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Industry 2000 - New Perspectives:*

PROPOSAL NO. 3:

COMMISSION FOR INTERNATIONAL INDUSTRIAL DEVELOPMENT LAW

Paper prepared by the Secretariat of UNIDO

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TABLE OF CONTENTS

COMMISSION FOR INTERNATIONAL INDUSTRIAL DEVELOPMENT LAW. [1]

1. The Need for Promotion of a New International Industrial Development Law.

International Industrial Development Law is understood in this paper to comprise models for industrial contractual relationships, which may be adopted by the parties concerned, and which would be in line with their economic and social objectives. What is sought to be achieved is the creation of a new contractual framework for international industrial co-operation. This major objective determines the specific functions of the proposed commission, enumerated on pages 8 and 9 below.

1.1 International Industrial Development Law as a Dynamic Function for Third World Industrialization.

The legal framework for international industrial co-operation influences industrial co-operation and its effects on Third World industrial development to a considerable degree. It may, in some instances, constitute a directly applicable constraint for state action but more frequently produces its effects through the standards of legitimacy for state and enterprise action emanating from international law. On the level of project co-operation, the legal framework provides the organizational instruments which shape the project, which give an institutional setting for the community of interests inherent in it, and which are decisive for the long-term stability of such communities of interest. For the developing countries the legal methods used are of prime importance in their attempt to obtain the desired positive contribution of industrial co-operation to industrial development and the necessary protection against malperformance. [2] The legal framework of industrial co-operation can emphasize the defensive, conservative function of the law, but it can also fully develop the dynamic function of law in favour of an active support for Third World industrialization. The presented proposal is built upon the premise that structural changes in the law are needed to correct imbalances and inherent unfairness of the existing legal environment. Developing countries have less resources to develop, to co-ordinate and to advocate alternative legal concepts. The present information system in international law and practice which is heavily geared towards a North/South flow of information should, therefore, be restructured to allow a corresponding South/South process of generation and exchange of relevant legal information. It is less the task of providing for official, authoritative and legally

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1/ For a background analysis of the proposal see: Methods and Mechanisms for International Industrial Enterprise Co-operation, Collected Background Papers for Industry 2000 - New Perspectives (ID/CONF.4/3); UNIDO, (forthcoming)

2/ Cf. the Algerian Memorandum presented at the 1975 Conference of Heads of State of OPEC, p. 211ff.

binding instruments and codifications, but more the intensive participation of developing countries in the international process of information-sharing, opinion-building and articulation of legal concepts which should be in the centre of improved and new institutional mechanisms. 1/

1.2 From Traditional International Economic Law to a New International Industrial Development Law.

International industrial co-operation takes place within the framework of international economic law, a body of rules relating - in its state-to-state dimension - to states, but also - in its dimension as a private and commercial system of law - to private enterprises. Rules derived from that legal framework often cannot be directly applicable to co-operation projects because they are generally too vague and directed primarily to inter-state relationships. However, standards of behaviour expressed in international economic law exercise a considerable impact on negotiations, implementation and revision of co-operation contracts. They lay down standards of behaviour of states vis-à-vis foreign investors and they provide for legitimacy for sanctions against developing countries violating such standards. Even if not always directly applicable, they are ever present, ready to be invoked and thus to restrain the scope for action by developing countries vis-à-vis transnational corporations. The concepts in international law often influence the content of specific investment contracts and regulations through referral or through direct incorporation. Choice of law and arbitration clauses in investment agreements are an illustrative case in point.

International economic law is through its origin geared towards regulating commercial interaction between industrialized countries. More recently it has been directed specifically at protecting the interests of capital- and technology exporting countries. Its defensive orientation creates substantial obstacles for developing countries attempting to develop their economic sovereignty and to render foreign investment more responsive to the requirements of the process of industrial development. 2/ These roadblock effects of traditional international law have surfaced visibly in major cases of international arbitration where developing countries' attempts to revise investment concessions were at issue. The same applies to the standards of compensation claimed for nationalization. 3/ The same has been said

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1/ Cf. Bedjaoui, M., Pour un Nouvel Ordre Economique International, UNESCO, 1979, p. 197ff;

2/ See for an extensive discussion of these issues Friedmann, W., The Changing Structure of International Law, 1964;

3/ Cf. Benchikh, M., Les Relations entre les Entreprises Transnationales et les Pays Sous-développés: Contrat Produit-en-Main et Arbitrage, Report for UNIDO, Algiers, 1979; Wilde, Th., Negotiating for Dispute Settlement, Denver Journal of International Law & Policy 7 (1977), p. 33.

of bilateral investment protection treaties. Such treaties are often concluded in the context of unequal bargaining power. Assuming a formal equality, they grant effective and practical privileges to foreign investment without a corresponding commitment of the industrialized country in respect to developmental performance or control against abuses of market power. 1/

The traditional international legal framework for industrial interaction expresses a primarily defensive and static position. It is meant to enforce "investment security" but does not take account of the conditions which are necessary to create a lasting stability of the community of interest in a project. This legal environment does not contribute to long-term stability, as it does not provide instruments to solve the essential problems of North/South interaction affecting the mutually desired stability. Present international economic law does not provide for methods and mechanisms to adapt the contractual regime for long-term projects to changes in social and economic systems, it does not provide for legal instruments to maximize the contribution of foreign investment to development objectives of host states and it does not offer the specific protection needed by developing economies against malperformance and abuses of market power. Thus, insistence on traditional international economic law may lead into costly conflicts. The more sophisticated advocates of stability in industrial co-operation have started to realize that a rigid notion of investment security protected under international law runs counter to the objective of stability.

This evaluation applies also to the body of legal rules, practices and model terms which emanates from present business practice. This practice is decisively influenced by the model instruments elaborated by the manifold international organizations of private business, primarily national industry associations and particularly the International Chamber of Commerce (ICC). This system of international economic law naturally reflects the interests of those actors on the international scene who make it: the international business community of transnational corporations. While high professional quality can be expected from the legal process producing this "lex mercatoria" of international practice, the composition and the structure of the legal process creating such a system of private international economic law is not likely to produce legal instruments which are specifically responsive to Third World industrialization. As developing countries cannot avail themselves of an equally qualified and powerful support system to produce "negotiating know-how" and model instruments to back their project oriented bilateral bargaining, there is a strong need for countervailing institutional support systems. This dimension of the international legal process is perhaps a more powerful factor of law creation than legislation,

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1/ Cf. Hartmann, G., Nationalisierung und Enteignung im Völkerrecht, 1976.

judicial precedents and international treaties. More than international codification - which should only be the ultimate phase of a process of law creation - it is in this dimension where persuasive instruments for bilateral project bargaining are generated that developing countries need institutional support responsive to and reflective of their authentic needs and developmental requirements.

1.3 The Characteristics of a New Legal Environment for Industrial Co-operation.

A new legal environment for industrial co-operation is warranted, primarily for the project level of co-operation, but also for the level of international law. Such a system has to be acceptable to all members of the international community; it should no longer be the tenaciously defended position of one group of countries only. The argument is often advanced that a new system of international economic law should be tilted unilaterally in favour of developing countries, in order to compensate the Third World for past discrimination. 1/ Such concepts would hardly work in practice, as an universal consensus is a prerequisite for the effectiveness of the new legal framework proposed. Such a consensus can only come about if the new legal environment promises to be of advantage to all parties concerned - developing and developed countries included.

The concepts of interdependence and active stability elaborated in the background study for this conference paper suggest that "dynamic stability" is best achieved through a legal environment which accommodates requirements both of stability and of evolution. This stability cannot be based on a rigid system perpetuating powerful entrenched interests. It is not the defensive, static orientation - witnessed today in international arbitration, freezing clauses, foreign trust accounts and bondage transmitted through rigid financing agreements-, but a positive, active orientation responsive to Third World industrial development which will contribute ultimately to the stability of industrial co-operation. Such a new legal system for industrial co-operation, the legal dimension of the New International Economic Order, will be termed International Industrial Development Law.

Many of the guiding principles for a New International Industrial Development Law have already been expressed by authoritative resolutions relating to a New International Economic Order. 2/ Others will be articulated through the forthcoming Codes of Conduct on Transfer of Technology and Transnational Corporations. The task is now to implement, to draw practical conclusions, to develop effective methods and mechanisms and develop

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1/ Cf. Girvan, N., Corporate Imperialism, 1976, p. 180ff.;
Agrawala, S. K., Indian Journal of International Law 17, 1977, 261.

2/ Cf. UN GA-Resolutions 3201, 3202, 3281; Lima Declaration and Plan of Action.

through concrete institutional and legal measures the rather broad new principles articulated, i.e. to bring into motion a process to establish new international legal environment for industrial co-operation.

2. Present Practice and Existing Institutions in International Industrial Development Law.

At present, the design of model instruments (contracts, manuals, negotiating guidelines) is undertaken primarily by the national and international organizations of private business in Western countries. The International Chamber of Commerce (ICC), for example, is active in the areas of insurance contracts, products liability, international tax management, application of competition law to state enterprises, marketing, international arbitration (including technical expertise, maritime arbitration), protection of patents and trademarks, bank guarantees for performance and bidding, financing contracts and contract regulation. The recommendations and model documents elaborated by high-level experts are given effect and disseminated through institutional facilities - such as the ICC's Court of Arbitration - through international, regional and national conferences and training seminars and through regular publication. 1/

These very influential and standard-setting activities are complemented by national industry associations, which as, for example, the Machine Builders Association of the Federal Republic of Germany have issued highly sophisticated guidelines for industrial co-operation, for transfer of technology and for turnkey contracts.

In socialist states, the development towards Uniform Rules for Industrial Co-operation has advanced very far; General Conditions for the Delivery of Goods, for Assembly and Rendering other Technical Services, for Allocation of Maritime Tonnage, for the constitution of international economic organizations and other forms of industrial interaction have been elaborated within the CMEA.

The unequal distribution of information resources with respect to the legal issues surrounding industrial co-operation characterizes also the institutions of academic scholarship and training which are crucial for the international process of opinion-building and concept formation. Academic institutions for the study of international economic law, conferences, publications, research centres are mostly located in industrialized countries and impregnated by the schools of thought prevailing there. Developing countries have less potential, fewer personnel and less financial resources to develop, to co-ordinate and to advocate their alternative legal concepts.

1/ Cf. the ICC's Annual Report for 1978, Paris 1979.

This situation is also prevalent in the area of negotiating assistance to developing countries. Negotiating assistance is rendered through private consultants and through law firms from Western countries, sometimes - as is the case of the US AID - financially supported by governments. Courses in negotiation strategy tailored for developing countries are offered by US universities. Such programmes certainly effect a transfer of negotiating skill. However, it is difficult to view such a North/South transfer of bargaining technology and legal concepts as completely neutral. At least it does not contribute to a self-reliant generation of appropriate bargaining technology and alternative legal concepts through South/South co-operation.

Within the UN system, the UN Commission on International Trade Law (UNCITRAL) is engaged in unification of international trade law issues. It does not, however, take up issues of specific relevance to Third World industrialization. A Secretariat document 1/ states that such issues "are to a great extent of a political and economic nature and cannot be dealt with by such a legal body such as the Commission", which should focus "on subject matters in the area of international trade law". It would seem that UNCITRAL at present, therefore, would not cover the task of promoting the evolution of a New International Industrial Development Law. However, UNCITRAL's expertise in trade law and arbitration could be central for the present proposal.

The UN Centre on Transnational Corporations (CTC) is rendering advisory services to host states for bargaining purposes and it has on its work programme the collection of "contracts and agreements". The CTC focuses on economic analysis and on the establishment of a comprehensive computerized information system on TNCs. 2/ Its mandate requires the CTC to focus on transnational corporations, which would seem to exclude state enterprises and middle- and small-scale enterprises from its field of interest.

Some specialized agencies - particularly WIPO - and other UN bodies (UNCTAD, Regional Economic Commissions, particularly ECE) have also touched upon legal issues of industrial co-operation, but more in a passing form. UNESCO has a programme on developing "authentic legal concepts" for endogenous development, but not oriented at international industrial co-operation. UNIDO has elaborated a number of basic manuals on contracting for development 3/ which are complemented by the Manual for

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1/ A/CN.9/171, p. 22, May 1979;

2/ See, however, the analysis of investment agreements contained in: Transnational Co-operations in World Development: A Re-Examination, E/C.10/38;

3/ Industrial Joint Venture Agreements in Developing Countries, 1972; Subcontracting for Modernizing Economies, 1974; Contract Planning and Organization, 1974; Guidelines for Contracting for Industrial Projects in Developing Countries, 1975.

the Preparation of Industrial Feasibility Studies (1978). With n its System of Consultations, UNIDO has recently advanced from the manual-stage to elaborating a very complex full-text model contract for the construction of fertilizer plants (1979).

Apart from the UN syster, the Commonwealth Secretariat which is providing negotiating assistance to member countries and the Afro-Asian Legal Consultative Committee should be mentioned. This Secretariat is active in the evolution of legal instruments and institutions - particularly in arbitration - reflecting the legal culture and interests of developing countries. With both organizations, particularly the latter, the proposed body would have to maintain close ties.

From the survey of existing instiutions and present practice it appears that no one institution exists which has as its task to focus on efforts of promoting in a co-ordinated and concentrated way the evolution of a New International Industrial Development Law. Efforts within the UN system appear fragmented and lack a joint, concentrated effort and a common underlying guiding philosophy. Developing countries have at present small potential to develop, to co-ordinate and to advocate their alternative legal concepts and to elaborate and disseminate alternative model instruments of the highly persuasive and effective character effected through the existing institutions of the industrialized countries' business community. As has been stated by UNESCO on a more general level [1] there is a need to provide an alternative and countervailing information-network for a legal process which is more responsive to Third World industrialization.

3. The Proposal for a Commission for International Industrial Development Law.

From the analysis above, it would seem necessary to concentrate and focus the hitherto fragmented efforts to provide legal instruments and concepts more responsive to Third World industrial development. It is proposed that a Commission for International Industrial Development Law is set up for this purpose. The Commission should be a focal point, a catalyst in the communicative process of opinion-building and consensus-making for a New International Industrial Development Law. To the extent the presently existing information machinery of international economic law is geared primarily to the attitudes and interests of industrialized countries, the Commission's task would be to contribute to provide a more balanced information machinery. It would constitute a meeting ground for global fact-finding, opinion-building and consensus-making, but also countervail the effective efforts of national and international industry associations to influence international commercial practice.

The proposed Commission should focus relatively little on formal codifications, as this task should better be left with the existing legal UN bodies. Also, a too

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1/ Cf. the report of the UNESCO Director General to the 1976 Nairobi Conference of UNESCO, Doc. 19/C 87.

early emphasis on international codification would tend to freeze and polarize positions and thus be an obstacle for an active process of consensus-building. Information and the design of non-binding model instruments for the respective areas of industrial co-operation should instead be in the centre of the Commission's activities. The Commission should concentrate on developing and supplying concrete substance and argument to alternative legal concepts where there are not well established support institutions in industrialized countries, on evaluating and disseminating relevant information on the international practice of industrial contracting and on assisting negotiations for guidelines and recommendations in the area of International Industrial Development Law.

The work programme of the Commission should relate to the promotion of a New International Industrial Development Law, particularly in the following areas:

(1) The design of model instruments for project co-operation: of contracting guidelines, of negotiating manuals and of model contracts in co-operation with other competent bodies in the global UN system.

This responsibility could focus specifically on the extension of industrial performance guarantees and a corresponding system of regional insurance, on new forms of marketing co-operation (marketing joint ventures, buy-back arrangements) to facilitate the access of products from industrial co-operation to industrialized countries, on new forms for long-term industrial co-operation agreements, and on new and improved forms of investment incentives.

(2) The provision of negotiating assistance to developing countries, with special emphasis for methods of collective bargaining. The prime objective of such a programme should be to set into motion a communicative process among developing countries to generate appropriate concepts and instruments of bargaining.

(3) The design of non-binding mechanisms of control for foreign enterprises in industrial co-operation. Here, the design of such instruments as model corporate codes for the protection of minorities and creditors, to secure a maximum autonomy for the national subsidiary of a world-wide operating transnational corporation could be considered as technical assistance to less experienced host states.

(4) The design of model administrative procedures to increase the speed, the efficiency and the concentration of administrative licensing of industrial co-operation activities.

(5) Collection, evaluation, information-dissemination and eventually the design of recommendations and model instruments for an extended use of inter-governmental agreements for industrial co-operation.

(6) Study and design of regional industrial investment insurance schemes and respective insurance contracts as a method of collective self-reliance to improve South/South industrial co-operation based on the model of the Inter-Arab Investment Guarantee Corporation.

(7) Study and design of investment guarantee agreements on a joint regional basis as an instrument of collective self-reliance in financing. 1/

(8) The preparation and design of a regional corporate statute for regional industrial joint enterprises in co-operation with the Regional Economic Commissions. Such a statute would - based on experiences with the Andean Pacts "empresas multinacionales", the CMEA's "International Economic Organizations" and the EC's "Societas Europeae" - provide for preferential treatment for regional joint enterprises. The statute's function would be to compensate the inherent weaknesses of regional joint enterprises vis-à-vis transnational corporations; accordingly, it would be open only to enterprises belonging to the member countries of a region in the material sense. The project of an international corporate statute for regional joint enterprises could be linked to the promotion of legal harmonization as a mechanism to facilitate regional industrial co-operation and integration.

(9) The preparation of studies on evolving legal issues of International Industrial Development Law with particular emphasis on presenting, elaborating and disseminating alternative legal concepts responsive to the requirements of Third World industrial development. In this context, training seminars and specialized post-graduate programmes, conferences, international law journals specialized in industrial development law and a co-ordinating centre acting for formal and informal processes of information-sharing and opinion-building are necessary. A close co-operation with UNITAR and the UN university system is warranted.

1/ Cf. UNIDO, Industry 2000 - New Perspectives, op.cit. chapter 6.6.5, p. 175.