

COMMUNICATION FROM UNCTAD

Reproduced hereunder is the statement made by the observer representative of UNCTAD at the meeting of 13 and 14 June 2001.

Recent work undertaken within
UNCTAD's work programme on international investment agreements

1. Thank you very much for this opportunity to bring you and the Working Group up-to-date on UNCTAD's activities within the work programme on investment policies and international investment agreements since your last session in March 2001. My brief remarks will concentrate on two items: first, the outcome of the Third United Nations Conference on the Least Developed Countries (LDCs), relevant for this area of work; and second, the activities implemented under the purview of our international investment agreements (IIA) work programme, namely the bilateral investment treaties (BITs) facilitation round for Croatia, the currently ongoing intensive training course on issues in IIAs for francophone LDCs in Alexandria, Egypt, and the recently issued IIA paper on *Host Country Operational Measures* (HCOMs).

2. First, the Third United Nations Conference on the LDCs, held in Brussels from 14-20 May 2001. At the Conference a number of concrete deliverables were announced in the area of investment and enterprise development which were supported financially by different donors. These deliverables are aimed at assisting LDCs in enhancing their productive capacity, the bedrock of their sustained economic growth and development and the basis of their expanding trade. Growth in LDCs requires, in addition to official development assistance, enterprise development and especially investment, including foreign investment, in particular of the kind that brings employment, technology, skills, and access to markets and diffuses these assets through backward linkages to host economies. Therefore, the deliverables, which have been developed in consultation with LDCs, reflect UNCTAD's experience of providing technical assistance in the areas of investment and enterprise development, and have benefited from symposia held with LDCs in Oslo (at the end of January 2001) and Bonn (in March 2001). While some of the deliverables complement on-going activities, others relate to activities, which are important to LDCs but have not found reflection in our on-going activities.

3. The various deliverables form part of an *International Investment Initiative for LDCs* announced at the Conference. The Initiative combines the investment-related parts of the Programme of Action negotiated by governments for the Conference with a number of flagship projects that were launched at the time of the Conference because concrete commitments have been obtained. The deliverables comprise two programmatic areas.

- First, attracting foreign direct investment (FDI) and benefiting from it. The heart of this programmatic area is a multi-agency technical assistance programme on *Facilitating FDI in LDCs* by UNCTAD, the World Bank Group (MIGA, FIAS) and UNIDO, which will in a pilot phase include five LDCs. *Investment Policy Reviews* will be undertaken in four to five LDCs and assistance will be extended to a number of LDC investment promotion agencies, including for the purpose of good governance in these institutions. Another programme is assisting LDCs in participating as effectively as possible in discussions and negotiations of IIAs, including intensive training seminars, negotiation of bilateral treaties and double taxation treaties. Two programmes will be implemented together with the International Chamber of Commerce: (i) *Investment Guides* for a number of LDCs; (ii) *Investment Advisory Council* which will bring together senior government and corporate leaders to advice LDC Governments on issues related to investment.
- Second, promoting enterprise development. The key issues here are support for the emergence of small and medium-sized enterprises in LDCs and the promotion of linkages between foreign affiliates of transnational corporations and domestic firms in LDCs. For this purpose, our *Empretec* programme will be implemented in Uganda thus contributing to an Eastern-African enterprise corridor. The link between the investment and enterprise development areas is the *Linkage Promotion Programme* which will be established in LDCs to promote linkages between foreign affiliates and domestic enterprises, paying special attention to the promotion of *women entrepreneurs* and *Empretec* enterprises.

4. Let me now turn to the activities implemented since your last session in March 2001 within our work programme on IIAs. Here, three events are noteworthy.

5. First, UNCTAD has implemented another round of BITs negotiation facilitation events from 19-28 April in Dubrovnik, Croatia, within the framework of the Balkan Stability Pact. This round involved Belarus, Croatia, Latvia, Malta, Moldova and Pakistan, and resulted in 8 BITs. Belarus and Croatia utilized this round to also discuss a general trade agreement. A report on this round of negotiations can be made available. Like earlier rounds, the Croatia event was meant to provide a platform for developing countries to negotiate BITs with other interested countries, and among themselves. UNCTAD does not participate in the negotiations as such.

6. In this context it is noteworthy that 29 BITs negotiated during the round organized for francophone least developed countries (LDCs) that was held in Geneva from 24 January to 3 February 2001 were officially signed during the Third United Nations Conference on the Least Developed Countries in Brussels. The signing ceremony, which took place on 18 May 2001, was presided over by Boutros Boutros-Ghali, Secretary-General of the Organisation internationale de la Francophonie, and Rubens Ricupero, Secretary-General of UNCTAD.

7. Second, the first intensive training course on issues in IIAs for francophone African countries. This course is currently underway in Alexandria, Egypt, in cooperation with Senghor University and l'Agence pour la Francophonie. Scheduled to last until 16 June 2001, the course has brought together 21 participants and speakers from Northern African countries (as well as the People's Republic of Laos). For your information, we have made available (outside at the documents counter) a copy of the programme and curriculum for this course. Please note that similar courses for anglophone Asia and for anglophone Africa are currently in their planning stage, with the Asian course scheduled to take place in November this year.

8. Third, UNCTAD has since your last meeting finalized work on the issues paper on *Host Country Operational Measures*. As this subject is relevant to your current discussion, allow me to elaborate on its content in more detail.

9. The paper deals with the vast array of measures implemented by host countries concerning the operation of established foreign affiliates. Covering all aspects of an investment (such as ownership and control, hiring of personnel, procurement of inputs, sales conditions, etc.), these measures (which usually take the form of restrictions or performance requirements) are meant to influence the location and character of FDI with a view to increase its benefits in the light of national objectives and to correct actual or perceived market distortions.

10. Noting that HCOMs have rarely been considered as a separate issue in IIAs, the paper singles out the WTO Agreement on TRIMs as the only existing agreement specifically dealing with a number of HCOMs. It notes that the more recent IIAs that regulate HCOMs tend towards the restriction of some of these measures. However, the majority of IIAs, especially most BITs, adopt an approach to investment that does not explicitly address the use of operational restraints as a specific issue on its own.

11. For its analysis, stocktaking and discussion of the development and economic policy considerations, the paper groups HCOMs into three categories and proceeds with discussing them in the context of some of their restrictions at different international levels:

- First, measures that are explicitly prohibited at the multilateral level, i.e. by the TRIMs Agreement. A number of interregional, regional and bilateral agreements also explicitly prohibit the same HCOMs (or, where these agreements are in a draft form, envisage their prohibition). To use a traffic light analogy, these are “red light” HCOMs, i.e. measures that the international community as a whole (or, more precisely, as represented in the WTO) has agreed should not be employed (although not all countries feel comfortable with the implementation of this agreement).
- Second, additional measures that are explicitly prohibited, conditioned or discouraged by interregional, regional or bilateral (but not by multilateral) agreements (or drafts thereof). These are “yellow light” HCOMs in the sense that negotiators of IIAs ought to be aware that some countries (or groups of countries) have indeed prohibited them in some IIAs. Categorising these measures as yellow light HCOMs should not suggest that they are not as legally binding as the red light HCOMs. Indeed both derive from instruments governed by international law, and which, among the parties, create binding legal obligations. The point of emphasis is that the red light HCOMs have, in terms of parties, a wider application.
- And third, all other measures. These are “green light” HCOMs. Such measures are generally not subject to control through IIAs although their use may be subject to other international obligations, e.g. to apply national treatment.

12. The paper suggests that countries negotiating international investment rules in the future need to take into account the TRIMs Agreement. Negotiations should they at all include HCOMs are likely to pay special attention to “yellow light” HCOMs. However, the paper concludes that options go beyond either covering or not covering certain HCOMs. For example, the extent to which certain HCOMs are tied to certain conditions (e.g. incentives) or the legal nature of any coverage (e.g. best-efforts clauses) can introduce some flexibility. In fact, even when it comes to the TRIMs Agreement, the paper identifies various options as to its further development.

13. In all, the paper's analysis shows that the scope for an unconditional use of HCOMs has narrowed over the past two decades. At the same time, the debate remains open as to which, how and under what circumstances HCOMs do or do not contribute to the development process. Ideally, therefore, any such regulation should be preceded by careful study and determination of the contribution by a specific HCOM to the development efforts of developing countries, and how a certain flexibility can be maintained in IIA provisions related to their use in the interest of development.

14. Allow me to close my remarks with a reference to the forthcoming expert group meeting on "International arrangements for transfer of technology: best practices for access to and measures to encourage transfer of technology with a view to capacity-building in developing countries, especially in least developed countries". The meeting, scheduled for 27-29 June 2001, is expected to the coverage of agreements, particularly as regards the spread of provisions on transfer of technology, the effectiveness of their implementation (how are they operationalized?), and possible improvements in terms of what can be done to enhance their impact on transfer of technology. The main questions are how to ensure the effectiveness of international arrangements for transfer of technology and capacity building and what are the best mechanisms for their successful implementation.

15. To conclude, I would like to emphasize that we welcome the opportunity to continue to share our experiences with this Working Group and to continue to make our expertise available, if so desired.
