

Bank, the African Bank, the Islamic Bank or the I.F.C. in Washington but having regard to the vast resources necessary for operation of such a scheme and complexities involved much progress cannot be expected within a reasonable time-frame.

### Multilateral conventions

The only multilateral convention which is at present in force regarding protection of investments is the Convention between the 18 Arab States establishing the Arab Investment Guarantee Corporation. If the scheme formulated by the Inter-American Bank is approved, it will also be under cover of a multilateral convention.

It may be observed that the multilateral conventions in regard to investment protection are not likely to provide a suitable pattern for the Asian-African region due to the fact that the region as a whole consists of a large number of countries whose economic systems, needs and requirements are bound to be different. Consequently, a bilateral approach should be considered as more suitable at the present stage.

The Organization for Economic Co-operation and Development (OECD) had formulated the draft of a Convention on the Protection of Foreign Property. The Council of the OECD however decided that rather than going through the process of adoption of a multilateral convention, it would follow a simpler method of adopting the principles contained in the draft convention through a resolution reaffirming the adherence of member States to the principles embodied in the draft convention. These basically cover the question of treatment of foreign property, observance of undertakings given by member States, payment of fair and effective compensation on taking of property, free transfer of assets and income and settlement of disputes.

### Conclusion and recommendations

On a broad survey of the investment protection mechanisms which have been tried out, it would seem that bilateral investment protection agreements might perhaps provide the best

practicable solution for the present in the matter of protection of investments in the countries of the region even though this may not be a wholly satisfactory method. Such agreements could be made applicable in regard to investments which are approved and registered in the host country. The agreements might generally provide for repatriation of capital and income and adequate and effective compensation as also provision for some notice in the case of nationalization for a public purpose. In addition, the AALCC could consider adoption of certain principles in the form of recommendations in respect of a special category of investments. This special category might consist of :

- (a) Investments declared by the host government to be in their national interest;
- (b) Investments which promote economic co-operation among the countries of the region; and
- (c) Investments by one developing country in another developing country.

All such investments would need to be approved and registered in the host country as falling within the special category. Furthermore, the agreements for investment must contain a provision for settlement of disputes through fair, inexpensive and speedy procedures acceptable to both the parties.

### LEGAL FRAMEWORK

Whilst the climate for accelerating investments in the countries of the region *inter se* by way of regional co-operation can be promoted through consultations between the governments of the region towards adoption of certain basic norms and policies, it might not be practicable at this stage to conceive of any legal instrument like a multilateral convention providing for the framework and modalities for economic co-operation between the countries of the region. On the other hand, if some kind of understanding can be arrived at on the basic approaches and norms, bilateral negotiations between interested governments on substantive projects is likely to



produce the best practical results in the immediate future. The legal framework which could be contemplated at present to achieve the desired objectives may fall under four broad categories :

- (i) Bilateral or multilateral arrangements between interested governments for undertaking a major industrial project like a petroleum refinery or shipbuilding with the participation of two or more governments or State agencies.
- (ii) Bilateral arrangements for participation by one government in State owned projects of another government.
- (iii) Bilateral umbrella agreements setting forth the terms and conditions on which investments may be made by the nationals of the contracting States including bodies corporate in the territories of each other, both in the public and the private sectors.
- (iv) Commercial agreements in respect of joint venture projects as also other forms of investment. Such agreements would be of several kinds depending upon the subject-matter of the agreement and modalities sought to be employed.

It may be pointed out that if investments are made under government-to-government agreements in respect of State owned projects or joint ventures between governments, or under umbrella agreements in respect of private investments, the same will facilitate effective protection of investments in a practical manner.

The AALCC has already undertaken the preparation of certain model agreements which would be consistent with the principles underlying the basic concept of the international economic order as also in the context of regional co-operation through harnessing the resources of the region in the shape of technology, manpower, raw material supplies as well as

capital. This had been taken up as a priority project in the hope that such model agreements might focus the attention of the governments to the need and utility of regional co-operation and also with the object of assisting them in the conclusion of contracts in the economic field.

#### Jakarta Session (1980)

At the Jakarta Session, since many of the member governments had not included economic experts in their delegations, it was agreed to discuss the Secretary-General's report with respect to the following aspects only : (i) Possible pattern of legal framework for regional economic co-operation; (ii) Investment protection and guarantees; and (iii) Settlement of disputes.

One Delegate was of the view that the topic of the New International Economic Order should be taken up by the AALCC in limited aspects only and particularly those which had a bearing on promoting regional co-operation among the countries of the region. He considered investment protection and guarantees as an antiquated concept imposed by foreign corporations on the poor developing countries which tended to compromise their independence and sovereignty. In his view, investment guarantees threatened the interests of the developing countries and that history was full of such instances.

Another Delegate felt that although the matters raised by the Secretary-General were already before bodies like UNCTAD, UNIDO and even before the special session of the General Assembly, slow progress made in those forums fully justified the AALCC's initiative with regard to these matters with its objective of promoting co-operation. However, he stressed that before the AALCC could consider a legal instrument to provide for the modalities of regional economic co-operation, the fundamentals of such co-operation should be sufficiently identified. For this, he stated, an inter-sessional meeting should be convened to make an in-depth study of the matters, the date and venue of which could be left to the Secretary-General to decide in consultation with the member governments.



Another Delegate, however, felt that in respect of investment protection, a distinction should be made between such protection in the context of regional co-operation and that under the general law of investment. Since the work of the AALCC was essentially of a legal nature, he was of the view that the AALCC should concentrate on a strategy for a suitable legal framework for investment protection on a global basis and also evolve model bilateral or multilateral agreements for the purpose.

Another delegate welcomed the initiative taken by the Secretary-General which he considered to be a practical means to translate the NIEO into practice. He endorsed the suggestion regarding the convening of an inter-sessional meeting for an in-depth study of the matters raised by the Secretary-General.

One of the Delegates commended the AALCC for the practical work done by it towards the establishment of a NIEO as demonstrated by its formulation of standard contract forms for use in international sale transactions, the establishment of regional centres for commercial arbitration and the preparation of model clauses for insertion in industrial contracts. He urged the AALCC to take up on a priority basis the question of drafting guidelines or model forms or national legislation or bilateral agreements which set forth therein main principles of co-operation among developing countries for counteracting the adverse influence of the activities of transnational corporations on the economy of the developing countries. He expressed the hope that the AALCC in its work on NIEO would take into account the experience of countries with different economic and social systems including the CMEA countries.

In the view of another Delegate although the Group of 77 had articulated the hopes and aspirations of the developing countries concerning the NIEO in various international forums, nothing concrete had been achieved. Even so, he suggested, that the AALCC should study the various instruments adopted by the Group of 77 such as the Manila Declaration, the Arusha

Charter etc. to derive inspiration for its work. He was, however, of the view that a distinction should be maintained between the activities of the AALCC and those of the Group of 77 concerning regional co-operation. On investment protection and guarantees, he suggested that an investment guarantee scheme should be devised for the Asian-African region so that countries of the region could derive full benefits from foreign investments.

One of the Delegates commended the Secretary-General for his proposals on regional co-operation aimed at rapid industrialization through harnessing the resources of the region and investment protection. He considered it timely for the AALCC to take the initiative of expediting the process of establishing the NIEO since efforts made in that direction in the various international forums had ended in failure. The Delegate, however, found it difficult to accept the classification of countries into five groups set forth in the Secretary-General's study as he felt that it was not easy to make a clear distinction between the developed of the developing countries and the developing ones. He was of the view that countries of the region should be classed into three categories, namely, oil producing, developed and developing countries and that his country should be treated as a developing country. That, however, did not mean, he clarified, that his country was unwilling to participate in regional co-operation schemes.

The representative of the *International Centre for Settlement of Investment Disputes* (ICSID) observed that there were three possible approaches to the problem of protection of investments against political risk. The first approach was for the investor to obtain insurance, either national or international. Even though most of the national schemes issued insurance with the host countries's consent, in his view, they could be objected on the ground that the capital exporting country providing such insurance to their nationals' investment abroad would base their decisions on their own national interest which might or might not serve the priority needs of the host country. This objection, he said, would not apply to an international scheme.



The second approach was for the investor and the host country to conclude an agreement spelling out the terms of the agreement and the extent to which these terms would be immune from governmental action. If such an agreement contained a dispute settlement clause under the ICSID Convention, permitting application of the principles of international law, that would afford effective protection against the host government's actions in that regard.

The third approach consisted in the conclusion of multilateral or bilateral treaties to regulate foreign investments. He pointed out that so far there was not a single multilateral agreement although there were numerous bilateral agreements mostly concluded with the countries of Asia and Africa.

Referring to the Secretary-General's proposals, he said that they represented useful refinements of the international law approach and a worthwhile programme for evolving a requisite legal framework suited to the needs of the region.

One Delegate observed that although there had been numerous developments in the field of international economic relations during the last three decades leading to the proposed establishment of a new international economic order, the role of the AALCC in those developments had not been very comprehensive. He believed that the AALCC could not undertake intensive studies in this area mainly because of its preoccupation with the Law of the Sea negotiations, but now that the work on the Law of the Sea was nearing completion, the AALCC should adopt a comprehensive programme of action for the 1980s concentrated on regional economic co-operation. Restructuring of international economic relations was being discussed in various regional and international forums and a growing picture was emerging on the legal aspects of this cooperation. The AALCC should make an exhaustive study of these developments so as to bring the legal aspects of these developments to the attention of the member governments.

Expressing his approval of the proposals presented by the Secretary-General on the new international economic order,

the Delegate suggested that the AALCC should concentrate on three aspects: namely (i) regional cooperation in industrial matters; (ii) protection of investments and (iii) settlement of disputes. In taking up these projects, the AALCC should not start in vacuum but should take into account the numerous industrial collaboration, joint venture, and technical assistance agreements that had been concluded between the countries of the region, evolving a comprehensive legal framework for economic co-operation in the region. The AALCC should undertake a study of this growing legal framework and the practices that have been established as also the problems encountered in that context covering the entire region and draw up certain conclusions. The Delegate suggested the following procedure for the Secretariat to go about its task: (i) on regional industrial cooperation, the Secretariat should prepare a questionnaire to elicit the requisite information from member governments for the eventual preparation of guiding principles or model contract forms; (ii) Promotion of investment protection—protection of contributions to joint ventures, sharing of technology, training of personnel, labour protection etc. and (iii) Settlement of disputes—how joint ventures could be related to the regional arbitral centres for dispute settlement.

Another Delegate observed that in the face of dangers in the world economy threatening the political and economic stability of nations, it was appropriate that the AALCC should serve as a forum for exchange of views on regional co-operation in the context of the new international economic order. He endorsed the proposals of the Secretary-General for a possible initiative in regard to regional co-operation. The Delegate was also of the view that the new international economic order should eventually be based on legal norms and standards governing the behaviour of States, transnational enterprises and other subjects of international law. Since the Declaration on new international economic order and the Charter of the Economic Rights and Duties of States lacked the enforceability of law, his country had proposed consideration of the progressive development and codification of the norms and principles of international law relating to global economic relations at the thirtieth session of the General Assembly. He expressed the



hope that this item would be discussed in the AALCC at some future time within the legal framework of economic co-operation among the countries of the region.

Another Delegate welcomed the efforts of the AALCC to contribute to the establishment of a new international economic order. He was of the view that the Secretary-General's proposals on the topic would positively assist in the establishment of the new order. Investments must be encouraged within the region and he considered the suggestion for umbrella agreements for investment protection as sound and valid. The preparation of model clauses by the AALCC for insertion in industrial contracts would also be a positive contribution to the establishment of the new order.

Yet another Delegate stated that although the new international economic order could not be realized without the cooperation of the industrialized nations, an effort on the part of the Third World countries on a regional basis could surely lay the foundation of the same. Since the AALCC had already worked on certain aspects of international economic law, he felt convinced that regional co-operation could be achieved through this body.

Expressing his satisfaction on the AALCC's dispute settlement system and the establishment of the two regional arbitration centres, he said that it should be ensured that the procedures adopted by these centres were expeditious and simple while at the same time effective and capable of imparting justice so that confidence was generated among the industrialized nations in those centres.

Considering regional co-operation for industrialisation as an important component of the concept of self-reliance, the Delegate said that the areas in which co-operation could be promoted should include all inputs required namely, equipment, raw material, technology, capital and managerial skill. Since such co-operation presupposed exchange of information between the countries of the region, arrangements for the same should be institutionalized through the AALCC.

Regarding co-operation in the field of investment and industrialization in order to protect the rights as well as to determine the obligations of the potential investor of one country in another country of the region, the Delegate suggested that a regional "investment protection agreement" should be drafted. Such an agreement might consider granting Most-Favoured-Nation treatment to all signatories to the agreement to make it more attractive for investors to operate within the region rather than outside. In this context, the Delegate pointed out that presently most of the surplus capital in some of the countries of the region was being recycled back to the advanced countries. Since opportunities for investment already existed in this region, in his view efforts should be made to redirect a major portion of those resources to the requirements of the developing countries.

On transfer of financial resources and technology, the Delegate said that this involved contractual arrangements, but most of the developing countries had little potential to develop legal concepts suited to their interests. This was for three reasons: (a) an absence of institutions corresponding to the powerful and well-funded industrialized country institutions; (b) educational and academic dependence; and (c) the absence of communication and opinion-building mechanisms. The result was the contracts were frequently loaded against the developing countries. In this context, he felt that there was a need for an international body designated with the task of providing alternative legal concepts, disseminating the relevant information on international practices of industrial contracting and assisting in preparing guidelines, model contracts, uniform terms and multilateral conventions.

The Delegate pointed out that industrial countries often insisted on incorporating clauses in the agreements compelling the other parties to submit to the jurisdictions chosen by them. In order to meet the needs for satisfactory arbitration, a proposal for setting up regional arbitration centres to serve as a forum to articulate developing countries' concepts was considered by UNIDO III. However, those centres could not be brought into being on account of lack of consensus between the



developed and developing countries. Although the AALCC's centres were in line with the proposal before UNIDO III, these centres should be further strengthened and possibilities should be worked out for setting up one or two more centres in view of their importance to the developing countries.

The Delegate proposed the setting up of a panel of legal consultants or experts to assist the developing countries in solving disputes, in the formulation of a system of industrial development and technical issues involved in that context.

One of the Delegates stated that his country attached the highest importance to foreign investments in its new economic development programme, and had established a free trade zone and was now negotiating bilateral investment protection agreements with a number of countries. These agreements provided guarantees for the free transfer of capital and returns, compensation for losses, MFN treatment and nationalization only on grounds of public utility subject to strict legal criteria and the payment of prompt, effective and adequate compensation. The agreements provided for ICSID arbitration procedure in case of any investment dispute. The Delegate, in the light of the above background, supported the AALCC's initiatives and its future programme of work.

In regard to organization of future work on this topic, the Secretary-General proposed that in accordance with the suggestions made by the several delegations, appropriate inter-sessional meetings might be convened for an in-depth study of the proposals contained in the Secretariat papers as also the issues raised by the delegations. This was agreed to on the understanding that the dates and venues of such meetings should be fixed in consultation with the interested governments.

#### **The Ministerial Meeting on Regional Co-operation on Industries, Kuala Lumpur, 8 to 9 December 1980**

The topic "Regional Co-operation in the context of the New International Economic Order" was further discussed at a ministerial level meeting held in Kuala Lumpur on 8th and

9th of December 1980 under the auspices of the Government of Malaysia and the AALCC. The countries represented in the meeting included Arab Republic of Egypt, Bangladesh, Indonesia, Iran, Iraq, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Nepal, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, Sierra Leone, Somalia, Sri Lanka, Syria, Thailand and Turkey. The meeting was chaired by the Right Hon'ble Dr. Mahathir Mohamad, Acting Prime Minister of Malaysia.

The meeting proceeded to discuss a possible pattern of regional cooperation in the economic field, particularly in regard to industrialization on the basis of a working paper presented by the Secretary-General of the AALCC. The participants were agreed about the need and feasibility of promoting co-operation between the countries of the region particularly in the context of industrialization. They took note of the fact that the economies of the countries of the region in many respects were complementary as their resources, their needs and also their technical advancement took a varied form and pattern which was conducive to regional co-operation based on the harnessing of their resources.

The meeting was of the view that co-operation at sub-regional level had been extremely fruitful between the countries of ASEAN and it also took note of the recent experience in certain sub-regional groupings in West Africa. It was felt that promotion of mutual trust and confidence between the countries of the region was a necessary *sine qua non* for bringing about co-operation between them. The meeting was of the view that sub-regional co-operation on the basis of the experience of ASEAN would be a productive method through which co-operation could be achieved where the economic conditions made the same feasible.

The meeting was further of the view that apart from such sub-regional arrangements the possibility of co-operation between the countries of the region through bilateral or tripartite arrangements be intensified which would have as their objective the harnessing of their resources. In this connection it was



felt that specific projects should be examined on the basis of their economic feasibility and the important areas where co-operation could be brought about might include the following:

- (a) Downstream activities in relation to petroleum and gas including processing, transport and marketing;
- (b) Iron and steel and non-ferrous industry;
- (c) Engineering and machine tools;
- (d) Energy other than petroleum such as coal; and
- (e) Food and agro industries.

The major area of industrial co-operation on a regional basis was identified as downstream petroleum development. Apart from the ready availability of crude on a Government to Government basis to developing countries, the petroleum and capital from the oil rich nations could be invested in other developing member States of the AALCC which offer the ready markets, infrastructure, labour and export marketing potential. This would ensure that the oil rich nations maintain control of not only their oil resources but also the downstream activities including transportation and marketing. At the same time this would assist the developing nations (including the least developed nations) to enjoy benefits of economic growth which these projects would engender.

The meeting took note of the fact that a pattern of regional co-operation had been developing during the past decade as set out below :

(i) *Loan assistance or concessionary lendings made in respect of specific industrial ventures or for building of infrastructure given by a State or a State agency such as a Fund or development corporation in favour of another State or a State agency*—These arrangements generally contain favourable terms for the countries assisted and are not tied to any particular source of supply of material or technology.

(ii) *Location of industries by a developed or near developed country in the territory of a developing country of the region at*

*the invitation or encouragement given by the latter* : Although the industrial activities in these cases seem to remain solely in the hands of the management with no technical assistance or training programme attached, the country or countries in which such industries have come to be located have derived substantial benefits by finding employment for their labour force including technicians and also in contributing to the general industrial growth of the country with consequential benefits flowing therefrom in the shape of revenues, marketing etc.

(iii) *Outright contracts for building of roads and civil works for infrastructure and factory premises* : These are mainly labour intensive where the contractor provides the labour and in some cases also material for outright payment under the contract. Such contracts have provided opportunities for private sector undertakings and commercial firms of developing countries in new areas of activity, as also employment of surplus labour and sources for earning of foreign exchange.

(iv) *Outright contracts in regard to more sophisticated areas of infrastructure like telephone system* : Such contracts have generally been granted in favour of companies or corporations in developed or near developed countries of the region through which developing countries have been able to avail of the expertise and technical assistance from a country of the region.

(v) *Contracts for erection and commissioning of plants with an element of training programme* : Such contracts are also generally with companies or corporations in the developed or near developed countries.

(vi) *Joint ventures in less sophisticated industries* : These are generally between two developing countries, one of which is usually a country which may be termed as developed of the developing. Such arrangements are generally carried out as commercial contracts between State owned corporations or private companies. This form of co-operation has appeared to be extremely fruitful in transferring technology in less sophisticated fields which can be readily absorbed by developing countries. The arrangements normally provide for employment of local personnel and include a programme of training.