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1st ASIA COOPERATION DIALOGUE WORKSHOP
ON
STRENGTHENING LEGAL INFRASTRUCTURE

Strengthening Legal Infrastructure of Economic Laws: An Indian Experience*

I. Introduction. –

India is a Federal Republic. Constitution is supreme and rule of law prevails in all walks of life – economical, social and others. Legal infrastructure includes key aspects of State's legal system such as Law of Contract and the means for resolving contractual disputes and enforcing contractual obligations and in India the legal system follows common law tradition of laws and administrative practices for consistent interpretation and enforcement of laws. In the system of hierarchy of courts, the Apex Court (Supreme Court of India) has unique power under Article 142 of the Constitution of India to pass an order granting relief appropriate to the circumstances of a case. Jurisprudence on protection of environment had been developed by the Supreme Court of India, mainly, through public interest litigation and invoking its power and authority under Article 142 of the Constitution of India. The components of a country's legal infrastructure that are of greatest interest to international investors are the commercial law, the lawyers, the judges and the market regulators. Lawyers play three distinct roles. Firstly, they advise their clients about the effect of relevant law on a transaction contemplated by the parties. Second, it is the lawyer's job to memorialize the business understanding of their clients in clear, legally enforceable contracts. Finally, a lawyer

* Dr. K.N. Chaturvedi, Member Secretary, Law Commission of INDIA – Paper presented in ACD Workshop held in Tokyo on 21st May, 2004.

may be called upon to assist the client in seeking an interpretation or enforcement of the contract in judicial or arbitral proceeding. The Bar is thus a crucial component of the legal infrastructure in any country.

II. Legal Infrastructure and Market Economy. –

Legal Infrastructure for the Regulation of Market Economy underwent significant changes during the last 15 years. The foreign exchange reserve which was $1 billion in 1991 has now reached $181 billion. Independent regulators have come in place of the executive authority of Government for regulating capital market (Securities and Exchange Board of India), Telecom Regulatory Authority for providing communication services, Electricity Regulatory Commission in the energy sector and proposed Petroleum Regulatory Authority for regulating petroleum products and natural gases.

Securities Market. –

Till 1992, the Capital Issues Control Act, 1947 vested powers on the controller of capital issue to regulate securities market. In 1992, Securities and Exchange Board of India Act, 1992 replaced the institution of controller of capital issue by an independent body created under the Act which is responsible for regulating the securities market in the interest of investors. This body is independent and its decisions may be challenged by affected parties before the Securities Appellate Tribunal, a quasi-judicial body established under the Act and direct appeal lies to the Supreme Court.

Telecommunication. –

The Telegraph Act, 1885 regulates through licenses the operation of telecom services. Till recently, only the Government had the privilege of providing telecommunication services but with the passing of the Telecom Regulatory Authority Act, 1997, now the private players are also providing the basic and mobile telecom services.

Insurance Sector. –

In India, the business of life insurance was nationalized in 1956 and that of general insurance in the year 1972 with the passing of the Life Insurance Corporation Act, 1956 and the General Insurance Business (Nationalization Act, 1972). In the liberalized regime, the insurance sector was also thrown open to private players including foreign investors upto the equity of 26% after enacting the Insurance Regulatory Authority Act, 1999. This Act creates Insurance Regulatory Authority as an independent body to monitor the business of insurance in public and private sector.

Energy Sector. –

With the passing of the Electricity Act, 2003, the laws relating to generation, transmission, distribution, trading and use of electricity have been consolidated and the Indian Electricity Act, 1910, the Electricity Supply Act, 1948 and the Electricity Regulatory Commission Act, 1998 have been repealed. By the Electricity Act, 2003, the State electricity laws of the States of Andhra Pradesh, Haryana, Karnataka, Delhi, Madhya Pradesh, Rajasthan, Orrisa and of the Uttar Pradesh have been

saved to the extent those States Acts are not inconsistent with the Electricity Act, 2003. This Act is aimed at promoting competition, protecting interests of consumers and supply of electricity to all areas, rationalization of electricity tariff and the constitution of Central Electricity Regulatory Commissions and establishment of appellate tribunals under the Act.

III. Legal Framework for Development of National Highways, Roads, etc.

India is a vast country and the maintenance and development of national highways is regulated by the National Highways Act, 1956 and through a statutory authority known as National Highway Authority of India. For the development of national highways and roads under the Central enactments, i.e., the Central Road Fund Act, 2002, a cess of rupees one per litre is levied on production petroleum and diesel and on its import. The money so collected is credited to a fund for the development of national highways and rural roads in India.

IV. Legal Infrastructure for growth of multimodal transportation. –

Countries in the Asian region are experiencing growth in the demand for transportation services. The need of the hour is cost efficient transportation. Multimodal transport logistic is likely to be an appropriate strategy to encourage cost efficient, energy saving and ecologically friendly transportation. The Multimodal Transportation of Goods Act, 1993 provides a legal regime to govern on a uniform basis the liabilities and responsibilities of a multimodal transport operator who can provide services under a single document to shippers engaged in international trade. As containerization makes it practically impossible in

most cases for the claimants to establish where the goods were damaged, this Act provides relief/remedy in such cases.

V. Legal Infrastructure in the era of globalization:

Communities around the world have been working extremely hard to minimize legal barriers in order to bring the best to the world community. This may be achieved by –

(a) judiciary playing a significant role in applying appropriate legal principles to adjudicate international business disputes efficiently;
(b) development of substantive law in international business;
(c) more frequent use of arbitration in setting international business disputes. Arbitration and Conciliation Act, 1996 applies to both international as well as domestic arbitration. In several countries the laws of arbitration for international and domestic arbitration are governed by different statutes. The Law Commission of India undertook a comprehensive review of the existing Act and made recommendations in its 176th Report inter alia to provide that where the place of arbitration is in India whether in regard to arbitration between Indian parties or an international arbitration in India the Indian laws will apply. In an international arbitration where the place of arbitration is situated in India the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.
(d) building of stronger economic ties such as Malaysian Companies building highways in India and Indian Companies building railways in Malaysia;

(e) legal systems around Asian Countries vary and even where there is a great deal of similarities both procedural and substantive law are likely to differ. Study of Private International Law and its application in Asian Countries;

(f) closer economic partnership agreement – Hong Kong and China

(g) identifying in a proposed legislation as to whether there are any cross-border issues that should be addressed; are special rules required for civil claims with cross-border elements; are special rules required for criminal offences with cross-border elements; will any regulatory agency responsible for the regime be able to perform its role effectively in cross-border cases and should the legislation provide for recognition or enforcement of overseas decisions in a country vice versa other countries.

THE PREVENTION OF MONEY LAUNDERING ACT 2002 AND THE OBLIGATIONS OF BANKING COMPANIES, FINANCIAL INSTITUTIONS, ETC.[*]

1. Genesis – The International Conventions, Resolutions and Declarations have recognized money laundering as a serious threat not only to financial system of a country but also to their integrity and sovereignty. The United Nations believes that to eliminate criminals free access to their illegally gained profits is the most effective way to counter the expansion of transnational organized crime activities. Citing the Political Declaration of the United Nations General Assembly adopted in June 1998 calling upon the Member States to adopt national money laundering legislation and programme, the Parliament of India enacted the Prevention of Money Laundering Act, 2002.

2. Concept of Money Laundering – Money laundering is being recognized as a measure used by the Mafia, including organized gangs, narcotic groups and terrorists. Operation of organized crimes has increasingly become an international phenomenon as transactions and communication advances have expanded the opportunities to generate criminal profits and to conceal them from the authorities. The money laundering after all is an economic phenomenon wherein launders rely on already existing financial activities as a way of hiding illegally obtained funds. An act of money laundering consists of the following components, firstly, a crime has been committed; secondly, there are proceeds or gains from crime; and thirdly, there is a transaction in respect of the proceeds of or gains from the crime which involves three stages, namely, placement, layering and integration of the proceeds of crime into legitimate economy.

[*] Dr. K.N. Chaturvedi, Member Secretary, Law Commission of India, New Delhi Talk delivered at Reserve Bank of India, Mumbai on 22nd November, 2004

3. The Prevention of Money Laundering Act – The Prevention of Money Laundering Act 2002 provides for the creation of offence of money laundering, its detection, attachment of property, procedure for adjudication of attached property, management of property confiscated, duties of financial institutions and international cooperation through mutual assistance procedure. We are concerned at the moment with the obligations of banking companies and financial institutions under the Prevention of Money Laundering Act 2002 (hereinafter referred to as Act), therefore, the relevant provisions of that Act are discussed as below. The Act has yet to be brought into force and the rules are to be notified.

4. Obligations of Banking Companies and Financial Institutions – Chapter IV of the Act obliges banking companies, financial institutions and intermediaries to maintain records of the identity of the clients and of the transactions (section 12). The power of director in case of failure of a banking company, financial institution or an intermediary to comply with the provisions of section 12 have been discussed in section 13. Certain immunities have been provided to banking companies, financial institutions, intermediaries and their officers under section 14. The last section of Chapter IV is section 15 of the Act. Under this section, the Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information under sub-section (1) of section 12 for the purposes of implementing the provisions of the Act.

5. Obligations to maintain records – It is mandatory for every banking company, financial institution and intermediary to maintain the record of all transactions, i.e., the nature of the transaction, the amount of the transaction, the date on which the transaction was completed and the parties to the transaction of such nature and value as may be prescribed by the Central Government in the

rules. Further, such banking companies, financial institution and intermediaries are also obliged to verify and maintain the record of all its clients in such manner as may be provided in the rules made by the Central Government. The records shall be maintained for a period of ten years from the date on which the transaction between the clients and the banking company is completed. Under section 12, the discretion has been conferred on the principal officer of a banking company or financial institution to furnish information in respect of such transactions which are below the prescribed limit if such principal officer has reason to believe that a single transaction or a series of transactions connected to each other have been valued below the prescribed value so as to defeat the provisions of section 12. The expression "reason to believe" is different from the expression "reason to suspect", hence before exercising the discretion, the principal officer must have in his possession such material as would justify his action that a transaction or transactions have been entered into with a view to defeat the provisions of section 12.

6. Obligation to furnish information – Every banking company, financial institution and intermediary shall furnish information of transactions which have been recorded and maintained by them to the Director within such time as may be provided in the rules.

7. Powers of Director – Under Section 13(1) of the Act, the Director may either of his own motion or on an application made by any authority, officer or any person call for records maintained by the banking companies and financial institutions. He (Director) may make such inquiry or cause such inquiry to be made as he thinks fit. The purpose of such inquiry is to satisfy himself whether the records are being maintained in the manner as provided under the rules or not. Similarly, such inquiries are intended to verify whether the identity of all its clients is being maintained in the manner as provided in the rules or not.

Any failure to comply with the requirements provided under section 12 would result into levy of fine on defaulting banking company or financial institution. The amount of such fine shall not be less than ten thousand rupees for each failure and such amount may extend up to one lakh rupees in respect of each act of failure on the part of a banking company or a financial institution. Thus, the consequences of non-compliance on the part of a banking company or a financial institution would be in the nature of civil liability as distinct from criminal liability. However, it is necessary that before levy of fine an opportunity of being heard be provided to defaulting banking company or financial institution. An order, levying fine on defaulting banking company or financial institution shall be served upon the banking company, financial institution or on a person who is representing such banking company or financial institution in proceedings before the Director.

8. Remedy against an Order of Fine – Against an order of fine levied under sub-section (2) of section 13 by a Director on a banking company or on a financial institution, the aggrieved banking company or financial institution may prefer an appeal to the appellate tribunal. Such an appeal is to be filed within a period of 45 days after the date on which the order is received by the banking company or financial institution. The appellate tribunal after hearing parties and giving an opportunity of being heard pass such orders as it thinks fit either confirming or modifying setting aside the order appealed against. An appeal by the appellate tribunal shall be disposed of finally within six months from the date of filing of the appeal.

Against any decision or order of the appellate tribunal, any aggrieved person may file an appeal to the High Court within 60 days from the date of the communication of the decision or order of the appellate tribunal.

9. Recovery of fine – Where any fine imposed on any person under section 13 is not paid within six months from the date of imposition of fine, the Director or any other officer authorized by him in this behalf may proceed to recover the amount from the defaulting person in the manner as is prescribed in Schedule II of the Income Tax Act 1961 for the recovery of arrears and such officer shall have all the powers of tax recovery officer as mentioned in Schedule II of the Income Tax Act 1961.

10. Immunity from Civil Proceedings – A banking company, a financial institution or an intermediary and their officers shall not be liable in any civil proceedings against them for furnishing information to the Director. This provision is intended to protect a banking company or a financial institution from any proceeding which may be initiated against them by the persons whose transactions have been reported by such banking companies or financial institutions to the Director under section 12(1)(b) of the Act.

11. Financial Intelligence Unit – It is understood that the Government of India has taken a decision to set up the office of the Financial Intelligence Unit. In preventing money laundering the key issue has been to ensuring that critical piece or pieces of information are made available to the right people, i.e., the investigators and the prosecutors who are charged with putting criminals behind the bars and taking their illegally obtained wealth away in a timely and effective manner. In other words, the law enforcement and prosecutional agencies that investigate money laundering must be able to count on vitually immediate exchange of information. The financial information can best be collected by the Financial Intelligence Units. Financial Intelligence Units are clearing house for financial information and act as buffer between private financial sector and law enforcement and judicial/prosecutional agencies. Financial Sector is usually represented through their compliance officer. To sum up, the Financial

Intelligence Unit is a central, national agency responsible for receiving, analyzing and disseminating to the competent authorities – disclosure of financial information concerning suspected proceeds of crime or such information as may be required necessary for preventing money laundering.

12. Concluding Remarks – Be that as it may, the new law on prevention of money laundering would pose a new challenge before the institutions in the financial sector. On the one hand, new law, procedure and its enforcement would have to take into account the compliance cost on financial sector, on the other hand, the financial sector has to gear up its own machinery. Whereas, on the one hand, preparation and circulation of guidance notes on various aspects of compliance by the financial sector would bring uniformity in the application of Chapter IV of the Prevention of Money Laundering Act, 2002 to the banking and Financial institutions, on the other hand, the training and recruitment of best talent in the banking and financial sector as Compliance Officers would enable them to follow guidance notes. This would enable the country to project its compliance on anti-money laundering measures in various regional and international forum, such as Asia Pacific Group on Money Laundering or at Egmont in most effective manner.

KEYNOTE ADDRESS BY DR. K.N. CHATURVEDI, MEMBER SECRETARY, LAW COMMISSION OF INDIA AT THE INAUGURATION OF SEMINAR ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION TECHNOLOGY AND ENTERTAINMENT INDUSTRY FEBRUARY 18, 2005 ALLAHABAD

I am extremely delighted to be here today. It is good to be here at Allahabad and that too at the Campus of IIIT. My thanks to Dr. M.D. Tiwari and to the IIIT, for inviting me to be here. Under the leadership of Dr. M.D. Tiwari, IIIT, Allahabad has done outstanding work in the field of Information Technology. Today's Seminar also shows his leadership in holding the Seminar for discussing subjects, which are multi-disciplinary in approach. With the assistance of Ministry of Human Resource Development and in cooperation with FICCI, New Delhi and Indian Music Industry, India.

21st Century is the century of knowledge. The transformation of economy from paper economy to digital economy is visible now. The recent advances in information technology and the advent of Internet and e-commerce have resulted in the knowledge product forming a substantial growth of many countries. Countries who create, manage and protect their knowledge and information products would be the leaders of tomorrow. This require computer, connectivity and content and also a secured framework of laws, which would both, foster and protect the knowledge product. Knowledge products being intangible receive protection under the laws as intellectual property rights. These include Copyright, Patents, Trademarks, etc.

Copyright subsists among other things in literacy and artistic material, music, films, sound recordings and broadcasts, including software and multimedia. Copyright arises automatically without registration as soon as there is record in some form of what has been created. Copyright lasts for the life of

author plus 60 years in India and for life of author plus 70 years in USA and some European countries. The idea is to reward the creativity beyond the life of writers and artists. In USA, the term of copyright was extended from 50 tears to 70 years by enacting the Copyright Term Extension Act. The constitutional validity of this Act was raised and decided by US Supreme Court in Eldred v. Ashcroft on January 5, 2003. The issues raised in this case were as to whether the Copyright Term Extension Act, which extended the term of existing copyright from 50 tears to 70 years, exceeds the power of the Congress under the copyright clause. The second issue was whether the Copyright Extension Act which extends the existing and future copyright violates the first amendment of the US Constitution. US Supreme Court upheld the extension of the term of copyright by 7:2 in its opinion. Justice Breyer in his dissenting opinion was of the view that it would inhibit rather than promote the progress of science. Another Judge, Justice Stevens in his dissenting opinion observed that the Copyright Extension Terms Act is neither encouraging new inventions nor advancing progress.

Patent encourages inventions through new and improved products and processes that are capable of industrial applications. Patent lasts for 20 years from the date of filing. Patent protection is intended not only to promote research and development, which leads to inventions but also to encourage such inventions published. The grant of a patent prevents full use by others of inventor's knowledge till the subject matter o patent becomes freely available after the patent has expired.

Trademark protects brand identity of goods and services. Trademark once registered can be repeatedly renewed. Trademark is not limited in duration unless they are revoked. A trademark is generally a visually perceptible sign used in relation to goods and services. The primary purpose of a trademark is to

identify the commercial or trade origins of the goods and services. As such a trademark distinguishes a particular product from another product and reflects the goodwill or reputation of a particular product.

India has ratified the Agreement on Trade Related Aspects of Intellectual Property Rights and Articles 41 to 61 of the TRIPs contain provisions of Enforcement of Intellectual property Rights. India has given effect to its different provisions by amending its laws relatable to Intellectual Property Rights. The Copyright Act, 1957 was amended in 1994 and in 1999. The Patents Act, 1970 was recently amended by the Patents (Amendment) Ordinance, 2004. The Trademark Act, 1999 replaced the Trade and Merchandise Marks Act, 1958. The Geographical Indication of Goods (Registration and Protection) Act, 1999, the Design Act, 2000, the Semiconductor Integrated Circuit Layout Design Act, 2000 and the Protection of Plant Varieties and Farmer's Rights Act, 2001have been enacted to align the legal system of our country with the global economy.

Now, I may briefly mention on the role of information technology in the society. In the area of information technology, it is the Indian minds today, which are making waves internationally. India is the most sought after destination for software professionals. Electronic connectivity through information technology has become as important as physical connectivity, i.e. highways, railways, airlines and waterways. E-governance and e-commerce tops the agenda of nations and governments. The growth of internet has removed all barriers of time and space. Until the middle of 1998 VSNL enjoyed a monopoly on internet connectivity. Now, we have private parties as internet service providers. BSNL Data One Broadband Service provides a bandwidth, which facilitates uninterrupted and speedy access on internet. Creating bandwidth is only one aspect of connectivity. The other important aspect is

creating content that is transmitted across the bandwidth. The content creation particularly in the area of infotainment resulting from convergence of information and entertainment and the protection of content through intellectual property rights has assumed significance.

The Indian Institute of Information Technology, Allahabad deserves applaud for organizing three-day National Seminar on IRP-IT and Entertainment Industry. The agenda of the Seminar is on a large canvass to look into the relations of IPR in IT and Entertainment industry, Music Industry and IPR, IPR and Internet. IPR in film industry and IPR in information technology. These areas would be the main focus by the eminent experts in the Seminar.

Here, I may mention about the downloading of music from the internet and the digital distribution, i.e. the delivery of downloaded music from the internet. This raises a number of complex legal issues. Whether jurisdiction should be determined by reference to the place from where the material has originated or where it went along or where it ended up being displayed, stored or printed out. Definitely, an infringement of copyright in such situations would fall in more than one jurisdiction and under more than one law. If that is the case then the liability of online service providers is perhaps the most controversial legal issues to emerge from cyberspace. Should provider be treated as electronic publishers and thus made directly liable for all the infringing gigabytes flowing through their servers or are they merely the postmen of the internet exempt as common carrier from all liabilities.

While addressing these issues in the context of internet which largely ignores distinctions based on territorial borders, the question comes up is, whether the provisions of the Copyright Act, 1957 imposing civil and criminal

liability are enough to deal with these issues. If not so, do we need a new strategy for dealing with cases of less serious and more serious acts of infringement of copyright via internet?

About technology it is said that technology is always ahead of market practices and market practices are ahead of law. The technology has devised enabling and disabling devices to keep a track of subscribers. We also hear of encryption circumvention devices. The speech on technological protection of computer software programme, packages, music and film would immensely benefit the persons from the legal field who are present here. The audience present here would like to hear on an important aspect of technology, which no-a-days is known as open source of software. To improve the technology, open source software practice is gaining momentum. In this system, software is offered to users with open access to source code and that end users should be freely able to modify, copy or redistribute the software they have legally acquired. Open source software authors want the widest dissemination possible of their information products. We also hear of free software, which is distinct from open software.

Now, I would like to raise an important human rights issue, i.e. the issue of privacy. Under the Indian Constitution, right to privacy flows from Article 21 (personal liberty). In the context of use of internet privacy may be offended either in the form of using subscribers data or by sending unsolicited e-mail. It is the normal practice on a transaction on-line including buying music on-line to collect information of different kinds from the subscriber or user in that transaction. The issue is whether such confidential information should be used for other purposes against the consent of the subscriber. And in case of breach of privacy, should we have any legal solution to this problem or the issue may be addressed by having privacy policy on the part of Internet service provider or

alternatively the Internet service provider through technological innovation block the access of information to any other person except to the legitimate parties of a transaction on the net. Surely a discussion on these issues would enable the policymakers to design a framework, which may balance the interest of all parties in on-line business transaction.

Before I conclude the Inaugural Address, I would like to mention briefly on the famous Napster case. The downloading of music files through Peer-to-Peer Network was the brainchild of 19-year-old Shaun Fanning – his childhood name was Napster. On 1st June, 1999, his company Napster Inc. was set up at Redwood City, California. After a few days, Napster Inc. had three or four thousand customers and by the end of the year it had 38 million customers. In litigation, Napster lost but thereafter Napster moved to legitimate business in U.K. (www.napster.co.uk) and record industry moved to new on-line business models like Digital Streaming and retail downloading. The copyright holders further moved to technological protection measures such as Digital Rights Management to constrain usage. Digital Rights Management can disable the user in making further copies than permitted unless the user can remove Digital Rights Management. Technological innovation and creating technological barriers is one strategy to deal with the problem faced by entertainment industry from the digital revolution. Additionally, one may look at intellectual property rights laws. The products of entertainment industry, films and music, are protected as copyright works. The Copyright Act, 1957 was last amended in 1999. But the growth of internet which has brought digital revolution and in its turn the necessity of updating the law. I am sure that the deliberation in the Seminar would show the way forward.

NATIONAL WORKSHOP ON WTO & INDIAN ECONOMY
APRIL 23, 2005 – ALLAHABAD
INAUGURAL ADDRESS
DR. K.N. CHATURVEDI, MEMBER-SECRETARY
LAW COMMISSION OF INDIA, NEW DELHI

Distinguished guests, ladies and gentlemen,

It is my pleasure to be invited here in the Inaugural Session of the 2-days National Workshop on WTO & Indian Economy. I express my appreciation to the Department of Economics, University of Allahabad for organizing this Workshop. The Department of Economics besides teaching under-graduate and post-graduate students also conducts diploma programme in foreign trade. The objective of the Workshop on WTO & Indian Economy is to assess and develop insights to meet the challenges that are likely to come up in future. The WTO through its Agreements affects almost all aspects and sectors of national economics. An issue of considerable importance to developing countries is development of Intellectual Property Rights and its protection. This would also be discussed in the Workshop.

Economists present here would agree that economic theory has shown that other things being equal, international trade benefits all parties.

In recent years, the international trade has become a vital strategy of economic development and growth. The cooperation among Nations at bilateral, regional and multilateral level has taken the international trade to new heights. At bilateral level, countries enter into free trade area agreements. These Agreements are aimed at securing economic cooperation by liberalizing barriers to trade and facilitate cross-border movement of goods and services. At regional level, the agreements are entered into among Nations to integrate the

economies of a particular region. For example, the European Union has integrated the economies of their member-State. The European Union was formed with an objective of creating a common market among its member-State. The treaty forming the European Union commonly known as the Treaty of Rome provided for elimination of commercial/customs barrier to facilitate the free movement of goods, workers, services and capital among the member-State and the establishment of a common tariff and commercial policy towards non-members. To achieve these objects, the Treaty of Rome also provides for common policies in agriculture, competition and transportation. It also provides for the harmonization of the member-State laws generally to the extent required for the proper functioning of the common market. There are European Union legislations applicable in such fields as environment, worker and consumer protection, gender equality, corporate law and securities regulations and taxation.

At regional level, India also signed on 8th October 2003 an Agreement on Comprehensive Economic Cooperation with the association of South-East Asia Nations. These Nations are Cambodia, Indonesia, Myanmar, Philippines, Singapore, Thailand, Vietnam and Lao. The said Agreement came into force on 1st July 2004. The Agreement recognizes that regional trade arrangements can contribute towards accelerating regional and global liberalization and as building blocks in the framework of the multilateral trading system.

At multilateral level, the emergence of the World Trade Organization demonstrated the commitment of the member-State towards the multilateral trading system. India is a founding member of the World Trade Organization, which came into existence on 1stJanuary 1995 after the conclusion of the Uruguay round of multilateral trade negotiations. The World Trade Organization is the only global international organization dealing with the rules

of the trade between Nations. At its core are the agreements signed at Marrakesh establishing the World Trade Organization? The Principal Agreement and Associated legal Instruments included in the annexure & are to be referred as multilateral trade agreements.

The Charter of WTO recognizes the need for positive efforts to ensure that Developing Countries and the Least Developed Countries secure a share in the growth of international trade commensurate with the needs of their economic development. The Charter obliges the WTO to provide the common institutional framework for the conduct of trade relations among its members".

Article-VIII of the Charter confers legal personality on the World Trade Organization and exhorts each of its members to confer such legal capacity as may be necessary to discharge its function. These include the conferment of privileges and immunities to the World Trade Organization and its officials and the representatives of its members. In fact, the privileges and immunities shall be similar to the privileges and immunities stipulated in the Convention on privileges and immunities of the specialized agencies of the United Nations.

Article-XVI.4 of the Agreement provides that each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the multilateral trade agreements.

Architecture of the World Trade Organization:

The architecture of the World Trade Organization includes its structure, functions and decision-making process.

Structure of World Trade Organization:

The World Trade Organization is headed by a ministerial conference of all members that meet at least once every two years. Between meetings of ministerial conference, the World Trade Organization is managed by general council at the level of diplomats. General council meets at least twelve times a year. General council also adjudicates trade disputes (dispute settlement body) and also acts as trade policy review body to review trade policies of the member-State. Three subsidiaries councils on trades, on services and on intellectual property rights cooperate under the general guidance of the general council. In addition to the subsidiary council, there are working groups. All World Trade Organization members may participate in all councils, committees and bodies with certain exception, such as the membership of dispute settlement panels.

Functions of World Trade Organization:

The World Trade Organization administers the trade agreements negotiated by its members in particular, the general agreement on tariff and trade, the general agreement on trade in services and agreement on the Trade related aspects of the intellectual property rights. These agreements contain a set of specific legal obligations regulating trade practices of member-State. The main function of the World Trade Organization is as a forum for international cooperation on trade related policies – the creation of code of conduct for member-Governments. The World Trade Organization is charged with facilitating the implementation and operation of the multilateral trade agreements providing a forum for negotiation and administering the dispute settlement mechanism.

WTO as a Dispute Settlement Body:

World Trade Organisation Dispute Settlement mechanism provides opportunities for membes to obtain satisfaction regarding grievances stemming from practices of other members that cause trade injury. Dispute Settlement Body has the authority to establish panels (three panelists) adopt panel and appellate body reports, maintain surveillance of the implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the WTO agreements.

A member must first request bilateral consultation if it considers that a benefit accruing to it directly or indirectly under the WTO agreement is being nullified or impaired. If the consultation fails to settle the dispute, the complaining party may request the establishment of a panel, which must be created unless the dispute settlement body decides by consensus not to do so. Panel may report to WTO members within sixty days. A party may go in appeal to the appellate body. Appellate body consists of seven members of whom three members serve in a case. These members are appointed for four years term. Before the appellate body appeals are limited to issues of law and the interpretation of law. Appellate body must complete its proceedings within sixty days and its report is confidential. Dispute Settlement Body usually awards compensation to the injured state or may direct for suspension of concessions available to a Member against whom a complaint has been made to the Dispute Settlement Body.

Decision-making:

In World Trade Organization, decision-making is based on consultation and consensus. Where consensus cannot be reached, a simple majority vote is

sufficient. On matters of interpretation of World Trade Organization Agreements, a majority vote by a three quarter is required.

After ten years of the WTO where we are now. So far there had been Five Ministerial Conferences at Singapore (1996); Geneva (1998); Seattle (1999); Doha (2001), Cancun (2003) and the sixth Ministerial Conference is due to be held at Hong Kong (Dec.2005). The last Ministerial Conference reaffirmed the Doha Declaration. Another significant development took place in August 2004 is known as 'July package' of decisions aimed at carrying the negotiations forward which was adopted by the WTO General Council.

Doha Declaration includes development dimension (Technical assistance and capacity building issues); market access negotiations; and rule related issues in the areas of anti-dumping, subsidies and countervailing measures.

One of the important agreements which would be discussed in the workshop is the Agreement on Trade related Intellectual Property Rights. The importance of intellectual property rights is well established at all levels – statutory, administrative and judicial. Indian Parliament enacted the Trade Marks Act, 1999 to consolidate the law relating to trade marks and to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. The Geographical Indication of Goods (Registration and Protection) Act, 1999 was enacted to provide for the registration and better protection of geographical indications relating to goods. A new Designs Law repealing and replacing the Designs Act, 1911 was passed in the year 2000. The Semi-conductor Integrated Circuits Layout Design Act was enacted by Parliament in the year 2000. It protects intellectual property embedded in lay-out design of integrated circuits. With the recent amendment of the Patents Act, 1970 by the Patents (Amendment) Act, 2005 our country has

fulfilled obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights, which forms part of the Agreement establishing the World Trade Organization. Thus, now it becomes necessary to understand as to what these intellectual property rights are.

In today's world the decisive assets in global economy are skill, knowledge and technology. As a result, the intellectual property has emerged as a key asset in ensuring advancement, growth and competitiveness. At the time when Uruguay Round started, the globalized knowledge economy was at an advance stage and it was estimated that the developing country trade would increase by US dollars 1200 billion on the conclusion of multi-lateral trade agreement. To cope up with this development an appropriate global regime of intellectual property rights was needed. The adoption of the Trade Related Aspects of Intellectual Property Rights laid the basis for a global intellectual property rights regime. The issue today is how can global intellectual property rights be shaped and implemented to facilitate economic development and social welfare for all and in particular for developing countries. There is little evidence of the impact of various forms of intellectual property rights on economic development. The reason is that intellectual property rights are one of the factors that determine the economic development of a country. However, in major trading economies such as India, intellectual property rights play a vital role in the economic development. Intellectual property regime may attract foreign direct investment for countries like India.

Intellectual property rights are patent, trademark, copyright and design. These are traditional intellectual property rights. Copy right law protects the author by granting them exclusive rights to sell copies of their work in whatever tangible form, i.e. printed publication, sound recording, film and broadcasting rights. Copyright extends to new types of works such as computer software

programmes. The duration of copyrights is 60 years from the date of its creation.

Trademarks are marketing tools that claim that products and services are authentic or distinctive compared with similar products and services of the competitors. They shall contain a distinctive design, word, or series of words. Trade marks can be renewed indefinitely.

The new intellectual property rights are geographical indications, semi-conductor and integrated circuit and trade secret. The owner of intellectual property rights or its creators may make legitimate use of these rights. The use of intellectual property rights by a third person may either amount to bona fide use or infringement of the intellectual property right. Looking at the importance of these rights, I would like to dwell upon the patent and its significance.

What is patent? The legal protection of inventions is obtained through grant of patent. Patent is a document issues by a government which describes the invention (background to the invention and differences with pre-existing technology), summary of invention, drawing and claims. Claims define the monopoly granted to the inventor. The duration of a patent is 20 years.

Earlier, the inventions sought to be patented were mostly mechanical devices and variants of mechanical instruments. Now the patent is extended to the field of chemistry (chemical compounds), biotechnology, genetic engineering and software related inventions.

In India, the Patent Act, 1970, which came into force on 20th April, 1972, was amended in March, 1999, June, 2002 and on 1st January, 2005. The amendments were necessitated to meet India's obligations under the agreement

on trade relates aspects of intellectual property rights, which forms part of the agreement establishing the World Trade Organization. India had negotiated at the time of accession to the World Trade Organization a 10 years transition facility commencing from 1st January, 1995. The first amendment to the Patents Act, introduced in 1999, introduced a transitional facility (mail box) from January 1, 1995 to receive and hold product patent applications in the field of pharmaceuticals and agricultural chemicals till January 1, 2005 and also for grant of exclusive marketing rights for a period of five years or till the product patent is grant or rejected, whichever is earlier. The Patents (Amendment) Act, 2005 has made comprehensive amendments in the Patents Act. The provisions of the Patents Act, 1970 (section 5) dealing with inventions where methods or processes of manufacture are patentable stands omitted. A new definition of inventive step has been given which provides that it involves technical advance as compared to the existing knowledge or having economic significance or both, and that makes the invention not obvious to a person skilled in the art represented by the claimed invention. The important issues addressed in the new patent law deal with patentable subject matter, opposition of the grant of patents and granting of compulsory licenses.

Agreement on Agriculture is another important area. WTO has opened up new opportunities in this area for developing countries. There seems to be a consensus that the process of liberalizing agricultural trade is an absolutely crucial step on the part of developing countries to improve their possibilities to participate in global markets. Removing barriers in the agriculture sector will improve their capability to play a role in the global market. Recently, Framework for establishing Modalities in Agriculture has been developed. The Framework addresses three issues, namely, Market Access, Domestic Support and Export Competition.

MARKET ACCESS:

High tariffs on agricultural products are a matter of discord between WTO Members. It is believed that while tariffs on manufactured goods have substantially dropped from an average of 40% before GATT was passed to 4%, today, the agricultural tariffs have remained in the range of 40% to 50%. The issues which are part of the market access are tariff peaks and tariff escalations as well as the question of special agricultural safeguards and sensitive product policy. For developing countries, the likely impact of tariff liberalization on farmers is also to be taken into account.

DOMESTIC SUPPORT

The framework requires substantial reduction of trade distorting domestic support. This will include overall reductions as well reductions within different types of support. For domestic support, a balance has to be maintained between the pursuit of legitimate domestic, economic and social objectives and on the other creation of new trade opportunities.

EXPORT COMPETITION

Export subsidies provided by the developed countries should be eliminated as far as possible. July package of 2004 is aimed at carrying on the negotiations forward which was adopted by the General Council of WTO where it was agreed to that the major trading countries would go forward and eliminate all forms of export subsidy. No time limit has been laid down yet. However, the commitment itself is a significant development.

AGREEMENT ON TRADE IN SERVICES

Ranging from architecture to voice mail telecommunications and to sport transport services are the largest and most dynamic component of both developed and developing country economics. Services are also crucial inputs into the production of goods. Since January 2000 GATS have become the subject of multilateral trade negotiation. WTO General Agreement on trade in services commits members' governments to undertake negotiations on specific issues and to enter into successive rounds of negotiations to progressively liberalize trade in services. The services negotiations started in the year 2000 under the Council for Trade in services. The Council established the negotiating guidelines and procedures. These guidelines refer to the request offer approach as the main method of negotiation. Thus participants in the services negotiations have been exchanging bilateral initial request, So far EU Nations and Australia, Canada, Japan New Zealand, USA have made their initial offers.

I hope and believe that I have given you an overview of the World Trade Organization and briefly the areas in which discussions on negotiations would follow. Undoubtedly Doha Development Agenda is the Centre point of discussion as the difference over the development of new rules on the Singapore issues, i.e. investment, competition, Trade Facilitation and Transparency in Government procurement could not be overcome. The discussion in the Two Days Workshop should build up awareness on the issues facing the Indian Economy. I wish the deliberations in the Workshop would benefit all the participants.

EVOLVING A LEGL FRAME[1]WORK FOR PRESERVATION OF HERITGE PROPERTIES[*]

The cultural heritage law has developed in an ad-hoc manner as a series of reactions to particular crises and other situations. A sound cultural heritage management is not possible without appropriate legislation and it is essential that there should be a well thought legislative and legal framework to cover all implementation aspects of the management of cultural heritage.

The concept of cultural heritage may be divided into four primary categories, i.e., firstly, manmade; secondly, non-manmade; thirdly, immoveable; fourthly, fixed. The concept can also be sub-divided into, at least, six secondary categories, these are as follows:

1. Under-water cultural heritage
2. Archaeological heritage
3. Architectural heritage
4. Natural heritage
5. Cultural heritage
6. Cultural objects

At international level, UNESCO is responsible for the international legal protection of cultural heritage. So far following Conventions have been adopted for protection of cultural heritage, these are as follows:

I. Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 (World Heritage Convention).

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[*] Workshop held at Railway Staff College , Vadodara, India

II. The Convention brought together the conservation of cultural and natural heritage under a single instrument. The Convention pioneered some of the thinking, which during the later 1970s and 1980s evolved to become the core of the concept of the sustainable development. Sustainable development has been defined as a stage of economic development that can maintain both economic growth and the fullness of the planet's biological and cultural diversity.

II. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November, 1970)

III. Convention for the Protection of the Cultural Property in the Event of the Armed of the Armed Conflict (The Hague, 14 May, 1954)

IV. Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November, 2001)

V. Convention for the Safeguarding of the Intangible Cultural heritage (Paris, 17 October, 2003)

At the UNESCO, the International Centre for the Study of the Preservation and Restoration of Cultural Property acts as the nodal agency in the area of the protection of cultural heritage.

At national level, the legal reforms with the aim of legalizing and supporting the concept of cultural heritage management were initiated since 1960.

In USA, a law was passed, namely, Reservoir Salvage Act, 1960. This Act recognized the impact of development projects (Dams) on the destruction of cultural heritage. The purpose was the preservation of sites, buildings, objects and antiques of national significance. This Act was amended in 1974 to allow for funding to undertake recovery, protection and preservation measures in respect of cultural heritage properties. The National Historic Preservation Act, 1966 called for programmes for the preservations of historic properties throughout the nation. This Act, inter alia, provide for a national register; a programme of matching grants-in-aid to the States and a programme of matching grants-in-aid to the national trust for pre-historic preservation.

In Australia, in 1975, the Australian Heritage Commission was set up to create and maintain a register of national estates in the form of fully computerized data base of heritage properties. The function of the Commission includes assessing the significance of sites and granting of financial incentives for conserving the national heritage.

In Spain, the protection of cultural heritage was embodied in the Constitution of Spain in the year 1978. The Constitution embody the public commitment to the conservation and promotion of the artistic cultural and historic heritage of the whole Spanish people regardless of ownership or legal status. The Spanish Law No.18 of 1985 legally defines the type of historical heritage and archeological activities.

In India, Article 49 of the Constitution under the heading "Directive Principles of the State policy" provide for the protection of monument, places and object of national importance. Under this provision, it shall be obligation of the State to make every monument or place or object of artistic or historic interest declared by or under law made by the Parliament to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be. The expression 'State' includes the Government and Parliament of India and the Government of legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

The Ancient Monuments Preservation Act, 1904 and the Ancient Monuments and Archeological Sites and Remains Act, 1958 deal with the preservation of ancient monument in antiquities and to prevent the excavation by unauthorized persons of sites of historic interests and value. The Act was designed to provide effective protection to monuments and movable antiquities and to regulate excavations. The Act empowered the Archaeological Survey of India to acquire and give protection to any kind of cultural property and if necessary to acquire a monument by eminent domain to ensure its preservation and maintenance. Archaeological Survey of India could repairs of ancient remains. The Act, however, does not provide for protection of natural heritage and underwater archaeological remains.

In the Government of India, the Ministry of Culture is the nodal Ministry for maintenance and conservation of heritage, historic sites and ancient monuments. The Ministry of Culture is concerned with tangible and intangible heritage like, monuments, sites and archeology, anthropology, and ethnology, folk and tribal arts, literature, handicrafts, archives, libraries, performing arts including music, dance and drama and visual arts in the form of painting,

sculpture, graphics. Amongst the institution, INTACH is actively involved in the heritage conservation and management through its various activities including legal intervention through public interest litigation. It has been reported that in the case of expansion of the Nizamuddin railway station, New Delhi, the case was filed against the Northern Railway and which was won by INTACH, which resulted in conserving of the original splendor of the building. On a petition by INTACH in another case, the High Court of Delhi ordered preventing the proposed demolition of the canopy of King-V at India Gate.

The subject of cultural heritage has been dealt mostly with preventive aspect rather than pro-active measures. In view of increasing involvement of UNESCO at international level and of various NGOs at national level, it becomes imperative to study the existing law on cultural heritage, the changes which may be proposed in those laws, means through which such changes may be brought and the agencies responsible for such change.

So far as the means of change are concerned, they may include international Conventions, international recommendations or Declarations, model legislations, code of ethics or code of conduct and draft principles. At international level, the agencies responsible for change would UNESCO, UNIDROIT and at national level the Central Government, State Government, local authorities and NGO. A few days before a news appeared that a Dubai based Heritage Conservation Organization Juma A1 Mayid Centre for culture enter into MOU with two organizations in Hyderabad for protection and preservation of old books and rare manuscript in Hyderabad.

1. Convention for the Safeguarding of the Intangible Cultural Heritage (Paris 17 October, 2003)

2. Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November, 2001)

3. Convention for the Protection of the Cultural Property in the Event of the Armed Conflict (The Hague, 14 May, 1954)

4. International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) UNESCO

5. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November, 1970)

6. Convention for the Safeguarding of Intangible Cultural Heritage, 2003

7. Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression

8. Convention on the Protection of the Underwater Cultural Heritage adopted on 2 November, 2001

9. Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 (World Heritage Convention)

THE ROLE OF LAW REFORM AGENCIES: AND INDIAN EXPERIENCE[*]

By

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The Law Reform bodies are being increasingly recognized as a principal agency through which Law Reform is being undertaken in Commonwealth countries. The need for a standing Law Commission was projected way back in 1869 by John Austin in his lectures on Jurisprudence. Since then it has been almost universally accepted that a developed legal system should contain a legal institution whose duties it is to keep the law under review, with the object of systematic development and reform so that law must become capable of adjustments to new situations and new concepts of human needs. The Law Reform Agencies exist in a number of countries including Australia, Canada, France, United States of America and United Kingdom. I shall narrate the Indian experience.

Law Reform has been a continuing process in India. The first Law Reform Commission was established in 1834 under the Charter Act of 1833 under the Chairmanship of Lord Macaulay, which recommended codification of the Penal Code, the Criminal Procedure Code, and a few other matters. Thereafter, the second, third and fourth Law Commissions were constituted in 1853, 1861 and 1879 respectively which contributed a great deal to enrich the Indian Statute Book with a large variety of legislations on the pattern of the then prevailing English Laws and were adapted to Indian conditions. The Indian Penal Code 1860, Indian Code of Civil Procedure, the Indian Contract Act, the Indian Evidence Act, 1872, the Transfer of Property Act, etc. are products of the labour of the first four Law Commissions.

[*]Published in Commonwealth Law Bulletin.

At this stage, it would be appropriate to give some more details about the pre-independence Law Commission of India.

(A) <u>First Law Commission (1833):</u>

Section 53 of the Charter Act, 1833 provided for the Constitution of a Law Commission (the members of the Commission should not be more than four at any time) to enquire into the existing system of administration of justice of all laws prevalent in the country. In pursuance of this authority, the First Law Commission was constituted in 1835. It consisted Lord Macaulay, W.H. Macnaghten, Mr. J.M. Mcheod and Mr. G.W. Anderson, the last three named members were civil servant representing Bengal, Madras and Bombay presidencies. Mr. F.M. Millet was appointed as fourth Member. The Commission took up first the job of preparing a draft of Penal Code. They submitted their draft penal code on 2nd May 1937. The Penal Code was finally enacted in 1860 and the Commission derived suggestions among others from the French Penal Code. Lord Macaulay added authoritative illustrations to the Indian Penal Code.

(B) <u>Second Law Commission (1853):</u>

The Second Law Commission was constituted under the authority given by the Charter Act, 1853. It consisted of Sir John Romilly, M.R., Sir John Jervis, Sir Edward Ryan, Sir Robert Lowe, C.H. Cameron, John M. McLeod and T.F. Ellis as members. The main object of this Commission was to examine the reports and enactments proposed by the First Law Commission for the reform of judicial establishment, judicial procedure and laws of India and

such other matters of the reform as might be referred to them for consideration. This Commission sat in London till the middle of 1858. It examined and adopted the recommendations proposed by the First Law Commission regarding the civil substantive law.

(C) <u>Third Law Commission (1861):</u>

In December, 1861, a fresh Commission was constituted authorizing its members to prepare for India a body of substantive law in preparing which the law of English should be used as a basis. The members of this Commission were originally Lord Romilly M.R., Sir W. Erle, C.J., Sir E. Ryan, Mr. R. Lowe, Mr. Justice Willes, and Mr. J.M. McLeod.

The Secretary of State of India made a request to these Commissioners that the result of their labour on one branch of civil law should be reported before they begin their deliberation on another branch. This Commission submitted seven reports. First Report on the law of Succession; second Report containing draft of the law of Contract; third Report on draft of the law on Negotiable Instruments; the fourth Report contained observations of the Commission in reply to certain remarks of the Government of India against the inclusion of sections dealing with the law of Specific Performance in the draft law of contracts contained in the Second Report; fifth Report on Draft of the law of Evidence Bill; sixth Report on draft of the law on Transfer of Property; and seventh Report on Revision of the Criminal Procedure Code.

(D) <u>Fourth Law Commission (1879):</u>

On 11th February, 1879 through a notification issued by the Governor General in Council, a Commission was appointed to enquire into and consider the provisions of the draft bills, and to report thereon and to make suggestions as to the codification of the substantive law in British India as might seen desirable. The members of the Commission were Sir Whitley Stokes, Sir Charles Turner, Chief Justice of the Madras High Court and Raymond West, a Judge of the Bombay High Court. The fourth Law Commission recommended that the Transfer of Property Bill already drawn for the purpose by the Commission should be passed into law.

Post Independence (1955):

After independence in 1947, there had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country. After independence, the first Law Commission was constituted in 1955 with the then Attorney-General for India, Mr. M.C. Setalvad as its Chairman. Such Commissions are constituted every three years. Sixteen more Law Commission have given their reports to the Government of India, and the seventeenth Law Commission which was constituted on 1st September, 2003 has so far given nine reports (from 186th to 194th Reports) on various subjects relating to substantive and procedural laws.

India is a federal State. At present the Indian State consist of 28 States and 7 Union Territories. Some States have State Law Commission to serve the needs of the legislations in the States. The States having Law Commissions are Tamil Nadu (since 1994); Gujarat (since 1998); Maharashtra, Punjab, Sikkim,

Meghalaya, Madhya Pradesh, Assam, Bihar and Uttar Pradesh. The State of Orissa has a Law Revision Committee and in State of Jammu & Kashmir, there is a codification cell. The State of Uttar Pradesh has very recently constituted a Statutory Law Commission.

Sound legal frameworks are perquisites for economic growth and social development. Legal Reform is an ongoing process that involves the executive and legislative branches, law reform commissions, non-governmental organizations, and the public. For most countries, legal reform addresses new international standards, responds to social and economic issues, expands access to justice or improves court operations. Effective and coherent legal reform requires a comprehensive and sustainable approach that avoids importing models inconsistent with national, legal and socio-economic norms. Effective legal reform also promotes opportunity, security and empowerment for the world's poor. It is on this touchstone that one has to evaluate the work done by successive Law Commissions constituted in independent India right from the first Law Commission to the present seventeenth Law Commission.

Procedure for Legislation based on Reports:

The recommendations contained in the Reports of the Law Commission are of various kinds. Some of the recommendations do not call for any change in the law and no legislative action had been taken in those cases. Some other recommendations contain only general recommendations for the guidance of the Government and in respect of them also no particular action is called for. However, the bulk of the recommendations of the Law Commission deals with revision of particular enactments or bring into being new legislations. The Report may contain various changes in a particular enactment and sometimes the same report suggests recommendations with regard to corresponding

changes that have also to be effected in other related enactments. Every Report is examined and processed by the concerned Ministry, which is responsible for the administration of the enactment concerned in consultation with other Ministries of Government and in matters relating to subjects for legislation contained in the Concurrent List, in consultation with the State Governments. In India, the Reports from the Law Commission, which are received only in English version, are to be translated into Hindi language, and thereafter steps are taken to get printed copies of the Reports of both the versions. The Reports are laid on the Table of each of the Houses of Parliament and till then they are treated as confidential. At present the website of the Law Commission of India http://www.lawcommissionofindia.nic.in contains all relevant information relating to the Law Commission including some of the important Reports of the Law Commission, which can be freely accessed from the internet.

Types of Reforms:

On reform of judicial administration, both civil and criminal, the Reports of the Law Commission were taken into account while revising the Code of Civil Procedure and the Code of Criminal Procedure. On Civil Procedure, the Law Commission's recommendations contained in 27th Report and 54th Report (Code of Civil Procedure, 1908) were given effect to by the Code of Civil Procedure (Amendment) Act, 1976. Subsequently, other recommendations of the Law Commission contained in 139th, 140th, 144th, 150th and 163rd Reports were considered while bringing out amendments by the Code of Civil Procedure (Amendment) Act, 1999 and Code of Civil Procedure (Amendment) Act, 2002. The constitutional validity of amendments made in the Code of Civil Procedure, 1908 was upheld by the Supreme Court of India in Salem Advocate Bar Association Vs. Union of India (2005) 6 SCALE 26 and the Court recorded sincere gratitude and appreciation in particular of the present Chairman of the

Law Commission of India under whose Chairmanship three Reports were filed in the Court so as to ensure that the amendments in the Civil Procedure become effective and result in quicker dispensation of justice.

There is close link between criminal justice and economic development. Some perceive the reform of the criminal justice system as fundamental to economic development. On criminal procedure, the recommendations of the Law Commission's Reports contained in 32nd Report (Section 9 of Cr.PC); 33rd Report (Section 44 of Cr.PC); 36th Report (Grant of Bail); 37th Report (Cr.PC 1898); 41st Report (Cr.PC 1898) and 48th Report (some questions under the Code of criminal Procedure Bill, 1970). These Reports were given in the year 1967 (32nd, 33rd, 36th and 37th Reports) and in the years 1969 and 1971 respectively. The recommendations contained in these Reports were considered while enacting the Code of Criminal Procedure, 1973, The other important recommendations of the Law Commission on Criminal Justice System are 78th Report on Congestion of under trial prisoners in jails; 152nd report on Custodial Crimes and 154th Report on The Code of Criminal Procedure, 1973. The other Reports are 177th Report on Law Relating to Arrest; 180th Report on Article 20(3) of the Constitution of India and right to Silence. These reports also contain valuable safeguards for a person accused of an offence.

On reform of Judicial Administration, fourteenth Report of the Law Commission is a monumental work. It is treated in India as the best of all reports, even today. Other reports which dealt with Reform and Judicial Administration in Trial Courts and High Courts are as follows:-

1. 4th Report (1956) on the proposal that High Courts should sit in Benches at different places in a State;

2. 44th Report (1971) The Appellate Jurisdiction of the Supreme Court in Civil Matters;

3. 45th Report (1971) Civil Appeals to the Supreme Court Certificate of Fitness;

4. 58th Report (1974) Structure and Jurisdiction of the Higher Judiciary;

5. 77th Report (1979) Delay and arrears in trial courts;

6. 79th Report (1979) Delay and Arrears in High Courts and other Appellate Courts;

7. 80th report (1979) Method of Appointment of Judges;

8. 95th Report (1984) Constitutional Division within the Supreme Court – A proposal for;

9. 99th Report (1984) Oral and written arguments in the Higher Courts; and

10. 100th Report (1984) Litigation by and against the Government: some recommendations for reform.

Gender perspectives are vital to the consideration of legal reform and hence the issues on Justice to Women (Gender Justice) received attention of all the Law Commissions constituted since 1956. Reform of criminal law and procedure to protect women received attention in some of the Reports of the Law Commission which dealt with the problems of the women. These Reports are as follows:-

1. 73rd Report (1978) on Criminal liability for failure by Husband to pay maintenance or permanent alimony granted to the wife by the Court under certain enactment or rules of law;

2. 84th Report (1980) on Rape and allied offences – some questions of substantive law, procedure and evidence;

3. 91st Report (1983) on Dowry deaths and law reform: Amending the Hindu Marriage Act, 1955, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872;

4. 109th Report (1985) on Obscene and Indecent advertisements and Displays: Sections 292-293, Indian Penal Code;

5. 132nd Report (1989) on Need for Amendment of the Provisions of the Chapter IX of the Code of Criminal Procedure, 1973 in order to ameliorate the hardship and mitigate the distress of Neglected Women, Children and Parents;

6. 135th Report (1989) on Women in Custody;

7. 146th Report (1993) on Sale of Women and Children: Proposed Section 373-A, Indian Penal Code;

8. 64th Report (1975) The Suppression of Immoral Traffic in Women and Girls Act, 1956; and

9. 172nd Report (2000) on Review of Rape Laws.

Some other Reports of the Law Commission dealing with matrimonial and succession rights of women and other issues are:-

1. 15th Report (1960) Law relating to Marriage and Divorce amongst Christians in India;

2. 22nd Report (1961) Christian Marriage and Matrimonial Causes Bill, 1961;

3. 23rd Report (1962) Law of Foreign Marriages;

4. 59th Report (1974) Hindu Marriage Act, 1955 and The Special Marriage Act, 1954;

5. 65th Report (1976) Recognition of Foreign Divorces;

6. 66th Report (1976) Married Women's Property Act, 1874;

7. 71st Report (1978) The Hindu Marriage Act, 1955 – Irretrievable breakdown of marriage as a ground of divorce;

8. 83rd Report (1980) The Guardians and Wards Act, 1890 and Certain Provisions of the Hindu Minority and Guardianship Act, 1956;

9. 90th Report (1983) The Grounds of Divorce amongst Christians in India: Section 10 of the Indian Divorce Act, 1869;

10. 98th Report (1984) Sections 24 to 26 of the Hindu Marriage Act, 1955: Orders for interim maintenance and orders for the maintenance of children in matrimonial proceedings;

11. 133rd Report (1989) Removal of Discrimination against women in matters relating to Guardianship and Custody of Minor Children and Elaboration of the welfare principle;

12. 164th Report (1998) The Indian Divorce Act, 1869; and

13. 174th Report (2000) Property Rights of Women: Proposed Reforms under the Hindu Law.

Implementation:

Out of 191 Reports of the Law Commission, which have been submitted to the Government so far, 96 Reports have been implemented fully and 51 Reports are still pending implementation whereas 34 Reports have not been accepted. It would be difficult to treat each report individually. However, a brief narration of important reports which have been implemented and which are pending implementation will show the extent of persuasive authority, which the Law Commission commands in the Government and outside. The laws enacted on the basis of the recommendations of the Law Commission are the Central Sales Tax Act, 1956; the Limitation Act, 1963; the British Statute (Application to India) Repeal Act, 1960; the Specific Relief Act, 1963; the

Income-tax Act, 1961; the Hire-Purchase Act, 1972; the Marine Insurance Act, 1963; the Foreign Marriage Act, 1969 and the Interest Act, 1978.

Amongst the Reports pending implementation, the reference may be made of the 69th Report on the Indian Evidence Act, 1872 (1977) and 185th Report on Review of the Indian Evidence Act, 1872 (2003). Both the Reports are monumental works on law of evidence. 185th Report among others exhaustively and authoritatively deals with videoconference and oral evidence, blood test, DNA test, right to silence of accused. The printed report runs into 380 pages and besides summary of recommendations in more than 50 pages, the report also contains the draft of the proposed Indian Evidence (Amendment) Bill, 2003. Recently, the Commission received e-mail from the Law Revision Commissioner of the Singapore Law Reform and Revision Division, appreciating the exhaustive recommendations contained in the above report on Law of Evidence as being very useful since Singapore's Evidence Act had its origins in the Indian Evidence Act. More recently, in 2005 the 'breadth of the research' undertaken in our Consultation Paper on Witness identity Protection and Witness Protection Programme has been reviewed in the recent issue of the Criminal Law Review (February, 2005). The review also remarks that the Consultation Paper goes significantly beyond the traditional scope of comparative studies in Criminal Justice Law Reform documents.

Before I conclude I may mention that the Sixth Report on Demands for Grants (2005-2006) of the Ministry of Law & Justice prepared by the departmental related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, made following significant observations:-

> **"Para 7.15:** The Committee feels that the Law Commission's Reports form the basis for review of the judicial system and

framing, amending and repealing the legislations as per the need of changing circumstances. Thus, the role of the Commission assumes special significance in the Indian judicial and legislative system. The Committee, therefore, recommends that the reports of the Commission should be implemented in letter and spirit and the Government should make concerted efforts to ensure timely implementation of its recommendations. The Committee also recommends that the Government should consider providing statutory backing to the Law Commission of the pattern of other countries like U.K. and Canada, etc. so that it could function more effectively with the desired empowerment."

As mentioned earlier, the above Report of the Parliamentary Committee recognizes the value and authority of the recommendations made by the Law Commission in its report. As our reports are available on our website http://www.lawcommissionofindia.nic.in, and the feedback which we may receive from other Commonwealth Law Commission is a matter of great satisfaction.

Paper prepared for the Conference of the Commonwealth Association of Law Reform Agencies scheduled to be held on 11th September, 2005 at London.

EMERGING TRENDS IN LEGISLATIVE DRAFTING*

Lecture delivered to the participants in the 21st International Training Programme in Legislative Drafting on 26th December, 2005.

Rule of law requires the existence of simple and accessible laws. 'Law' means statute law, statutory instruments such as rules, regulations, by laws, schemes, orders etc. However, when we refer to legislative drafting, primarily it means preparation of bills, ordinances, regulations, etc., which are debated in legislature before being enacted as statute law. It also includes subordinate legislation which becomes law on being notified in the official gazette. It must be remembered that a government never legislates for itself. It legislates for its people. A legislation creates rights and obligations and hence it should be the object of a legislation to be as accurate and as precise as possible. Legislation must also be intelligible. Firstly, it must be intelligible to the members of Parliament. Secondly, it must be intelligible to those to whom the rights are given or on whom the duties are imposed. Thirdly, it must be intelligible to those who have to administer it.

For a draftsperson it is a challenge every time a draft of the bill is prepared to achieve clarity and precision. It is easy to criticize, but it is hard to draft. The fact that something has been overlooked may cause comments, but it is much easier to see the omission after it has been discovered in practice than it is to guard against that omission when drafting the bills to be introduced in Parliament.

Legislative drafting in order to make its final product, that is legislation, should be clear and precise and should focus on language, the organization of the material of the proposed legislation and finally the lay out and formatting.

* *By Dr. K.N. Chaturvedi, Member-Secretary, Law Commission of India.*

Thus the legislative drafting involves firstly a look at overall organization; secondly organization within parts, divisions and particularly sentence word order. The modern drafting is traced to Sir Henry Thring, who developed the structure and lay out of legislation which he first used in the Merchant Shipping Bill, 1854 of the United Kingdom. Since then many changes have been made in the formatting of legislation currently in use by following a style of drafting which is known as traditional legal drafting as opposed to the legislation based on some emerging trends which have surfaced during recent years.

The most prominent defects of traditional legal drafting are as follows:-

(1) Long and involved sentences and sections;

(2) Indirect approach to the subject matter;

(3) Poor and sometimes illogical arrangement of clauses; and

(4) Too many cross references to other Acts.

A considerable section of people have come to believe that the texts of the Acts of Parliament are far from being clear and concise. It is in this background that new trends emerged in the area of legislative drafting in Europe, United Sates of America, Australia, and Canada. A movement which has emerged is the use of plain language in legislation. In United States of America, states have enacted laws on use of plain language in the statute. It has been felt that any legislation pertaining to the interests of the consumers and workers and dealing with family relations, the laws should be drafted in plain language. The plain language drafting refers to a range of techniques, designed to create legislation that is readable and easy to use by the relevant audiences for that legislation. These techniques are in the area of vocabulary; syntax; structure and document design.

Vocabulary

The most systematic and extensive treatment of the nature and origins of American legal language is David Mellinkoff's The Language of the Law (1963). Mellinkoff, a Professor of Law, carefully traces modern legal usages from the roots in Anglo-Saxon, Latin, French and pre-modern English. Mellinkoff lists nine characteristics of the language of the law. According to Mellinkoff, these attributes of legal language occur to some degree in everyday English, but it is their greater frequencies, and co-occurrences that characterize legal English. We shall discuss some of these characteristics as follows:

(i) Common Words with Specialized legal meanings/action for 'law suit', instrument for 'legal document', serve for 'deliver legal papers' etc.

(ii) Rare Words from Old and Middle English (Archaic Words); Aforesaid, forthwith, witnesseth, and various words built on the roots of here, there and where (such as hereafter, herein, thereon, therewith, whereas, whereby, etc. Archaisms nearly always seem to add a touch of formality to the language in which they occur, and in this respect those found in legal documents complement the extremely large proportion of words which, even though in current use, seem highly formal in their effect.

(iii) Latin Vocabulary and Phrases: Corpus delicti, mens rea, holo contendere, resn judicata, etc.

(iv) French words which are common but are used in legal contexts: assault, battery, counsel, felony, heir, plaintiff, suit, assurance, schedule, duty, signed, contract, etc. The French element in legal vocabulary is extremely large a consequence of the wealth of French legal terminology that was conveniently borrowed after the conquest

(v) Terms of Art: contributory, negligence, judicial notice, injunction, negotiable, instrument, prayer, alibi, etc.

Terms of art are those words and phrases about whose meanings judges, lawyers, civil servants, etc. have decided there can be no argument.

So far as the vocabulary is concerned, it is suggested to avoid while using English language in legislative drafting the Latin words and phrases and also the words and phrases in French. It is recommended to use words and expressions that are familiar to everyone. The Complete Plain Words by Sir Ernest Gowar is an authoritative work recommended for those who use the written English word as a tool of their trade in administration or business. In the domain of vocabulary, firstly use no more words than are necessary to express your meanings for if you use more, you are likely to obscure it and to tire your reader. Secondly, use familiar words rather than far fetched, if they express your meanings equally well; for the familiar are more likely to be readily understood. Thirdly, use words with a precise meaning rather than those that are vague, for they will obviously serve better to make your meaning clear; and in particular prefer concrete words to abstract for they are more likely to have a precise meaning.

Recently, CLARITY, an international organization promoting plain legal language has come into existence. It is a worldwide group of lawyers and interested lay people. Its aim is use of good and clear language by the legal profession.

Syntax

The defects found in the language used in legislation are its long-windedness and the complexity of its sentence structure. A major problem lies in the length of sentences used in legislation. The expression of a complex rule often requires the use of a large number of words, particularly when that rule is subject to conditions and exceptions. Legislation should be drafted in a way that meets the expectations of the readers. The use of short sentences relying on verbs rather than one noun; use of active rather than passive voice are some of the important features of the plain language drafting. It is also emphasized that positive rather than negative formulation are to be used to state particular propositions of law.

Structure

Structure of a legislation is as important as its language so as to make the provisions of a statute clear to its audiences. If complex messages are to be understood, the ideas must not only be coherent, they must also be presented in an orderly flow. Statutes are to be organized in a clear and meaningful way. Sequencing should be chronological, logical and the proposition of the law are to be arranged in order of importance. Proper headings, sub-headings and marginal notes are to be given. Table of contents and the summary of legislation may be useful in understanding a law more clearly. Explanatory notes, examples, maps and charts are to be used wherever it is considered necessary from the point of view of the reader of the legislation.

Documents Design

There are problems with the typography used in legislation. First, the material is set out densely or closely. Secondly, section and sub-section numbers are located in the text wherever they are hard to find. Thirdly, insufficient use is made of drafting types like bolding and italics for the purpose of emphasis and greater clarity. Lastly, type size is small in the schedules.

Legislation creates rights and obligations. Hence it is necessary that the design of documents should be devised in such manner as to present material that will assist a reader to use the statute book effectively land with minimum of efforts. Care is to be taken while choosing the fonts and proper white space is to be provided.

TOOLS OF DRAFTING

Traditionally, draftsman have been using legislative precedent and other materials such as index to summary definitions and index to Central Acts and States Acts as a tool of drafting statutes. In Government of India, all Central laws are contained in India Code. However, with the advent of computers, the legislative drafting has been benefited in various ways. Firstly, for the preparation of number of number of drafts now, it is not required to devote innumerable hours on typewriters. The software package Word Perfect helps in storing the draft in the memory of the computers and hence necessary changes may be carried out as and where required by the draftsman. For locating the precedents, the use of Internet has made it easy to find out material available on a subject. In recent years, there has been a huge increase in websites established by Parliaments and Governments. Global legal information network is a website which offers variety of information of legislation around the world.

PRIVATISING LEGISLATIVE DRAFTING

In U.K., Ministers were apparently considering contracting out some legislative drafting work to the private sector according to a report published in Financial Times on January 4, 2000. In some other jurisdictions also the contracting out drafting of primary legislation has started.

In Anglo-saxon system, which we also follow in India, the task of law drafting is separated from policy formulation in relation to Government Bills. This is different from the system, which is followed in continental Europe where the functions of policy making and drafting are undertaken by some group of people/officials in the Ministry.

In Anglo-saxon system, the central cadre of officials known as legislative draftsmen or Parliamentary Counsel undertakes the drafting of all legislative texts of the Government Bills. They give effect to detailed instructions as to the contents of the Bill that have been prepared by the policy developers in the concerned Ministry. Although the law drafters are responsible for preparing the text of the legislation the legal inputs on substantive matters continue to be made by the policy developers through a regular process of consultation. One of the shortcomings of this system is that the preparation of the legal texts of the legislation usually takes a long time in some jurisdiction land practice has emerged to get the draft prepared by the private drafters that is by lawyers, consultancy firms, retired judges, retired legislative draftsmen. Although on the face of it, it appears that a prepared draft helps the Parliamentary Counsel or legislative draftsmen in the Government to process the proposed legislation more swiftly, however, the experience in some cases is otherwise. A legislative text is prepared in the context of the constitutional scheme prevailing in a country, allied legislation concerning the same subject matter, the judicial

interpretation on these legislation and last but not the least the legislative precedent which is readily available in the Government departments. In addition to above, constant interaction is to take place with the officials of other Ministries and Departments and when a Bill is introduced and debated in Parliament and its Committees, it is the legislative draftsmen who are required to explain the various aspects of the proposed legislation at those forums. However, where a draft of the legislation is prepared by a private drafter necessarily his role comes to an end the moment the Bill is sent to the Parliamentary Counsel office or to the Legislative Department of the concerned States. While concluding on the subject it would be worthwhile to reproduce from the Statute Law Review Vol.17, No.2 under the heading 'Contracting out drafting; a British Experience' which is as follows:

"…The United Kingdom Government announced that it intended to contract out the drafting of some primary legislation on an experimental basis. Elements of the 1996 Finance Bill were subsequently put out to tender. The estimated cost of contracting out what amounted to 32.5 pages of a 408 page Bill was 130,000 Pound. So, if the whole of the Finance Bill has been contracted out at the same rate the cost would have been in the region of two million pounds, which does not compare favourably with the annual budget of the Office of Parliamentary Counsel, which is approximately three million pounds".

FICCI – LIFE INSURANCE COUNCIL SEMINAR*

ON

AMENDMENTS TO THE INSURANCE ACT, 1938

Ladies and Gentlemen,

I am very pleased to participate in today's seminar on amendments to the Insurance Act, 1938. I would like to dwell on genesis of the proposal to amend the Insurance Act, 1938. The Chairman, IRDA in his D.O letter dated 9th April, 2002 requested the Chairman, Law Commission of India to take up the study of the Insurance Act, 1938 as the said Act does not fully reflects the requirements of the present day insurance regulation. The request by the Chairman, IRDA was made as the government decided to look into the provisions of the Insurance Act, 1938 and to provide a new Bill for presentation to the Parliament. A consultation paper on "Revision of the Insurance Act, 1938 and the Insurance Regulatory and Development Authority Act, 1999" was prepared by the Law Commission of India and the same was circulated in June 2003 to the Government at the Centre, the IRDA, the public and private sector insurance companies and a wide range of other experts in the field of law and insurance.

Later on, a workshop was organized on 25th August, 2003 at FICCI. The Chairman submitted 190th Report in June 2004 on certain legal issues about which there was no controversy. To examine other issues not covered by Law Commission Report, IRDA constituted a Committee headed by Shri K.P. Narsimhan.

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6th February, 2006

The Law of Insurance is a technical area of private law, in which areas for review include issues such as non-disclosure, breach of warranty, doctrine of insurable interest; definition of insurance; Agency and Insurance; Subrogation; worthless policies; contract certainty; post contractual duty of good faith; Fraud in the making of the claim; remedies available to a policy holder when an unreasonably delays the settlement of a claim and reinsurance – should it be in line with general principles of insurance law. In these areas reform in law is slow. To develop a sound legal framework it is necessary that all interested parties in insurance sector – insurer, brokers, loss adjustors, lawyers, consumer organizations – all should have a reasonable opportunity to make an input to the development of proposals so that necessary changes in law may be made.

My endeavour is to present a brief of the insurance scenario in India, the earlier reports of the Law Commission and of the other expert bodies on the subject.

The Indian financial industry primarily comprise of the banking sector, financial institutions, non-banking financial companies, capital market intermediaries and life and non-life insurance companies. In particular the insurance segment form an important part of the financial services industry. The insurance sector performs an important financial intermediation task by mobilizing savings to aid capital formation.

In recent years the insurance industry has entered in its most momentous phase and its market dynamics are changing fast. One can foresee tremendous development of the sector in terms of the market, the number of players and the products and services offered by them, accompanied by market innovation and professionalism. The population and the geographical area covered are expected to grow phenomenally. It is but natural that the common man expects

better services from the insurer no matter whether the insurer is in private sector or in public sector.

Prior to 1871, Indian lives were treated as sub-standard and attracted an extra premium of 15 to 20%. The Bombay Mutual Life Insurance Society, an Indian insurer formed in 1871 was the first one to charge normal rates from Indian lives. And before 1912 there was no specific regulation for the life insurance business. The first enactment i.e. the Indian Life Insurance Companies Act, 1912 was enacted to enable the Government to collect statistical information about both the life and non-life insurance business including the provident insurance societies.

It was in the year 1938 that the Insurance Act was enacted which contained comprehensive provisions for the detailed and effective control over the insurer (both life and non-life) so as to protect the interest of the insuring public. Some of the Acts both of pre-Independence and post-Independence period which are having bearing on insurance areas are –

(a) The Indian Stamp Act, 1899 which prescribes the duties payable on insurance policies;
(b) The Transfer of Property Act, 1882 which contains provisions relating to formalities to be observed in the assignment of policies;
(c) The Insurance Act, 1938;
(d) The Marine Insurance Act, 11963;
(e) The insurance Regulatory and Development Authority Act, 1999.

LAW REFORMS IN INSURANCE SECTOR

Law reform has been a continuous process in our country. In the ancient period, when religious and customary law occupied the field reform process had been ad hoc and no institutionalized. The institution of Law Commission was established in 1834 under the Charter Act, 1833 under the Chairmanship of Lord Macaulay, which recommended codification of the Penal Code, the Criminal Procedure Code, and few other matters. The Second Law Commission (1853); the Third Law Commission (1861) and the Fourth Law Commission (1879) contributed la great deal and the laws enacted at that time, namely, The Code of Civil Procedure; the Indian Contract Act; The Indian Evidence Act; and The Transfer of Property Act continue to remain in force till today with appropriate modification. After independence the Government of India constituted the First Law Commission in 1955. Since then the Law Commission is in existence and the present Commission is the 17th Law Commission (2003-2006) and the successive Commissions have given till now 194 Reports on diverse subjects of legal and judicial reforms and all the Reports are available on the website of the Law Commission of India (www law commission of India.nic.in). It is important here to mention that the Law Commission's 21st Report on Marine Insurance (1961); the 82nd Report on Effect of Nomination under Section 39 of the Insurance Act, 1938 (1980); the 112th Report on Section 45 of the Insurance Act, 1938 (1985) and 190th Report on the Revision of the Insurance Act, 1938and the Insurance Regulatory and Development Authority Act, 1999 (2004) have been submitted to the Government.

LAW COMMISSION REPORT ON MARINE INSURANCE

In 1959 a Bill on Marine Insurance, namely, the Indian Marine Insurance Bill, 1959 (Bill No.1 of 1959) was introduced in Rajya Sabha by a private Member Shri M.P. Bhargava. The Bill was circulated for the opinion of the State Governments, High Courts and other legal bodies and persons interested. After the receipt of their comments, the Government of India referred to the Law Commission of India the question as to whether there was need for legislation on the subject, and if there was, the lines on which it should be undertaken. That is how this matter was referred to the Law Commission. The Law Commission forwarded its 21st Report on the law of Marine Insurance on1st September, 1961 and a law was enacted by Parliament in 1963, i.e., the Marine Insurance Act, 1963.

It would be appropriate to mention briefly about the insurance law reform undertaken abroad. Insurance is both regional as well as international and we may draw some lessons from the experience of reforms undertaken abroad. The Australian Law Reforms Commission submitted its Report No.20 on Insurance Contract (1982) and the said Report was implemented by the Government by passing of Insurance Contract Act, 1984. The other report of the Australian Law Reforms Agencies is on the Insurance Agents and Brokers, Report No.16 l (1980). In the United Kingdom, the Law Commission considered Insurance Contract Law in 1980 when it looked at non-disclosure and breach of warranty. Its conclusion then was that the law was undoubtedly in need of reform. The title of the Report is Insurance Law Non-Disclosure and Breach of Warranty 1980 (Law Commission Report No.104). Currently, the English and Scottish Law Commission has taken up a Joint review of insurance contract law and on 18th January, 2006 issued a paper seeking consultation to determine scope of project and consultation on perceived problems within that scope and possible

solutions. The scoping paper as it is called categorizes policyholders by using abbreviation CSB to refer to consumers and small businesses and abbreviation MLB to refer to medium and large businesses. This distinction has been drawn as the typical small business takes specialist knowledge of insurance and may not have the resources to seek outside advice and does not have bargaining power to agree on special terms. Small businesses apparently face broadly the same problems as consumers. A small business is defined as one within an annual turnover of less than $ 1 million. On the other hand, MLB policyholders usually have access to professional advice and their bargaining power may be equal to that of insurer. The scoping paper has framed two issues, namely, should we seek to produce statutory code for insurance contract law as it applies to consumers and small business policyholders; and secondly should we seek to produce a statutory code for insurance contract law as it applies to medium and large policyholders? We have yet to get an answer on the above issues.

LAW REFORMS BY OTHER BODIES

In England, the reform in insurance law was urged in a report published by National Consumer Council in 1997. The Report is referred as National Consumer Council, Insurance Law Reform; the consumer case for review of insurance law (May 1997). In the year 2002 the British Insurance Law Association published a Report titled "Insurance Contract Law Reform" (September 2002). This Report was prepared by a special committee, which included academics, brokers, insurers, lawyers, loss adjusters, self-regulatory bodies and trade associations. The report contains detailed proposals for changes.

Since Law Commission does not give comment on the Report of other Committee, it is not proper for me to offer comments on KPN Committee Report. It is up to the Government to take a decision in the matter.

BSF OPENING ADDRESS

13TH FEBRUARY, 2006

BSF LAW INSTITUTE

LAW COURSE OFFICERS SRL No.9

OPENING ADDRESS BY DR. K.N. CHATURVEDI

Gentlemen,

It gives me immense pleasure to address the senior officers who are present here to attend the Law Course No.9.

Discipline is the most well-known characteristics of men in Uniform, the hallmark of soldiers all over the world. BSF is a force of soldiers in uniform and its role is vital in guarding borders in north-west and north-east and prevents cross border crimes, smuggling and counter insurgency.

BSF is an armed force of the Union. The Constitution of India under article 33 empowers the Parliament by law to restrict or abridge the fundamental rights of the armed forces so as to ensure proper discharge of their duties and the maintenance of discipline among them. Again, the Constitution l under clause (4) of article 227 restricts the powers of the High Court so far as armed forces are concerned. The High Court has no power of superintendence over Court or Tribunal constituted under law relating to armed forces. Under article 136 (2) of the Constitution the Supreme Court has no power to interfere in respect to any judgment, determination, sentence or order passed or made by any Court or Tribunal constituted by any law relating to the Armed Forces.
Under other laws also a fine balance has been maintained between the powers conferred on the individual officers of the BSF and the responsibilities attached

with the exercise of such powers. BSF Act, 1968 and BSF Rules, 1969 provide a framework of ensuring discipline amongst the members of the force. It spells out the offences, the constitution of the Security Force Court, procedure of the Security Court, and punishment. The Act and Rules also lay down elaborate provisions to ensure fair trial. The provisions for confirmation and revision, Pardon and remission, for arrest and investigation, rights of a person under arrest and preparation of defence by the accused act as limitation on the exercise of power in an arbitrary manner by the officers manning Security Force Court.

The institutional discipline – accountability is secured under an Act known as the Human Rights Act, 1993. The Act permits the filing of complaints of violations of the human rights to the Human Rights Commission. Human Rights are those rights of life and liberty which have protection under the Constitution. The violations of Constitutional Rights amount to Constitutional Torts for which the Courts – Supreme Court and High Courts under article 32 and 226 may award monetary compensation to the victims.

Globally, national laws are incorporating human rights. In United Kingdom, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights. In a House of Lords decision of dated 16 December 2004 section 23 of the Anti-Terrorism, Crime and Security Act, 2001 was held incompatible to section 4 of the U.K. Human Rights Act 1998 and articles 5 and 14 of the European Convention on Human Rights.

Maintenance of discipline by constituting court-martial and by initiating disciplinary proceedings is one of the duties assigned to the senior officers of the Force who are present here. The officers who posses knowledge of law and procedure and an attitude of impartiality are selected for the job.

TRIAL AT THE FORCE SECURITY COURT:

Offences are either civil offences or other offences. Civil offences are triable by criminal courts and other offences by the Security Force Court. The most important stage in a trial is the collection and appreciation of evidence to arrive at the truth of the matter. In a proceeding under the BSF Act the provisions of the Evidence Act, 1872 shall apply. Under the Evidence Act the evidence is oral, documentary or electronic. There is increasing mention of use of video conferencing, video recorded and tape recorded evidence in the Courts. In Andhra Pradesh the Code of Criminal Procedure as amended enables a Magistrate to speak to prisoners in jail through video conferencing at the stage of remand and grant of Bails,

In Singapore Evidence Act section 62A refers to evidence through live – video and live television link which apply to proceedings other than criminal proceedings. In New Zealand Evidence Act section 19 refers to the Court granting leave receiving evidence by video link and tele-conference from Australia.

In United Kingdom the Criminal Justice Act 1988 section 32 refers to evidence by television links.

In matters of video recording certain safeguards are necessary to see that there is no tampering of the video records. In view of the Law Commission of India in its 185th Report (2003) the pre-recorded video cassettes may not be useful to produce in a criminal trial because the accused has a right to see that prosecution evidence is recorded in his presence.

Another important issue in a trial is the choice of jurisdiction between Security Force and the Criminal Court.

Now, I may briefly mention about conduct of disciplinary proceedings. In such proceedings principles of natural justice and fairness are to be observed. Strict proof or proof beyond reasonable doubt may not be necessary.

Gentlemen, as you know the superior courts have powers under articles 32 and 226 to entertain a petition challenging the validity of sentence awarded and order passed in a trial and a disciplinary proceeding as the case may be. Therefore, adequate care and caution is required while conducting court-martial and disciplinary proceedings.

The design of course curriculum and the choice of resource persons is impressive. I am confident that every one of you will enjoy your participation in this Court.

I WISH THE COURSE A GRAND SUCCESS.

Constitutional Imperatives for Inter-Government Agreement for Trans Asian Railways[*]

INTRODUCTION

It is great pleasure to address the gathering of eminent people present here. Today's topic is important and interesting. At the outset, I would like to emphasize that in today's would sovereignty is a myth. The emergence of European Union and integration of economy in that region, Euro as a single currency and European Courts of Human Rights – all this could materialize because member states agreed to restrict their sovereignty. The process of integration is now taking place in the Asian region also. The countries of Asia have recently agreed on an Inter-Governmental Agreement on the Asian Highway Network. An Inter-Governmental Agreement on the Trans Asian Railway Network came into being on 1st December, 2005.

I will first touch upon the initiative taken by Transport and Tourism Division of the United Nations Economic and Social Cooperation for Asia and the Pacific to bring economic growth in the region. After that I will proceed to discuss opportunities for Rail Network in the Asian Region. The most informative part of my speech is the constitutional framework and the norms of international law within which member states may agree on an inter governmental Rail Network. Finally, I will say few words about the possibility of Trans Asian Railway amongst BIMSTEC countries.

[*] Dr. K.N. Chaturvedi, Member Secretary, Law Commission of India
Workshop of Foreign Participants from Bangladesh, India, Myanmar, Sri Lanka and Thailand (BIMSTEC) 23rd March, 2006 at Railway Staff College, Vadodara.

II. INITIATIVE OF UNESCAP FOR BUILDING OF INFRASTRUCTURE

Outpacing Europe and North America, economic growth in Asia is boosting international trade to unprecedented levels. There is a prediction by the United Nations Economic and Social Commission for Asia and the Pacific that the growth in worldwide maritime container traffic would be tremendous and the Intra-Asian Trade is likely to double. Recognizing the need the United Nations Economic and Social Commission for Asia and the Pacific – Transport and Tourism Division launched the Asian Land Transport Infrastructure Development Project in 1992. The objective of the Project is to identify rail routes which can be connected into an international network and which are capable of bringing economic growth in the region.

A long deliberations since 1992 catalyzed into an Intergovernmental Agreement on the Trans-Asian Railway Network on 28-30 November, 2005 at Bangkok. A recapitulation of brief history from the inception of the concept of the Trans-Asian Railway is necessary and interesting.

III. GENESIS OF INITIATIVE BY UNESCAP

The Trans-Asian Railway (TAR) was initiated in the 1960s with the objective of providing 14,000 KM rail link between Singapore and Istanbul (Turkey). The link offers the potential to greatly shorten the distances while being a catalyst for the notion of international transport, trade expansion, economic growth and cultural exchanges. Given the extent of the territory covered the differences in standards and differences in technical development between Railways in the region, Economic and Social Commission for Asia and

Pacific adopted a step-by-step approach of the Trans Asian Railway. The network was initially divided into four major components, namely:-

(i) a Northern Corridor;
(ii) a Sourthern Corridor connecting Thailand and Southern China through Myanmar, Bangladesh, India, Pakistan, Iran and Sri Lanka;
(iii) a Sub-regional network covering the ASEAN and the Indo-China sub-regions;
(iv) a North-South Corridor linking Northern Europe to the Persian Gulf through the Russian Central Asian and the Caucasus Region.

IV. Opportunities for Rail Network:

There is growing acceptance that rail has an important role to play in the movement of goods and people. A number of features speak in favour of a greater utility of rail transport in Asia. Firstly, twelve of the thirty land locked countries of the world are located in Asia with the nearest ports situated several thousands of kilometers way. Cut off from the sea, landlocked countries are usually noticeably poorer and less developed than coastal States.

Secondly, for number of countries which are exporters of mineral resources the logistic of rail transport plays a crucial role.

Thirdly, shipping freight across Asia is today far from smooth sailing..

Fourthly, increasing World Trade means growing opportunities. Meanwhile, environmental concerns are arising too. Road transport pollutes

more is less safe and only really efficient over short distances. On the other hand, Railways companies will be able to capitalize in long distance movements for which they are economically better suited than other surface modes.

Railways connecting far distance places have its history also. A railway from Yunnan in Southern China to Myanmar or Thailand was being called for in 1880. In India the construction of the Khyber Railway opened on May 9, 1924 – linking India and Afghanistan – one of the most remarkable lines in the world. In some areas railways links have come and gone, such as these between Cambodia and Thailand or a link from Chinas Xingjian to Kazakhstan that was completed in mid-90s, only to fall into disuse a few years later before being restored in the year 2004.

V. HANDICAPS OF TRANS BORDER RAILWAY

Next comes the handicap of the Trans border Railways. Railway gauges abruptly change at borders requiring switching cargo from one set of the rail cars to another. Though containers facilitate fast and secure movement of goods even the up gradation of systems and technology is needed. Customs, security inspection and paperwork further slow a train's progress. The need for common standards becomes imperative. Hence, the intergovernmental Agreement – be it for 27 countries of Asia or for BIMSTEC i.e. Bangladesh, India, Sri Lanka, Thailand, Myanmar which were admitted as its full member in December 1977 and Bhutan and Nepal were admitted in 2004. The recent Inter Governmental Agreement on Trans-Asian Railway Network singed on 1st December, 2005 at Bangkok shows that the railway officials first discussed various issues and afterwards the Transport Ministers signed the Agreement.

The Inter-Government Agreement for trans Asia Railways among countries of BIMSTEC is best with challenges. Firstly, the countries in the region before they agree formally must listen to each other individually and together collectively employing the fine art of argument, debate and persuasion. The building up of infrastructure includes double tracking nationwide as is being done in Thailand with $ 10 billion project. Secondly, a new railway across Myanmar is needed. Besides bad or missing rail points and signaling mind of the government should discuss issues standardization of rail gauges. In early days of development problems associated with the gauge differences did not arise. Railways were developed exclusively for the inter-state movement of cargo and people and for linking the capital cities and ports with their hinterland. The present day needs of inter-state and the inter-country movement of goods and people require serious efforts to standardize the gauges. Thirdly, creating rules that offer attractive opportunities to private money and skilled logistic firms.

VI. THE CREATION OF RULES FOR TRANS ASIAN RAIL NETWORK

Now, how do we create rules? As the States are sovereign entities they can agree to develop the Inter Governmental Agreement on Trans Asian Railway Network. The structure of the Agreement and the method by which Inter Government Agreements are given virtually effect as law of a country party to the agreement. Strictly speaking, municipal law deals with issues that arise between the State and the individual and between individual and between individuals. International law deals with the matter that arises between states. There exist two theories on the relationship of International Law and Municipal Law. The first is referred to as Dualism. According to Dualism theory, international law and municipal law belong to two separate legal systems. The

second theory is Monism, which is also known as Automatic Incorporation Theory. According to this theory, the international law and municipal law are considered to be parts of the same system. Most countries follow the Dualist Approach to bring about the Domestic Application of International Law. This is true in Democracies where a strict separation of power is maintained. This system enables the elected representatives of the people to ratify only those decisions of the Executive that it feels necessary to do so. Apart from maintaining a control over executive decision-making it also enables the States to put in place the necessary infrastructure before attempting to implement a particular international norm. However, in several legal systems the judiciary plays a proactive role in incorporating the norms of international law as a part of municipal law.

At this stage, it is necessary to understand the implications of the expression 'signatory to the treaty' and 'party to the treaty'. If a State has signed the treaty (which act is not intended to convey the consent of that State to be bound by treaty) it is obliged to refrain from acts which would defeat the object and purpose of a treaty until it shall have made its intention clear not to become a party to the treaty.

Ratification is the confirmation of the consent of a State given by signature of a Treaty for the purpose of giving it a binding force. Ratifications in modern times have been made subject to constitutional control. The time lag between signature and ratification allow extra time to elicit public opinion. However, the question of how a State effects ratification is a matter for internal law alone and is outside the purview of international law.

Ratification in the case of Bilateral Treaties is usually accomplished by exchanging the requisite instruments, but in the case of multilateral treaties the

usual procedure is for one party to collect the ratifications of all states – the Secretary General of the United Nations act as the depository for ratifications. The consent of the State is given by Accession also. This is the method by which a State becomes a party to the treaty it has not signed.

VII. CONSTITUTIONAL IMPERATIVES

Now we come to discuss constitutional imperatives for evolving Intergovernmental Agreement for Trans-Asian Railways. In the United Kingdom, in Attorney General for Canada vs. Attorney-General for Ontario (1937) AC 326 speaking for the Judicial Committee of the Privy Council, Lord Atkin observed:

> "It will be essential to keep in mind the distinction between (1) the formation; (2) the performance of the obligations constituted by a treaty using that word as comprising any agreement between two or more sovereign states, within the British Empire. There is well-established rule that the making of a Treaty is an executive act, while the performance of its obligation, if they entail alteration of the existing domestic law, requires legislative action. The same system is followed in Commonwealth countries which in past were rules by Britain".

In India, legislation is required in order that a Treaty may create rights and obligations enforceable in the courts. India follows the theory of transformation. Article 253 of the Constitution empowers Parliament to make any law for the whole or part of the territory of India for implementing any treaty, Agreement or Convention with any other country or countries or any decision made at any international conference, Association or other body. The Executive in India can enter into any Treaty, be it bilateral or multilateral, with any other country or countries. In the absence of Article 253, such a Treaty by

virtue of the provision contained in Article 73 read with Article 246 and entries No.10 to 20 of the List I of the Seventh Schedule to the Constitution will become law of the land. Article 73 deals with the extent of executive power of the Union. According to Article 73, the executive power of the Union extends where the law making power of the Union extends. Therefore, if India enters into a Treaty with any other country, it will become law of the land by virtue of Article 73 since the extent of executive power extends to the extent of the legislative power.

Sri Lanka

In the Constitution of Sri Lanka Chapter XX (Art. 157) refers to international treaties and agreements. The said article reads as follows:

> "157. Where Parliament by resolution passed by not less than 2/3rd of the whole Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any treaty or agreement between Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its national or corporations, companies and other associations incorporated or constituted under its laws, such treaty or agreement shall have the force of law in Sri Lanka and otherwise than in the interests of national security no written law shall be enacted or made and no executive or administrative action shall be taken in contravention of the provisions of such treaty or agreement.

Myanmar

Article 73 of the Constitution of the Socialist Republic of the Union of Burma empowers the Council of State to make decisions concerning entering

into, ratification or annulment of internationals treaties or the withdrawal from such treaties with the approval of *Pyithu Hlutta.*

CONCLUSION

I shall now focus on the issues that are to be addressed in an intergovernmental agreement by the BIMSTEC States. Settlement of dispute is an important part of an agreement. There is a need to address jurisdictional issues when a Trans-Asian Railway is contemplated. Should be have an independent board comprising representatives of Member States to monitor movement of freights, passengers, infrastructure and maintenance services or this function is to be discharged by the concerned Ministries and Departments of each Member State.

Many services in railways are being outsourced to other agencies and in such eventuality there is a need of an independent regulator to settle disputes that arise between the Member States. The need of the hour is first to discuss and sort out the issues relating to physical barriers[*] and jurisdictional constraint and thereafter the Member States may forge towards intergovernmental agreement for Trans-Asian Railways.

[*] The details of railway network and gauge are as under:

1.	India	63,230 km	Broad gauge	Narrow gauge
2.	Sri Lanka	2,706 km	Broad gauge	Narrow gauge
3.	Sri Lanka	1,449 km	Broad gauge	
4.	Vietnam	2,600 km	Standard gauge	Narrow gauge
5.	Cambodia	603 km	Narrow gauge	

Note :

Broad gauge is 5'3" or 1600 mm
Narrow gauge is 3'6" or 1067 mm
Standard gauge is 4'8" 1435 mm