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Investment Rulemaking
Geneva, 28–29 June 2007

**REPORT OF THE EXPERT MEETING ON DEVELOPMENT
IMPLICATIONS OF INTERNATIONAL INVESTMENT
RULEMAKING**

Held at the Palais des Nations, Geneva,
from 28 to 29 June 2007

Contents

	Page
I. Chairperson's summary.....	2
II. Organizational matters.....	7
Annex	
Attendance	8

Chapter I

CHAIRPERSON'S SUMMARY

1. At its eleventh session, held in March 2007, the Commission on Investment, Technology and Related Financial Issues confirmed that UNCTAD should serve as the key focal point in the United Nations system for dealing with matters related to international investment agreements (IIAs), and continue to provide the forum to advance understanding of issues related to those agreements and their development dimension, with the involvement of all relevant stakeholders and particular consideration of the needs of least developed countries. Against that background, the Trade and Development Board agreed at its forty-first session executive session, held from 18 to 20 April 2007, that the Commission on Investment, Technology and Related Financial Issues should convene two expert meetings on investment-related issues, the first one to be held on 28 and 29 June 2007 on the development implications of international investment rulemaking. This note summarizes the discussions at that meeting.

A. Opening statements

2. In his opening remarks, the Director of the Division on Investment, Technology and Enterprise Development (DITE) noted that the evolution of the international investment rules system is a dynamic process that poses new challenges for countries at the beginning of the 21st century. These include policy coherence, the balancing of private and public interests in matters relating to IIAs, and the development dimension, all of which are aimed at ensuring that developing countries retain sufficient regulatory autonomy to pursue their economic and social development goals. The purpose of the meeting was, first, to take stock of recent trends in, and characteristics of, the existing universe of IIAs; second, to identify the most significant concerns and development-related challenges associated with that universe; and, third, to begin exploring possible ways and means of addressing those challenges.

3. The Head of the Policies and Capacity-Building Branch of DITE explained the above-mentioned matters in greater detail. He provided an overview of the recent trends in international investment rulemaking, its main characteristics and the support role played by UNCTAD. Referring to the continuing growth and complexity of IIAs, the increasing role of developing countries in treaty-making and the increase in the number of investor-State disputes, he described the current IIA universe as highly atomized, multilayered, multifaceted and innovative, with uniformity at its core but increasing variation on the periphery. Finally, he addressed the development implications of those characteristics and noted the need to strengthen developing countries' capacity to deal with the systemic issues resulting from an increasingly complex IIA universe.

4. Thereafter, the meeting discussed – in an informal setting – the three main challenges for international investment rulemaking at the beginning of the 21st century, as identified in the secretariat's background note (TD/B/COM.2/EM.21/2).

B. Session I: Promoting policy coherence

5. At the first session of the meeting, experts emphasized the lack of policy coherence in the IIA universe. This could have the following dimensions: (i) incoherence between a country's IIA network and its domestic economic and development policies; and (ii) incoherence among a country's IIAs. As reasons for that incoherence, the meeting noted,

among others, political pressure – both internal and external – to accept an IIA irrespective of the coherence aspect, lack of awareness of the coherence issue, and lack of coordination between different actors at the national or international level.

6. Developing countries may be compelled to sign incoherent IIAs or ones that are not in line with their development objectives for political reasons that derive from the greater bargaining power of their negotiating partners. IIAs between developed and developing countries are usually based on the models prepared by developed countries. In addition, there may be incoherence in connection with the interpretation of core treaty provisions.

7. Another potential source of incoherence cited by participants was lack of coordination. IIAs, in particular those in the context of free trade agreements, may have been negotiated without proper consultation with investment experts.

8. Participants made various proposals regarding how to address the issue of policy coherence in future international investment rulemaking. More exchange of information, capacity-building, technical assistance, coordination and consensus-building at the multilateral level were identified as possible solutions to the problem.

9. Experts stressed that the strengthening of national expertise and institutional capacity at the national level was needed for better understanding and implementation of IIAs. The positive impact that IIAs can have depends on the quality of the national legal system, including its implementation mechanisms. This requires strong and more trained institutions.

10. Some participants requested the inclusion of a general rule in IIAs addressing the impact of investments on the economic and social development of developing countries. It was suggested that investors be obliged to contribute to the achievement of national development objectives, and the UNCTAD secretariat was called upon to develop proposals in that respect.

11. Experts also discussed the possibility of advancing international consensus-building at the multilateral level. The need to analyse the reasons for the failure of past attempts at the multilateral level was underlined. Participants expressed their support for the idea of a more coordinated approach among countries that would take into account development needs and would contribute to ensuring more coherence. Such an approach should, however, not be mistaken for a renewed attempt to secure multilateral agreement on this matter.

C. Session II: Balancing private and public interests

12. Discussion at the second session centred on issues relating to the balancing of public and private interests in IIAs. First, new treaty language, the use of general treaty exceptions and reforms to investor-State dispute settlement procedures were discussed as ways of strengthening the State's role. Secondly, the question of corporate social responsibility and whether IIAs should include binding obligations on investors was raised. Thirdly, discussion was invited on how IIAs could increase foreign investors' contribution to economic and social development.

13. A number of speakers acknowledged the benefits – for example, transfer of technology and skills – that their countries had derived from inflows of foreign direct investment (FDI). Speakers also outlined foreign investment policy reforms undertaken by their Governments in the last 20 years or so and highlighted various features of IIAs concluded by their countries. A few delegates noted that their countries now pursued IIAs with the twin objectives of seeking investment protection for their capital exporters and pursuing host government interests, in the context of national development strategies.

14. Attention was drawn to the signalling effect that reservations in respect of national treatment commitments had on investors wary of possible future legislative changes, and the disadvantage for some countries resulting from currency convertibility provisions that could be interpreted as indirect expropriation.

15. Experts also discussed existing IIA mechanisms such as exceptions (national security, public order and health), safeguards (particularly in relation to capital transfers) and reservations that would provide greater policy manoeuvrability in certain sectors.

16. This theme was elaborated on in a presentation cataloguing indicators of how States' interests are addressed in IIAs and by jurisprudence and arbitration procedures. It was suggested in the presentation that IIAs contain the following features to take account of such interests: a reference in the preamble to economic development; a conformity clause, as found in some treaties, requiring investments to be consistent with domestic law; exceptions preserving regulatory flexibility; derogation from most-favoured-nation treatment; the balance-of-payments exception to free transfers; and performance requirements. Jurisprudence also takes account of States' interests. This has been the case, for example, with regard to the interpretation of the fair and equitable treatment standard, the principles of national treatment and most-favoured-nation treatment, and the expropriation clause. Some tribunals have held that only development-oriented FDI is protected under an IIA and that investor behaviour has to be taken into account.

17. On the question of including investors' obligations in IIAs, one delegate pointed out the need for caution in the light of potential legal and political hurdles. In particular, if a country's constitution requires that the State not discriminate in economic matters, IIA negotiators should be cautious about imposing on foreign investors obligations not imposed on national investors competing in the same market.

18. A number of delegates expressed concern about imbalances within existing IIAs and the asymmetry in many investment negotiations resulting from the differing economic power of State parties. There was a broadly shared view that IIAs should include provisions that are more balanced. One delegate articulated that concern in a historical context: bilateral investment treaties (BITs) were first used to redress the imbalance faced by investors seeking to enter host countries, and to replace reliance on diplomatic channels for investor protection. He argued that protection was now greater than necessary and that development was not addressed in the operative provisions but was relegated to the preamble of BITs. A more balanced approach would be in the interest of foreign investors because an imbalance in their favour would not be sustainable over a longer period of time.

19. Several delegates queried whether BITs led to increased investment inflows, noting the indirect relationship between IIAs and actual flows of FDI, while others pointed to the confidence-building effect of IIAs in their countries. In addition, participants called for further work to shed light on the relationship mentioned above. The UNCTAD secretariat referred to a forthcoming study on the subject.

20. In a related discussion, a delegate queried the role of BITs and said that some countries (including a few industrialized ones) were now asking themselves whether BITs were the only tool available in international law to govern international investment. Two delegates favoured going beyond discussing how to improve BITs, and considering whether there were alternative solutions for ensuring that FDI flows benefited development.

21. On disputes arising from IIAs, speakers noted the difficulties that sometimes arose in determining whether disputes involved national or international law. The potential for

conflict between domestic legislation and international treaty law was highlighted as a difficult area and an issue for possible further work by UNCTAD.

D. Session III: Enhancing the development dimension of IIAs

22. The third challenge identified at the meeting concerned the strengthening of the development dimension of IIAs and improving capacity-building in developing countries. Experts pointed to the fact that the great majority of IIAs did not deal with development issues, or did so only peripherally. For the most part, IIAs pursued development goals indirectly, namely through the protection of foreign investment in the host country. Participants were invited to discuss what could be done to strengthen the development aspect of IIAs.

23. Another point raised concerned investor–State disputes, which could have significant drawbacks, particularly for developing countries, in terms of high costs, long duration and the damage that proceedings might do to the investor–State relationship. The ensuing discussion focused on the role of alternative methods of dispute resolution as a more “development-friendly” mechanism to resolve disputes, since it might be cheaper, faster, and more protective of the relationship between the foreign investor and the host country than international arbitration. Some participants, however, were concerned that such a mechanism would not necessarily be cheaper or faster than international arbitration.

24. The meeting took note of the use of exceptions and reservations in respect of treaty obligations relating to the protection of national security, public health and the environment. It was pointed out that those exceptions and reservations could be used for development purposes. The issue of proactive home country measures such as increased transparency, capacity-building, provision of investment insurance, encouragement of transfer of technology, easing of informal investment obstacles and the setting up of an institutional mechanism to coordinate investment promotion activities was explored. One delegate noted that development provisions and the interests of developing countries were not easily incorporated into IIAs and that there could be greater emphasis in preambles on development objectives and the provision of technical assistance.

25. The issue of capacity constraints was raised by a number of participants. Least developed countries are particularly affected as they often lack the necessary human and material resources for remaining up to date with the latest trends in IIAs. In addition, the lack of viable databases and statistics on FDI and IIAs may have implications for development in the sense that the less developed countries might find it difficult to effectively monitor their commitments arising from IIAs and their investment flows. In that connection, many participants called on UNCTAD to strengthen its technical assistance and capacity-building programmes. The view was expressed that investment promotion provisions were too weak in IIAs and that there was a need to place the development dimension at the centre of the debate. Experts voiced concern about the inequalities of bargaining power in BIT negotiations between developed and developing countries.

26. Several delegates called on UNCTAD to develop a model BIT to assist developing countries in their negotiations. Other suggestions related to the development of non-binding guidelines or principles concerning best practices in BIT negotiations.

27. Specific suggestions were made by experts to improve the efficiency of developing countries in managing their investment policies and keeping them coherent. UNCTAD was

asked to develop a matrix of FDI-related policies of different countries, as well as to formulate best-practice rules, including on inter-State dispute settlement mechanisms.

28. Some participants raised the issue of performance requirements and incentives, and the need to revisit their impact on development in the context of IIAs. Provisions on corporate social responsibility in IIAs were also discussed as a possible way of strengthening the latter's development dimension.

29. Experts stressed the significant role of national laws on investment, especially with regard to the admission and establishment of foreign investors and the development implications of domestic legislation, which should be reflected in IIAs.

30. In conclusion, there was a broadly shared view that the debate on IIAs should put more emphasis on their development dimension and that UNCTAD would be the appropriate forum for providing more extensive knowledge and discussing newly emerging problems.

Chapter II

ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

31. The Expert Meeting on Development Implications of International Investment Rulemaking was held at the Palais des Nations, Geneva, from 28 to 29 June 2007.

B. Election of officers

(Agenda item 1)

32. At its opening meeting, the Expert Meeting elected the following officers to serve on its bureau:

Chairperson: H.E. Mr. Sergio Florencio (Brazil)
Vice-Chairperson-cum-Rapporteur: Mr. Fredrik Arthur (Norway)

C. Adoption of the agenda

(Agenda item 2)

33. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in document TD/B/COM.2/EM.21/1. The agenda for the meeting was thus as follows:

1. Election of officers
2. Adoption of the agenda
3. Development implications of international investment rulemaking: Stocktaking and challenges
4. Adoption of the report of the meeting

D. Documentation

34. For its consideration of the substantive agenda item, the Expert Meeting had before it a note by the UNCTAD secretariat entitled "International investment rulemaking" (TD/B/COM.2/EM.21/2).

E. Adoption of the report of the meeting

(Agenda item 4)

35. At its closing meeting, the Expert Meeting authorized the Rapporteur to prepare the final report of the meeting under the authority of the Chairperson.

Annex

ATTENDANCE*

1. Experts from the following States members of the Trade and Development Board attended the meeting:

Algeria	Iran (Islamic Republic of)
Argentina	Kyrgyzstan
Austria	Lao People's Democratic Republic
Bolivia	Lesotho
Bosnia and Herzegovina	Malawi
Botswana	Malaysia
Brazil	Mali
Burkina Faso	Mauritania
Burundi	Mexico
Cameroon	Morocco
Canada	Nepal
Chile	Nicaragua
China	Niger
Cuba	Norway
Democratic Republic of the Congo	Pakistan
Djibouti	Portugal
Ecuador	Qatar
Egypt	Republic of Korea
El Salvador	Russian Federation
Finland	Saudi Arabia
France	Sudan
Germany	Switzerland
Greece	The former Yugoslav Republic of
Guatemala	Macedonia
Honduras	Timor-Leste
India	United States of America
Indonesia	Venezuela (Bolivarian Republic of)
	Zimbabwe

2. The following intergovernmental organizations were represented at the meeting:

African Union
Common Market for Eastern and Southern Africa
European Commission
Inter-American Development Bank
Organisation internationale de la francophonie
South Centre

* For the list of participants, see TD/B/COM.2/EM.21/INF.1

3. The following non-governmental organizations attended the meeting:

General Category

International Centre for Trade and Sustainable Development

Organisation camerounaise de promotion de la coopération économique internationale

Special Category

Center for International Environmental Law
