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INTERNATIONAL CHAMBER OF COMMERCE

MODEL BILATERAL AGREEMENT ON THE STATUS OF FOREIGN ESTABLISHMENTS

BROCHURE NO. 109

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THE STATUS OF FOREIGN ESTABLISHMENTS

In its constant endeavour to eliminate barriers to the free flow of capital and trade, the International Chamber of Commerce has frequently drawn attention to the discriminatory and restrictive treatment to which commercial and industrial enterprises operating in foreign countries are subject on account of their nationality. Its conviction has always been that one of the best means of bringing such restrictive practices to an end lies in the conclusion of bilateral inter-governmental agreements. At its Copenhagen Congress in 1939 the I.C.C. therefore drew up a Model Bilateral Agreement on the status and treatment of foreign establishments. The I.C.C. has now brought this Model Agreement into line with present-day requirements. The revised text is given below, and where necessary the articles are accompanied by a commentary. The revised Model Agreement is offered to governments either as a basis for the conclusion of special bilateral agreements on this subject or for insertion in commercial treaties.

/MODEL BILATERAL AGREEMENT

MODEL BILATERAL AGREEMENT FOR THE PURPOSE OF DETERMINING THE STATUS AND REGULATING THE ACTIVITY OF THE COMPANIES OF EACH CONTRACTING PARTY ON THE TERRITORY OF THE OTHER CONTRACTING PARTY

PREAMBLE

With a view to facilitating the economic relations between the two High Contracting Parties and, in particular, in order to enable the Companies of each Party freely to carry on their business in the territory of the other Party, the High Contracting Parties agree as follows:

COMMENTARY

It should be understood that the Contracting States may put their own interpretation on the expression "companies" so as to include if necessary partnerships and one-man businesses. In this connection the main types of association are those listed in the following extract from the League of Nations Report (1946) "Conditions of Private Foreign Investment", page 30:

(a) "Ordinary or general partnerships administered jointly by all the partners, in which each member is personally liable as partner to the full extent of his property for the obligations of the partnership."

(b) "Limited partnerships in which the liability of general or managing partners is unlimited while that of the silent partners is limited to their agreed share."

(c) "Private companies administered by a board of directors, in which the liability of each member is limited to his agreed share, which he cannot transfer without the consent of the other members or the company."

(d) "Corporations or joint stock companies administered by a board of directors who are elected by, and report to, the general meeting of shareholders and so constituted as to allow the free transfer of shares by the shareholders."

/ARTICLE 1

ARTICLE 1

For the purposes of the present Agreement, all associations of persons and/or of capital having their seat in the territory of one of the High Contracting Parties and doing business legitimately for profit as ordinary business undertakings shall be deemed to be Companies of that Party by the other High Contracting Party.

COMMENTARY

The expression "ordinary business undertakings" is used to refer to all undertakings for which no State immunity or other special privilege is claimed.

ARTICLE 2

The seat referred to in the previous Article shall in any case be in the place where the real centre of management is situated.

COMMENTARY

There are two possible methods of determining the country to which the Companies covered by the present Agreement belong: either the country where the legal seat of the Company is situated (place where it is registered or where its bye-laws declare it to be constituted, etc.) can be chosen, or the country in which it has its principal establishment. The drawback of the first method is that it is not always easy to exclude the possibility of the Company's setting up a fictitious seat merely in order to benefit by more favourable treatment. On the other hand, with the second method, difficulties may arise if the term "principal establishment" is interpreted as meaning the principal centre of operation, since a Company with many international ramifications may have several very important centres of operation, none of which is its legal seat.

By a majority vote, the Committee decided in favour of the second method. But in order to avoid any possibility of misunderstanding, it adopted, instead of "principal establishment",

/the more

the more precise expression "real centre of management".

However, owing to the complex nature of the problem, and the fact that different criteria have already been adopted in the various countries, the Contracting Parties are free to choose a definition other than that given in Article 2, if more in conformity with their own systems of legislation.

ARTICLE 3

The Companies of each of the High Contracting Parties shall have the right to do business in the territory of the other High Contracting Party by setting up branches and/or by creating subsidiaries, subject for these to the same conditions and authorizations as shall be required for the Companies of the other Party, it being understood that in no case shall the nationality of the Company affect the granting of the authorizations demanded.

Such companies may also enter into combination with local businesses under the afore-mentioned conditions.

ARTICLE 4

The branches and subsidiaries referred to in Article 3 above shall have, in the State on whose territory they are established, the same rights and powers as similar national undertakings of that State, provided always that they shall comply with the laws in force in the said State.

In particular they may appear in court as plaintiffs or defendants, acquire land and buildings, participate in public tenders and be concessionaries of public services.

However, each of the High Contracting Parties shall retain the right to reserve as it sees fit tenders for supplies or concessions of public services of importance to national defence properly so called.

COMMENTARY

In interpreting this article special regard should be paid to the general statements of policy contained in Chapter V of the before

/mentioned

mentioned League of Nations Report "Conditions of Private Foreign Investment".

ARTICLE 5

The provisions of Articles 3 and 4 above shall be understood without prejudice to the provisions of Articles 8, 9 and 10 below.

ARTICLE 6

All permanent establishments not having a separate legal personality of their own, situated on the territory of one of the High Contracting Parties, which are directly dependent financially and/or administratively on a Company of the other High Contracting Party, have the same description as, and an activity exercised within the limits of the object of that Company, and are under the direction of a person appointed by that Company with the necessary powers to represent it and to contract obligations on its behalf towards third parties, shall be deemed to be branches of that Company.

COMMENTARY

The term "permanent establishment" should be understood as follows:

The term "permanent establishment" includes the installations and fixed places of business of an enterprise, such as mines and oil-wells, plantations, factories, workshops, warehouses, offices and agencies.

When the term "permanent establishment" is used with reference to a particular State, it includes all the permanent establishments, whatever their form, which are situated within such State.

The fact that an enterprise with its seat (i.e., real centre of management) in one of the Contracting States has business dealings in another Contracting State through an agent of genuinely independent status (broker, commission agent, etc.) shall not be held to mean that it has a permanent establishment in the latter State.

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When a foreign enterprise regularly has business relations in a State through an agent established there who is authorized to act on its behalf, it shall be deemed to have a permanent establishment in that State.

A permanent establishment shall be deemed to exist when the agent established in the State:

1. is a duly accredited agent (fondé de pouvoirs) who habitually enters into contracts for the enterprise for which he works, and
2. is bound by an employment contract and habitually transacts commercial business on behalf of the enterprise in return for remuneration from the enterprise, and
3. is habitually in possession, for the purpose of sale of a depot or stock of goods belonging to the enterprise, if this is implied by the nature of the trade or industry in question.

This definition is based upon that given in the Protocol of the revised text of the League of Nations Draft Convention for the Allocation of Business Income between States, for the purposes of Taxation (C.252. M.124. 1933 II. A.). A few alterations have been made to bring the definition into line with the subject-matter of the present Agreement.

Further, in accordance with the point of view adopted by the I.C.C. in its work on double taxation, the three conditions required for the existence of a permanent establishment have been made cumulative; in the League's definition, they are alternative.

The term "same description" should not be taken in the strict sense of the word. It is clear that a permanent establishment, the description of which might vary, in particular on account of translation into another language, would none the less be considered as having "the same description". This would be the case for instance

/as regards

as regards the French term "Société Anonyme" which, translated into German, becomes A.G.

ARTICLE 7

Companies situated on the territory of one of the High Contracting Parties which, although having a legal existence and property of their own with independent management and direction, are nevertheless subordinate, whether financially and/or administratively, and/or technically to one or several Companies situated on the territory of the other High Contracting Party shall have the rights of subsidiaries of such other Company or Companies.

ARTICLE 8

No restriction shall exist between the High Contracting Parties as to the nationality of founders, directors, shareholders, or partners, of Companies or of their subsidiaries.

Furthermore, no restriction shall be imposed on the owner of capital combining with local businesses.

There shall be no exception to the provision of this Article, other than for reasons affecting the security of the State.

ARTICLE 9

In the branches or subsidiaries created by the Companies of each of the High Contracting Parties on the territory of the other High Contracting Party, executive staff and technical specialists of the nationality of the parent Company may be employed without any restriction whatever. Executive staff and technical specialists of any third nationality may also be employed without any restrictions other than those in force for national establishments.

There shall be no exception to the above provision other than for reasons affecting the security of the State.

COMMENTARY ON ARTICLES 8 AND 9

Legislation requiring a rigid proportion of the capital to be

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owned by, or staff to consist of nationals of a particular country would not be in accordance with the spirit of these articles.

ARTICLE 10

No restriction shall be placed on the transfer, from one of the High Contracting Parties to the other, of monies resulting from profits made or capital invested in their subsidiaries and branches by the Companies of each of the High Contracting Parties in the course of business done on the territory of the other High Contracting Party.

COMMENTARY

The present draft being that of a model agreement, no account could be taken of the restrictions at present placed by certain countries on exchange transactions. However, should the agreement be concluded between two countries where such restrictions are in force, they are of course free to adopt Article 10, as a provision applying to the future, and leaving the past and present unaffected. The countries in question could fix a time-limit beyond which the agreement would cease to have retrospective effect as regards the transfer of capital invested and profits made before the agreement was concluded.

Pending the establishment of effective international agencies (e.g. those envisaged at Bretton Woods) circumstances may for the time being prevent certain countries from including this provision at all in a bilateral agreement.

ARTICLE 11

The branches and subsidiaries of a Company of one of the High Contracting Parties shall not be subject, on the territory of the other High Contracting Party, in respect of dues, rates and taxes, to higher fiscal charges than those imposed on national establishments.

Questions of double taxation shall be settled between the High Contracting Parties by a separate agreement.

/COMMENTARY

COMMENTARY

The Committee is unanimously of the opinion that it would be desirable for an agreement on double taxation to be concluded at the same time as the agreement on the status of foreign companies. In that case, the same wording should as far as possible be used in both agreements, so as to avoid any conflict between the definitions adopted.

ARTICLE 12

Should difficulties arise in respect of the application or interpretation of the present agreement and affecting one of the Companies covered by its provisions, that Company shall appeal to the Government of the country to which it belongs and the High Contracting Parties must come to an agreement for the solution of the difficulty in question in the spirit of the present Agreement.

COMMENTARY

This Article leaves the Contracting States entirely free to choose whatever procedure they find to be most suitable for settling differences arising between themselves. It is most important, however, that such procedure should be laid down in advance in the agreement itself, e.g. reference might be made to the International Court of Justice or to arbitral institutions or any other body appointed ad hoc.

ARTICLE 13

The present Agreement is made for a period of five years and shall be renewable by tacit consent. Should either party desire to bring the agreement to an end at the expiration of a period of five years, it shall give notice of its intention to the other party one year before the expiration of the period in question.

COMMENTARY

The Committee is unanimous in considering the period of five years as the strict minimum. States are accordingly recommended to envisage a longer period for such agreements as they may conclude.