OCCASIONAL PAPER NO 111

Economic Diplomacy Programme

March 2012

Perspectives on Trade, Investment and Competition Policy in South Africa

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South African Institute of International Affairs

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SAIIA gratefully acknowledges the Swedish International Development Cooperation Agency, the Danish International Development Agency, and the Foreign and Commonwealth Office through the British High Commission in South Africa, which generously support the EDIP Programme.

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ABSTRACT

In a liberalised trade and investment environment, trade, investment and competition policies together form a specific nexus. South Africa needs foreign direct investment to help address its need for employment creation, growth and development. Trade can lead foreign direct investment or follow on from it, and it may well be that a merger transaction leads to increased import competition in domestic markets. Competition policy can address different aspects of this issue. First, pre-merger notification and merger review provide an opportunity to assess a priori the competitive impact of a proposed transaction, to determine whether a substantial lessening of competition will result, or whether any specified public interests are likely to be adversely affected. Secondly, Competition Act provisions on restrictive practices and abuse of a dominant position can be invoked to check the effects of unfair trade practices. Although at this stage South Africa is reluctant to include new generation issues in regional trade agreements, there are already regional instruments that embrace them and it is also probable that these questions will feature on the agendas of South Africa's negotiating partners. World Trade Organisation agreements also include provisions on 'new generation' issues such as competition. Obligations entered into in this multilateral forum, as well as in regional agreements, are binding and cannot subsequently be revoked citing domestic policy imperatives. The proposed Walmart-Massmart merger is a reminder that international obligations must be considered carefully prior to, and at the time of, negotiations, and no matter how worthy domestic policy aims might be, they cannot justify attempts to skirt around international legal obligations.

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ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
CET	common external tariff
DED	Department of Economic Development
dti	Department of Trade and Industry
FDI	foreign direct investment
FIP	Finance and Investment Protocol
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ITAC	International Trade Administration Commission
ITED	International Trade and Economic Development
M&A	merger and acquisition
RTA	regional trade agreement
SADC	Southern African Development Community
SACU	Southern African Customs Union
TNC	transnational corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

INTRODUCTION

Trade, investment and competition policies are central to broader discussions of South Africa's industrial policy. In the period immediately after the general election of 1994 which brought to power the African National Congress (ANC) government, trade policy was a key component of the new administration's strategy for economic transformation, and reintegration into the world economy. Economic policy was informed by a 'reconstruction and development' imperative, supported by a need for global integration after years of international isolation. By contrast with its predecessor's industrial and trade policy of import substitution, the new government embraced outward orientation with a very bold trade liberalisation strategy. At that early stage of the new political dispensation, it was arguable that trade policy was ahead of industrial policy.

The broad sweep of the restructuring taking place in those years also included a review of competition policy. It was clear that a robust competition policy and legal framework would be politically acceptable only if public interest featured explicitly in competition governance architecture. The inclusion of specific public interest issues has become a hallmark of South Africa's competition legislation and has provided guidance for many other developing countries. Nevertheless, while there was a strong emphasis on investment promotion and encouragement of foreign direct investment (FDI), little attention was paid to developing an investment policy, or a legal framework for investment governance.

By the second half of the 1990s the adjustment costs of extensive trade liberalisation had become evident. Some industries – most importantly, perhaps, clothing and textiles – had experienced the severe effects of increased import competition, with many enterprises closing down in consequence. Resultant job losses became a serious policy (and broader socio-political) issue. The impact of trade liberalisation during that time has been the focus of many subsequent enquiries. (It is important to note that liberalisation poses specific challenges for developing countries: for them, adjustment processes often are not cushioned by the support of trade-related policies, or indeed by the more robust market and broader institutional infrastructure of many developed countries.)

Over the next decade South Africa responded to the experience of the late 1990s with a more circumspect and cautious approach to trade policy and a distinct shift in emphasis, mainly to domestic development challenges and among those, primarily employment creation. Arising from this policy there were important changes to government structures, including the establishment of the Department of Economic Development (DED) after the general election of 2009. This was a significant institutional development, both as regards trade policy and strategy, and international trade administration.

South Africa's most recent trade policy and strategy[1] was released in May 2010 after extensive consultation. It articulates a very specific trade-industrial policy conjuncture. It is clear that industrial policy, in which the manufacturing sector is still predominant, leads trade policy; and the import tariff is regarded primarily as an instrument of industrial policy to be used selectively to protect and support specific industries: In South Africa, import tariffs do not feature prominently as a revenue-generating instrument, as they do in many other African countries. In line with so strong an emphasis on manufacturing in its industrial strategy,[2] South Africa's trade policy still lacks clarity on trade in services, and a clear stance on 'new generation' issues, including investment and competition.[3]

A strategic tariff policy is the focal point of the new trade policy and strategy. It provides a visible means of protecting domestic industries and supporting job creation and retention and it is in this context that the DED becomes important. The International Trade Administration Commission (ITAC) which decides on tariff applications (and also implements trade remedies), considers the merits of applications specifically with respect to their impact on employment and investment. ITAC, which used to fall within the purview of the Department of Trade and Industry (dti), now comes under the DED.[4] This raises a number of institutional matters regarding trade policy implementation and international trade administration. Primary responsibility for trade and industrial policy rests with the dti, which is where the core policy expertise in those fields lies. DED has a mandate for development planning and policy coordination with a strong domestic focus: in short, to ensure that employment and job creation are at the heart of economic policy. Given that, for example, ITAC decisions on tariff applications are referred to the minister of economic development, institutional co-operation between DED and the dti is essential, both in the latter's industry division (which has industrial policy and specific industry expertise), and its international trade and economic development (ITED) division, where trade-related expertise is housed. At present it is unclear whether or not this level of co-operation exists.

This paper reviews recent investment and competition policy developments in South Africa in the light of trade policy. It traces the strategic policy and legal interface as well as the institutional architecture for policymaking and implementation in those areas.

A COMPETITION POLICY PERSPECTIVE

The relationship between trade and competition policy is well recognised.[5] Adam Smith was well aware of it, and documented the pernicious effects of cross-border anti-competitive practices in a liberalised international trade environment. Rather more recently, at the first World Trade Organization (WTO) ministerial conference in Singapore in 1996, a year after the organisation's establishment, linkages between trade and competition policy were formally introduced to the international trade agenda.[6] As a rapid increase in globalisation over recent decades spurred the opening of domestic markets to foreign competition, domestic economies have become increasingly susceptible to anti-competitive practices that originate outside their own national borders.[7] Hence a multilateral agreement on competition policy can be justified because anti-competitive practices are rarely confined to one jurisdiction;[8] for example, there may be global market sharing arrangements; export cartels based in one country may affect consumers in another; import cartels may work to exclude foreign suppliers, or form other barriers to entry; mergers may take place in competitive markets at home in which the parties may have substantial market shares in other parts of the world; and abuses in one market may result from a dominant position in another.[9] In this context a well-functioning national competition regime may be necessary but not sufficient,[10] hence the need for international co-operation with other competition authorities that have a stake in the matter.[11]

The question therefore arises as to whether, alongside trade and investment liberalisation initiatives, a global and coherent approach to competition policies is required.[12] Given that anti-competitive practices can impede trade liberalisation there

are strong incentives to include specific provisions on competition policy in the WTO framework.[13] The Doha Ministerial Declaration of 2001 'recognised the case for a multilateral framework to enhance the contribution of competition policy to international trade and development'.[14] In July 2004, however, following failure to reach consensus on competition policy at the Cancun ministerial meeting in September 2003, the WTO general council decided that it would no longer form part of the work programme set out in the Doha Declaration.[15] Despite this setback, many international organisations continue actively to discuss the creation of international frameworks to shape competition policy.[16]

Competition in WTO agreements

Various WTO legal texts include provisions with specific reference to competition policy. Article III of the General Agreement on Tariffs and Trade (GATT) of 1947 calls for 'national treatment'; this implies a general prohibition on the use of internal taxes and other internal regulatory measures to afford protection to domestic production of trade in goods[17] and thereby discriminate against imported products. Importantly, however, Article III covers discrimination by nationality only of goods, not of business enterprises. Further rules on competition in the trade of goods are contained in GATT Article XVII, which authorises contracting parties to maintain state trading enterprises (including monopolies) so long as they do not discriminate between domestic and foreign goods in their purchases and sales; and Article II, which requires that trading monopolies authorised by the state must not restrict sales of imports in a manner inconsistent with tariff commitments.[18] Within the realm of trade in services, Articles 8 and 9 of the General Agreement on Trade in Services (GATS), which came into force in 1995, lay down general obligations not to abuse market power or restrain competition while recognising the right of governments to act against anti-competitive practices and to work together to limit them.[19] Commitments are scheduled in specific sectors identified by national governments. These have to be read together with Article 17 (national treatment); which means that it is possible to stipulate specific requirements for foreign services suppliers, provided these have been scheduled in the sector commitments.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), in force since 1995, includes references to competition policy; it allows countries to take steps such as compulsory licensing when they can show that an anti-competitive abuse has occurred. It also provides an incentive to enacting competition legislation by making compulsory licensing easier against such a legal background.[20] Although some competition rules clearly already exist within the WTO it has been argued that they should be made more precise in order to encourage international co-operation on competition policy.[21]

In addition to the WTO agenda competition policy also features increasingly in regional trade agreements (RTAs), which arguably have been the fault line in international trade governance over the past decade or so. The inclusion of competition policy and other new generation issues reflects a trend to deeper integration extending well beyond border measures such as tariffs. South Africa does not, however, support the inclusion of new generation trade issues[22] in RTAs; its trade policy agenda still largely centres on trade in goods.

South Africa's competition policy

Competition (or antitrust) law and policy have together become an indispensible toolkit not only to promote efficiency by preventing and addressing anti-competitive practices, but also to address broader development priorities or public interest questions. The aim of competition policy is to safeguard the competitive process, not to protect specific competitors. As noted earlier, South Africa's competition policy is a case in point explicitly including, as it does, public interest issues in competition law. The post-1994 broad economic policy review included competition law and policy.

The Maintenance and Promotion of Competition Act of 1979 did not provide for a robust competition regime. Among its several shortcomings was an absence of provisions related to vertical or conglomerate configurations or ownership concentration. There were also no pre-merger notification requirements and no explicit prohibitions; and the final yardstick for decisions, the 'public interest', was not defined in the Act. The Competition Board operated under the 1979 Act and its *ad hoc* and inconsistent decisions were, therefore, not unexpected. It was not independent and its powers were limited to making recommendations to the minister of trade and industry. A regulation issued by the minister in 1984 declared some practices *per se* unlawful, including resale price maintenance, horizontal collusion on price, terms or market share and bid rigging; but despite this there were no prosecutions.

In the review, effective implementation of a strong competition policy was seen as an important tool to regulate private enterprise, given that the nationalisation policy of the ANC had been abandoned by 1994. Specific goals of competition policy included diluting the concentration of economic power, which was desirable to promote balanced economic development, and the promotion of greater private sector efficiency. Following a comprehensive policy consultation process which included debates within the National Economic Development and Labour Council, a new competition law, the Competition Act No 89 of 1998, was promulgated and became effective in September 1999.

The Act provides for three agencies to enforce and implement competition regulations. They are respectively the Competition Commission, the Competition Tribunal and the Competition Appeal Court, which together have exclusive jurisdiction over competition matters.

The Competition Commission is an investigatory agency. It is an autonomous statutory body that monitors competition and market transparency by investigating anti-competitive conduct.[23] It is empowered to investigate, control and evaluate restrictive practices, abuse of dominant position, and mergers and acquisitions (M&As).[24] The commission is independent of the dti and its decisions are subject to appeal through the Competition Tribunal and the Competition Appeal Court. This is very different from the position of the previous Competition Board which existed until 1999 under the Act of 1979, and was essentially an administrative unit within the dti.[25] It is true that the act granted the board extensive scope to investigate both mergers and restrictive practices[26] but with effective decision-making resting with the responsible minister, it was inevitable that political considerations would prompt challenges to its credibility and consistency.

The Competition Tribunal is the adjudicatory body or court of first instance, adjudicating matters referred to it by the commission or by a complainant. The latter, under Section 51(3) and (4) of the Competition Act, can refer matters directly to the

tribunal, subject to that body's rules of procedure, after a decision of non-referral has been made by the commission.[27]

In brief, the key functions of the tribunal are to grant exemptions, authorise or prohibit large mergers[28] and adjudicate prohibited practices and mergers respectively under Chapters 2 and 3 of the Act.[29] The tribunal also acts as an appeal body for decisions of the commission and may grant orders for costs on matters presented to it by the commission.[30]

The Competition Appeal Court (CAC) may consider any appeal against, or review of, a decision of the tribunal. It may confirm, amend or set aside any decision or order and give any judgment or make any order that circumstances require.

The Competition Act incorporates features that reflect South Africa's unique development problems. It permits (and in certain cases requires) consideration of public interest issues such as empowerment, employment and the effect of actions on small and medium enterprises. Although equity considerations are explicitly incorporated into competition law, political channels as a route for appeals concerning such issues are not permitted. Contrary to previous practice the minister now has no power to override the decisions of the competition agencies, which are independent.[31]

Development concerns also featured strongly in debates on the role of competition policy in addressing both structural elements in the economy and corporate behaviour, especially of large conglomerates.[32] Poverty and unemployment were as much a part of the policy discussion as was the promotion of competition and economic efficiency.[33]

The Competition Act covers 'all economic activity within, or having an effect within, the Republic', thus providing for extraterritorial jurisdictional coverage. The nature and scope of its extraterritorial reach was recently tested in a case involving the export of soda ash from the US to Botswana.[34] Botswana and South Africa are members of the Southern African Customs Union (SACU) and implement a common external tariff;[35] hence imports into Botswana can be expected to have an effect within South Africa. It was argued in this case that soda ash from the US to Botswana was in reality destined for the South African market. Reference to extraterritorial scope is also found in a recent consent order that required scrutiny of South African citrus exports to the US.[36] The Competition Commission investigated allegations by South African citrus exporters that the USA Citrus Alliance, a trade association, was indirectly fixing the selling price of citrus in the US.[37] South African citrus exporters[38] argued that this conduct had an impact within South Africa.

In addition to embracing restrictive practices and abuse of a dominant position, South Africa's competition law makes provision for pre-merger notification and assessment of the effect of merger transactions. A merger (or acquisition) takes place when a company or group of companies directly or indirectly acquires or establishes control over all or part of another business, or an entire firm. It may take the form of the purchase or lease of assets, joint ventures and/or the amalgamation of the businesses. Pre-merger notification is required for intermediate and large mergers (thresholds for these categories are determined periodically). Should FDI take the form of a merger or acquisition it must be notified to the Competition Commission, subject to the size of the merger. The connection between trade, investment and competition issues is clear in the case of FDI in services sectors (see below).

Competition in South Africa's trade agreements

South Africa is party to several regional trade agreements which cover competition policy. Notable among them are regional integration arrangements in southern Africa that provide for co-operation between member states in enforcing competition law.

Like other member states South Africa implements the SACU common external tariff (CET). In 2002 the members signed a new customs union agreement that came into force in 2004; Article 40, Part 8[39] of the agreement makes reference to competition policy. Under this article member states are required to apply a competition policy and to co-operate in competition enforcement. At present, South Africa, Namibia, Botswana and Swaziland have such a policy and law, and Lesotho is working towards one. The SACU agreement makes no mention of an institutional model for co-operation in enforcement, but information sharing takes place and South Africa has helped smaller competition authorities to establish enforcement capacity.

South Africa also belongs to the Southern African Development Community (SADC). In 2009 the members of this regional economic grouping signed a declaration on regional co-operation in competition and consumer policies, but it has not yet been implemented. The declaration follows Article 25 of the SADC trade protocol, which calls for member states to implement measures within the community to prohibit unfair trade practices and promote competition.

At this stage there are still member states in SADC and SACU that have no law or competition authority, and in neither case has a modality for co-operation been established. Competition questions with a cross-border dimension therefore must still be addressed in line with national competition laws.

FOREIGN DIRECT INVESTMENT

It is axiomatic that FDI can make an important contribution to a country's development.[40] For developing countries in particular, it has become a crucial factor in promoting and sustaining economic growth and development,[41] given its potential *inter alia* to raise productivity, enhance exports, promote the transfer of technology, and facilitate global economic integration.[42] In the face of insufficient resources to finance long-term development in Africa, policymakers increasingly see FDI as key to facilitating and enhancing the continent's economic growth.[43] The South African government subscribes to this view and in a recent policy statement recognised that FDI is required to support its own growth and development objectives.[44] Making sure that FDI contributes to economic growth and welfare, however, is a question not only of increasing inward investment flows but also of ensuring that the industries and markets in the host country operate efficiently. Efficient functioning of markets depends on contestability (ie the ease with which firms can enter and exit the market) as well as the extent and nature of competition. Reaping the benefits of FDI therefore requires not merely that regulatory barriers to FDI are reduced and positive standards of treatment for foreign investors are established – the traditional focus of FDI liberalisation – but in addition, that competition in markets is maintained.[45] Because FDI can result in undesirable economic effects, host countries must support the liberalisation of FDI policies by instituting

measures aimed at ensuring the proper functioning of markets, including control of anti-competitive commercial practices.[46] It is in this context that the relationship between competition policy and foreign investment becomes important.

FDI is the sum of equity capital, reinvestment of earnings and other long- and short-term capital as shown in the national balance of payments.[47] The International Monetary Fund (IMF)[48] defines FDI as a cross-border investment in which a resident in one economy (the investor, usually a multinational enterprise or transnational corporation [TNC]) acquires a lasting interest in an enterprise in another economy. By convention, a direct investment is established when the investor has acquired 10% or more of the ordinary shares or voting power of an enterprise abroad. 'Lasting interest' implies a long-term relationship between the investor and the investment enterprise, and usually gives the investor an effective voice in the latter's management. FDI is therefore distinct from portfolio equity investment and 'other investments' that do not result in foreign management, ownership, or legal control of the firm.[49]

FDI may involve the creation of a new establishment or investment ('greenfield' investments), or a joint venture, or the acquisition of an existing enterprise (ie cross-border M&As). Its benefits for a host country can be significant. They may include:

- enhanced productivity;
- technology and skills transfer to companies and the labour force;
- human capital enhancement;
- enterprise development;
- integration into the global economy through the establishment of foreign trade flows;
- improved access to international markets; export diversification; and
- enhanced competition.

In this way FDI can be used to diversify an economy and reduce over-dependence on a limited sectoral spread.[50] Given these potential gains it is not surprising that many countries are actively seeking to attract FDI, and in some cases treat foreign investors better than their nationals – in terms of business incentives, for example.

As countries liberalise and reduce policy impediments to FDI, however, competition policy becomes an increasingly important factor in regulating markets, to ensure that regulatory barriers to FDI are not replaced by anti-competitive company practices.[51] The inflow of FDI can have unintended side-effects on an economy. They may include:

- conflicts between the host country and that of the investor;
- creation of a hostile business environment;
- de-capitalisation as foreign owners transfer earnings abroad;
- market inefficiencies and misallocation of resources; and
- creation of competition damaging to local firms, including market dominance and abuse of dominant positions.[52]

Many of these adverse consequences, however, can be mitigated by policy measures.[53] Given that FDI thrives in a market economy, it is necessary to accelerate and sustain market economic reforms alongside policies aimed at liberalising FDI.[54] In so doing, competition policy provides an important avenue of reform.

It can:

- promote consumer welfare;
- foster efficient allocation of resources;
- prevent or control excessive concentration levels and resultant structural rigidities in the market;
- address anti-competitive practices;
- reinforce the benefits of privatisation and regulatory reform;
- establish a focal point for advocating pro-competitive policy reforms and a culture of competition; and finally and importantly
- 'enhance an economy's ability to attract foreign investment and to maximise the benefits of such investment'.[55]

Investment liberalisation and competition policy play a complementary role in promoting efficiency, consumer welfare, economic growth, and development.[56] The impact of FDI on a host economy depends on several factors. They include:

- mode of entry (for example M&A or greenfield investment);
- the type of activity engaged in by the investment enterprise, and whether or not it is already undertaken in the host country;
- sources of finance for FDI (eg reinvested earnings, intra-company loans, or equity capital from parent companies); and
- the effect on domestic companies.[57]

Over the past two decades there has been a surge in FDI, mainly through cross-border M&As. The impact on host economies of such activity – as opposed to greenfield FDI – has caused some concern, much of which is based on the fact that M&As represent a transfer of ownership from domestic to foreign hands and do not, initially at least, add to the productive capacity of host countries. FDI through M&As is therefore less likely than other forms of investment to transfer new or better technologies or skills at the time of entry, or to generate employment. In addition, M&As can lead to increased market concentration with implications for restricted competition. They may even be used deliberately to reduce or entirely eliminate competition.

The impact on domestic competition is perhaps the most common concern regarding cross-border M&As: the sheer size of many TNCs and their large share of global markets raises fears about growing international oligopolies and the market power of individual enterprises.[58] Many of these concerns have been highlighted recently in a proposed merger between US-based Walmart Stores Inc and South Africa's Massmart Holdings (see Box 1).

It is clear that effective competition policy is vital to the management of FDI, through M&As in particular as well as more generally.[59] In addition, the Walmart merger is a very clear example of an awkward policy interface that highlights the importance of reconciling international trade obligations with specific domestic development imperatives. The transaction offers important implications for the host country's policy space, and policy coherence, in the context of international agreements and domestic policy and laws.

Box 1: The Walmart-Massmart merger

Introduction

In November 2010, US-based Walmart Stores Inc, the world's largest retailer, made an offer to purchase a 51% stake in South Africa's Massmart Holdings Ltd. Walmart's rationale for the $2.4 billion (ZAR 2.5 billion[60]) deal was a desire to increase its exposure to emerging markets,[61] given their high growth potential. Walmart does not yet have a presence in Africa but already has stores in 14 countries outside the US, including Brazil, China and India. Massmart, with operations in 14 sub-Saharan African countries, is one of the largest distributors of consumer goods in Africa and a leading retailer of general merchandise. The deal can be seen, therefore, as a strategic regional acquisition by Walmart for expansion into the African market.[62]

The proposed acquisition was notified to the Competition Commission of South Africa in late 2010 in accordance with provisions of the Competition Act No 89 of 1998. The Competition Commission recommended to the Competition Tribunal that the merger be approved without conditions, based on a finding that the merger did not raise competition concerns. Nevertheless, public interest concerns related to employment and procurement practices were noted. Hearings at the Tribunal took place in May 2011, following which the Competition Tribunal announced its conditional approval of the transaction. This decision overcame the final hurdle to Walmart's entry into Africa: required approvals had already been obtained from competition authorities in all the other African countries in which Massmart operates.[63]

Major concerns and findings

Although the merger did not raise competition concerns *per se*, various trade unions, government departments, and the Small, Medium and Micro Enterprises Forum opposed the merger on the basis of several public interest issues. A major concern was that given Walmart's reputation for being anti-union, the merger would negatively affect existing relationships between Massmart and trade unions in South Africa. It might also result in an attenuation of employment terms and conditions and substantial job losses, both within the merged entity and across the broader retail industry, because other retailers would be compelled to respond to Walmart's entry by implementing similar strategies in order to remain competitive. Thirdly, the merger would probably reduce local procurement of goods, since Walmart's size and power allows it to source manufactured products globally at substantially lower cost than could be met locally. This, in turn, would result in job losses across the broader manufacturing sector in South Africa. The objecting parties therefore argued that the merger be prohibited or alternatively, approved subject to certain conditions, including a preferential procurement quota to protect local suppliers, and standardisation of Massmart's employment conditions across Africa.[64] Although the merging parties maintained throughout the hearings that no conditions were necessary in approving the deal, as a demonstration of goodwill they offered commitments to the various stakeholders

in the transaction. These undertakings were later taken into consideration in the tribunal's ruling.

The Walmart–Massmart merger raised important questions about South Africa's international trade law obligations (ie commitments made at the WTO) and public interest issues (as provided for in Section 12(A)3 of the Competition Act). It was argued that imposing the restrictions and conditions on the merger that the objecting parties wanted would violate Article III of GATT, which deals with the national treatment obligation that prohibits discrimination. In addition, South Africa has fully liberalised its wholesale and retail sectors under GATS and is therefore prohibited from denying market access to foreign wholesalers and retailers, or discriminating against them.[65]

The 1998 Competition Act stipulates that when considering a proposed merger, competition authorities must consider not only whether the merger is likely to 'substantially prevent or lessen competition', but also whether it 'can or cannot be justified on substantial public interest grounds.'[66] In terms of the latter, the authorities must consider whether the merger will have an effect on:

> (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (d) the ability of national industries to compete in international markets.[67]

Following consideration the merger may be approved subject to certain conditions relating to these public interest concerns.

The commitments made to the WTO have a permanent and continued impact on measures taken by the South African authorities, including the Competition Commission and the Competition Tribunal. Competition laws and their application must comply with WTO law and ultimately, any violation could lead to dispute settlement proceedings under the WTO. This partly explains why the Competition Tribunal was careful to rule on the legality of the preferential procurement with respect to international law,[68] and why it avoided making a finding on the issue of whether the merger would have significant effects on employment.[69]

Tribunal decision on the merger

The Tribunal conditionally approved the transaction on 31 May 2011, based on the concern to protect the public interest while recognising that the merger does not raise competition concerns. The following conditions were imposed:[70]

- The merged entity may not retrench workers for a period of two years.
- Preference must be given to the re-employment of the 503 retrenched workers when employment opportunities become available within the merged entity.
- Existing labour agreements must be honoured and the merged entity may not challenge the role of the South African Commercial, Catering and Allied Workers Union's role as

collective bargaining agent, for at least the subsequent three years.
- The merged entity must set up a ZAR 100 million development fund to support local suppliers and small businesses as well as provide training to South African suppliers on how to do business with the merged entity and with Walmart.

The government departments and trade unions that participated in the merger have subsequently appealed and reviewed the Tribunal's decision to the Competition Appeal Court (CAC), seeking prohibition of the merger, or more onerous conditions on it.[71] The CAC's decision is still pending (as at mid February 2012).

Recent FDI developments in South Africa

The South African government acknowledges the importance of FDI to the development of the local economy. In early 2011 the National Treasury reiterated that cross-border FDI would be beneficial for South Africa because of its probable positive impact on employment, productivity and growth. Benefits could include the transfer of skills and technology from multinational companies to the host economy, overspill through the creation of linkages between foreign and domestic firms, and the prospect of stronger integration into international markets. The treasury noted that FDI is necessary to support domestic investment in South Africa, which is a low-savings developing economy.[72] The National Development Plan released by the National Planning Commission in November 2011 similarly recognises that in the context of curbed savings, foreign investment must have a significant role.[73] South Africa is therefore committed to maintaining an open environment for investment.[74]

The institutional framework governing investment in South Africa has remained broadly unchanged since 2003.[75] The country has made significant progress in liberalising exchange controls since 1994; at present, there are no general restrictions on movements of foreign capital and foreign companies are able to raise capital in the local equity and bond markets. Foreign and domestic investors are subject to the same laws and regulations, through the application of the 'national treatment' principle. Hence investment is controlled mainly by sector-specific legislation. This includes competition regulation (primarily related to M&As under the Competition Act) and sectoral regulations affecting foreign entry and ownership in strategic sectors (eg the financial sector – banking and insurance – mining, telecommunications and broadcasting, and transport). There is also a range of incentive schemes in place for investors.[76] It has, however, been recognised that there are gaps in the current South African policy environment. These, taken together with repeated calls from some political quarters for nationalisation of key industries, and objections by government to the Walmart-Massmart merger, make for a somewhat risky environment for foreign investors.[77]

Against this backdrop, the National Treasury has proposed a review framework for cross-border direct investment into South Africa.[78] Its purpose would be to help maintain an open environment for inward FDI, thereby encouraging new inflows of foreign capital – with expected benefits for employment, productivity, growth and competition – while at

the same time safeguarding the public interest. It would also aim to improve predictability for foreign investors and domestic companies through transparency in decision-making; support consistency in inward FDI policy across government departments; and support the policy framework for managing the macroeconomic benefits and risks of cross-border capital flows. It is clear that Pretoria has recognised that to be successful, policies promoting FDI must be part of broader economic reform;[79] and furthermore, that they can coexist with other regulations and policies that address existing, specific objectives. Competition policy under the Competition Act is a prime example of this approach.

Global FDI inflows have grown rapidly over the past decade, with world FDI more than doubling between 2000 and 2010.[80] Increasing globalisation, combined with the adoption of economic and structural reforms – including the elimination of trade and investment barriers and fewer restrictions on international capital flows – brought a surge in FDI to developing countries in particular.[81] In 2000, developing economies received a mere 17.7% of world FDI inflows, but this had increased to 46.1% by 2010. Over the same period FDI to Africa more than tripled, from 3.5% of inflows to developing countries to 9.6%.[82]

Overall FDI to Africa remained resilient during the global financial crisis of 2008–2009. This was partly a result of policies introduced in the 1990s and early 2000s: Around that time many African countries liberalised their investment regimes and also, shifted from targeting FDI for specific sectors to establishing a broad enabling investment climate. This approach reflected the view that a coherent strategy to attract investment is likely to be more effective than measures adopted in isolation or ad hoc.[83] In South Africa, however, net FDI inflows have trended downward since the peak of the resource boom in 2008, a cause for concern given the importance of FDI for local economic growth. Nevertheless, it is encouraging to note that the value of inward FDI stock has increased dramatically, to $132.4 million in 2010 from $43.5 million 10 years earlier.[84]

Although much of the growth in FDI over the past two decades has been spurred by an increase in the number of cross-border M&As across the globe, by 2010 developing economies were receiving more investment through greenfield projects than through M&As.[85] FDI in South Africa has followed this trend. Between 2005 and 2011, the country received more than twice as many greenfield investments as it did cross-border M&As, the value of greenfield investment consequently being significantly greater than that of M&As (see Table 1). This is encouraging, given that greenfield investment raises fewer concerns than do cross-border M&As, in terms of their impact on the host economy.

Investment in South Africa's regional trade agreements

As noted earlier, South Africa is not keen to include new generation issues on the regional trade agenda. Included in the SADC Finance and Investment Protocol (FIP), however, is an Annex on Investment. The FIP resembles Chapter 11 of the 2011 North American Free Trade Agreement in that the annex, on a broad interpretation of its scope, arguably applies to any investment in the territory of a host state irrespective of the investor's nationality.[86] The investor is required to be a legal or natural person who has been admitted to make an investment or has made an investment, which can be interpreted to mean that national investment laws regulate admission of investors. (At this stage, of course, South Africa has neither a comprehensive domestic policy nor an investment law.)

Table 1: Inward FDI flows to South Africa 2005–2011

		2005	2006	2007	2008	2009	2010	2011[a]	Total
M&A	Number of deals	24	34	41	37	22	27	23	208
	Value ($ million)[b]	5,092	-1,336	4 301	6,676	4,215	3,943	232	23,123
Greenfield investments	Number of projects	62	76	59	120	109	95	41	562
	Value ($ million)	3,467	4,947	5,148	11,873	7,509	5,891	1,042	39,877

a M&A 2011 data is for the period January–May. For Greenfield Investments, 2011 data is for January–April.

b Net sales.

Source: United Nations Conference on Trade and Development (Unctad), *World Investment Report*, 2011

The scope and application of the FIP are particularly important when considering its provisions for dispute resolution. The FIP provides for investor-state dispute resolution through recourse to international arbitration after exhaustion of local remedies.

CONCLUSION

The linkages between trade, investment and competition policy are especially important for South Africa as it tries to promote FDI, and reintegrate into African and world economies (specifically through South–South partnerships) while simultaneously addressing domestic economic development problems. Among these, the most important is probably job creation.

Competition policy provides checks and balances in a liberalised trade and investment environment, because the contestability of domestic markets can be improved by reducing or eliminating barriers to trade and investment. With market entry through M&A or through trade, the nature and intensity of competition in domestic markets may change considerably, making market outcomes difficult to predict. The impact of such activities, in particular on employment, is of material concern, an example being the Walmart-Massmart transaction. The scope of South Africa's competition law is very broad, providing as it does for extraterritorial application and in some cases the explicit consideration of specific public interest issues. In the context of controls on cross-border mergers concerns regarding trade-investment linkages are important, because such transactions could lead to increased imports.

As African countries increasingly recognise that FDI can play a positive role in promoting their economic growth, productivity, and development,[87] national policies

become crucial to attracting FDI and increasing developmental gains made as a result.[88] For FDI to contribute fully to economic and social progress in Africa, therefore, host country governments need to create an enabling policy environment.[89]

South Africa has implemented various strategies to attract FDI since 1994, but a refinement of some of its policies is needed if it is truly to benefit from FDI inflow. Nevertheless it is important that policies for promoting FDI are seen in the context of broader economic development policies and not in isolation.[90] Competition policy can play an important part in creating a robust policy environment for attracting foreign investment and maximising its benefits.[91] In the words of former Unctad secretary-general Rubens Ricupero, 'governments must foster open investment and trade policies, *as well as a culture of competition*, to maximise the potential of their economies' [emphasis added].[92]

ENDNOTES

1 South Africa, dti (Department of Trade and Industry), *A South African Trade Policy and Strategy Framework*, Pretoria, May 2010.

2 Dti released the Industrial Policy Action Plan (IPAP 2), in 2012, following the National Industrial Policy Framework (NIPF) of 2007–2008.

3 'New generation' trade issues usually refer to services, investment, competition policy, government procurement and other trade-related issues.

4 The Competition Commission and Competition Tribunal now also fall under the Department of Economic Development.

5 The 1948 Havana Charter (Unctad 1948: Article 46, para.1) recognised the need to prevent business practices that restrain competition, limit access to markets, or foster monopolistic control, where such practices have harmful effects on the expansion or production of international trade. Cited in Holmes P, 'Trade and Competition Policy: At the WTO Issues For Developing Countries,' Manchester: Centre on Regulation and Competition, 2003, http://www.competitionregulation.org.uk/conferences/mcrcarr03/pholmes.pdf.

6 Bilal S, 'Trade and Competition Policy: Perspectives for Developing Countries', paper prepared for workshop on The Regulatory Framework of Globalisation, Barcelona, 5–6 October 2001, http://www.odi.org.uk/resources/docs/4709.pdf.

7 Nanda N & A Pham, 'Multilateral Competition Framework: Where and How?' Consumer Unity & Trust Society (CUTS) Centre for Competition, Investment & Economic Regulation. Viewpoint Paper, 1/2004. Jaipur: CUTS-C-CIER, 2004.

8 European Community (EC), *Submission to the Working Group on the Interaction Between Trade and Competition Policy From the European Community and Its Member States: A WTO Competition Agreement's Contribution to International Cooperation and Technical Assistance for Capacity-Building*. Brussels: EC, 2003, http://trade.ec.europa.eu/doclib/docs/2003/june/tradoc_113125.pdf.

9 Holmes P, *op. cit*.

10 Nanda N & A Pham, *op. cit*.

11 Bilal S, *op. cit*.

12 *Ibid*.

13 *Ibid*.

14 WTO (World Trade Organization), 'Working Group on the interaction between Trade and Competition Policy (WGTCP) – history, mandates and decisions', WTO website, 2012a, http://www.wto.org/english/tratop_e/comp_e/history_e.htm.

15 *Ibid*.

16 Hufbauer GC & J Kim, 'International competition policy and the WTO', paper presented at New York University School of Law conference One Year Later: The Antitrust Modernization Commission's Report and the Challenges that Await Antitrust. New York, 11 April 2008, http://www.iie.com/publications/papers/paper.cfm?ResearchID=930.

17 See statement by WTO Appellate Body in its ruling on Japan: Taxes on Alcoholic Beverages (1996). Cited in Holmes P, *op. cit*.

18 Holmes P, *op. cit*.

19 WTO, 'Understanding the WTO: Cross-cutting and new issues – investment, competition, procurement, simpler procedures', WTO website, 2012b, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm.

20 Holmes P, *op. cit*.

21 *Ibid*.

22 'New generation' trade issues usually refer to services, investment, competition policy, government procurement and other trade-related issues.

23 See Chapter 4: Republic of South Africa, Competition Act: Act no 89 of 1998. Pretoria: Government Printer, 20 October 1998.

24 For functions of the Competition Commission, see http://www.compcom.co.za/aboutus/aboutus_competition_commission_function.asp?level=3&child=2&desc=9, accessed 13 February 2006.

25 Republic of South Africa, Maintenance and Promotion of Competition Act 96 of 1979. Pretoria: Government Printer, 21 June 1979, http://www.compcom.co.za/thelaw/thelaw_act_maintenance.asp?level=1&child=3.

26 *Ibid*.

27 For a case of alleged price discrimination referred by a complainant to the Tribunal after a non-referral decision by the Commission, see Case 72/CR/Dec03, Nationwide Poles and Sasol Oil (Pty) Ltd, Competition Tribunal, Republic of South Africa, 2005, http://www.comptrib.co.za/decidedcases/html/72CRDec03.htm. See also (overturning the Appeal Court) Case 49/CAC/Apr05, Sasol Oil (Pty) Ltd and Nationwide Poles CC, Competition Tribunal, Republic of South Africa, 38-41 (2005) at 38-41, http://www.comptrib.co.za/CAC/Sasol%20Nationwide%2049CACApr05.pdf.

28 The Commission has first-instance jurisdiction over smaller mergers, see Competition Act, 1998 chapter 4, sec. 21, *op. cit*.

29 Competition Act, 1998, chapter 2 (Prohibited Practices), chapter 3 (Merger Control), *op. cit*.

30 *Ibid*. chapter 4 (Part B).

31 The overall purpose of the Competition Act is to promote and maintain competition, in order to:

> '(a) promote the efficiency, adaptability and development of the economy; (b) provide consumers with competitive prices and product choices; (c) promote employment and advance the social and economic welfare of South Africans; (d) expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic; (e) ensure that small and medium-sized enterprises have an equitable

opportunity to participate in the economy; and (f) promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'

32 Lewis D, 'The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency', paper presented at the Organisation for Economic Cooperation and Development (OECD) Global Forum on Competition, 10–11 February 2003. Paris: OECD, p. 4.

33 *Ibid.*

34 Case 49/CR/Apr00 and 87/CR/Sep00, Competition Commission and Botswana Ash (Pty) Ltd, Competition Tribunal, Republic of South Africa, 2001, http://www.comptrib.co.za/decidedcases/pdf/49CRAAPR00-2pdf.pdf.

35 For more detail on SACU, see 2002 Customs Union Agreement, http//www.tralac.org/scripts/content.php?id=3031.

36 Case 67/CR/Jul05, Competition Commission and USA Citrus Alliance, Competition Tribunal, Republic of South Africa, 2005, http://www.comptrib.co.za/decidedcases/pdf/67CRJul05.pdf.

37 *Ibid* at 2–3.

38 *Ibid.*

39 The 2002 SACU Agreement is available at http://www.sacu.int.

40 Unctad (United Nations Conference on Trade and Development), *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development*. New York and Geneva: Unctad, 2000.

41 IMF (International Monetary Fund), *Foreign Direct Investment in Emerging Market Countries: Report of the Working Group of the Capital Markets Consultative Group*. Washington, DC: 2003; Mwilima N, *Foreign Direct Investment in Africa. Social Observatory Pilot Project Final Draft Report*, Windhoek: Africa Labour Research Network, 2003; Unctad, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*. New York and Geneva: Unctad, 2003a.

42 Unctad, 2003a, *op. cit.*; IMF, 2003, *op. cit.*

43 WEF (World Economic Forum), World Bank, and African Development Bank, *The Africa Competitiveness Report 2011*. Geneva: WEF, 2011.

44 Republic of South Africa, National Treasury discussion document, *A Review Framework for Cross-Border Direct Investment in South Africa*. Pretoria: Government Printer, February 2011.

45 Unctad, *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy*. New York and Geneva: Unctad 1997a.

46 *Ibid.*

47 WEF *et al.*, op cit.

48 IMF *op. cit.*, p. 41.

49 Graham JP & RB Spaulding, *Understanding Foreign Direct Investment (FDI)*. Citibank International Business Portal, 2005, http://www.going-global.com/articles/understanding_foreign_direct_investment. htm; South Africa, National Treasury, *op. cit.*

50 Asafo-Adjei A, 'Foreign Direct Investment and Its Importance for the Economy of South Africa'. unpublished master's dissertation, University of South Africa, 2007.

51 Unctad, 1997a, *op. cit.*

52 Asafo-Adjei A, *op. cit.*

53 Unctad, 2000, *op. cit.* Important areas affecting FDI include competition policy; fiscal policy; revenue administration; exchange control; trade and tax policy; corporate governance and responsibility; human resource development; infrastructural development; and public

governance. See OECD Secretariat, *The OECD Initiative on Investment for Development a Policy Framework for Investment: Competition Policy. Background information in support of Session 3 of the Round Table on Investment for African Development*. Entebbe: OECD, 2005. See also Unctad, *Effectiveness of Foreign Direct Investment Policy Measures: Note by the UNCTAD Secretariat. Trade and Development Board*, TD/B/COM.2/EM.13/2. Geneva: Unctad, 2003b.

54 Asafo-Adjei A, *op. cit*.

55 WTO, *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth. Working Group on the Interaction Between Trade and Competition Policy*, WT/WGTCP/W/80. Geneva: WTO, 1998; OECD, 2005, *op. cit*.

56 *Ibid*.

57 Mehta PS & N Nanda, 'Foreign Direct Investment and Competition Policy', CUTS Centre for Competition, Investment & Economic Regulation Briefing Paper, 2/2005. Jaipur: CUTS-C-CIER, 2005.

58 Unctad, 2000, *op. cit*.

59 *Ibid*.

60 ZAR is the currency code for South African rand.

61 Competition Tribunal of South Africa, 'Walmart/Massmart merger: Latest developments', 2011, http://www.comptrib.co.za/walmart-massmart-merger/latest-developments.

62 Kruger P, 'The Impact of WTO Law on Foreign Investment: The Walmart/Massmart Merger', tralac (trade law centre) Working Paper, S12WP03/2012. Stellenbosch: tralac, forthcoming.

63 Kruger P, 'The Walmart/Massmart merger', tralac Hot Seat Comments, Stellenbosch, 11 May 2011, http://www.tralac.org/2011/05/13/the-walmart-massmart-merger/.

64 Garden M, Balkin J & K van den Bergh, 'Massmart/Walmart merger' ENS (Edward Nathan Sonnenbergs), May 2011, http://www.ens.co.za/news/news_article.asp?iID=254&iType=4.

65 Kruger J, 2012, *op. cit*.

66 Republic of South Africa, Competition Act No 89 of 1998 as amended, Section 12A.

67 *Ibid*, Section 12A(3).

68 Kruger J, 2012, *op. cit*.

69 Webber Wentzel Competition Practice Group, 'South Africa: Merger control', Mondaq, London: 7 February 2011, http://www.mondaq.com/x/163778/Mergers+Acquisitions/Merger+Control.

70 Garden M *et al., op. cit*.

71 *Ibid*.

72 South Africa, National Treasury, *op. cit*.

73 Republic of South Africa, National Planning Commission, *National Development Plan: Vision for 2030*. Pretoria: Government Printer, 2011. It is, however, concerning to note that the Plan believes that 'over time, a larger share of investment should be funded domestically, but this will depend on how well resources are used in the short term to raise productivity, incomes and employment'.

74 South Africa, National Treasury, *op. cit*.

75 WTO, *Trade Policy Review: SACU. Annex 4: South Africa,* WT/TPR/S/222/ZAF. Geneva: WTO, 2009.

76 South Africa, National Treasury, *op. cit*.

77 Creamer T, 'FDI inflows to SA slumped 70% in 2010, recovery expected in 2011', *Engineering News Online*, 26 July 2011, http://www.engineeringnews.co.za/article/unctad-2011-07-26.

78 South Africa, National Treasury, *op. cit*.

79 Asafo-Adjei A, *op. cit*.; WEF *et al., op cit*.

80 Based on data from the IMF World Economic Outlook database, April 2011.

81 IMF, *op. cit.*

82 Calculated using data from Unctad, 2011, *op. cit.*; Unctad, 1997, *op. cit.*

83 WEF *et al.*, op cit.

84 Unctad, 2011, *op. cit.*

85 Unctad, 2000, *op. cit.*; Unctad, 2011, *op. cit.*

86 Van Roessel H, 'The SADC Finance and Investment Protocol – potential challenges for member states?', http://www.tralac.org/2011/03/22/the-sadc-finance-and-investment-protocol-potential-challenges-for-member-states/.

87 WEF *et al.*, *op. cit.*

88 Unctad, 2003a, *op. cit.*

89 UN (United Nations), 'FDI in Africa', Office of the Special Adviser on Africa, UN office of the Special Advisor on Africa (OSSA) Policy Brief, 4. Geneva: OSSA, 2010.

90 Asafo-Adjei A, *op. cit.*; WEF *et al.*, *op. cit.*

91 OECD, *op. cit.*; WTO, 1998, *op. cit.*

92 Unctad, 'World Investment Report 1997: FDI and competition policy', press release, TAD/INF/PR/9715, 9 September 1997b, http://www.unctad.org/Templates/webflyer.asp?docid=3292&intItemID=1465& lang=1.

SAIIA'S FUNDING PROFILE

SAIIA raises funds from governments, charitable foundations, companies and individual donors. Our work is currently being funded by, among others, the Bradlow Foundation, the United Kingdom's Department for International Development, the European Commission, the British High Commission of South Africa, the Finnish Ministry for Foreign Affairs, the International Institute for Sustainable Development, INWENT, the Konrad Adenauer Foundation, the Royal Norwegian Ministry of Foreign Affairs, the Royal Danish Ministry of Foreign Affairs, the Royal Netherlands Ministry of Foreign Affairs, the Swedish International Development Cooperation Agency, the Canadian International Development Agency, the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the United Nations Economic Commission for Africa, the African Development Bank, and the Open Society Foundation for South Africa. SAIIA's corporate membership is drawn from the South African private sector and international businesses with an interest in Africa. In addition, SAIIA has a substantial number of international diplomatic and mainly South African institutional members.

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