

(vii) *Joint ventures in more sophisticated areas* : These are comparatively few having regard to the fact that the technology in this field is available only with Japan and a few of the countries which may be considered as near developed.

(viii) *Technical assistance programmes* : Even though programmes of technical assistance availed of by the countries of the region are fairly large, most of them are offered by countries outside the region.

The participants were, however, of the view that the number of projects on which co-operation had been developed on this pattern were still comparatively limited and they needed to be further encouraged and intensified.

Some of the participants pointed out the difficulties that could be encountered in rapid industrialization in the countries of the region so that they could be taken note of and solutions found in any system of regional co-operation. These included : (a) the quality of finished products and their marketing; (b) lack of infrastructure and communications; (c) lack of skilled technicians; and (d) technology. A view was also expressed that some of the developing countries might find it difficult to absorb technology which was not appropriate. The meeting was agreed that special consideration should be given to the least developed countries.

The meeting was also of the view that in the programme of regional co-operation exchange of information was a vital factor and in this connection it was recommended that the member-governments of the AALCC be requested to furnish to the AALCC's Secretariat the relevant information concerning the contracts and agreements which they had concluded including joint venture arrangements as also their national laws and regulations in the economic field. This would facilitate development of some kind of uniformity in the terms and conditions through which co-operation could be achieved and accelerated.

The meeting also recommended that the member governments consider the possibility of setting up sub-regional institu-

tions with a view to provide training facilities for personnel in the technical and managerial fields.

The participants were of the view that the initiative taken through the present meeting should be pursued in a suitable manner so as to ensure fruitful and tangible outcome of the objectives of industrial growth in the countries of the region. In this connection the following modalities were recommended for consideration of Governments :

(a) Formation of a nucleus or an informal group of technical experts in the legal and economic fields drawn from the delegations of the member governments of the AALCC participating in the global negotiations whose activities could be coordinated either through a member government or the AALCC. The functions of this informal group which would be open-ended might include examination of the proposals which may be put forward in the course of the negotiations.

(b) The possibility of organizing periodic expert group meetings to consider in detail matters concerning promotion of bilateral or tripartite arrangements on specific projects.

(c) To convene another ministerial meeting, if possible, within a period of six months on the pattern of the present meeting to be hosted by another member government of the AALCC.

The meeting recognized the need to create stable but flexible relations between the investor and the host government, particularly where the investments were made by one developing country in another. It was also generally agreed that investment climate could be promoted through adequate provisions for the protection of investments, repatriation of capital and profits and a procedure for settlement of disputes.

It was agreed that the meeting of officials/experts should examine various 'umbrella' investment protection agreements that have been concluded by governments with a view to formulating the draft of a model agreement which could be

considered by member governments. It was also agreed that the expert group could also prepare draft formulations applicable to certain special categories of investments, particularly the investments made by developing countries.

The Meeting of Officials on Regional Co-operation in Industries, Kuala Lumpur, 10 to 12 December 1980

The ministerial level meeting was followed by an official level meeting to give in-depth consideration to certain specific issues arising out of the decisions taken at the ministerial meeting. These were (a) scope and content of model bilateral umbrella agreements for protection of investments; (b) possible formulation of principles for investment protection applicable to certain special categories of investments, particularly the investments made by a developing country in another developing country of the region; (c) appropriate legal framework for bringing about economic co-operation between the countries of the Asian-African region; and (d) special consideration to be given to the least developed countries in the formulation of draft instruments for regional co-operation.

The meeting was chaired by Mr. Zakaria bin Mohd. Yatim, Solicitor-General of Malaysia and participating States included Arab Republic of Egypt, Bangladesh, India, Indonesia, Iran, Iraq, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Nepal, Pakistan, Philippines, Singapore, Sierra Leone, Somalia, Sri Lanka, Syria, Thailand and Turkey.

The meeting gave consideration to the question of drawing up of guidelines for preparation of umbrella investment protection agreements and in this connection examined the provisions of the investment protection laws in various countries and some of the bilateral agreements which had been entered into by member States of the AALCC with the developed countries. It was agreed that the model agreement should be prepared on broad general terms which could be adjusted to the needs and requirements of particular countries. It was generally the view that investment incentives which were offered by various countries under their laws should normally not be

incorporated in the investment protection agreements. The meeting was further of the view that model agreements should include certain provisions which would be applicable to investments by developing countries. The meeting identified the following elements for incorporation in the umbrella investment protection agreements :

1. *Definitions*

- (a) Investments
- (b) Nationals
- (c) Or any other definition or the definition of any other term deemed appropriate between the host country and the investing country.

2. *Reception or Classification of the Investment*

- (a) Whether there is to be a registration of the investment.
- (b) Reception by a specific authority of the host country in order to categorise the investment as approved projects.
- (c) Reception by way of licensing.

3. *The Promotional Aspects of the Agreement—whether a protection is afforded to Foreign Investment*

- (a) Provision relating to the rule of fair and equitable and a non-discriminatory treatment between nationals and entities of the host country and the nationals and companies of the investing countries.
- (b) A most-favoured-nation treatment.
- (c) Repatriation of capital and surplus earnings, profits etc.
- (d) Exemption from customs duties and local taxes.
- (e) Special conditions for sale of products.

4. *A Safeguard for Foreign Investment*

- (a) Measures that are taken in the host country that result in the deprivation of the investment of nationals and companies of the investing country to be governed by certain conditions.
- (b) Measures taken in public interest and in accordance with the due process of law.
- (c) Measures are not discriminatory.
- (d) Measures are effected with provisions for the payment of adequate and effective compensation.

5. *Guarantees*

The principle of subrogation in the event that the Contracting Party makes payment to any of its nationals or companies under a guarantee.

6. *Settlement of Disputes*

- (a) Settlement of disputes by arbitral proceedings.
- (b) The appointment of the Chairman of the Tribunal.
- (c) Enforcement of awards.

7. *General Provisions*

- (a) Amendments
- (b) Duration of the Agreement
- (c) Determination of the Agreement
- (d) Continuation of the investment protection for a certain period of years after termination.
- (e) Any other matter related to coming into force of the Agreement.

The meeting also generally discussed the possible contents of the agreement relatable to each of the above-mentioned

elements. It requested the Secretary-General to prepare the Draft of a Model Umbrella Agreement in the light of the discussions held during the meeting for consideration of an Expert Group to be convened prior to the next ministerial meeting.

The meeting next considered the question of formulation of principles for protection of special category of investments, particularly investments by developing countries. Some doubts were expressed as to whether it was necessary to formulate a set of principles apart from the draft of the model umbrella investment protection agreement. Some views were expressed that the investments from developing countries could be provided with incentives in the shape of tax concessions and other benefits under national laws but it might be difficult to draw up a separate set of principles in regard to protection of the investments. The meeting also discussed the question as to whether it would be appropriate to set out principles concerning a regional standard of investment protection in the form of recommendations or a declaration. Since different views were held by participants on this question it was decided that the Secretary-General should examine this matter further and place his proposals at the next meeting of the Expert Group for consideration.

In regard to appropriate legal framework to bring about regional co-operation it was generally agreed that it would be difficult to have a multilateral instrument applicable to the whole of the Asian-African region. Some of the participants were of the view that it would be useful to prepare a model agreement for sub-regional co-operation in the light of the ASEAN and sub-regional groupings in West Africa. The meeting took note of certain types of bilateral agreements and commercial contracts which would be suitable for economic co-operation between two or more parties on the principle of harnessing of their resources. A view was expressed that priority should be given to preparing a model contract for transfer of technology to developing countries along with preparation of guidelines for developing countries in drafting licensing agreements or contracts for transfer of technology.

It was felt that it would be extremely useful if the contracts and joint venture agreements which had been entered into by member States or their nationals could be collected and information relating thereto be exchanged between member governments. It was agreed that further consideration be given to preparation of model contracts and agreements at the next meeting of the Expert Group. It was also agreed that member governments be requested to exchange a list of their priority projects through the AALCC Secretariat in order to facilitate bilateral consultations on economic co-operation.

Colombo Session (1981)

Following the recommendations of the Ministerial Meeting on Industries and the subsequent meeting of officials held in Kuala Lumpur in December 1980, which had envisaged bilateral investment protection agreements between the countries of the Asian-African region for greater economic co-operation among them, the draft of a Model Agreement was prepared by the AALCC Secretariat. The Model Agreement was examined by the Trade Law Sub-Committee* during the Colombo Session of the AALCC. Its text along with the views expressed thereon were as follows :

A. Draft Text of Model Agreement

Title

Agreement between the Government of.....and the Government of.....for Promotion, Encouragement and Reciprocal Protection of Investments.

* The Trade Law Sub-Committee was attended by the Delegates of the Arab Republic of Egypt, Bangladesh, India, Indonesia, Japan, Republic of Korea, Malaysia, Mongolia, Nepal, Nigeria, Oman, Pakistan, Sierra Leone, Sri Lanka, Thailand, Turkey, United Arab Emirates and the Observers from the People's Republic of China, Hague Conference on Private International Law, International Centre for the Settlement of Investment Disputes and the United Nations Commission on International Trade Law.

Preamble

The Government of.....and the Government of

Recognizing the need to promote wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries of the region;

Desirous to create conditions in which investments by each other and their nationals would be facilitated and thus stimulate the flow of capital and technology within the region;

Have agreed as follows :

Article I

Definitions

For the purpose of this Agreement

(a) **"Investment"* means

- (i) direct or indirect contributions of capital, technology and any other kind of assets invested or reinvested in projects approved by the host government in the field of agriculture, industry, mining, forestry, communications or tourism including shares acquired in companies engaged in such projects;
- (ii) investment in the shape of assets acquired through monies brought in or out of return on its investments

* In the definition of investments a comprehensive approach has been adopted. It may however be pointed out that in some countries assets acquired by foreign nationals are treated on a different footing from investments in classified industries or projects for the purpose of investment protection. In the draft, investments in projects which are sought to be protected within the purview of the agreement have been restricted to approved projects to conform to the national laws and regulations of several member states.

in the host country. Such assets shall include movable and immovable property and any other property rights such as mortgages, liens or pledges; shares, stocks and debentures of companies or interest in the property of such companies.

- (iii) title to or claims of money or to any performance under contract having an economic or financial value;
- (iv) copyrights, patents other industrial property rights including technical processes or know-how, trade marks, trade names and good will;
- (v) such business concessions acquired (under a contract or) under a public law including concessions regarding the prospecting for, or the extraction or minning of natural resources, as give to their holder a legal position of some duration.
- (b) "National" in respect of each contracting State means a natural person who is a citizen of that State under its constitution or nationality law;
- (c) "Companies" means corporations, firms or associations incorporated, constituted or registered in the contracting State in accordance with its laws.
- (d) *"State Entity" means
A government department, corporation, institution or undertaking wholly owned and controlled by government and exclusively engaged in activities of a commercial or private law nature.
- (e) "Returns" means
the amount yielded by an investment and in particular include profits, interests, capital gains, dividends, royalties or fees.

* In the developing countries of Asia and Africa investments, whether in the shape of capital or technology, are likely to be made at times by State entities which cannot be appropriately brought within the expanded definition of companies.

(f) "host government" means

the government of the country in whose territory the investment is received.

Article 2

Promotion and encouragement of investments

- (i) Each Contracting Party shall take steps to promote investments in the territories of the other Contracting Party and encourage its nationals and companies to make such investments through offer of appropriate incentives including tax concessions and investment guarantees wherever possible.
- (ii) Each Contracting Party shall encourage and create favourable conditions for the nationals, companies or State entities of the other Contracting Party to invest capital, technology and other form of assets in its territory through according of fair and equitable treatment and ensuring full protection and security in conformity with the provisions of this agreement.
- (iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territories of each other in various sectors such as industry, mining, communications, agriculture and forestry where investments from one contracting State into the other may be most beneficial in the interest of both the parties.

Article 3

Reception of investments

- (i) A State entity, company or national of a Contracting State intending to invest or enter into collaboration arrangements in respect of a project in the other Contracting State shall submit its or his proposal to the appropriate government department of the State where the investment

is sought to be made. Such proposals shall be examined expeditiously and so soon after the proposal is approved a letter of authorisation shall be issued and the investment shall be registered with a designated authority of the host State.

- (ii) The investment shall be received subject to terms and conditions specified in the letter of authorization. Such terms and conditions may not be altered to the prejudice of the investor, except in circumstances where the conditions are so radically altered as to justify a reappraisal.
- (iii) The host government may in the interest of its economy specify conditions concerning the marketing of products of any industrial venture or the commodities including minerals which are obtained through any activity in which the investments have been made.
- (iv) The host government shall offer to the investor from the other Contracting State the most favourable terms permissible under its laws at the time when the investment is received in the matter of tax concessions and customs duties on importation of goods for purposes of investment. Such incentives may be specified in the letter of authorisation issued for the reception of the investment which shall not be withdrawn for a period of.....years or upon adequate notice to the investor.

Article 4

Most-favoured-nation treatment

- (i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that which it accords to the investments or returns of nationals, companies or State entities of any third State.

- (ii) Each Contracting Party shall also ensure that the nationals, companies or State entities of the other Contracting Party are accorded treatment not less favourable than it accords to the nationals or companies or State entities of any third State in regard to the management, use, enjoyment or disposal of their investments including management and control over business activities and other ancillary functions in respect of the investment.

Provided however that neither Contracting Party shall be obliged to extend to the nationals or companies or State entities of the other, the benefit of any treatment, preference or privilege which may be accorded to any other State or its nationals by virtue of the formation of a customs union, a free trade area or any other similar arrangement to which such a State may be a party.

Article 5

**National standard of treatment*

Each of the Contracting Parties shall endeavour to extend to the nationals, companies or State entities of the other Contracting Party the same standard of treatment as it accords to its own nationals and companies in regard to the management, control, use, enjoyment and disposal in relation to investments which have been received in its territory; and for this purpose the Contracting States shall initiate appropriate legislative and administrative measures within a period offrom the date of conclusion of this agreement.

* In several countries in the Asian-African region the conditions of investment by foreign nationals differ from those applicable to investments by their nationals. It would be desirable if national standard of treatment could be accorded to those categories of foreign investments which have been permitted by the host government from other developing countries of the region. In order to effectuate this certain amendments in local legislation may be necessary.