Article 6

Repatriation of investments and returns

Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed full freedom and facilities in the matter of repatriation of capital and return on its investments including fees, emoluments and earnings accruing from or in relation to such investments subject however to the right of the Contracting State to impose reasonable restrictions for temporary periods to meet exceptional financial or economic situations.

Article 7

Nationalization or expropriation

(i) Investments of nationals, companies or State entities of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose related to the national interest of the expropriating party and against prompt, adequate and effective compensation provided that such measures are taken on a non-discriminatory basis and in accordance with law.

(ii) Such compensation shall be determined on equitable principles taking into account *inter alia* the capital invested, depreciation, return from investments already repatriated and other relevant factors which shall be subject to review by an independent judicial or administrative tribunal or authority. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

(iii) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in its territory and in which nationals or companies or State entities of the other Contracting Party own shares, it shall ensure that prompt, adequate and

effective compensation is received and allowed to be repatriated in respect of such investments.

Article 8

(i) Nationals, companies or State entities of one Contracting Party whose investments in the territory of another Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by that Contracting Party treatment regarding restitution, indemnification, compensation or other settlement, no less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(ii) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in paragraph (i) suffer losses in the territory of another Contracting Party resulting from :

(a) requisitioning of their property by its forces or authorities;

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded restitution or adequate compensation and the resulting payments shall be allowed to be repatriated.

Article 9

Settlement of disputes

Each Contracting Party shall consent to submit any disputes or differences that may arise out of or in relation to investments made by a national, company or a State entity of the other Contracting Party to conciliation or arbitration in

accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 at the request of such national, company or State entity.

Alternative

Each Contracting State shall consent to submit any disputes and differences that may arise out of or in relation to any investment made by a national, company or State entity of the other Contracting State for settlement by arbitration under the UNCITRAL Rules 1976.

Article 10

(i) Disputes or differences between the Contracting Parties concerning the interpretation or application of this agreement shall be settled through negotiations.

(ii) If such disputes and differences cannot thus be settled it shall upon request of a Contracting Party be submitted to an arbitral tribunal to be composed of three members. Each Contracting Party shall nominate one member of the tribunal and the third member shall be appointed jointly by agreement between the parties failing which by the President of the International Bank for Reconstruction and Development at Washington/President of the International Court of Justice at The Hague.

Article 11

Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognize :

(a) the assignment, whether under the law or pursuant to a legal transaction, of any right or claim from the party indemnified to the former Contracting Party or its designated Agency; and

(b) that the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

Article 12

Application of the agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement and the investments previously made which are approved and registered by the host government within a period of twelve months from the date of entry into force of this Agreement.

Article 13

Entry into force

This Agreement shall enter into force upon signature.

Article 14

Duration and termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from any date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ten years after the date of termination.

B. Views Expressed by the Trade Law Sub-Committee

Article 1 : Definitions

(a) *Definition of 'investment'*—It was generally agreed that the definition as set out in the model Agreement was inappropriate as it combined the concept of 'investment' with

the notion of 'approval'. The requirement of 'approval' should be delinked from the definition of 'investment'. The Sub-Committee suggested that the Secretariat may consider modelling its definition on the basis of proposals set out below :

Model A

"Investment" means every kind of asset and in particular, though not exclusively, includes :—

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value;

(iv) copyrights, industrial property rights (such as patents for inventions, trade-marks, industrial designs), know-how, trade names and goodwill; and

(v) business concessions conferred by law or under contract including concessions to search for, cultivate, extract or exploit natural resources".

Model B

"Investment" includes every kind of asset including :—

(a) shares, other types of holdings of companies;

(b) claims to any performance under any contract having financial value and claims to money;

(c) rights with respect to movable and immovable property;

(d) patents and inventions, rights with regard to trade-marks, labels and any other industrial property; and

(e) concessionary rights including exploration and exploitation of natural resources".

(b) *Definition of 'National'*—It was suggested to amend the definition of 'national' so as to make it also applicable to countries not having the concept of citizenship.

(c) *Definition of 'Companies'*—It was suggested that 'firms' be replaced by 'partnerships' and to dispense with the requirement of registration of companies.

(d) *Definition of 'State entity'*—It was suggested to replace the term 'Government Department' by 'State Department' as the former expression could imply Central Government. It was also suggested to delete the word 'exclusively' and 'or private law' from the text of the definition.

(e) *Definition of 'returns'*—It was suggested that the words "amount yielded by the investment and in particular include" may be deleted.

(f) *Definition of 'Host Government'*—This was generally acceptable subject to the substitution of the word 'made' in place of 'received'.

Article 2 : Promotion and encouragement of investments

It was noted that Article 2 provides for favourable treatment, Article 4 provides for most-favoured-nation treatment and Article 5 provides national treatment. The suggestion was made that Article 2 should be suitably amended *vis-a-vis* Articles 4 and 5 so that the various standards provided by the Model Agreement could be easily identified.

Article 3 : Reception of investments

It was generally agreed to delete paragraphs 3 and 4 as the limitations and restrictions which these paragraphs contemplated could be set out in the letter of authorization. The view was expressed that there may be investments which do not require approval or registration. Hence, this article should refer only to admission of investments by the host country.

Article 4 : Most-favoured-nation treatment

It was recognized that this provision posed a difficult problem. On the one hand, co-operation between developing countries might imply, under the traditional approach, the inclusion of a MFN clause in bilateral treaties. It was noted, however, that a large number of developing countries in the AALCC region have already concluded investment protection treaties (mostly with industrialized countries) which grant the investor a greater degree of protection than that provided by the Draft Model Agreement. For these countries, the inclusion of Article 4 in the Model Agreement would appear to make that Agreement illusory since every new treaty partner would be entitled to demand the treatment accorded by the earlier treaties with industrialized countries. It was further recognized that the seriousness of this unintended effect of Article 4 would depend on the extent to which the Draft Model Agreement would differ in substance from the past bilateral investment protection treaties. A view was expressed that the MFN clause should be available on the basis of reciprocity.

Article 5 : National standard of treatment

Article 5 obliged the contracting States to enact appropriate legislative and administrative measures so as to extend to the investors national standard of treatment. Since Article 2 already covered this obligation it was felt that this obligation should not find place in Article 5.

Article 6 : Repatriation of investment and returns

Article 6 assures full freedom in the matter of repatriation of capital and returns on investments. It was pointed out in this connection that since in actual practice States permit repatriation of capital and returns on investments upto a specified limit, would it not be appropriate to set a standard in this regard. It was also suggested that some of the returns out of investments could be re-invested so as to accelerate industrial development. Another question posed was whether repatriation of capital or returns should be allowed only to

the country of the nationality of the investor or could it also be to a third country. One view was that ordinarily repatriation should be allowed only to the country of the nationality of the investor. Another view was that since the Model Agreement covered only investments between developing countries *inter se*, repatriation of capital and returns to a third developing country should not be excluded.

Further, Article 6 permitted the host country to curtail the 'freedom of repatriation' for temporary periods to meet exceptional financial or economic contingencies. The view was expressed that the exceptional situations necessitating the host State to curtail this freedom should be framed in terms of an acceptable standard, for example, the standards set in the IMF Charter.

Article 7 : Nationalization or expropriation

There was a suggestion regarding the advisability of using one word in the title in place of two. However, it was also observed that the interjection of the word 'or' in between the two words—achieves the same objective.

The principal issues identified under this article were the following :

(a) the respective advantages and disadvantages of the use of broad general language as in Article 7 (1) or a more detailed definition of the conditions under which nationalization or expropriation could occur;

(b) the question whether the provisions of Article 7 (ii) would be any more acceptable to capital exporting developing countries than to the industrialized countries which had rejected them in the North-South discussions, and if compensation should be general or whether the amount should become ascertainable by reference to specific standards; and

(c) the question of setting forth guidelines in Article 7 (iii) for determining the compensation payable to the shareholders of a company in the event of its nationalization.

Article 8

This article was generally acceptable. It was noted that this article did not have a heading unlike the other articles, hence it was suggested that a heading should be given to this Article.

Articles 9 & 10 : Settlement of disputes

Consideration was given as to the desirability of preceding these two articles by a separate new article which would state explicitly that the parties to disputes either under Article 9 or Article 10 could agree to conciliation under the UNCITRAL Conciliation Rules 1980 prior to invoking the respective arbitration provisions of Articles 9 and 10. The view was also expressed that such a provision was especially appropriate for disputes between Contracting States and might be inserted in Article 10.

With respect to Article 9 it was suggested that parties might be given three choices of forum for arbitration. If both the host State and the national State of the investor are parties to the 1965 Convention on the Settlement of Investment Disputes, the first paragraph of Article 9 would provide the appropriate solution. If neither State is a party to that Convention, the second paragraph entitled 'Alternative' would be appropriate. If one of the States concerned is but that other is not a party to the 1965 Convention, parties to the dispute might be given the option of either the UNCITRAL Arbitral Rules or the 'Additional Facility Rules' of ICSID which provide an institutional framework for this kind of situation.

With respect to Article 10, various alternatives were explored as to the appointing authority in the event of failure of the parties to agree on the third member of the arbitral tribunal. There was also discussion of the rules which would govern the procedure. It was felt that these might be left to be decided by the arbitral tribunal or be set forth in some detail in the Model Agreement as has been done in the standard text of investment protection agreement used by Sri Lanka.

Article 11 : Subrogation

It was agreed to delete from sub-paragraph (a) the following wording "whether under the law of or pursuant to a legal transaction" as it made the text vague.

Article 12 : Application of the agreement

It was felt that this article which deals with the application of the Agreement was misplaced and should be located towards the beginning of the text.

As presently worded, Article 12 was designed to have both retrospective and prospective application. The view was expressed that the agreement should have prospective application only. However, if it was to have retrospective application as well, a schedule listing the existing investments to which the protection of the agreement would be available might be annexed to the Agreement.

Article 13 : Entry into force

The main issued discusse concerning this article was whether the Agreement should enter into force upon signature or by exchange of instruments of ratification. One view was that since exchange of ratifications usually takes a long time, the Agreement should come into effect on a signature, at least provisionally. Another view was that since in certain countries, compliance with the constitutional requirements was a condition precedent to enforcing such an Agreement, it was appropriate to provide that it would enter into force upon exchange of instruments of ratification. It was agreed that the Agreement should provide for both the alternatives.

Article 14 : Duration and termination

Ten years was considered too long a period for the Agreement. It was suggested that this be reduced to five years. Similarly, in respect of investments made during the subsistence of the Agreement, it was felt that these should be governed by the Agreement only for the duration of the remaining period of the Agreement.

Other suggestions

Other suggestions put forward were to the effect that the Agreement should provide for the right of the national companies to have access to the Courts of the Contracting States; entry of nationals of Contracting States in the context of approved investments; a provision on applicable law; a definition of 'territory'. A suggestion was also made that an attestation clause may be provided in the Model Draft.

As the Delegates did not have sufficient time to study the document and consult the concerned authorities of their governments, it was decided that detailed and considered suggestions would be sent to the Secretariat later which will also be taken into consideration in the preparation of the revised draft for further examination.