

**Title: “Legal Framework in Namibia: An Analysis of the
impact of Competition Act, 2003 (Act No.2 of 2003) on
Investment Promotion in Namibia.”**

BY
Simana Chimana
2001-4-1775

**A Thesis submitted in partial fulfillment of the requirements for the degree of
Master of Laws (International Economic Law), Faculty of Law, University of
Namibia**

Supervisor: RA Kaakunga
Prof. M Hinz

Table of Contents

Abstract

1. Chapter One

1.1 Introduction

2. Chapter Two

2.1 Literature Review on Investment

2.1.1 Definitions

2.1.2 World Trend in Foreign Direct Investment

2.1.3 Types of Foreign Direct Investment

2.1.4 Theoretical Importance of Foreign Direct Investment

2.1.5 Determinants of Foreign Direct Investment

2.1.6 Customary Law

2.1.7 International Instruments

2.1.8 Link between Competition Law as envisaged in *Competition Act, 2003 (Act No.2 of 2003)* and Investment

2.1.9 Nature of Law-Related Obstacles to Investment

2.1.10 Legislative and Regulatory Provisions

2.1.11 Institutions

2.1.12 Systemic Issues

3. Chapter Three

3.1 Literature Review on Competition

3.1.1 Competition Policy

3.1.2 Government Stance on Competition Policy

3.1.3 National Competition Legislation

3.1.4 Objectives of National Competition Law

3.1.5 Instruments on Competition Legislation

3.1.6 Perspectives of High Income Countries

3.1.7 Perspectives of Developing Countries

3.1.8 International Anti-Trust Agreement

4. Chapter Four

4.1 Legal Framework on Investment Promotion in Namibia

4.1.1 Scope of Legislation on Investment Promotion

4.1.2 Analysis of the Coverage and Application

5. Chapter Five

5.1 Legal Framework on Competition in Namibia

5.1.1 Scope and Analysis of Application

6. Chapter Six

6.1 Nature of Legal Framework in Namibia

6.1.1 Comparisons

6.1.2 Contrasts/Degree of intersection

6.1.3 Possible Implications

7. Chapter Seven

7.1 Conclusions and Recommendations

8. Bibliography

Abstract

The aim in this thesis is to find out and analyze the possible impact of *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of investment in Namibia as per the provisions in the *Foreign Investment Act, 1990 (Act No. 27 of 1990) as amended by Act No.24 of 1993*. Furthermore, the objective of the *Foreign Investment, 1990 (Act No.27 of 1990) as amended* is effectively supported by other Acts in Namibia, namely the *Arbitration Act No. 42 of 1965, Bank of Namibia Act No. 15 of 1997, Customs and Excise Act No 20 1998, Export Processing Zones Act No. 9 of 1995, Foreign Courts Evidence Act No. 2 of 1995 and the Import and Export Control Act No. 30 of 1994*. The study also demonstrates that there is a link that exists between the objectives of *Act No 27 of 1990 as amended* and the other Acts mentioned above. However, the main focus of the study is on the possible impact of *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of investment in Namibia as per the provisions in the *Foreign Investment Act, 1990 (Act No. 27 of 1990) as amended by Act No.24 of 1993*.

The study consists of seven chapters. While chapter one introduces the topic, chapters two and three present a review of literature on investment and competition, respectively. Chapter four analyses the legal framework on investment in Namibia, while chapter five analyses legal framework on competition in Namibia. Chapter six critically compares and contrasts the nature and structure of legislation on investment and competition. Chapter seven presents conclusions and observations on policy recommendations.

1. Chapter One

1.1 Introduction

Namibia is endowed with abundant reserves of minerals (diamonds, base metals¹), marine resources (hake, orange roughy, kingklip, snoek and other marine species), tourist attractions, (wild animals, sand dunes, savannah, plains, forests and canyon) agricultural products, (cattle, goats, sheep, dates, grapes and ostrich) and semi-skilled to unskilled labour force. Like other countries classified as developing economies, she needs capital and technology to use as inputs in production before Namibia can achieve and maintain industrialization of the economy as per the national vision 2030. The required technology and capital could be obtained through the attraction of foreign direct investments in Namibia. The capital and technological inputs required for the industrialization process need to be mixed however, among others, with labour to transform raw material into manufactured products. This is important as it adds value to the products, which can fetch better price on the international commodity markets.

The abundance of natural resources, openness of the economy to international trade and the envisaged national vision 2030 has increased Namibia's involvement in international trade, both at regional and international levels. This interaction is some times referred to as *globalization* and entails cross-border economic interaction in trade, investment, labour and could include integration in values, culture or and diseases (Stiglitz 2002:9). This interaction in international trade operates within a legal framework, and the resources cited above are as important in economic development as the legal framework. For the Namibian government to realize the national vision 2030, it must resort both to

¹ In this thesis base metal refers to minerals such as copper, gold, zinc, lead and silver.

the utilization of natural resources and adherence to the legal framework. However, for the sake of this thesis, the legal framework concerning the possible impact of Competition Act, 2003 (Act No.2 of 2003) on investment promotion in Namibia is the main thrust of this research.

In this thesis, the *literature review* on national competition law is narrowed towards the perspectives held in developed and developing countries. In most jurisdictions, be it that of developing or developed economies, *efficient allocation* of resources that maximize the national welfare ensures that the competition process is not distorted or impeded through the abuse of dominant positions. However, many jurisdictions recognize through *escape clauses* specific agreements between firms that may reduce competition but can enhance efficiency and make allowance for such agreements.

It is worth mentioning that the legal framework on the promotion of investment and the promotion of efficient markets through competition provide existing investors with the access to certain incentives. But are the incentives emanating from this legal framework enforceable? As an attempt to allude to this question or concern, the study will evaluate and discuss the Foreign Investment Act, 1990 (Act No. 27 of 1990) as amended by *Foreign Investment Act as amended, Act No.24 of 1993* and *Competition Act, 2003 (Act No.2 of 2003)* by analyzing the possible impact of the latter on the objectives of the former on the promotion of investment in Namibia.

Turning to the definition of the *'research problem,'* this is analyzed by looking at the state of the economy in the 1990s. Upon independence in 1990, the government of Namibia inherited an economy characterized by exports of raw products (minerals, fish, grapes, ostrich products etc) and imports of capital as well as technology. Exports markets were and still are mainly concentrated in the European Union, South Africa, United States of America, Far East², while import of capital and technology are from United States of America, European Union and foodstuff mainly from South Africa. Government realized this to be a constraint, especially the concentration of exports in unprocessed products. The key approach to use to solve the lack of diversity in processed products mainly depend on solving endogenous³ issues of Namibia first and then solve external constraints⁴. This is the same argument advocated by Zinn (1985:92). Further, this concentration of unprocessed export products prompted the government to realize over a short period of time that the solution to the problem required proactive setting up of policies encouraging manufacturing of products for exports. In order to encourage manufacturing of products for exports, the government implemented manufacturing incentives, for example, by enacting the *Foreign Investment Act, 1990* as amended by *Act No.24 of 1993*. The *Foreign Investment Act, 1990* as amended by *Act No. 24 of 1993* basically aim to promote foreign direct investment (FDI), however the Act⁵ has a positive impact on domestic direct investment (DDI) also. Further, the *Export Processing Zone Act, 1995* was also enacted to support the Act on foreign direct investment. Both Acts render national treatment to both the domestic and foreign investors as either the

² Far East in this thesis refers to Japan, Australia, New Zealand and certain East Asian economies like Malaysia as well as North Korea.

³ Such as poor productivity, shortage of and high cost of capital.

⁴ Such as the perception that Namibia carried a high international investment risk due to political instability in the region.

⁵ Refers to the *Foreign Direct Investment, 1990* as amended by *Act No.24 of 1993*.

domestic or the foreign investor has access to certain special fiscal incentives. Basically this shows that government has adopted a policy of non-discrimination between domestic and foreign investors. This is important in attracting investment to main sectors of the economy. Sorsa (1999:13) supports this argument by stating that national treatment and special fiscal incentives given to investors in the national investment codes are important and necessary in attracting productive investment.

The issue to explore in this thesis is that given *Foreign Investment Act, 1990 as amended by Act No.24 of 1993* how will the enactment of the *Competition Act, 2003 (Act No.2 of 2003)* impact on the legal framework on investment in general and the promotion of investment in particular? This is the issue that needs to be evaluated and discussed. I hope that it will contribute to the debate as to what really matters when designing an investment promotion package. Is it the attraction of investment that matters? Alternatively, does the promotion of both investment and competition matter when designing an investment promotion package? Is the degree of openness in legal requirement to both domestic and foreign business activities relevant?

Further, the degree of openness in legal requirement could be crucial provided it increases the level of comparative advantage in the economy. Nordas (1995:5) supports this view and argues that to maintain a substantial manufacturing sector, investment opportunities existing elsewhere in the economy can be justified by a drive to create a comparative advantage. Comparative advantage in a particular industry means having a relatively abundant and cheap supply of the factors intensively used in that industry,

which should include the legal framework of that country. But is this always the case given the diverse motives of investors, namely *market-seeking*, *assets/resources seeking* and *efficiency seeking*. It seems the investor's motive is always a determining factor. It is important in Namibia however, to have a simple self-reinforcing legal framework on investment in *Foreign Investment Act as amended, Act No.24 of 1993*, which is complemented by *Competition Act, 2003 (Act No.2 of 2003)* on competition, as they should be complementary. Moreover, other factors such as the *degree of international trade openness*, *agglomeration* and the *quality of bureaucracy* are as well important in determining the flows in FDIs.

The *objective or purpose* of the study is analyzed below as follows. Primarily the study assesses the extent to which *Competition Act, 2003 (Act No.2 of 2003)* influences the promotion of investment in Namibia. The study aims at finding out legal factors pertaining to the *Competition Act, 2003 (Act No.2 of 2003)* that does or does not support investment promotion as provided by *Foreign Investment Act 1993 as amended by Act No.24 of 1993*. It is debatable whether the tax and non-tax incentives as provided by the legal framework on investment is all-inclusive and can really penetrate the entire legal landscape on international trade, competition, and investment in Namibia. This concern requires the study to establish possible impact of *Competition Act, 2003 (Act No.2 of 2003)* on *Foreign Investment Act as amended, Act No.24 of 1993*. Concisely, I believe the study would contribute to the debate on how far the degree of intersection in the legal framework foster active interaction or participation of economic agents in reallocating resources in investment and production. Against this backdrop, the study will identify

certain provisions in Competition Act 2003 (*Act No.2 of 2003*) if any, that contrasts and compares with the existing legislation on investment as provided by *Foreign Investment Act as amended by Act No.24 of 1993*.

Against this background thus far given, I hope that the area of this research and focus of the topic will contribute to the debate on the influence or impact of *Competition Act, 2003 (Act No.2 of 2003)* on investment promotion in Namibia. The *importance* of this study on the possible impact of *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of investment is linked to raising standards of living in Namibia. Thomas (1990:1) is in support of this view and argues that trade reform programs have two main objectives. First is to help raise economic growth and development by improving the allocation of resources, hence efficiency in raising or improving the welfare in the economy. Second is to help improve balance of payment by strengthening the competitiveness of the external sector in international trade for goods and services. All the above-cited reasons are the main targets of the legislation in Namibia on investment and competition, and such targets have been supported by the government decision to accede to the World Trading Organization in 1994.

The *analysis on the methodology* is divided into three parts viz., the *research design*, and *the use of literature and actual analysis of the possible impact of Competition Act, 2003 (Act No.2 of 2003) on the promotion of investment in Namibia*. Against the backdrop outlined above, this research will touch on investment and competition in general. It will, however, be more focused on the Namibian economy and to a larger extent on two sets of

legislations viz., *Competition Act, 2003 (Act No.2 of 2003)* and Foreign Investment, 1990 as amended by *Act No.24 of 1993*. The study will entail a research with formative evaluation, whose aim will bring out the results of the possible impact of the *Competition Act, 2003 (Act No.2 of 2003)* on investment promotion in Namibia. Moreover, it will evaluate the weaknesses and strengths identified or other problems thereof.

The research will be skewed on the weights for the use of literature. There will be no reference on data /statistics. As for the literature, interviews with knowledgeable staff in government ministries and private sector institutions will be conducted. Also, of vital necessity will be certain websites on the Internet, such as that of the Institute of Public Policy and Research (IPPR), the United Nations (UN) and World Bank etc. Such websites are important, as they are sources of relevant articles on conventions regarding competition, investment and trade. Also, a research on Namibian theses on similar topics will be conducted. The debate in parliament on the Competition bill will also be consulted in order to ascertain the main objective behind *Competition Act, 2003 (Act No.2 of 2003)*.

A systematic evaluation of selected legislation, section by section will be undertaken and the meaning and implications of each provision highlighted. This will bring out findings that can determine and evaluate the effectiveness and appropriateness of *Competition Act, 2003 (Act No.2 of 2003)* on investment promotion.

2. Chapter Two

2.1 Literature Review on Investment

2.1.1 Definitions

In general terms investment could be in the form of *direct investment*, *portfolio investment* or *other investment* such as in pension and insurance funds⁶. Direct investment involves a long-term commitment of resources by domestic firms abroad that includes management in a host country and portfolio on the other hand, is short term in nature while other investment is a residual of both the direct investment and portfolio investment (Shihata 1991:485). Foreign direct investment⁷ is a good example of direct investment while investment in shares is an example of portfolio⁸. If an investment is neither direct nor portfolio it becomes other investment. The focus in this chapter however, is not to contrast the types of investment. The main aim besides the definition is to review the literature on foreign direct investment in terms of its importance, the types of FDIs as well as the determinants of inflows to the host country. For the sake of this thesis, reference to the impact of Competition Act, 2003 (Act No.2 of 2003) on investment promotion as provided in Foreign Investment Act as amended by Act No.24 of 1993 will be highlighted.

Foreign direct investment has been recognized by the government of Namibia to be crucial in facilitating economic development and as a result, recently, it received more

⁶ Balance of Payments Manual (1993:70-71)

⁷ In practice foreign direct investment is reflected in takeovers or equity participation of existing foreign enterprises or in the establishment of new enterprises in foreign countries by domestic firms; as the control-orientation of foreign direct investment cannot be identified when collecting data, it is common statistical practice to accept all capital flows with a minimum level of 10% of the entitled shares as foreign direct investment (Knodler and Albertshausen 2001:8).

⁸ To differentiate it from the foreign direct investment, capital inflows in the host country with foreign shareholding levels less than 10% is classified as portfolio investment.

attention from the Ministry of Trade and Industry in Namibia such that the Foreign Investment Act of 1990 was amended by Act No. 24 of 1993. This amendment was necessary in order to accommodate provisions that attract investment. Attracting foreign direct investment has been at the top of the agenda not only of Namibia, but also of most governments around the world, particularly in the 1990s. This closer attention given by government to FDI worldwide emanates from the advantages that could possibly be derived from such type of investment.

2.1.2 World Trend in Foreign Direct Investment

During the 1990s there has been renewed interest in foreign direct investment unlike for example in the 1960s and 1970s when developing countries were skeptical about the importance of foreign direct investment. Foreign direct investment has become the largest single source of external finance for economic development in developing countries. According to Salacuse (2000:382), foreign direct investment has increased six fold⁹ between 1987 and 1996. The skepticism about foreign direct investors in the 1960s and 1970s as a result subjected foreign investments to the restrictive conditions that protected national interest of the host governments (Kaakunga 1992:8). The restrictions might have been imposed through a number of instruments including the national investment codes and in certain cases through legislation on competition. However, this is not what *Competition Act, 2003 (Act No.2 of 2003)* intends to impose in Namibia.

⁹In 1987, developing countries received total foreign direct investment (valued in 1996) of less than US\$20 billion. In 1996, they received nearly US\$120 billion. Foreign investment has grown in importance not only in absolute terms but also in its relation to other forms of development finance. In 1996, out of all external financial flows to developing countries, nearly 40 percent consisted in direct foreign investment, with portfolio investment accounting for an additional 16 percent. By 1997, nearly 50 percent of all capital flows to developing countries consisted of direct foreign investment.

Competition legislation in general has the mandate to stop through an escape clause a business activity perceived not to be in the interest, for example, of the host government.

It is not surprising that in the 1960s and 1970s, nationalization and the rigid control on foreign investment, particularly in the sector relying on natural resources gained momentum. Such actions were implemented on recognition of the United Nations General Assembly Resolution 3301 and 3302, 1974 developing countries interpreted that it allowed them entitlement under international law to exercise a complete management of their resources.

However, this trend of thinking has changed and as from the 1990s a renewed interest in attracting foreign direct investment has been observed. In Namibia, for example, *Foreign Investment Act as amended by Act No.24 of 1993* was enacted mainly to attract foreign investment to Namibia through investment incentives. As per the preamble of the former, the Act makes provisions for the promotion of foreign investments in Namibia by providing exclusive rights (compensation in case of expropriation¹⁰ and dispute settlement¹¹ in respect of Special Status Investment) given to the holders of the so called *status investment*. Further, *Foreign Investment Act as amended by Act No.24 of 1993* embodies several incentives that would attract potential investors namely the unrestricted transfer of profits and proceeds of sale (Section 9) and availability of foreign currency to honor, for example, payments in respect of property rights and/or debt service obligation (Section 8). In the same light, by advocating against unfair business practices,

¹⁰ Section 11, Foreign Investment Act, 1990 (Act No.27 of 1990), as amended by Act No.24 of 1993.

¹¹ Section 12, Foreign Investment Act, 1990 (Act No.27 of 1990), as amended by Act No.24 of 1993.

Competition Act, 2003 (Act No.2 of 2003) could still be used to stimulate the accommodation of foreign direct investment through safeguarding companies against unfair business practices such as mergers and monopolies unless when exemptions are allowed. *Competition Act, 2003 (Act No.2 of 2003)* promotes investment, for example, by recognizing the role of foreign competition in Namibia (section 2(d)) and exemption or escape clause, for example, in respect of intellectual property rights¹² and professional rules¹³. All this complements *Foreign Investment Act as amended, Act No.24 of 1993* positively on promotion of investment.

Before expanding on the benefits associated with foreign direct investment, it is necessary to elaborate on the types of foreign direct investment.

2.1.3 Types of Foreign Direct Investment

Before elaborating on the types of foreign direct investment, we need perhaps to ask a question as to what actually motivates investors or are the determinants of foreign direct investment. According to Kinoshita and Campos (2003:5) motivation depends mainly on the motives of foreign direct investors when choosing the type of investment viz, *marketing seeking*¹⁴, *asset/resource seeking* and *efficiency seeking foreign direct investments*. The purpose of the *market seeking foreign direct investment* is to serve local

¹² Section 30(1) states that the Commission may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trade marks, plant varieties or any other intellectual property rights.

¹³ Section 31(1) states that a professional association whose rules contain a restriction that has the effect of preventing or substantially lessening competition in a market may apply in the prescribed manner to the Commission for an exemption in terms of subsection (2).

¹⁴ It is also called horizontal FDI, as it involves replication of production facilities in the host country. The mode of horizontal FDI is typically 'greenfield investment.'

and regional markets. As for the *asset/resource seeking type* of foreign direct investment, firms invest abroad to acquire resources not available in the home country such as raw materials and low cost labor. *Resource seeking* type of foreign direct investment is a common type of motive behind the inflows to developing countries in SADC¹⁵. Development Policy Research Unit (2000:4) cites mining as the main foreign direct investment determinant during the 1990s in a number of SADC countries including South Africa, Angola, Botswana, Zambia, Zimbabwe and Namibia. The third type occurs when the firm can gain from the common governance of geographically dispersed activities in the presence of economies of scale and scope. All the three types of FDIs are important in one-way or another and together make a favourable initial condition that could attract large amount of FDIs.

However, there are other factors also explaining the motives of investors such as agglomeration. According to Kinoshita and Campos (2003:5) agglomeration behaviour in choosing investment location happen when new investors mimic past investment decisions of other investors in choosing where to invest; locating next to other firms, they benefit from positive spillovers from investment already in place. The common sources for these positive externalities are knowledge spillovers, specialized labor and intermediate inputs¹⁶ (Marshall 1920) and (Krugman 1991) in Kinoshita and Campos (2003:6).

¹⁵ Southern Africa Development Community and includes Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

¹⁶ Emphasis is on the linkages effect: users and suppliers of intermediate inputs cluster near each other because the large market provides greater demand for goods and supply of inputs.

2.1.4 Theoretical Importance of Foreign Direct Investment

In Namibia, foreign direct investment is not only a source of external finance required for large capital projects in developing and/or certain developed countries, but also of improving productivity in firms, especially those operating in less developed economies. According to Kinoshita (2001:1-5) productivity improves either by investment in research and development or by technology spillover from foreign direct investment, through either joint ventures or when operating in sectors with great foreign presence. Joint ventures between an FDI and host enterprise are important sources of absorbing technological skills, though such joint ventures have to be recognized by *Competition Act, 2003 (Act No.2 of 2003)* through exceptions in the Act referred to as an 'escape clause'. The provision of an escape clause for joint venture in *Competition Act, 2003 (Act No.2 of 2003)*, for example, in research and development encourages investment and as such impacts positively on the promotion of investment in Namibia as stipulated in *Foreign Investment Act, 1990 as amended by Act No. 24 of 1993*.

Though Foreign Direct investment is a source for scarce capital it enhances new knowledge in processing techniques, market development and strategies (Kinoshita 2001:1) and (Shahita 1991:486). Such benefits derived from foreign direct investment activities might not be always realized in the absence of legislation on investment. Neither is investment in research and development always ideal in the absence of legislation with provisions that protect property rights, for example. Further it is driven positively by factors such as (1) *public expenditure* (2) *openness to trade and investment* (3) *human capital*, (4) *per capita income* (5) *development of capital markets* (Clarke

2001:3-7). The lesson for Namibia is that Competition Act, 2003 (Act No. 2 of 2003) though it positively impacts on Foreign Investment Act, 1990 as amended by Act 24 of 1993, might not have the desired result in terms of investment promotion. Furthermore, Clarke (2001:3) cautions that although foreign direct investment rather than research and development is probably the primary way that enterprises in developing countries acquire technology, expenditures on research and development are one way to facilitate and increase technological depth other than through foreign direct investment, which also depends on institutional quality that includes effectiveness in enforcement of the provisions of *Competition Act, 2003 (Act No.2 of 2003)* on the investment activities. If the institutions involved in facilitating FDIs are hostile in terms of enforcement of the Act (Act no 2 of 2003), by for example, discriminating against foreign investors, it could deter investment instead of promoting it. Kinoshita (2001:1-5) argues that there are other determinants of expanding investment besides the equal treatment of foreign and domestic investment. Firstly, local firms should also have an *absorptive capacity* by investing in research and development activity in order to maximize the extent to absorb spillovers in technology from foreign direct investment. Secondly, it is particularly necessary and important for Namibia as a host government to attract foreign direct investment in certain specialized sectors in which the potential spillovers in technology are greater than in other sectors. This approach needs to be backed up by the national codes on investment (*Foreign Investment Act as amended by Act No.24 of 1993*) and competition (*Competition Act, 2003 (Act No.2 of 2003)*). This implies that the stance taken by government on attracting FDIs in the manufacturing sector is on account of absorbing technological skills in Namibia.

Against the points illustrated above, it can be argued that for Namibia as a host economy to realize the attraction of foreign direct investment, the positive effect of *Competition Act, 2003 (Act No.2 of 2003)* on investment promotion should also be taken into account besides other policies. This is because competition legislation might be reinforcing or not reinforcing (depending on the objectives) the drive to attract foreign direct investment. This, however, will depend on the objectives of the foreign investment Act as well.

2.1.5 Determinants of Foreign Direct Investment

As already mentioned above, the changing attitude towards foreign direct investment not only in Namibia, but also worldwide has led, in turn, to a global capital shortage in the 1990s. This global capital shortage in turn further enhanced competition for private foreign capital resulting in the attraction of foreign direct investment topping the agenda of most countries around the world. Much of the recent research¹⁷ has focused on identifying factors and policies, which can influence the decision of foreign investors when locating multinational companies. However, the debate is yet still open as to what combination of factors is the most effective one for attracting foreign direct investment, especially in small open developing economies such as that of Namibia. The degree of attractiveness depends also on a number of indicators that includes *stability in politics*, *rule of law*, and *transparency* in government decisions adhering to set legislations

¹⁷ UNCTAD (1998), Sauvart and Mallampally (1999). ATKearney (2002, 2003). Wells, Jr. et al (2001), Salacuse (2000) and Kinoshita and Campos (2003) just to mention few.

(Kearney 2003:7-37)¹⁸. Sauvant and Mallampally (1999:36) support Kearney on the degree of competitiveness and gives details as shown in the box.

<p style="text-align: center;">Host country determinants of foreign direct investment (FDI)</p> <p style="text-align: center;">Policy Framework for FDI</p> <p>1. Economic, political and social; 2. Rules regarding entry and operations; 3. Standards of treatment of foreign affiliates; 4. Policies on functioning and structure of markets (especially competition and policies governing mergers and acquisitions) 5. International Agreements on FDI; 6. Privatization policy; 7. Trade Policy (tariffs and non-tariff barriers and coherence of FDI and trade policies; 8. Tax policy</p> <p style="text-align: center;">Economic determinants</p> <p style="text-align: center;">Type of FDI Classified by motives of firm</p> <p>1. Market-seeking¹⁹ 2. Resource/asset- seeking²⁰ 3. Efficiency seeking²¹</p> <p style="text-align: center;">Business facilitation</p> <p>1. Investment promotion (including image-building and investment-generating activities and investment facilitation services); 2. Investment incentives; 3. Hassle costs (related to corruption and administrative efficiency); 4. Social amenities (for example, bilingual schools, quality of life); 5. After investment services</p>
--

Source UNCTAD, World Investment Report 1998: Trends and Determinants, table IV.1 p.91. in Sauvant and Mallampally (1999:36).

The host country's determinants of FDI could also be analyzed in terms of the legal scope on the *admission clauses* particularly on the *freedom of establishment, freedom of movement of capital* and *freedom of investment* in Namibia. Admission clause gives a foundation of the European model and the United State of America's model on admission of foreign investment. According to Juillard (2000:336) the European model is tilted more towards favouring the protection of sovereign rights of the host State, unlike the USA model, which favours an *open-door policy* with respect to the entry of foreign investment.

¹⁸ Prepares the FDI confidence index, which assists chief executives to monitor and capitalize on geopolitical, economic, social and technological change worldwide.

¹⁹ Eg., market size and per capita income, market growth, Access to regional and global markets, country-specific consumer preferences and structure of markets.

²⁰ Raw materials, low-cost unskilled labor, skilled labor, technological, innovative, and other created assets (for example brand names), including as embodied in individuals, firms and cluster, physical infrastructure (ports, roads, power, telecommunications).

²¹ Cost of resources and assets listed above, adjusted for labor productivity, other input costs, such as transport and communication costs to /from and within host economy and other intermediate products, membership of a regional integration agreement conducive to the establishment of regional corporate networks.

The European model has *no open-door clause*, rather reserves the application of domestic laws and regulation, which might limit certain foreign investment economic activities. In such instances states, host States have eliminated or severely weakened the screening requirements and other controls on entry, and further have retained entry restrictions to particular sectors, for example, such as on national security Fatouros (1995:193). As a result, the European model preserves the sovereign rights of the host State with respect to the foreign investment. The US model, on the other hand, contains no admission clause, but only a general provision on treatment, which covers the pre-investment phase as well as the post-investment period.

A critical analysis of the admission clause on investment shows enactment by parliament on the promotion of investment could still be further limited by what the clause on admission advocates. However, this is not valid in countries following the USA model. As Namibia follows the European model, which does not have an open door clause for the entry of FDI in the host country, it is the general provision on treatment of FDIs, as provided by the Foreign Investment 1990 as amended by *Act No.24 of 1993* or the *Competition Act, 2003 (Act No.2 of 2003)* that becomes valid. Admission clause in this sense is an important factor anyhow in determining the location of investment. As already mentioned above, this is because the freedom of establishment, freedom of capital movement and investment have link with the national investment codes or other clauses with respect to admission of foreign investment. National investment codes in Namibia play an important role as a determinant of foreign direct investment to Namibia.

Besides entry and establishment, other substantive issues found in the legal framework on investment are the notions of legal treatment after admission and settlement of investment disputes. This legal treatment includes the extent the Competition Act, 2003 (Act No. 2 of 2003) could be used in addressing issues on competition. The legal treatment after admission relate to issues of discrimination while the settlement of investment disputes relates to disputes that can arise between the host State and foreign investor. The notion of legal treatment after admission is a very important aspect in attracting the desired type of investment. This notion can be addressed from the competition law point of view besides investment codes. Moreover, the notion of discrimination can further be interpreted with reference to the notions of ‘most-favored-nation’, national and special treatment. Most-favored-nation clause is an anti-discriminatory treatment given to companies or products from different countries, national treatment refers to a requirement of equal treatment afforded to aliens and host country nationals while special treatment has to do with the possibility of discrimination in favor of a foreign investor through the offer of incentives or other kinds of special treatment (Fatouros 1995:196).

2.1.6 Customary Law

Customary international law norms and principles in matters related to foreign direct investment is overshadowed by lack of clarity and specificity. However, they are important in laying the foundation of other legal norms such as the competence of States to control the entry and operations of foreign enterprises (Fatouros 1995:188-89). In one way or another, the competence of State in controlling the entry and operations of FDIs clearly has an impact on how government can successfully attract investment. This

is because the manner or capacity of government in dealing with issues of entry and operations can either encourage or discourage foreign investors.

2.1.7 International Instruments

International instruments, on the other hand, are transparent and evident part of the international framework on treatment of foreign direct investment. However, the effects of such instruments like regional agreements may not be so effective in facilitating investment unless supported by the law and legal institutions. According to Salacuse (2000:383) the role of law and legal institutions, both international (World Bank) and domestic (national investment codes/clauses), though often neglected in facilitating the flow of private capital from one country to another, is crucial. This observation is further supported by Fatouros (1995:189-90), who argues that the General Agreement on Trade in Services (GATS), Agreement on Trade Related Investment Measures (TRIMS), United Nations Centre for Trade and Development's (UNCTAD) code of conduct on restrictive business practices and International Labor Organization's (ILO) tripartite declaration on labor relations are some of the several soft law texts (ie., not legally binding) that rose from international economic agreements with quite a substantial effect on the operations of foreign direct investments. UNCTAD's code of conduct on restrictive business practices is also a provision that is reflected in Competition Acts of most countries and *Competition Act, 2003 (Act No.2 of 2003)*; implying a similar dimension on the extent that both attract investment.

2.1.8 Link between Competition Law as envisaged in *Competition Act, 2003 (Act No.2 of 2003)* and Investment

Thus far, it has been shown that the host country governments should understand the link between law and investment. This link can be demonstrated by the ‘risk of expropriation’ and ‘rule of law;’ two measures²² of proxy for the security of property, including property rights and contract rights. ‘Risk of expropriation’ measure risk of confiscation or forced nationalization while ‘rule of law’ measure the degree to which established institutions make and enforce laws and adjudicate disputes Clarke (2001:4). The higher the risk of expropriation and lower the rule of law, the more the host government is willing to confiscate property and less likely to respect private property rights when solving disputes, for example between foreign and local investors. This will definitely have a negative effect on investment promotion in the host country.

Namibia as a host government need to understand the link between the provision²³ in the Competition law, 2003 (*Act No.2 of 2003*) and investment promotion (*Foreign Investment Act, 1990 as amended, Act No.24 of 1993*) otherwise formulation of legal and administrative requirements (bureaucracy) for capital flows might create an environment that is not conducive to direct investment. This is because the legal system might increase or reduce the risk attached to the return on investment. Investors will commit funds to a project when in their judgment the project will yield a satisfactory return at an acceptable level of risk, and refuse to invest when the reward is insufficient in view of

²² The international Country Risk Guide (ICRG), a private international investment risk service, produces these measures.

²³Refers to the provisions as per in chapter 3, section 23 dealing with restrictive business practices prohibited, sections 27-32 dealing with exemptions of certain restrictive practices.

expected risk or transaction costs Salacuse (2000:386). On the other hand, the host nation might be willing to admit foreign investments hoping that such investment contributes to scarce capital, transfer of technology, knowledge, skills and addition to efficiency and competitiveness of the host economy (Khalil 1992:323). This is the basis on which both the European model and Namibia admits foreign investment.

2.1.9 Nature of Law-Related Obstacles to Investment

Despite numerous legal reforms to reduce transaction costs and associated risk to foreign investors, there are inherent obstacles pertaining to the *legislation* and *regulation provisions, institution* and *systemic issues*. All the above mentioned attempts at reducing associated risks and costs have a link to Foreign investment Act, 1990 as amended by *Act No.24 of 1993* as well as *Competition Act, 2003 (Act No.2 of 2003)*. Further this shows a link to the promotion of investment in the host country.

2.1.10 Legislative and Regulatory Provisions

The legislative and regulatory provision in this context refers to legal matters that raise transaction costs and the associated risks such as (1) *restrictions on foreign investment entry*, (2) *licensing requirements and administrative approvals*, (3) *foreign exchange restrictions* (4) *operational requirements*, (5) *restrictions on access to the use of land and natural resources* (6) *taxation*. It is important that the legislation overseeing the prohibition of unfair business practices viz, *Competition Act, 2003 (Act No.2 of 2003)* in Namibia take into account legal matters that could cause higher transaction costs and the associated risks, by for example. However, this is not the case in Namibia. An account of

them could be taken up and done through exemptions in *Competition Act, 2003 (Act No.2 of 2003)*, as is the case with respect of intellectual property rights (*section 30*) and professional rules (*section 31*). The above mentioned legal matters raise costs and impede flow of investment to host country. Salacuse (2000:389-95) argue that matters such (1) *foreign investment entry restriction* (2) *requirements on licensing and approval* (3) *foreign exchange restrictions* (4) *operational requirements* (5) *institutions* and (6) *systemic issues* could possibly raise costs and thereby impede investment from flowing to the host economy.

1. Restrictions on Foreign Investment entry

Most often this refers to an entry ban, equity restrictions and performance requirement. An entry ban is based on certain arguments such as national security and protection of strategic industries and control of key sectors of the economy. However, countries need to evaluate sectoral bans carefully by assessing what the national capital be it private or public have done in such sectors compared with what foreign direct investment could contribute through the banned sectors. This approach could help in promoting investment. It is equally so important and necessary to evaluate sectoral ban in terms of competition requirement as well. The codes on *Competition Act, 2003 (No. 2 of 2003)* have influence or can place some limitations on what sectors to open up entry to and which ones to restrict entry. As for equity restriction, *section 3(1) to (3) of Foreign Investment Act, 1990, as amended by (Act No. 24 of 1993)* provides that foreign direct investment shall not require the participation of Namibian government or nationals

unless the minister states so by notice in a gazette. This is done purely to prevent the control of national economy by foreigners, facilitate the transfer of technological skills and ensure that project management has national interest. Again, this is an issue under joint ventures, which is raised under the national competition law. Further, *Competition Act, 2003 (Act No. 2 of 2003)* needs to recognize the importance of joint ventures and this could influence the promotion of investment²⁴. Performance requirement on the other hand ensures that market forces are substituted with national laws to determine prices and therefore production decisions.

2. Licensing Requirements and Administrative Approvals

Licensing and administrative requirement are fundamental legal principles that advocate for no foreign economic activity in the host economy without permission unless the State has specifically approved it. Extensive screening of foreign investment by host government before approval, is basically designed to protect the national interest to ensure that investment comply with the national investment codes. This could have a positive effect on the possible impact of investment promotion. By ensuring that all investment decisions received are screened, investor confidence is retained in the economy, as it provides a platform where crucial information in business is exchanged.

3. Foreign exchange restrictions

²⁴ It is however argued later in this chapter on pages 35-37 that corruption hinders joint ventures, especially those in manufacturing.

There are certain restrictions on the repatriation of capital or/and profit as well as ability to secure foreign exchange for the purchase of raw materials and to service foreign debt. For the foreign investor, the host country's policies on the repatriation of profits and capital or access to foreign exchange are important determining factors when considering locating foreign direct investment. In Namibia, as per the provisions in *Foreign Investment Act as amended, Act No.24 of 1993*, such restrictions do not exist. Where such restrictions exist there could be some hindrance on the promotion of investment in an economy.

4. Operational requirements

Operational requirements are price controls, restrictions on the use of expatriates and customs clearing procedures. This can be seen in the same light like the restrictions on natural resources such as land. No foreign investor can be willing to invest substantial amount of money without rights on the land; implying could impact negatively on the promotion of investment in an economy. Land ownership as of late has become a controversial and sensitive issue in Namibia, especially the political dimension that it has taken towards commercial land ownership. Further, the unions and politicians have on a regular basis pronounced openly against ownership of vast hectares of commercial land by the minority while the majority seemingly is clustered in small areas not suitable for large scale farming. The sensitivity of land ownership often but not always threatens private property rights of commercial land. In turn a threat of private property rights could lead to the expropriation of land. Again this could negate the positive influence of

Competition Act, 2003 (Act No. 2 of 2003) on investment promotion if this happens without a fair compensation.

5. Taxation

A high tax rate provided by taxation laws that includes custom duties and fiscal charges could be barriers to investors as it increases the costs involved in the operation. Taxation could therefore deter the promotion of investment in an economy. Governments often seek to attract foreign direct investment by offering tax incentives for firms with foreign participations. “To be considered an investment incentive, tax incentives must not be available to all investors, but rather tailored towards specific investors or types of investors,” (Wells et al 2001:1).

While there seems to be a consensus view that the level of tax rates in host countries is a significant factor in explaining cross-country patterns in foreign direct investment, the more limited evidence for tax incentives suggests that the effects in most countries is either small or nonexistent (Hines, 1991)²⁵ and (Shah, 1995) in Edmiston et al (2000:1).

Edmiston et al (2000:17) argues that

“First the effectiveness of tax incentives in attracting FDI depends on the ability of the countries to target the incentives to marginal firms. However, the ability of a country to effectively target tax incentives depends not only on identifying marginal firms and designing tax policy to direct the incentives toward them, but also on well-designed institutions to administer policies. ... [Further much more is still challenging], perhaps most interesting is the political economy of the incentive adoption process. Which sectors are targeted and how much discretion is allowed to the tax official in interpreting the prescription of the law? Is legislation introducing incentives easier to pass in times of declining or accelerating economic activity, in times of tight or easier budgetary policy?

²⁵ Due in large part to data limitations, much of the literature that investigates the relationship between tax rates and FDI focuses on the United States, either the flows of FDI into the USA or the investment of USA firms abroad (Hines 1999) in Edmiston et al (2000:1).

Thus, tax incentives could promote FDI sometimes, but might deter FDI in most cases. The difference is explained by the degree of accuracy in the effectiveness of allocating incentives. There is a challenge related to the precise calculation of the tax levy on firms; normally leading to a shift of tax liabilities from firms that receive incentives²⁶ to ones that does not. This tax shifting could reduce investment and is a crucial problem in most cases. The marginal firms (non tax incentive recipient) that might have invested if tax burden was spread out across all firms may choose not to invest because they must pay a larger portion of the overall tax bill. In this environment, a country that offers incentives but allocates them ineffectively may actually reduce the amount of FDI coming into the country. Further, awarding tax incentives could cause increased levies on other tax bases in order to compensate for the reduced government tax revenue. All such process could deter investment in one way or another.

On the other hand, giving tax exemptions and incentives only to foreign investors is discriminatory between national and foreign firms. It also causes distortions in business decision-making. Tax uncertainty might be expected to harm investment as well (Hassett and Metcalf 1999:372-93). Further, credence to a negative relationship between tax uncertainty and investment is given by the investors, who argue, “they cannot make plans if they do not have confidence in the tax structure” (Bizer and Judd 1989:223). Edmiston (2001:2) supports such arguments and believes that the impact of tax uncertainty depends crucially on the source and nature of uncertainty. Moreover, the

²⁶ Most countries use tax holidays, some have a minimum investment amount for the incentive to apply and other apply the incentive to a portion of the firm (Edmiston et al 2000:11).

discretion to grant them can cause corruption, which could deter investment promotion further. This shows that for Competition Act, 2003 (Act No.2 of 2003) to be effective it has to be supported by an effective none-discriminatory tax incentive regime, otherwise the opposite is eminent. This is because a tax incentive is like a subsidy; the more attractive and non-discriminatory it is, the more attractive it becomes for a potential investor to invest or actual investor to expand investment.

2.1.11 Institutions

Making reference to a legislative related obstacle to investment without referring to institutions that give laws their reality is not adequate. Developing countries normally set up a number of agencies to administer foreign investment flows. They are known as (1) *foreign investment agencies*, (2) *other executive agencies and organizations* and (3) *courts*. It is also important for such institutions to be aware of the provisions encompassing the competition in terms of investment promotion. This is because institutions influence investment decisions as they directly affect business-operating conditions²⁷. Good institutions can also play a crucial mediating role in attracting FDIs. Kinoshita and Campos (2003:7) concur with such a view. The key related question to ask then is how important are institutions²⁸ and the agglomeration effect²⁹ relative to other factors in the host country? Head, Ries and Swenson (1995) in Kinoshita and Campos (2003:7) find industry-level agglomeration economies play an important role in

²⁷ Business operation conditions of host country for investors are the 'rule of law' and quality of bureaucracy. The former reflects the strength and impartiality of the legal system and popular observance of the law; countries with better legal infrastructure will be able to attract more FDI. The latter refers to the ease of regulations concerning licensing requirements, environmental, consumer safety and worker health, 5/21/2015 2:43:08 PM 5/21/2015

²⁸ For instance, Wei (2000a, 2000b) found out that corruption in a host country substantially deters inward FDI.

²⁹ The theory of agglomeration suggests that once countries attract the first mass of investors, the process will be self-reinforcing, without needing a change in policies. From this perspective, if there is any agglomeration effect, the past stock of FDI will be a good predictor of current FDI, even after controlling for the classical factors of comparative advantage.

the location choice of Japanese manufacturing FDI in the United States and a recent work by Cheng and Kwang (2000) in Kinoshita and Campos (2003:7) reports a similar effect of agglomeration in China. In the case of Namibia, agglomeration effect explains the influx of South African retailing FDI subsidiaries in Namibia during the 1990s and is purely on account of positive externalities; South African investors view investment decisions by other retailing outlets as a good signal of favourable conditions.

Foreign investment agencies

Foreign investments agencies are normally set up to enforce apply investment codes for their respective countries. However, depending on the work ethics of a particular agency, inefficiency in the day to day activities causes delays in approving investment proposals. According to Salacuse (2000:395) such agencies promote, screen and monitor foreign investment and in reality, after screening foreign investment proposals, such agencies sometimes are slow in approving investment and impose costly unnecessary requirements. The challenge normally therefore is to turn such agencies into institutions promoting foreign investments. Foreign investment agencies³⁰ should ensure that their operation requirements minimize bottlenecks that would hamper the promotion of investment. However, such agencies are catalysts in the promotion of investment as having such institution makes it easier for an investor to get all the necessary documents, for example, needed in one agency. Others would be easily obtained through the agency should need be.

³⁰ In Namibia the Namibian Investment Centre, a division in the Ministry of trade and industry is the foreign investment agency with the mandate to facilitate the promotion of investment, it foreign direct investment or domestic investment.

Other executive agencies and organizations

The contentious issue at heart is whether the additional agencies operate within the ambits of the legislative scheme. This is necessary for the cohesion in the application of principles centred on the promotion of investment. Otherwise, such agencies might hamper the promotion of investment if they operate outside or against the ambits of the legislative scheme. However, various issues such as those concerning environmental protection and health and safety of workers, are necessary to protect public interest and should be considered when screening an investment proposal. According to Mabey and McNally (1999:1) the debate on FDIs and environment centers on the ‘pollution havens’ hypothesis; companies will move operations to developing countries to take advantage of less stringent environmental regulations³¹. Countries may purposely lower environment standards requirement in order to attract new investment. In light of this, the position that a municipal office handling environmental concerns arising from foreign direct investment have either a negative or positive influence on investment promotion. It is important for such institution’s capacity in facilitating the promotion of investment in Namibia to recognize and take note of *Competition Act, 2003 (Act No. 2 of 2003)*. This shows that the required environmental standards determine the degree that *Competition Act, 2003 (Act No.2 of 2003)* could possibly impact on the promotion of investment in Namibia. If the standards of environmental requirements are lower in terms of, for example on pollution, health and safety, it will lower costs and in turn encourage

³¹ It is necessary to effectively internalize the environmental cost of an economic activity by introducing an tax on environmental degradation though.

investment. On the other hand, if the standards on environmental requirements are higher, the costs could rise.

Courts

Courts as part of the judiciary are important institutions as they facilitate enforcement of the rule of law. This because the judiciary resolves business disputes, enforces the laws as written, protects property rights, and assures the sanctity of contract (Salacuse 2000:396). Courts therefore have a crucial role to play in the promotion of investment in the economy, particularly because they are the ‘*engine room*’ for facilitating the enforcement of laws and resolving disputes arising in investment contracts. However, the judicial functions should be executed properly in the courts otherwise the reduction of political and commercial risks to investors, thereby contributing to an environment favorable for investment might not be realized. *Competition Act, 2003 (Act No. 2 of 2003)* need a support from a proper functioning judiciary, otherwise enforcement of *Competition Act, 2003 (Act No. 2 of 2003)* aiming at facilitating the investment promotion could fail.

2.1.12 Systemic Issues

Systemic issues are fundamental problems in the functioning of the legal system as a whole. The issues relate to respect of property rights and the sanctity of contracts, rule of law and corruption (Salacuse 2000:396-98).

Respect of property rights and Sanctity of contract

The respect of property rights and sanctity of contracts are vital ingredients in ensuring that a conducive investment climate is setup. Autocratic governments allow private law to languish or limit its application particularly with respect to private property rights and the sanctity of contracts (Salacuse 2000:397). In situation like this where the private property rights are not respected or recognized, investment cannot flourish and this in turn hampers the promotion of investment activities in the economy. The extent of protection of intellectual property rights in a host country could also affect the composition of foreign direct investment. This is because a weak intellectual property rights regime deters foreign investment in high technology sectors where intellectual property rights play an important role and tilts the focus from manufacturing to distribution (Smarzynska 2000:1). This shows the extent that *Competition Act, 2003*(Act No.2 of 2003) might positively impact on the promotion of investment could be negated by the stance of government on intellectual property right³².

Rule of Law

Absence or lack of rule of law is an obstacle to investment as it increases the risks to invest. This implies that the rise in the investment risk associated with the lack of rule of law hampers the promotion of investment in an economy. A lack of rule of law or arbitrary governmental action in the host country is risk enhancing and increases the transaction costs, which deters the decision to invest in such environment. According to Salacuse (2000: 398) the basic requirements though not all of them are included here, that an effective rule of law that the government authorities are supposed to exercise are

³² See Section 30(1) of the Competition Act, 2003 (Act No.2 2003).

(1) the law is known to all those to whom it applies, ie., transparency (2) the law applies equally and even-handedly to those for whom it is intended, (3) that governmental action is done only in accordance with stipulated and known rules of law and (4) that governmental authorities are accountable through legal process for their actions. Hence, an effective rule of law as provided by the provisions of *Competition Act, 2003*(*Act No.2 of 2003*) helps to provide predictability for investors in developing countries and thus facilitates investment. Again, the lesson drawn here is that *Competition Act, 2003 (Act No.2 of 2003)* generally needs to be supported by an effective enforcement of rule of law and thereby impacting positively on the *Foreign Investment, 1990* as amended by *Act No.24 of 1993* in promoting investment activities. A lesson in terms of the impact of *Competition Act, 2003 (Act No. 2 of 2003)* on promotion of investment is that the *Foreign Investment Act, 1990 as amended by Act No. 24 of 1993* is enforced by the former. Further, both *Acts, Competition Act, 2003 (Act No. 2 of 2003) and Foreign Investment Act, 1990 as amended by Act No. 24 of 1993* can be seen and used as catalysts for promoting investments in Namibia.

Corruption

The final systemic issue is the abuse of public office for private gain. Corruption can be a significant obstacle to foreign investment because it raises the cost of doing business, thereby reducing returns to the investor and incentive to invest. This implies that corruption misallocates resources away from productive work to rent seeking³³ or

³³ Rent seeking in this context refers to 'economic rent', being the extra amount paid over what would be paid for the best alternative use to somebody or for something useful whose supply is limited either by nature or through human ingenuity (Mauro 1997:2).

alternatively reduces the effectiveness of aid³⁴ flows through the diversion of funds. This further shows that corruption intuitively hampers the promotion of investment. This implies that the possible positive impact of the *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of investment could be hampered by corruption. Smarsynska and Wei (2003:2) illustrate the negative effect of corruption on the magnitude of foreign direct investment flows thus:

...foreign investor's choice of entry mode may be affected by the extent of corruption in a host country. Corruption makes dealing with government officials, for example, to obtain local licenses and permits, less transparent and more costly, particularly for foreign investors. In this case, having a local partner lowers the transaction cost (e.g., the cost of securing local permits). At the same time sharing ownership may lead to technology leakage.

This shows that the probability of foreign direct investment taking place is negatively linked to the extent of corruption in the host economy. Further, foreign investors with more sophisticated technologies and those operating in corrupt economies are more likely to retain full control of their projects and refrain from joint ventures. In a way this would defeat the aim of attracting foreign investment for technological spillover into the local investors.

Given its unpredictable nature, substantial governmental corruption also increases investor risks. Wei (2000:1) refers to 'crony capitalism³⁵' as a deterrent not only to foreign direct investment inflows to the host economy, but also bad to international direct creditors, as such crony capitalist economies are more likely to default on the loan, or

³⁴ Aid, being fungible, may ultimately help support unproductive and wasteful government expenditure instead of employed in investment projects.

³⁵ Strictly speaking crony capitalism refers to an economic environment in which relatives and friends of government officials are placed in positions of power and government decisions on allocation of resources are distorted to favor friends and relatives-in reality 'crony capitalism almost always implies a wide spread corruption as private firms and citizens in such an environment find it necessary to pay bribes to government officials in order to get anything done (Wei 2000:1)

nationalize assets of the foreign direct investor. It raises the cost of capital, facilitates unproductive or inappropriate investment projects and leads to a general lowering of standards. Henceforth, a lesson for Namibia is to guide against crony capitalism³⁶ or corruption in order to avoid discouraging both potential and actual investors from investing as they would fear incur losses from say expropriation without compensation or nationalization. Measures put in place to reassure investors that corruption is not accepted by government of Namibia include the setting up of a number of Presidential Commission of enquiries³⁷. Such enquiries investigate malpractices suspected to have been committed and the commission is given mandate to expose them and also to make recommendations.

3. Chapter Three

3.1 Literature Review on Competition

3.1.1 Competition Policy

National competition law or anti-trust law as it is known in the United States of America is a component of the domain on competition policy. According to Hoekman and Holmes (1999:876-77) ‘other components include actions to privatize state-owned enterprises, de-regulation, subsidy programs and discrimination policies on foreign products and producers.’ Against this background, it is expected that a policy on competition would have a positive impact on investment promotion. A reduction in or limitation of discriminatory practices might open up entry to those respective sectors; ultimately attracting investment in those sectors.

³⁷ For example, the social security presidential commission of enquiry in 2003 and Amcom-DBC presidential commission of enquiry in 2004.

Competition policy encompasses a wide domain that comprises a set of government measures and instruments used to set up directives and the required standard of competition advocated by the *Competition Act, 2003 (Act No.2 of 2003)* in the domestic markets of Namibia³⁸. *Competition Act, 2003 (Act No.2 of 2003)* tends to reduce or restrict artificial anti-competitive market barriers in trade such as the collusive restraints on trade and the mergers with competitors aiming at maintaining monopoly. According to Martin (1999:895) promotion of competition restricts or reduces artificial barriers to trade and could lure larger number of potential rival investors to enter in those certain sectors. Maskus and Lahouel (1999:596) support this argument and further argue that trade barriers choke off imports of technologically sophisticated capital goods and material inputs, while the protected or subsidized firms have limited incentives to innovate or adapt new technologies. This by itself hampers investment initiatives and discourages the acquisition of high quality foreign technologies thereby reducing the promotion of investment in the process. In the case of Namibia, according to *section 3 (1) and (5) of the Foreign Investment Act of 1990 as amended by Act No.24 of 1993*, the free entry of foreign multinationals in the manufacturing and other sectors of the economy has also a guarantee for a free exist should the firm wish so. Firms are as a result encouraged investing in these sectors not by the pursuit and eventual abuse of dominant position, but the fair trade practices that government advocates. It is not the abuse of dominant position or other forms of anti-competitive market practices that attract such investors as *section 23 of Competition Act, 2003 (Act No.2 of 2003)* clearly prohibits the horizontal and vertical relationships that lessen competition substantially in goods or services in Namibia.

³⁸ See Sections 2, 3, 23, 26 and 30 of the Competition Act 2003 (Act No.2 of 2003).

Though the competition policy encompasses the National Competition law, there are profound differences between the two. The difference between competition law and competition policy is that the former deals with actions or behaviour of private firms while the latter pertains to a much broader domain that covers both the actions of private and public firms (Hoekman and Holmes 1999:876-77). Maskus and Lahouel (2000:595) support this definition that competition policy covers all aspects of government actions that affect the condition under which firms compete in a particular market while competition law refers to legislation, judicial decisions and regulations specifically aimed at avoiding the concentration and abuse of market power. However, it is still important to note that exemptions in competition law or policy are stipulated mainly for various social goals, including national interest; making the intentions and effects more complex. The exemptions recognized under *Competition Act, 2003 (Act No.2 of 2003)* are on intellectual property rights contained in *section 30 (1-2)* and that on professional rules reflected in *section 31 (1-7)*. Exemptions in respect to intellectual property rights and professional rules encourage direct investment in such exempted areas.

3.1.2 Government Stance on Competition Policy

A stance of the government on competition policy is determined partly in some cases by signed international treaties such as the World Trade Organization (WTO) that government is a signatory. It is however, important and necessary to cite the WTO provision on competition policy in terms of the so called Singapore issues and events at

Cancun (World Trade Organization: 2003), and the issues in Siddiqui (2003:1) are as follows:

In the first WTO Ministerial Conference in Singapore, four issues were put on the table. These are (1) trade and investment (2) trade and competition (3) transparency in government procurement and (4) trade facilitation. These are known as “new issues” or Singapore issues. ...The Cancun Ministerial Conference reviewed the Singapore issues and concluded that despite a considerable consultation members remained entrenched.

The Singapore issues do not contradict the provisions in *Competition Act, 2003 (Act No.2 of 2003)* in terms of encouraging competition. This is because the new issues curbs for example mega-mergers, acquisitions and anti-dumping from taking place. Such restrictive business practices are prohibited under *section 23, Competition Act, 2003 (Act No.2 of 2003)*.

Many dimensions of the competition policy are found in the rules of the WTO on trade policy, subsidies, intellectual property rights and market access to services and further they emphasize that the focus of the debate in the WTO has been on whether to include specific rules pertaining to competition law of the member states and its enforcement. Hoekman and Holmes (1999:877) and Maskus and Lahouel (2000:595) support this view as follows:

Competition law has emerged as an issue for the WTO largely because exporting firms in the high-income developed economies argue that anti-competitive practices of competitors in foreign markets hinder their ability to penetrate those markets. Such practices may be largely private in nature and could be facilitated by the absence or weak enforcement of local competition laws. These issues have prompted a number of proposals for negotiating a limited agreement on multilateral principles and disciplines in competition law within the WTO. However, the debate is contentious and no consensus has emerged on whether and how to address competition law and regulations within the WTO. ...[they]...argue that developing countries would gain if a WTO agreement were reached that recognized the principle that competition law should promote open competition, emphasized international cooperation in competition enforcement and disciplined the most anti-competitive forms of public and private restraints against market contestability.

Once competition law has been included in the rules of the WTO, this will further harmonize the National Competition laws of the WTO member countries. In addition to the harmonization of the national competition law, this will not only make a provision for effective remedies against the violation of the WTO rules but also provide a transparent

forum where to determine and assess cases on the violation of accepted competition market practices between member states (Hoekman and Mavroidis 1994) in (Hoekman and Holmes 1999:880). Again though this will depend on the directives included in the WTO, once included, it might lead to a positive impact on the promotion of investment in certain sectors of developing countries in general and Namibia in particular. This will be on account of the confidence that harmonization of competition laws and the effective remedies would bring in the investment environment. However, harmonization of competition law might still limit entry of investment to sectors or investment activities perceived to be of national interest by the Namibian government.

3.1.3 National Competition Legislation

For the sake of the focus of this thesis, the definition and analysis of the terms on competition is narrowed to that on the Competition Act, 2003 (Act No. 2 of 2003) and further linked with the possible impact on investment promotion particularly in Namibia. Further, the scope in this chapter will narrow and focus the general analysis at the perspectives prevailing in the developed countries as compared to that in developing countries in general and Namibia in particular. Again the possible impact of Competition Act, 2003 (Act No. 2 of 2003) on the promotion of investment particularly in Namibia will be highlighted.

3.1.4 Objectives of National Competition Law

Competition laws address essentially two areas, viz the *conduct of business* and the *structure of market for economic activities* (Economic Commission for Africa 2000:6-7).

Hence, competition tends to counter negative effects of anti-competitive practices in terms of the conduct, structure and performance of the markets.

Section 23 (2) (a) of the *Competition Act, 2003 (Act No.2 of 2003)* actually states that the restrictive practices prohibited “include agreements concluded between parties in a horizontal relationship, being undertakings trading in competition”:-

(1) *horizontal relationship* undertaking trading in competition³⁹.

It can be argued that the impact of Competition Act, 2003 (Act No. 2 of 2003) on foreign direct investment, for example of firms interacting horizontally with their notional competitors or rivals can result in agreements⁴⁰ that have possible adverse effect on investment decisions of potential entrants in product market (Noland1999:3). In Namibia, this adverse effect lessens competition and is not allowed under the *Section 23 (1)-(4)* of the *Competition Act, 2003 (Act No.2 of 2003)*. However, this depends on the restrictive business practice being chosen. This is because if prices are artificially raised, then new entrants (foreign and domestic) will enter the market attracted by the supernormal profits, undermining the arrangement, while if prices are lowered the new competitors are driven out of the market. This is a problem in competition law. This implies that some entry defensive mechanism needs to be in place to restrain entry otherwise such arrangements may not be able to sustain driving out potential investors.

³⁹ See Section 23 (2) (a) of the competition Act, 2003.

⁴⁰ Such as price fixing, cartels or market allocation schemes and bid rigging are all mechanisms for exploiting market power.

(2) *vertical restraint*, which is a provision in the contract⁴¹ between suppliers and their distributors, which could include retailers as well. Vertical relationships are prohibited in Namibia under section 23 (2) (b). This is because they lessen competition like horizontal relationships do. Further, Noland (1999:2) supports this view that vertical restraints⁴² on trade involving buyers and sellers in intermediate input markets and distribution of final products affect adversely investment decisions of potential entrants in the distribution system⁴³.

(3) *Enforcement standards*: that is the existence of law is necessary, but not efficient, if the law is to achieve the objectives. This implies that the law ought to be respected and enforced. It is important to have a strong competition law enforcement agency for the objectives to be realized.

With structural policies, competition law aims to prevent transactions that would reduce interdependence of competing suppliers (vertical integration) and increase concentration in markets (horizontal integration). It deals specifically with:

(1) *Merger control regulation*: selectively prohibiting mergers that would substantially increase concentration in the market or restrain trade among suppliers⁴⁴;

⁴¹ The Kodak-Fuji case is a perfect example, the USA argued that large Japanese companies restricted market access by buying predominantly from each other and retaining close links between manufacturers, wholesalers and retailers. Kodak in particular claimed that its access to the Japanese film market was made harder by Fuji's control of film wholesalers. The USA had to make a complaint under the GATT Article XXIII of the WTO (Holmes Brief No.5: 1).

⁴² Conventional vertical restraints include such practices as refusals to deal with another party and boycotts, retail price maintenance, exclusive dealing arrangements and tie-ins.

⁴³ Vertically integrated firms refuse to carry the products of competitors and rebate systems are used to tilt retailer incentives towards domestically produced goods. Vertical distribution affiliation usually set up by manufacturers, tie wholesalers and retailers together through various links including special agent contracts, extension of technical and financial assistance, exchange of personnel and cross-shareholding (Noland 1999:5).

⁴⁴ See Section 43(1) (2) of Competition Act, 2003 (Act No. 2 of 2003).

- (2) *Pre-merger notification*: allows authorities to review proposed mergers prior to actualization, thereby making merger control administration more efficient⁴⁵.
- (3) *Enforcement and remedial measures under merger control*: designed to preventing the negative increased concentration effects of the merger.

This transparency in prohibiting mergers and accessing pre-mergers notification positively attracts potential investors; implying *Competition Act, 2003 (Act No.2 of 2003)* further promotes investment. Performance policies on the other hand basically include administrative pricing by anti-trust authority, whereby the state compensates for the lack of competition by dictating prices or output. This is usually applied to sectors that display significant characteristics of natural monopoly.

Put simply, national competition law includes government directives or rules that are against restriction of competition between firms or the abuse of dominant positions in the market (Hoekam and Holmes 1999:876). This includes agreements between firms that could result in restricting competition among firms. From this definition one concludes that the objective of national competition legislation is to achieve and maintain competition in markets. Maintaining competition in the market requires more participants, and is more efficient hence impacting positively on investment promotion. According to the supporting views of Maskus and Lahouel (2000:597), national competition law is an important complementary support to general liberalization of markets from barriers in trade and investment, particularly direct investment. Reduced trade and investment barriers ideally level the playing field, which ultimately leads to

⁴⁵ See Section 44 and 45 of Competition Act, 2003 (Act No. 2 of 2003).

more investment entering sectors of the economy. This is mainly due to the fact that once the field is level; both small and large enterprises would participate in business activities, creating investment in the process.

Thus far, it has been demonstrated that in this chapter on competition a major objective of Competition Act, 2003 (Act No.2 of 2003), like most other competition laws in most jurisdictions is the efficient allocation of resources that maximizes the national welfare, by ensuring that the competition process is not distorted or impeded through the abuse of dominant positions and other forms of anti-competitive business practices. It can be further concluded however that many jurisdictions recognize specific agreements between firms that may reduce competition but still can enhance efficiency and as a result make allowance for such agreements. This provision, to a certain extent might only limit the promotion of investment in those types of activities. Richardson (1998) in Hoekam and Holmes (1999: 876) supports the same dimension as the objective of national competition law though countries vary in the emphasis each place on efficiency; some include social objectives and 'fairness' considerations.

3.1.5 Instruments on Competition Legislation

There are broadly two diverse instruments used in competition viz, the *per se approach* and the *rule of reason approach*. Khemani (1998:2) supports the view that an outright prohibition or *per se approach* may well be adopted against price-fixing agreements as is the case in the European Union, Germany and United States, while a *rule of reason approach* usually in Spain, Sweden and United Kingdom evaluates facts on a case by

case basis is likely to be more appropriate in certain types of business practices such as exclusive dealing contracts. For the sake of illustrating this point further, Singh and Dhumale (1999:9-10) supports the view that competition instruments in the UK and USA has been applied on different philosophy as thus:

“...in the simplest case, mergers between two large firms in the same industry—which by the traditional US anti-trust [law] would be ruled out *per se*—may be permitted under the traditional UK competition laws, if it can be shown that the welfare reducing effect of increased market power resulting from the merger is more than matched by gains to society, as a consequence of reduced costs of production because of economies of scale and/or because of synergy. ...This leads in practice to a case-by-case approach to mergers rather than the promulgation of *per se* structural rules as has historically been the case in the US”⁴⁶.

Among the industrial countries, Japan has its own pragmatic approach closer to *rule of reason* in assessing competition law question. Okimoto (1989 12-130) supports the idea that:

“...the Japanese government takes a more pragmatic approach to anti-trust enforcement, one that makes allowances for national goals such as industrial catch-up. It takes into account other collective values and extenuating circumstances in weighing enforcement decisions against the latter and spirit of anti-trust laws. Included here are such considerations as economies of scale, enhanced efficiency, optimal use of scarce resources, international competitiveness, heightened productivity, business cycle stabilization, industrial orderliness, price stabilization and economic security.”

This different ways of applying instruments when enforcing competition law show that an anti-competitive practice in one jurisdiction would differ from another jurisdiction.

3.1.6 Perspectives of High Income Countries

Put not only in general terms but also specifically, developed countries are in dire need of market access for their products. However, besides the concerns for market access,

⁴⁶ There has been some convergence of competition policies in the US and the UK in the 1980s and 1990s; the US authorities, partly due to increased international competition, started to give greater importance to so called ‘economies of scale defense’ for mergers than they used to do before (Singh 1993 in Singh and Dhumale 1999:9). Regulators in the UK, on the other hand, have started giving much greater weight to the effects of mergers or of other kinds of corporate behaviour on competition *per se* than on other considerations (such as regional impact) in the calculation of net social gain.

another concerns the treatment of parallel imports⁴⁷, mergers and acquisition with international spillovers. Market access concerns imply that there is an excess demand for the markets of products, while the supply of such markets are limited, either due to the stance of government policy or high costs involved in entry. It can therefore be argued that Competition Act 2003, (*Act No.2 of 2003*) will have a positive impact on market access for the affected products, including capital goods and services needed as inputs in investment. Ultimately, Competition Act 2003 (*Act No.2 of 2003*) will positively impact on the promotion of not only foreign investment, but also domestic investment in Namibia.

In this context, market access in the world has been perceived blocked to a certain degree by measures that prevent foreign firms to enter those markets. According to Hoekman and Holmes (1999:878) non-existent or poorly enforced national competition codes or directives in some cases, like the traditional instruments of contingent protection such as anti-dumping and restricted access to markets have increased the cost of entry to certain markets. The restricted access to markets as a result have increased the cost of entry to those markets, and this can be illustrated by looking at the case between Japan and USA that arose from market access and vertical restraint concerns.

The type of concerns on market access by developed nations has been demonstrated in the dispute between Kodak, a USA company and Fuji, a Japanese company. The key allegation made by Kodak against Fuji was that of anti-competitive vertical relationship

⁴⁷ That is imports of branded goods bought in markets where they are cheaper to avoid high price official marketing channels (Hoekman and Holmes 1999:880). Vautier et al (1999:34) define parallel imports as imports of branded goods by importers other than the holders of the relevant intellectual property rights or licences.

between Fuji and its primary distributors. According to (Hoekman and Holmes 1999:879) the arguments from both parts are as follows:

The US alleged that informal administrative guidance, industrial policy tools applied by Japanese firms themselves and guidelines on what constituted fair and unfair competition allegedly deprived Kodak of marketing tools that were of special importance to it as an outsider. Most directly on the competition front, the US claimed that because Fuji controlled the distribution system, this allowed it to exclude Kodak from access to film wholesaling network, obliging it to sell directly to retailers, a much less efficient method of market penetration. Japan responded that the control by Fuji of wholesale networks was irrelevant since most of the retailers they served also bought imported film and that Kodak's own distribution system amounted to the creation of a wholesale system of its own, the exclusion from the Fuji system, such as it was, therefore being irrelevant.

Thus, the Kodak-Fuji case was centred on an exclusive or a selective agreed vertical arrangement between upstream and downstream sellers; an arrangement where a producer gives sole right to one wholesale or retailer in an area and impose conditions that once the handling of their goods have started, they should not handle anyone else's goods or services.

This dispute that rose from the concern on market access between Kodak and Fuji was brought under GATT Article XXIII before the WTO dispute panel by the USA as mentioned already. According to Hoekman and Holmes (1999:879) the ruling of the WTO dispute panel's ruling on this dispute on market access between Kodak and Fuji read as thus:

The WTO dispute panel treated all the 'measures' attacked by the [Kodak of] USA, including decisions of Japan Fair Trade Commission regarding the absence of the anti-competitive practices by [Fuji of] Japan, as possible grounds for complaint as they could have affected trade. On examining the facts, it concluded there was no impairment of USA a market access right. The panel investigated claims that restrictions on certain forms of marketing strategy affected importers disproportionately and concluded that they did not. They did not see anything in Japanese distribution structures that excluded foreigners as a result of public policy, even on a wide interpretation of this term. In particular they concluded that single-brand wholesale distribution is the common market structure-indeed the norm-in most major national film markets, including the USA market.

3.1.7 Perspectives of Developing Countries

Unlike in the developed economies where market access, parallel imports, mergers and acquisition with international spillovers is a concern, developing nations pursue a broad-based concern encompassing all actions government might take to promote competition and attract investment. Hoekman and Holmes (1999:883) argue that it can be concluded that a broad based concern involving trade liberalization, measures to facilitate domestic entry into industry and services, de-monopolization of sectors, imposition of hard budget constraints on public enterprises, well-managed privatization and encouragement of foreign direct investment. This is similar to measures as contained in *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of competition in Namibia and I hope that the *Competition Act (Act No.2 of 2003)* will be actively enforced in order to provide an impetus for increased promotion of investment. Developing countries in general and Namibia in particular have interest to adopt a strong competition policy. A liberal trade and foreign direct investment have been identified as main pillars as competition law is not a panacea for the economic concerns Namibia has. Enforcement is neither costless nor simple, and can impose a great deal of uncertainty on firms if it is not clearly defined and enforced consistently, Hoekman and Holmes (1999:886). In this context, competition law becomes necessary to ensure that the contestability of markets is not replaced by the firms' anticompetitive practices as they pursue their private interests in markets. "Removal of trade barriers provides limited market access on monopoly and dominance issues in the market (Organization of Economic Co-operation and Development (OECD) (98/26:4)). According to the OECD (98/98:4) "Competition law and trade liberalization policies are, in general, complementary and mutually reinforcing". This is because

domestic competition laws complement the liberalization of trade and investment by ensuring the results are not negated by private restraints to trade. Again, this implies that competition law has a positive impact on the promotion of investment, provided there are enforcement mechanisms in place.

3.1.8 International Anti-Trust Agreement

Probably it is first necessary to ask a question whether there is a need for a multilateral agreement on issues pertaining to competition law. The answer to this question is demonstrated by the consequence in the world economy of the so-called *global merger waves*⁴⁸ that was experienced in the 1990s. This boom in mergers of the 1990s was not entirely an exogenous or autonomous event, but was in part caused by the liberalization and globalization process, a closer integration of world markets through finance and trade, and the creation of the single European market, as well as the privatization and deregulation of enterprises in most parts of the world, among other reasons (Singh and Dhumale 1999:3-7). Such developments in industrial organization, as a result between 1990 and 1998 the value of mergers and acquisitions worldwide rose nearly fivefold as firms took strategic advantages in the new industrial organization environment through mergers⁴⁹, acquisitions and other kinds of tie-ups (Singh and Dhumale 1999:3).

⁴⁸ However, it is important to remember that not all mergers necessarily lead to increased monopoly power; even when they do, they are not always welfare reducing. Often a case-by-case investigation is needed to determine the size of the effect of each merger. Economic theory suggests that mergers could have a positive effect on welfare (through synergy among the amalgamating firms or economies of scale) or negative effect on welfare through increased monopoly power reducing welfare.

⁴⁹ As takeovers occurred in particular industries, market shares of some larger firms were disturbed negatively and such giants were obliged to follow suit in order to maintain their lost shares, ultimately leading into a wave of defensive mergers (Singh and Dhumale 1999:4).

Such significant waves of mergers worldwide had serious competition policy concerns both in the developed and developing countries. This is because such mergers continued to have potentially serious adverse implications across economic borders, especially in the developing countries on competition. Against this background, there is a need for a multilateral agreement on issues pertaining to competition. The leading question on this juncture would be are national competition codes and other existing mechanisms viz, bilateral, multi-country and multilateral agreements insufficient to deal with the underpinning problem arising from such mergers? The answer to this critical question lays in the nature of such agreements; what exactly such agreements entails in terms of the codes on anti-competitive practices. This requires an analysis of each one of them before making up conclusions whether they are sufficient or not sufficient to handle and enforce remedies against illegal anti-competitive actions.

Bilateral Agreement

There are bilateral agreements for example, such as that between the European Union (EU) and United States of America (USA). Holmes (Brief no. 5:2) supports the idea that

... [EU-USA bilateral agreement is] for co-operation between competition authorities which establishes the principle that each jurisdiction will intervene at the request of the other. This 'positive comity' goes one step beyond 'negative comity'-refraining from doing anything harmful to the other side. But the EU will do not more than apply its own laws in its own territory and will not sacrifice its own interests. No confidential data will be transmitted even if they contain evidence of an offence against another region's laws.

The EU-USA bilateral agreement cannot deal and enforce remedies against anti-competitive actions mainly because firms effectively do not agree to exchange data, for example. Further, this failure is also effectively hampered by the clash in the interest of

the respective participants. This shows that this agreement cannot foster the promotion of investment between the respective member states, as there is lack of confidence in dealing with matters involving anti-trust behavior in the market. This shows that a need exists to have a stronger co-operation on all matters of competition.

Multi-country agreements

A multi-country agreement exists between the EU and the two blocks, that being the Central and East European countries (CEEC) and the European Free Trade Area member states (EFTA). Holmes (brief no.5: 2) supports the idea that

...the application of competition law along EU lines is part of the conditions [in the multi-country agreement]. The Australia-New Zealand free trade area also provides for regulation of 'unfair trade' by the use of competition law. Other regional agreements do not go so far: NAFTA⁵⁰ leaves competition law to its individual member states.

Though there is application of competition law as a condition to the free trade agreements in certain areas, still there is inconsistency in other areas. This inconsistency to conditions in the free trade agreements shows that there are yet obstacles in enforcing remedies against anti-trust actions. A multilateral co-operation on competition still is necessary. However, it is important to note that where competition law is part of the agreement and each member adheres to the principles as laid down, agreements of such nature might impact positively on the promotion of investment. This is especially so as it restore confidence in terms of common approaches in enforcement of remedies.

Multilateral agreement

⁵⁰ NAFTA is the North America Free Trade Area.

The multilateral agreement that exists pertains to the WTO. According to Holmes (brief no.5: 2) multilateral agreement on competition as provided by WTO is that:

...GATT Article XXIII allows complaints against any measure that could affect trade... but it is difficult to use⁵¹. ...The GATS⁵² recognizes the dangers of private market barriers in services, and the Telecommunications Agreement spells out more fully an obligation for intergovernmental consultation. The TRIPs⁵³ Agreement explicitly authorizes the use of competition policy measures against abuses of such rights, but in rather vague terms. Important anti-monopoly issues of interest to developing countries remain to be settled: patent and trademark holders will frequently use these rights to segment markets⁵⁴. The Agreements on Trade-Related Investment Measures (TRIMs) also refers to possibility of discussions on competition issues.

The Kodak-Fuji case shows that government measures that foster anti-competitive behaviour can be challenged at the WTO, but also concludes that it provides little guidance for the future cases, even those of the similar nature. This is because the WTO is a multilateral organization that provides a system of international trade law which is enforceable through its Dispute Settlement Provisions, but does not regulate competition laws of its members, neither does it imposes obligations on members to have competition laws. Vautier et al (1999:19) supports the argument no provisions in GATT that put obligations on member countries to take action against horizontal or vertical agreement, neither are there provisions against neither mergers nor cartel activities. This lack of action against such anti-competitive actions is a clear demonstration that the international trade law of the GATT is not concerned with competition issues *per se* but rather on quantitative restrictions. However, the WTO provisions are somewhat different in GATS and TRIPs. GATS Article XVI on market access prohibits limits on the number of

⁵¹ The Kodak-Fuji case was taken by USA as a complaint against Japan under GATT Article XXIII to the WTO, but without success.

⁵² As it is defined in the WTO, GATS stands for General Agreement of Trade in Services.

⁵³ As it is defined in the WTO, TRIPs stands for Trade Related Intellectual Property Rights

⁵⁴ The US Trade Representative was reported to have protested to New Zealand over a law that bans restrictions on 'parallel' imports. South Africa was engaged in a similar dispute over pharmaceuticals. The USA and EU consider that rules allowing freedom for parallel imports can 'unfairly' undermine the investments made by their exporters in brand distribution and marketing, although there is little economic evidence to judge such claims. The EU sometimes complains about similar actions in Japan-but within the Common Market it insists that parallel imports must be free!

service providers. TRIPs Articles XXXIX and XXXX relate to aspects of competition. The former concerns effective protection against certain competition while the latter concerns control of anti-competitive practices. According to Vauntier et al (1999:21) much of :

... [Article XXXX] concerns issues of pricing for the use of intellectual property rights, which is a classic competition issues and further explains that as with GATS, TRIPs incorporates positive comity. Enforcement of these provisions is by means of civil and administrative procedures and remedies under national law. Intellectual property transactions too are an increasingly important part of the international trade in technologies and goods.

Against this backdrop, with respect to the business conduct covered, the WTO still addresses only a small fraction of conduct and competition problems, which might be addressed by multilateral competition law. There are no provisions at all in the WTO that relate to horizontal restraints involving collusion (such as price-fixing or bid-rigging) abuse of dominance, vertical restraints or mergers. Again, this proves there is a need for a multilateral co-operation on issues of competition.

As for the parallel imports, a satisfactory outcome for developing countries would be an agreement that recognizes the right to control parallel imports. Vautier et al (1999:34) supports that the US and the EU like developing countries are opposed to parallel imports but Japan and some other countries permit them. There is no international agreement on parallel imports because Article 6 of TRIPs states that nothing in the Agreement shall be used to address the issues of exhaustion of intellectual property rights and as a result countries are free to determine the extent parallel imports.

Thus far, the analysis concludes that the three agreements and national competition codes have some shortcomings in addressing anti-competitive actions and enforcing remedies against such actions. The former is because of disparities in the interests that do crash in some cases. As for the latter, the problem here is that most often there are still anti-competitive actions with cross-border effects, yet quite challenging to deal with such actions as it requires access to specific data and other related information.

Therefore, countries do not only need competition policies in their respective economies but also international co-operation. Countries need to involve the international community in actions against potentially anti-competitive practices of the mammoth corporations, which are emerging in industrial countries as a consequence of the recent merger wave (Singh and Dhumale 1999:5).

A multilateral agreement on competition law need to emphasis cooperation and transparency. This is because the success here depends on either the bilateral or multilateral consultations, which has to be supported by sharing of market information as well as the enforcement of rules (Maskus and Lahouel 2000:608). A multilateral competition law could however be challenging given the difficult experience already encountered to reach a consensus at the WTO on the same subject. The Declaration of the WTO Ministerial Conference held in Singapore in December 1996 stated in paragraph 20 they agreed to establish a working group to study issues raised by Members relating to interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework

(Singh and Dhumale 1999:1). In June 1999 the group's secretary acknowledged the need to take developing country interest better into account but stated that the problem is how to keep trade and competition on the WTO agenda without alienating any of the developing country's needs⁵⁵ and that of the USA. Vautier et al (1999:31) agrees that a multilateral competition law would be a daunting task⁵⁶ as this will require an agreement on the rules, the objectives, the basis for analysis of competition cases (prohibition by per se or rule of reason), the remedies and enforcement.

It has already been demonstrated that developing countries might have different matters to be addressed seriously as opposed to the developed countries. The market access and merger control issues that dominate the agenda of major developed countries are largely irrelevant for developing countries. However, this does not mean that merger issues are not of interest to developing countries as mergers increases market power that reduces competition and national welfare⁵⁷. As competition increases efficiency in allocation and distribution of national resources, the reduction in competition ultimately reduces efficiency. Whether mergers reduce the maximization of national welfare or not is debatable. Increasing market access enhances welfare maximization but will not always be the result; especially where firms are actively seeking to create and defend rent, Hoekman and Holmes (1999:887). Reduction in a nation's welfare is a more general potential problem for developing countries and is a major externality-related rationale, for an international agreement on competition law.

⁵⁵ Developing countries do not want further regulatory obligations thrust upon them while the USA and EU considers a multilateral action unnecessary, they resist discussion on anti-dumping in the context of global competition rule. But, developing countries believe it is necessary.

⁵⁶ Even if objections of national sovereignty and problems of deciding on a single multilateral law could be overcome, there are a number of practical objections to having the WTO act as a multilateral law viz, WTO regulates government measures affecting international trade not private conducts, it has no powers to investigate private producers nor impose remedies on private conducts.

⁵⁷ National welfare refers to both consumer and producer surplus.

Given the fact that mergers and other anti-trust actions are a violation of the accepted market practices as per the provisions in Competition Act 2003 (*Act No.2 of 2003*), a multilateral agreement on competition law is a key in the drive to promote investment in Namibia. However, for the reasons given above, it is not feasible to construct a binding multilateral competition law at the present time in the WTO. Further, greater difficulty may be experienced concerning the procedural and administrative disciplines, as this may well constitute more of a threat for vested interests that oppose greater competition (Hoekman 1997:18).

4. Chapter Four

4.1 Legal Framework on Investment Promotion in Namibia

Namibia attained independence in 1990, the era when governments in developing and developed economies had recognized the importance of foreign direct investment in economic development through the spillover in technology into the host country. The Namibian government was no exception to the group of countries that recognized the important effect of foreign direct investment, for example in the manufacturing and processing sectors of the economy, and ultimately on the welfare of Namibians. However, this was seen in the light of supporting the role already played by domestic direct investment in the production process of goods and services. The realization that foreign direct investment is an important complement in activities of the domestic private sector concurs with the views expressed by the International Finance Corporation (IFC) that the role of private sector had increased substantially in the 1990's when compared to the 80's, 70's and even the earlier decades. IFC (1997:1) has identified the

sectors targeted by FDI as those in the manufacturing and processing industries, and further explains this shift in the 1990s as follows:

Before the 1990s, attractiveness of FDIs has been closely linked to the possession of natural resources and large domestic markets. With the shift toward globalization in production and trade, competitiveness has become the main determinants of attractiveness.

Following globalization process, competitiveness for Namibia in attracting foreign direct investment now encompasses the entire necessary infrastructure required to attract investment. The necessary infrastructure includes the *Competition Act 2003 (Act No.2 of 2003)* and *Foreign Investment Act as amended, Act No.24 of 1993* besides other sets of legislation serving an auxiliary role such as the *Bank of Namibia Act, 1997*⁵⁸ and the *Arbitration Act, 1965*. Against this backdrop, the government in Namibia has since independence put a number of legislation and special programs such as the *special incentives for manufacturers* and *exporters* that are designed to stimulate new and additional economic activities in the private sector.

4.1.1 Scope of Legislation on Investment Promotion

A lack of clear directive or legislation dealing with commercial dispute can scare potential investors to invest in a country. This is because venturing in FDIs could be costly once a dispute arises not only between the host nation and a private foreign investor, but also a private investor who is a citizen of the host nation. It is against this backdrop that *Arbitration Act no 42 of 1965* is enforceable in Namibia. Further, *Foreign Investment Act as amended, Act No.24 of 1993* followed by the enactment of the *Export*

⁵⁸ Such as the promotion of a sufficient payment system and efficient credit and financial system, section 3.

*Processing Zone Act, Act No. 9 of 1995*⁵⁹ and the *Export Processing Zones Amendment Act, 1996 (Act No. 6 of 1996)* were mainly passed for the purpose of attracting foreign direct investment to Namibia. The provisions of Competition Act, 2003 (Act No. 2 of 2003) facilitates the purpose of the Acts⁶⁰ and in the process positively influences inflows in direct investment. *Foreign Investment Act as amended, Act No.24 of 1993* and *Export Processing Zone Act of 1995* also support *Arbitration Act, 1965 (Act no 42 of 1965)* in providing an environment conducive for both domestic and foreign direct investment. *Arbitration Act, 1965 (Act No 42 of 1965)* provides information on how the settlement of an investment dispute would be executed in line with the terms of a written arbitration agreement and enforcement of awards by arbitration tribunal. This process restores investment confidence and is an attractive way of solving investment disputes that could arise among direct investors. Kaakunga (1992:62) illustrates this point as follows:

...foreign property in Namibia for example, is formally subjected to municipal law, but in practice, any dispute regarding foreign property may, by tacit consent or by formal agreement, be governed by international or [either] bilateral [or] multilateral agreement which in most cases prefer foreign jurisdictions, eg., London or New York. The [legislation on investment promotion] in Namibia expressly provides that dispute settlements in respect of Status Investments shall, if the Certificate holder so elects, be referred for settlement by international arbitration, and in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in force at the time when the certificate was issued.

Arbitration agreement is necessary when committing funds into direct investment as this agreement assures investors of agreed alternative ways amicable to settle disputes on commercial matters other than through litigation. This assurance restores business confidence, an important factor in making investment decision; implying a positive

⁵⁹ In this Act, the provisions of the Labour Act were not applicable but were later included in the Export Processing Zones amendment Act, No. 6 of 1996.

⁶⁰ For examples are the Export Processing Zone Act, 1995 (Act No. 9 of 1965) and the Arbitration Act 1965.

impact on the promotion of investment. *Article 21 (1)(d) of the Cotonou Agreement, 2000*⁶¹ has also identified arbitration as one area to be harmonized between or among member States, for example, for the development of more direct investment in the private sector.

Among other Acts⁶² enacted with clauses or provisions that make Namibia conducive for *FDIs* inflows and also domestic direct investment includes the following: *Bank of Namibia Act No 15 of 1997, Foreign Courts Evidence Act No 2 of 1995, Import and Export Control Act No 30 of 1994 and Customs and Excise Act No 20 of 1998*, just to mention a few. They are catalysts for the increased production in manufacturing and trade internationally. This is achieved through clauses that spell out rules on pertinent investment issues critical whenever making an investment decision. Acceding to the WTO in 1995 has further supported the initiative to drive for investment as it is a constitution encompassing rules on international trade in goods and services. Jackson (1998:305-316) supports this view that the WTO is a constitution for international trade as it encompasses certain rules on trade in goods, services and even property rights.

Moreover, *programs such as the Special Incentive Programs for Manufacturers and Exports, which were adopted in January 1999, supplemented Act No. 6 of 1996*. Later on the government enacted *Competition Act, 2003 (Act No. 2 of 2003)* to complement further the government objective of attracting more direct investment to Namibia.

⁶¹ Since 1994 Namibia has been a member of the African Caribbean-Pacific countries, which form part of the group to the Cotonou Agreement, 2000.

⁶² All such Acts has a positive impact on the promotion of investment through facilitating an enabling environment.

4.1.2 Analysis of the Coverage and Application

There are wide ranging issues that impede inflow of direct investment besides Acts of parliament. According to Micheal et al (1996:11) factors that can contribute to setbacks and delays in carrying out a successful trade reform that includes a promotion of more inflows of direct investment as follows: (1) a persistent decline in aggregate economic activity and high levels of unemployment, (2) inappropriate macroeconomic policies that distort price signals and slow structural reorientation of sectors in production, (3) powerful specific-sector interest groups with well entrenched connections to government, (4) insufficient complementary structural reform (privatization, price liberalization, labor market and financial system reforms) and (5) domestic or regional armed conflicts. On the other hand, according to the IFC (1997:2) restrictions on the inflows of FDI to the host country include:

...limits on entry to certain sectors, complex approval mechanism⁶³, high taxes, and a regime with complex incentives, restriction on share of foreign ownership, and restrictions on the use of land and expatriate labor. Restrictions have been imposed for many reasons, including concerns over excessive foreign influence and loss of national wealth, desire to promote indigenous entrepreneurship and workers, and desire to achieve transfer of technology and management techniques.

Hence, it is important and necessary to have a legal framework on investment that clearly takes into account wide coverage and application requirement necessary in facilitating the flow of investment to Namibia. The Namibian government took note of such factors with a potential to limit foreign direct investment inflow to Namibia and have been dealt with in *Foreign Investment Act as amended, Act No.24 of 1993*. In order to encourage inflows

⁶³ The Investment Centre deals with matters related to the approval to ensure that the process is not cumbersome to the foreign investor.

in foreign direct investment to Namibia, the openness of the domestic legal codes and the entire domestic legal environment to trade policies, for example is necessary.

Foreign Investment Act 1990 as amended by Act No 24 of 1993

According to the preamble of *Foreign Investment Act 1990 as amended, Act No.24 of 1993*, the Act makes provision for the promotion of foreign direct investments in Namibia. *Part I, sections 2 and 3* of the Act deals with the administration of the Act and business activities of foreign nationals. The *Foreign Investment Act 1990 as amended by Act No.24 of 1993* section 3(1) state that subject to any law in relation to the relevant business activity in Namibia, a foreign national may invest and engage in any business activity undertaken by a Namibian. Hence, this indicates that the Competition Act, 2003 (Act No. 2 of 2003) by encouraging competition impacts positively on Foreign direct investment, 1990 as amended by Act No. 24 of 1993. *Part II sections 4 to 7*; contain clauses on status investment⁶⁴, while *sections 8 to 13* deal with the rights⁶⁵ and obligations of the holders of the certificate on status investment.

The *Foreign Investment Act 1990 as amended by Act no 24 of 1993, section 9(1)(2)* permits, for example, free repatriation of capital, profits and dividends. The free repatriation of earnings from foreign direct investment attracts FDIs to Namibia, as it is an incentive that assures both the domestic and foreign investors that their profit is free to move elsewhere. As already alluded to under the review of the literature on investment,

⁶⁴ That is the power by the minister to issue Certificate of Status Investment, investments eligible for Certificate of status Investment and application for Status Investment.

⁶⁵ Unrestricted access to forex for payment, transfer of profits and proceeds of sale, and compensation in case of expropriation.

restrictions on the free flow of profits and dividends are legislative and regulatory requirements that could effectively raise transaction costs and hinder inflow of direct investment in Namibia. The retention of foreign currency abroad in any currency obtained from the sale of exported goods is provided in *section 10 (1) to (3)*. *Section 11* deals with compensation in case of expropriation. *Section 11 (1) and (2)* state that expropriation should be done in line with the provisions of *Article 16(2)* of the Namibian Constitution and in case of expropriation; Government of Namibia shall pay to the holder of the certificate just compensation for such expropriation without undue delay and in freely convertible currency. *Section 13* deals with settlement of disputes in respect of Status Investment while *Section 13 (2) to (4)* makes reference to international arbitration provided the certificate indicates so, otherwise the dispute is referred to the national courts. *Sections 14 to 15* are on amendment, transfer and cancellation of certificate. The miscellaneous is covered in *sections 16 to 20*.

All the above mentioned provisions facilitate inflow of capital in direct investment. Though such provisions are not referred to under the Competition Act 2003 (Act No. 2 2003), the provisions under the Competition Act merely ensures that such facilities do not get disturbed by unfair business practices such abuse of dominant position. This point illustrates that Competition Act, 2003 (Act No. 2 2003) positively impacts on the promotion of investment.

Foreign Investment Act as amended, Act No.24 of 1993 states that the minister should pay attention to certain requirements before granting *Status Investment Certificate*. Certain criteria set up for the Status investment are found in section 6. According to *section 6 (3)*

(b) the minister should consider the extent the proposed investment will utilize Namibian natural resources and manpower so as to contribute to the economy, by inter alia-

- (1) increasing employment opportunities in Namibia,
- (2) providing extra opportunities for the training of Namibians,
- (3) earning or saving foreign exchange,
- (4) generating development in less developed areas of Namibia.

Government of Namibia realized they should push for better incentives in order to take advantage of investor's motive as reflected in the requirements for Status investment. Again in this respect or rather condition the provision in both Acts coincides. Hence the both move parallel in attracting investment.

Export Processing Zone Act 1995

The *Export Processing Zone Act, 1995 (Act No. 9 1995)*, as contained in the preamble is to provide for establishment, development and management of export processing zones in Namibia and facilitate matters incidental thereto. The purpose and objective of the Act as contained in section 3 is to:

- (1) attract, promote or increase the manufacture of export goods
- (2) create or increase industrial employment
- (3) create or expand export earnings
- (4) create and expand industrial investment, through foreign investment; and
- (5) encourage transfer of technology and development of management and skills in labour in Namibia.

The provisions in *Export Processing Zone 1995 (Act No.9 of 1995)* does have a link with *Competition Act, 2003 (Act No.2 of 2003)* and both complement each other in promoting direct investment through joint ventures and objectives mentioned above. In support of

Foreign Investment Act 1990 (*Act No. 24 of 1993*) on investment promotion, the matters relating to expropriation are also dealt with in Export Processing Zone Act 1995 (*Act No. 9 of 1995*). *Section 16 (1)* of the Export Processing Zone Act 1995 (*Act No. 9 of 1995*) states that no property in an export-processing zone shall be expropriated except in accordance with the provisions of the Expropriation Ordinance, 1978 (Ordinance 13 of 1978) and subject to the provisions of Article 16(2) of the Namibian Constitution. Further, this advocates the respect of property rights in Namibia. The respect of property rights is one of the determinants of foreign direct investment especially in manufacturing sector. Otherwise, where property right is expropriated, Government of Namibia shall, subject to the provisions of *section 17*, (dealing with the settlement of dispute by arbitration) pay to the owner of such property just compensation in respect of such expropriation without undue delay and in freely convertible currency. Again, this is also mentioned under Competition Act 2003 (*Act No. 2 of 2003*) and further shows that the competition Act positively impacts on investment promotion as the Foreign Investment Act, 1990 as amended by Act No. 24 of 1993.

The *Export Processing Zones Act, 1995 (Act No. 9 of 1995)* has been supported to achieve its objectives by the government pronouncement of the so-called *Special Incentives for Manufacturers and Exports (SIME)*. Manufacturing enterprises aiming to produce primarily for the Southern African Customs Union (SACU) market are allowed to use such incentives. The incentives are both tax and non-tax related (Investment Centre 1999:1-3) and they are as per box that follows below.

Manufacturing Incentives

Tax Incentives for Manufacturers⁶⁶

1. Tax abatement
2. Possible tax package for new investment
3. Special building allowance
4. Tax incentives for export promotion activities
5. Subsidy on training and production line wages

Non-tax incentives for Manufacturers

1. Industrial studies
2. Cash grants and loans for exporters

Source: Special Incentives for Manufacturers and Exporters, January 1999

Further, incentives for the exporter of manufactured goods such as on the *tax allowance* on income derived from the export of manufactured goods exist in Namibia. With the exception of meat and fish products, taxable income derived from the export of manufactured products exclude 80 percent of export income earnings (Investment Center 1999:4). This implies that only 20 percent of the export income earnings are taxed.

Moreover, the incentives designed for the Export Processing Zones includes others outlined as follows (Investment Center (1999:4) :

- (1) EPZ enterprises are allowed to hold foreign currency accounts in local banks.
- (2) Enjoy industrial calm as no lockout or strike is allowed in the EPZ regime.
- (3) Companies are allowed to locate their companies any where in Namibia.
- (4) Through the Offshore Development Company, EPZ enterprises have access to factory facilities, which are rented at economical rates.
- (5) EPZ companies investing in upgrading skills and productivity of Namibian workers receive a grant to cover a substantial part of the direct costs of on-the-job and institutional training.

Arbitration Act No 42 of 1965⁶⁷

⁶⁶ The benefits over unlimited duration include non-payments of corporate tax, import duties on imported intermediate capital goods, sales taxes, stamp and transfer duties on goods and services required for EPZ activities.

Arbitration Act No 42 of 1965 supports *Foreign Investment Act 1990 as amended, Act No.24 of 1993* on settlement of dispute arising from investment. For example, *section 13 (2) to (4) of Foreign Investment Act, 1990 as amended by Act No. 24 of 1993* makes reference to an international arbitration when an investment dispute arises provided the certificate indicates so; otherwise the dispute is referred to the national courts. *Arbitration Act 42 of 1965* provides for the settlement of disputes by arbitration tribunals. Arbitration is a process in which impartial individuals, called arbitrators, in order to avoid costly and lengthy litigation, resolve a disagreement between two or more parties (Lubbe: 2001). Resorting to arbitration has inbuilt benefits, such that the transaction costs⁶⁸ related to trials in courts are avoided or minimized substantially.

As already alluded to, incentives especially that lure FDIs sometimes may not really achieve the desired results. This could be on account of several reasons that differ from case to case. Such reasons involve undefined legal procedures and directives as well as the lack of independence from government interference in the judicial system. In Namibia, commercial disputes between either nationals or parties of different nationalities provided they parties entered into an agreement prior to the dispute would resort to the directives in *Arbitration Act 42 of 1965*. This provision does not have a link with *Competition Act, 2003 (Act No.2 of 2003)* apart from the fact that both complement each other in promote direct investment.

Bank of Namibia Act, 1997 (Act No 15 of 1997)

The *Bank of Namibia Act, 1995 (Act No 15 1997)*, deals with matters related to the efficient payment system including in foreign currency and supports *Foreign Investment Act, 1990 as amended by Act No. 24 of 1993* on efficient payment system. However, this

⁶⁷ South African Arbitration Act of 1965 applied to Namibia prior to independence in 1990 and continues to apply since then. Why this law still apply in Namibia is not clear whether it is for constitutional reasons or not.

⁶⁸ Transaction costs are avoided for example because a claimant does not have to take the proceedings of the case to the country of the defendants and the place of business or residence. Further, the claimant will not be obliged to translate essential documents and as a result delays and costs are avoided.

provision does not have a link with *Competition Act, 2003 (Act No.2 of 2003)* apart from the fact that both complement each other in promoting direct investment. However it has a link to *Foreign Investment Act as amended, Act No.24 of 1993*. *Section 8(1) (a) and (b)* deals with the availability of foreign currency for certain payments, while *section 9 (1) to (4)* deals with the availability of foreign currency for the transfer of profits and proceeds of sale.

The *Bank of Namibia Act, 1997 (Act No 15 of 1997)* renders the supporting arm to the promotion of foreign direct investment as per its provisions that are important to investors, be it foreign or domestic ones. Such directives are found in *section 3 (a) to (e)*. This section deals with objectives of Bank of Namibia Act, 1997 (*Act No 15 of 1997*) outlined below:

- (a) to promote and maintain a sound monetary, credit and financial system in Namibia and sustain the liquidity, solvency and functioning of that system;
- (b) to promote and maintain internal and external monetary stability and an efficient payments mechanism;
- (c) to foster monetary, credit and financial conditions conducive to the orderly, balanced and sustained economic development of Namibia;
- (d) to serve as the Government's banker, financial advisor and fiscal agent; and
- (e) to assist in the attainment of national economic goals.

Foreign Courts Evidence Act, 1995 (Act No 2 of 1995)

The *Foreign Courts Evidence Act No 2 of 1995* recognizes the need to support the respect for the rule of law and systemic issues. The preamble of this Act states that the Act provide for obtaining of evidence of persons in Namibia by courts of law outside Namibia, and for matters connected therewith. Section 2 deals with the order made by High Court in Namibia to examine witness in Namibia in connection with civil or criminal proceedings pending in a foreign court. Moreover, section 8 deals with witnesses

from certain countries attending court in Namibia not to be arrested for certain matters, committed before appearing before the court. The Act lays a foundation on how a trial on criminal acts can be conducted by making provision of witnesses beyond the national borders of Namibia. This provision does not have a link with *Competition Act, 2003 (Act No.2 of 2003)* apart from the fact that both complement each other in promote direct investment.

The Customs and Excise Act, 1998 (Act No 20 of 1998)

The *Customs and Excise Act No 20 of 1998* ensures that operational requirements conducive and ideal in attracting investment are met. This Act is to provide for the levying, imposition, payment and collection of customs and excise duties, of a surcharge and of a fuel levy; to prohibit and control the import, export or manufacture of certain goods; and to provide for matters incidental thereto. *Sections 60-64 in chapter VI* deal with matters related to anti-dumping, countervailing and safeguard duties. *Section 58* deals with those concerning discrimination by other countries, while *Section 56* deals with agreements made with other territories. In summary, the *Customs and Excise Act no 20 1998*, generally prohibits anti-dumping, countervailing and safeguard duties as well as discrimination like the rules provided by the WTO, Namibia acceded to in 1994. The *Competition Act, 2003 (Act No.2 of 2003)* prohibits unfair trading practices and as a result positively impacts on promotion of investment. The *Customs and Exercise Act (Act No. 20 of 1998)* through its provision, for example on anti-dumping promotes fair trading practice. Such a provision on anti-dumping also supports the provisions in the *Import and Export Control, Act no 30 of 1994*. The preamble state that the Act is to provide for the import and export control as well as on matters incidental thereto.

5. Chapter Five

5.1 Legal Framework on Competition in Namibia

It is unusual to analyze a legal framework for Namibia in the context of economic law without making reference to a certain extent the corresponding legislation in South Africa. This is so because of the strong political and economic link between Namibia and South Africa, now and during the pre-independence era. It is against this background that *Competition Act, 2003 (Act No.2 of 2003)* mirrors *Competition Act (Act No. 89 of 1998)* of South Africa⁶⁹. However, the aim in this chapter is to assess the possible impact of *Competition Act, 2003 (Act No.2 of 2003)* on the promotion of investment in Namibia. The analysis will be confined to the scope of the Act, which will mainly focus on certain key sections viz the preamble, purpose of the Act, application of the Act, restrictive business practices, exemption of certain restrictive practices and mergers.

5.1.1 Scope and Analysis of Application

The preamble of *Act No.2 of 2003* states that the Act is (1) to safeguard and promote competition in the Namibian market; (2) to establish the Namibian Competition Commission and make provision for its powers, duties and functions; (3) and to provide for incidental matters. The legislation on competition protects competition by striking down or preventing restraints on private business practice that adversely interfere with the process of competitive market activities. This could be demonstrated by making reference to the case⁷⁰ between the South African Competition Commission⁷¹ (SACC)

⁶⁹ Competition Act, 89 of 1998 replaced the Maintenance and Promotion of Competition Act, 96 of 1979 in South Africa.

⁷⁰ Case No: 95/FN/Dec02, paragraph 76-83 (2002:17-19).

and Edgars Consolidated Stores Limited⁷² and Retail Apparel (Pty) Ltd⁷³. In this case, the South African competition tribunal imposed a penalty on the companies involved on the basis that certain provisions of the South African Competition Act, 89 of 1998 prohibiting uncompetitive measures were violated.

According to *Section 2*, of the Competition Act, 2003 (Act No.2 of 2003), like the provisions in Competition Act 89 of 1998, the purpose is to enhance the promotion and safeguarding of competition in Namibia in order to:-

- (a) promote efficiency, adaptability and development of the Namibian economy;
- (b) provide consumers with competitive prices and choice of products;
- (c) promote employment and advance the social and economic welfare of Namibians;
- (d) expand opportunities for Namibia's participation in world markets, while recognizing the role of foreign competition in Namibia;
- (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- (f) promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

The purpose of *Act No.2 of 2003* is to lay a foundation for promoting investment in Namibia. Once the purposes marked (a) and (d) to (f) are achieved with more direct investment there would be additional employment opportunities and a wide choice of products. As for the purposes marked (b) and (c), they are the results of the aim of this

⁷¹ The applicant in this case.

⁷² The first respondent in this case.

⁷³ The second respondent in this case.

Act in the market once a competitive market structure has been achieved. In summary the main purpose of *Competition Act, 2003 (Act No.2 of 2003)* is to provide a foundation for an improved welfare of consumers and to level the playing field for producers. The base for this foundation is increased foreign and domestic direct investment not only in the manufacturing and processing sectors of Namibia, but also the service and retailing sectors. Moreover, the legislation acknowledges that it sets up parameters for promoting equity in ownership of productive resources through the recognition and encouragement of formerly disadvantaged persons to participate in production where possible⁷⁴.

The purpose of the Act has several objectives, which to a greater extent advocates the promotion of direct investment in Namibia just like other legislations and programs by government on investment promotion.

The application of the Act is covered in *Section 3* and according to *Section 3(1)*, the Act applies to all economic activities within Namibia or having an effect in Namibia⁷⁵, except-

- (a) collective bargaining activities or collective agreements negotiated or concluded in terms of the *Labour Act, 1992 (Act No. 6 of 1992)*;
- (b) concerted conduct designed to achieve a non-commercial socio-economic objective;

⁷⁴ See Section 2 (f) of Competition Act 2003 (Act No. 2 of 2003).

⁷⁵ This implies that it would include a foreign activity provided it has an impact on the Namibian economy. However, there is a provision for an escape clause provided such actions have been published in the Gazette.

(c) in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the Gazette, to be exempted from the provisions of this Act.

In this case involving points (a) to (c) above reservations or discretions are exercised in promoting foreign direct investment to Namibia. Moreover, *Section 3(2)* of the Act binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service, but the State is not subject to any provision relating to criminal liability. *Section 3 (3)* of the Act applies to the activities of statutory bodies, except in so far as any law authorizes those activities.

Prohibited Business Restrictive Practices

Section 23 (1-8) makes provisions for restrictive business practices. *Section 23(1)* state that agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions dealing with exemption of certain restrictive practices. The South African Competition Tribunal extended exemption to the parties involved in the following merger cases:

- (1) Standard Bank South Africa limited and PROCHEM (Pty) Ltd.⁷⁶
- (2) De Beers Consolidated Mines Limited and Anglovaal Mining Limited.⁷⁷
- (3) Cape of Good Hope Bank Limited and Nedcor Investment Bank Limited.⁷⁸
- (4) Old Mutual Bank Limited and Nedcor Bank Limited.⁷⁹

⁷⁶ Case No: 34/LM/Jun01.

⁷⁷ Case No: 36/LM/Mar00.

⁷⁸ Case No: 18/LM/Mar02.

⁷⁹ Case No: 03/LM/Jan02.

- (5) Mutual and Federal Insurance Company Limited and Credit Guarantee Insurance Corporation of Africa Limited.⁸⁰
- (6) Spar Group Limited and Nelspruit Wholesalers Limited.⁸¹

The Competition commission under Competition Act 2003 (Act No. 2 of 2003) also would have extended exemption in the similar case due to lack of public concern. In all the merger cases mentioned above, the Competition Tribunal of South Africa approved the mergers and granted merger Clearance Certificate to each merger agreement in terms of section 16(2)(a) of Act 89 of 1998. The reasons for the approving each case on merger was the fact that the merger was unlikely to lessen competition⁸² and did not have adverse effect on employment since there would be no public concern. However, in the joint venture case involving the joint venture agreement between Dorbly Engineering Management Company (Pty) Ltd and Fastpulse Trading 26 (Pty) Ltd a penalty for not informing the commission was imposed.

The case⁸³ between Patensie Sitrus Beherend Beperk and Jacobus Johannes Petrus Bezuidenhout brought by the Competition Commission of South Africa⁸⁴ was about the violation of sections 4(1)(b)⁸⁵ and 8(d)(i)⁸⁶ of Act 89 of 1998. The order sought was based on allegation that Patensie, according to the its Articles of Association, especially articles 25.1, 112.6, 110 and 30.1 was engaged in an agreement constituting a horizontal relationship which directly or indirectly fixed trading conditions⁸⁷ and inducing Jakobus not to deal with a competitor⁸⁸. Section 23 of Competition Act, 2003 (Act No.2 of 2003) is relevant to this case.

⁸⁰ Case No: 49/LM/Sep03.

⁸¹ Case No: 46/LM/Sep03.

⁸² Even if it were, if the gains to society as a consequence of larger economies of scale or synergy exceed the anti-competitive effects, then the merger would still be permissible. The approach is case-by-case.

⁸³ Case no. 37/CR/Jun01.

⁸⁴ The applicant.

⁸⁵ On horizontal practice.

⁸⁶ On abuse of a dominant position.

⁸⁷ A contravention of terms of section 4(1)(b)(i) of Act 89 of 1998.

⁸⁸ A contravention of terms of section 8(d)(i) of Act 89 of 1998.

Section 23(2) states that agreements and concerted practices contemplated in *subsection (1) of section 23*, include agreements concluded between-

- (a) parties in a horizontal relationship, being undertakings trading in competition; or
- (b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

The effect on promotion of investment is positive, especially genuine investment. This is because an investor is assured of protection against anti-competitive practice which could arise. However, scrupulous investment is discouraged by the section because the section does not accommodate such investment.

Section 23(3) of the Competition Act 2003 (Act No. 2 of 2003) says without prejudice to the generality of the provisions of *subsection (1)*, that subsection applies in particular to any agreement, decision or concerted practice⁸⁹ which-

- (a) directly or indirectly fixes the purchase or selling prices or any other trading conditions;
- (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) involves collusive tendering;
- (d) involves a practice of minimum resale price maintenance;
- (e) limits or controls production, market outlets or access, technical development or investment;
- (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

⁸⁹ Abuse of dominant position is a good example (Section 26 of Act No.2 2003).

(g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

Subsection (4) explains that *paragraph (d) of subsection (3)* does not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided-

- (a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
- (b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words “recommended price” appear next to the price so affixed or applied.

Subsection (5) state that it is presumed that an agreement or a concerted practice of the nature prohibited by *subsection (1)* exists between two or more undertakings if-

- (a) any one of the undertakings own a significant interest in the other or they have at least one director or one substantial shareholder in common; and
- (b) any combination of the undertakings engages in any of the practices mentioned in *subsection (3)*.

Subsection (8) reads that *subsection (1)* does not apply in respect of an agreement entered into between, or a practice engaged in by-

- (a) a company and its wholly owned subsidiary, as contemplated in *section 1* of the Companies Act, 1973, or a wholly owned subsidiary of that subsidiary company;
- (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.

Exemption of Certain Restrictive Practices

Competition Act 2003, (Act No. 2 of 2003) Section 28(3) says in making a decision under *subsection (2)* the commission must take into account the extent to which the agreement, decision or concerted practice, or the category of agreements, decisions or concerted practices concerned contributes to or results in, or will likely contribute to or result in-

- (a) maintaining or promoting exports;
- (b) enabling small undertakings owned or controlled by historically disadvantaged persons, to become competitive;
- (c) improving or preventing decline in the production or distribution of goods or the provision of services⁹⁰;
- (d) promoting technical, economic progress or stability in any industry designated by the Minister;
- (e) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practices.

Such exemptions are very important and necessary in the application of competition directives through *Act No.2 of 2003* in Namibia. This argument can be demonstrated by making reference to the merger case No.69/LM/Sept02. According to this case, the merger between clicks pharmaceutical wholesale (Pty) Ltd and New United Pharmaceutical Distributors (Pty) Ltd was granted on the ground that there was no public interest concerns and also the merger would not have led to a substantial lessening of competition. Such a conclusion came about after an analysis of the relevant market, in

⁹⁰ Case No.69/LM/Sept02 and Case No.77/LMOct02..

order to establish whether in either the downstream (retail distribution market) or upstream (wholesale distribution), either firm was dominant. However, it was found out that there was no dominance concern in both the upper stream and downstream market. Similar conclusions were reached with regards to Case No. 77 on a merger between South African Airways and Air Chefs. Further, numerous other pro-competitive aspects were identified. They are (1) the merger would allow customers access to a wider variety of products and (2) the merger would be essentially a pro-active strategy.

As Namibia strives to industrialize towards the objectives for the Vision 2030, technical skills in the manufacturing and processing sectors as well as in the services sector is crucial. An exemption allows certain actions that otherwise could be perceived as lessening competition in the market, entry into such business activities mentioned above.

Moreover, exemptions in respect of intellectual property rights and professional rules are given in *Sections 30 and 31*, respectively of the *Competition Act of 2003 (Act No. 2 of 2003)*. The provision in the *Competition Act 2003 (Act No.2 of 2003)* on intellectual property rights does not negate the promotion of investment. The respect of property rights by government implies that government would not expropriate private property rights without a fair compensation. This by itself restores investor confidence in direct investment where intellectual property rights are important in manufacturing (*Salacuse 2000:397 and Smarzynska 200:1*). Also, mergers should comply with the regulation as set out in *chapter four* of the Act. *Section 51* state that if a merger is being, or has been,

implemented in contravention of the provisions of this Chapter, the Commission may make application to the court for-

- (a) an interdict restraining the parties involved from implementing the merger;
- (b) an order directing any party to the merger to sell or dispose of any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
- (c) declaring void any agreement or provision of an agreement to which the merger was subject;
- (d) the imposition of a pecuniary penalty.

The directives of the *Competition Act, 2003 (Act No.2 of 2003)* indicate that merger matters may be handled efficiently. Where a merger contravenes *Competition Act, 2003 (Act No.2 of 2003)*, the remedy recognizes the inherent jurisdiction of the court⁹¹. This link besides scrutinizing the impact of mergers on competition is a positively impact on attraction of investment.

The relationship with other authorities⁹² provided in this Act is found in *section 67*. This again indicates that the application of the *Competition Act (Act No.2 of 2003)* recognizes other legislation. This approach effectively will harmonize application of this legislation simultaneously with others. As it was alluded to earlier that promotion of investment is a multi-faced discipline involving institutions such investment centers, courts, and municipalities, harmonization of allows transparency and ease in approving rules. *Section 67* states that if a regulatory authority, in terms of any public regulation, has

⁹¹ See Sections 52 and 53 of the *Competition Act, 2003 (Act 2 of 2003)*.

⁹² According to section 66 (b) this refers to an entity established by or under any law which is responsible for regulating an industry or sector of an industry.

jurisdiction in respect of any conduct regulated in terms of *chapter 3 or 4 Competition Act, 2003 (Act 2 of 2003)* within a particular sector, the Commission and that authority-

- (a) must negotiate an agreement to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

Subsection 2 further provides that in addition to matters contemplated in paragraph (a) of *subsection (1)*, an agreement in terms of that subsection must-

- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
- (b) promote co-operation between the regulatory authority and the Commission; and
- (c) provide for the exchange of information and the protection of confidential information;
- (d) an agreement referred to in *subsection (1)* must be published in the *Gazette*.

Thus far, *Act No.2 of 2003* shows that it recognizes and offers a complementary role to other relevant codes on the promotion of investment in Namibia. *Act No.2 of 2003* only complements and does not replace other relevant codes on the promotion of investment.

6. Chapter Six

6.1 Nature of Legal Framework in Namibia

6.1.1 Comparisons

The set of legislation on investment promotion in Namibia viz, *Foreign Investment Act, 1990 (Act No 27 of 1990) as amended by Act No, 24 of 1993* and the *Export Processing Zone Act No 9 of 1995* as well as the supporting programs on investment promotion mirrors certain directives in the *Competition Act, 2003 (Act No.2 of 2003)*. The *Foreign Investment Act, 1990 (Act No.27 of 1990) as amended by Act No24 of 1993* advocates for the promotion of foreign investment inflow to Namibia. This objective is supported by the purpose and objective of the *Export-Processing Zone Act, 1995 (Act No. 9 of 1995)*. The *Competition Act 2003 (Act No.2 of 2003)* and other legislation such as *Foreign Investment 1990 (Act No 27 of 1990) as amended by Act No.24 of 1993* and *Export Processing Zone Act (Act No.9 of 1995)*, as well as the so-called *Special incentives for Manufacturers and Exports* including *Export processing Zone Program* acknowledge the importance of foreign direct investment in expanding industrial investment.

Given the above mentioned similarity on investment promotion, the possible impact on other legislation emanating from the *Competition Act 2003 (Act No. 2 of 2003)* is likely to be positive. The *Competition Act 2003 (Act No.2 of 2003)* has a positive impact on the *Foreign Investment Act, 1990 (Act No. 27 of 1990) as amended by the Foreign Investment Act 1993 (Act No. 24 of 1993)* because both are among the ideal factors worse considering when deciding where and how to invest; implying both attract inflows in investment in Namibia.

6.1.2 Contrasts in degree of intersection

Thus far, it has been illustrated that the Competition Act 2003, (*Act No.2 of 2003*) positively impacts on the promotion of investment in Namibia. However, the Competition Act 2003 (*Act No 2 of 2003*) in Namibia mainly focuses on giving guidance for accepted norms in the conduct of business and market structure, nothing else. This indicates that this Act only partially complements the other Act⁹³ in promoting investment inflows in the economy. This is because the Competition Act, 2003 (*Act No. 2 of 2003*) does not deal with matters concerning for example the compensation in case of expropriation⁹⁴, unrestricted availability of forex, dispute settlement and retention of forex. Such matters are extensively dealt with in the Foreign Direct Investment, 1990 (*Act No. 27 of 1990*) as amended by *Act No.24 of 1993* and not in the other Act⁹⁵. This shows that the Competition Act, 2003 (*Act No.2 of 2003*)'s impact on Foreign Direct Investment, 1990 (*Act No. 27 of 1990*) as amended by *Act No.24 of 1993* in promoting investment is limited to the structure of markets and conduct thereof. It is however, not having a clause contradicting other provisions⁹⁶ but rather support them by reinforcing the promotion on investment.

6.1.3 Possible Implications

Thus far, it has been illustrated that policy makers need to take account of the motives of investors, supporting institutions and legislation. Having sets of legislation running

⁹³ Refers to the Foreign Investment Act 1990 (*Act No. 27 of 1990*) as amended by *Act No. 24 of 1993*.

⁹⁴ However, according to section 30, it gives discretion to Competition commission on matters relating for example against expropriation of intellectual property rights.

⁹⁵ Refers to the Competition Act, 2003 (*Act No. 2 of 2003*).

⁹⁶ For example, on matters relating to dealings in forex.

parallel in Namibia implies that investors are given wide-ranging incentives. This indicates that given the different motives in investors towards investing in Namibia, an investment promotion package for the country need to be diverse. Promoting direct investors, for example, could involve a number of institutions responsible, among others to facilitate the entry of potential investment.

7. Chapter Seven

7.1 Conclusions and Recommendations

Thus far, it could be concluded that Namibia is endowed with natural resources, but still has to formulate an environment that maintains investor confidence. This is so, as without maintaining investor confidence, the motive to invest in Namibia whether for resources or efficiency seeking could be affected adversely. The government has since independence put measures believed would promote direct investment in Namibia. The challenge however, is to compete with other countries with similar measures. Further, the challenge is to have an effective combination of measures that range from a legal framework to the capacity of institutions expected to enforce the available remedies. The capacity of institution in this regard depends on the degree to which established institutions make and enforce laws and adjudicate disputes.

Governments compete for foreign direct investment because it is a source, amongst others, of capital and technology. In order to improve on the capacity of the domestic conditions in attracting direct investment, Namibia has worked against the factors with a potential to deter direct investment inflow such as the hostile policy frameworks, civil

strife and political instability, high transaction costs and policy reversals, among others. Namibia has since independence worked against such deterrents of direct investment by adopting a liberal regulatory framework, facilitation and promotion of investment and providing extra incentives.

Namibia has adopted a liberal regime for foreign direct investment by allowing foreign direct investors to repatriate profits and dividends and ensuring a legal protection of investment. Further, the regulatory system is free from corruption and the emphasis is on transparency.

However, all that has not been enough in attracting direct investment; government still continue to strive for not only improving the above measures, but others beyond that. In this thesis we looked at the *Competition Act, 2003 (Act No.2 of 2003)* and assessed the possible impact on the promotion of investment, especially as promoted through the *Foreign Direct Investment, 1990 (Act No 27 of 1997)* as amended by *(Act No 24 of 1993)*. The main finding is that the possible impact on the promotion of inflows in investment is positive. The positive impact is, however, emanating from the structure of markets and related business conducts that the *Competition Act, 2003 (Act No. 2 of 2003)* advocates. Further, the *Competition Act, 2003 (Act No.2 of 2003)* has little or insignificant influence on enforcement of the rule of law, as enforcement is executed by the *Namibian Competition Commission*⁹⁷.

⁹⁷ The role of the court in enforcement of the *Competition Act (Act No. 2 of 2003)* is distinctive.

This indicates that an effective promotion of direct investment would be determined by not only the provisions⁹⁸ referred to above already but also the enforcement capacity of institutions is crucial. This is thus what matters; a broad spectrum of provision that has to be supported by an effective capacity to enforce what the law advocates. Moreover, the motives for both the investor to invest and Namibia's investment promotion strategies would matter and need to be in harmony.

⁹⁸ Refers to those discussed under the Competition Act, 2003 (Act No. 2 of 2003).

8. Bibliography

ACTS of Parliament

Arbitration Act no. 42 1965
Bank of Namibia Act no. 15 1997
Competition Act of 2003 (Act No. 2, 2003)
Cotonou Agreement, June 2000 Benin
Customs and Excise Act no 20 1998
Export Processing Zones Act no. 9 1995
Foreign Courts Evidence Act no. 2 1995
Foreign Investment Act, 1990 (Act 27 of 1990)
Foreign Investment Act as amended, Act No 24 1993
Import and Export Control Act no. 30 1994

Articles

International Finance Corporations
Isaken J et al (1992). Some notes on an Industrial Policy for Namibia. August 1992.
Nepru Working Paper no. 11 Windhoek.
John-Wha Lee (1992). International Trade, Distortions and long run Economic Growth.
November 1992. IMF Working Paper 92/90.
Kovacic W & Gellohorn E. 1994. Anti-turst law and economics in a nutshell. 4th Edition.
Michael L et al July 1996. Recent Trade Policies and an Approach to Further Reform in
the Baltics, Russsia and Other countries of the Former Soviet Union. IMF
working Paper 96/71.
Nepru (1994). Future Agricultural Trade & Co-operation between Namibia and New
South Africa Windhoek, AGRECONA, March 10, Nepru working paper 40.
Nordas Hildegunn K (1995). South African Manufacturing Industries- Catching Up or
Falling Behind? CMI working paper 1995.2. Chr. Michelsen Institute
Development Studies and Human Rights, Bergin, Norway.
Sorsa P (1999). Algeria-The Real Excahnge Rate, Export Diversification and Trade
Protection. IMF Working Paper, April 1999.

Thomas V et al (1990). Lessons in Trade Policy Reform. Policy and Research Series 10. Policy Research and External Affairs, The World Bank Washington, DC.

Vautier K et al 1999. Competition Policy, Developing Countries and the WTO. World Bank, July 1999.

World Trade Organization (1998). Trade Policy Review: Namibia, Report by the government. WTO Trade Policy Review Body.

Books

Erasmus G. Trade and Competition Policy in Business Guide to the World Trading System. 2nd Edition. International Trade Centre, Commonwealth Secretariate.

Jackson H J 1998. The World Trading System: Law and Politics of International economic relations. The MIT Press, London.

Stiglitz Joseph E 2002. Globalization and its Discontents. The Penguin Press. London.

Voillemot and Thiller A 2000. WTO and Competition Rules in Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy. Edited by Hawk E.B. Fordham Law Institute 2000. Juris Publishing Inc.,

Briefings

Holmes P. International Competition Policy: Trade and Investment Background Briefing No. 5. Institute of Development Studies. University of Sussex.

Development Policy Research Unit (DPRU). 2000. What are the major trends and determinants of foreign direct investment in SADC countries? DPRU Policy Brief No. 00/P2, July 2000, Industrial Strategy Project. University of Cape Town.

Cases

Cape of Good Hope Bank Limited and Nedcor Bank Limited. Case No. 18/LM/Mar02. <[http://www. Competition Tribunal.Co.Za/Index.htm](http://www.CompetitionTribunal.Co.Za/Index.htm)>

Competition Commission Vs Edgars Consolidated Stores Limited and retail Apparel (Pty) Ltd. Case No. 95/FN/Dec02 <<http://www. Competition Tribunal.Co.Za/Index.htm>>

Competition Commission Vs Structa Technology (Pty) Ltd, Dorbyl Engineering Management Company (Pty) Ltd and Fastpulse Trading 26 (Pty) Ltd.
<[http://www. Competition Tribunal.Co.Za/Index.htm](http://www.CompetitionTribunal.Co.Za/Index.htm)>

Clicks Pharmaceutical Wholesale (Pty) Ltd and New United Pharmaceutical Distributors (Pty) Ltd. Case No.69/LM/Sept02 <<http://www. Competition Tribunal.Co.Za/Index.htm>>

Mutual and Federal Insurance Company Limited and Credit Guarantee Insurance Corporation of Africa Limited. Case No. 49/LM/Sept03. <<http://www. Competition Tribunal.Co.Za/Index.htm>>

Old Mutual Bank Limited and Nedcor Bank Limited Case No. 03/LM/Jan02.
<<http://www. Competition Tribunal.Co.Za/Index.htm>>

Rand Merchant Bank and Mettle Treasury (Pty) Ltd. Case No.65/LM/Nov03
<<http://www. Competition Tribunal.Co.Za/Index.htm>>

South African Airways (Pty) Ltd and Air Chefs (Pty) Ltd. Case No. 77/LM/Oct02
<<http://www. Competition Tribunal.Co.Za/Index.htm>>

Spar group Limited and Nelspruit Wholesales (Pty) Ltd. Case No. 46/LM/Sept03.
<<http://www. Competition Tribunal.Co.Za/Index.htm>>

Standard Bank South Africa and PROCHEM (Pty) Ltd. Case No.34/LM/Jun01.
<<http://www. Competition Tribunal.Co.Za/Index.htm>>

Discussion, Lectures, Economic Issues, Working, Occasional and Seminar Papers

Bizer D.S and Judd K.L 1989. Taxation and Uncertainty. American Economic Review. Volume 79 Number 2.

Clarke G.R.G 2001. How the Quality of Institutions Affects Technological Dependence in Developing Countries. Policy Research Working Paper 2603. Development Research Group, The World Bank, Washington D.C.,

Edmiston K 2001. Tax Uncertainty and Investment: A cross-Country Investigation. Working Paper #01-5. April 2001. International Studies Program, School of Policy studies, Georgia State University, Atlanta Georgia.

Edmiston K et al 2000. Incentive Targeting, Influence Peddling and Foreign Direct Investment. Working Paper 00-7, September 2000. International Studies Program,

- Andrew Young School of Policy Studies, Georgia State University, Atlanta Georgia.
- Hoekman B. 1997. Competition Policy and the Global Trading System: A Developing-Country Perspective. Policy Research Working Paper 1735. The World Bank, International Economics Department, International Trade Division, March 1997.
- Horstmann J. I et al 1992. Exploring New Markets: The Multinational Firm's Choice of Direct Investment versus Licensing. Seminar Paper No. 528, November 1992. Institute for International Economic Studies, Stockholm University, Stockholm.
- Kinoshita Y. 2001. R & D and Technology Spillovers Through FDI: Innovation and Absorptive Capacity. Discussion Paper No. 2775 May 2001. Centre for Economic Policy Research, London.
- Lubbe . 2001. Lecture on Arbitration, University of Namibia.
- Mauro P 1997. Why Worry About Corruption? Economic Issues. International Monetary Fund, Washington D.C.
- Noland M. 1999. Competition Policy and FDI: A Solution in Search of a problem. Working Paper 99-3. Institute for International Economics. February 1999.
- Okimoto D.I. 1989 in Singh A. and Dhumale R. 1999. Competition Policy, Development and Developing Countries. Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Paper 7, South Centre, University of Cambridge, November 1999.
- Singh A. and Dhumale R. 1999. Competition Policy, Development and Developing Countries. Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Paper 7, South Centre, University of Cambridge, November 1999.
- Singh A. 1993 in Singh A. and Dhumale R. 1999. Competition Policy, Development and Developing Countries. Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Paper 7, South Centre, University of Cambridge, November 1999.
- Wells L. T. Jr, et al 2001. Using Tax Incentives to Compete for Foreign Investment: Are they Worth the Costs? Foreign Investment Advisory Services (FIAS) Occasional Paper 15. International Finance Corporation, Washington, D.C., September 2001.

Journals

- Bockstiegel Karl-Heinz. 2000. Settlement of Disputes between Parties from developing and Industrial Countries. Foreign Investment Law Journal. ICSID Review. Volume 15, Number 2 Fall 2000.
- Fatouros A.A. “Towards an International Agreement on Foreign Direct Investment”. Foreign Investment Law Journal. ICSID Review. Volume 10, Number 2 Fall 1995.
- Hassett, K. A. and Metcalf G.E 1999. Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment? Economic Journal Volume 109, Number 457
- Hoekman B and Holmes P. 1999. Competition Policy, developing countries and the WTO. The World Economy, the leading journal on international economic relations. Volume 22, Number 6, August 1999.
- Hoekman B and Mavroidis 1994 in Hoekman B and Holmes P. 1999. Competition Policy, developing countries and the WTO. The World Economy, the leading journal on international economic relations. Volume 22, Number 6, August 1999.
- Juillard P. 2000. Freedom of Establishment, Freedom of Capital Movements, and Freedom of Investment. Foreign Investment Law Journal. ICSID Review. Volume 15, Number 2 Fall 2000.
- Khalil M.I. “Treatment of Foreign Investment in Bilateral Investment Treaties”. Foreign Investment Law Journal. ICSID Review. Volume 7, Number 2, Fall 1992.
- Kinoshita Y. and Campos N F 2003. Why Does FDI Go Where it Goes? New Evidence from the Transition Economies. IMF Working Paper 03/228.
- Martin S 1999. Trade and Competition: An Industrial Economist’s Perspective. The World Economy, the leading journal on international economic relations. Volume 22, Number 6, August 1999.
- Maskus K.E and Lahouel M. 2000. Competition Policy and Intellectual Property Rights in Developing Countries: Interest in Unilateral Initiatives and a WTO Agreement Trade and Development Centre September 1999.
- Richardson, J.D. (1998), on the objectives of competition law in Hoekman, B and Holmes, P. “Competition Policy, Developing Countries and the WTO”. The

- World Economy, the leading journal on international economic relations. Volume 22, Number 6, August 1999.
- Salacuse J. W. 2000. Direct Investment and the Law in Developing Countries. Foreign Investment Law Journal. ICSID Review. Volume 15, Number 2 Fall 2000.
- Sauvant K.P and Mallampally M 1999. Foreign Direct Investment in Developing Countries. Finance and Development /March 1999, Volume 36 No.1 IMF, Washington, DC.,
- Shihata I. F.I 1991. Promotion of Foreign Direct Investment-A General Account, with Particular Reference to the Role of the World Bank Group. Foreign Investment Law Journal. ICSID Review. Volume 6, Number 2 Fall 1991.
- Smarzynska B. K 2000. Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence From Transition Economies. World Bank. August 2000.
- Weil P. 2000.The State, the Foreign Investor, and International Law: the No longer Stormy Relationship of a Menage A Trois. Foreign Investment Law Journal. ICSID Review. Volume 15, Number 2 Fall 2000.

Manuals on International Standards and Codes

Balance of Payments Manual. Fifth Edition, 1993. International Monetary Fund, Washington D.C.,

Reports

Baker D.I 2000. Practical risks and opportunities for countries creating new competition laws and enforcement agencies. Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA): The Relevance of Regional Integration, International Cooperation and the Contribution of Competition Policy to Development in COMESA Countries. United Nations Conference on Trade and Development, United Nations, Geneva 2000.

Economic Commission For Africa 2000. Trade and Competition Policy in the framework of African Countries. Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA): The Relevance of Regional Integration, International Cooperation and the Contribution of Competition Policy to Development in COMESA Countries. United Nations Conference on Trade and Development, United Nations, Geneva 2000.

Organization of Economic Cooperation and Development (OECD) 1999. Competition Elements in international Trade Agreements: A Post-Uruguay Round Overview of the WTO Agreements. OECD, Paris, COM/TD/DAFFE/CLP/ (98)26/FINAL

Organization of Economic Cooperation and Development (OECD) 1999. Complementarities between Trade and Competition Policies. OECD, Paris, COM/TD/DAFFE/CLP/ (98)98/FINAL

United Nations Conference on Trade and Development (UNCTAD) 1997. World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy, Overview, New York:UNCTAD.

United Nations Conference on Trade and Development (UNCTAD) 1998. World Investment Report 1998: Trends and Determinants in Sauvant K.P and Mallampally P. 1999. Foreign Direct Investment in Developing Countries. Finance and Development /March 1999, Volume 36 No.1 IMF, Washington, DC.,

Resolutions

United Nations General Assembly Resolution on Permanent Sovereignty over Natural Wealth and Resources, 14 December 1962; Declaration and Program of Action on the Establishment of a New International Economic Order, GA Res. 3301 and 3302 (S.VI) of May 1974.

Theses On Namibia

Kaakunga R A . September 1992. Foreign Investment Prospects in Post-Colonial Namibia. Warwick University School of Law, United Kingdom.

Zinn P D. September 1985. Industrial Growth in Namibia Theoretical Perspectives and Empirical Evidence. University of Cape Town, South Africa.

Surveys results

Kearney A. T. 2003. FDI Confidence Index. Global Business Policy Council, September 2003, Volume 6. A.T. Kearney, Inc.

_____. 2002. FDI Confidence Index. Global Business Policy Council, September 2002, Volume 5. A.T. Kearney, Inc.

Website literature

Siddiqui A.H December 2003. WTO: Singapore issues.

www.dawn.com/2003/12/01/ebr10.htm

Smarzynska B. K and Wei S. 2003. Corruption and Composition of Foreign Direct Investment: Firm Level Evidence.

www.worldbank.org/wbi/governance/pdf/wps_2360.pdf

Wei Shang-Jin 2000. Corruption, Composition of Capital flows and Currency Crises.

www.nber.org/~confer/2001/cccf/Wei.PDF

World Trade Organization (WTO) 2003. What is the Cancun Ministerial Conference?

www.wto.org/english/thewto_e/minist_min03_whatism.htm

World Trade Organization (WTO) 2003. Day 5: Conference ends without consensus.

www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sep_e.htm

World Trade Organization (WTO) Articles

GATT Article XXIII

TRIPs Article XXXIX

_____Article XXXX

_____Article VI