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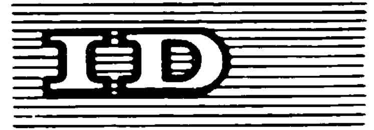

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Industry 2000 - New Perspectives:*

PROPOSAL NO. 4:

SYSTEM FOR THE RESOLUTION OF INDUSTRIAL CO-OPERATION CONFLICTS

Paper prepared by the Secretariat of UNIDO

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* The attached is an elaboration of the proposal described in ID/CONF.4/3, Part One, section 2.3.3 and Part Two, section 6.4.2. It is available in English only.

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SYSTEM FOR THE RESOLUTION OF INDUSTRIAL CO-OPERATION CONFLICTS

1. THE NEED FOR NEW MECHANISMS FOR CONFLICT RESOLUTION

1.1 Conflict Resolution as an Element of International Industrial Development Law

Conflicts inevitably arise in the context of industrial enterprise co-operation. Their occurrence is due to its complexity, to the technological change, to its long-term character and to the divergent interests and attitudes of partners which often do not have a homogeneous background. The methods and mechanisms so far used for conflict avoidance and conflict resolution do not show the required effectiveness and responsiveness necessary for Third World industrialisation. An effective system of conflict resolution based on the recognition of need both for stability and for adaptation in long-term co-operation agreements has to be constructed.

Conflict resolution is based on legal standards and principles of decision which will be decisive for the outcome. Conflict resolution methods also constitute an important component in the programme to promote the evolution of a New International Industrial Development Law. The proposed System for the Resolution of Industrial Conflicts[1/] is hence closely linked to the proposed Commission for International Industrial Development Law. Both proposals attempt to institutionalise essential and mutually complementing functions of a New International Industrial Development Law.

1.2 Present Position of Countries with Respect to Conflict Resolution

International arbitration and the use of the established institutions as instrument of dispute settlement is generally advocated by transnational corporations and industrialised countries. Besides the reasons normally advanced in favour of arbitration - expediency, expertise, and confidentiality, the main argument in favour of international arbitration has been the expectation of impartiality. National courts, it is feared, will often decide under political pressure and can therefore not be trusted to render a neutral decision in a politicised conflict. This insistence by industrialised countries is articulated in their position in the North/South (CIEC)-Conference:

> "Disputes between a host country and a foreign investor shall be resolved rapidly, in accordance with the above principles and with the procedural standards called for by international laws; access to international arbitration shall be available. Where possible, the procedures to be followed should be agreed upon before any dispute arises. In all cases, arbitration proceedings and standards should be transparent and mutually satisfactory to both investors and host government. The IBRD's Center for the Settlement of Investment Disputes is an important institution in this regard."

1/ For a background analysis of this proposal see, Methods and Mechanisms of International Industrial Enterprise Co-operation, UNIDO, 1979.

Developing countries, on the other hand, do not share these views. Latin American countries have consistently adhered to the Calvo-Doctrine which prohibits submission of investment disputes to a non-national arbitration forum. The relevant authoritative resolution of the UN General Assembly on the Charter of Economic Rights and Duties (Res. 3281, XXIX) as well as official statements by other international organisations (OPEC Res. XVI.90 of 1968; Decision 24 of the Andean Pact Commission) reflect this official view of developing countries. The most recent statement of this view is also to be found in the respective "South" position paper of the North/South Conference:

"Disputes between a host country and a foreign investor shall be resolved in accordance with the national legislation of the host country by its own courts of law except in those cases where the host country government freely chooses to submit the matter to international arbitration. In all cases, arbitration proceedings and standards should be transparent and mutually satisfactory to both investors and governments."

The opposition of developing countries against international arbitration is based on the one hand on the concept that national sovereignty prohibits a foreign tribunal to judge on the legitimacy of state action. On the other hand, it is based on the fear that traditional international arbitration - practised primarily through the prevailing institutions - is not favourable to developing countries' needs for a legal process which is responsive to Third World economic development. Procedures, standards and experts of arbitration tribunals are said to be impregnated by the concepts and attitudes underlying business behaviour and respective interests of capital-exporting industrialised states. That this stance may not be unfounded is reflected in the fact that almost all publicly known investment arbitration cases were decided by western eminent lawyers against the host state.[1/]

1.3 New Methods of Conflict Resolution in Support of Third World Industrialisation

It is increasingly being realised by developing countries that an effective mechanism for conflict resolution may be of great utility for Third World industrial development, provided that the rules and institutions are changed in order to be responsive to the specific needs of economic development.

This attitude is already reflected in the South-position for the North/South Conference where the preference for complete national jurisdiction extends only to "investment disputes" - i.e. essential matters of national sovereignty - and where a freely conceded submission to non-national arbitration under rules and standards acceptable to the host state is recognised. Algeria has begun to question the exclusive hold of the Northern enterprises and states over international arbitration by calling for an appropriate system of

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1/ Cf. Goldfields, L.; Société Rialet; Saudia Arabia v. ARAMCO; Quatar v. International Marine Oil Petroleum Development Corp. v. Sheikh of Abu Dhabi; NIOC v. Sapphire; this applies even to recent cases such as TEXACO/CALASIATIC v. Libya and BP v. Libya.

arbitration to obtain effective protection against malperformance in industrial co-operation.[1] Non-official representatives and non-governmental organisations from developing countries have strongly supported this view requesting a structurally revised system of conflict resolution in favour of the special needs and conditions of developing countries at the International Arbitration Congress in New Delhi (1975) and Mexico (1978).[2]

An effective - and structurally revised - system of conflict resolution can contribute to Third World industrial development in several, essential ways. It allows to harness the industrialising potential from industrial co-operation on a long-term basis by providing for the requisite stability and adaptation to steer a complex project through the storms of fast transition. It means that conflicts which are costly for both parties - in terms of fiscal revenues foregone, of developmental contribution lost - can be avoided or resolved. Mutually trusted conflict resolution, furthermore, reduces the mistrust which leads to the goal of fast and high profits on the side of the investor and of tight and suspicious control and intervention on the side of the host state. Effective conflict resolution is also a method of conflict avoidance.

An effective and structurally revised system of conflict resolution has to be viewed particularly in the context of collective self-reliance and the objective to increase South/South industrial co-operation. At present, South/South industrial co-operation has still to rely to a considerable degree on the services provided by traditional arbitration institutions. A new system of conflict resolution geared to specific South/South requirements has not yet emerged. The task of the proposed system of conflict resolution can hence be understood as promoting efforts to establish arbitration as a distinct instrument for South/South industrial co-operation.

These considerations underly the presented proposal for a System for the Resolution of Industrial Co-operation Conflicts. It has to fulfil the difficult task of resolving the controversy between the insistence on national jurisdiction only and the insistence on traditional international arbitration. Stability is viewed not as a static concept - as in the repeated insistence on "investment security" -, but as a problem of equitable and fair procedures of adaptation, i.e. as "dynamic stability". The various components of the proposed system when taken as a package, represent a finely balanced synthesis. The philosophy behind the proposal is not of rejecting existing mechanisms, but of improving them and of creating new, complementing mechanisms to increase and enrich the options available to partners in a co-operation contract. By opening up new avenues for agreement, the proposal seeks to create institutions and dynamic processes to stabilise mutually beneficial projects with a lasting community of interest and with terms not negotiated at a time of one-sided bargaining power relationship. The proposal constitutes

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1/ Cf. Mémoire présenté par l'Algérie à la Conférence des Souverains et Chefs d'Etats des Pays Membres de l'OPEP, March 1975, pp. 211, 227.

2/ Cf. also the Report by the Afro-Asian Legal Consultative Committee (AALCC) on its 15th session, 1974, p. 119; cf. also the UNCTAD Doc. TD/B/C.7/17 of 18 September 1978, p. 42 in preparation for the Manila Conference.

hence one method in the process to bring about a new International Industrial Development Law, one element in the implementation machinery of a New International Legal Order for Industrial Co-operation.

2. EXISTING INSTITUTIONS FOR CONFLICT RESOLUTION AND PRESENT PRACTICE

At present, conflict resolution in investment matters is divided between the competence of national courts - particularly in countries adhering to the Calvo-Doctrine and countries of a relatively strong bargaining power - and submission to international arbitration tribunals. Arbitration before a national arbitration tribunal, constituted ad-hoc, is sometimes a compromise solution. In non-investment disputes, reluctance against non-national arbitration may be reduced, but still exists as expressed in Decision 24 of the Andean Pact's Commission. The form of dispute settlement and its effects depend to a considerable degree on the arbitration institution used.

The International Chamber of Commerce's (ICC) International Court of Arbitration is the most frequently used arbitration facility. The ICC has recently issued rules for contract adaptation and established a Center for Technical Expertise. The considerable expertise and the efficient institutional framework provided by the Court and its Secretariat are a precondition for its success. Another favourable condition has been the relative homogeneity among the international business community of western countries, the principal clientèle and the most influential members of the ICC.

The Convention on the World Bank's Centre for the Settlement of Investment Disputes (ICSID) has been signed by 77 countries and ratified by 71 since 1965. Algeria, Libya and Tanzania are notable exceptions as are socialist countries (except Yugoslavia and Romania), most major petroleum producers, the Latin American countries, India, Thailand and the Philippines. Canada - an industrialised country with an exceptionally strong presence of TNCs - is also a non-member. From 1965 to 1979, only 10 cases have come to the ICSID's arbitration tribunals, several of which were withdrawn after one host state (Jamaica) refused to accept the ICSID's jurisdiction. It seems that also in most of the remaining cases no decision was rendered. In 1978, the ICSID added facilities for conciliation, arbitration of non-investment disputes and for fact-finding. Industrialised countries are disposed favourably towards the ICSID; some investment insurance schemes - e.g. in France - require submission to the ICSID. This preference is also reflected in the "North" position at the North/South Conference presented above. The ICSID jurisdiction is seen by investors as a protection against renegotiation of long-term investment agreements; the organisational ties to the World Bank are viewed as an additional deterrrent and stabilising factor.[1/]

1/ Schmidt, J., Arbitration under the Auspices of the ICSID, Harvard Journal of International Law 17 (1976) 90.

In the context of East/West relations, arbitration has taken a special significance, as the Final Act of the Helsinki Conference in 1975 has expressly endorsed arbitration for industrial co-operation.[1/] Highly specialised arbitration tribunals attached to the national chambers of commerce are available for settling disputes in international CMEA trade and sometimes in East/West co-operation. As a compromise solution, socialist states have also accepted non-national arbitration at relatively "neutral" locations.[2/]

In East/South co-operation, conflict resolution is sometimes entrusted to the socialist states' national arbitration tribunals, and sometimes a specific procedure for dispute settlement is provided through inter-governmental agreements.[3/]

State-to-state procedures for solving differences arising out of private foreign investment are also to be found, albeit at present relatively rarely, in inter-governmental West/South agreements concerning specific projects.

Of considerable interest for the presented proposals have been activities undertaken by developing countries to establish mechanisms of conflict resolution among themselves. The Afro-Asian Legal Consultative Committee (AALCC) is promoting the establishment of regional arbitration centres in developing countries; two projects of this kind (Cairo, Kuala Lumpur) are already close to the fully operational stage. ESCAP has - parallel to EC⁻ - rules for arbitration procedure. Regional methods of conflict resolution are also envisaged in a number of regional co-operation or integration arrangements; for example, the Convention establishing the Inter-Arab Investment Guarantee Corporation provides (Art. 34 ff.) for a procedure of conciliation and arbitration which can be termed regional conflict resolution.

3. GAPS IN THE EXISTING INSTITUTIONAL INFRASTRUCTURE

The major international arbitration institutions have been criticised by the developing countries on many accounts. Several alleged characteristics of arbitration under their auspices are viewed as roadblocks to a free industrial development and as an imposition on national economic sovereignty. Examples are the international reactions against host state attempt to redress unequal terms of investment agreements, the application of legal concepts arising from the commercial interaction of western countries, the absence of sufficient responsiveness to Third World economic development and the inherent bias of the arbitrators in favour of the legal concepts and the arguments accepted in western legal culture.[3/] This view is summarised by a recent major study by the UN Centre on Transnational Corporations.[4/]

1/ Strohbach, H., Improvement of Existing Mechanisms of Dispute Settlement, Berlin 1979, Report for UNIDO.

2/ Boguslavsky, M.M./Platonova, N.L., Legal Aspects of Industrial Co-operation between the Soviet Union and other CMEA Countries and the Developing Countries, Moscow 1979, Report for UNIDO.

3/ Benchikh, M., Les Rélations entre les Entreprises Transnationales et les Pays Sous-Développés: Contrat Produit-en-Main et Arbitrage, Algiers, 1979, Report for UNIDO.

4/ See next page.

Developing countries have, however, shown considerable reservation also towards submitting investment disputes among themselves to the conflict resolution mechanisms created.

In essence under all present arrangement, developing countries have been reluctant in submitting investment disputes touching the essence of national sovereignty to non-national arbitration.[1] This reservation is shared in most western countries, where a strong reluctance exists against submission to non-national arbitration of acts of state, of issues considered to belong to public policy or of public enterprise.[2]

From the preceding survey it can be concluded that the prevailing institutions and practices do not find the universal acceptance necessary for an effective system of conflict resolution. The ICC's arbitration is regarded as being reflective of the western international business community, the World Bank's ICSID cannot count on a large number of major developing countries and socialist states as signatories. But even the signatory states seem to have considerable reservations. The almost complete absence of meaningful conflict resolution activity may be an indicator of such reluctance. There seems to be an apparent need for mechanisms of conflict resolution which reflect the specific requirements of Third World industrial development and which can be oriented to South/South industrial co-operation. New proposals would have to build on South/South activities such as the AALCC's work and the Inter-Arab Investment Guarantee Corporation's regional arbitration schemes. Improved and new methods should have their place under the auspices of the United Nations as a truly universal organisation. New mechanisms are not meant to replace existing institutions or dispute their value, but to add a new option for participants in industrial co-operation who have hitherto not been able to agree to their mutual satisfaction on one of the existing mechanisms. Such new solutions should leave all the freedom to the bilateral negotiations of partners. Partners should not de iure or de facto be coerced into arbitration through investment insurance or financing leverage.

4/ TNCs in World Development; A Re-Examination, E/C.10/38 of 1978, p. 122:

"Many host developing countries have reservations about international arbitration. Latin American states have traditionally opposed international arbitration as a derogation from their sovereignty and have consistently resisted accession to the ICSID Convention in accordance with the Calvo Doctrine. Other host states which have acceded to the Convention have adopted a cautious attitude towards actual participation in ICSID proceedings, particularly in respect of major policy disputes. Many of these states harbour the fear that recourse to international arbitration would result in a vindication of traditional international legal principles which are perceived to be more favourable to investors than to host states. Host states are more likely to participate in international dispute settlement in the future when they are confident that the basic ground rules relating to foreign investment and general principles of law have been sufficiently reformed to reflect the assumptions of the New International Economic Order."

1/ Cf. also Art. V(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which allows non-recognition if recognition would be contrary to public policy or if the subject matter is not capable of settlement by arbitration.

2/ Cf. the US Supreme Court's Decision in Wilko v. Swan, 346 US 427 (1953); A + P Plastic Pack Comp. v. Monsanto Comp. 396 F2nd 710 (9th Circ.); see also the Federal Republic of Germany's Federal Civil Court in AWD/RIW 1969, p. 230; Battifol, Arbitration Clauses concluded between French Government-Owned Enterprises and Foreign Private Parties, 7 Colum. J. Transnational L. 32, 1968.

4. THE PROPOSAL FOR A SYSTEM FOR THE RESOLUTION OF INDUSTRIAL CO-OPERATION CONFLICTS

Bearing in mind the gap identified in the present institutional infrastructure it is proposed to set up a system for the resolution of industrial conflicts. The basic aim of the system would be to overcome the present shortcomings as described above. In specific, a number of guiding principles have to be observed in designing a System for Resolution of Industrial Co-operation Conflicts.

- Proposals for conflict resolution have to recognise the principle of national economic sovereignty. This implies that the establishment and the improvement of national institutions for conflict resolution should receive highest priority. Appropriate technical assistance, training and international co-ordination should be oriented at making national centres an acceptable form of conflict resolution in respect to expertise, neutrality and expediency. For the purpose of making such national bodies acceptable, utmost care has to be paid to build up a reputation for impartiality and fairness.

- Regional conflict resolution can be a contribution to collective self-reliance in dispute settlement, to successful and effective regional co-operation. It could be a compromise solution, where neither purely national nor traditional international arbitration is acceptable. Economic state sovereignty of developing countries could thus be expressed at the regional level.

- Global action should concentrate on technical assistance and training, on communication, co-ordination and on the design of appropriate model agreements. Only when required by imperatives of efficiency and necessary concentration, can global facilities take the place of national or regional bodies.

- Conflict resolution should include specialised methods for solving technical disputes and for contract adaptation; both services are necessary due to the technical complexity and the long-term character of international industrial co-operation contracts.

5. THE BASIC ELEMENTS OF THE PROPOSED SYSTEM

The proposed system consists of National Arbitration Centres, Regional Arbitration Centres and an International Centre for the System. Activities to promote the setting-up of this system would be undertaken through the International Centre.

5.1 National Arbitration Centres

For developing countries, the exclusive jurisdiction of their national courts is the preferred form of conflict resolution. However, national courts may often not possess the requisite expertise for complex international industrial co-operation matters. Foreign enterprises will often be deterred from co-operation if they have to submit to the exclusive jurisdiction of national courts. In case they are willing to submit, they will

usually build additional safeguards into the project's organisation which will be costly for both parties. In this situation, national arbitration, as opposed to recourse to the normal national courts, will be an alternative favoured y and acceptable to the host state. This preference will be particularly strong in matters which are close to the essence of national economic sovereignty, such as special concession rights, tax rules, economic development obligations, the regime governing non-renewable natural resources and other issues of public policy.

Accordingly, the establishing of national arbitration centres should be encouraged by all means with the purpose of making them acceptable to foreign partners. A high reputation for objectivity, for impartiality and remoteness from political pressures, for expertise, efficiency and expediency is an essential factor for such acceptance. The encouragement of national arbitration centres can build to some extent on the successful experience of socialist states' arbitration tribunals attached to the national chambers of commerce and on the ad-hoc arbitration tribunals established by some developing countries, exclusively composed of nationals and situated in the capital of the host state. It can also build upon the AALCC's activities to foster national expertise in arbitration and on the practice of some countries which engage in technical assistance through co-operation agreements of their national arbitration institutions with the respective body in a developing country.[1]

The assistance required should come forth from a UN body acting as a focal point concentrating expertise and hitherto fragmented individual piece-meal operations. The assistance required would comprise training, organisation, regional and international communication and co-ordination. It would also encompass the design of model clauses in co-operation contracts providing for submission of disputes to a National Arbitration Centre.

5.2 Regional Arbitration Centres

Many conflicts arising out of industrial co-operation require highly specialised expertise, not only in the field of arbitration procedures, but even more so in a wide range of rules and practices relating to commercial and industrial transactions. At the same time most countries, particularly those of a smaller size, are likely to have only a small number of disputes reaching the stage of arbitration. For these reasons, the efforts for establishing expertise in developing countries must to some degree be concentrated in collective mechanisms of conflict resolution. A development of comprehensive conflict-solving capacities in each host state would lead to a multiplication of under-utilised facilities and thus occupy highly qualified personnel without corresponding benefits. Accordingly, an approach of regional conflict resolution is necessary for many types of disputes. Such an approach has the additional advantage that regional facilities will in many cases alleviate suspicions concerning the political control over dispute settlement, as regional facilities are more removed from direct political pressures brought to bear on conflict resolution. But a major advantage of fostering regional conflict resolution seems

1/ Cf. Strohbach, H., op.cit.

to lie in the fact that such mechanisms promise to be an appropriate method to handle conflicts arising in the context of regional integration and co-operation. The growing need for and acceptance of such a regional solution is reflected by such regional action as ESCAP's arbitration rules, the regional dispute settlement schemes established through inter-governmental instruments - as, for example, the Convention establishing the Inter-Arab Investment Guarantee Corporation - and the promotion of the regional arbitration centres by the AALCC.

Regional Arbitration Centre should be set up by and attached to the UN Regional Economic Commissions. They could be integrated to the extent possible with existing arbitration facilities operating on the regional level. They would apply uniform procedural rules. Arbitrators would be selected out of experts in industrial development law out of the countries of the region with due qualifications to ensure expertise and impartiality. They would be called on through a request by one of the parties and a corresponding contractual submission or through stipulations in intergovernmental agreements to use the Regional Arbitration Centre. These Centres could also - if considered necessary - supervise whether fundamental procedural and material rules of fairness and equity in proceedings before national arbitration centres are being complied with. Their regional character, their attachment to the UN system and their role in the evolution of a New International Industrial Development Law would distinguish them from the major existing arbitration bodies.

In line with modern developments and the growing complexity of long-term industrial co-operation contracts, several specialised facilities could be attached to Regional Arbitration Centres.

5.2.1 Facility for Contract Adaptation

Long-term contracts require sophisticated methods of adaptation in order to maintain the stability of a mutually advantageous relationship. In theory, normal arbitration procedures could be used for adaptation and for filling gaps which the parties left consciously or unconsciously. However, up to now, these procedures have been rarely used for the purpose of adaptation. In response to this situation, some arbitration institutions and regulations dealing with international contracts have recently begun to provide for specialised contract adaptation.[1/] Many costly escalations of conflicts could be solved if a method were found to adapt long-term contracts to changing circumstances, to maintain the initial notion of fairness through the storms of change and to revise a contract which has become unbalanced through the initial unequal distribution of bargaining power or obsolete through fundamental changes in comparable agreements. Institutionalised renegotiation would be a mechanism to break a deadlock created by the unability of

1/ Cf. the recently established ICC-Rules for Contract Adaptation; Art. 295/42 of the German Democratic Republic's Code on International Economic Contracts; cf. also the former US Renegotiation Act for Government Procurement Contracts establishing a Renegotiation Board.

parties to agree among themselves on the appropriate adaptation. Even if such a facility was not actually used, but could be invoked by one of the parties it would constitute an incentive for the parties pressuring them to find an agreement on their own. Regional Facilities for Contract Adaptation could hence be established within the context of Regional Arbitration Centres with appropriate procedural rules and material standards to which the parties could have recourse with a request for contract adaptation. The Facility could also constitute a point of referral for intergovernmental agreements.

5.2.2 Facility for Technical Expertise

Technical disputes are increasingly important in modern industrial co-operation. In recent contracts, procedures of technical expertise often gain predominance over the traditional procedure of legal arbitration.[1/] Technical procedures and criteria are by no means neutral; they often reflect an inherent bias in favour of the modes of technical business behaviour in industrialised countries and they are not oriented at the specific requirements for appropriate technology in developing countries. Also, the technical experts called upon to give an impartial expert's decision can often not help being integrated closely into the transnational network of their major clients. Professional standards applied by technical experts often leave considerable leeway for discretion. Some agreements, for these reasons, have attempted to define specific technical criteria for deciding disputes in such areas as accounting, feasibility studies, fair market pricing et al.[2/]

Accordingly, rules, procedures and capacities for technical expertise should be developed with a view of responding to the specific needs of Third World industrial development and to promote the growth and the use of developing country-based technical expertise for questions of dispute settlement. Facilities for Technical Expertise should be established within the context of Regional Arbitration Centres; if so required by reasons of efficiency, they could be concentrated at the International Centre. The Centres for Technical Expertise would provide services of technical expertise upon referral by the parties or through intergovernmental agreements. They would draw upon to the maximum extent feasible on the expertise available within developing countries and within the UN system.

5.2.3 Facility for Conciliation

Often, non-litigous ways of settling disputes are preferred, as they avoid costs and efforts involved in long drawn out disputes. Western parties may rarely avail themselves of conciliation proceedings as they are either likely to undertake conciliation efforts by themselves or as they come from a tradition which is favourable to judicial or arbitral litigation. In some developing countries, however, the cultural tradition is opposed to litigation and is more inclined to favour non-legal procedures of conciliation.[3/]

1/ Cf. the ICC's recently established Centre for Technical Expertise and the ICSID's Additional Facility comprising a procedure for fact-finding.

2/ Cf. Wälde, Th. W., Negotiating for Dispute Settlement, Denver Journal of International Law and Policy, Vol. 7, 1977, p. 55ff.

3/ Cf. Tiewul, S./Tsegah, F., Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice, ICLQ 24, 1974.

It may hence prove useful to provide a facility for conciliation to which parties could have recourse before taking to the more formalised arbitration. Respective facilities attached to the Regional Arbitration Centres could provide appropriate conciliators, organisational services and procedural rules.

5.2.4 Facility for Summary Hearings

Often, the procedure of a summary hearing and a respective expedient decision are necessary for co-operation projects, e.g. for filling of unforeseen gaps during project implementation. Here, a respective Facility for Summary Hearings, or a special procedure for summary decisions could add a useful component to the functions of conflict resolution discussed. The Facility for Summary Hearings could be particularly useful in a frequently encountered deadlock situation: many developing countries often insist on first-demand performance bonds, while foreign enterprises[1/] - supported by national and international industry associations - prefer performance bonds conditioned upon an arbitral award. A compromise position would here be to require foreign partners to post higher performance bonds as is practised today (say 25-50 per cent instead to 10-15 per cent) or on an amount above the usual level - conditioned upon the award of the proposed Facility for Summary Hearings.

5.3 International Centre for Conflict Resolution

At the apex of the proposed system, an International Centre for the System for the Resolution of Industrial Co-operation Conflicts would be responsible for co-ordinating technical assistance and support to national and regional arbitration centres. It would, through information-sharing, recommendations and the elaboration of model clauses for conflict resolution link the function of conflict resolution with the legal programmes on the global level under the responsibility of the proposed Commission for International Industrial Development Law. Specialised training could be provided, inter alia, through a system of rotating fellowship whereby experts from developing countries would be familiarised with conflict resolution expertise in the International Centre or in Regional Arbitration Centres. In many instances, the International Centre could act as a broker of co-operation between national arbitration centres and organisations and newly created institutions in developing countries, thus channelling technical assistance of a neutral nature to countries requesting it.

In principle, the Centre would not engage in actual arbitration. In highly specialised areas, it might be more practical, however, to concentrate technical functions globally. The International Centre could also develop a limited appeal procedure to supervise regional and national arbitration tribunals for their compliance with fundamental rules of procedure, industrial development law and fairness. Such a supervisory function might increase the acceptability and the reputation of national and regional bodies.

1/ Cf. the ICC's recently issued Uniform Rules for Contract Guarantees.

6. ORGANISATIONAL ISSUES

A first step to set up the system proposed would be to assign to a small group of highly qualified industrial development lawyers to undertake an in-depth survey of existing arbitration institutions in developing countries, of expertise available within the UN system and with established arbitration institutions of the ICC, the World Bank and the CMEA countries. The potential of technical assistance from these institutions could be explored and matched with corresponding expectations in developing countries. An expert group could elaborate proposals for the organisational set-up and the design model clauses and negotiating guidelines. This responsibility would have to be closely tied to the programme to promote the evolution of a New International Industrial Development Law.

On a step-by-step basis, jointly with national institutions and the Regional Economic Commissions as well as the AALCC, national and regional centres could be established. As corresponding needs can be sufficiently perceived, the additional facilities discussed could be created. If a gradual step-by-step approach is observed, the risk of a multiplication of under-utilised capacities and of excessive employment of scarce personnel resources can be avoided.

Costs for the proposed system would be relatively small - a secretariat group of three to five professionals would probably be sufficient, with Joint Units in the Regional Economic Commissions.

7. SUMMARY AND CONCLUSIONS

A regionally and nationally decentralised system of conflict resolution is proposed for conflicts arising out of international industrial co-operation. Information-sharing, technical assistance, specialised services and eventually some supervisory responsibility would be concentrated in an international centre, while the predominant share of actual arbitration should be taken by national and regional bodies. Distinct facilities would provide for specialised services of conflict resolution - particularly contract adaptation and technical expertise. The proposal should offer the ground for a consensus by going beyond the present controversy between insistence on international arbitration on the one hand and the insistence on complete national jurisdiction on the other hand. In contrast to prevailing international arbitration institutions - particularly the World Bank's ICSID and the ICC's Court of Arbitration - the new conflict resolution mechanism proposed is to be firmly placed into the UN system as the organisation most appropriate to house a universally acceptable system of conflict resolution. As the existing institutions are not considered as representative of the whole world community and as completely netural and without inherent biases, the proposed mechanism would offer a new option for compromise where divergent views have up to now prevented a consensus. The proposed system would leave all the freedom to bilateral negotiations and would exercise no express or implicit leverage to pressure parties into submission to its jurisdiction. It should hence serve

purposes of conflict resolution, conflict avoidance and overall stability of long-term industrial co-operation. The suggested step-by-step approach, with close feedback between needs and activities would allow an inexpensive and gradual build-up of services offered.