

**Speaking notes for Workshop on  
“Capital Account Regulations and Global Economic Governance”  
UNCTAD/WTO, Geneva, 3-4 October**

- ≡ Thank UNCTAD, WTO and the Global Economic Governance Initiative (GEGI) at Boston University for organizing this workshop.
- ≡ And for inviting me to this Panel to offer a perspective from South Africa.
- ≡ My entry point to the discussion on transfers arises in relation to the Review of bilateral investment treaties that SA undertook between 2007 and 2010 and this resulted in a set of Decisions and instructions by our Cabinet with respect to BITs more widely.
- ≡ For the purposes of this discussion, therefore, I will briefly outline the main findings of the Review, the specific cabinet decisions which we are now in the process of implementing, including with respect to how we intend to address transfer provisions in future investment treaties.

### **The Review**

- ≡ Between 2007 and 2010, South Africa undertook an extensive, multi-stakeholder review of all our 19 bilateral investment treaties.
- ≡ That review was prompted by a growing recognition of the risks associated with BITs: the post-2000 rapid increase in the number of investor–state dispute settlement claims cases, and South Africa’s own experiences with two investor-state cases.
- ≡ The review observed that the BITs South Africa had concluded in the mid-90s were aimed at providing confidence to investors in the immediate post-apartheid period at a time when democratic South Africa’s economic policy was largely unknown.
- ≡ These were negotiated or concluded before the adoption of the new Constitution in 1996 that was to provide robust safeguards to protect private property and investment,
- ≡ Since 1996, we have steadily expanded, updated and strengthened legislation to protect investment.

- ⌘ The review further suggested that those early generation BITs were now outdated and posed growing risks to policy making in the public interest.
- ⌘ The review highlighted two key issues that are now widely acknowledged:
- ⌘ The first lesson is that relationship between BITs and increased inflows of FDI in South Africa has been ambiguous.
- ⌘ South Africa does not receive significant inflows of FDI from many partners with whom we have BITs. And we continue to receive significant investment from jurisdictions with which we have no BITs.
- ⌘ Second, the Review highlighted the range ambiguities that are evident in many standard provisions of the BITs to which we are a party.
- ⌘ This is particularly evident in provisions such as the definition of investment, national treatment, fair and equitable treatment, and expropriation.
- ⌘ Third, it has also become increasingly apparent that deficiencies in the treaties are accompanied by shortcomings in the functioning of the international investment arbitration system itself.
- ⌘ It is not a unified system, it has no common standards.
- ⌘ There is growing evidence of inconsistency in awards granted by arbitration Panels.
- ⌘ Divergent legal interpretations of identical or similar provisions and differences in assessment of the merits of cases involving the same facts.
- ⌘ These inconsistencies lead to uncertainty about the meaning of treaty obligations and compound problems of unpredictability of treaties.
- ⌘ In South Africa we were concerned that arbitration awards, issued by panels of just three arbitrators, could undermine democratic decision making.

### **Cabinet Decision in July 2010**

- ⌘ On the basis of the Review, Cabinet decided:
- ⌘ First, South Africa would terminate its existing BITs and would only enter into new agreements if there were compelling economic reasons to do so;

- ≡ Second, if we were to enter new BITs, it would need to be on the basis of a new model that would aim to reduce the risks inherent in the earlier generation BITs;
- ≡ Third, where possible, we would offer our partners the opportunity to re-negotiate existing BITs;
- ≡ And fourth, while South Africa already provides strong protection for foreign investors in our national legislation, we will clarify that protection in a new Investment Act.
- ≡ Essentially, the new Act will elaborate provisions usually found in BITs into South African law and bring them into line with Constitution requirements.
- ≡ We have notified our intention to terminate BITs with two partners and others will follow. We are also finalizing work on the new investment act, and this should be ready for public comment soon. We have also developed a new model BIT that is in line with a new Model BIT adopted by the 15 countries of the Southern African Development Community (SADC).

### **Free Transfers**

- ≡ And it is in this overall context that the “free transfer of funds” clause of BITs is being re-thought.
- ≡ Our first generation BITs contained unfettered clauses on repatriation of funds:
- ≡ *UK BIT 1994: “Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns.”*
- ≡ *German BIT: “...The compensation shall be paid without delay and shall carry the normal commercial interest until the time of payment; it shall be effectively realizable and freely transferable....”*
- ≡ In updating our approach to the “free transfer of funds” clauses, we will balance
- ≡ The right of investors to freely repatriate their investment-related funds - an essential tenet of an open investment regime.
- ≡ With the need to limit that right under particular circumstances, notably where capital movements may cause, or threaten to cause, serious difficulties to the balance of payments.

- ≡ None of this is to suggest that South Africa will impose capital controls but simply that we do not want to foreclose that option in investment treaties, in the future
- ≡ This will be in line with the relevant IMF Articles and is in line with the Model BIT we have adopted with other Member states in the Southern African Development Community.
- ≡ In terms of our investment act, the transfer clause will simply be aligned to existing legislation that contains the same balance.

### **Some Final comments**

- ≡ South Africa has already notified its intention not to renew two of its BITs (Belgo-Lux in September 2012, and Spain in in July). Others will follow.
- ≡ A key issue is that even with termination, the provisions of the BITs remain in force for between 10 and 20 years depending on the BIT in question.
- ≡ The existing transfer clauses therefore will continue to remain in force over this period.
- ≡ Thank you.