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**COMMITTEE ON ARRANGEMENTS FOR CONSULTATION WITH
NON-GOVERNMENTAL ORGANIZATIONS**

**SECOND DRAFT OF THE REPORT OF THE
COMMITTEE ON FOREIGN INVESTMENTS OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

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INTERNATIONAL CHAMBER OF COMMERCE

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COMMITTEE ON FOREIGN INVESTMENTS

SECOND DRAFT OF REPORT*

Prepared for the Consideration of the Committee

by

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The Need for a Code of Fair Treatment in International Capital Movements

26. In view of the various obstacles mentioned in a previous section of this Report to the revival of private capital movements, it is absolutely necessary that the principles of fair play in the field of foreign investments should be codified, as far as possible, in a way that would render disputes susceptible of being settled by arbitration. The Report, prepared in 1945 for the Council of the International Chamber of Commerce by a small

* It is to be noted that this document is confined to paragraph 26 to 35 inclusive, of this Draft Report. Furthermore, this Draft Report itself is subject to approval by the Committee on Foreign Investments of the ICC at its meeting on 26 March and is also subject to the approval of the Executive Committee of the ICC at its meeting on 2 April.

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international group and presented by the British National Committee of the International Chamber of Commerce, entitled "Encouragement and Protection of International Investment", makes a very strong recommendation that a Code subject to arbitration should be set up, along with an International Tribunal which would settle disputes arising under that Code. The most recent and comprehensive report on the question of private foreign investments prepared by a Special Joint Committee of the League of Nations and published in 1946 under the title of "Conditions of Private Foreign Investment", makes no specific recommendation for either a Code or a Tribunal, but contains many helpful suggestions for the drawing up of a Code. Some of these are incorporated in the next Chapter of the present Report.

27. Before we proceed to formulating the basic principles which should be elaborated in the proposed Code, certain preliminary comments seem to be indicated. It is very likely that a large part of private investments of the future will take the form of direct business investments. This prompts the Committee to make the following comments. In order to conduct business in foreign countries, it is necessary for the investor to enjoy a substantial freedom of enterprise in the country to which he moves. This, as has been recognized in the above-mentioned League of Nations Report and in other documents, is linked with the questions of control and of the employment of foreign specialists and managers. The many delicate problems created by the conflict of interests and ideas growing out of these questions must be frankly faced. On the one hand, as has been indicated before, there is a growing feeling of economic nationalism in many countries which resents the control of enterprises by owners resident abroad. On the other hand, a foreign concern will naturally be reluctant to establish a new enterprise without some assurance that it will not be deprived of its administrative control. It is to be deplored that governments should attempt to put impediments in the way of this vitalizing flow of international capital and /"know-how".

"know-how". A satisfactory solution, reconciling the real and imaginary interests of all parties, can be possible only after a good deal of compromise and give-and-take. The investor's contribution in some cases might be the acceptance of the principle of joint enterprise in which is achieved the maximum of local control without prejudicing reasonably efficient management. Each enterprise will have to solve this problem in its own way. It is strongly recommended that consideration should be given to association and co-partnership of local capital, including whenever possible the establishment of local boards. Arrangements of this nature should be purely a matter of negotiation between the local and foreign financial interests and should not be the subject matter for rigid laws or governmental decrees or regulations. To this compromise the local participants can contribute a willingness to refrain from swamping the enterprise with inadequately qualified personnel, and from insistence on a majority of the capital stock being locally held, a proviso which invites attempts at evasion. The underlying need is mutual confidence that agreements will be honoured and that there will be no unfair treatment on the part of the borrower or selfish exploitation on the part of the investor.

28. The Code of Fair Treatment, the basic contents of which will be suggested in the next chapter of this Report, must of necessity be limited to provisions which can be the object of international arbitration. In order to be binding, the Code must be the object of an international convention which would at the same time specify the contents of the Code and establish a machinery of arbitration. It is particularly desirable that the Code should become a part of the Charter of the proposed International Trade Organization. Because the scope of the Code must be limited to arbitrable provisions, there are a number of conclusions which follow from the preceding paragraphs of this Report but cannot be incorporated into the Code. These can briefly be summarized as follows:

/(a) Foreign

(a) Foreign investments should be undertaken with an eye to their effects upon the capacity of the capital-importing country to develop the productivity of its economy and, in particular, to expand its export trade in goods and services (including its ability, whenever circumstances allow, to cater to foreign tourists).

(b) Because non-discriminatory, multilateral foreign trade allows the international division of labour to operate most effectively, and greatly facilitates the process of international payments, foreign investments should encourage the growth of that kind of trade rather than interfere with it; in this connection, the practice of tying foreign investments to specific exports of goods or services by the creditor country (so-called "tied" loans) should be discouraged.

(c) Since economic depressions result (or may result) in the contraction of foreign trade, in drastic price declines, and, therefore, in considerable difficulties for the process of international payments, it is important that the various countries should pursue policies aimed at the mitigating of the fluctuations in business activity; these policies should, to the largest possible extent, be internationally co-ordinated.

(d) Because the scope of the transfer problem is lesser in the case of ownership investments (equity and "direct" investments) than in the case of loans, the former ought to be encouraged in preference to the latter. This means that investments should be made whenever possible by private individuals and corporations rather than by governments and other public bodies. In this connection mention should be made of capital movements between free-enterprise countries and state socialistic countries; such movements present special problems of economic and political nature. A special Committee of the ICC is concerned with these important problems.

(e) The principle of non-discrimination in commercial as well as in financial relations between nations, should receive a strong endorsement

/from international

from international conferences. It is the cornerstone of international goodwill and an indispensable condition of the revival of foreign investments.

(f) It is necessary to revive public confidence in international economic relations in order to create an environment favourable to the activity of the private investor; the Code of Fair Treatment, embodied in an International Convention will be very helpful to the restoration of confidence - conversely, a strong public opinion will be necessary in order to render effective the practical application of the Code and the execution of any judgments that might be issued by the Arbitration Court entrusted with the settlement of conflicts arising out of violations of the Code.

(g) Inter-governmental loans, an important feature of current international economic relations, should be used to promote the growth of productive efficiency throughout the world, speeding up reconstruction and economic growth. They should aim at the creation of an environment favourable to the resumption of private investments. Inter-governmental loans should never be regarded as a permanent substitute for private capital. They should always be given for constructive purposes, as recommended by the Monetary Committee of the ICC.

(h) In a world of many currencies, the steadiness of international capital movements requires that economically tenable rates of exchange should be arrived at and thereafter kept stable; such adjustments as may be necessary at one time or another, should be carried out in an orderly fashion and in a spirit of international co-operation. The International Monetary Fund provides a suitable machinery for the making of such adjustments. Attention should be directed here to the Report of the Monetary Committee of the ICC and to the Resolution adopted by the Council of the ICC in December 1946.

/(i) The ultimate

(1) The ultimate fate of the international flow of capital depends, of course, upon the fate of international collaboration in the realm of political organization as well as of commercial relations between nations.

29. Many of the points indicated in the preceding paragraph have been dealt with, or are being considered by other Committees of the International Chamber of Commerce. Here it is sufficient to indicate this Committee's opinion that, unless the above-listed requirements are fulfilled, the revival of private foreign investments will be either entirely impossible, or, at best, very precarious.

IV. A CODE OF FAIR TREATMENT FOR INTERNATIONAL INVESTMENTS

Provisions Concerning All Foreign Investments

30. (a) Taking note of the obligations of governments under the Bretton Woods Agreements freely to transfer current income, the governments of countries in which foreign capital is invested should guarantee the transfer of the current income deriving from the investment (interest, dividends, business profits in the case of direct investments) and of such repayments of the principal as are currently falling due in accordance with the loan contract, into the currency in which the loan is expressed or to the creditor's currency. Such payments are included in the concept of "current transactions", as used in the Bretton Woods Agreements. (In Article XIX (1) of the Agreement on the International Monetary Fund, "Payments due as interest on loans and as net income from other investments", as well as "Payments of moderate amount for amortization of loans or for depreciation of direct investments" are considered to be payments for current transactions). Transfer guarantees need not be associated with the guarantee of a specific rate of exchange, unless this is provided for especially in the loan contract. In the case of sales by the foreign investor of his equity holdings or his property share (in the case of a "direct" business investment), the transfer should
/be guaranteed

be guaranteed to be carried out over a period not exceeding five years (or such other number of years as may be decided upon at the time of drawing up the Code).

(b) In case of transfer emergencies arising in respect to the debtor country's economic situation, the debtor's current obligations should be dealt with in accordance with the stipulations of the Bretton Woods Agreements (Agreement on the International Bank for Reconstruction and Development, Article IV, Section 4 (c)). As a last resort, the debtor's obligations should be subject to review and adjustment by the interested parties, with the assistance of an International Court of Arbitration or another body of mediation.

(c) International loan contracts should be drawn up with the greatest care and in a style free from all ambiguity. On this important technical question, the Committee draws attention to the Report of the Committee for the Study of International Loan Contracts, published by the League of Nations in May 1939, and to the study of Uniform Rules applicable to International Loans, which is being carried out under the auspices of the International Institute for the Unification of Private Law, in Rome.

(d) The liability of income of foreign investments to be taxed by the government, both of the territory where its operations are carried on and of the territory where that income is remitted, or where the beneficiary of that income resides, constitutes a serious obstacle to the development of foreign investment. Whereas another Committee of the International Chamber of Commerce is dealing with the problem of suppressing international double taxation, this Committee wishes to draw attention to the important Report of the Fiscal Committee of the League of Nations, entitled "Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion", published in 1945.

/Provisions

Provisions Concerning Equity and Direct Investment*

31. The provisions that follow are in the nature of broad suggestions for a future legal document to be drawn up by an appropriate body of lawyers. The suggestions made below do not aspire in any way to become the actual wording of the future clauses of an international Code.

(a) Persons (physical and legal) engaging in enterprise in a foreign country (hereafter referred to as "foreigners") should be entitled to carry on trade and business on the same basis as nationals, whether they engage in commercial, financial, industrial or agricultural activities. Foreign firms should be allowed to establish branches in a country provided that they submit to the same formalities as nationals with regard to registration, publicity, bookkeeping and other provisions of the laws and codes of the country.

(b) Foreigners should not be the object of arbitrary treatment in respect to their person and property.

(c) The principle of equality of treatment should be applied fully to foreigners provided that the civic and property rights of the nationals are fully protected by the government of the capital importing country. In cases in which such rights of nationals are restricted, special protection should be granted to foreign investors and to the foreign personnel employed in their businesses, even if this should result in a treatment more favourable than that granted to nationals.

(d) No tax discriminations should be adopted against foreign investors.

(e) Foreigners should have access to domestic courts as plaintiff or defendant under the same conditions as nationals.

(f) Foreigners should be recognized as having the same right and capacity as nationals to enter into contracts on their own behalf or

* The Committee is indebted to the League of Nations Report "Conditions of Private Foreign Investment" (1946) for several of the points included in this section of its statement.

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(g) The countries importing foreign capital should allow full and adequate information to be provided concerning their economic conditions and their political, legal and administrative organization, to the prospective foreign investors.

(h) Where policies of nationalization are adopted by the capital importing country, the properties of foreign investors should not be nationalized without the due process of law and they should be guaranteed a fair compensation for their nationalized properties. This compensation should be paid in cash and freely transferable within a reasonable time. In case of conflict, the ultimate decision concerning the size of the compensation and the length of time over which its transfer into foreign currencies is to be spread should be referred to an International Court of Arbitration.

Representative of Bondholders

32. The investor in foreign loans has been prejudiced in the past by the lack of any agent to represent his interests effectively before the courts or government of the capital receiving country or in any international forum. Such agencies as have occasionally been established have been always limited in scope by lack of status. Every international capital flotation should include, therefore, a stipulation appointing some agency as a Representative of the bondholders, and giving it the right to sue in a representative capacity on their behalf in appropriate courts and on their behalf to proffer complaints of inequitable treatment of a non-justiciable character to the International Arbitration Court proposed below. The Representative Agency need not be the same agency for every transaction. Possibly its most useful function would be that when difficulties arose which seemed likely to entail default or discriminatory action by a "debtor" public authority, the Representative could act as a negotiator to secure an agreed solution before the matter came to open conflict.

/International Court

International Court of Arbitration

33. In order to obtain impartial decisions on disputes arising out of international investment contracts, an International Court of Arbitration should be established to decide between the parties on the basis of the contract concluded and of the law applicable. Agreement to accept the Code of Fair Treatment as the basis of the contract and to abide by the decisions of the Court should be written into all transactions of international investment affecting government authorities.

34. The effectiveness of the judgments rendered by the Court of Arbitration would depend upon the three following factors:

1. An International Convention (preferably a section of the Charter of the International Trade Organization) establishing the Code and the Court, the signatories of which would undertake to enforce by domestic policy the verdicts of the Court;
2. By potential investors who can make the authority of the Court very real through withholding their funds in case verdicts of the Court are not implemented and provisions of the Court continue to be violated. Such sanctions on the part of potential investors are, of course, a very important instrument of informal but effective pressure;
3. The development of an active and informed public opinion both in the capital receiving and capital exporting countries which would insist upon the acceptance and the carrying out in practice of the provisions of the Code of Fair Treatment and of the verdicts of the Court of Arbitration.

35. The precise form which the International Court of Arbitration will take is a matter which only a future international conference of experts can settle. The Committee feels, however, that important headway has been made by the League of Nations Committee for the Study of International Loan Contracts.