

Possible Commonwealth Scheme for Arbitration, Conciliation and Mediation

A Working Paper prepared for the Commonwealth Secretariat

by Dr. Barry Sen, former Secretary-General of the Asian African Legal Consultative Committee

1. The proposal to examine the possibilities for a Commonwealth Scheme for provision of services in the field of arbitration, conciliation or mediation originated from suggestions at the 1990 Commonwealth Law Ministers' Meeting in Christchurch, New Zealand. The communique then invited the Commonwealth Secretary-General to explore the possibility of providing such services and to report the result, at the next meeting of the Commonwealth Law Ministers. This paper is in response to that invitation and sets out the available options for consideration by Ministers.

2. The Hon Prince Bola Ajibola (Attorney-General and Minister of Justice, Nigeria) in the course of his statement requested careful consideration of the possibilities of setting up an International Arbitration Centre for the Commonwealth. He had observed that some other organisations of less significance in terms of numbers had been able to set up various types of systems for international commercial arbitration or international arbitration. The Minister added that if the type of centre he had in mind could be created, it might seriously address the issue of mediation, conciliation as well as that of arbitration. He further emphasised that the system be less expensive and if possible to be less complex than the existing ones and it should be able to function expeditiously.

3. In order to examine the question of a dispute settlement scheme for the Commonwealth three basic issues call for consideration, namely:

- (1) the types or classes of disputes sought to be resolved through a Commonwealth initiative;
- (2) the modalities to be employed for dispute settlement under a Commonwealth scheme; and
- (3) the organisational pattern of the facility to be created.

4. Before addressing these issues it ought to be emphasised that any Commonwealth scheme aimed at providing assistance in the matter of settlement of disputes must have as its objective the rendering of services exclusively in relation to (a) disputes and differences between two or more Commonwealth Governments or (b) other disputes, including commercial disputes between private parties, which have sufficient *nexus* with the Commonwealth. Such an exclusive use of the facility by Commonwealth entities is likely to provide the justification for the proposed initiative.

5. It may be stated that even the facility created under the auspices of the World Bank for settlement of investment disputes could be availed of by a State party of ICSID Convention 1965 or a national of a State party. Similarly the forums created for settlement of disputes by regional organisations arising out of interpretation or application of constituent treaties can be availed of only by the State parties or their nationals.

I. TYPES OR CLASSES OF DISPUTES THAT COULD BE BROUGHT WITHIN THE PURVIEW OF A COMMONWEALTH SCHEME

6. To facilitate examination of this question it is necessary to identify the situations where disputes and differences may arise as between or relating to Commonwealth countries. It is also pertinent to consider the existing modalities for resolution of disputes, to evaluate the efficacy or the shortcomings experienced, and to investigate the areas where a Commonwealth initiative is likely to prove productive.

A. Disputes and differences between states or governments in areas governed by Public International Law

7. Since the Commonwealth is a voluntary association of free nations, it is conceivable that disputes and differences would arise between two or more Commonwealth Governments in the same manner as between any other sovereign independent states. It is seen from past experience that the areas where controversies mostly arose between states were related to territorial claims or treatment of nationals. However, in recent years such disputes and differences have arisen more often over such matters as delimitation of maritime zones, border disputes, fishing rights, flights of aircraft, sharing of waters of international rivers, trans-frontier pollution, protection of investments and a variety of other matters. These can lead to protracted and very public disputes being heard before the International Court of Justice at The Hague.

Existing modalities for settlement of disputes and differences

Mediation and Conciliation

8. The traditional mode for settling disputes and differences when negotiations failed between the states has been to have recourse to the 'good offices' of another state or an individual dignitary to mediate, conciliate or

arbitrate on the dispute. In the days when the international community was confined to the European States, the use of 'good offices' of a third state or a group of states, or the mediation by a powerful monarch or the Pope had proved to be an effective means of settling disputes and differences.

9. In recent years, although on several occasions offers of mediation by eminent personalities are known to have been made for resolving disputes, very few of them appear to have been availed of. It had limited success in Latin America and the best known example where mediation seems to have proved effective was in the case of *Argentina v Chile* in regard to the disputes over the Beagle Channel, where after an effort to resolve the disputes through arbitration, the two countries sought the mediation of His Holiness Pope John Paul the II. Other recent examples where the Secretary-General of the United Nations was called upon to use his good offices, was over the "Rainbow Warrior" dispute between France and New Zealand and also in relation to the situation in Cyprus. Also the Organisation of African Unity had set up a Commission for conciliation, mediation and arbitration for resolving disputes between its member states but information is not readily available as to how far the services of the Commission have been availed of by the states concerned. The Arab League also provides machinery for the purpose of settling disputes between its member states through conciliation, mediation and arbitration, but to date this has not been fully utilised.

Arbitration

10. Arbitration through *ad hoc* tribunals composed of members chosen by the parties appear to have been resorted to more often as a means for settling differences between states. It has not been possible to monitor all cases where states have had recourse to this modality since little publicity is attached to some of the cases or they are not considered sufficiently important to be commented upon in legal literature. The absence of or minimised publicity available in the comparatively private arbitration procedure (in contrast to the limelight drawn to litigation before the Courts) could well be a distinct advantage to many Governments.

11. The classic examples where disputes had been resolved through arbitration can be found in the awards of *U.S. Mexico Claims Commission*, which related to the treatment of U.S. Nationals and their property, and the *Trail Smelter Arbitration* between the United States and Canada concerning Trans-Boundary pollution. Among the disputes submitted to *ad hoc* tribunals for arbitration since the year 1955 the following may be regarded as more important: -

- (a) *France, Great Britain and the United States of America v Federal Republic of Germany, 1955-1966*
Issue: Property, Rights and Interests in Germany.

- (b) *Argentina - Chile Frontier Arbitration, 1965-1966*
Issue: Boundary.
- (c) *Lac Lanoux Arbitration, 1957*
Issue: Use of International Rivers.
- (d) *Rann of Kutch (India v Pakistan) Award, 1965*
Issue: Territorial Dispute.
- (e) *Canada v United States of America, 1968*
Issue: Claims of United States citizens for real property damage occurring along the South Shore of Lake Ontario.
- (f) *Kingdom of Greece v Federal Republic of Germany 1972*
Issue: Claims originating from judgments of the Greek-German Arbitral Tribunal.
- (g) *Rio Encuentro: 1965-1968*
- (h) *France British Continental Shelf-Arbitration 1978*
- (i) *Dubai-Sharjah Frontier Delimitation Arbitration*
- (j) *Young Plan Loan Arbitration (Federal Republic of Germany v Belgium, France, United Kingdom and the United States of America, 1960).*
- (k) *Egypt-Israel - territorial claims 1988.*
- (l) *Iran-United States of America Claims Tribunal (Ongoing) - Property rights of U.S. Nationals.*

12. It may be stated that the disputes referred to the Iran U.S. Claims Tribunal, established as a part of the package contained in the Algiers Accords of 19 January 1981, are voluminous in number. It would be noticed that one of the major arbitrations was between two Commonwealth countries, namely India and Pakistan, in regard to certain territorial claims.

13. The main problems experienced in resorting to *ad hoc* arbitration have often been the difficulty in reaching agreement on a *comprise*, the determination of applicable rules, both substantive procedural, as well as the selection of the tribunal or its chairman in cases where the tribunal is composed of one member to be nominated by each party and the chairman to be chosen by agreement of the parties. Moreover, the protracted nature of the arbitration proceedings and the costs involved by way of fees of the arbitrators, the expenses of the secretariat as well as costs of representation through counsel, which are enormous and at times prove to be prohibitive, have prevented smaller nations from resorting to arbitration.

International Court of Justice

14. Another modality for resolving dispute is through recourse to the **International Court of Justice**. There are two possible avenues of approach to the Court, namely (i) under article 36(1) of the Statute of the Court where parties refer their disputes by means of a special agreement and (ii) under article 36(2) of the Statute where the Court exercises compulsory jurisdiction in

respect of legal disputes between states which had made declarations accepting such compulsory jurisdiction of the court.

15. Although the practice to have recourse to the Court was not uncommon during the first decades of the Court, the later years revealed a gradual decline in the number of cases being referred to the Court. It might be stated that out of 42 cases filed in the Court pursuant to its compulsory jurisdiction under article 36(2) of the Statute, more than one-half were instituted during the decade 1950-60 whereas in the decade following only four cases were instituted. In the 'seventies, a total of ten cases was instituted - and, indeed, since the second half of that decade the Court was concerned only with two such cases, and during the 'eighties, only two cases were instituted.

16. However, with regard to cases referred by agreement of parties some six cases were instituted during the past decade. The decline in the number of cases referred to the International Court of Justice was partly due to the general reluctance on the part of several states to accept the compulsory jurisdiction of the Court and partly due to other reasons such as the complicated procedural rules, heavy costs of representation through counsel and the composition of the Court. It was generally felt that the hearing of cases by fifteen judges was inappropriate for speedy solution of disputes, and the fact that the parties could have no choice in selection of the tribunal had also proved to be a disincentive.

17. However, after amendments to the rules of the Court, which made it possible for a case to be heard by a chamber of five to seven judges, the position improved. This, indeed, accounts for a larger number of cases being referred to the Court by virtue of special agreements during the past few years, some of which were to be heard by a chamber. Among the cases referred to the Court a Commonwealth Government was a party in four, and were between two Commonwealth Governments.

B. Interpretation and Application of Treaties and Conventions

18. Almost all Commonwealth countries/Governments have bilateral treaty relations with several other Commonwealth countries on a wide range of subjects, such as treaties of friendship and treaties of commerce, treaties providing for most favoured nation treatment for their respective nationals, treaties for extradition, air traffic agreements, treaties for sharing of natural resources including river waters etc. Commonwealth countries are also parties to numerous multilateral conventions including those which have been promoted under United Nations auspices. It is not uncommon for disputes and differences to arise which would involve the question of interpretation or application of a treaty and the same may have to be resolved through a dispute settlement mechanism between the states concerned.

Existing modalities for settling disputes

19. Normally a treaty or convention would spell out the modality or modalities for resolving differences arising out of interpretation or application of the particular treaty or convention. If the treaty is silent on the matter, the modality for dispute settlement would be determined by reference to the Vienna Convention on the Law of Treaties 1969. The usual modalities for settling disputes of this type is basically the same as for settling disputes in matters falling within the sphere of public international law namely, negotiation, conciliation, mediation, arbitration or through the International Court of Justice.

20. There are several treaties which provide for settlement of disputes through arbitration and among the cases where this modality was invoked mention may be made by way of example to the *Arbitration between Italy and USA 1965* and *Arbitration between France and the U.S.A. 1963-1978* concerning air transport agreements. Another case which went to arbitration relating to interpretation of a treaty was between *Austria & Germany in 1972*. In earlier years the general trend was to incorporate a provision in treaties and conventions for disputes to be settled through recourse to the International Court of Justice. However, during the sixties in most of the international conventions the provision for referring disputes to the Court had to be put in an optional protocol in view of the fact that the Court's jurisdiction for settling disputes arising out of the interpretation and application of the convention was not found acceptable to a large number of states. From the seventies the general trend has been against incorporating a provision in conventions and treaties for settlement of disputes by the International Court of Justice.

21. It may be mentioned that there are some multilateral conventions of a global character as well as conventions for regional co-operation which have in-built special mechanisms for settling disputes arising out of interpretation or application of the convention. An example of this is the treaty establishing the International Civil Aviation Organisation which provides for a machinery of its own for settling certain classes of disputes concerning air flights. Another is the U.N. Convention on the Law of the Sea 1982 which provides for several options for settling disputes and establishing a Law of the Sea Tribunal to which certain types of disputes can be referred by parties to the Convention. The treaty establishing the European Economic Community also provides for a European Court of Justice for determining matters which relate to the interpretation or application of the Treaty of Rome and other related treaties. The basic framework treaty for the establishment of the Preferential Tariff Area (PTA) and the Southern African Development Co-operation Council (SADCC) (both of which embrace a number of Commonwealth countries) also contemplates special machinery for set-

tlement of disputes. However, some treaties do not contain any such special machinery - like those constituting ASEAN and SAARC.

C. Disputes between a State and the Nationals of Another State

22. This type of case may arise when a foreign national suffers harm or bodily injury in the state of his or her residence or sojourn, or his or her property rights are affected through governmental action or the acts of a governmental agency or at the hands of a private person. In modern context such complaints are known to have been made where a person complains that he or she had been treated in violation of his or her human rights or has been denied right of residence, or the right to carry on a vocation contrary to the provisions of a bilateral or multilateral treaty such as the Treaty of Rome. There has also been occasion for complaint when foreign investments have been affected by change of law and the investor had been denied control over his or her investments or the right to repatriate profits. Such instances are not uncommon even in some of the Commonwealth countries in respect of the nationals, including bodies corporate of other Commonwealth countries.

23. In traditional international law, an individual aggrieved by the action of a foreign state resulting in loss or damage to his person or property could only approach the state of his or her nationality to take up his cause, because an individual had no right to proceed against a state before an international forum. The state of nationality in the exercise of its right of diplomatic protection of citizen abroad alone was competent to take up the matter with the foreign state concerned, and if differences persisted it could have the dispute resolved through one of the recognised modalities for settling disputes between states. It was the usual requirement that the aggrieved individual should pursue available remedies before the appropriate national forums of the foreign state concerned as a prerequisite to his or her claim being taken up by the state of his or her nationality.

24. However, in recent years some exceptions to this rule have been noticeable. For example, under the European Convention of Human Rights a person complaining of violation of his or her human rights by a state can have direct access to the European Court of Human Rights against that state. Similarly, the European Court of Justice is empowered to adjudicate upon complaints by individuals who are affected by the action of a state in derogation of the provisions of the Treaty of Rome and its subsidiary instruments. These instances can be understood in the context that the multilateral conventions in question themselves expressly provided for a machinery with exclusive competence in regard to interpretation and application of the provisions of those treaties and conventions.

25. It is felt that these precedents should not be extended beyond limited areas and as a general rule a dispute between an individual and a foreign state should be adjudicated before the national courts of the state concerned, and failing redress the state of nationality of the individual should take up his or her cause in the same manner as a state to state dispute.

D. Disputes of a Private Law Nature arising out of Economic and Commercial matters

26. This class of cases may be sub-divided as follows:

- (i) Disputes between a Government or governmental agency and the nationals (including bodies corporate) of another country.
- (ii) Disputes between nationals (individuals and bodies corporate) belonging to different countries.

27. In recent years, the broadening of governmental functions into the private law sphere has often brought government and state agencies into direct contact with nationals of other states. For example, the governments of developing countries and countries following socialistic pattern or economy usually make purchases of arms and equipment for their defence requirements and also make purchases of foodstuffs for maintenance of their rationing system. In addition several countries undertake developmental projects and some countries through state organs are known to carry on industrial, commercial and trading activities resulting in transactions of sales and purchase with nationals of other countries. Several Commonwealth countries are known to carry on activities of the types mentioned above.

28. The respective contracts which are entered into for the aforesaid purposes between a government or governmental agency and nationals belonging to other states usually contain provisions for settlement of disputes. The choice of modality for the purpose is usually a matter of negotiation between the parties. A wide range of dispute settlement procedures are available in this respect. Some contracts provide for resort to the national courts of the country of one of the parties; others sometime contemplate *ad hoc* arbitration by a sole arbitrator or a three member panel, both parties nominating one member each and the third member agreed upon by both the parties. The procedural rules applied in such arbitrations are either the national arbitration rules of the country where the arbitration is to be held or the UNCITRAL Rules of 1976. A number of contracts also provide for arbitration under the auspices of a national or international institution. Among international institutions, the most important is the International Centre for Settlement of Investment Disputes - Washington (ICSID) which was established under a Convention adopted in 1965 at the initiative of the World Bank to promote larger volume of investments in developing

countries. The Centre has its own set of rules for arbitration which provide for adjudication of disputes by a tribunal to be composed of arbitrators to be chosen from a panel maintained by the Centre. Arbitration under the auspices of ICSID can only be availed of in disputes between a state party to the 1965 convention or a state agency on the one hand and nationals of another state which has ratified or acceded to the 1965 convention.

29. The number of contracts which have incorporated the ICSID clause is fairly large and is being progressively used by states in respect of projects which represent investments by foreign nationals. The international dispute settlement procedure which is most widely used is the one provided by the International Chamber of Commerce (ICC) in Paris, which has its own procedures to be applied in arbitration proceedings. The American Arbitration Association which also has its own rules is resorted to in many contracts particularly in the western hemisphere. In recent years, various arbitration centres have been set up to provide facilities for settlement of disputes. Among such centres, mention may be made of the regional centres in Kuala Lumpur, Cairo and Lagos established under the auspices of the Asian African Legal Consultative Committee. Centres for arbitration have also been established in Hong Kong, Melbourne, San Francisco, Vancouver and a number of other places. The rules for arbitration applied by these centres are usually the UNCITRAL Arbitration Rules with suitable adaptation. Arbitration facilities are also provided by several associations of trade in disputes arising out of commodity transaction as well as in regard to shipping. Such institutions are located in London, Hamburg, Tokyo, etc.

II. NEED FOR A COMMONWEALTH DISPUTE SETTLEMENT FORUM

0. Notwithstanding the availability of a number of options in the modality for resolving the diverse types of disputes in the public law sphere as well as in disputes between a state and nationals of other states or between individuals belonging to different jurisdictions in relation to commercial and trading matters, it would seem to be worthwhile pursuing the idea of making available some kind of machinery within the Commonwealth for dispute settlement for more reasons than one.

31. In the first place, it would seem to be reasonable to contemplate that the Commonwealth - being an association of fifty independent nations, both large and small - should make available a forum for dispute settlement which could be availed of by its member nations, and where appropriate, in disputes involving Commonwealth Governments or their nationals in the private law sphere. Secondly, such a forum could be more readily availed of in view of the fact that the Commonwealth countries between themselves basically share a com-

mon system of law and also are able to transact business through the English language. Thus, a Commonwealth dispute settlement forum would be in a position to conduct proceedings in a single language avoiding all problems arising out of multiple interpretation. Moreover, the use of a common system of law on substantive issues could result in avoiding complexities arising out of conflict of laws which often hamper progress of dispute settlement through international forums. Furthermore, the familiarity of Commonwealth Governments and their nationals with Commonwealth institutions is likely to make a Commonwealth forum to be more readily acceptable to many governments, particularly those of the smaller nations of the Commonwealth. As adverted to (see para 10 above) there could also be the advantage of minimised publicity available under a relatively "private" Commonwealth scheme.

32. However, it is necessary to ensure that the use of the Commonwealth forum is entirely on a voluntary basis, that is to say that the forum would be available only where both parties to the dispute are agreed on the reference of a dispute. Experience has shown that compulsory procedures whereby a party could be brought before a dispute settlement forum without its consent have raised many misgivings, since the general trend evidenced in many Commonwealth countries is against acceptance of compulsory procedures. Furthermore, any scheme for a Commonwealth dispute settlement machinery is likely to be more attractive to smaller nations if simpler procedural rules than those applicable at the present in proceedings before international tribunals could be worked out and a system could be evolved for speedy disposal of cases and consequent reduction in costs.

III. CLASSES OF DISPUTES WHICH COULD BE CONSIDERED APPROPRIATE FOR RESOLUTION THROUGH A COMMONWEALTH MACHINERY

33. If a decision is taken to promote a scheme under the auspices of the Commonwealth with a view to assisting the member nations to resolve disputes through suitable modalities, it is suggested that the scheme should be geared to deal with the classes of disputes indicated below. Both the parties to a dispute must however agree upon its resolution by availing of the facilities provided under the Commonwealth scheme. Such agreement should be in express terms and appear from the provisions of a treaty or some other instrument whereby they agree in advance to settle their disputes through a particular mode of settlement of the dispute. The agreement may also appear from an instrument executed between the parties after the dispute has arisen.

A. Disputes between member states of the Commonwealth in the Field of Public Law

34. It is conceivable that some member states of the Commonwealth may wish to avail of the facilities offered through a Commonwealth scheme to settle their disputes and differences in areas broadly falling within the public law sphere such as border disputes, claims concerning maritime zones, the right of exploitation of resources in exclusive economic zones, the question extradition of fugitive offenders, or the question of admission and treatment of nationals in another Commonwealth country.

35. This might particularly be true of those nations which have preferred to keep a dispute unresolved, after arbitral tribunals or the International Court of Justice. Indeed a Commonwealth facility may be singularly attractive to some of the Commonwealth countries as a forum in which they would be willing to repose confidence in view of their familiarity with Commonwealth personalities as well as the applicable laws. Moreover, the possibility of mediation in regard to some of the disputes might become feasible through Commonwealth judges or other eminent Commonwealth personalities whose services may be obtained within the frame work of Commonwealth scheme.

B. Interpretation of Treaties

36. There are several bilateral treaties in existence on a wide range of subjects between states members of the Commonwealth and it is very likely that similar treaties would continue to be concluded between these states. The usual modality for settlement of disputes, generally incorporated in bilateral treaties is through negotiations, mediation or arbitration. It is possible that if disputes and differences between the parties do arise which cannot be resolved through negotiations, the parties may choose to go for mediation or arbitration, and in such cases a Commonwealth facility might become an attractive forum which they may like to approach. Moreover, in several multi-lateral instruments to which Commonwealth Governments are parties, arbitration is contemplated as one of the modes for settling any differences. Here also it is conceivable that if the question of interpretation or application of a treaty provision were to arise between two Commonwealth countries, the same may be sought to be resolved through arbitration under Commonwealth auspices.

C. Technical Assistance and Loan Agreements

37. Several countries of the Commonwealth like Australia, Canada and the United Kingdom provide loans and offer technical or economic assistance to the developing countries of the Commonwealth under bilateral executive agreements for building their infrastructure or undertaking projects of national importance. A Commonwealth scheme for settlement of disputes and differences could well be resorted to for the interpretation or application of such agreements, when the same cannot be resolved through negotiation. In such cases,

the agreements themselves should provide that the disputes and difference arising out of or in relation to the agreement would be settled through appropriate modalities provided for in the Commonwealth scheme.

D. Disputes between a Commonwealth Government and a National of another Commonwealth Country

38. It is felt that any dispute between Government and an individual or body corporate in relation to a matter falling within the field of public law, such as concerning personal or property rights should not be included within the purview of the Commonwealth Scheme. If such disputes were to arise, the individual or body corporate should have resource to the national courts of the country in question or request his own government to take up his case.

39. In regard to commercial or investment disputes between a Commonwealth government and an individual belonging to another Commonwealth country, it may be stated that there are already several international forums available for settlement of such disputes through conciliation or arbitration. It is, however, one category of case where a Commonwealth forum may be useful i.e. in cases where a Commonwealth Government enters into a Commercial transaction or agreement for construction of a project or transfer of technology with a national of another Commonwealth country and that activity is financed wholly or substantially through a programme or assistance or loan by the country of his nationality. It would seem that in many cases where a Government sanctions a loan or provides economic or technical assistance to another country for a particular activity, the recipient government is required to obtain goods, such as plant, machinery, technical know how etc. as well as services from the aid giving country. For that purpose contracts are usually entered by the Government receiving assistance or one of its agencies on the one hand and an individual or body corporate located in the aid giving country on the other, the terms and conditions of which are usually subject to the approval of the latter. It is seen from experience that in the course of execution of such projects, disputes and differences do arise between employer and the contractor. These disputes need to be speedily resolved in order to ensure due progress of the projects but the existing systems of dispute settlement are not sufficiently geared to ensure expeditious disposal of such cases. Moreover, in such cases the Government receiving assistance for the project as well as the government providing aid have a direct interest in the matter of settlement of such disputes.

E. Disputes between Nationals of two or more Commonwealth Countries

40. Disputes of this type normally arise in relation to commercial matters including trade and investments. As already stated, there are several existing modalities

available for settlement of disputes in such matters. It is therefore for consideration whether the Commonwealth Scheme should also make available an additional facility for settlement of such dispute between nationals of Commonwealth countries.

IV. ORGANISATION OF A DISPUTE SETTLEMENT MECHANISM WITHIN THE COMMONWEALTH

41. In determining the pattern of a dispute settlement mechanism within the Commonwealth, it may be pertinent to keep in perspective the basic features of the Commonwealth itself, which is a voluntary association of independent nations. The Commonwealth is not an international organisation in the conventional sense, nor is the subject matter of association between its member nations governed by a multilateral treaty or convention. Nevertheless, the Commonwealth does have a number of the characteristics of an international organisation. For example, every new member has to make a declaration concerning its membership of the Commonwealth; there are procedures and practices governing admission of members; it has a permanent secretariat whose expenses are shared between Commonwealth Governments; and the Commonwealth Secretariat has observer status at the United Nations in the category of being an Inter-governmental organisation.

42. Consistent with these features of the Commonwealth, it is felt that it would not be appropriate to contemplate formulation of a scheme which would introduce any form of institutional structure for compulsory procedures for settlement of disputes. The aim should, therefore, be merely to provide a facility which could be availed of, if the parties so agreed, in certain stated category of cases to assist Commonwealth Governments and other entities to settle their disputes and differences. Such a pattern of Commonwealth assistance might be more acceptable in view of the reluctance of many developing countries of the Commonwealth to submit to compulsory procedures. However, the scheme should provide for some form of organisational machinery so as to facilitate settlement of disputes and differences in an orderly and expeditious fashion. It is therefore suggested that a facility should be created within the Commonwealth Secretariat to be known as the Commonwealth Centre for settlement of disputes.

A. The Commonwealth Centre for Settlement of Disputes

43. The Centre might be established as an organ of the Commonwealth Secretariat, by means of a resolution or decision taken at a meeting of Commonwealth Law Ministers which might be appropriate for the purpose. Alternatively, this could be done by means of an admin-

istrative decision of the Commonwealth Secretary-General pursuant to an understanding reached or recommendation made at an appropriate Commonwealth Heads of Government meeting. The Commonwealth Centre for dispute settlement (hereinafter referred to as the 'Centre') should be headed by a Registrar, who might (at least initially) be the Director of the Legal Division (ex-officio). The Centre might in time require such number of technical and administrative staff as the Secretary-General considered appropriate and as the volume of work might require. Applying a "user pays" principle should mean that the creation of the Centre would have no implications for the regular budget of the Secretariat.

44. It might be stated that in some organisations like the EEC, the Arab League, the Arab Co-operation Council, the SADCC or the PTA where dispute settlement machinery have been created or are contemplated to deal with matters arising out of interpretation or application of the parent treaty creating the organisation or to regulate the relationship among member states in respect of matters covered by the treaty, the disputes settlement machinery is not made a part of the Secretariat. This is because under those schemes the Secretariat of the organisation can in certain circumstances be made a party to the dispute. However, these considerations do not arise in the case of any Commonwealth scheme for dispute settlement, and there would not appear to be any difficulty in making the Centre a part of the Secretariat. This will indeed help in keeping down the administrative costs of the disputes settlement machinery.

B. The Functions of the Centre will include the following

- (a) To provide information concerning the types of disputes that could be resolved through the Commonwealth Dispute Settlement machinery and the modalities that could be availed of for the purpose, through publication of brochures and other appropriate means;
- (b) To formulate rules, subject to the approval of the Commonwealth Governments, applicable to various categories of disputes including the modality for settlement and the procedures to be followed;
- (c) To compile, in consultation with Commonwealth Governments, a list of arbitrators whose services may be available in settling disputes and differences between Governments; and to compile an additional list of arbitrators competent to serve in tribunals to be established in economic and commercial disputes of a private law nature;
- (d) To receive and register requests for settlement of disputes in accordance with the rules; to receive pleadings submitted by the parties to a dispute and to verify their conformity with the rules of the Centre;

- (e) To assist parties in the selection of the tribunal or settlement of disputes, to keep custody of records, to assist the tribunals in the hearing and disposal of cases, to monitor progress of proceedings and to ensure their speedy disposal.
- (f) To receive decisions or awards on the disputes submitted to the Centre, and to communicate them to the parties.

V. MODALITIES FOR DISPUTE SETTLEMENT AND APPLICABLE PROCEDURES

A. Disputes between Commonwealth Governments

(a) In regard to all categories of disputes and differences between two or more Commonwealth Governments which have been submitted to the centre for settlement, there should be an option provided to settle the differences through mediation, conciliation or arbitration and the parties should be asked to agree upon the choice of the modality and indicate the same at the time of filing of their request to the Centre. However they should have the liberty to communicate their choice within a reasonable period as may be provided for in the rules. The parties should also have the liberty, if they so agree, to alter the choice of modality even after communicating their choice to the Centre; for example the parties may initially decide to go for mediation, or conciliation but later in the light of circumstances they may consider arbitration to be a more appropriate procedure; similarly the parties may initially agree to go for arbitration but may later opt for conciliation or mediation as being more effective. However, the choice of modality should not be altered after a particular procedure in accordance with the agreement of parties have commenced. This should be allowed to be completed. There would, however, be no bar to fresh initiation of proceedings, if the parties so agree after the procedures under the modality chosen has failed to resolve the dispute. In the absence of agreement between the parties on the choice of modality after the dispute has been submitted to the Centre, the dispute or the difference should only be resolved through arbitration.

(b) Where parties to a dispute agree upon their differences being resolved through mediation, the parties should communicate to the Centre the name of the agreed person whom they wish to act as Mediator, together with his consent to act as such, at the time of the reference of the dispute to the centre or at any time thereafter within the limitation of time that may be prescribed. Alternatively, they may seek the assistance of the Centre on the choice of a Mediator, in which event the Centre

shall communicate to the parties the names of five individuals who may be prepared to act as Mediator. If the parties fail to agree to any one of those names, the proceedings for mediation shall be terminated. Where a Mediator has been duly appointed, the Centre shall transmit to him the statement of cases filed by the parties together with all relevant documentation. The Mediator shall apply such procedures and principles of law as might appear to him to be just and proper. The Mediator shall transmit to the Centre the result of his efforts which shall be final and binding on the parties and thereafter the proceedings shall be terminated.

- (c) In cases, where the parties choose to submit their disputes and differences to the Centre for conciliation the parties should in the first instance be invited to agree upon the choice of a single conciliator or a panel of three Conciliators. Where the parties fail to reach agreement the Commonwealth Secretary-General shall, after consultation with the parties, constitute the Conciliation Commission composed of a single member or of three members chosen from the panel of arbitrators maintained by the Centre. The procedure for conciliation will be governed by the Centre's rules. It is suggested that in the formulation of the rules by the Centre, the procedures applicable under the UNCITRAL Conciliation Rules and the ICSID Conciliation Rules may be consulted. The ICC Conciliation rules would appear to be simpler and might provide useful guide lines.

(d) In regard to cases where disputes or differences have to be referred to arbitration either because the parties have so requested or where parties have failed to agree on any other mode of settlement of disputes under the auspices of the Centre the following procedure might be followed:

(i) The parties may jointly initiate proceedings by filing a *compromise* with the Centre or by filing a request for arbitration together with the instrument or a copy of the instrument evidencing the agreement of the parties to have the disputes and differences resolved through the Centre. It should also be possible for either party to initiate proceedings by filing with the Centre a request for arbitration if both the parties had earlier executed an agreement to have their disputes and differences settled through arbitration under the auspices of the centre. Upon receipt of such a request the centre shall issue notices to the opposite party named in the request. After the second party has entered appearance or the expiry of period of notice, the Centre shall proceed to constitute the Arbitral Tribunal.

(ii) The Arbitral Tribunal should be composed of three members chosen out of the Panel of

Arbitrators maintained by the Centre. Each party should be entitled to select a member and the third member shall be jointly chosen by agreement of both parties but failing such agreement, the appointment of the third member shall be done by the Commonwealth Secretary-General. If a party fails to nominate its arbitrator, the Commonwealth Secretary-General should be competent to nominate a person chosen from the panel of arbitrators. The Arbitral Tribunal will have the option to appoint experts or assessors to assist in its deliberations.

(iii) After the tribunal has been constituted, the Centre shall transmit to each member of the tribunal a copy of the statement of cases filed by the parties together with the relevant documents. The centre shall render all facilities and provide assistance to the tribunal for hearing of the case.

(iv) The procedure to be followed in arbitration proceedings should be governed by the Centre's rules. Such rules might be based on the UNCITRAL Arbitration Rules or the ICSID arbitration rules or the draft procedures drawn up for the Committee on Peaceful Settlement of Disputes of the United Nations. However, these rules will need to be suitably modified and adapted to make the procedure much simpler. It may be stated that the UNCITRAL Arbitration Rules were recommended by the General Assembly of the United Nations for settling disputes of a commercial nature but these have been used with suitable adaptation and modification even in disputes between governments such as the United States - Iran Claims Tribunal. These rules have also been prescribed for use in arbitrations under the U.N. Convention on the Law of the Sea. The ICSID Arbitration Rules, which were formulated in pursuance of the 1965 ICSID Convention are applied in disputes between states and individuals in the matter of investments. The draft rules prepared for the Committee on Pacific Settlement of Disputes is intended to be applicable in disputes between states but these have not been adopted so far.

B. Panel of Arbitrators

45. The Centre shall prepare and maintain a list of names whose services may be available to serve as arbitrators. The list should include preferably the names of persons who are or have been judges of the highest court of a Commonwealth country on the basis of recommendations received from the Governments. There should be at least one person in the panel from each Commonwealth country unless the Government concerned declines to make its recommendation. The reasons for the suggestion that the arbitrators who may be called upon to decide disputes between the member states of the Commonwealth should be sitting or retired judges of the highest courts of Commonwealth countries are two-

fold. Firstly, in most Commonwealth countries the judges command a great deal of prestige and have generally the reputation of being impartial and independent. Secondly, it could be expected that the judges would be prepared to serve on the tribunals for a moderate honorarium and not charge the fees required to be paid to eminent Queens Counsel or Law Professors of standing. There is also the fact that full use is presently not being made of a number of the Commonwealth's outstanding jurists from developing countries. Recognition of their scholarship and independence in this way might serve to strengthen local judiciaries.

C. Venue

46. The proceedings under the auspices of the Centre whether it be for arbitration, conciliation or mediation should be allowed to be held in any Commonwealth country which the parties may choose as appropriate for the purpose. However, in the absence of agreement the proceedings should be held in London at the seat of the Commonwealth Secretariat.

D. Costs

47. It would be important to ensure that the establishment of the Centre had no ramifications for the Commonwealth Secretariat's regular budget.

48. At the same time, one of the points emphasised by Prince Bola Ajibola at the Commonwealth Law Ministers Meeting in New Zealand was that the Commonwealth facility for dispute settlement should be aimed at keeping down the costs of litigation. This could be achieved if the persons on the panel of arbitrators agree to serve on the tribunals for a modest honorarium and consider their assignment, at least in part, to be a service to the Commonwealth community. The administrative charges of the Centre should be kept at a bare minimum to cover its costs.

49. It would also help if the procedural rules to be followed are less complicated and the proceedings can be terminated expeditiously. The difficulty experienced in *ad hoc* arbitrations have often led some countries to refrain from having recourse to such procedures. A further consideration is the mounting costs which have to be paid in fees to the arbitrators and to the secretarial staff assisting them. In ICC arbitrations concerning commercial disputes, the fees paid to the arbitrators are comparatively low but the administrative charges levied by the ICC Secretariat impose almost a prohibitive burden.

50. In the case of references to the International Court of Justice, the problem is somewhat different since the parties do not have to contribute towards the costs of the court. However, the complicated and protracted nature of proceedings in the International Court of Justice creates an impression that it is only through engagement of most expensive team of lawyers from western countries that a case could be adequately presented. Bearing in

mind the above considerations it is suggested that the Centre should fix a scale of honorarium to be paid to an arbitrator, mediator or conciliator for each day he is engaged on a given case, as well as the administrative costs of the Centre incurred in a particular case.

51. Subject to the above it is suggested that the parties to a dispute should initially bear in equal proportion the costs incurred in a given case. Such costs would include the honoraria and expenses payable to the conciliators, mediators or arbitrators, as the case may be, the expenses incurred by the Centre in providing technical and secretarial assistance to the tribunal as well as the administrative charges of the Centre.

E. Disputes between a Commonwealth Government and the National of another Commonwealth Country or between Nationals of two or more Commonwealth Countries

52. If it is decided that the disputes in the economic and commercial spheres falling within any of the above categories should be included within the Commonwealth scheme for dispute settlement, it is suggested that such

disputes should be resolved through conciliation or arbitration as may be agreed upon between the parties. The Conciliation Commission as well as the Arbitral Tribunal should be chosen from a list of arbitrators to be maintained by the Centre.

53. The list shall be compiled by the Commonwealth Secretary-General after inviting the recommendations of the Governments of the Commonwealth countries and the person included on the panel must be fully conversant with economic and commercial matters. It is suggested that a separate set of conciliation and arbitration rules shall be prepared by the Centre for this category of disputes which may be based on the UNCITRAL Arbitration Rules or the ICSID Rules subject to suitable adaptations or modifications. A separate set of administrative charges of the Centre and the scale of fees payable to the arbitrators or conciliators should also be prepared.