

agreements between the countries of the region.

(VII) National standard of treatment

Some of the existing bilateral investment protection agreements entered into by the developing countries with industrialized States provide that the foreign investor should be accorded treatment no less favourable than is accorded to the nationals and companies of the host State. However, some of the countries of the region do not consider application of national standard of treatment to foreign investments to be appropriate. Even though it may be desirable to apply this standard for investments from developing countries among themselves, its impact has to be judged in the light of existing agreements with industrialized nations.

(viii) Repatriation of capital and return

Most of the existing bilateral agreements contemplate full freedom in the matter of repatriation of capital and profits subject to reasonable restrictions being imposed by host governments to meet exceptional financial or economic situations. Some countries however stipulate that a portion of the profits should be re-invested and also impose conditions concerning repatriation of capital. It is necessary that such conditions should be negotiated at the time of the reception of the investment and clearly specified at that time.

(ix) Compensation for losses suffered

Most bilateral agreements provide for restitution or compensation for losses suffered by the investor under various circumstances.

(x) Conditions for expropriation and nationalisation including principles for compensation

Several investment protection agreements recognize that an investment can be nationalised or expropriated for a public purpose related to the internal needs and national interest of the host State. These agreements also provide for prompt payment of the full market value as compensation. However, there are some countries in the region who consider that the compensation should be computed on equitable principles.

(xi) Value of investments—effect of inflation and variation in exchange rates

Some of the countries of the region who have investments in the

western countries have contended that compensation should be payable for loss in the value of investments by reason of the effect of inflation and variation in exchange rates. It is for consideration whether this principle should be suitable for adoption in regard to investments made by the developing countries in other developing countries of the region.

(xii) Training programmes, transfer of technology and marketing arrangements

Several developing countries would desire the investor to arrange for suitable training programmes and transfer of technology as also some share in marketing arrangements. Such conditions should be negotiated and specified at the time of reception of investments.

(xiii) Past investments

It is very often a matter of debate whether past investments should be covered in bilateral umbrella investment protection agreements. One view is that only future investments should be the subject matter of such agreements, whilst the other view is that past investments made within a specified period should also be covered provided they are registered with the host government within a reasonable period from the time when the umbrella agreement comes into force.

(xiv) Settlement of disputes as between the investor and the host government

A provision for settlement of disputes between the host government and the investor is invariably incorporated in bilateral investment protection agreements. This is important in order to create stability and confidence in the transaction. The most appropriate modality for such purposes is the ICSID Convention or "The Additional Facility Rules" of ICSID, if applicable. Otherwise UNCITRAL Arbitration and Conciliation Rules might be appropriate.

(xv) Settlement of disputes between the Governments Parties to the Agreement

Specific provisions are invariably included in bilateral agreements which follow the normal pattern for settlement of Government to Government disputes such as through negotiations or arbitrations.

*** MODEL AGREEMENT FOR PROMOTION AND
PROTECTION OF INVESTMENTS
MODEL-A**

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

The Government of _____ and the Government
of _____

Recognising in particular 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;

Also Recognising that reciprocal protection of such investments will
be conducive to the attainment of desired objectives in a spirit of
partnership;

Desirous to create conditions in which the 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 1

Definitions

For the purpose of this Agreement

(a) 'Investment'

(Alternative 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;

* The model agreement is intended to provide a possible negotiating text for
consideration of governments. It is merely a model and not an adhesive text. The
possibility that the text would be modified or altered in the course of bilateral
negotiations to suit the needs of the parties is clearly contemplated.

- (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, and loans;
- (iv) copyrights, knowhow, (goodwill) and industrial property rights such
as patents for inventions, trade marks, industrial designs and trade
names;
- (v) rights conferred by law or under contract, including licence to
search for, cultivate, extract or exploit natural resources.

(Alternative B)

'Investment' includes every kind of asset such as

- (i) shares and other types of holdings of companies;
- (ii) claims to any performance under contract having a financial value,
claims to money, and loans;
- (iii) rights with respect to movable and immovable property;
- (iv) rights with regard to patents, trade marks and any other industrial
property; and
- (v) contractual rights relating to exploration and exploitation of natural
resources.

(Alternative C)

'Investment' means:

- (i) _____ in respect of investment in the territory of (First Party) _____
- (ii) _____ in respect of investment in the territory of (Second Party) _____

(b) 'National'

(Alternative A)

'National' in respect of each Contracting Party means a natural
person who is a national or deemed to be a national of the Party under
its Constitution or relevant law.

(Alternative B)

'National' in respect of (First Party) means _____
and in respect of (Second Party) means _____.

(c) 'Companies'**(Alternative A)**

'Companies' means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws (and includes such entities in which nationals of a Contracting Party have substantial interest and majority shareholding.)

(Alternative B)

'Companies' means _____ in respect of the (First Party)
and in respect of the (Second Party) _____.

(d) 'State Entity' means a department of government, corporation, institution or undertaking wholly owned or controlled by government and engaged in activities of a commercial nature.

(e) 'Returns' includes profits, interests, capital gains, dividends, royalties or fees.

(f) 'Host State' means the country in whose territory the investment is made.

(g) 'Territory' means:

- (i) In respect of the (First Party) _____;
- (ii) In respect of the (Second Party) _____.

Article 2**Promotion and encouragement of investments**

- (i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.
- (ii) Each Contracting Party shall create favourable conditions to encourage the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.

(iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territory of each other in various sectors such as industry, mining, communications, agriculture and forestry to determine where investments from one Contracting Party into the other may be most beneficial in the interest of both the parties.

(iv) * (Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other contracting Party.)

Article 3**Reception of Investments**

- (i) Each Contracting Party shall determine the mode and manner in which investments are to be received in its territory.
- (ii) The Contracting Parties may determine that in a specified class of investments, a national, company or State entity of a Contracting Party intending to make investment in the territory of the other Contracting Party including collaboration arrangements on specific projects, shall submit its or his proposal to a designated authority of the Party where the investment is sought to be made. Such proposals shall be processed expeditiously and soon after the proposal is approved, a letter of authorisation shall be issued and the investment shall be registered, where appropriate, with the designated authority of the host State. The investment shall be received subject to the terms and conditions specified in the letter of authorisation.
- (iii) The host State shall facilitate the implementation and operation of the investment projects through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation or permits for importation of goods, employments of consultants and technicians of foreign nationality in accordance with its laws and regulations.

Article 4**Most-Favoured-Nation Treatment**

- (i) Each Contracting Party shall accord in its territory to the

* There were some differences of views on the need for inclusion of this clause.

investments or returns of nationals, companies or State entities of the other contracting Party treatment that is not less favourable than that 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 that 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 investments.

Article 5

National 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 it accords to the investments or returns of its own nationals, companies or State entities.
- (ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.

Article 6

Repatriation of capital and returns

- (i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed full facilities in the matter of the right to repatriation of capital and returns on his or its investments subject, however, to any condition for re-investment which may be stipulated at the time of the reception of the investment and subject also to the right of the host State to impose reasonable restrictions for temporary periods in accordance with its laws to meet exceptional financial and economic situations (as determined in the light of guidelines generally applied by the IMF or such other criteria as may be

* Some countries do not favour 'National Treatment' for foreign investments.

agreed upon by the parties). The capital and returns allowed to be repatriated shall include emoluments and earnings accruing from or in relation to the investment as also the proceeds arising out of sale of the assets in the event of liquidation or transfer.

- (ii) In the event of exceptional financial or economic situations as envisaged in paragraph (i) of this article, the host State shall exercise its power to impose reasonable restrictions equitably and in good faith. Such restrictions shall not extend ordinarily beyond a period of _____. Any restriction in operation thereafter shall not impede the transfer of profits, interests, dividends, royalties, fees, emoluments or earnings; as regards the capital invested or any other form of returns, transfer of a minimum of 20 per cent in each year shall be guaranteed.
- (iii) Repatriation shall be permitted ordinarily to the country from which the investment originated and in the same currency in which the capital was originally invested or in any other currency agreed upon by the investor and the host State at the rate of exchange applicable on the date of transfer upon such repatriation unless otherwise agreed by the investor and the host State.

Article 7

Nationalization, expropriation and payment of compensation in respect thereof

- (i) Investments of nationals, companies or State entities of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except (for a public purpose) (in national interest) of that Party and against prompt, adequate and effective compensation provided that such measures are taken on a non-discriminatory basis and in accordance with its laws.
- (ii) Such compensation shall be computed on the basis of the value of the investment immediately prior to the point of time when the proposal for expropriation had become public knowledge to be determined in accordance with recognized principles of valuation such as market value. Where the market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account *inter alia* the capital invested, depreciation, capital already repatriated and other relevant factors. The compensation shall include interest at a normal commercial

rate from the date of expropriation until the date of payment. The determination of the compensation, in the absence of agreement being reached between the investor and the host State, shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

- (iii) Where a Contracting Party nationalises or expropriates the assets of a company which is incorporated or constituted under the laws 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 by the owners of the shares in the other Contracting Party. Such compensation shall be determined on the basis of the recognized principles of valuation such as the market value of the shares immediately prior to the point of time when the proposal for nationalisation or expropriation had become public knowledge. The compensation shall include interest at a normal commercial rate from the date of nationalisation or expropriation until the date of payment. If any question arises regarding the determination of the compensation or its payment, such questions shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State.

Article 8

Compensation for losses

- * [(i) Nationals, companies or State entities of one Contracting Party whose material assets in the investments in the territory of the other 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 it accords to (its own nationals, companies or State entities or to) nationals, companies or State entities of any third State.]

* Several participants had reservations on the provisions of this paragraph

- (ii) Nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other Contracting Party resulting from:
- (a) requisitioning of their property by its forces or authorities, or
 - (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

Access to courts and tribunals

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning any investment including judicial review of measures relating to expropriation or nationalisation, determination of compensation in the event of expropriation or nationalisation, or losses suffered and any restrictions imposed on repatriation of capital or returns.

Article 10

Settlement of Investment Disputes

- (i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other Contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.
- (ii) If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which can not be resolved within a period of _____ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration unless the investor has chosen to avail himself or itself of local remedies.

- (iii) Unless the parties have reached agreement to refer the disputes to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965, conciliation shall take place under the UNCITRAL Conciliation Rules 1980 and the assistance of _____ may be enlisted in connection with the appointment of Conciliator(s).
- (iv) Where the conciliation proceedings have failed to resolve the dispute as also in the event of agreement having been reached to resort to arbitration, the dispute shall be referred to arbitration at the instance of either party to the dispute within a period of three months.
- (v) Any reference to arbitration shall be initiated under the provisions of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 or "the Additional Facility Rules" of ICSID, whichever may be appropriate.
In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules 1976, and the appointing authority for the purposes of such rules shall be _____.
- (vi) Neither Contracting Party shall pursue through diplomatic channel any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

Article 11

Settlement of disputes between Contracting Parties

- (i) Disputes or differences between the Contracting Parties concerning interpretation or application of this agreement shall be settled through negotiations.
- (ii) If such disputes and differences cannot thus be settled, the same shall upon the request of either Contracting Party be submitted to an arbitral tribunal.
- (iii) An arbitral tribunal shall be composed of three members. Each

Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to appointment of the chairman of the tribunal within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment. The chairman so appointed shall not be a national of either Contracting Party.

- (iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give directions in regard to the costs of the proceedings.

Article 12

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 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 13

Exceptions

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 regional arrangement on economic co-operation to which such a State may be a party.

Article 14

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 State (in accordance with its laws) within a period of _____ from the date of entry into force of this Agreement.]

Article 15

Entry into force

**(This Agreement shall enter into force on signature.)

or

**(This Agreement shall enter into force as from _____.)

or

**(This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification.)

Article 16

Duration and Termination

This Agreement shall remain in force for a period of _____. 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 _____ years after the date of termination.)

In Witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at _____, this _____ day of _____ 198. (In the _____ languages, both texts being equally authoritative.)

For the Government of the _____

For the Government of the _____

- * There were some differences of views about the past investments being covered.
- ** Alternative provisions.
- *** There were some differences of views whether past investments should be covered.

ADDENDUM TO MODEL 'A'

SUGGESTIONS OF THE DELEGATION OF KUWAIT

1. Article 2 (Promotion and encouragement of investments) Paragraph (iv) should be expanded to read as follows (additions underlined):

"Each Contracting Party shall at all times ensure fair and equitable treatment to the investments of nationals, companies or State entities of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals, companies or State entities of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures.

Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other Contracting Party."

2. Article 6 (Repatriation of capital and return) It is proposed that the following paragraph be added to Article 6.

"(iv) The Contracting Parties undertake to accord to transfers referred to in paragraphs (i), (ii) and (iii) of this Article a treatment as favourable as that accorded to transfers originating from investments made by nationals, companies and State entities of any third Party."

3. Article 11 (Settlement of disputes between Contracting Parties).

Paragraph (iii) of Article 11 should be expanded to read as follows (additions underlined).

.....either Contracting Party may approach the President of the International Court of Justice to make the appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

4. Suggested Additional Articles

There are two additional Articles that should be incorporated into the agreement. There are related to the relations between governments and to the application of other rules.

Article

Relations between Governments

"The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties."

Article

Application of Other Rules

"Notwithstanding the provisions of this agreement, the relevant international agreements which bind both contracting parties may be applied with the consent of both parties".

*MODEL AGREEMENT FOR PROMOTION AND PROTECTION OF INVESTMENTS

MODEL B

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

The Government of _____ and the Government
of _____

Recognising in particular 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;

Also Recognising that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

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 1

Definitions

For the purpose of this Agreement

(a) 'Investment'

(Alternative A)

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

The model agreement is intended to provide a possible negotiating text for consideration of governments. It is merely a model and not an adhesive text. The possibility that the text would be modified or altered in the course of bilateral negotiations to suit the needs of the parties is clearly contemplated.