

SECOND COMMITTEE: ECONOMIC DEVELOPMENT

SUB-COMMITTEE B ON ARTICLE 12

DRAFT REPORT TO COMMITTEE II ON ARTICLE 12

1. At its Thirteenth Meeting Committee II appointed a Sub-Committee to consider Article 12 and the amendments submitted thereto. The Sub-Committee consisted of the delegates of Australia, Brazil, Canada, Ceylon, Czechoslovakia, Egypt, India, Mexico, Netherlands, New Zealand, Sweden, United Kingdom, United States of America and Venezuela. Mr. Jose TORRES (Brazil) was elected Chairman of the Sub-Committee.

2. The Sub-Committee held seven meetings and has agreed on the text of Article 12 which appears at the end of this report. In the course of the discussion of Article 12 certain Members of the Sub-Committee withdrew their proposed amendments. The Sub-Committee considers that the amendments not so disposed of are either taken into account or disposed of by the text of Article 12 which appears below. In view of the extensive revision of Article 12 which has been agreed by the Sub-Committee, it is not practicable to show in detail the changes made in the Geneva text.

3. In the course of considering Article 12 the Sub-Committee agreed on several interpretations of the Article as follows:

(a) The requirements referred to in paragraph 1 sub-paragraph (c) (iv) may, provided they are reasonable, relate either to foreign investments only or to investments generally.

(c) Legislative or constitutional requirements, existing at the time that an investment is made and providing for recourse only to national courts, would not in themselves be reviewable pursuant to Chapter VIII. Chapter VIII provides for review by the Organization of whether nullification or impairment of a benefit accruing to a Member under the Charter has taken place, even if the nullification or impairment arises out of a measure completely consistent with the Charter, or "any other situation", even if there is no violation of the Charter, and without involving the power of the Organization to pass or judge upon the validity of the measure itself taken by a Member, or of a decision taken by a Member's national courts.

//(c) The Articles

(c) The Articles of Agreement of the International Monetary Fund are included among the international agreements referred to in paragraph 2 sub-paragraph (b).

4. The text of Article 12 as agreed by the Sub-Committee is as follows:

"ARTICLE 12

INTERNATIONAL INVESTMENT FOR ECONOMIC DEVELOPMENT

1. The Members recognize:

- (a) that international investment, both public and private, can be of great value in promoting economic development and consequent social progress;
- (b) that the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments;
- (c) that, without prejudice to existing international agreements to which Members are parties, a Member has the right
 - (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
 - (ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;
 - (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;
 - (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;
- (d) that the interests of Members whose nationals are in a position to provide capital for international investment and of Members who desire to obtain the use of such capital to promote their economic development may be promoted if such Members enter into bilateral or multilateral agreements relating to the opportunities and security for investment which the Members are prepared to offer and any limitations which they are prepared to accept of the rights referred to in sub-paragraph (c) of this paragraph.

2. Members therefore undertake:

- (a) Subject to paragraph 1 sub-paragraph (c) of this Article and any agreements entered into under paragraph 1 sub-paragraph (d) to provide reasonable opportunities for investments acceptable to
/them

them and adequate security for existing and future investments and, as far as possible, to avoid discrimination as between foreign investments;⁽¹⁾

(b) Without prejudice to existing international agreements to which Members are parties upon the request of any Member to enter into consultation or to participate in negotiations directed toward the conclusion, if mutually acceptable, of an agreement of the kind referred to in paragraph 1 sub-paragraph (d) of this Article.

3. Members shall promote co-operation between national and foreign enterprises or investors for the purpose of fostering economic development in cases where such co-operation appears to the Members concerned to be appropriate."

(1) Note by the Secretariat: As agreed at the Sixth Meeting, the delegates of Australia, New Zealand and Sweden met to consider a revision of this sub-paragraph for the purpose of clarifying the meaning of the provision on discrimination. These delegates recommend that sub-paragraph (a) read as follows:

(a) Subject to paragraph 1, sub-paragraph (c) of this Article and any agreements entered into under paragraph 1, sub-paragraph (d)

(i) to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments and,

(ii) to give due regard to the desirability of avoiding discrimination as between foreign investments.
