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INTERGOVERNMENTAL FRAMEWORK AGREEMENTS AND PROCEDURES FOR SOLVING DIFFERENCES*

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BACKGROUND PAPER 4(e)

Introductory Note

1. The purpose of this paper is to discuss the adequacy of the current framework for industrial co-operation at the enterprise level, given that the scope of these relations is often the subject also of Governments' concern and intervention and to suggest areas in which further research work is required. The paper is largely based on a meeting which was held at UNIDO on Industrial Co-operation Contracts and Procedures for Solving Differences, where a group of eminent lawyers discussed the need to improve this legal framework in order to cover the special and changing requirements of developing countries in terms of finance, technology, training, information and the settlement of disputes.[1/] The discussions at the meeting were in turn based on preliminary research work undertaken by UNIDO during 1976/1977. Similar problems have also been debated in several international fora as reflected inter alia in the deliberations of the sixth and seventh special sessions of the United Nations General Assembly, the Second Ministerial Conference of the Group of 77, the Conference of Sovereigns and Heads of State of OPEC member countries, the Second General Conference of UNIDO, the Conference on International Economic Co-operation, and the UNIDO system of consultations.

2. Within the broad area of industrial co-operation based on interfirm relations, it would seem that two interconnected issues constitute one of the bones of contention between the industrialized and the developing nations of the world: one relates to the question of the degree of government involvement in interfirm industrial co-operation and of

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1/ The meeting was organized by UNIDO in Vienna from 14 to 16 November 1977.

appropriate performance guarantees and the other to the question of national or international procedures for settling differences. Judging from the present situation, it would appear that some preliminary steps might be taken towards continuing the dialogue left off in Paris[1] and later towards reaching a package arrangement between developed and developing countries in the form of a set of general principles or guidelines for international industrial co-operation which could perhaps be included in an intergovernmental framework agreement.[2]

3. In international industrial co-operation, one of the fundamental concepts which should be re-examined is that of investment, i.e. in a narrow traditional sense and in a wider meaning within the context of its over-all contribution to the industrialization effort of a developing country. Indeed, from the point of view of the latter, the purpose of building a factory is not only to make profit, but rather it is to provide technological and managerial know-how, training, information, and more broadly, experience.[3] In other words, since the objective goes beyond interfirm relations and lies within the sphere of competence of Governments, the forms and scope of government intervention, either through national legislation or through international agreements, consequently needs to be examined very closely in order to take into account the broader concept of investment, the provision of appropriate guarantees to both parties, the clarification of the rules of the game, and the redressing of inequalities between partners.

The Possible Role of Intergovernmental Framework Agreements

4. Intergovernmental agreements play an important role in industrial co-operation between centrally-planned countries and developing countries. Such agreements usually indicate the sectors of co-operation, taking

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1/ UN General Assembly Report on the Conference on International Economic Co-operation: Note by the Secretary-General, A/31/478/Add.1, dated 9 August 1977.

2/ UNIDO: Joint Study on International Industrial Co-operation - A Note on Some Specific Issues, ICIS.48, dated 3 October 1977.

3/ Deliberations of the meeting on Industrial Co-operation Contracts and Procedures for Solving Differences, Vienna, 14-16 November 1977.

account of the plans and programmes of the developing countries concerned, and attempt to provide for a mutually advantageous division of labour, including in certain cases provisions related to the creation of markets for the production envisaged. The agreements frequently contain provisions on financial as well as on technology and training arrangements. Joint commissions may be established in order to facilitate the implementation of the agreements.

5. More satisfactory answers to the problems raised by private foreign direct investment might be found through the conclusion of bilateral framework agreements on economic and industrial co-operation between Governments in a more widespread manner between market economy and developing countries. In the past, this type of framework agreements has been adopted in several instances by market economy countries in their relations with socialist countries and in certain cases with developing countries.

6. Most western countries now have some sort of agreement with socialist countries on economic, technical and scientific co-operation. These mainly enunciate the intentions of both parties on co-operation matters and sometimes identify individual industrial branches which will be the object of special attention. At the same time such agreements provide for the establishment of bilateral institutions, such as joint commissions, which may themselves count on the support of working groups, whenever specific economic sectors or projects are included in the agreement or in a corresponding protocol. The role of such commissions would appear to be effective, especially for medium and small-size firms, in facilitating contacts between enterprises, whether in the form of exchange of economic and technological information or in the conclusion of specific industrial co-operation contracts. With regard to the settlement of disputes, experience has shown that the joint mixed commissions only rarely have had to intervene directly and that in the majority of cases the partners solve the problems by themselves. Provisions are generally made for dispute settlement through arbitration either in the host country or, at the request of one of the parties concerned, in a third country.

7. The Lomé Convention[1] is an example of an agreement between Governments of developed and developing countries which provides inter alia a framework for industrial co-operation amongst its signatories. The corresponding Chapter of the Convention covers a broad range of activities such as infrastructure for industry, industrial undertakings, training, technology transfer and development, assistance to small and medium-scale firms, industrial information and promotion, trade co-operation. It is characterized partioularly by the non-reciprocity of its clauses, the imbalance being justified by the different levels of economic development of the partners. The implementation of the Convention follows the guidelines laid down by the Council of Ministers, assisted by the Committee of Ambassadors, and has the power of taking decisions which are binding on the signatories of the Convention. As regards the settlement of disputes, it should be noted that the Convention provides an arbitration procedure in cases in which direct arrangements or consultations between the Governments concerned cannot be arrived at.

8. A number of other intergovernmental agreements on a North-South basis have been concluded. Many of these agreements are essentially concerned with investment protection,[2] often at the request of the developed countries concerned. In certain cases, the Government of the investing enterprise provides investment insurance only if it has previously concluded an intergovernmental agreement with the host country, such as for example the USA's treaties of "friendship, commerce and navigation" or the Federal Republic of Germany's "Investitionsschutzverträge". These agreements usually contain clauses specifying the arbitration procedures which are to be adopted in order to settle disputes.

9. It may thus be seen that developed countries are already engaged in many instances in intergovernmental agreements providing a framework for their industrial co-operation with many countries. This applies in particular to the relations between developed market countries and centrally-planned countries. But, as mentioned above, market economy countries are also

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1/ See for instance EEC The Courier, special issue, no. 31, Brussels, March 1975.

2/ See ICSID: "Investment Laws of the World", Washington, D.C., 7 volumes.

inclined to enter into intergovernmental agreements with developing countries, especially as a way of protecting investments of their nationals. However, as in the case of the Lomé Convention, it appears that developed market countries are also in a position to conclude broad intergovernmental agreements with developing countries covering many important aspects of industrial co-operation.

10. It is suggested here that broad bilateral intergovernmental agreements may be well suited to the specific requirements and capacities of the developed and developing countries in the general area of international industrial co-operation. They would permit to ensure that the package contained in industrialization contracts conforms with Governments' strategies, plans and policies for development and provide general guidelines and principles for co-operation with regard to technology, research and development, training. Furthermore, they would tend to increasingly involve the Governments of developed countries in the interfirm contracts signed within the framework of such intergovernmental agreements, thereby providing a guarantee against malpractices on the part of their nationals and ensuring that such contracts are properly executed.

11. It is worth referring in this connexion to the meeting of the Club of Dakar which was held in Abidjan in December 1976[1/] and adopted a declaration on global co-operation between developed and developing countries, as well as a proposal for a Charter on International Industrial Co-operation. Amongst the issues discussed, it was emphasized that arrangements should be made between Governments in the interest of concerting the development and distribution of various industries in the industrialized and the developing worlds. The Charter outlines various types of measures such as the guarantee of access to markets which could be taken by the developed

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1/ Club of Dakar, Third Plenary Meeting, Final Documents (Abidjan, 29 November to 2 December 1976). The Final Documents contain, inter alia, the proposed Charter on Industrial Co-operation.
See also: Actuel développement, no.17, 1977. J. Florenzano "Le Club de Dakar: une approche nouvelle dans les relations entre pays industriels et pays en voie de développement" in Futuribles, no.10, 1977.

countries in order to promote the establishment in the Third World of several industries which they would be prepared to support on a concerted basis with the developing countries. It was also envisaged that private firms should obtain appropriate guarantees against non-commercial risks and that joint commissions should be set up to supervise the implementation of industrial co-operation agreements and thereby forestall any disputes. The Club of Dakar also suggests the creation of a Joint Guarantee Fund in order to provide compensation in a relatively short space of time to an injured party.[1/]

Procedures for Solving Differences

12. While differences in the implementation of industrial co-operation contracts are often settled through negotiation between the partners concerned, the provision for legal procedures for solving differences, such as through arbitration, may be conducive to the creation of a climate of confidence between the partners concerned. Host countries generally consider that their national institutions are the only competent ones to deal with differences between their nationals and foreign enterprises. However, intergovernmental agreements on industrial co-operation, and more particularly on investment protection, mentioned in the previous section of this paper, generally contain clauses relating to arbitration procedures which do not necessarily take place in accordance with the national jurisdiction of either country. Cases such as that of the Lomé Convention, which includes a broad range of subjects, would seem of particular interest in this connexion. It should also be noted that international arbitration is envisaged within the framework of East-West industrial co-operation agreements.

1/ In this connexion, it might be worth considering the experience of institutions such as the Inter-Arab Investment Guarantee Corporation. See in particular Kuwait Fund for Arab Economic Development: "Convention Establishing the Inter-Arab Investment Guarantee Corporation".

13. The field of international commercial arbitration is at present the domain of a relatively small group of specialists which is even more so the case of arbitration of disputes in international industrial co-operation. Specialists are generally found in the industrialized countries, so that it is not so frequent to find a national of a developing country as an arbitrator or as a counsel in arbitration proceedings to which a developing country is a party.

Existing arbitration institutions are in themselves quite numerous, the most important being the American Arbitration Association, the Foreign Trade Arbitration Commission of the Chambers of Commerce and Industry of the CMEA countries, as well as the Court of Arbitration of the International Chamber of Commerce in Paris, which is involved in both East-West and North-South dispute settlement. The International Centre for the Settlement of Industrial Disputes (ICSID), set up under the Washington Convention of 1963[1/], is specialized in certain aspects of international industrial co-operation.

14. It should be recalled at this point that current international law has emerged out of practice and custom between the developed countries. The existing arbitration institutions, with the exception of ICSID, were also established to solve the problems arising out of co-operation between enterprises in the developed countries. The problems arising between partners of the industrialized and the developing countries, with their basic unequal levels of development, are not always appropriately dealt with under such conditions. This is reflected in the initiatives taken by certain institutions, such as the International Chamber of Commerce, with a view to promote more contacts and interest amongst lawyers of developing countries. As for ICSID, it should be noted that the Convention has not been signed by several developing countries, such as those from Latin America.

1/ Convention for the Settlement of Investment Disputes between States and Nationals of other States, Washington, 1965.

15. It appears that, although a more systematic recourse to international arbitration procedures might facilitate the participation of foreign enterprises in the industrialization process of developing countries, such procedures should be viewed as only one element in broader arrangements covering the various aspects of industrial co-operation.

16. The difficulties in the present mechanisms and procedures for dispute settlement are essentially due to a lack of mutual trust and confidence.[1/] It is considered, for example, that there are not a sufficient number of lawyers from developing countries specialized in the field of international arbitration; this has resulted firstly in their lack of representation on arbitration panels and secondly in the general failure on the part of arbitration bodies to appreciate the problems of industrial development rather than of commercial transactions. Excessive costs and time have given rise to a trend towards the use of technical expert services designed to solve differences prior to having recourse to conciliation or arbitration procedures.

Conclusion

17. In the field of dispute settlement, special attention should be paid to the usefulness of pre-legal methods such as the provision of technical expert services. Similarly, it is necessary to review the current conciliation and arbitration mechanisms, particularly with regard to the necessity of new arbitration institutions, the number of arbitrators from developing countries, duration and cost of procedures. On the question of applicable law, for example, it would be useful to examine the possibility of establishing a guide to the legislation applicable in various legal systems to specific problems arising out of industrial co-operation arrangements. At a more general level, it is necessary to examine the conditions under which international procedures could be rendered palatable to developing countries, particularly those from Latin America.

1/ M.E. Schneider: Report on Certain Issues Relating to the Joint Study on International Industrial Co-operation, UNIDO/ICIS.34/Rev.1, 25 July 1977.

18. The present and future role of Governments should be examined in order to determine the conditions under which Governments of both developed and developing countries might be willing to support such a set of general principles by including them in intergovernmental framework agreements. The objective is to explore how Governments of both parties would engage to a certain degree their responsibility with regard to the implementation of those general principles; this formula may go a step towards that Governments of industrialized countries should bear legal responsibility for the activities of their nationals abroad.

19. Nevertheless, the frequent inequalities between the partners concerned points to the importance of the questions related to the negotiation of co-operation contracts between enterprises, and accordingly to the need for codes of conduct and possibly for the establishment of new or improved advisory services in this field. Although technical co-operation institutions exist at the national and international level, it might be useful to examine the possibilities to reinforce the capacity of developing countries to benefit from independent expertise in the field of contract negotiation.

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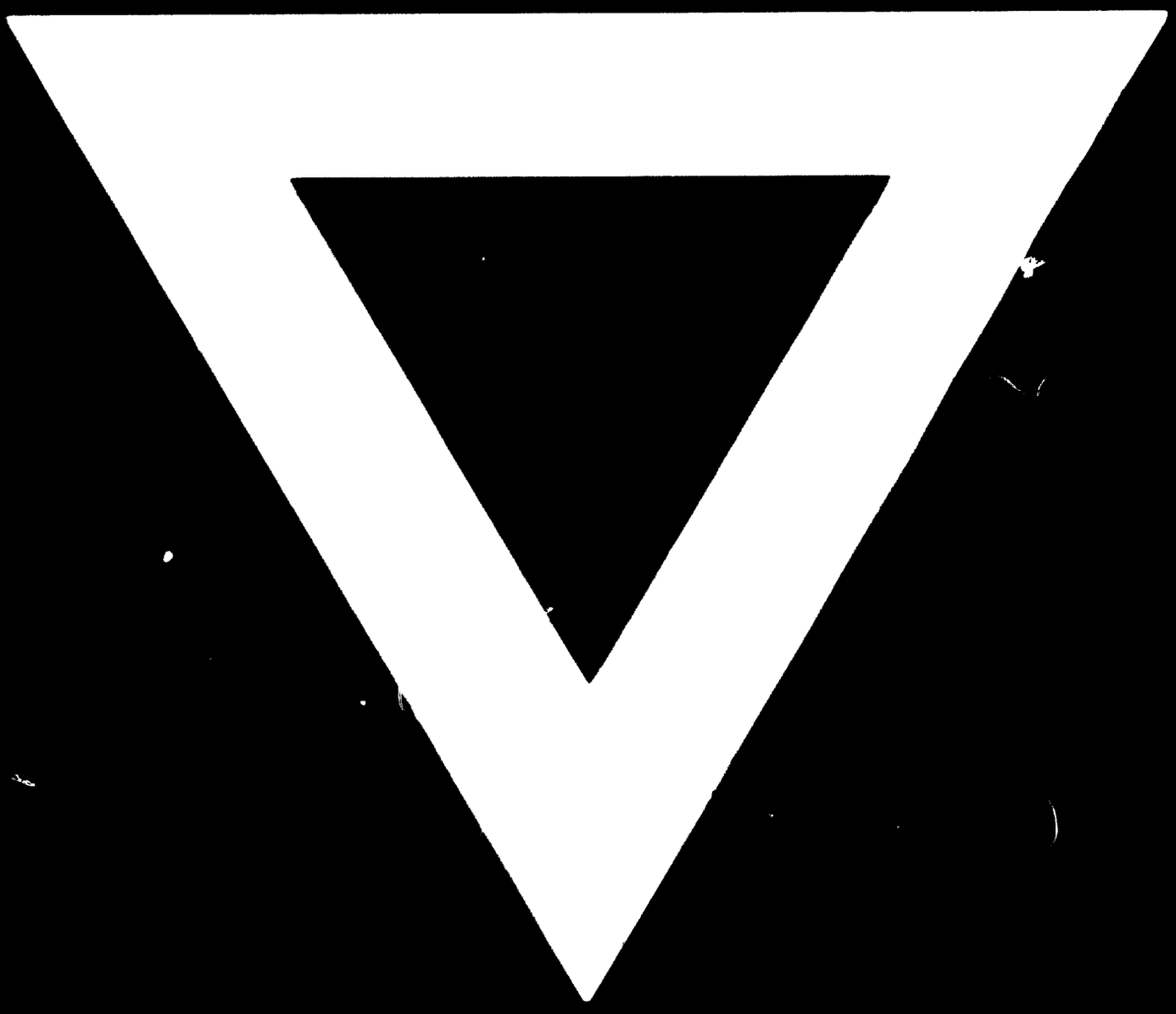

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