LST REVIEW

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LAW & SOCIETY TRUST

LST REVIEW

(This is a continuation of the Law & Society Trust Fortnightly Review)

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Editor's note.....

In this issue we publish the National Child Protection Authority Act which was passed by Parliament in September 1998 without a single dissenting vote. The Bill was published in the September issue of the LST Review. Certain amendments were made to the Act pursuant to representations made to the Minister of Justice (see the box overleaf for these amendments)

While it seems that the Bill has been modified to some extent, some of the amendments proposed by civil society organisations have not been included. An amendment of particular significance was expanding the scope of the Act itself to encompass protection of children generally without confining it to instances of child abuse. Although the Act provides that the Authority can receive public complaints with regard to cases of child abuse, the function of the Authority is to channel these complaints to the relevant authorities. It has no powers of investigation. The role of the Authority thus seems largely advisory in nature.

We also publish the recommendations from Article XIX's report entitled "Fifty Years On: Censorship, Conflict and Media Reform in Sri Lanka" and the text of the presentation made by Dr Rohan Perera on the "Indo-Sri Lanka Trade Agreement" at the Symposium on the *Indo-Sri Lanka Free Trade Agreement* organised by the Trust in January.

Some of the amendments made to the National Child Protection Authority Bill:

1. In relation to the composition of the National Child Protection Authority (Section 3):

   (i) the deletion of the requirement that those who are nominated to serve on the Authority to be in government service;

   (ii) the addition of a senior psychologist;

   (iii) the rank of the representative from the Attorney-General's department has been changed from a Deputy Solicitor-General to a Senior State Counsel;

   (iv) the addition of the following *ex officio* members: the Commissioner of Labour and the Chairman of the Committee established by Article 40 of the Charter on the Rights of the Child;

2. Section 8 which deals with the qualifications of the Chairman of the Authority has been amended to include a member with experience in disciplines such as law, child welfare, education or other related field.

3. The functions of the Authority have been expanded to include the receiving of complaints from the public relating to child abuse and referring such complaints to the appropriate authorities.

4. The Panel of Resource Personnel has been expanded to include an officer not below the rank of a Senior Assistant Secretary to the Ministry in charge of the subjects of tourism and media to be nominated by the Secretary to each Ministry.

5. The declaration of secrecy in section 23 has been confined to the identity of any victim of child abuse.

6. Section 32 has added the requirement of submitting an annual report to the Minister who shall cause it to be placed in Parliament.

PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

NATIONAL CHILD PROTECTION AUTHORITY ACT, NO. 50 OF 1998

[Certified on 12th November 1998]

L.D. - 0.9/97.

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF THE NATIONAL CHILD PROTECTION AUTHORITY FOR THE PURPOSE OF FORMULATING A NATIONAL POLICY ON THE PREVENTION OF CHILD ABUSE AND THE PROTECTION AND TREATMENT OF CHILDREN WHO ARE VICTIMS OF SUCH ABUSE; FOR THE CO-ORDINATION AND MONITORING OF ACTION AGAINST ALL FORMS OF CHILD ABUSE; AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

BE it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short title and date of operation.

1. This Act may be cited as the National Child Protection Authority Act, No. 50 of 1998 and shall come into operation on such date as the Minister may appoint by Order published in the Gazette.

Establishment of the National Child Protection Authority

2. (1) There shall be established an Authority which shall be called the National Child Protection Authority (hereinafter in this Act referred to as the "Authority.")

(2) The Authority shall by the name assigned to it by subsection (1) be a body corporate and shall have perpetual succession and a common seal and may sue and be sued in such name.

Members of the Authority

3. The Authority shall consist of -

(a) the following members to be appointed by the President (hereinafter referred to as the "appointed members") -

(i) at least one but not exceeding two,

(A) senior psychiatrists;

(B) senior paediatricians;

(C) medical practitioners engaged in the field of forensic medicine,

(D) senior psychologists,

nominated by the Minister in charge of the subject of Health;

(ii) a senior officer of the Attorney-General's Department not below the rank of Senior State Counsel nominated by the Minister in charge of the subject of Justice;

(iii) a senior officer of the Department of Police not below the rank of Deputy Inspector General nominated by the Minister in charge of the subject of Defence;

(iv) five members from persons who appear to the President to have wide experience, capacity and recognition in law, child welfare, education or any other related field; and

(b) the following *ex-officio* member, namely -

(i) the Commissioner of Probation and Child Care;

(ii) the Commissioner of Labour; and

(iii) the Chairman of the Committee established by Article 40 of the Charter on the Rights of the Child, for the purpose of implementing the provisions of that Charter.

Disqualification from being a member

4. A person shall be disqualified from being appointed or continuing as a member of the Authority if -

(a) he is or becomes a member of Parliament or any Provincial Council or any local authority; or

(b) he is not, or ceases to be, a citizen of Sri Lanka; or

(c) he is under any law in force in Sri Lanka or in any other country found or declared to be of unsound mind; or

(d) he is serving or has served a sentence of imprisonment imposed by any court in Sri Lanka or any other country; or

(e) he holds or enjoys any right or benefit under any contract made by or on behalf of the Authority; or

(f) he has any financial or other interest as is likely to affect prejudicially the discharge by him of his functions as a member of the Authority.

Removal and resignation of members

5. (1) An appointed member of the Authority may resign his office by letter addressed to the President and such resignation shall be effective from the date on which it is accepted by the President.

(2) The President may for reasons assigned remove an appointed member of the Authority from office.

(3) Where a member of the Authority dies, resigns or is removed from office, the President shall, having regard to the provisions of section 3, appoint another member in his place.

(4) A member appointed under subsection (3) shall hold office for the unexpired part of the term of office of the member whom he succeeds.

Term of office of members

6. Subject to the provisions of subsections (1) and (2) of section 5 the term of office of an appointed member of the Authority shall be three years and such member shall be eligible for re-appointment for one more term of office.

Remuneration or allowance of members

7. The members of the Authority shall be paid remuneration or allowances out of the Fund of the Authority at such rates as may be determined by the Minister.

Chairman and Deputy Chairman of the Authority

8. (1) The President may appoint as the Chairman of the Authority, a member who has proven experience and capacity in the field of administration, management, law, child welfare, education or other related field.

(2) The President may appoint another member as the Deputy Chairman of the Authority.

(3) If the Chairman or the Deputy Chairman is by reason of illness or absence from Sri Lanka, temporarily unable to perform the duties of his office, the President may appoint another member of the Authority to act in his place.

(4) The Chairman and the Deputy Chairman shall not engage in any paid employment outside the duties of their office, without the approval of the President.

Meetings of the Authority

9. (1) The Chairman of the Authority shall, if present preside at every meeting of the Authority. In the absence of the Chairman from any such meeting, the Deputy Chairman shall preside at such meeting. In the absence of both the Chairman and the Deputy Chairman from any such meeting, a member elected from among the members present shall preside at such meeting.

(2) The quorum for any meeting of the Authority shall be six members.

(3) The Chairman or the Deputy Chairman or other member presiding at any meeting of the Authority, shall in addition to his own vote, have a casting vote.

(4) Subject to the preceding provisions of this section, the Authority may regulate the procedure in regard to the meetings of the Authority and the transaction of business of such meetings.

Acts not invalidated by reason of a vacancy

10. No act, decision or proceeding of the Authority, shall be deemed to be invalid by reason only of the existence of any vacancy of the Authority or any defect in the appointment of any member thereof.

Seal of the Authority

11. (1) The seal of the Authority may be determined and devised by the Authority, and may be altered in such manner as may be determined by the Authority.

(2) The seal of the Authority shall be in the custody of such person as the Authority may decide from time to time.

(3) The seal of the Authority shall not be affixed to any instrument or document except with the sanction of the Authority and in the presence of the Chairman and one member who shall sign the instrument or document in token of their presence.

(4) The Authority shall maintain a register of the instruments and documents to which the seal of the Authority has been affixed.

Authority to exercise its powers under the direction of the Minister

12. In the exercise of its powers and the discharge of its functions, the Authority shall comply with the policy of the Government in relation to the protection and welfare of children and with any general or special directions issued to it by the Minister in relation to the implementation of such policy.

Delegation of powers and functions of the Authority

13. (1) The Authority may delegate any of the powers and functions of the Authority to the Chairman and the Deputy Chairman.

(2) The Chairman and the Deputy Chairman to whom any of the powers and functions of the Authority have been delegated under subsection (1) shall exercise or discharge the powers and functions so delegated, subject to the general or special directions of the Authority.

Functions of the Authority

14. The functions of the Authority shall be -

(a) to advise the Government in the formulation of a national policy on the prevention of child abuse and the protection and treatment of children who are victims of such abuse;

(b) to advise the Government on measures for the prevention of child abuse;

(c) to advise the Government on measures for the protection of the victims of such abuse;

(d) to create an awareness, of the right of a child to be protected from abuse and the methods of preventing child abuse;

(e) to consult the relevant ministries, Provincial Councils, local authorities, District and Divisional Secretaries, public and

private sector organisations and recommend all such measures as are necessary, for the purpose of preventing child abuse and for protecting and safeguarding the interests of the victims of such abuse;

(f) to recommend legal, administrative or other reforms required for the effective implementation of the national policy for the prevention of child abuse;

(g) to monitor the implementation of laws relating to all forms of child abuse;

(h) to monitor the progress of all investigations and criminal proceedings relating to child abuse;

(i) to recommend measures to address the humanitarian concerns relating to children affected by armed conflict and the protection of such children, including measures for their mental and physical well-being and their re-integration into society;

(j) to take appropriate steps where necessary for securing the safety and protection of children involved in criminal investigations and criminal proceedings;

(k) to receive complaints from the public relating to child abuse and where necessary, to refer such complaints to the appropriate authorities;

(l) to advise and assist Provincial Councils and local authorities, and non governmental organisations to co-ordinate campaigns against child abuse;

(m) to prepare and maintain a national data base on child abuse;

(n) in consultation with the relevant ministries and other authorities to supervise and monitor all religious and charitable institutions which provide child care services to children;

(o) to conduct, promote and co-ordinate, research in relation to child abuse and child protection;

(p) to provide information and education to the public regarding the safety of children and the protection of the interests of children;

(q) to engage in dialogue with all sections connected with tourism with a view to minimising the opportunities for child abuse;

(r) to organise and facilitate, workshops, seminars and discussions, relating to child abuse;

(s) to liaise and exchange information with foreign Governments and international organisations, with respect to detection and prevention of all forms of child abuse;

Powers of the Authority

15. The Authority shall have the power -

(a) to acquire, hold, take or give on lease or hire, mortgage, pledge, sell or otherwise dispose of, any movable or immovable property;

(b) to borrow, with or without security, moneys, on such terms and conditions as may be approved by the Minister, for the purpose of discharging its functions;

(c) to accept gifts, grants or donations whether in cash or otherwise, and to apply them for discharging its functions;

(d) to appoint such officers and servants as may be necessary for carrying out the work of the Authority;

(e) to appoint sub-committees or to coordinate with units at provincial level, for the effective discharge of its functions;

(f) to determine the remuneration payable to the officers and servants so appointed;

(g) to establish a social security scheme, and provide welfare and recreational facilities for its officers and servants;

(h) to enter into and perform all such contracts, whether in or outside Sri lanka, as may be necessary for the exercise of the powers and the discharge of the functions of the Authority;

(i) to make rules in respect of the administration of the affairs of the Authority; and

(j) generally, to do all such other things as are necessary to facilitate the proper discharge of the functions of the Authority;

Panel of Resource Personnel

16. (1) There shall be established a Panel of officials (hereinafter referred to as "the Panel").

(2) The Panel shall consist of the following officers:-

(a) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Justice, nominated by the Secretary of such Ministry.

(b) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Education, nominated by the Secretary of such Ministry;

(c) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Defence, nominated by the Secretary of such Ministry;

(d) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Health, nominated by the Secretary of such Ministry;

(e) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Social Services, nominated by the Secretary of such Ministry;

(f) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Provincial Councils, nominated by the Secretary of such Ministry;

(g) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Women's Affairs, nominated by the Secretary of such Ministry.

(h) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Labour, nominated by the Secretary of such Ministry.

(i) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Tourism, nominated by the Secretary of such Ministry;

(j) an officer not below the rank of a Senior Assistant Secretary of the Ministry of the Minister in charge of the subject of Media, nominated by the Secretary of such Ministry.

Panel to assist in the implementation of the decisions of the Authority

17. The officials of the Panel shall attend all meetings of the Authority and assist the Authority in the implementation of the decisions of the Authority.

Authority to advise the Minister

18. The Minister may on the advise of the Authority issue general or special directions to any Government departments or statutory institutions requiring any such department or institution to carry out such acts relating to the prevention of child abuse as are specified in such direction.

Staff of the Authority

19. (1) The Authority may appoint officers and servants as it considers necessary for the efficient discharge of its functions.

(2) The officers and servants appointed under subsection (1) shall be remunerated in such manner and at such rates and shall be subject to such conditions of service as may be determined by the Authority with the approval of the Minister.

(3) At the request of the Authority an officer in the public service may, with the consent of the officer and the Secretary to the Ministry of the Minister in charge of the subject of Public Administration, be temporarily appointed to the Authority for such period as may be determined by the Authority with like consent, or be permanently appointed to such staff.

(4) Where any officer in the public service is temporarily appointed to the staff of the Authority, the provisions of subsection (2) of section 14 of the National Transport Commission Act, No. 37 of 1991, shall, *mutatis mutandis*, apply to and in relation to him.

(5) Where any officer in the public service is permanently appointed to the staff of the Authority, the provisions of subsection (3) of section 14 of the National Transport Commission Act, No. 37 of 1991, shall, *mutatis mutandis*, apply to and in relation, to him.

(6) Where the Authority employs any person who has agreed to serve the Government for a specified period, any period of service to the Authority by that person shall be regarded as service to the Government for the purpose of discharging the obligations of such agreement.

Fund of the Authority

20. (1) The Authority shall have its own fund (hereinafter referred to as the "Fund").

(2) There shall be paid into the Fund -

(a) all such sums of money that may be made available to the Authority out of the Consolidated Fund;

(b) all such sums of money that may be received by the Authority in the exercise, performance and discharge of its powers, duties and functions under this Act; and

(c) all such sums of money received by the Authority by way of gifts, grants or donations.

(3) There shall be paid out of the Fund all such sums as are required to defray the expenditure incurred by the Authority in the exercise, performance and discharge of its powers, duties and functions under this Act or under any other written law and all such sums as are required to be paid out of the Fund.

Exemption from certain taxes

21. Every donation made by money or otherwise to the Authority shall, for the purpose of paragraph (b) of subsection (2) of section 31 of the Inland Revenue Act, No. 28 of 1979 be deemed to be a donation made in money or otherwise to a fund established by the Government.

Financial year and audit of accounts

22. (1) The financial year of the Authority shall be the calendar year.

(2) The provisions of Article 154 of the Constitution relating to the audit of the accounts of public corporations shall apply to the audit of the accounts of the Authority.

Declaration of secrecy

23. Every member of the Authority and all officers and servants of the authority, shall before entering upon his duties, sign a declaration pledging himself to observe strict secrecy in respect of all matters connected with the affairs of the Authority, and shall by such declaration pledge himself not to disclose any matter which may come to his knowledge in the performance or discharge of his duties and functions relating to the identity of any victim of child abuse except -

(a) when required to do so by a court of law; or

(b) by any person or body of persons to whom such matters relates; or

(c) in order to comply with any of the provisions of this Act, or any other law.

Returns and information

24. (1) For the purpose of enabling the Authority to exercise, perform and discharge any of the powers, duties and functions under section 14 and section 15 of this Act, the Authority or any person authorised in that behalf by the Authority may by notice in writing require any person to furnish to the Authority or to the person authorised, within such period as shall be specified in the notice, all such returns or information pertaining to any activities relating to children as are known to, or in the possession of, such person.

(2) It shall be the duty of any person who is required to furnish any return or information by a notice under subsection (1) to comply with such requirement within the period specified in such notice, except where such person is precluded from making such return of divulging such information under the provisions of any law.

(3) The Authority or any member thereof or any officer or servant of the Authority, shall not disclose to any person or use any returns or information furnished under subsection (1), except when required to do so by a court of law or for the purposes of discharging its functions.

Authority to be a scheduled institution within the meaning of the Bribery Act

25. The Authority shall be deemed to be a scheduled institution within the meaning of the Bribery Act and the provisions of that Act, shall be construed accordingly.

Members, officers and servants of the Authority deemed to be public servants

26. All members, officers and servants of the Authority shall be deemed to be public servants within the meaning and for the purposes of the Penal Code.

State property both movable and immovable to be made available to the Authority

27. (1) Where any immovable property of the State is required for any purpose of the Authority, such purpose shall be deemed to be a purpose for which a special grant or lease of such property may be made under section 6 of the Crown Lands Ordinance and accordingly the provisions of that Ordinance shall apply to a special grant or lease of such property to the Authority.

(2) Where any movable property of the State is required for any purpose of the Authority, the Minister may, by Order published in the Gazette, transfer to, and vest in the Authority the possession and use of such movable property.

Provided however, that no Order affecting any movable property of the State shall be made by the Minister under the preceding provisions of this subsection, without the concurrence of the Minister having control over such property.

Acquisition of immovable property under the Land Acquisition Act

28. (1) Where any immovable property is required to be acquired for any specific purpose of the Authority and the Minister by Order published in the Gazette approves of the proposed acquisition for that purpose that property shall be deemed to be required for a public purpose and may accordingly be acquired under the Land Acquisition Act and transferred to the Authority.

(2) Any sum payable, for the acquisition of any immovable property under the Land Acquisition Act for the Authority shall be paid out of the Fund of the Authority.

Protection for action taken under this Act or on the direction of the Authority

29. (1) No action or prosecution shall be instituted -

(a) against the Authority, for any act, which in good faith is done or purported to be done by the Authority under this Act; or

(b) against any member, officer or servant of the Authority or a officer of the Panel for any act which in good faith is done or purported to be done by him under this Act or on the direction of the Authority.

(2) Any expenses incurred by any such person as is referred to in paragraph (b) of subsection (1), in any action or prosecution instituted against him in respect of any act which is done or purported to be done by him under this Act or on the direction of the Authority shall be paid out of the Fund of the Authority, if the Court holds that such act was done in good faith.

No writ to be against a member, officer or servant of the Authority

30. No writ against the person or property shall be issued against any member of the Authority or any officer or servant of the Authority in any action brought against the Authority.

Furnishing of information to the Minister

31. The Minister may, from time to time, direct the Authority to furnish to the Minister in such form as the Minister may require returns, accounts and other information with respect to the work of the Authority and the Authority shall carry out every such direction.

Annual report

32. The Authority shall submit an annual report to the Minister of all its activities during the year to which the report relates, and the Minister shall cause such report to be placed before Parliament. The Authority may, whenever it considers it necessary to do so, submit periodic or special reports to Minister in respect of any particular matter or matters examined by it, and the action taken in respect thereof.

Powers of Authority to authorise any officer to enter and inspect any premises

33. The Authority may, where it has reason to believe that there is child abuse on any premises, and that application to court for a search warrant may prejudice investigation into such child abuse, authorise in writing an officer

of the Authority to enter and search such premises. An officer so authorised is hereinafter referred to as an "authorised officer."

Power of inspection and search

34. (1) Any authorised officer may -

(a) enter and inspect any premises of any institution by which child care services are provided;

(b) enter and inspect any premises, where he has reason to believe that children are being kept for -

(i) the purpose of child abuse;

(ii) any other unlawful purpose;

(iii) illegal adoption;

(c) enter and inspect any hospital or maternity home, where he has reason to believe that, illegal adoptions are taking place in such hospital or maternity home;

(d) examine any books, registers or records maintained by such institution, hospital or maternity home and make extracts or copies therefrom;

(e) interrogate any person in any such premises for the purpose of ascertaining the activities carried on in such premises and whether there is any contravation of any law relating to children.

(2) Every person who obstructs or resists such officer in the exercise of any power conferred on him by subsection (1) shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not less than one thousand rupees or to imprisonment of either description for a term not less than six months or to both such fine and imprisonment.

Power to seize articles

35. (1) Any authorised officer may, if he has reason to believe that any offence under any law relating to children, has been or is being committed, seize and detain -

(a) for such time as may be necessary, any article by means of or in relation to which the offence is alleged to have been committed or which is used in relation to the commission of the offence;

(b) any book, register, record or other document or any mechanical or electronic device which in his opinion may constitute evidence in relation to the prosecution of any person for any such offence.

(2) Where any authorised officer seizes any article under subsection (1), such article shall be kept in the custody and control of the Authority pending its disposal.

Authorised officers deemed to be peace officers

36. All authorised officers appointed under section 33 shall be deemed to be peace officers within the meaning of and for the purposes of, the Code of Criminal Procedure Act, No. 15 of 1979.

Offences

37. Every person who -

(a) fails to furnish any return or information in compliance with any requirement imposed on him under this Act;

(b) knowingly makes any false statement in any return or information furnished by him;

(c) being a member, officer or servant of the Authority or a officer of the Panel discloses any information obtained by him in or in connection with the exercise of his powers or the discharge of

his functions under this Act which has the effect of disclosing any matter relating to the identification of victims of child abuse, to any person for any purpose other than a purpose for which he is authorised to disclose such information by this Act;

(d) contravenes the provisions of this Act or any regulation made thereunder,

shall be guilty of an offence under this Act.

(2) Every person who commits an offence under this Act for which no punishment is expressly provided by any other provision of this Act, shall on conviction after trial before a Magistrate, be liable to a fine not exceeding five thousand rupees or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.

(3) Where an offence under this Act is committed by a body of persons, then -

(a) if that body of persons is a body corporate every director or officer of that body corporate;

(b) if that body of persons is a firm, every partner of that firm,

shall be deemed to be guilty of that offence;

Provided, however, that a director or an officer of such body corporate or partner of such firm shall not be deemed to be guilty of such offence if he proves that such offence was committed without his knowledge or that he used all due diligence to prevent the commission of such offence.

(4) Every officer of the Panel or an officer or servant authorised in writing by the Authority shall be deemed to be a public officer within the meaning of section 136 of the Code of Criminal Procedure Act, No. 15 of 1979, for the purpose of instituting proceedings in respect of offences under laws relating to children.

Regulations

38. (1) The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorised by this Act to be made.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in such regulation.

(3) Every regulation made by the Minister shall as soon as convenient after its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of such disapproval but without prejudice to anything previously done thereunder.

(4) Notification of the date on which any regulation made by the Minister is deemed to be rescinded shall be published in the Gazette.

Interpretation

39. In this Act unless the context otherwise requires -

"Chairman" means the Chairman of the Authority appointed under section 8;

"child" means a person under eighteen years of age;

"child abuse" means any act or omission relating to a child, which would amount to a contravention of any of the provisions of -

(a) sections 286A, 288, 288A, 288B, 308A, 360A, 360B, 360C, 363, 364A, 365, 365A, or 365B of the Penal Code;

(b) the Employment of Women, Young Persons and Children Act;

(c) the children and Young Persons Ordinance; or

(d) the regulation relating to compulsory education made under the Education Ordinance,

and includes the involvement of, a child in armed conflict which is likely to endanger the child's life or is likely to harm such child physically or emotionally;

"Deputy Chairman" means the Deputy Chairman of the Authority appointed under section 8.

"local authority" means any Municipal Council, Urban Council or Pradeshiya Sabha and includes any authority created or established by or under any law to exercise performance and discharge, powers duties and functions corresponding to or similar to the powers duties and functions exercised, performed and discharged by any such Council or Sabha;

"Provincial Council" means a Provincial Council established under Chapter XVIIA of the Constitution;

Sinhala text to prevail in case of inconsistency

40. In the event of any inconsistency between the Sinhala and Tamil texts of this Act the Sinhala text shall prevail.

Fifty Years On
Censorship, conflict and media reform in Sri Lanka

ARTICLE XIX*

(International Centre Against Censorship)

Implementation by the Sri Lankan Government of ARTICLE 19's Recommendations on Freedom of Expression

ARTICLE 19 published 25 recommendations on freedom of expression in its report, *an Agenda for Change: The Right to Freedom of Expression in Sri Lanka* (October 1994).[1] Of these, 19 recommendations are directly concerned with, or affect, freedom of the media. These 19 recommendations are reproduced below with comment on their implementation to date. (Also included are ARTICLE 19's comments on implementation of March 1995, published in *Words into Action: Censorship and Media Reform in Sri Lanka;* February 1996, published in *Silent War Censorship and the Conflict in Sri Lanka*; and March 1997, published in *Reform at Risk? Continuing Censorship in Sri Lanka).* Two further recommendations relating to public service broadcasting, which ARTICLE 19 made in *Words into Action,* are also included below, as are the main recommendations from *Silent War: Censorship and the Conflict in Sri Lanka.*

Recommendation 1: The Constitution should be amended to provide full protection of all the rights guaranteed under the ICCPR, and especially of those rights guaranteed under Articles 19, 21 and 22 of the ICCPR. There should be no restrictions on these rights on any grounds other than those permitted by the ICCPR.

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* December 1998. The references in this report to March 1995 and February 1996 have been deleted in some places where they are no longer relevant.

[1] With regard to this report see *Fortnightly Review*, Vol. VII, Issue 114 (April 1997) p 11.

November 1998: The government placed the last version of its proposals for constitutional reform before Parliament in October 1997. While the proposals would, if adopted, expand the protection of the rights to freedom of expression, association and assembly, and would bring Sri Lanka's constitution closer to the requirements of the ICCPR, they would still not conform to these requirements entirely.

March 1997: The recommendations for reform by the Parliamentary Select Committee on Constitutional Reform have not yet been published. The committee established by the Media Minister to advise on legal reform affecting freedom of expression made a similar recommendations in its final report.

Recommendation 2: Article 16 of the Constitution should be repealed or amended to ensure that all laws in force are in keeping with constitutional provisions protecting human rights. All existing law should be reviewed and amended as necessary to ensure that it is fully consistent with international human rights law.

November 1998: The government's October 1997 proposals for constitutional reform retain the provision that all laws - both 'written and unwritten' - in force at the time the proposed constitution comes into force will remain valid, regardless of whether or not they are consistent with the provisions of the constitution. The draft also provides for the President to establish a Commission, within three months of the commencement of the constitution, to examine all existing written or unwritten law and report to the President on whether any such law is inconsistent with the provisions of the fundamental rights chapter.

March 1997: The recommendations for reform by the Parliamentary Select Committee on Constitutional Reform have not yet been published. The committee established by the Media Minister to advise on legal reform affecting freedom of expression made a similar recommendation in its final report.

Recommendation 3: The Constitution should be amended to ensure that it protects the fundamental rights of all persons under the jurisdiction of the state, including non-citizens.

November 1998: The government's October 1997 proposals for constitutional reform would, if adopted, expand the protection of freedom of expression, association and assembly from the present 'citizens' to 'all persons.'

March 1997: The recommendations for reform by the Parliamentary Select Committee on Constitutional Reform have not yet been published. The committee established by the Media Minister to advise on legal reform affecting freedom of expression made a similar recommendation in its final report.

Recommendation 4: The Sixth Amendment to the Constitution, which prohibits advocacy of a separate state, should be revoked in order to protect the right to freedom of expression.

November 1998: The government's October 1997 proposals for constitutional reform, if adopted, would require a Member of Parliament to swear to uphold and defend the Constitution of the Republic of Sri Lanka, but drops the requirement under the Sixth Amendment that an MP must also swear not to 'support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka.'

March 1997: The recommendations for freedom by the Parliamentary Select Committee on Constitutional Reform have not yet been published. The Committee established by the Media Minister to advise on legal reform affecting freedom of expression made a similar recommendation in its final report.

Recommendation 5: The right to freedom of information should receive explicit protection under the Constitution and any restrictions on this right should be limited to those set out under the ICCPR. A Freedom of Information Act should be introduced to give effect to this right, and existing laws containing provisions which hamper the free flow of information in the

public interest should be reviewed and amended accordingly.

November 1998: The government's October 1997 proposals for constitutional reform include, as an aspect of freedom of speech and expression, 'the freedom to hold and express opinions and to seek, receive and impart information and ideas either orally, in writing, in print, in the form of art, or through any other medium.' The permissible restrictions on this right, if the proposals are adopted, would considerably exceed those permitted under the ICCPR, however. There have been no developments on freedom of information legislation; legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

March 1997: The recommendations for reform by the Parliamentary Select Committee on Constitutional Reform have not yet been published. The committee established by the Media Minister to advise on legal reform affecting freedom of expression recommended in its final report that 'a Freedom of Information Act should be enacted which makes a clear commitment to the general principle of open government,' including the principles that: disclosure should be the rule rather than the exception; all individuals should have an equal right to information; the government should bear the burden of justification for withholding information; individuals improperly denied access to documents or other information should have the right to seek redress in the courts; the law should list the types of information that may be withheld and indicate the duration of secrecy, and there should be legal provision for enforcement of access; the law should make provision for exempt categories such as those required to protect individual privacy, confidential commercial information, law enforcement investigations, information obtained on the basis of confidentiality and national security; the law should provide for administrative penalties, including loss of salary, for government employees who arbitrary deny access to information, secrecy provisions in other laws should be

subordinate to the freedom of information law, or should be amended to accord with in practice and in spirit.

Recommendation 6: The remedies - both national and international - available against violation of fundamental rights should be reviewed and strengthened. The government should extend the jurisdiction of the Supreme Court in fundamental rights cases and allow the right of individual petition to the international tribunals established under the ICCPR and the Torture Convention.

November 1998: Legislation to create a new Human Rights Commission was passed in July 1996 and the members were appointed in March 1997. The Commission began to function around June 1997 and - among its broad range of other responsibilities - has taken over the role of the former Human Rights Task Force (HRTF). The government's October 1997 proposals for constitutional reform would, if adopted, extend the jurisdiction of the Supreme Court in fundamental rights cases. Sri Lanka ratified the (first) Optional Protocol to the ICCPR in October 1997, thereby allowing the right of individual petition to the Human Rights Committee.

Recommendation 7: The Constitution should specify that emergency powers may only be used in exceptional circumstances as defined under international human rights law. They must never be used as a matter of expediency to circumvent the normal legislative process. The necessity for a state of emergency should be stated fully at the time of declaration, and whenever it is renewed, together with a statement of the conditions which must be achieved for the state of emergency to be lifted. Provision should be made for the courts to assess whether the declaration of a state of emergency and its prolongation are indeed justified.

November 1998: No change. The government's October 1997 proposals for constitutional reform do not contain these safeguard.

March 1997: No change since March 1995. The recommendations for reform by the parliamentary Select Committee on Constitutional Reform have not yet been

published. In April 1996 the state of emergency was extended island-wide.

February 1996: No change since March 1995. In its scrutiny of Sri lanka's compliance with the requirements of the ICCPR, the Human Rights Committee made a similar recommendation. In February 1996 the state of emergency remained in force in specified areas of the country. The state of emergency must be renewed monthly by Parliament. However, Parliament does not vote on the content of the emergency regulations. These can be introduced or amended at any time by the President.

Recommendation 8: The Constitution should specify that no restrictions on fundamental rights - including on the right to freedom of expression and information - are permissible save in the exceptional circumstances specified in Article 19(3) of the ICCPR. All emergency regulations in force must be reviewed and amended to ensure that they comply fully with international human rights law and cannot be used to violate the right to freedom of expression and information. In particular, provision should be made for prompt and substantial judicial review of all detentions under emergency regulation.

November 1998: The government's October 1997 proposals for constitutional reform do not contain these safeguards, and would permit restrictions on fundamental rights - including on freedom of expression and information - to be imposed on broader grounds than are contained in the ICCPR. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

Recommendation 11: The Prevention of Terrorism Act should be reviewed and amended to ensure that it is consistent with international human rights law and that it cannot be used to violate the right to freedom of expression and information.

November 1997: No change since March 1995. Legislation which limits free expression and the independence of the media

is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

Recommendation 12: The 1978 amendment to the Parliament (Power and Privileges) Act of 1953 should be repealed. If the offence of contempt of parliament is retained, it should be subject to the freedom of expression safeguards set down under international law, and any contempt proceedings should be tried fairly before the courts, and not by parliamentarians themselves. The right to disclose information in the public interest, including about the activities of Parliament and its members, should be fully protected in law.

November 1998: This amendment was repealed in September 1997, returning to the Supreme Court powers to try persons violating the Act and to fine or imprison them. No further change. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

Recommendation 13: Repeal the Press Council Law in order to safeguard press freedom and the principle of editorial independence.

November 1998: This matter, together with the creation of a new Media Council, is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

March 1997: No change. In its final report, the committee established by the Media Minister to advise on legal reform affecting freedom of expression reiterated the recommendations on this issue that it had made earlier. It specified that the Media Council Act, which should replace the Press Council Law, should cover both print and electronic media, and that it should articulate the freedom of the media in terms of the requirements of the ICCPR, and seek to uphold and promote

freedom of the media in these terms. The committee recommended that the objectives of the Act should include: promotion of freedom and responsibility of the mass media of social communication; ensuring the right of citizens to be informed freely, factually and responsibly on matters of public interest; ensuring the maintenance of high standards of communication ethics; keeping under review developments likely to restrict the supply of information of public interest and importance, and developments within the media which may tend towards monopoly, and taken appropriate remedial action. The committee recommended certain criteria to ensure the full independence of the members of this body, and specified that its powers should include the power to order a correction or apology, or to censure the particular medium of communication, depending on the circumstances. There should be no provision in the Act prohibiting publication of cabinet decisions or other matters, and there should be no possibility of political interference in its functioning.

February 1996: The committee established by the Media Minister to advise on legal reform affecting freedom of expression recommended that Section 16 of the Press Council Law, which prohibits the unauthorised publication by the press of the proceedings of Cabinet meetings and decisions among other things, should be repealed. It said that it would address in its second report the replacement of the Press council Law by a Media Council Act. The second report had not been submitted by late February 1996. It was unclear from the reporting of the Media Minister's December 1995 speech - in which he said laws relating to parliamentary privilege, defamation and oaths of secrecy were among those to be amended in 1996 - whether the Press Council Law would be included.

Recommendation 14: Defamation law should be reviewed and amended to ensure that the media are able to freely perform their twin roles of informing the public and acting as a watchdog of government. In particular, Section 479 of the Penal Code, which makes libel a criminal offence, punishable by imprisonment, should be repealed, and politicians

and other public officials should be expected to tolerate a higher level of criticism than private individuals in defamation cases.

November 1998: No change. The government continues to bring cases of criminal defamation against newspaper editors. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

March 1997: No change. In its final report, the committee established by the Media Minister to advise on legal reform affecting freedom of expression reiterated the recommendations on this issue that it had made earlier. The government has made no changes to this legislation.

February 1996: The committee established by the Media Minister to advise on legal reform affecting freedom of expression recommended the repeal of Section 479 of the Penal Code, or alternatively that an amendment be introduced to empower a High Court Judge to decide whether to indict for defamation, with specific guidelines. In his December 1995 speech, the Media Minister said the defamation law would be amended in 1996, but he gave no further details.

Recommendation 15: Amend Section 120 of the Penal Code on sedition to protect the legitimate expression of dissent.

November 1998: No change. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

February 1996: The committee established by the Media Minister to advise on legal reform affecting freedom of expression recommended that Section 120 of the Penal Code should be amended to provide a narrower definition of sedition.

It was unclear from the reporting of the Media Minister's December 1995 speech - in which he said laws relating to parliamentary privilege, defamation and oaths of secrecy were among those to be amended in 1996 - whether Section 120 of the Penal Code would be included.

Recommendation 16: Amend the Official Secrets Act to ensure that it does not threaten the right to seek, receive and impart information in the public interest.

November 1998: No change. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

February 1996: The committee established by the Media Minister to advise on legal reform affecting freedom of expression recommended that the Official Secrets Act should be repealed, and that instead, a narrowly defined exception could be made in a new Freedom of Information Act. In December 1995, the Media Minister said that laws relating to oaths of secrecy would be among those to be amended in 1996, but he gave no details of the proposed changes.

Recommendation 17: End state ownership and control of Associated Newspapers; ensure the independence of the Sri Lanka Broadcasting Corporation, Sri Lanka Rupavahini Corporation and Independent Television Network by creating a governing board and financial structure for these bodies which is independent of government and which allows them to fulfil their public service functions; establish an independent broadcasting authority with sole discretion to grant licences to privately owned broadcasting stations.

November 1998: No change. The government has said that it will not end state ownership and control of Associated Newspapers, despite its election promise. Issues relating to broadcasting are under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

March 1997: No change. The government took no known steps towards removing Associated Newspapers from state control. In its final report, the committee established by the Media Minister to advise on legal reform affecting freedom of expression made numerous recommendations relating to the electronic media and public service broadcasting, which were consistent with, and elaborated, ARTICLE 19's recommendations. These included: the need for legislation to set out measures to protect and promote broadcasting freedom, and which should state the public's right to receive information and opinion on matters of public interest; the principle of respect for pluralism (which should be reflected in all activities of publicly-funded media); and the policy of developing community radio. The committee said that the legislation should explicitly require that publicly-funded media must maintain a fair balance of alternative viewpoints at all times, and not only during election periods. There should be no disparity in the provision of services in Sinhala and Tamil. The law should also establish an independent public authority to lay down and oversee the implementation of broadcasting policy, and to have responsibility for licensing community radio and private broadcasting. Its membership should not be dominated by any political group, and should be sensitive to the basic principles of the policy.

The committee further recommended that the framework for state broadcasting should recognise the difference between the state and the public interest, and between the government *per se* and the interest of those who for the time being exercise governmental power. The law should guarantee the editorial independence of state broadcasting authorities, and the independence from government of their governing bodies. Members of the governing bodies should be appointed with a mandate to act as independent trustees of the public interest in broadcasting and not as representatives of government or any special interest.

With respect to private broadcasting, the committee recommended that licences should be allocated by the

independent broadcasting authority described above, in a fair and non-discriminatory manner according to specified criteria. The granting of licences to a variety of private broadcasters should not be seen as a substitute for ensuring the pluralism and independence of publicly-funded broadcasting.

The committee also made several recommendations relating to the development of community radio, including that it should not be precluded from broadcasting news.

Complaints about violations of broadcasting freedom should be made to the proposed Media Council.

Recommendation 18: Permit the gathering of information and broadcasting of local news by private radio and television stations.

November 1998: News broadcasts relating to the conflict are subject to censorship under emergency regulations.

March 1997: This remains permitted, but some private stations have been barred from broadcasting news at times, apparently as 'punishment' for incorrect broadcasts.

Recommendation 20: Provide protections in law against the use of government advertising and other state resources to influence, threaten or reward newspapers or other media.

November 1998: No change.

March 1997: No protections against the misuse of government advertising have been introduced. Some newspapers have recently complained of bias in the allocation of advertising.

March 1995: The government media policy promises that: 'Fiscal policies of the government shall not be used as an instrument of suppressing or controlling the media,' and that 'Government advertisements will be distributed among all media organisations without any favour or discrimination. The official responsible for the placement of advertisements will be

expected to do so in keeping with the standard norms of judging the media for the purpose of advertising - namely circulation or reach, target segments of the population, quality and/or image of the publication or station.' Some state advertising is now given to certain independent publications which received no advertising at all from the previous government.

Recommendation 21: Permit full reporting of the conflict in the north and east, including of any human rights abuses that have been committed. Provide ready access to the north and east for journalists who wish to cover the conflict, and issue full information to the public.

November 1998: Formal censorship under emergency regulations on reporting the conflict resumed on 5 June 1998 and remained in force in November. Again, this censorship has gone beyond legitimate national security concerns. Journalists still do not have ready access to the conflict areas and the government attempts to restrict public information on the conflict.

March 1997: Journalistic access to the north has remained barred by the military, except for very few occasions when journalists were taken on visits to the north under military escort. Formal censorship under emergency regulations was in force from April to October 1996, with no difference from the censorship that had been in force in late 1995.

February 1996: Since September 1995, the military has denied journalists access to the main conflict Zones in the north, as well as other areas under LTTE control and in which the majority of those recently displaced by the conflict are residing. In addition, formal censorship was introduced between September and December 1995 under emergency regulations for reporting on military matters. In practice, this censorship went well beyond legitimate national security concerns. Humanitarian organisations which have spoken out about suspected violations of humanitarian and human rights law have been subjected to intimidation by verbal attacks from

government, as well as threats from other sources. Reporting on the north and east continues to rely primarily on information issued by official sources. There is very little media coverage of possible violations of human rights or humanitarian law by government forces.

Recommendation 25: Ensure that the publication of information in the public interest is fully protected in law; charges such as defamation or sedition should not be used to render issues sub-judice, thereby obstructing debate on important issues of public interest.

November 1998: No change. Legislation which limits free expression and the independence of the media is now under the consideration of the Parliamentary Select Committee on the Legislative and Regulatory Framework relating to Media, which was established in late 1997.

March 1997: No change. In its final report, the committee established by the Media Minister to advise on legal reform affecting freedom of expression elaborated on the principles to be contained in the proposed Freedom of Information Act (see above, under Recommendation 5). Criminal defamation charges continue to be used against newspaper editors.

INDO-SRI LANKA TRADE AGREEMENT

Treaty Law Aspects*

Dr Rohan Perera

The elements of the Indo-Sri Lanka Trade Agreement which are dealt with here focus essentially on some issues having a bearing on the treaty law aspects of the Agreement. There are broadly categorised under the following heads:

(i) Mechanisms for review and implementation of the Agreement;

(ii) dispute settlement provisions; and

(iii) legal procedures that need to be completed for the Agreement to enter into force.

1. Nature of the Agreement

I wish, to preface my presentation with some observations on the nature of the Agreement. The Agreement provides the legal framework for the establishment of a free trade area for the purpose of free movement of goods between India and Sri Lanka through the elimination of tariffs. It is an Agreement of an enabling nature, sometimes referred to as a "framework agreement." The framework nature of the Agreement is best illustrated by Article XVI which requires the Contracting Parties to finalise within a period of 60 days of the signing of the Agreement, the several annexures referred to therein, covering the negative lists of India and Sri Lanka respectively and those dealing with the items on which India and Sri lanka have undertaken to give 100% tariff concessions on coming into force of the Agreement.

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* Text of the presentation made at the Symposium on "Indo-Sri Lanka Free Trade Agreement" held at the Trust on 22 January 1999. Edited for publication.

Framework Agreements are not without precedent in international treaty practice. A clear precedent of relevance to the South Asian region is the Agreement on SAARC Preferential Trading Arrangement (SAPTA) which makes enabling provision for Contracting States to conduct their negotiations for trade liberalisation in accordance with certain approaches and procedures prescribed in the Agreement. In terms of Article 5 of the SAPTA Agreement, Contracting States have agreed to negotiate tariff preferences initially on a product by product basis and have further undertaken to enter into negotiations from time to time, with a view to further expanding SAPTA. Thus, the SAPTA Agreement provides the broad legal framework for the creation of a SAARC preferential trading arrangement and the fleshing out is a continuing process and upto now three rounds of tariff negotiations have been held under the framework of that Agreement.

Similarly, the Indo-Sri Lanka Free Trade Agreement contains the broad framework of principles of a free trade regime, which could be categorised as (i) tariff elimination provisions (ii) general exceptions in conformity with GATT (94) Principles (iii) safeguard measures (iv) mechanisms for review and implementation (v) dispute settlement and (vi) entry into force. The matters on which negotiations would continue are those Annexures listed in Article XVI which have already been adverted to. This approach, therefore, is consistent with international treaty law and procedure.

2. Mechanisms for review and Implementation

The provisions of the Agreement relating to review and implementation could broadly be categorised as institutional mechanisms and *ad-hoc* mechanisms.

The Joint Committee which is established under Article XI of the Agreement constitutes the institutional mechanisms to review the progress in the implementation of the Agreement. Article XII which provides for consultations between the Contracting Parties, constitutes the *ad-hoc* mechanism.

As far as the powers and functions of the Joint Committee is concerned, a significant feature which emerges from the Agreement is the high degree of flexibility which is conferred on the Committee with the objective of dealing with practical issues arising in the implementation of the Agreement.

The principal functions assigned to the Committee, constituted at Ministerial level, are to review progress made in the implementation of the agreement and to ensure that benefits of trade expansion emanating from the Agreement accrue to both parties equitably.

The latitude given to the Joint Committee in ensuring the effective implementation of the Agreement is best evidenced by the powers vested in the Committee to set up Sub-Committees and/or Working Groups as considered necessary. Such Sub-Committees or Working Groups would essentially be at the technical level to address practical difficulties that could arise in the implementation of the Agreement, which distinguishes these bodies from the Joint Committee which is constituted at the political level.

Thus, apart from the general provision to set up Sub-Committees and Working Groups, Article XI(2) makes specific provision on the establishment of a Working Group on customs related issues. In terms of this provision, the Contracting Parties have expressed their agreement to constitute a special Working Group to facilitate co-operation on customs matters, specifically on the harmonisation of tariff headings. The particular significance of this provision is that the parties have anticipated in advance, the practical issues that could arise due to divergencies in tariff headings being used in the respective countries and have created a mechanism for their harmonisation. The Joint Committee is required to accord adequate opportunity for consultations on representations made by any Contracting Party and to adopt appropriate measures for settling any matter arising from such representations, within a period of six months of a representation being made.

The Joint Committee is also vested with a central role where a Contracting Party adopts safeguard measures in terms of Article VIII. In terms of this provision, where the import of any product into the territory of a Contracting Party would cause or threaten to cause serious injury in the territory of that Contracting Party, the latter is entitled, with prior consultations except in critical circumstances, to suspend provisionally, the preferential treatment accorded under the Agreement. This is a well recognised safeguard provision found in Free Trade Agreements including SAPTA. In such a situation, it is incumbent on that Party to notify the other Contracting Party as well as the Joint Committee. The Committee is then required to enter into a consultation process with the concerned Contracting Parties and endeavour to reach a mutually acceptable agreement to remedy the situation. It is only where there

is a failure to resolve the matter within a period of 60 days, that the Party affected could finally withdraw the preferential treatment accorded under the Agreement. Thus the Joint Committee has a critical role to play in ensuring that all efforts are exhausted to reach a mutually acceptable agreement, within a stipulated time frame, before a Contracting Party exercises the right to withdraw the preferential treatment.

The wide ranging powers vested in the Joint Committee are also reflected in Article XV which requires proposals for modification or amendment of the Agreement to be submitted to the Committee for acceptance.

It is expected that the political level at which the Committee is constituted would facilitate the decision making process in these matters which are vital for the effective and equitable implementation of the Agreement.

The *ad-hoc* mechanism for review and implementation of the Agreement is provided in Article XII which requires Contracting Parties to afford adequate opportunity for consultation regarding representations that may be made with respect to any matter affecting the operation of the Agreement. This envisages, consistent with international treaty practice, the pursuit of negotiations and consultations through diplomatic channels. Thus, an informal, *ad-hoc* process could also be set in motion in addition to the institutional mechanism provided in the Agreement. This informal process is however, also linked to the institutional mechanism in the sense that where there is a failure to find a satisfactory solution through such consultations, either Contracting Party could request a meeting of the Joint Committee.
It is, therefore, evident that the mechanisms worked into the Agreement for its review and implementation provides parallel procedures which are flexible in nature and are designed to meet practical difficulties which could arise in the implementation of an Agreement of this nature. The importance of such mechanisms when Sri Lanka is venturing on a bilateral Free Trade Agreement for the first time cannot be overstated.

3. Dispute Settlement Mechanisms

The Agreement also provides both formal and informal mechanisms for dispute settlement with regard to two categories of disputes: The first category is a dispute that may arise between the commercial entities of the Contracting Parties. Such disputes, in the first instance, are to be referred for amicable

settlement to the Nodal Apex Chambers of Trade and Industry to be nominated by the Joint Committee. Failing such consultations the matter has to be referred for arbitration for binding decision. The Tribunal is to be constituted in consultation with the relevant arbitration bodies in the two countries.

The second category are disputes between the Contracting Parties themselves or inter-state disputes, which may arise regarding the interpretation and application of the provisions of the Agreement or any instrument adopted within its framework. With regard to this category of disputes, what is envisaged are only negotiations at the inter-state level which are normally conducted through diplomatic channels, with a view to reaching an amicable settlement. Failing such negotiations, a notification may be made to the Committee by anyone of the Contracting Parties. It is to be noted in this connection that in the case of inter-state disputes of an intractable nature, recourse could be had in the final resort to the termination procedure in an Agreement. where circumstances warrant such action, bearing in mind both the legal and political implications of such a course of action.

3. Legal procedures for the entry into force of the Free Trade Agreement

The consent of a state to be bound by a treaty may be expressed by various means. Some agreements provide for entry into force upon signature while others require ratification or notification that their respective constitutional requirements have been completed. The Free Trade Agreement provides, in terms of Article XVII, that the Agreement would enter into force on the 30th day after the Contracting Parties have notified each other that their respective constitutional requirements and procedures have been completed.

The treaty practice in Sri Lanka since independence (this is also the case in India) requires executive approval in the conclusion of treaties. Once the annexures have been finalised, the approval of the Cabinet would be sought prior to the ratification of the Agreement, and its entry into force in terms of Article XVII. Once the internal constitutional procedures have been completed on both sides, the notification between the Contracting Parties will take place as envisaged in Article XVII. The Agreement will enter into force on the 30th day after the date of the last notification.

The question would then arise what the status of the agreement is pending the act of ratification. It is well established in treaty law and there has been long standing authority for the view that the principle of good faith suggests that states should refrain, prior to ratification, from acts intended substantially to impair the value of the undertaking as signed. Article 18 of the Vienna Convention on the Law of Treaties which reflect customary law principles relating to international treaty practice, obliges states to refrain in such circumstances, from acts which would defeat the object and the purpose of a treaty. Thus, although agreements of this nature do not enter into force upon signature, nevertheless the act of signature constitutes an important and a solemn act in the treaty-making process, particularly when executed at a high political level. It is also to be observed that although the treaty is made binding only upon ratification, it is not always without effect even before its entry into force, typically, during the interval between signature and ratification. Many treaties contain provision regulating matters necessarily arising before their entry into force, and such provisions apply from the time of the adoption of the text. Thus in the present instance, Article XVI which requires that the annexures must be finalised within 60 days of the agreement having being signed, has the effect of imposing on the contracting Parties specific obligations by way of completing the remaining negotiating measures. This would involve a process of wide ranging consultations both within the Government and the private sector in Sri Lanka and India respectively, to be followed by bilateral negotiations between India and Sri Lanka.

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