

ANNEXURE
DEFINITION OF
"PERMANENT ESTABLISHMENT"

The term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on;

- (a) the term "fixed place of business" shall include a place of management, a branch, an office, a factory, a workshop, a warehouse, a mine, quarry or other place of extraction of natural resources;
- (b) an enterprise of one of the territories shall be deemed to have a fixed place of business in the other territory if it carries on in that other territory a construction, installation or assembly project or the like;
- (c) the use of mere storage facilities or the maintenance of a place of business exclusively for the purchase of goods or merchandise and not for any processing of such goods or merchandise in the territory of purchase, shall not constitute a permanent establishment;
- (d) a person acting in one of the territories for or on behalf of an enterprise of the other territory shall be deemed to be a permanent establishment of that enterprise in the first-mentioned territory, but only if

1. he has and habitually exercises, in the first-mentioned territory, a general authority to negotiate and enter into contracts for or on behalf of the enterprise, unless the activities of the person are limited exclusively to the purchase of goods or merchandise for the enterprise, or

2. he habitually maintains in the first-mentioned territory a stock of goods or merchandise belonging to the enterprise from which the person regularly delivers goods or merchandise for or on behalf of the enterprise, or

3. he habitually secures orders in the first-mentioned territory wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises which are controlled by it or have a controlling interest in it;

- (e) a broker of a genuinely independent status who merely acts as an intermediary between an enterprise of one of the territories and a prospective customer in the other territory shall not be deemed to be a permanent establishment of the enterprise in the last-mentioned territory;
- (f) the fact that a company, which is a resident of one of the territories, has a subsidiary company which either is a resident of the other territory or carries on a trade or business in that other territory (whether through a permanent establishment or otherwise) shall not, of itself constitute that subsidiary company a permanent establishment of its parent company.

VI. CODIFICATION OF THE PRINCIPLES
OF PEACEFUL CO-EXISTENCE

(I) INTRODUCTORY NOTE

The subject "Codification of the Principles of Peaceful Co-existence" was referred to the Committee by the Government of India under Article 3(b) of the Committee's Statutes.

The subject was taken up for consideration at the Seventh Session of the Committee and was generally discussed on the basis of the statements made by the Delegates of Ceylon, Ghana, India, Iraq, and Japan. The Committee directed the Secretariat to collect the relevant materials on the subject including the report of the Special Committee set up by the U. N. General Assembly to consider the Principles of International Law concerning Friendly Relations and Co-operation between States, and decided to take up the subject for further consideration at its next Session.

At the Eighth Session of the Committee held in Bangkok, the subject was further considered on the basis of a comprehensive brief prepared by the Secretariat which included the report of both the meetings of the Special Committee of the General Assembly convoked in 1964 (New York). The Committee appointed a Sub-Committee to give detailed consideration to the subject. The Sub-Committee presented an interim report dealing with some of the aspects. The Sub-Committee was, however, not in a position to discuss all aspects of the matter due to lack of time. The Committee, therefore, directed the Secretariat to continue its study of the subject and to revise the draft articles prepared by it in the light of discussions at that Session and to place the revised draft articles before it for consideration at its Ninth Session.

(II) MEMORANDUM OF THE GOVERNMENT OF INDIA

The subject of Peaceful Co-existence is one which is of the greatest importance to all States, especially the Asian-African States. Though the final communique of the first Asian-African Conference held at Bandung in 1955 did not expressly refer to "Peaceful Co-existence" as such, it nevertheless set forth a ten-point declaration on the "Promotion of World Peace and Co-operation", which is essentially identical with the basic principles of peaceful co-existence as universally understood. The second Asian-African Conference, to be held in Algiers, is to specifically consider (item 9 of its provisional agenda), the subject of Peaceful Co-existence and its basic principles. In addition, numerous bilateral and multilateral declarations of various Asian and African States testify to the vital concern of these States with the principles of peaceful co-existence, in the context of modern international relations.

Besides, the United Nations General Assembly has, for some time, been considering the subject of "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". These principles are essentially related to those of peaceful co-existence. The consensus among the vast majority of Asian African States at the Sixteenth Session of the U. N. General Assembly (wherein the above mentioned item was first taken up by the General Assembly) was that the principles of International Law concerning friendly relations and co-operation among States were but synonymous with the basic principles of peaceful co-existence. The U. N. General Assembly, at its Seventeenth Session, referred to seven principles of International Law in regard to the subject of friendly relations

and co-operation among States (Resolution 1815(XVII)). Recently a Special Committee of the General Assembly, in which several Asian African members were represented, considered in detail four of these seven principles and has submitted a report, which is to be considered by the General Assembly at its present session. During this session, the General Assembly will also consider the remaining three principles of International Law referred to by it in Resolution 1815(XVII).

The Government of India would draw particular attention to the fact that the General Assembly is considering these principles "with a view to their progressive development and codification so as to secure their more effective application" (see Resolutions 1815(XVII) and 1966(XVIII)). In recent sessions of the General Assembly, as well as in the above mentioned Special Committee, several Asian-African States, as well as others, have emphasized the need for the adoption of a declaration amplifying these principles of International Law by the General Assembly.

The second conference of Heads of States and Governments of Non-aligned Nations (Cairo, October 1964) in its official declaration has also referred to Peaceful Co-existence. The conference, also in this declaration, recommended to the U. N. General Assembly that the latter should adopt a declaration on the principles of peaceful co-existence. It should be pointed out that a large number of Asian and African States are parties to this declaration.

It is submitted, in this light, that the Asian-African Legal Consultative Committee could play an important and useful role by formulating and amplifying the basic principles of peaceful co-existence, taking into account the view-points and interests of Asian African States.

(III) REPORT OF THE SUB-COMMITTEE

Appointed at the Eighth Session.

1. A Sub-Committee was constituted by a decision of the Asian-African Legal Consultative Committee dated August 8, 1966 to examine the question of Codification of the Principles of Peaceful Co-existence. The Sub-Committee was to report the result of its examination to the Committee before the close of its Eighth Session. The Sub-Committee consisted of the following delegates :—

1. Mr. H. L. de Silva (Ceylon)
2. Mr. D. K. T. Djokoto (Ghana)
3. Dr. S. P. Jagota (India)
4. Mr. Z. Arifin (Indonesia)
5. Mr. J. H. Rizvi (Pakistan)
6. Dr. Sompong Sucharitkul (Thailand, in the Chair)

2. The Sub-Committee held several meetings during the Eighth Session, where it proceeded with the general discussion of the subject as well as the methods of approach and procedure. The Sub-Committee had before it a collection of basic documents and materials as well as draft articles on the Principles of Peaceful Co-existence, prepared by the Secretariat, which it took occasion to examine and to discuss briefly. Their discussion was cut short owing to the limited time available.

3. Considering the shortage of available time and the fact that the same subject was being studied by a Special Committee of the United Nations, whose report would be discussed at the Twenty-first Session of the General Assembly, the Sub-Committee concluded that pending further discussion of the subject by the United Nations the Sub-Committee should

await the results of further studies and developments of State practice on the subject.

4. Nevertheless, the Sub-Committee, having examined the draft articles prepared by the Secretariat, rewrote some principles which it considered as forming constitutive elements of Peaceful Co-existence. It was able to agree on one principle, namely that of observance of obligations of States (attached as *Annex I* to this report). As time was running short, the Sub-Committee did not have an opportunity to consider the draft proposed by the Delegate of Thailand regarding the Principle of Cooperation (attached as *Annex II* to this report), or the draft proposed by the Delegate of Ceylon concerning the Principle of Non-intervention (attached as *Annex III* to this Report).

5. The Sub-Committee accordingly recommended that the subject be further studied by the Committee at its Ninth Session.

Sd. Sompong Sucharitkul
Chairman.

ANNEX I

PRINCIPLE OF OBSERVANCE OF OBLIGATIONS OF STATES

- (1) Every State has the duty to observe strictly and in good faith obligations arising under International Law, unless their observance will be in conflict with any provisions of the Charter of the United Nations, or the performance of such obligations has become unduly burdensome or unjust.
- (2) Where an existing treaty is found to be in conflict with any provisions of the Charter, the rights and obligations under such treaty shall be void.
- (3) Where the performance of an existing treaty obligation has become unduly burdensome or unjust, such obligation shall no longer be binding.

ANNEX II

PRINCIPLE OF CO-OPERATION

(Prepared by the Delegate of Thailand)

1. A State has the right and legal duty to cooperate with other States and international organisations in the maintenance of international peace and security and in particular to assist and defend in a manner consistent with its existing obligations a State or country which has fallen victim of aggression. On the other hand, it shall strictly observe the legal duty not to cooperate in any manner with any other State or Country either by aiding, abetting or assisting, in the planning, initiation, preparation or perpetration of an act of aggression, infiltration, subversion or the so-called war of national liberation against

another independent sovereign State, or any act calculated to impair the political stability of a developing nation.

2. A State has the right and legal duty to cooperate with other States and international organisations in their individual and collective efforts to promote and maintain economic stability and to bring about progress and prosperity in the social and economic development, of all nations, large and small. In particular, it shall strictly observe the legal duty to refrain from any acts or measures calculated or tending to impede or retard in any manner whatsoever the social growth and economic progress of a developing nation or to impair in any way its social and economic stability.

ANNEX III

PRINCIPLE OF NON-INTERVENTION

(Prepared by the Delegate of Ceylon)

Article 1

(based on Art. 19 in Secretariat draft)

Subject to the provisions of Article 15 (of Secretariat draft) every State has the duty to refrain from intervening in matters within the domestic jurisdiction of another State.

Article 2

(based on Art. 20 in Secretariat draft)

(1) Intervention means such conduct on the part of a State as is calculated to deprive another State of its inherent discretionary powers in the conduct of its internal or external affairs.

(2) Without prejudice to the generality of the provisions of clause (1), it includes the use of armed force and recourse to acts of bribery, assassination, espionage, terrorism and the promotion of all forms of subversive activity against another State.

(3) The question whether the conduct of a State constitutes intervention should be determined by the Security Council or the General Assembly.

Article 3

(based on Art. 21 in Secretariat draft)

The enforcement of an international obligation by a State shall not be regarded as an act of intervention unless such obligation contravenes the United Nations General Assembly's Resolution on "Permanent Sovereignty over Natural Resources" or has become void on other grounds under these Articles.

(Articles 22, 23 and 24 of the Secretariat draft are unnecessary and out of place under this Principle.)

VII. WORLD COURT JUDGMENT ON
SOUTH WEST AFRICA
CASES