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# Regime on foreign direct investment within the Southern African Development Community (SADC): A comparative study of foreign direct investment (FDI) laws of select Southern African countries

## Summary

This paper has as its emphasis the cogent need for the effective implementation of a general but uniform legal framework or environment for the treatment of foreign direct investment by the recipient African States. Hence its purpose, namely, the need to move towards the development of a harmonised legal regime on foreign direct investment within the Southern African Development Community. This necessitates a comparative study of the FDI laws of select South African countries, examining and analysing the principal features of the legal regimes of some of these countries with the aim of illustrating the areas of commonality and highlighting the differences. It also assesses the feasibility of developing or adopting an already existing model legislation on direct foreign investment by contracting parties to the SADC treaty. It thus proves instructive not to confine this paper to Southern African countries, but rather to draw from the experiences of various other countries on the African continent.

## 'n Stelsel vir buitelandse direkte beleggings (FDI) in die Suider Afrikaanse Ontwikkelingsgemeenskap: 'n vergelykende studie aangaande FDI reg in geselekteerde Suider Afrika lande

Die artikel se klem word geplaas op die noodsaaklikheid van effektiewe implementering van 'n algemene maar eenvormige juridiese raamwerk of omgewing vir die behandeling van FDI deur gasheer-Afrika state. Die doel hiervan is die beweging na die ontwikkeling van 'n geharmoniseerde regsraamwerk vir FDI binne die SAOG streek. Dit noodsaak 'n vergelykende studie van FDI reg in geselekteerde Afrika state, die ondersoek en analisering van die basiese beginsels van die regstelsels van hierdie state met die doel om eenvormighede en verskille aan te toon. Die artikel poog ook om die lewensvatbaarheid van die ontwikkeling en aanvaarding van reeds bestaande model wetgewing oor FDI deur lidlande van die SAOG te bepaal. Die artikel word nie beperk tot SAOG lidlande nie, maar poog om ook te steun op die ervaring en ondervinding van ander Afrikalande in ag te neem.

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## 1. General introduction

One of the primary goals of regional economic integration in Southern Africa has been the promotion of direct foreign investment into the region's economy. This is explicitly stated in not only the SADC treaty but also the COMESA treaty.<sup>1</sup> Regrettably, this important regional goal has not been successfully attained. One of the factors underlying this failure has been ascribed to the fact that the SADC member states have tended to adopt varied and competing legal regimes regulating foreign direct investment.

## 2. Introduction

### 2.1 The present situation in Southern Africa

It is generally accepted that in the changing economic environment of the world today, the phenomena or processes of "internalisation", "globalisation", "increasing international independence", or "close international economic integration", are viewed as "well established and pervasive trend".<sup>2</sup> As these trends become more and more evident, African countries indicated their willingness to move towards regional economic integration.<sup>3</sup> The rationale for such a regional economic union has been stated as follows:

This issue has been alive in Africa since the early years of independence and African leaders have long recognised that closer regional ties are a possible means of overcoming the economic fragmentation of the continent, which is one of the major constraints to its economic development. Regional co-operation can help to promote more complementary and sustained development in African countries, through the reinforcement of the regional infrastructure, a more efficient payment system, greater access to credit, a more interrelated institutional system, and greater technical compatibility, to name but a few.<sup>4</sup>

It has become clear that there is a great deal of benefit to marketing a region as opposed to a single country. It is a strategy that allows especially the smaller countries and also sometimes the countries weaker in a given sector to attract the attention of investors who might not otherwise have considered them. Regional promotion pools the promotional resources of the countries and presents an attractive picture of regional "openness" to foreign investment. A regional marketing approach creates the critical mass of investment opportunities that ensure strong investor response and cost effectiveness.<sup>5</sup>

It would appear that individual, economies comprising the African continent are geographically too small to warrant much interest from foreign investors.

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1 Schulze 1997:63.

2 Henderson 1992:633.

3 See Treaty establishing the Southern African Development Community XXXII ILM No 1:120-135 (January 1993).

4 Schulze 1997:62.

5 MIGA in Africa: file:///A\afrika.htm.

However, together their economic output and population would effectively lure foreign investment ensuring the success of economic integration. By virtue of the regional integration of markets and thus their combined strength, African states have the ability, acting in concert with one another, to introduce the African continent into the mainstream of global social and economic development.

The drive for regional economic integration in Africa resulted in the establishment of organisations now commonly known as the Southern African Development Community (SADC)<sup>6</sup> and the Common Market of Eastern and Southern Africa (COMESA).<sup>7</sup> The goals of the SADC, are clearly reflected in the objectives of the Treaty Establishing the African Economic Community which is planned to serve as the umbrella organisation for all African regional institutions.

Its objectives as set out in article 4 of the Treaty are the following:

- (1) to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and an indigenous and self-sustained development;
- (2) to establish, on a continental scale, a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development;
- (3) to promote co-operation in all fields of human endeavour in order to raise the standard of living of African peoples and maintain and enhance economic stability, foster close and peaceful relations among member states and contribute to the progress, development and the economic integration of the continent, and
- (4) to co-ordinate and harmonise policies among existing economic communities in order to foster the gradual establishment of the Community.<sup>8</sup>

On the other hand COMESA has as its stated objectives the following:

- (1) To attain sustainable growth of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;
- (2) To promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programs to raise the standard of living of its peoples and to foster closer relations among its Member States;
- (3) To cooperate in the creation of an enabling environment for foreign, cross-border and domestic investment and in the joint promotion of research and adaptation of science and technology for development;

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6 See note 3.

7 See The Treaty Establishing the Common Market of Eastern and South Africa (COMESA) XXX ILM No 5:1067-1113 (September, 1994).

8 See The Treaty Establishing the African Economic Community (AEC) XXX ILM No 5:1241-1282 (September, 1991).

- (4) To co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;
- (5) To co-operate in strengthening the relations between the Common Market and the rest of the world and in the adoption of common positions in international fora, and
- (6) To contribute towards the establishment, progress and the realization of the objectives of the African Economic Community.<sup>9</sup>

The significance behind these stated objectives goes far beyond any of the previous treaties on regional economic integration and the encouragement and protection of foreign investment which have been signed hitherto by the various states comprising the African continent. They reflect a definitive commitment and resolve to move forward on a partnership basis. Regrettably, the successful realisation of this important regional goal has not yet been achieved. Indeed there is a real risk of regional economic integration becoming hostage to a number of problems. In this regard, Sikhakhane pointed out:

One explanation for the failure of integration schemes in Africa is that there is a lack of political will that is necessary for the integration to succeed. This lack of political will is often reflected in the chronic failure to meet commitments undertaken within the respective agreements and in the insufficient use of the instruments (based on trade liberalisation) set up by those agreements. The differences in approach by the various states to the solution of acute balance of payment difficulties are as responsible for the failure of these schemes as the incorrect design of the schemes themselves and the inadequacy of the traditional instruments, based on trade liberalisation, in helping to solve the current problems of economic development in Africa.

It also failed because of perceptions that there would be a disproportionate sharing of the benefits of economic integration and that there were insufficient mechanisms to redress the imbalances.<sup>10</sup>

Another factor underlying this failure may be attributed to the divergent and competing legal regimes or frameworks regulating foreign direct investment.

There is however a general recognition and acceptance of FDI as a means of stimulating and propelling economic growth.

Foreign investment is useful not only for its financial contribution; rather it is important because of other characteristics of FDI as a package. The benefits in this package include management and marketing know-how, technology transfer, linkages to domestic firms and access to markets. These aspects can directly benefit host countries but are also important for the demonstration effect they stimulate.<sup>11</sup>

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9 See The Treaty Establishing the Common Market of Eastern and Southern Africa (COMESA) XXX ILM No 5:1067-1113 (September 1994).

10 Sikhakhane 1999:57.

11 See A Allahaoua and M Atkin: *Foreign direct investment in Africa: Trends, constraints and challenges*. Economic commission for Africa: Ad-hoc Expert Group Meeting on the Revitalization of Investment for Africa's Development: Prospects in the 1990s and Beyond Addis Ababa, 29 November-1 December 1993.

It is also accepted that Africa is competing with other developing regions of the world for limited foreign direct investment:

Global demand for foreign direct investment right now is strong: many countries place a high value on it, because it brings so much benefit to their economies. Increasingly, to attract foreign investment it is necessary to do much more than remove discrimination against foreigners in the investment code. Africa has to compete actively for foreign investment, and unfortunately much of Africa has been behind the game in this respect. While Africa's receipts of foreign direct investment have been averaging about \$1 billion per year in recent years, total foreign direct investment into all developing countries has been growing from less than \$10 billion in the mid 1980s to an estimated \$38 billion in 1992. Moreover, most of Africa's \$1 billion goes to a very small number of countries which have energy and mineral resources. The sad fact is that most African countries are getting virtually no foreign investment.<sup>12</sup>

It is trite that the flow of foreign direct investment has played an important — if at times controversial — role in the growth of emerging economies.<sup>13</sup> Developing countries demonstrated an unwillingness to influence the flow of FDI, even when they sought to promote it.<sup>14</sup> As a consequence, they placed onerous limitations on FDI inflows, planning effective deterrents to FDI:<sup>15</sup>

From time to time, developing countries have expressed serious misgivings about the economic, social and political consequences of foreign investment. Most commonly, they have feared losing control to foreigners over important parts of their economies and excessive drains on profits as foreign investors, exercising 'oligopolistic powers', make off with excessive profits. Developing nations, perceiving a conflict between national and foreign corporate goals have imposed a variety of restrictive policies in an effort to protect themselves. Some of these policies may have captured a large part of the economic rents, but at the expense of reducing the investments overall benefits. Restrictions on inflows to FDI have taken many forms, including limits on entry to certain sectors, complex approval mechanisms, high taxes and complex incentive regimes, restrictions on share of foreign ownership, and restrictions on use of land and expatriate labour. Restrictions have been imposed for many reasons, including concerns over excessive foreign influence and loss of national wealth, workers, and desire to achieve transfer of technology and management techniques.<sup>16</sup>

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12 See "Private sector development in Africa". Address by Sir William Ryrie, Executive Vice-President International Finance Corporation, Euromoney Conference Sub-Saharan Africa: The New Emerging Market? Nairobi, Kenya, March 2, 1993.

13 *Foreign Direct Investment* FC(5) 1997:5.

14 *Foreign Direct Investment* FC(5) 1997:2.

15 *Foreign Direct Investment* FC(5) 1997:2.

16 *Foreign Direct Investment* FC(5) 1997:2.

Recently, however a number of developing countries including those on the African continent, have either removed or reduced these “onerous limitations”.<sup>17</sup> With the shift towards globalisation and in view of the limited share in global flows of foreign direct investment, “competitiveness as a location for investment ... has become the main determinant of attractiveness”.<sup>18</sup>

## 2.2 Africa’s investment climate

In an era of “increasing international economic competition” and “rapid globalisation”,<sup>19</sup> the African continent has embraced the challenge of attracting and sustaining foreign direct investment by identifying and eliminating both existing and potential barriers.<sup>20</sup> Its recent fast-paced economic and political transformation has attracted keen interest, meriting international attention.

In a recent study, it has been pointed out that:

Since the dawn of this decade Africa has been experiencing profound social, political and economic changes that are carrying African countries into the new millennium with greatly improved prospects for economic development and growth. This renaissance is taking place amidst equally dramatic changes in the global political economy, and portends important opportunities for African nations to deepen their participation in the international system in numerous and mutually beneficial ways. The positive trends — of democratization, economic reform, and settlement of long-standing conflicts — characterize the present era as the most promising period since the onset of African independence 40 years ago. While the continent’s continuing problems should not be understated, it is evident that we are witnessing the inception of Africa’s second independence.<sup>21</sup>

These significant positive developments throughout much of the African continent have spawned an atmosphere extremely attractive to investors by cultivating a climate conducive to promoting and sustaining investment and reflecting its deep commitment to growing foreign direct investment in Africa.

Africa's economic potential is largely untapped. Its plentiful resources have been enhanced by economic and political progress over the last decade. Most observers foresee growth and increased investment over the next 10 years. With a population of more than 500 million, Africa presents a tremendous potential market. It is true that per

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17 *Foreign Direct Investment* FC(5) 1997:2.

18 *Foreign Direct Investment* FC(5) 1997:1.

19 Africa News Online: A Policy Resource Document Statement of the Task Force — May 1997. ‘*Promoting US Economic Relations with Africa*’:3. <<http://www.africanews.org/usaf/cfr-taskforce.html>>.

20 Africa News Online: A Policy Resource Document Statement of the Task Force — May 1997. ‘*Promoting US Economic Relations with Africa*’:3. <<http://www.africanews.org/usaf/cfr-taskforce.html>>.

21 Africa News Online: A Policy Resource Document Statement of the Task Force — May 1997. ‘*Promoting US Economic Relations with Africa*’ at 3. <<http://www.africanews.org/usaf/cfr-taskforce.html>>.

capita incomes remain low and many of the economies are too small. But many of the goods and services marketed elsewhere have still not penetrated Africa fully and that offers a great growth potential. In addition, Africa is rich in natural resources ranging from hydrocarbon, to mining, fertile land and tourism. Wages are still low and represent a good asset for labour intensive activities.<sup>22</sup>

At present, the more successful African industries include those of “mining and petroleum, while promising unexplored consumer durables and infrastructure development”.<sup>23</sup>

In light of Africa’s limited share in global flows of direct foreign investment and the huge potential for increase clearly evidenced by the prevailing economic and political trends in the continent, African states have actively courted foreign direct investment in their efforts to boost their individual economies. Having emphasised the argument that a “good enabling environment” is a crucial or critical factor in attracting foreign direct investment in their attempt to make their country a more appealing market for foreign direct investment, African states have prepared themselves for growth and development by embracing varying and divergent market economics and reforms containing sweeping changes in foreign investment laws and policies. Nevertheless, the flow of foreign direct investments to emerging markets on the African continent are heavily concentrated among a relative few African countries and play a somewhat minor role in the economic growth of many others.<sup>24</sup>

### 2.3 A comparative analysis of economic political reforms within various African states

In striving to create a favourable climate that would prove attractive to foreign direct investment, the various African countries have realised their intentions by implementing a series of reforms. Towards this end, they have embarked on and adopted radical reforms and policies liberalizing their economies and the legal environment regulating foreign direct investment. This section of the paper surveys principally the laws and policies applicable to the promotion and protection of foreign direct investment and describes the sweeping changes made to the environments, reflecting the general policy thrust being subscribed to by various African States. It examines the different techniques that have been adopted by these countries for attracting foreign direct investment and ensuring that it serves their economic objectives by relinquishing the existing and potential obstacles. It considers and assesses the various foreign legislation regulating foreign direct investments and in so doing, it considers the changing attitudes towards the role of foreign direct investment by the various states.

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22 Mante: “investing in Africa Connects”.

23 “Africa” 1 FC J. Humphreys: International Business: Strategies for the Global Marketplace, July/Aug 96, 9(7):48.

24 See “Private sector development in Africa”. Address by Sir William Ryrie, Executive Vice-President International Finance Corporation, Euromoney Conference Sub-Saharan Africa: The New Emerging Market? Nairobi, Kenya, March 2, 1993:vi.

### 2.3.1 Swaziland

Swaziland, one of the smaller African countries is located in the South Eastern part of Southern African and its border, the Republic of South Africa and the Republic of Mozambique.<sup>25</sup> Essentially an agricultural country, Swaziland's principal agricultural commodities include cotton, maize, sugar, citrus fruits, rice and vegetables, while its principal agricultural exports being sugar and wood pulp.<sup>26</sup> In addition, it has been blessed with mineral resources such as coal, gold and iron ore.<sup>27</sup>

Economically, Swaziland is known to be extremely dependant on the Republic of South Africa and is linked to it by the Customs Union and the Rand Monetary Union.<sup>28</sup> A sizeable portion of its annual budget is financed by Customs Union payments,<sup>29</sup> such receipts accounting for about 40% of the Swaziland government budget. Many of its industries appear to be financed largely by both British and South African capital.<sup>30</sup> External sanctions imposed on the Republic of South Africa during the apartheid era impacted largely on the Swazi economy with its consequent increase in South African capital which the Swaziland Government actively encouraged in the form of incentives.<sup>31</sup>

The role of South African capital in the Swazi economy further increased during the decade of the 1980s when the effect of external sanctions on the Republic of South Africa isolated that country and drove many companies to either direct or relocate elsewhere within the Southern African region. In the event, Swaziland became a willing and suitable host to many South African

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25 Baloro 1993:69-84.

26 Baloro 1993:69-84.

27 Baloro 1993:69-84.

28 Baloro 1993:69-84.

29 Baloro 1993:69-84.

30 Baloro 1993:69-84. The Economist Intelligence Unit; Botswana, Lesotho, Swaziland, country Profile 1989/90, Annual Survey Political and Economic Background:35 (1990).

31 See also "Tax Concessions for hotel exporters", *The Times of Swaziland*, (July 1, 1988). For a comment on the character role and effect of these concessions, see Booth:44-45. "The only possible beneficiaries for such concessions would be South African exporters, or those foreign investors in the Republic wishing to divert exports through a non-sanctioned neighbouring territory. Swaziland, with virtually open borders with South Africa by virtue of its membership in the Customs Union, with access to both the European Community and the Preferential Trade Area, and with direct rail and road links to Maputo (Mozambique), is ideally positioned to play such a role. Its own stipulation that an imported item need only have a 25% local value added to qualify for labelling as the "product of Swaziland" further eased the task of the re-exporter wishing to avoid sanctions. "These new concessions could only add to the attractiveness of Swaziland already so apparent to foreigners. Major manufacturers and processors, notably textile enterprises, have inundated the Kingdom's industrial estates since 1985, when the Kirsch Group of South Africa, in anticipation of sanctions, established the "Swatex" (now "Natex") textile manufacturing mill at Matsapha Industrial Park (SIC) near Manzini. The Taiwanese soon followed, establishing four clothing factories. All these enterprises were aimed principally at the European and American markets".

companies which happily relocated there, exploiting cheap labour and the access to the international markets which would have been otherwise closed to them. Policy makers in the country went overboard to grant fiscal and other incentives to attract these sanctions-busting South African Companies. For example in 1985, tax holidays and residence permits were liberalized to cover "any business which is predominantly engaged in exporting goods from Swaziland".

According to Baloro, in relation to its African counterparts; "Swaziland has operated a relatively open economy anchored on the policy of developing the national economy through private enterprise".<sup>32</sup> Privatisation has been vigorously promoted with free enterprise and ownership of private property being key aspects of Swaziland's national development policy and its role as a source of government revenue in the form of taxes and employment and its role in promoting the policy of localisation currently emphasised by the Minister of Trade and Industry, acknowledged by the Swaziland Government.<sup>33</sup>

In the absence of a single regime of legislation such as a code of foreign investment law regulating foreign direct investment in Swaziland, recourse must be had to the more pertinent provisions of the complex of laws regulating the entry, incorporation and establishment of foreign investment in relation to certain essential matters.<sup>34</sup>

#### (1) The forms of private business organisations in Swaziland<sup>35</sup>

In terms of the Companies Act 7/1912, a foreign investor in Swaziland may establish his business in four different ways, namely, in an informal unincorporated form as a sole trader; a partnership, incorporation of the business as a Swazi registered company with limited liability either as a private or a public company under the provisions of the Companies Act.<sup>36</sup> This involves registration of a memorandum of association, articles of association and a prospectus, including obtaining a certificate to commence business and an annual company licence.<sup>37</sup> According to the laws of Swaziland, the registration and drafting of documentation is to be done by Attorneys or qualified Accountants.<sup>38</sup> At present, the Swazi company registry is staffed by a non-lawyer without legal assistants, rendering it impossible for the present incumbent to ensure that all legal requirements are complied with.<sup>39</sup> According to Baloro, it would prove constructive were the Company Registrar to be administratively integrate with the parent Ministry — the Minister of Trade and Industry.<sup>40</sup>

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32 Baloro 1983:5.

33 Baloro 1983:5.

34 See the *Companies Act 7/1912; Registration of Business Act 42/1933; Income Tax (Consolidation) Order, Kings Order-in-Council 21/1975; Employment Act 5/1980.*

35 Baloro 1983:6.

36 Baloro 1983:6.

37 Baloro 1983:6.

38 Baloro 1983:7.

39 Baloro 1983:8.

40 Baloro 1983:8.

He further submits that the existing arrangement whereby the registry is located in the Ministry of Justice is “confusing and unsatisfactory”, suggesting instead the establishment of independent company registry with decentralised branches in strategic locations throughout the country.<sup>41</sup>

The Swaziland Government has sanctioned and often engaged in joint business ventures with foreign investors in strategic sectors of the national economy.<sup>42</sup> Of considerable importance to foreign investors are that the finer details of these agreements relating to the division of shares between the Swazi Government and the foreign investors, the tax rates, the applicable laws and its duration and particulars are subject to negotiation by the relevant parties.<sup>43</sup> It is noteworthy, according to Baloro, that at this point-in-time the national government has displayed hesitancy in imposing rigid and specific limitations or guidelines of foreign ownership and investment in Swaziland.<sup>44</sup> Additionally, there are no existing laws or regulations in place 'mandating particular percentages of local ownership (either in terms of the Government or indigenous private ownership) of businesses established in the country.<sup>45</sup> Virtually all sectors of the country's economy are open to foreign investors, except ownership of land by foreign investors.<sup>46</sup> Further, the Companies Act makes no provisions mandating the appointment of Swazi nationals to sit on the boards of the various foreign companies operating in the country.<sup>47</sup>

## (2) Foreign Investment and the Tax Regime

The financial legal regime regulating both foreign and national corporate investors is the Income Tax (Consolidation) Order 1975 as amended, a fiscal or tax regime, which according to Baloro, “is geared towards encouraging the flow of foreign investment into the country by the grant of generous tax incentives”.<sup>48</sup> Examples of these tax incentives include the granting of a five year tax holiday and the deduction of certain allowances from taxable corporate income to certain foreign companies.<sup>49</sup> Other notable tax incentives include the granting of additional tax concessions to businesses, which are established in localities designated by the Minister of Finance and carrying out such designated industries<sup>50</sup> as well as allowable deductions which may be made from a company's gross income in terms of section 14(1).<sup>51</sup> The Income Tax

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41 Baloro 1983:8.

42 Baloro 1983:7.8.

43 Baloro 1983:7.8.

44 Baloro 1983:7.8.

45 Baloro 1983:7.8.

46 Baloro 1983:7.8.

47 Baloro 1983:7.8.

48 Baloro 1983:7.8. See the *Income Tax (Consolidation) Order 1975, King's Order-in-Council 21/1975* as amended. The most important recent amendments being the following: the *Income Tax (Amendment) Act 11/1987*; the *Income Tax (Amendment) Act 6/1987*; the *Income Tax (Amendment) Act 5/1988*, the *Income Tax (Amendment) Act 9/1988* and the *Income Tax (Amendment) Act 1989*.

49 See sec 12(5) of the *Income Consolidation Order of 1975* as amended.

50 Section 69 (2) of the *Income Consolidation Order of 1972* as amended.

51 See section 14(1)(c), section 14(1)(i) and (ii).

(Consolidation) Order of 1975, as amended also provides for the deduction of allowances in respect of farming and mining capital expenditure.<sup>52</sup>

Aside from the various fiscal incentives to attract foreign investment, Swaziland has sought to promote foreign investment by improving on and establishing an efficient investment infrastructure such as the industrial sites located in strategic parts of the Kingdom, including the establishment of the Swaziland Investments Development Corporation (SIDC) responsible for the processing of applications of foreign investors, the rendering of assistance in locating and renting building space and promoting access to loan and equity finance.<sup>53</sup>

### (3) The Exchange Control Regime

Swaziland's national currency, the Lilangeni or Emalangeni in its plural form, is linked to the South African Rand.<sup>54</sup> Swaziland, in concert with Lesotho, Namibia and South Africa belong to the Common Monetary Area, and the South African Customs Union (SACU).<sup>55</sup> There exists no exchange controls within the CMA and the South African rand is freely exchangeable in all four countries. In consequence Swaziland has opted not to adopt an independent

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52 Baloro 1983:12-13. Subject to the foregoing deductible allowances, all income earned by businesses other than mining companies, is chargeable to tax at a flat rate. Subject to periodic reviews usually announced in the annual budget. It stands at 37.5%. "For the first five tax years from the 1st July 1973, or the date on which the holder has been granted a mineral right by the Ngwenyana, whichever is the later date, an annual sum equal to R10 per each hectare of the land or part thereof in respect of which the mineral right is held by such holder and thereafter, at the rate of R50 per each hectare or part thereof. Provided that no such tax shall be charged for the first tax year in which such mineral right has been granted after the 1st July 1973".

Section 3(4) of the Act provides for the deduction in any tax year of any reasonable expenditure actually incurred in respect of *bona fide* mining operations, prospecting or development work undertaken before the commencement of mining operations. These expenditures must have been incurred during the tax year preceding the tax year in which mining tax is payable. An innovative feature of 1973 statute is the imposition of a capital gains tax on any person who sells, exchanges or assigns any mineral right to another person. In the event of such a sale or exchange, the rate of tax payable is an amount equal to 73.5% of the capital gains reaped from the disposition. The purpose of the capital gains tax is to reduce the windfall profits likely to be reaped from speculative deals in mineral rights in the country. It is therefore hoped to discourage such deals and promote the actual exploitation and mineral rights by their holders.

See the first schedule and section 16, the *Income Tax (Consolidation) Order, Kings Order-in-Council 21/1975*, and the *Mineral Rights Tax Order 34/1973*. These statutory provisions deal with the tax treatment of farming and mining capital expenditure.

53 Baloro 1983:13.

54 Baloro 1983:11-12. See sections 14(1) (c): 14(1)(i) and 14(1)(ii) of the *Income Tax (Consolidation) Order* of 1975 as amended.

55 For further promotional activities of the SIDC and other Government incentives provided to foreign investors, see *Barclays Bank of Swaziland Ltd Swaziland, A Business Man's Profile*, 1986.

monetary policy since it has continued to follow the South African monetary policy, the benefits of which are manifold from the view of businessmen.<sup>56</sup>

(4) Protection from nationalisation and expropriation

In official statements emanating from the national government, nationalisation has been ruled out. However, there exists no constitutional or statutory guarantee against the nationalisation or exploration of foreign Investment in Swaziland. In practice, since 1968 the Swazi government has never nationalised or expropriated any foreign property. Against this welcoming and generous disposition, foreign investments are “practically securely guaranteed” against nationalisation and expropriation in Swaziland.<sup>57</sup>

(5) Recognition and protection of industrial and intellectual property rights

The legal framework recognizing and protecting Industrial and Intellectual property rights in Swaziland is, anchored in legislation enacted by the British Colonial Government, which is however outdated and ineffective.<sup>58</sup>

(6) Key labour and employment laws in Swaziland<sup>59</sup>

For many years industrial relations in Swaziland have been relatively very peaceful, with trade unionism fairly underdeveloped, an attribute extremely attractive to foreign investors. However since the late 1980s, this situation has changed dramatically as the main Trade Union Movement, the SFTU has organized many national stay-aways.

With regard to immigration requirements the Immigration Act of 1982 regulates the entry of foreigners desirous of establish a business in Swaziland.<sup>60</sup> Representations have been made to the Minister of the Interior and Immigration to sanction the issuing of business permits for a period of five years, ensuring stability and long term planning.<sup>61</sup>

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56 Baloro 1983:14-15. “From the point of view of businessmen, this has its benefits since it helps to simplify transactions with South African companies many of which are parents of Swazi-based companies. However, where there are financial transfers outside the CMA, the provisions of the Exchange Control Order, 1974 and the Exchange Control Regulations, 1975 will apply. Within this legal framework, the central Bank of Swaziland formulates day-to-day directives on exchange control policy in the Manual of Exchange Control Rulings which are distributed to the various authorized foreign exchange dealers. In practice, central bank approval for those transfer transactions which require it is routinely granted. Dividends are freely remitted, subject to withholding tax of 15% (12.5% within SACU) for non-resident shareholders. Also, interest payable on loans may be freely repatriated but this is subject to a 10% tax. All expatriate employees may freely repatriate one-third of their gross monthly salaries or even one-half of such salaries provided that they can furnish evidence of their dependent’s residence outside the jurisdiction”.

57 Baloro 1983:61.

58 Baloro 1983:17.

59 See *Industrial Relations Act* 8/1980; *Employment Act* 5/1980; *Wages Act* 16/1964; *Workmens Compensation Act* 4/1963 (*Kings Order-in-Council* 23/1974).

60 See the *Immigration Act* 17/1982. See Sections 4, 5(2).

61 Baloro 1983:24.

### 2.3.2 Tanzania

Tanzania has enacted a comprehensive code of legislation to regulate the entry and operation of foreign investments in its country, namely, the National Investment (Promotion and Protection) Act, 1990.<sup>62</sup> This new law effectively repeals the Foreign Investments (Protection) Act of 1963 and applies only in one part of the United Republic, namely, Mainland Tanzania. Zanzibar continues to apply the Foreign Investment act of 1986.<sup>63</sup> The new Act effectively covers the Investment Promotion Centre and its application procedure; areas of investment; the various attractive investment incentives; protection of foreign investments; settlements of disputes and the transfer of foreign currency.<sup>64</sup> According to Baloro, the Tanzanian National Investment Act 1990 “has a very comprehensive schedule which lists the priority areas for foreign investment, the controlled and reserved areas and those activities which have been exclusively reserved for local investors”.<sup>65</sup> These areas are inclusive of “retail and wholesale trade, product brokerage, the operation of taxis, barber shops, hairdressing salons, butcheries and ice-cream making parlours”.<sup>66</sup> The detailed and comprehensive provisions of the new Act effectively creates certainty and builds confidence amongst potential foreign investors.

Another positive aspect of the new legislation is the establishment of the Investment Promotion centre as an autonomous institution “which shall be the focal point of the implementation of national investment policy, and in particular, it shall be responsible for the promotion, co-ordination, regulation and monitoring of local and foreign investment in Tanzania”.<sup>67</sup> Section 5(2) details the functions of the centre:

- (1) to identify and advise potential investors on possible areas of investment and to provide them with available feasibility reports and market studies;
- (2) to collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise upon request, on the availability, choice or suitability of partners in joint venture projects;
- (3) to assist where appropriate, in the identification of local partners for foreign investors.

The Act further stipulates both broad and specific criteria which would assist and guide the Investment Promotion Centre in evaluating applications

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62 See *National Investment (Promotion and Protection) Act 1990* Vol 71 *Gazette of the United Republic of Tanzania* No 26 (June 29, 1990); *Act Supplement* No 3 reproduced in 30 *ILM* No 4:890-912 (July 1991). For a commentary on the general legal framework governing foreign private investments in Tanzania, see Peter 1989.

63 Peter 1989:890.

64 Peter 1989:890.

65 Baloro 1983.

66 Baloro 1983.

67 See also SS.4(1) and 5(1). The national Investment (Promotion and Protection) Act 1990 71 *Gazette of the United Republic of Tanzania* No 26 June 29, 1990, *Acts Supplement* No 3.

for foreign investment approval.<sup>68</sup> In terms of section 13(1) of the new Act, the Centre, in considering applications, “shall satisfy itself of the likely contribution by the enterprise to the economic development and benefit of Tanzania.<sup>69</sup> It is hoped that the investments and operatives of foreign investors should, *inter alia*, help the host country attain the following objectives:

- (1) maximisation of foreign exchange earnings and savings;
- (2) the enhancement of import substitution activities which achieve identifiable substantial foreign exchange savings;
- (3) the expansion of food production;
- (4) the attainment of a high degree of technology transfer;
- (5) the creation of employment opportunities and the development of human resources.<sup>70</sup>

A noteworthy comment is that under the previous legislation, the power of approval was solely concentrated in one person, namely, the Minister of Finance who exercised total discretion on whether to grant an investment certificate or not.<sup>71</sup> With the establishment of an autonomous institution to implement investment law and policy, the centre will have the time available to scrutinize applications forwarded to it, a factor which should result in profit for the country.

### 3. Conclusion with recommendations

A major obstacle to the success of regional economic integration is the absence of a comprehensive code of uniform legislation effectively by regulating foreign investment in the SADC region as a whole. The major advantage of such uniform legislation is that it would eliminate unnecessary competition between the SADC states and the consequent disparity in foreign investment allocation. Further, it would create certainty and build confidence amongst investors, facilitating choices made by the investor regarding location, national currency, migration, admission and application requirements, tax regimes etc. It therefore becomes necessary to overhaul the legal frameworks in the region within which foreign investment is expected to operate in a single uniform investment law. In this regard, the World Bank has already done extensive work, reflecting principles which ought to be welcomed by the SADC Member States and other African Countries.<sup>72</sup>

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68 Baloro 1983:27.

69 See also sec 13(1).

70 See also sec 13(1)(a-h).

71 Peter 1989:891.

72 See World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment (Adopted September 21, 1992), 31 ILM 1363 (1992).

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