

**Speaking notes for Minister**

**at the**

**Discussion of UNCTAD's Investment Policy Framework for  
Sustainable Development (IPFSD)**

**Geneva, Switzerland**

**24 September 2012**

I thank UNCTAD for inviting South Africa to a discussion of UNCTAD's Investment Policy Framework for Sustainable Development.

We are pleased to be at this discussion, and to be given the opportunity to offer a South African Government Policy perspective on investment. This follows on from our participation at the World Investment Forum during the UNCTAD Thirteen Conference in Qatar in May this year, and marks another example of the unique leadership UNCTAD provides in development policy thinking on a range of issues, including on investment.

I want to start by reminding us all of the profound shifts occurring in the global economy, notably the growing centrality of developing countries in driving global economic growth. These shifts have been underway for some time and the recent global economic recession appears to have given greater impetus to the comparative rise of the South, including the African continent.

The IMF Economic Outlook for 2012 projects weak average global growth at 3.3% with advanced economies growing at 1.2%. The IMF projects that developing countries will grow by an average of 5.5%, with

China slowing down to 8.2% and India to 7%. Sub-Saharan Africa is projected to grow at 5.5%. South Africa is projected to grow at 2.7%. By 2050, Brazil, Russia, India and China are expected to account for around for almost half of total global GDP. Further, emerging markets which hold two-thirds of official foreign exchange reserves alongside sovereign wealth funds and other pools of capital will become key players in global financial markets.

These global changes have been accompanied by significant improvements in Africa's economic prospects. Africa is already the second fastest growing continent in the world, after Asia, and offers the highest return on investment of any region. Growth in Africa has been driven by the boom in mineral exports, as well as growth in the agriculture, transport, telecommunication and retail sectors. Africa's enormous reserves of raw materials, 60% of the world's unused arable agricultural land, a young growing population, a growing middle class with considerable purchasing power, urbanisation alongside steady improvements in economic governance, are factors which could see Africa becoming the next leading source of global economic growth.

Africa's challenge is to move off an economic growth path built on consumption and commodity exports onto a more sustainable developmental path based on industrialization. Africa's ongoing initiatives to advance regional integration and infrastructural development are vital in this respect. UNCTAD's recently released Economic Development in Africa report underlines the necessity of this structural transformation.

All these changes are reflected in changing sources, direction and flows of FDI. UNCTAD's recent World Investment Report indicates that global

FDI flows exceeded the pre-crisis average in 2011, reaching \$1.5 trillion despite turmoil in the global economy. However, flows remained some 23 per cent below their 2007 peak. While FDI inflows increased across all major economic groupings in 2011 it is striking that developing economies now account for 45 per cent of global FDI. Africa saw a third year of declining FDI inflows but the 2011 decline in flows to the continent was due largely to divestments from North Africa. In contrast, inflows to sub-Saharan Africa recovered to \$37 billion, close to their historic peak.

The World Investment Report points out that TNCs are holding record cash reserves which could fuel a future surge in FDI. It can be expected that developing countries, including those in Africa, would be prime destinations given their comparatively better economic growth prospects. South Africa's inclusion in UNCTAD's list of top prospective host economies for FDI over the next two years is indeed a positive reflection on our country and continent's long-term growth and development potential.

It is also evident that countries of the South are now sources of investment. In South Africa, we are seeing growing investment from India and China, and this is occurring across Africa. South African companies are also major investors in Africa. A recent publication by the South African Institute of Race Relations suggests that direct investment in Africa has increased at four times the rate of overall South African foreign direct investment since 1994. It observes that total South African direct investment in Africa has increased from R3.8bn in 1994 to R115.7bn in 2009, or by 31 times. The study also finds that 76% of all South African investment in Africa is direct investment.

Accompanying these changes are shifts in economic policy thinking that envisions a greater role for the state in economic development. The shift is also reflected in debates on investment policy. In these discussions, a broad distinction between a Freedom of Investment Model (FOI), on the one hand, and an Investment for Sustainable Development Model (ISD), on the other, can be discerned. The FOI 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.

By contrast, the ISD 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, also need to find expression in international investment policy-making.

South Africa's three-year BITs review concluded in 2010 confirmed this assessment. The recommendations emanating from the Review were largely endorsed by the South African Cabinet in April 2010. Cabinet understood that the relationship between BITs and FDI was ambiguous



at best, and that BITs pose risks and limitations on the ability of the Government to pursue its Constitutional-based transformation agenda.

Cabinet concluded that South Africa should refrain from entering into BITs in future, except in cases of compelling economic and political circumstances. It 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.

Cabinet further decided that South Africa should strengthen its domestic legislation in respect of the protection offered to foreign investors by, amongst other things, codifying typical BIT-provisions into domestic law. Importantly, too, 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.

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.

South Africa’s updated approach would aim to achieve an appropriate balance between the rights and obligations of investors, the need to provide adequate protection to foreign investors, while ensuring that constitutional obligations are upheld, and that government retains the policy space to regulate in the public interest.

This corresponds in large measure to emerging thinking at the global level. A new generation of investment policies has emerged, with governments pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a favourable investment climate. New generation investment policies now place inclusive growth and sustainable development at the centre of efforts to attract and benefit from investment.

A related challenge is that international jurisprudence continues to evolve through the numerous cases that are taken up and settled under international arbitration. This has been problematic in our view. The highly fragmented arbitration system; lack of common standards of protection; inconsistent interpretations by arbitration panels even on similar matters continues to add to the complexity of the international system. Investor-state dispute resolution that opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration is of growing concern to constitutional and democratic policy-making. In short, international jurisprudence is no substitute for multilateral cooperation to strengthen global governance in the area of investment policy.

The debate on investment is yet to be settled, and there are numerous efforts underway to fashion a common approach to international investment policy. In this context, UNCTAD's can play a vital role as the focal point in the UN system dedicated to consider the interrelated issues of trade, investment, finance and technology from a development perspective. This is a unique and extraordinarily valuable role.

UNCTAD provides a transparent and inclusive platform for wide-ranging inter-governmental consultations on investment policy that can also draw

on the views of other, relevant multilateral institutions and concerned sectors of civil society. UNCTAD's record of work on investment, its expertise places it at the forefront of the global debate, and the Investment Policy Framework for Sustainable Development offers us a strong point of departure for international cooperation in the area of international investment policy-making within a universally-accepted human rights framework.

I thank you.

