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**Executive Summary of the Follow-up Report of the Expert
Group Meeting on Corruption and International
Investments held virtually on May 18–19, 2021**

This executive summary serves as a background documentation for a special event on Taking stock of the work of the Expert Group Meeting on Corruption and International Investments organized in line with CoSP resolution 8/9.



UNITED NATIONS OFFICE ON DRUGS AND CRIME

TACKLING CORRUPTION IN FOREIGN DIRECT INVESTMENT



EXECUTIVE SUMMARY OF THE FOLLOW-UP REPORT OF THE EXPERT GROUP MEETING HELD
VIRTUALLY ON MAY 18-19, 2021¹

Co-organised by the United Nations Office on Drugs and Crime and the United Nations
Conference on Trade and Development

¹ This executive summary serves as a background documentation for a special event on *Taking stock of the work of the Expert Group Meeting on Corruption and International Investments organized in line with CoSP resolution 8/9 (COSP 9, Thursday, 16 December 2021, 3:30–4:30 p.m.)*

Acknowledgements

This report benefited from insights of the 2021 Expert Group Meeting on Corruption and International Investments, which included panel discussions with the following participants:

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1. Introduction – Background and mandate

Foreign direct investment (“FDI”) plays an important role for both governments and corporations and serves as a catalyst for development. By investing abroad, private sector actors expand their business and open up new markets, which, for States hosting the investments, can lead to additional tax revenues, increased employment, and easier access to new technologies. Foreign direct investment is therefore generally seen as fostering development in many economies and can be considered a contributing factor to attaining the Sustainable Development Goals (“SDGs”).

Corruption negatively affects the attraction and retention of foreign investments. It weakens institutions, erodes confidence and trust in governance, and threatens economic growth. Corruption also causes uncertainty and increases the costs and risks of doing business, particularly for investors with long-term investment horizons. Studies have found that regions with higher levels of corruption have lower levels of foreign investment.

In December 2019, the Conference of the States Parties to the United Nations Convention against Corruption (“the Conference”), adopted Resolution 8/9, in which it noted “the positive role of international investments and the importance of minimizing opportunities for corruption and transfer of proceeds of crime in this context.” The Conference requested the United Nations Office on Drugs and Crime (“UNODC”) to consider organizing an expert meeting “to discuss the issues of the existence and the extent of corruption and the transfer of proceeds of crime in the context of international investments, with a view to raising awareness of existing issues in this area and promoting the implementation, if appropriate, of relevant provisions of UNCAC and other international instruments.”

UNODC partnered with the the United Nations Conference on Trade and Development (“UNCTAD”) to organize an Expert Group Meeting on Corruption and International Investments. The meeting took place on 18 and 19 May 2021 in a virtual format and brought together over 140 experts specialized in matters ranging from investment policy to corporate compliance and the prevention of and fight against corruption, representing development finance institutions, national and international institutions on investment promotion, the private sector, civil society and academia, and coming from more than 60 countries from across the world.

This executive summary presents the main points that emerged from the presentations and discussions during the two-day meeting.

2. Expert Group Meeting – Key issues

The purpose of the Expert Group Meeting was to provide a platform for anti-corruption and foreign investment specialists to exchange ideas, discuss common challenges and identify ways forward with respect to minimizing the risk of and opportunities for corruption in foreign direct investments.

The discussions focused on raising awareness of the current issues, possible synergies or inconsistencies between the anti-corruption and foreign direct investment legal frameworks, respectively, the roles of various stakeholders, and specific perspectives on tackling corruption in foreign investment (such as the use of technology or the application of due diligence measures). The Expert Group Meeting also examined ways to enhance the efficiency of existing policies and measures – including through stronger adherence to UNCAC and other international instruments – and it identified the following policy objectives as areas of focus for the prevention of and fight against corruption in FDI:

- **Strong and coherent anti-corruption provisions are needed in international investment agreements.**

International investment agreements (IIAs), which are treaties aimed at protecting and promoting investments between countries, increasingly include anti-corruption provisions. Some of these agreements include 'legality requirements' with explicit references to corruption, which require foreign investments to be made or owned 'in accordance with' or 'in conformity with' the laws of the host State. Failure to abide by such requirements can result in arbitral tribunals declining jurisdiction in case of a dispute between the investor and the State, thus essentially withholding treaty protection from investments tainted by corruption. Other IIAs contain obligations for the parties to implement effective anti-corruption policies and measures, or they include anti-corruption provisions as part of the corporate social responsibility requirements for foreign investors. However, the scope and clarity of those provisions vary greatly, and their effects remain unclear and largely untested.

Another approach that the Expert Group Meeting considered as potentially worth exploring is to use international anti-corruption standards to evaluate the conduct of corporations looking to invest abroad, and on that basis decide on the prospective investor's eligibility for investment treaty protection and access to investor-state dispute settlement mechanisms.

- **IIAs and domestic laws on foreign investment should be in compliance with and, to the extent possible, implement the standards of UNCAC and other anti-corruption instruments.**

As the only legally binding universal instrument aimed at preventing and eliminating corruption, UNCAC plays an essential role in harmonizing the actions taken by States in the fight against corruption. It covers all essential aspects of preventing and combatting corruption, including prevention, criminalisation, international cooperation, and asset recovery. Given the scope and nature of UNCAC and other international instruments, they should serve as important points of reference when including anti-corruption provisions in international investment agreements. IIAs could make explicit reference to UNCAC to provide clarity for all parties involved as to the standards they are expected to adhere to, and to make sure that definitions are aligned.

The Expert Group Meeting also noted that international investment agreements first and foremost aim to promote and protect investments, and that they may therefore not be the ideal anti-corruption instruments, this is however changing in new generation IIAs which increasingly address issues such as the protection of health and the environment; and combatting corruption.

- **IIAs should better balance the interests of investors and host States and provide adequate domestic policy space to enable host States to regulate for the public interest, including to prevent and fight corruption.**

International investment agreements typically include significant protection standards for foreign investors, which could potentially limit the ability of host states to regulate matters relating to or affecting foreign investments. UNCTAD has called for the modernisation and renegotiation of old generation international investment agreements to restore the balance between existing investment protection provisions and the right of States to retain sufficient policy space to regulate investments with a view to achieving

the SDGs. The G20 has also reaffirmed the importance of regulating investments to achieve legitimate public policy objectives, and the need for investors to observe applicable instruments of responsible business conduct, corporate governance, and international best practices, including those related to combatting corruption.

- **Measures against misuse of investment promotion regimes should be enhanced to prevent corruption and Illicit Financial Flows (IFFs).**

Residence-by-investment or citizenship-by-investment schemes have recently become an area of concern because they carry an increasingly high risk of corruption, particularly because of insufficient due diligence and weak governance. By obtaining legal immigrant status in a country in which they made an investment, corrupt persons can potentially evade justice and launder illicit proceeds. Decisive action is needed to safeguard the rule of law by tackling the shortcomings of these schemes and mitigating corruption risks. Strong political will, international cooperation between States and other relevant stakeholders, adequate regulation, and proportional sanctions are key in this respect.

- **Investors and corporate entities should implement effective anti-corruption compliance programs.**

Corporate compliance mechanisms, codes of conduct and corporate certification schemes encourage companies to adhere to strict compliance, record-keeping and internal control mechanisms and they incentivise stronger anti-corruption efforts by investors and their agents. The development and enhancement of domestic legal frameworks for the liability of legal persons and corporate social responsibility, the inclusion of relevant provisions on corporate social responsibility into IIAs, and the creation of compliance mechanisms are essential.

- **Adequate anti-corruption due diligence mechanisms can facilitate the prevention of corruption and other illicit activities in foreign investments.**

Anti-corruption due diligence has emerged as a way to proactively manage corruption risks. It involves identifying and managing actual or potential corruption risks to which the investor or the host State may be exposed. In the case of foreign investors, these risks may be linked to their operations, products, or services, including third parties and their business relationships. For host States, corruption risks usually lie with the public institutions and officials managing and overseeing those investments.

Anti-corruption due diligence mechanisms employed by international financial institutions and multilateral development banks – implemented alongside other pre-investment due diligence requirements (such as legal or financial due diligence) – require recipients of funding to comply with anti-bribery and anti-corruption requirements from the very start of an investment in a high-risk jurisdiction. There is a growing understanding that in the context of foreign investments both investors and States benefit from such mechanisms.

- **New technologies and statistics can play an essential role in ensuring the integrity of foreign investments.**

New technologies allow for the rapid transfer of large amounts of money and make it easier to hide stolen assets. At the same time, anti-corruption solutions using technology, statistics and artificial intelligence could offer more precise responses to corruption. Software tools can process millions of transactions and spot patterns, for example

identifying a suspiciously high or unusual number of transactions coming from particular entities or in specific industry sectors, which could be possible indicators of irregular or illicit behaviour. This could enable law enforcement agencies to initiate much more targeted investigations. Intelligence can come either from open-source databases or databases only open to States.

Statistical analysis also helps to combat corruption and other illicit activities in international trade and investment by detecting suspicious activities and spotting unusual patterns in trade data and anomalies in pricing. This too could help enforcement authorities identify where in-depth checks are warranted, potentially making anti-corruption agencies more efficient. For instance, if offenders are transferring illegal funds across international borders, they can use international trade transactions and overpay or underpay for imported goods, or issue false invoices. Such discrepancies usually result in differences between trading partner statistics and national statistics, which is suggestive of corruption, money laundering and tax evasion.

- **The role of Investor-State dispute settlement mechanisms in tackling corruption in foreign investment should be enhanced.**

Despite a growing number of investor-state disputes involving corruption allegations, arbitral tribunals often do not address the issue and the limited number of awards that did deal with corruption allegations lack consistency. Arbitrators generally appear hesitant to address corruption allegations, and when they do their approaches seem ambiguous and inconsistent. Coherent standards must be in place to ensure that corruption allegations based on credible sources are appropriately addressed based on international public policy as embodied in UNCAC.

3. Conclusions – Ways forward

More work needs to be done to integrate anti-corruption standards in the FDI framework and to address the proliferation of corruption allegations in investor-State disputes. Developing detailed and widely used guidance on anti-corruption due diligence (both for private investors and for States) could help to promote more effective and uniform approaches to combating corruption. Technology and artificial intelligence are bound to play a greater role in the fight against corruption and in this context, more needs to be done to enhance cooperation between States on sharing information and know-how while protecting privacy and procedural propriety.

The participants welcomed the initiative of convening the Expert Group Meeting and noted the importance of continuing discussions and further examining issues on tackling corruption in the context of foreign direct investment. In the view of the Expert Group meeting participants, the following topics deserve particular attention going forward:

- 1) Facilitating the exchange of ideas on the topic of corruption and FDI, for example by organizing regular expert meetings, and encouraging cooperation and the implementation of joint projects involving key stakeholders.
- 2) Exploring the possibility of issuing more detailed guidance on anti-corruption due diligence in the public and private sectors.
- 3) Implementing the anti-corruption agenda in the process of reforming international investment agreements and reassessing the definition of investment (e.g. by including a legality requirement to ensure that investments tainted by corruption cannot benefit from treaty protection). The anti-corruption agenda may benefit from drawing on

UNCTAD's work in this area, especially its Investment Policy Framework for Sustainable Development (IPFSD).

- 4) Increasing the use of new technological solutions and artificial intelligence to identify and tackle instances of corruption in foreign direct investments.
- 5) Increasing awareness of the United Nations Convention against Corruption, UNCTAD's Guiding Principles for Investment Policymaking, and other instruments developed by the United Nations, OECD, and other institutions and encouraging their more effective implementation.
- 6) Tackling corruption in the context of residency-by-investment and citizenship-by-investment programmes to ensure transparency and due diligence and deny safe haven to persons sought for corruption and their proceeds of corruption.
- 7) Studying the challenges and opportunities of investor-state dispute settlement processes in the context of addressing corruption in foreign direct investments.