

# PROMOTION AND PROTECTION OF INVESTMENTS

## Introduction

The question of promotion and protection of investments on a reciprocal basis was first discussed at the Jakarta Session held in April 1980 in the context of regional co-operation in the field of industry among the countries of the Asian-African region. This was followed by more intensive discussion of the matter at the Ministerial Meeting held in Kuala Lumpur in December 1980 under the auspices of the Government of Malaysia in collaboration with the AALCC. That 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. The participants at the Ministerial Meeting generally agreed that the investment climate should be promoted through adequate provisions for protection of investments, repatriation of capital and profits as also a procedure for settlement of disputes. The meeting examined the various modalities which had hitherto been employed for protection of investments and in the light of the discussions, indicated the desirability of formulation of the draft of a model umbrella investment protection agreement for consideration by member governments.

A meeting of officials which followed the Ministerial Meeting at Kuala Lumpur discussed the guidelines for preparation of a model umbrella investment protection agreement and in this connection the meeting identified the relevant elements which could be incorporated in the proposed draft. It was agreed that the model agreement should be prepared on broad general terms which could be suitably adjusted to the needs and requirements of each State. It was generally the view that investment incentives which were offered by various governments 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 special provisions which would help to promote investments from developing countries. The meeting 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 Secretary-General had accordingly prepared the tentative draft of a model bilateral agreement on investment protection intended to be applicable between the countries of the region to serve as a basis for preliminary discussions by an Expert Group. The Secretariat draft was taken up for consideration during the Committee's Colombo Session held in May 1981 by its Trade Law Sub-Committee. The Sub-Committee had raised a number of important issues on the contents of the tentative draft for the purposes of further study. The report of the Trade Law Sub-Committee was thereafter placed before another Ministerial Meeting on Regional Co-operation in Industries held in Istanbul in September 1981 at the invitation of the Government of Turkey in collaboration with the AALCC. The meeting generally discussed some of the more important issues indicated by the Trade Law Sub-Committee and expressed the view that the comments of the Governments should be invited in order to enable the Secretariat to study the matter further. The Ministerial Meeting was further of the view that there should be an understanding that special treatment and incentives should be offered for investments from developing countries and it would be a matter for each Government to decide as to the modalities through which this should be effected, namely, under their municipal legislations or under bilateral treaties or under joint venture agreements as might be appropriate.

Subsequent to the Istanbul Meeting, the Secretary General had carried out extensive consultations with a view to preparation of a revised study so that the recommendations of the Committee, which might ultimately emerge, could be of practical value to meet the desired objectives. These consultations revealed a good deal of divergence in State practice and the attitude of States towards bilateral umbrella investment protection agreements as also in the matter of treatment of foreign investments. As a result of the overall survey of the position held by various Governments within the Asian-African region, it became apparent that a uniform approach in the matter of promotion and protection of investments through the formulation of a single draft of a bilateral treaty, however desirable, might not result in an adequate response in practical terms. It was therefore felt that the AALCC's study on the subject could perhaps contemplate preparation of models for three different types of bilateral agreements.

This approach was considered to be particularly suited in the context that the main purpose of AALCC's study, pursuant to the mandate of the Kuala Lumpur Meeting, was to promote flow of investments between the countries of the region. It therefore seemed that the primary objective should

be aimed at creating a climate in which Governments would be prepared to accept the concept of promotion and protection of investments under bilateral arrangements. It was felt that through the preparation of various alternative drafts it might be possible to promote such agreements in the manner acceptable to the Governments concerned based on terms and conditions suited to their needs. Furthermore, having regard to the divergence of State practice as also the commitments already made by some of the Governments in their bilateral agreements with industrialized States it seemed difficult to come out with a single text which would meet the needs and interests of all Governments.

It may be observed that a single model text incorporating a set of provisions which may represent a common standard acceptable to a group of States and basically reflecting their negotiating position is extremely useful when the model agreement is intended for use by a small group of nations having identity of interest and approach on economic issues. It is also possible to work out a model for those countries who would be prepared to enter into bilateral agreements on the basis of certain norms and standards set out therein either generally or for a class of investments. Neither of these approaches appeared to be suitable to meet the present objectives of the study since a common position had yet to emerge in regard to investments which would make it possible for the Governments of the region to accept a uniform set of norms. Furthermore, if the AALCC were to recommend a text only for those countries which were prepared to accept it, that would derogate from the wider objectives of promoting investment protection agreements as between a substantially large number of countries of the region. One possible method in a single text might have been the inclusion of alternative formulations on the various issues and topics but the exercise would be extremely cumbersome and its utility minimal since such a draft could merely serve the purpose of placing at the disposal of Governments some material for their consideration which might be useful in negotiating bilateral agreements.

It was recognized that if three different models for bilateral agreements were to be formulated and recommended, complete uniformity of approach towards investments from developing countries could not be achieved, but at the same time it is to be appreciated that the formulation of a single text is not likely to produce any better result since that text might not be acceptable to a number of Governments in the practical realities of the situation with divergent views being held by different States or groups of States.

A revised study prepared by the Secretariat in November 1982 accordingly contained the suggestion that an endeavour be made to prepare the texts of three model agreements even though much of the material to be used in each of the texts would be common. The tentative formulations in regard to the three possible model agreements were included in the study, namely:

Model A: Draft of a bilateral agreement basically on similar pattern as the agreements entered into between some of the countries of the region with industrialized States with certain changes and improvements particularly in the matter of promotion of investments.

Model B: Draft of an agreement whose provisions are somewhat more restrictive in the matter of protection of investments and contemplate a degree of flexibility in regard to reception and protection of investments.

Model C: Draft of an agreement on the pattern of Model 'A' but applicable to specific classes of investments only as determined by the host State.

A meeting of an open-ended Expert Group was thereafter convened for examination of the study prepared by the Secretariat. The Expert Group met at the Committee's Headquarters in New Delhi from the 5th to the 7th January 1983. The Meeting was attended by representatives of twentyfour Governments and the Kuwait Fund for Arab Economic Development.

The Expert Group endorsed the Secretary-General's suggestion that the Committee's approach should be towards formulation of alternative models in the matter of promotion and protection of investments rather than pursue a single model approach which had been attempted earlier and found 'to be impracticable in the light of the difficulties pointed out by the Trade Law Sub-Committee during its meeting in Colombo in May 1981. The Expert Group examined the tentative drafts prepared by the Secretariat. The text of Models 'A' and 'C' was revised by the Expert Group with a view to its submission to the Twenty-third Session of the AALCC. The text of Model 'B' was also discussed in considerable detail and the Secretariat was requested to revise its draft in the light of the discussions and observations made at the Expert Group Meeting.

The matter was thereafter discussed at the AALCC's Twenty-third Session held in Tokyo in May 1983 and it was decided that the drafts should be further examined by another Expert Group in order to ensure their wider acceptability to the countries of the region. An Expert Group Meeting at official level was accordingly convened which met in New Delhi during January-February 1984. The meeting was attended by participants from twenty-three Governments as also by the representatives of the Inter-Arab Investment Guarantee Corporation, the World Bank and the European Communities. The Meeting examined the provisions of the drafts and finalised its recommendations in the form of the three models for submission to governments for observation and comments.

The Report of the Expert Group was placed before the Kathmandu Session for further consideration by the Committee. No comments of a substantive nature were made by any Member Government. However the delegation of Kuwait put forward certain suggestions for incorporation in an addendum to be annexed to Model 'A'.

The Committee, after taking note of various observations made in the course of its deliberations, decided to transmit to Member Governments the three Models of bilateral agreements for promotion and protection of investments, as finally adopted together with explanatory notes with the request that these model bilateral agreements be brought to the notice of the appropriate authorities and government departments.

## **REVIEW OF PROBLEMS AND ISSUES**

### **Some basic observations**

1. Foreign investments both in the form of capital and technology are needed by practically all developing countries in the Asian-African region for their developmental programmes. The needs of each country however varies depending upon its own resources, the development plans and the priorities attached to different sectors. Generally speaking, the sectors where foreign assistance is most needed are industry, infrastructure, including power generation and communication systems, mining, modernisation of agriculture and fishery development. With the exception of major oil producing countries, the capital investments needed by the developing countries are extensive which are obtained by way of assistance, lending programmes of international institutions or consortia of States, individual governments as also the private sector. Investment is made in the shape of loans (both tied and untied credits), acquisition of shares in companies, capital participation in projects or joint venture undertakings. Investments in technology take place through use of technical processes. In industrial plants provision of know-how and the services of technicians and experts. Investments both in capital and technology have hitherto been obtained largely from industrialized states even though assistance from socialist countries has not been insignificant.
2. Many of the developing countries in the Asian-African region have themselves become investors during the past decade. In addition, some of the more developed of the developing countries of the region have developed and perfected technology in less sophisticated fields which can be more easily absorbed by developing countries. These are being progressively invested within the region through joint venture projects or other types of arrangements. Investments are also being made by developing countries in the building of roads, cement or fertiliser factories, textiles and synthetics in other developing countries. This form of investment by one developing country into another is likely to assume a distinct pattern within the foreseeable future,
3. It would be in the interest of the countries of the region, particularly in the present context of world economic situation, to encourage greater flow of capital and technology among themselves and to create favourable conditions in which this could be achieved. Capital investment from within the region has one distinct advantage as there would be little possibility of their being tied to any particular or specific source for supply of technology. Furthermore, the technology to the extent they are obtainable from within the region is likely to be more suitable for adaptation and use in developing countries.
4. No investor, whether from a developed or developing country, would be likely to invest unless it is satisfied of certain basic conditions. It is therefore a matter of fundamental importance that a

degree of stability in the relations between the investor and the host government must be foreseen, particularly where long-term arrangements are concerned. The basic conditions which the investors do seem to expect relate generally to favourable conditions concerning repatriation of capital and income, adequate compensation in the event of nationalisation or expropriation as also the assurance that the terms and conditions on which it has agreed to invest should remain operative for the period of investment and that nothing should be done by the host government to the detriment of the investor. It is nevertheless conceived that a certain degree of flexibility should be retained since it may well happen over the life of an investment that what was fair and equitable at the beginning may no longer be so in the light of changed circumstances. In such a case, revision or re-negotiation could be justified. As a matter of fact many long term agreements have been revised in favour of host countries sometimes as the result of voluntary re-negotiation; in other cases by unilateral government action but ultimately accepted by the investor.

5. Promotion and protection of investments in the context of furtherance of regional co-operation would include a combination of four basic factors, namely, (i) an element of reciprocity; (ii) encouragement given by government to their nationals and companies to invest in the developing countries of the region; (iii) creation of favourable conditions by host governments for reception and treatment of such investments; and (iv) adequate and effective provision for settlement of disputes as an important element in creating stability and confidence for attracting investments. These basic conditions would naturally need to be reflected in the recommendations and the instruments that are prepared by the AALCC under the present programme.

It may be stated that a provision on reciprocity has invariably been included in almost all bilateral investment agreements concluded between the developing countries and industrialized nations but the practical impact of such a provision except in regard to agreements with the major oil producing countries is not substantial. This is in view of the fact that the investments made by other developing countries in the industrialised States are almost negligible. However, in investment protection agreements between the countries of the region, the element of reciprocity would be a major consideration since the concept of harnessing of their resources is an essential *sine qua non* in a programme of regional co-operation.

In regard to promotion of investments by nationals and companies of one developing country in another, it may be stated that whilst the attitude of the host governments would constitute an important element, efforts would equally be needed by the host governments to stimulate the flow and to create a climate in which such investments are encouraged. This would be particularly necessary in the initial stages to create a psychological orientation in the investor to diversify his investments and gradually channelize some of them to developing countries. It may be stated that most of the industrialized nations offer guarantee schemes to their nationals and companies against noncommercial risks to promote investments in developing countries. Similar guarantee schemes or insurance covers could possibly be contemplated by some of the countries of the region to promote investments by their nationals and companies in developing countries. Furthermore, concessionary rates of taxation or other forms of tax incentives as well as relief against double taxation might possibly be contemplated.

As regards the treatment to be accorded by host governments to investments emanating from developing countries, it has already been envisaged in the two Ministerial meetings that such investments should receive the most favourable treatment both in regard to incentives as also in the matter of protection of investments and repatriation of capital and profits.

In so far as the question of settlement of disputes is concerned, it may be stated that resolution of disputes and differences through fair and expeditious procedures constitute an integral part of any investment protection mechanism, since stability and confidence of the investor largely depend on the adequacy and effectiveness of the system. It has been pointed out in a recent study commissioned by the UNIDO that the arbitral institutions which had originated during the colonial period were inadequate and unsuitable for resolution of north-south industrial conflicts; it would seem to be equally so in promotion of south-south relations. A study of the existing bilateral investment protection agreements reveals that the most suitable manner in which conflicts can be resolved between the investor and the host governments is through recourse to the International Convention on Settlement of Investment Disputes or the Additional Facility Rules of ICSID wherever possible. In other cases and also by way of

an alternative, recourse to ad hoc arbitration under the UNCITRAL Rules could be contemplated since those Rules have been recommended by the General Assembly and have already received wide acceptance by the international community. The AALCC's scheme on settlement of disputes is primarily based on the acceptance of these two modalities. Through establishment of its Regional Centres for Arbitration at Kuala Lumpur and Cairo, the AALCC has already made provision for administration of the UNCITRAL Rules. Under two specific agreements between the ICSID and the AALCC arrangements have now been made for the proceedings under the ICSID Convention to be held in Kuala Lumpur or Cairo instead of Washington if the parties so desire. It is felt that the three possible modalities, namely, the procedures under the ICSID Convention, the Additional Facility Rules introduced by ICSID and conciliation or arbitration under the UNCITRAL Rules should be appropriate in settlement of disputes between the investor and the host government in a scheme for regional co-operation. It may be added that the success of the ICSID's scheme is demonstrated by the fact that a large number of agreements have incorporated a clause for arbitration under the ICSID Convention but only eighteen disputes have so far arisen thus demonstrating the effectiveness of the ICSID clause in creating stability and confidence in the investments.

#### Attitude of Asian-African States towards investment protection

The attitude of the States within the Asian-African region in regard to the mode and manner of investment protection and the extent to which promotional incentives are offered appear to vary to a considerable extent.

In the Charter of Economic Rights and Duties of States, it is provided that each State has the right to regulate and exercise authority over foreign investments within its national jurisdiction, in accordance with its laws and regulations and in conformity with its national objectives and priorities. The State has also the right to nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. \*

Several developing countries in the Asian-African region have, however, in the exercise of their sovereignty entered into bilateral investment protection agreements with industrialized States such as the United Kingdom, France, the Netherlands, Belgium, Federal Republic of Germany, Switzerland, Italy and Sweden, for promotion and protection of investments. The basic pattern followed in most of the agreements concluded with the countries in Western Europe by the

See Article 2.2 of the Charter of Economic Rights and Duties of States adopted by the General Assembly on 12 December 1974.

- The relevant provisions of paragraph 2 of Article 2 are in the following terms: "(a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investments;
- (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking in to account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, It shall be settled under the' domestic law of the nationalising State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means".

ASEAN countries, Sri Lanka, Egypt, Republic of Korea and a few others provide for most-favoured-nation treatment, full freedom in the matter of repatriation of capital and profits, adequate and effective compensation (full market value) in the event of expropriation or nationalisation and provisions for settlement of disputes. Some of the agreements such as an agreement between Japan and Egypt as also the agreements between the Netherlands with Malaysia and Singapore seem to further provide, that the investments of the contracting parties shall not only be provided most-favoured-nation treatment but also treatment no less favourable than accorded to their nationals. In the recent British draft of

investment protection agreement a similar pattern is contemplated, that is to say, a treatment which would be no less favourable than accorded to the nationals of the host State as also to the nationals of any third State. Some agreements also provide for treatment in accordance with international law such as in the most recent agreement between Egypt and the United States. In the course of Euro Arab dialogue for conclusion of a model multilateral convention, the Arab States have, however, been reluctant to concede the national standard of treatment although they have been willing to accept other terms such as most-favoured-nation treatment, full freedom in the matter of repatriation of capital and return, full market value as compensation and a provision for settlement of disputes.

It may be reasonable to presume that the States which have expressed their willingness to enter into bilateral investment protection agreements and accord most-favoured-nation treatment to western investments should have no difficulty in concluding similar agreements with the countries of the region. Four such agreements have so far been concluded namely, between Japan with Egypt and Sri Lanka, and the agreements of Sri Lanka with Singapore and the Republic of Korea.

On the other hand, there are some States which are reluctant to enter into investment protection agreements find prefer to rely upon the provisions of their Constitution and the laws for taking a position that those are sufficient for protection of the investments in their countries. Some of these countries have, by now become investors themselves in the developing countries of the region and it is therefore possible that they might be interested in concluding investment protection agreements with the countries of the region on a bilateral basis for the promotion and protection of their own investments.

There is yet another group of countries such as the States parties to the Lome' Convention who accept in principle the need for protection of investments and this is clearly recognized in the Lome' Convention itself as also in the Declarations adopted therewith. These countries are however reluctant to enter into bilateral investment protection umbrella agreements as such but favour investment protection agreements in regard to specific project on such sectors as mining, power generator etc.

In addition, there are also some states which without entering into bilateral government to government umbrella agreements have accepted the major elements relatable to investment protection in specific agreements concerning individual investments or classes of investments.

### **AALCC's Model Drafts**

As regards the contents of the models of three investment protection agreements the following elements are of importance: -

- (i) Desirability of entering into bilateral agreements;
- (ii) Principle of reciprocity and non-discrimination;
- (iii) Promotion of investments by contracting States in the territory of each other-financial guarantees and tax incentives;
- (iv) Reception and registration of investments including the provision that the terms and conditions on which investments were made shall remain unaltered;
- (v) Investments in national companies or corporations;
- (vi) Most-favoured-nation treatment;
- (vii) National standard of treatment;
- (viii) Repatriation of capital and return;
- (ix) Compensation for losses suffered;
- (x) Conditions on which expropriation and nationalisation can take place including principles for compensation;

- (xi) Value of investments-effect of inflation and variation in exchange rates;
- (xii) Training programmes and transfer of technology and marketing arrangements; 154
- (xiii) Past investments;
- (xiv) Settlement of disputes as between the investor and the host government; and
- (xv) Settlement of disputes between the two governments.

These points are briefly discussed below although some of the more important elements have already been referred to in the earlier part of the note.

### **(I) Desirability of entering into bilateral agreements**

Investments abroad are generally made by corporations and State entities and at times even by individuals. Direct investments by governments are not very common. Experience has shown that an investor is usually reluctant to invest unless he is guaranteed certain safeguards for his investment such as in regard to repatriation of capital and return as also full compensation in the event of nationalisation or expropriation. Even though several countries offer such safeguards under their constitution or laws, there is a better psychological impact when the investment is made under government to government umbrella agreements. This method has proved to be very effective in recent years and many developed countries accordingly consider such bilateral investment protection agreements to be of considerable importance. The Ministerial Meeting at Kuala Lumpur held under the auspices of the AALCC in December 1980 recognized the importance of such investment protection agreements in the context of co-operation between the countries of the Asian-African region.

### **(II) Principle of reciprocity and non-discrimination**

This is an element which is generally incorporated in bilateral investment protection agreements even through the reciprocity provision in agreements between developing and developed countries are not of much practical significance. However, this is an element which would be meaningful in agreements between the countries of the region.

### **(III) Promotion of investments by contracting States In the territory of each other-financial guarantees and tax Incentives**

Many developed countries provide investment guarantees or insurance schemes as incentives for their nationals and companies to invest abroad. Several countries also offer various kinds of reliefs in taxation to their nationals and companies in regard to their income, profit or gain derived from investments abroad. It is felt that if the countries of the region were to offer some attractive incentives in the form of tax concessions for investments in the-developing countries of the region, it would greatly help to promote flow of investments between developing countries *inter se*. It may however not be practicable for most of the countries of region as yet to initiate investment guarantee schemes. .

### **(iv) Reception and registration of investments including the terms and conditions thereof**

It is felt that foreign investments in certain categories of cases should be registered in the host country to facilitate their identification in relation to discharge of the host government's obligations especially in regard to repatriation of capital and return as also protection of the investment. Many States allow foreign investors various incentives including concessionary taxation. It is felt that such incentives should be offered to the maximum extent in regard to investments emanating from the countries of the region. It is also important that the terms and conditions on which the investment is received should remain unaltered for the period of the investment.

## **(V) Investment In national companies or corporations**

Capital participation or investment in national companies or corporations by foreign parties are regulated by local laws; several countries allow such participation to the extent of a specific percentage of share capital and subject also to various terms and conditions. It is considered that such matters should be liberalised to the extent possible in so far as the investment from the countries of the region are concerned.

### **(vi) Most-favoured-nation treatment**

Almost all bilateral agreements on promotion and protection of investments, which have been entered into by 'developing countries with industrialized nations contain provisions concerning most favoured-nation standard of treatment. This means that whatever treatment that State accords to a third State, the same treatment would have to be applied to the nationals, and companies of those industrialised States also. This necessarily creates some problems for those States who have already entered into such agreements in considering the standard of treatment for investments between developing countries *inter se*. Nevertheless, it is important that a most favoured-nation treatment clause should be incorporated in bilateral 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 favorable 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 or 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 I**

**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, know how, (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)'Notional'**

**(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 Rs 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 \_\_\_\_\_  
And \_\_\_\_\_ 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 I**

##### **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. If it 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.

- (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 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: -

- (1) in respect of investment in the territory of \_\_\_\_\_

(First Party).

(ii) in respect of investment in the territory of (second arty). \_\_\_\_\_

(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, interest, capital gains, dividends, royalties or fees.

(t) '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 for 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 o nationals, companies of State entities of the other Contracting Party.)

### **Article 3**

#### Reception of Investments

- (i) 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 his or its proposal to a designated authority of the Party 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 investment shall be registered where appropriate, with the designated authority of the host State.
- (ii) The investment shall be received subject to the terms and conditions specified in the letter of authorisation. Such terms and conditions may include the obligation or requirement concerning

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

employment of local personnel and labour in the investment projects, Organisation of training programmes, transfer of technology and marketing arrangements for the products.

- (iii) The host State shall facilitate the performance of the contracts relating to the investments through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.
- (iv) The Contracting Parties shall make every endeavour through appropriate means at their disposal to ensure that their nationals, companies or State entities comply with the laws and regulations of the host State and also carry out in good faith the obligations under taken in respect of the investments made in accordance with the terms and conditions specified by the host State.

#### 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 it accords to the investments or returns of nationals, companies or State entities of any third State.
- (iii) 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.

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

Employment of local personnel and labour in the investment projects, Organisation of training programmes, transfer of technology and marketing arrangements for the products.

- (iii) The host State shall facilitate the performance of the contracts relating to the investments through suitable administrative measures and in particular in the matter of expeditious clearance of authorisation or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.
- (iv) The Contracting Parties shall make every endeavour through appropriate means at their disposal to ensure that their nationals, companies or State entities comply with the laws and regulations of the host State and also carry out in good faith the obligations under taken in respect of the investments made in accordance with the terms and conditions specified by the host State.

#### 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 it accords to the investments or returns of nationals, companies or State entities of any third State.
- (iii) 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.

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

- (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 that 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 facilities in the matter of repatriation of capital and returns on his or its investments in accordance with the terms and conditions stipulated by the host State at the time of the reception of the investment.
- (ii) Such terms and conditions may specify: -
  - (a) the mode and manner of repatriation of profits and returns as also the requirement, if any, concerning re-investment;
  - (b) the extent to which the capital invested may be allowed to be repatriated in each particular year;

- (c) any requirement concerning the currency in which repatriation is to be made and the place or places of such repatriation;
- (d) the nature of restrictions that may be imposed by the host State on repatriation of capital and returns in its national interest during any period of exceptional financial or economic situations.
- (iii) The stipulations concerning repatriation of capital and returns shall be set out in the letter of authorisation referred to in Article 3. The terms and conditions so specified shall remain operative throughout the period of the investment and shall not be altered without the agreement of the parties.

#### *Article 7*

##### Nationalisation, expropriation and payment of compensation in respect thereof

###### **(i) (Alternative 1)**

A Contracting Party may exercise its sovereign rights in the matter of nationalisation or expropriation in respect of investments made in its territory by nationals, companies or State entities of the other Contracting Party upon payment of appropriate compensation, subject however, to the provisions of its laws. The host State shall abide by and honour any commitments made or assurances given both in regard to nationalisation or expropriation and the principles for determination of appropriate compensation including the mode and manner of payment thereof

###### **(Alternative 2)**

Investments of nations, 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 payment of appropriate compensation.

###### **(ii) (Alternative 1)**

\*(Unless stipulations are made to the contrary at the time of the reception of the investment, the expression 'appropriate compensation' shall mean compensation calculated on the basis of recognised principles of valuation).

###### **(Alternative 2)**

Unless stipulations are made to the contrary at the time of the reception of the investment, the expression 'appropriate compensation' shall mean compensation determined in accordance with equitable principles taking into account the capital invested, depreciation, capital already repatriated and other relevant factors.

#### *Article 8*

##### Compensation for Losses

The 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

\* Some delegation had reservations on this provision.

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

#### **(Alternative 1)**

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 an investment including judicial review of measures relating to nationalisation or expropriation, determination of compensation in the event of nationalisation or expropriation or losses suffered and any restrictions imposed on repatriation of capital or returns. The local remedies shall be exhausted before any other step or proceeding is contemplated.

#### **\*(Alternative 2)**

Any difference or dispute between the investor and the host State in relation to any matter concerning an investment including those relating to nationalisation or expropriation, determination of compensation in the event of nationalisation or expropriation or losses suffered and any restrictions imposed on repatriation of capital and returns shall be settled through recourse to appropriate courts and tribunals, judicial or administrative and other authorities competent under the local laws of the host State. Neither Contracting Party shall pursue through diplomatic channel any such matter until the local remedies have been exhausted.)

## 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

\* Several participants considered this provision to be Inappropriate.

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 national, company or State entity of the other Contracting Party, which cannot be resolved within a period of \_\_\_\_\_ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration after the local remedies have been exhausted.
- (iii) Conciliation shall take under the UNCITRAL Conciliation Rules 1980 unless the parties have reached agreement to refer the dispute to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965.
- (iv) Where the conciliation proceedings have failed to resolve the dispute, it 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 for 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 of 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.
- (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.

#### **Article 15**

##### **Entry into force**

\*(This Agreement shall 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 \_\_\_\_\_ 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 \_\_\_\_\_ 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 ..... and  
..... languages, both texts being equally authoritative.)

For the Government of  
the \_\_\_\_\_

For the Government of  
the \_\_\_\_\_

\*Alternative provisions.

## **MODEL AGREEMENT FOR PROMOTION AND PROTECTION OF INVESTMENTS**

### **MODEL C**

#### **Note**

The provisions for incorporation in the text of this model draft -would. be identical with the provisions set out in Model 'A' with the exception of the definition of 'Investment' in Article 1 (a) and the text of Article 14. The suggested texts for these provisions are as follows: -

#### **Article I**

##### Definitions

(a) *'Investment' means:*

Capital and technology employed in projects or industries -in specified sectors of national importance- as set out in the schedule to this Agreement and includes the following in relation there to

- (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 regard to patents, trade marks and any other industrial property; and
- (iv) contractual rights relating to exploration and exploitation of natural resources.

#### **Article 14**

##### Application of the Agreement



The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement where the investments has been made in specified sectors set out in the schedule to this agreement.