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**DRAFT REPORT OF THE COMMISSION ON INVESTMENT, TECHNOLOGY
AND RELATED FINANCIAL ISSUES ON ITS FIFTH SESSION
12 – 16 February 2001**

Rapporteur: Mr. Younes Tijani (Morocco)
Introduction, agenda item 3 and organizational matters

Speakers:

Deputy-Secretary General	Singapore (for the Asian Group and China)
Officer-in-Charge, DITE	United States of America
Head of the Investment Issues Analysis Branch	Sweden
Chairperson of the Expert Meeting	Chile
South Africa (for the African Group)	International Confederation of Free Trade Unions
Cuba (for the Group of 77 and China)	Japan
Mexico (for the Latin American and Caribbean Group)	

Note for delegations

This draft report is a provisional text circulated for clearance by delegations.

Requests for amendments to statements by individual delegations – to be submitted in English or French – should be communicated by **Friday, 23 February 2001** at the latest, to: UNCTAD Editorial Section, Room E.8102, Fax No. 907 0056, Tel. No. 907 5654/1066.

I. INTRODUCTION

Opening statement

1. The **Secretary-General of UNCTAD** set out the major points of the Commission's session. He noted that despite a sustained growth in FDI flows, these remained highly concentrated in a few regions and economies, with most foreign direct investment (FDI) occurring among the already advanced economies, and the flows to the developing world concentrated in roughly 10 developing countries in Asia and Latin America. Secondly, the surge in FDI was based on a wave of cross-border mergers and acquisitions, a factor which appeared to lessen the benefits conventionally associated with foreign investment. These two factors suggested that the overwhelming majority of the countries of the developing world, especially African countries and the least developed countries (LDCs), were not benefiting from the possible contribution of FDI in coping with the challenges of globalization. UNCTAD was therefore proposing practical ideas so that FDI would be distributed more evenly. This was in accordance with the Bangkok Plan of Action, which had entrusted the secretariat with the task of providing insight and assistance to member countries in coming to grips with the challenges of international capital flows.

2. Regarding the secretariat's activities since UNCTAD X, the Secretary-General highlighted the work on competition policy, notably the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, held in September 2000, and the work on the issue of cross-border mergers and acquisitions. In connection with the latter, the secretariat had examined the differences between greenfield FDI and cross-border mergers and acquisitions at an Expert Meeting, which would be reviewed under agenda item 3, and in the *World Investment Report 2000*. To shed further light on the role of home country measures in promoting FDI flows to developing countries, the secretariat had organized an Expert Meeting, which would be reviewed under agenda item 4.

3. He noted in particular the practical initiatives undertaken by the secretariat to overcome the excessive concentration of FDI. These included the production of investment guides to the LDCs and assisting LDCs in negotiating bilateral investment agreements. A recent round of negotiations, involving francophone countries and other countries as partners, had concluded 41 agreements. This was a tangible and useful initiative in terms of familiarizing LDCs with different legal traditions.

4. Turning to the major implications of the Bangkok Plan of Action for the Commission on Investment, Technology and Related Financial Issues, the Secretary-General emphasized that the issue of international investment flows and their development impact was firmly established as one of the main pillars of UNCTAD's work programme. He reiterated that the Commission's deliberations would be crucial to the preparatory process for the Third United Nations Conference on the Least Developed Countries, to be held in Brussels in May 2001, and that two of the Commission's agenda items – home country measures and investment policy reviews – were of special relevance to LDCs. He urged Governments in a position to

do so to support the concrete and practical projects that UNCTAD was proposing for the Brussels conference, noting that a list of such projects was available from the secretariat.

5. In closing, he noted that the issues addressed by the Commission on Investment, Technology and Related Financial Issues were essential in enabling countries to cope with the challenge of competitiveness. This referred not only to preparations for global negotiations on trade or investment issues, but also to their practical and integrated implementation. In essence, this challenge was to develop the productive capacity to take advantage of concessions and agreements negotiated in various trade agreements. Building productive capacity necessitated both domestic and FDI; and it required links between large companies with distribution channels of a globalized nature and small and medium-sized domestic enterprises, the development of entrepreneurship in countries, and the capacity to absorb technology, including managerial capacity. This would call for great efforts and the results would vary, depending both on the degree of commitment of the developing countries and on the response by the international community.

II. IMPACT OF INTERNATIONAL INVESTMENT FLOWS ON DEVELOPMENT: MERGERS AND ACQUISITIONS – POLICIES AIMED AT MAXIMIZING THE POSITIVE AND MINIMIZING THE POSSIBLE NEGATIVE IMPACT OF INTERNATIONAL INVESTMENT

(Agenda item 3)

Statements made in plenary session

6. The **Officer-in-Charge of the Division on Investment, Technology and Enterprise Development** noted that the continued high growth of FDI inflows, which had reached \$1.2 trillion in 2000, was sustained by the dynamic evolution of cross-border mergers and acquisitions (M&As) – which mainly involved developed countries – while the share of greenfield FDI had been declining in recent years. This raised concerns about whether cross-border M&As played a role similar to that of greenfield FDI in the development process, since M&As, in contrast to greenfield investment, would not add to the productive capacity of the host countries but simply involve a transfer of ownership and control from domestic to foreign hands.

7. While the liberalization of FDI policies had greatly facilitated cross-border M&As, a number of host countries, including developing countries, had introduced various policy instruments to deal with cross-border M&As, and competition law and merger review systems that often worked on a case-by-case basis. At the regional and international level, the number of bilateral investment treaties (BITs) concluded, which had totalled 1,857 by the end of 1999, had continued to increase in 2000, partly as a result of UNCTAD's work in facilitating BITs negotiations, especially among developing countries. In this respect, he drew attention to the fact that a BITs negotiation round organized in Geneva recently for francophone LDCs had resulted in the signing of 41 BITs.

8. He noted that the significance of cross-border M&As for host economies still needed to be assessed, particularly in the light of concerns expressed by Governments and civil society about their impact on economic and social development. For this reason, the UNCTAD *World Investment Report 2000* dealt with the special topic of cross-border M&As and their impact on development, and an Expert Meeting had been convened on the same topic. The Director called upon the Commission to formulate agreed policy recommendations on the basis of the findings of the Expert Meeting and stressed that the policy dialogue during the Commission would provide an input into the preparatory process for the Third United Nations Conference on the Least Developed Countries (LDC III).

9. Home country measures (HCMs) to promote outward FDI flows and the transfer of technology was the second issue on the Commission's agenda. He stated that this was a nascent area of international cooperation and policy formulation that required the establishment of a broad understanding and consensus on the definitions, rationale, best practices and international dimension underlying such HCMs. The outcome of the policy dialogue on this issue would also represent an input into the preparatory process for LDC III.

10. Finally, he was pleased to welcome the members of the World Association of Investment Promotion Agencies (WAIPA) whose sixth annual conference, which was taking place simultaneously with the Commission's session, was considering the issue of HCMs from a practical point of view. He invited the Commission to take up several investment policy reviews (IPRs) in a high-level, focused and detailed exchange of experience on specific country investment issues, namely IPRs on Ecuador, Ethiopia, Mauritius and Peru. In addition, the Commission was invited to look at the work of its subsidiary bodies and the Division's activities since its last session, including the Commission on Science and Technology and the report of the Intergovernmental Expert Group on International Standards of Accounting and Reporting.

11. The **Head of the Investment Issues Analysis Branch** introduced agenda item 3 "Impact of international investment flows on development: mergers and acquisitions – policies aimed at maximizing the positive and minimizing the possible negative impact of international investment", and she referred to the note prepared by the secretariat reflecting the outcome of the Expert Meeting (TD/B/COM.2/29), a document which had been prepared in response to guidelines established at UNCTAD X.

12. She noted that the Expert Meeting had been timely, as it examined the challenges arising from the wave of cross-border M&A sales after the financial crisis in Asia. The overall trend towards increasing cross-border M&As had indeed continued since the Meeting convened in June 2000, with most deals taking place among developed countries. In commenting on the findings of the Expert Meeting, she noted that the impact of cross-border M&As on host economies had to be assessed from a long-term perspective, taking into account the different levels of development. Policy responses, therefore, would depend on the special circumstances of the countries as well as the context in which such M&As took place. In sum, policy considerations identified at the Meeting included the adoption and implementation of an appropriate regulatory framework and a competition policy; identification of "correct" price levels of assets to be sold; introduction of safety nets and programmes to train and retrain workers in cases of lay-offs; and establishment of corporate governance rules. Moreover, competition laws and cooperation between competition authorities had been found to be extremely important. The Meeting had emphasized the need to strengthen international cooperation among competition authorities, at the bilateral, regional and multilateral levels. The Meeting had also identified areas requiring further research and technical assistance. She reminded the Commission that the recently concluded Fourth United Nations Conference to review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices had similarly recommended the periodic publishing of information on M&As, and cooperation regarding merger control, including in the process of privatization.

13. The **Chairperson of the Expert Meeting** presented the report on the Expert Meeting's discussions. The Expert Meeting had observed that cross-border M&As had positive effects, as well as risks and challenges, for the host economy. The consensus was that the effects of cross-border M&As depended on the host country's level of development

and its policy framework, as well as the business motivations of companies. The experts pointed out that “appropriate” policies might vary among countries. Hence, policies or guidelines on M&As needed to be attuned to each country’s long-term development objectives, and at the same time to the circumstances under which these M&As were undertaken. With respect to employment effects, provisions had to be made to cushion the impact of M&As in general and that of cross-border M&As in particular, including through the creation of more employment opportunities and support to the training and retraining of workers who might be laid off.

14. He stressed the crucial need to adopt and implement competition laws where these were not yet in place or were weak. Noting that many developing countries lacked a competition culture as well as the necessary human and material resources to enforce anti-trust and regulatory legislation, he stressed the need to help developing countries, in particular the least developed countries, to develop and implement national competition policies, as well as to formulate policies and measures concerning cross-border M&As. There was also a need to have a common approach to cross-border M&As in the context of regional trade and investment agreements. Furthermore, in addition to national merger reviews, he called for international cooperation among competition authorities. Such cooperation could take the form of an exchange of information among competition authorities, ideally before any M&A deal, joint review mechanisms and standardization of the time limits for notification. Lastly, he said that research on the impact of cross-border M&As in developing countries and economies in transition ought to be pursued further.

15. The representative of **South Africa**, speaking on behalf of the **African Group**, noted the uneven impact of cross-border mergers and acquisitions, particularly in developing countries. They had the potential to offer benefits in the form of a transfer of skills and expertise, the facilitation of enterprise linkages with global markets and an immediate injection of capital; but they could create problems related to employment reduction following the restructuring of enterprises, as well as problems arising from the anti-competitive behaviour of foreign firms, the crowding out of domestic enterprises and market concentration in a number of sectors.

16. With respect to the performance of Africa in attracting FDI, he noted that Africa continued to receive a marginal share of global flows, despite improvements in the regulatory framework and the business environment. In Africa, cross-border mergers and acquisitions had accounted for 40 per cent of FDI inflows between 1997 and 1999, reflecting the limited share of the region in privatizations, as well as the small number of domestic enterprises with strategic assets or attractive markets which could make them a target for takeovers by foreign firms. Given the importance of competition policy and merger reviews in dealing with the consequences of cross-border mergers and acquisitions, he stressed that the international community needed to continue its support and technical assistance to African developing countries in establishing, strengthening and implementing their competition laws. He encouraged the UNCTAD secretariat to continue its research and technical assistance in the field of cross-border mergers and acquisitions. In connection with the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, he

recalled that the Fourth United Nations Review Conference had recommended that cooperation regarding merger control, including in the process of privatization, be studied. He added that African countries would greatly benefit from information exchanges among countries in relation to mergers which took place in third countries, but indirectly affected countries of the region. Finally, he urged support from the international community to deal with worker lay-offs resulting from cross-border mergers and acquisitions, given the small government budgets and the lack of social security in most of African countries.

17. The representative of **Cuba**, speaking on behalf of the **Group of 77 and China**, noted that the Expert Meeting on cross-border mergers and acquisitions had been both timely and pertinent, since foreign direct investment was increasingly taking the form of M&A's. This raised the pressing question of the impact on development of such cross-border mergers and acquisitions, as opposed to that of greenfield investment. He set out the policy recommendations of the Group of 77 and China to the Commission. First, since cross-border M&As could have positive or negative effects, there was a need for developing countries to have in place a mechanism to analyse their impact, with full recognition of their long-term developmental objectives. Secondly, competition policy deserved particular attention and developing countries would need support in this area in the form of consultation and cooperation among competition authorities. His Group and China encouraged some forms of *ex-ante* exchange of information among countries affected by cross-border M&As, and perhaps also joint review mechanisms. Thirdly, the UNCTAD secretariat was urged to continue analysing both the trends and the impact of cross-border mergers and acquisitions on the domestic enterprise sector and on market structure in developing countries. Finally, he invited the international community and the private sector to support developing countries in putting in place effective social security systems to assist workers affected by closures and lay-offs.

18. The representative of **Mexico**, speaking on behalf of the **Latin American and Caribbean Group**, indicated that the current wave of cross-border mergers and acquisitions had to be evaluated from a long-term perspective, with due consideration paid to differences in the levels of development. He noted that mergers and acquisitions involving competitors would pose immediate competition problems. Therefore, it was necessary that UNCTAD's analytical work on cross-border mergers and acquisitions continue, focusing on the challenges which they posed for competition policy. These challenges included the impact of M&As on market structure, especially in infrastructure industries, and the need for regional cooperation in taxing those transactions. He stressed that it would be useful to develop information exchange among countries and joint reviews of cross-border mergers and acquisitions. It would also be necessary to assist developing countries in the area of asset valuations, in reducing the cost of dispute settlements, in developing the competitiveness of domestic small and medium-sized enterprises, and in retraining employees affected by restructuring. In closing, he expressed the expectation of the Latin American and Caribbean Group that the Commission would encourage prompt application of the recommendations of the Expert Meeting.

19. The representative of **Singapore**, speaking on behalf of the **Asian Group and China**, expressed the appreciation of the Asian Group and China for the Expert Meeting on mergers and acquisitions. She noted that Asia had been the scene of a large number of cross-border mergers and acquisitions since countries had been opening up to foreign direct investment and adopting more liberal policies towards such investment. She highlighted the policy concerns of the Asian Group and China with respect to mergers and acquisitions. It was their conviction that the effects of an incoming merger or acquisition largely depended on the policies pursued by the host country. In this regard, she noted the usefulness of sectoral reservations, ownership regulations, size criteria, screening, incentives and other special measures. With regard to cross-border mergers and acquisitions taking place under special circumstances, for example the recent Asian financial crisis, she invited the UNCTAD secretariat to continue evaluating the experience of policy responses in the countries affected by the crisis, notably of measures taken to alleviate the negative impact of cross-border mergers and acquisitions.

20. One of the concerns of the Asian Group and China was the impact of cross-border mergers and acquisitions on the domestic enterprise sector in general, and on small and medium-sized enterprises in particular. Another concern to be addressed by Governments was that of lay-offs, at least in the short run, which might call for policy measures to promote the creation of employment elsewhere. As for competition laws and authorities, the Asian Group and China considered maintaining the contestability of markets and ensuring a culture of competition to be the linchpin of both domestic and cross-border merger policies. They therefore called for special attention to be paid to the establishment and strengthening of competition authorities. In this regard, developing countries in general, and the least developed countries in particular, required international assistance.

21. The representative of **China** supported the statement made by the Group of 77 and the Asian Group. She commended the high quality of the *World Investment Report 2000* and of the UNCTAD Expert Meeting on cross-border mergers and acquisitions, held in June 2000. She invited UNCTAD to continue studying this issue, particularly in developing countries and economies in transition. She noted that cross-border mergers and acquisitions were becoming increasingly important in many developing countries as a mode of entry for FDI, and could have both positive and negative impacts. Therefore, it was crucial that Governments establish an appropriate policy framework so as to formulate competition and other policies. Referring to her country's experience with market reforms over the past 20 years, she expressed concerns about the capability of the enterprise sector in China, both of some of the large strategic enterprises and also of dispersed small and medium-sized enterprises, to face the challenge of competition by large transnational corporations. Large numbers of firms in China needed to be revitalized, and some were using mergers to increase their size and efficiency. In this context, the analysis of the M&A experiences of developed countries and of TNCs would be of great value.

22. The representative of the **United States of America** noted the role of FDI in development and noted that the effects of cross-border mergers and acquisitions did generally not differ from those of greenfield investments. He nevertheless recognized that M&As

within the domestic economy or across the borders of different economies gave rise to specific issues regarding their impact on competition and market concentration. Such issues were common to developed and developing countries and economies in transition. In dealing with these issues, technical assistance was useful for developing countries. But most important, the host countries should put in place a stable, predictable and transparent policy environment, providing for the protection of property rights, the removal of restrictions, strong legal systems for mediation of disputes, and the elimination of corruption. He said that UNCTAD X had given UNCTAD a major role in the investment area. He noted that the Third United Nations Conference on the Least Developed Countries and the Preparatory Committee for the United Nations High-level Meeting on Financing for Development would also deal with these issues. He emphasized the need for UNCTAD to cooperate with other institutions such as the Organisation for Economic Co-operation and Development (OECD).

23. The representative of **Sweden**, speaking on behalf of the **European Union (EU)**, urged the Commission to adopt short and action-oriented recommendations. On the issue of cross-border M&As, she said that these did not yield fewer benefits than greenfield foreign direct investment in terms of creation of new jobs, quality of employment and transfer of technology. As stated in the report of the Expert Meeting, the extent of benefits derived from inward FDI, including in the form of cross-border M&As, depended on "having the right economic policies, the right level of government activity, a regulatory framework and a competition policy". Investment agreements could serve to create an enabling investment climate through transparency and predictability, and in this regard, she emphasized the contribution that a plurilateral or multilateral investment agreement could make in "locking in" domestic reforms that were implemented by most developed and developing countries. The increase in cross-border M&As gave rise to the risk of firms acquiring dominant market positions and pursuing anti-competitive practices beyond national borders. Accordingly, a vigorous domestic competition policy was necessary, as well as increased international cooperation in this area. The European Union was of the view that a multilateral framework agreement on competition policy would ensure that balanced consideration was given to all forms of anti-competitive practices with an international dimension.

24. The representative of **Chile** supported the statement by the representative of the Group of 77 and China. He said that the question of a multilateral framework on competition policy needed to be given further thought. He noted, however, that there was a general consensus on the questions of transparency and predictability of regulatory frameworks.

25. The representative of the **International Confederation of Free Trade Unions** emphasized that policy measures in the areas of international investment and competition needed to encompass the core labour standards. Special measures were necessary to deal with the negative impact of cross-border M&As on workers, notably lay-offs and the deterioration of working conditions. Such standards could serve to discourage "social dumping" as a means of gaining unfair competitive advantages, and were indispensable in maintaining social and economic stability.

26. The representative of **Japan** stressed the importance of competition policy and the need to formulate and implement regulatory frameworks and competition laws. His Government attached priority to this area in its technical cooperation activities.

27. The **Chairperson of the Expert Meeting** stressed the importance of transparency in procedures related to the implementation of competition policy. This was with respect to both the terms of such legislation and to the decisions taken. He said that it was crucial, particularly in countries which lacked a competition culture, that the private sector understood government decisions in this area, and that decision-making procedures be transparent.

28. The representative of the **Republic of South Africa**, speaking on behalf of the **African Group**, stressed the need to strengthen regulatory frameworks at the national level. It was necessary that the international community assist African developing countries in establishing regulatory frameworks on competition law and policy. Only 28 African countries had so far implemented regulations relating to competition law and policy. It was premature to consider initiatives regarding multilateral frameworks. He called on UNCTAD to continue its analytical as well as its advisory work in this area.

III. ORGANIZATIONAL MATTERS

A. Opening of the session

29. The fifth session of the Commission on Investment, Technology and Related Issues was held at the Palais des Nations, Geneva, from 12 to 16 February 2001. In the course of the session, the Commission held ___ plenary meetings and ___ informal meetings. The session was opened on 12 February 2001 by Mr. Rubens Ricupero, Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

30. At its plenary meeting, on 12 February 2001, the Commission elected its Bureau as follows:

Chairperson: Mr. Jean-Luc Le Bideau (France)

Vice-Chairpersons: Ms. Irina Ananich (Belarus)
Mr. Rafael Parades Proaño (Ecuador)
Mr. Sherif Kamel (Egypt)
Ms. Margaret Liang (Singapore)
Ms. Eleanor Fuller (United Kingdom)

Rapporteur: Mr. Younes Tijani (Morocco)

C. Adoption of the agenda and organization of work

(Agenda item 2)

31. At the same meeting, the Commission adopted the provisional agenda circulated in document TD/B/COM.2/28. Accordingly, the agenda for the fourth session was as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. Impact of international investment flows on development: mergers and acquisitions – policies aimed at maximizing the positive and minimizing the possible negative impact of international investment
4. International policy issues: home country measures
5. Investment policy reviews: exchange of national experience
6. Reports of the subsidiary bodies of the Commission
7. Other business
8. Adoption of the report

D. Other business

(Agenda item 7)

E. Adoption of the report of the Commission to the Trade and Development Board

(Agenda item 8)