

Chapter 5

Critical Review of Existing Policies on Foreign Direct Investment in South Africa

5.1 Introduction

Given that the purpose of this dissertation is to determine the efficiency prospects offered by way of the rationalization of government structures that are involved in the regulation of foreign direct investment policy, it must be noted that examination of these structures cannot take place in isolation of the underlying policies. These policies must first be understood and articulated before their implementing structured can be evaluated. To this end the current chapter first sets out to get clarification on what is meant by the term policy and how the process of policy determination is realized. Further, a survey of foreign direct investment and/or multinational enterprise policies in South Africa is undertaken in order to give clarity to where specific policies are housed as well as how they are administered in relation to other policies in the same area.

Comparatively, foreign direct investment and multinational enterprise policies that have been applied in other countries are surveyed in order to examine alternative policy options that may (or may not) prove effective in the South African context. This chapter serves as a prelude to next chapter that examines if rationalization and/or re-organization may provide the necessary framework under which foreign direct investment and multinational enterprise policy can be more effectively delivered than is currently the case.

5.2 Public policy defined

Parsons (1995:2) gives pragmatic value to the term public policy by defining separately and then examining together its component parts. Thus he defines 'public' at great length before tackling the definition of 'policy' with the same zeal. The integration of these two terms/concepts is then derived. In short, Parsons defines public (in relation to private) as encompassing that sphere of life that is not purely private, but is instead the common domain of all in society. More specifically, Parsons defines public as comprising "that dimension of human activity which is regarded as requiring governmental or social regulation or intervention, or at least common action" (Parsons 1995:3). Although this definition recognizes the interventionist role of government, it is not entirely inconsistent with the laissez faire principle and the belief that market forces left to their own devices would maximize the welfare of not only individuals in markets but also that of the public at large. Instead, the role of the state was seen to be that of merely creating and maintaining 'free' market conditions through limited intervention in the economy and the maintenance of law and order (Gildenhuys 1997:2-8). The term public thusly accurately refers to all areas of activity of the state as defined here.

Of the many definitions offered for the term policy, a fairly succinct definition is that offered by Anderson (1975:3) who states that a policy is: "*A purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern*". This definition regards policy as what is actually done (a purposive course of action) as opposed to what is proposed, decided upon or intended. Further, this definition also requires the clear identification and specification of a problem, the resolution of which requires policy intervention. Combining the aforementioned definitions of public and of policy, it can be ascertained that public policy as an integrated term refers to problem solving actions undertaken by government.

5.3 Public policy and change

Policies tend to be dynamic in nature. Policy change can be viewed as taking place within the context of one or more of four ideal types of change: policy innovation, policy succession, policy maintenance and termination (Hogwood and Peters 1983:26; Cf. Brewer and de Leon 1983:17-21). Each of these types of policy change are briefly discussed hereunder.

5.3.1 Policy Innovation

Policy innovation represents the creation of a new area of policy that occurs as a result of the entry of an institution/governmental unit into an activity in which it has not previously been involved. The key challenge faced by the institution in attempting such an endeavor is the fact that newly established organizational, legislative and budgetary provisions normally start from an unstable base founded in an uncertain environment. The level of complexity of policy innovation can thus be expected to greatly surpass that of other types of policy changes that merely involve changes to already existing organizational structures and policy regimes (Hogwood and Peters 1983:26-9).

5.3.2 Policy succession

Policy succession, on the other hand, refers to *significant* modification or outright replacement of standing policies (and their organizational structures) as a strategy to adapt the organization to internal and/or environmental change. This type of policy change does not, by definition, involve the organization engaging in a new field of activity. Instead, under this type of policy change the objectives (ends) remain the same while the mechanisms of program delivery (means) are changed (Hogwood and Peters 1983:26-9).

5.3.3 Policy maintenance

Alternatively, policy maintenance can be thought of as the continuous monitoring and amending of standing policies. Unlike policy innovation and policy succession, policy maintenance does not involve, to any significant extent, changing either the objectives (ends) or the means of the organization. Instead, policy maintenance changes are characterized by the attempt to improve upon the use of existing program delivery mechanisms (means) in order to conform to the original policy objectives (ends) (Hogwood and Peters 1983:26-9).

5.3.4 Policy termination

Lastly, policy termination involves the complete or partial dissolution of organizational structures and the attendant legislation thereof, as well as the complete cessation of public expenditure on policy related activities and programs. Although policy termination is a rare form of policy change in the public sector, its importance lies in the fact that it calls for the continuous evaluation of organizations and their policies, activities and programs and further calls for their termination where this is justified from an effectivity and efficiency basis (Hogwood and Peters 1983:26-9; Cf. Brewer and de Leon 1983:20-1).

5.4 Public Policy Determinants

Other important influences over and possible determinants of public policies are public policy role players, public policy formulation processes, and the legislative processes required for the enactment of government reorganizations and rationalization. A brief discussion of each of these factors follows.

5.4.1 Public policy role players

Although the activity of formulating public policy is normally concluded at some level (usually top) within the government administration, public policy development is not the exclusive domain of any person or assemblage of persons either within or outside of government. Rather, all citizens [and non-citizens who have an interest (ex. financial) in a given country] are able to affect public policy with varying degrees of influence. Anderson (1975) addresses this point by differentiating between the more influential official policy makers and the usually less influential unofficial policy-makers (Anderson 1975:37-48; Cf. Hanekom 1987:21). Official policy-makers are those policy-makers whose official decisions are recognized as legally binding. Included among this grouping of individuals are legislators, executives, administrators and judges. It is not, however, uncommon for these public policy actors to be influenced and/or controlled by unofficial policy-makers, such as political party bosses and special interest groups.

Unofficial policy-makers, on the other hand, have no legal endorsement of their decisions and wishes, although they may be able to influence policy through pressure exerted on official policy-makers. Included in this grouping of persons are special interest groups, political parties, non-governmental organizations (NGOs) and citizens based organizations (CBOs).

5.4.2 Public policy formulation

Upon receipt of policy proposals from the administrative and executive branches of government, legislators must engage in the process of debate, amendment, ratification and enactment on those policy proposals that they consider to be worthwhile. Policy formulation at the legislative level of government is thus a two-stage process that includes firstly, deciding what should (or should not) be done to resolve a particular problem, and secondly drafting legislation to give

effect to the solutions decided upon (Anderson 1975:70; Cf. Gildenhuys 1997: chapter 4). Bills that have been passed into law (Acts) represent an important indicator of the actual content of public policy (Anderson 1975:70).

5.4.3 Rationalization within the public policy process

The authority to execute structural change by way of rationalization or reorganization within the South African government administration is shared amongst the Executive and Legislative branches of government, with the Judiciary playing a secondary role given its mandate to make a determination as to the constitutionality of the agency in question and the procedures to be followed for its creation (Roux et. al 1997:chapter 3; Cf. Cloete 1998:chapter 4).

The Constitution of the Republic of South Africa, 1996, Act 108 of 1996 confers legislative authority upon the bicameral Parliament which consists of the National Assembly and the National Council of Provinces. The procedures for getting a bill passed - in this case a bill concerned with an administrative reorganization - are based on the system of checks and balances whereby both divisions of Parliament as well as the President must scrutinize the bill before it is signed into law by the President. Section 75(1) of the Constitution stipulates that a bill originating from and passed in the National Assembly must be forwarded to the National Council of Provinces for consideration. If the bill is also passed by the National Council of Provinces without amendments, it then must be submitted to the President for assent. If, however, the bill is rejected by the Council or affirmed by the Council subject to amended changes, the bill must be returned to the Assembly for reconsideration before resubmission to the President for assent. In the case of matters dealing with Provincial affairs, Section 76 (2) of the constitution specifies the reverse order of the procedure of Section 75(1) such that when the National Council of Provinces passes a bill it must be submitted to the National Assembly for consideration before being presented to the President for assent.

The President is also a significant role player in administrative reorganization as the President possesses not only the affirming vote on legislative matters vis-à-vis signing a bill into law; but the President also maintains the constitutional authority to prepare and initiate legislation; develop and implement national policy; appoint commissions of inquiry; as well as being responsible for coordinating the functions of state departments and administrations. [Sections 84 and 85 of the Constitution of South Africa 1996 (Act 108 of 1996)].

5.5 Review of FDI/MNE policies – South Africa

Policies can either be explicit or implicit. Explicit policies are often referred to as rules since they clearly state what is or is not to be done, whereas implicit policies are open to interpretation and merely provide guidelines for those charged with their implementation (Roux et. al 1997:125; Cf. Brewer and de Leon 1983:268). This being noted, it can further be stated that policies can exist even though they have not been clearly articulated or documented. Although it may be correctly stated that there is no institutional unit within which foreign direct investment policy is *coordinated* in the South African public sector, it is not the case that these policies are non-existent. Several departments and sub-units hold some responsibility in the formulation and implementation of foreign investment policy. Thus for example, the South African Reserve Bank is in charge of regulating exchange controls that put limits on the amount of money and other capital assets that can be brought into or taken out of the country; while the Company registrar's office under the Department of Trade and Industry is responsible for setting registration requirements for internal (domestic) and external (foreign) companies while at the same time several subunits under the Department of Trade and Industry provide investment and export incentives to foreign investors in order to attract greater amounts of foreign direct investment. This section of the current chapter is ultimately concerned with the possibility of putting in place a government structure that would coordinate all areas of policy involving foreign direct investment in order to provide a consistent and measured

approach to determining the appropriate forms and levels of foreign direct investment policies. The underlying questions that need to be raised in this regard relate to whether or not the Government is engaged in unhealthy and excessive competition with other governments to attract foreign direct investment; and are all governmental units that regulate some aspect of foreign direct investment acting in a unified and coordinated manner in formulating their policies?

The discussion that follows attempts to partially resolve these two questions by conducting a critical review of the foreign direct investment policies that exist in each of the following governmental units: the Department of Trade and Industry; the Competition Commission; the South African Reserve Bank; the Department of Environmental Affairs and Tourism, and the Department of Minerals and Energy (for a comprehensive summary see Table 5/1 below).

5.5.1 Department of Trade and Industry

A synoptic picture of the policy approach of the South African government towards multinational enterprises and foreign direct investment can be constructed mainly from the work of the Department of Trade and Industry and its affiliated governmental and quasi-governmental organizations. In order to counteract the low savings and investment rates occurring in the economy, the Department of Trade and Industry has set for itself a key strategic objective of promoting domestic and foreign direct investment. This object is being pursued primarily through concentrating investments into Spatial Development Initiatives (SDIs). Spatial Development Initiatives represent one of the Government's key industrial policies aimed at fostering sustainable industrial development in areas with viable economic potential but where poverty and unemployment rates are amongst the highest in the nation (South Africa Yearbook 1999:288-90).

The Department of Trade and Industry also pursues more generic investment promotion initiatives aimed at foreign investors such as marketing South Africa as an investment destination, conducting investment missions, investment facilitation services, and investment incentives (Accelerating Growth and Development: The contribution of an integrated manufacturing strategy – Department of Trade and Industry, 2003:46-7). A primary example of the type of investment incentives offered for foreign investors is the Foreign Investment Grant (FIG). The Foreign Investment Grant provides 15% cost recovery (up to a maximum amount of R3m per entity) for foreign entrepreneurs to transport into South Africa, new machinery and equipment as part of their invested capital (DTI website 2004).

Other support mechanisms employed by the Department of Trade and Industry to support foreign direct investment include the Foreign Direct Investment Scheme (FDIS), the Export Marketing & Investment Assistance Scheme (EMIA), and the Inward Investment Missions Scheme (IIMS) all of which provide financial assistance to exporters to partially cover costs incurred in the process of recruiting new foreign direct investment into South Africa (Department of Trade and Industry website 2004).

5.5.1. (a) Manufacturing industry

Although South African economic activity can be categorically divided into major divisions, divisions, and further sub-divided into major groups and subgroups, (or alternatively into sectors and industries) the Department of Trade and Industry is organized to attend mostly to the needs of the manufacturing industry. The Motor Industry (regulated by the DTI's Directorate: Motor Assembly and Components) has benefited significantly from international competition and accordingly has been one of the largest recipients of foreign investment of any manufacturing sector since April 1994. Measures taken by the Directorate to increase competition in this industry include a gradual reduction in tariff

protection and the abolition of local content requirements. At the same time, the directorate introduced a range of incentives for both domestic and foreign investors that are designed to upgrade the capacity of the industry in all spheres (DTI Annual Report 1996-7:48-54).

5.5.1. (b) External trade and investment relations

Although there is not yet in place a multilateral system for the promotion and protection of foreign direct investment, South Africa does have a number of bilateral agreements entered into by the Department of Trade and Industry and foreign partner governments. Bilateral Investment and Protection (BIP) agreements generally stipulate that, *inter alia*, investors should receive national or most favored nation treatment, that investors or investments will not be treated in a discriminatory manner and they will receive fair, equitable and just treatment. While investments may be expropriated (normally only for a public purpose) such action gives rise to the right of market related compensation which shall be prompt, adequate and effective. The agreements also guarantee the right to transfer of profits and remittances and other transfers related to investments, including the repatriation of investments themselves. By 1997, South Africa was in the process of *negotiating* BITs with over 20 other countries and had signed BITs with Austria, Canada, Cuba, Denmark, France, Germany, Netherlands, South Korea, Switzerland and the United Kingdom (Annual Report - Department of Trade and Industry 1996-7:100 -102). By March 1999, 28 bilateral investment treaties had been entered into by South Africa (South Africa Yearbook 1999:285).

5.5.1. (c) Company Registrars Office

The Company Registrars Office exists as a chief-directorate within the Department of Trade and Industry and is responsible for the provision of efficient and speedy companies registration services to both domestic and foreign businesses (DTI Annual Report 1996-7:109). These registrations are governed under the legislation encapsulated in the Companies Act 61 of 1973, the requirements of which do not differentiate, to a significant degree, between foreign and local investors in terms of establishing a business enterprise in the country. The following specific references to foreign investors can, however, be noted:

- (i) Chapter XIII (ss 322-336) of the Act requires that external (foreign) companies must, within twenty-one days after establishment of the place of business in the Republic, lodge with the Registrar a certified copy of its Memorandum and Articles of Association, a list of the names and addresses of the directors, and the names and addresses of one or more persons resident in the Republic and authorized to accept service of process and notices on behalf of the company. The Registrar must be advised of any alteration in the names and addresses of these persons.
- (ii) Every external company shall appoint and shall at all times have an auditor within the meaning of this Act and shall not later than fourteen days after such appointment or any change in office of the auditor, lodge with the Registrar in the prescribed form a notice stating the name and address of such auditor or the change in such office.
- (iii) Lastly, an external company must lodge with the Registrar annual accounting records.

Importantly, the Act requires that the Registrar, upon receiving payment of the prescribed registration fee, '*shall register the said memorandum in the register*

kept by him under section 5, distinguishing the registration from the registrations in respect of companies incorporated in the Republic'. This is an important requirement and can be taken as a first and important step in the process of MNE regulation as it assists in distinguishing foreign from domestic firms, thus facilitating the processes of promoting, monitoring, and controlling foreign investment in the country.

By 1999, the Registrars office was concerned solely with the task of registering and licensing businesses, and the financial data they required to accomplish this task was not being captured or made available to other government departments or agencies (Interview with Deputy Director- Company Registrars Office- April 1999)(DTI Annual Report 1996-7:108-9). This deficiency in record keeping and information sharing was indicative of both a lack of appropriate information systems and administrative coordination between government departments. These deficiencies have been identified and are currently being addressed by the Registrars Office.

5.5.1.(d) Department of Trade and Industry - Directorate: Technology Promotion

The Directorate: Technology Promotion in the Department of Trade and Industry is responsible for overseeing the provisions of The Inventions Development Act, 1962 (Act No 31 of 1962) which calls for "the promotion of and development and exploitation in the public interest of certain discoveries, inventions and improvements and to establish a South African Inventions Development Corporation and to prescribe its powers and functions and the manner in which it shall be managed and controlled" (DTI website: www.thedti.gov.za). The Directorate is also responsible for administering the Technology Transfer Guarantee Fund, the aim of which is to make local and international technology available to South African Small Medium and Micro Enterprises (SMMEs), (DTI website: www.thedti.gov.za). With respect to foreign direct investment, it can thus be observed that the Directorate: Technology Promotion is the Governments

main institutional role player with respect to the execution of technology transfer policy. It can further be observed that the policy approach of the government in this regard, is one of support and facilitation rather than of control through, for example, a body of technology transfer laws that places restrictive and local participative requirements on potential investors.

5.5.2 Competition Commission

The Competition Act, 1998 (Act 89 of 1998) provides for the establishment of a Competition Commission consisting of an Inspectorate and an Adjudicating Body. Although the Competition Commission is an independent advisory body that is attached to the Ministry of Trade and Industry, its decisions may be appealed to the Competition Tribunal and the Competition Appeal Court (South Africa Yearbook 1999: 285).

The functions and duties of the Competition Commission are specified by Section 21 of the Competition Act. These functions and duties include investigating anti-competitive conduct in contravention of the Act; assessing the impact of mergers and acquisitions on competition and taking appropriate action; monitoring competitive levels and market transparency in the economy; identifying impediments to competition and playing an advocacy role in addressing these impediments (DTI website: www.thedti.gov.za).

While striving to meet these goals, the Competition Commission must also balance these against the broader social and economic goals as outlined in the Act, such as employment, international competitiveness, efficiency and technology gains, as well as the development and promotion of small and medium sized businesses and firms owned or controlled by historically disadvantaged persons. The Competition Commission attempts to facilitate the achievement of this wide array of goals by working collaboratively with other regulatory authorities (DTI website: www.thedti.gov.za).

Although competition policy normally does not distinguish between foreign and domestic companies, large foreign investors who may be in a position to dominate particular industries or markets (a dominant position, according to the Act, is defined as a market share of 35 percent or more) are also subject to control under the competition law regime (South Africa Yearbook 1999:285)(Muchlinski 1995: chapter 11).

5.5.3 The South African Reserve Bank (SARB)

The South African Reserve bank is the central bank of South Africa, and as such it is tasked primarily with “[protecting] the value of the currency in the interest of balanced and sustainable economic growth in the Republic” (section 3 of the South African Reserve Bank Act 90 of 1989; Cf. section 224 of the Constitution - Act 108 of 1996). One of the key instruments historically used by the Bank towards this end has been exchange control policy. Exchange controls focus on controlling the flow of funds and capital assets into and out of the country in order to stabilize and maintain sufficient levels of the country's gold and foreign currency reserves (Mollentze 2000:38).

In 1961 the South African government introduced exchange controls for non-residents only. This policy initiative effectively created a dual exchange rate system whereby certain foreign equity investments into South Africa were carried out in financial rand, while all other transactions were conducted in commercial rand. By 1971 the Reserve Bank had also implemented a policy of exchange controls on South African residents.

The turnaround in the Governments reliance on strict exchange controls to stabilize the value of the currency began to take place around the mid-80s, corresponding with the recommendations of the De Kock Commission. In 1983 the financial rand (and thus the dual exchange system) was abolished. Further, with the dismantling of the system of apartheid, South Africa's full participation in

the global economy was welcomed by South Africa's trading partners (Mollentze 2000:39). In order for South Africa to successfully integrate into the global economy, South Africa had to open up its economy to both inward and outward trade and foreign direct investment. This global economic integration thus required, among other, the gradual removal by South Africa of exchange controls that served to hinder the cross-border flows of capital and goods (Quarterly Bulletin – SARB – March 1999:40).

5.5.4 Department of Minerals and Energy

South Africa's mining industry has, since its inception, been one of the key pillars of the South African economy. By 1997 the industry accounted for approximately 10 percent of gross domestic fixed investment (GDFI) while sales of primary minerals alone accounted for 40 percent of total export revenue. (South Africa Yearbook 1999:97). The government department that is responsible for exercising executive and administrative control and regulation over the mining industry is the Department of Minerals and Energy. With regards to mining policy, the primary objectives of the Department are to:

- Promote exploration and investment leading to increased mining output and employment;
- Ensure security of tenure of mining rights;
- Address past racial inequities by assisting those previously excluded from participating in the mining industry to gain access to mineral rights;
- Recognize the responsibility of the State as custodian of the nation's mineral rights; and
- Take reasonable legislative and other measures, to foster conditions conducive to mining which will enable entrepreneurs to gain access to mineral rights on an equitable basis.

Policy reforms undertaken by the department have been particularly influenced by the regulatory proceedings occurring in the areas of labor legislation, environmental legislation, and the international competition for inward direct investment in the minerals sector from developed and developing countries (Green Paper, 1998 - Mineral Policy for South Africa). In working through policy reforms, the Department has identified the following factors for consideration (Green Paper, 1998 - Mineral Policy for South Africa):

- The South African mining industry, one of the country's few world-class industries, has the capacity to continue to generate wealth and employment opportunities on a large-scale.
- Mining is an international business and South Africa has to compete against developed and developing countries to attract both foreign and local investment. However, many mining projects in South Africa have tended to be unusually large and long term, requiring massive capital and entailing a high degree of risk.
- South Africa has an exceptional minerals endowment, and in several major commodities has the potential to supply far more than the world markets can consume.
- As articulated in its macroeconomic strategy, Government has committed itself to a continuing process of economic liberalization, thus strengthening the competitive capacity of the economy, fiscal and tariff reform and bureaucratic deregulation. These are essential steps towards enhancing the country's competitiveness, attracting foreign direct and portfolio investment and creating a climate conducive to business expansion. The mining industry among others will benefit in the long term from these developments.
- By its very nature the mining industry has the potential to endanger human health and safety as well as the physical environment. It is the responsibility of Government to establish a regulatory framework that

minimizes such dangers without imposing excessive cost burdens on the industry and thereby jeopardizing its economic viability.

Mineral rights policy is an important aspect of mining policy in general. South Africa's current system of mineral rights is a dual system that allows for the ownership of mineral rights by the State as well as by private owners. The present governmental administration, however, is of the belief that its objectives as set out above cannot be met under the present system. In place of the status quo, the State has articulated the following sub-objectives in respect of mineral rights (Green Paper, 1998 - Mineral Policy of South Africa):

- (i) Government recognizes the inherent constitutional constraints of changing the current mineral rights system, but it does not accept South Africa's system of dual state and private ownership of mineral rights;
- (ii) Government's long-term objective is for all mineral rights to vest in the State;
- (iii) State-owned mineral rights will not be alienated;
- (iv) Government will promote minerals development by applying the "use it or lose it" principle; and
- (v) Government will take transfer of mineral rights in cases where a holder of mineral rights cannot be readily traced or where mineral rights have not been taken cession of and are still registered in the name of a deceased.

The Department's policy towards foreign direct investment is further expressed in tax legislation that is unique to the mining industry. The rationale for having a specialized tax structure for the mining industry is based on the fact that (Green Paper, 1998 - Minerals Policy for South Africa):

- a) the risk to reward ratio in exploration is high, and mining itself is attended by a high degree of geological, project and market risks;
- b) particularly in big-scale and deep-level operations large amounts of capital are required. This capital is at high risk over a long period;
- c) mining companies are usually required to provide their own infrastructures because of the remote location of mining deposits;
- d) mining involves the realization of a wasting asset and the mine has little or no residual value. Continuing investment is therefore necessary in exploration, the acquisition of rights to mine and the development of new mines. All these activities form an essential part of the mining business cycle;
- e) taxes that increase mining costs have the effect of increasing the cut-off grade of ore, thus reducing the life of a mine and sterilizing mineral assets. It has therefore long been recognized that, in principle, mines should be taxed on profit and not in a manner which increases costs;
- f) In view of international competition for investment funds, the tax system should be designed to assist in attracting and retaining investment in South Africa;

Thus this is in line with the above-mentioned basis for mining taxation, Government's tax policies for the mining industry are aimed at (Green Paper, 1998 - Minerals Policy for South Africa):

- (i) ensuring that the tax regime will be consistent and stable and that the aggregate rate of tax will be internationally competitive;
- (ii) seeking, wherever possible, to minimize taxes which increase the costs of mining; and
- (iii) ensuring that the tax system does not inhibit mining but encourages the efficient use of resources.

Foreign investors thus find that South African mining policy seeks to offer investors, in general, a cost effective investment option through a tax scheme that is favorable to mineral prospecting and exploration. In terms of ownership, however, investors are no longer assured of the right of ownership over mining land nor the right to conduct mining operations on that land. These rights are to be vested in the State.

Foreign investors will also find that they will be held to greater account for the negative externalities of their activities in this sector. However, although the State is in the process of legislating remedial measures to be placed on mining operators that require the recovery of the costs for environmental damage, pollution, ecological degradation and/or harm to human health caused by such operators, the Department spent R20 million during the 2002-2003 fiscal year on the rehabilitation of abandoned mines. Of this amount, R17 million was spent on rehabilitating asbestos mines alone (Mineral and Petroleum Resources Development Bill 2002, section 42; Cf. Department of Minerals and Energy – Annual Report 2002/3: p.14)

5.5.5 Department of Environmental Affairs and Tourism

The Department of Environmental Affairs and Tourism administers, among other legislative Acts, the National Environmental Management Act (Act No. 107 of 1998). The Act recognizes, in its preamble, that "*...everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*"

According to this legislation (and the Bill of Rights of the Constitution, Act 108 of 1996), the people have the power to hold government accountable for abuses to

the environment caused by government or any other transgressors as the environment is considered (by government) to belong to all the people of the country (White Paper - Environmental Management Policy for South Africa 1998:20). Thus, government's responsibilities with respect to the alienation of public resources (such as renewable and non-renewable natural resources) are to ensure that the people of the country are not substantially disenfranchised by the unchecked transfer of ownership of land and other public resources to private investors (White Paper - Environmental Management Policy for South Africa 1998:20). Further, section 28 of the Act places a duty of care and remedial repair on those persons and/or organizations who cause environmental damage, pollution or harm to human health. These persons/organizations are also responsible for the costs of further preventive measures to reduce the risks of re-occurrence of any of the aforementioned violations.

Table 5.1

Summary of FDI related policies as per responsible institution

Department of Trade and Industry	Competition Commission	South African Reserve Bank	Department of Minerals and Energy	Department of Environmental Affairs and Tourism
Spatial Development initiatives	Competition policy	Exchange controls (gradually being phased out).	Mining industry tax legislation	
Investment incentives			Power to expropriate land and impose remedial costs on mining investors	Power to expropriate land and impose remedial costs on mining investors
Bilateral Investment and Protection Agreements				
Companies registration				
Technology transfer				

5.6 Alternative policy options reviewed

It is possible to compare ideological approaches and policies along the continuum of liberal/non-interventionist to conservative/insular. Summarily, the two extremes of this continuum can be depicted as in table 5.1.

Table 5.2

Liberal versus conservative policy options

Liberal/non-interventionist	Conservative/insular
Investment incentives	Screening laws
Lack of specialized controls over FDI	Indigenization laws
Export processing zones and related policy enclaves	
Regional, bilateral and multilateral liberalization agreements	

(Adapted from Dunning 1993:554-560 and Muchlinski 1995:172-3)

To have a basis of comparison for the liberal/interventionist approach to foreign direct investment, the conservative/insular approach is discussed next in further detail. The former approach will not be discussed at this juncture as it has already been covered under the foregoing subtopics of this chapter (Supra. Par. 5.5).

Policies that fall under the conservative/insular approach are normally undertaken at either the stage of entry of foreign direct investment into the country (screening laws) or during the operational phase in which the multinational enterprise is already established in the host country and will then have operating, performance or other requirements imposed on it (Dunning

1993:554-560)(Muchlinski 1995:172-3). Screening laws, and indigenization laws are briefly explained hereunder.

5.6.1. Screening laws

Screening laws refer to the evaluation, case-by-case, of the suitability of inward investment proposals in lieu of granting authorization for the investment to take place. Screening laws are one of the most commonly used methods of regulating foreign direct investment and have been used by countries that are both liberal towards foreign direct investment as well as by countries that are not. Countries of the former type welcome foreign investment but are also concerned about the loss of national (economic, political and social) sovereignty or adverse economic consequences that may accompany such investments under certain circumstances, whereas countries of the latter type are ideologically bound to limit inward direct investment for the sake of national sovereignty (Muchlinski 1995:194-5). Screening laws often come with conditions attached. These conditions are usually in the form of performance requirements that aim to ensure that the investor contributes positively to growth and development through such performance related measures as minimum export requirements and local content requirements in production processes (Muchlinski 1995:195; Cf. Dunning 1993:559).

There is no institutional mechanism in place in the South African context to impose screening laws. This is not necessarily a criticism as screening laws are generally thought to inhibit the flow of inward direct investment and additionally, South African policy tends to lean to the liberal side of the policy continuum outlined in tables 5/2 and 5/1. Thus in maintaining consistency between (and aligning) the ideological approach of government to the types of policy instruments used, screening laws do not and should not feature in any proposed rationalization effort.

5.6.2 Indigenization laws

Indigenization laws tend to have a converse relationship to laws that exercise specialized controls over foreign direct investment and may appear in three forms. Firstly, and most commonly, are indigenization laws that place legal restrictions on the percentage of ownership that can be held by foreign interests in local companies. Secondly, there are indigenization laws that aim to give citizens of host countries the opportunity to purchase shares in investing foreign firms. It can therefore be seen that the rationale behind the first two types of indigenization laws described above, is to increase the participation of host state nationals in the economy. A third type of indigenization law is in the form of restrictions on the participation of foreign investment in certain sectors of the host states economy. This type of restriction is usually motivated by the perceived need to protect, from foreign domination, industries that are relevant to national security and defence, as well as industries that are considered to be culturally significant (eg. media and broadcasting industries) (Muchlinski 1995:175-185; Cf. Dunning 1993:559).

In the South African context, although there are no distinct indigenization laws in place, certain culturally sensitive industries, such as the South African Broadcasting Company are run as parastatal organizations under the direct ownership and control of the government. Likewise Denel, the State's defence manufacturer is also a government parastatal, although it has recently been partially privatized. This being the case, the need for indigenization laws is partially mitigated as long as foreign ownership and control of defence and cultural industries is government controlled through other operational strategies.

5.7 Conclusion

From the foregoing discussions of this chapter and particularly with respect to the categorization of foreign direct investment policy approaches as depicted in tables 5.1 and 5.2, it can be discerned that South African public policy vis-à-vis foreign direct investment is formulated from a liberal approach that encourages (rather than restricts) this type of investment. This being the case, there is little evidence of specialized controls that restrict the entry of the foreign direct investment of multinational enterprises. Rather, especially since the lifting of the veil of apartheid, Government has put measures into place to encourage and boost the levels of inward direct investment into the country as a means of addressing the country's low savings and investment rates as well as to improve the level of development of the country. Although these foreign direct investment promotion measures were discussed in relative detail, it must be noted that the specifics of the exact number, characteristics and qualifying conditions of incentives and other promotional measures tend to change over time. Even so, the general tone of the policy approach remains consistent over the long term.

The processes of establishing and operating a foreign business in South Africa currently involves administrative oversight from more than one government department. This is because the activities of foreign firms within the country are expected to fall within the functional responsibilities of several departments. As identified in this chapter, the most relevant departments in this regard are the departments of Trade and Industry, Minerals and Energy, Environmental Affairs and Tourism as well as the South African Reserve Bank.

There appears to be a high level of consistency across the South African public sector in what is being articulated as the government's policy towards foreign investors, however, there are issues of coordination that need to be addressed. More specifically, the powers and functions of the minister of Minerals and Energy, and those of the minister of Environmental Affairs and Tourism overlap

in certain critical areas. Thus, for example, The Minerals and Petroleum Resources Development Bill (Notice 541 of 2002) and the National Environmental Management Act of 1998 (Act No. 107 of 1998) both empower their respective ministers to expropriate land and/or impose remedial costs for damages caused by investors. Without the duty on the part of both ministers to inform and cooperate with each other in these gray areas, loopholes in the legislative framework may be created. Although it is possible that the current South African Cabinet committee system may to some extent fulfill this coordinating function, it can also be discerned that coordination needs to take place not just at the Executive cabinet level. Coordination of foreign direct investment policies that are specific to the investment of multinational enterprises must occur at all levels of policy analysis, policy drafting and implementation. What may be needed is the creation of a coordinating body or institution that will stay abreast of all policies and legislation applicable to foreign investors and will thus be in a position to ensure a coordinated effort on the part of government with respect to regulating investment (both domestic and foreign). With this in mind, the next chapter addresses issues of coordination, rationalization and other organizational dynamics.