository for United States Government funds.

The subsection goes on to clarify that the imposition of either prohibition on a sanctioned person that is a financial institution shall be treated as a single sanction and that the imposition of both shall be treated as two sanctions for the purposes of Section 5 of the Act.

5. Procurement Sanction

The United States Government may not procure , or enter into any contract for the procurement of, any goods or services from a sanctioned person.

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23. As defined in section 3 (c) (1) of the Federal Deposit Insurance Act.

24. As defined in section 1 (b) (7) of the International Banking Act of 1978.

6. Additional Sanction

Finally, the President may, in accordance with the International Emergency Economic Powers Act , impose sanctions to restrict imports with respect to a sanctioned person.

The European Union has identified the measures taken by the United States President, to limit imports into USA, prohibition of designation as primary dealer or as repository of USA Government funds, denial of access to loans from USA institutions , export restrictions by USA, or refusal of assistance by Export - Import Bank, as damaging to its interests.

Be that as it may, the impermissibility under international law of unilateral sanctions is uniformly recognized by the international community. The adoption of coercive economic measures lies only within the mandate of the United Nations in particular instances where there exists a threat to peace or breach of peace .

B. Ratione Personae

The ratione personae of the Act is set out in Section 5 (e) which identifies the Persons Against Which the Sanctions Are to be Imposed. The sanctions described in the Act are to be imposed on (i) any person , the president determines, has carried out the activities described; (ii) successor entity to the person referred ; (iii) a parent or subsidiary of that person, if that parent or subsidiary , with actual knowledge , engaged in the activities referred to ; (iv) or an affiliate if that affiliate, with actual knowledge, engaged in those activities and if the affiliate is in fact controlled by the person .

Section 14 paragraph 14 stipulates that the term person means (a) a natural person; (b) a corporation business association, partnership, society, trust, any other non governmental entity, organization, or group , and any other governmental entity operating as a business enterprise; and (c) any successor to any entity- described above.

C. Rationae Temporis

The Iran and Libya Sanctions Act of 1996 entered into force on the date of its enactment viz. 5th August 1996. It will "cease to be effective 5 years after the date of the enactment of the Act."

The Iran Libya Sanctions Act goes beyond previous sanctions imposed by the United States against other States and is not limited to regulating American interests in these countries. Rather, like the LIBERTAD Act it is designed to impose sanctions on companies or individuals located outside the United States that trade with Iran and Libya and these sanctions are targeted at investments of non-US businesses in the oil industries of Iran and Libya i.e. investments having no necessary link with the United States.

In the course of the debate at the 36th session of the AALCC it was pointed out that the imposition of sanctions is permissible only by the United Nations under Chapter VII of the Charter. Article 41 of the United Nations Charter provides *inter alia* for complete or partial interruption of economic relations" in order to give effect to Security Council decisions with respect to maintaining or restoring international peace and security. Sanctions can only be imposed by the Security Council against a lawbreaking State after the determination of the existence of "threat to peace, breach of peace or act of aggression". The Security Council has followed this procedure over the past half a century. Although the sanctions policies of the United Nations remain under criticism, the power of the United Nations to enforce sanctions and the obligation of the Member States to abide by such decisions continue to remain as part and parcel of contemporary international law.

The General Assembly on its part has repeatedly denounced economic coercion as a means of achieving political goals. Among these the resolution entitled "Economic Measures as a means of Political and Economic Coercion against Developing Countries" has strongly urged the industrial nations to abstain from the use of their superior position as a means of applying economic pressure "with the purpose of inducing changes in the economic, political, commercial and social policies of other countries."

The unilateral imposition of sanctions infringe upon the right to development. The Vienna Declaration and Programme of Action of June 25, 1993 has delineated that the Right to Development has become a "universal and inalienable right and an integral part of fundamental human rights."[25] The Declaration on the Right to Development describes this principle as "an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, culrural and political development, in which all human rights and fundamental freedoms can be fully realized."[26]

Another inherent flaw is that the unilateral imposition of sanctions violates the principle of non-intervention. The principle of non-intervention, a customary norm of international law, is backed by established and substantial state practice and has been incorporated in various internationally binding instruments as well as the General Assembly resolutions. The resolutions of the General Assembly and the proceedings of the International Court of justice[27] provide ample evidence that the non-intervention principle encompasses the rejection of intervention and interference in both internal and external affairs of other states. Consequently, imposition of secondary sanctions, which interrupt economic cooperation and trade relations of traget States with third parties, violates the universally accepted principle of non-intervention in the international and external affairs of other States.

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[25] op.cit.note9

[26] See Article 1, paragraph 1 of General Assembly Resolution 41/128 of 4 Dec. 1986.

[27] The International Court of Justice in the *Case concerning the Military and Paramilitary Activities* in Nicaragua against the Unites States of America has established that: "The principle of non-intervention establised the right of every sovereign State to rule it's affairs without foreign interference; although examples of violation of such principle are not rare, the Tribunal states that it's part of the customary internaional right. The existence of the No intervention principle is backed by a very important and well established practice. On the other hand, this principle has been introduced as corollaries of sovereign equality of all States"

GENERAL ASSEMBLY OF THE UNITED NATIONS

An item entitled "Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion" was inscribed on the agenda of the 51th session of the General Assembly at the request of the Libyan Arab Jamahiriya. In the course of deliberations on the item it was pointed out that the United States had enacted legislation that punishes foreign non-United States companies which invested more than $40 million to develop petroleum resources in either the Islamic Republic of Iran or the Libyan Arab Jamahiriya. It was recalled that the United Stats had often employed sanctions to bring pressure on what it termed "rogue" States[28]

The enactment of laws which contravene the principle of territoriality national laws significantly affects the sovereignty of other States and the legimate interests of companies and persons within their jurisdiction.

The view was expressed that on the threshold of the new millennium, the emergence of unilateral coercive measures of an extraterritorial nature entails yet another serious danger in the context of an increasingly interdependent world . The risks posed by a country in unilaterally reserving the right to undemine the discipline of multilateral trade for reasons totally alien to trade issues, must be confronted appropriately and resisted by the international community.

In the course of the debate on the item it was *inter-alia* pointed out that the imposition of coercive measures and the approval of domestic legislation for the horizontal escalation of such actions with extraterritorial implications contradicts established international trade law including the regulations of the World Trade Organization.[29]

[28] The United States of America has since 1941 either unilaterally or in concert with others- has invoked sanctions more than 70 times. The overall success of sanctions has largely been limited For details see *The wall Street Journal* November 25, 1996.

[29] The Understanding of Rules and Pocedures Governing Settlement of Disputes, adopted as an Annex to the Agreement Establishing the World Trade Organization (WTO), *inter alia* incorporates restrictions on the use of individual counter measures. A similar provision can also be found in the "North American Free Trade Agreement" (NAFTA)

Speaking on behalf of the European Community at the 51th session of the General Assembly, the Permanent Representative of Ireland stated : "the European Union wishes to reiterate its rejection of attempts to apply national legislation on an extra-territorial basis." He concluded : "Measures of this type violate the general principles of international law and the sovereignty of independent States."

At that session the Assembly by its Resolution 51/22 of 27th November 1996 guided by the principles of the Charter of the United Nations, particularly those which call for the development of friendly relations among nations, and the achievement of cooperation in solving problems of an economic and social character recalled its resolutions in which it had called upon the international community to take urgent and effective steps to end coercive economic measure;[30] Concerned over the enactment of extraterritorial coercive economic laws in contravention of the norms of international law and believing that the prompt elimination of such measures is consistent with the aims and purposes of the United Nations and the relevant provisions of the World Trade Organization , the General Assembly reaffirmed the "inalienable right of every State to economic and social development and to choose the political, economic and social system which it deems most appropriate for the welfare of its people in accordance with its national plans and policies," and called for "the immediate repeal of unilateral extraterritorial laws that imposed sanctions on companies and nationals of other States". It also called upon all States not to recognize unilateral extraterritorial coercive economic measures or legislative acts imposed by any State[31], and decided to include in the agenda of its 52nd session an item entitled Elimination of Coercive economic Measures as a means of Political and Economic Coercion."

[30] See General Assembly Resolutions 47/19, 48/16 and 49/9 of the General Assembly of the United Nations." A similar resolution, calling upon all States to refrain from promulgating laws and regulations the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation was also adopted at the 50th session of the General Assembly.

[31] Earlier by its resolutions 47/19 and 50/10, General Assembly had called upon all States to refrain from promulgatlng and applying such laws and measures in conformity with their obligations under he Chart of the United Nations and international law which, *inter alia*, reaffirm the freedom of trade and navigation. These resolutions call upon States to revoke such laws.

By its resolution 51/22 the General Assembly had requested the Secretary General to prepare a report on the implementation of the resolution in the light of the purposes and principles of the Charter of the United Nations and international law and to submit the same to the Assembly at its 52nd Session. Pursuant to that request to Secretary General invited Governments to furnish any infirmation that they may wish to contribute to the preparation of that report. In response to that invitation of the Secretary General the Government of Belgium stated that like its partners in the European Union it was " opposed to the extraterritorial application of national legislation, more particularly the unilateral imposition of commercial measures, especially sanctions."[32]The Government of Iraq in its reply to the Secretary General stated inter alia that the coercive measures taken by some States constitute a real threat to international peace and security and a flagrant violation of human rights principles. It went on to suggest that "the international community, as represented by the United Nations, must increase the resolute and effective measures it takes with a view to dissuading States from taking such action and in order to block any attempts to apply pressure on the United Nations or any multilateral body , or to use them as a means to legitimize such practices, which conflict with the Provisions and Precepts of international law."[33]

The Government of the Islamic Republic of Iran observed that the "consideration of this very issue in all recent major international conferences and summits is a manifestation of the international concern about the multidimensional character of unilateral coercive economic measures which adversely affect all countries and the world economy as a whole"

The outcome of the debate, during the recently concluded 52nd session of the General Assembly, at the time of preparing this Background Note was not available to the Secretariat.

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32. It went on to state that the European Union had confirmed this position in its explanation of vote when the General Assembly voted on resolution 51/22,. See *Elimination of coercive economic measures as a means ofpolitical and economic compulsion. Report of the Secretary General,* A/52/343 dated 15 September 1997.

33 *Ibid*

EUROPEAN ECONOMIC COMMUNITY

The European Economic Community too asserts an extraterritorial application of its own competition laws and the application of these rules to international trade and economic relations has been equally controversial. As regards the European Community it has been stated that "(i) legislative jurisdiction may not be extended to acts outside Community territory in so far as prohibitive rules of international law stand in the way of such extension; (ii) *enforcement* jurisdiction is strictly limited to community territory, unless the rules of international law permit an extension to the territory of third States."[34]

Be that as it may , it has been and continues to be the policy of the European Union to oppose national legislation with extra-territorial effects. The 1982 Amendments to the US Export Administration Regulations which, expanded the US control on the export and re-export of goods and technical data to USSR was objected by the European Commission. The European Commission called these amendments "unacceptable under international law because of their extra-territorial effects."

The European Union strongly opposed the enactment of the legislation and termed the extraterritorial application of US jurisdiction baseless in international law. The essence of the European objection to D'Amato Act is summarized in the following extract from a letter addressed by EU to Senator D'Amato on 12 February 1996:

" We find it unacceptable that companies incorporated in and operating from European Community will be threatened by unilateral US sanctions when maintaining legitimate business relations with Iran and Libya. We reiterate our opposition that the US has no basis in international law to claim the right to regulate in any way transactions taking place outside the US."

The European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act of March 15, 1995, had *inter alia*

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34 P.J.Kuyper "European Community Law and Extra-territoriality: Some Trends and New Developments" 33 ICLQ (1984) p. 1013

pointed out that the European Union had consistently expressed its opposition as a matter of law and policy to extra-territorial application of US jurisdiction, which would restrict European Union trade in goods and services with Cuba. It emphasizes that "it cannot accept US unitateral determination and restrict EU economic and trade relations with third countries."[35] The Council of Ministers of the European Union adopted a regulation declaring the Act to be in violation of international law and decreeing that any company established in Europe that is subjected to a judgment under the Act may "claw back" against the assets of the American plaintiff in any of the Union's States.

The Council of the European Union has by its Regulation No. 2271/96 of 22 November 1996 emphasized that extra-territorial application of laws, regulations ' and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of its Member States violate international law and impede the attainment of the objective of free movement of capital between its Member States and third countries. It further states that such laws, regulations and other legislative instruments, which by their extra territorial application purport to regulate activities of natural and legal persons, "affect or are likely to affect the established legal order and have adverse effects on the interests of the Community and the interests of natural and legal persons exercising rights under the Treaty establishing the European Community."

Article 1 of the Regulation adopted by the European Council provides protection against and counteracts the effects of extra-territorial application" of the (i) National Defense Authorization Act for Fiscal Year 1973; Title XVII "Cuban Democracy Act 1992'; (ii) Cuban Liberty and Democratic Solidarity Act of 1996; (iii) Iran and Libya Act of 1996 ; and (iv,) Code of Federal Regulations Chapter V (7.1.95 edition) Part 515 - Cuban Assets Control Regulations, subpart B (prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties)[36]

35. See the text of the European Union Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act in 35 international Legal Materials (1996) p. 397.

36 For the full text of the European Council : Regulation (EC) No.2271 / 96, Protection Against The Effects. of the Extra-territorial Application of'Legislation Adopted by A Third Country of November 22,1996 see 36 International Legal Materials (1997) p. 125

GROUP OF 77

The Ministerial Declaration of the Group of 77 adopted at Midrand. South Africa on 28 April 1996 during the Ninth Session of the UNCTAD *interalia* observed that although the Uruguay Round Agreements and the establishment of the World Trade Organization (WTO) had boosted confidence in the multilateral trading system, its credibility and sustainability are being threatened by emerging recourse to unilateral and extra-territorial measures. The Declaration emphasized that environmental and social conditionalities should not constitute new obstacles to market access for developing countries. That Declaration had also expressed concern at the "continuing use of coercive economic measures against developing countries, through inter alia, unilateral economic and trade sanctions which are in clear contradiction with international law."[37]

The Group of 77 had at Midrand objected to the new attempts aimed at extraterritorial application of domestic law, which "constitutes a flagrant violation of the United Nations Charter and of WTO rules."

NON-ALIGNED COUNTRIES

The Eleventh Conference of the Heads of State or Government of the NonAligned Countries held in Cartagena de India's, Colombia, in October 1995 had *inter alia* "condemned the fact that certain countries, using their predominant position in the ,world economy, continue to intensify their coercive measures against developing countries, which are in clear contradiction with international law, such as trade restrictions, blockades, embargoes and freezing of assets with the purpose of preventing these countries from exercising their right to fully determine their political, economic and social systems and freely expand their international trade. They deemed such measures unacceptable and called for their immediate cessation."

37. See the Ministerial Declaration of the Group of 77, Midrand , South Africa, 28th April 1996 in the Report of the United Nations Conference on Trade and Development on its Ninth Session, held in Midrand , South Africa, 27th April- 11th May 1996. Dec. TD/378 p. 89 at 90.

The Eleventh Conference of the Heads of State or Government of the Non-Aligned Countries had called upon the developed countries "to put an end to all political conditionalities to international trade, development assistance and investment, as they are fully in contradiction with the universal principles of selfdetermination national sovereignty and non-interference in internal affairs.'

The Eleventh Conference of the Head of State or Government of the NonAligned Countries had also called upon the Government of the United States of America to "put an end to the economic, commercial and financial measures and actions which in addition to being unilateral and contrary to the Charter and international law, and to the principles of neighborliness, cause huge material losses and economic damage."

More recently, the Twelfth Conference of the Foreign Ministers of the NonAligned Countries held in New Delhi in April 1997, inter alia called upon all States to refrain from adopting or implementing extra-territorial or unilateral measures of coercion as means of exerting pressure on non-aligned and developing countries. They noted that measures such as Helms-Burton and Kennedy-D'Amato Acts constitute violations of international law and the Charter of the United Nations, and called upon the international community to take effective action in order to arrest this trend.

ORGANIZATION OF ISLAMIC CONFERENCE.

Like the Non-Aligned Movement, the Organization of Islamic Conference (OIC) has rejected extra-territorial application of domestic law as illegal and unacceptable. The Preparatory Meeting for the 24th OIC Ministerial Conference adopted a similar position. The 8th Islamic Summit Conference held in Tehran in December 1997 declared its firm commitment to the rejection of unilateral and extra-territorial law. The Final Declaration of the 8th OIC Summit held in Tehran inter alia rejected unequivocally the "unilateralism and extra-territorial application of domestic law" and urged all States to "consider the so-called D'Amato Act as null and void."

THE IBER-AMERICAN SUMMIT CONFERENCE

In November 1996, leaders of Latin America, Spain and Portugal denounced the sanctions as violating international law at Iber-American Summit Conference held in Chile. The resolution of the Conference was based on the opinion of the Inter-American Juridical Committee. In its opinion, of 23 August 1996, Inter-American Juridical Committee had inter alia observed that :

> "Except where a norm of international law permits, the State,May not exercise its power in any form in the territory of another State. The basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality"[38]

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[38]. See the Opinion of the Inter-American Juridical Committee in Response to Resolution AG\DOC.3375\96 of the General Assembly of the organization, Entitled "Freedom of Trade and Investment in The Hemisphere" in 35, International Legal Materials, (1996) p. 1329 at 1333.

Annex

Report Of The Rapporteur Dr. V.S. Mani On The Seminar On Extra Territorial Application Of National Legislation:Sanctions Imposed Against Third Parties, Tehran 24-25 January 1998

Mr. President,

1. I thank you for giving me this privilege of being the Rapporteur of this Seminar.

I. INTRODUCTION

2. The Seminar was participated by delegations from 16 Member countries of the AALCC seven Observer delegates and seven experts three of whom are from non-member countries. One expert could not attend but sent his paper for the Seminar, while the seven experts who attended made presentations at the Seminar.

3. The present report seeks to portray an overview of the Seminar in terms of the major issues raised, broad areas of agreement, the few points of disagreement, State responses to unilateral sanctions imposed through extra-territorial application of national legislations, and the further work to be pursued in study and elaboration of rules.

II. THE ISSUES.

4. The deliberations at the Seminar focused on a range of legal and policy aspects of the subject mainly in relation to two US enactments, namely the Helms-Burton Act, 1966 and the D'Amato Act, 1996, although references were also made to some of the earlier US laws such as the anti-trust legislation, the US Regulations concerning Trade with USSR, 1982, and the National Defence Authorization Act, 1991(i.e. the Missile Technology

Control Regime - MTCR - Law).

5. The legality of the two 1966 US enactments were examined in terms of their conformity with the peremptory norms of international law, the law relating to countermeasures, the law relating to international sanctions principles of international trade law, the law of liability of States for injurious consequences of acts not prohibited by international law, impact of unilateral sanctions on the basic human rights of the people of the target state, and issues of conflict of laws such as non-recognition, *forum nonconveniens* and other aspects of extraterritorial enforcement of national laws.

6. At least two of the presentations expounded the policy implications and foundations of the Helms-Burton Act and the D'Amato Act. They also analyzed the major provisions of these statutes examined their international legal validity.

III. BROAD AREAS OF AGREEMENT.

7. There was general agreement that the validity of any unilateral imposition of economic sanctions through extra-territorial application and national legislation must be tested against the accepted norms and principles of international law. The principles discussed included those of sovereignty and territorial integrity, sovereign equality, non-intervention, self-determination, and the freedom of trade. It was generally agreed that the Helms-Burton Act and the D'Amato Act in many respects contravened these basic norms. The right to development and the permanent sovereignty over natural resources were specifically mentioned, and it was argued that the two enactments impinged these principles as well.

8. While discussing the law relating to counter measures, it was generally agreed that the rules of prohibited counter measures as formulated by the international law Commission in its draft articles on State Responsibility must apply to determine the legality of counter measures purported to be effected by the extra territorial application of the two impugned US statutes. These rules include the prohibition of injury to third states, the rule of proportionality, and also the other rules relating to prohibited counter measures

incorporated in Article 13 of the ILC draft articles.

9. While discussing counter measures, it was emphasized that the presiding peremptory norm must be the peaceful settlement of disputes. All States have an obligation to seek settlement of their international disputes through peaceful means, an obligation to continue to seek such settlement, an obligation not to aggravate the dispute pending peaceful resolution, and an obligation not to resort to counter measures until after all reasonably possible methods of peaceful settlement have failed.

10. The ensuing discussion also highlighted the inter play between counter measures and non-intervention, and between counter measures and unilateral imposition of economic sanctions.

11. There was also general agreement that counter measures could not be a facade for unilateral imposition of sanctions in respect of matters that fell within the purview of Chapter VII of the Charter of the United Nations or the sanctions competence of other international organizations. A State could not take the law in its own hands where an organization had competence to decide whether or not sanctions should be issued. The differences between counter measures and sanctions of the nature of international sanctions should be recognized, it was argued.

IV. POINTS OF DISAGREEMENT

12. The seminar revealed mainly three points of disagreement.. First, whether the subject should be confined, to secondary sanctions through extra territorial application of national laws. There was a view held by an overwhelming majority of the participants that the delegate should encompass all legal aspects of unilateral economic sanctions imposed through extra territorial application of national legislation. The reasons in support of this proposition were given at two levels. First, it was pointed out that some of the Member States were themselves targets for such legislation. Second it was also contended, the distinction between the target state and the third State was often not maintainable in terms of the basic legality of the sanctioning legislation. The opposite view was that the subject should be confined in terms of the

impact of unilateral sanctions on third states, since it was clearly identifiable and separable from the impact on the target State.,

13. Second there was also a disagreement on the distinction between the prescriptive jurisdiction and the enforcement jurisdiction of every state. A minority view argued that what mattered for state responsibility was violation of international law by a State under its enforcement jurisdiction. Passing a piece of domestic legislation, even if purported to be enforced, but not yet enforced in itself did not invite state responsibility. The majority view, however, was that a national legislature could also involve state responsibility, by directing action by national authorities. Also, even a threat of sanctions could cause injury to the economy of another state. At any rate, it was pointed out, the concept of reparation must wipe out all consequences of an illegal act, including its ultimate source.

14. Third, the debate revealed a further disagreement concerning the applicability of WTO disputes settlement procedure to resolve disputes relating to Helms-Burton Act and the D'Amato Act in their extra-territorial application. One view was that the United States could , as it did, make its national security interests in defence of its unilateral action and that therefore the WTO fora would not have jurisdiction to deal with the disputes. The contrary view was that the WTO disputes settlement Body and the Council had competence to interpret the provisions of the Agreements. The economic sanctions, according to this view, by definition invited the disputes settlement competence of WTO.

V. STATE RESPONSES TO UNILATERAL SANCTIONS THROUGH EXTRA-TERRITORIAL APPLICATION OF US NATIONAL LEGISLATION.

15. The Seminar deliberations touched on a range of State responses to counter the possible impact of the US legislation in particular and the unilateral imposition of sanctions through extra territorial application domestic legislation in general. Detailed references were made of the response of the Inter-American system. and the European Union. The measures discussed encompassed 'blocking' legislation, statutes with 'drawback' provisions and

laws providing for compensation claims, all at the national level. At the international level the responses noted included diplomatic protests, negotiations for exemptions \ waivers in application of the projected sanctions, negotiations for settlement of disputes, use of WTO avenues and measures to influence the drafting of legislation in order to prevent its adverse extra territorial impact. It was also suggested,as a lego-political response that an old agenda item calling for a study of the distinction between acts in pursuance of the right of self-determination and terrorist acts.

VI. FUTURE WORK TO BE UNDERTAKEN

16. A number of proposals were made by the participants for AALCC to pursue. The Rapporteur takes the liberty to reformulate some of them and add some of his own.

17. The proposals would include formulation of principles, and sponsorship of studies.

A. FORMULATION OF PRINCIPLES \ RULES

18. The Rapporteur proposes that:

(i) AALCC along with ILC undertake formulation of principles \ rules relating to extra-territorial application of national laws in all its implications.

(ii) There is need for a second look at the ILC formulation of principles concerning counter measures vis-a-vis sanctions. The ILC formulation of counter measures seems to leave this aspect open. A State may violate (a) an obligation erga omnes or (b) an obligation erga omnes but injuring another state, or (c) an obligation vis-a-vis another state which of these situations would give rise to counter measures? A clarification on this issue will help determine the permissible counter measures, and the relationship between them and sanctions.

Similarly the relationship between counter measures and other peremptory norms of international law such as non-intervention and peaceful settlement of international disputes needs to be further examined.

B. PROPOSALS FOR STUDIES

19. It is also suggested that AALCC undertake three studies:

(i) A study on unilateral sanctions counter measures and disputes settlement procedures offered by the WTO group of agreements;

(ii) A study of the concept of abuse of rights in international law, preferably under the presiding norm of good faith, with context of exercised extra territorial application of national laws in pursuit of national policy objectives and

(iii) A study of the impact of unilateral sanctions on trade relations between States.

20. No doubt the above proposals, if approved by the Members of the AALCC, would require close co-operation of the Members with the AALCC Secretariat.

Rapporteur
(V.S.Mani)

Tehran
25th January 1998

XI. UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT : FOLLOW UP

(i) Introduction

The topic "United Nations Conference on Environment and Development: Follow Up"has been considered by the Committee at its 32nd (Kampala, 1993), 33rd (Tokyo, 1994), 34th (Doha, 1995), 35th (Manila, 1996) and 36th (Tehran, 1997) Sessions. The Secretariat studies prepared for these Sessions focussed on matters concerning implementation of Agenda 21 in general, and the UN Conventions on Climate Change, Biological Diversity and Desertification in particular.

At the 36th Session, the Committee taking note of the General Assembly Resolution 47\190 of 22 December 1992 which had decided to convene a special session on Environment for the "Purpose of an Overall Review and Appraisal of the Implementation of Agenda 21", directed the Secretariat to "continue to monitor the progress in environmental matters, particularly towards the implementation of Agenda 21 and the follow-up work to the recent environmental Conventions. The Secretariat brief for the New Delhi Session furnishes an overview of : (I) The special session of the General Assembly for the Purpose of an Overall Review and Appraisal of the Implementation of Agenda 2 1; (ii) The United Nations Framework Convention on Climate Change, COP-III held in Kyoto; (iii) The Convention on Biological Diversity; and (iv) The first session of the Conference of Parties to the United Nations Convention to Combat Desertification.

Thirty Seventh Session : Discussion

The Deputy Secretary General Mr. Ryo Takagi introduced the Secretariat Document and recalled that the item had been on the agenda of the Committee since the Kampala session(1993). He added that at that session the Secretariat had been directed to monitor the developments related to the implementation of Agenda 21, and in particular the United Nations Conventions on Climate Change, Biological Diversity and Desertification. He also recalled the Special Session on General Assembly for the Purpose of an Overall Review

and Appraisal of the Implementation of Agenda 21. Making a special reference to the United Nations Framework Convention on Climate Change, he said that the third Conference of Parties to the Convention met at Kyoto, Japan from 1-10 December 1997. This Conference, he added, after contentious bargaining adopted a protocol on 9 December 1997 towards quantified emissions limitations reductions objectives by Annex-1 Parties. He also said that the Ad hoc Working Group on Bio-safety (BSWG) has prepared a draft text of a protocol which would be adopted by the fourth session of the Conference of the Parties to the Convention on Biological Diversity scheduled to meet from 4-15 May, 1998 in Bratislava, Slovakia. He stated that in a rapidly changing world, a number of environmental treaties had been concluded. The AALCC, he felt, could serve the Member States with information and material on state practice in the implementation of environmental treaties. He also suggested that the Secretariat would like to organise a programme or training course on environmental law in cooperation with some agencies of the United Nations especially the UNEP in the course of 1998.

The Representative of UNEP expressed the view that strengthening of international law called for integration of environment and development. He said that this could be done in two areas which include dissemination of information on materials on environmental law and capacity building in environmental law, along with training. Referring to his organization's expertise in the field for the last twenty five years, he felt this could be used for strengthening closer co-operation between UNEP and AALCC. In this regard, he suggested some key areas involving, environmental convention processes, environmental impact assessments, international economic instruments and the role of the judiciary in promoting sustainable development. He pledged the support of his organization to the compilation of an "AALCC handbook on Environmental Law," by the AALCC Secretariat.

The Delegate of Tanzania highlighting the importance of the subject, wholeheartedly supported the suggestion of the UNEP Representative to convene a programme for training on environmental law and also the compilation of an AALCC Handbook on Environmental Law.

The Delegate of India stated that he would like to dwell on the two

important issues of special concern to developing countries of the region. These included, firstly the principle of common but differentiated responsibilities occurring in UN Conventions such as those on Climate Change, Biological Diversity, Desertification and the proposed Bio-safety Protocol; secondly, he added that the fulfilment of socioeconomic needs of developing countries, would entail transfer of technologies and additional financial resources. On the question of bio-safety, he expressed the view that as the matter was a sensitive one, involving living modified organisms of important interest to developing countries rich in biological resources, his Government solicited the support of other countries concerning compensation and liability and the issue of socioeconomic consideration, provided in the Protocol.

The Delegate of Sri Lanka congratulated the representative of UNEP for his suggestions to strengthen ties with the AALCC. Furthermore, he felt that the proposed training programme in environmental law and the Handbook, would help countries of the region in addressing issues relating to sustainable development.

The Delegate of Uganda supported the suggestion for organising a training programme in environmental law for AALCC Member States.

The Delegate of Pakistan welcomed the initative taken by the UNEP and called for greater interaction with in the AALCC on matters concerning environmental law.

(ii) Decision on the "The United Nations Conference on Environment and Development: Follow up"

(Adopted on 18.4.98)

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

Having considered Doc. No. AALCC/XXXVII /New Delhi 198/ S.12 on matters concerning the follow-up to the United Nations Conference on Environment and Development held in Rio in June 1992;

Taking note of the outcome of the Special Session of the General Assembly for the Purpose of an Overall Review and Appraisal of the Implementation of Agenda 21;

1. **Urges** the Member Governments which have not already done so to consider ratifying or acceding to the Framework Convention on Climate Change, Convention on Biological Diversity and the Convention to Combat Desertification and other relevant environmental conventions;

2. **Directs** the Secretary General to organize a workshop in the field of Environmental Law in cooperation with the United Nations Environment Programme and other international/ regional organizations and in collaboration with the United Nations Environment Programme to publish a Handbook of Environmental Law for AALCC' Member States, for their practical use in the field of environment and development;

3. **Appreciates** the voluntary contributions made by the Government of Saudi Arabia and Myanmar to the AALCC's Special Fund on Environment. and urges Member Governments to make voluntary contributions to that Fund to enable the Secretariat to play an effective role in raising issues relating to emerging norms and principles of environmental law and examining them from the perspective of Member States; and

4. **Directs** the Secretariat to continue to monitor the progress in

in senvironmental law matters, particularly towards the implementation of Agenda 21, and the follow-up work to the UN Conventions on Climate Change, Biological Diversity, and Desertification and submit a report thereon at its thirty-eighth Session.

(iii) Secretariat Study : United Nations Conference on Environment and Development : Special Session of The General Assembly For The Purpose of An Overall Review And Appraisal of The Implementation of Agenda 21.

The General Assembly by its resolution 44\228 of 22 December 1989 had decided to convene a United Nations Conference on Environment and Development (UNCED). The UNCED was held at Rio de Janeiro from 3 to 14 June 1992. It resulted in the adoption of the Rio Declaration on Environment and Development,[1] Agenda 21[2] and the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests.[3] The General Assembly in its resolution 47\ 190 of 22 December. 1992 while endorsing the Report of the Rio Conference also decided to convene a special session for the Purpose of an Overall Review and Appraisal of the Implementation of Agenda 21, not later than 1997.

The General Assembly further decided[4] that the special session should be convened at the highest possible level of participation and also determined the organizational modalities for the preparation for the special session, including the role of the Commission on Sustainable Development (CSD) and other relevant organizations of the United Nations System. The Ad Hoc Open-ended Inter-sessional Working Group of the UN Commission on Sustainable Development (CSD) which met in New York from 24 February to 7 March 1997 focused its attention on the format and contents of the documents for consideration at the special session. There were differences in key areas between the developed and developing countries concerning the structure of the draft on the "proposed out come of the special session". The CSD met again prior to the convening of special session to sort out the divergent views.

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1. Report of UNCED. UN Doc.No.A\CONF. 151\26\Rev. 1 (Vol.1 and Vol.I\Corr.1, Vol. 11, Vol.III and Vol. III\Corr.
2. Ibid, Annex II.
3. Ibid., Annex III.
4. General Assembly resolutions 50\113 of 20 December 1995 and 51\181 of 16 Dec.

It was against this backdrop that the nineteenth special session of the General Assembly was held at the United Nations Headquarters from 23 to 27 June 1997. Also known as Earth Summit+5, it was attended by 55 Heads of States or Governments 178 Ministers of various rank, executive heads and high level officials of a large number of international organizations, both from within and outside the United Nations system and representatives of a large number of non-governmental organizations.

The Special Session unable to reach an agreement on adoption of a declaration, adopted a Programme for the Further Implementation of Agenda 21. This Programme which would be a blue print for implementation of Agenda until the next review in 2002, contains: (a) a statement of commitment; (b) an assessment of the progress made since UNCED; (c) implementation in areas requiring urgent action; and (d) financial mechanism and international institutional arrangements.

A. Statement Commitment

The Statement recognized that the UNCED was a landmark event which launched a new global partnership for sustainable development, founded on a global consensus and political commitment at the highest political level. It "re-affirmed that Agenda 21 adopted at Rio remained the fundamental programme of action for achieving sustainable development, along with all the Principles contained in the Rio Declaration on Environment and Development and the Forestry Principles".

B. Assessment of Progress made since UNCED

It was acknowledged that the global environment has continued to deteriorate since Rio, due to rising levels of green house gas emissions, toxic pollution, solid waste and the continuous depletion of renewable resources such as fresh water, forests, top soil and marine fish stocks. Although economic growth on account of globalization, was discernible it was felt, that the gap

between the rich and the poor was ever increasing.

As regards the significant achievements since UNCED the assessment noted the entry into force of the United Nations Framework Convention on Climate Change (UNFCCC), the UN Convention on Biological Diversity, the UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa; the conclusion of an Agreement on Straddling and Migratory Fish Stocks; the adoption of the Programme of Action for the Sustainable Development of Small Island Developing States and the elaboration of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities; and the entry into force of the United Nations Convention on the Law of the Sea. It was stressed that the implementation of the commitments, provided in these instruments by all States' Parties was of fundamental importance for achieving sustainable development.

It was recognized that some progress had been made in incorporating the principles contained in the Rio Declaration on Environment and Development, including the principle of common but differentiated responsibilities, which embodies the concept and basis for international partnership; the precautionary principle; the polluter pays principle; and the principle of environmental impact assessment, in a number of national and international environment instruments.

C. Implementation in areas requiring urgent action

Emphasizing a comprehensive approach to achieve sustainable development it was stressed that all sectors covered by Agenda 21 are important and deserve attention by the international community on an equal footing. Recommendations were made on each of the sectors taking into account the need for international co-operation in support of national efforts, within the content of the principles of UNCED, including inter alia, the principle of common but differentiated responsibilities. It was however agreed that these recommendations would not in any way prejudice the work accomplished under existing legally binding conventions. The important sectors listed in the assessment inter alia, include: (i) fresh water; (ii) climate change (atmosphere);

(iii) forests;(iv) desertification;(v) oceans and seas; (vi) energy; (vii) small island developing states; and (viii) biological diversity.

D. Financial Resources and international institutional arrangements

It was recognized that financial resources and mechanisms play a key role in the implementation of Agenda 21. The need for developing more concessional mechanisms of funding through multilateral financial institutions, in order to fully implement the sustainable development objectives contained in Agenda 21, was also emphasized. Donor countries were urged to engage in providing "new and additional resources", through satisfactory replenishment of the GEF. Recognizing, that private capital could be a major tool for economic growth in developing countries, it was suggested that Governments should aim at providing economic stability, open trade and investment policies and a favourable legal framework for encouraging higher levels of foreign private investment.

It was reaffirmed that developing countries need greater access to environmentally sound technologies, if they are to meet the obligations agreed at UNCED and other relevant conventions. Stressing upon the need for urgent fulfillment of all UNCED commitments by developed countries, it was agreed that such technologies should be transferred on a preferential basis. In this context, it was felt that UN bodies and other mechanisms, such as Technical Co-operation among Developing Countries (TCDC), Economic Co-operation among Developing Countries (ECDC), UNCTAD, UNIDO, UNEP and other regional Commissions, could provide technical expertise.

Renewed commitments and support from the international community to support national efforts for capacity building in developing countries and countries with economies in transition was considered essential. In this regard reference was made to the Capacity 21 programme of the UNDP, which could provide assistance for infrastructural development, using local talent, on the basis of a participatory approach.

It was also recommended that environmental policies should be integrated with appropriate legal and regulatory policies and judicial and administrative enforcement mechanisms at the national, state, provincial and local levels. Also, mindful of the provisions of Chapter 39, paragraph 1 of Agenda 21, continued efforts towards the progressive development and when appropriate codification of international law related to sustainable development was considered necessary.

It was affirmed that the institutional framework outlined in Chapter 38 of Agenda 21, will continue to be fully relevant in the period after the special session as there was need for greater coherence in the functioning of various intergovernmental organizations and processes, to facilitate better policy co-ordination.

Follow-Up Work Of The Special Session

As regards the follow-up action on the decisions and recommendations of the nineteenth special session, the Economic and Social Council at its Substantive session in July 1997 approved the "Programme of Work of the CSD for the period 1998-2002" and invited the CSD to adjust its future methods in accordance with "paragraphs 132 and 133" of the Programme for the Further Implementation of Agenda 21. The Council also established, under the aegis of the CSD, an Intergovernmental Forum on Forests which would report to the CSD. at its eighth session in the year 2000.

The General Assembly at its 52nd Session considered the Report of the Special Session including the Programme for the further implementation of Agenda 21. It considered that along with the already existing framework provided in Chapter 38 of Agenda 21, it was necessary to strengthen the Administrative Committee on Co-ordination (ACC) and the Inter-Agency Committee on Sustainable Development and its system of task managers, with a view to further enhancing system-wide inter-sectoral co-operation and coordination for the implementation of Agenda 21.

To facilitate national implementation of national Agenda 21, the General Assembly also stressed that all organizations and programmes of the United Nations should strengthen within their area of expertise and jointly or individually, extend support for implementation of Agenda 21.

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

The United Nations Framework Convention on Climate, Change which was adopted in May 1992 was opened for signature at the Rio Conference from 4 to 14 June 1992 and thereafter at the United Nations Headquarters until 19 June 1993. It came into force on 21 March 1994. As of 30 September 1997, there are 170 States parties to the Convention. [5]

The first Conference of Parties (COP-1) met in Berlin from 28 March to 4 April, 1995. Among its main decisions included: (a) the establishment of a Ad-hoc Group on Berlin Mandate (AGBM) entrusted to negotiate a protocol or any other legal instrument containing additional commitments of Annex I Parties provided in Article 4.2; (b) initiation of "Joint Activities" or activities implemented jointly (AIJ) on a pilot basis; (c) designation of the Global Environmental Facility (GEF) as an interim financial mechanism; and (d) constituting a multilateral consultative process, pursuant to Article 13 of the UNFCC.

At the second Conference of Parties (COP-2) which was held in Geneva from 8 to 19 July 1997, discussions continued on the mandate of AGBM and its work towards substantive negotiation, following 70 proposals received by the AGBM Secretariat. An important event during the Conference

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[5]. The AALCC Member States that are Parties to this Convention are: Bahrain,Bangladesh, Botswana, China, Egypt, Gambia, Ghana, India, Indonesia, Islamic Republic of Iran, Japan, Jordan,Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria,, Oman. Pakistan, Philippines, Qatar, Saudi Arabia,Senegal, Sri Lanka, Sudan, Syrian Arab Republic, Tanzania, Thailand, Uganda, United Arab Emirates and Republic of Yemen.

AGBM and its work towards substantive negotiation, following 70 proposals received by the AGBM Secretariat. An important event during the Conference was adoption of a Ministerial Declaration which highlighted the political importance of the implementation of the objectives and commitments provided in the Convention. Despite dissatisfaction expressed by some Ministers and other Heads of delegations; the declaration; (1) reaffirmed the over reaching importance of the principles of equity, common but differentiated responsibilities and the precautionary approach in mitigating the effects of climate change; (ii) endorsed the Second Assessment Report of the IPCC as currently, the most comprehensive and authoritative assessment of the science of climate change although some uncertainties do exist; (iii) called upon Annex-I Parties to strengthen their commitments by implementing their national policies and measures and making additional efforts to stabilize their emissions of greenhouse gases; (iv) instructed the representatives to accelerate negotiations on the text of a legally binding protocol or any other legal instrument to be completed for adoption at COP-3; (v) affirmated quantified legally binding emission limitations (QELROS) objectives and significant overall reductions within specified time frames such as 2005, 2010 and 2020 with respect to their anthropogenic emissions by sources and remarks by sinks o f greenhouse gases; (vi) welcomed the efforts of the developing country .Parties in implementing the Convention and called upon Annex-11 Parties to fulfil their commitments to provide environmentally sound and benign technologies towards meeting the incremental costs; and (vii) called upon the GEF to provide timely support to developing country Parties and initiate work towards a full replenishment in 1997.

During the inter-sessional period, the Subsidiary bodies met four times. The Subsidiary Body for Implementation received a number of first and second national communications from Annex-1 Parties, as well as the financial mechanism of the UNFCC. The Subsidiary Body for Scientific and Technological Advice (SBSTA) defined its co-operation with other relevant international organisation, in particular, the IPCC. SBSTA considered a uniform reporting pattern for AIJ projects. The Ad hoc Group on Article 13 considered a number of proposals on a multilateral consultative process.

COP-3

The third Conference of Parties (COP-3) met in Kyoto, Japan from 1-10 December, 1997. Among the issues before the Conference were the drawing up of an international framework by way of a protocol or any other legal instrument, containing additional commitments by Annex-1 Parties, beyond the period 2000 and the quantified emissions limitation and reduction objectives (QELROS) of a 20 percent reduction in carbon dioxide emission by 2005 A.D. to 1990 levels, as proposed by the Alliance of Small Island States (AOSIS). After ten days of negotiations, especially on the contentious issue of QELROS, a Protocol was adopted on 10 December 1997.[6]

The main elements of the Protocol include: (i) commitment towards QELROS (Article 3); (ii) a commitment of five percent reduction in the time frame of 2008 to 2012; (iii) commitment towards AIJ; (iv) trading of emissions targets\quotas amongst Annex-1 Parties; (v) voluntary opt-in mechanism; (vi) new additional resources and transfer of technologies; (vii) setting up of a clean development fund;. and (viii) methodologies for estimation of anthropogenic emissions.

QELROS

As regards quantified emission limitation and reductions (QELROS), Article 2 of the Protocol provides that each Annex-1 Party shall strive to promote sustainable development. Towards this end, the Party shall implement and elaborate policies and measures in accordance with national circumstances such as: enhancement of energy efficiency in relevant sectors; protection and enhancement of sinks and reservoirs of greenhouse gases (GHG's) not controlled by the Montreal Protocol; promotion of forestry policies and sustainable forms of agriculture; promotion of R&D and use of renewable forms of energy and environmentally sound technologies; and progressive reduction or phasing out of market imperfections, fiscal

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[6] FCCC\CP\1997\CRP.4.

exemptions or subsidies in GHG's emitting sector that run counter to the objectives of the UNFCC.

Article 2, paragraph 3 further provides that Annex 1 Parties shall implement the above mentioned policies, bearing in mind the adverse effects of climate changeon international trade,environmental and socioeconomic impact on other Parties, especially developing country Parties.

Commitment Period (2008-2012)

Article 3 of the Protocol provides for a commitment period wherein Annex-II Parties would reduce their collective aggregate anthropogenic carbon dioxide equivalent emissions of carbon dioxide, methane and nitrous oxide, listed in Annex A, by five percent in the period 2008-2012. Annex-I Parties would also individually or Jointly ensure their "assigned amounts pursuant to Annex of the Protocol" as calculated in accordance with paragraph 3 of Article 3.

Article 3 further stipulates that the Conference of Parties (COP-4) to be held in Buenos Aires in 1999 could consider adoption of an annex to this Protocol which could establish emission limitation and reduction commitments for Annex-I Parties with respect to hydro fluoro-carbons, perfluoro carbons and sulphur hexafluoride. Besides these commitments, the net changes of GHG's from sources and removals by sinks, resulting from human induced land-use change and forestry activities since 1990, which will be measured as verifiable changes in stocks in each commitment period which would be used to meet the commitments mentioned in Article 3, by the Annex-1 Parties.

Activities Implemented Jointly (AIJ)

Article 4 of the Protocol provides for joint implementation or AIJ wherein the Annex-1 Parties have agreed to jointly fulfill their commitments under Article 3 of the Protocol. Such a commitment would be deemed to have met those commitments provided their total combined aggregate anthropogenic carbon dioxide equivalent emissions of GHG's listed in Annex

A do not exceed their assigned amounts in Annex B. It further stipulates that all Parties desirous of such AIJ should notify the Secretariat of their terms of agreement on the date of deposit of their instruments of ratification, acceptance, approval or accession.

When the Parties undertake AIJ within the framework of their regional economic integration organization any alteration in the composition of the organization would not affect their individual commitments under the Protocol. In the event of the regional economic organization itself being a Party to the Protocol, each member of the organization individually and together with the regional economic integration organization in accordance with Article 25, would in case of failure to achieve the total combined level of emissions reductions, be responsible for its level of emissions, as provided in Article 4.

Trading Of Emissions Reduction Targets\Quotas

Article 6 provides that the Conference of Parties under the UNFCC, would serve as the meeting of Parties to the Protocol. Such a COP of the Protocol, at its first session to be convened after the date of its entry into force, shall decide upon the modalities, rules and guidelines for an international framework for emissions trading. Annex-I Parties can transfer their assigned amount to any other Annex-I Party as provided in Article 3 of the Protocol. Furthermore a Party may also authorize "legal entities", to participate under its responsibility for transfer or acquisition of any assigned amount. In the event of excess emissions by an Annex-I Party in any commitment period such amount may be acquired, but not transferred. All emission trading shall be supplemental in nature to domestic actions required of Parties under Article 3 of the Protocol.

Voluntary Opt-in Mechanism

Article 10 of the Protocol states that "Any Signatory Party this Protocol not included in Annex-I may at any time, notify the depository that it has opted to be bound by this Article". The party so choosing to be included in Annex-I will have to notify : (i) its intention with the support of an inventory of GHG

emissions not controlled by the Montreal Protocol; and (ii) the historical base year or period for implementation of emissions reduction commitments. This provision ensures that a larger number of non Annex 1 Parties are co-opted in Annex 1 to enable burden sharing. However, developing countries have resisted attempts by Annex-I Parties for a compulsory time frame for opting in clause.

New Additional Resources And Transfer Of Technologies For Developing Countries\Non Annex I Parties

Article 12 -of the Protocol calls upon all Parties to formulate to the extent possible, cost effective, national and where appropriate, regional programmes to improve the quality of local emissions and preparation of national inventories of anthropogenic emissions by sources and removal by sinks of GHG's not controlled by the Montreal Protocol. While doing this, special emphasis must be laid on the socioeconomic conditions of the Party concerned, bearing in mid their common but differentiated responsibilities, as provided in the UNFCC. In carrying out these programmes and furthering the objectives of Protocol non Annex-I Parties and especially developing countries are guaranteed transfer of and access to environmentally sound technologies, know-how practices and processes pertinent to climate change, new and additional financial resources to assist them in meeting the costs of adaptation and human and institutional capacity building by way of educational training and imparting technical expertise, by Annex II Parties. Article 13 of the Protocol further reiterates the commitments by Annex II Parties to the UNFCC to provide new and additional financial resources to developing country Parties, through the operating entity (financial mechanism of the UNFCC).

Clean Development Fund (CDF)

The Brazilian proposal for a CDF finds place in Article 14 of the Protocol. It provides for a CDF which would assist Parties not included in Annex I in achieving sustainable development and thereby contribute to the objective of the UNFCC and also assist Annex I Parties in achieving

compliance with their QELROS commitments under Article 3. The CDF would thus have a two fold purpose: (a) it would benefit non-Annex I Parties from various projects undertaken which are certified emission reductions; and (b) these certificates can be used by Annex 1 Parties towards their compliance with QELROS commitments as decided by the meeting of Parties to the Protocol. The CDF would operate under the guidance and authority of the Conference of Parties serving as the meeting of Parties to this Protocol and decide the elaborate procedures for the operation of the CDF, participation of private entities, user fees for certified project activities, auditing and verification mechanisms.

In addition to these main elements, the Protocol provides for a Conference of Parties which would serve as the meeting of Parties (Article 15); establishment of a Secretariat i.e. the UNFCC Secretariat shall serve as Secretariat of the Protocol (Article 16); SBI and SBSTA of the UNFCC to serve as SBI and SBSTA of the Protocol (Article 17); a multilateral consultative process or dispute settlement mechanism as provided in Article 14 of the UNFCC (Article 20); amendment procedures (Article 21); Annex of Protocol i.e. Annex A and B form an integral part, of the Protocol (Article 22); each Party has one vote (Article 23); Secretary General of the United Nations to be the Depository (Article 24); ratification, acceptance or approval clause - open for signature at UN Headquarters in New York from 16 March 1998 to 15 March 1999 (Article 25); entry in force on ninetieth day after the date on which 60 Parties have deposited their instruments of ratification, acceptance or approval or accession (Article 26); no reservation allowed under the Protocol (Article 27); and withdrawal clause (Article 28).

In conclusion, it may be stated that the COP-3, saw the completion of the task of the AGBM process, and thereby adopted a workable compromise in the form of a protocol for controlling emissions of GHG's by Annex-I Parties. It is hoped that COP-4 to be held in Buenos Aires, Argentina in 1999 would see a successful implementation of emission trading albeit a partial fulfilment of larger UNFCC objectives.

CONVENTION ON BIOLOGICAL DIVERSITY

The Convention on Biological Diversity (CBD), negotiated under the auspices of the United Nations Environment Programme (UNEP), was opened for signature on 5 June 1992 and entered into force on 29 December 1993. The first meeting of the conference of Parties (COP-1), took place in Nassau, Bahamas from 28 November to 9 December 1994. Some of the important decisions taken by COP-1 were: adoption of a medium term work programme; designation of a permanent secretariat; establishment of a clearing house mechanism (CHM) and the establishment subsidiary Body of Scientific, Technical and Technological Advice (SBSTTA) and designation of the Global Environmental Facility (GEF), as the interim (institutional structure for the) financial mechanism. The second session of the COP, met in Jakarta, Indonesia from 6 to 17 November, 1995. Among the key decisions taken by COP-2 included: location of the permanent secretariat of the CBD in Montreal, Canada; an agreement to develop a protocol on the safe transfer, handling and use of living modified organisms (LMO's); operation of the CHM and consideration of substantive issues of marine and coastal biodiverstiy.

The third Conference of Parties (COP-3) to the CBD met in Buenos Aires, Argentina from 4 to 15 November 1996. The discussion focused on: (a) clearing house mechanism; (b) financial mechanism; (c) agricultural biodiversity; (d) access to genetic, resources and transfer of technology; (e) intellectual property rights; and (f) the protocol on biosafety.

As regards the adoption of a protocol on Blosafety, the COP considered the report of the First Meeting of the Open Ended Ad Hoc Working Group on Biosafety (BSWG) and the progress report on the elaboration of a protocol on Biosafety. The Committee of the Whole (COW) had before it the work of BSWG-1, which had considered the matters concerning legislations on safe transfer, handling, use and disposal of living modified organisms and recommended the setting up of a ten-member Bureau. The developing country Parties, however, expressed concern and called for stricter liability measures, risk assessment structures and increased assistance for capacity building. Although, accepting and endorsing the pioneering work done by UNEP International Technical guidelines for Safety in Biotechnology, delegates felt this was only an interim mechanism, which should not prejudice efforts for a

future protocol.

The second session of the Open-ended ad hoc Working Group on Biosafety was held in Montreal from 12 - 16 May 1997. The discussion continued on the elaboration of a Protocol on Safety in Biotechnology based on aide-memoirs submitted by the Chairman. The issues discussed included: objectives of the proposed protocol, procedures for transfer of living modified organisms; advance informed agreement (AIA), competent authorities, information sharing and a clearing house mechanism; capacity building risk assessment and risk management. At the end of the session, some progress was made in identifying the main elements of the protocol and the tentative structure by a number a Contact Groups established for addressing issues relating to definitions and annexes. However divergent views were expressed on the key issue concerning the scope of the protocol.

The third session of the Open-ended ad hoc Working Group on Biosafety (BSWG-3) met from 13-17 October 1997 in Montreal. It established two sub-working Groups to address core articles of the Protocol and delegates besides extending the mandate of the Contact Group on definitions created another Contact Group on institutional mechanism and final clauses. The elements identified as outstanding issues included: socioeconomic consideration; liability and compensation; illegal traffic; nondiscrimination; and trade with non-parties.

The main task before BSWG-3 was preparation of a draft text on biosafety, on issues relating to socioeconomic considerations and liability and compensation. Some delegates were of the view that socio economic consideration should be included in the risk-assessment provision of the Protocol, to provide sufficient safeguards for biotechnology importing countries.

It is against this backdrop that the BSWG-4 met in Montreal from 9-17 February 1998. Delegates met in two sub Working Groups (SWG's) and two Contact Groups (CG's). The draft protocol considered by Working Groups included main provisions relating to: definations (Article 1); use of terms (Article 2); application of the AIA procedure (Article 3,); notification procedure for AIA (Article 4); response to AIA notification (Articles 5);

decision by the Party of Import (Article 6); review of decisions under AIA (Article 7); notification of transit (Article 8); simplified procedure (Article 9); subsequent imports (Article 10); bilateral and regional agreements (Article11); risk assessment (Article 12); risk management (Article 13); minimum national standards (Article 14); unintentional transboundary movement (Article 15); emergency measures (Article 16); handling, transport, packaging and labelling (Article 17); competent authority\ focal point (Article 18); information sharing\biosafety clearing house (Article 19); confidential information (Article 20); capacity building (Article 21); public awareness\public participation (Article 22); non-parties (Article 23)., nondiscrimination (Article 24); illegal traffic (Article 25); socioeconomic consideration (Article 26); and liability and compensation (Article 27).

Other provisions considered at the BSWG-4 include Secretariat (Article 29); subsidiary bodies and mechanisms relating to them (Article 30); Conference of Parties (Article 31); Jurisdiction and scope (Article 32); relationship with the convention (Article 33); relationship with other conventions (Article 34); monitoring and compliance (Article 35); signature (Article 37); accession (Article 39); entry in force (Article 40); withdrawal (Article 42); and authentic text (Article 43).

It appears that there are still differing views on the key contentious issues of socioeconomic considerations, liability and compensation, illegal traffic, non-parties and non-discrimination. It is hoped that it would be possible to resolve these outstanding issues and prepare a draft text to be approved by the fourth Conference of Parties to the Convention on Biological Diversity before the convening of an extraordinary session of the COP for the adoption of a Protocol in December 1998.

UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION IN THOSE COUNTRIES EXPERIENCING SERIOUS DROUGHT AND\OR DESERTIFICATION, PARTICULARLY IN AFRICA,

The Convention on Desertification was adopted on 17 June 1994, along with Annex-1 on Regional Implementation Annex for Africa.The

Convention entered into force on 26 December 1996[7] The first session of the Conference of the Parties to the Convention was held in Rome from 29 September to 10 October 1997. It was attended by 102 States Parties and a large number of observers for Governments, United Nations and its agencies, intergovernmental and non-govemmental Organizations. As considerable progress had already been made at the Intergovernmental Negotiating Committee's (INCD) Sixth Session in August 1997, on the issues for consideration at the COP-1, the session achieved its objectives in a smooth manner. The consensus achieved on the location of the permanent secretariat at Bonn (Germany) and the designation of the International Fund For Agricultural Development (IFAD) as the organization to administer the Global Mechanism bear testimony to the success of the session. Following the recommendation of the Committee on Science and Technology (CST), the COP agreed to establish an Ad Hoc Panel to carry out the process of surveying benchmarks and indicators which would help consideration of linkages between traditional knowledge and modern technology, which is the key factor in the bottom-up participatory approach adopted by the Convention.

The Convention is a watershed in the consistent efforts of the international community against drought and desertification. Some notable elements of the Convention are (i) it gives priority to the African region, which is the worst affected; (ii) it provides for a participatory, bottom-up approach, ensuring use of traditional knowledge by local population; (iii) it adopts a long term approach, that includes the socioeconomic dimeision of desertification and; (iv) it also details out precise commitments by Country Parties, in the form of national, sub-regional and regional action programmnes.

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[7]. There are 113 country Parties to the Convention, of which the 28 AALCC Member States are: Bahrain, Bangladesh, Botswana, China, Egypt, Gambia, Ghana, India, Islamic Republic of Iran, Jordan. Kenya, Kuwait, Libyan Arab Jamahiriya, Malaysia. Mauritius, Mongolia, Myanmar. Nepal, Nigeria, Oman, Pakistan, Saudi Arabia, Senegal, Sudan, Syrian Arab Republic, Uganda, United Republic of Tanzania and Yemen.

General Comments of The AALCC Secretariat

The Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of Agenda 21 was an honest assessment of the progress made since UNCED 1992. It may be stated that the focused discussion on the ways and means to accelerate and streamline the implementation of Agenda 21, in a comprehensive manner along with the reaffirmation of Agenda 21 being the fundamental programme for achieving sustainable development, was timely.

In the light of the decision by special session to recommit itself for building a renewed global partnership for meeting the needs of present and future generations, it may be added, that developed countries should fulfil their international obligations made under various multilateral environmental agreements to make available additional financial resources, access to sound environmental technologies and enhanced capacity building measures to developing countries.

The Programme for the Further Implementation of Agenda 21 in paragraph 13, highlighted the entry into force of the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification, as important achievements in international environmental law for further strengthening the UNCED process.

The protection of the global climate for present and future generations has been recognized as the common concern of mankind. The adoption of a legally binding Protocol is a first step towards building a genuine global partnership for mitigating the harmful effect of greenhouse gases and other anthropogenic emissions.

The Protocol recalling UNFCC obligations reiterates the strengthening of commitments by Annex I Parties and providing new and additional resources, environmentally sound technologies to developing country Parties, by Annex II Parties. A novel inclusion in the Protocol, the Clean Development Fund can prove to be an added incentive by increased burden sharing and

implementation of the commitments by developed country Parties, as provided in Annex B of the Protocol.

The QELROS and emission trading amongst Annex I Parties represent quantitative fulfilfment of UNFCC objectives which would require governments, civil society and the private sector to joint efforts to protect common environmental resource.

As regardsConvention on Biological diversity, among the main issues for consideration is the proposed Protocol on biosafety. At the fourth session of the Open ended Ad Hoc Working Group on Biosafety (BSWG-4) which met in Montreal from 9-17 February 1998 there were differing views on issues relating to socio-economic considerations, liability and compensation and number of other issues. It is hoped that these outstanding issues are resolved to enable the adoption of a protocol in December 1998, at an extra ordinary session of the COP to be convened for this purpose.

The first session of the Conference of Parties to the Convention on Desertification was able to reach a consensus on the location of the permanent secretariat to be at Bonn, Germany. It is a matter of satisfaction that the International Fund for Agricultural Development (IFAD) has been designated to house the Global Mechanism of the Convention. However, it may be stated that, for the effective implementation of national, sub regional and regional programmes initiated under the Convention would require increased financial and administrative support from developed country parties and bodies within and outside the United Nations system.

Work Programme Of The Asian-African Legal Consultative Committee

As regards AALCC's work programme in this field, the United Nations Institute for Training and Research (UNITAR) has shown keen interest in organising a Joint Training Programme on Environmental Law. The World Wildlife Fund (WWF - India) has also evinced a desire for cooperation. It is suggested that a work programme focussing upon the United Nations

Framework Convention on Climate Change could be taken up. The Committee may wish to direct the Secretariat upon the future course of action in this regard.

The implementation of a Programme of Training for Environmental Law can only be undertaken with the active financial and material support from Member Governments. In this regard, it may be recalled, that the Committee established a Special Fund on Environment in 1991. The - Governments of Saudi Arabia and Myanmar had generously contributed US $ 25,000 and US $ 500 respectively to this fund. As this amount has been utilized for meeting the expenses of participation by AALCC Secretariat officials at environmental conferences, an urgent replenishment of the Fund is needed for launching new initiatives in the field of environment. Further, at the thirty-fourth Session of the AALCC held in Doha, the Committee had urged Member Governments to make voluntary contributions to the Special Fund on Environment.

XII. LEGAL PROTECTION OF MIGRANT WORKERS

(i) Introduction

The item "Legal Protection of Migrant Workers was taken up by the AALCC at its 35th Session held in Manila (1996) upon a reference made by the Government of Philippines, in which the Government of Philippines had invited attention to the plight of migrant workers and the denial and abuse of their basic human rights. A preliminary study prepared by the Secretariat had outlined some basic issues concerning migrant workers in Asia and Africa. Reference was also made to available legal framework within the UN System and initiatives taken therein. At its Manila Session, the AALCC after exchange of views, urged Member States to transmit their views to the Secretariat as to how legal protection to migrant workers could be effectively implemented. The study prepared for the 36th Session held in Tehran focussed on some international trends in migration, the proposal for an International Tribunal and the UN Convention on the Protection of Migrant Workers.

The Assistant Secretary General Dr. Ahmed Al Ga'atri while introducing the item at the Thirty-Sixth session stated that during the 35th Session, Mr. Fidel V. Ramos, President of the Republic of Philippines, while calling for a 'more sensitive approach by governments of their host countries' proposed, in order to facilitate a comprehensive programme of implementation and adherence to the international conventions and standards, had proposed the following : (a)survey of laws and mechanisms in receiving countries to protect migrant workers with a view to harmonizing them at a later stage; (b) bilateral arrangements; (c) system of legal assistance to migrant workers; and (d) constitution of an impartial international or regional tribunal with petitioning mechanism and procedures specific means by which an aggrieved migrant worker may seek redress of his grievances.

These proposals he stated, could be deliberated upon, so that a general consensus emerged among AALCC Member States, and a suitable mechanism or mechanisms brought into existence for offering, willing and effective legal assistance and protection to migrant workers, by both sending and receiving countries. These proposals he felt, had an important key to reorienting policies

both to make international migration more manageable and to promote efficiency in the world economy.

It was observed that as a first step, Member States of the AALCC may consider the possibility of ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of, their Families (1990). The proposed basic rights tribunal, on the other hand, needed thorough consideration. As pointed out by the delegate of Philippines during the 35th Session of the AALCC, it would be worthwhile to examine laws and mechanisms in receiving countries with a view to harmonizing at a later stage.

It was stated that the AALCC consider giving the Secretariat an appropriate mandate to draft a model legislation among AALCC Member States so as to protect the rights of migrant workers, if not more, at least within the framework of the existing conventions and recommendations. This would go a long way in facilitating the movement of migrant workers, more particularly in the countries of the Asian-African Region.

At the Tehran Session, the Secretariat was mandated to study the utility of drafting a model legislation aiming at the protection of the rights of migrant workers within the framework of International Labour Conventions[1] and recommendations[2] of the relevant UN General Assembly Resolutions[3] and the International Convention on Protection of the Rights of all Migrant

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1. Some noteworthy International Labour Conventions open for ratification by Member States are (1) Convention (No.97) concerning migration for employment (revised 1949); (11) Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975; (iii) Convention (No. 118) Concerning the Equality of Treatment (Social Security), 1962.

2. Some important International Labour Recommendations which are non binding guidelines but which may guide National Policy and practice are : (i) Recommendation (No.86) concerning Migration for Employment, (revised 1949); (ii) Recommendation (No. 151) Concemin Migrant Workers, 1975; (111) Recommendation (No. 167) Concerning the Maintenance of Security Rights, 1983; (iv) Recommendation (No. 100) Concerning the Protection of Migrant Workers in Underdeveloped Countries, 1955.

GA Resolutions 51/85 and 51/65 dated 12 December 1996.

workers and Members of their Famalies. At the same time the Secretariat was cautioned that there should be no duplication of work. In pursuance of the mandate the Secretariat had urged Member States to transmit to the AALCC Secretariat their comments and revelent national legislation on the protection of migrant workers.

Thirty Seventh Session : Discussion

The Assistant Secretary General Dr. Ahmed Al-Ga'atri while introducing the Secretariat report on the item stated that the item had been included in the agenda at the Thirty-fifth session of the AALCC, in response to a reference made by the Government of the Republic of Philippinnes. He further stated that at the thirty-sixth session held in Tehran, the Secretariat was mandated to study the utility of drafting a model legislation aimed at the protection of the rights of the migrant workers within the framework of of the International Labour Conventions and Recommendations, relevant UN General Assembly resolutions and the International Convention on the protection of the rights of the Migrant Workers and Members of their famalies. He drew attention to the resolution addopted during the 52nd Session of the General Assembly, which had encouraged, where relevant, interregional, regional and sub-regional mechanism to continue to address the question of international migration and development. It further states that in-spite of the existence of an already established body of principles, there is a need to make further efforts to ensure the human rights and dignity of all migrants and their families and that it is desirable to improve the situation of all documented migrants and their families. He noted that the Secretariat was cautioned that there should be no duplication of work.

He stated that though the Secretariat had proposed a framework as well as a draft structure, yet it was very important to study the local conditions affecting migrant workers in as many States as possible. Unless this was done, it would be difficult to prepare a text which will meet the common minimum agenda of each Member State and be generally acceptable.

As time available during the session was not enough to study the topic, he was of the view that an "open ended working group" be established. This

would give an opportunity to discuss the subject in greater detail.

The Delegate of Ghana commended the Secretariat for its documentation on the subject and observed that international migration in today's time required due attention, because the world is getting smaller in view of technological development. His delegation supported the view expressed during the 36" Session that as a first step, Member States of the AALCC may consider the possibility of ratifying the UN Convention on the Protection of Migrant Workers and their Families. Nonetheless he was of the view that Member States send their relevant legislations to the Secretariat. He supported the idea of the Government of Philippines on the establishment of a tribunal with direct petitioning mechanisms from migrant workers.

The Delegate of the People's Republic of China observed that the model legislation contained in the Secretariat study covered the essential aspects of legal protection of migrant workers on which further deliberation could be done, and responses from the Member Governments would help in advancing the work.

As far as migrant workers is concerned, she stated that countries may find themselves falling into different categories of either sending States or receiving States or both. Varied situations and interests could influence their attitude to the issues. But in the spirit of the protection of the migrant workers and in accordance with international law there could be agreement on this issue.

The delegation supported the suggestion of the Secretariat to constitute an "Open-ended working group" as time available during the session was not enough to conduct an in-depth study on this issue.

The Delegate of Singapore noted that the Secretariat at the 36th Session was mandated to study the utility of drafting a model legislation and it is important that Member States give their comments, from them a conclusion and report can be prepared for the next session. The delegate considered protection of migrant workers important but was of the view that there should be no duplication of work on this subject.

The Delegate of Sudan informed the Committee that the Sudanese work and labour laws did not distinguish or discriminate between nationals and migrant workers and provided adequate protection to them. She supported the idea of a model legislation on the subject.

The Delegate of Japan expressed his gratitude to the Secretariat for useful background documents. He supported the view of the Delegate of Singapore that the utility of drafting a model legislation must first be looked into. He was of the view that the setting up of the "Open ended Working Group" as suggested by other delegations might produce some good study on this subject. Furthermore, the UN Convention on Migrant Workers was, in his view, too stringent. Many governments, including his own find it difficult to ratify the Convention. The Committee, he felt, could look into the reasons as to why. so few States had ratified the Convention and make a realistic and pragmatic approach on the subject.

The Deleagate of India said the idea for legal protection of migrant workers first came up in 1972 and later in 1990's when the UN Convention on the Protection of Migrant Workers and their Families was adopted. In his govemment's view the item was of topical importance and the AALCC could contribute a lot by undertaking a comprehensive study. However, he said his Government had reservations on the definitional aspect as to who is a 'legal' or 'illegal' migrant worker. The AALCC, in his opinion, could study the issue further. He said the study should also take into consideration human rights aspects, as provided in the International Covenant on Civil and Political Rights.

(ii) Decision On "The Legal Protection Of Migrant Workers"
(Adopted on 18.4.98)

The Asian African Legal Consultative Committee at its Thirty seventh Session

Having considered Doc. No.AALCC\,XXXVII\New Delili\98\S-7 on "The Legal Protection of Migrant Workers;"

Having heard the comprehensive statement of the Assistant Secretary General;

Mindful of the difficulties faced by the migrant workers;

Mindful also of the crucial issue of the protection of the basic human rights of migrant workers;

Recalling General Assembly Resolution 51\148 and the work of the United Nations in the implementation thereof,

1. **Urges** the Member States to transmit to the AALCC Secretariat the text of their relevant laws and mechanisms concerning the protection of migrant workers;

2. **Directs** the Secretariat to seek written comments from the Member States on

(i) the utility of drafting a Model Legislation on the Protection of Migrant Workers; and (ii) the constitution of "Open Ended Working Group" for an in-depth examination of the issue; and

3. **Decides** to place the item "Legal Protection of Migrant Workers" on the agenda of its thirty eighth Session.

(iii) Secretariat Study : Legal Protection of Migrant Workers

The Secretariat is grateful to the five Member States i.e. People's Republic of China, Kuwait, Philippines, Qatar and Sri Lanka who have responded by sending their relevant national legislations and comments to the AALCC Secretariat and have appreciated the idea of a model legislation to protect migrant workers.

The Government of China while appreciating the work of the AALCC in the sphere of promotion and protection of the legitimate rights of migrant workers, supports the AALCC in the work to collect comments of Member States in respect to the protection of migrant workers. In furtherance of this objective the Government of the People's Republic of China has sent to the AALCC's Secretariat, the "Labour Law of the People's Republic of China" and "the Rules for the Administration of Employment of Foreigners in China".

The State of Kuwait has sent in the' "Labour Law no 28 of the year 1969 (oil sector); Labour Law no 38 of the year 1964 (private sector); Ministerial Ordinance no. 617 of the year 1992 Regarding the Rules and Regulation of Employment Offices; Law no 40 of the year 1992 Regarding the Regularization of the Work of the Employment Offices and Ministerial Ordinance no 115 of the year 1996 regarding the Organising of the Private Employment Offices.

The Government of Philippines has reiterated the positive utility for Member States to have a draft model legislation aiming at the protection of migrant workers in consonance to international instruments, because upholding the rights of these workers will maximize their economic contributions to the host countries and minimize sources of friction and discord among the sending and receiving states. They have transmitted to the Secretariat the "Republic Act 8042 entitled "Migrant Workers and Overseas Filipinos Act" as well as pertinent provisions of the Philippine Labour Code and Immigration Act on the Employment of Alien Workers.

The State of Qatar in a note on the "Situation of Foreign and Migrant

workers in the State of Qatar" states that the policy with regard to migrant workers is based on principles aiming to diversify the sources of national income through expanding industrial and agricultural production bases. Apart from these projects, Qatar is among the major leading oil producing nations. The State has been opening the corridors for large number of migrant workers from different origins and of numerous categories, in recognition of man powers' importance to the process of building the nation, and as an important factor in implementing the States' plans. It has sent to the AALCC Secretariat "Law no 141 of 19923 which concerns bringing foreigners to work for other employers. Immigration laws; "Law no 15 of 1997" by which foreigners working in Qatar can bring in their families, and "Labour law no(3) of 1962 which regulates the rights and duties in any contractual relationship existing between an employe and a workman in the State of Qatar.

In view of the Government of the Democratic Republic of Sri Lanka drafting of a Model Legislation aimed at the protection of the rights of migrant workers, will help them to gain recognition of their rights and alleviate considerable hardships that migrant workers are undergoing at present. Sri Lanka has acceded to the UN Convention on the Protection of Migrant Workers. Further the drafting of a Model Legislation will help formulate a framework for their protection in the labour recipient countries. It would also generate greater awareness of the UN Convention among the recipient countries and help to accelerate the process of ratification to bring the Convention into force.

The migrant worker is not a product of the twentieth century. Women and men have been leaving their homelands in search of work elsewhere ever since payment in return for labour was introduced. The difference today is that there are far more migrant workers (legal and illegal) than in any period of human history. Millions of people now earning their living - or looking for paid employment - came as strangers to the States where they reside. There is no continent, no region of the world, which does not have its share of migrant workers.

It is a fact universally acknowledged that migrant workers, be they documented or undocumented, do need protection as a matter of right so that

they are not exploited by unscrupulous elements in the sending country as also in the receiving country. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families defines the term 'migrant' worker as referring to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

The Proposed Framework of the AALCC Model Legislation

Some States encourage their citizens to go abroad to work; others actively recruit foreign workers. There are, in certain cases, bilateral agreements between states covering migrant labour. It is important, subject to bilateral or multilateral agreements between member countries, migrant workers remain adequately protected. It is thus necessary that suitable rules and norms are incorporated in the proposed AALCC model legislation which will not only have universal appeal, but will appeal to local requirements of Member States and will even extend to addressing the questions of finances for funding these efforts to protect migrant workers and their families.

Though member countries are willing to express general agreement with the position that there should be a model legislation to meet at least the basic minimum requirements for, protecting the migrant workers, there should be some concrete proposals in this behalf.

Migrant workers, whether under contract or other formal arrangements, or simply setting off on their own initiative, should be given basic understanding of the language, culture and legal, social and political structures of the State to which they are going. They should be informed in advance of the wages and working conditions and general living conditions they can expect to find on arrival.

Migrant workers are aliens. They may, on this account alone, be the targets of suspicion or hostility in the communities where they live and work. In most cases financially poor, they share the handicaps economic, social and cultural of the least favoured groups in the society.

Discrimination against migrant workers in the field of employment takes many forms. These include exclusions or preferences as regards the types of jobs which are open to migrants, and difficulty of access to vocational training. Different standards are many a times applied to nationals, on the one hand, and migrants, on the other, as regards job tenure, and contracts may deprive migrants of certain advantages.

Living conditions for migrant workers are often unsatisfactory. Low incomes, high rents, housing shortages, the size of the migrants families, and local prejudice against foreign elements in the community are the main factors which cause serious accommodation problems. The integration of migrant workers and their families into the social environment of receiving States without loss of their cultural identity is another problem. The education of children of migrant workers is another area which needs attention.

Migrant workers face the gravest risk to their human rights and fundamental freedoms when they are recruited, transported and employed in defiance of the law. Mass poverty, unemployment and under employment in many developing countries offer a fertile ground of recruitment to unscrupulous employers and private agents; in some cases, the undercover transfer of workers taken on the character of a criminal operation.

The illegal migrant is a target of exploitation. He or she is at the mercy of employers and may be obliged to accept any kind of job, and any working and living conditions. Illegal migrants rarely seek justice for fear of exposure and expulsion, and in many States have no right of appeal against administrative decisions which affect them.

Taking the aforementioned into consideration, the local conditions affecting migrant workers in each Member State have to be studied, unless this is done it will be difficult to prepare a text which will meet the common minimum agenda of each of the Member Countries and will, as such, be generally acceptable. The text to be, generally acceptable must, for instance, address the definition of a migrant workers and the categories of the migrant workers, social and cultural handicaps of migrant workers, must not only provide to them a right to return home, but also must ensure prevention of arbitrary

expulsion. The text must also give particular attention to the educational needs of the children of migrant workers. Again it must also address, apart from the integration of migrant workers and their families in regular situations, human concerns of illegal and clandestine migrants who face the gravest risks to their human rights and fundamental freedoms when they are recruited, transported and employed in defiance of the law. Still further it should clearly cover the conditions of employment, the conditions of work, labour administration and management, social security, legal remedies and fiscal matters.

The Proposed draft Structure of Model Legislation

1. Preamble
2. Definition of "Migrant workers" and categories of migrant workers.
3. Procedure for "Migrant Worker" status determination.
4. Principle of family unity and dependency status.
5. Non-discrimination.
6. Human Rights.
7. Protection of women migrant workers.
8. Conditions of employment.
9. Conditions of work.
10. Employment policy.
11. Social security.
12. Education.

13. Conditions of return.

14. Legal remedies.

15. Taxation and financial issues.

This is in fact the initial framework, which can have options of covering either a wide or narrow range of issues to be decided by the Committee and, which if approved by the Committee will be further elaborated, after a study of all existing international and national legislation on Migrant workers, in order to present a comprehensive piece of legislation which could be of immense benefit to the Member States. There is an urgent need for international legal instruments to be implemented at national level and further be supplemented and enforced through national legislation.

Initiatives to be Considered by the 37th Session of the AALCC

As suggested during the 36th Session, as a first step member States of the AALCC may consider the possibility of ratifying the UN Convention on the Protection of Migrant Workers and their Families. This Convention is a vitally important international instrument "providing the foundation" for migrant workers protection around the world.

The proposed AALCC Model Legislation still needs to be studied and deliberated upon thoroughly. Member Governments may consider to send their National Legislations concerning Migrant Workers. At the same time the Secretariat will highly appreciate if Member States could send their comments on the aforementioned framework and draft structure of the Model legislation suggested by the AALCC Secretariat. These comments could among other things possibly tackle the establishment of a tribunal with direct petitioning mechanisms from Migrant Workers, as was suggested by the Government of the Philippines.

During the recently concluded 52" Session of the General Assembly, the representative of Tanzania, on behalf of the States Members of the Group of 77 and China, (A/52/628/Add.4 dated 2 December 1997) introduced a draft resolution entitled "International Migration and Development, including the convening of a United Nations Conference on International Migration and Development." The General Assembly while recalling its resolution 51/148 of 13 December 1996 has encouraged, where relevant, interregional, regional and sub-regional mechanism to continue to address the question of international migration and development. It further states that inspite of the existence of an already established body of principles, there is a need to make further efforts to ensure the human rights and dignity of all migrants and their families and that it is desirable to improve the situation of all documented migrants and their families.

Keeping the relevance of the topic in mind and as time available during the Session might not be enough to study. in depth, the issues involved, it would be desirable to constitute an "Open-ended Working Group". This Group could meet at a convenient time prior to the next AALCC Session. This would give an opportunity to examine the proposed Secretariat Draft Structure of the Model Legislation on the Legal Protection of Migrant Workers in detail. The Committee may wish to consider this Secretariat proposal and give necessary directions in this regard.

XIII. INTERNATIONAL TRADE LAW

A. Legislative Activities of the United Nations and Other Organisations Concerned with International Trade Law

B. World Trade Organisation (WTO)

(i) Introduction

The AALCC Secretariat presents a report on the "Legislative Activities of the United Nations and other international Organisations concerned with International Trade Law"at its annual sessions. Such reports, are intended to keep Member Governments abreast of the recent developments in the field of international trade law. The Committee takes note of the Secretariat report and inter alia "request the Secretary-General to continue to monitor the developments in the area and present the same to its next session"

The Secretariat at its thirty-fourth session (1995) held at Doha, Qatar presented a brief of documents on the then concluded Marrakesh Agreement entitled, "The New GATT Accord: An Overview with Special Reference to World Trade Organization (WTO), Trade-Related Investments Measures (TRIMS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS)It focussed on the salient features of this Agreement on three crucial areas, viz., WTO, TRIPS, and TRIMS. Besides outlining the major policy initiatives which had actually shaped the Final Agreement, the Secretariat brief called for a closer scrutiny of the implications arising out of the agreements in the light of the practices that they may establish. . The Committee took note of the Secretariat document and "requested the Secretary- General to continue to monitor the developments in the area and to report thereon to its thirty-fifth session".

Accordingly, the Secretariat at the thirty-fifth session(1996) held at Manila, presented a comprehensive brief of documents on "WTO as a Framework Agreement and Code of Conduct for the World Trade" During the course of the deliberations on this item at the thirty-fifth session, a view was expressed that the issues raised in the Secretariat brief were extremely

important and complex. It was proposed that the Secretariat should concentrate on some select issues arising from the WTO and prepare studies for discussion either by a group of experts or in the Trade Law Sub-Committee. In a resolution adopted on this item, the Committee directed the Secretariat "to continue to monitor the developments related to the code of conduct for the world trade" and decided to place the item on the agenda of its thirty-sixth session."

The Secretariat at the thirty-sixth session (1997) held at Tehran, reported on the,outcome of the WTO Ministerial Meeting held at Singapore between 9-13 December 1996.The Committee taking note of these developments reiterated the importance and complexity of the issues raised in the Secretariat study for the Member States. In a resolution adopted on this subject, (Res. No. 36/10) the Committee directed the Secretariat ".to continue to monitor the developments related to the code of conduct for the world trade, particularly the relevant legal aspects of dispute settlement machinery"

In fulfilment of this mandate, the brief of documents for New Delhi Session prepared by the Secretariat provides a comprehensive overview of the 'Understanding on Rules and Procedures Governing the Settlement of Dispute' as reflected in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. This document will focus on the substantive and procedural aspects of the WTO dispute resolution mechanism, in the light of the experience gained by the Dispute Settlement Body (DSB), since its establishment. Besides analysing the comparative merits of the WTO mechanism vis-a-vis the GATT dispute resolution system, particular emphasis is laid on the Special Procedures involving the Least Developed Countries.

The Thrity Seventh : Discussion (A)

The Assistant Secretary General Dr. M.Al'Gaa'tri introduced the Secretariat Document and said that the main objective of this Report was to keep the Member Governments abreast of the legislative developments in the field of international trade law. As regards, the work of UNCITRAL at its thirtieth session in 1997, he elaborated on the Model Law on Cross Border Insolvency as adopted by the General Assembly of the United Nations. He also referred to the progress made by UNCITRAL in the preparation of a

'draft legislative guide' on privately-financed infrastructure projects, electronic commerce and assignments receivables financing; and the Commission's proposal to commemorate in 1998, the thirtieth anniversary of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

He outlined the activities undertaken by UNCTAD and UNIDO for the year 1997. With regard to the work of UNIDROIT he drew attention to the preparation of uniform rules on international interests in mobile equipment and the legal guide on international franchising. As regards the activities of the Hague Conference on Private International Law, he appraised the Committee of the progress made in the preparation of a preliminary draft convention on International Jurisdiction and the Effects of Foreign Judgements, scheduled to be adopted in the year 2000.

The President reflected that rapid changes leading to creation of new legal regimes were occurring in the field of international trade law. Expressing regret that the participation of developing countries in the process was woefully inadequate, he urged the Member States to actively associate themselves in the international law-making process.

The Delegate of India expressed his appreciation to the Assistant Secretary General and the Secretariat for the informative report presented on this subject. Commenting on the Model Law on Cross-Border Insolvency, he was of the view that the Model Law reflected a realistic compromise between the preferred positions of different legal systems and would contribute to meeting the objective of setting out a model for a modern and efficient insolvency system in a unified manner. Elaborating on other salient features of this legislation, he observed that the strength of the Model Law lay in its flexibility, which paved way for wider acceptance and adoption by enacting States. In the light of the existing authoritative pronouncements by the Indian courts on this subject, he was of the view that the Model Law needed to be assessed as to its compatibility with Indian enactments.

While agreeing with the preliminary conclusion of the Working Group on Electronic Commerce as to the preparation of draft uniform rules on 'digital signatures' and "Certification authorities', he proposed that the future work on

the subject should also include issues relating to jurisdiction, applicable laws and dispute settlement mechanisms.

Referring to the work of the Commission.on receivable financing, he observed that one outstanding issue relating to effect of assignments on third parties, especially on creditors and administrators needs to be resolved. He also called for a closer examination of the idea that registration should be the basis for the determination of time of assignment. His delegation generally approved the line of work proposed by the UNCITRAL Secretariat on the topic of "privately financed infrastructure projects". He appreciated the Secretariat efforts towards monitoring the implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Finally, he reiterated his country's support to the work of the UNCITRAL and said that India, upon. its re-election for the next term, would constructively contribute to the work of UNCITRAL in further development of international trade law.

The President welcomed the Deputy Secretary General for Political Affairs of the Commonwealth Secretariat, Dr. Srinivasan and invited him to address the Committee. He stated that both the AALCC and Commonwealth dealt with many similar subjects and hoped that co-operation between the two bodies could be intensified in the future.

The Deputy Secretary General of the Commonwealth Secretariat, Dr. Srinivasan observed that the Commonwealth Secretariat pursued similar issues as discussed within the AALCC framework. He enumerated the work of the Commonwealth in areas like mutual assistance in extradition. trans-border criminality and exchange of prisoners; preservation of cultural heritage, assistance in legal matters arising from the law of the sea, WTO, ICC, refugee law, money laundering and drug trafficking etc., Reciprocating the sentiments expressed by the President, he looked forward to closer cooperation with AALCC on matters of mutual interest.

The Deledate of Ghana acknowledging the role of the private sector in the evolving liberalization process, said that the preparation of a legislative

guide on privately financed infrastructure projects is one that needs to be completed on a priority basis. He expressed the hope that the UNCITRAL Model Law on Cross Border Insolvency will help to deal effectively with instances of crossborder insolvency and promote the objectives as set out in the preamble to the Model Law. His delegation was of the view that the interests of developing countries would be well served with the enunciation of definitive rules on : (i) the obligation of the private investor to transfer technology and managerial skills to local personnel; and (ii) matters relating to competition policy and monopoly in provision of services. He also stressed the importance of extending increased training and technical assistance, in matters relating to international trade law, for lawyers in developing countries.

The Delegate of the Islamic Republic of Iran informed that his country's membership in UNCITRAL had been renewed by the General Assembly at its 52nd session in 1997. He stated that, following the 36thsession of the Committee, the Iranian Consultative Assembly had ratified the UNCITPAL Model Law on International Commercial Arbitration in Septeinber 1997. This, in his view, could provide legal safeguards to resolve commercial disputes and also encourage foreign traders to conclude commercial agreements with Iranian nationals.

The Deputy Secretary General Ambassador Dr. W. Z. Kamil introduced the Secretariat brief on WTO and stated that the Secretariat document focussed on the substantive and procedural aspects of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, in the light of the experience gained by the Dispute Settlement Body (DSB), since its establishment. He informed the meeting that the WTO Understanding had introduced may innovative proceedings which would render the dispute settlement process more effective, timely and automatic. In this regard, he drew attention to the negative consensus rule for decision making, stringent time limits for various stages of dispute resolution process interm review and appellate review procedures. He made a reference to paragraph 24 of the Understanding which laid down the general rule that "at all stages of the determination of the causes of the dispute and of dispute settlement procedures involving a least developed country Member, particular consideration shall be given to special situation of least developed countries."

He called for an exchange of individual country experiences with the WTO dispute settlement body. He observed that, one, particular area that could be focussed during the Committee's deliberations were the specific modes by which both the WTO Members and the panel had extended special and differential treatment contemplated for developing and least developed countries.

The President underscored the importance of the subject for the Asian-African States and wished that more time was available to discuss the subject. Besides the dispute settlement mechanism, there were some other equally important areas within the WTO framework bearing potential implications on the trade interests of the AALCC's Member States. To ensure a comprehensive and meaningful exchange of views on these topics, he proposed the convening of an inter-sessional meeting of the AALCC during the current year.

The Delegate of Pakistan while affirming the practical importance of the subject, expressed his appreciation for the commendable work done by the Secretariat in presenting the salient features of the WTO dispute settlement mechanism. The procedure involving panels, appellate bodies and the Dispute Settlement Body (DSB), he felt, had developed a streamlined system of dispute resolution. Noting the increasing number of disputes brought to the WTO dispute settlement forum, he declared that the WTO framework inspired more confidence than its predecessor, the GATT system. With the entry into force of the General Agreement on Trade in Services (GATS) and Agreement on Trade Related Intellectual Property Rights (TRIPS), he lauded the initiative of the Committee in taking up the subject of WTO as timely.

He proposed that this subject needs to be given priority in the AALCC's work programme. He called for an indepth study to be undertaken by the Secretariat towards identifying legal rules and norms applicable to dispute resolution. Emphasising the utility of a co-ordinated response by developing countries in protecting their trade interests, he felt that the Secretariat could arrange for exchange of information between AALCC Member States. He also supported the President's proposal for a inter-sessional meeting or an expert group meeting on the subject.

He said the successful outcome of the dispute in favour of India regarding the grant of patent in respect of certain plants in USA, which were traditionally grown in India was a heartening development for the countries in this region. He also informed the meeting as to the efforts of India and Pakistan in challenging the grant of patent in the United States to M\s. Ricetech Inc. in respect of basmati rice. In this context, he stated that the underlying philosophy of a grant of patent was to ensure exclusive economic exploitation of an invention for the inventor for a specified period of time, and not to ensure him the exclusive rights to exploit the name of a well-known, naturally -grown product of a specific region other than that of the inventor. In his view, such a course would amount to "passing off" which was a tortuous act under common law.

The Delegate of People's Republic of China thanked the Secretariat and the Secretary General for the three valuable reports on WTO. Dispute Settlement Mechanism; Legislative Activities of UN Agencies relating to Trade Law and on the AALCC's Regional Centres for Arbitration.

He informed the Committee that though China is not a member of WTO, and is now in the process of acceding to WTO, his delegation welcomed the opportunities including the AALCC forum, to exchange views and information,on WTO' with other countries. He characterised the 'dispute settlement mechanism' as the key element in.the WTO legal framework, towards ensuring that the obligations under WTO agreements are fully honoured. He said that China was the tenth biggest country in terms of trade in goods and twelfth in terms of trade in services. Highlighting the fact that China as a developing economy is also one of the biggest emerging markets in the world, he underscored the significance of China's joining the WTO as a Member. In the light of the fact that China is one of the biggest developing countries in terms of people living under poverty line, it was his delegation's view that the objectives of WTO i.e. promoting economic growth and raising the standards of living, including those in LDCS, would be impaired and rule-making in the WTO would not be soundly based, unless full account is taken of the experience and practices of China which has more than one-fifth of the world population.

As regards the topic of AALCC's Scheme on Regional Centres for Arbitration, he welcomed the efforts of AALCC in promoting the effective functioning of the regional arbitration centres and the establishment of new centres. providing an overview of the efforts made in his country, he stated that China had acceded to the New York Convention in 1986. The Law of Arbitration in China had taken effect in 1994, from then on, more than 100 local arbitration commissions have been established. He also recalled the role of the Chinese International Economic and Trade Arbitration Commission (CIETAC) in promoting arbitration as a mode of dispute resolution, since its establishment in the early 1950s. With the growing pace of economic globalization, he foresaw the emergence of complex commercial disputes requiring speedy, informal and convenient methods of dispute resolution. In this regard, he drew attention to the mechanism of "alteniative dispute resolution" (ADR) and urged the Committee to study the role that ADR can play in the Asian-African region.

The Delegate of India thanked the Secretariat for the informative brief of documents on the subject. Referring to the salient features of the WTO dispute settlement process, which includes: an integrated dispute settlement framework, automaticity of decisions, and strict deadlines for various phases of the dispute resolution procedures, he stated that the WTO dispute resolution mechanism marked a sharp deviation from the GATT practice.

Offering an overview of India's experience with the WTO dispute settlement mechanism, more particularly with the TRIPS regime, he identified certain aspects which might be of concern to all Asian-African States. Firstly, he underscored the ambiguity of the WTO provisions concerning how the dispute resolution panels received and treated municipal law. In a recent dispute before WTO involving India, the panel and appellate panel reports had held that the consistency of certain administrative measures regarding the grant of patent protection with the Indian laws could be examined by the WTO dispute settlement bodies. Rejecting the arguments by India, it was held that it was open to the WTO dispute settlement body to interpret the national laws for the purpose of examining the consistency of any measures.

Secondly , he informed that the principle of 'res judicata' was not

being applied by the WTO bodies. In this connection, he referred to the dispute between US and India on compliance with the provisions of the TRIPS Agreement. Following the panel's finding that India had to comply with the agreement, India undertook to implement the decision. At this stage the European Communities (EU) had filed a complaint on the same subject matter, which was opposed by India.

Thirdly, he felt that the stricter time limits in the dispute resolution process posed difficulties for developing countries in presenting their written statements within a short period. Moreover, topics like TRIPS are sensitive, requiring wider consultations among developing countries before they could present their position to the WTO panel.

Fourthly, he pointed out that the WTO Understanding provided for representation from developing countries in the, panels, where the dispute involved a developed and developing country Member. He stated that it was unfortunate that no similar arrangement existed in the constitution of an appellate body.

The President, in this context, referred to the practice of the International Court of Justice, wherein ad hoc judges chosen by the disputing parties were appointed to sit in the bench for hearing a particular dispute. He suggested that a similar arrangement could be considered within the WTO dispute resolution framework. With reference to the observations made by the delegate of India, he said that the role of "res judicata' principle in WTO needs to be examined, as multiplicity of complainants on the same subject would impose heavy financial burdens on the developing countries.

The Delegate of Sri Lanka expressed his appreciation to the Secretariat for the admirable briefs of documents relating to the WTO dispute settlement mechanism, legislative activities of UN bodies concerning trade law and the report on AALCC's regional arbitration centres. He was of the view that the recent developments in international trade law, particularly the establishment of the WTO has shifted the focus of international trade policies from protectionism to a more tight-knit partnership among countries. The growing interdependence among States on trade issues is manifested by the effects of

the Asian financial crisis on the Western economies. In this context, he said that the AALCC had an important role to play in facilitating regional cooperation between and among Asian and African States. He proposed that the AALCC could undertake the following tasks: (i) publish a handbook setting out treaty provisions, GATT rulings and local legislation concerning international trade Law; (ii) publish a regular journal aimed at dissemination of information and views on trade law; and (iii) convene seminars and workshops on matters related to international trade law.

He expressed appreciation for the wide range of activities undertaken by the AALCC's regional arbitration centres. He endorsed the suggestion of the President for convening an intersessional meeting on the subject of WTO.

The Delegate of Somalia stated that it was his view that with many new institutional -regimes being created, States must be fully aware of the effects and consequences of acceding to such bodies. He felt that AALCC could serve as a forum for discussion and exchange of views for enabling Member States to study the implications of various multilateral treaties which are constitutive in nature.

Referring to the current work being undertaken by the OECD for concluding a Multilateral Agreement on Investments (MAI), he felt that it could have a pronounced effect on developing countries, and hence need to be considered by the Committee.

(ii) Decision on A."The Progress Report Covering the Legislative Activities of The United Nations and other International Organisations concerned with International Trade Law"

(Adopted on 18.4.98)

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

Having taken note of the Report concerning the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law contained in Doc. No. AALCC/XXXVII/New Delhi/98/S 10;

Having heard the comprehensive statement of the Assistant Secretary General;

Having heard also the statement of the Observer for UNIDROIT and views of member delegations;

1. **Expresses** its appreciation for the brief of documents prepared by the Secretariat on the recent developments in the field of International Trade Law;

2. **Also expresses** its appreciation for the continued co-operation with the various international organizations competent in the field of international trade law and hopes that this co-operation will be intensified in the future;

3. **Urges** the Member States of the AALCC to favourably consider the UNCITRAL Model Law on Cross-Border Insolvency, as they reform or enact their legislation on cross-border aspects of insolvency ;

Also urges Member States to consider adopting, ratifying or acceding to the other texts prepared by the United Nations Commission on International

Trade Law (UNCITRAL);

5. **Requests** the Secretariat to continue to monitor the developments in the area of international trade law and present a report thereon to its thirty-eighth session.

B. "The World Trade Organisation: Dispute Settlement Mechanism"

(Adopted on 18.4.98)

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

Having taken note of the Secretariat study on "World Trade Organization: Dispute Settlement Mechanism" contained in Doc. No. AALCC/XXXVII/New Delhi/98/S 11;

Having heard the comprehensive statement of the Deputy Secretary-General;

Acknowledging the importance of the issues raised in the Secretariat study for the Member States;

1. **Calls upon** the Secretariat to intensify co-operation with international organizations and specialized agencies, working in the field of international trade law;

2. **Directs** the Secretariat to continue to monitor the developments related to the working of the WTO dispute settlement mechanism, with particular attention to the special requirements of developing countries

3. **Directs** the Secretariat to monitor the developments relating to the Second WTO Ministerial Meeting, scheduled to be held at Geneva in May 1998;

4. **Directs the Secretary General** to convene an inter-sessional meeting of the AALCC with a view to enable an indepth study of the matters arising outof the establishment and the functioning of the World Trade Organization; and

5. **Decides** to place the item on the agenda of the its thirty-eighth session.

(iii) Secretariat Study : A. PROGRESS REPORT COVERING THE LEGISLATIVE ACTIVITIES OF THE UNITED NATIONS AGENCIES AND OTHER INTERNATIONAL ORGANIZATIONS

I. Report on the work done by the United Nations Commission on International Trade Law at its Thirtieth Session, VIENNA, 1997

Introduction

The General Assembly, by its resolution 2205 (XXI) in 1966, established the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL or 'the Commission') as the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. This resolution also mandates the Commission to submit an annual report to the General Assembly, as to the tasks accomplished at its yearly sessions. The thirtieth session of UNCITRAL was held in Vienna from 12 to 30 May 1997. It had on its agenda five substantive topics for consideration:

(i) Cross-Border Insolvency: draft UNCITRAL Model Legislative Provisions;

(ii) Privately-Financed Infrastructure Projects;

(iii) Electronic Commerce;

(iv) Assignments in Receivables Financing: draft UNCITRAL Convention; and

(v) Monitoring of the Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards

Although the Commission considered all these items, its major accomplishment at this session was in the area of cross-border insolvency. The Commission completed its consideration of the draft text of the Model provisions[1], prepared by the Working Group and adopted the UNCITRAL Model Law on Cross-Border Insolvency. A detailed consideration of the Model Law is provided in Part 11 of this document.

On the topic "Privately -Financed Infrastructure Projects", the Commission had for its consideration a table of contents setting out the proposed topics to be dealt under the "Draft Legislative Guide" and annotations concerning the issues to be discussed therein[2]. This document was prepared by the Secretariat in response to the Commission's decision in 1996 to prepare a legislative guide to assist States in preparing or modernising legislations relevant to implementation of privately-financed infrastructure projects. The Commission generally approved the line of work proposed by the Secretariat, and invited the co-operation of Governments to identify experts who could be of assistance to the Secretariat in the accomplishment of its further work programme. An overview of the deliberations at the current session on this topic is found in Part III of this document.

As regards the subject of "Electronic Commerce", the Commission considered the report of the Working Group on Electronic Commerce[3], which had been mandated to provide the Commission with sufficient elements for a decision to be made as to the feasibility and scope of preparing uniform rules on issues of digital signatures and certification authorities. The Working Group had reached a consensus on the importance and feasibility of undertaking such harmonization measures. Besides, the Working Group also identified a host of related areas of study that could possibly be addressed in its future work, which includes: issues of technical alternatives to public-key cryptography; general issues of functions performed by third-party service providers; and electronic contracting. After due consideration of the Report,

[1] A/CN.9/435.
[2] A/CN.9/438
[3] A/CN.9/437

the Commission endorsed the conclusions of the Working Group and entrusted it with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. The Commission stressed the need for the uniform rules to be prepared to be consistent with the media-neutral approach taken in the UNCITRAL Model Law on Electronic Commerce.

On the subject of "Assignment in Receivables Financing", the Commission considered the reports of the twenty fifth[4] and twenty-sixth[5] sessions of the Working Group on International Contract Practices, which had been mandated to prepare uniform law on assignment in.receivables financing. The Working Group had reached agreement on a number of issues including, the validity of bulk assignments of present and future receivables, the time of transfer of receivables, no-assignment clauses, representations of the assignor and protection of the debtor. The main outstanding issues were the effects of the assignment on third parties, viz., creditors of the assignor and the administrator in the insolvency of the assignor, as well as scope and conflict-of-laws issues. The Commission was of the view that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates. Hence, the Commission expressed its hope that the Working Group would proceed with its work expeditiously, so as to submit the draft Convention for consideration by the Commission at its thirty-second session in 1999.

While considering the item "Monitoring of Implementation of 195 8 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards", the Commission reviewed the progress made in monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and called upon States parties to the Convention that had not yet replied to the questionnaire of the Secretariat, to do so. In the light of the special commemorative meetings to celebrate the fortieth anniversary of the 1958 New York Convention, scheduled to be held during the next session of the Commission, in June 1998 a number of

[4] A/CN.9/432

[5] A/CN/9/434

suggestions as to the specific aspects to be deliberated therein, were proposed. These ranged from a discussion of possible work towards a new convention or additions to the UNCITRAL Model Law on International Commercial Arbitration ; the possible revision of the 1927 Geneva Convention; and a few additions to the New York Convention concerning written form requirments, interim measures of protection, and court assistance for the taking of evidence. In the backdrop of the intiative offered by the AALCC in formulating tfie UNCITRAL Model Law on International Commercial Arbitration and also the close working relationship between both these organisations on this subject, it would be worthwhile to formulate an appropriate agenda for the AALCC'S work programme for the current year, towards contributing to the commemoration of the fortieth anniversary of the 1958 New York Convention.

Since the work on the topics of Electronic Commerce and Assignments in Receivables Financing, are still in the formative stages, the following note is focussed only on Model Law on Cross-Border Insolvency and Privately-Financed Infrastructure Projects.,

II. Model Law On Cross-Border Insolvency

The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made at the UNCITRAL Congress under the theme, "Uniform commercial law in the twenty-first century" held in 1992. Subsequently, in order to assess the desirability and feasibility of work in this area and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held two Colloquia in April 1994 and March 1995. The outcome of these Colloquia was a general consensus for the Commission to provide a legislative framework, by way of model legislative provisions, for judicial co-operation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. The Commission at its twenty-eighth session in May 1995, endorsed this opinion and entrusted the task of preparing such uniform provisions to one of the Commission's three intergovernmental Working Groups, which, for this, project was named the Working Group on Insolvency Law. Reviewing the proceedings of the UNCITRAL at its twenty-eighth session, the AALCC Secretariat had pointed out that the incidence of cross-

border insolvency is likely to increase appreciably on account of the emerging trend towards integration of national economies with the world economy, and hence welcomed the initiative of the Commission, to be in the right direction.

The Working Group devoted four two-week sessions to the work on the subject. At its eighteenth session(3 0 October- 1 0 November 1995) the Working Group considered possible issues to be covered under the proposed legislative framework. At its nineteenth session (1-12 April, 1 996), it considered the question on the form of the instrument to be prepared and finally decided to work on a draft Model Provisions. At the close of its twenty-first session (20-31 January 1997), the Working Group noted that it would have wished to have some more time available for completing its review of the draft. Yet, in deference to the hope expressed by the Commission at its twenty-ninth session, the Working Group decided to submit the draft UNCITRAL Model Provisions on Cross-Border Insolvency to the Commission at its thirtieth session in 1997.

After the twenty-first session of the Working Group, the UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held from 22 to 23 March 1997 in conjunction with the Fifth World Congress of the International Association of Insolvency Practitioners (INSOL). The Colloquium recognised the high degree of cooperation achieved within the Working Group on Insolvency Law during the preparation of the draft. Participants hailed the draft Model Provisions for providing the necessary legislative basis for foreign insolvency administrators to have easier and quicker access to courts; and the provisions for granting statutory authority to judges for enhancing judicial co-operation - where each jurisdiction would defer to the concerns of others.

After its substantive consideration of the draft Model Provisions, the Commission reviewed the draft articles prepared by the drafting group.It approved the suggestion that the draft text should bear the title "Model Law" rather than "Model Provisions", in line with the other pieces of model legislation prepared by the Commission. At its meeting on 30 May 1997, the Commission finally adopted the UNCITRAL Model Law on Cross-Border Insolvency.

The Model Law: An Overview

The UNCITRAL Model Law on Cross-Border Insolvency (hereinafter referred to as "Model Law") consists of a Preamble and 32 Articles, placed under five chapters.

Chapter I - General Provisions (Articles 1 to 8)

Chapter II - Access of Foreign Representatives and Creditors to Courts in the State (Articles 9 to 14)

Chapter III- Recognition of a Foreign Proceeding and Relief (Articles 15 to 24)

Chapter IV - Co-operation with Foreign Courts and Foreign Representatives (Articles 25 to 27)

Chapter V - Concurrent Proceedings (Articles 28 to 32)

The Preamble states the purpose of the Law is, to provide effective mechanisms for dealing with cases of cross-border insolvency, so as to promote, inter alia , the objectives of co-operation between States on matters of cross-border insolvency; ensuring fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and the protection and maximisation of the value of the debtor's assets

Chapter I, (Articles 1 to 8) sets out the general provisions on scope of application; definitions and rules of interpretation; designating the competent court and authorisation of a person or body to administer liquidation under the law of the enacting State to act in a foreign State ;and public policy exceptions. Article 1 on 'Scope of Application' states that this Law is applicable where: (i) assistance is sought in the enacting State, by a foreign court or foreign representative in connection with a foreign proceeding, or (ii) assistance is sought in a foreign State in connection with a proceeding under the laws of the enacting State, or (iii) a foreign proceeding and a proceeding in the enacting State are concurrently taking place, as regards the same debtor, or (iv) creditors

or other interested parties in a foreign State have an interest in requesting the opening of or participating in a proceeding under the insolvency laws of the enacting State. Paragraph 2 of the article provides for the enacting State to exclude from the application of this Law, any types ofdesignated entitles such as banks or insurance companies, which may be subject to a special insolvency regime under its national laws. The exclusion was generally acceptable, because insolvencies of financial services institutions usually required prompt and discrete action, and hence were administered under special regulatory regimes in various States. To ensure transparency, it was considered that all such exclusions should be expressly mentioned by the enacting State under paragraph 2.

Article 2 an 'Definitions' defines the terms, "foreign proceeding, "foreign main proceeding", "foreign non-main proceeding", "foreign representative", "foreign court" and "establishment". "Foreign proceeding" for the purposes of this Law means a collective judicial or administrative proceeding including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation. A "foreign main proceeding" taking place in the State where the debtor has the centre of its main interests. A "foreign non-main proceeding" is defined as a foreign proceeding, other than a foreign main proceeding, taking place in the State where the debtor has an establishment. The term "establishment" in this context, is defined to mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services. A "foreign representative" is a person or body, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding..

Article 3 on 'International obligatons of this State' explicitly provides that wherin the obligations imposed on a State under this Law conflicts with any other obligations, arising out of a treaty or an agreement to which the State may be party, then the requirements of such treaty or agreement would prevail.

Article 4 entitled 'Competent court/authority' provides for designating a court or any other authority in the enacting State to perform the functions referred to in this Law relating to recognition of foreign proceedings and co-operation with foreign courts . This would increase the transparency and ease the use of insolvency legislation, for the benefit of foreign representatives and foreign courts. Article 5 calls for the enacting State to authorise a person or body administering a liquidation under its laws, to act in a foreign State on behalf of a proceeding in the enacting State, as permitted by the applicable foreign law.

Article 6 on 'Public policy exceptions' enables the courts of the enacting State from refusing to take an action contemplated by this Law, if such action would be manifestly contrary to the public policy of the State. Bearing in mind the possibility of the domestic courts, attempting to give a broad interpretation of the term 'public policy'- which would undermine the achievement of the objectives of this Law, the Commission emphasised that the use of the term 'manifestly' in Article 6 was intended to convey the meaning that the public policy exceptions should be interpreted restrictively and are meant to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Article 7 on 'additional Assistance under other laws' provides that, this Model Law does not limit the power of the courts to render additional assistance to a foreign representative, under laws of the enacting State. Article 8 on 'interpretation', lays down a rule of construction that in the interpretation of the Model Law, courts might bear in mind the international origin of the Law and the need to promote uniformity in its application and the observance of good faith.

Chapter II, (Articles 9 to 14) deals with the substantive and procedural aspects, as regards facilitating access of foreign representatives and creditors to the courts of the. enacting State. Article 9 on 'Right of direct access', entitles a foreign representative to apply directly to a competent court in the enacting State for the purpose of obtaining any relief available under this Law. The main purpose of this provision is to ensure direct access by the foreign representative to the courts, without having to meet the formal requirements

such as licences or consular actions. Article 10 on 'Limited jurisdiction' porovides that the sole fact that a request, pursuant to this Law, to the courts of the enacting State is made by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the Jurisdiction of the courts of the enacting State, other than for the purpose of the request. This limitation on jurisdiction is not absolute. Other grounds under the laws of the enacting State, such as the possible misconduct and the resulting liability of the foreign representative are not affected by this limitation.

Article 11 on 'application by a foreign representative to commence a proceeding', entitles a foreign representative to apply for commencement of a proceeding under the laws of the enacting State, provided other conditions for opening such proceedings are satisfied. Hither to it had been noted that national insolvency legislations, while enumerating persons who may apply for commencement of proceedings, often did not refer to a foreign representative. The explicit reference to the foreign representative, under Article 11 is intended to dispel this ambiguity. Further, as recognition was the procedure by which the foreign representative was given standing before the courts of the enacting State for the purposes of the Model Legislation, there were objections to allow a foreign representative to apply for the commencement of proceedings, before he was formally accorded recognition by the court. However, the Commission was of the view that such an arrangement was crucial in cases of urgent need for preserving the assets of the debtor.

Article 12 on 'participation of a foreign representative in a Proceeding' entitles a foreign representative, upon recognition of a foreign proceeding, to participate in a proceeding concerning the debtor in the enacting State. The expression 'participate' is intended to include rights such as the right to be heard in an insolvency proceeding and to make proposals therein.

Article 13 on 'Access of foreign creditors to a proceeding' provides for access of foreign creditors to a proceeding under the laws of the enacting State. Paragraph 1 embodies the principle of nondiscrimination, whereby foreign creditors have equal rights as the local creditors in the enacting State, as regards the commencement and participation in an insolvency proceeding. Paragraph 2 makes it clear that the equality of treatment embodied in paragraph

1, does not affect the provisions on the ranking of claims in insolvency proceedings. Nevertheless, it provides a minimum ranking for claims of foreign creditors. Hence, the claims of foreign creditors shall not be ranked lower than unsecured non-preferential claims. An alternative provision to paragraph 2, allows discrimination against foreign tax and social security claims.

Article 14 'Notification to foreign creditors' lays down the procedure for issuing notification to foreign creditors of an insolvency proceeding under the laws of the enacting State. Paragraph 1 provides that, whenever under the laws of the enacting State, notification is required to be given to creditors in that State, then such notification shall also be given to "known creditors that do not have addresses" in this State. As in many cases, the deadline for filing claims was not established upon commencement of the proceedings, but at a later stage, the Commission opted for an uniform requirement that notification to foreign creditors be made 'whenever' the law of the enacting State required notification to be given to all creditors. Such notification shall be made individually, unless the court deems that some other form of notification would be proper. Paragraph 2 also dispenses with the cumbersome and time-consuming formal procedures like, letters rogatory - used by many States to effect notification in a forign jurisdiction. Paragraph 3 lays down the requirements of a notification of commencement of a proceeding, which shall (a) indicate the time and place for filing of -claims; (b) indicate whether secured creditors need to file their secured claims; and (c) contain any other information, as required by the laws of the enacting State or the orders of the court.

Chapter III entitled 'Recognition of a Foreign Proceeding and Relief', (Articles 15 to 24) addresses itself to rules concerning recognition of a foreign proceeding in the enacting State and the nature and procedures towards the granting of relief, consequent,to the recognition. Article 15 on 'Application for recogniton of a foreign proceeding', lays down the rules regarding the application for recognition of a foreign proceeding Paragraph 1 states that a foreign representative may apply to the court for recognition of the foreign proceeding in which he is appointed. The application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative or; (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the

appointment of foreign representative. In the absence of such evidence stated in (a) and (b), any other evidence to that effect, which is acceptable to the court may be produced. A statement, identifying all foreign proceedings in respect of the debtor, as known to the foreign representative, shall also be attached. As regards the admissibility of these documents, Article 16 lays down a set of presumptions which acknowledge the authenticity of the documents, until proof to the contrary is produced.

Article 17 on 'Decision to recognise a foreign proceeding' elaborates the criteria for recognition of a foreign proceeding. Subject to the public policy exception provided for in Article 6, a foreign proceeding shall be recognised if. (a) it is a proceeding within the meaning of Article 2 (a); (b) the application has been submitted to the competent court; and (c) the application meets the requirements of Article 15(2). The foreign proceeding shall be recognized as a foreign main proceeding if it takes place in the State where the debtor has the centre of its main interests or as a foreign non-main proceeding, if the debtor has an 'establishment' within the meaning of Article 2(f). Such an application for recognition shall be decided upon at the earliest possible time. Further, the court retains the power to modify or terminate the recognition, if it is shown that the grounds for granting it were lacking or have ceased to exist.

Article 18 on 'Subsequent information', obligates the foreign representative, following the time of his filing the application for recognition, to promptly inform the court about: (i) any substantial change in the status of the recognized foreign proceeding or the foreign representative's appointment; and (ii) any other foreign proceeding regarding the same debtor, that becomes known to the foreign representative.

Article 19 on 'Relief that may be granted upon application for recognition of a foreign proceeding', provides that upon the request of a foreign representative, seeking relief urgently needed to protect the assets of the debtor or the interests of the creditor, the competent court may grant relief of a provisional nature. Such relief may be granted at any time after the filing of the application for recognition sby the foreign representative and until the application is decided upon by the court. The grant of relief is discretionary and does not flow automatically from the presentation of an application. Following are the

various types of reliefs that can be granted

(i) staying execution against the debtor's assets;

(ii) entrusting the administration of the debtor's assets located in the enacting State to the foreign representative or any other person designated by the court;

(iii) suspending the right to transfer, encumber or dispose of any assets of the debtor;

(iv) providing for the examination of witnesses or taking of evidence concerning the debtor's assets or liabilities; and

(v) any other additional relief as available under the laws of the enacting State.

Barring the exception under Article 21(1) (f) when the relief granted may be extended, the provisional relief generally terminates when the court decides on the application for recognition. Moreover, the court may refuse to grant relief under this provision if such relief would interfere with the administration of a foreign main proceeding.

Article 20 lays down the 'Effects of a foreign main proceeding'. Paragraph 1 describes the consequence of the recognition of a foreign main proceeding, as follows: (a) commencement or continuation of individual actions concerning the debtor's assets is stayed; (b) execution against the debtor's assets is stayed and; (c) suspension of the right to transfer, encumber or dispose of any assets of the debtor. It must be noted that, while the relief granted under Articlel9 or 21 is subject to the discretion of the courts, the effects attendant upon recognition under this article are mandatory, i.e., they flow automatically from the fact of recognition of the main proceeding. However, the scope of the stay andsuspension referred above. are subject to exception or limitation that might exist in the law of the enacting State. Paragraph 3 stipulates that, the staying of commencement or continuation of individual actions concerning the debtor's assets as provided in paragraph 1, does not affect the right to commence individual actions or proceedings, to the extent necessary

to preserve a claim against the debtor. This is intended to protect creditors from losing their claims because of a stay, pursuant to the recognition of a foreign main proceeding. Similarly the effects of recognition as enumerated in paragraph 1 does not bar the right of a creditor to request the commencement of a proceeding under the insolvency laws of the enacting State.

Article 21 enumerates the 'Relief that may be granted upon recognition of a foreign proceeding' The court may, following the recognition of a foreign proceeding and upon the request of the foreign representative, grant any appropriate relief, including:

(a) staying the commencement or continuation of individual actions concerning the assets of the debtor, to the extent they have not been stayed under Article 20(1)(a);

(b) staying execution against the debtor's assets to the extent it has not been stayed under Article 20(1) (b);

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under Article 20(1)(c);

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the'court;

(f) extending relief granted under Article 19(1); and

(g) granting any additional relief available under the laws of theenacting State.

Paragraph 2 authorises the court, following a specific request from the foreign representative, to entrust the distribution of the debtor's assets

located in the enacting State to the foreign representative or another person designated by the court. Such action can be taken only after the court. is satisfied that the interests of creditors in this State are adequately protected. In the event of granting relief to a representative of a foreign non-main proceeding , paragraph 3 requires that the court be satisfied that the relief relates to assets that, according to the laws of the enacting State, should be administered in the foreign non main proceeding or concerns information required in that proceeding.

Article 22 on 'Protection of creditors and other interested persons enables the court to adopt the following measures : (a) The court may, at the request of a person affected by the relief granted under Article 19 or 21, or *suo motu* , modify or tenninate such relief. (b) While doing so, the court must satisfy itself that the interests of the creditors and other interested persons, including the debtor are adequately protected. (c) To ensure this, the court may while granting relief impose such other conditions it deems appropriate. The power of the court to 'modify or terminate the relief is regulated by Article 20(2) which states that "the scope of relief granted is subject to the laws of the enacting State".

Article 23 titled 'Actions to avoid acts detrimental to creditors', provides that, upon recognition of a foreign proceeding, the foreign representative had "procedural standing" to initiate actions (also referred to as 'Paulian actions') to avoid or render ineffective, legal acts detrimental to the creditors. Strong opposition was expressed in the Working Group on the inclusion of this provision, as it had the potential of creating uncertainty about concluded or performed transactions, thus affecting third parties who in good faith, were unaware that a concluded transaction would be rendered ineffective. However, the, provision was retained on the understanding that it only confers standing to bring actions for consideration and not to specify which law was applicable to a claim that a transaction should be avoided or rendered ineffective.

Article 24 on 'Intervention by a foreign representative' enables the foreign representative to intervene in any proceeding in which the debtor is a party, subject to other requirements of the laws of the enacting State are satisfied. Such a 'right to intervene' is intended to give the foreign representative standing

to appear in court and make representations in individual actions by the debtor against a third party or by a third party against the debtor.

Chapter-IV on "Co-operation with Foreign Courts and Foreign Representatives", consisting of Articles 25 to 27 lays down the legal basis for enabling court and other competent authorities in the enacting State to communicate directly with, or to request information or assistance from foreign courts or foreign representatives. A non-exhaustive list of the various modes of implementing the co-operation requirements, is also provided . Article 25 lays down a general rule and mandates the court to co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a person or body administering a reorganisation or liquidation under the law of the enacting State. More specifically, this provision empowers the court to communicate directly to request information or assistance directly from foreign courts or foreign representatives. It is interesting to note that in the discussion of the Working Group some States had expressed doubts as to whether a workable framework for judicial co-operation could be established exclusively by way of a national statute, since it was difficult to incorporate the concept of reciprocity in this Model Law. This view was not accepted, as the Commission felt that many States considered themselves to be in a position to provide a meaningful cross-border judicial co-operation in a national statute. To that extent, the Commission felt that Article 21 offered an opportunity for making the principle more concrete and adaptable to the particular circumstances of cross-border insolvency. In this context, it is worth recalling the conclusion reached by the Working Group at its earlier session "on the possibility of undertaking work towards model treaty provisions or a convention on judicial co-operation in cross-border insolvency, if the Commission at a later stage so decided"[6].

Article 26 authorises a person or body administering a reorganisation or liquidation under the law of the enacting State, to cooperate to the maxirnum extent possible with foreign courts or foreign representatives. Such co-operation measures, in the discharge of its functions, shall be subject to the supervision of the court.

[6] A/CN.9/433, paragraph 20.

Article 27 on 'Forms of co-operation', enumerates the following means of implementing the obligation of judicial co-operation, as set out in Articles 25 and 26: (a) appointment of a person or body to act at the direction of the court; (b) communication of information by any means considered appropriate by the court; (c) co-ordination of the administration and supervision of the debtor's assets and affairs; (d) approval or implementation by courts of agreements concerning the co-ordination of proceedings; (e) co-ordination of concurrent proceedings regarding the same debtor; and (f) any other additional forms of co-operation as provided under the laws of the enacting State.

Chapter V dealing with 'Concurrent Proceedings' consists of Articles 28 to 32 deals with the commencement and co-ordination of concurrent proceedings in the enacting State against the debtor and also seeks to regulate the rate of payment to the creditors. Article 28 on 'Commencement of a Proceeding under the laws of the enacting State.provides that, upon recognition of a foreign proceeding, the court can open an insolvency proceeding against the same debtor, under the laws of the enacting State(hereinafter "local insolvency proceedings"), if the debtor has assets in that State. This is in line with the practice in many States. Article 28 also restricts the effects of that proceeding to (a) the assets of the debtor located in the enacting State; and (b) to other assets of the debtor, to the extent necessary to implement co-operation under Chapter IV. This provision is aimed at removing any,jurisdictional obstacles for the foreign representative who believes that opening of an local insolvency proceeding is in the best interests of the creditors.

Article 29 lays down the rules for co-ordination of concurrent proceedings (local insolvency, proceeding and a foreign proceeding):

1. When a concurrent proceeding is taking place in the enacting State, the court shall seek co-operation under Chapter IV of this Model Law;

2. When a local insolvency proceeding is taking place at the time the application for recognition of the foreign proceeding is filed, then:

(a) any relief granted under Article 19 or 21 must be consistent with the

local insolvency proceeding; and

(b) if the foreign proceeding is recognised as a foreign main proceeding, the Article 20 does not apply.

3.. When a local insolvency proceeding commences after recognition or after the filing of the application of the foreign proceeding, then:

(a) any relief granted under Article 19 or 21 shall be reviewed,and if found to be inconsistent with the local proceeding - shall to that extent of inconsistency be modified or terminated;

(b) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in Article 20(1), shall to the extent of its inconsistency be modified or terminated.

4. In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of the enacting State, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

Artiele 30 covers the rules concerning the 'Co-ordination of more than one foreign Proceeding. Besides reiterating the requirement of judicial co-operation as outlined in Chapter-IV, Article 30 directs the court that:

(a) following the recognition of a foreign main proceeding, any relief granted to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding.;

(b) if a foreign main proceeding is recognized after the recognition of a foreign non-main proceeding, then any relief granted under Article 19 or 2 1, to the extent of its inconsistency with the foreign main proceeding - shall be reviewed and accordingly be modified;

(c) wherein after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised , the court shall grant,

modify or terminate relief for the purpose of facilitating the co-ordination of proceedings.

Article 31 lays down the presumption that, in the absence of any other evidence, the fact of recognition of a foreign main proceeding, is proof of the debtor's insolvency for the purpose of commencing a local insolvency proceeding.

Article 32 lays down the 'Rule of payment in concurrent proceedings' A creditor who had received part payment in respect of its claim in a foreign proceeding may not receive a payment for the same claim under a local insolvency proceeding, if the payment to other creditors of the same class is proportionately less than the payment already received by the creditor. This provision does not affect the ranking of claims under the laws of the enacting State, but is solely intended to establish the equal treatment of creditors of the same class.

Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency

The Commission had earlier decided to formulate a Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency. The proposed guide, which would contain background and explanatory information to the Model Law as a whole and to individual articles, is primarily intended to assisting States in enacting and applying the Model Law. At the current session, the Commission had before it the draft Guide prepared by the Secretariat(A/ CN.9/436), but owing to paucity of time could not give active consideration to the subject. However, since much of the requisite material was to be found in the report of the current session and. other *travaux preparatoires*, the Commission mandated the publication of the final version of the Guide to be prepared by the Secretariat together with the text of the Model Law, as a single document.

Adoption of the Model Law

At its meeting on 30 May 1997, the Commission finally adopted the

UNCITRAL Model Law on Cross-Border Insolvency. In adopting the Model Law, the Commission recommended "that all States review their national legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modem and efficient insolvency system, and that, in that review give favourable consideration to the UNCITRAL Model Law on Cross-Border Insolvency".

As to the future course of work on the topic, the Commission the proposal that it should prepare model provision for an international treaty, on judicial co-operation and assistance in cross-border insolvency. Besides, suggestions were made to explore the feasibility of work on various topics like: legislative treatment of cross-border insolvency in the banking sand financial services sector, preparation of model agreement, for cross-border co-operaation in reorganisations of insolvent enterprises, conflict-of-laws solutions in cross-border insolvency cases, and the effects of insolvency proceedings on arbitration agreements and arbitral proceedings. After discussion, the Commission decided that it would be preferable to evaluate the impact of the Model Law on Cross,Border Insolvency, before undertaking work towards a treaty or any other above mentioned topics. Towards this end, the Commission proposed that the Secretariat should collect information and monitor developing practices in the use of national laws based on the UNCITRAL Model Law.

The Sixth (Legal) Committee of the General Assembly, at its fifty-second session recommended all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and , in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonzed legislation governing instances of cross-border insolvency.

Comments

The significance of the Model Law lies in the fact, that it seeks to furnish the requisite statutory basis for the courts to communicate and request information or assistance directly from foreign courts or foreign representatives. Given the contemporary trends witnessing a growth in the volume of international trade and the liberalisation of national economies, such an

arrangement for enhanced 'judicial co-operation' could be deemed to be a *sine qua non* for ensuring greater legal certainty in trade and investments.

Apart from building on the existing practice, the Model Law embodies certain progressive elements like, dispensing with formal procedures of communication through letters rogatory and the legalisation of documents.

The importance of the Model Law is that it effectively consolidated and streamlines the existing State practice on the administration of foreign insolvency proceedings and the co-ordination of concurrent proceedings. Thus, it provides a single integrated framework, harmonising the diverse practices on the subject, thereby offsetting the difficulties faced by national jurisdiction in administering fragmentary and disparate elements of foreign insolvency laws. The fact that, the Model Law aims to provide only the skeletal framework containing the bare minimum requirements - offering sufficient room for the application of the national law - is evidence of the flexibility of the document.

III. Privately-Financed Infrastructure Projects : Preparation of a draft Legislative Guide

Background

Following the review of recommendations made by many States and a report by the Secretary-General containing information on work being undertaken by other organisations, the Commission at its twentyninth session in 1996, decided to prepare a 'Legislative Guide' on BuildOperate-Transfer (BOT) and related types of projects. Subsequently, the Commission requested the Secretariat to review issues for being dealt with in a legislative guide and to prepare draft materials to enable the Commission to make an informed decision on the proposed structure of the draft legislative guide and its contents. In response to this, the Secretariat submitted for the consideration of the Commission at the current session, a table of contents setting out the topics proposed to be covered by the legislative guide, followed by annotation concerning the issues suggested to be discussed therein). The Commission also had for consideration the initial drafts[7] of Chapter I: Scope, Purpose and

Terminology of the Guide, ChapterII Parties and Phases of privately-financed infrastructure projects and Chapter V: Preparatory Measures.

In pursuance of the recommendation by the UNCITRAL Secretariat to the thirtieth session of the Commission, it was decided to henceforth use the words "privately-financed infrastructure projects" to refer to its work in this field, rather than the words "build-operate-transfer" (BOT) which had been so far used.

Privately -Financed Infrastructure Projects: Its Significance

In the case of privately financed infrastructure projects, the Government engages a private entity to develop, maintain and operate an infrastructural facility in exchange for the right to charge a price, whether to the public or to the government, for the use of the facility or the services or goods it generated. Such projects are considered to be significantly advantageous in two ways: (i) They would enable States to achieve substantial savings in public expenditure and to reallocate the resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs; (ii) Since these projects are built and, during the concession period, operated by the project company, the State benefits from private sector expertise in operating and managing the relevant infrastructural facility.

As any successful implementation of privately-financed infrastructural project requires a favourable legal framework that fostered the confidence of potential investors, while protecting public interest. It is against this backdrop that the Commission mandated the Secretariat to review issues suitable for being dealt with in a legislative guide.

Structure of the draft legislative guide and issues to be covered

At the current session, the Commission engaged in a general discussion on the proposed structure of the draft legislative guides, as set out in the Secretariat document A/CN.9/438. It was noted that in dealing with individual

[7] A/CN.9/438/Add.1-3

topics, the draft legislative guide should distinguish among the following categories of issues: general legal issues under the laws of the host country; issues relating to legislation specific to privately-financed infrastructure projects; issues that might be dealt with at the regulatory level; and issues of a contractual nature.

As a general comment on the subject matters to be covered by the draft legislative guide, the Commission observed that infrastructure projects increasingly involved the combined participation of public authorities and private sector entities - a development which needed to be adequately reflected in the Secretariat's future work. Furthermore, it was pointed out that the governmental decision to opt for private participation in infrastructure projects may be influenced by many factors, not limited to the objective of reducing public expenditure. It was noted that issues pertaining to privately-financed infrastructure projects also involved issues of market structure and market regulations. Hence, consideration of these issues is important for the treatment of a number of individual topics proposed to be covered by the guide. The Commission made several proposals as to the contents of the future chapters and requested the Secretariat to:

(a) To elaborate in Chapter-III (General Legislative Considerations), on the different legal regimes governing the infrastructure in question, as well as on the services provided by the project company - issues in which there were significant differences among legal systems.

(b) To emphasise in Chapter-VI (The Project Agreement), the obligations of the project company to transfer technology and also issues relating to competition policy;

(c) To consider in Chapter-VII (Government support), possible ways in which privately-financed infrastructure projects could be facilitated with a minimum involvement of governmental guarantees.;

(d) To give particular attention in Chapter-XI (Expiry, Extension and Early Termination of the Project Agreement), to questions such as ownership of infrastructure and related properties; responsibility for 'dual liabilities of the

project company and terms of transfer of infrastructure to the host Government in BOT projects; and

(e) To elaborate in Chapter-XII (Governing Law), on the possibility and limitations of choice- of-law clauses and arbitration agreements taking into account the specific nature of the various contractual arrangements involved.

Consideration of draft chapters

The Commission considered the initial drafts on Chapters I,II and V, as prepared by the Secretariat and made the following recommendations as to the future work on the subject:

As to Chapter I on the 'Scope, purpose and terminology of the guide', the Commission. suggested that the guide should avoid generating the impression that it dealt only with infrastructure projects exclusively financed with private funds. Hence, the need to highlight the role of local capital providers and investors in the development of infrastructure projects was stressed upon. It was also suggested this chapter must make it clear that infrastructure projects could also be carried out by entities in which the host Government participated, as long as these entities were subject to substantially the same legal regime that applied to the operations of private entities. With reference to projects related to construction and operation of power plants, there were instances where project companies were granted the right to exploit some natural resources - as an ancillary activity for producing fuel for operating the concession. Such transactions, it was suggested should not be excluded to the extent it was ancillary to a main, infrastructure project.

As a general comment on Chapter -II, relating to 'Parties and phases of privately-financed infrastructure project"' the Commission suggested that more emphasis should be given to the implications of internal approval and licensing requirements of the host Government and the need for co-ordinating with all agencies involved in the process. It might also address the legal risks faced by prospective concessionaires during the pre-contractual phase (eg. unsuccessful negotiations; subsequent avoidance of contract, etc.); and

consider issues arising out of renegotiating of the terms of concession or as a result of its transfer to another concessionaire.

On 'Preparatory Measures' dealt with in Chapter -V the Commission stressed the need to adopt a flexible approach to meet the requirement of individual projects, while discussing the preparatory steps for the implementation of the projects. The preparatory steps involves: the acquisition of land for the construction of the facility; establishment of the consortium that would build and operate the facility; issuance of licenses and approvals and ensuring co-ordination among governmental entities for, necessary for carrying out the project activities. As regards the acquisition of a site for the project company it was suggested to give attention to the position and interests of the owners of property that might be expropriated for the purpose of building the infrastructure.

Future Work

The Commission approved the line of work proposed by the Secretariat and requested it to seek the assistance of outside experts, as required, for facilitating the work on this subject. Governments were invited to identify experts who could be of assistance to the Secretariat in this task.

Comments

With the changes ushered by the ongoing phenomenon of liberalization, the private sector has come to play a major role in the economic development of a number of States. For many underdeveloped and developing economies, their relatively recent involvement with the private sector makes it an innovative experiment for them. As the increase in international trade warrants active participation of hitherto marginalised economies, it is imperative that they are sufficiently acquainted with the modalities of seeking capital from private sources. In this context , the efforts towards preparing a legislative guide on privately-financed infrastructure projects, is a step worthy of being considered on a priority basis and accomplished expeditiously.

Besides the wide range of issues involved, the varied requirements / of States at different levels of development does not easily lend itself to

formulating uniform legislative and commercial practices in this area. Hence, the decision to opt for a legislative guide - which provides room for flexibility and offers various alternatives - has the distinct utility of enabling States to become conversant with the working of privatelyfinanced infrastructure projects.

In the view of the AALCC Secretariat, the work of the UNCITRAL at the current session, is a good beginning in identifying the issues to be incorporated in the draft legislative guide. Besides developing a favourable legal framework to assist States in implementation privately financed infrastructure projects. The interests of developing States would be well served with the enunciation of definite rules on such issues as: (i) the obligation of the private investor to transfer technology and managerial skills to local personnel; and (ii) matters relating to,competition policy and monopoly in the provision of services.

II. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT(UNCTAD)

Introduction

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to promote international cooperation in trade and development and economic development of developing countries. It is composed of 187 member States. Its institutional set-up comprises the Conference, the Trade and Development Board (TDB) and a number of subsidiary bodies serviced by a permanent Secretariat.

Held every four years, the Conference is the organization's highest policy-making body. -,It formulates policy guidelines and decides on the programme of work. Nine Conferences have been held so far: Geneva(1964), New Delhi(1968), Santiago(1972), Nairobi (1976), Manila(1979), Belgrade(1983), Geneva(1987), Cartagena de Indias, Colombia(1992) and Midrand(1996).

UNCTED IX : FINAL DOCUMENT

It might be recalled that the Ninth session of the United Nations Conference on Trade and Development(UNCTAD IX) was held at Midrand (South Africa) in 1 996. The outcome of the session is reflected in the Midrand Declaration and the final document titled " A Partnership for Growth and Development", adopted by the Conference. The final document sets priorities for development action in a globalizing world economy. The Conference reiterated the comparative advantages of UNCTAD as a focal point for tackling trade-related development issues, viz., trade, finance, technology, investment and sustainable development. Towards this end, it was agreed that UNCTAD should continue to facilitate the integration of developing countries and countries in transition with the international trading system. Its work should be action-oriented and provide guidance on national policies, with special focus on LDCS.

Outlining the priorities for UNCTAD, until the next session , the Conference decided to pay more attention in its analytical and deliberative work on the following areas:-

- Globalization and development;
- International trade in goods and services, and commodity issues;
- Investment, enterprise development and technology; and
- Services infrastructure for development and trade efficiency

In the process of restructuring and streamlining the organisation, the UNCTAD-IX established the following subsidiary bodies of the Trade and Development Board: (i) the Commission on Trade in Goods and Services. and Commodities; (ii) the Commission on Investment, Technology and Related Financial Issues; and (iii) the Commission on Enterprise Business Facilitation and Development. These Commissions will adopt a integrated approach in their respective areas of competence and will meet once a year, unless otherwise decided by the Board. In order to benefit from higher level of technical expertise, each Commission may convene exper meetings of short duration. Technical matters discussed at the expert level would be reported to the relevant parent body, which may transmit them to the Board as appropriate.

III Working of the Commissions:-

With the advent of WTO, the focus of the UNCTAD work programme has shifted from the traditionally specific themes like primary commodities, transfer of technology, competition policies, etc. to a broade and integrated approach. The UNCTAD is currently working incoordination with the WTO on issues like investments and competition policy. The emphasis of UNCTAD following its Midrand Session is mostly in terms of analysing the impact of the Uruguay Round Agreements on development and working out modalities for enhancing capacities of developing countries for participation in the multilateral trading, system.

This part seeks to provide an overview of the activities of the three Commissions.

Commission on Trade in Goods and Services, and Commodities:-

In consonance with the decision of UNCTAD-IX, the Trade and Development Board at its thirteenth executive session held in July 1996 adopted the agenda for the first session of the Commission on Trade in Goods and Services and Commodities. The following two items were taken up at the first session of the Commission held on 19-21 February 1997:-

(1) Enabling countries to respond to the opportunities arising from the Uruguay Round Agreements so as to derive maximum available benefit by: analysing the impact of Uruguay Round Agreements on development and enhancing capacities for participation in the multilateral trading system; and

(2) Integrating trade, environment and development: Recent Progress and Outstanding issues.

The first session of the Commission discussed the issues relating to tourism, environment and development; role of direct foreign investment in the transfer of environmentally friendly technology; ecolabelling, etc. Pursuant to the decision of the Commission to convene two expert group meetings, the

following meetings were held:

(a) Meeting of Experts on Strengthening the Capacity and Expanding Exports of Developing Countries in the Services Sector: Health Services (16-18 June 1997).

(b) Experts Meeting on Vertical Diversification in the Food Processing Sector in Developing Countries (1 -3 September 1997).

The recommendations adopted by the two expert group meetings forwarded to the second session of the Commission held in November 1997. The Commission endorsed the recommendations of the two expert group meetings, and decided to convene three expert meetings on the following topics, in 1998:-

(a) Examination of the effectiveness and usefulness for commodity dependent countries of new tools in commodity markets: risk management and collateralized finance;

(b) Strengthening the capacity for expanding the tourism sector in developing countries, with particular focus on tour operators, travel agencies and other suppliers; and

(c) Strengthening capacities in developing countries to develop their environmental services sector.

B. Commission on Investment, Technology and Related Financial Issues:-

The agenda as adopted by the Board for the first session of the Commission on Investment, Technology and Related Financial Issues contained the following items:

(1) Developments in International Investment: Interaction between investment and trade and its impact on development.

(2) Issues related to competition law of particular relevance to development.

It may be recalled that UNCTAD has been active in the field of competition and restrictive business practices since the early 1970s. As of date the Set of Multilterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices as formulated by UNCTAD and adopted by the General Assembly in its resolution 35/63 of 5 December 1980 is the only multilateral instrument on competition in existence. Recalling the past work of UNCTAD on this subject, an Expert Meeting on Competition Law and Policy which met from 13 to 15 November 1996 recommended that the Commission at its first session should consider convening expert level meeting on the subject in 1997.

The first session of the Commission held from 18 to 22 November 1996, endorsed the recommendations of the Expert Meeting on Competition Law and Policy. Besides, the Commission recognised the need expressed by many developing and least developed countries for empirical studies to shed further light on the impact on development of liberalising domestic investment regimes. Following the conclusion adopted at the first session of the Commission, the below mentioned meeting of expert groups were convened:

(a) Expert Meeting on Existing Agreements on Investment and their Development Dimensions, 28-30 May 1997.

(b) Expert Meeting on Investment Promotion and Development Objectives, 24-26 September 1997; and

(c) Expert Meeting on Competition Law and Policy, 24-26 November 1997

The report of the expert level meetings held in May and September 1997 were forwarded to the Commission which met at its second session in 29 September - 3 October 1997. Taking note of the reports by the expert meetings the Commission called for work to elucidate the elements of appropriate competition policy and the modalities of achieving coherence

between FDI liberalization, trade policy and competition policy. The Commission was of the view that it was important to continue work on the development dimension of international investment agreements and accordingly recommended to the Board that the following meetings at the expert level be held:

(i) Examination and review of existing regional and multilateral investment agreements and their development dimensions;
(ii) Environmental accounting;
(iii) Competition law and policy.,
(iv) The growth of domestic capital markets, particularly in developing countries, and its relationship with foreign portfolio investment.

The work of this Commission assumes more significance in the light of the interlinkages established by the WTO Singapore Ministerial Meeting, 1996 between UNCTAD and WTO to Jointly study the issues of investments and competition policy. It might be recalled that the Singapore WTO Ministerial Meeting had established two working groups: one to study the relationship between trade and investments and the other to study issues relating to the interaction between trade and competition policy. Such a coordinated approach, it is hoped, would effectively draw upon the specific expertise and complementary mandates of UNCTAD and WTO.

C. Commission on Enterprise, Business Facilitation and Development:

The agenda for the first session of the Commission on Enterprise, 'Business Facilitation and Development as adopted by the Board in July 1996, included the following items,

(1) Enterprise: Issues relating to an enterprise development strategy.
(2) Services Infrastructure for Development and Trade efficiency Assessment.

At its first session held in January 1997, the Commission recognised

the importance for developing countries, to develop enterprise strategies. Taking into account the changing nature of enterprises and the importance of a coherent policy environment, the Commission felt that further analytical work was required in promoting effective inter-firm cooperation; roles of government and the private sector in creating a coherent policy framework; effective support measures for development of small and medium sized enterprises (SME); short and long-term impacts of macro economic reform on the development of enterprises.

As regards the item "Services infrastructure for development and trade efficiency" the Commission was of the view that the work of the UNCTAD Secretariat in the areas of telecommunications, transport, customs, banking and insurance trade facilitation, business information, transit, human resource development and legal issues should be pursued in an integrated fashion, so as to maximise the synergies and economies of scale which may be identified between these areas.

The Commission at its first session decided to convene expert level meetings to facilitate indepth study on specific issues. Accordingly, the following meetings were convened:

(a) Expert Meeting on the Use of Information Technologies to Make Transit Arrangements More Effective, 5-7 May 1997;

(b) Expert Meeting on Government and Private Sector Roles and Interactions for SME Development, 23-25 July 1997; and

(c) Expert Meeting on Telecommunications, Business Facilitation and Trade Efficiency, 8-10 September, 1997.

The recommendations of the expert group meetings were forwarded to the second session of the Commission which met from 1 to 5 December 1997. Taking note of these recommendations the Commission called upon the international community to promote cooperation between firms in developed and developing countries. International financial institutions were urged to develop and support specific programmes to build private sector lending

capacities to small and medium sized enterprises.

On the item "Services Infrastructure for Development - and Trade Efficiency Assessment", the Commission acknowledged the significant impact of micro-finance in poverty alleviation. It recognised the importance of expanding financial services in the area of micro-enterprise development, as they contribute to providing the basic means for empowering individuals, especially women to launch micro enterprise activities. The Commission directed the UNCTAD Secretariat to continue to promote practitioners and governments, including among developing countries.

IV. REVIEWOF THE INTERNATIONAL CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952.

In May 1993, the UN/IMO Conference of Plenipotentiaries on Maritime Liens and Mortgages , having adopted the International Convention on Maritime Liens (MLM Convention) and Mortgages, recommended that, "the relevant bodies of the Conference, reconvene the -Joint Intergovernmental Group (JIG) with a view to examine the possible review of the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, 1952". Accordingly, the JIG of UNCTAD/IMO met from 1994 to 1996 to deliberate on a revised set of articles prepared by the Secretariats of UNCTAD and IMO. A Working Group was established with the task of ensuring that all claims with maritime lien status under the 1993 MLM Convention are included in the list of maritime claims.

The JIG completed consideration of the draft articles for a convention on arrest,of ships at its ninth session. It also recommended to the IMO Council and the Trade and Development Board of UNCTAD, ,that they consider favourably, on the basis of the useful work done so far, proposing to the General Assembly of the United Nations the convening of a diplomatic conference to consider and adopt a convention. The Trade and Development Board at its fifteenth executive session held in June 1997 endorsed this

recommendation.

Draft Articles for a Convention on Arrest of Ships - An Overview:

The draft Convention comprises of nine articles. Article 1 on 'Definitions' defines the terms: maritime claim, arrest, person, claimant and court. The term 'maritime claim' is defined comprehensively. But opinion was divided within the JIG as to whether the definition of 'maritime claim' should be based on providing an exhaustive, list or whether it should adopt a more flexible approach of retaining an open-ended list. The question was left to be decided at a later stage by a diplomatic conference.

Article 2 on "powers of Arrest" provides that a ship may be arrested only in respect of a maritime claim exclusively by or under the authority of a Court of the Contracting State in which the arrest is made. The procedure for the arrest or release of a ship shall be governed by the law of the State in which the arrest was made. Article 3 on 'Exercise of right of arrest' enumerates the pre-conditions for effecting the arrest of a ship in respect of which a maritime claim is arrested.

Article 4 on "Release from arrest" lays down the general rule that a ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement nt of liability nor as a waiver of any defence or any right to limit liability. This provision also describes the effect of arrest effected in a non-party State, when security as regards the same claim has been given in a State, party to the Convention.

Article 5 on "Right of re-arrest and multiple arrest" lays down the general rule that where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime claim, that ship shall not thereafter be re-arrested or arrested in respect of the same maritime claim. Exceptions to this general rule are also enumerated therein.

Article 6 on "Protection of Owners and demise charterers of arrested ships" elaborates on the powers of the court to impose upon the claimant who seeks to arrest a ship the obligation to provide security. The imposition of such an obligation is to recompense any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable.

Article 7 titled "Jurisdiction on the merits of the Case" provides the general rule that the courts of the State in which an arrest is effected or security given shall have the jurisdiction to determine the case upon its merits. Nevertheless, a State may refuse to exercise that jurisdiction where refusal is permitted by thelaw of that State and a court of another State accepts jurisdiction. In such cases, the refusing court may upon request, order a period of time within which the claimant shall bring proceedings before a competent court or arbitral tribunal.

Article 8 on "Application" lays down the scope and coverage of the Convention. The Convention shall apply to any sea-going ship within the jurisdiction of any State party, but not to ships owned or operated by a State and used only on government non-commercial service. Article 9 on 'Reservations' entitles a State to reserve the right to refrain from applying the Convention to ships not flying the flag of a State party.

III. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)

Pursuant to resolution (2152-XXI) of the UN General Aqsembly, the United Nations Industrial Development Organization (UNIDO) was established as its subsidary body in 1966. Subsequently in 1979, it became an autonomous organization and started functioning as a specialized agency from August 1985. The primary objective of UNIDO is the 'promotion and acceleration of the industrial development in the developing countries with a view to assisting in the establishment of anew international economic order.

The work programme of UNIDO in the area of international trade law appears to be focused on the preparation of guidelines, manuals and checklists of contractual clauses so as to assist parties from the developing

countries in concluding industrial contracts. These may be enumerated as below:

(1) Guidelines on the purchase, maintenance and operation of basic insurance coverage for processing plants in developing countries;

(2) UNIDO Model form of agreement for the licensing of patents and know-how in the petrochemical industry, including annexes, an integrated commentary and alternative texts of some clauses;

(3) Items which could be included in contractual arrangements for the setting up of a turnkey plant for the production of bulk drugs(pharmaceutical chemicals) or intermediaries included in the UNIDO list;

(4) UNIDO Model form of licensing and engineering services agreement for the construction of a fertilizer plant;

(5) UNIDO Model form of turnkey lump-sum contract for the construction of a fertilizer plant;

(6) UNIDO Model form of semi-turnkey contract for the construction of a fertilizer plant;

(7) UNIDO Model form of cost-reimbursable contract for the construction of a fertilizer plant;

(8) Guidelines for Infrastructure through Build-Operate-Transfer Projects: The BOT Guidelines prepared by UNIDO cover the entire spectrum of financial and legal issues faced by government authorities and project managers in the development of BOT projects, while offering developing countries the basic orientation needed to design effective BOT strategies. The Guidelines *inter alia* contain chapters on the following aspects: introduction to the BOT concept; the government's role in providing for successful BOT concept; transfer of technology and capability building; procurement issues and selection of sponsors; financial structuring of BOT projects; and standard forms of agreements relating to construction, operation and maintenance.

(9) The UNIDO Manual on Technology Transfer Negotiations: This Manual, is primarily intended to serve the purpose of a teaching tool for technology transfer negotiation courses for enhancing the negotiation skills of the developing countries.

IV. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (.UNIDROIT)

The 76th session of the Governing Council of the UNIDROIT met at the seat Of the Institute in Rome from 7 to 12 April 1997. During the course of the session a number of important issues were discussed which *inter alia* include:

(i) Study group for the preparation of uniform rules on international interests in mobile equipment;

(ii) Study group on franchising;

(iii) Principles of International Commercial Contracts;

(iv) Civil liability connected with the carrying out of dangerous activities;

(v) Legal issues associated with computer software; and

(vi) Creation of a database on uniform law.

Some briefs comments on these agenda items are supplied below:

(i) Preparation of uniform rules on International interests in mobile equipment

The main effort of UNIDROIT in this direction is towards development of uniform international rules designed to address legal problems arising out of the everyday use of high value mobile equipment across frontiers. Following the Canadian proposal made at the 67th session, a study group was constituted under the Chairmanship of Dr. Roy. Goode which had undertaken a preliminary

examination of the subject. Consequently a Sub-committee of the Study Group and later, a Draft Committee of the Group were established. A draft was completed by the Drafting Group of the Study group on 5 December 1995.

The areas covered by the first draft included the sphere of application of the proposed Convention, the setting up of an international register and the conditions which should govern the recognition by the courts of contracting States of international interests in mobile equipment created in accordance with the proposed convention. Special rules were also proposed for aircraft industries by the Aviation Working Group.(AWG)

The Third session of the Study Group which met from 15 to 21 January 1997 considered the draft rules proposed by the Drafting Group. The Drafting Group had suggested revision of certain issues that would result in the text including inter alia, assignments of international interests and provisions for speedy interim relief. The AWG had also made representations pertaining tc registration of national non-consensual interests under the future convention and another rule permitting States to declare as to which of their national non-consensual interests should have precedence over the international interest.

Other decisions of the Study Group included the acceptance of a proposal tabled jointly by the AWG and the International Air Transport Association (IATA) to split the future international instrument into a Convention containing general rules applicable to all different categories of mobile equipment failing within its sphere of application and one or more specific protocols containing such additional special rules as were judged to be necessary for the special requirements of a particular category of equipment.

Elaborating further on the future convention along with more equipment specific protocols (as regards aviation and rail transportation), the Chairman of the Study Group stated that much progress had been made. The basic approach followed, he said incorporated ideas from the civil law and common law systems. The provisional text of the future convention provided an indicative list of the items to be covered, the key features being: (i) equipment is of high value; (ii) of a kind normally moving from one State to another in the course of ordinary, business; and (iii) and is uniquely identifiable. Identifiability would

help an asset based future international registration system which would include equipments such as airframes, aircraft engines, satellites and ships.

The Chairman stated that the subject matter of the future convention would be mobile equipment. He added that three different types of international interest were provided for in the future convention which include: those granted under a security agreement, those granted under a title reservation agreement and those vested in a person who was a lessor under a leasing agreement.

Other specific aspects of the proposed convention are as provided. Chapter 111 sets out the basic default remedies. Chapters IV and V contain registration rules of various international interests. Chapter VI deals with the effects of an international interest as against third parties. Chapter VII contains a set of provisions on assignments and Chapter VIII provides for registrable national interests.

The Governing Council expressed satisfaction at the progress achieved by the Study Group and the Drafting Group and approved albeit provisionally the approach adopted in the preparation of the rules of the future Convention. Furthermore with a view to enable Members of the Council to have a full discussion of the text of the future convention, it decided to convene a special session if need arose in early 1998 to consider the preliminary text and the draft protocol on aircraft equipment established by the Aircraft Protocol Working Group.

(ii) Study Group on Franchising

This item has been on the agenda of the UNIDROIT since its 65th session (1986). It may be recalled that at its 72nd session the Governing Council of the Institute had decided to set up a Study Group on Franchising to examine the different aspects of franchising and in particular the disclosure of information between the parties before and after a franchise contract has been concluded and the effect of a master franchise agreement on sub-franchise agreements.

At its first session, held in Rome, from 16 to 18 May 1994 the Study

Group had considered both international and domestic franchising. As regards the former the Group had focussed its attention on master franchise agreements. Also examined were the nature of the relationship between such agreements and sub-franchise agreements, the applicable law and Jurisdiction; settlement of disputes and the problems associated with the tripartite nature of the relationship between franchisor, sub-franchisor and sub-franchisees, especially in connection with termination and disclosure.

With respect to domestic franchising the Study Group had conce - ntrated its efforts on the question of disclosure, examining the experience of countries which had, or had attempted some form of regulation in this area, the role of franchising association and the importance of the codes of ethics adopted by these associations.

The Study Group furthermore had decided to prepare an elaborate guide to international franchising rather than work towards a convention. The recommendations of the Study Group on the need for a Legal Guide, especially with regard to master franchise agreements, was endorsed by the 74th Governing Council of the Institute held in March/April 1995.

At the 74th session of the Institute, the Study Group produced a first preliminary draft Guide to International Franchinsing Produced in a rudimentary way it consisted of three chapters and required further editing and recording.

At the 75th session of the Governing Council the Study Group presented the full English text of revised guide as an interim report. The complete guide along with a second draft was to be ready by May 1997. The staff of Secretariat of the Institute also added that copies of the draft guide had been sent to the International Bar Association (IBA) Committee on International Franchising which met in New Delhi in November 1997 and to national franchising associations and lawyers with particular interest in this field. The recommendations of the IBA Meeting along with modifications suggested by the Study Group would bring out a final text which was expected to be ready for submission to the Governing Council at its 1998 session.

The Governing Council took note of the work on the item and decided

to set up a Sub -Committee to,undertake a detailed consideration of the English and French revision of the draft at its next session to enable publication.

On the work on the guide being finalized, the Secretariat expressed hope that the Study Group would examine the possibility of preparing a model law on the subject as it would lead to greater harmonization on the subject. The work of the UNIDROIT in the Secretariat's view had also influenced drawing up of domestic legislations on franchising in France (1 989), Brazil (1994), Mexico (1994), Spain (1996) and Russia (1996).

(iii) Principles of International Contracts.

The work on this item was completed in 1994 with the adoption of the final text of the UNIDROIT Principles of International Commercial Contracts. The Principles consist of a preamble and 119 articles divided into seven chapters (General provisions; formation; validity; interpretation; content; performance; and non-perfonnance). Each article is accompanied by a commentary including illustrations, which form an integral part of the principales). These Principles constitute a system of rules of contract law specifically adopted to meet the special requirement of modern commercial practice. The Principles, have been published in five official languages of UNIDROIT (English, French, German, Italian and Spanish). At the same time, the Institute has authorized the preparation by leading scholars of translations of the Principles into other language versions such as Arabic, Bulgarian, Chinese, Japanese, Dutch, Russian, Hungarian, Portuguese, Serbian and Slovakian.

To enable wider dissemination of these Principles, the Governing Council of the Institute requested the Secretariat to conduct an inquiry as to the use of the Principles in actual practice and prepare a paper containing proposals for new topics to be dealt in the second enlarged edition. As a follow-up to this request, the Secretariat prepared a questionnaire which was circulated to around 1000 individuals who had shown keen interest in the UNIDROIT Principles. The questionnaire met with an overwhelming response as 226 replies were received from, around forty countries of the world in a short period of time.

The questionnaire referred to the six different uses of the UNIDROIT Principles i.e. for study and/or teaching Purposes; as a model for national or international legislation; as a guide in contract negotiations; as the law governing the contract, in support of a particular argument developed in a statement of claim or defence; and in support of a particular solution adopted in an arbitral award or a court decision.

Appreciating the good response received from a number of countries as regards the Principles, the Governing Council called for further dissemination of the Principles by:

(i) requesting the President of the Institute to negotiate with leading arbitral centres enabling the Secretariat to have access to awards referring to the Principles, with a view to permmitting publication by the Institute and identify any problem, in application;

(ii) having the feasibillty Of supporting the publication within the UNILEX;

(iii) working towards the publication of second enlarged edition of the Principles on a priority basis; and

(iv) convening of a smaller drafting committee by the Working Group to prepare the preliminary draft, taking into account linguistic and terminological difficulties.

(iv) Civil liability connected with the carrying out of dangerous activities

This item was included in the work programme of the UNIDROIT upon a reference made by the Government of India in the wake of leakage of methyl iso-cyanate gas from a multinational power plant at Bhopal and the consequent disaster that claimed the life of thousands and leaving others permanently incapacitated. It may also be recalled that the Governing Council of the Institute at its 73rd session (1994) had asked the Secretariat to prepare

a study designed to identify issues that might serve as a basis for possible measures designed to ensure compensation for personal injury to the victims of industrial accidents.

The 74th session of the Institute had reviewed the mandate and asked the Secretariat to conduct the study within the following parameters:

(i) It should be confined to the question of liability for personal injury;

(ii) It should not cover nuclear accidents or accidents occurring in the transport of goods; and

(iii) Any action that might be authorized in the light of such a study should be undertaken on a stepby step basis.

At the 76th session of the Institute the subject was not debated as there was not much progress due to lack of funding. However the Secretariat is continuing to collect documentation on the subject. There was also a suggestion that the subject be deleted ftom the agenda of the next session, as the work programme for the 1999-2001 triennial period would expire at the 77th session. The President clarified however this topic could be taken up again in the framework of the new work programme.

(v) Legal issues associated with computer software

A study by the Secretariat of UNIDROIT had suggested an initiative in the area of specific commissioning of software programmes and the rights to use this programme,by the party commissioning the programme and the party developing it. Agreements concluded with a view to the preparation of such programmes are usually tailor-made from one agreement to another and their terms differ according to the experiences of the parties and their respective bargaining power. It had also been proposed by the Secretariat that the UNIDROIT might usefully consider the drawing up of guidelines regarding the negotiation of such agreements, their purpose being to make the parties more aware of the differing legal consequences flowing from their choice of

contractual provisions.

The Governing Council at its 72nd session (1993) had taken note of the Secretariat study but in view of the doubts expressed by certain members as to the usefulness of the exercise, deferred the taking up of the topic. Later at successive sessions of the Council i.e 73rd (1994), 74th (1995) and 75th (1 996), on account of lack of financial and human resources no Progress has been made, on the subject.

(vi) Creation of a Database on Uniform Law

At its 75th Session (1996) the Governing Council had endorsed a project for setting up of an UNIDROIT Data base on Uniform Law. The main aim of this database would be providing information on diverse areas of uniform law and access of this information not only through common means of retrieval such as title and date but also through a concept key-word system elaborated after a thorough analysis of the materials.

This project would *inter alia* involve a three stage progression which would include :

(i) The insertion of certain basic materials;
(ii) the insertion of case law and bibliographic references; and
(iii) analysis of the materials and extrapolation of the concept key words.

Besides this, other preparatory work would involve the identification of the instruments that the database should contain for each subject, the retrieval of the authoritative text of the instruments in English and French and memorizing of texts in computer form. Small databases containing addresses of various interest groups (international organizations, specialized research institutes, chambers of commerce and industry and law firms) were also being prepared.

A decision was also taken to pursue funding facilities for the software and the preparation of a draft database on uniform law to be placed before the next session.

V. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

On the basis of an earlier request made by the United States and the terms of reference assigned, the Secretary General of the Hague Conference on Private International Law convened a Special Commission, which met from 17 to 27 June 1997 at the Hague, Netherlands. The Meeting was attended by thirty five Member States, nine non-Members, five inter-governmental organization and six international non-govemmental organizations.

The main item on the agenda of the Special Commission at its first session was the preparation of a preliminary draft Convention on international jurisdiction and the effects of foreign Judgements, to be submitted to the nineteenth Diplomatic Session of the Conference to be convened in 2000. The proposed Convention will apply to matters relating to international litigation. i.e. in cases between parties who are all subjects of private law, or who are acting for private activities. This would exclude all cases between a State or a State entity, or any other entity acting on behalf of the state in public service missions.

On the basis of the discussion and Preliminary Document No.7 of April 97, prepared by the Secretariat of Conference entitled "International Jurisdiction and Foreign Judgements in Civil and Commercial matters", the Chairman of Special Commission called upon the delegates to identify the objectives of future convention. Whereupon, the delegates reached a consensus that the proposed convention must be: (1) adapted to the technical economic, sociological and legal developments of the twenty-first century: (11) simple, effective and pragmatically drafted to be understood by lawyers, judges and lay public; (iii) be able to identify and solve questions pertaining to international litigation without duplication; (lv) in the form of a mixed convention, although most delegates preferred to negotiate a double convention; (lv) truly global in nature whereby elements of all legal and judicial systems are taken into consideration; and (v) able to respect the balance between the plaintiff and the defendant.

The Special, Commission discussions on the Preliminary Doc. No.7 essentially focused on the rules of direct jurisdiction. However within the

broader framework of general Jurisdiction under the proposed convention the following issues figured: (a) foundation of Jurisdictional rules in general and specific circumstances; (b) criteria for jurisdiction should include national persons, companies and legal persons; (c) criteria to decide fora for jurisdiction would include place of headquarters, principal place of business place of incorporation and place of central management and control; (d) issue of party autonomy; (e) formal validity and material validity for choice of court; (f) tacit acceptance of court; (g) jurisdiction in matters relating to legal persons, immovable property and intellectual property rights; (h) Jurisdiction in matters relating to enforcement of judgements; (i) jurisdiction in matters of contract; jurisdiction in matters relating to tort, wherein specific case of traffic accidents, products liability and environmental torts were considered; (k) competition laws; (l) nationality and domicile of parties; and (n) protective measures.

All delegations were of the unanimous view that not only is an exchange of information on the application and implementation of the Convention essential, but also that a uniform interpretation of the future Convention would ensure the objective of the Convention of good international management ofjustice and improved efficiency.

It may be stated that the nineteenth session of Hague Conference noted that as globalization of world economies posed increased difficulties in dealing with matters relating to international litigation, especially where private parties are involved it require adoption of a new convention to ensure jurisdictional equality among plaintiff and defendants. In furtherance of this need, the Special Commission of the Conference decided to commence work from March 1998 on Chapter III of the Preliminary Document No.7, dealing with foreign decisions. Matters relating to protective measures, *lis pindens* multiple defence warranty and guarantee of third party proceedings and *forum non conveniens*, would also be discussed.

As regards the meeting of Special Commission in November 1998, the task would be to prepare a preliminary draft convention, as far as complete, to enable further consultation before the Special Commission meeting in 1999, which will prepare the preliminary draft Convention ready for adoption at the Diplomatic Session in 2000.

(iii) B.Secretariat Study : World Trade Organisation : Dispute Settlement Mechanism

OVERVIEW OF GATT PRACTICE

A. Institutional mechanism

Paragraph 3:1 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter 'Dispute Settlement Understanding' or 'Understanding'] commits the Members of WTO to adhere to dispute settlement principles as provided under Article XXII and XXIII of GATT 1947. Taking into account this arrangement which aims at ensuring legal continuity of the GATT/WTO dispute settlement, this part shall endeavour to provide an overview of the working of the GATT dispute settlement system.

The General Agreement by itself contained no explicit provisions concerning dispute settlement panels. The right to dispute settlement was usually attributed to Articles XXII and XXIII of the General Agreement. Article XXII directed parties to consult with other party requesting consultation regarding "all matters affecting the operation of this Agreement". Article XXIII directed parites to give sympathetic consideration" to claims that "a benefit accruing directly or indirectly to a complaining party pursuant to the General Agreement was being nullified or impaired by some action of another party". If consultations did not yield a satisfactory agreement, Article XXIII ' allowed the aggrieved party to request the GATT Contracting Parties to investigate the matter and make recommendations to the parties concerned or give a ruling on the matter, as appropriate.

Apart from Articles XXII and XXIII,'international procedures for the settlement of disputes among GATT Contracting Parties are set out in a few special GATT provisions, such as Article XVIII:12 (disputes over balance-of payments restrictions) and Article sXXIV:7 (disputes over the GATT consistency of interim agreements for a customs union or free trade area), which do not exclude resort to the general GATT dispute settlement procedures in Article XXIII. Besides, the GATT regulates the resolution of trade disputes both at the national and the international levels. Article X:3(b) requires that:

"Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal or superior jurisdiction within the time prescribed for appeals..."

Thus, customs duties and non-tariff trade barriers can be reviewed by domestic courts in most GATT Contracting Parties.

Under Article XXIII complaints may take three forms.

(i) The first is a 'violation' complaint, which consists of a claim that one or more GATT disciplines has been violated (e.g. most-favoured-nation treatment).

(ii) Second, is a 'non-violation' complaint wherein Members may argue that although no specific GATT rules are violated, a government measure nonetheless nullifies a previously granted concession. Three conditions need to be met in order to bring such a non-violation complaint.

(a) the measure must be applied by a government-,

(b) it must alter the competitive conditions established by the agreed tariff bindings; and

(c)the measure must be 'unexpected' in that it could not have been reasonably anticipated at the time the concessions were negotiated.

(iii)The third possibility is a so-called 'situation' complaint, under which a Member may argue that 'any other situation' not captured by the violation or non-violation options has led to nullification or impairment of a negotiated benefit.

In the early years of GATT, the Contracting Parties set up -working parties' to handle disputes under Article XXIII. These working parties included the parties to the dispute, and hence exhibited a predisposition towards

negotiation. As of 1952, "panels" composed of three or five independent experts from third GATT Contracting Parties had become the preferred mode of dispute settlement. Panel procedures have thus evolved over a period of time 'and the dispute settlement procedures progressively codified and supplemented by a number of decisions and understandings adopted by the GATT Contracting Parties. This includes:

(i) Decision of 5 April 1966 on "Procedures under Article XXIII" applying to disputes between a developing contracting party and a developed contracting party;

(ii) Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979;

(iii) Decision on "Dispute Settlement Procedures" of 29 November 1982;

(iv) Decision on "Dispute Settlement Procedures" of 30 November 1984; and

(v) Decision on "Improvements to the GATT Dispute Settlement Rules and Procedures" adopted on 12 April 1989.

This transition from working parties to panels was a strategic choice to cultivate a more rule-oriented process for settling disputes.

After receiving submissions and hearing oral arguments, the panel deliberated for an unspecified period of time. Following its deliberation the panel issued a report, which need not be unanimous, announcing its findings, the reasons and if necessary making recommendations as to the future course of action to be taken by the disputing parties. A panel report had no legal effect by itself. Panel reports were submitted to and voted upon by the Contracting Parties (General Council). Reports could only be adopted by consensus of all voting parties, including the parties to the dispute. Consensus meant that no party present at a vote objected to the adoption of a report. A losing party could therefore prevent adoption of a panel report by objecting.

GATT Article XXIII:2 provides for three kinds of remedies. rulings, recommendations and suspension of obligations[1] . The adoption by the Contracting Parties, acting through the General Council, of a dispute settlement report is regarded in GATT practice as a 'ruling'. The power to give a ruling includes the power to decide on the GATT-consistency of disputed trade measures and, in this context, to decide on the interpretation and application of GATT provisions that are relevant for the dispute settlement. It also includes the power to determine the legal responsibilities of a contracting party that has violated GATT law. 'Recommendations' relate to the implementation of ,rulings' and differ from them by their non-binding character. Recommendations need to be consistent with GATT law and applicable general international law. For example, in case of a discriminatory tax on imported products in violation of Article 111:2 , the recommendation must respect the range of legal options which GATT law grants to the defaulting country to remove the GATT - inconsistenty(e.g. reduction of the higher tax on imports, increase in the lower tax on domestic products, abolition of the tax, etc), In such cases, the dispute settlement body will only request the defendant to bring the inconsistent measure in conformity with GATT law by appropriate means of the country's own choice. The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to an authorisation to that effect by theContracting Parties.

Like many other international agreements, GATT does not define the legal responsibilities of a contracting party that has violated its obligations, But it has long been recognized in GATT dispute settlement practice and in "secondary GATT law" that :

"the first objective of the Contracting Parties is usually to secure the withdrawal of the measures concerned if these are found to ' be inconsistent with the General Agreement. The provision of compensation should be resorted to only if the immediate

[1] For an elaborate discussion on remedies, see E.U. Peterssmann, *The GATT/WTO Dispute Settlement System - International Law, International Organizations and Dispute Settlement,* Kluwer Law International Ltd., pp.74-81. (1997)

withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are. inconsistent with the General Agreeinent"[2].

B. Working of the GATT dispute resolution mechanism - Evaluation

For the limited purpose of this study and considerations of brevity, this part avoids a comprehensive analysis, but focuses on providing a broad outline of the working of the GATT dispute settlement mechanism. Compared with other international dispute settlement mechanisms, the GATT system includes many unique features such as: the large number of complaints file by governments (more than 250 under GATT Article XXIII and the corresponding dispute settlement provisions in the 1979 Tokyo Round Agreements); the large number of disputes on which a panel was established and submitted a report (more than 130), the average speed of panel procedures(less than 10 months between the establishment of the panel and the submission of its report); the regular adoption of panel reports by the GATT Council until the beginning of the Uruguay Round., and the regular implementation of adopted panel rulings within a reasonable period of time.[3]

Until the start of the Uruguay Round negotiations in 1987, virtually all panel reports submitted to the GATT Council under Article XXIII:2 had been adopted. But also in the, case of the four GATT panel reports[4]not adopted under Article XXIII between 1948 and 1987 , the disputing parties settled their dispute on the basis of the panel report. The GATT Director-General in his annual report to the GATT Council in 1989 stated:

"Overall the experience with the adoption of panel reports continues to be good. There has so far been no instance in which a panel report was neither adopted nor implemented merely because the party complained against refused to accept the panel's recommendations"[5]

[2] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979.

[3] Petersmann, supra n. 5, at p. 87

[4] These were the Soyabeans Panel Report (L/5 142), the EEC Canned Fruit Panel Report (L/5778), the EEC Citrus Preferences Panel Report (L/5776)and the Gold Coins Panel Report (L/5863).

[5] GATT documents C/RM/OV/1at p.7

Notwithstanding such significant features, the following developments fuelled the need for a more resilient and fool-proof mechanism of dispute resolution. The successful GATT dispute settlement practice under Article XXIII as mentioned above contrasted, since 1983 with a number of unadopted panel reports elaborated by panels established by the Subsidies Code Committee under the special Subsidies Code and the Anti-Dumping Committee under the Anti-Dumping Code. Since the 1980s, the Political pressures at the Uruguay Round negotiations induced the European Communities (EC) and United States to link the adoption of certain panel reports under Article XXIII to the conclusion and implementation of the Uruguay Round results.

Under the GATT dispute settlement system, the European Communities United States and Japan were involved in the majority of the proceedings. Though the General Agreement was replete with special provisions for developing countries and the Decision of 5 April 1966 on "Procedures under Article XXIII" entitled developing countries to the good offices of the Director-General and a panel procedure with shorter time limits, it is interesting to note that it was invoked only a handful of times, and in each of those few instances the disputants settled or withdrew the complaint before a panel could issue a report[6]. Also the increasing recourse to unilateral trade sanctions by some States on grounds that the existing dispute settlement system was too slow and unreliable, raised concerns leading to the desire to establish a genuine system of enforceable rules and remedies.

WTO UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

A. INTRODUCTION

The Uruguay Round of Multilateral Trade Negotiations launched in 1986, concluded on 15 April 1994 in Marakesh (Morocco) with the signing of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and opening for signature the Agreement establishing the

[6] P.M Nichols GATT Doctrine, 36 Virginia Journal of International Law (1996), p. 451.

WTO[7]. The WTO came into existence on 1 January 1995.

The subject-matter of this study - the 'Understanding on Rules and Procedures Governing the Settlement of Dispute' (hereinafter 'Understanding'), is appended as Annex- 2 to the Final Act. The Understanding, which contains 27 paragraphs and four annexes, provides an integrated dispute settlement mechanism linking trade in goods, services and intellectual property. Exhibiting a conscious deviation from the ambivalent approach under the GATT, the WTO Understanding seeks to provide a firm legal basis for the settlement of disputes. The preference for such a rule-oriented dispute settlement process finds manifestation in the elaborate and assiduously constructed provisions for an institutional framework and detailed procedures, as embodied in the Understanding.

The Understanding is administered by a Dispute Settlement Body (DSB). The Agreement Establishing the WTO (Article IV.3) provides that its General Council, consisting of representatives of all contracting parties, shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body. For this purpose, the membership of the DSB would be the same as that of the General Council, but it may have its own Chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities. The DSB would administer all dispute settlement procedures, including establishment of panels, consideration of panel reports, providing for appeals, surveillance of implementation of ruling and recommendations, and authorization of retaliatory measures as a last resort.

B. DISPUTE SETTLEMENT MECHANISM - AN OVERVIEW

1. Rule-oriented adjudicative system:

Paragraph 23 of the WTO Understanding constitutes the basis of a legally binding dispute settlement mechanism. Paragraph 23.1 declares..

[7] For full text, see 33 *International Legal Materials* (1994), p 1140. For a more detailed study on the Final Act, see AALCC Secretatial brief on 'WTO as a Framework Agreement and Code of Conduct for the World Trade', supra n. 2

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered they shall have recourse to and abide by, the rules and procedures of this Understanding.

Recourse to unilateral retaliatory measures is prohibited under paragraph 23.2(a) which states, "...Members shall not make a determination to the effect that a violation has occurred ,that benefits have been nullified or except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding". Towards this end, the Members are obliged to..

(a) make a determination consistent with the panel or Appellate Body report adopted by the DSB or an arbitration award;

(b) to follow the procedures set out in paragraph 21 of the Understanding , in determining the reasonable period of time for the implementation; and

(c) to follow the procedures set out in paragraph 22 of the Understanding for determining the level of suspension of concessions and to obtain authorization from the DSB for retaliation.

The legalistic character of the Understanding is reaffirmed in paragraph 3.2 , wherein Members of the WTO recognise that it [Understanding]serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".

2. Continuity with the GATT regime

To ensure legal continuity and build upon the existing jurisprudence on the subject, the WTO Agreement and the Dispute Settlement Understanding explicitly provides that in its operation, consideration would be given to past, GATT, practices and procedures. According to paragraph XVI.1 of the WTO Agreement, "the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties tp GATT 1947and the bodies established in the framework of GATT 1947"

Similarly, under paragraph 3.1 of the WTO Understanding, "the Members of the WTO affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947, as further elaborated and modified therein". It can be expected that the interpretation and application of WTO dispute settlement mechanism will therefore be. strongly influenced by the past evolution of the GATT dispute settlement system since 1948.

Scope and Coverage[8] :

According to Article II.2 of the WTO Agreement, the Understanding is an "integral part of this Agreement, binding on all Members". Thus the Understanding constitutes a single binding framework integrating various multilateral and plurilateral agreements and unified dispute settlement mechanism.

coverage *ratione materiae* : Paragraph 1 of the Understanding styled "Coverage and Application lays down the material jurisdiction of the WTO dispute settlement mechanism. Paragraph 1. 1 provides that the Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement procedures of the agreements listed in Appendix I[9] of this Understanding (hereinafter referred to as 'covered agreements). The covered agreements include.. the WTO Agreement. Agreements on Trade in Goods. the General Agreement on Trade in Services (GATS), the Agreement on Trade -Related Aspects of Intellectual Property Rights and the WTO Dispute Settlement Understanding. That apart, the dispute procedures of the Understanding also covers disputes between WTO Members concerning their rights and obligations under the WTO Agreement and the WTO Understanding taken in isolation or in combination with any of the other covered agreements.

Secondly, many multilateral agreements forming part of the covered agreements such as the Agreement on Implementation of Article VI of GATT

[8] For detailed analysis on the scope and coverage of the DSU, see Norio Komuro, 7he WTO Dispute Settlement Mechanism - Coverage and Procedures of the WTO Understanding, 29 Journal of World Trade(1995), pp 5-96

[9] For text see Appendix-I,

1994[10], Agreement on Technical Barriers to Trade[11] Agreement on Subsidies and Countervailing Measures[12]Agreement on Implementation of Article VII of GATT 1994[13], Agreement on Sanitary and Phytosanitary Regulations[14]and Agreement on Textiles[15] - quite independent of the dispute settlement procedures under the Understanding contain special dispute settlement rules and procedures[16]. The rules and procedures of the Understanding applies to these agreements subject to such special or additional rules and procedures on dispute settlement. Paragraph 1.2 states that, "to the extent that there is a difference between the ... Understanding and the special or additional rules and procedures, the special or additional rules shall prevail".

Coverage *ratione temporis*: Coverage of the WTO dispute settlement mechanism, as per paragaph 3.1 1, is strictly limited to new disputes between WTO Members for which requests for consultation are made after the entry into force of WTO. As regards disputes, for which the request for consultations was made under GATT 1947 or where the panel reports were not adopted or fully implemented, the pre-WTO dispute settlement mechanism will continue to apply.

Article II.4 of the WTO Agreement provides that GATT 1947 and GATT 1994 (which forms part of the WTO Agreement) are "legally distinct", and co-exist after the entry into force of the WTO Agreement. The WTO Understanding is silent regarding disputes arising during the transitional coexistence of the WTO and pre-WTO regimes. This aspect is covered by the Transitional Arrangements of 8 December 1994.[17]

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[10] 17.4 to 17.7

[11] 14.2 to 14.4 Annex 2

[12] 4.2 to 4.12, 6.6,7.2 to 7.10,8.5,25.3 to 25.4, 28.6,Annex V

[13] 19.3 to 19.5, Annex II.2(f), 3, 9, 21

[14] 36

[15] 2.14,2.21,4.4,5.2,5.4,5.6,6.9 to 6.11,8.1 to 8.12.

[16] Appendix -II of the Understanding.

[17] See the Transitional Coexistence of the GATT 1947 and the WTO Agreement (PC/12, L/7583, 13 December 1994)as adopted by the Preperatory Committee for the WTO and the Contracting Parties to GATT 1947 on 8 December 1994.

4. Settlement of disputes - Violation complaints

The WTO regime retains the three categories of complaints as it existed under the GATT regime, viz., violation complaint, non-violation complaint and situations complaint. As regards, a violation complaint, paragraph 3.8 of the Understanding states that:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge".

This section discusses the working of the dispute settlement mechanism within the framework of the WTO Understanding. The procedure as outlined herein will more particularly be applicable to violation complaints.

(i) Consultations

Consultations take place when "measures affecting the operation of any covered agreement taken within the territory of a Member" are at stake. The Member requesting such consultations shall notify the DSB and the relevant Councils and Committee, about the request. Where such a request for consultation is made, the Member to which the request is made shall accord sympathetic consideration and shall enter into consultations within a period of 30 days from the date of request. Wherein the requested party does not enter into consultations within the stipulated time or if the consultations do not result in a settlement of the dispute - the complaining party may, under paragraph 4 ofthe Understanding, request the establishment of a panel. The timeframe is accelerated in cases of urgency, including those that concern perishable goods.

Whenever a third-party considers that it has a 'substantial trade interest' in such consultations, such party may join in a consultation under the following conditions:

(a) the third party notifies its desire to join the consultations to the

consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations,

(b) the consulting Member to which the request for consultations was addressed concurs with such a request.

(ii) Good Offices, Conciliation and Mediation

Paragraph 5 of the Understanding permits the parties to a dispute to "voluntarily undertake good offices, conciliation or mediation', if they so agree. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Unlike the 1979 Understanding which provides for conciliation in case of failed consultation, the WTO Understanding allows a request at will for good offices, unconditionally. This arrangement is a reflection of the intention of the drafters to promote a negotiated solution rather than an adjudicative solution, even after a formal process has commenced.

When good offices, conciliation or mediation are entered into within 60 days after the request for consultations, the complainants must allow a period of 60 days after that request, before requesting the establishment of a panel. If the parties agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds,

(iii) The Panel Process

The panel process can be discussed in three stages: initiation stage, operational phase and adoption of panel reports.

(a) Initiation stage

Establishment of a panel: Paragraph 6 of the WTO Understanding reaffirms the right of a complaining party to have a panel process expeditiously initiated. On the request of a complaining party, a panel shall be established by the DSB. The Understanding provides for a time-frame in this regard, whereby a panel must be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda. The

setting up of a panel cannot be blocked, as was the case under GATT, unless the DSB by consensus decides not to establish a panel. This rule of 'negative consensus' for decision making by the DSB has the advantage of securing the automaticity of dispute settlement procedures by excluding a veto by the defendant party. Paragraph 7 lays down the standard terms of reference of panels unless the disputing parties agree otherwise wit in 20 days from the establishment of the panel.

Composition of a panel: Paragraph 8 of the Understanding lays down the qualificational requirements to be met by panellists. Panels shall be composed of "well qualified governmental and/or non-governmental individuals" with a wide experience. With a view to ensure the independence of the members, they must be selected from a sufficiently diverse background. However, panellists shall not be citizensof the disputing parties or third parties, unless the parties to the disputes agree otherwise.

Panels shall be composed of three panellists, unless the parties to the dispute agree to a panel of five panellists. If there is no agreement on the composition of panellists, the Director-General of the WTO, in consultation with the Chairman of the DSB and the parties to the dispute, shall form the panel by appointing the panellists whom he/ she considers more appropriate, in accordance with any relevant special or additional procedure of the covered agreement. In case, where the dispute is between a developing country Member and developed country Member, the panel. shall include at least one panellist from a developing country Member.

Procedures for multiple complaints: Where more than one Member requests the establishment of a panel related to the same matter, paragraph 9 warrants that to the extent feasible, a single panel should be established to examine such complaints. However, if more than one panel is established, to the greatest extent possible, the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonised.

(b) Operational phase

Function of panels: Paragraph 11 of the Understanding states that the function of panels is to assist the DSB in discharging its responsibilities. Towards this end, the panels primary task is to:

(a) make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements,

(b) make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements; and

(c) consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Panels procedures: Panels shall follow the Working Procedures appended to the Understanding as Annex-3[18] unless the panel decides otherwise. Paragraph 12 mandates the panellists to fix the timetable for the panel process, in consultation with Parties to the dispute. The understanding sets out detailed rules of procedure regarding the time periodfor deposit of written submissions by the parties to the panel.

The findings of a panel shall be submitted in the form of a report. Where a settlement the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached. In instances where parties fail to develop a mutually satisfactory solution, the panel report shall set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations that it makes.

As a general rule, the duration of the panel proceedings - from the time of its composition to the time when the final panel report is made available to the disputing parties - shall not exceed six months. Should the panel find the duration to be inadequate, it shall inform the DSB of the reasons for the delay together, with an estimate of the period within which it will submit the report. In no case, shall the duration for panel proceedings exceed nine months. Exceptionally, the panel may, following a request from the complaining party

[18] For full text, see appendix 3

suspend its work for a period not exceeding twelve months, beyond which the authority for establishment of the panel shall lapse.

Where one or more of the parties is a developing country Member, the panel shall accord sufficient time for such Members to prepare and present its argumentation. In addition, the panel report shall explicitly indicate the form in which account has been taken of the relevant provisions on differential and more-favourable treatment for developing country Members.

Panels have the right to seek information and technical advice from any individual or body which it deems appropriate. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.(Appendix 4 to the Understanding)[19] . Besides, the panel deliberations shall be confidential and the panel reports shall be drafted without the presence of the parties to the dispute.

Interim Review: Paragraph 15 provides for an interim review stage. Following the consideration of the submissions of the disputing parties. the panel shall submit the descriptive (factual and argument) sections of its draft report to the parties, for their comments. After receiving the parties' comments, the panel shall issue an interim report to the parties, including the panel's findings and conclusions. If a party requests a review of parts of the interim report within the period set by the panel, the panel should hold a further meeting with the parties to discuss the issue. If no comments are submitted within the comment period , the interim report shall be considered the final panel report. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage.

(c) Adoption of panel reports

After the interim review stage, the final panel report is issued to the parties within two weeks and to the WTO members within three weeks. Paragraph 16 lays down that with a view to provide sufficient time for the WTO Members to consider panel reports, the reports shall not be considered

[19] For Full text see Appendix 4

for adoption by the DSB until 20 days after their circulation to the WTO Members. If Members have objections to a panel report, they shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered. The disputing parties have the right to participate fully in the DSB's consideration of the panel report and their views shall be fully recorded.

The report shall be adopted by the DSB, within 60 days of the issuance of the panel report to the Members, unless one of the disputing parties formally notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report. Where a party has notified its intention to appeal the panel report shall not be adopted until the appeal process is completed.

(iv) Appellate Review

Standing Appellate Body - Composition and Functions: Paragraph 17 provides that a standing Appellate Body shall be established by the DSB to hear appeals from the panel cases. It will be composed of seven members. Members shall be appointed for a four-year term , and each person may be reappointed once. As regards the qualifications of such members, they shall be persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.

Only parties to the dispute may appeal a panel decision. Third parties which have notified the DSB of a substantial interest in the matter, may make written submissions and given an opportunity to be heard by the Appellate Body. An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel. The report of the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. Rules of confidentiality and transparency governing the panel proceedings are *mutatis mutandis* applicable to the Appellate Body.

As a general rule, the appellate proceedings shall not exceed sixty days from the date a party notifies its intention to appeal to the date the Appellate Body issues its decision. If the Appellate Body finds the duration to be inadequate, it shall inform the DSB of the reasons for the delay together with

an estimate of the period within which it will submit the report. In no case, shall the duration for appellate proceedings exceed ninety days.

Adoption of Appellate Report: An appellate report shall be adopted by the' DSB and unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt the appellate report within thirty days following its issuance to the Members. The WTO Members have the right to express their views on an appellate report.

The WHOUnderstanding sets stringent time periods for each phase of the panel and appellate proceedings. Paragraph 20 provides that the period from the establishment of the panel to the time until the DSB considers the panel or appellate report for adoption shall, as a general rule, not exceed nine months where the report is not appealed or twelve months where the report is appealed.

(v) Implementation

The DSB oversees the implementation of the recommendations. The WTO Understanding sets out a three-fold system of remedies, which includes : prompt compliance with recommendations. compensation, and suspension of concessions.

(a) Prompt compliance with recommendations or rulings of the DSB is essential to ensure effective resolution of disputes to the benefit of all Members. Hence, paragraph 21.3 directs the defendant party to inform the DSB meeting, within 30 days of the adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations of the DSB. If immediate compliance is not feasible, then the defendant party shall be given a reasonable period of time to do so. The reasonable period of time shall be

(i) the period of time proposed by the defendant party and approved by the DSB;or

(ii) in the absence of such an approval, a period of time mutually agreed by the parties to the dispute within 45 days after the adoption of the

recommendations and rulings; or

(iii) in the absence of such agreement, a period of time determined through binding arbitration within 90 days following the adoption of the recommendations and rulings.

In case, there is a disagreement on the consistency of the measures taken by the defendant party with a covered agreement, such dispute shall be decided through recourse to these dispute settlement procedures, involving resort to the original panel wherever possible. The panel shall issue its decision within 90 days of referral of the matter to it.

The DSB shall, under paragraph 21.6, keep under surveillance the implementation ithe recommended measures. Any Member may raise the issue of implementation at the DSB following the adoption of recommendations. The issue of implementation shall be placed on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time and shall remain on the DSB's agenda until the issue is resolved. The defendant party shall provide a status report of the progress in implementation, ten days prior to each such DSB meeting.

Differential treatment is provided for monitoring a developing country Member that has brought a dispute settlement case. Under paragraph 21.8, in cases brought by a developing country Member, the DSB while consider what appropriate action might be taken is required to take into account not only the trade coverage of impairing measures, but also their impact on the economy of developing country Members concerned.

(b) Compensation and the Suspension of Concessions: In the event that the recommendations and ruling are not implemented within a reasonable period of time, paragraph 22.1 of the Understanding prescribes compensation and suspension of concessions or other obligations, as alternate remedies. The Understanding characterizes compensation and suspension as 'temporary measures' and declares that neither is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

If the defendant party fails to ensure prompt compliance with the recommended measure, it shall , no later than the expiry of the reasonable period of time, enter into negotiations with the other party, with a view to developing mutually acceptable compensation. Wherein no satisfactory compensation has been agreed upon within 20 days after the expiry of the reasonable period of time, any party which had invoked the dispute settlement mechanism may seek authorisation from the DSB to suspend the application to the defendant party , of concession or other obligations.

Principles governing suspension of concessions: In considering what concessions or other obligations to suspend the complaining party shall apply the following principles and procedures:

Parallel retaliation - The general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment.

Cross-sector retaliation - If the party considers that parallel retaliation is not practicable or effective, it may seek to suspend concessions or other obligations in other sectors under the same agreement.

Cross-agreement retaliation - If the party considers that it is not practicable or effective to seek cross-sector retaliation, it may seek to suspend concessions or other obligations under another covered agreement.

Where the complaining party decides to seek authorization to suspend concessions, either cross-sector or cross-agreement retaliation, then it shall state the reasons therefor. At the same time as the request is forwarded to the DSB, it shall also be forwarded to the relevant Councils and sectoral bodies.

In applying the above principles, the complaining party must take into account two elements, viz.,

- trade in the sector or under the agreement under which nullification or impairment has been found, and the importance of such trade to that party;

- the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other

Authorization by DSB: When a request seeking authorization is made, the DSB shall suspend concessions within thirty days of the expiry of the reasonable period of time, unless the DSB decides by consensus to reject the request. In this context, it is important to note that the level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment . Where a covered agreement prohibits such suspension, the DSB shall not authorize suspension.

In the event of a dispute - where a defendant party objects to the level of suspension proposed or claims that the principles and procedures for seeking cross-retaliation has not been followed by the complaining party - the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel or by an arbitrator appointed by the Director-General and shall be completed within 60 days of the expiry of the reasonable period of time. The parties shall accept the arbitrator's decision as final and shall not seek a second arbitration.

The suspension of concession or other obligations shall be temporary, and shall be applied until such time.

- the inconsistent measure is removed; or
- the defendant party that must implement the recommendations provides a solution to the nullification or impairment of benefits; or
- a mutually satisfactory solution is reached.

5. Settlement of disputes - 'Non-violation' and 'Situations' complaints:

Non-violation complaint: The WTO Agreement confirms the continued availability of non-violation complaints, more notably in the specific dispute settlement provisions of the WTO Subsidies Agreement (Art.4), the Agreement on Agriculture (Art. 13), the General Agreement on Trade in

Services (GATS) [Art. XXIIII, and in the Agreement on TradeRelated Intellectual Property Rights (TRIPS) [Art.641. More specifically, paragraph 26 of the WTO Understanding codifies and develops the relevant rules on non-violation complaints as described in GATT Article XXIII: 1(b).

Paragraph 26.1 postulates the applicability of the WTO Understanding and requires a panel or Appellate Body to make rulings or recommendations, in a dispute that involves a non-violation complaint, on the fulfilment of the following two conditions:

1. The non-violation provision as laid down under Article XXIII: 1(b) is applicable to the relevant covered agreement. and

2. A party to the dispute considers that any benefit accruing to it directly or indirectly under the covered agreement is being nullified or impaired, or the attainment of any objective of that agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that agreement.

Wherein a panel of Appellate Body determines that a case concerns non-violation complaints, the procedures of the WTO Understanding apply, subject to the following four conditions:

(a) the complaining party should present a detailed justification in support of its nonviolation complaint;

(b) even when there is a determination made that the measures complained against nullifies or impairs a benefit arising out of a covered agreement, but if such measures do not violate the agreement, there is no obligation to withdraw the measures. In such cases, the panel or Appellate Body may however, may recommend that the defendant party make a mutually satisfactory adjustment.

(c) In case parties resort to the arbitration procedure, as set forth in paragraph 21.3, the resulting arbitral determination may clarify the level of benefits which have been nullified or impaired and also suggest ways and

means of reaching a mutually satisfactory adjustment. However, such suggestions shall not be binding upon the parties.

(d) Compensation may be part of a mutually satisfactory adjustment as a final settlement of non-violation disputes.

It must be noted that the above four conditions, substantially varies with the normal procedure prescribed for a violation complaint.

Situation complaint. Paragraph 26.2 states that a panel may make rulings/recommendations in a dispute involving a 'situation' complaint, provided:

1. The situation complaints provision as laid down under Article XXIII-.l(c) is applicable to the relevant covered agreement; and

2. A party to the dispute considers that any benefit accruing to it directly or, indirectly under the covered agreement is being nullified or impaired, or the attainment of any objective of that agreement is being impeded as a result of the existence of any situation other than violation of covered agreements and non-violation measures.

Wherein a panel determines that a case is covered by situation complaints, the procedures of the WTO Understanding apply, subject to the following conditions:

(a) the complaining party should present a detailed justification in support of its situation complaint,

(b) the procedures of the WTO Understanding shall apply 'only up to and including the point in the proceedings where the panel report has been issued to the Members'.

(c) the procedures for adoption recommendations, surveillance and implementation are governed by the dispute settlement rules and procedures contained in the GATT Decision of 1989, and not by the WTO Understanding; and

(d) if a panel finds that cases also involve dispute settlement

matters other than those of a situations complaint, then the panel shall issue a report addressing such matters and a separate report on matters concerning the situation complaint.

6. Special procedures for Least-Developed Countries

Paragraph 24.1 of the WTO Understanding lays down the general rule that, "at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member (LDC), particular consideration shall be given to the special situation of LDCs". In this regard, Members of the WTO are obliged to exercise due restraint in raising matters under these procedures involving a least-developed country. More specifically, if nullification or impairment is found to result from a measure taken by a LDC, then complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concession or other obligations, pursuant to these procedures. Besides, paragraph 24.2 mandates the DirectorGeneral or the Chairman of the DSB, on a request from the least-developed country Member and when consultations have not yielded a solution, to offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute.

Apart from paragraph 24, the Understanding contains a host of other provisions concerning special procedures for developing countries, Following is a checklist of such provisions..

3.12 - if a complaint is brought by a developing country member, as an alternative the procedures under the Understanding, choose to apply the provisions of the GATT 1966 Decision which entitles developing countric# to the good otices of the Director-General and a shorter time limit for panel procedures.

4.10 - WTO Members shall give special attention to the particular problems of developing countries during consultations.

8.10 - in a dispute involving a developed and developing country Member, the composition of the panel shall at least include one, panellist from

a developing country, if the if the developing country Member so requests.

12.10 - the panel examining a complaint against a developing country shall grant sufficient time for the developing country to prepare and present its arguments.

12.11 - in disputes involving a developing country, the panel report shall explicitly indicate how special and differential provisions raised by the developing country has been taken into account.

21.2 and 21.8 - While keeping the implementation of recommendations under surveillance , particular attentions shall be paid to matters affecting the interest of developing countries. If the case has been brought by a developing country Member, the DSB while considering what appropriate action might be taken is required to take into account not only the trade coverage of impairing measures, but also their impact on the economy of developing country Members concerned.

C. General Comments

The WTO Understanding, which constitutes a single integrated system of dispute settlement covering trade in goods, services and matters arising out of the TRIPS Agreement constitutes a significant advancement , as against the legally fragmented GATT system. The wider coverage of the WTO Understanding has the distinct advantage of not only reducing the scope for 'forum shopping', but also enables Members to benefit from the DSB's authorization of 'cross-retaliation' when suspension of concessions in the same sector is not practicable.

The edifice of the WTO dispute settlement mechanism is fundamentally constructed on the following three basic premises: (i) the right to seek establishment of a panel; (ii) the general application of a panel's recommendations., and (iii) the prohibition of resort to unilateral measures for vindication of trade interests. Such a rule-oriented approach and judicialization of dispute settlement process would lead to increased recourse by Member States to the WTO's dispute settlement procedures. More particularly, the

Understanding would meet the special requirements of small and marginalized economies, who can look up to an effective multilateral dispute settlement system as the final guarantor of their rights.

The Understanding also offers the widest possible alternatives for arriving at a negotiated settlement within an adjudicative framework. Given the scope for less formal procedures like consultations; good offices, mediation and conciliation; and arbitration it may be hoped that many disputes could be settled, without progressing to the panel stage, by mutual agreement between parties.

Guided by the lessons learnt from the GATT dispute settlement regime, the Understanding has introduced many innovative procedures which could render the dispute settlement under WTO more effective, timely and automatic. The introduction of 'negative .consensus' rule for decision-making by the DSB brings an element of automaticity to the decisions of the DSB. The stringent time frame governing all stages of the dispute proceedings, would ensure timeliness and certainty of the outcome. Moreover, the inclusion of procedures concerning 'interim review' and 'appellate review' could function as some kind of quality control, thereby strengthening the legal authority of panel reports.

Ideally, the introduction of special procedures for disputes involving least-developed countries, should lead to their increased participation in the dispute settlement proceedings. It is true that the Understanding is replete with such special provisions warranting due consideration of the interests of LDCs in the administration of the dispute settlement procedures. But, it is too early to speculate on the specific modalities by which, either the WTO Members or the panels, would extend the contemplated special and differential treatment for the LDC'S.

THE WORKING OF THE WTO DISPUTE SETTLEMENT SYSTEM SINCE ITS ESTABLISHMENT - A SURVEY

Since the entry into force of the WTO Agreement on 1 January 1995, and until the end of August 1997 the DSB was notified of almost 100 requests for consultations pursuant to paragraph 4 of the WTO Dispute Settlement

Understanding. In comparison with the GATT's dispute resolution mechanism (which dealt with some 300 disputes - an average of six disputes a year) the record of the WTO dispute setlement mechanism (averaging 40 disputes annually) has been hailed to represent a vote of confidence by WTO Members in the improved dispute settlement procedures of the new organization. This part of the brief endeavours to provide a preliminary survey of the working of the WTO dispute settlement system since its establishment.

Adoption of reports by the DSB: The DSB, which is the final decision-making body on all disputes within the WTO framework, has adopted the following seven reports (covering the period between January 1995 to September 1997) :

1. **United States - Standards for Reformulated and Conventional Gasoline, complaints by Venezuela and Brazil.** A single panel established to consider both complaints, found the regulation to be inconsistent with GATT Article 111:4 and not to benefit from an Article XX exception. Following an appeal by United States, the Appellate Body issued its report, modifying the panel report on the interretationof GATT Article XX(g), but concluding that the exception provided by Article XX was not applicable in this case. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 20 May 1996.

2. **Japan - Taxes on Alcoholic Beverages, complaints by the European Communities (EC), Canada and the United States.** A joint panel was established by the DSB on 27 September 1995. The panel report found the Japanese tax system to be inconsistent with GATT Article 111:2. Following an appeal by Japan, the Appellate Body reaffirmed the panel's conclusion , but pointed out the areas where the panel had erred in its legal reasoning. The Appellate Body Report,,together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 1 November 1996.

3. **United States - Restrictions on Imports of Cotton and**

Man-Made Fibre Underwear, complaint by Costa Rica. The panel found that the US restraints were not valid. On 11 November 1996, Costa Rica notified its decision to appeal against certain aspects of the panel report. The Appellate Body allowed the appeal. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 25 February 1997. On 10 April 1997, the US informed the DSB that the measure had expired on 27 March 1997 and not renewed.

4. **Brazil - Measure Affecting Dessicated Coconut, complaint by Philippines.** The report of the panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute. Following the appeal by Philippines , the Appellate Body upheld the findings of the panel. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 20 March 1997.

5. **United States - Measures Affecting Imports of Woven Wool Shirts and Blouses,** complaint by India. The panel established on 17 April 1996 found that the US safeguard measure violated the provisions of the Agreement on Textiles and Clothing and the GATT 1994. On 24 February 1997, India notified its intention to appeal. The Appellate Body upheld the panel's decisions on those issues of law and legal interpretations that were appealed against. The Appellate Body Report, together with the panel report as upheld by the Appellate Body Report, was adopted by the DSB on 23 May 1997.

6. **Canada - Certain Measures concerning Periodicals, complaint by the United States.** The panel established on 19 June 1996 found that the measure applied by Canada to be in violation of GATT rules. Following an appeal by Canada, the Appellate Body upheld the panel's findings and conclusions on the applicability of GATT 1994 to Part V. 1 of Canada's Excise Tax Act, but reversed the panel's finding that Part V. 1 of the Act was inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V. 1 of the Excise Act was inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the panel's conclusion that Canada's funded

postal rate scheme was justified by Article 111:8(b) of GATT 1994. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 30 July 1997.

7. **European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.** The panel established on 8 May 1996, found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, are inconsistent with various provisions of the GATT, the Import Licensing Agreement and the GATS. Following an appeal from the EC, the Appellate Body upheld most of the panel's findings that the EC regime was inconsistent with the WTO rules. The Appellate Body Report, together with the panel report as modified by the Appellate Body Report, was adopted by the DSB on 25 September 1997.

Negotiated settlements: An interesting feature of the WTO dispute settlement practice is that about one quarter of the disputes have not progressed to the adjudicatory phase but were resolved by the parties themselves at the consultation stage. This outcome amply justifies the decision of the drafters that the interpolation of a negotiation Outcome amply justifies the decision of the drafters that the interpolation of a negotiation mechanism along with formal adjudicatory process would render the dispute settlement mechanism more effective. The instances of such negotiated settlements are listed below"

Complainant	Subject of complaint	Status
1. Singapore	Malaysia: Prhibition of imports of polyethylene	complaint withdrawn
2. United States	Korea: Measures concerning the shelf-life of products	Bilateral solution notified
3. Japan	US: imposition of import duties on autos from Japan	Bilateral solution notified
4. Canada	EC: Trade description of scallops	Solution notified
5. Canada	EC: duties on imports of cereals	Appears settled
6. Peru	EC: Trade description scallops	Solution notified
7. United States	EC: Duties on imports of grains	Panel request withdrawn
8. Chile	EC: Trade description of scallops	Solution notified
9. EC	Japan: Measures affecting purchase of telecom equipments	Appears settled
10. India	Poland: Import regime for automobiles	Bilateral solution notified
11.Canada	Korea: Measures concerning bottled water	Bilateral solution notified
12. United states	Japan: measures concerning protection of sound recordings	Bilateral solution
13. India	US: Measures affecting imports of women's wool coats	Measures removed
14. Argentina Australia, Canada, New Zealand, Thailand, US	Hungary : Export subsidies of agricultural products	Solution notified
15. United States	Pakistan: Patent protection for pharmaceutical and agricultural chemical products	Bilateral solution notified
16. United States	Portugal: Patent protection under Industrial Protection Act	Bilateral solution notified
17. EC	US: The Cuban Liberty and Democratic Solidarity Act	Panel suspended on notified
18. EC	US: Tariff increases on products from EC	Measures terminated
19. US	Turkey: Taxation of foreign film revenues	Bilateral solution notified
20. Mexico	US: Anti-dumping investigations on fresh and chilled tomates	Appears settled
21. US	Australia: Textile, clothing and footwear import credit scheme	Appears settled
22. EC	Japan: Procurement of a navigatioal satellite	Bilateral solution notified

Increased Participation by developing countries: At much variance with the GATT practice, a new legal development in the WTO dispute settlement system is its frequent use by developing countries. As of August 1997, the developing countries have file 31 cases and have been the subject of 37 complaints. Among the AALCC Member States, Japn, India and Thailand have been the leading Complainants. The list of disputes wherein an AALCC Member State was involved whether as a complainant or as a subject of a Complaint is given below[20]:

Participation of AALCC Member States in WTO dispute Settlement Process

Complainant	Subject of the complaint
1. Singapore	Malaysia:prohibition of imports of polyethylene and polypropylene
2.United States	Korea: Measures cocerning the testing and inspection of agricultural products
3.United States	Korea: Measures concerning the shelf-life of products
4.Japan	US: Imposition of import duties on autos from Japan
5.EC	Japan: Taxes on alcoholic beverages
6.Canada	Japan: taxes on alcoholic beverages
7.United States	Japan: Taxes on alcoholic beverages
8.Thailand	EC: Import duties on rice
9. India	Poland: import regime for automobiles
10.Canada	Korea: measures concerning bottled water
11.Philippines	Brazil: Measures affecting dessicated coconut
12.United states	Japan: Measures concerning protection of sound recordings
13.Hong kong	Turkey: Restrictions on imports of textiles and clothing products
14.Sri Lanka	Brazil: Measures affecting dessicated coconut and coconut milk powder
15.India	US:Measures affecting imports of women's and girls' wool coats
16.India	US:Measures affecting imports of women's and girls' wool coats
17.India	Tukey:Restrictions on import of textiles and clothing products
18.Thailand and others	Hungary: Export subsidies of agricultural products
19.United States	Pakistan: Patent protection for pharmaceutical and agricultural chemical products
20.EC	Korea: Laws,regulations and practices in the telecommunication sector
21.United States	Korea: Measures concerning inspection of agricultural products
22.EC	Japan:Measures concerning sound recordings
23.US	Tukey: Taxation of foreign film revenues
24.US	Japan: Measures affecting consumer photographic film and paper
25.US	Japan: Measures affecting distribution services
26.Thailand	Turkey:Restrictions on imports of textiles and clothing products
27.United States	India: Patent protection for pharmaceutical and agricultural chemical products
28.Japan	Brazil: Certain automotive investment measures
29.EC	Indonesia: Certain measures affecting the automobile industry
30.Japan	Indonesia: Certain measures affecting the automobile industry
31.Malaysia, Thailand India,Pakistan	US: Import prohibition of certain shrimp and shrimp products
32.US	Indonesia: Certain measures affecting the automobile industry
33.Philippines	US: Import prohibition of certain shrimp and shrimp products
34.Japan	Indonesia:Certain automotive industry measures
35.EC	Japan: Measures affecting import of porks
36.EC	Japan:Procurement of a navigational satellite
37.US	Philippines: Measures affecting pork and poultry
38.EC	Korea: Taxes on alcoholic beverages

[20] WTO Focus August 1997.

39.US	Japan: Measures affecting agricultural products
40.EC	India: Patent protection for pharmaceutical and agricultural chemical products
41.US	Korea: Taxes on alcoholic beverages
42. Korea	US: imposition of anti-dumping duties on imports of colour television receivers
43. US	India: Quantitative restrictions on imports of agricultural, textile and industrial products
44.Australia	India: Quantitative restrictions on imports of agricultural, textile and industrial products
45. Canada	India: Quantiative restrictions on imports of agricultural, textile and industrial products
46. New Zealand	India: Qunatitative restrictions on imports of agricultural, texile and industrial products
47.Switzerland	India: Quantitative restrictions restrictions on imports of agricultural, textile and industrial products
48. EC	India: Quantitative restrictions on imports of agricultural, textile and industrial products
49. Japan	US: Measures affecting government procurement
50.EC	Korea: Definitive safeguard measure on imports of certain dairy products
51.Korea	US: Anti-dumping duty on dynamic random access memory semiconductors originating from Korea

Other Aspects:

Moreover, it is worth noting that the WTO Members are actively using a new feature of the TO procedures - the appellate review process. All the panel reports so far issued has been brought on peal to the Appellate Body for a final ruling. The review of the panel's rulings by an Appellate Body Ifills the aspirations of a legalised and rule-oriented dispute settlement mechanism and estops the losing rty from claiming that the dispute.settlement process was unfair, erroneous or incomplete.

ANNEXURES

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

A)	Agreement Establishing the Multilateral Trade Organization	
B)	Annex 1A	Agreememts on trade in goods
	Annex 1B	General Agreement on Trade in Services
	Annex1C	Agreement on Trade-Related Aspects of intellectual property Rights
	Annex2:	Understanding on Rules and Procedures Governing the Settlement of Disputes
C)	Annex 4.	Agreement on Trade in Civil Aircraft
		Agreement on Government Procurement
		International Dairy Arrangement Arrangement Regarding Bovine Meat

The applicability of this Understanding to Annex 4 Agreements shall be subject to the adoption of a decision by the Signatories of each Agreement setting out the terms for the application of the Understinding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the Dispute Settlement Body.

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES CONTAINED IN THE COVERED AGREEMENTS

Agreement	Rule and Procedures
Anti-Dumping	17.4 to 17.7
Technical Barriers to Trade	14.2 to 14.4, Annex 2.
Subsidies and Countervailing Measures	4.2 to 4.12, 6.6, 7.2 to 7.10, 8.5,footnote 33, 25.3 to 25.4, 28.6,Annex V.
Customs Valuation	19.3to19.5,Annex II.2(f),3,9,21
Sanitary and Phytosanitary Regulations	36
Textiles	2.14, 2.21,4.4, 5.2, 5.4, 5.6, 6.9,6.10, 6.11, 8.1 to 8.12
General Agreement on Trade in Services	XXII:3, XXIII:3
Financial Services	4.1
Air Transport Services	4
Ministerial Decision on Services	1 to 5
Disputes	

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in ANNEX 4 Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

APPENDIX 3

WORKING PROCEDURES

1. In its proceedings the panel will follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes. In addition, the following working procedures will apply.

2. The panel will meet in closed session. The parties to the dispute, or other interested parties, Will be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it will be kept confidential. Nothing in the Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential, information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, both parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5- At its first substantive meeting with the parties, the panel will ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought will be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the . panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals will be made at the second substantive meeting of the panel. The party complained against will have the right to take the floor first to be followed by the complaining party. Both parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the with the parties writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Section 8 of the Understanding shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 above will be made in the presence of both parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, will be made available to the other party.

11. Any additional procedures specific to the panel.

12. The panel proposes the following timetable for its work:

(a) Receipt of first written submissions of the Parties:
(1) complaining Party: 3-6 weeks
(2) Party complained against: 2-3 weeks

(b) Date, time and place of first substantive meeting with the Parties; Third Party session: 1-2 weeks

(c) Receipt of written rebuttals of the Parties: 2-3 weeks

(d) Date, time and place of second substantive meeting with the Parties: 1-2 weeks

(e) Submission of descriptive part of

the report to the Parties: 2-4 weeks

(f) Receipt of comments by the Parties on the descriptive part of the report: 2 weeks

(g) Submission of the interim report, including the findings and conclusions, to the Parties: 2-4 weeks

(h) Deadline for Party to request review of part(s) of report: 1 week

(i) Period of review by panel, including possible additional meeting with Parties: 2 weeks

(j) Submission of final report to Parties to dispute: 2 weeks

(k) Circulation of the final report to the Members: 3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the Parties will be scheduled if required.

APPENDIX 4

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of Article 13.2.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical service from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be 'released without formal thorization from the government, organization or

person providing the information. Where such information is requested from the expert review group but release of such information by the expert re view group is not authorised, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.