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South Africa's review and new policy on BITs

Below is a speech on "A South African Perspective on International Investment Agreements" by Xavier Carim, Deputy Director General, Department of Trade and Industry, South Africa at the WTO Public Forum, 25 September 2012, Geneva.

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Let me start by thanking the organizers - Our World Is Not for Sale Network, the International Trade Union Confederation, and Public Citizen - for inviting me here this evening to participate in this WTO Public Forum panel discussion on international investment treaties.

I am pleased to be able to share a South African Government perspective on some of the challenges raised by these treaties, and how we are responding.

Some of you may have heard the intervention yesterday by South Africa's Minister of Trade and Industry, Dr Rob Davies, at the UNCTAD Trade and Development Board meeting during the discussion on UNCTAD's Investment Policy Framework for Sustainable Development.

Minister Davies addressed the same set of issues being discussed tonight, and my input today will track and try to complement that intervention. I want to start by giving a short background of South Africa's experience; then outline the key decisions that the South African Cabinet took on this matter in April 2010; and I will close with some brief remarks on the way forward.

Some background: In the immediate post apartheid era (1994-1998), South Africa concluded around 15 bilateral investment treaties (BITs) mainly with European countries. At the time, this was a good faith attempt to assure investors that their investments would be secure under the new democratically-elected government. Signing these BITs was also seen as an important diplomatic signal confirming South Africa's re-entry to the international community after the years of isolation under apartheid.

However, we soon became aware of challenges posed by international investment treaties. We observed the fractious debate in the OECD when its members were seeking to negotiate a multilateral investment agreement in the late 1990s. We were participants in the discussions in the WTO that sought to include, as one of the Singapore Issues - trade and investment - in the Doha Round negotiations, where many developmental concerns emerged in the engagements.

Perhaps most seriously, the spike in international investment arbitrations that followed the financial crisis in 2001 laid bare that bilateral investment agreements can pose profound and serious risks to government policy.

Our own experience demonstrated that that there was no clear relationship between signing BITs and seeing increased inflows of FDI. This had been a motivating factor in signing BITs in the 1990s. We do not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, we continue to receive investment from jurisdictions with which we have no BITs. In short, BITs are not decisive in attracting investment.

In addition, over the last decade, South Africa had to confront several challenges, and threats of challenge, brought under various BITs. This focused our minds! Most of the threats of challenge can only be described as spurious or frivolous but they all underscored the fact that BITs do not adequately take into account in particular the conditions found in South Africa, the complexities of our socio-economic challenges and the broad objectives of government policy.

It may be useful to make a comment about South Africa's post-apartheid Constitution. Our Constitution is widely commended around the world for its strong assertion of human rights. Embedded in the Constitution is a transformation agenda that seeks to overcome deeply rooted inequities inherited from apartheid's exclusionary policies. There is little disagreement with the need to pursue this agenda to ensure an inclusive and just society.

The Constitution also provides for non-discrimination between foreign and domestic investors and all investors need to undertake their activities in this context of the transformation agenda set out in the Constitution. However, as we assessed the bilateral investment treaties that we had entered into, we began to identify a range of inconsistencies with the Constitution.

This prompted South Africa's review of BITs in 2008. We held extensive and intensive consultations in South Africa over a three-year period. We invited international experts to contribute to the discussion. The review identified a range of concerns associated with expansive interpretations on the provisions usually found in BITs: definitions of investment and of investor, national treatment, fair and equitable treatment, most favoured nation clause, expropriation, compensation, transfer of funds etc.

The review also identified difficulties with respect to international arbitration. It observed fragmentation in the system; the lack of common standards of protection; inconsistent interpretations by arbitration panels even on similar matters; as well the growing complexity of the international system through an evolving jurisprudence. All this exacerbates uncertainty and risk.

In particular, we were concerned with investor-state dispute provisions in our BITs. This, in our view, opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and is a direct challenge to constitutional and democratic policy-making.

Against this background, in April 2010 the South African Cabinet concluded that South Africa should: First, refrain from entering into BITs in future, except in cases of compelling economic and political circumstances.

Second, Cabinet instructed that all "first generation" BITs which South Africa signed shortly after the democratic transition in 1994, many of which have now reached their termination date, should be reviewed with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed.

Third, Cabinet decided that South Africa should strengthen its domestic legislation in respect of the protection offered to foreign investors. In this regard, key considerations would be to codify BIT-type protection into South African law and clarify their meaning in line with the South African Constitution. We would also seek to incorporate legitimate exceptions to investor protection where warranted by public policy considerations such as, for example for national security, health, environmental reasons or for measures to address historical injustice and or promote development.

Fourth, Cabinet elevated all decision-making in respect of BITs to an Inter-Ministerial Committee tasked with oversight of investment, international relations and economic development matters.

This is the work we are undertaking now. The process of interdepartmental consultations is underway; there will be an extensive set of intergovernmental consultations as well as consultations with stakeholders and with Parliament – a social and economic dialogue.

We are working to terminate existing BITs; develop a new Model; and developing an Investment Act. This is complex technical and legal work and is unfinished. Nevertheless, our broad policy approach is clear. We aim to update and strengthen South Africa's investment regime to ensure that South Africa remains open to foreign investment, provides adequate security and protection to all investors, while preserving the sovereign right of the South African Government to pursue its developmental public policy objectives. We also aim to reduce exposure to the unpredictable risks we see and have had to confront in our bilateral investment treaties.

The new approach does not introduce any new obstacles to investment but will establish a framework for more equitable relationships between investors and Government based on respect for human rights, the rule of law and due process, sustainable development, and security of tenure and property rights within the framework created by the South African Constitution.

As we do this nationally, we are acutely aware of the unfolding debate at the international level. In broad terms, a broad distinction can be discerned between a Freedom of Investment Model, on the one hand, and an Investment for Sustainable Development Model, on the other. The Freedom of Investment model tends to assume that all investment is good, and that all investment promotes development.

The derived policy implications are that Governments should continue to liberalise their investment regimes, reduce or limit regulations and conditions on investors and, in so doing, realise the benefits of FDI. "First generation" bilateral investment treaties (BITs) tend to reflect this approach.

The Investment for Sustainable Development Model approach recognizes that while FDI can make a positive contribution to sustainable development, the benefits to host countries are not automatic. It posits that regulations are needed to balance the economic requirements of investors with the need to ensure that investments make a positive contribution to sustainable development in the host state.

The associated benefits of investment as they relate to technology transfer, skills development, research, establishing local economic linkages etc., need to be purposefully built into the investment regime, and not taken for granted. New thinking and practice in international economic policy-making, notably with respect to the role of state in economic development, finance and industry, are also finding expression in international investment policy-making.

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