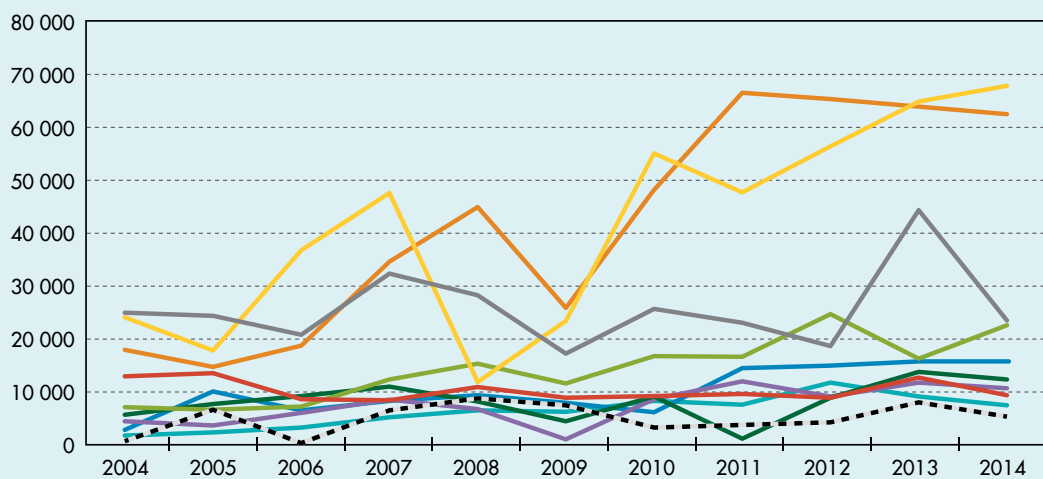


FOREIGN INVESTMENT PROMOTION AND DOMESTIC PROTECTION: A BALANCING ACT

CHELSEA MARKOWITZ & AZWIMPHELELI LANGALANGA



INWARD FDI FLOWS OF SELECTED UPPER-MIDDLE-INCOME DEVELOPING COUNTRIES

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ABSTRACT

This paper analyses South Africa's relationship with sustainable inward foreign direct investment (FDI). It examines South Africa's balancing act of promoting FDI that brings inclusive economic development while remaining an attractive FDI destination for investors. It first gives a brief overview of South Africa's current FDI context, with particular focus on the dynamics of international mergers and acquisitions and how South Africa's competition and domestic policy frameworks affect these types of investments. Walmart's acquisition of Massmart is employed to demonstrate the challenge of ensuring that FDI has positive spillover effects for South Africans within the context of increasingly globalised production chains. Ultimately, the paper focuses on South Africa's future path towards more sustainable FDI, and the last section therefore analyses the government's current efforts to create a domestic FDI regulatory framework. It then explores additional efforts to promote sustainable FDI such as the One-Stop Shop for investors and new public interest guidelines for competition, as well as prospects for a mechanism to support small, medium and micro-sized enterprise suppliers.

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ABBREVIATIONS AND ACRONYMS

BBBEE	broad-based black economic empowerment
BBSDP	Black Business Supplier Development Programme
BIT	bilateral investment treaty
CAC	Competition Appeals Court
DSBD	Department of Small Business Development
dti	Department of Trade and Industry
FDI	foreign direct investment
GVC	global value chain
HDI	historically disadvantaged individual
IPA	investment promotion agency
IPAP	Industrial Policy Action Plan
LCR	local content requirement
M&A	merger and acquisition
MNC	multinational corporation
MPRDA	Minerals and Petroleum Resources Development Act
OSS	One-Stop Shop
PIA	Protection of Investment Act
RVC	regional value chain
SMMEs	small, medium and micro-sized enterprises
SACCAWU	South African Commercial, Catering and Allied Workers Union
TRIMs	Agreement on Trade-Related Investment Measures
UNCTAD	UN Conference on Trade and Development

INTRODUCTION

South Africa has experienced sluggish economic growth over the last four years. Real gross domestic product (GDP) growth has fallen steadily since 2011, and was down to 1.4% in 2015 and was predicted to drop by another 0.1% in 2016.¹ This depressed economic performance is heavily influenced by the global economic recession and exacerbated by falling demand from China for raw materials such as coal and minerals, the destination of roughly 40% of South Africa's total exports.² Skyrocketing energy costs and shortages due to an aging electricity infrastructure as well as labour market rigidity and instability have also contributed to this low growth trend.³ Given South Africa's high levels of unemployment and inequality, the country can ill afford such low levels of growth. South Africa has a historically low savings rate⁴ and external financing needs of above 10% of total public expenditure; as such foreign direct investment (FDI) can be an important vehicle to help reverse this trend and bring future economic growth.⁵

This paper examines South Africa's balancing act of promoting FDI that brings inclusive economic development while remaining an attractive FDI destination for investors. Encouraging FDI that supports industrial policy is in line with the global trend commonly known as 'sustainable FDI'.⁶ However, the controversial Walmart-Massmart merger demonstrates the difficulties of promoting sustainable FDI, particularly in mergers and acquisitions (M&As).

CURRENT FDI CONTEXT IN SOUTH AFRICA: MERGERS AND ACQUISITIONS

South Africa consistently receives some of the largest FDI inflows in Africa. However, the country still ranks well below many other middle-income countries such as Singapore, Peru, Mexico, Chile and Brazil, which all have recently enjoyed FDI inflows above \$10 billion per year (See Figure 1, with the South African FDI flows indicated in grey and white stripes).⁷ These numbers indicate that there is significant room for improvement in attracting FDI into South Africa.

1 IMF (International Monetary Fund), *Regional Economic Outlook Sub-Saharan Africa: Dealing with Gathering Clouds, Biannual Report*. Washington DC: IMF, 2015.

2 *Ibid.*

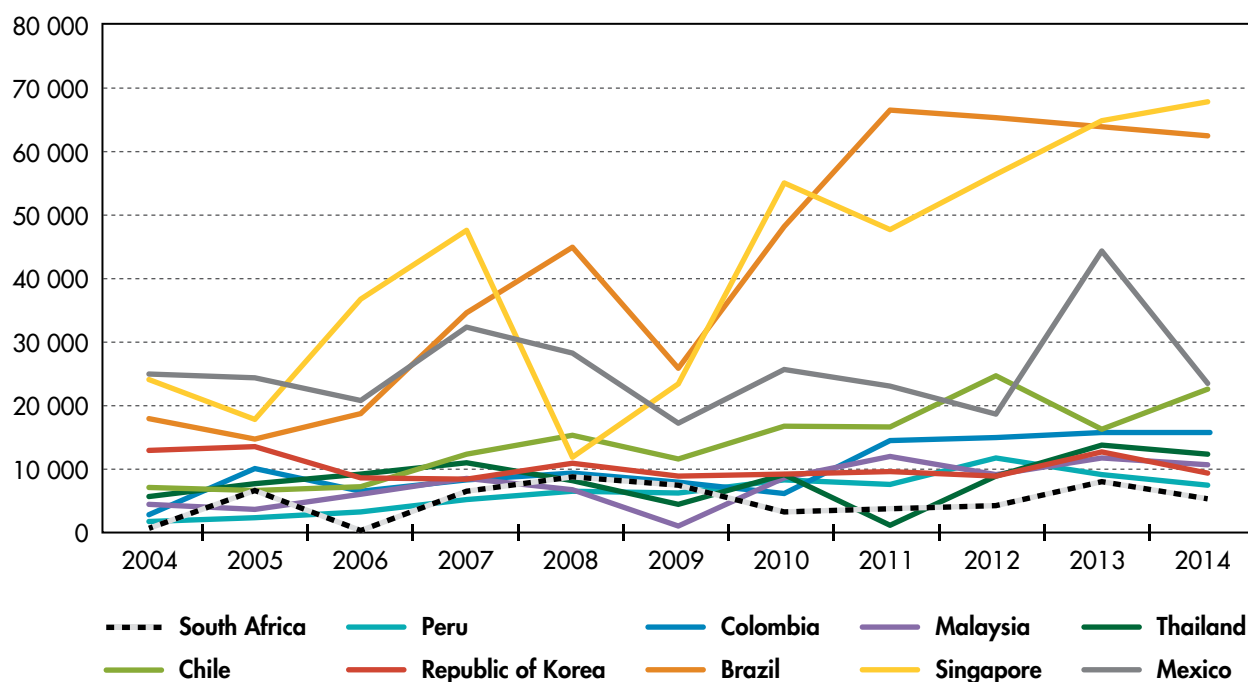
3 *Ibid.*

4 The South African gross savings rate was 15.2% of GDP in September 2015, according to the South African National Reserve Bank. See SA Reserve Bank, 'Rates', <https://www.resbank.co.za/Research/Rates/Pages/Rates-Home.aspx>, accessed 7 August 2016.

5 UNCTAD (UN Conference on Trade and Development), *Global Investment Trends Monitor: Financing For Development*. Geneva: UN, 2015.

6 Kline JM, 'Evaluate Sustainable FDI to Promote Sustainable Development', Columbia FDI Perspectives Occasional Paper, 82. New York: Vale Columbia Center on Sustainable International Investment, 2012.

7 UNCTAD Stat, 'Foreign direct investment: Inward and outward flows and stock, annual, 1980–2014', <http://unctadstat.unctad.org/wds/TableView/tableView.aspx>, accessed 30 December 2015.

FIGURE 1 INWARD FDI FLOWS OF SELECTED UPPER-MIDDLE-INCOME DEVELOPING COUNTRIES

Source: UNCTAD Stat, Inward FDI statistics, <http://unctadstat.unctad.org/>

South Africa is unique in SADC – and the whole of sub-Saharan Africa – in terms of its popularity as a destination for FDI in the form of M&As. While the rest of the continent receives most of its FDI as greenfield investments, M&As are common in South Africa. Between 2008 and 2014 South Africa averaged almost \$3 billion in M&A sales, and in 2014 alone 24 M&As took place.⁸ The majority of these M&As are in banking, telecommunications and retail.⁹

It is important to understand the dynamics of M&As in comparison to greenfield investments. In this context, an M&A occurs when a foreign company purchases a controlling share in an existing company in the host country. With an M&A, both the production facilities and a dedicated labour force are already in situ in the host country.

8 Competition Commission South Africa, 'Merger and acquisition activity update (2014)', <http://www.compcom.co.za/merger-and-acquisition-activity-update/>, accessed 30 December 2015.

9 Wöcke A & E Sing, 'Inward FDI in South Africa and its Policy Context', *Columbia FDI Profiles*. New York: Vale Columbia Center on Sustainable International Investment, 2012.

In a greenfield investment a company begins an establishment in a foreign country from the ground up, building its own production facilities and requiring new labour.¹⁰

M&As are often preferred by investors due to their lower costs and quick returns, as there is already an established market and infrastructure in the host country. In South Africa, acquiring existing enterprises is even more attractive because of the country's significant investments in other countries in the region, to which foreign investors then can gain access.¹¹ This has earned South Africa the tag of being a 'gateway to Africa'. Greenfield investments yield slower returns, and it often takes years before they begin to generate profits.

Despite the potential benefits for investors, M&As are generally less well received than greenfields by host countries due to uncertainty surrounding the benefits they can provide. According to UNCTAD's 2001 report,¹²

[c]ross-border M&As, particularly those involving large firms, vast sums of money and major restructurings of the activities of firms, are among the most visible faces of globalization. And, as with globalization generally, the impact of M&As on development can be double-edged and uneven. Indeed, perhaps to a greater extent than many other aspects of globalization, cross-border M&As – and the expanding global market for firm ownership and control in which these transactions take place – raise questions about the balance of their benefits and costs for host countries.

More specifically, given that an investor will likely not create new capacity in an M&A, increased employment opportunities and the transfer of new skills and technology are less likely. Instead, the efficient supply chains of large multinational corporations (MNCs) often lead to restructuring, resulting in cuts in employment, existing research and development, and production, as well as their favouring cheaper, better quality imports over the products of local suppliers. Additionally, there is concern about the potential of large MNC M&As to consolidate market power, which can adversely affect competition by preventing the entrance of smaller local enterprises or pushing existing enterprises out.¹³ In light of these concerns, it is important to consider how South Africa regulates FDI and balances sustainability with openness to investors.

In part because of the sensitive dynamics surrounding M&As, South Africa's formerly liberal attitude to its FDI regulation has changed. The South African government now seeks to ensure that FDI is not only economically beneficial but also serves the 'public interest'. Although 'public interest' does not have a single definition, it features in the constitution

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- 10 Wentworth L, 'FAQs on Foreign Direct Investment', SAIIA (South African Institute for International Affairs) Opinion and Analysis, 2014, <http://www.thetradebeat.com/opinion-analysis/faqs-on-foreign-direct-investment>, accessed 12 November 2015.
- 11 SA Reserve Bank, *op. cit.*
- 12 UNCTAD, 'Cross-Border Mergers and Acquisitions and Development', Annual World Investment Report. Geneva: UN, 2001.
- 13 *Ibid.*; Hartzenberg T, 'Perspectives on Trade, Investment and Competition Policy in South Africa', SAIIA Occasional Paper, 111. Johannesburg: SAIIA, 2012.

and in South Africa's domestic legislation, and has various policy-specific definitions that broadly speak to the country's industrial policy objectives of socio-economic equality and domestic growth. This FDI policy shift is evidenced most prominently by the Protection of Investment Act (PIA),¹⁴ which makes provision to regulate investment so that it contributes to local policies such as broad-based black economic empowerment (B-BBEE) and domestic industrial growth. However, critics contend that such regulations may have a negative impact on South Africa's ability to attract FDI.

SOUTH AFRICA'S PAST FDI REGULATORY FRAMEWORK: COMPETITION LAW

South Africa has generally had an open regulatory regime for FDI. An investor only had to adhere to the registration and incorporation requirements as provided in the Companies Act of 2008.¹⁵ However, M&As at a certain threshold (both domestic and foreign) trigger screening by South Africa's competition court before receiving approval. While the general practice is that competition policy is used mostly to remedy market failures, in South Africa the context has been markedly shaped by the country's history. The Competition Act of 1998 is unique in its emphasis on public interest. Its preamble highlights the discriminatory apartheid laws that led to the concentrated control of the economy by a small percentage of the population, and it therefore seeks to ensure that economic ownership is distributed more evenly, through both competition and public interest promotion.¹⁶

The Competition Act is standard in its responsibility for 'the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers'.¹⁷ Section 12 stipulates that any medium or large M&A must be tested for its impact on competition. This reassures foreign investors by ensuring that other actors in the market are acting competitively, and by offering them legal recourse if they feel subjected to anti-competitive behaviour. It also assures the public that if an international M&A is found to prevent or substantially lessen competition, it will be prohibited.¹⁸

However, the act also goes beyond pure competition concerns to test an M&A's effect on public interest. Section 12A(1)(b) contains a public interest clause that mandates that an M&A must be proven not to harm the public interest. Section 12(A)(3) elaborates that public interest includes an M&A's effect on a particular industrial sector or region, employment, the ability of small businesses or historically disadvantaged firms to become competitive, and the ability of national industries to compete in international markets.¹⁹

14 South Africa, dti (Department of Trade and Industry), Protection of Investment Act (PIA) 2015 (Act No. 22 of 2015). Pretoria: Government Printer, 2015.

15 South Africa, Companies Act 2008 (Act No. 71 of 2008). Pretoria: Government Printer, 2008.

16 South Africa, Competition Act 1998 (Act No. 89 of 1998). Pretoria: Government Printer, 1998, Preamble.

17 Competition Act, *op. cit.*, Preamble, Section 12.

18 Hartzenberg T, *op. cit.*

19 Competition Act, *op. cit.*, Section 12.

If the competition authorities can prove that an M&A directly and significantly impairs any of the above public interests, the M&A can be prohibited even if it is competitive. Conversely, if an M&A is found to be anticompetitive, it can still be approved if it significantly benefits public interest. Competition and public interest are technically weighed as having the same importance and must be balanced. However, it is important to note that precedent has seen neither a competitive M&A prohibited because of public interest concerns nor an anticompetitive M&A approved for its public interest benefits. This demonstrates the important implication that in practice, public interest is considered secondary to competition effects. This will be further expounded upon in the Walmart-Massmart M&A case study. However, competitive M&As have been approved with added conditions to promote public interest.²⁰ Thus the Competition Act has significant implications for foreign investors, both in its ability to ensure that they are operating in a fair market in the host country and its potential to prevent or condition their entry into the market if they prove a threat to competition and/or are incompatible with public interest imperatives. The public interest considerations also have the potential to promote equality and domestic industry, and thus drive sustainable FDI for South Africa.

OTHER DOMESTIC POLICIES AND THEIR IMPLICATIONS FOR FDI

South Africa has implemented a number of domestic policy measures that, while not specifically aimed at FDI, tend to have an effect thereon. These policies seek to counter South Africa's economic history of exclusion characterised by skewed economic development, oligopolies, market concentration, low human capital development, and low manufacturing and value addition.

BROAD-BASED BLACK ECONOMIC EMPOWERMENT

The B-BBEE Act, the cornerstone of post-apartheid reparatory policies, was passed by the South African government in 2003. It builds on the public interest focus that was initially mandated in the Competition Act. The B-BBEE Act's stated mission is to promote the economic empowerment of historically disadvantaged individuals (HDIs) by increasing their participation in the economy and promoting a more equitable income distribution.²¹ In 2007 the Department of Trade and Industry (dti) gazetted a guideline for the B-BBEE Codes of Good Practice, which measures businesses' compliance with B-BBEE principles based on seven categories: ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development (in favour of HDIs). The higher a business scores, the more advantageous its position to qualify for public procurement.²²

20 Raslan A, 'Mixed policy objectives in merger control: What can developing countries learn from South Africa?', Forthcoming paper, 2016.

21 South Africa, Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003). Pretoria: Government Printer, 2003.

22 South Africa, Broad-Based Black Economic Empowerment Codes of Good Practice. Pretoria: Government Printer, 2007.

While the B-BBEE Act is constitutional,²³ it creates the potential for conflict with foreign investors in the sense that it is not in conformity with bilateral investment treaties (BITs) and basic international standards on the protection of foreign investors. South Africa is currently a signatory to 48 BITs, which regulate investment practice between itself and other countries on a bilateral basis to ensure that both adhere to an international standard of fair treatment of investors.²⁴ The B-BBEE Act was passed when many BITs were already in place in South Africa and had set a liberal investment climate for FDI. In contrast, it affords certain privileges to HDIs as well as redistributive measures in order to promote equality. While there might exist, at an international level, some sympathy for South Africa's history and the country's need to redress historical inequality, anecdotal evidence points to investors' being more concerned with the economic and commercial imperatives around FDI protection as found in the previous generation of BITs. This emphasis on economic and commercial considerations over public interest gives rise to disputes between investors and the South African government.

Within the South African context this potential for conflict was seen in the *Foresti* arbitration case. In 2006 European investors with mining operations in South Africa requested arbitration from the International Centre for Settlement of Investment Disputes. The investors were objecting to the B-BBEE requirements under the new Minerals and Petroleum Resources Development Act (MPRDA),²⁵ which was enacted in 2002 to replace the South African Minerals Act of 1991. Under the MPRDA, the South African government took ownership of all resource rights in order to remedy the previous status quo in the mineral sector, which saw all mineral wealth held by a few members of the minority white population. Private enterprises that owned land with resources had to reapply for licences in order to own the resources. Unlike under the South African Minerals Act, licences were only valid for five years, and many were denied licences for various reasons. Foreign investors, as in the *Foresti* case, believed that these actions constituted unlawful expropriation.²⁶ While the case was settled out of court after counsel for the state was

23 Section 9(2) of the constitution states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' Thus B-BBEE would constitute legislation to advance persons previously disadvantaged by unfair discrimination.

24 UNCTAD, 'International Investments Agreement Navigator'. Geneva: UNCTAD Division on Investment and Enterprise, 2015, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195>, accessed 12 November 2015.

25 South Africa, Minerals and Petroleum Resources Development Act 2008 (Act No. 49 of 2008). Pretoria: Government Printer, 2008.

26 See the Belgium-Luxembourg-SA BIT: UNCTAD, Investment Policy Hub, 'BLEU (Belgium–Luxembourg Economic Union) – South Africa BIT (1998)', <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/537>, accessed 22 August 2016.

involved in an attempted bribery scandal, the case impressed upon the government the potency of BITs and their ability to constrain government policy space.²⁷

LOCAL PROCUREMENT FRAMEWORK

Public procurement is one of the main measures utilised by governments to promote inclusive growth and domestic industry, and it can affect FDI. South Africa is no exception, and the development status of the country makes government involvement in procurement more pronounced. The country's procurement regime is entrenched in the constitution (Section 217) and the government is assigned empowerment rights.²⁸ In order to give meaning to the constitutional provision, the Preferential Procurement Policy Framework Act was promulgated in 2000, mandating the government to consider HDI status as contributing 10%–20% to any tender decision, with the remaining consideration based upon the tender price, thus integrating the objectives of B-BBEE.²⁹ The 2011 amendment to the act's regulations further provides that a tenderer can pre-screen a bid based upon its local content and production before officially awarding points to the project. Most importantly, the minister of trade and industry can choose certain industries in which to mandate a certain percentage of local production and content for state tenders.³⁰

In its recent Industrial Policy Action Plans (IPAPs), the dti has adopted these regulations and initially mandated eight sectors for local procurement: rail rolling stock; power pylons; bus bodies; canned/processed vegetables; certain pharmaceutical products; furniture products; electricity meters, valves and actuators, electrical and telecommunication cables, and components of solar water heaters; and clothing, textile, leather and footwear.³¹ The last three IPAPs focus on local procurement even beyond these sectors, highlighting the utilisation of local content as a priority strategy for rapid industrialisation and growing a dynamic domestic industry. Many of the priority sectors consist of majority HDI businesses, thus contributing to the general principle of public interest promotion.

South Africa is not a signatory to the WTO's Government Procurement Agreement, which requires governments to treat local and foreign tenders equally. However, it is a signatory

27 Friedman A, 'Flexible arbitration for the developing world: Piero Foresti and the future of bilateral investment treaties in the global South', *Brigham Young University International Law and Management Review*, 7, 1, Winter 2010, pp. 38–51; italaw, 'Piero Foresti, Laura di Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/0701', <http://www.italaw.com/cases/446>, accessed 22 August 2016.

28 Section 217(2)(b) allows the state to implement a procurement policy that provides for 'the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination'.

29 South Africa, Preferential Procurement Policy Framework Act 2000 (Act No. 5 of 2000). Pretoria: Government Printer, 2000; South Africa, Preferential Procurement Regulations. Pretoria: Government Printer, 2000.

30 South Africa, Preferential Procurement Regulations. Pretoria: Government Printer, 2000.

31 South Africa, dti, 'Industrial Policy Action Plan 2013–14/2015–16 (IPAP)'. Pretoria: Government Printer, 2013.

to the WTO's Agreement on Trade-Related Investment Measures (TRIMs),³² which outlaws any form of local content requirements (LCRs). Thus the LCRs utilised under the government's public procurement regime and the IPAPs are in violation of TRIMs.³³ Local content requirements are still utilised widely throughout the world, especially in developing countries, and have proved integral to the development of countries such as South Korea and more recently Brazil.³⁴ However, these import substitution policies were mainly used before the current WTO regime, under the General Agreement in Trade and Services system, which was less stringent. When these countries joined the WTO they gradually liberalised their trade regimes until their protected industries were competitive.

South Africa's current procurement regulations in the public sector can also have negative impacts on FDI. Foreign companies rely on extensive, efficient supply chains that utilise cheap imports rather than local suppliers and products. Foreign investors are likely to interact with those sectors that are now covered by public procurement regulations. This could make investors' operations more expensive and South Africa a less attractive FDI destination. Local production and local content regulations are also difficult to implement and are often complicated in South Africa by a lack of skills and the quality of local suppliers. They therefore risk leading to inefficient production and higher consumer prices. Such concerns need to be balanced with the intended benefits of LCRs, such as job creation, industrial capacity building and inclusive economic growth.

Both B-BBEE and public procurement align with South Africa's shift toward encouraging investment that brings domestic benefit

Both B-BBEE and public procurement align with South Africa's shift toward encouraging investment that brings domestic benefit, which the government terms 'public policy' in its policy documents. Persisting inequality is reflective of an urgent need to promote inclusive growth, and thus the push for sustainable FDI is not unjustified. However, such aims must be balanced with policies that are not overly restrictive for foreign investors. The balance between encouraging FDI and ensuring socio-economic development sets a crucial framework to understand Walmart's acquisition of Massmart in 2011. This M&A demonstrates the practical challenges of promoting sustainable FDI.

WALMART'S ACQUISITION OF MASSMART: BANE OR BLESSING FOR SOUTH AFRICA?

The potential social impacts of the M&A, underpinned by Walmart's reputation, led to a highly contentious debate on the extent of Walmart's obligations to act sustainably in South Africa.

32 WTO, 'Agreement on Trade and Investment-Related Matters'. Geneva: WTO, 1995.

33 Cimino C, Hufbauer GC & JJ Schott, 'A Proposed Code to Discipline Local Content Requirements', PIIE (Peterson Institute for International Economics) Policy Brief, 14-6. Washington DC: PIIE, 2014.

34 See the following examples of local content in FDI: Perez A, 'Foreign Investment, But With Local Content: Development Strategies in Brazil', Elcano Royal Institute Working Paper, 17, 2013; Cyhn JW, *Technology Transfer and International Production: The Development of the Electronics Industry in Korea*. Cheltenham: Edward Elgar Publishing, 2002.

THE PROPOSED M&A

Operating in 14 countries in 2010, Walmart is one of the biggest MNCs in the world and the world's largest retailing conglomerate.³⁵ Massmart is a South African retail MNC that was operating in 15 countries throughout Africa at the time. In June 2010 Walmart announced its intention to acquire a controlling interest in Massmart of 51%.³⁶

The two chains' similar business models offering low-cost consumer products pointed to a strategic fit for the M&A. (See Table 1, which lists Dunning's³⁷ four purposes for FDI.) Although much FDI in sub-Saharan Africa is natural resource seeking, the Walmart-Massmart merger represented a case of market-seeking FDI. In particular, Walmart sought to establish its presence in Africa through a suitable company with a strong presence in the region's markets, thereby gaining access to an expanding African consumer base.³⁸ Despite the opportunities presented through this M&A for expanding regional integration in Africa, local sentiment surrounding the M&A was not positive.

TABLE 1 FOUR MOTIVATIONS FOR FDI	
Type of FDI	Factors influencing location decisions
Natural resource-seeking	Availability, cost and quality of resources, as well as processing and marketing; infrastructural development; availability of joint venture partners
Market-seeking	Size, growth of domestic and regional markets, cost of labour, infrastructure quality, institutional competence, agglomeration economies and service support, macro-economic policies of host government
Efficiency-seeking	Production costs, skilled and professional labour, industrial competitiveness quality of infrastructure and institutions, macro-economic policies, knowledge and innovation development, cluster specialisation (eg science and industrial parks)
Strategic asset-seeking	Availability of knowledge-related assets (eg technology and management expertise), markets and geographical dispersion of such assets, price and availability of synergistic assets to foreign firms, and access to different cultures, institutions and systems

Source: Wentworth L, 'South Africa's Investment Landscape: Mapping Economic Incentives', SAIIA Occasional Paper, 105. Johannesburg: SAIIA, 2012

35 Kenny B, 'Citizen WalMart? South African food retailing and selling development', in Pillay D *et al.* (eds), . Johannesburg: Wits University Press, 2014.

36 Walmart, 'Walmart confirms offer to acquire 50% of Massmart,' 29 November 2010, http://corporate.walmart.com/_news_/news-archive/investors/walmart-confirms-offer-to-acquire-51-of-massmart-1500505, accessed 31 December 2015.

37 Dunning JH, *Multinational Enterprises and the Global Economy*. Harlow: Addison-Wesley, 1993.

38 Meyer KE & E Estrin, 'Brownfield entry in emerging markets', *Journal of International Business Studies*, 32, 3, 2001, pp. 575–584.

LABOUR UNIONS AND GOVERNMENT REACTIONS

Three months before the M&A went public, Massmart's Massdiscounters division laid off 503 people. Although Massmart claimed that the retrenchments were planned before the M&A and were part of a cost-cutting exercise, labour unions – the South African Commercial, Catering and Allied Workers Union (SACCAWU), the Congress of South African Trade Unions, the Food and Allied Workers Union and the National Union of Metalworkers of South Africa – were not convinced, mainly because of allegations of Walmart's negative effect on employment and local retail economies throughout the world.³⁹ Thus they mounted an opposition campaign and protests after the M&A was announced.⁴⁰ The labour unions questioned the cost at which 'everyday low prices' would be offered to consumers and suggested that this would occur either through the retrenchment of existing staff or through lower wages and working standards.⁴¹

Government departments such as the dti and the Department of Agriculture, Forestry and Fisheries, led by the Department of Economic Development, also disapproved of the M&A, primarily because of the potential negative impacts on local production. This issue was also taken up by the labour unions. Walmart is known for revolutionising the retail supply chain through centralised distribution and information technology centres, as well as sophisticated logistics technology and inventory management.⁴² It often sources internationally in order to obtain the cheapest inputs. Specifically, the government departments feared that these practices would crowd out historically disadvantaged local small, medium and micro-sized enterprises (SMMEs), which are vital to South Africa's industrial policy. This crowding-out would not only affect existing Massmart suppliers but also spill over to competing SMME suppliers and retail chains.⁴³ Thus they insisted that Walmart should be required to utilise local content in its supply chains to ensure SMME protection.⁴⁴

Walmart countered by saying it would directly address South Africa's public interest by providing lower prices to the poorest communities. It affirmed that it honoured existing bargaining agreements in its foreign operations, and therefore would honour Massmart's

39 Human Rights Watch, 'Discounting Rights: Wal-Mart's Violation of US Workers' Right to Freedom of Association', 2007; UNI Global Union, 'Walmart's Global Strategy: Undercutting Workers' Rights'. Nyon, Switzerland: UNI Global Union, 2012.

40 Reuters, 'UPDATE 1-Massmart to cut 1,500 jobs, workers to strike', 1 June 2010, <http://uk.reuters.com/article/idINLDE6501TA20100601>, accessed 31 December 2010.

41 SACCAWU, *Minister of Economic Development, Minister of Trade and Industry, Minister of Agriculture, Forestry and Fisheries vs WalMart Stores Inc & Massmart Holdings Limited*, 'Minister of Economic Development, Minister of Trade and Industry and Minister of Agriculture, Forestry and Fisheries Heads of Argument', 2011 (CAC 110).

42 Kenny B, *op. cit.*

43 Bezuidenhout H & E Kleynhans, 'Implications of foreign direct investment for national sovereignty: The Wal-Mart/Massmart merger as an illustration', *South African Journal of International Affairs*, 22, 1, 2015.

44 SACCAWU, *Minister of Economic Development, Minister of Trade and Industry, Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc & Massmart Holdings Limited*, *op. cit.*

recognition of SACCAWU. It also stated that it was likely to expand its operations in the future and that the M&A would lead to an extra 15 000 jobs over the following five years. In addition, it noted that it planned to retain Massmart's management team. Regarding its stance on local procurement, Walmart pointed to its engagement with local suppliers in other foreign operations, and said that it was planning to expand Massmart's product offerings, thereby providing more opportunities for local suppliers. It also suggested that local South African products could be integrated into Walmart's global value chains (GVCs) for selling on in international markets.⁴⁵

LEGAL BATTLES

This M&A constituted a large-sized acquisition at approximately \$2.4 billion and therefore triggered an automatic review by the South African Competition Commission. After review, the Competition Commission approved the M&A with no conditions. This ruling sparked outrage among the government and labour unions, which raised several concerns in the subsequent tribunal hearings, referring to the Competition Act's public interest clause.

Despite the act's four-part description of 'public interest', including the effects of an M&A on employment and SMMEs owned by HDIs, this case raised an interesting predicament for the Competition Tribunal.⁴⁶ It had to consider carefully how far its mandate extended in regulating the 'public interest' to address socio-economic imbalances and promote domestic industry.

In its ruling, the tribunal found that in terms of Section 12(A)(1), which addresses anti-competitive behaviour, no case could be made against the M&A. This was because Walmart at the time was not competing with Massmart and thus the M&A would not be consolidating existing competition. However, regarding the public interest considerations in Section 12(A)(3), the tribunal approved the M&A but with conditions to ensure benefit to potentially affected citizens (in line with past precedent for cases concerning public interest). The conditions included a temporary freeze on operationally based retrenchments, honouring SACCAWU, giving preference to the 503 retrenched workers for future employment and establishing a ZAR⁴⁷ 200 million (\$22.7 million)⁴⁸ Supplier Development Fund.⁴⁹ The opposing parties still maintained that requiring local content was the only way to protect historically disadvantaged SMMEs; however, the tribunal determined that such a requirement would distort the market and conflict with TRIMs.

45 *Ibid.*, CAC 110 and 111; Soni P & AM Karodia, 'Unpacking the WalMart debate: A discussion of the international trade process, issues and implications of Wal-Mart's entry into South Africa', *International Journal of Accounting Research*, 1, 10, 2014.

46 Under the Competition Act, the Competition Commission is the investigative and enforcement agency, the tribunal is the adjudicative body and the Appeal Court considers appeals against the tribunal.

47 Currency code for the South African rand.

48 The oanda exchange rate used for 2012 is ZAR 8.79/\$1.

49 Kenny B, *op. cit.*

Although South Africa's attractiveness as a 'gateway to Africa' may allow it more leverage to push forward its socio-economic interests, the dire state of its economy still cause many to question whether the country should risk conveying such a potentially investor-unfriendly image to investors

According to the tribunal, mitigating these adverse impacts was the responsibility of the government's industrial policy. A subsequent appeal by SACCAWU and a request for a review by the government departments were not upheld.⁵⁰

Although the labour unions and the government felt that the competition authorities had not done enough, others felt that the court had done too much. The M&A was thus approved despite opposition from the government, which provided encouraging evidence of the court's impartiality. However, various academics, business analysts and members of opposition parties suggested that this decision would create a disincentive for foreign companies to invest in South Africa and solidify the impression that the government is not open to FDI.⁵¹ The social dynamics present in South Africa resulted in a protracted M&A, spanning more than two years, and uncertainty for Walmart as to how the 'public interest' requirement would be balanced against commercial considerations.

It could be argued that this arduous and protracted process would not occur in many similar emerging markets, including South Africa's neighbours. Although South Africa's attractiveness as a 'gateway to Africa' may allow it more leverage to push forward its socio-economic interests, the dire state of its economy still cause many to question whether the country should risk conveying such a potentially investor-unfriendly image to investors.

UNPACKING THE WALMART–MASSMART M&A: GLOBALISATION AND THE ROLE OF THE COMPETITION COURT

To understand the broader implications of the Walmart–Massmart M&A, it is necessary to look beyond this particular case, to the emerging trend of globalising production and supply chains. Walmart's effect on employment and supply chains is not an anomaly but rather a norm in South Africa and throughout the world. For example, even within

50 SACCAWU, *the Minister of Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc & Massmart Holdings Limited*, *op. cit.*, CAC 110 and 111.

51 See the following articles, which detail the view that the treatment of Walmart was over-regulatory/concerning for future investment: Wharton, University of Pennsylvania, 'Far from Bentonville: Wal-Mart expands to Africa, but faces opposition', 27 September 2011, <http://knowledge.wharton.upenn.edu/article/far-from-bentonville-wal-mart-expands-to-africa-but-faces-opposition/>; <http://www.bizcommunity.com/Article/196/524/66431.html>, accessed 7 July 2016; tralac, 'Massmart–Wal-Mart merger (finally) approved', 14 March 2012, <http://www.tralac.org/discussions/article/5256-massmart-wal-mart-merger-finally-approved.html>, accessed 7 July 2016; *The Wall Street Journal*, 'Wal-Mart, Massmart merger approved in South Africa', 9 March 2012, <http://www.wsj.com/articles/SB10001424052970204603004577270942176432300>, accessed 7 July 2016; allAfrica, 'Walmart-Massmart – cabinet intervention constitutes obstruction of foreign investment', 21 July 2011, <http://allafrica.com/stories/201107220864.html>, accessed 7 July 2016; *Mail & Guardian*, 'Government should have stayed out of Walmart merger', 10 March 2012, <http://mg.co.za/article/2012-03-10-government-should-have-stayed-out-of-walmart-merger>, accessed 7 July 2016; *SANews.gov.co.za*, 'Govt to study Walmart-Massmart decision', 1 June 2012, <http://www.sanews.gov.co.za/business/govt-study-walmart-massmart-decision>, accessed 7 July 2016.

South Africa, big retailers such as Shoprite, Pick n Pay, Spar and Woolworths maintain an oligopoly in food retail, controlling an overwhelming majority of supermarket sales. South Africa's oligopolistic market structure is part of a global move towards larger production chains and the exploitation of economies of scale, in order to achieve greater efficiency and profits – although South African oligopolies also owe their existence to the past market concentration under apartheid. Their more cost-efficient value chains have already resulted in the displacement of smaller local suppliers. Shoprite in particular has made its way into poor rural markets, displacing small and/or informal retail competitors.⁵² While this undermines the sustainability of 'mom and pop' stores, it comes with the long-term gains of enabling greater consumer welfare in the form of lower prices. Walmart's acquisition of Massmart represents this same phenomenon, save for its larger economies of scale and value chains crossing national borders to become GVCs.⁵³ Thus, those who objected to Walmart's entry into South Africa were ultimately concerned about the international shift in production towards larger retail chains, a phenomenon that developing countries will find difficult to circumvent in the long run. According to those who opposed the M&A, it was the job of the Competition Tribunal to ensure that HDIs and SMMEs were not disadvantaged, or, if that was not possible, to reject the M&A. Yet it is debatable whether industrial policy should be the domain of a competition authority.

The Competition Tribunal echoed this concern in the court hearings when it stated: 'Competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation.'⁵⁴ Indeed, doing so could compromise its fundamental purpose of promoting fair competition. However, there may be a solution that aligns FDI closer to industrial policy goals without deterring FDI.

SOUTH AFRICA'S NEW FDI REGULATORY FRAMEWORK: THE PROTECTION OF INVESTMENT ACT

The dti has taken steps to reframe FDI to benefit public interest with the recent passage of a domestic FDI regulatory framework, namely the PIA. Passed in December 2015, the act aims to replace South Africa's expiring BITs.⁵⁵ Most of these BITs, especially those with EU countries, were entered into before the South African constitution was promulgated. After reviewing its BIT policy in 2012 the government identified a dissonance between the

52 Kenny B, *op. cit.*

53 The Organization for Economic Cooperation and Development (OECD) defines a global value chain as occurring when different stages of the production process are located across different countries. See OECD, 'Global value chains', <http://www.oecd.org/sti/ind/global-value-chains.htm>, accessed 7 July 2016.

54 SACCWU, *Minister of Economic Development, Minister of Trade and Industry, Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc & Massmart Holdings Limited*, *op. cit.*

55 UNCTAD, 'International Investments Agreement Navigator'. Geneva: UNCTAD Division on Investment and Enterprise, 2015, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195>, accessed 12 November 2015.

country's hitherto relatively liberal FDI regime and its domestic policies, and decided not to renew them. This prompted the drafting of the PIA.⁵⁶

The PIA asserts in its preamble that it aims to allow the government to take measures 'to protect or advance persons, or categories of persons, historically disadvantaged in the Republic due to discrimination', and in so doing subjects investors to the same treatment as South Africans.⁵⁷ This means that foreign investors could be subject to B-BBEE and local content requirements (depending upon the regulations that will accompany the act).⁵⁸ It is likely that the Walmart-Massmart M&A would have been more strictly regulated if the PIA had been in force in 2010. The new act also enforces domestic adjudication of legal disputes, whereas under the BITs investors could settle disputes in international arbitration tribunals, as in the abovementioned Foresti case. Additionally, the PIA allows for government expropriation if it is in the public interest, as provided for in the constitution.

The PIA has not been passed in isolation, and should be considered against the backdrop of shifting global trends towards carving out domestic policy space and public interest protection in investment regulation. Many developed countries such as the US, Canada and Australia, as well as middle-income countries such as Mexico and India, allow for some form of domestic protection in their investment regulation.⁵⁹ Indonesia is also allowing its BITs to expire, and some sub-Saharan African countries are considering following suit.⁶⁰

However, it remains to be seen whether this act will serve its intended purpose of harnessing FDI to ensure broader societal benefit or, more likely, divert FDI from the country in favour of countries with more liberal investment environments. Significantly, the South African-based foreign business community believes that such measures will cause FDI to decline.⁶¹ Additionally, notable international communities such as the US and EU business chambers have spoken out against the act. Although the concessions that might be required of foreign investors to satisfy national 'public interest' objectives (as in the Walmart case) are of concern, perhaps most worrying for foreign investors are how

56 Davies R, 'Discussion of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)', Speech Notes, Geneva, 24 September 2012.

57 South Africa, PIA, *op. cit.*

58 According to South Africa, Constitution of the Republic of South Africa, 1996, Section 25(4) (a), 'the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.

59 South Africa, National Treasury, 'A Review Framework for Cross-Border Direct Investment in South Africa', Discussion Document. Pretoria: Government Printer, 2013.

60 UNCTAD, 'Reforming International Investment Governance', Annual World Investment Report. Geneva: UN, 2015.

61 Sakoschek S, The Mandela Institute at the School of Law, University of the Witwatersrand and the World Trade Institute (WTI) and Swiss Economic and Cooperation Development (SECO) Fourth Annual International Economic Law Update, Presentation, Johannesburg, 5 November 2015.

the government might utilise the expropriation clause and the competency of domestic arbitration.

EXPROPRIATION AND DISPUTE SETTLEMENT: THE MISSING LINKS IN THE FDI MATRIX

In order to understand the shortcomings of the South African FDI investment framework, one must analyse the underpinnings of investment protection at an international level. At the core of international FDI regulation are the principles of expropriation and recourse to international arbitration. International investment law as it pertains to BITs, including those that South Africa terminated, provides for compensation at market value in cases of lawful expropriation. Market value is in this context understood to be on a willing buyer–willing seller basis, in an arm’s-length transaction. What the South African government has done in the new PIA is to replace the market value in BITs with an ‘equitable and just’ compensation standard. While the idea behind the change in compensation terms was to bring the PIA into conformity with Section 25 of the constitution,⁶² this has had the adverse effect of diminishing the rights of foreign investors. ‘Just and equitable’ compensation is more subjective and leaves investors at the mercy of the state.

Related to the issue of compensation is the abolition of foreign investors’ right to international arbitration. The whole international investment protection framework is built around granting recourse to international arbitration. South Africa, which previously adhered to this framework with its BITs, has now adopted a domestic arbitration system under the PIA. The international arbitration system is meant to afford foreign investors the right to an adjudication forum that is independent and immune from the potential vagaries of domestic political pressures. In a nutshell, international arbitration has the effect of depoliticising investment disputes. A country such as South Africa, with its troubled history and potential flare-ups of social unrest due to high inequality, would arguably be best served by recourse to international arbitration as a way of building confidence in the foreign investment community. Considering that South Africa’s judicial institutions, while fiercely independent, are still fairly young and untested, an international arbitration regime would have served as a guarantor of the domestic legal system until it came of age. Instead of abolishing international arbitration, the government could have opted for an ‘exhaustion of internal remedies’ approach, which means that investors may only approach international arbitration tribunals after going through the local courts. Such an approach would have created a symbiotic relationship between the South African legal system and that of the international sphere.

However, dti officials have indicated that the government may still be willing to enter into BITs in compelling economic and political situations.⁶³ They cite South Africa’s signing

62 Section 25 (3) of the South African constitution states that ‘the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected’. See South Africa, Constitution, *op. cit.*

63 Interview, dti official, 15 November 2015.

of a BIT with Zimbabwe in 2009 even after the former had officially placed a moratorium on entering into BITs as such an example of ‘compelling political and economic’ conditions.⁶⁴ South Africa entered into a BIT with Zimbabwe with a view to safeguarding the country’s investors from Mugabe’s chaotic land reform and so-called indigenisation laws. Judging from the recent treatment of MTN in Nigeria, in which the South African telecommunications giant was fined \$5.2 billion under questionable circumstances, the situation there might also give rise to a climate warranting the signing of a BIT.⁶⁵ Furthermore, the dti, in interviews, has indicated that the South African government is open to entering into investor–state contracts on a case-by-case basis.⁶⁶

This approach poses a couple of challenges to foreign investors. Firstly, it favours large multinationals, leaving SMMEs with recourse only to domestic courts. Secondly, the framework lends itself to rent-seeking, considering that the signing of investor–state contracts is at the discretion of departmental officials. The government is in the process of reviewing and updating the Arbitration Act,⁶⁷ which would deepen the commercial arbitration culture in the country. Issues of transparency, consistency and certainty become important. The best approach would most probably have been for the government to negotiate its need for policy space within third-generation BITs, or at the very least strengthen the SADC Tribunal.

Although the PIA was designed with the intention of facilitating foreign investment that is sustainable and responsive to South Africa’s socio-economic objectives, this may come at the expense of greatly deterring FDI

Although the PIA was designed with the intention of facilitating foreign investment that is sustainable and responsive to South Africa’s socio-economic objectives, this may come at the expense of greatly deterring FDI. Most investors would prefer a continuation of the BITs, as the act as it stands does not give foreign investors much certainty in terms of whether potential investments will be rejected and how investors will be treated once they have established themselves in the country. This raises the question of whether the government is doing enough to create an enabling environment to attract FDI, particularly considering the dire state of the economy and the political uncertainty created by cabinet reshufflings in the Treasury and the allegations of state capture. In this context it is important that the South African government sends a clear signal that it is open to investment and that investors will be protected. The jury is still out on whether the PIA succeeds in doing so. Ultimately, the true effects of the PIA will not be known for five years or more, as investment decisions are often made many years in advance of their implementation.

64 See UNCTAD, Investment Policy Hub, ‘Agreement Between the Government of the Republic of South Africa & The Government of the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments’, 27 November 2009, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2281>, accessed 18 September 2016.

65 Khuzwayo W, ‘How to extract a bailout when you get a chance’, *Business Report*, 4 November 2015, <http://www.iol.co.za/business/opinion/analysis-how-to-extract-a-bailout-when-you-get-a-chance-1940031>, accessed 18 September 2016.

66 Interview, dti official, *op. cit.*

67 South Africa, Arbitration Act 1965 (Act No. 42 of 1965). Pretoria: Government Printer, 1965.

PROSPECTS FOR IMPROVING SUSTAINABLE FDI PROMOTION

Considering both South Africa's new domestic policy framework and the complications encountered in the Walmart–Massmart M&A, there are some encouraging initiatives that already have or could be implemented to promote sustainable FDI. These include the new public interest guidelines in the Competition Act, the national investment One-Stop Shop (OSS) and the prospect of establishing a national supplier development fund.

NEW PUBLIC INTEREST GUIDELINES

While the new FDI regulations create considerable uncertainty, the Competition Act's new Public Interest Guidelines⁶⁸ (gazetted in June 2016) provide additional guidance and clarity for foreign investors (although they only apply to M&As). The guidelines further clarify the aforementioned Section 12a of the Competition Act, and entail a five-step process:

- 1 determine the likely effect of the merger on the listed public interest grounds;
- 2 determine whether such effect, if any, is merger specific;
- 3 determine whether such effect, if any, is substantial;
- 4 consider any likely positive effects to justify the approval of the merger or determine whether a likely negative effect can be justified which may result in the approval of the merger, with or without conditions; and
- 5 consider possible remedies to address any substantial negative public interest effect.

The guidelines then explain in detail how each step will be applied to the four public interest considerations of section 12a (the effect of an M&A on: a particular industrial sector or region; employment; the ability of small businesses or historically disadvantaged firms to become competitive; and the ability of national industries to compete in international markets). For example, regarding the effect of a merger on small businesses (step 1), the commission will consider any barriers to entry and/or expansion, access to inputs, the effect on pricing and supply conditions (ie, volume and discounts), denial or granting of access to suppliers, preventing or allowing training and skills development, and denial or granting access to funding.

While the guidelines are not binding, they can provide significant insight into how exactly the government will consider public interest, allowing investors to take the necessary actions in advance and preparing them in broad terms for any additional concessions that they might have to make. With regard to competition, the government does not seek to weigh public interest more prominently than has been done in the past, which might deter investors, but rather to clarify the existing classifications to increase certainty and transparency. It is a good example of balancing the sustainability of investments/public interest with providing certainty for investors. These guidelines particularly speak to the difficulties of the Walmart-Massmart M&A, as they provide clarification on the issues that

68 South Africa, Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998. Pretoria: Government Printer, 2016.

caused conflict, such as employment and small business development. If they had been in place at the time of the M&A, it is likely that the legal dispute would have been much less protracted or even non-existent, as the investor would have been aware in advance of the way in which public interest would be considered. There are still some outstanding concerns regarding the clarity of the guidelines (for example, in step 3, what constitutes a 'substantial' effect), but they are a significant step in the right direction.

One concern that must be considered is how the public interest considerations of the Competition Act will be balanced with the forthcoming PIA regulations. This is relevant for M&As that involve foreign partners, which will fall under the ambit of both regulations. Both touch on issues of public interest (although the PIA does not use the term 'public interest'), but it is unlikely that they will be identical in their consideration of the issue. Therefore the overlap between the Competition Act and the PIA is cause for concern, and something that the government will need to address when promulgating the PIA regulations.

ONE-STOP SHOP AND INVESTMENT PROMOTION

The South African government has also recently begun the process of establishing an OSS for investors. InvestSA has been established as a division of the dti as a vehicle to roll out the OSS. InvestSA will provide investment promotion; a single-window clearinghouse for licensing, permits and registration; and aftercare.⁶⁹ Despite the flaws of the FDI institutional framework, the OSS will be a welcome development to facilitate investment. The World Bank's 2016 Ease of Doing Business rankings put South Africa at 74th out of 189 countries, with Mauritius, Rwanda and Botswana all faring better, indicating that there is considerable room for improvement.⁷⁰ For example, currently investors must communicate with five or more government departments in the process of starting up their investment. The Presidency has therefore also established an Inter-Ministerial Committee on Investment, composed of two-dozen ministers and tasked with facilitating ease of doing business, while also supporting the rollout in different departments of the OSS.⁷¹

However, implementing this proposal will be easier said than done, as government agencies are generally reluctant to give up autonomy and co-ordination is difficult, particularly in South Africa, where there is much bureaucratic overlap.⁷² Achieving buy-in through promoting the ultimate objective of this initiative – attracting more sustainable investment – is crucial.

69 dti, InvestSA, 'Briefing to the Portfolio Committee on Trade and Industry', 2016, <https://www.thedti.gov.za/parliament/2016/InvestSA.pdf>, accessed 7 August 2016.

70 World Bank, 'Ease of Doing Business Rankings', 2016, <http://www.doingbusiness.org/rankings>, accessed 14 November 2016.

71 Dti, InvestSA, *op. cit.*

72 Sader F, 'Do One-Stop Shops Really Work?'. Washington DC: World Bank Group, 2000.

Currently, much of South Africa's investment promotion activities are completed by provincial investment promotion agencies (IPAs), thereby fragmenting the current system. It must be a priority for InvestSA and provincial IPAs to establish strong co-ordination and information sharing, so that the OSS can serve as a centralised information hub to direct investors towards the most suitable provincial IPAs and their respective incentive programmes. InvestSA seems to be adopting this approach by establishing national OSS branches as the first point of contact in all of the provinces. It is especially important that InvestSA helps to reduce information asymmetries and guides investors through the FDI process, given South Africa's often changing and sometimes unco-ordinated laws and regulations.⁷³

ENHANCING LOCAL SUPPLIERS

Walmart's effect on South Africa is not an isolated incident but rather indicative of a global trend, even among local retail conglomerates. SMMEs should thus be capacitated to expand and adapt to the global context. In 2014 the government created the Department of Small Business Development (DSBD), which is an opportune space to enhance SMME participation in larger supply chains. The DSBD now houses the Black Business Supplier Development Programme (BBSDP), which was formerly run by the dti. This programme aims to increase the competitiveness of SMMEs and facilitate their sustainable integration into the larger economy. It provides capital grants of up to ZAR 800,000 (\$57,430) and grants of up to ZAR 200,000 (\$14,357) in business development and training.⁷⁴ This programme can be a key resource for SMMEs affected by M&As to integrate into the merged companies' international supply chains and diversify into other national supply chains. However, specifically in retail, the large MNC buyer-dominated supply chains such as Walmart offer a less viable chance for SMME upgrading and integration, even with supplier support programmes.⁷⁵ Therefore the BBSDP should focus on guiding the amalgamation and formation of co-operatives among SMMEs in order to scale up their size and truly increase their economies of scale and competitiveness.

There is understandable scepticism about the feasibility of supplier integration into GVCs and even into some of South Africa's larger national supply chains, as well as whether such integration can truly promote inclusive growth. This is because these supply chains are already highly consolidated and South Africa's SMMEs often can only integrate at the

The BBSDP should focus on guiding the amalgamation and formation of co-operatives among SMMEs in order to scale up their size and truly increase their economies of scale and competitiveness

73 Sauvant K & M Mallampally, 'Policy options for promoting foreign direct investment in the least developed countries', *Transnational Corporations Review*, 7, 3, 2015.

74 DBSD (Department of Small Business Development), 'Programme Guidelines: Black Business Supplier Development Fund', 2010. Average exchange rate for 2016 is ZAR 13.93/\$1.

75 SADC, *Industrialisation Strategy and Roadmap 2015–2063*, approved 29 April 2015; Bamber P *et al.*, 'Connecting Local Producers in Developing Countries to Regional and Global Value Chains: Update', OECD Trade Policy Paper, 160, 2013.

lowest value-add levels of the chain.⁷⁶ Considering these realities, the BBSDP should place particular focus on capacitating SMMEs to engage in regional value chains (RVCs) as a longer-term goal. RVCs hold the potential to exploit value-add from countries throughout the region and increase their development, and also have lower barriers to entry for South African suppliers because they are less consolidated and have less stringent quality standards. Additionally, in certain sectors such as retail, rapidly changing consumer trends, or 'fast fashion', demand strict supply timelines, and sourcing regionally (rather than internationally) can help facilitate faster supply.⁷⁷ However, deficiencies in the regional transport infrastructure are a significant challenge and must be tackled alongside such initiatives. The BBSDP, coupled with better investment promotion, could assist in mitigating the negative effects of large M&As and thus ensure that FDI is both attractive and sustainable.

CONCLUSION

South Africa has taken a bold approach towards stricter regulation of investment, in the hope of ensuring more inclusive growth in the country. However, this approach has brought with it serious concerns over certainty and transparency for potential investors. A supplier development fund could support suppliers affected by large M&As without decreasing competition and deterring FDI, and the new competition and public interest guidelines will work towards this purpose. The OSS, if implemented effectively, will also facilitate investment. However, these positive developments are still overshadowed by the uncertainty created by the PIA, which would need serious reworking to ensure that South Africa remains a truly open destination for FDI.

76 Newman S & L Takata-Greenish, 'African industrialisation: Is global value chain development the answer', paper presented at Joint South Africa–EU initiative, 'TIPS and Dialogue Facility Conference: International Conference on Manufacturing-Led Growth for Employment and Equality', Johannesburg, 20–21 May 2014; OECD & WTO (World Trade Organization), 'Value chains and the development path', in 'Aid for Trade at a Glance 2013: Connecting to Value Chains'. Geneva & Paris: WTO & OECD Publishing, 2013.

77 Bamber P *et al.*, *op. cit.*

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