FOREIGN INVESTMENT REGULATION IN THE SERVICES SECTOR IN AFRICA: SADC EXPERIENCE

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SUMMARY

The growth of the service sector foreign direct investment (FDI) globally reflects an underlying need for appropriate regulation. As investors look into the African continent for investment opportunities, they need to find a regulated environment that can support their investments and related rights. This includes both intra-Africa FDI flows and investments that emanate out of the continent. The focus of this paper is on the Southern African Development Community (SADC). This paper will show that FDI will be critical for trade liberalization to be realised in the region. The findings of the paper point to the need for an institutional and regulatory framework in order to understand the consequences for investment flows. Where gaps are, appropriate cover needs to be found.

1 INTRODUCTION

Foreign Direct Investment (FDI) flows into developing economies have increased to reach their highest level at $681 billion in 2014.[1] According to Ernst & Young African CEO, Africa's share of global FDI projects has grown steadily over the past decade, and it is a promising sign that investors are now looking across the continent and to new sectors.[2] Further regional integration and infrastructure development should continue to entice investors to the exciting investment opportunities that Africa can offer. These FDI flows are also multi-dimensional; on one hand, we have the traditional FDI flows from outside Africa but of recent, the trends also show that intra-Africa FDI flows are on the increase. Investors from other developing countries, particularly South East Asia have also emerged as frontrunners with respect to FDI in Africa. This paper deals with foreign investment in the

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1 World Investment Report 2015 "Reforming International Investment Governance" http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (accessed 2016-02-20).

2 Ernst & Young Africa CEO Sita statement http://www.southafrica.info/africa/fdi-160514.htm#.VkegbHYrLIU#ixzz3rVB3cGyC (accessed 2016-02-25).

services sector in Africa, exploring some of the key issues related to FDI in the Southern African Development Community (SADC). Accordingly, this paper will show that complete trade liberalization in Southern Africa will be hard to come by in the absence of significant investment flows in the regional economies. There is a need to analyse the institutional and regulatory framework in the SADC region as well as understand the consequences for investment flows in the region. It is important that where major challenges of attracting FDI exist; resolutions are found. Accordingly, the key to economic growth, sustainable development, and socio-political stability is investment.[3]

The first part of the paper gives a historical background of Southern Africa, whose character in the attraction of FDI had until recently been influenced by colonial ties. African countries had traditionally been linked to trading mostly with their former colonial masters. This phenomenon is equally mirrored in the high number of Bilateral Investment Treaties (BITs) African countries signed with mostly European countries. This part also gives a general picture of foreign direct investment (FDI) in Sub-Saharan Africa. It will indicate that FDI is on the rise, with the continent's share of global FDI projects at its highest level in a decade. Sharply improved perceptions also make it the second-most attractive investment destination in the world.[4] The competition by BRICS[5] countries seeking to invest in Sub-Saharan Africa has also led to the increase in FDI.

The second part of the paper will identify the four modes of services and show how they manifest themselves in the region, giving a detailed analysis of how the SADC has also been very proactive in placing itself at the forefront as a favourable destination of FDI across all four modes of the services sector. In addition, part three will show that the SADC bloc has developed a unique Bilateral Investment Treaty Model that has been described by what the United Nations Conference on Trade and Development (UNCTAD) calls a "new and next generation" of investment policies that are beginning to take root. This Model is very highly rated and recommended that other African and non-African Governments alike can also utilise it. One of the main regional challenges has been on how to tackle issues surrounding the liberalization of movement of natural persons that accompany FDI in Southern Africa.[6] This affects progress in facilitating intra-regional trade through the liberalization of cross-border movement of natural persons as service providers. The last part of this paper will give recommendations on how Southern Africa and the African continent can improve on their share of attracting FDI.

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3 Muradzikwa "Foreign Investment in SADC" 2002 *Development Policy Research Unit Working Paper 02/67*.

4 See Ernst and Young's 2014 Africa Attractiveness Survey http://www.southafrica.info/africa/fdi-160514.htm#.VkegbHYrLIU#ixzz3rVB3cGyC (accessed 2016-06-25).

5 The acronym BRICS stands for a group of five major emerging global economies. These are Brazil, Russia, India, China and South Africa. These BRICS countries are all leading developing or newly industrialised countries that are distinguished by their large and fast-growing economies and significant influence on regional affairs, especially trade.

6 Khumalo "Trade in Services: From Controlling to Managing the Movement of Persons in SADC" 2007 *Trade Policy Report no 16*.

2 HISTORICAL BACKGROUND[7]

The SADC is a regional economic community comprising of 15 Southern African countries that share borders from South Africa in the south to the Democratic Republic of Congo (DRC) in central Africa. It also stretches from Mozambique on the eastern coast to Angola on the Western side. A few island nations like Madagascar, Mauritius, and Seychelles also form part of this block. Before the signing of the SADC Treaty in 1992, the organisation was run under a loose and non-binding structure of the Southern African Development Coordination Conference (SADCC).[8] The origins of SADCC lie in the Frontline States,[9] a group of eminent Southern African countries that fought for independence from colonial rule. Their aim was to help liberate the whole region from colonial rule. In the 1960s and 70s, these newly independent States supported national liberation movements in the region by coordinating their political, diplomatic and military struggle to bring an end to colonial and white minority rule.

After all the Southern African countries attained independence, the original idea of political independence became redundant. New initiatives to secure international cooperation for economic liberation and collective self-reliance became the norm.[10] At that time, according to the late President of Botswana, Sir Seretse Khama, "economic dependence had in many ways made political independence somewhat meaningless".[11] Additional effort under former President Kaunda of Zambia was to establish a transcontinental belt of independent and economically powerful nations from Dar es Salaam and Maputo on the Indian Ocean to Luanda on the Atlantic.[12] This dream became reality when one of the first significant FDI projects was funded by China through the construction of the Tazara railway line linking

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7 The full background on SADC history is well enumerated in Saurombe *Regionalization through Economic Integration in SADC* (Unpublished doctoral thesis, North West University 2010).

8 Oosthuizen *Southern African Development Community: The Organisation, Its Policies and Prospects* (2006). See also Abegunrin "The Southern African Development Coordination Conference: Politics of Dependence" in Onwuka and Sesay (eds) *The Future of Regionalism in Africa* (1985) 36. See also Abegunrin "Southern Africa: Union of the Southern Nine" 1980 105 *Africa* 45. Green argued during the first year of SADCC that at one extreme Lesotho would find a total break with South Africa either impossible or economically suicidal – see Green "First Steps towards Economic Integration" in Nsekela (ed) *Southern Africa: Towards Economic Liberation* (1981). The Southern African Development Coordination Conference was established in 1980 by the Governments of Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.

9 Clough and Ravenhill "Regionalism in Southern Africa: the SADCC" in Clough (ed) *Political Change in Southern Africa* (1982) 21. See also Thompson *Challenge to Imperialism: The Frontline States in the Liberation of Zimbabwe* (1984) 71.

10 Tsikata "Southern Africa: Trade, Liberalization and Implications for a Free Trade Area" (Unpublished paper presented at the Annual Trade and Industrial Policy Secretarial Forum 1999). See also Gibb "Southern Africa in Transition: Prospects and Problems Facing Regional Integration" 1998 38(2) *JMAS* 287–306.

11 Malan "Regional Economic Cooperation in Southern Africa" quoting Khama 1979 16(4) *Africa Research Bulletin* 51–55. See also Gibb 1998 38(2) *JMAS* 287–306.

12 Kaunda *Address* Unpublished speech delivered at the Lusaka Economic Summit of the Southern African Development Coordination Conference in Lusaka (1980) 3–4.

East Africa through Tanzania to the whole of Southern Africa. This generation of leaders paved the way to a successful organisation that has had a good track record in trade liberalization using the SADC Trade Protocol. Tariffs are now significantly low.

However, the services sector remains a challenge for the region with the SADC Protocol on trade in services[13] failing to live up to its global expectation. In 2015, South Africa, the powerhouse of the Southern African economy refused to ratify the SADC Protocol on trade in services. This brought sharp criticism from President Mugabe of Zimbabwe, who accused President Zuma of South Africa of failing to cooperate with other countries but instead accused him of seeking to turn the region into a market for South Africa's products.[14] Mugabe was right considering that the SADC Protocol recognises the need for newly liberalised economies to benefit from investment flows to reduce the real possibility of weaker economies becoming "retail outlets" for goods and services produced in the relatively stronger economies such as South Africa.[15] The slow pace of developing an attractive services sector can also be down to the levels of development and industrialisation in Southern Africa. Most of the economies besides South Africa and Mauritius remain net importers of services as opposed to exporters of services.

Following Nigeria, South Africa is the second largest economy on the African continent.[16] The country is also the main player in so far as intra-FDI in Southern Africa. This is very significant for the country. The South African Government has successfully embarked on a number of outward investment reforms in an effort to position the country as a base of investment in the Southern African region and the African continent. Through the signed Protection of Investment Bill[17] South Africa's reform focuses on among other things, the relaxation and promotion of services related to the free flow of cross-border financial regulations. These reforms will ease tax requirements on companies that are operating in other countries and put measures in place to make it easier for financial institutions like banks in South Africa to invest and operate in other countries. Furthermore, these reforms seek to create a more supportive and conducive environment for South African companies seeking to expand into the rest of Africa and offshore.

Thus, as a measure aimed at emphasising this investment policy shift, South Africa made a decision to overhaul its policy on Bilateral Investment Treaties (BITs). Under the new investment protection regime, the South African Government has decided to refrain from entering into BITs in the

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13 SADC Protocol in Services http://www.sadc.int/files/7313/6439/6118/Protocol_on_Trade_in_Services_-_2012_-_English.pdf (accessed 2016-06-28).

14 Gagare and Mushava "Mugabe snipes at Zuma over SADC Protocol on Trade" 14 August 2014 *Mail & Guardian online* http://mg.co.za/article/2014-08-18-mugabe-snipes-at-zuma-over-sadc-trade-protocolhttp://mg.co.za/article/2014-08-18-mugabe-snipes-at-zuma-over-sadc-trade-protocol (accessed 2016-06-30).

15 Muradzikwa "Foreign Investment in SADC" 2002 *Development Policy Research Unit Working Paper 02/67*.

16 Alfa Shaban African Development Bank http://www.africanews.com/2016/09/27/nigeria-the-largest-economy-in-africa-afdb// (accessed 2016-10-22).

17 Hereinafter "Protection of Investment Bill 2013".

future “except in cases of compelling economic and political circumstances” and to review its existing BITs “with a view to termination, and possible renegotiation on the basis of a new Model BIT to be developed”.[18] This new approach is the genesis of the development of a new investment regime that will seek to protect inward investments by codifying typical BIT provisions into domestic law and a move to terminate existing “first generation” BITs and refrain from entering into BITs in the future unless there are compelling reasons as highlighted above. The South African Government is convinced that BITs have the tendency of constraining domestic policy space when it allows foreign investors to circumvent domestic legal systems and the public interest safeguards contained in such BITs.

It has also been argued that this move away from using BITs to protect inward FDI may provide South Africa with a better way to promote and protect investment while also addressing the developmental challenges facing the country. One of the major challenges that range high on South Africa’s list has to do with the adverse effects of the financial crisis and unequal share of the benefits of sustainable development among its population. South Africa remains an epitome of an unequal society with a small fraction of rich and a huge poor population. The South African Government is convinced that recovering from the global financial crisis demands that countries use domestic intervention mechanisms and become innovative in dealing with international investment law regulation. Thus, it is important for this paper to also investigate how South Africa and the SADC region will manage to introduce reforms within the guidelines of international investment law in the current services trade architecture.

3 THE SADC MODEL BIT[19]

Southern African countries are no strangers to the use of BITs. According to the United Nations Conference on Trade and Development (UNCTAD), every one of the 15 Member States of the SADC is party to at least one BIT, and together they have signed over 250 BITs to date, of which over 100 are currently in force.[20] The BITs concluded by SADC Member States largely follow the form, structure and content of traditional BITs.

Thus, besides South Africa, the SADC region is however still in favour of BITs. Before discussing the SADC Model BIT, it is important to define what a “BIT” in general is. BITs are binding international agreements between two States that establish the terms and conditions for private investment by nationals and firms of either State in the territory of the other. In particular, BITs grant investments made by an investor of one contracting State party

[18] Davies The Minister of Trade and Industry, Dr Rob Davies, at the Discussion of UNCTAD’s Investment Policy Framework for Sustainable Development (IPFSD) in Geneva, Switzerland (2012) http://www.dti.gov.za/delegationspeechdetail.jsp?id=2506 (accessed 2016-09-25).

[19] The SADC Model BIT template http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (accessed 2016-06-20).

[20] Woolfrey “The SADC Model Bilateral Investment Treaty Template: Towards a New Standard of Investor Protection in Southern Africa” https://www.tralac.org/publications/article/6771-the-sadc-model-bilateral-investment-treaty-template-towards-a-new-standard-of-investor-protection-in-southern-africa.html (accessed 2016-10-25).

(contracting party) in the territory of the other, a number of guarantees that typically include fair and equitable treatment, full protection and security, protection from discriminatory treatment, protection from expropriation and free transfer of funds. Notably, BITs also provide for international investor-state dispute settlement.

In undertaking this process, the SADC Member States completed the challenge of drafting a new model for Bilateral Investment Treaties for regional Governments to use and adapt according to their needs. By making the documents public, they have also decided to make the template a tool available for other African and non-African Governments alike to consider using it. In undertaking this process, the SADC Member States completed the challenge of drafting a new model for Bilateral Investment Treaties for regional Governments to use and adapt according to their needs. The template is considered the next generation model that is practicable to use. Accordingly, it is better than other documents that provide guidance in the form of analysis and general recommendations, the SADC template provides guidance in the form of specific textual language along with a commentary explaining the choices made.[21] Its orientation is maintained throughout the text and was used as a benchmark when examining other draft provisions for the text. It was thus not simply a question of inserting the words "sustainable development", but also of seeking throughout the process, what this meant in practical terms for drafting various articles. The result is a concrete draft text for an investment treaty that incorporates sustainable development thinking from the beginning to the end of the text. The BIT template is available for use by SADC Member States.

The SADC BIT has also been heralded for its sustainable development orientation. Sustainable development is practically evident in the drafting process of various articles. The result is a concrete draft text for an investment treaty that incorporates sustainable development thinking from the beginning to the end of the text.

As far as SADC is concerned, there are numerous factors, which shaped the development of BITs. One of the main factors relates to the uncertainties and inadequacies of customary international law of State responsibility for injuries to aliens and their property. As a result, developed countries resorted to BITs to improve the protection of investors abroad.[22] There are uncertainties about the content of customary international law on foreign investments. Furthermore, it has proved to be very difficult to conclude a binding multilateral agreement on investment, hence the proliferation of BITs as alternatives to the multilateral regime. BITs are perceived to be setting forth necessary guarantees of protection for foreign investments by developed countries of their national individuals and corporations in developing countries. They are considered to offer a higher and more reliable protection of FDI than domestic laws, administrative regulations and policies of the host country which are subject to unilateral modification.

21 http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf (accessed 2016-06-12).

22 See United Nations Centre on Transnational Corporations, Bilateral Investment Treaties (New York: United Nations 1988) (Doc No ST/CTC/65) 1.

Harten[23] examined five common justifications for the investment treaty system. First, investment treaties are a means to encourage foreign investment. Second, investment treaties respond to the bias and unreliability of domestic Courts by providing for an international dispute settlement mechanism. Third, investment arbitration advances fairness and the rule of law in the resolution of investment disputes. Fourth, investment treaties affirm the sovereignty and bargaining strategies of States and lastly, investment treaties were endorsed by a democratic process, based on the analysis of the above factors. Harten however, recommends that Governments should exercise greater care when considering entry into the system or, more likely, the maintenance or renewal of existing treaties and those developing countries should consider options for reform to suit their own developmental objectives. On the other hand, Schwebel[24] pointed out that BITs have overwhelming merits in that they contain substantive standards for the treatment of foreign investment and that they have procedures for the settlement of disputes arising under those treaties. In addition, BITs are made on an *ad hoc* basis and so there is flexibility. They can take into account mutual interests of the parties. They also set clear conflict norms, for example, the standard of protection and State responsibility.

Developed countries and developing countries have different rationales when entering into a BIT. For developed countries, they seek to protect the foreign investment of their nationals abroad by securing some guarantees from the host State. This would cater for the inequality in the customary international law and domestic laws which can be changed unilaterally. For developing countries, the understanding has been that they could attract FDI if they offered *inter alia*, guarantees of protection to prospective investors so that they provide for legal stability. However, it should be noted that BITs are only but one factor among many which may influence a foreign investor to invest in a particular developing country. Thus the mere existence of a Bilateral Investment Treaty will not itself attract an investment.[25] However, it at least gives an indication that a certain country is willing to subject itself to rules that are beyond its own bias.

SADC countries have shown innovation in this new generation BIT. In it, the differences of view maintained by the Member States were reflected in the final text, by the inclusion of options with commentary for each option. In other words, where there was consensus, this is clear in a single option being put forward. Where the differences remained, this was reflected in the final text. The recommended draft articles as well as the commentary were all equally subject to full review in the drafting committee meetings. At the

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[23] Harten "Five Justifications for Investment Treaties: A Critical Discussion" 2010 2(1) *Trade, Law and Development* 19–56.

[24] Schwebel "The Overwhelming Merits of Bilateral Investment Treaties" 2008 32(2) *Suffolk Transactional LR* 263–269.

[25] Other relevant factors are the political stability of the host country, the economic profitability of an initial investment (especially in the mineral sectors), the incentives package or the selection of new investment arrangements in the form of licensing agreements, management and marketing contracts The bottom line is that the host country should offer secure profit–making ventures to the foreign investor.

same time, it was recognised in the process that the model template is not a legally binding document for the Member States, but a guide and tool to be used and adapted as needed. This allowed a comprehensive approach to be articulated that Member States (or indeed other Governments) can draw upon in whole or in part, depending on individual needs in a negotiation. This approach also meant that each Member State did not have to endorse every draft article in order for the text to be completed. This process indicates a sharp contrast to the historical BIT regimes that were mainly developed by developed countries.

The pertinent provisions of the SADC BIT relevant to this paper are as follows:

i) Investor rights post-establishment

ii) Rights and Obligations of investors and State Parties

iii) Dispute settlement

iv) Final provisions

A look at these provisions indicates that the establishment of investment in SADC is fully understood and desires protection. Where a position against the inclusion of investment liberalization provisions is taken, it has to be specifically identified. This is then related to the rejection of a provision prohibiting performance requirements by host States. In place of such a provision, the text actually makes it clear that any performance requirements imposed or undertaken by a foreign investor or its investment shall not be considered a breach of the Agreement as long as this was done before the investment was authorised and acted upon by the investor. Requirements imposed afterwards are subject to the other provisions of the model.

The standard list of investor protections forms part 2 of the SADC BIT template. In Article 5, special attention is paid to the issue of fair and equitable treatment. This aspect has always been controversial among developing countries. It has been recommended that this provision be avoided. The favourable proposition is for a narrowly constructed version of a fair and equitable treatment clause to be provided as an alternative option. This construct should satisfy the needs of SADC Member States.

A unique feature of the BIT template is also its different approach based on the recognition of administrative law approaches to fair administrative treatment and due processes of law instead of the international law language of fair and equitable treatment. Accordingly, the idea here is to begin to construct an alternative to the continuously controversial and enduringly unclear FET provisions, which is based more clearly on known and less vague standards.

Pertaining to sustainable development, the right to engage foreign personnel is contextually set on the need for skills transfer. The understanding is for flexibility in making sure those domestic programmes of training are taken into account, local people remain an objective of skills transfer. This reflects the development goals associated with FDI of skills development and transfers as well as higher value-added employment.

Part 3 addresses anti-corruption, compliance with domestic law, environmental assessment and management, human rights, social and economic development issues, corporate governance. These critical issues will be discussed later in the chapter under challenges. The question of enforcement of these obligations is addressed in three ways:

1 The obligations can be made part of domestic law if they are not already so and therefore enforced through domestic Courts.

2 Depending on the specific obligations, a breach may vitiate the jurisdiction of an investor-state tribunal if one is established (for example a breach of the anti-corruption obligation) or enable a State to take counterclaims for breaches related to the conduct of the investor.

3 The template calls for the investor to accept the possibility of civil liability in its home State for decisions and acts taken by the investor that impact the conduct of the investment and may lead to damage in the host State. This is not a standard of liability, but simply a requirement to waive the use of such doctrines as *forum non conveniens* in order to allow such a case to be heard on the merits in the home State.

In light of the above, part 3 also addresses the State right to regulate and the right to pursue development goals, thus balancing the investor rights expressly with the State rights commonly recognised by international law. As the earlier discussion indicates, South Africa has clearly adopted this stance in its policy on moving away from signing BITs.

Part 5 addresses dispute settlement. SADC shares the growing concern among developing countries over the growth of the investor-state arbitration industry. It recommends against the inclusion of investor-state arbitration in future treaties and ties this to a limited MFN provision that, if included, ensures against future tribunals importing investor-state rights through the MFN provision. The cost of arbitration is also a concern for developing countries.

The template is however flexible and recognises that some States may nonetheless choose to include investor-state arbitration for different reasons. Thus, it builds a carefully constructed process that circumscribes investor-state arbitration rights to alleged breaches of the treaty and no other permits or authorisations, as set out in the United States' Model BIT of 2012. It also expressly recommends against the inclusion of an umbrella clause and the transfer through this provision of domestic law issues into international law issues.

As a standard procedure, the template recommends the inclusion of a provision that requires treaty arbitration tribunals to recognise and give primacy to dispute settlement mechanisms identified in any investment contracts for any matters related to the alleged breach of such contracts, even if restated as a breach of the treaty. This is supported by a provision that seeks an exhaustion of local remedies rule to be put in place, subject to a tribunal being able to assess whether the claims relating to the underlying measure can be addressed in a domestic Court.

In the final analysis, the template shows innovation, rejecting the view that because something was done before it must be done the same way again.

Hence, for example, investor-state, investment liberalization, the promotion of social and economic development, investor liability, FET, MFN, all get new or different interpretation and treatment or are recommended against. The template thus demonstrates a new approach not just in principle, but also through concrete language and recommendations that are clearly set out. The template is not without its limitations. For example, not every issue is fully "resolved". Indeed, seeking to do so was beyond the mandate of the drafting committee. In addition, it is not drafted as nor intended to be a legally binding document in the Member States. Still, it is a tool that provides a coherent option to the SADC Member States in any future negotiations and by extension to other Governments who wish to access the template and assess its value as a guide in their own contexts.[26]

4 PART B

The second part of the paper will identify the four modes of services in the region, giving a detailed analysis of how the Southern African Development Community (SADC) has also been very proactive in placing itself at the forefront of the favourable destination of FDI across all four modes. Investors are also looking beyond the more established markets of South Africa, Nigeria, and Kenya to expand their operations, as well as moving into more consumer-related sectors as Africa's middle class expands.[27] The services sector provides a sound basis upon which infrastructure is improved, jobs created, poverty alleviated and redistribution activities strengthened.[28]

4 1 Mode 1

Cross-border services trade covers services supplied from the territory of one member into the territory of another. In practice, it creates the possibility for a non-resident service supplier to supply services cross-border into the territory of a WTO member. For example, a service supplier of banking services can supply banking services through telecommunications cross-border into any WTO member. Call centres in South Africa export this service to the region. This form of service has become very popular in the telecommunication sector where mobile phones can be used to send money across the border on platforms like Ecocash and M-pesa. EcoCash is an innovative mobile payment solution that enables Econet mobile customers to complete simple financial transactions such as sending money, buying prepaid airtime for themselves or other Econet subscribers and paying for goods and services.[29] M-pesa is a mobile phone-based money transfer and microfinancing service, launched in 2007 by Vodafone for Safaricom and

[26] Howard Mann is the Senior International Law Advisor to IISD. He acted as a consultant to the SADC Secretariat and Member States on this project.

[27] See http://www.southafrica.info/africa/fdi-160514.htm#.VkegbHYrLIU#ixzz3rVAkUHin. (accessed 2016-07-25).

[28] Muradzikwa "Foreign Investment in SADC" 2002 *Development Policy Research Unit Working Paper 02/67*.

[29] https://www.econet.co.zw/ecocash/ (accessed 2016-06-20).

Vodacom, the largest mobile network operators in Kenya and Tanzania.[30] Through cellular networks, people can send money to each other very easily on these networks. This service has become very popular in Africa where migrant workers continue to support their families who remain in their countries of origin.

4 2 Mode 2

Consumption abroad covers services supplied in the territory of one member to the consumers of another. Examples include where the consumer moves to consume tourism or education services in other countries. Southern Africa is richly endowed with natural resources of which one of them is nature. Holidaymakers from all over the world make their way to Southern Africa all year round. To maximise the use of this service, SADC has developed the concept of transnational or trans frontier parks whereby as many as three neighbouring countries combine their national parks into mega parks that attract huge numbers of tourists.[31] This huge proportion of the FDI in services trade flowing into the SADC region especially tourism and telecoms have provided much-needed employment at a time when other sectors are shedding jobs. Similarly, the provision of university education mostly by South Africa Universities sees many African students who can afford to pay moving to South Africa for tertiary education. It has been suggested that at least one tenth of all students in South African Universities are foreign nationals.

4 3 Mode 3

This mode covers services supplied through any type of business or professional establishment of one member in the territory of another. This allows a company to set up a branch or a subsidiary in a foreign country. This can take the form of a company, joint venture, or partnership, and as such is a best-considered investment. This form of service is the one requiring much legal protection from expropriation since the establishment of a local branch or subsidiary by a foreign firm country subjects the investor to risk especially of expropriation from the host State. In Southern Africa, Zimbabwe is leading the way in legislating for 51 percent local ownership for all foreign companies. This has had a negative impact on FDI inflows not just for the country but also for the SADC region. There is a fear that other countries of the region will follow suit. The adoption of a new policy and law moving away from BITs has not helped matters in South Africa. There is fear among potential investors that South Africa may follow the Zimbabwean example on nationalisation of foreign investments. Populist political parties like the Economic Freedom Fighters (EFF) have been gaining ground based

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30 Vaughan *Providing the Unbanked with Access to Financial Services: The Case of M-PESA in Kenya* Presentation given during the Mobile Banking & Financial Services Africa conference in Johannesburg, South Africa (2008).

31 Child, Suich and Anna *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Trans frontier Conservation Areas* (2012).

on their promise for the expropriation of foreign assets under the guise of indigenisation.

4 4 Mode 4

This mode deals with the temporary movement of natural persons to the territory of other members as service suppliers or employees of service suppliers. Provision for this movement is thus critical for foreign investments associated with the movement of persons. This allows for the movement of intra-corporate transferees, as well as independent professionals (eg, developing country software engineers often move to developed countries to supply their services). This movement should be temporary, and service suppliers are supposed to go back to their home countries after completing a particular mission. This phenomenon is very common in SADC where mostly Chinese investors bring in their specialists work in their local investment related projects. Projects related to infrastructural development (roads, rail, dams, and mines) are being managed mostly by the Chinese. The debate has however been on how these initiatives fail to transfer skills to the local population. It has often been argued that some of the work being done by expatriate workers can also be done by skilled local people. China has been accused of bringing basic skilled migrant workers to work in the mines as well as other infrastructural projects at the expense of local workers. Foreign companies are thus encouraged to employ locals in these projects.

5 CHALLENGES AND ANALYSIS

The main challenge facing SADC is that most of the Member States industrial base keeps shrinking. In most cases, many of these countries have suffered from de-industrialisation as a result of trade liberalization not being complemented by sufficient investment and therefore leading to the wholesale import of goods and services that could have otherwise been produced locally.[32] Post-colonialism, most of the manufacturing industries that had opened up in Zimbabwe, Zambia, Malawi and Mozambique are facing challenges and some have relocated to South Africa.

Another challenge affecting FDI flows in SADC relates to infrastructure weaknesses. If South Africa is removed from the equation, the whole SADC region shows the poor state of road, rail, and aviation network that is also poorly regulated. In some cases, the rail and road network has deteriorated post-independence from colonial rule. Roads and railways have fallen into disrepair. Most Governments in SADC are under pressure to reduce Government expenditure. For political reasons, Governments have found it easier to reduce capital expenditure and spend more on the public service wage bill. This has increased the cost of doing business in the region. This state of affairs will reduce profitability for investment projects.

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[32] Muradzikwa "Foreign Investment in SADC" 2002 *Development Policy Research Unit Working Paper 02/67*.

Communication costs also remain high and the broadband remains expensive. Scarce resources like water and electricity make it difficult for investors to operate in some of the regions. For a number of years now, Southern Africa has been hit by a massive electric power shortage. Blackouts remain the order of the day with some industries threatening to shut down. Recently some mining firms in Zimbabwe were seriously considering generating their own power. Private importation of power without the use of the national power control channels has also become the norm. On the other hand, such an approach is positive since it adds to another dimension of FDI inflows since in most cases such a foreign firm may engage another foreign firm to build a power station. The local community within the vicinity of such a plant can also benefit from jobs and electrification.

The challenge of corporate governance relates to the reluctance of institutional investors to commit to long-term capital to the region. Universal trends demand that company board of directors be transparent and honest and that they demonstrate a high level of integrity towards both shareholders and other stakeholders.[33] State-owned enterprises are often staffed with political appointments whose mandate in most cases is to protect the ruling party interests. It is thus justified when investors tend to develop fear from partnering with such enterprises. The running of a business in such an entity does not normally consider logical business considerations but mere political undertakings.

Crime and corruption also rank high as one of the impediments to attracting FDI in SADC. Some of it is real but to some extent, perceptions are built on imagination. Corruption raises the cost of doing business. Some investors are well known to increase this phenomenon. As discussed by Muradzikwa in a survey of 45 European and South African Investors, historically corruption was cited as a critical impediment to investment in South Africa.[34] The types of corruption range from maladministration and unauthorised expenditure, ripping off the system or routinize looting, nepotism and cronyism as well as official corruption using control over regulatory mechanisms (tender boards, licensing departments).

On the African continent, political instability and uncertainty is another challenge. A clear example in the regions pertains to Zimbabwe where investors are not clear on the direction the country will take post-President Mugabe’s reign that will inevitably come to an end soon considering that he is 93 years old. However many commentators are of the opinion that the appetite for investment will always be greater than the threat of political instability considering that Angola has been topping the list of FDI attraction despite being run by a dictatorship characterised by political instability and unpredictability. It is only now that President Dos Santos has indicated that he will step down.

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[33] *Ibid.*

[34] Butler *Considerations on the Promotion of Foreign Direct Investment in South Africa: Coping with Adverse Perceptions*, Political and Policy Uncertainty in South Africa (PUSA) Project, University of Cape Town, South Africa (2001).

6 RECOMMENDATIONS

SADC needs to have strong linkages between trade, investment and industrialisation. Thus, SADC should look to investment as a key facilitator to trade. There is a need to make sure that a conducive regulatory environment for attracting FDI is present.

SADC Member States need to follow up with the implementation of the BIT model template. Such an exercise is critical for the realisation of the goals and objectives set out in the template. This will boost the confidence of potential investors. For instance, Part 3 of the template deals with the importance of transparency. The Extractive Industries Transparency Initiative (EITI) calls for transparency in contracts and revenue flows between the Government and investor. This is seen as an increasingly important element in avoiding corruption and promoting more sustainable conduct and relationships.

The Chinese investment model of upgrading infrastructure along the mining ventures should be encouraged. While China is investing heavily in most parts of the African economy, infrastructural development remains key to their strategy. China is building roads, railways, airports and harbours in Southern Africa. This will greatly lower the cost of doing business in the Southern African region.

7 CONCLUSION

This paper has explored the SADC diverse trends of FDI inflows in the services sector. It has analysed the regional as well as some individual Member States policies and strategies aimed at attracting FDI in trying to boost the economy. The findings of this paper indicate the influence of colonialism way beyond the attainment of independence by most Southern African States. These countries have failed to liberate themselves economically hence, dependence on former colonial masters is characterising the legacy of FDI trends. Things began to change in the late 1990’s as Governments embarked on privatization, liberalization and focus on economic adjustment programmes. This new focus demanded a paradigm shift whereby external funding became paramount. This external funding required the guaranteed protection of foreign investment. Many of the SADC countries thus signed a number of BITs that in most of the cases were biased towards investor protection. This, however, did not deter African countries from signing these treaties.

This study has indicated that most of these investments cover all 4 services modes on investment. The challenges of attracting FDI in SADC were also enumerated with political instability, policy uncertainty, poor infrastructure, and corruption being the main culprits. However, a number of recommendations have been proposed. There is huge potential for growth in SADC as well as the whole of Africa in the services sector. Thus, it is prudent that this paper concludes with the observation captured in the World Investment Report 2016 that the potential for services FDI to develop Africa’s economy is significant. The report added that FDI services are important in supporting the participation of African economies in global value chains, as an increasing part of the value-added in trade consists of services. Finally, it is becoming evident that SADC and the rest of the African continent need to move away from rhetoric that is characterised by enacting liberal policies and legal instruments without implementation. There is need to implement all policies and signed agreements as a precondition to show seriousness in attracting FDI.