Analysing the Possible Impacts of the New Namibia Investment Promotion Act of 2016 on the flow of Foreign Direct Investment into the country

by

Tanya Chamel Klazen

Student Number: 17398992

Submitted in fulfilment of the requirements for the Degree of

Master of Laws in International Trade and Investment Law in Africa

at the

Faculty of Law

UNIVERSITY OF PRETORIA

Supervised by: Dr Femi Oluyeju

October 2017

DECLARATION

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Miss Tanya Chamel Klazen

10 October 2017

DEDICATION

This piece of work is dedicated to my Mother Helena Johanna Klazen and to my Father Christiaan Klazen

ACKNOWLEDGMENTS

Firstly, I would like to glorify the Creator of all things for his relentless love, his never-ending grace and for inspiring in me the passion and the enthusiasm to embark on this journey. If God is for you who can be against you? This is a promise that gives me courage to persevere and remains my point of reflection in my endeavours to succeed.

I would also like to express my sincere gratitude to my supervisor Dr Femi Oluyeju for his assistance and guidance throughout the completion of this research. This is surely a stepping stone to greater heights in my life. Thank you.

Lastly, sincere gratitude goes to three wonderful ladies, Mrs Bonaventura Hinda, Mrs Maureen Hinda and my dear friend Miss Suzan Lizzette Mbahahiza Katitire Hinda. Your every contribution in whatever way counted, thank you.

ACRONYMS & ABBREVIATIONS

AGOA	Africa Growth and Opportunity Act
ACC	Anti-Corruption Commission
BIT	Bilateral Investment Treaty
BEE	Black Economic Empowerment
EPZ	Export Processing Zone
EU	European Union
FDI	Foreign Direct Investment
FTAs	Free Trade Agreements
GDP	Gross Domestic Product
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
IEEA	Zimbabwean Indigenization Economic Empowerment Act
ICSID	International Court for Settlement of Investment Disputes
MFN	Most Favoured Nation Treatment
MAI	Multilateral Agreement on Investment
MNEs	Multilateral Enterprises
MIT	Ministry of Trade and Industry
NIPA	Namibia Investment Promotion Act
NIFA	Namibia Foreign Investments Act
NIC	Namibia Investment Centre
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development

RTAs	Regional Trade Agreements
SMEs	Small and Medium Enterprises
TNCs	Transnational Corporations
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax
WTTC	World Travel and Tourism Council
WTO	World Trade Organisation

DIRECTORY OF CASES

Consortium RFCC v Morocco

Genin v Estonia

Marvin Feldman v Mexico

Noble Ventures v Romania

UPS v Canada

USA (LF Neer) v United Mexican States

Waste Management v Mexico

LIST OF TREATIES AND INSTRUMENTS

The Namibian Constitution Act 1 of 1990

The Namibia Foreign Investments Act 27 of 1990

The New Namibia Investment Promotion Act 9 of 2016

The Namibia Income Tax Act, Act 24 of 1981

The Namibia Income Tax Amendment Act 4 of 2005

The Export Processing Zone (EPZ) Act 1995 as amended by Act 6 of 1996

The Namibia Agricultural (Commercial) Land Reform Act of 1995

The Namibia Companies Act 28 of 2004

The Namibia Black Economic Empowerment Act

The Namibia Companies Amendment Act 9 of 2007

The Namibia Competition Act 2 of 2003

The Close Corporations Act 26 of 1988

The Anti-Corruption Act 8 of 2003

The Zimbabwean Indigenisation and Economic Empowerment Act 14 of 2007

Table of Contents

DECLARATION 2

DEDICATION 3

ACKNOWLEDGMENTS 4

ACRONYMS & ABBREVIATIONS 5

DIRECTORY OF CASES 7

LIST OF TREATIES AND INSTRUMENTS 7

TABLE OF CONTENTS 8

ABSTRACT 12

CHAPTER 1 INTRODUCTION 13

1.1 BACKGROUND TO THE STUDY 13
1.2 RESEARCH PROBLEM 14
1.3 RESEARCH QUESTION(S) 15
1.4 THESIS STATEMENT 16
1.5 SIGNIFICANCE OF THE STUDY 16
1.6 LITERATURE REVIEW 16
1.7 RESEARCH METHODOLOGY 20
1.8 LIMITATIONS OF THE STUDY 20
1.9 OVERVIEW OF CHAPTERS 20

CHAPTER 2 22

THEORETICAL UNDERPINNINGS OF FOREIGN DIRECT INVESTMENT 22

2.1 INTRODUCTION 22
2.2 THE JOURNEY TOWARD FOREIGN DIRECT INVESTMENT REGULATION 23
2.2.1 The Havana Charter of 1948 24
2.2.2 The 1959Abs-Shawcross Draft Convention 25
2.2.3 The role of the World Bank 25
2.2.4 Efforts to progress the law through the New International Economic Order (NIEO) 25
2.2.5 The role of the Organisation for Economic Cooperation and Development (OECD) 26
2.2.6 The World Trade Organization 26
2.3 THE CONCEPT FOREIGN DIRECT INVESTMENT VS THE PROS AND CONS TO HOST ECONOMIES 26
2.3.1 Foreign Direct Investment the Concept 27
2.3.2 FDI has three distinct components 28
2.3.3 Four types of FDI 29
2.3.4 Potential Advantages of FDI for Host Economies 29
2.3.5 Potential Drawbacks of FDI for Host Economies 31

2.4 THE THEORETICAL UNDERPINNINGS OF FOREIGN DIRECT INVESTMENT 32
2.4.1 The Classical Theory of FDI 33
2.4.2 The Dependency Theory 34
2.4.3 The middle path Theory 34
2.5 THE PRINCIPLES UNDERLYING FOREIGN DIRECT NVESTMENT 35
2.5.1 Fair and Equitable treatment principle 35
2.5.2 The principle of Full Protection and Security 36
2.5.3 Most-Favoured-Nation principle (MFN) 37
2.5.4 National Treatment 37
2.5.5 Protection against Expropriation and Compensation 38
2.6. THE AFRICAN STANCE TOWARD A MULTI-LATERAL INVESTMENT TREATY 40
2.6.1 Definition and scope of Investment 40
2.6.2 Minimum Standard of Treatment 41
2.6.3 Guarantee and compensation scheme 41
2.6.4 Other terms 42
2.7 CHAPTER SUMMARY 43

CHAPTER 3 45

EVOLUTION OF FDI IN NAMIBIA 45

3.1 INTRODUCTION 45
3.2 HISTORICAL ARCHITECTURE OF THE NAMIBIAN ECONOMY 45
3.3 HISTORICAL EVOLUTION OF FDI LEGISLATION IN NAMIBIA 46
3.4 THE NAMIBIA FOREIGN INVESTMENTS ACT 1990 (NFIA) A LIBERAL FRAMEWORK 49
3.5 CHAPTER SUMMARY 49

CHAPTER 4 51

LEGAL FRAMEWORK FOR FOREIGN INVESTMENT IN NAMIBIA 51

4.1 INTRODUCTION 51
4.2 POSSIBLE PARADIGM SHIFT: THE 2016 NAMIBIA INVESTMENT PROMOTION ACT (NIPA) 52
4.2.1 The Namibia Investment Promotion Act 2016 (NIPA) 52
4.2.2 Namibia Investment Centre (NIC) 54
4.2.3The likely challenges accompanying NIPA to Namibia's FDI climate 55
4.3 STATISTICAL OVERVIEW: FDI INFLOWS INTO THE NAMIBIAN ECONOMY 60
4.4 FDI REGULATORS IN NAMIBIA 63
4.4.1 The Namibian Constitution 63
4.4.2 The Foreign Investment Act, Act 1990 and the 1993 amendment 63
4.4.3 The Export processing zone Act (EPZ) of 1995 as amended by Act 6 of 1996 64
4.4.4 The Agricultural (Commercial) Land Reform Act of 1995 64
4.4.5 The Companies Act 28 of 2004 as amended by the Companies Amendment Act 9 of 2007 64
4.4.6 The Competition Act 2 of 2003 64
4.4.7 The Close Corporations Act 26 of 1988 65

4.4.8 The Anti-Corruption Act 8 of 2003 ... *65*
4.4.9 The Income Tax Act 24 of 1981 and the Income Tax Amendment Act 4 of 2005 ... *65*
4.5 FDI IN NAMIBIA; BENEFITS FOR SMALL AND MEDIUM ENTERPRISES (SMES) ... 66
4.5.1 The concept of SMEs ... *67*
4.5.2 Challenges Facing SMEs in Africa ... *67*
4.5.3 SMEs and Large Industries: The linkages for Increased Market and Trade ... *68*
4.5.4 SME linkages and FDI: Benefits to the Namibian economy ... *69*
4.6 THE NEED FOR AN EFFECTIVE LEGAL REGIME AND EFFECTIVE IMPLEMENTATION OF LOCAL LAWS ... 70
4.6.1 The Ramatex Fiasco in Namibia ... *71*
4.7 CHAPTER SUMMARY ... 72
CHAPTER 5 ... 74
COMPARISON WITH THE ZIMBABWEAN INDIGENIZATION ECONOMIC EMPOWERMENT ACT (IEEA) ... 74
5.1 INTRODUCTION ... 74
5. 2 ZIMBABWE ... 74
5.3 ZIMBABWEAN INDIGENIZATION AND ECONOMIC EMPOWERMENT ACT (IEEA) ... 75
5.3.1 The Indigenisation & Economic Empowerment Legislative Framework ... *75*
5.3.2 Conceptualizing Indigenization ... *75*
5.3.3 Scope of the Zimbabwean IEEA ... *76*
5.3.4 Economic sector reservations for indigent Zimbabweans ... *77*
5.4 THE IMPACT OF THE IEEA ON FDI FLOWS INTO THE ZIMBABWEAN ECONOMY ... 77
5.5 HOW NIPA MIRRORS ZIMBABWE'S INDIGENIZATION LAW ... 79
5.5.1 Like the IEEA NIPA too looks like an Economic Empowerment policy ... *80*
5.5.2 Susceptibility to corruption and the openness to politicization ... *81*
5.5.3 Both NIPA and the IEEA contain Blanket Barriers ... *81*
5.5.4 FDI Deterrent ... *81*
5.5.6 Empowerment programmes in other developing countries ... *82*
5.6 CHAPTER SUMMARY ... 83
CHAPTER 6 ... 84
CONCLUSIONS AND RECOMMENDATIONS ... 84
6.1 INTRODUCTION ... 84
6.2 SUMMARY OF FINDINGS ... 85
6.3 CONCLUSIONS ... 86
6.4 RECOMMENDATIONS ... 86
BIBLIOGRAPHY ... 92
1. TEXT BOOKS ... 92
2. JOURNAL ARTICLES ... 92
3. LEGISLATION ... 93
4. CASE LAW ... 94

4.1 United States of America *94*
4.2 ICSID *94*
5. WEBSITES 94
6. NEWS PAPER ARTICLES 96
7. OTHER 96

ABSTRACT

The purpose of this paper is to discuss and to anticipate the possible impacts Namibia's New Investment Promotion Act (NIPA) may have on the flow of Foreign Direct Investment into the country. The aim is to highlight the researchers' view that restrictive laws are harmful and deters investors. She maintains that NIPA be overhauled to create certainty and build investor confidence. Foreign direct investment is a significant part of every economy. It graces hosts with foreign revenue, technical know-how, technological spill overs, job creation, but to mention a few. The researcher also opines that liberal investment policies cannot be attributed to economic stagnation. The greatest evil in Africa is illicit financial flows, prompted by administrative corruption and the more. It is also noted throughout the paper that as Africans we need to focus on the proper implementation of domestic laws to see greater growth. This is where law-makers should direct their creative energies to. Liberal investment regimes are not the problem, but rather the ineffective implementation of those related laws and policies.

Key words; Namibia, Foreign Direct Investment (FDI), Investment Promotion, Hosts, Restrictive policies

CHAPTER 1 INTRODUCTION

1.1 Background to the study

Namibia has always been an attractive destination for Foreign Direct Investment (FDI). It boasts with substantial quantities of natural resources such as uranium, diamonds, zinc, copper, oil, all of which have spurred the flow of FDI into the country.[1]The Namibian economy is also known for political stability, good infrastructure, modern banking and financial systems etc, all which investors seek when they decide to invest in a country.

Apart from the rich extractive industry (the secondary economic sector), the primary economic sector is another important segment due to its generation of large volumes of foreign exchange earnings through commodity exports.[2] This primary sector covers the rearing of livestock, processing of meat products, crop farming and forestry.[3] The country also has one of the most productive fishing industries in the world based on the Benguela current system.[4] "The Benguela current system supports rich populations of fish, forming the basis for the Namibian marine fisheries and fills up more than 25% of the primary sector activities".[5]

Shortly after independence in 1990, endeavouring to increase the flow of foreign investment into the country, Namibia passed the Foreign Investments Act of 1990 which has since been the primary legislation governing Foreign Direct Investment (FDI) in the country.

Investments in the service sector according to the KPMG economic snapshot report has also boomed tremendously in the recent years contributing a whole 62% to the country's GDP.[6] The main components in this sector are wholesale, retail, transport and real estate. Tourism is a major contributor to this sector. According to the World Travel and Tourism Council

---

[1] https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3 accessed 24/08/2017
[2] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdf accessed 04/09/2017
[3] n 2 above
[4] n 2 above
[5] n 2 above
[6] n 2 above

(WTTC), the total contribution (direct and indirect) of tourism to Namibia's GDP in 2016 was $1.6 billion (14.9% of 2016 GDP).[7]

The Gross Domestic Product (GDP) growth of the Namibian economy has however slowed significantly in 2016 to just 0.1% and was expected to recover to 3.5% in 2017 and to 4.8% in the year 2018. This slowdown in the year 2016 is said to have been prompted by weak external demands and slow growth in the services sector. It is said that the recovery forecast for 2017 will be dependent on higher uranium production. [8]

In November 2016, the Namibia Investment Promotion Act 2016 (NIPA) was signed into law by the president, and is set to replace the 1990 Investment legislation once it becomes operational. NIPA supports greater government regulation to ensure that FDI serves the developmental goals of the country. Under the new legislation, various initiatives such as local employment, skills development and joint ventures, which investors must comply with, have been introduced. The new law also reserves certain sectors of the economy for government and domestic investors.

However, NIPA is currently under review with its highly controversial provisions predicted to be potentially harmful to the investment climate in the country. The newly promulgated Act comes with several extra hurdles for investors to jump, especially the red tape introduced into the investment regulatory landscape in Namibia.

1.2 Research Problem

Over the last few years, it's reported that Namibia has been quite unsuccessful in attracting high levels of FDI, leading to raised private and public debt levels.[9] These barriers are largely attributed to low levels of openness to foreign investment.[10]

---

[7] n 2 above
[8] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdf accessed 04/09/2017
[9] n 8 above
[10] n 8 above

Currently in Namibia, FDI is governed by the Foreign Investments Act 27 of 1990[11]. However, on 16 August 2016, the President of the Republic of Namibia signed new investment legislation, the Namibia Investment Promotion Act (NIPA)[12]. NIPA is therefore set to replace the Foreign Investments Act, 1990 and there are concerns that the new law may have far-reaching consequences for the flow of FDI into Namibia. Whereas the 1990 legislation provides for a free investment regime backed by institutional support, the new legislation (NIPA 2016) affords wide ranging discretionary powers to the Minister, clearly incorporating a red tape into the country's investment regime and landscape.[13]

It is in light of the above that this study seeks to interrogate the likely impacts of Namibia's new investment legislation, NIPA, on the flow of FDI into the country and the economy as a whole. Therefore, the research agenda this study seeks to plug is the likely leaks associated with the implementation of NIPA on the FDI climate in Namibia. Furthermore, the study will endeavour to highlight the impacts that may be brought about by restrictive investment policies and recommends how the country can use calculative and informed draftsman-ship to reap 'the good fruits' that come with FDI.

1.3 Research Question(s)

The overarching research question which this study will seek to answer is what is the likely impact of Namibia's new investment legislation on the on the flow of FDI into the country? In answering the broad question, the following sub-questions will also be answered-

i. What is foreign direct investment and what are the theoretical underpinnings that drive FDI in host economies?
ii. How has the Namibian investment legislation evolved over time?
iii. How is the new Act different from the old 1990 Act, and what is the likely impacts of the new Act on the flow of foreign direct investment into the country?

[11] Namibia Foreign Investments Act 27 of 1990
[12] Namibia Investment Promotion Act 9 of 2016
[13] https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreigninvest?Id=2707&STitle=ENSafrica%20ENSight?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original accessed 24/08/2016

iv. In what way can Namibia learn from the Zimbabwean Indigenization Economic Empowerment Act (IEEA) as a negative example of reckless nationalism in investment legislation?
v. What should the new policy framework/ regulations look like in respect of the economic sector reservations and the joint ownership aspect?

1.4 Thesis Statement

This study will seek to investigate the possible impact of Namibia's new Investment legislation, NIPA, on the flow of FDI into the country and the economy as a whole. It will therefore argue that with NIPA set to replace the Foreign Investments Act, 1990, it would have far-reaching consequences for the flow of FDI into Namibia. The argument bases on the fact that, while the 1990 legislation provides for a free investment regime backed by institutional support, the new legislation seems to promote 'red-tapism' and reckless economic nationalism through restrictive investment policies, all of which may negatively transform the investment landscape of Namibia.

1.5 Significance of the Study

The study will endeavour to make a positive contribution towards an improved investment regime in Namibia. Currently Namibian legislative drafters are busy formulating the regulations that will form the backbone of the newly promulgated investment legislation. Importantly, the study will make proposals that could be used by drafters toward finalizing these regulations. The hope is to strike a positive balance between interventionist policies strongly public sector-biased with the risk of deterring foreign direct investment inflow into the Namibian economy. It is therefore the sincere hope of the researcher that the study will be timely in this regard.

1.6 Literature Review

The research agenda of this study is to investigate the possible impact of Namibia's new Investment legislation, NIPA, on the flow of FDI into the Namibian economy. The argument is that NIPA set to replace the Foreign Investments Act 1990 may halt the flow of FDI into

the country. This roots in the fact that, the 1990 legislation is very liberal backed by institutional support, whilst the new legislation seems to promote 'red-tapism' and reckless economic nationalism through restrictive investment policies, all of which may negatively transform the investment landscape of Namibia.

The researcher will thus seek to address the pitfalls brought about by restrictive investment legislation as opposed to regulative ones. This will be done by articulating what was opined by previous scholars in the field of FDI.

Sornarajah[14] opines that; that investments should be balanced. It should mirror both the interests of home (investors' country of origin) and host (the FDI recipient) countries. It should take due account of the development policies and objectives of host governments as well as their right to regulate investment for the public interest. The researcher imitates Sornarajah's view and will reflect same in this study.

Irandoust's (2010) views will also be discussed[15]. He talks of how FDI is one of the major sources that contribute to economic growth through capital accumulation, technology transfer and knowledge spill overs. World Bank reports show that FDI accounts for more than 60 percent of private capital flows to the developing world. This expansion of FDI has encouraged policymakers in developing countries to attract more foreign capital by reducing barriers to FDI and offering tax incentives and subsidies trusting that FDI promotes economic growth.

The world bank reports also show that Namibia has enjoyed a sustained period of strong growth between 2011 and 2015. The Namibian economy grew at an average annual rate of 5.6% per annum[16]. This growth said to have been driven by massive investments in extractive

---

[14] M Sornarajah *The International Law on Foreign Investment* (2010)

[15] MA Irandoust, 'Survey of Recent Developments in the Literature of FDI – Led Growth Hypothesis' (2010) *The Journal of World Investment & Trade*

[16] http://www.worldbank.org/en/country/namibia/overviewaccessed 27/07/2017

projects, strong export prices, rapid private credit growth, and a program of deficit-financed fiscal stimulus.[17]

According to the ministerial annual report 2015/16, the Namibia Investment Centre in this financial year (2015/16) facilitated new investments to the value of N$409 million, which created about 260 jobs in various economic sectors such as tourism, hospitality, agriculture, manufacturing, construction and services. During this same period under 2015/2016, the ministry facilitated 13 new investments worth N$2.8 billion and committed to create 836 permanent jobs.[18] These investments are from South Africa, Germany, Zimbabwe, Portugal, Belgium, Italy and Dubai.[19] The new investment law (NIPA) is however expected to restrict some of the economic sectors to foreign investors and to introduce investor-performance requirements. The researcher's aim is to evaluate how these reservations and performance requirements will affect the investment climate in Namibia.

Other authors like, Lall and Narula (2004)[20] hold different views that more flexible and open laws instead of boosting the economy of the host state rather allows foreign investors to exploit existing capabilities more freely. The researcher tends to look at these differing views comparing them with those of Dr Enga Kameni[21] a trade expert, stating that;

> "though countries need to craft packages favourable enough to attract investors, they have a duty, both explicit and implicit to effectively regulate the activities of foreign companies operating in their territories".[22]

Dr Kameni's views will be discussed regarding the Ramatex fiasco in Namibia. This is to highlight that the failure to reap from FDI should not be attributed to liberal investment policies, but rather, to the failure to regulate and to implement domestic laws.[23]

---

[17] n 16 above

[18] "Annual Report 2015/2016" http://www.mti.gov.na/downloads/MITSMED%20Annual%20Report%20201516.final.pdfaccessed 27/07/2017

[19] n 18 above

[20] S Lall & R Narula, 'Foreign Direct Investment and its Role in Economic Development: Do we Need a New Agenda?' (2004) *The European Journal of Development Research*

[21] DR Enga Kameni is a Manager Legal Services with the African Export-Import Bank (Afreximbank). This is the premier Trade and export development bank in Africa. He holds a Ph.D. in International Trade Law from the University of Pretoria where he was a potter fellow

[22] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323accessed 24/08/2017

[23] n 22 above

The theoretical underpinnings namely the classical, dependency and the middle path theories will also be discussed in much dept. These underpinnings come from the viewpoint of Sornarajah and will be used to map out the different notional drivers behind FDI in developing countries.

The researcher will furthermore evaluate the Namibian investment regime as is essentially regulated by framework legislation, namely the Investments Promotion Act 27 of 1990 and its 1993 amendments. This Act is to be replaced by the Newly Promulgated Investment Promotion Act 9 of 2016 (NIPA) once same is enforced. These Acts and their regulations should form the backbone of Investment promotion in the country. They are to reflect sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, to reduce unemployment, to accelerate growth and to diversify the economy. The new Namibia Investment Promotion Act (NIPA) however provides for reservations of certain economic sectors and business activities to certain categories of investors which is the crux of this study.

Findings also dictate that not much has been documented on the New investment promotion Act (NIPA) which is at the core of this research and therefore the writer reviewed some of the documented findings, (articles, newspaper reports), however direct or indirect.

The researcher will also explore the linkage between income growth rates and FDI inflows as looked at by Busse and Groizard.[24] According to them countries need a sound business environment and well nuanced government regulations to be able to benefit from FDI. The researcher shares these views and will thus strive to explore how this can be done.

The Indigenization Economic Empowerment Act (IEEA) passed in Zimbabwe will be scrutinized by the researcher to articulate how reckless economic nationalism can deter FDI inflows into host countries. The views of Gamuchirai Chiwunze[25] in this regard will be

[24] http://works.bepress.com/andrew_guzman/15 accessed 27/027/2017
[25] Gamuchirai Chiwunze a research fellow at the Zimbabwe Economic Policy Analysis and Research Unit (ZEPARU)https://www.linkedin.com/in/gamuchirai-chiwunze-9b865023 accessed 17/09/2017

discussed. He opines that "economic empowerment policies are of concern to foreign investors if they are perceived to amount to appropriation and violation of private property rights".[26] The researcher accords with this view and reasons will be articulated in chapter 5.

1.7 Research Methodology

This research will be library and desk-top based. Reliance will be placed on both primary and secondary sources and all related approaches/methods-theoretical, descriptive, analytical, comparative and prescriptive will be deployed in this investigation.

The writer will adopt a more descriptive approach in the sense that the legislation under investigation is relatively new, only passed in the year 2016. The new Namibia Investment Promotion Act (NIPA) therefore has not invited much literature. The writer's approach is thus descriptive in narrating the particular sections in the new Act which form the crux of this study. The researcher will furthermore use Zimbabwe's indigenization laws as comparator. This comparison will serve as a measuring tool to somehow analyse the impacts that may possibly be brought about by restrictive investment policies in host economies.

1.8 Limitations of the Study

The study will limit itself to analysing three aspects in the new Namibia Investment legislation (NIPA 2016). The economic sector reservations, the joint ownership aspects and the wide discretionary powers afforded to the Minister by this new Act. [27]

1.9 Overview of Chapters

This study is structured into six chapters.

Chapter 1 This chapter is an introductory chapter and provides readers an overview of the research paper.

---

[26] http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13 accessed 17/09/2017

[27] Namibia's Investment Promotion Act, Act 9 of 2016

Chapter 2 This chapter serves as the theoretical chapter. It will define the important terms and discuss the general evolution of FDI regulation and the international initiatives to regulate foreign direct investment dating back to 1948. The chapter will also reflect global trends regarding FDI inflows to host countries.

Chapter 3 Chapter 3 is a narrative chapter of chapter 1 and will therefore narrate on the historical evolution of FDI legislation in Namibia. It will discuss the current 1990 Act (NFIA) to underpin how this Act differs from the new Act NIPA.

Chapter 4 Chapter 4 is the analytical chapter and herein the researcher wishes to particularly answer the thesis of the study, that the Newly legislated investment Act NIPA will have far reaching consequences for the Namibian investment climate. Herein the new Investment Act NIPA will be discussed to show how this Act diverges from the 1990n Act (NFIA). This chapter will furthermore, specifically highlight the probable challenges to be brought about by NIPA 2016 on the flow of FDI into Namibia. It will discuss the Namibian economy as an investment destination. This chapter will also delve into what mechanisms are in place to manage regulatory policies across different levels of government to ensure consistency and transparent application of regulations (the role of the Namibia Investment Centre as a one stop shop for investors). Small and Medium Enterprise's SME's will also be discussed to demonstrate how linkages with foreign investors can develop this important sector.

Chapter 5 This is a comparative chapter. The comparison will discuss the Zimbabwean Indigenization Act (IEEA) as a barrier to FDI into Zimbabwe. It will reflect on how NIPA resembles the IEEA.

Chapter 6 In this chapter, a curtain is drawn on the discussion and recommendations will be made.

CHAPTER 2

THEORETICAL UNDERPINNINGS OF FOREIGN DIRECT INVESTMENT

2.1 Introduction

The concept investment a highly controversial yet an interesting notion shaped by historical, economic and political factors unexplainable by standing theories of international law. This was explained by the famous writer Sornarajah in his book "the international law on foreign investment" where he states that[28];

> 'Positivism is where the bulk of international theories are rooted in, portraying the law in a static existing phenomenon, unaffected by political and other trends making it incapable even impractical to apply same to situations where existing principles of law, formulated at a time when they were kept in place by hegemonic control and dominance are under attack. Other theories are idealistic rooted in the objectives of morality and conscience. Sornarajah further opines that these theories can also not adequate to explain situations in which different value systems of somewhat equal moral validity are in collusion'.[29]

This chapter seeks to advance the over-all evolution of foreign direct investment (FDI) regulation and the standing international initiatives introduced to somehow regulate FDI investment dating back to 1948. Most of these initiatives remained same and this is evidenced by the fact that there exists no multi-lateral framework to regulate international investment law. The absence of this multi-lateral framework therefore explains why there exists no standard definition of investment acceptable to the international community of states.[30]This chapter will therefore conceptualize some of the various definitions of investment as well as distinguish foreign direct investment from portfolio investment. The researcher also undertakes to inform the readers yet again of the various failed attempts for a multi-lateral investment treaty on foreign investment.

---

[28] Sornarajah (n 14 above) 6-7

[29] Sornarajah (n 14 above)

[30] VN Fru *The international law on foreign investments and host economies in sub-saharan Africa* (2011) 14

There has always existed a notion that investments, particularly direct investments (FDI) are beneficial to host economies. FDI's are important and provides for open and successful international economic systems, and is a major mechanism for development.[31]Foreign direct investments bring development in the form of skills and technology transfer and most importantly foreign capital. This notion has however proved not to be true for many developing countries as in as much as FDI brings economic development it may not always be advantageous to host economies. Proper regulation establishing the role of FDI in the growth of the host economy is thus crucial to ensure a perfect balance and to make sure that host states benefit from inward FDI.[32] The advantages and disadvantages that accompany FDI being the basis of this study will off necessity be outlined

Light will further be shed on the impacts that restrictive FDI investment policies have on the flow of FDI into host countries generally. The various principles as well as the theories that underpin investment as opined by Sornarajah[33], namely the classical, dependency and middle path theories will be discussed in this chapter.

2.2 THE JOURNEY TOWARD FOREIGN DIRECT INVESTMENT REGULATION

As stated in the introduction above, there is no multilateral framework regulating international investment law. Despite the demands, saying it would create a conducive and protective business environment there has been many failed attempts and the failures therefore not attributable to a lack of trying. Many international efforts to regulate came from the Bretton woods institutions, the United Nations (UN), the Organization of Economic Change and Development (OECD) etc[34].

[31] http://www.ejist.ro/files/pdf/369.pdf accessed 18/08/2017)
[32] The development dimension of FDI: policies to enhance the role of FDI in the national and international context policy issues to consider (2002)
[33] Sornarajah (n 14 above) 8-60
[34] S Supedi *International Investment Law: Reconciling Policy and Principle* (2012) 19

FDI is considered as an important tool of economic growth especially in developing nations in Africa.[35] The belief is that FDI inflows, creates jobs in the host economies, facilitate technology transfers and is a great source of foreign revenue for developing countries.[36] The end of colonialism and the rise of multilateral corporations therefore meant new laws to protect investments.[37] African states in these times provided tremendous incentives to attract investment relying on the 'classical theory' that foreign direct investment is entirely beneficial to host economies.[38] This race to obtain foreign investment was so high that states gave incentives that they would never have considered giving.[39] It is therefore opined that this massive growth in foreign investment, is what awoke the need to regulate.

The researcher therefore undertakes to pin down the various attempts toward a multi-lateral framework made by several international institutions.

2.2.1 The Havana Charter of 1948

Attempts toward a multi-lateral framework trace all the way back to the Havana Charter of 1948. The initial draft which did not provide for international investment, a deliberate oversight because the United States were fearful that, 'investment provisions negotiated at a multilateral conference might depict the lowest common denominator of protection to which any of the participants would be willing to agree to. This was later amended to include several provisions referring to foreign investment.[40] The Havana Charter was to launch the International Trade Organisation (ITO) a replacement for the temporary GATT arrangement and addressed both international direct investment activities under articles 11 and 12.[41] These provisions pointless to mention at this stage as the charter itself never came into effect.[42]

---

[35] V Mosoti "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 *North western Journal of International Law and Business* 95

[36] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017

[37] Sornarajah (n 14 above) 6-7

[38] Sornarajah (n 14 above) 48

[39] V Mosoti "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 North western Journal of International Law and Business 95

[40] Supedi (n 34 above)

[41] Supedi (n 34 above) 20

[42] Supedi (n 34 above) 20

2.2.2 The 1959Abs-Shawcross Draft Convention

The 'Magna Carta' of private investors adopted by the major capital exporting countries.[43] This was the description given to this convention which protected the interests of foreign investors by introducing much stronger standards of protection, i.e. a broader definition on expropriation and an investor-state investment dispute settlement mechanism. The convention strongly opposed by capital importing countries was never adopted. Most of the provisions from the Abs-Shawcross draft were later incorporated into the 1967 Draft Convention on the Protection of Foreign Property proposed by the OECD which was also never adopted.[44]

2.2.3 The role of the World Bank

The World Bank having a long-standing interest in the promotion of FDI has allied itself with several initiatives like the convention for the settlement of Investment disputes (1965), the convention establishing the multi-lateral investment guarantee agency of 1985 and the 1992 guidelines to deal with foreign direct investment.[45] It is however during this time after 1992 that it became clear that the feasibility to establish a multilateral investment treaty (MIT) was not yet possible and thus prompted bank experts to draft sets of guidelines to guide the treatment of foreign direct investment.[46]

2.2.4 Efforts to progress the law through the New International Economic Order (NIEO)

These efforts started when the developing world gained a numerical majority in the UN. They attempted to use the system to introduce fundamental reforms to the laws governing international economic relations between states. [47] The efforts were started by the now defunct United Nations Commission on Transnational Corporations (UNCTC) and were geared towards a draft code of conduct on multinational corporations which failed because it favoured the interests of the developing states at the peril of the developed world.

---

[43] Supedi (n 34 above) 21
[44] Supedi (n 34 above) 21
[45] Supedi (n 34 above) 29
[46] Sornarajah (n 14 above) 257
[47] Supedi (n 34 above) 23

Next was a movement toward creating a New International Economic Order. This gave developing countries greater control over foreign investments.[48] The codes were resisted by the developed states, which put forward their own versions, causing it not to succeed.

2.2.5 The role of the Organisation for Economic Cooperation and Development (OECD)

In the year 1995 the (OECD) created the Multilateral Investment Agreement (MAI). This agreement was not successful as it came with the liberalisation theory concerning itself more with protecting investors and their investments in host states rather than providing and promoting the protection against economic and human right abuses [49]

2.2.6 The World Trade Organization

The World Trade Organisation (WTO) was the next focus as states considered creating an MIT under the auspices of the WTO. The success under the WTO, though not to the extent intended was in the Uruguay round where the Trade Related Investment Measures (TRIMS) were put into place.[50]

2.3 THE CONCEPT FOREIGN DIRECT INVESTMENT VS THE PROS AND CONS TO HOST ECONOMIES

In the absence of a multi-lateral treaty on investment, the concepts commonly adopted are found in the different bilateral treaties (BIT's) signed between states. BITs stem all the way from the 1990s and are the regulatory framework within which many investments operate. Where there is no BIT, domestic regulation commonly known as investment promotion acts define this term. The long and the short is that states have the flexibility to define for themselves, what constitutes direct investment and could thereby expand the scope of their foreign investors' property protection to whatever lengths they want.[51] The idea to protect direct investment in the international sphere arose because if aliens and their property are not

[48] Supedi (n 34 above) 23
[49] Sornarajah (note 14 above) 258
[50] Mosoti (note 35 above) 102
[51] KN Schefer *International Investment Law; text cases and materials* (2013) 60

afforded minimum standards of protection in foreign states, state responsibility would be triggered.[52]

2.3.1 Foreign Direct Investment the Concept

For the last decade FDI has proven to be the greatest and most stable source of external capital for developing countries exceeding portfolio investment, other private capital inflows and development aid/ official development assistance (ODA) by far.[53] But what exactly is FDI?

FDI as defined by the United Nations Conference on Trade and Development (UNCTAD) is a long-term investment with a lasting interest and control in the host economy.[54] The International Monetary Fund (IMF) (2008) accords with UNCTA. According to Mosima Makola a business undertaking is a foreign direct investment if the ownership of the foreign investment remains in the host country and if such ownership possesses an advantage over the local competitors.[55]

> The threshold for FDI is normally considered ten percent or more equity capital stake of the ordinary shares for an incorporated enterprise or its equivalent for an unincorporated enterprise.[56] Sornarajah in his book 'the international law on foreign investment' opines that 'there is foreign direct investment when a transfer of tangible or intangible (intellectual property) assets from the investors home country to the host country solely for the use in the host country to generate wealth under the sole or partial control of the owner of the assets is visible'.[57] On the facet it is therefore clear that FDI extends beyond the borders of states.

[52] Sornarajah (n 14 above) 11

[53] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017

[54] The UNCTAD definition bases on the OECD (2008) and International Monetary Fund (IMF) of (2009)

[55] https://www.researchgate.net/publication/237367817_THE_ATTRACTION_OF_THE_FOREIGN_DIRECT_INVESTMENT_FDI_BY_THE_AFRICAN_COUNTRIES?ev=prf_high accessed 27/07/2017

[56] n 53 above

[57] n 53 above

2.3.2 FDI has three distinct components

Equity Capital. Equity Capital accrues when the foreign direct investor purchases shares of an enterprise in a foreign country. Greenfield FDI, dealing with projects that entail the establishment of new entities is also part of this component;[58]

Reinvested earnings, is the direct investors' share of earnings and is not distributable as dividends by affiliates, or earnings not paid to the direct investor;

Intra company loans or debt transactions, these can be long or short-term borrowings and lending's between direct investors and affiliates.

If in a transaction an investor does not acquire equity share, there cannot be said to be a foreign direct investment. Foreign direct investments can take two pathways; either via mergers and acquisitions or though setting up an entirely new entity in the host economy.[59] Mergers and acquisitions (M&A's) are big parts of the corporate finance world. A merger is a combination of two companies, and an acquisition is where one company buys another. M&A's are often arranged transactions, bringing separate companies together to form larger ones.[60]

It is furthermore noted that FDIs, being about investing in overseas markets or beyond national borders solely for conducting a specific business activity rarely relies on land or property investments even though same may be profitable.[61] An affiliate may own assets like land and buildings, but these are usually connected with the running of the business and by the presence of the running/ controlling of the business undeniably constituting a foreign direct investment.[62]

[58] n 53 above
[59] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017
[60] http://www.investopedia.com/university/mergers/ accessed 18/08/2017
[61] n 59 above
[62] n 59 above

2.3.3 Four types of FDI

The four main types of FDI as pointed out by the United Nations Conference on Trade and Development (UNCTAD) is market -seeking, efficiency-seeking, resource-seeking; and, strategic asset-seeking FDI.[63]

Market-seeking investors are concerned with the size and expected growth of the host countries market. These investors thus look at the regional trade agreements in place that might enlarge the market giving them more access and the bilateral trading agreements with other countries.[64]

Efficiency-seeking FDI aims at rationalized investments for the foreign investor's operations by fully riding on lower costs or economies of scale and scope.[65]

Resource-seeking FDI occurs when there is resource (raw materials) acquisition prospects. The African continent attracts lots of these types of investors since Africa is big on extractives like oil and gas.

Asset-seeking FDI is driven by access to created assets, i.e. special skills or technology.[66] Many trans-national companies (TNCs) may combine the four types.

2.3.4 Potential Advantages of FDI for Host Economies

As seen in many scholarly articles on the subject matter, there is no doubt that those lauding FDI in host economies attribute it to the spill-overs into these economies in the form of foreign capital, skills transfer, employment creation, and enhanced competition.[67]

---

[63] n 59 above
[64] n 59 above
[65] n 59 above
[66] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017
[67] http://2015.essa.org.za/fullpaper/essa_2942.pdf accessed 27/07/2017

FDI unlike any other increases and expands the host countries productive capacity.[68] This is because foreign investors come with their tangible and intangible assets into these economies which would otherwise not have been had the investor not entered the host country. This new investment activity then drives job creation and massive income growth.[69]

International investments further serve as a conduit to locally diffuse technology and expertise through the creation of local supplier linkages and via the provision of improved access to international markets.[70]

These direct investments increase foreign reserves in host economies as it is the largest source of external finance for developing countries.[71] These investments as opposed to portfolio or other investments are more stable sources and are much easier to service than commercial debt or portfolio investment.[72] FDI can also serve as an important source of government revenue i.e. 'through payment of corporation tax, or duties on traded goods'.[73]

FDI as previously stated, creates employment in host countries that would otherwise not be available if these investments were not present.

Foreign direct investment through a change of ownership (acquisition) / merger/ can advance or add capacity which in turn improves efficiency of existing assets and thereby raising the overall outputs.[74]

When FDI is concentrated in the right areas according to the needs of host economies, it can help to channel resources to more productive uses and may through its competitive nature

---

[68] http://www.oecd.org/daf/inv/investment-policy/pfi-update.htm accessed 27/07/2017
[69] n 68 above
[70] n 68 above
[71] n 66 above
[72] n 66 above
[73] n 66 above
[74] http://www.oecd.org/daf/inv/investment-policy/pfi-update.htm accessed 27/07/2017

ensure that all establishments strive toward improved efficiency and thereby prompting only those that are efficient to exist.[75]

Finally, untrue as it may sound some FDIs, with their modern clean technologies from the developed world may improve the host economies environment. An example is when investors introduce low-carbon production processes in the production of goods and services.[76]

These potential benefits are available to all host countries, if investment allocation is strategic and done in a sustainable manner. This is possible when host states allow the right kind of FDI as opposed to investments which will not spearhead any meaningful socio-economic development.

2.3.5 Potential Drawbacks of FDI for Host Economies

When foreign direct investment is an end in itself it can have very detrimental effects for a host country's economy as FDI is not always beneficial. As stated above host economies need to be strategic in the placement of FDI to avoid some of the following drawbacks;

FDIs often have the potential to crowd out domestic investors and unless a positive way can be found to align the competition and to make it level, domestic investors will always suffer.[77] Although FDI is said to create jobs, new employment may be offset by the disappearance of old jobs in competing enterprises. Growth in strategic enterprises and domestic capabilities may also be hampered by foreign business activity.[78]

[75] n 74 above
[76] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017
[77] n 76 above
[78] n 76 above

If careful consideration is not taken by host economies, investments may flow into sectors lacking sufficient production or social benefits or which may cause environmental derogation. Investment impacts rest on quality and not quantity.[79]

Job creation by transnational corporations are normally concentrated in the lower skilled areas with the low wage packages whereas the more technical and specialized areas with the higher wage ratios are left for the investors own people. This trend tremendously curbs the spill-over of skills and new technology much desired by host states, keeping developing countries hooked on foreigners and unable to compete.[80]

FDI inflows also have the potential to adversely affect host economies net exports because instead of the foreign affiliates sourcing from domestic firms in the host state they normally tend to do so from other trans-national corporations abroad, from more established suppliers in the home state, or from third states.[81]

Many FDIs, if not properly managed may lead to land derogation, water supply depletion, pollution (air/water), loss of biodiversity especially in the agricultural sector.[82] It is also true that in Africa where capital is a problem, much is not spent on environmental protection and thus when an investor comes many countries are reliant on their green schemes. This may many times only be a cloak and these corporations might not look after the environment as they should.

2.4 THE THEORETICAL UNDERPINNINGS OF FOREIGN DIRECT INVESTMENT

The underlying section attempts to surmise the relevant theories, hypotheses and schools of thought that contribute to the understanding and fundamental motivation of FDI flows. The researcher opines that exploring these theories will assist in the study and it will support the

[79] http://www.oecd.org/daf/inv/investment-policy/pfi-update.htm accessed 27/07/2017
[80] http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017
[81] n 80 above
[82] n 80 above

arguments presented. The researcher opines that regulation is important to make sure that host countries reap as much as possible from the flow of FDI. Host economies must be alert to the needs of the investor which is profits to the home economy and thus greater protection of the investment and that of the host country which is sustainable economic growth and development. Formulation of investment regulation should reflect these competing interests and must strive toward setting a positive balance beneficial for both host and home states.

In view of the above the researcher dedicates the underlying discussion to the theoretical underpinnings of FDI that host countries need to be mindful off.

2.4.1 The Classical Theory of FDI

The classical theory, a theory not without criticism based on neo-liberal views harnessing market-orientation, liberalization of capital markets and the assurance of freedom of movement of multi-lateral corporations[83] wholesomely bases on the premise that foreign investment is advantageous to the host country. Its proponents opine that foreign direct investment brings new technologies to host countries, provides employment opportunities, and brings new technological skill, improved or else development of infrastructure which is all beneficial to the host state. It is these potential benefits that prompt the protection of foreign investment by international law.

Sornarajah[84] in his book notes that despite the widespread acceptance of the theory, the theory does not provide answers as to why despite all the potential benefits, there is still state meddling with foreign direct investment. He argues that even though this theory stands accepted, evidence is yet to avail its accuracy. He backs this by stating that;[85]

> ‘though initial capital inflows may take place through greater investment, there is evidence that outflows by way of repatriation of profits are greater than the inflow. Some studies indicate that capital outflows associated with foreign investment may be twice as much as the initial inflows. The presumed advantage of the new technology that is brought in may also be incorrect, these technologies are the ones that have become outdated in their home countries. Consumer tastes are created for products of

[83] Sornarajah (n 14 above) 25
[84] Sornarajah (n 14 above)25
[85] Sornarajah (n 14 above) 49-50

little social utility. A classic example being the introduction of breast-milk substitutes. Also, the claimed skills to be brought are in many times concentrated in the low wage work-chain, whereas the high-ended shops remain in the control of the hosts keeping their skills close by. The infrastructure improvements to the host economy by these investors are also just a charade as if these are set up it only benefits the elite and does not coincide with development goals in the host state, set to benefit even the grass-root man. It is also so that alliance between the elite of the host state and the personnel of the international corporation has unhealthy effects on the political life of the host state'.[86]

2.4.2 The Dependency Theory

As opposed to the classical theorists, the dependency theory holds that foreign investment is uniformly bad.[87] The argument is that investors do not develop the host state but in turn keeps them reliant on the central economies of the developed states.[88] The arguments hold that multinational corporations being the main investors find their mother branches in the developed states and functions through subsidiaries in developing states which means their interests are geared toward the parent/mother company and not the host state. Foreign direct investment therefore does not bring about meaningful economic development to host states as their motives are profit driven making them oblivious to the harmful effects their investments may have on the environment of host states.[89]

Proponents of the dependency theory hold that development is impossible in the peripheral economies unless they can break out of the situation in which they are tied to the central economies through foreign investment.[90]

2.4.3 The middle path Theory

The middle path theory strives to strike a middle course between the classical theory and the dependency theory.[91] This theory concedes with both the classical theorists and the dependency theorists that FDI is both good and bad. It thus based on the carefully regulated codes to guide FDI. It and accepts that multinational corporations can engineer development,

[86] Sornarajah (n 14 above) 49-50
[87] Sornarajah (n 14 above) 53
[88] Sornarajah (n 14 above) 53
[89] Sornarajah (n 14 above) 53
[90] Sornarajah (n 14 above) 53
[91] Sornarajah (n 14 above) 58

if properly harnessed.[92] This is the theory that the researcher aligns with as nothing good was ever immune to what is also potentially bad. The challenge is just to find the middle path that strikes that positive balance. The researcher also opines that a middle path is possible if policy-makers adopt a hybrid framework of law making in which both foreign investors and the hosts can benefit.

2.5 THE PRINCIPLES UNDERLYING FOREIGN DIRECT NVESTMENT

The principles that underlie FDI are the most important aspects to the subject and are incorporated in almost every bilateral investment treaty ever signed. These principles root in the minimum standards of protection that host states are required to extent to foreign investments within their territories. Non-discrimination; fair and equitable treatment; full protection and security of investments and the investor are the most widely accepted minimum standards and will be discussed below.[93]

2.5.1 Fair and Equitable treatment principle

Plausibly regarded as a catch-all provision for investor protection, this principle is a common reference to a standard that is seen in many investment treaties.[94] Premised on the elements of fairness and equity, this principle is highly controversial and extremely difficult to define hence the writer opts to use case law to shed some light.[95] In the case of Noble Ventures v Romania[96], the ICSID tribunal concluded that;

> this standard of protection was a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measure and the obligation to observe contractual obligations toward the investor'.

[92] Sornarajah (n 14 above) 58
[93] Schefer (n 51 above) 272
[94] Schefer (n 51 above) 327
[95] Supedi (n 34 above) 63
[96] Noble Ventures v Romania, ICSID Case No ARB/01/11 of 12 October 2005, 112

In Neer case,[97] where the notion of 'denial of justice' as an example of an unfair treatment was dealt with it was held that:

> 'the treatment of aliens, to constitute an international delinquency, should amount to an outrage, bad faith, wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards, that every reasonable and impartial man would recognise its insufficiency'.

The case of Waste Management v Mexico[98] having regard to due process and fair and equitable standards the tribunal held that:

> 'the minimum standard is infringed when the conduct of the state involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process'.

Lastly, in the Genin v Estonia case:[99]

> 'the arbitration tribunal held that acts of wilful neglect of duty and insufficiency of action falling far below international standards, or even subjective bad faith are clear violations of the fair and equitable treatment principle'.

2.5.2 The principle of Full Protection and Security

This principle guards a foreign investor against third party or state interference in an investment.[100] the state is therefore tasked to protect the investor against employee uprisings or civil disturbances and must refrain from threatening the investor or the investment itself.[101] In the case of Noble Ventures v Romania, [102] Romania was required to provide Noble Ventures with 'full protection and security', which required Romania to enforce its own laws and to provide police protection to protect the investment of foreign investors located in Romania.[103]

---

[97] USA (LF Neer) v United Mexican States (1927) 21 American Journal of International Law 555 - 556
[98] Waste Management Inc v Mexico A/F/00/3 para 98-99 (ICSID) 2004
[99] Genin v Estonia, ICSID Case No ARB/99/2, Award of 25 June 2001
[100] KN Schefer *International Investment Law; text cases and materials* (2013) 311
[101] KN Schefer *International Investment Law; text cases and materials* (2013) 311
[102] Noble Ventures v Romania, ICSID Case No ARB/01/11 of 12 October 2005, 12
[103] Supedi (n 34 above) 66

2.5.3 Most-Favoured-Nation principle (MFN)

The most-favoured nation principle is premised on the notion that foreigners may not be discriminated against and is second to the principle of national treatment principle contained in many bilateral investment treaties.[104] It differs from national treatment in that it looks at the host's treatment of third party investors in comparison with the foreign investor lodging the complaint.[105] The underlying idea is therefore the assurance of equality of competitive opportunities between investors from different foreign countries.

According to Schwarzenberger[106], an MFN clause:

> 'Consists of forming an agency of equality. It prevents discrimination and establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third state. MFN clauses serve as insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties. While it is thus that the standard of MFN treatment has the effect of putting the services of the shrewdest negotiator of a third country graciously at the disposal of one's country, another aspect of the matter is more significant. As long as country is content to enjoy treatment equal to that of the most-favoured third country, and that subject matter of the treaty lends itself to such treatment, the use of the MFN standard leads to the constant self-adaption of such treaties and greatly contributes to the rationalization of internal affairs.[107]

2.5.4 National Treatment

National treatment (NT) basis itself on the principle of non-discrimination between the foreign investor and a local investor engaging in similar business activities/ ventures.[108] There can therefore be no comparison if like circumstances does not exist.[109] "The better treatment of a national who is alike and operates in like circumstances, unless there is a justification, would involve a violation of the treaty standard".[110] Like circumstances defined to be identical is however excessive as it is unlikely that due to size and deep pockets, the foreign investor is likely to be identical to local investors".[111] According to Sornarajah[112] "it

[104] Schefer (n 51 above) 304
[105] Schefer (n 51 above) 304
[106] Supedi (n 34 above) 67-68
[107] Supedi (n 34 above) 67-68
[108] Sornarajah (n 14 above) 337
[109] Sornarajah (n 14 above) 337
[110] Sornarajah (n 14 above) 337
[111] Consortium RFCC v Morocco ICSID case no ARB/00/6 (award 23 December 2003)
[112] Sornarajah (n 14 above) 337

is necessary to identify the purpose of the measure to ensure likeness, for there could have been justification in taking the measure that affected the foreign investor like where a measure is taken to curb a violation of labour standards or pollution". Transparency is thus of essence and where non-exists the possibility of a National treatment violation is highly probable. In Marvin Feldman v. Mexico[113] the failure to grant foreign investors with tax rebates as was given to nationals was justified on the basis that foreign investors were not able to produce the necessary invoices.

In the case of UPS v. Canada, a US provider of courier services, alleged violation of the national treatment standard when Canada Post, a monopoly provider of postal services, permitted its subsidiary, which runs a courier service, to collect parcels from post offices. This facility was denied to UPS and other courier services and thus breaching the national treatment standard of the North America Free Trade Area (NAFTA).

2.5.5 Protection against Expropriation and Compensation

Protection against Expropriation and Compensation are old principles of investment law founded to protect foreign-owned property from the unjustified taking by the host state. Foreign property may therefore not be expropriated or subjected to measures tantamount to expropriation unless four conditions are met:

The expropriation must be for public purpose, it should be non-discriminatory, it should be done in accordance to the applicable laws and due process and full prompt and adequate compensation should be made in case of an expropriation.[114] Expropriation can take two forms; it can either be direct or indirect.

2.5.5.1 Direct Expropriation

Comprises of the actual taking of the foreign-owned property by the host government using direct measures. In this instance, the foreign investor loses all, or almost all, useful control of the property.[115] This form of expropriation is an investment nationalized or otherwise directly

[113] Marvin Feldman v Mexico (2002) 7 ICSID Reports 318;2003 42 ILM 625
[114] Supedi (n 34 above) 73
[115] Supedi (n 34 above) 74

expropriated through formal transfer of title or outright seizure.[116] An example of this was seen in Namibia in 1995 when the government enacted a land reform law granting the government permission to expropriate property in the public interest, provided just compensation was paid. The Namibian government exercised this power and expropriated land belonging to certain German Nationals in 2004.[117]

2.5.5.2 Indirect Expropriation

Here property is not directly taken but the impact is the same to the foreign investor. In these instances, the owner of the property is deprived of substantial benefits of the property.[118] This controversial form of expropriation thus has an effect equivalent to direct expropriation without the formal transfer of title or outright seizure and basis on case to case and fact-based inquiry considering;

The economic impact of the government action (can however not be alone-standing); the extent to which the government act in interferes with distinct, reasonable investment-backed expectations; and the character of the government action.[119]

Indirect expropriation does however not occur when it is done in a non-discriminatory manner designed and applied to protect legitimate public welfare objectives like public health and safety etc.

2.5.5.3 Other forms of Indirect Expropriation can be found in:

Creeping expropriation: this is also a form of indirect expropriation and involves the use of a series of governmental measures to reduce the economic value of the investment.[120] What is involved here is the cumulative impact of the measures rather than the individual measures which on their own may not amount to expropriation.

Regulatory Expropriation[121] is another form of indirect expropriation whereby the host government takes measures for regulatory purposes which indirectly impacts the economic

---

[116] Supedi (n 34 above) 75
[117] Supedi (n 34 above) 75
[118] Supedi (n 34 above) 75
[119] Supedi (n 34 above) 75
[120] Supedi (n 34 above) 76
[121] Supedi (n 34 above) 76

value of the foreign-owned asset. The challenge here is to distinguish between a legitimate exercise of governmental discretion that interferes with the enjoyment of foreign owned property and a regulatory taking that amounts to expropriation requiring compensation.

Consequential or De Facto Expropriation: is yet another form of indirect expropriation which is like regulatory expropriation. According to Reisman and Sloane[122]

> 'it involves deprivations of economic value of a foreign investment, which within the legal regime established by a BIT, must be deemed expropriatory because of their casual links to failures of the host state to fulfil its paramount obligations to establish and maintain an appropriate legal, administrative and regulatory formative for foreign investment'.[123]

2.6. THE AFRICAN STANCE TOWARD A MULTI-LATERAL INVESTMENT TREATY

Is Africa ready for a multi-lateral treaty to regulate foreign direct investment? The answer is no. Currently it is seen that countries are even releasing themselves from bilateral investment treaties (BITs) which is the *lex specialis* between a host and a home country.

BITs are meant to give parties the ability to have different agreements with different contracting parties/ foreign investors. This position has however changed over time, as BITs today possess specific elements that show that there is an inclination towards having a similar standard agreement when it comes to foreign direct investment. Dr Victor Mosoti[124] in his article provides that there are general sets of major provisions often found in BITs prompting that Africa can no longer resist a multi-lateral agreement on investment. The following commonalities are found in BITs:

2.6.1 Definition and scope of Investment

There is no fixed definition of investment and thus parties are at liberty to put in place their own definitions of what constitutes an investment and its scope. However regardless of a common definition there are some common elements in most BITs, that there should be some

[122] Supedi (n 34 above) 78
[123] Supedi (n 34 above) 78
[124] V Mosoti "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 North western Journal of International Law and Business 95

assets placed in the host state by the home state and such assets should bring about revenue to the host state. African states however seem to have "shot themselves in the foot"[125] as they have driven a whole truck through the ambit of defining investment. Examples are given of agreements between Germany and Namibia, South Africa and Botswana where an investment includes "movable and immovable property, shares of companies 'and other kinds of interest in companies' and 'claims to money which has [sic] been used to create an economic value or claims to any performance having economic value.[126]

2.6.2 Minimum Standard of Treatment

National Treatment (NT) and MFN clauses: Apart from the minimum standards of treatment which are provided for under international customary law, the other provisions are expressly provided for when it comes to international trade through the General Agreement on Tariffs and Trade (GATT), such is not the case in international investment law. However, every BIT has at least the national treatment clause and though the actual wording may be different, it all comes down to a restriction on the host state from giving preferential treatment to national or third-party state investments respectively. So apart from just issuing the required minimum standards, African states go further and provide for NT and/or MFN clauses where some do not even have the "like circumstances" criteria like the Chinese Model BIT.

2.6.3 Guarantee and compensation scheme

Guarantee and compensation cuts across guarantees for protecting the investment, guarantees on dispute resolutions, guarantees on non-expropriation and compensation matters.

Beginning with dispute settlement, African countries have accepted or promoted using arbitration as an investor state dispute settlement mechanism. This is not a bad provision but one would have thought that the least that could happen would be the inclusion of a provision on local remedies.

[125] V Mosoti "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 North western Journal of International Law and Business 95-116

[126] n 125 above

Expropriation is prohibited but the interesting part is that some BITs do not have provisions on situations where expropriation could be considered and there is also the situation on how compensation should be paid. Should it be in a prompt, adequate and effective manner or is adequate compensation enough.

Restrictions or non-restrictions on the outflow of funds are other guarantees given by many African countries whereby home investors are guaranteed the transferability of funds from the host state. Most of the BITs do not have proper restrictions on this matter. While some BITs have spelt out restrictions like the Indian model BIT, others are not as explicit. Some do not even mention restrictions for purposes of tax.

2.6.4 Other terms

These include applicable laws, enforcement of national laws, transparency, performance requirements, entry and movement of foreign personnel and sometimes exceptions.[127] In this category, while some provide for international law as applicable, others provide for domestic law while others tend to strike a balance and provide for both domestic and international law.

2.6.5 Can Africa resist a multilateral agreement much longer?

Considering the above it is clear that there exist all these commonalities in the different BITs, prompting that there is nothing restricting the international community from moving towards a multi-lateral investment treaty (MIT). Now, the question, can African countries resist a MIT? Mosoti states in his article that African countries have precluded the chance to advance a defensible argument for a multilateral investment framework.[128] His position being that after agreeing to so many outrageous provisions, why should they not agree to an MIT? The answer is simple. A bilateral BIT is open to amendments and it is not an indefinite arrangement. Thus, regardless of African states accepting the provisions in BITs that may be found in an MIT, African states still have the power to amend their positions. BITs do not last for an eternity and they can be terminated or even renegotiated with different terms. This will

[127] V Mosoti "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 North western Journal of International Law and Business 95-116

[128] n 127 above

of course dampen the stability of the investment environment but if it is a position that must be taken, it will be taken.

So, do Africans have the power to resist an MIT, they most certainly do. Will they? That is entirely up to them. As sovereign states, they can decide what is best for them and if anything, history should show African states that since the expected development may not be achievable through these treaties, maybe it is time to change the rules before they become part of customary international law as this is the only way to automatically bound all states.

2.7 CHAPTER SUMMARY

What this chapter ultimately does is to wrap the readers around the generalities of what encompasses FDI today. It illumines not only the much hyped good that FDI brings to a nation, but awakens the beneficiaries to the pitfalls as well. The reasoning, based on a movement towards a more balanced and differentiated view, taking full account of expected positive effects as well as the possible negative impacts.

While the benefits of FDI are touted around all the time the costs and pitfalls are seldom discussed. These are however necessary as it prompts legislative drafters or policy-makers to not be blind-sided by the negatives, ambiguities and the shortcomings FDI can bring. Sound policies and laws know that pitfalls exist and cater to minimize the damage these may bring. We need not only harness FDI but we need to do it in a sustainable manner which is only achievable by the effective implementation of local laws.

This chapter also sketched over the historical background underlying FDI showing that the concept has been around for some time. FDI as portrayed by the classicalists is a major source of growth. It raises productivity for the whole economy by spreading its effects to other firms and sectors through technology spill-overs increased competition, job creation etc. Subsequent issues have reiterated this view and continually identify foreign direct investment (FDI) as one of the main contributors to growth and development in Africa. Sornarajah's dependency theories depicting that FDI keeps developing countries from emerging and rather keeps them dependant on the developed world, together with his middle

path theory was also discussed. The Middle path theory as the name suggests strives to strike a middle path in which the classical and the dependency theories can co-exist. The researcher discussed these underpinnings as it is extremely important for hosts to understand what underlies and underpins FDI. Important in the sense that it helps host nations understand and evaluate how various types of risk influence investment decisions and the various laws that regulate the field.

Finally, this section also evaluated the non-existence of a multi-lateral framework guiding investment laws globally. It had regard to Africa, its many BITs and whether it can resist a multi-lateral treaty much longer. The conclusions as depicted by the researcher were clear. Africans have the power to resist a multi-lateral treaty. As sovereign states, they can decide what is best for them and the commonalities in BITs should not be misconstrued as them being receptive toward a multi-lateral framework on investment regulation. The shinning glance stemming from BITs should however not be overlooked. Although unsuccessful in creation of multi-lateral framework, they played a significant part in developing the main principles of law governing treatment of foreign investment in the international sphere.

CHAPTER 3

EVOLUTION OF FDI IN NAMIBIA

3.1 Introduction

Whereas the preceding chapter has generalized, conceptualized and theorized FDI, this chapter desires to narrate on the introductory chapter (chapter 1). It was noted in chapter 1 that the thesis of this study seeks to investigate the possible impact of Namibia's new Investment Act, NIPA, on the flow of FDI into the country's economy. The thesis stated that the researcher would argue that NIPA in its current form would have negative consequences on the flow of FDI into Namibia. The reasoning was, that the old Act, the Namibia foreign Investments Act (NFIA) 1990 provides for a liberal and investor friendly regime, whereas NIPA seems to promote 'red-tapism' and reckless economic nationalism through restrictive investment policies.

The primary aim of this chapter is therefore to inform on the 1990 Act NFIA. All of this is however redundant in the absence of some historical background on the Namibian economy. Hence the researcher starts the chapter with a brief overview of the land of the brave (Namibia).

3.2 Historical Architecture of the Namibian Economy

Namibia a vast but sparsely populated country with a total population of about 2.57 million spread over an area of approximately 824 292 square kilometres is often referred to as the land of the brave.[129]The bulk of the population resides in the central and northern regions of the country cradled by the Namib Desert stretching along the cold Atlantic Ocean in the west and the Kalahari semi-desert along the eastern border with Botswana. The southern areas of the country borders on South Africa.[130]

Namibia became an Independent state free from the South African colonial rule and the apartheid regime in the year 1990. Before 1990 Namibia has been under German colonial

---

[129] http://www.werksmans.com/wp-content/uploads/2013/04/LA-NAMIBIA.pdf accessed 24/08/2017

[130] n 129 above

rule for nearly 30 years where after South Africa colonised us for 76 more years, including the 6-year guerrilla war that finally led to Namibia's Independence. The year 1990 therefore marks a tremendous triumph in the history of Namibia. It signified the end of the colonial South West Africa (SWA) and the birth of Namibia. The Name Namibia[131] comes from the Damara tribe and means vastness of nothingness.[132]

21 March 1990 (Independence Day) thus signifies rays of hope and prosperity for the Namibian people. It is also in this year right after independence that Namibia endeavouring to increase the flow of foreign investment into the country passed the Foreign Investments Act 1990. This Act has since been the primary legislation governing FDI in the country.

3.3 Historical Evolution of FDI Legislation in Namibia

Globalization over the past decade has brought massive foreign revenue via FDI's to many African countries. Namibia attempting to attract this foreign revenue and not to miss out on the globalization bandwagon enacted the Foreign Investments Act and the Export Processing Zone (EPZ) Act/ Free Trade Zone in the year 1990 and 1995 respectively.[133]

These two legislative pieces provided incentives to possible investors to lure them to invest in Namibia.[134]

NFIA the Namibia Foreign Investments Act 1990 came into force on the19th of December 1990. NFIA was subsequently amended in 1993.[135] The Namibia Foreign Investment Act (NFIA) together with its 1993 amendment therefore forms the cornerstone of Namibia's policy on foreign investment pending the acceptance and the entry into force of the new law NIPA.

---

131 The United Nations in 1967officially adopted the name Namibia. During the colonial Era Namibia was called South West Africa (SWA)

132 https://ubuntustateofmind.wordpress.com/2013/04/24/namibia-the-land-god-made-in-anger/accessed 24/08/2017

133 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323accessed 24/08/2017

134 n 133 above

135 Namibia Foreign Investment Amendment Act 24 of 1993

The Ministry of Trade and Industry (MTI) is the governmental authority mainly responsible for carrying out the provisions of the Foreign Investment Act and has in so doing established the Namibia Investment Centre (NIC) which will later be discussed in more detail. Below is some elaboration on the 1990 Act (NFIA).

The Namibia Foreign Investment Act (NFIA) comprises of three parts: the first dealing with the administration and the principles regarding foreign investment; the second concerns itself with investment statuses, the rights and the obligations of investors or those holding investment certificates; and the third part deals with miscellaneous provisions.[136] NFIA also provides for national treatment, compensation following expropriation, profit repatriation and the settlement of investment disputes. All these cardinal provisions visible in most investment legislation. NFIA also refers to the status of investments (article 4) and the award of investment status certificates (article 5).

Article 3 (2) of NIFA provides for National Treatment and holds that:

> " No foreign national engaged in business in Namibia shall be required to provide for the participation of the Government or any Namibian as shareholder or as partner in such business, or for the transfer of such business to the government or any Namibian: Provided that it may be a condition of any licence or other authorization to or any agreement with a foreign national for the granting of rights over natural resources that the government shall be entitled to or may acquire an interest in any enterprise to be formed for the exploitation of such rights".[137]

A very liberal approach to foreign direct investments in the country. One, miles apart from the conventional view that there should be some form of local involvement in foreign investments.

Article 6 (1) provides for status certificates for eligible investors:[138]

"A foreign National may apply to the Minister for a Certificate of Status investment in respect of an investment which qualifies as an eligible investment". An eligible investment,

---

[136] The Namibia Foreign Investments Act 27 of 1990
[137] The Namibia Investments Act 27 of 1990 Article 3 (2)
[138] n 136 above Article 6

one determined by a monetary value set by the Minister of Trade and published from time to time in the official Gazette [139] Holders of this certificate according to Article 8[140] shall be provided by the Bank of Namibia with foreign currency freely convertible for use without restriction. In addition, the certificate holders shall be subject to international arbitration in the event of any dispute regarding the payment of compensation following expropriation-Article 13.[141]

The Repatriation of profits are Outlined in Article 9 of the NFIA 1990 and provides that "the Bank of Namibia shall make available foreign currency, which the holder of a certificate may use inter alia, for the transfer of profits, payment of company remittances, and payment of dividends to shareholders or stockholders residing out of Namibia. Article 10 [142] further prescribes that a certificate holder may retain any payment or portion of a payment in foreign currency for goods produced by the enterprise or any undertaking carried on by the enterprise, which are exported from Namibia.

Articles 11 provides[143] for compensation (in freely convertible currency without undue delay) in the event of expropriation and states that same must be done in accordance with article 16 (2) of the Namibian constitution.[144] According to Dr Enga Kameni [145] this is a "laudable initiative as the Government of Namibia applies the Hull Formula, as postulated by the United States then secretary of State, Hull in the second quarter of the 20th century, is to the effect that expropriation must be followed by prompt, adequate and effective compensation".[146]

Article 13[147] provides for the settlement of disputes in respect of status investments. it depicts that dispute settlement would operate under the guise of the United Nations Commission on

[139] n 136 above Article 5 1(a)
[140] n 136 above Article8
[141] n 136 above Article 13
[142] The Namibia Foreign Investments Act 27 of 1990 Article 10
[143] n 136 above Article 11
[144] The Namibian Constitution Act 1 of 1990 Article 16 (2)
[145] E Kameni, DR Enga Kameni is a Manager, Legal Services, with the African Export-Import Bank (Afreximbank). This is the premier Trade and export development bank in Africa. He holds a Ph.D. in International Trade Law from the University of Pretoria, where he was a potter fellow
[146] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017
[147] n 136 above Article 13

International Trade Law (UNCITRAL) rules, unless another method was agreed to by the Minister and the foreign national and the certificate provides for same.

3.4 The Namibia Foreign Investments Act 1990 (NFIA) a Liberal Framework

The 1990 Act (NFIA)[148] is a very liberal framework, maintaining a free investment regime as opposed to the newly promulgated investment framework NIPA. The 1990 Act calls for equal treatment of foreign investors and Namibian firms, it provides for non-discriminatory access to all sectors of the economy, no local participation requirement, full protection of investments, repatriation of capital, the right to remit profits, access to foreign exchange, international arbitration in the case of disputes between investors and the government, and fair compensation in the event of expropriation.

NFIA according to the researcher, at the time completely sober and generally realistic toward the country's capabilities and development needs was premised on the overall development efforts articulated in the Namibian Constitution (Article 96) and the First National Development Plan (NDP1). The question did the Namibian position change so drastically in the last 27 years warranting a policy framework like NIPA, which clearly promotes reckless nationalisation, administrative corruption etc. It is with this in mind that this paper wishes to address the likely challenges that may accompany NIPA in its current form. Chapter four will therefore delve into the paradigm shift to illustrate how NIPA differs from the 1990 Act NFIA. This is to respond to the broad question this study seeks to answer; "what will the likely effects be on the flow of FDI into Namibia, if NIPA is applied in its current form?

3.5 CHAPTER SUMMARY

The overall aim of this chapter was to inform readers of the historical architecture of the Namibian economy and how the Namibia Foreign Investments Act (NFIA 1990) came into being. This chapter also sought to illumine the liberal investment climate depicted in this Act

[148] n 136 above

(Act 1990) before the new Investment Promotion Act NIPA[149] and its provisions is deliberated on.

[149] Namibia Investment Promotion Act 9 of 2016

CHAPTER 4

LEGAL FRAMEWORK FOR FOREIGN INVESTMENT IN NAMIBIA

4.1 Introduction

This chapter desires to illume how the New Namibia Investment Promotion Act 9 of 2016 (NIPA) differs from the standing Namibia Foreign Investments Act 27 of 1990 (NFIA) as was discussed in the preceding chapter. NIPA which was signed by his Excellency Dr Hage Geingob in November 2016,[150] is set to replace the Foreign Investments Act, 1990 (NFIA). Though NIPA was passed in August 2016, it is currently under review by the government. Some changes to the Act and the Regulations are currently under discussion, in hope to resolve some of the practical issues in applying the legislation in its current form. This development comes after the private and the public sectors raised concerns relating to the negative impact that NIPA may have on the flow of foreign investments into the country.[151]

Unlike the 1990 Act it is feared that, NIPA if passed in its current form will result in far-reaching changes in the Namibian foreign investment regime. The researcher in this chapter will therefore discuss the controversial provisions in NIPA prompting this research bearing in mind the liberal nature of the 1990 Act. This chapter will envision the likely impacts NIPA if passed may have on the flow of FDI into the country. Some of the regulators regulating investments in Namibia will also be pinned down to show the broader framework in which investments operate in the country. The role of the Namibia Investment Centre, the NIC will also be discussed. The synergies and the linkages between FDI and Small and Medium Enterprises (SME's) will furthermore be outlined to show how the two if combined can bring Namibia on board towards participating in the world trading system. A statistical overview to show where foreign investors invest will also be discussed in this chapter.

The aim is to see whether blanket changes especially in the retail industry is necessary. Also, whether the problem characterizes with too liberalized investment regimes or rather with the

---

[150] 'Geingob signs three laws' *The Namibian* 15 August 2016 3

[151] https://www.ensafrica.com/news/The-Namibia-Investment-Promotion-Act-2016-hindering-or-promoting-foreigninvest?Id=2707&STitle=ENSafrica%20ENSight?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original accessed 24/08/2016

ineffective implementation of this regime.[152] The researcher will also discuss why there is a need for an effective legal regime, and effective implementation mechanisms of local laws using the case of Ramatex in Namibia as an illustration.

4.2 POSSIBLE PARADIGM SHIFT: THE 2016 NAMIBIA INVESTMENT PROMOTION ACT (NIPA)

Currently investments in Namibia are regulated primarily by the Namibia Foreign Investment Act (NFIA) 1990. This act will however be replaced by the Namibia Investment Promotion Act (NIPA) 2016 once it is passed. The researcher in this section highlights how NIPA differs from the 1990 Act (NFIA). It attempts to shows how NIPA if accepted may likely transform the investment climate in Namibia from what was once an open investor friendly climate to a more interventionist government policy.

Clear as day there are several characteristics to the 1990 Act which differs considerably from the newly promulgated investment promotion Act (NIPA) passed (but not yet operational) in 2016. Encapsulated in one word, the provisions in the 1990 Act is more liberal, maintaining a free investment regime as opposed to NIPA. NFIA as opposed to NIPA, a very liberal slant toward foreign investors sometimes critiqued for being an ignorant sacrifice of the Namibian people at the altar of foreign Investment. [153] A view that does not sit with the researcher who agrees with Dr Enga Kameni, when he states that “investors put their money in hosts that offer them the best conditions for a favourable return to their investments”.[154]

4.2.1 The Namibia Investment Promotion Act 2016 (NIPA)

NIPA in its preamble strives:

> “To provide for the promotion of sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy; to provide for reservation of

[152] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017
[153] n 152 above
[154] n 152 above

certain economic sectors and business activities to certain categories of investors; to provide for dispute resolution mechanisms involving investment; and; to provide for incidental matters".

NIPA was signed by the president in November 2016, and is set to replace the 1990 investment act once it becomes operational.

NIPA, Namibia's newly tabled domestic investment framework supports greater government regulation to ensure that FDI serves the developmental goals of the country. NIPA enacts certain performance requirements, which mandate various initiatives such as local employment, skills development and joint ventures, which investors must comply with or lose their business licenses. It also reserves certain sectors of the economy for government and domestic investors.

As identified in the previous chapter, this study limits itself to analysing the two aspects that most distinguishes NIPA 2016[155] from the 1990 Act.[156] These being;

"Section 8 (1) of the Investment Promotion Act 9 of 2016 which "Reserves certain economic sector categories and business activities for certain categories of investors;"

The Minister, in recognition of the sustainable economic sectors, business activities and development objectives of Namibia, its national security interests and the public interest, may, by regulations, reserve certain categories of

(a) Economic sectors; or

(b) Business activities,

Secondly the study will delve into the ownership aspect as underpinned in section, 4 (b) (ii) and section 8 (c) of the same Act.

Section 4 (2) (b) (i) of the Investment Promotion Act 2016 reads; "Powers and functions of Ministers;"

Section 4 (2) (b)-The Minister may approve the investment proposal after having considered and satisfied himself or herself that;

(b) A substantial number of the following requirements, as each case may require, are fulfilled or likely to be fulfilled in a specified period;

[155] Namibia Investment Promotion Act 9 of 2016
[156] Namibia Foreign Investments Act 27 0f 1990

(i) the joint venture with Namibians; and;

Section 8; "Reservation of categories of economic sectors and business activities for certain categories of investors;"

The Minister, in recognition of the sustainable economic sectors, business activities and development objectives of Namibia, its national security interests and the public interest, may, by regulations, reserve certain categories;

Section 8 (2) (b) reserved for Namibians and entities whose majority shareholdings are owned by Namibians;

Section8 (2) (c) reserved for joint venture partnership between Namibian investors and foreign investors".

The shift from the old 1990 Act [157] toward NIPA [158] is thus tremendous. As opposed to a free and liberal investment regime like the 1990 Act, NIPA provides for an investment approval regime offering a wide range of discretionary powers to the Minister. The new Act introduces the concept of performance agreements where appropriate enabling the Minister to sign performance agreements with investors.

The new Act (NIPA) will furthermore give the Minister of Industrialisation, Trade and SME Development the option, in the interest of national security and the public interest, to reserve certain sectors for certain categories of investors, or for the State or Namibians. The Minister may also set out conditions that need to be met by investors, and may introduce incentives. This act clearly grants broad discretion to the minister to determine the types of investors that may invest in certain business activities or economic sectors.

4.2.2 Namibia Investment Centre (NIC)

As noted previously the Foreign Investment Act of 1990 is currently the primary legislation that governs foreign direct investment in Namibia. Responsible for administering the provisions of this act is the Ministry of Trade and Industry (MTI) which has in execution of these duties established the Namibia Investment Centre (NIC). [159] The NIC being the first

[157] Namibia Foreign Investments Act 27 of 1990
[158] Namibia Investment Promotion Act 9 of 2016
[159] http://www.aimcongress.com/en/exhibitors-2014/namibia-investment-centre-nic/accessed 24/08/2017

point of contact for potential investors is Namibia's official investment promotion and facilitation office. The centre is designed to offer comprehensive services ranging from initial inquiries right through to the operational stages. The investment centre provides general information packages, it advises on investment opportunities, incentives, and procedures. The NIC is also tasked with assisting investors minimize bureaucratic red tape by coordinating work with government ministries as well as regulatory bodies.[160]

The NIC also undertakes as one of its responsibilities the screening of all potential foreign investments. It however does not follow a formal review process, but does evaluate the credibility of potential investors, their business presentations, to measure the potential economic benefits it may bring to the country. The centre's decisions are however forwarded to the Minister of Trade and Industry for final approval/rejection.[161]

4.2.3 The likely challenges accompanying NIPA to Namibia's FDI climate

In highlighting the possible challenges, the researcher undertakes not simply to censure NIPA and its likely impacts, but intends to illumine that an interventionist policy stance that is strongly biased in favour of governments should be balanced with the risk of deterring FDI altogether. The researcher opines that to gain maximum benefits from FDI, a healthy enabling environment for business is paramount.

The underlying is the likely challenges that accompany NIPA as anticipated by the researcher:

The rising of private and government debt levels

If NIPA is to replace the old 1990 act in its current form, the Namibian economy is likely to see increased private and government debt levels. According to the KPMG economic snapshot report the last few years has been a bit gloomy for the Namibian investment climate with private and government debts rising.[162]

[160] https://www.state.gov/e/eb/rls/othr/ics/2012/191205.ht accessed 24/08/2017
[161] n 160 above
[162] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdf accessed 04/09/2017

The Namibian economy has failed to attract high levels of foreign direct investment (FDI), amid rising private and government debt levels.[163] It is noted that these low levels of FDI is attributed to low levels of FDI openness. In terms of investment openness, Namibia was rated 8th out of 13th Southern African countries, according to a February 2017 report by BMI. [164] This challenge according to the researcher is likely to be armoured with the implementation of NIPA. If FDI levels have been dropping with the old act, which as opined by the researcher is investment friendly, the likeliness of private and government debt levels rising more with the implementation of the new act (NIPA) in its current form is inevitable. It is also reasonable to infer that with the rise of private and public debt levels, investors are most likely to be cautioned.

Corruption

The wide range of discretionary powers given to the minister in NIPA is highly susceptible to corruption. As mentioned previously NIPA empowers the Minister to reserve categories to particular investors exclusively. It allows for the introduction of an approval and registration regime, for the screening of investors and investor incentives. Now, some may hold that this could ensure Namibian participation in the market enabling growth of the Namibian economy. The researcher however holds that this discretion is abuse or manipulation prone and cannot be overlooked. The powers could be used by the Minister to completely reserve certain business sectors for the state, or could simply exclude foreign investors from investing in specific business activities or economic sectors. Although NIPA's objectives are to promote transparency and the mobilisation of investments, the Minister's wide discretion to determine which investors may or may not partake in certain economic sectors and business activities could potentially result in excluding potential investors. Nepotism and favouring the elite may also elevate to unimaginable levels.

When it comes to foreign investments two very important considerations lead to investor distrust and comparative advantage: These are; Distrust over political interference in the economic process and ideologies of state supervision.

[163] n 162 above
[164] n 162 above

If a foreign investor gets the inkling that the advantage compared to a domestic investor is not proportional he will be dissuaded from investing. Same goes for distrust over political interference in the economic process. Ministers are political appointees and not necessarily technocrats making manipulation of the system very easy.

Red Tape

The administrative burden placed on the Minister to personally approve the registration of new investments could result in approvals being delayed. This may dissuade foreign investors from embarking on what could well be a burdensome process, and encourage them to rather place their investments in another country. NIPA requires investors that meet certain investment thresholds (to be determined by the Minister) to register with the Namibia Investment Centre. NIPA also provides that no foreign investor may invest in Namibia or acquire any licence, permit, authorisation or concession in Namibia through any form of merger, acquisition, direct or indirect sale or transfer without first receiving the approval of the Minister. [165] It is this provision that changes the current investment regime from a free to an approval regime, and is likely to have far-reaching consequences for foreign direct investments in Namibia.

Over regulation/ Performance Requirements

The over-regulation of this field may slow down the investment process, which may leave investors frustrated. Over regulation is found in NIPA's cumbersome approval based and performance requirements system. The constant approvals from the Minister may be tedious and may dissuade investors from investing in Namibia.

The researcher is mindful that the objectives underlying performance requirements include: the strengthening of the country's industrial base, increasing domestic value addition, and the generation of employment opportunities, linkage promotion, export generation and performance, trade balancing, regional development promotion, technology transfer, avoidance of restrictive business practices. The researchers only concern however is that

[165] http://www.mondaq.com/southafrica/x/612174/Inward+Foreign+Investment/The+Namibia+Investment+Promotion+Act+2016+Hindering+Or+Promoting+Foreign+Investment accessed on 27/07/2017

Performance requirements are different from economic social responsibility and they make the decision to locate an investment particularly difficult.

Viability of performance requirements

NIPA evokes concern about the viability of performance requirements. For example, joint ventures in sectors where the local partner is severely under capacitated often do not foster a productive working relationship, and can lead to much less skills and technology transfer than is intended when it is forced. It also risks deterring FDI into certain sectors other than natural resources, where investors would likely have alternative country options to consider.[166]

Blanket Barriers

Blanket barriers have likely effects of keeping investors out. This may leave some sectors or business ventures unexplored in the absence of a Namibian taking the initiative. While the researcher understands that new law if passed aims to enhance the well-being of Namibians as well as to bring about long-term structural and societal change in the country, she opines that the means adopted is not rational. Whether the new law will bring genuine social change, reduced poverty and inequality is highly questionable? Blanket barriers will simply keep foreign investors and there capital out contrary to the notion, "promotion of investment".

Retail sector reservations

With the implementation of NIPA, the reservation of certain business activities for domestic investors and performance agreements for large foreign investors are on the cards. These business activities are to include, taxi and shuttle services; small retail businesses, hairdressing and cosmetic services. The performance requirements are said to hinge at; joint ventures; local employment and skills development. Now as noted above, blanket barriers in the retail sector is not investor friendly. In as much as Namibia thrives on investments in extractives, investments in the retail sector is quite significant and need to be protected. As

[166] http://www.polity.org.za/article/the-rise-of-sustainable-fdi-emerging-trends-in-the-sadc-region-2016-09-13accessed 24/08/2016

noted above the services sector contributes 62% to the country's GDP of which wholesale and retail, transport and real estate are the main components.[167]

Joint ownership Aspect

Joint ventures are very risky provisions in investment legislation. No foreigner wishes to surrender power and control to host nationals. Thus, the joint venture aspect must be camouflaged in a manner that does not deter FDI and should rather hinge at foreign firms surrendering the manufacturing or marketing of their products to local firms. This can be done by the foreign firm adding an extra wing to the company and thereby creating a positive linkage between the foreign investor and the domestic firm. Equity in these instances can be shared by the partners to ensure a strong linkage is kept between the foreign firm and the local firm.

Redundancy of the Namibia Investment Centre (NIC)

The wide range of discretionary powers given to the Minister have a likelihood of removing the independence of the NIC screening process and rather opens it up to politicisation. It is important that we have an independent body like the NIC to qualify investor statuses. This will stir investor confidence in the administrative process. Too wide a discretion to the Minister takes away most administrative power from the NIC. Also, what is and administrative body to do if the final word rests with the Minister? The researcher thus opines that when administrators and implementers are overshadowed by political affiliates, there is no need for the administrative body in this case the NIC. Foreign investors are cautious when it comes to their investments and the probability of dealing with political/ a political affiliate is not attractive and has the likelihood of deterring future investments. It is also not lucrative to have a body such as the NIC, if same has no empowerments or liberalizations.

---

[167] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdfaccessed 04/09/2017

Favouring of domestic investors disproportionately over foreign investors

As noted earlier two very important considerations come into play when it comes to foreign direct investment that lead to investor distrust and comparative advantage namely;

What are the levels of competitive advantage to domestic investors; and what are the levels of political interference in the economic process? Foreign investors seek assurance from legal instruments, in the form that the same comparative advantage will be granted to them as that of a domestic investor. If this is not the case or if same is not proportional he will be dissuaded from investing in that country. Similarly, if political appointees are armoured with too much power to interfere in the economic process it only but grows investor distrust and will most certainly dissuade them.

Increased Dependency on Foreign Aid

If NIPA is to be implemented in its current form, it has the likely potential of deterring foreign investors, which in turn may have ripple effects on the nation and may thereby stir a dependency syndrome on foreign aid.

The questions, does the new Act (NIPA) in its current form have the likelihood of hindering investments and thereby stirring the countries dependency on foreign aid? Is the legislation (NIPA) mutually beneficial or is there a probability that it may favour domestic investors over foreign investors disproportionately? These are the unanswered questions that dress up the new legislation and the researcher opines that these are possible challenges that have the probability of hindering foreign direct investment inflows into the country. Foreign direct investment which is a source of external capital for developing nations, if hindered will undeniably increase the dependency syndrome on foreign aid.

4.3 Statistical overview: FDI inflows into the Namibian economy

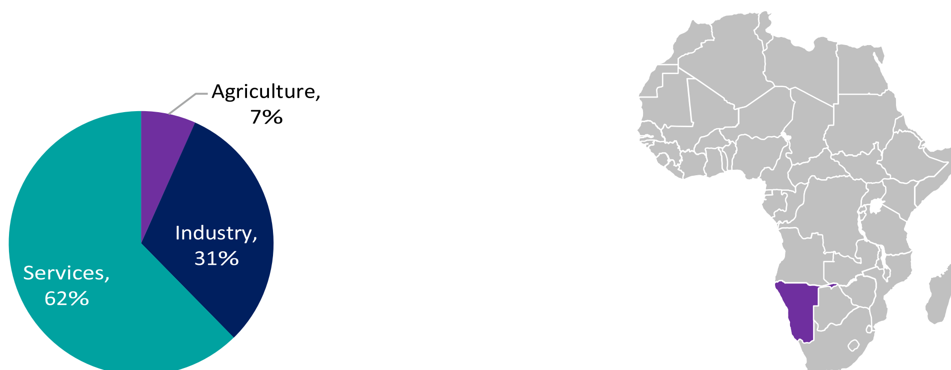
Namibia has always been an attractive FDI destination, boasting in substantial natural resources uranium, diamonds, zinc, copper, oil, all of which attract FDI. [168]In analysing the

[168] https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3 accessed 24/08/2017

economic structure of the Namibian economy, this industry of extractives, covers the countries secondary sector. Equally important as the primary sector due to the generation of large volumes of foreign exchange earnings through commodity exports.[169]

The primary economic sector covers the rearing of livestock, processing of meat products, crop farming and forestry.[170] The country also has one of the most productive fishing industries in the world based on the Benguela Current system. [171] "The Benguela current system supports rich populations of fish, forming the basis for the Namibian marine fisheries and fills up more than 25% of the primary sector activities."[172]

Investments in the service sector according to the KPMG economic snapshot report has also boomed tremendously in the recent years contributing a whole 62% to the country's GDP.[173]The main components in this sector are wholesale, retail, transport and real estate. Tourism is a major contributor to this sector. According to the World Travel and Tourism Council (WTTC), the total contribution (direct and indirect) of tourism to Namibia's GDP in 2016 was $1.6 billion (14.9% of 2016 GDP).



Source: The World Bank: World Development Indicators[174]

The Namibian economy also boasts in political stability, good infrastructure, modern banking and financial systems etc, all which investors seek when they decide to invest in a country.

---

[169] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdf accessed 04/09/2017
[170] n 169 above
[171] n 169 above
[172] n 169 above
[173] n 169 above
[174] n 169 above

The GDP growth of the Namibian economy has however slowed significantly in 2016 to just 0.1% and was expected to recover to 3.5% in 2017. This slowdown in the year 2016 is said to have been prompted by weak external demands and slow growth in the services sector. It is said that the recovery forecast for 2017 will be dependent on higher uranium production. [175]

Over the last few years it's reported that Namibia was quite unsuccessful in attracting high levels of foreign direct investment (FDI), leading to raised private and government debt levels. These barriers are largely attributed to low levels of openness to foreign investment.

Regarding liberal investment policies in Southern Africa, KPMG reports that;[176]

> "Namibia ranks eight out of thirteen countries currently. KPMG. Clearly showing the country receives much less foreign direct investment than its regional peers. The results were however justified or attributed to, the small market, the small population and the low GDP per capita ratio. It was also reported that high private and public debt levels have contributed to investor caution. FDI have been decreasing steadily since 2011, to such an extent that it was only equivalent to 32.1% of GDP in 2015. In 2015, Namibia's total inward FDI stocks were an estimated \$3.7 billion, which is the fifth-lowest amount out 13 Southern African countries".

The ministerial annual report 2015/16, also reported that the Namibia Investment Centre in this financial year (2015/16) facilitated new investments to the value of N\$409 million, which created about 260 jobs in various economic sectors such as tourism, hospitality, agriculture, manufacturing, construction and services. During this same period under 2015/2016, the ministry facilitated 13 new investments worth N\$2.8 billion and committed to create 836 permanent jobs. These investments are from South Africa, Germany, Zimbabwe, Portugal, Belgium, Italy and Dubai.

---

[175] n 169 above

[176] https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pdf accessed 04/09/2017

4.4 FDI REGULATORS IN NAMIBIA

4.4.1 The Namibian Constitution

Article 96 of the Namibian Constitution titled Foreign Relations holds that: The State shall endeavour to ensure that in its international relations it:[177]

> "adopts and maintains a policy of non-alignment; promotes international cooperation, peace and security; creates and maintains just and mutually beneficial relations among nations; fosters respect for international law and treaty obligations and encourages the settlement of international disputes by peaceful means."

Article 99 states that; "Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament".

Article 16 (2) dealing with the right to property provides that "the state or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of parliament".

4.4.2 The Foreign Investment Act, Act 1990 and the 1993 amendment

Guarantees equal treatment for foreign investors and Namibian firms, i.e., fair compensation in the event of expropriation, international arbitration of disputes between investors and the government, the right to remit profits and access to foreign exchange. Investment incentives and special tax incentives are also available for the manufacturing sector

[177] The Constitution of the Republic of Namibia, Act 1 of 1990 Article 96

4.4.3 The Export processing zone Act (EPZ) of 1995 as amended by Act 6 of 1996

An Export Processing Zone also known as a free trade zone is a local tax free, tariff free or otherwise highly incentivised zone created within a country with the sole intent of attracting investors to invest.[178] In Namibia, the Export Processing Zone (EPZ) Act regulates this area.

The objectives of the EPZ are to protect, promote, to increase the manufacture of export goods, the creation of industrial employment, the expansion of export earnings, the creation or the expansion of industrial investment and foreign investment as well as the encouragement of technological transfers and the improvement/ development of executive and labour skills.[179]to

4.4.4 The Agricultural (Commercial) Land Reform Act of 1995

This Act regulates the acquisition of agricultural land by foreign nationals. No foreign national can acquire agricultural land without the prior consent of the Minister of Lands.

4.4.5 The Companies Act 28 of 2004 as amended by the Companies Amendment Act 9 of 2007

Provides for the incorporation, management and liquidation of companies; as well as for incidental matters.

4.4.6 The Competition Act 2 of 2003

Established in 2009 the Namibian Competition Commission (NACC) under the Competition Act of 2003 charged by the Ministry of Trade and Industry reviews foreign and domestic mergers to safeguard and promote competition in the Namibian market.

[178] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017
[179] The Export Processing Zone (EPZ) Act 1995 as amended by Act 6 of 1996, Article 3

4.4.7 The Close Corporations Act 26 of 1988

This act provides for the formation, registration, incorporation, management, control and liquidation of close corporations; and for matters connected therewith. The Registrar of Companies in the Ministry of Trade and Industry is responsible for managing, regulating, and facilitating the formation of businesses. The Registrar's office encourages investors to seek professional advice from legal practitioners, auditors, accounting officers, or secretarial firms when registering their businesses.

4.4.8 The Anti-Corruption Act 8 of 2003

The Anti- Corruption Act (Act 8 of 2003) mandates the Anti-corruption commission (ACC) to receive or initiate or to investigate allegations of corrupt practices, to educate the public on the evils of corruption and to prevent corruption. The vision and the mission of the ACC is to free Namibia from corruption (vision) and to lead the fight against corruption in Namibia through effective law enforcement and preventative measures for the good of the inhabitants of the country.

4.4.9 The Income Tax Act 24 of 1981 and the Income Tax Amendment Act 4 of 2005

Tax a concept notoriously difficult to define, can be described as a monetary based compulsory contribution payable by the public as whole or as a substantial sector thereof to a government. The purpose: to fund government expenditure and to attain socio-economic and political objectives. Taxes are not a quid pro quo for something specific in return.

In Namibia income tax is guided by the Income Tax Act 24 of 1981 and the Income Tax Amendment Act 4 of 2005 wherein the Namibia Transfer Pricing regulation is enshrined. Section 95(1) of the Namibian Income Tax Act [180](ITA) on the determination of taxable profit with respect to international transactions. This is largely in line with the OECD Transfer Pricing Guidelines. This section was amended by the Income Tax Amendment Act 4 of 2005 which is inserted in the principal Act after section 95 (insertion- 95A). Transfer

[180] The Income Tax Act, Act 24 of 1981

pricing is an important part of tax. World markets are so integrated and related that the shift of prices is everywhere to avoid paying tax. In fact, it is the main way in which big corporations like De Beers in Namibia shift profits out of the country to their subsidiaries in tax havens to avoid paying tax/ high tax rates. These corporations simply misprice the goods that they are exporting and thereby avoid paying tax.

4.5 FDI in Namibia; Benefits for Small and Medium Enterprises (SMEs)

SMEs in recent times are described as the seedlings of the bigger businesses that fuel national economic engines.[181] Micro, Medium and Small Enterprises (MSMEs) as they are referred to in Namibia is closely linked to poverty reduction in both urban and rural areas. These inherently flexible enterprises are at the forefront of technological innovation and thus more intense integration between MSMEs and FDI required.

SMEs are important for the vitality of the business sector and they contribute significantly to the socio-economics of countries.[182] SMEs are thus critical tools for spearheading development hence the need for closer linkages with FDI. These small and medium enterprises are said to contribute considerably to the national GDP and to private sector employment, but they struggle to gain access to the funding needed to support business sustainability and growth. SMEs speed up development in that these businesses are seen to be positive drivers of growth and job creation. These two attributes are closely linked to every country's development objectives. In creating jobs, SMEs, are considered key players in poverty alleviation and inequality. In Africa, it is anticipated that the number of Africans joining the working age population will exceed that of the rest of the world combined, due to the rapid growth of SMEs on the continent.[183]

It is recorded that SMEs create approximately 80% of the African contents jobs establishing a new middle class and a fuelling demand for new goods and services.[184] The IMF's Regional Economic Outlook for Sub-Saharan Africa, published in April 2015, states that:

> "In the struggle of emerging Africa's utter determination to succeed, Sub-Saharan Africa will become the main source of new entrants in to the global labour force over the next 20 years".[185]

[181] J Abor *Internationalisation and Financing options of Ghanaian SMEs* (2004) 4 Acta Comercii 60-72
[182] Abor (n 134 as above)
[183] https://www.weforum.org/agenda/2015/08/why-smes-are-key-to-growth-in-africa/ accessed 05/09/2017
[184] n 181 above

The challenges facing SMEs however, lei in the struggles of gaining sufficient access to funding to support their sustainability and growth.[186] It is therefore evident all over Africa that governments have with bold commitment to infrastructure investment turned to entrepreneurs to support future growth. Linking SMEs with foreign direct investors can also assist in maintaining the viability of this very important sector and governments should fully explore and exploit this possibility.

4.5.1 The concept of SMEs

SMEs are non-subsidiary independent firms which employ less than a given number of employees. This number can vary across national statistical systems.[187]The most determining number used is 250 or less as accepted by the European Union (EU).[188]

The European Commission in 1996 established the following definition of small and medium enterprises. "The definition basis on four quantitative criteria (EC. 1996):

a) The over-all number of employees in the enterprise;

b) The annual volume of the turnover;

c) The total number of the assets in the enterprise;

d) The degree of independence of the enterprise or the ownership over it".[189]

4.5.2 Challenges Facing SMEs in Africa

The following is some of the multiple constraints faced by SMEs hindering them from reaching their ultimate potential (Hussain 2000)[190]:

---

[185] n 181 above

[186] HA Snyman D. Kennon, CSL Schutte & K von Leipzig*A Strategic Framework to Utilise Venture Capital Funding to Develop Manufacturing SMEs in South Africa South* (2014) 25 The African Journal of Industrial Engineering 2-816

[187] http://www.oecd.org/cfe/leed/1918307.pdf accessed 03/09/2017

[188] n 181 above

[189] http://management.ase.ro/reveconomia/2011-1/25.pdf accessed 03/09/2017

[190] https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157640-EN-ERP-53.PDF accessed 05/09/2017

"Excessive state involvement in the economy prevents indigenous entrepreneurs from gaining managerial experience in dynamic medium and large-scale enterprises.

Monopolies and subsidies given to public enterprises, and rules and regulations which stifled entrepreneurship.

SMEs have been starved of capital and other inputs with credit directed to larger enterprises, even when practical experience has shown that it is possible to lend profitably and effectively to micro - enterprises (MEs).

SMEs have scant access to foreign funds and foreign direct investment, reducing their ability to upgrade their technology and managerial know-how".

The need for SME and FDI linkages are ever so important because as foreign competition grows and export markets are ever-more demanding in terms of quality, delivery and product features our locals will never be able to compete independently.

4.5.3 SMEs and Large Industries: The linkages for Increased Market and Trade[191]

"The micro-enterprise sector MEs is not only important because it create jobs; it can also be an instrument of "participatory development" since it enables a wider section of the population, particularly the poor, to participate in the process and benefits of development. In addition, MEs not only help to integrate marginalized elements of society, making better use of human energy and initiative, but they can also act as a breeding ground for entrepreneurs. There is much evidence that MEs can be transformed into modern small and medium-scale enterprises. An IFC study on African entrepreneurs reported that several APDF-assisted entrepreneurs began their businesses on an informal basis. For example, an egg producer in Ghana started with less than US$200, three chicken pens and 900-day-old chicks. The study indicates that the business grew to employ over 300 workers and has a turnover of US$1.5 million. A garment maker in Botswana began with US$100 personal savings, a rented shed and sewing machines, and two apprentices but now operates a business that employs 65 workers. A Malawian left school at 18 to work as a self-employed tobacco grader, and became owner and managing director of four companies engaged in tobacco growing and curing, commodity processing and exporting, property investment and importation of machinery with a turnover exceeding US$1 million. A family-owned conglomerate in Ghana, which manufactures clothing, spirits, furniture, text books and other educational materials, and imports vehicles and equipment, grew from only a small dry-cleaning shop. The progression from MEs to SME and from SME to large companies is heavily dependent upon the strength of the linkages forged during this dynamic process. These linkages

[191] https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157640-EN-ERP-53.PDF accessed 05/09/2017

compensate for the shortcomings and constraints facing SME operators in an ever-growing, competitive and globalized economic arena".

4.5.4 SME linkages and FDI: Benefits to the Namibian economy

The Namibian newspaper (The Namibian) on the 2017/07/05 reported that the SME bank in Namibia is on the brink of closure.[192] According to the newspaper article, Bank of Namibia governor Ipumbu Shiimi in a media statement announced that they were approaching the High Court for an order to close the troubled bank. The Banks liquidity problems stem from alleged questionable investments amounting to N$200 million made in South Africa.[193] This unpleasant move became a reality, when the High Court of Namibia ruled that the financial institution was insolvent causing 200 individuals to lose their employment.

The role of the SME bank in Namibia was to finance small and medium enterprises (SMEs) in Namibia. With the closure of the bank the financial assistance to these Micro, Medium and Small Enterprises (MSMEs) entrepreneurs are now lost. This unfortunate event therefore adds to the struggle that most SMEs face, "funding". Creating synergies between foreign direct investors and local SME entrepreneurs can ease the pressure bought by the closure of the bank.

Foreign investors are known to be more technologically advanced then locals, they have more capital available, they know how to guard against risk etc. Also, as foreign competition grows and export markets are ever-more demanding in terms of quality, delivery and product features our locals will never be able to compete independently emphasizing the need for these synergies. Our industries are operating way below their capacity and this has led to massive lay-off. of workers and proliferation of informal sectors. The informal sector however does not have the financial muscle to run the country's economy hence the need for FDI. Foreign firms, unlike the local ones, have large sums of capital they can use to establish According to Hill (2000), "TNCs, because of their large size and financial strength, have access to financial resources not available to host country firms. The availability of these funds may stem from internal company sources, or, may be acquired because of their

[192] 'SME Bank on brink of closure' *The Namibian* 05/07/17 1

[193] n 191 above

reputation. Large TNCs may find it much easier to borrow money from capital markets than those (local firms) of host-counties.

4.6 The need for an Effective Legal Regime and Effective Implementation of Local Laws

Why is there a need for an effective legal regime? Why is there a need for an effective implementation of mechanisms of local laws? These are the by far the most important questions that if attended to will lead to extraordinary FDI success stories in African economies.

Investment laws are common to most African states and so is the ineffective implementation of this regime together with other local laws. This according to the researcher is Africa's problem. We do not know how to operate, control and regulate what we have put in place. Similarly, we lack flexibility to adapt our laws to the peculiar circumstances in which it operates, and rather opt for a one size fits all approach.

Multinational corporations, especially shell corporations from the developed world have since time in memorial violated local laws in the developing countries they operate. The argument is that these shell companies unlike in their home countries do not respect local environmental, labour laws and other standards of treatment in the countries in which they operate. The effective implementation of domestic laws vis-à-vis foreign direct investment is thus crucial.

Many factors impact where investors invest. One of these is better incentives which offer better returns on their investments.[194] This is the ultimate trigger countries use to compete with one another in the hope to lure more investors. This is however a fatal venture, if in the end the investors by not being compliant with local/domestic laws cause more harm than good. The case of Ramatex in Namibia is a classical illustration of just this.

---

[194] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017

4.6.1 The Ramatex Fiasco in Namibia

This is probably one of the most sensitive subject matters that the researcher wishes to educate on. The case of Ramatex had far reaching consequences bruising the Namibian economy its environment and its people extensively. Ramatex factory, a Malaysian textile and garment company started operations in Namibia in November 2001. The advent of Ramatex came with high hopes of building Namibia towards a skill based compotator for textile and garment industries in Africa.[195] The location into Southern Africa was motivated by the objective to benefit from the Africa Growth and Opportunity Act (AGOA) which allows for duty free exports to the US from selected African countries who meet certain conditions set by the US government.[196] The project was said to create ten to fifteen thousand jobs for the historically disadvantaged Namibians[197] and was therefore highly incentivised. It received subsidized water and electricity supply, a 99-year tax exemption on land use and more than 100 million Namibian dollars for site preparation (earthworks, water and sewage infrastructure, electricity).[198]

Today Ramatex is no longer in Namibia and the echo of this name awakens painful memories. The factory closed officially on 6 March 2008 with one of its Rhino garments plants having closed in 2005 already and in 2006 the main spinning, knitting and dyeing factories leaving thousands of Namibians jobless. The name (Ramatex) associates with, widespread abuses of workers' rights, open hostility towards trade unions, environmental degradation, health problems, clear disregard for domestic laws, a very, very bad investment one could argue. [199]

The questions fuelling the researcher, is whether one can attribute sole accountability to Ramatex? Or is the Namibian government and its failure to implement its local laws equally to blame? Did the Namibian government respond effectively or even timeously to the cries of those exploited by Ramatex? In as much as the researcher prompts governments to design

---

[195] n 194 above
[196] 'The Ramatex Closure in Namibia: Hard Lessons to Be Learned' *The Namibian* 14/03/2008
[197] n 196 above
[198] n 194 above
[199] n 196 above

laws attractive to FDI, she agrees with Dr Kameni[200] that there is a duty both explicit and implicit to effectively regulate the activities of foreign companies operating in their territories.[201] This according to Dr Kameni[202] should take the form of robust legal mechanisms by enacting appropriate pieces of legislation and the employment of technocrats competent to implement the legislation.[203] Dr Kameni[204] also recommended and the researcher accords, that the involvement of the Non-Governmental Organizations (NGO's) and the local community as watchdogs to hold these foreign investors to their word will be advantageous.[205]

4.7 CHAPTER SUMMARY

This chapter emphasised on the cogent need for the effective implementation of a sound but uniform legal framework or environment for the treatment of foreign direct investment in Namibia. The reasoning, that same would create certainty that will boost investor confidence facilitating their choice to choose Namibia as their desired FDI location. The researcher in this chapter emphasised the need to overhaul the new Namibia Investment framework endeavouring attracting FDI and not deterring it.

This chapter looked at the paradigm shift from Namibia's old 1990 Investment Promotion Act to the new Act NIPA and how it may possibly impact the investment climate in the country. It shows that moving away from the liberalized regime in the 1990 Investment Promotion Act can have grave consequences for Namibia's development and prompts that there are other means in which NIPA can attain similar results. The chapter also briefly dwelled on the various regulators in Namibia impacting foreign investments endeavouring to harmonise the objectives each one of these laws attempts to achieve.

[200] E Kameni, DR Enga Kameni is a Manager, Legal Services, with the African Export-Import Bank (Afreximbank). This is the premier Trade and export development bank in Africa. He holds a Ph.D. in International Trade Law from the University of Pretoria, where he was a potter fellow

[201] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017

[202] n 200 above

[203] n 201 above

[204] n 200 above

[205] n 201 above

This chapter further instructs on the need for SME linkages with foreign investors to help grow the nation's economy. It stressed how SMEs contribute considerably to the national GDP of African nations and to private sector employment. It looked at the constant struggles faced by these SMEs in gaining access to the funding needed to support business sustainability and growth. This chapter methodically suggests that SME linkages with foreign investors can bring the much-needed joint ownership aspect NIPA hopes to achieve. The researcher however holds that this need to be encouraged incentivised and not imposed in a blanket.

Finally, this chapter briefly informed of the Ramatex fiasco in Namibia in the hope to demonstrate the importance of effective implementation of domestic laws to reap positive benefits from FDI in host states.

CHAPTER 5

Comparison with the Zimbabwean Indigenization Economic Empowerment Act (IEEA)

5.1 Introduction

The following chapter will analyse the FDI climate in Zimbabwe as compared to that of the Namibian economy. Introduced, to prove that it is instructive not to confine one's lessons to own experiences, but rather to draw from the experiences of various other countries on the continent. The researcher selected Zimbabwe and their indigenization laws as a comparator to show how restrictive policies can impact FDI inflows into an economy. The objective of this comparative analysis is to somehow measure the likely impacts either restrictive or liberal policies can have on an economies economic development. The researcher opines that the Zimbabwean indigenization law resembles the New Namibia investment promotion Act (NIPA 2016) in more ways than we would like to admit. This indigenization law will therefore be used as a measuring tool to depict how restrictive laws can caution foreign direct investors from investing in host economies. This comparator draws inspiration from the joint ownership aspect, the retail reservations and the vast powers afforded to the Ministers in both the Namibia's new investment law (NIPA) and the Indigenization Economic Empowerment Act (IEEA) of Zimbabwe.

5. 2 Zimbabwe

The Republic of Zimbabwe is a Southern African state with an estimated population of 16 million inhabitants. This landlocked country is lies between the Zambezi and Limpopo Rivers.[206] South Africa borders Zimbabwe to the south, Botswana to the west and southwest, Zambia to the northwest, and Mozambique to the east and northeast. Although it does not border Namibia, less than 200 metres of the Zambezi River separates it from that country. The countries capital and largest city is Harare where the inhabitants speak sixteen different official languages, with English, Shona, and Ndebele being the most commonly used.[207]

[206] https://data.worldbank.org/indicator/SP.POP.TOTL accessed 13/09/2017
[207] n 206 above

5.3 Zimbabwean Indigenization and Economic Empowerment Act (IEEA)

The Zimbabwean Indigenisation Economic Empowerment Act 14 of 2007 was gazetted on March 7, 2008. The law was signed into law on April 17, 2008 and provides for all companies with a share capital above US 500 000 dollars operating in Zimbabwe to arrange for 51% of their shares or interests therein to be owned by indigenous Zimbabweans. The regulations accompanying this act were published in January 2010 rendering the law effective.[208] The Act is generally aimed at diluting foreign domination in Zimbabwe and thereby empowering the previously disadvantaged indigenous people in the country. The Act seeks to give back to indigent Zimbabweans what they lost in colonial times and is therefore a powerful tool empowering indigent Zimbabwean's to take over and to control many foreign owned companies in Zimbabwe.[209] The effect of this law is that over 50 percent of all the businesses in the country will be transferred into local African hands.

5.3.1 The Indigenisation & Economic Empowerment Legislative Framework

The framework comprises of the;

The Indigenisation & Economic Empowerment Act (chapter 14:33),

The Indigenisation & Economic Empowerment (General) Regulations, 2010,

The Indigenisation & Economic Empowerment (General) (Amendment) Regulations, 2010.

5.3.2 Conceptualizing Indigenization

Chapter 14:33 of the Indigenization Policy defines Indigenization as "the deliberate involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, to have an equitable ownership of the nation's resources". This policy also highlights, "an indigenous Zimbabwean to mean "any person who, before 18 April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race and any descendant of such person and includes any company, association, syndicate or

[208] P Munyedza 'The Impact of the Indigenous Economic Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities' (2011) 37 *Business and Economics Journal*
[209] http://www.economist.com/node/9804332 accessed 13/09/2017

partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest".

5.3.3 Scope of the Zimbabwean IEEA

The government of Zimbabwe through this Act endeavours to secure, at least 51 per cent of the shares of every public company and any other business shall be owned by indigenous Zimbabweans. According to the legislation[210] new investments exceeding US $500 000, shall declare their levels of indigenisation to the Minister and if they are not compliant, submission of their Provisional Indigenisation Implementation Plans is expected.[211]

It also provides that no merger or restructuring of the shareholding of two or more related or associated businesses; or the acquisition of a controlling interest by a person in a business that requires to be notified to the Competition Commission shall be approved unless 51% (or such lesser share as may be temporarily expected) in the merged or restructured business is held by indigenous Zimbabweans.

The Government of Zimbabwe like Namibia in NIPA also reserved some economic sectors to be ventured into by only local Zimbabweans. According to the IEEA entry into these sectors requires approval from the Government. The legislation also provides preferential procurement from local companies, just like South Africa's BEE preferential procurement provisions.

According to the researcher, this Act seeks to proliferate domestic industries at the expense of foreign firms, value addition, captain of industries by local citizens, employment creation, reduced dependency on foreign companies (countries), avoids neo-colonialism, community ownership of natural resources etc. It looks at promoting the procurement of goods and services from indigenous businesses and provides for the establishment of the National

[210] Indigenisation and Economic Empowerment Act, Act 14 of 2007, Regulations 2010
[211] http://saviourkasukuwere.blogspot.co.za/p/issues-agenda.html accessed 15/09/2017

Indigenisation & Economic Empowerment Board to advise the Minister and to manage the Fund. The fund will finance the indigenisation and empowerment transactions.[212]

5.3.4 Economic sector reservations for indigent Zimbabweans

Primary food products and cash crops; wholesale and Retail sectors; hairdressing and beauty salons; craft-markets; employment agencies, estate agencies, grain milling; bakeries; tobacco grading; packaging and processing and advertising agencies.[213]

5.4 The Impact of the IEEA on FDI flows into the Zimbabwean economy

Zimbabwe's economic empowerment programmes appear to have had a significant impact on FDI flows in and out of the country in the period immediately following land reform, with a particularly drastic decline in FDI inflows.

As reported the net FDI in Zimbabwe grew steadily at an annualised 0.24% of GDP between the years 1985 and 1998. Where after, the confidence of investors was shattered by the fast-track land reform programme that nationalised private land in violation of private property rights. Resultant of this, declining FDI inflows into the country. The declines on average measured at 0.55% a year between 1999 and 2009. See graph below, [214] compiled from data from United Nations Conference on Trade and Development (UNCTAD) website, http://unctadstat.unctad.org.[215] The graph shows, how Zimbabwe's economic empowerment programmes significantly impacted FDI flows into and out of the country immediately following land reform programme. The graph particularly shows drastic declines in FDI inflows.

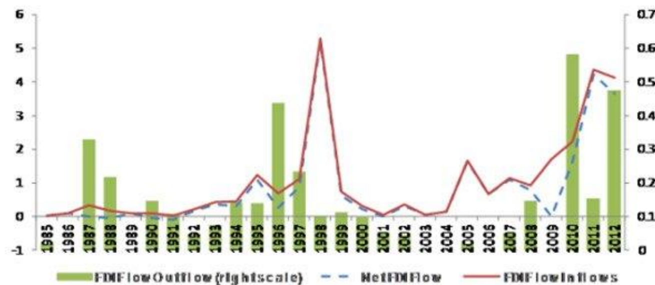
---

[212] n 211 above

[213] http://saviourkasukuwere.blogspot.co.za/p/issues-agenda.html accessed 15/09/2017

[214] http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13 accessed 17/09/2017

[215] n 214 above



Graph: Foreign direct investment flows, Zimbabwe 1985–2012 (% of GDP)

Succeeding the land reform programme in Zimbabwe was the IEEA in 2010. With the implementation of this Act came significant increases in FDI outflows and it was reasoned that the IEEA then, lacked clarity on the protection of property rights.[216] The total FDI outflows were said to have increased from 0.05% of GDP in 2007 to 0.47% of GDP in 2012 with the implementation of the IEEA, because investors feared losing their investments to a policy reminiscent of the land reform programme.[217]

Preceding the land reform programme, the indigenization Act (IEEA) in Zimbabwe was another major deterrent to FDI inflows into the country. Foreign investor that had hoped to invest in the country has been subdued in 2012 due to the IEEA creating uncertainty over the country's political reforms. According to the Zimbabwean Investment Authority (ZIA), in 2012, investment approvals dropped from approximately US$7 billion in 2011 to US$821 million.[218] This drastic decline in FDI from the billions is said to be attributed to the IEEA and the aggressiveness in which it was implemented. Thus, despite the expected influx in of investments in the mining and manufacturing sectors, most foreign investors have adopted a "wait and see "approach, in hope of some form of change in the IEEA.

[216] http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13 accessed 17/09/2017
[217] n 216 above
[218] n 216 above

It is however relevant to mention, as reported by the ZIA, that despite the of reluctance of investors, investments in Zimbabwe have grown from US$ 40 million in 2006 to US$387 million in 2011, US$52 million in 2008, US$ 105 million in 2009, US$166 million in 2010 and US$387 million in 2011. In 2008 the countries total investment inflows amounted to US$52 million, in 2009 it was US$105 million, in 2010 the figure rose to US$166 million to US$387 million in 2011, conversely this falls short of the US$7 billion projects approved in 2011 (Zimbabwe Investment Authority ZIA-2012).[219] This clearly illumines that while the country was in the process of attracting large amounts of FDI; the IEEA's implementation came and stirred a rather significant flight in capital inflows from FDI into the country.

5.5 How NIPA mirrors Zimbabwe's Indigenization Law

The motive behind Zimbabwe's indigenization Act (IEEA) is the empowerment of ordinary indigent Zimbabweans marginalized in the colonial era. The Act (IEEA) however does not come without any weaknesses and as argued by the researcher, finds its only strength in its nobility. This analysis is also what inspired this comparator. The Namibia investment law (NIPA) like the Zimbabwean indigenization law is also a very noble piece of legislation driven by the countries development goals like the Harambee Prosperity Plan (HPP), Vision 2030 and the National Development plans (NDP1-4). Though NIPA is not particularly there to rectify colonial injustices like the Zimbabwean Laws, the two pieces of legislation do share some similarities urging this comparison.

In comparing Namibia's Black Economic Empowerment (BEE) policy to Zimbabwe's IEEA, the Namibian law is quite impressive as it offers some flexibility concerning safe guarding investors which is not the case with the Zimbabwean IEEA. Whether NIPA and its economic sector reservations/joint ownership aspect rob the shinning BEE provisions off its shimmer is another over overarching question underpinning this debate.

The following similarities according to the researcher are encompassed in both laws;

[219] http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13 accessed 17/09/2017

5.5.1 Like the IEEA NIPA too looks like an Economic Empowerment policy

The researcher opines that the objectives are similar. Like the IEEA, NIPA wishes to achieve Namibia's development goals (vision 2030/ HPP/ NDP4) through the Act. The question, is NIPA an economic empowerment policy? Or are these objectives to be enshrined in our BEE policy? The researcher opines that NIPA in its current form invalidates and misconstrues the investor protections brought forth by the Namibian BEE policy. As opined by Gamuchirai Chiwunze [220] economic empowerment policies are of concern to foreign investors if they are perceived to amount to appropriation and violation of private property rights. The researcher accords with Chiwunze's view, stating that joint ownership disempowers foreign investors of their investments and deters them in that way. The Indigenisation Act in Zimbabwe threatened company seizures like the land reform program.

According to the Zimbabwean Reserve bank in 2009, establishing and enforcing property rights in the country was critical for the attraction of foreign investment into the economy.[221] Empowerment programmes raise concern with foreign investors in host economies as these intrude on private property rights. Property rights are said to be violated when the owner loses their right to or there's an assault on the right to tenure or entitlement. The researcher like many foreign direct investors opine that economic empowerment programmes like the IEEA and NIPA in its current form characterise "appropriation" as investors lose total control over their investments in the host state. It is with these same views that the Zimbabwe Human Rights NGO Forum stated that many investors view economic empowerment programmes suspiciously, adopting a wait and see attitude towards investing in hosts, fearing the loss of their investments.[222]

The question, is NIPA an economic empowerment policy? It certainly looks like one. Is this the correct platform to address economic imbalances? No. NIPA, like the name states should promote foreign direct investments into the Namibian economy and leave the BEE to address the economic imbalances as it currently stands to do. NIPA in its current form overrides the shimmer of the BEE, being flexible in foreign investment protectionism and thus creates a

---

[220] Gamuchirai Chiwunze is a Research Associate at CAI with interests and expertise in finance, macroeconomics, development economics and international trade. Gamuchirai can be contacted via the Consultancy Africa Intelligence's Finance & Economy unit (finance.economy@consultancyafrica.com).
[221] http://www.rbz.co.za accessed 13/09/2017
[222] http://www.kubatana.net accessed 13/09/2017

pool of contradictory laws which has the likeliness of dissuading foreign investors from investing in the country.

5.5.2 Susceptibility to corruption and the openness to politicization

A striking resemblance between the NIPA and the IEEA of Zimbabwe is the susceptibility to corruption and the openness to politicization that both laws create. Both laws give a lot of loosely-defined discretion to the government. If one has regard to section 15 of the IEEA Act, it is seen that the Minister is the one in charge of establishing a database encompassing of willing investors who want to partner up with indigenous Zimbabweans to acquire shares in their businesses, and of those indigenous Zimbabweans who wish to partner with such investors. A strikingly problematic provision giving the Minister too much flexibility to partner politically acceptable partners. NIPA on the reverse side also affords the Minister too much power in the form of too wide a discretion. This discretion is found in the approving and registering of investments that vest in the Minister. NIPA therefore creates an investment regime that could be dependent on personal style, preferences, intentions and whims of the incumbent Minister.[223] Although NIPA does purport to set out criteria for the approval of investments, same is vague and gives the Minister flexibility to politicise and corrupt the system. These laws therefore mirror one another in more ways than one would hope and has clear negative attributes that can deter rather than promote FDI.

5.5.3 Both NIPA and the IEEA contain Blanket Barriers

The IEEA is inflexible to certain investor demands with a one-size-fits-all approach that allows no exceptions. Also, blanket barriers have the potential of leaving certain sectors undeveloped or underdeveloped.

5.5.4 FDI Deterrent

The Zimbabwean IEEA is clearly not a promoter of FDI, as many opine that this law makes Zimbabwe an undesirable destination for foreign direct investment. No investor wishes to

[223] http://www.mondaq.com/southafrica/x/612174/Inward+Foreign+Investment/The+Namibia+Investment+Promotion+Act+2016+Hindering+Or+Promoting+Foreign+Investment accessed on 27/07/2017

surrender 51% ownership to a host's nationals. This law burdens investors with surrendering 51% of their share to the indigent Zimbabwean's. Like this law, NIPA comes with the same FDI barriers. Sections 8 (2) (b) of NIPA reserves sectors for Namibians and entities whose majority shareholdings are owned by Namibians and section 8 (2) (c) reserves certain businesses for joint venture partnership between Namibian investors and foreign investors exclusively.

Also like Namibia's economic sector reservations as outlined in NIPA, the a Zimbabwean IEEA, also reserved some economic sectors to be ventured into by only local Zimbabweans and entry into these sectors needed prior approval.

The Question, is Namibia's BEE policy similar to the Zimbabwean IEEP policy/ IEEA? The answer no, but NIPA certainly is. Like the IEEA, NIPA's blanket economic sector reservations and joint the ownership aspect has the likeliness of deterring instead of promoting FDI flows into the country. No investor wishes to be disempowered by a host countries laws and will simply relocate their investments if need be. No country holds a monopoly of resources and our policy-makers should be mindful of this.

5.5.6 Empowerment programmes in other developing countries

Namibia and Zimbabwe can learn much from the empowerment programmes implemented in Malaysia. Although the researcher feels that empowerment in Namibia should be addressed in the BEE only and not in NIPA, Malaysia is an example of a country that has implemented a successful, robust and inclusive affirmative action programme to address past economic imbalances.

> The Malaysian New Economic Policy (NEP) implemented from 1970 to 1981 looks as follows: [224]"It is designed to eradicate poverty through expanding the economy and reducing the proportionate economic share of non-Malays. The NEPs objective was to increase the economic share of Malays from 2.4% of total wealth in 1970 to 30% in 1990; to reduce poverty; and to change employment patterns in urban areas to reflect the racial composition in the country. Malaysia succeeded in attracting FDI regardless of the NEP because it had a relatively open and welcoming environment to FDI and maintained restrictions on purely financial flows. Furthermore, it offered

[224] http://saviourkasukuwere.blogspot.co.za/p/issues-agenda.html accessed 15/09/2017

incentives for export-oriented FDI and allowed for the establishment of special export processing zones where FDI was shielded from changes in government policies. Therefore, FDI as a proportion of GDP increased from 25% in 1975 to 29% in 1988, whilst by 1990 the economic share of Malays increased to 19.3% of total wealth and poverty levels fell to 17.1% of the ethnic Malay population. This success was based on the flexibility of the Malaysian authorities in varying empowerment policies by allowing exceptions that suited the needs of foreign investors through incentives in export-oriented industries. Malaysia's experience holds a lot of lessons for African countries. First, asset–wealth transfer is not the only option in economic empowerment; preferential treatment for skills acquisition is another form. Second, transparency and well-defined policy fosters investor confidence. Finally, empowerment policies need to be flexible and accommodate some investor demands".

5.6 CHAPTER SUMMARY

In summation, this chapter, sought to highlight the likely impacts of NIPA on the flow of FDI in Namibia by using the Zimbabwean IEEA as a negative comparator. The aim of this comparator was to show readers that reckless nationalism in Zimbabwe had far reaching consequences for the economy of Zimbabwe. Not only did the Zimbabwean IEEA result in private property expropriation, but it deterred possible foreign investors from investing in the economy causing drastic declines of the much-needed foreign revenue. The aim of this comparator was to create awareness and to prevent the Namibian nation from making the same mistakes. We need to learn from our neighbouring countries and should endeavour to better our laws, to prevent similar results.

This comparison therefore shows the bottlenecks that the IEEA has created for Zimbabwe concerning FDI. The IEEA does not forefront the much-needed economic growth so desired by the masses in the country. It is more political in nature, a superficial policy which NIPA does not want to resemble in the least. As the Zimbabwean nation, Namibia too needs policies which aim at solving the endemic problems that can enhance economic growth. The comparator thus shows that NIPA is not what Namibia needs at this stage as the little resemblances mirrored by the IEEA is a little our people do not need. Our policy makers should think hybrid policies favouring both indigenization or Namibianisation and the much needed FDI.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

The research problem which this study has sought to solve is that over the last few years, it has been reported that Namibia has been quite unsuccessful in attracting high levels of FDI, leading to raised private and public debt levels. These barriers are largely attributed to low levels of openness to foreign investment. Currently in Namibia, FDI is governed by the Foreign Investments Act 27 of 1990 [225]. However, on 16 August 2016, the President of the Republic of Namibia signed a new Investment legislation, the Namibian Investment Promotion Act (NIPA)[226]. NIPA is therefore set to replace the Foreign Investment Act, 1990 and there are concerns that the new law may have far-reaching consequences for the flow of FDI into Namibia. While the 1990 legislation provides for a free Investment regime backed by institutional support, the new legislation affords wide ranging discretionary powers to the Minister, clearly incorporating a red tape into the countries investment regime and landscape.[227]

It is against this backdrop that this study has sought to investigate the possible impact of NIPA, on the flow of FDI into the country and has therefore argued that with NIPA set to replace the Foreign Investment Act, 1990, it would have far-reaching consequences for the flow of FDI into Namibia. The argument basis on the fact that, while the 1990 legislation provides for a free investment regime backed by institutional support, NIPA seems to promote 'red-tapism' and reckless economic nationalism through restrictive investment policies which would all transform, in the negative by daunting future foreign investors.

---

[225] Namibia Foreign Investments Act 27 of 1990

[226] Namibia Investment Promotion Act 9 of 2016

[227] http://www.mondaq.com/southafrica/x/612174/Inward+Foreign+Investment/The+Namibia+Investment+Promotion+Act+2016+Hindering+Or+Promoting+Foreign+Investment accessed on 27/07/2017

6.2 Summary of findings

In chapter two, general issues regarding FDI as a potent capital flow has been discussed. The chapter not only discussed the much hyped good that FDI brings to a nation, but awakens the beneficiaries to the pitfalls as well. The reasoning, based on a movement towards a more balanced and nuanced view, taking full account of expected positive effects as well as the possible negative impacts. While the benefits of FDI are touted around all the time, the costs and pitfalls are seldom discussed. These are however necessary as it prompts legislative drafters or law-makers not to be blind-sided by the negatives, ambiguities and the shortcomings FDI can bring. Sound policies and laws know that pitfalls exist and cater for these to minimize the damages they may bring. We need not only harness FDI but we have to do it in a sustainable manner which is only achievable by the effective implementation of local laws.

Chapter three looked at the historical architecture of the Namibian Economy. It discussed the old 1990 Act to illumine the liberal framework of this old Act as opposed to that of NIPA.

Chapter four emphasised on the cogent need for the effective implementation of a sound but uniform legal framework or environment for the treatment of foreign direct investment in Namibia. The reasoning is that same would create certainty that will boost investor confidence facilitating their choice of Namibia as their desired FDI location. The researcher therefore emphasised the need to overhaul the new Namibia Investment Promotion Act (NIPA) endeavouring attracting FDI and not deterring it.

Chapter five analysed the FDI climate in Zimbabwe as compared to that of the Namibian economy. This is to draw lessons from the experiences of various other countries on the continent. The researcher selected Zimbabwe and their indigenization laws as a comparator to show how restrictive policies can impact FDI inflows into an economy. The objective of this comparative analysis was to somehow measure the likely impacts restrictive policies can have on an economies economic development. The researcher opines that the Zimbabwean indigenization law resembles the New Namibia investment promotion Act (NIPA 2016) in more ways than we would like to admit. This indigenization law was therefore used as a

measuring tool to depict how reckless nationalism cautioned foreign direct investors from investing in Zimbabwe.

6.3 Conclusions

On a final reflection, the researcher wishes to note that the ultimate purpose of this contribution is not to draw conclusions but rather to present the issues and to point to a roadmap that may lead to an improved investment regime in Namibia. It must be noted that FDI is a double ended sword. It can either be good or bad, if not harnessed properly. The concept comes with many theoretical underpinnings, principles, pros and cons that countries should be mindful of. It is considered a powerful tool that has caused game changing effects for many countries. FDI is however not always beneficial hence the need to be reminded of its potential pitfalls as well. This will create reasoning, based on a movement towards a more balanced and nuanced view, taking full account of expected positive effects as well as the possible negative impacts. It will furthermore assist policy-makers in eliminating the negatives, the ambiguities and the shortcomings, creating soundness in laws that embrace sustainable development using sornarajah's middle path theory.[228]

6.4 Recommendations

To maximize the potential benefits by protecting the rights of all parties involved, economic activity should take place under an umbrella of appropriate legislation. The researcher therefore in recommending a roadmap toward an improved investment regime in Namibia hinges the underlying as several milestones that could improve the developmental features of international investment law;

The new investment legislation (NIPA) is titled investment promotion and its contents should be reflective of this NIPA should selectively support investment in specific areas, especially in those of high sophistication where there is much use of advanced technology and those areas associated with exports. Accordingly, instead of promoting investment in general, attention should be focused on the development of certain sectors. The target in the new act should therefore not be toward the informal retail sector as much but should be geared at

[228] M Sornarajah (2010) The International Law on Foreign Investment

attraction of industrial conglomerates that will boost exports and positively contribute toward sustainable development. This approach promises a state the achievement of the countries strategic goals, reduced unemployment, acquisition of technological knowhow and the development of exports which we all so desire with the promotion of FDI. (Centre for Information and Decision Support, 2004).

Furthermore, distinguishing organised and unorganised retailing from one another is of utmost importance. Organised retailing characterises with trading activities that is undertaken by licensed retailers, which is those businesses registered for tax (sales and income). [229] It also includes corporate-backed hypermarkets, retail chains as well as privately owned large retail businesses.[230] Unorganised retailing, on the other hand, refers to the traditional formats of low-cost retailing, like street vending, local koeka shops, low cost hairdressing, taxi services to mention but a few.[231] This will make it easier for policy-makers to somehow Namibianise or rather to reserve the unorganised sectors for locals without deterring organised foreign investments.

The new law should promote synergies or linkages between SMEs and foreign investors rather than bluntly call for joint ownership. As of present, the two stands too far apart prompting the researcher too think that a workable broader policy and regulatory approach guiding FDI and SME engagement would go a long way.[232] This will encourage enhanced investment flows, skills development and technological advancements for the country. Linking SMEs with foreign investor will give these enterprises the capital they need and governments the joint ventures they require to obtain their socio-economic objectives. SMEs also sometimes lack the understanding of the business value curve utilised by financiers to gauge the risk-reward characteristics of an investment. This is especially true for developing countries in Africa where linkages may not occur spontaneously.[233]

---

[229] http://www.insightsonindia.com/wp-content/uploads/2013/09/influence-of-fdi-on-retail-sector.pdfaccessed 25/08/2017
[230] n 229 above
[231] n 229 above
[232] https://www.namibian.com.na/index.php?id=8940&page=archive-readaccessed 24/08/17
[233] http://www.oecd.org/cfe/leed/FDI-SME-Kazakhstan-final-eng.pdf accessed 05/09/2017

It is therefore appropriate in these instances for law-makers at the national and regional levels to take charge and to propose these linkages between multinational companies and SMEs. This is referred to as an' FDI-SME linkage programme'. The fragmentation of global supply chains is a chance for SMEs to come into the supply networks of large firms and there by seize positive spill overs from the transfer of technology, skills and expertise.[234]

The researcher is mindful that in the very beginning, FDI encouraged local investment, increased government revenues etc much more than it does today. This is simply because times have changed and the damage repair caused by these multi-later corporations today cost much more for government then the revenue initially brought. Also, the capital inflows from FDI may be beneficial but the resulting outflow of profits may be so high making it a substantial cost. The researcher thus opines that the government, instead of making laws that might deter rather than promote FDI, should focus on greater environmental protection impact plans and should pass stricter transfer pricing laws. Illicit financial flows are the devils in Africa and we should focus our time and resources ther rather than fixing laws that are not broken. NIPA in its current form will just hinder direct investments at the cost of greater socio-economic problems for the country.

Government, civil society, and all Namibians should come together so that in unity laws are formulated based on rational calculations of advantage and disadvantage.[235]This will not only help Namibia achieve economic growth, but also the countries developmental objectives as outlined in the most recent Harambee Prosperity Plan, the NDP 4 and vision 2030.

The Namibian government should strive to effectively implement domestic laws. There should be a binding agreement between the host state and the investor company, outlining clear rights and obligations of either party. NIPA instead of blanket reservations should focus on clauses expressly dealing with respect for local laws and clear penalties in cases of non-observance.

---

[234] http://www.oecd.org/cfe/leed/FDI-SME-Kazakhstan-final-eng.pdf accessed 05/09/2017

[235] Classical or traditional realists departed from the premise that the international system of states was anarchic and conflict bound. Through the mechanism of the "balance of power" and military alliances, order and peace could be brought.

NIPA should create supervisory mechanisms to act as watchdogs over foreign investment.[236] These agencies should be mandated and empowered to regularly visit and inspect investment sites and report back to the NIC. Meetings should also be conducted with employees working for these foreign investors in instances where there is evidence of non-compliance with local la.ws (labour, environmental laws etc). This can be done in a procedural evidence based manner to prevent unnecessary interference with investors.[237]

It is furthermore recommended that NIPA in its framework should insist on the respect for local and international laws on corporate social responsibility and other internationally recognised standards.[238] This would encourage MNC's to consider all stake holders, employees and communities in which they have operations running and not just the shareholders. This will empower all stakeholders with a voice in company activities regarding the investment. Often, civil society organisations (C.S.O.) and NGO's are far better informed then their own governments and their knowledge can prove invaluable.[239] They can thus be used to express their views on the respect of labour, environmental and other local laws.

The Namibian government should implore on a united approach towards investment. Dr Kameni[240] in his article titled, "Towards an effective legal scrutiny of Foreign Direct Investments in Africa, states that this can take the following forms: harmonisation of laws, having a tribunal to deal with investment cases and periodic meetings to share information on good practices and keeping abreast with the international developments on FDI".[241]

It is furthermore noted by the researcher that Namibian policy-makers should harness how they deal across borders as foreign direct investment really encapsulates a State's relations with the outside world. As was stated by the then, Minister of Foreign Affairs Theo-Ben Gurrirab, *"Foreign policy, in a nutshell, is really the reflection of one's domestic policy,*

[236] https://papers.ssAw3rn.com/sol3/papers.cfm?abstract_id=1682323accessed 24/08/2017
[237] n 236 above
[238] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017
[239] n 238 above
[240] DR Enga Kameni is a Manager, Legal Services, with the African Export-Import Bank (Afreximbank). This is the premier Trade and export development bank in Africa. He holds a Ph.D. in International Trade Law from the University of Pretoria, where he was a potter fellow
[241] n 238 above

[242]and therefore insinuating an investment law that deters and not promotes is simply appalling.

Laws surrounding FDI should be transparent, predictable and not contradictory of each other. We should shy away from reckless nationalism as seen in Zimbabwe with the IEEA.

Full responsibility and accountability should be given back / rather should be given to the Namibia Investment Centre (NIC). NIPA in its current format offers wide discretionary powers to the minister, rendering the role of the Investment Centre redundant. Promoting institutional frameworks removes potential barriers faced by foreign investors, improves competence with simpler procedures for establishing projects and it provide consultation and advice to investors through research and database facilities. The role of the NIC is to remove the prolonged procedures and hurdles but with the approval backed regime by the minister, this role simply becomes redundant. Foreign investors are in most cases dissuaded from investing in countries where the administrative processes are politicized. The reasons, because of the susceptibility to corrupt practices, lack of transparency and lack of discretion. Administrative processes need to be run by technocrats, not political affiliates as this will ensure service delivery. The new act should combat corruption and not create possibilities in which it can thrive. The wide discretionary powers given to the Minister has the potential of hindering potential foreign and domestic investors from investing in the country. Administrative corruption (the abuse of position or authority for personal gratification) is real and our laws should strive to combat this at all costs. Removing this discretion from the minister and placing it with the NIC is a much more investor friendly and will certainly boost the confidence of investors local and foreign.

Technocrats, comprising of diplomats, economists and lawyers should be the core workforce at the investment centre. Diplomats being the foreign representatives, economists to run the numbers and lawyers to read the fine print. This triad will not only make informed decisions but it will ease out possible corrupt practices. Ministers are political appointees and not necessarily technocrats. NIPA also requires investors that meet certain investment thresholds

[242] http://www.kas.de/upload/auslandshomepages/namibia/State_Society_Democracy/chapter10.pdf accessed 25/08/2017

(to be determined by the Minister) to register with the Namibia Investment Centre, clearly giving too much power to the minister, opening doors for corruption, nepotism, unjustified enrichment, all of which deters FDI.

NIPA should also be adjusted to ease out all the performance requirements as this merely sets a red tape in the investment climate the act also provides that no foreign investor may invest in Namibia or acquire any licence, permit, authorisation or concession in Namibia through any form of merger, acquisition, direct or indirect sale or transfer without first receiving the approval of the Minister. These are clear procedural hurdles which have the potential of deterring investments.

When drafting new laws focus should be on international cooperation, multilateral, regional and bilateral instruments such as investment chapters within free trade areas (FTAs) as these are key in promoting investments.[243] Much research has proven that when a country opens up to the international community by adopting a free- market economy, it creates investor confidence, boosts capital flow, commodities and technological transfer both in and out of the host country. This maximizes economic benefits for a host country. All of which is impossible if our overall objectives are not intertwined. We cannot look to advance our development/ strategic goals at the expense of FDI. Our new law should therefore be drafted in a manner that improves the business environment for FDI.

Incentivise investors in the new law to purchase local resources from local firms. This can be done via urging investors to subcontract local firms. Subcontracting would involve the buying of supplies from local or domestic firms and working closely on detailed specifications for a complex product. In both the 1990 investment promotion act and in NIPA there is no legal requirement for investors to purchase from local sources. Now in as much as performance requirements are different from corporate social responsibility and the fact that it may have potential deterrent effects, there exist different approaches to incorporate same into legislation. The researcher proposes that instead of making it a legal requirement the Act can rather provide incentives to encourage this.

[243] S Hindelang& M Krajewski *Shifting Paradigms in International Investment Law; More balanced less isolated increasingly diversified* (2016) 39

Bibliography

1. Text Books

1.1 Fru VN The International law on foreign investments and host economies in sub saharan Africa (2011)

1.2 Hindelang S & Krajewski M, Shifting Paradigms in International Investment Law; More balanced less isolated increasingly diversified (2016)

1.3 Sornarajah M The International Law on Foreign Investment (2010)

1.4 Supedi S International Investment Law: Reconciling Policy and Principle (2012)

1.5 Supedi S International Investment Law: Reconciling Policy and Principle (2008)

1.6 Schefer KN International Investment Law; text cases and materials (2013)

2. Journal Articles

2.1 Irandoust MA 'Survey of Recent Developments in the Literature of FDI – Led Growth Hypothesis' (2010) The Journal of World Investment & Trade

2.2 Lall S & Narula R, 'Foreign Direct Investment and its Role in Economic Development: Do we Need a New Agenda?' (2004) The European Journal of Development Research

2.3 Mosoti V "Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: are poor economies caught in between' (2005) 26 North western Journal of International Law and Business

2.4 Abor J, Internationalisation and Financing options of Ghanaian SMEs (2004) 4 Acta Comercii

2.5 Snyman HA, Kennon D, Schutte CSL & von Leipzig K, A strategic Framework to Utilise Venture Capital Funding to Develop Manufacturing SMEs in South Africa South (2014) 25 The African Journal of Industrial Engineering

2.6 Munyedza P 'The Impact of the Indigenous Economic Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities' (2011) 37 Business and Economics Journal

3. Legislation

Namibia

3.1 The Namibian Constitution, Act 1 of 1990

3.2 The Foreign Investments Act, Act 27 of 1990

3.3 The Income Tax Act, Act 24 of 1981

3.4 The Income Tax Amendment Act 4 of 2005

3.5 The Export Processing Zone (EPZ) Act 1995 as amended by Act 6 of 1996

3.6 The Agricultural (Commercial) Land Reform Act of 1995

3.7 The Companies Act 28 of 2004 as amended by the Companies Amendment Act 9 of 2007

3.8 The Competition Act 2 of 2003

3.9 The Close Corporations Act 26 of 1988

3.10 The Anti-Corruption Act 8 of 2003

Zimbabwe

3.11 The Indigenisation and Economic Empowerment Act, Act 14 of 2007

4. Case Law

4.1 United States of America

4.1.1 USA (LF Neer) v United Mexican States (1927) 21 American Journal of International Law

4.2 ICSID

4.2.1 Waste Management Inc v Mexico A/F/00/3 para 98-99 (ICSID) 2004

4.2.2 Genin v Estonia, ICSID Case No ARB/99/2, Award of 25 June 2001

5. Websites

5.1

http://www.mondaq.com/southafrica/x/612174/Inward+Foreign+Investment/The+Namibia+Investment+Promotion+Act+2016+Hindering+Or+Promoting+Foreign+Investment accessed 27/07/2017

5.2 http://www.worldbank.org/en/country/namibia/overview accessed 27/07/2017

5.3 http://works.bepress.com/andrew_guzman/15 accessed 27/027/2017

5.4 http://www.ejist.ro/files/pdf/369.pdf accessed 18/08/2017

5.5 http://unctad.org/en/Docs/diaepcb2011d2_en.pdf accessed 27/07/2017

5.6

https://www.researchgate.net/publication/237367817_THE_ATTRACTION_OF_THE_FOREIGN_DIRECT_INVESTMENT_FDI_BY_THE_AFRICAN_COUNTRIES?ev=prf_high accessed 27/07/2017

5.7 http://2015.essa.org.za/fullpaper/essa_2942.pdf accessed 27/07/2017

5.8 http://www.investopedia.com/university/mergers/ accessed 18/08/2017

5.9 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682323 accessed 24/08/2017

5.10

https://home.kpmg.com/content/dam/kpmg/za/pdf/2017/06/KPMG_Namibia_final.pd
f accessed 04/09/2017

5.11 https://www.weforum.org/agenda/2015/08/why-smes-are-key-to-growth-in-africa/
accessed 05/09/2017

5.12 http://www.oecd.org/cfe/leed/1918307.pdf accessed 03/09/2017

5.13 http://management.ase.ro/reveconomia/2011-1/25.pdf accessed 03/09/2017

5.14 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157640-EN-
ERP-53.PDF accessed 05/09/17

5.15 https://www.state.gov/e/eb/rls/othr/ics/2012/191205.htm accessed 24/08/2017

5.16

http://www.mondaq.com/southafrica/x/612174/Inward+Foreign+Investment/The+Na
mibia+Investment+Promotion+Act+2016+Hindering+Or+Promoting+Foreign+Invest
ment accessed on 27/07/2017

5.17 http://www.polity.org.za/article/the-rise-of-sustainable-fdi-emerging-trends-in-the-
sadc-region-2016-09-13 accessed24/08/2016

5.18 https://data.worldbank.org/indicator/SP.POP.TOTL accessed 13/09/2017

5.19 http://www.economist.com/node/9804332 accessed 13/09/2017

5.20 http://saviourkasukuwere.blogspot.co.za/p/issues-agenda.html accessed 15/09/2017

5.21 http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-
investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13 accessed
17/09/2017

5.22 http://www.rbz.co.za accessed 13/09/2017

5.23 http://www.kubatana.net accessed 13/09/2017

5.24 https://en.portal.santandertrade.com/establish-overseas/namibia/investing-3 accessed
24/08/2017

5.25 http://re-define.org/sites/default/files/ForeignDirectInvestment-Acriticalper.pdf
accessed 23/08/17

5.26 http://www.oecd.org/cfe/leed/FDI-SME-Kazakhstan-final-eng.pdf accessed 05/09/2017

5.27 http://www.kas.de/upload/auslandshomepages/namibia/State_Society_Democracy/chapter10.pdf accessed 25/08/2017

5.28 http://africanarguments.org/2015/08/20/foreign-investment-isnt-necessarily-good-for-africa-but-heres-how-it-can-be/ accessed 11/09/2017

5.29 http://www.nestle.com/assetlibrary/Documents/Reports/CSV%20reports/Specific%20regions/Commitment_Africa_2004_English.pdf accessed 11/09/2017

5.30 http://africanarguments.org/2015/08/20/foreign-investment-isnt-necessarily-good-for-africa-but-heres-how-it-can-be/ accessed 11/09/2017

6. News Paper Articles

6.1 'Geingob signs three laws' The Namibian 15 August 2016

6.2 'The Ramatex Closure in Namibia: Hard Lessons to Be Learned' The Namibian 14/03/2008

6.3 SME Bank on brink of closure' The Namibian 05/07/17 1

7. Other

7.1 E Kameni, DR Enga Kameni is a Manager, Legal Services, with the African Export-Import Bank (Afreximbank). This is the premier Trade and export development bank in Africa. He holds a Ph.D. in International Trade Law from the University of Pretoria, where he was a potter fellow

7.2 The development dimension of FDI: policies to enhance the role of FDI in the national and international context policy issues to consider (2002)

7.3 The UNCTAD definition bases on the OECD (2008) and International Monetary Fund (IMF) of (2009)

7.4 Dahl J (2002) Incentives for Foreign Direct Investment: The case of SADC in the 1990s NEPRU Working Paper. Namibia

7.5. UNCTAD, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements: New York and Geneva, United Nations (1999) 1

7.6 M Gaomab 'Can SME's Benefit from Foreign Direct Investment; Challenges Facing SME's' 2004. Paper delivered at a breakfast Meeting on Foreign Direct Investment, Windhoek, 28 November

7.8. Gamuchirai Chiwunze is a Research Associate at CAI with interests and expertise in finance, macroeconomics, development economics and international trade. Gamuchirai can be contacted via the Consultancy Africa Intelligence's Finance & Economy unit (finance.economy@consultancyafrica.com).