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Report of the Multi-year Expert Meeting on Investment for Development on its fourth session

Held at the Palais des Nations, Geneva, from 5 to 6 December 2011

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I. Chair's summary

Making investment contribute to development: the policy perspective

(Agenda item 3)

1. The fourth and last session of the Multi-Year Expert Meeting on Investment for Development was opened on Monday, 5 December 2011, by Mr. James Zhan, Director of the Division on Investment and Enterprise of UNCTAD. The meeting discussed the findings of the previous three meetings from the policy perspective, with an emphasis on making investment contribute to development.

A. Opening statements

2. In his opening remarks, the Secretary-General of UNCTAD said that the ongoing financial crisis and the serious risk of a widespread economic downturn had created an additional need for private productive investment in order to rescue the global economy from a prolonged depression and facilitate a sustained recovery. Companies had the necessary cash reserves as well as the willingness to invest and governments were encouraged to create and maintain a policy environment that was favourable to investors and conducive to sustainable development. Indeed, governments were increasingly taking action to promote investment and development, while also tackling fundamental problems of humankind such as food crises and climate change. The renewed interest in industrial policies and industrial development strategies in developing and developed countries alike was highlighted. The Secretary-General further pointed out that policymakers faced complex and interconnected policy challenges at the national and international levels, including (a) the issue of how to best integrate the national and international investment policy framework into an overall development strategy, (b) the need to develop strategies to promote investment that served sustainable development purposes and (c) the challenge of rebalancing the rights and obligations of foreign investors without resorting to investment protectionism. He advocated finding a tried and tested tool to measure the development impact of investment policies with a view to ensuring policy effectiveness and assisting policymakers in their current efforts.

3. Introducing the Note by the UNCTAD secretariat contained in document TD/B/C.II/MEM.3/11, the Director of the Division on Investment and Enterprise said that foreign direct investment (FDI) had made a moderate recovery in 2010 and 2011 and FDI inflows and outflows had risen in developing and transition economies. As pointed out by the Secretary-General, investment policymaking was marked by a trend towards investment liberalization and promotion, while the risk of investment protectionism remained. States were using their regulatory powers in the economy to set up industrial policies as they sought to steer economic development and regulate markets. This, however, raised challenges for national policymaking that related to difficulties in identifying the industries for promotion, in choosing among different promotion policies and in ensuring the favourable interaction between investment policies and enterprise development and in preventing FDI restrictions. It was necessary to make investment work for sustainable development as the overarching challenge for both national and international policymaking. At the international level, the regime of international investment agreements (IIAs) was becoming ever more complex amidst a growing number of IIAs and investment disputes. To tackle the systemic challenges this posed for policymakers, he advocated (a) better equipping the IIA regime to promote investment for sustainable development, (b) rebalancing the rights and obligations of investors with regard to States and (c) encouraging

multilateral engagement and joint initiatives to share experiences and discuss best practices in addressing the aforementioned challenges.

B. Integrating investment policies into overall development strategies

4. The first session centred on the point that industrial development strategies were key to economic and social progress in developing countries. However, it was acknowledged that such strategies were complex and required a coherent and inclusive policy approach in many policy areas such as trade, investment, technology, intellectual property, competition, taxation, labour, the environment and infrastructure development. Many experts emphasized that ad-hoc policies might not be adequate and that the business strategies of companies should ideally match the industrial development strategies of countries in order to create synergies.

5. It was further noted that investment policies were an integral part of industrial development strategies. Two policy areas stood out, as they reflected the close interaction between those strategies and investment policies: industrial policies and enterprise development. Many delegates stressed that their countries promoted specific industries. They suggested that such “picking -the-winner” strategies could be successful if the industries had a comparative (actual or potential) advantage, which governments sought to exploit. These advantages could be based on lower labour costs or specific skills, for example. Experts suggested that governments might wish to promote foreign investment in specific industries to further develop these advantages.

6. Besides direct investment, experts identified an increasing trend to build upon advantages that were relevant for non-equity modes of international production, such as contract manufacturing, service outsourcing, franchising or contract farming. One expert explained that both governments and business associations had an important role to play in laying the groundwork that would enable such forms of business cooperation to prosper and to establish best practices. Smarter financing was signalled as crucial, as credit institutions and borrowers should become informed about the financial situation of the partners they chose.

7. Participants stressed that the ultimate goal of investment policies was to integrate domestic companies better into regional or global value chains and to make them move up the chain through constant learning and upgrading. Some experts argued that, to be successful, governments should have clear objectives rather than a purely defensive policy towards foreign investment. An appropriate institutional set-up was also important. One expert emphasized the risk of governments overlooking the potential productivity gains related to foreign investments.

8. The discussions revealed that countries had different investment needs and priorities. For instance, speakers emphasized the importance of investment in infrastructure and logistics, in particular in rural areas and in the context of migration; investments in information technology, biotechnology and renewable energy were important as well. In some cases, these priorities were endorsed by national development plans. There was also a call to move towards a green economy and a need to review existing investment policies to facilitate a smooth transition thereto.

9. Experts also said that industrial policies could include elements of restrictions on foreign investment, for example, to protect infant industries, national champions or politically sensitive industries. There was a risk of such policies slipping into investment protectionism. More international cooperation could help to avoid beggar-thy-neighbour policies and create synergies through joint industrial projects. One speaker said that a greater focus on cluster policies that brought together foreign and domestic companies

could help prevent protectionism. In addition, incentives for special economic zones could help prevent some of the trade-offs involved in “picking the winner”.

10. Discussion was also devoted to enterprise and skill development, stressing its crucial importance in ensuring industrial and sustainable development and deriving benefits from FDI. Without sufficient local capacities, foreign investment would not flow in; at the same time, foreign investment could help upgrade and develop domestic capacities. Participants agreed that governments had an active role to play in providing education and training, as well as access to finance and broadband internet connectivity to build up local capacities and to develop entrepreneurship, as underlined by country examples from Asia. A comprehensive entrepreneurship policy framework that promoted absorptive capacity-building and built synergies between investment and enterprise policies could be helpful, as well.

11. Experts noted that local capacity-building was crucial at all stages of the value chain – from farming and simple manufacturing to more sophisticated activities. Constant upgrading of existing capacities was also vital in order to move up to higher stages of the global value chain when countries lost their advantage of low labour cost. Capacity-building helped local firms become entrepreneurs in their own right. This increasingly included strategies for promoting outward investment.

12. Encouraging such investment could facilitate the acquisition of technology and know-how from abroad, and access to the global networks of an acquired company.

C. Promotion vs. regulation: finding the “right” balance for investment policy

13. Experts observed a general trend towards a stronger involvement of the State in the economy in recent years. This was due not only to the reaction to the ongoing financial and economic crisis as governments sought to help the economy get back on track, but also to a move towards increased sustainable economic development. This trend was marked by a rebalancing of the rights and obligations of investors with regard to the State. Policy areas frequently mentioned in the meeting included environmental and social issues, taxation, and sector- and industry-specific regulation, for instance, in agricultural production or financial services. In this context, some experts acknowledged that UNCTAD’s collection of national policy changes was very useful. They underlined the importance of UNCTAD’s work for policymakers, academia and civil society, and asked the secretariat for a more detailed discussion of the data.

14. Finding the right balance between investment promotion or liberalization and investment regulation or restriction was not an easy task. On the one hand, more regulation might be needed in the light of increasing environmental and social concerns and the focus on sustainable development. One expert indicated that more research needed to be done in the area of sustainable investment. It was also noted that a less welcoming investment environment did not automatically imply increased protectionism. On the other hand, too much regulation could negatively affect a country’s attractiveness as an investment destination. Experts agreed that it was important to keep in mind that regulation did not necessarily mean placing new constraints on investors, for regulation provided clarity, transparency, security and predictability. A stable, predictable legal framework for investments was essential.

15. Another challenge was striking the right balance in large-scale investment contracts between States and private investors, including in public-private partnerships. For example, developing countries might not have enough bargaining power and expertise to secure a fair deal in these contracts. One expert, noting a negative experience with such partnerships,

stressed that developing countries needed support to set up more balanced contracts with an equal distribution of benefits between the State and the investor. In this regard, the principles for responsible contracts (A/HRC/17/31/Add.3) played a key role, as they could help preserve policy space in such contracts, in particular with respect to the bona fide application of domestic laws to enforce human rights.

16. Many participants said that national development plans could be used to ensure that foreign investment contributed to sustainable development and that investment promotion strategies focused on environmentally and socially responsible investment. Many experts highlighted the importance of special policy guidelines on how to deal with investment and of indicators measuring the impact of foreign investment on the economy.

17. Some experts were of the opinion that investment policies should include better linkages between the public and private sector and that there was often a need to further diversify the economy by moving away from raw material sectors to higher value-added modes of production. Speculative investments that did not aim to establish a lasting relationship in the host country should not be promoted.

18. Experts said that the issue of balancing rights and obligations had gained new importance in negotiating international investment agreements. There was already a move towards giving greater weight to the right to regulate in these treaties. In this respect, experts stressed the growing role of emerging economies as outward investors. In this role, they were likely to put more emphasis on securing the sufficient protection of their investors abroad. Whether or not to grant foreign investors establishment rights in investment treaties was also a critical issue.

19. The role of corporate social responsibility was also discussed. As one expert pointed out, it could serve as an important external benchmark for contracts between States and private investors. The rapid proliferation of corporate social responsibility codes in recent years was an encouraging sign, but more could be done, for example, by improving the monitoring of compliance with these codes and working towards a greater harmonization of their substantive content.

D. Strengthening the development dimension of international investment agreements

20. The meeting discussed the systemic and substantial challenges that the international investment regime posed for negotiators, policymakers and other stakeholders today. Participants underlined the need for greater transparency, legitimacy, coherence and consistency in international investment policymaking. Many experts and delegates highlighted the importance of joining forces and sharing experiences and best practices so as to make the international investment regime work better for sustainable development.

21. Numerous participants raised concerns regarding the current system of investor-State dispute settlement (ISDS). References were made to a number of recently initiated cases that had a significant public policy dimension. In response, some countries had recently taken a more cautious approach towards ISDS provisions in IIAs. Some delegates stressed the need to prevent investment disputes and to encourage their settlement through domestic courts and alternative forms of dispute resolution. One participant recalled that the current ISDS system had not always been beneficial to investors, since investors won less than 50 per cent of the disputes overall. Other participants underlined the value of IIAs as an essential element of a rules-based regime.

22. In a discussion on how to achieve a more coherent, predictable and balanced interpretation of IIAs by arbitral tribunals, a number of speakers said it was necessary to ensure that arbitrators interpreted IIA provisions in conjunction with each other, not separately, and drew on other sources of international law with a view to avoiding unilateral and subjective decisions. Provisions of those agreements should not be read in isolation from their broader context. Several experts suggested that tribunals should use the Vienna Convention on the Law of Treaties as a guiding source, which would allow to take into account international environmental and labour law. The choice of arbitrators was also important. Appointing arbitrators who were sensitive to States' public policy interests could help achieve more balanced outcomes in ISDS. Some experts further suggested that an institution similar to the Appellate Body of the World Trade Organization could prove useful in the context of international investment law.

23. How to ensure that IIAs granted proper policy space, while supporting efforts to attract investment and keeping an open investment policy framework, was a cross-cutting issue addressed by many delegates and experts. States not only had the right but the duty to regulate in the public interest; for example, they were bound to protect human rights, the environment and public health. Several delegates requested that regulation in the public interest should not be regarded as a violation of obligations under IIAs. Attention was also drawn to the complexity of the interaction between international and national policies.

24. A number of participants discussed how future treaties could be designed to more effectively foster sustainable development. Several stressed that treaty provisions should be more carefully drafted. Drafting an IIA's definition of the investment clause to exclude speculative forms of investment or, more specifically, investment in government bonds, was mentioned as an example. Some participants raised the question of how to address sovereign wealth funds and State-owned entities. A number of delegates expressed their countries' intentions to include references – for example, in the preamble, in the substantive treaty provisions or in a separate chapter – to sustainable development in future IIAs.

25. Some countries were taking innovative approaches to IIA policymaking; others were currently reviewing their model investment treaty and evaluating the impact of IIAs. Many delegates emphasized that such reviews were part of a larger trend across countries and should not be perceived as aiming to create obstacles to foreign investment. Instead, the reviews served to strengthen the transparency, predictability and coherence of a country's investment policy and to embed it in a broader sustainable development strategy. Several delegates stressed that such reviews were undertaken through an open and inclusive process. One participant recommended that lessons for rebalancing IIAs should be drawn from the revision of the United States 2004 model bilateral investment treaty. Regional, development-centred IIA initiatives, such as the Pacific Alliance in Latin America and the Southern African Development Community in Africa, were also discussed.

26. Regarding deliberations on the good-governance enhancing function of IIAs, there was a call to make IIA deliberations less technocratic, more open, transparent and development-centred. This was understood to involve multiple stakeholders, for example, foreign and domestic investors, and other groups. Some participants pointed out that coordination among a country's government ministries throughout the decision-making process leading to the initiation of IIA negotiations, including the systematic assessment of potential costs and benefits, was crucial.

27. With a view to moving beyond establishing solely investor rights in IIAs, several participants suggested tangible steps to encourage adequate corporate contributions to sustainable development. One expert proposed annexing non-binding instruments on investor conduct to IIAs, for example, the so-called Ruggie Principles or the *OECD Guidelines for Multinational Enterprises*. Another expert suggested the inclusion in IIAs of elements of accountability, such as monitoring and the assessment of the impact of IIAs on

FDI flows and sustainable development. Some considered the domestic regulatory framework to be the appropriate level for introducing and implementing investor obligations. Others suggested that IIAs should foster investors' compliance with domestic laws by stating that investors involved in illegal activities such as corruption or drugs and arms trafficking would be denied IIA protection.

28. Capacity constraints in the negotiation of IIAs were an issue of concern for many delegates. Some referred to asymmetries in the negotiation power between developed and developing countries. Many delegates expressed their gratitude for the capacity-building assistance provided by UNCTAD and asked the secretariat to further expand work in that area. There was consensus that more capacity-building efforts were essential for countries to adequately respond to current challenges, particularly with a view to enabling developing countries to (re-)negotiate IIAs, settle disputes and pay justice to sustainable development issues.

E. Conclusions: the way forward

29. The discussion focused on several core elements for future investment policymaking and experts agreed that sustainable development implications would play a crucial role in this context. There was agreement that investment policymaking at the national and international levels should be incorporated in countries' overall development strategies and that this would relate to both inward and outward investment.

30. Participants agreed that foreign investment and IIAs involved both costs and benefits. Several experts emphasized that the IIA regime was a strong, rules-based regime, noting the importance of ISDS in this respect. However, it was also necessary to enhance the development dimension of IIAs, to rebalance IIAs and to ensure that the current IIA regime worked better for sustainable development. UNCTAD expertise and capacity was called upon in several regards.

31. Continuing capacity-building and technical assistance for the negotiation and re-negotiation of IIAs and support in the conduct of IIA reviews, which were currently taking place at many levels and in many instances, were crucial at a time when treaty making continued at a rapid pace. Similarly, there was a call for enhanced ISDS assistance, including through legal advice offered by an advisory facility and assistance in the context of dispute prevention and alternative methods for resolving disputes. One representative requested additional training courses, including on non-typical issues and for non-typical audiences such as (a) international law and development for IIA arbitrators; (b) IIA issues for domestic judges, including for judges working on constitutional issues; or (c) development aspects of investment for the private sector. Experts also called upon UNCTAD to foster transparency by monitoring national and international policy developments, making investment decisions and other relevant documents available to the public, and building on and improving its databases on national and international policies. Finally, further investment policy reviews and investment promotion and facilitation work would be required.

32. There was a strong call upon UNCTAD to continue developing its innovative, cutting edge and demand-driven research agenda to help answer some of the most pressing questions investment policymakers faced today. Further work on policy analysis and research, including on issues related to rebalancing and fostering the sustainable development dimension in IIAs, so as to offer sophisticated and practical solutions for policymakers, was important. One representative suggested that UNCTAD develop a comprehensive policy framework on investment for sustainable development, covering both the national and international dimensions of policymaking. Moreover, fostering country-level research, including by assisting academia through networks such as the IIA

network of universities and research institutions and by sponsoring research responding to the specific needs of individual countries, was also desirable.

33. Strengthening multilateral cooperation, including by building consensus to address the challenges arising from the current “spaghetti bowl” of IIAs was considered another important aspect. Many participants expressed the need for multilateral approaches to international investment rulemaking so as to collectively make sense of the existing regime and make it work for development. This could be done by exchanging experiences and lessons learned, and through legal and policy analysis. One participant recalled that guidelines and principles for national and international investment policymaking for sustainable development, as developed through UNCTAD research and policy analysis, could be useful in this regard. Finally, experts noted that the thirteenth session of the United Nations Conference on Trade and Development, to be held in Doha in 2012, and the World Investment Forum 2012 would provide important opportunities for further consensus-building in this area.

II. Organizational matters

A. Election of officers

(Agenda item 1)

34. At its opening plenary meeting, on Monday, 5 December 2011, the multi-year expert meeting elected the following officers:

Chair: Mr. Luzius Wasescha (Switzerland)

Vice-Chair-cum-Rapporteur: Mr. Wamkele Mene (South Africa)

B. Adoption of the agenda

(Agenda item 2)

35. Also at its opening plenary meeting, the multi-year expert meeting adopted the provisional agenda for the session (contained in document TD/B/C.II/MEM.3/10). The agenda was thus as follows:

1. Election of officers
2. Adoption of the agenda
3. Making investment contribute to development: the policy perspective
4. Report of the meeting

C. Report of the meeting

(Agenda item 4)

36. At its closing plenary meeting, on Tuesday, 6 December 2011, the multi-year expert meeting agreed that the Chair should summarize the discussions.

37. Also at its closing plenary meeting, the multi-year expert meeting authorized the Vice-Chair-cum-Rapporteur, under the authority of the Chair, to finalize the report after the conclusion of the meeting.

Annex

Attendance*

1. Representatives of the following States members attended the expert meeting:

Angola	Italy
Argentina	Japan
Austria	Kuwait
Bangladesh	Madagascar
Belarus	Malaysia
Benin	Mauritius
Brazil	Mexico
Cameroon	Nepal
Canada	Netherlands
China	Nigeria
Colombia	Peru
Côte d'Ivoire	Philippines
Cuba	Russian Federation
Czech Republic	Saudi Arabia
Dominican Republic	Serbia
Ecuador	South Africa
Egypt	Sri Lanka
El Salvador	Sudan
Ethiopia	Switzerland
France	Tajikistan
Germany	Thailand
Guinea	Turkey
Haiti	United States of America
Hungary	Uzbekistan
India	Viet Nam
Iran (Islamic Republic of)	Zimbabwe
Iraq	

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

African, Caribbean and Pacific (ACP) Group of States
 Caribbean Community (CARICOM)
 Cooperation Council for the Arab States of the Gulf
 European Union
 South Centre

* For the list of participants, see TD/B/C.II/MEM.3/Inf.4.

3. The following specialized agencies or related organizations were represented at the session:

International Labour Office (ILO)
International Trade Centre (ITC)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
United Nations Environment Programme (UNEP)
World Bank Group
World Health Organization (WHO)
World Trade Organization (WTO)

4. The following non-governmental organizations were represented at the session:

General category

Consumer Unity & Trust Society (CUTS International)
Ingénieurs du monde
International Institute for Sustainable Development (IISD)

In the process of affiliation

Centre for Research on Multinational Corporations (SOMO)

5. The following guest speakers attended the session:

Mr. Karl **Sauvant**, Executive Director, Vale Columbia Center on Sustainable International Investment, Columbia Law School – Earth Institute, Columbia University
Mr. Stephen **Gelb**, Professor of Economics, University of Johannesburg
Mr. Marino **Baldi**, Senior Adviser, European Free Trade Association (EFTA) Secretariat, Geneva
Mr. Brian C. **Smart**, Director General, British Franchise Association
Ms. Ana Teresa **Tavares-Lehmann**, Professor, Professor of International Economics, University of Porto
Mr. Roberto **Echandi**, Director of the Programme on International Investment, World Trade Institute (WTI)
Mr. Pierre **Sauvé**, Deputy Managing Director and Director of Studies, World Trade Institute (WTI)
Mr. Stephen **Young**, Research Professor of International Business, University of Glasgow
Ms. Andrea **Shemberg**, Former Legal Adviser to the Special Representative of the United Nations Secretary-General for Business and Human Rights
Ms. Laurence **Boisson de Chazournes**, Professor of International Law, University of Geneva
Ms. Gabrielle **Marceau**, University of Geneva
Mr. Georges **Abi-Saab**, Emeritus Professor of International Law, Graduate Institute of International and Development Studies
Mr. Stephan **Schill**, Senior Research Fellow, Max Planck Institute
Ms. Rabab **Yasseen**, Attorney, Mentha and Partners