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ISSUES RELATED TO THE DEVELOPMENT DIMENSION OF INTERNATIONAL INVESTMENT AGREEMENTS

Note by the UNCTAD secretariat

FOREWORD

1. UNCTAD's efforts at identifying the development dimension of international investment agreements are still at an early stage. Pursuant to the Midrand mandate, which called on UNCTAD to identify and analyse the implications for development of issues relevant to a possible multilateral framework on investment (MFI),[1] the secretariat has prepared this note with the objective of seeking guidance from the Commission in order to refine and develop further its work in this area.

2. The note recalls some relevant elements of discussions carried out so far in the Commission and in its expert meetings and then outlines basic approaches for dealing with issues related to the development friendliness of international investment frameworks.

EXPERT MEETINGS: MAIN ELEMENTS OF THE DISCUSSIONS

3. Two expert meetings have been held so far: the first,[2] held on 28-30 May 1997, dealt with bilateral investment treaties (BITs), their development dimension and implications for a possible MFI; the second took place on 1-3 April 1998 and focused on regional and multilateral investment agreements.[3] Both expert meetings were convened by the Commission on Investment, Technology and Related Financial Issues to examine and review existing agreements on investment and their development dimensions.

4. The rationale for starting with an examination of BITs was that these treaties have been concluded in great numbers over the past 40 years, and especially in the past 10 years; in fact, more than half of the more than 1,300 BITs in existence at the end of 1996 had been concluded since 1990. Moreover, although BITs were initially concluded mostly between developed and developing countries at the suggestion of developed countries, such treaties are now increasingly being negotiated between developing countries and between these countries and economies in transition. Bilateral investment treaties therefore constitute an international instrument that is familiar to most countries and thus appeared to be a natural point of departure for the exercise.

5. The experience of countries with BITs varies considerably. It is generally agreed that, although BITs are only one factor contributing to the creation of a favourable investment climate, they are nevertheless important as confidence–building signals to foreign investors. Other more important determinants in attracting investment include the size and growth of the market, along with the political and macroeconomic stability of the host country, and the availability and cost of resources (such as labour, skills and, increasingly, created assets such as innovatory capability and patents), preferably coupled with the existence of an adequate physical and business infrastructure.[4]

6. The second expert meeting focused on regional and multilateral instruments and, in particular, their objectives and the question of the definition of investment in existing investment agreements. As regards objectives, it was considered that development is an important objective of international investment agreements. How this could be achieved remained a critical issue. It was felt that

further work could be undertaken to elucidate development dimensions that need to be taken into consideration when formulating investment agreements. It was furthermore suggested that a stable, transparent and predictable investment framework, providing security for investments, helps to attract investment flows which could contribute to employment, technology transfer, the strengthening of domestic capacities and the improvement of efficiency and competitiveness.

DEVELOPMENT–FRIENDLINESS OF INVESTMENT AGREEMENTS

7. Development is the fundamental objective of developing country Governments and of the international community as a whole. To what extent and how this objective can be served by international agreements that address investment issues is a matter that is currently attracting considerable attention. If international agreements can, indeed, be helpful in this respect, an important issue is how the concerns of the principal actors in this regard -- host countries, home countries, investors -- can be addressed in a mutually beneficial manner. To a large extent, an investment-friendly environment is also a development-friendly environment. At the same time, it is important to ensure that the developmental needs and concerns of host developing countries are centrally addressed by any investment agreement so that it is both development and investment friendly in its orientation.

8. There are various approaches that could be taken in this respect, and they are not necessarily mutually exclusive. The ones that are outlined below are illustrations:

- One approach is to establish a catalogue of development-friendly elements of international investment agreements[5] . Such a catalogue could be a checklist of elements -- without establishing priorities or a hierarchy among them -- of issues and concerns that can be consulted when negotiating international investment agreements, be they at the bilateral, regional, plurilateral or multilateral levels. Such a catalogue would be compiled to make sure that, when negotiating agreements, negotiators have, indeed, considered all relevant issues. Given the congruence, to a large extent between an investment-friendly environment and a development-friendly environment, such a catalogue would therefore include virtually all issues that need to be considered in the context of investment agreements. A more elaborate version of this approach would involve analysis each of these elements in greater detail and determining how they contribute -- singly or collectively -- to the development objectives of host countries. Indeed, this kind of analysis may be necessary because, in practice, it is possible that one element would counteract another.

- A second approach would be to identify a set of development objectives that international investment agreements should serve. Such objectives could include, for example, securing a stable, predictable and transparent investment climate; increasing the level and quality of FDI flows; strengthening domestic entrepreneurship; and recognizing the non-discriminatory exercise of governmental regulatory power in pursuing development objectives.

- A third approach could be based on the recognition that not only do the contents (i.e. specific treaty provisions) of investment agreements need to be development-friendly, but their very structure (i.e. their overall design or plan) needs to reflect this objective, as should their implementation (i.e. specific actions by various parties involved). The challenge is, of course, to spell out in operational detail what “structure” means beyond the statement of objectives and to transcribe it into workable formulations that can be implemented, enforced, monitored and, if disputes arise, adjudicated. On the other hand, when it comes to “content”, the catalogue of development-friendly elements, as well as the development objectives, appears relevant.

9. Before work can be moved forward, it is necessary to reflect on whether these approaches are appropriate to the identification of the development–friendliness of international investment agreements or whether there are other approaches that need to be considered. The interrelationships between these approaches also require attention, as each of them seeks to deal, after all, with the same problematique. It goes without saying that the basic questions that permeate the above approaches, individually or collectively, is how to maximize the positive contribution of FDI to development and minimize its possible costs to host countries, and to what extent international investment agreements could contribute to these objectives. For this purpose, it would be useful to examine the concrete experiences of countries with FDI in general and the extent to which international investment agreements have affected the development objective in order to bring empirical evidence to bear on the discussions.

Endnotes

1. *Proceedings of the United Nations Conference on Trade and Development*, Ninth Session, Report and Annexes. United Nations publications, Sales No. E.97.II.D.4.

2. "Report of the Expert Meeting on Existing Agreements on Investment and their Development Dimensions" (Geneva, 28-30 May 1997). TD/B/COM.2/5.

3. "Report of the Expert meeting on Existing regional and Multilateral Investment Agreements and their Development Dimensions" (Geneva, 1-3 April 1998) TD/B/COM.2/11.

4. For an elaboration on the determinants of FDI , see UNCTAD, *World Investment Report 1998* (forthcoming).

5. During the expert meetings and in order to facilitate discussions, the secretariat began to catalogue - on the basis of the discussions - elements that could be used to evaluate the conditions under which international investment agreements could be conducive to economic development. The beginning of such a catalogue of "development-friendly elements" is contained in a very informal and preliminary note that is available to delegations upon request. These elements are not listed in any particular order, and they do not indicate any preference. They are merely a listing of points referred to by experts during the meetings (Informal "Catalogue of criteria for determining the development-friendliness of international investment agreements").