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# **Protecting International Investors in SACU:** Towards Harmonisation

Sheila Kiratu

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## ABBREVIATIONS

ASEAN	Association of South East Asian Nations
BIT	bilateral investment treaty
BLNS	Botswana, Lesotho, Namibia, Swaziland
CCA	common customs area
CIA	common investment area
CMA	Common Monetary Area
FDI	foreign direct investment
FIP	Finance and Investment Protocol
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organisation
Mercosur	Mercado Común del Sur (Southern Common Market)
MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OECD Declaration	OECD Declaration on International Investment and Multinational Enterprise
PTA	preferential trade agreement
REC	regional economic community
RISDP	Regional Indicative Strategic Development Plan
RTA	regional trade agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community

TDCA	Trade, Development and Cooperation Agreement
TRIMS	Agreement on Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UNCTAD	UN Conference on Trade and Development
WTO	World Trade Organisation

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# 1. INTRODUCTION

Foreign investment inflows are of vital importance to the national economic development of African countries, because in most parts of Africa there is very little generated capital for substantial investment. Hence, most countries tend to look to foreign investors to bring much-needed foreign direct investment (FDI) to their shores. For this reason, considerable effort has been made by African countries, at national and regional levels, to improve the economic fundamentals and other determinants of investment such as stable political, economic and social conditions, factors that combine to form an important pillar in enhancing the overall attractiveness of a country or region.

The Southern African Customs Union (SACU) member states, Botswana, Lesotho, Namibia, Swaziland (the BLNS countries) and South Africa have also taken measures to encourage FDI and create a better feeling of investment security in their respective countries. Interestingly, except for Namibia, none of the countries in the region has codified provisions on investment protection into a singular law. Most investment protection provisions in SACU are entrenched in a network of bilateral investment treaties (BITs), regional trade agreements (RTAs) and multilateral agreements with other states.

Generally, the commitment by the SACU member states to these international agreements relating to investment proves or at least assumes the general conviction that any such kind of investment-related provision is the result of a determined policy on the matter. As such, it is safe to conclude that the investment regimes<sup>1</sup> in SACU constitute the various standards found in these agreements, plus, specific to Namibia, the country's Foreign Investment Act.<sup>2</sup>

Most of these international agreements underline the minimum international standards on protection of investments and particularly address the definition of investment and investor, the right of establishment of the investor provided through the guarantee of national treatment or most-favoured nation treatment, the right to repatriate profits, protection against nationalisation and expropriation, and recourse to international arbitration in case of conflict.

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<sup>1</sup> Investment regimes here are defined as the regulations found in SACU's international agreements with other parties that affect the protection of foreign investors and/or their investment in SACU countries.

<sup>2</sup> Act 27 of 1990.

In the absence of a SACU-wide policy on the treatment of these standards the regime in SACU is a patchy and structurally unbalanced system. In some areas, like services investments, there are clear-cut rules. In other areas, like performance requirements, there are basic rules, even though they in part still need to be settled, and yet in other areas, like entry of investment or investor protection, there are vague rules or no rules at all. This state of affairs is untenable for a region that has as one of its objectives the multiplication of investment opportunities. Why is this so?

Currently, it is widely recognised that conflict and divergences arising from the regimes of member states of a regional bloc in matters relating to investment may constitute an obstacle to the development of trade and the increase in investments in the region by hindering the prospects of meaningful regional economic co-operation and complementary economic development.<sup>3</sup> The question then is whether harmonisation of the investment regimes can assist SACU to reach its objective of increasing investment opportunities in the region.

But what is harmonisation of laws and why this approach? Harmonisation is defined to encompass the merging of national systems into a unified approach to reduce differences in operating environments between countries as much as possible.<sup>4</sup> To harmonise the law also means more than a technical equalisation of legal differences; it means harmonising the respective national policies behind relevant laws.

This report therefore attempts to investigate how the investment regimes in SACU differ and the desirability of member states harmonising their regimes, and considers the implications of a harmonised regime in SACU for trade in services and intra-SACU trade. The report also highlights the existing and potential challenges regarding this objective and proposes a selection of collaborative modalities to tackle the mentioned challenges.

Section 2 provides an overview of the investment regime in SACU, as reflected in a number of bilateral, plurilateral and multilateral investments agreements, highlighting the key provisions these instruments embody. Section 3 provides a general account of disparities in the treatment of key standards on

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<sup>3</sup> Akiwumi A, 'A plea for the harmonization of African investment laws', <<http://www.jstor.org/view/00218553/ap020056/02a00130/0>>.

<sup>4</sup> Schmitthoff CM, *The Harmonisation of European Company Law*. London: United Kingdom National Committee of Comparative Law, 1973.



investment in SACU through an analysis of a sample of BITs and interviews (the latter are listed in Annex 2). Section 4 analyses the costs and benefits of harmonising the investments regimes in SACU and discusses the potential obstacles to such an endeavour, and concludes the report by suggesting policy options.

## 2. OVERVIEW OF THE INVESTMENT REGIME IN SACU

Foreign investment regulation is very much in the domain of national governments in the form of investment codes and/or legislation. In SACU, only one country — Namibia — has legislation on investments through its Foreign Investment Act.<sup>5</sup> The other countries do not have laws dedicated to investment facilitation and protection, although investment codes for Botswana and Lesotho are in the pipeline.<sup>6</sup> The lack of national legal frameworks does not preclude per se the existence of an investment regime in SACU. On the contrary, the regime in the region is characterised by protection standards embodied in a plethora of investment-related agreements at bilateral, regional and multilateral levels.

### 2.1 Bilateral agreements on investment

In the absence of a global investment treaty, most legal disciplines regulating the relationship between foreign investors and host countries have been developed at a bilateral level, through bilateral investment treaties. In recent years, the proliferation of BITs has burgeoned to 2,573 at the end of 2006, all signed within a 48-year span from the conclusion of the very first BIT between the Federal Republic of Germany and Pakistan in 1959.<sup>7</sup>

These treaties set the general framework for facilitating and protecting the investments of a foreign investor in the host country's territory. The popularity of BITs suggests that many investors are not confident about the legal and

<sup>5</sup> Act 27 of 1990.

<sup>6</sup> Interviews with government officials from the two countries.

<sup>7</sup> UNCTAD (United Nations Conference on Trade and Development), 'Developments in International Investment Agreements in 2005', *IIA Monitor*, 2, 2006. UNCTAD/WEB/ITE/IIA/2006/7.

political environments in low- and middle-income countries,<sup>8</sup> which entail a variety of risks to their investment. By providing an internationally binding mechanism, BITs give investors confidence that any agreement made with the host will be honoured, as derogation from such an agreement becomes a violation of international law.<sup>9</sup> That is not to say that a BIT is a prerequisite for investing in a foreign country. On the contrary, some investors choose to invest without binding commitments from a host state, and studies have shown that the signing of a BIT does not guarantee increased investment from the home country.<sup>10</sup> What is important for a host state is to consider the effect of its actions on its reputation and on future investors. Botswana and Lesotho, for instance, have been successful in attracting investments on the basis of their governments' good reputation regarding their treatment of investment.<sup>11</sup>

SACU member states have signed a host of BITs, set out in Annex 1, with bilateral partners and have committed themselves in binding international law treaties to guarantee investors the right to repatriate profits, guarantee compensation in cases of expropriation or nationalisation, provide the promise of 'fair and equitable treatment' and 'full protection and security' of investments, and offer avenues for dispute settlement, with some variance at the discretion of the contracting parties. South Africa leads the way, having entered into 42 such treaties.

In addition to the BITs in SACU, there is a bilateral trade agreement between the EU and South Africa known as the Trade, Development and Cooperation

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<sup>8</sup> See further, Tobin J and S Rose-Ackerman, 'Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties', *Centre for Law, Economics and Public Policy Research Paper*, no. 293.

<sup>9</sup> The value of this depends on the dispute settlement and enforcement measures in the BIT. See further, Trebilcock MJ and H Robert, *The Regulation of International Trade and Investment*. London: Routledge, 1999.

<sup>10</sup> Countries like Nigeria, Brazil, China and Cuba have seen sizable flows of investment, despite shying away from BITs. The World Bank also reports that countries that had concluded BITs were no more likely to receive additional FDI than were countries without such pacts. See Hallward-Driemeier M, *Global Economic Prospects and the Developing Countries 2003*, World Bank, <[http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000265513\\_20040205152440](http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000265513_20040205152440)>.

<sup>11</sup> UNCTAD, *Investment Policy Review, Botswana*, UNCTAD/ITE/IPC/Misc.10. New York & Geneva: UN, 2003; UNCTAD, *Investment Policy Review, Lesotho*, UNCTAD/ITE/IPC/2003/4. New York & Geneva: UN, 2003.

Agreement (TDCA). Although this Agreement does not qualify as a BIT in the strict sense of the term, it deserves mention, because it contains provisions that relate to the treatment of investment by specifically calling for close co-operation on the free movement of capital between the two parties. These investment provisions, and the TDCA as a whole, are also applicable to the BLNS countries by virtue of their being members of a customs union with South Africa.

## 2.2 Investment in regional trade agreements (RTAs)

The bulk of RTAs, as the term suggests, deal with trade issues, but over the years a growing number of them have dealt with investment liberalisation. The first RTA of importance for the development of investment rules was the Treaty Establishing the European Community in 1957, which, among other things, prohibited restriction on the freedom of establishment and/or the setting up of agencies, branches and subsidiaries of foreign companies in member states. Before it, no regional agreement had dealt with the treatment of investment. The treaty was not only important for the evolution of investment RTAs, but it also served as a source of inspiration and model for subsequent integration efforts.<sup>12</sup>

The treaty set the stage for the creation of the Arab Economic Unity in 1957, the Customs and Economic Union of Central Africa in 1965, the Association of South East Asian Nations (ASEAN) in 1967, the Andean Common Market in 1969 and the Caribbean Community in 1973, all of which contained common vague frameworks for investments. In the 1990s there was a push to establish new regional agreements<sup>13</sup> and a renewed vigour in attempts to deepen existing regional agreements, which saw instruments related to investments strengthened and expanded.

These new and revised RTAs often contained improved rules on the right of establishment of foreign investment, the free movement of capital, non-discrimination clauses that distinguished between regional and third-party

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<sup>12</sup> Reiter J, 'Investments in RTAs', <<http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Events/December2004/Investment.doc>>.

<sup>13</sup> Such as the Mercado Común del Sur (Southern Common Market or Mercosur) in 1991, the ASEAN Free Trade Area in 1992, the African Economic Community in 1991 and the Common Market for Eastern and Southern Africa in 1993.

investors, and even the BIT practice of investor–state dispute settlement.<sup>14</sup> The US, which had generally refrained from signing BITs and RTAs, reversed its policies and approach to RTA activism by codifying ambitious investments provisions, usually found in its model BITs, into its new RTAs with Canada and Mexico under the North American Free Trade Agreement (NAFTA).

NAFTA went beyond previous investment RTAs, as it provided for non-discrimination with respect to both pre- and post-establishment of foreign investment, market access granted based on a negative list of exemptions, access granted to the temporary entry for business persons, the highest protection against expropriation, a detailed mechanism for investor–state dispute resolution that provided for international arbitration, and a long list of prohibited performance requirements, including transfer of technology and limitations on ownership.

By consolidating the US BITs model, NAFTA raised the bar for rule making on investment generally and is thus viewed as a state-of-the art investment framework, because it sets out the most comprehensive rules on investment protection or the ‘best standards’ of investment protection that have evolved so far.<sup>15</sup> This has had important ramifications, and the NAFTA model has in many instances come to function as a benchmark in the recent surge of RTAs, from which countries either have gathered inspiration or consciously decided to deviate.<sup>16</sup>

In fact, this characteristic of US free trade agreements (FTAs) had a bearing on the unsuccessful outcome of US–SACU FTA negotiations, in which SACU negotiators identified the investment chapter in the US comprehensive FTA as a particular obstacle,<sup>17</sup> leaving the SACU Agreement, SACU–European Free Trade Association (SACU–EFTA) FTA and the SACU–Mercosur Preferential

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<sup>14</sup> Mercosur became the pioneer in this arena, where it was typically left for states to thrash out investment disputes with one another and not with the investor directly.

<sup>15</sup> See, Sornarajah M, ‘The clash of globalizations and the international law on foreign investment’, Simon Reisman Lecture in International Trade Policy, Ottawa, 12 September 2002.

<sup>16</sup> Reiter R, ‘Investments in RTAs’, <<http://www.lse.ac.uk/collections/internationalTradePolicyUnit/Events/December2004/Investment.doc>>.

<sup>17</sup> See further, Wandrag R, ‘SACU–US FTA: Investment issues’, in Draper P and N Khumalo, *One Size Doesn’t Fit All: Deal-breaker Issues in the Failed US–SACU Free Trade Negotiations*. Johannesburg: SAIIA, 2007, pp.26–57.

Trade Agreement (PTA) as the only regional trade agreements in force that inform investments in SACU via RTAs.

### *2.2.1 SACU Agreement*

The objectives of the SACU Agreement are provided in Article 2 as the:

- facilitation of cross-border movement of goods between member states;
- creation of institutions ensuring equitable trade benefits to member states;
- promotion of conditions of fair competition in the common customs area (CCA);
- increasing investment opportunities in the CCA;
- enhancement of economic development, diversification, industrialisation and competitiveness of member states;
- integration of member states into the global economy by enhanced trade and investment; and
- development of common policies and strategies.

From the above, it is clear that a CCA is the point of reference as to the promotion of conditions of fair competition to be established in the CCA and the objective of enhancing inward investment in the region. Member states are central in the facilitation of cross-border trade and are also the principal beneficiaries of SACU institutions established to ensure equitable trading benefits, enhanced economic development, diversification, industrialisation and competitiveness, and their integration into the global economy. However, since the objective of increasing investment opportunities cannot be read to the exclusion of the other objectives, a discussion of increasing investment in SACU must firstly be seen to create a benefit for the CCA<sup>18</sup> and secondly for the member states. This issue will be dealt with in section 4 of this report.

Related to investments is the objective of facilitating cross-border movement of goods within the region and the inclusion of free movement provisions in the Agreement to enable this. To this effect, the SACU Agreement provides that goods grown, produced or manufactured in the CCA can be imported to the area of another member state, free of customs duties and quantitative

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<sup>18</sup> SACU Agreement, art. 2(e).

restrictions,<sup>19</sup> but with exceptions.<sup>20</sup> Goods being imported to one member state from another, although having originated from outside the CCA, shall also be exempt from duties.<sup>21</sup>

These free movement provisions in the SACU Agreement, though in accord with the definition of custom unions provided in Article XXIV of the General Agreement on Tariffs and Trade (GATT), which stipulates that ‘duties and other restrictive regulations of commerce shall be eliminated with respect to substantially all of the trade between the Members’, indicate that the scope of the Agreement is limited to trade in goods.

The SACU Agreement does not establish provisions for the movement of services or service providers, as in the formation of the economic integration arrangement according to Article V of the General Agreement on Trade in Services (GATS). The SACU Agreement is also silent on enabling the free movement of persons or capital between members states, which exposes the poverty of the Agreement in establishing a legal framework for the facilitation of investment in services in the region.

One of the defining characteristics of the SACU Agreement, though, is that it calls for the adoption of common policies and strategies. Chapter 8 of the Agreement is dedicated to the development of ‘common policies’ in the areas of industrial development,<sup>22</sup> agriculture,<sup>23</sup> competition<sup>24</sup> and unfair trade practices.<sup>25</sup> The textual variations in these provisions demand that the concept ‘common policies’ be interpreted very broadly, as only Article 38 on industrial development specifically refers to the creation of common policies, while the other articles only require co-operation.<sup>26</sup>

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<sup>19</sup> *Ibid.*, art. 18.

<sup>20</sup> *Ibid.*, arts. 18(2), 25 & 26.

<sup>21</sup> *Ibid.*, art. 19.

<sup>22</sup> *Ibid.*, art. 38.

<sup>23</sup> *Ibid.*, art. 39.

<sup>24</sup> *Ibid.*, art. 40.

<sup>25</sup> *Ibid.*, art. 41

<sup>26</sup> McCarthy C & D Hansohm, ‘Integration through common policy: Industry policy in SACU’, presentation to the Monitoring Regional Integration in Southern Africa workshop, <[http://rta.tralac.org/pdf/20070116\\_SACU\\_igd\\_workshop.pdf](http://rta.tralac.org/pdf/20070116_SACU_igd_workshop.pdf)>.

The common policies referred to above have to be interpreted in the context of the region's objectives, and a conservative reading of these provisions suggests that while the Agreement poses objectives for enhancing investment in SACU, it does not contain a section envisaging common principles relating to investment. It can, however, be argued that some aspects of investment policy co-operation are in some of the envisaged SACU common policies, notably in Article 38 on industrial development.

The Agreement also denies the CCA the power to represent member states in external agreements relating to services or investment.<sup>27</sup> For the purposes of negotiating with third parties on these issues, members maintain a common negotiating mechanism and create common understandings on various issues. More importantly, the Agreement does not create, nor does it require its member states to enact, investment protection mechanisms.

### 2.2.2 SACU–EFTA FTA

The SACU–EFTA FTA, in addition to aiming to increase investment opportunities in the free trade area,<sup>28</sup> requires the parties to the agreement to 'create and maintain a stable and transparent investment framework that shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments by investors of the other parties'.<sup>29</sup> Although this provision is not as comprehensive as those found in BITs, and any disputes settlement processes arising under it would have to be instituted by the signatory governments (i.e. private actors would only have recourse via their governments), it at least creates a contractual right to fair treatment of an investor and his/her investment in SACU.

The agreement further recognises the importance of promoting cross-border investment as a means for achieving economic growth and development, and aims at co-operation in this respect by way of, among other things, 'furthering of a legal environment conducive to increased investment flows'.<sup>30</sup> Another interesting feature of the SACU–EFTA FTA is that it also covers services. The provision on services goes beyond the recognition of the parties' obligations

<sup>27</sup> SACU Agreement, art. 31.

<sup>28</sup> SACU–EFTA FTA, art. 2(b).

<sup>29</sup> *Ibid.*, art. 28(1).

<sup>30</sup> *Ibid.*, art. 28(2)(c).

under GATS, because it 'endeavours to extend the scope of the GATS with a view to further liberalising trade in services between the parties'.<sup>31</sup>

However, despite an attempt at the broad coverage of investments, the SACU–EFTA FTA falls short of underlining specific protections and leaves these to be determined by the parties in accordance with their laws and regulations.

### 2.2.3 SACU–Mercosur PTA

The SACU–Mercosur PTA, signed at the end of 2004 as a first step toward the creation of a free trade area, covers only goods and does not include other areas, such as investments or services. Indeed, the Mercosur–SACU PTA does not contain a single mention of either investments or services.<sup>32</sup>

## 2.3 Multilateral treaties on investments

Although the world does not have a comprehensive multilateral agreement covering investment, such as that envisaged by the Organisation for Economic Co-operation and Development (OECD)<sup>33</sup> or entrenched in the Singapore issues,<sup>34</sup> there are some investment-related provisions contained in a number of existing multilateral agreements and governed by diversified sets of institutions that include the World Trade Organisation (WTO), World Bank, International Labour Organisation (ILO) and OECD.

The rules covered by the ILO (the ILO Declaration of Principles), signed by all SACU member states, are omitted from this discussion, because they are not legally binding on signatories. The OECD's Declaration on International Investment and Multinational Enterprise (OECD Declaration), on the other hand, is only binding on the 30 participating OECD countries and nine non-member countries. South Africa is on the queue for possible membership, and, if it is admitted to the organisation, the OECD Declaration would form part of

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<sup>31</sup> *Ibid.*, art. 27(2).

<sup>32</sup> See the PTA between Mercosur and SACU, <[http://www.mre.gov.br/ingles/politica\\_externa/mercosul/sacu/MSSACU%20%20Texto%20base%20-%20PTA%20-%2016dec2004%20\(ingl%C3%AAs\).doc](http://www.mre.gov.br/ingles/politica_externa/mercosul/sacu/MSSACU%20%20Texto%20base%20-%20PTA%20-%2016dec2004%20(ingl%C3%AAs).doc)>.

<sup>33</sup> See further, Drabek Z, 'A multilateral agreement on investment: Convincing the skeptics', in Teunissen JJ (ed.), *The Policy of Global Financial Integration*. The Hague: FONDAD, 1998.

<sup>34</sup> See further, <<http://www.ictsd.org/pubs/dohabriefings/doha6-singaporeIssues.pdf>>.



its investment regime. Unlike the TDCA, which de facto applies to the BLNS countries, the OECD Declaration would not affect these countries, as Article 31 of the SACU Agreement mechanism only comes into play if the agreement in question is a trade agreement.<sup>35</sup>

The implications of the OECD Declaration would be a policy commitment by South Africa to constitute rules of conduct for multinational enterprises, to accord to foreign-controlled enterprises on its territory treatment no less favourable than that accorded in like situations to domestic enterprises, to cooperate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises, and to endeavour to make national measures affecting investors (e.g. administrative processes, incentives and disincentives) as transparent as possible.

In contrast to the aforementioned ILO Declaration of Principles, the WTO's Dispute Settlement Understanding and the Washington Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) are legally binding on their member countries, which include the SACU member states. Namibia has signed the Washington Convention establishing dispute settlement measures for foreign investment disputes, but has not yet ratified it. South Africa on its part has not signed this Convention, which would subject it to the investment dispute settlement body of the World Bank. The World Bank's ICSID governs the settlement of disputes between investors and host states.

The international agreements under the auspices of the WTO that include investment provisions are mainly GATS, the Agreement on Trade Related Investment Measures (TRIMS) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).

None of these agreements even remotely resembles a fully fledged investment framework, but they are nevertheless important in SACU's investment architecture, especially GATS and TRIMS, both of which explicitly aim to address investment conditions either with regard to entry and treatment, in the case of GATS, or government control over investment activities, in the case of TRIMS.

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<sup>35</sup> Article 31 of the SACU Agreement envisages the establishment of a common negotiating mechanism that hinders an individual SACU member state from entering into a PTA with a third party without the prior consent of the other member states.

GATS incorporates rules on investment, but only in so far as they are necessary to address services that are provided by on-site investments through a local (commercial) presence in the foreign country. The investment provisions of GATS are subsidiary to its service trade liberalising provisions and are mainly designed to avoid hidden protectionism and to protect investments that are an integral part of services, such as banking and transport. It should be noted, though, that these investment provisions are subject to Article XII (Restrictions to Safeguard the Balance of Payments)<sup>36</sup> and Article XIV (General Exceptions)<sup>37</sup> of GATS, which have no equivalent in most investment agreements.<sup>38</sup>

The investment implications of GATS are derived from Article I.II, which identifies the modes by which services can be supplied. These imply a significant presence in the country where the service is provided, and provide the basic protections of GATS to the investments that are an integral part of this presence.

TRIMS, on the other hand, intended by some WTO members as a first step towards a much more comprehensive agreement on investment, is not an independent agreement such as GATS, but forms part of the GATT framework as one of the multilateral agreements on trade in goods prohibiting measures that are inconsistent with the basic provisions of GATT.<sup>39</sup> The coverage of the Agreement is defined in Article I, which states that the 'agreement applies to investment measures related to trade in goods only', as it is aimed at phasing out measures that are contrary to GATT. Its operative provisions are contained in Article II.I, which provides that 'without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent

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<sup>36</sup> Article XII allows members to introduce restrictions on trade in services as an exceptional measure, and notwithstanding any commitments they have assumed, in order to safeguard their balance of payments position.

<sup>37</sup> Article XIV of GATS allows members to introduce measures that would otherwise be inconsistent with their obligations under the Agreement in exceptional circumstances and in order to pursue any of the policy objectives set out in the relevant provisions. These provisions are Article XIV (General Exceptions) and Article XIV *bis* (Security Exceptions). They must not be used, however, as a means of arbitrary or unjustifiable discrimination or a disguised trade restriction.

<sup>38</sup> Cosbey A, L Peterson, H Mann and K von Moltke, 'Investment, Doha and the WTO', background paper for the Chatham House meeting on Trade and Sustainable Development Priorities Post-Doha, London, 2003 <[http://www.iisd.org/pdf/2003/investment\\_riia\\_iisd.pdf](http://www.iisd.org/pdf/2003/investment_riia_iisd.pdf)>.

<sup>39</sup> <[http://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_e.htm](http://www.wto.org/english/tratop_e/invest_e/invest_e.htm)>.

with the provisions of Article III or XI of GATT 1994'.<sup>40</sup> The Agreement, however, does not give a definition of 'investment' or a 'trade-related investment measure', but rather provides an annex with an illustrative list of trade-related investment measures that are inconsistent with Article III or Article XI of the GATT.

Consequently, the investment provisions in GATS and TRIMS bear little or no resemblance to the 'tighter' protection provisions found in bilateral investment agreements, such as the South Africa–Canada BIT. The upshot of the above is that investment protection provisions in SACU are largely enshrined in the above investment-related agreements and BITs, particularly the latter.

Therefore, the analysis of harmonisation of investment regimes in the region focuses on the principles or provisions that emerge as core constituents of SACU's investment regime, i.e. (1) the definition of investment; (2) the treatment of convertibility of investment and earnings; (3) the expropriation of property and adequacy of methods of determining just compensation; and (4) other conditions that may affect foreign investment, such as restrictions on the importation of skilled labour or the existence of privileges such as tax exemptions, and the treatment of these principles on a country-by-country basis. These factors are considered below.

### 3. DISPARITIES IN THE REGIMES OF SACU MEMBERS

#### 3.1 Definition of 'investment' and 'investor'

The first question facing a potential investor is the qualification of his/her proposed enterprise through the definition of what may be accepted as an investment or an investor. The definitions of 'investment' and 'investor' are important because they determine the object to which the rules of the agreement shall apply and the scope of their applicability, because different kinds of investment have different economic implications and a different impact on development; hence parties to a BIT may wish not to promote and protect investment flows in the same manner. It also follows that this definition would be crucial in determining the jurisdiction of arbitral panels.

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<sup>40</sup> These provisions respectively require states to provide national treatment for trade in goods and prohibit quantitative restrictions on imports or exports.

The definitions of the two terms are included in SACU member states' BITs with different partner states. The BITs in SACU define an investor as both a natural and juristic person. With respect to natural persons, the BITs protect persons who have the nationality of one of the contracting parties. Thus, the typical definition of a national of a party is a natural person recognised by that party's internal law as a national or citizen. In the case of South Africa, the definition is even broader, as it includes permanent residents under domestic law.<sup>41</sup>

Disparities also exist in the definition of a legal or juristic person. Usually a juristic/legal person is determined from the place of incorporation of the company, the location of the company's seat, and the nationality of ownership and control.<sup>42</sup> Most SACU BITs use the place of incorporation or constitution of the company concerned in accordance with the law of either contracting parties.<sup>43</sup> The application of this broad criterion has disadvantages. For example, under the Netherlands–South Africa treaty, any Dutch national will enjoy the treaty protections when investing in South Africa. Accordingly, nationals of third countries could easily avail themselves of the protections found in the South Africa–Netherlands treaty, merely by virtue of creating a Dutch holding company for purposes of making South Africa-bound investments.<sup>44</sup> Treaties with such loosely drafted provisos — which allow anyone to use them based on mere incorporation in the home state — are subject to abuse.<sup>45</sup>

Some BITs in SACU have departed from the above practice and require incorporation not just in the home state, but also that the corporate seat be located

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<sup>41</sup> For example, the BIT between South Africa and the Netherlands defines an investor as a natural person, a legal person constituted under the law, and even a legal person not constituted under the law, but controlled directly or indirectly by natural South Africans (art. 1[b], i–iii).

<sup>42</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*. UNCTAD/ITE/IIA/2006/5. New York & Geneva: UN, 2006.

<sup>43</sup> For example, the BITs between South Africa and Mauritius, Korea and the United Kingdom, Lesotho and Germany, and all Swaziland's BITs define companies as juridical persons, firms or associations incorporated or constituted in accordance with the law of the contracting party.

<sup>44</sup> See further, Peterson LE, 'South Africa's bilateral investment treaties: Implications for development and human rights', *Dialogue on Globalization Occasional Paper No. 26*, November 2006.

<sup>45</sup> The BITs of Botswana–Egypt, Swaziland–Mauritius and Swaziland–China are examples of the latter type.

in the home state.<sup>46</sup> For instance, Namibia's BIT with Spain reads 'a "company" means juridical persons or any other incorporated entity constituted under the applicable law of the Contracting party and *having its seat in the territory of that same Contracting party*'<sup>47</sup> (emphasis added). This type of requirement makes it harder for investors to incorporate in a home state of convenience and adopt the corporate nationality of the new home state.

The BITs in SACU have a standard definition of investment, covering every kind of asset owned or controlled by an investor of another party. In some cases, this is even complemented by an illustrative list of assets included within the definition to cover property, shares, money, intellectual property rights and business concessions.<sup>48</sup>

From the above, it can be argued that the guiding principle of the wide definition of investment and investors in SACU member states' BITs is to guarantee protection of as many forms of investment as possible, bar the BITs of Namibia and Botswana, which limit the benefits of the agreements to those legal entities that have genuine ties with the home country. The presence of the former trend in many BITs also suggests that in case of harmonisation, one would not expect much conflict on this issue, as the definition in most countries is very similar.

### 3.2 The right to admission and establishment

The right of admission and establishment refers to the entry of investments of a contracting party into the territory of another contracting party. According to the principle of sovereignty entrenched in customary international law, a state has the right to regulate the entry of foreign investment into its territory. This involves the right to exclude foreign investments or impose conditions on the entry of foreign investment or the acquisition of property by foreign capital and the exercise of general jurisdiction over such companies, usually justified on economic, social, political and national security grounds.

This principle notwithstanding, BITs have evolved to either allow the admission and establishment of foreign investment subject to the domestic

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<sup>46</sup> For instance, the BITs between Germany and Namibia, the Netherlands and Namibia, Botswana and Germany, Botswana and China, and Lesotho and Germany.

<sup>47</sup> BIT between Spain and Namibia, art. 1(a).

<sup>48</sup> The BIT between Swaziland and Mauritius limits the scope of the definition of investment to exclude assets for personal use.

laws of the host country or to grant follow investors a right of establishment<sup>49</sup> in accordance with the principles of national treatment and most-favoured nation (MFN) treatment, not only once the investment has been established, but also with respect to the process of establishment. These approaches require that states accord equal treatment to all investors, which can be interpreted to mean that investors of one party should receive treatment not less favourable with regard to investing in the territory of the other party than domestic investors and investors of any third country, the aim being to provide a level playing field for all investors, both domestic and foreign.

*National treatment* (a principle applied in trade in goods) involves an economic aim whereby foreign and domestic investors should be subject to the same competitive conditions in the host country market, and therefore no government measure should unduly favour domestic investors. While most SACU member states do not subject foreign investors to arbitrary discrimination, the national treatment standard evinced by these countries becomes applicable only after the investment has entered the host state, i.e. post-establishment, as opposed to pre-establishment.<sup>50</sup>

However, South Africa and Botswana do not fully subscribe to a policy of according total and unqualified non-discrimination to foreign companies vis-à-vis domestic enterprises. South Africa practises discrimination on economic, social and political grounds owing to its experience with apartheid. This has seen the government undertake measures to transform the country's socioeconomic landscape so as to bring about so-called broad-based black economic empowerment. Several of the government's laws and policies take into account the Constitution's overall goal to redress historical, social and economic inequalities and therefore create affirmative action requirements for the hiring, promotion and creation of legal partnerships with historically disadvantaged persons.<sup>51</sup> Some investors have cited this policy as a hindrance to investing in

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<sup>49</sup> Although this is not absolute, these agreements impose a duty on the contracting parties to admit foreign investment in accordance with their national legislation. See further, UNCTAD, *Bilateral Investment Treaties 1995–2006*, *op. cit.*

<sup>50</sup> For example, the BITs of Canada and the US reserve the right not to grant national treatment in the pre-establishment phase, whereas most BITs with European countries do allow the contracting parties to refrain from granting national treatment to the investor or investment in the pre-establishment phase.

<sup>51</sup> Constitution of the Republic of South Africa, Act 108 of 1996, sec. 9.

the country,<sup>52</sup> and others have gone as far as legally challenging South Africa's black empowerment policies.<sup>53</sup>

Exceptions to the national treatment standard in Botswana can be found in the Reservation Policy of 1982, which reserves certain economic activities exclusively for Botswana-owned businesses and gives preferences for locally owned companies in public procurement. This policy is motivated by the wish to encourage local enterprise development. Lesotho, Swaziland and Namibia, through their BITs and the latter's Foreign Investment Act,<sup>54</sup> provide for national treatment and generally treat foreign investors equally to national investors, with an exception of the prohibition of ownership of land by foreigners.

Although UNCTAD<sup>55</sup> recognises that 'no single country has so far seen itself in a position to grant national treatment without qualifications, especially when it comes to the establishment of investment', a key question for consideration by SACU on the application of national treatment would be whether the principle should apply to all phases of an investment, i.e. pre- and post-establishment, and who/what should receive this treatment, the investor or the investment.

Investment treaties mainly concern the treatment of foreign investment after its entry into the territory of the host state. They tend not to place any obligation on the home state to facilitate investment abroad, e.g. through tax schemes, nor any obligation on the host state to admit foreign investment into its territory. This means that the host state retains control over the entry of foreign investment into its territory — although the treaty may call on state parties to regulate in 'favourable' terms the entry of investment from the other state party.

However, some BITs, particularly those based on the US BIT model, go beyond this and regulate entry and treatment in the same way. In these cases,

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<sup>52</sup> Interview with investor, 23 August 2007.

<sup>53</sup> Luke EP, 'Tribunal chosen over South African black empowerment policies', <[http://www.iisd.org/pdf/2007/itn\\_sep28\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_sep28_2007.pdf)>.

<sup>54</sup> Section 3(1) of the Namibian Foreign Investment Act provides that 'a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake'.

<sup>55</sup> See UNCTAD, *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11. New York & Geneva: UN, May 1999, vol., IV, p.1.

principles such as national treatment and MFN also apply to entry. The effect is to limit the host state's control over investment inflows.

The *MFN principle*, on the other hand, ensures that a host country does not treat an investor or investment any less favourably than it treats investors or investments of BIT or RTA partners or of any other country. The rationale for this is that foreign investors are usually wary of being placed in a commercial environment in which they will be rendered less competitive due to a host country's discriminatory investment policies.

The MFN obligation is just as important under investment law as it is in trade in goods. However in trade in goods, MFN treatment is really a border measure, meaning that it is a standard applied before the goods gain entry into a particular country's market.<sup>56</sup> This differs markedly from the field of investment, where the requirement to treat foreign investors or investment applies only after they have been admitted into the host country, i.e. post-establishment. US model BITs and the investment chapters of some recent comprehensive RTAs, such as NAFTA and even GATS,<sup>57</sup> now contain pre-establishment and market access provisions, hence creating a denominator for MFN treatment to extend to the pre-establishment phase.

The SACU member states have no legal provisions that discriminate among home countries, and there are no known instances of departure from the principle. They have to be commended, though, for upholding the MFN principle, because the region's relationships with each other and members of the SADC group have not led to preferential treatment for investors from these countries.

### 3.3 Transfer of funds

The ability to repatriate income and capital, pay foreign obligations in another currency, and purchase raw materials and spare parts from abroad is crucial for the proper operation of an investor's enterprise. For these reasons, investors prefer to have unrestricted freedom to undertake these monetary operations. The key standards of protection are (1) the type of currency in which the trans-

<sup>56</sup> GATT, art. III.

<sup>57</sup> GATS, art. II. GATS art. V also creates exemptions to the rule. See further, Khumalo N, *Trade in Services: From Controlling to Managing the Movement of Persons in SADC*, SAIIA Trade Policy Report No. 16. Johannesburg: SAIIA.



fers are to be allowed; (2) the exchange rate that will apply for currency conversions; and (3) the time frame in which the transfers will be effected. Thus, a significant number of BITs have included provisions granting investors the right to make capital transfers in relation to their investment without undue delay, in a freely convertible currency and at a specified rate of exchange.<sup>58</sup>

However, these provisions are in conflict with some SACU countries' laws that press for limited guarantees on monetary transfers and have exchange control measures to regulate the conversion and transfers of currency. Botswana, for instance, has a long history of convertibility, and no foreign investor has been unable to make such transfers from Botswana for any reason, including the convertibility of the pula. Its financial regime bestows wide and unconditional rights of repatriation on disinvestment proceeds and profits, fees, royalties and even debt service, and the country has also abolished foreign exchange controls.<sup>59</sup>

Of course, investors not covered by any of the country's BITs cannot be sure that exchange restrictions will never be re-established, thereby affecting their ability to access dividends and disinvestments proceeds, although this is highly unlikely, as the government's track record in dealing with foreign investors is unimpeachable. Nevertheless, the government of Botswana allows major investors — such as in mining or privatised industries — to negotiate contractual assurance of bankable foreign exchange arrangements on a project-by-project basis.<sup>60</sup>

Botswana is an exception when it comes to the non-restriction of the transfer of funds. Many developing countries include exceptions to the obligations above, on the grounds that they are particularly vulnerable to capital flight and sudden large capital inflows into their economies, and, as such, they need to regulate capital inflows and outflows appropriately. This exception gives the host country flexibility to administer its monetary and fiscal policies. For example, Lesotho, Namibia and Swaziland provide for free funds transfer for a wide range of payments associated with an investment, but such transfers may be delayed in the event of economic difficulties. The South Africa–Israel BIT also

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<sup>58</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006*, *op. cit.*

<sup>59</sup> UNCTAD, *Investment Policy Review, Botswana*, *op. cit.*

<sup>60</sup> *Ibid.*

displays this feature by allowing the government to derogate temporarily from the requirement to permit free transfer of investment-related funds in the case of balance of payment difficulties.

The transfer of funds regulations in the above countries, i.e. Lesotho, Namibia, South Africa and Swaziland, are also affected by these countries' relationship as members of the Southern African Common Monetary Area (CMA). There are no exchange controls between the member countries, but in their dealings with third parties, the members cannot impose exchange controls less stringent than those of South Africa. Thus, as long as these countries remain members of the CMA, their scope for liberalising foreign exchange controls depends on the relaxation of South Africa's controls.<sup>61</sup> Furthermore, the exchange rate of their currencies against major currencies is entirely dependent on the external value of the rand, and thus on South African monetary policies.

### 3.4 Protection against dispossession

This covers any government action that would have the effect of depriving an investor of his/her investment, including limits on use and disposal, government regulation and partial 'taking' of the investor's property rights. The minimum standard prescribed by traditional international law is rooted in the basic principles of the inviolability of property and the sanctity of contract. The fundamental premise for this standard is respect for acquired rights and protection of foreign investment against nationalisation, expropriation or other forms of interference with property rights by host country governmental authorities.<sup>62</sup>

The classic formulation of this doctrine originally prohibited the expropriation of foreign property and imposed the sanction of restitution upon the expropriating state.<sup>63</sup> The modern formulation of the doctrine of acquired rights

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<sup>61</sup> The South African Exchange Control Regulations of 1961 (amended in 1999) prohibit the exportation of capital (art. 10); dealing in securities belonging to non-residents (sec. 14); the purchase, sale and loan of foreign currency and gold (sec. 2); and the export of currency (sec. 3), among other restrictions. See further, <[http://www.reservebank.co.za/internet/Publication.nsf/LADV/E2B2440F192F118342257134004A9935/\\$File/Regulations.pdf](http://www.reservebank.co.za/internet/Publication.nsf/LADV/E2B2440F192F118342257134004A9935/$File/Regulations.pdf)>.

<sup>62</sup> See further, Akinsanya A, 'International protection of direct foreign investments in the Third World', *International and Comparative Law Quarterly*, 36, January 1987, pp.58-75.

<sup>63</sup> See further, *Charzow Factory Case (1927)*, PCIJ Series No. 13, <[http://www.worldcourts.com/pcij/eng/decisions/1927.07.26\\_chorzow/](http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow/)>.

concedes the sovereign right of the host state to expropriate foreign property. This doctrine has been adopted in all the constitutions of SACU member states, with some variation of the traditional view by permitting expropriation (1) for a public purpose; (2) in a non-discriminatory manner; (3) upon payment of just compensation; and, in most cases, (4) with provision for some judicial review.

SACU member states<sup>64</sup> have generally refrained from nationalising and/or expropriating investments, with the exception of some cases in Namibia and South Africa that are attributed to policies of land redistribution to remedy the historic imbalance of land ownership. After Namibia gained independence from South Africa in 1990, it launched a land reform process on a 'willing buyer, willing seller' basis. This land reform programme was marked by slow progress, leading the government to initiate a regime of compulsory expropriations in 2004.<sup>65</sup>

However, the government's efforts recently hit a snag when the High Court in Namibia ruled in favour of German absentee land owners that had contested the government's bid to expropriate their farms. The court found that the government had erred by not following certain procedural steps outlined in the Land Reform Act and targeting foreigners over Namibian nationals in its bid to acquire and distribute land more equitably, relying on the Germany–Namibia BIT to emphasise this point.<sup>66</sup>

The South African Constitution grants the government a precisely equivalent power, which the Commission on Restitution of Land Rights has not been shy to exercise,<sup>67</sup> and it has been further emboldened by the amended Expro-

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<sup>64</sup> Botswana has never expropriated a foreign investment, although its Constitution allows for this if the investment contravenes public policy. Lesotho's and Swaziland's Constitutions also permit the acquisition of private property by the state only for specified public purposes.

<sup>65</sup> Compulsory expropriation or purchase is the right reserved for governments to take private property for public use when the owner proves unwilling to sell or demands a price that the government is unwilling to pay.

<sup>66</sup> Vis-Dunbar D & LE Peterson, 'Namibian court reverses expropriation of foreign owned farms', *Investment Treaty News*, 1 April 2008, <[http://www.iisd.org/pdf/2008/itn\\_april1\\_2008.pdf](http://www.iisd.org/pdf/2008/itn_april1_2008.pdf)>; *Mail & Guardian* (Johannesburg), 'Namibian court halts expropriation of farms', 6 March 2008, <<http://www.mg.co.za/article/2008-03-06-namibian-court-halts-expropriation-of-farms>>.

<sup>67</sup> See Restitution of Land Rights Act 22 of 1994 and its annual report, <<http://land.pwv.gov.za/restitution/ANNUAL%20REPORT%20%202002%20TO%202003.ppt>>.

priation Bill.<sup>68</sup> The South African government is also entangled in an international expropriation suit instituted by a Luxembourg-based mining company over the alleged expropriation of its mineral rights.<sup>69</sup>

Tied to a government's right to exercise its sovereign power to expropriate property is the corresponding obligation to compensate the investor. Botswana's law allows expropriation only if an enabling law is enacted to provide for *prompt and adequate* compensation. Lesotho's law, though, calls for *full* compensation, which means that compensation must reflect the actual price of the investment. The Namibian Foreign Investment Act requires the government to pay the investor *just* compensation without undue delay, while the South African Constitution stipulates that 'the amount of compensation, time and manner of payment must be just and equitable'.<sup>70</sup>

There is therefore great convergence regarding the protection of foreign investment from expropriation and the standard of compensation, as most laws call for prompt and adequate compensation. A potential problem, though, is how to effect compensation. The Namibian Act, for instance, provides that compensation should be in a freely convertible currency. This creates problems in the harmonisation effort and raises questions as to whether compensation should be paid in a freely convertible or freely usable currency.<sup>71</sup> Who should bear the risk of devaluation? Should compensation include interest on the investment from the time it is expropriated to the time of payment, and what should be the criteria to determine this?

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<sup>68</sup> *Mail & Guardian* (Johannesburg), 'Cabinet approves expropriation bill', 6 March 2008, <<http://www.mg.co.za/article/2008-03-06-cabinet-approves-new-expropriation-bill>>.

<sup>69</sup> See Foresti P, *Laura De Carli and others v. Republic of South Africa (Case No. ARB(AF)/07/1)*, <<http://www.worldbank.org/icsid/cases/pending.htm>>.

<sup>70</sup> Constitution of the Republic of South Africa, sec. 25(3).

<sup>71</sup> While almost any national currency can be considered by the International Monetary Fund to be freely usable, only a limited group of hard currencies are considered by the organisation as such. Among the latter are the US dollar, the euro, the pound sterling, the Swiss franc and the Japanese yen. Most of the BITs in SACU do not specify the currency to be used for the purposes of compensation, which gives the contracting parties freedom to pay in whichever currency it deems appropriate.

### 3.5 Dispute settlement

Foreign investors subject themselves to the law of the host country once they have entered its market and established themselves there. Local courts are therefore in principle assumed competent to adjudicate disputes involving the treatment of foreign investors' investment by application of the law of the land and upholding the rule of law. However, the impartiality of the host country's judiciary towards foreign investors cannot always be guaranteed, e.g. when the host country is itself a party to the dispute, the local judiciary may not always be relied upon to be independent from political influence. The most graphic example is Swaziland, where, not too long ago, all the judges in the court of appeal resigned because of interference from the executive organ of government. In the context of this report, the plight of litigant investors would seem precarious if they were in dispute with the government in such a situation.<sup>72</sup>

Furthermore, the means of settlement may be unsatisfactory for the foreign investor when major disputes arise, especially when the application of the rules of international law, typically those on expropriation, is at issue:

It is argued that many judicial systems in developing countries are not sophisticated enough to handle such disputes and therefore do not guarantee impartiality towards foreigners. As a consequence the practice of concluding agreements between foreign investors and host states has been advocated as an effective method of avoiding such problems.<sup>73</sup>

The possibility of subjecting such disputes to an 'impartial' dispute settlement procedure of an international nature then automatically depends on the existence of a previous agreement either with the investor affected or with his/her home state, as provided generally in BITs and RTAs. These treaties generally provide for two different types of dispute settlement procedures: for interstate disputes (i.e. state-to-state) and investor-to-state disputes resolved through arbitration. In general, however, reference to state-to-state dispute

<sup>72</sup> See <[http://www.legalbrief.co.za/publication/archives.php?mode=archive&p\\_id=Legalbrief\\_Africa&issueno=12&format=html](http://www.legalbrief.co.za/publication/archives.php?mode=archive&p_id=Legalbrief_Africa&issueno=12&format=html)>.

<sup>73</sup> See Sacerdoti G, 'Bilateral treaties and multilateral instruments on investment protection: The Settlement of foreign investment disputes', *Recueil des Cours*, 269, 1997, pp.412-55. For a counter-argument on the use of international arbitration to resolve investor-state disputes, as opposed to the domestic courts of host countries, see Peterson LE, 'Bilateral investment treaties and development policy making', November 2004, <[http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf)>.

settlement is quite uncommon in recent BITs and RTAs.<sup>74</sup> Most clauses provide for host state–foreign investor arbitration by affording private parties the right to pursue claims against a foreign state in direct arbitration under an international treaty by the application of both domestic and international law.

The investor–state dispute settlement provisions in SACU refer to various existing international arbitration conventions that prescribe rules governing the arbitration. The forums most commonly referred to by SACU countries are ICSID, by virtue of all but South Africa in SACU being signatories to the ICSID Convention, and the Court of Arbitration of the International Chamber of Commerce (ICC).

ICSID was created by convention, and arbitration is only available if both the host state and home government of the foreign investor have ratified the Convention. Two main advantages of the ICSID process is that it is removed from the ambit of national courts and tribunals, thus ‘enhancing’ neutrality,<sup>75</sup> and that it demands that contracting states recognise any awards of the body and ‘enforce any pecuniary obligations imposed by the award as if it were a final judgement of a court in that state’.<sup>76</sup>

South Africa is not a member of ICSID, and disputes concerning it would therefore not fall under the jurisdiction of the ICSID Convention. The same applies for Namibia, which, although it has signed the Convention, has failed to ratify it. It should be noted that South Africa is a member of the ICSID Additional Facility Rules, which cover proceedings between states and foreign nationals that are not ICSID contracting states. Disputes involving South Africa or South African investors can therefore be heard under these Additional Facility Rules.

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<sup>74</sup> This is not always the case, though. The SACU–US FTA, for instance, faced stiff opposition from some quarters that were concerned about the loss of South Africa’s sovereignty through the proposed investor–state dispute settlement provision in the agreement.

<sup>75</sup> The arbitration model has been criticised for lacking public accountability, transparency and citizen participation. See further, Peterson LE, ‘South Africa’s bilateral investment treaties: Implications for development and human rights’, *Occasional Paper*, no. 26 in the Friedrich Ebert Stiftung’s Dialogue on Globalisation Series, <<http://saiia.org.za/images/upload/Peterson%202006%20%20SA%20BITS%20and%20human%20rights.pdf>>.

<sup>76</sup> See further, Wandrag R, *op. cit.*, pp.41 & 49.

Submission of a dispute to the ICC is more flexible, as it is not restricted to contracting party members only. Usually, the court will have jurisdiction if any agreement refers disputes to it, or in the event that it does not, if the disputing parties agree to bring the dispute to the ICC.

A key feature of dispute settlement is creating finality in the matter. In principle, unless an international convention provides for the recognition and enforcement of an arbitral award made outside its jurisdiction, a country is under no obligation to recognise and enforce it.<sup>77</sup> Thus, by ratification of the ICSID Convention and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention), SACU investment regimes have provisions that prevent conflicting parties from resubmitting their dispute to another forum for adjudication in the instance that one of them is dissatisfied with the outcome. By virtue of the country being a member of the ICSID Additional Facility Rules, disputes involving South Africa are, on the other hand, not enforceable.

In a nutshell, save for South Africa's non-ratification of the ICSID Convention, provision for international dispute settlement by SACU member states is similar to the regime in SACU that provides more than one possible arbitration forum, which creates an advantage to the investor, who has more than one option available. This is all very well, but it leaves the state party with uncertainty as to the forum in which the dispute will be settled.

## **4. IS THERE A NEED FOR INVESTMENT POLICY HARMONISATION IN SACU?**

### **4.1 Rationale for harmonisation**

There are two main objectives of harmonisation. The first is the unification of policy where there is disparity. The second aim is law reform where the existing law cannot cope with evolving practice and policy needs. In either case, the ultimate objective is the development of a policy framework that will create a strong and coherent investment regime in the region. Against these two objectives, the advantages of harmonisation seem clear, *but they are further fortified by*

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<sup>77</sup> UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*. New York & Geneva: UN, 1998.

*SACU'S objectives outlined in Article 2 of the SACU Agreement, which can only be realised if the harmonisation of law and policy is achieved.*

On a number of core standards, the SACU regime reflects considerable homogeneity. Provisions for national and MFN treatment for established investment, compensation for expropriation, the free transfer of funds and international dispute settlement are guaranteed by all SACU member states, with a slight variation on discrimination with respect to the admission of foreign investors, prohibition of certain performance requirements and choice of forum for dispute settlement. This state of affairs has had a mixed effect in the region.

Even though these protections are in line with minimum international standards, the standards in SACU only superficially promote protection of investment, as much is left to the discretionary environment of national laws, which are not always consonant with BITs. For example, whereas protection against expropriation is an international rule and is even entrenched in the South African Constitution, the Minerals and Petroleum Resources Development Act grants investors conditional mining rights by providing that 'a holder [of mining rights] will be subject to the applicable laws of South Africa, as amended from time to time'. This includes all new legislation and legislation that may be passed in the future that may adversely affect the holder's rights.

This is just an example that shows that what SACU countries give with one hand, they can take away with the other. These legal encumbrances in SACU make the investment protection climate of the region generally unpredictable, and one that retards rather than promotes investment. The harmonisation of investment policies to an agreed level by all and reflected in unified laws would therefore eliminate the perception of an unpredictable environment and contribute to the clarity, stability and legal certainty of the investment climate in SACU, and consequently reduce legal risk for foreign investors.

Besides denting the investment image of a country or the region, policy measures that affect foreign investments, such as black economic empowerment measures, including employment equity, mandatory divestments and other policy tools, may give rise to threats of international law suits by foreign investors under investment treaties, hence limiting the policy space of host states. While such policy tools appear in harmony with, for example, the South African Constitution — which expressly provides for affirmative action — these measures have been construed by some investors as placing foreign-



owned businesses operating in South Africa at a disadvantage,<sup>78</sup> and in some case the BITs concerning the aggrieved investors have been invoked.

In addition to the above, SACU member states should consider the wider policy impacts of these agreements, including the prospect that disputes are resolved outside of their domestic judicial jurisdictions and by arbitration tribunals that may be inclined to resolve interpretive uncertainties in favour of foreign investors, with a consequent loss of policy latitude for governments.

Disparities among the member states regarding several policy issues in SACU have been identified as a hindrance to the prospects of meaningful regional economic co-operation. Lack of harmonisation, for instance, on investment has been blamed for the 'unwillingness [and/]or inability of SACU to engage third parties, such as the US in the deadlocked US-SACU FTA negotiations, comprehensively'.<sup>79</sup> Harmonisation can therefore be used as a tool to consolidate SACU's negotiating powers in its dealings with other economic groupings and in helping it reduce prospects for its marginalisation from the global economy.

It is clear that without foreign investment in developing countries, economic and social development, such as that of SACU member states, would be very slow or virtually impossible. This reality, among other factors, has pushed many developing countries to allow inappropriate investments that undermine communities and domestic governments' environmental and development strategies. As mentioned above, land reform initiatives (a socioeconomic development initiative) undertaken by the governments of Namibia and South Africa have triggered the expropriation standards under the countries BITs.

As such, SACU countries ought to strive for well-planned and high-quality foreign investment by improving the rules that govern foreign investment. This will help them attract investment that promotes sustainable development. Policy and law coherence could create opportunities for SACU to draft terms and agreements that best suit member states' development purposes and block out foreign investors that are not ready to meet the host countries' development obligations.

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<sup>78</sup> Interview with representative of a foreign country whose nationals have investments in South Africa, 23 August 2007.

<sup>79</sup> Wandrag R, *op. cit.*, p.51.

The lack of convergence on investment policy has also restricted complementarities in economic development in the region. The acute polarisation of economies of scale in the region and the dominance of South Africa, as the largest and most competitive economy in Africa, skews foreign investment in its favour and makes competitiveness of the BLNS countries almost impossible. This situation was aptly captured by one of the interviewees for this report who asked, 'what's the point of harmonisation when investors are only interested in South Africa?'<sup>80</sup>

It is precisely for that reason that harmonisation must be undertaken to avoid a 'race to the bottom', as countries compete with one another to attract investments and to promote economic development in the region by spreading capital efficiently across the entire region. Harmonisation will eliminate national weaknesses and help overcome the small size of the BLNS countries' national economies, as consideration for investment location will be at the regional level. This will in the long run advance deeper integration efforts.

A common policy on investment and the creation of a common investment area (CIA) is likely to attract investment to the region, which is important to provide a base for regional integration. For instance, a network of operations across the region will result in greater scope for division of labour and industrial activities across the region, creating opportunities for greater industrial efficiency and cost competitiveness, thus increasing intra-SACU trade.

As such, harmonisation is crucial to strengthening regional activities and deepening regional integration. Such an exercise undertaken with the needs of the region in mind can be tailor made to compel SACU countries to conform to a set of common operating conditions working towards a common objective, which could, for instance, be the promotion of a particular economic agenda in SACU or a regime tailored to help meet its objectives.

Common regional rules that replace disparate national standards naturally result in easier access for third parties. Potential foreign investors would benefit from greater investment access to industries and economic sectors as a result of the opening up of industries under the CIA arrangements, greater transparency, information and awareness of investment opportunities in the region,

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<sup>80</sup> Interview with representative of a foreign country whose nationals have investment in South Africa, 23 August 2007.

more liberal and competitive investment regimes, and lower transaction costs for business operations across the region

However, care must be taken to ensure that harmonisation, when it is formulated, is not in the lowest common denominator, as there is no merit in harmonisation if it results in the adoption of legal concepts of the least progressive member(s) in SACU. This issue is linked to the question of which is the best 'law' or regime in SACU to follow. As there is no country in SACU that can authoritatively dictate the best law SACU should adopt, should SACU engender a new corpus of standards or aim to adopt international standards?

#### 4.2 Method of harmonisation

There are two main methods of harmonisation. The first is the introduction of normative rules devised and elaborated within the framework of the [SACU] treaty. This would involve the elaboration of an annex to be adopted by the member states.<sup>81</sup> The normative rules themselves could be of three different kinds, i.e.:

- the adoption of detailed uniform provisions;
- the adoption of conflict of law rules, which does not envisage uniform substantive rules, but uniform reference to a particular body of law in case of dispute; and
- a constitutional approach that seeks to specify general uniform standards<sup>82</sup> within which particular standards are met or enshrined. This is where, for instance, a treaty provides that states will enact the necessary legislation to implement the policies embodied in the treaty, within specified limits. Of course, this approach cannot be applied in SACU, where a policy on investment does not exist.

The second method of harmonisation is the formulation of model laws to serve as guides for local adaptation and uniform laws to be incorporated by states into their legal jurisprudence. An example of this would be the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. This option is more attractive because the Southern

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<sup>81</sup> The recommendation favoured by majority of the interviewees.

<sup>82</sup> Akiwumi A, 'A plea for the harmonization of African investment laws', <<http://www.jstor.org/view/00218553/ap020056/02a00130/0>>.

African Development Community (SADC), a REC of which SACU members are part, does have in place what can be argued to be a ‘model law’ on investment in the region.

As such, there is no need to create new norms for SACU, as the countries have the fundamentals right, and what is needed is the ironing out of the disparities in the current rules. Furthermore, by setting new norms or standards, SACU runs the risk of both going beyond international standards and hence creating divergent regional rules from those of SADC. This can pose problems for the long-term compatibility of rulemaking in SACU vis-à-vis SADC. For this reason, it is paramount that the interaction of rulemaking in SACU be consonant with SADC’s rules.

In terms of the 1992 treaty that established SADC, its central objectives are:

- promoting development, poverty reduction and economic growth through regional integration;
- consolidating, defending and maintaining democracy, peace, security and stability;
- promoting common political values and institutions that are democratic, legitimate and effective;
- strengthening of links among people of the region; and
- mobilising regional and international private and public resources for the development of the region.<sup>83</sup>

While the political agenda in the region has advanced, progress on the economic front has faltered. SADC has recently made a spirited attempt to change this and drive the region’s economic development and integration by identifying critical social and economic policy issues that would help the community achieve its aims. The economic integration agenda is articulated in the Regional Indicative Strategic Development Plan (RISDP), the central objective of which is deeper regional integration and the creation of a common market. In terms of the establishment of a common market, some of the priorities identified are macroeconomic convergence, including exchange rate alignment; financial integration; and the free flow of goods, services, capital and people.

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<sup>83</sup> See SADC Treaty, 1992, art. 5, <[http://www.sadc.int/english/documents/legal/treaties/declaration\\_and\\_treaty\\_of\\_sadc.php#preamble](http://www.sadc.int/english/documents/legal/treaties/declaration_and_treaty_of_sadc.php#preamble)>.

This contains elements of both shallow integration, i.e. removing barriers to the movement of goods, capital and people; and deep integration, which demands harmonisation and alignment of policies. Although the RISDP has been criticised for setting unrealistic targets, the goals relating to investments can quickly be pursued as the SADC Treaty has fashioned a tool — the Finance and Investment Protocol (FIP) — to drive harmonisation of investment policies, among other reasons, so as to facilitate the creation of a favourable investment climate with SADC and, in effect, SACU.

FIP lays down comprehensive investment protections to be observed by parties to the treaty that include all SACU member states. To this end, Annex 1 in FIP:

- provides investors with protection against nationalisation or expropriation,<sup>84</sup> prohibits discrimination on the basis of nationality (MFN principle);<sup>85</sup>
- allows the repatriation of investment and returns;<sup>86</sup>
- encourages the parties to accede to multilateral agreements designed to promote and protect investments;<sup>87</sup> and
- provides recourse to investors in case of investment disputes through international arbitration.<sup>88</sup>

While FIP is silent on facilitating investments in services, at least the SADC Trade Protocol, aimed at streamlining trade and co-operation in various areas within the region, deals with trade in services.

The Trade Protocol obligates members to adopt policies and implement measures in accordance with their WTO GATS obligations with a view to liberalising their services sectors. Pursuant to the mandate in Article 23 of the SADC Trade Protocol, an Annex on Trade in Services has been proposed for annexure to the Trade Protocol. The annex constitutes a body of law governing the progressive liberalisation of trade in services — and, in effect, the increase of investment in services — among SADC members. Though this annex was

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<sup>84</sup> FIP, Annex 1, art. 5.

<sup>85</sup> *Ibid.*, art. 6.

<sup>86</sup> *Ibid.*, art. 9.

<sup>87</sup> *Ibid.*, art. 21.

<sup>88</sup> *Ibid.*, art. 28.

approved in July 2007, it has not entered into force, as some legal issues are outstanding.

By adopting FIP and the Trade Protocol's annex on services as the model for harmonisation, SACU countries will not only achieve the aim of unifying their standards, but will also address investment related issues such as services, movement of personnel, among others, enabling SACU to attract greater levels of investment into the region through creating an international competitive investment area that allows free movement of capital, labour, goods and services across the borders of the member states.

### 4.3 Challenges to harmonisation

It should be noted that the creation of common policies at the regional level is not only a deliberate act of policy on the part of a REC, but a political act necessitated by the desire to accomplish national and regional objectives, because, implicit in the process, is a complex tension between national and regional priorities. For instance, South Africa's reluctance to ratify the ICSID Convention can be assumed to be part of its policy, and in the present world order, rooted in the concept of national sovereignty, the country has the right to determine the forum it would want to be subjected to, even though the other SACU member states have signed the Convention.

Another factor constraining the advancement of integration is the lack of visionary leadership and political commitment needed to give thrust to the integration agenda. This paralysis can also be attributed to regional secretariats with little capacity. For example, FIP, which is central to resource mobilisation, has not been signed by all SADC members, let alone ratified and implemented.<sup>89</sup> The lack of political commitment to the integration agenda is further illustrated by statistics that reveal that of the 27 protocols that have been crafted, only two, the Protocol on Trade and the Amended Protocol on Trade, have been implemented. Eighteen have entered into force but not been implemented, and seven have not yet entered into force. The participation and endorsement of South Africa, as the biggest economy in SACU and, indeed, SADC, is, of course, crucial. To this end, the ratification of all aspects of FIP by South Africa would

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<sup>89</sup> Angola, Malawi, Namibia and Zambia are yet to sign the Protocol.

send a strong signal to other SACU countries to expedite the process,<sup>90</sup> to the benefit of all.

The other political character of harmonisation is the loss or shrinkage of policy space for the member states. Any development of harmonised policies would be carried out in common, causing member states to lose their right to independent reforms, failing which new disparities would arise and obstruct all common efforts. The unwillingness of individual member states to give up sovereignty for a future common good has been the central challenge to regional integration efforts the world over, the key reason for this being that most member states do not see any concrete benefits from economic integration, when measured against the substantial cost of surrendering sovereignty.

For example, while all the officials of the BLNS countries interviewed showed eagerness for a harmonisation exercise in SACU and significant optimism about reaping economic benefits from it, government officials in South Africa were tepid, creating a dividing line between those favouring harmonisation and those favouring policy competition. Naturally, this poses problems related to the economic and development policy of a country. For instance, South Africa basically pursues an interventionist policy with considerable regulatory interference in the transfer of funds, whereas the BLNS countries are more liberal on this aspect. The existence of a common standard prohibiting such interference in the region could jeopardise several other of South Africa's policies.

While a great deal would be accomplished in terms of harmonisation of investment protection standards and investment policies, procedural unification must not be ignored. If anything, the differences in the procedural or regulatory frameworks in SACU will have more serious implications for the region than disparities in protection standards. This, of course, further compounds the retention of policy space 'problem', but there is no need of harmonising at the regional law level and retaining cumbersome company or land laws that hinder investment. The enhancement of SACU's competitiveness and that of the greater SADC region through the increase of intraregional trade and investments should act as an incentive towards progress in achieving reducing the regulatory bottlenecks that hinder investors.

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<sup>90</sup> Cole N, chief director of international economics at the South African National Treasury, speech, <<http://www.tralac.org/scripts/content.php?id=6889>>.

#### **4.4 Conclusion**

This report has argued that SACU does not have a coherent investment promotion and protection policy, but, rather, has various investment rules largely found in BITs that reflect the individual member countries' policy preferences. This is ironic and untenable for a region whose objectives revolve around the increase of trade and investment in the region. To remain true to these objectives, SACU's investment regime needs to evolve by laying down at the very least minimum standards that promote the realisation of its development objectives by contributing to the clarity and stability of the investment climate and, more importantly, imposing appropriate commitments on foreign investors that enable them to retain flexibility to pursue social and economic goals.



**ANNEX 1: BITS IN FORCE IN SACU**

<b>South Africa *</b>	<b>Botswana</b>	<b>Lesotho</b>	<b>Namibia</b>	<b>Swaziland</b>
Algeria				
Angola				
Argentina				
Austria				
Belgium and Luxembourg	X			
Brunei Darussalam				
Canada				
Chile				
China	X			X
Congo, Democratic Republic of				
Cuba				
Czech Republic				
Denmark				
Egypt	X			
Equatorial Guinea				
Finland				
France			X	
Germany	X	X	X	X
Ghana	X			
Greece				
Iran, Islamic Republic of				
Israel				
Italy				
Korea, Republic of				
Libya				
Mauritius	X			X
Mozambique				
Netherlands			X	
Qatar				
Russian Federation				
Rwanda				
Senegal				

South Africa *	Botswana	Lesotho	Namibia	Swaziland
Spain			X	
Sweden				
Switzerland	X	X	X	
Tanzania				
Tunisia				
Turkey				
Uganda				
United Kingdom		X		X
Yemen				
Zimbabwe	X			

\* South Africa has BITs with all the countries listed.

## ANNEX 2: INTERVIEW RESPONDENTS FROM SACU

Catherine Grant

Jurgen Hoffman

Anton Faul

Klaus Schade

Wallie Roux

Moses Pakote

Diana Tjiposa

Mary Motebanga

Leoketse Leuta

Ms Lehohla

Lynette Gitonga

Muzi Mazikayesed

Dlamini Phume

Paulina Elago

Tsepand Sekhesa

Randall Williams

Morojela Mareseela

Zizwe Vilane

**ANNEX 3: BITS BETWEEN SACU MEMBER STATES AND OTHER  
PARTIES EXAMINED FOR THE REPORT**

Botswana–China  
Botswana–Egypt  
Botswana–Germany  
Lesotho–Germany  
Lesotho–United Kingdom  
Namibia–Germany  
Namibia–Netherlands  
Namibia–Spain  
Swaziland–China  
Swaziland–Germany  
Swaziland–United Kingdom  
South Africa–Canada  
South Africa–Chile  
South Africa–Netherlands  
South Africa–Mauritius  
South Africa–United Kingdom