

CHAPTER THREE

3.0 NATIONAL, REGIONAL AND INTERNATIONAL  
CONTROLS OF TNCs

The problems of TNCs cannot be overemphasised. However, in a nutshell they include inter alia, bribes, economic blackmail, economic blockade, corruption of leaders, financing of coup d'etat to topple governments which have contrary or hostile ideas towards them (TNCs) and repatriation of more profits thereby causing balance of payments problems in host countries, to mention but a few.

The alleged involvement of TNCs in the aforementioned activities and many others not mentioned, gave rise to great concern amongst the nation states of the world. In actual fact one may argue that most of these activities amounted to the denial of national sovereignty and independence in host countries, especially host developing countries. This resentment culminated in the expression by nation states that there was an urgent need to control the activities of TNCs. The most affected count-

ries are the developing countries, hence they have been more vocal against the operations of TNCs. This being the position SADCC member states are not an exception to this resentment.

On the whole, the desire for the control of TNCs, started with the Declaration of Ayacucho, signed in Lima, Peru, on December 9, 1974. In that Declaration, the Presidents of Bolivia, Peru, and Venezuela and the special representatives of the Heads of states of Columbia, Ecuador, Argentina and Chile affirmed the inalienable right of their countries in exercising control over the operations of TNCs. <sup>1</sup>

Since then, the movement for national, regional and international control of TNCs has been endorsed by governments and non-governmental institutions, such as the U.N. and its specialised agencies, Organisation of American States (OAS); Andean Pact Countries; Organisation of European Co-operation and Development (OECD); European Economic Community (EEC); Non-Aligned Movement (NAM); Group of 77; International Chamber of Commerce (ICC); International Conference of Free

Trade Unions (ICFTU) and the World Confederation of Labour (WCL).

Over the years the above institutions have made considerable efforts to command the control of TNCs. Such ensuing efforts have often been the drawing out of international declarations and guidelines and the enactment of, usually watered down national laws. The control called for, is mainly regarding TNCs' control or ownership in host countries, their accountability to host country tax laws, their responsibility to disclose information, their transfer pricing activities, in the field of technology transfer and indeed their business practices which are considered unfavourable to policies of recipient states, such as TNCs' corrupt practices and restrictive business practices.

Despite their limitations in regard to enforcement, the real value of the regional and international declarations and guidelines e.g. the U.N Draft Code on the control of TNCs, lies in the achievement of drawing attention of the TNCs to their activities as being unacceptable.

On the whole therefore, the whole question of TNCs-host country relationship deals with the friction between the TNCs and the national interests of host countries. A solution therefore lies in finding a balance between the interests of the parties in the conflict. This may be achieved by formulating rules and regulations in which both parties may operate with mutual respect and benefit. It is however a perennial problem because it involves the balancing of unequal relationships between the strong and the weak bargainers. It is difficult to imagine what mutual respect may exist between a poor country like Lesotho and a flourishing giant TNC such as SHELL, BP or General Motors whose annual sales or turnover exceeds the total GNP of all developing countries put together.

At this juncture it would be advisable to proceed with the consideration of some specific national, regional and international controls of TNCs, using some of the above examples as our basis. This is done with a view to derive or learn some possible lessons for SADCC if any.

### 3.1 National Control in General

Due to the difference in the operations of TNCs in both developed and developing host countries, the national governments respectively, have taken fairly different approaches on the control and encouragement of TNCs' operations. A major reason for this divergences in approaches certainly is the fact that the developed countries of Western Europe and America in most cases act as, both homes and hosts for the vast majority of TNCs and therefore these states are in most cases concerned about competition and fair treatment of TNCs.

The developed countries of Western Europe and America have focussed on the establishment of rules to guarantee fair competition among firms and to harmonize or unify national policies towards TNCs. For example President Ford in his international economic report to the U.S. Congress in March 1976, stated that TNCs must obey the laws and take fully into account public policies of host countries. Added to this he also stressed the need for host governments to foster conditions in

which TNCs can maintain successful operations. The then U.S. President further emphasised that the U.S. Government had taken the position that the proposed code of conduct for TNCs would be helpful in inspiring the climate for international investment through improved comprehension and acceptability of the legitimate interests of TNCs. It is undeniable that, the report was biased in favour of TNCs. This is substantiated by the U.S. senate Resolution No. 265 of 1976, recommending the formulation of a binding code of conduct with the General Agreement on Tariffs and Trade (GATT) as well as other appropriate international forums covering the subjects of bribery and political activities of the TNCs, the world over. One could argue that the U.S.A. officials were worried that TNCs' bribery and corrupt practices abroad could spread home (U.S.A.) the Resolution on the whole however, only deters and not prohibit payoffs and bribes to local officials.

The developing countries on the other hand operate as host countries in most cases, where domestic firms often need protection against TNCs'

unfair competition. Such fundamental differences of approach arising from differences in the socio-economic needs of each country impedes attempts to obtain multi-lateral agreements on the encouragement and control of TNCs in organisations which include developed and developing countries, for example the U.N and its various specialised agencies, especially UNCTAD.

In an effort to attract foreign investors the various instruments of control employed by host developing countries are a direct opposite of those of the home countries of TNCs. A case in point as we shall see later is that of national laws. These laws tend to be passive, as their primary purpose is to attract foreign investment at the expense of a similar primary position of control and regulation. In most cases as we shall see later, host developing countries cannot exert much pressure on the TNCs activities - mainly because of lack of unity of purpose and action among them. These are some of the many problems faced by host countries in international intercourse with TNCs.

The above demonstrates that there are a number of factors which determine a particular, country's policies towards foreign investment in general and TNCs in particular. The most important ones are the country's political - and cultural set up, resource endowment, level of economic activity, general development strategy and the extent of social, political and economic dependence of a developing host country on its former colonial power in particular and the international monopoly capital in general. A United Nations Report summarizes them as follows:

"..... A country rich in resources tends to be more selective in regard to transnational corporations than one which is less well endowed. A large country often assigns a different role on transnational corporations than a small island economy. An appropriate policy for a country which has attained a significant level of industrialization may some times be inappropriate for one that is less developed. A strategy which emphasises rapid economic growth has different implications from one which stresses distributional equity. There is therefore a great diversity of policies<sub>2</sub> towards transnational corporations".

Taking Zambia as our example, it is hypothesised that the objective environment suggests that Zambia's great dependence on an enormous,

highly sophisticated technology dependent, and capital intensive mining industry makes control of mining TNCs in this country very difficult and therefore, circumscribes the Zambian policy makers' room for manoeuvre. In other words even after nationalisation, has taken place there will always be need for various types of contracts e.g. management and service contracts to be provided by the mining TNCs. This is in addition to several regional geo-political factors that act on the Zambian political and economic system. These are proximity dependence and destabilization of Zambia by an imperialist outpost of South Africa. In the less-complex non-mining sectors of the Zambian economy, the government's desire to increase public participation has been considerable, but given several other objectives, geo-economic considerations, the governments' policy towards foreign investors since independence has remained reformist rather than revolutionary.<sup>3</sup> This means that historically the countries of the sub-region have been made to depend economically on an imperialist outpost of South Africa and as such Zambia, is not an exception. This being the position Zambia's

policy towards foreign investors, especially the TNCs since independence has been in the form of joint ventures rather than total nationalization, for example the 51% equity participation in the mining industry.

Looking at Tanzania where the economy is mainly agricultural, with low capital and technology intensity; little foreign investment prior to the major socio-economic reforms and in which peasant production is still dominant, policy makers were and still are able to be less cautious in formulating their country's policies towards foreign investment.<sup>4</sup> It can therefore be argued that Tanzania's ideology on the whole has played a major role in the formulation of her policy towards foreign investment and its role in the development of the Tanzanian economy.

It is also a well known fact that, the industrialist capitalist states tend to be more receptive to the activities of TNCs in their countries, than developed socialist states and developing countries. The latter two adopt strong regulatory measures towards TNCs. In

developing countries as opposed to socialist developed countries, however, due to their characteristics deficiency in both managerial and technical resources, many continue to enter into various types of contracts such as management and service contracts.

All in all whatever differences of approach, many countries' policies towards foreign investment, especially TNCs are determined by both internal and external factors. When we talk of internal factors we have in mind the states value system or ideology and when it comes to external factors, this is the degree to which the local economy and polity, especially in developing countries is tied to, or dependent on, the international, social, political and economic system. This is more so with the international monopoly capital vis-a-vis developing countries. In a nutshell, the extent to which a particular developing country's economy is dominated by external capital investment; technologies, markets, management and technical skills, etc., determines that country's policy towards foreign investment in general and

TNCs in particular.

This is assumed to be an important variable in explaining the degree and extent to which policy makers are circumscribed in their dealings with TNCs operating in their countries.

Having seen the divergencies of approaches in the control and encouragement of TNCs, it is important to note that all the various methods of control have four main common objectives to achieve. That is control is sought in the following areas:

- (i) technological procurement;
- (ii) financial structures of businesses; staffing; and
- (iii) utilization of the accrued profits with a prescribed percentage of repatriation or remittance where possible.

To fulfil these, there are three main accepted methods for the control and encouragement of foreign investment in general and TNCs in particular. These are:

- (i) Government Policy Statements,
- (ii) Constitutional Provisions, and
- (iii) Legislative Provisions or Statutes.

In addition we also have other controls such as financial and managerial controls.

(i) Government Policy Statements

Depending on the internal and external factors or both, each country's government makes a policy towards TNCs. This could be in the form of a Presidential or a Ministerial statement which could be implemented through legislation or any other government action.

Traditionally most governments of developing countries make policy statements on nationalisation of the commanding heights of their economies. However the major difference lies in the degree and modalities involved in nationalisation. These policy statements especially on nationalisation are in most cases supplemented by other policy statements encouraging foreign investment. A case in point is that of the late Kwame Nkrumah of Ghana when he said:-

"Our Government has no plans. Whatsoever to take-over industries in the private sector. Where the government has taken over private industry, it has done so either because, as in the case of the acquisition of the gold mines the owners had indicated their intention of closing them down, or as in other cases, because the owners themselves made propositions to the government".<sup>5</sup>

A similar assurance was also made by the Guinean Head of State when he said:-

"Those who are ready to invest in the Republic of Guinea and who wish to participate in the economic development of our country must be able to count on political and social stability and to benefit from guarantees protecting their capital from all arbitrary acts and ensuring fair interests".<sup>6</sup>

Apart from Zambia's policy of "Nationalisation", President Kaunda has repeatedly reiterated Zambia's call for foreign investment to play a dominant role in the Zambian economy. This could be taken from the First National Development Plan, where it was stated that:

"A vigorous investment policy by Government is a pre-requisite for dynamic, private enterprise (both local and foreign) especially when a large percentage of the investment is devoted to establishing the economic infrastructure which promotes, the expansion of productive private enterprise.... The role of the Government is to provide encouragement and assurance to the private industrial sector".<sup>7</sup>

Notwithstanding the above assurance by President Kaunda, he is also known at the same time to have repeatedly reiterated the need to secure more effective control over the Zambian economy, notably by ending the preferential tax treatment

accorded to foreign minority-owners of the copper industry and by placing new restrictions on the remission of dividends abroad.<sup>8</sup> However, some countries, for example Zambia given the prevailing socio-economic conditions, seem to favour various forms of control including partial nationalisation (through joint ventures) to total nationalisation.

In April 1968 therefore, the Zambian Government made a policy that aimed at increasing government control and participation in the commanding heights of the economy especially in the mining sector where foreign investment was dominant. The policy was mainly aimed at the retention of profits made by various TNCs in the country. The policy inter alia stipulated that:-

"Permission to remit profits and dividends by subsidiaries or branches of companies whose head offices are situated outside Zambia will, effective 12 September, 1972, only be granted up to a maximum equivalent of 30% of the equity capital of the company or 50% of the net profits of the company whichever is less. The profits should derive from the year's operations after full provision has been made for local taxation".<sup>9</sup>

Looking at Kenya as compared to other moderate African governments in particular, it would appear Kenya's policy on foreign private investment is more

capitalist oriented than others. The Government of Kenya is fully committed to what it calls "mixed economy". This was reflected in the following words:

"Our country believes in a mixed economy in which both public and private participation are allowed, and in which foreign capital, both public and private is welcome...." Foreign enterprises will be welcome and will be assured the possibility of adequate repatriation of profits".<sup>10</sup>

In actual fact the then Kenyatta's Government maintained that:-

"....state ownership was not necessary to ensure that industry operates in the national interest; and that increased state ownership might in fact have a detrimental effect by (1) discouraging overseas private investment and overseas government aid from the capitalist countries; (2) by syphoning Government finance off into large annual payments, in compensation to disposed capitalists; and (3) by blunting the edge of the incentives for local entrepreneurs to make the most economic opportunities".<sup>11</sup>

The Kenyatta Government further stated that the joint ventures in which government has participated with foreign investors should be continued and that in the manufacturing sector heavy reliance would be placed on private enterprise including TNCS.

Coming to Tanzania, once seen as the most radical state in Africa, it could be rightly agreed that, such an observation by some Western governments was derived from the promulgation by that country of the well known Arusha Declaration. When the Arusha Declaration was first launched in 1967, it revealed, among other things, that the government of Tanzania has taken a socialist approach, especially with regard to foreign investment. This could be derived from President Nyerere's Watershed speech when he briefly stated that, for Tanzania:-

".... the real ideological choice is between controlling the economy through domestic private enterprise or doing so through some state or other collective institution .... The only way in which national control of the economy can be achieved is through the economic institutions of socialism". 12

It must be mentioned however that, as of late, Tanzania's "socialist policy" of nationalisation has been modified, especially after President Nyerere stepped down. As a result it was reported that Tanzania has opened its doors to foreign countries, international organisations and agencies for investing in various sectors of the national economy. These include inter alia

agriculture, tourism and fishing.<sup>13</sup> In addition on January 22, 1986, a "Foreign Investment Protection Act" was adopted by Parliament in Zanzibar to attract foreign investment.<sup>14</sup>

In the case of Botswana, one finds that the government's policy is to attract foreign investment.<sup>15</sup> This idea was also reflected by Queti Masire, the President of Botswana when he said:-

".... I wish to make it clear that this Government believes that 'it is by creating a stable climate that can attract foreign investors .... this will enable this country to embark in its objectives to achieve economic development".<sup>16</sup>

The Minister of Commerce and Industry indicated the same view, when he said:

"My Ministry Commissioned a study to review the investment climate of the country and to make recommendations on how best to improve the situation to better suit foreign investments. A bill has been prepared that will safeguard foreign investment in any event".<sup>17</sup>

A critical look at these statements made by different national leaders reveals that they reflect government policy on foreign investment as provided for in the Sixth National Development Plan, where it is stated inter alia;

"There will be a continuing need for foreign investment respectively in those areas where the necessary skills and techniques are not available locally. Therefore government places great emphasis on maintaining a favourable climate for the investment of private capital". 18

Botswana's policy on foreign investment has been consistent since independence. This could be derived from a perusal of the various National Development Plans since independence. 19

In making the aims and objectives of the National Development Plan a reality, the Ministry of Commerce and Industry assist private entrepreneurs in many ways including:

- (i) Assisting in the preparation of specialised investigations such as market surveys and input analysis of technical alternatives; and
- (ii) conducting detailed pre-investment studies at no cost to the interested investor.

From the above objectives, it would appear government policy statements on foreign private investment are influenced by both internal and external factors. In addition we have also concluded that, such policy statements vary from country to country, region to region and so on. This would

also be derived from the assurances made by the  
Zambian Government in the following words:

"Genuine foreign investors would  
be accorded "red carpet treatment"  
and offered - attractive incentives  
under the revised investment  
regulations to woo more capital to  
stimulate economic growth".<sup>21</sup>

The above demonstrates the shift in the  
Zambian Government's policy on foreign investment.  
It has therefore decided to remove what it called  
cumbersome procedures and stringent controls which  
had tended to discourage prospective investors.<sup>22</sup>

Legally speaking such statements are mere  
public statements devoid of any binding effect.  
However, one way or the other they make a potential  
investor aware of a country's intention or policy  
towards it. Those which are favourable to TNCs'  
interests, especially in countries with relatively  
stable governments may be accepted as re-assuring  
and intended to be an expression of good faith<sup>23</sup>  
on the part of a host country. Apart from this  
they are of no real value to an investor whose  
main preoccupations are security, profit maximisa-  
tion, and certainty. For example, it was reported  
*that Kenyan President Arap Moi has taken the*

Nairobi business and diplomatic community by surprise with a promise to ensure that Kenyans in future hold a controlling interest in joint ventures with foreign private investors (TNCs).<sup>24</sup> This policy proposal would mark a radical departure from the country's liberal policy on foreign private investment, which for the last few decades has given TNCs a free hand to set up business in Kenya with or without equity participation.

The announcement aroused fears among investors in general and foreign private investors in particular, especially with regard to the future security of their investments.<sup>25</sup> To rectify the situation, the Moi Government issued another statement that:

"There is no ground for investors in general, and foreign investors in particular, to harbour announced fears as to the future security of their investments".<sup>26</sup>

The statement further stated that the government policies on encouraging and protecting investment from abroad and gradually transferring the economy to Kanyan hands remained unchanged.

The statement further stressed that, President Moi's remarks had been misinterpreted and meant only

that the Kenyan Government wished to encourage companies to take advantage of the country's membership of the Preferential Trade Area (PTA).

As a result of this fear of uncertainty, mainly on the part of a foreign investor, some governments have gone a step further by effecting their various policy statements and assurances on foreign private investment through constitutional and legislative provisions. This is both with a view to control and at the same time protect and encourage the free flow of foreign private investment in their respective countries.

Before we look at both constitutional and legislative provisions as means for the control, protection and encouragement of foreign private investment, a brief look at nationalisation the most popular strategy of seeking the control of TNCs will be an added advantage.

(ii) Nationalisation

Nationalisation (total or partial) has been at the centre of various governments' policies on local private or foreign investment. It is consi-

dered to be one of the most effective or important strategies or mechanisms for the control of private (local and foreign) investment especially the TNCs. It has been practiced by most governments in developing countries and developed socialist states.

The process of nationalisation as a general rule involves the partial or total takeover of foreign properties and their transfer to the state on behalf of the nation. It must be mentioned however that, the policy of nationalisation takes various forms; such as total (100%) takeover of foreign assets by the government with compensation. Where there is past compensation such a move is in most cases known as expropriation. Nationalisation doesn't mean that all contracts and links with the former proprietors are severed. These could be maintained through various arrangements, such as management and service contracts.

Secondly nationalisation can be in the form of joint ventures between the government and the foreign private or indigeneous investor. In other words the ownership of an economic activity is jointly owned by the government, and local citizens or foreign

investors. However, this always involves the buying of some of the foreign investor's assets by the government. It must be mentioned however that not all joint ventures are necessarily as a consequence of any form of nationalisation.

On the whole national control through policy statements or constitutional provisions or statutes on nationalisation in most developing countries has been in the form of joint ventures. That is partial as opposed to total nationalisation.

(iii) Constitutional Provisions

For the benefit of both host countries and TNCs, some governments' policy statements on foreign investment have been incorporated in their constitutions in the form of constitutional provisions. The most noticeable of all being government policy statements on nationalisation. These in most cases have been incorporated as both means of control and encouragement of private (local or foreign) investment.

This was necessitated by the various factors, such as the non-legal binding effect of government policy statements on nationalisation, on the one

hand and the uncertainty of security and profitability on the part of a foreign investor on the other. Constitutional provisions therefore, try to balance the interest of the government and those of a foreign investor. They mainly provide conditions or situations under which nationalisation can take place. They therefore protect private (local or foreign) investors from expropriation. The Indian constitution (Fourth Amendment) Act, 1965 has it as follows:

"No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation for the property so acquired". 27

The Zambian Second Republic Constitution has it as follows:-

"Save as herein after provided; no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except under the authority of an Act of Parliament which provides for payment of compensation for the property or interest or right to be taken possession of or acquired". 28

Further more such Act of Parliament;

"..... shall inter alia -

- (a) specify the principles on which the compensation is to be determined;
- (b) provide that compensation shall be paid in money; and

- (c) provide that the amount of the compensation shall in default of agreement be determined by resolution of the National Assembly" 29

The Zambian constitution further provides that:

"No compensation determined by the National Assembly in terms of any such law as is referred to in (1) and (3) shall be called in question in any court on the grounds that such compensation is not adequate".<sup>30</sup>

The Constitution of the Federal Republic of Nigeria, 1963 contains almost similar provisions to those in the Zambian Constitution.<sup>31</sup>

In Zimbabwe, the legal protection of any investment is guaranteed under the constitution. Article 12 of the Zimbabwen Constitution provides for the protection from deprivation of property. It requires that property may only be expropriated in terms of a law and that the following must be satisfied:

- (i) notice of the intention to acquire the property to be given to the owner;
- (ii) the acquisition is reasonably necessary one or either of certain specific grounds such as defence, public safety in public order;

- (iii) adequate compensation is paid promptly.

In the event of a dispute on the amount of compensation, the owner of the property can apply to a court of law to determine what is adequate compensation. Compensation paid can be remitted abroad within a reasonable time. Any bill which will amend; add to, or repeal this section not only requires to be published in the Gazette at least 30 days before its introduction to Parliament, but until 1991, must also be supported by two-thirds of the Senate and all members of the House of Assembly.

In Botswana, Article 8(1)<sup>32</sup> of the Constitution provides that no property of any description shall be compulsorily acquired nor any interest nor right over property can be taken possession of compulsorily, except where the following are satisfied:

1. The taking of possession or acquisition is necessary or expedient.
  - (i) in the interest of defence, public safety and public order and where
  - (ii) provision is made by a law applicable to that taking of possession or acquisition

for the prompt payment of adequate compensation and that such compensation should be allowed to be remitted within a reasonable time, any amount of that compensation or the whole of it (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his own choice outside Botswana except enemy property or subject to trust.

It should also be mentioned that the provisions of the Constitutional guarantees are entrenched, requiring agreement of two-thirds of all members of the National Assembly to change them.

In Kenya, Article 75 of the Constitution protection is guaranteed against compulsory acquisition of the property by the Government except in accordance with the provisions contained therein. In the event of acquisition in public interest, the Government will make payment of full and prompt compensation.

Briefly one could say that, constitutional provisions reflect a particular investee state's policy on nationalisation as a means of national control of TNCs and at the same time as a guarantee of TNCs against uncertainties. However, these

assurances or guarantees in the form of constitutional provisions have been viewed by TNCs with a lot of reservations and scepticisms, especially with regard to their amendments or repeal with ease. The author will now proceed to look at legislative provisions or statutes as means of TNCs' control, protection and encouragement or inducement.

(iv) Legislative Provisions

The adoption of "investment codes" by most host countries as we shall see later, emanated from the need to balance two diametrical and irreconcillable but inextricably intertwined interests of the two main parties in the conflict end/or international economic relations. These parties are mainly the host countries especially host developing countries on the one hand and TNCs on the other. It is beyond doubt that was parties involved in the development of international economic relations both parties have recognised the fact that they cannot do without one another if business, economic development and international trade have

to continue. The two parties therefore have recognised their positions as the main vehicles and parameters of national, regional and international economic development.

Regardless of their unconditional recognition of the need for interdependence in international trade and intercourse the weaker party has always been the victim of the stronger party. In other words the unequal bargaining position between the two parties has rendered national investment codes a futile exercise. This has been necessitated by two main factors. These are lack of unity of purpose and action among host countries, especially host developing countries on the one hand and the unity of purpose and action of TNCs. In other words, TNCs are united against host countries.

As a result they have even adopted a policy of divide and rule directed against so called radical and moderate host states respectively. Because of lack of unity of regional and/or international cooperation, individual host countries were made or forced to make a lot of fundamental concessions and sacrifices in the form of incentives, in the formulation of their various investment codes. The problem

of lack of unity of purpose and action among host **developing** countries especially in the formulation and adoption of various cooperations and instruments especially "investment codes", at the sub-regional and regional levels has caused a lot of irreparable damage to the development of their economies.

Notwithstanding the above disadvantages emanating from individualistic and nationalistic approaches by host countries, one is made to admit that in a way in some situations a compromise between the interests of host countries and TNCs has been reflected in various forms of investment codes. That is in the form of various controls and in incentives offered to foreign investors. However, I may hasten to say that, such a compromise has always been inadequate or unsatisfactory to host countries. Because it is always reached at the expense of host countries. However, due to the precarious position of host countries, foreign investment is recognised as having both costs and benefits for host countries.

A look at various investment codes has made scholars in international trade and investment

to conclude that such legislation were enacted to fulfill two main purposes. One of them is that an investment code is enacted to promulgate rules which will structure investment projects so as to maximise benefits and minimize costs. In a nutshell, one of the purposes of an investment code is to control the formation and operation of an investment project. The second function is the one which is concerned with the promotion and encouragement of foreign investment, especially through the provision of various incentives to investors. The provision of incentives in an investment code has emanated from the recognition by host countries that potential investors may not find prevailing conditions in the host country, particularly favourable - as there is always competition between and/or among host countries for foreign investment through use and offering of lucrative incentives.

On the whole and as a general rule, investment codes throughout the world are intended to perform or purport to perform two major functions, namely to control and to encourage foreign investment within the host country. However one wonders whether the

balance of the two functions could be amicably found by a single nation. This is more so, because history has shown that an emphasis on one or the other of these two primary functions varies from country to country and from situation to situation, depending on the degree of foreign capital needs and the country's potential endowments. In other words, the balance in the implementation of these two primary functions of investment codes depends mainly on the degree and balance of both internal and external factors at work. It is really a question of which one outweighs the other - hence a concerted sub-regional, regional, international effort especially with regard to TNCs is imperative. This is why the theme of our thesis is aimed at proposing some legal and economic strategy options for SADCC both at the national and sub-regional levels.

To avoid a situation of unbalanced national, sub-regional, regional and international economic development the unity of purpose and action among host countries is imperative especially through the adoption of sub-regional and regional investment codes which will later result into the much

needed "international investment code". This is more so, because countries in bad need of foreign capital tend to emphasise the encouragement functions, whereas those with significant capital and numerous attractions often tend to emphasise the control function. So it would appear the present unhealthy international economic relations is a question of the survival of the fittest-which if it goes unabated and/or unchecked may destroy the purpose and principles being called for under the New International Economic Order (NIEO).

This being the position, it could be argued that an investment law, is the product of specific national policies and regardless of legal tradition, seek to achieve four principal objectives namely:

- (i) To establish the incentives which the government is prepared to offer desired investment projects;
- (ii) To provide a system for administering the investment law itself;
- (iii) To define the types of investments which are permitted or desired; and
- (iv) To establish the control applicable to such investment projects.

These objectives if applied or adopted in a regional or international investment code the realisation of NIEO will not be far fetched.

(v )     "Investment Codes"

We feel duty bound to endorse Robert B. Seidman's analysis of an "investment code", when he said:

"Investment Code" has three different meanings. Originally, it meant a code that, by placing constraints on the action of the host country, aimed to protect the foreign private investor (nowadays, read "trans-national corporations"). These I denote here as investor protection codes.... "investment code" meant a law offering both protection and inducements to prospective foreign investors. Finally some developing countries enacted statutes designed to place restraints on most foreign private investment, while at the same time offering inducements to limited selected sorts.<sup>33</sup> These I denote investor control codes".

It must be stated however, that, most "investment laws in Africa fall in the category of investor protection codes". However the Zambian Investment Act No. 5 of 1986 seems to include the three meanings and this is what is expected of any good investment code.

As indicated earlier on and whatever differences of approach, many countries, particularly developing countries have enacted special laws to govern the entry and operation of foreign investment (TNCs) within their countries. Such laws are mainly created to put various government policies on foreign investment into effect. These laws are found in various forms as well as names, such as "investment codes"; "joint venture laws"; "foreign investment codes"; "investment laws"; "investment promotion statutes"; "investment Acts"; etc. These names on the whole mean one and the same thing. It is just a question of the choice of terminologies.

In this thesis the use of the phrase "investment codes/or laws" to represent all other various names and meanings given to investment legislation is adopted. Investment codes though regarded by many to be basic elements in the legal systems of almost every developing country do not solely cover all investment legislation. As a result, it is advisable for a foreign investor to consult all other laws dealing with or related to investments. These are, constitutional provisions regarding nationalisation; customs and excise regula-

tions, income tax laws, exchange control laws, labour and immigration laws and regulations, ministerial statements towards foreign investment etc. In other words an investment code of a given country should only be considered to be the main but not the only legislation on investment.

It is also important to note that regardless of title, all such laws have a primary and basic function of establishing a legal framework for the undertaking and operation of private direct investment, particularly foreign private investment. In addition, as a general rule, investment laws normally seek to define the kind of investment projects which governments encourage or allow investors to undertake. As a result of all these and regardless of proclaimed "open door policies" few countries will allow foreign investors to invest in any or all sectors of the national economy. In actual fact, consideration of various matters such as defence and national security will dictate that particularly sensitive industries, such as armaments be firmly controlled by citizens of the host country

if not by the state itself. Consequently such definitions or classifications of economic sectors are of course an important expression of the host country's investment policy.

In making their policies a reality, host country "investment codes" may take a variety of approaches and set down various investment characteristics and criteria, including the fields of operation, the amount of capital, the intended effect of investment, the list is inexhaustive.

An examination of various investment laws of host countries will show us that some of these laws specifically declare economic sectors to be closed either to foreign or national private investors. However, where there is no specific prohibition in a law, this does not mean that all economic sectors or activity are open to wholesale investment. This has been catered for through various laws as well as governmental policies. These therefore may restrict foreign investment in certain sector of the National economy. For example in Botswana, where private foreign investment is desperately sought the situation is governed by the Reserved Activities Regulations and not by the Industrial Development Act of 1968. <sup>34</sup> The

Botswana Government advocates that certain activities should be reserved for the indigeneous people and locally-wholly owned enterprises in order to create economic opportunities for Botswana and to encourage citizen participation in commercial, manufacturing and construction.

"The investment codes" also provide various conditions for entry. In other words;

"What persons, businesses or industries may be eligibled for favoured treatment and in what areas of economic activity would this play". 35

The implementation of entry condition requirements is usually entrusted to a special body or agency or ministry or person who may be vested with discretionary powers to grant permission to a TNC to operate in a given country.

In Nigeria for example, the discretionary power of approval is vested in the high level Federal Executive Council, Comoros (Interministerial Investment Commission); Lesotho (Pioneer Industries Board); Kenya and Uganda (Minister of Finance); Botswana (Minister of Commerce and Industry), Somalia (Committee on Foreign Investment) and Zambia (Investment Council).

As an exception to the general rule some countries do not have general or single investment laws such as Brazil and Swaziland. However, in such situations other laws and governmental policies may achieve the same desired results. Brazil, for example, has enacted a net-work of other laws on taxation, price controls, tariffs, foreign exchange regulations, technology transfer regulations and a host of other laws.

Another important observation, is that, in addition to the general investment laws discussed above, some countries may have special laws on investment, governing investments in particular sectors. The existence of such special laws will of course reflect a country's particular concern for and policy with respect to that sector. In the case of Ivory Coast for example, there is a special law for investment in tourism alone, whereas in some countries, such investments **are** covered under their general investment laws.

All in all, national "investment codes" are valiant instructions yet at the same time they cannot curb all the crippling effects of TNCs and as such one finds it difficult to agree how a single

country could succeed against TNCs. Such laws even if made more effective internally, need to be backed by regional or international co-operation. Such laws therefore need a regional or an international backing which can be a comparatively stronger bargainer than a single country. In this respect the next subject will deal with the role of regional co-operation in the control, protection and encouragement of foreign investors especially the TNCs. The subject will reveal to us that, considering the potential economic power of TNCs, it is neither difficult nor uncommon for a well-intended regulatory policy towards TNCs to back fire and destroy the very benefits such a policy is meant to bring about. It is this fact that host countries must first recognise before taking any regulatory action. Failure to do so a country's effort to control and encourage foreign investment is likely to run into serious difficulties.

### 3.2 Regional Control

The idea of regional control of TNCs was supported by the U.N. as well, when it says:-

"The bargaining power of developing countries may be strengthened by co-ordinated actions. Many of them in the past, have engaged in competitive granting of tax concessions

to Multinational, corporations and other incentives to attract foreign investment. Regional co-operation not, only strengthens the bargaining position of developing countries but also helps them to evolve appropriate techniques for dealing with the problems to which the activities of multinational corporations often give rise". 36

I. The Andean Common Market (ANCOM)

The Andean Common Market was established by the Agreement on Andean Sub-regional Intergration signed at Bogota, Columbia on 26th May, 1969. 37 Following this agreement the Andean Pact was adopted on 17th July, 1971. 38 It consists of economically least developed Latin American countries of Columbia, Ecuador, Chile, Bolivia, Peru and Venezuela.

Under the Agreement the following inter-related issues were considered to be important:

- (i) planned growth of the various industrial sectors to provide balanced development throughout the sub-region and in each country;
- (ii) decisional control of foreign enterprise;
- (iii) foreign acquisition of domestic enterprise;
- (iv) levels of dependency associated with the introduction of foreign technology;

- (v) regulation of repatriation of capital and profits; and
- (vi) policies towards sub-regional multinational corporation and mixed (foreign and national capital) enterprises".<sup>39</sup>

Its objectives on the other hand are as follows:

- (i) To create a customs union;
- (ii) to create a common external tariff;
- (iii) to create a firms sub-regional control of foreign investment; and
- (iv) to raise the standard of living in the sub-region.

The drafters of the Common Regime agreed on the broad guidelines, common registration and screening procedures under the Agreement and stated as follows:

"The agreed common policy requires all foreign investments to be registered with the host country's appropriate authority and new investment must obtain that authority's approval.....<sup>40</sup>

In addition member countries also agreed that agreements on the importation of technology and on patents and trademarks are to be reviewed

and submitted for the approval of the appropriate authority in each member state to evaluate the effective contribution of the imported technology.<sup>41</sup>

They further agreed that restrictive clauses requiring the purchase of raw materials, intermediate goods and equipment from a specified source would not be permitted, except in exceptional cases and then only if the prices correspond to the current levels of international market.<sup>42</sup>

The Andean Pact Code classifies business enterprises into three categories.<sup>43</sup>

- (i) National enterprises - 80 per cent capital owned by nationals;
- (ii) Mixed enterprises - 51 to 80 per cent capital is owned by Nationals; and
- (iii) Foreign enterprises - 45 per cent capital owned by foreigners.

The code inter alia, places numerous, mandatory limitations on the operations of foreign investment. For example, it rejects total foreign ownership of firms operating in the Andean Common Market. The rules limit foreign ownership through 15 year fade

out to a maximum of 49% foreign ownership), profit remittance, other financial policies, technology contracts and various TNCs activities. The code further provides for the closure of certain areas of the economy to direct foreign investment. It also includes what is commonly known as "Calvo Clause". This is a stipulation in a contract between a foreign investor and a host government forbidding the former from calling on his own government for protection in any legal issues arising from the contract unless all local remedies have been exhausted. It is interesting to note that the Andean code is silent on the question of nationalisation.

It is also important to note that, the Commission of the Cartagena Agreement adopted procedures and institutional measures relating to technology imports. Article 6 of Decision No. 24 referred to the creation of competent government agencies which, in each one of the member states, were to regulate and execute all relevant policies concerning the importation of technology. The technological policies laid down in Decision No. 24 were later supplemented by the adoption of Decisions Nos. 84, and 85, which

respectively deal with the establishment of a sub-regional technological policy and the application of common rules concerning industrial property. All the member of the Andean Pact incorporated Decision 24 into their national laws, although the timing of its application varied from country to country. Legislative measures, mainly in the forms of decrees, were promulgated by individual countries for the purpose of implementing the provisions of Decision 24 at the national level.

(II) Implementation of the Code

The code was implemented through national legislation in each of the member states and acts as a form of control over the activities of TNCs operating in the sub-region. It is the most restrictive transnational policy on foreign investors in the non-communist world, because it controls the level of foreign investment in such a way that it turns regional TNCs into local companies that are wholly subject to the control of national laws of the nation states of the Andean Common Market.

Its restrictiveness was proved by the shift of foreign investment away from the region during the early years of the codes existence. The causal factor was due to the rules on ownership, profit remittance of up to 14% annually of total investment, and capital investment, which have been cited as the main deterrents to direct foreign investment.<sup>44</sup> However, it is noteworthy that, such decline has stopped since approximately 1978, and now there is no significant differences in the rate of foreign investment.

Another positive impact lies in that the code has increased the proportion of local ownership in foreign subsidiaries through its requirement of fade-out principle in foreign ownership to 49 per cent over 15 years. Furthermore, profit remittance has been reduced to at most 20 per cent of registered capital in any year, and other limits constrain borrowing by affiliates in ANCOM.

The requirement for capital re-investment is also doing fine. In addition, payment for technology transfer from a parent company has been disallowed.

On the whole, it is hereby argued that, the freedom of foreign investors has been greatly reduced,

and at least during the early years of the codes existence (i.e. up to 1970), foreign investment grew at a slower rate. However it is important to note that, in the final analysis, the code has not reduced foreign investment into the region, but TNCs operations have been altered permanently in the region, in the directions desired by host governments.

(III) TNCs and the ANCOM

There are various divergent views on the role played by TNCs. For example Vaitos believes that the onset of difficulties was largely associated with the role played by TNCs.<sup>45</sup> According to him TNCs were concerned with the protection of parallel investments in different member states and were fearful of an expanded role which might be played by the various states in each country's economic affairs. Vaitos further argued that, in their opposition they were backed by external political forces which ate away at the key provisions which were designed to control the environment for foreign capital and technology, and to compensate the poorer economies against the unequalising tendencies of

the market. <sup>46</sup>

On the other hand, other observer give a different emphasis to the balance between local and external political forces. <sup>47</sup> The cause according to them was the failure of the ANCOM in the conflict between the poorer and richer member states. <sup>48</sup> Consequently, the weaker ones, - notably Ecuador and Bolivia - revolted towards TNCs since if they were allowed to treat the region as an undifferentiated bloc, the richer states would obviously gain most from the economies of a agglomeration. <sup>49</sup>

On the whole, whatever emphasis to be placed on the role of TNCs in the gradual whittling - away of 'dirigiste' policies, it would be unfair to treat the ANCOM's attempts, to regulate and control direct foreign investment and technology transfer as a complete failure. Despite its short-comings, ANCOM has successfully introduced a common policy regulating TNCs' operations in the region. It has also succeeded in limiting the transfer of profits from host home countries. Member states no longer allow total foreign ownership in companies operating in their territories.

(IV) OECD

OECD Guidelines of June 21, 1976, were preceded by a number of decisions. For example the 1961 "Code for the Liberalisation of Capital". Article 1(6) of the 1961 Code provides that nation states of the OECD shall:-

"..... deal in the same manner with all assets belonging to non-residents, without taking into account the date when they arose, to permit the realization of all assets belonging to non residents and to authorize the transfer of these assets or the product of their relization".

In 1976, the OECD came up with a draft "Convention for the Protection of Foreign Hqldings". This draft code provided that the host country should give just and equitable treatment to the property of other parties; secondly it should give constant protection and security to these holdings; and thirdly that it should not hamper the management, maintenance and enjoyment of these holdings.

The 1976 OECD Guidelines were aimed at the positive contributions of the TNCs and minimize and resolve the problems which may arise in connection with their activities. The Guidelines inter alia, call on TNCs not to render any bribe or other

improper benefit, directly or indirectly, to any public servant or holder of public office, and not to make contributions to candidates for public office or political parties or organisations unless legally permissible. The Guidelines further provide that, the TNCs should abstain and refrain from improper involvement in local political activities and actions which would adversely affect fair competition. Thirdly the Guidelines emphasised that TNCs must publish at least once in a year, financial statements and other pertinent information relating to the enterprise as a whole having due regard to their nature and relative size in the economic context of their operations and requirements of business confidentiality.<sup>50</sup> On the question of taxation, employment, and industrial relations, financing and science and technology, the TNCs are required to act according to national laws and policies of host governments.

The OECD Guidelines further accept, every host country's right to control the activities of TNCs, though "subject to international law and to international agreements to which it has sub-

scribed". They further advocate the principle of national treatment and non-discrimination of TNCs. However, the operations of TNCs should be in harmony with the national policies of the host countries.

On the question of national treatment, accorded to TNCs, it is one's considered view that, this is due to the fact that, the Declaration is in the form of a compromise adopted by the home countries of TNCs. Furthermore, the observance of these Guidelines is only voluntary and not legally enforceable. As a result, they may not be adhered to by the concerned parties and hence they remain ineffective. The issue of voluntary guidelines is synonymous to the OECD failure in its mission to check and control TNCs operations and eliminate the concern of the developing countries.

In conclusion, it would appear member states have disseminated the Declaration and Guidelines in varying degrees, but no widespread enactment of the rules into national laws has yet occurred. The Declaration was reviewed and slightly revised in 1979, and it remains in force. All in all, it is the author's view that, the OECD Guidelines provide a useful step toward transnational control and encourage-

ment of TNCs, but no evidence yet has shown any major changes in TNCs operations and behaviour as a result.

(V) The European Economic Community (EEC)

This code is a direct opposite of the ANCOM policies on TNCs. In 1973 the EEC issued, the "Multinational undertakings and Community Regulations", <sup>51</sup> which reiterated the principle of reciprocity.

The EEC code, laid down , among other things, three basic principles upon which the activities of the TNCs will be controlled namely:

- (i) The code provides for the principle of equal treatment to regulate bilateral negotiations on the basis of national treatment.
- (ii) The regulations merely provide that the TNCs shall only be required to provide better information on their activities in accordance with the Report of the U.N. Group of Eminent Persons. <sup>52</sup>
- (iii) The Community Regulations specify that nation states shall only be governed in their control of TNCs, by general rules and not code, for

the transborder activities of TNCs within the principle of non-discrimination.

### 3.3 International Control

#### (i) Attempts by the United Nations (U.N.)

As far back as 1969, the General Assembly, in its Declaration on Social Progress and Development, provided for the elimination of all forms of foreign economic exploitation, especially those practised by international monopolies.<sup>53</sup> The latter is an obvious reference to TNCs. In 1974, the General Assembly however adopted very important resolutions which had a direct bearing on TNCs. For example, the General Assembly Resolution 3201 (S-VI) on the Declaration on the Establishment of a New International Economic Order (NIEO), provided that one of the principles upon which the new order should be founded is on the right of regulation and supervision of activities of TNCs by the host countries.<sup>54</sup>

Furthermore, Resolution 3202 (S-VI); on the Programme of action, clearly favoured the formulation, adopted and implementation of an international

code of conduct on the transfer of technology ~~corresponding~~ to transfer the needs and conditions prevalent in developing countries. <sup>55</sup>

Another important General Assembly resolution is Resolution 3281 (XXIX), on the Charter of Economic Rights and Duties of States. This Resolution also reiterated the nation - states' right to control and exercise authority over TNCs. The Resolution also demands that TNCs shouldn't interfere with the internal interference affairs of host states.<sup>56</sup> In addition, the General Assembly Resolution 3514 condemned the corrupt practices of TNCs.<sup>57</sup>

To make these resolutions of the General Assembly a reality, the U.N. Economic and Social Council (ECOSOC) and the U.N. Conference on Trade and Development (UNCTAD) were given, the task of regulating the activities of TNCs. ECOSOC was mainly concerned with the overall operations of TNCs, while UNCTAD was only concerned with the problem of transfer of technology - hence the U.N. Draft Code on the Transfer of Technology was drafted.

Added to this, the U.N. has also created a Centre on Transnational Corporations, with a mandate

to draw up such guidelines into a code of conduct for TNCs, to be discussed below.

(ii) U.N. Commission on TNCs

The Commission was established on December 5, 1974, by ECOSOC, in its Resolutions 1913 (L VII). However, before this, it is noteworthy that on August 2, 1974, the ECOSOC, by its Resolution 1908 (L VII), established an Information and Research Centre on TNCs. This Centre was directly attached to the Office of the U.N. Secretary General. The Centre which was to function as an advisory body to ECOSOC on TNCs consists of 48 members. The Commission was entrusted with the task of formulating a code of conduct for TNCs in general. The Information and Research Centre on TNCs was entrusted with the task of assisting the Commission in formulating a code of conduct for TNCs.

In order to carry out its tasks, the Commission at its first meeting in March 1975, established a working programme for the Centre, which included inter alia, the formulation of a U.N Code of conduct for TNCs.<sup>58</sup> The Commission gave the highest priority on the question of the formulation of a

code on TNCs in its second meeting in March 1976. That being the position, a Working Group of 48 members, representing all the members of the Commission was established. It was entrusted with the task of preparing the full text of the Code by the spring of 1978.<sup>59</sup>

The Working Group commenced its first session in 1977. In that session, it provided a working paper based on its deliberations, informal consultations and two working papers provided by the U.N. Centre on TNCs. In its working paper the Working Group was concerned with the major principles and issues involved in the formulation of an annotated outline of a code of conduct for TNCs. The Working Group in its working paper did not cover issues pertaining to the legal nature and scope of the code or its implementation because it decided to give priority to substantive issues.<sup>60</sup> The rationale was that such issues were considered to be more controversial than the substantive ones.

Last but not the least the UN Code of conduct for TNCs decided to deal with the following issues; technology transfer; restrictive business practices;

transfer pricing; disclosure of information; ownership and control of foreign investment; taxation; corrupt practices, labour relations and framework of national - economic laws. However, it should be mentioned that, some of the above individual issues to be included in the U.N. Code have already been or will be treated separately in specific U.N resolutions as well. For example, the ECOSOC Draft Text on Illicit Payments<sup>61</sup> and the UNCTAD Code on Transfer of Technology.

It must also be noted that, the effectiveness of the "U.N Code" largely depends on national governments, unanimous acceptance of such a code. This was well expressed in a U.N document in the following words:

"Only when governments are willing and able to take the related decisions, either to translate the provisions of the code into specific policies and actions or to ensure the implementation of possible solutions, can a code be effective".<sup>62</sup>

However, it is submitted that, in the event of the final adoption of a U.N Draft Code of conduct for TNCs, such a code should be based on the principles on which the NIEO has been founded. In addition the code should be designed as a binding

code that will subject the TNCs to conduct their operations in a legal manner and for the benefit of both themselves and host countries. It should also include the recommendation, by the Group of Eminent persons, that, the international code of conduct for TNCs to be adopted as an international treaty should contain provisions for sanctions.

If the present U.N Draft Code of Conduct for TNCs with its voluntary rules to be observed by TNCs and enforced by nation states individually and severally, is adopted, it shall be regarded as a defeat. However it is too early to emphasise this aspect, as the negotiations are still in progress and chances of reaching a compromise exist. It may well be suggested that such a code should inter alia, provide mechanisms for "lifting the veil" in order to identify the central seat of any TNCs <sup>63</sup> and for extra-territorial effects of any sanction that may be imposed. <sup>64</sup>

Before we propose strategy options for the control and encouragement of TNCs in the SADCC sub-region, a look at the current foreign investment policy objectives and strategies of SADCC member states if any, will be an added advantage.

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CHAPTER FOUR

4.0 THE OBJECTIVES AND STRATEGIES OF  
SADCC COUNTRIES CONCERNING TNCs

SADCC member states have realised that there is shortage of money for development at both national and sub-regional levels. Consequently, all SADCC member states, regardless of their differences in politics, ideology, language, policy on foreign investment (TNCs), natural endowments, level of development, etc, have devised various national mechanisms of controlling, protecting and encouraging foreign investment. Among the various mechanisms devised by SADCC member states are government policy statements, constitutional provisions, nationalisation, and legislative provisions.

It should be stressed from the outset that, in this Chapter we will only generally look at legislative provisions, hereafter to be referred to as "investment codes" or investment laws. A discussion of all other control mechanism may

amount to a repetition, because it will not be very much different from what we have discussed in Chapter Three. Furthermore even our general discussion of the various investment laws will not be very much different from what has been discussed in Chapter Three. It should be further stated that, our general discussion of the various SADCC investment codes will mainly be based on secondary materials. The author was therefore not in a position to look at all the actual SADCC investment laws.

The reason why one has adopted this approach is that his main concern is not necessarily to critically assess and state the diversity found among, the various SADCC investment codes, because there is already enough evidence to that effect.<sup>1</sup> This can be drawn from one's discussion in Chapter Three, and as such SADCC countries' investment codes are not an exception to the diversity found in almost all other developing countries. The diversity is not only found in "investment codes" but also in other control mechanisms such as government policy statements, constitutional provi-

sions, nationalisation, and a host of administrative control mechanisms.

It is one's view that, this diversity complicates the process of making generalisations and comparisons. As a result of this approach without the benefit of field research, the study is unable to provide empirical data with regard to the manner in which legislative provisions of the SADCC states are actually implemented. Certainly one cannot evaluate the effectiveness of a law in encouraging and controlling investment, without considering numerous other elements of a country's legal, political, social and economic systems including the amount of its foreign exchange reserves the nature of its tariff system, the size of its domestic market, and the extent of its natural endowments or resources. Investment policy decisions may also be influenced by numerous other legal factors such as the commercial law, the company law, and the nature of the court system. In addition to this enumeration, one might also add the various bilateral and multilateral treaties affecting capital and trade flows, to which the host country may or may not be a party.

In a nutshell, neither available resources nor time and the required length of the thesis would permit a complete analysis of the investment conditions prevailing in such SADCC state, consequently, this Chapter, which has been limited almost exclusively to a general examination of investment laws - alone, makes no claim for such comprehensiveness. The Chapter on the whole tries to give us a general understanding that almost all SADCC member states, except Swaziland have enacted what may be dubbed as "investment codes" with differing titles.<sup>2</sup> However, although Swaziland does not have a general investment law, other laws and government policy statements, and, administrative mechanisms may achieve the same effect.

Let us now briefly look at some of the various aspects found in the national "investment codes" of the SADCC member states in order to justify our hypothesis that the difference in SADCC "investment codes", and government policies on foreign investment require a common SADCC approach in order to effectively encourage, protect and control foreign investment, especially the TNCs at both the national and SADCC level.

4.1 The Nature of the Provisions for the Control, Protection and Encouragement of Foreign Investment

The "investment codes" of SADCC member states, provide two main types of provisions for the control, protection and encouragement of foreign investment:

- (a) Provisions for the control of foreign investment and
- (b) Provisions for the protection and encouragement of foreign investment otherwise known as incentives.

It is noteworthy that, the nature of these provisions is not identified and as a result they differ from one country to another.

I. Provisions for the Control of Foreign Investment

These include inter alia; provisions on:

- (i) Equity or Local Participation in the Investment;
- (ii) Sectors open and/or closed to Foreign Investment;
- (iii) The Nature of Capital Invested;
- (iv) The Nationality of the Investor;
- (v) The Nature of Technology Required;

- (vi) Criteria for Approval; and
  - (vii) Administration of the "Investment codes" by an Investment Authority.
- 
- (i) Equity or Local Participation in the Investment

As a general rule investment laws of many countries, encourage or require foreign investment to take the form of a 'joint venture. In such a situation a joint venture can be between a foreign company and a public or private capital company. However, it would appear this is not the position with all SADCC states. In SADCC, some countries such as the Peoples Republic of Angola, Zimbabwe, Mozambique and Zambia specifically require that an investment take the form of a joint venture.<sup>3</sup>

The Angolan Law on investment states that joint ventures are required, except for enterprises which produce goods exclusively for export and when the volume and/or degree of technological complexity justifies the creation of a wholly owned foreign enterprises.<sup>4</sup> The Angolan Law further provides that, the Council of Ministers may authorise the creation of "private enterprise"

(i.e. wholly owned foreign enterprise) in cases of recognised national interest notably when they will result in a significant decrease in imports. <sup>5</sup>

The Zimbabwean Investment, Policy Guidelines and Procedures, provide that joint venture may be required in certain areas, and that local participation should preferably commence at no less than twenty per cent. <sup>6</sup> The Mozambique law specifically provides that the state reserves the right to participate in all undertakings involving the importation of capital. <sup>7</sup>

It should be stated however that, though some SADCC countries' policies on legal participation are not expressed in the law, they may still play a major role in granting or denying approval investment applications and proposals. <sup>8</sup>

(ii) Sectors Open or Closed  
to Foreign Investments

It can be generally stated that in order to provide guidance to potential investors, the investment legislation of many countries tend to affirmatively specify those areas of economic activity in which foreign investment and/or private investment is encouraged or prohibited. <sup>9</sup>

On the question of investment legislation on sectors open to investment, the laws of SADCC member states manifest three basic approaches:

- (a) Laws that refer to desired investment sectors in only general terms;
- (b) Laws that seek to define the favoured sectors with a certain degree of specificity; and
- (c) Laws that make no reference at all to desired sectors.

In the first category of laws, that refer in general terms to desired investment sectors in which investment is encouraged, we find Botswana and Malawi.<sup>10</sup> Generally speaking the "investment codes" of these two countries in one way or the other make a submission that foreign or local private investment is encouraged in "industry". They use "industry" as their criteria for allowing investment.

In the second category of laws that attempts to define with a certain degree of specificity the sectors that are either open or given priority, we find Lesotho and Zambia. Lesotho's investment laws encourage foreign and private local invest-

ment in hotels, manufacturing, casinos and building construction.<sup>11</sup> The Investment Act of Zambia encourages, foreign and private local investment in husbandry, pastoral, poultry, fish rearing, agricultural and forestry activity.<sup>12</sup>

In the third and last category of laws that make no specific reference at all to open or priority sectors we find the Peoples Republic of Angola and Tanzania.<sup>13</sup>

Coming to the legislative provisions on sectors closed to foreign investment, the laws of SADCC member states manifest two main approaches:<sup>14</sup>

- (a) Laws that specifically prohibit investment in certain sectors; and
- (b) Laws that make no reference at all to sectors closed to foreign investment,

In the first category we find Angola whose investment law prohibits investment in defence, telecommunications, foreign trade, insurance, finance and credit institutions, public services and utilities, press and publishing and radio and television.<sup>15</sup>

In addition, it is interesting to note that some SADCC member states close certain sectors to

foreign private investment, while others actively encourage investment in those same sectors. For example, while telecommunications is closed to foreign investment in Angola, it would appear some SADCC member states indirectly encourage foreign private investment in the telecommunication sector.

This in itself creates a "war of incentives" among SADCC member states for the benefit of TNCs and to the detriment of both national and sub-regional co-operation.

It is my considered view that, the absence of a specific prohibition in a law does not mean that all economic sectors are open to foreign and/or local private investment. This aspect is covered under numerous other laws, government policy statements and a host of administrative control mechanisms as employed and adopted by the various SADCC member states. Therefore, even though some SADCC member states may actively encourage foreign investment, it does not mean that there is no control at all. It is beyond doubt that considerations of national security and defence are some of the minimum tenets which will dictate that particularly sensitive industries, such as armaments be firmly controlled

by nationals of the host country if not by the state itself.

(iii) The Nature of Capital Invested

One of the main attributes of an investment project is of course the nature of the capital to be invested. Consequently one of the main functions of an investment law is to stimulate, protect or encourage foreign capital.

Like in all other cases, there is no common approach on this aspect in the various SADCC states' investment laws. The Zimbabwean Foreign Investment Policy Guidelines and Procedures, for example emphasizes the need for foreign capital, while the Investment Act of Zambia provides special incentives for projects using foreign capital.<sup>16</sup> The Peoples Republic of Angola refers to foreign capital and technology.<sup>17</sup> Malawi and Lesotho appear to allow foreign investors to invest either foreign or local capital.<sup>18</sup> Tanzania and Botswana make no reference to the origin of the capital to be invested.<sup>19</sup>

(iv) The Nationality of the Investor

The SADCC member states investment laws manifest two main approaches with regard to the nationality of

the investor. Firstly, some legislation apply only to both foreign and local investors. Secondly, others apply only to foreign investors.

In the first category of the laws which seek to encourage, protect and control both foreign and local investors we can identify, Zambia, Zimbabwe, Malawi, Botswana and Lesotho.<sup>20</sup>

In the second category Tanzania is the only one whose laws applies only to foreign investors.<sup>21</sup> The Angolan law however, apply to both foreign investors and Angolan Public Corporations.<sup>22</sup>

(v) The Nature of the Required Technology

Like capital, technology is important in the development of an effective investment project, as a result, some investment laws in developing countries have sought increasingly to regulate this aspect. In the lead in this aspect is the Andean Pact countries whose laws require the approval and registration of all technology transfer agreements.

Within the SADCC sub-region, however, most member states, except Zambia make no reference whatsoever to technology transfer in their "investment codes" The Zambian Investment Act,<sup>23</sup> sets

down detailed rules on technology transfer agreements and the criteria which they must meet in order to be approved.

The laws of other SADCC member states, however, either make no reference at all to technology or simply make general statements such as the technology must increase productivity, for example in the case of Zimbabwe.<sup>24</sup>

(vi) Criteria for Approval

Like in the previous uses, the goal of an "investment code" is to encourage, protect and control the creation of investment projects which will make positive contribution to the development of the national or regional economy. However as in all other areas, the extent to which the law defines the nature and extent of that contribution and establishes criteria for project approval varies in scope and degree from one SADCC country to another SADCC country.

Under this aspect, one could say that, SADCC member states' "investment codes" manifest two basic approaches. The first one being that, some laws merely make rather general statements with

regard to approval criteria and grant wide discretionary powers in the approving authority which is in most cases a government ministry. Lesotho's investment laws for example, merely state that they seek projects which will further economic development for the benefit of the whole country.

Secondly, some laws attempt to be more specific with regard to the approval criteria. Like in the previous cases, here too, investment laws of SADCC states differ in scope and degree. Some SADCC member states are particularly more concerned about rural development and they thus seek to encourage the establishment of projects in rural areas. Zimbabwe for example places high priority on investment in rural areas.<sup>25</sup> The same applies to Zambia, whose laws offer special benefits to or additional incentives for certain enterprises located in rural areas. A country such as Swaziland, which does not have an "investment code", this aspect is taken care of by other laws. In Swaziland, the Income Tax Act of 1975 allows the government to designate specific areas as "development areas" where certain industries

may qualify for special treatment. In the case of Botswana, the Income Tax Act of 1982 offers tax holidays to companies which invest in rural areas, using labour intensive techniques and offer training to nationals.

In a nutshell, there is a diversity in the criteria stated in the SADCC member states' investment laws. These include: <sup>26</sup>

- (i) Training of nationals, e.g. Zambia, Zimbabwe, Angola and Mozambique;
- (ii) Creation of employment, e.g. Zambia and Zimbabwe;
- (iii) Contribution to the improvement of the balance of trade; e.g. Zimbabwe and Angola;
- (iv) Import substitution i.e. the use of local raw materials e.g. Zimbabwe and Angola.
  
- (vii) Administration of the "Investment Codes" by an Investment Authority

*All SADCC "investment codes" provide, in varying degrees of detail, for a system to administer its provisions. A look at the writings on the "investment codes" of the SADCC member states reveals*

two basic approaches to administration:

- (i) Firstly, the administration of the "investment codes" is entrusted to an existing functional ministry, which may or may not seek the advice and assistance of other functional ministries and governmental agencies. This approach is to be found in Malawi, Botswana and Tanzania.
- (ii) Secondly, the administration of the "investment codes" is entrusted to a separate body or commission specialising in investment matters. This approach is to be found in Zambia. (Investment Council), Lesotho (Pioneer Industries Board), and Angola (the Council of Ministers, pursuant to a joint proposal of the Ministry of Planning and Finance and the appropriate supervising ministry, grants investment approvals).

Regardless of the differences in approach, the primary function of the above named administrative organs is to screen and approve investment applications or proposals. In essence the principal

function of all the administrative organs or bodies, whether commissions or independent ministries is to regulate investment. That is administrative bodies deal with the control over the entry and establishment of foreign capital and the investment project.

II. The Nature of the Provisions for the Protection and Encouragement of Foreign investment

In an attempt to attract foreign capital and/or encourage local investors, most SADCC member states if not all offer special incentives and guarantees. However like in the case of control provisions the nature and extent of such incentives and guarantees provisions differ from country to country, depending on the importance of the project to the country in question. Thus, the more important or strategic the project, the greater the incentives and guarantees.

Regardless of the differences in the nature and extent of incentives and guarantees offered by various SADCC member states, there is a degree of consensus in that, all SADCC member states offer fiscal, financial and non-financial incentives of

one kind or another.

For the purposes of this study one can divide the various SADCC incentives and guarantees into nine basic categories:

- (i) Incentives with respect to customs duties on imports;
- (ii) Grants and subsidies;
- (iii) Protection from competition;
- (iv) Exemptions with respect to income or business profits taxation;
- (v) Guarantees with respect to foreign exchange availability and repatriation;
- (vi) Exemptions with respect to other taxes and fees;
- (vii) Guarantees with respect to dispute settlement;
- (viii) Guarantees against expropriation and nationalization; and
- (ix) Other miscellaneous incentives.

It must be noted however, that the above incentives and guarantees are not found in each and every SADCC member states. In addition no

two countries have two indential incentives and as a group they demonstrate exceptional diversity.

#### 4.2 A General Assessment of the Investment Laws of SADCC member states

A general look at the various investment laws of SADCC member states reveals that there is a great diversity in the form and content of these laws. It is wonoteworthy though some SADCC member states names do not appear among the aforementioned criteria as stated in the various SADCC investment laws, this does not mean that the criteria used is not among those employed by the other host country governments in approving or disapproving specific investment applications or proposals. In other words although some investment laws do not refer to such criteria, they might be covered under other laws or governmental mechanisms. The same applies to those SADCC member states whose names appear only in some of the aforementioned criteria. The examples given are mainly to illustrate the diversity element found in the various "investment codes" of the SADCC member states.

In addition, the "investment codes" alone are not enough, one has to peruse several other investment related laws and government mechanisms such as income tax laws, customs and excise laws, foreign exchange regulations, constitutional provisions, national development plans, government policy statements and many other investment instruments.

The incentives and control mechanisms provided for in the individual or national "investment codes" vary from country to country. As a consequence of this diversity there is always competition for foreign investment in the sub-region which culminates in what would be termed as "a war of incentives". In this situation each country tries to outbid the others with a view to attracting foreign investors away from ones neighbours to the detriment of both national economy and subregional economic co-operations. This can be summed up in the following words:

"Some countries tend to promulgate investment laws which offer competitive concessions in the hope of attracting private foreign investment as a consequence African investment laws lack harmonization. This hinders progress of meaningful regional economic cooperation and complementing economic development effect". 2/

In such a situation a foreign investors (TNCs) find it very easy to escalate the "war of incentives" through their policy of divide and rule. This spirit of competitiveness culminates in the ultimate losers being the SADCC member states themselves.

All SADCC member states' investment laws, except Zambia, do not have provisions on the transfer of technology<sup>28</sup> and as such this has been the main cause of the perennial and unabated, technological dependence in the sub-region. In addition most laws except that of Zambia put more emphasis on the encouragement function at the expense of the control function. They can be rightly classified as "investor protection codes" rather than "investment codes" as in the case of Zambia.<sup>29</sup>

This being the position one wonders how SADCC as an economic entity will realise its state<sup>d</sup> objectives, especially its objective to reduce its dependence particularly, but not only on the Republic of South Africa if no common approach against TNCs is adopted by SADCC. One believes that this objective implies that SADCC is also

aimed at the reduction of its dependence from foreign capital owners, especially the TNCs with or without South African connection. Will this be possible in the present set up of the "war of incentives"? The answer is no. The validity of SADCC's success in the implementation of the above stated objective especially, may involve a common and joint SADCC approach especially with regard to the role of TNCs in the sub-region. This may involve first and foremost the rationalisation or harmonization of various national policies as well as investment laws of SADCC member states.

In this respect, SADCC with proper orientation and dedication in the use of its various institutions may succeed in the encouragement, protection and control of TNCs, especially if it succeeds to adopt a common and/or joint "investment and investor compliance code" and other common mechanisms to be proposed in our next Chapter. This will be more easier because, almost all SADCC member states face the same TNCs. Fundamental concessions are likely to be made by TNCs especially those based in South Africa taking into account the risk and uncer-

tainty of their business interests in explosive and volatile South Africa. Some of the TNCs have started leaving South Africa in search of greener pastures and SADCC may be one.

It is against this background that the next Chapter will propose some legal and economic strategy options for SADCC, both at the national and sub-regional levels.

NOTES AND REFERENCES

1. It is a question of public knowledge that a lot has been written on the diversity found in various investment laws and as such SADCC countries are not an exception. For more reading on the subject one should look inter alia at:
  - (i) A.M. Akimumi, 'A Plea for Harmonization of African Investment Laws', Journal of African Law. 19 No.1 and 2 (1975)
  - (ii) E.I. Nwogugu, The Legal Problems of Foreign Investment in Developing Countries (Manchester University Press, 1965).
  - (iii) G.T. Mukumbwa, "Was the Industrial Development Act 1977 Necessary? A Comment" Zambian Law Journal volumes 7-9, (1975-1977).
  - (iv) Publications and Reports by the UN Centre on Transnational corporations, especially with regard to legislation and regulations relating to TNCs.
  
2. Investment Laws or Investment Codes of SADCC Member States are as follows:
  - (a) Peoples Republic of Angola - Law No. 10/79 of June 22, 1979 (Diario da Republics, of July 19, 1979, page 471).
  - (b) Swaziland - No specific investment law.
  - (c) Zambia - Investment Act No.5 of 1986 repealing the Industrial Development Act 1977 (No. 18 of 1977).

- (d) Zimbabwe - Foreign Investment: Policy Guidelines and Procedures (September 1982, Card. R.2 15 - 1982)
  - (e) Botswana - The Industrial Development Act 1968 (No. 22 of 1968).
  - (f) Malawi - Industrial Development Act 1967 (Cap. 51:01 of the Laws of Malawi).
  - (g) Mozambique- Decree - Law 18/77 of April 28, 1977 - One understands this law has since been repealed by a new investment law enacted in late August 1984, unfortunately the author was not in a position to consult it.
  - (h) Lesotho - The Pioneer Industries Encouragement Act of 1969 (No. 19 of 1969)
    - Pioneer Industries Encouragement (Amendment) Act 1978 (No. 24 of 1978)
    - Industrial Licensing (Amendment) Act 1979 (No. 15 of 1979)
  - (i) Tanzania - Foreign Investments Protection Act (No. 40 of 1963 (Cap. 533 of the Laws of Tanzania).
3. PTA - Document - Incentives for local and Foreign Investors (84-0375) September 1984.  
PTA/TC/CIC/IV/4 p.10
4. PTA/TC/CIC/IV/4 p.10
5. PTA/TC/CIC/IV/4 p.10
6. PTA/TC/CIC/IV/4 p.10

7. PTA/TC/CIC/IV/ 4pp.10.
8. See Chapter Three and read under Government policy statements.
9. PTA/TC/CIC/IV/4 p.8.
10. PTA/TC/CIC/IV/4 p.8.
11. PTA/TC/CIC/IV/4 p.8.
12. Section 23(2) of the Investment Act No.5 of 1986 of Zambia.
13. PTA/TC/CIC/IV/4 p.8.
14. PTA/TC/CIC/IV/4 p.7.
15. PTA/TC/CIC/IV/4 p.7.
16. PTA/TC/CIC/IV/4 p.13.
17. PTA/TC/CIC/IV/4 p.13.
18. PTA/TC/CIC/IV/4 p.13.
19. PTA/TC/CIC/IV/4 p.13.
20. PTA/TC/CIC/IV/4 p.12.
21. PTA/TC/CIC/IV/4 p.12.
22. PTA/TC/CIC/IV/4 p.12.
23. Sections 36 and 37 of the Investment Act No.5 of 1986 of Zambia
24. PTA/TC/CIC/IV/4 p.13.
25. PTA/TC/CIC/IV/4 p.14.
26. PTA/TC/CIC/IV/4 p.16.

27. A.M. Akimumi 'A Plea for Harmonization'  
p. 130.
28. Sections 36 and 37 of the Investment Act  
No.5 of 1986 of Zambia.
29. The Investment Act No.5 of 1986 of Zambia,  
provides conditions to be met in any  
transfer of technology agreement. It also  
prohibits restrictive business practices  
under section 37(2)(a)-(b).

CHAPTER FIVE

5.0 SADCC'S POLICY ON FOREIGN INVESTMENT  
AND THE LEGAL AND ECONOMIC TECHNIQUES  
FOR CONTROLLING OF AND MAXIMIZING  
REGIONAL BENEFITS FROM TNCs AS  
STRATEGY OPTIONS FOR SADCC

5.1 SADCC's Policy on Foreign Investment

There is no doubt that SADCC member states have recognised the need for foreign investment if SADCC is to succeed in its endeavours. Initially SADCC dealt only with governments, international organisations and donor agencies. SADCC's central role is to co-ordinate and facilitate foreign participation. It was not until January 1984, when a special meeting in Harare for potential investors (both private and state) in industrial projects was convened. This was inevitable because, though the first priority sector, transport and communications, was dependent on aid from governments, international organisations and donor agencies it was, after all, private investors that were actually carrying out the railway and other projects, doing the consul-

tancy studies and providing energy, telecommunications and industrial technology. SADCC's need for private investment is well articulated in Chapter Two, especially the recognition given by Lebang Mpotokwane, Chairman of the Standing Committee of Officials, in London in July 1984. <sup>1</sup>

Regardless of the above recognition, it would appear some scholars still contend that there will be no SADCC investment code on both local and foreign private investment. <sup>2</sup> It is however contended that this view cannot stand unchallenged, in addition there is not even any agreed way or common approach of presenting incentives and other related matters among SADCC member States. As a result and as one has submitted in Chapter Four, there is always a "War of incentives" between or among the nine SADCC member states to the detriment of both national and sub-regional co-operation.

Another important observation is that given in Chapter Two, that most of the industries are controlled by TNCs based outside the sub-region particularly in South Africa. Some, as it has been demonstrated in Chapter Two, are openly hostile to SADCC and others have developed supply chains, often with other parts of the same TNC, which they are reluctant to break.

Given a situation of this nature where most of the industries if not the commanding heights of the economy are owned and controlled by TNCs based outside the sub-region, especially in South Africa, a country from whom SADCC is attempting to reduce its dependence - can SADCC succeed in its objectives without any form of common sub-regional approach on TNCs.

It is argued that, there is no way in which SADCC could succeed if it doesn't adopt a common approach, strategy or policy towards foreign investment in general and TNCs in particular. It is one's submission that, the control and encouragement of TNCs in the sub-region is strategic to the success of SADCC.

Notwithstanding the above mentioned, the fundamental question here is whether the present SADCC structure, approach, strategy and policy may be used to solve the problems of TNCs in the sub-region. Secondly, is the issue of TNCs outside the scope of SADCC's objectives? The answer is that, the present SADCC structure, approach, strategy and policy may be used to solve the problem of TNCs and as such the issue of TNCs is not outside SADCC's objectives.

The wording of the first three objectives would seem to accommodate the question of control and encouragement of TNCs in the sub-region. Why then was there no sector assigned on it, to a given state as per SADCC's sectoral policy?

It would appear, the reason would seem to lie not so much in the fact that these countries do not consider this as an important aspect, but rather on the business like approach adopted by SADCC in the creation of sectoral commissions.<sup>3</sup> Sectoral commissions as a general rule, are only created if SADCC considers the aspect to be of primary importance.

This being the position and now that SADCC since January 1984 has formally recognised the need for co-operation between it and the private sector (both local and foreign) it is suggested that the Council could now exercise its power to create and allocate a sector on TNCs to a given country of its choice.<sup>4</sup> If need be a sectoral commission on TNCs governed by a convention could also be drawn up or set up.<sup>5</sup> This is mainly so

because the above mentioned seem to be in line with the words of President Masire of Botswana when he succinctly said:

"Such bodies (Commissions) should be created only when there is a proven need for them. This deliberately business-like approach in which institutions will follow achievement, surely promises greater dynamism than a system in which member governments merely react to proposals put forward by technocrats lodged in a centralized bureaucracy".

It is one's considered view that the role of TNCs, especially in mining, agriculture, banking and transport is as important and strategic as like any other priority Sectors, such as transport. In the first place, even in the transport and communications sector for example, it is the TNCs that are actually carrying out the railways and road construction projects and doing the consultancy studies, since its inception. It was the TNCs that provided and still provide energy, industrial and telecommunication technology. At the same time TNCs serve as a major source of foreign exchange, both through suppliers' credits and investments. However if their operations are not monitored,

this could be detrimental to the national and sub-regional cooperation, especially through their transfer pricing techniques and other related exploitative mechanisms.

On the whole, there is no single SADCC country which is not affected by the role of TNCs. As a response to this, most SADCC member states with the exception of Swaziland have formulated their own national investment codes. National investment codes could therefore be used as a stepping stone to a SADCC investment and investor compliance code. It is one's considered view that, a co-ordination, protection, encouragement and control of the TNCs taken within the sectoral policy of SADCC may go a long way towards creating an environment through which the co-ordination of these countries' divergent or different foreign investment policies could be undertaken. As stated earlier on, the differences in foreign investment policies of SADCC member states makes it easier for TNCs to manipulate the situation in their favour, as most of them are indifferent towards SADCC's objectives.

It is one's considered hope that, there is no doubt that, a legal framework for the coordination of such policies and investment codes and laws is already provided for in the "Memorandum of Understanding". What is lacking is the Council to adopt a TNCs sectoral working programmes for SADCC and designate a member state to co-ordinate TNCs control policies, foreign investment policies, investment laws and national development plans. <sup>7</sup> It is only after, such a proclamation that, Article IV(1) of the "Memorandum of Understanding" could be employed in setting up a sectoral commission on TNCs (if need be) with the responsibility of overseeing the co-ordination of foreign investment policies and TNCs operations in the sub-region. Like in the case of SATCC if need be this commission will be governed by a convention to be adopted by the council and ratified or acceded to by SADCC member states.

It is undoubted that co-ordination of foreign investment policies, national development plans, investment codes and laws and the role of TNCs in the sub-region may assist the SADCC member states

exert unified influence on TNCs. The use of the phrase "united we stand, divided we fall" by SADCC member states is likely to prove more successful than the current strategy in which individual countries employ different methods for the control protection and encouragement of foreign investment.

It is against this background that the above proposed sector on TNCs and other strategy options for SADCC will be made. The author once again is confident that by using the present SADCC structure and approach the proposed strategy options would bring SADCC closer to the realization of its objectives.

In the next few pages one will discuss the following legal and economic strategy options: SADCC sector on TNCs; Towards an Investment and Investor compliance code; What a host state wants; Nationalisation; Establishment of Research and Development Centre(s); Technology Acquisition Board; Need for clear contractual Terms; Discouragement of "Brain Drain"; Improvement in Management Contracts; Technology Licence Agreements; The Nature and Extent of Incentives; The Role of

National and Regional Planners; Need for security and stability; SADCC and the Co-ordination and/or Harmonization of Marketing Policies and Sovereignty and Nationality vs. Political Will.

5.2 Proposed Legal and Economic Strategy Options for SADCC

I. SADCC Sector on TNCs

Given the above stated background, it is proposed that the Council is competent to adopt a TNCs sectoral working programme for SADCC and designate a member state to co-ordinate activities in specified areas.<sup>8</sup> In the same vein the Council may, at its discretion, appoint Ministerial Committees for programmes in functional areas. The Ministerial Committees shall report to the Council whose decisions shall be taken by consensus.<sup>9</sup>

In addition a SADCC Committee of TNCs experts could be formed. This committee should first and foremost consist of indigenous TNCs experts from relevant ministries in each member state with the co-ordinating state as the Chairman.

A TNCs official sub-committee consisting of designated officials from each member state should also be established. This committees, in addition

should consist of technical experts on TNCs matters. This committee should be charged with the task of creating various technical units or sub-committees whose primary task will be the strengthening of the present modus operandi of SADCC. The potential units would be as follows:

- (a) Rationalisation and Harmonisation of investment laws Unit;
- (b) Negotiation and Transfer of Technology Unit;
- (c) Transfer Pricing Monitoring Unit;
- (d) Negotiations, Aid and Loan Unit; and
- (e) Alternative Taxation Policies and their Implications Unit.

These units or sub-committees should carry out research on various TNCs operating within the SADCC sub-region. They will then, report and make recommendations to the TNCs Officials Sub-Committee which in turn will report to the SADCC Committee of TNCs Experts for tentative final direction, guidance and decisions. It is noteworthy that, the SADCC Committee of TNCs Experts at the centre oversees activities of all the sectors

and units. A designated country as a co-ordinator on TNCs sector has to report all the findings in SADCC forums, especially the Summit and Council of Ministers forums.

Depending on the situation and need the Summit may establish a Commission on TNCs for programmes in functional areas. Such a Commission shall be governed by a convention to be adopted by the Council and ratified or acceded to by SADCC member states. This Commission shall report to the Council. <sup>10</sup>

For our purposes it is recommended that one will only attempt to give a brief discussion on the **first three** proposed potential units of the SADCC Sector on TNCs.

(i) Rationalization and Harmonization of Investment Laws Unit.

This unit will be charged with the task of formulating a common approach or programme of rationalizing and harmonizing the various investment laws in orientation for a regional investment and investor compliance code to be implemented through national legislation.

This, however, will be done, taking into account the disparity in the political, social and economic conditions prevailing within the sub-region. It is beyond doubt that the various investment and company laws of the SADCC states differ greatly in their degree of specificity and in the specific issues which they treat. This, therefore, requires a rationalization process in orientation of harmonization which ultimately will result into a common or single investment code for SADCC to be implemented through national legislation.

This unit will therefore be responsible for the rationalization of various investment and company laws, so that each "investment code" treat or include all the above issues of primary consideration both to indigeneous and foreign investors. In addition the unit might prepare a checklist or guidelines against which the SADCC states might measure the comprehensiveness and relevancy of their current "investment codes". However this can only be made possible if a proposed directory of what existing investment rules are in each country by SADCC is compiled and made available to

the public. It should be underlined that the above mentioned suggestion is not a recommendation that SADCC adopt a common approach or uniform "investment code", but it merely suggests that, to make the process of rationalization easier, each SADCC member State should clearly and precisely state its own policies on each of the various issues which it consider relevant to investment. For example, each "investment code" might articulate the host country's policy with respect to local participation in investment policies or each investment law might state clearly the sectors to which foreign investment is closed. etc

This unit should review the scope of harmonization desired and the possible approaches to harmonization within the context of SADCC's objectives. In addition, an analysis of the possible barriers to the harmonization of the policies and laws of the SADCC states will be needed in order to shape the structure and content of the harmonization in ways that are generally acceptable to the SADCC States.

To make the functions of the unit easier, member states should agree to exchange information on legislation and regulations concerning local

and foreign investments from countries outside and within SADCC and the incentives offered to such investments.

Another important consideration is that, the unit should create conditions for a common legislative policy such as the one adopted by the Andean Pact countries, and set forth in Decision 24 of the Pact's Council. This has also been a cornerstone to the development of a harmonised code in investments for members of the Communauté Economique de l'Afrique de l'ouest (CEAO). The unit should consider a common regional policy with regard to economic incentives as crucial to the prevention of an otherwise inevitable inflation of incentives as crucial to the prevention of an otherwise inevitable inflation of incentives as member states compete with each other to attract foreign investors. A common policy, therefore, will protect member states from agreeing to terms under pressure of competition from TNCs, that become increasingly unfavourable for the host country.

(a) Scope of Rationalization and Harmonization

The unit apart from the "investment codes", should also look at other laws, such as company law and commercial law, the law of exchange controls, industrial property protection law, fiscal and customs laws and regulations, the law in the technology licensing agreements, tariffs and other aspects of national trade regulation, as well as the administrative and judicial systems. In addition, international regional and bilateral treaty obligations affecting trade and capital flows also constitute further elements of the national legal framework into which the investment will fit. The unit should also make decisions with respect to the functions of the law to be harmonised as well as the substantive areas of legislation to be included in the harmonization process. On the question of functions to be harmonised, this will depend on the emphasis SADCC places on the importance of the promotion of the control of foreign investment.

(b) Rationalization and Harmonization  
Methods

The unit in its endeavours, can choose to employ one of the following three methods:

1. The unit should attribute greater freedom to the drafters of the instrument containing the harmonization. The drafters would examine the existing national legislation and would determine those types of provision whose incorporation in an harmonised instrument would be consistent with the goals of a common sub-regional policy for investment, regardless of whether these provisions used are generally or only in one national law; or
2. To determine the specific legislative or administrative provisions on matters such as the specific criteria for granting of authorisation to invest, or the content of a specific incentive for investment would be gathered and compared.
3. Thirdly a mandate be given to the drafters to devise an instrument which will serve the set of common basic investment policies the member states of SADCC have agreed upon. Drafters should borrow from the experience of other regional groupings and UN bodies. They should not forget the inclusion of provisions on the transfer of technology, management contracts, work and service contracts, etc. in the regional instrument.

This method has been successfully employed by various regional groupings such as the Andean Pact, the European Economic Community, the CEAO, etc. and if it is wholly implemented it can rectify the inconsistencies found in national laws.

After the whole process is completed, there will be two alternatives on the types of an instrument on harmonization should take.

These are:

1. Unit should compile a series of guidelines on the common policies which the SADCC Summit would adopt as set of recommendations. In such a situation member states would be required to examine their national laws and make them consistent with the guidelines. In the alternative, these guidelines could be made mandatory for implementation by member states.
2. Unit should draft a model law for member states, consisting of a complete national law on investment, but leaving open certain clearly economic issues, such as priorities in economic sectors, and the specific quantitative content of incentives. The model law would be recommended to member states who would be free to adopt allow some of its provisions. However, during the course of time and with the Commitment and encouragement of SADCC, model law provisions would find their way into the legislation of the member states.

Decision 24 of the Andean Pact is the best example of the transformation of a model law provisions into an instrument creating a harmonized framework for the regulation of investment for all Andean Pact member states.

There is every reason to believe that, with the backing of SADCC, the work of this unit will be made a reality. In first place, the differences

in the investment laws of SADCC member states is a question of various colonial experiences. For example, countries which experienced British colonial rule are, Zambia, Malawi, Tanzania and Zimbabwe. These countries have their company and commercial laws based on the common law system. Swaziland, Lesotho and Botswana, are characterised by a hybrid between common and civil law principles. The Peoples Republic of Angola and Mozambique employ civil law principles. If the former colonial masters of Britain and France, who are the pioneers of the two legal systems can agree to harmonize their systems within the framework of the EEC, one foresees no impossibilities for the SADCC member states who are recent recipient of the two legal systems to do the same.

It is argued that rationalization may be more attainable objective than harmonization. The former would involve a co-ordination of incentives policies and elimination of measures likely to defeat SADCC objectives, whereas the latter will require a degree of convergence of macro-

economic policies among the SADCC member states which may be difficult to achieve, given the present political and economic realities of the sub-region. However, although this seems to be a difficult task, harmonization of SADCC member states' investment laws, policies and company laws is certainly a feasible proposition.

(ii) Negotiation on Transfer of  
Technology Unit

The general objective of negotiations on the transfer of technology is to formulate a national and regional technology transfer strategy which is closely related to the regional development strategy. What is needed is a comprehensive and co-ordinated system of regulation and control of the transfer of technology and related subjects which make transfer of technology to include and go beyond the legal system as such.

(a) Technology Transfer at the National Level

The unit shall be charged with the task of establishing national level science and technology centres which will carry out the following functions:

1. Compile detailed technological data bases and engage in technological research and development activities aimed at developing the local technological base;
2. Formulation and implementation of a strategy for technology that is consistent with and forms an interpreted part of each country's long term strategy for developments;
3. Strengthening of research and development (R and D) and technological innovation;
4. Formulate technology policies and plans within the framework of the overall national technology strategy;
5. Promoting the technological development of sectors that are of critical importance e.g. capital goods, skill formation, etc.;
6. Formulate appropriate legal and administrative frameworks for screening, evaluating, selecting, monitoring and registering technology contractual agreements and arrangements;
7. Training of local manpower; and
8. Formulation of payments terms and costs.

During negotiations, the unit should recommend the following to be included in the technology transfer agreement:

1. The availability of trained skilled manpower to man the technology, if there are any;
2. Information on the hardware;

3. Product design or basic process in terms of blue prints and drawings;
4. Operating manuals and details; quality control and standardization; and
5. Detailed design for manufacturing process for components elements and parts and production parametres.

In addition to the above, the unit should also research and advice on the more effective ways of importing technology. These are:

1. Contractual joint ventures;
2. Licensing agreements;
3. Turn-key and product in hand arrangements in which the foreign contractor/licensor has additional responsibility of ensuring that the plant is fully operational turning out the products;
4. Management contracts;
5. Foreign investment in production;
6. Pure technological leasing agreement with or without technical assistance in production and franchises;
7. Trademarks;
8. Consultancy services, and technical assistance agreements;
9. Importation of products, components and spare parts; and
10. Marketing by foreign contractor.

The unit should make it possible for SADCC governments to concentrate at the R and D activities at centres established with priorities in various fields such as rural development, low-cost housing, small-scale industrial and artisan enterprises and other fields which can be undertaken at the individual country level.

(b) Technology Transfer at the level of SADCC

The aim of the unit, like that of technology transfer is to reduce the sub-regions dependency on TNCs and to develop an economic base conducive to transfer and retention of technology in the sub-region. This will enable the region to acquire and develop a technological base to take part in the technological development of the international division of labour.

The unit should find ways and means to incorporate in the regions investment code provisions on technological transfer whereby the investors on one part will be obliged to import technological innovations and skills to the locals through formal and on the job training. The unit should make regional provisions for suitable trainees/employees and other

forms for the acquisition of technology and monitor their progress closely.

At the level of SADCC, R and D activities can be directed into, energy, manufacturing industries, mining, agriculture and transport.

There should also be a diversification of sources of technology so that the nations and region gradually replace the exploitative one source technology relationships with mutually beneficial diversified sources of technology. In other words, SADCC countries should look into sources other than TNCs, especially the smaller competitive companies in the Western countries. In addition, the unit should also look into socialist countries and other third world countries for sources of technology.

On the question of negotiations, the unit should conduct research on various negotiations and agreements on the transfer of technology, and make recommendations through the Commission, to national and regional authorities. The national and regional experts should know the techniques involved in the negotiations on the transfer of technology; because in most cases, it is at this stage that countries mortgage their economies to TNCs, due to lack of

expertise which manifests itself in their poor bargaining position.

All in all the units functions should aim at achieving the following interconnected goods - both at the national and sub-regional levels.

These are:

1. The control of restrictions in transfer of technology transactions;
2. The effective performance of transfer of technology arrangements;
3. Control over and, wherever possible, the reduction of the price and other costs of technology transfers;
4. The encouragement and promotion of the development of the technological capabilities of the recipient enterprises; and
5. The encouragement of **unpacking** in transfer of technology i.e., the breaking up of the complex technological "bundle" that is being transferred into separate elements.

The above mentioned should therefore be reflected in any national or sub-regional regulatory instruments in the transfer of technology.

(iii) Transfer Pricing Monitoring Unit

Due to the acute problem of transfer pricing in developing countries, SADCC included, the author recommends that urgent consideration be given to

establishing a unit charged with monitoring transfer pricing and related abuses. As much of the work would involve gathering of world market prices for traded commodities in the region, data of companies operating in the region, etc, it would be wasteful for each of the SADCC member states to duplicate the work of the others, so regional co-operation in this unit is clearly indicated, although for certain commodities and certain companies research specific to only one or two countries may need to be undertaken.

(a) Constitution of a Proposed Unit

A local or regional transfer pricing monitoring unit would ideally have three main sections:

(i) Information Storage:

This is a section in which price information and all other relevant data as well as copies of import and export invoices would be stored, preferably on computer. The section would have to use reliable telephone and telex communication with agents abroad (e.g. commercial attaches, consultants, and commissioned suppliers of trade information);

(ii) Technical Section:

This section would employ professionals such as mechanical engineers, chemists, economists, cost accountants and international trade specialists. These would be qualified to deal with problems arising from product differentiation, quality variation, etc. and could publish tables of 'normal' import and export prices of relevance to SADCC countries.

(iii) Investigation Section

This would employ lawyers, economists, etc. It would pursue the less routine cases uncovered by other sections.

These three sections would be appropriate at both the national and regional levels. How the information is to be used would be a matter for national decision. Ideally each country should have a small local branch receiving information from and giving information to the centre. Some countries might give these national branches additional investigative powers to pursue purely local questions or police powers of prosecution on the model of SITET.

(iv) Powers of a National Branch/Unit

The branch should probably be located in the Central Bank (though not necessarily part of it) but should be given necessary powers to obtain information from other departments of government, such as tax authorities, customs and excise, and it should liaise closely with the police (particular the Fraud Squand). One recommends that the unit be given its own powers either to prosecute, offenders, to compel return of foreign exchange illegally expatriated, or to appropriate other funds. Abuse of these powers by individuals in the unit itself, could be prevented as in SITET, by requiring the unit to report directly to a senior minister.

II. Towards an Investment and Investor Compliance Code

Shortly before independence, many developing countries adopted "investment codes", based upon a perception that each of capital caused developing countries' poverty. These codes offered tax incentives and other advantage, mainly to TNCs and other foreign investors in return for investment

in the host country. They offered these benefits or incentives indiscriminately, as though all foreign investment equally advantaged the host country.

Experience teaches us that by no means all foreign investment confers a good upon the host country. Much TNC investment does not enrich the host country, instead it impoverished it. Moreover, usually TNCs invest not for tax benefits, but for raw materials, markets and other considerations. For TNCs, the benefits conferred by the "investment codes" in most cases constitute not an inducement to invest, but a gift from the poor host country to the economic powerful and rich TNC.

This being the position, the need for a joint regional action implied in the preceding discussion seems particularly acute in the SADCC states. Here all the nine SADCC member states face many of the same TNCs. The same names appear active in most of the countries in the sub-region. Confronted by the same TNCs, of course the SADCC states should develop a common legal strategy to deal with them.

To avoid the "war of incentives" and the divide and rule policy of TNCs, SADCC member states through its various forums and institutions should seriously consider the creation and adoption of a sub-regional investment and investor compliance code. This could also be in a form of a model. Such a code should balance the interests of SADCC member states and TNCs. This matter could easily be resolved at the Summit or Council of Ministers level.

All in all, the code should incorporate provisions which seek to balance the interests of both host SADCC states and TNCs. The following are the main norms to be incorporated in the proposed code:

(i) The Law governing agreements should be the law of the host country;

(ii) In case of litigation, the TNCs shall first and foremost be subject to the exclusive jurisdiction of the courts of the country in which they operate, and only after local remedies have been exhausted that litigation

could be referred to a body outside the host country.

(iii) The TNCs shall be subject to the national and/or regional policies, objectives and priorities for development and should contribute positively to carrying them out;

(iv) The TNCs shall supply to the government of the host country all (pertinent) information about their activities in order to ensure that these activities shall be in accordance with the national and/or sub-regional policies, objectives and priorities of development of the host country or sub-region;

(v) The TNCs shall be subject to the exercise by the host country of its permanent sovereignty over all its wealth, natural resources and economic activities;

(vi) The TNCs shall conduct their operations in a manner that results in net receipt of financial resources for the host country or sub-region;

(vii) The TNCs shall contribute to the development of the scientific and technological and capacity of the host country or sub-region;

(viii) The TNCs shall abstain from all interference in the internal affairs of the states whereby they operate and/or in relations between the government of a host country and/or sub-region and other states;

(ix) There shall be a SADCC Technology Acquisition Board to scrutinise technology transfer agreements;

(x) There shall be a machinery through which all investment requests and applications are to be channelled and processed and provide sanctions to erring TNCs;

(xi) The host governments shall help TNCs in their efforts in producing positive effects in the economies of the host country; <sup>11</sup>

(xii) The TNCs shall be subject to the CALVO clause 12 to be incorporated in all their contracts with SADCC host countries individually or severally; and

(xiii) Restrictions on South African based TNCs to invest in the sub-region and guarantees to the local business community

(xiv) The TNCs shall refrain from all restrictive business practices;

(xv) There shall not be unwarranted discrimination against the TNCs by the host governments.

### III. What a Host State Wants

It is important that more emphasis must be put on what the state want and what it does not want. Indiscriminate foreign investment must be discouraged and ultimately eliminated as this underdevelops most countries. Any national government should make sure that selected TNCs agree in principle to contribute to the development of the host country's economy and social welfare of its people as well as to the economic development of the sub-region in accordance with the SADCC objectives as embodied in the SADCC Code. In doing so the state should make sure that it investigates the linkage of the potential TNCs production processes up to the consumer. In negotiation with a TNC, a government should have its own negotiation mandate, drawn up by well versed experts in trade negotiations with TNCs. In order to succeed, the government's team of negotiators must have enough knowledge and information of particular TNCs role. The main solution

The main solution on this aspect is to establish national central negotiating and information agencies in orientation of a single sub-regional central negotiating information agency.

In other words countries should give consideration to establishing a focal point or central unit for the co-ordination of dealings with TNCs and other foreign investors, so as to ensure consistency throughout the government and build up expertise among government negotiations. This will enable the government negotiators to look at the basic issues, such as capital requirement, that is who is to finance the project? Because in some situations TNCs or any foreign investors do not specify or reveal their sources of funds. In other words there should be a responsibility of finding the source of funds.

Secondly, the allocation of risk, that is, who bears the risk in the project?

Thirdly, the allocation of production, that is what happens to the output.

Fourthly, the team should look at the control of key decisions that is, who makes key decisions

in the operations of TNCs while in the host country. For example, who hires key personnel? Who draws up the investment budget? What type of control, for what and who will benefit from it? Who controls the projects? Who distributes the profits and how? etc."

(IV) Nationalisation

Though nationalisation is a well known adopted strategy for SADCC member states, a few observations on its application need to be made, because as a general rule nationalization per se is synonymous to ownership and control. In order to make nationalization achieve its objectives the following aspects need to be taken into account by any SADCC member states that intend to use the nationalisation strategy. These are ability to run an industry to be nationalised and the economic, political and social consequences. If the answers to the above aspects are satisfactory, one could then use the following general approaches in dealing with TNCs:

(i) Total disengagement from TNCs control; and phasing out approach, that is reducing the trans-

national corporate in the economy either gradually or abruptly;

(ii) Generally accepting TNCs throughout the economy, while emphasising mechanisms to serve benefits from their presence and to prevent abuses;

(iii) A laissez-faire strategy, with little direct government control of transnational corporate activities.

It is noteworthy that information on TNCs collected by governments need to be significantly improved to facilitate nationalization. That is, each government should set up an information collecting centre on the activities of TNCs. The information required should include information filed by companies when they register with any individual country for example, copies of TNCs contracts with other countries should be scrutinised by member states. In addition registration procedures require detailed and regularly updated information on such matters as:

(i) Ownership of companies - the parents and affiliates;

(ii) Full financial statements in accordance with prescribed accounting standards;

- (iii) Details of Cash flows;
- (iv) Details of the companies' physical operations in the host country; and
- (v) In the case of natural resources companies, details of reserves and productive capacity and estimates of future production should be provided.

On the whole nationalisation should be made a constitutional matter and as such there should be constitutional guarantees against nationalisation subject to public interests. However, provisions on constitutional guarantees should not be ambiguous and should at the same time remove the question or fear of uncertainty by TNCs or any other foreign investors.

(V) Establishment of Research and Development Centres (R and D)

Considerable evidence asuggest that TNCs reduce their tax liabilities through transfer pricing arrangements. To rectify this, there is need for training audit staff to limit these tax avoidance opportunities. In addition, in order to make proper analysis of the effects of tax

provisions, detailed data analysis is essentially and critically needed and therefore it must be compiled and published. This can be done through sector by sector analysis, without impairing the confidentiality of individual returns.

There is need to develop a SADCC Research and Development Centre as well as research development centres in universities and other institutions of higher learning, related to law and economics in the sub-region. That is to find out ways and means of creating bilateral agreements conducive for SADCC member states. The task of a research institution both at the national and SADCC levels, however, should be clearly stated.

The task could be to collect information on: technology transfer; taxation (alternative taxation policies) transfer pricing; negotiation approaches relating to management, management contracts, work and service contracts, technology license agreements, joint ventures, etc; co-ordination of information; co-operation of the SADCC Research Centre with other research centres within and without SADCC; barter arrangements; payment arrangements outside hard currencies; manpower and expertise; individual

countries products; compile a directory on various SADCC investment laws, that is there is need for a catalogue containing almost all if not all SADCC investment laws. They could do this by way of a questionnaire or at the level of university research; or evaluation of the various "investment codes" in the sub-region. That is by looking at the application of these laws and suggest alternative approaches aimed at the rationalisation or harmonization of these laws; and drawing up of a single SADCC investment and investor compliance code.

#### VI Technology Acquisition Board

It is also proposed that, SADCC could set up a Technology Acquisition Board both at the national and sub-retional levels. This could consist of a small group of people who are highly qualified and conversant with the economic needs of a country or sub-region. The membership may look at disciplines of law, economics and other sciences. The membership should be small enough to facilitate quick decisions. The board should be independent of government bureaucracy. Some members of the Board

need not even be fulltime members. For example members co-opted from the institutions of higher learning would still retain their academic appointments while serving the Board. A pre-condition to the formation of the Board would be a clear cut government or SADCC technology policy. The decisions of the Board would therefore be made *intra vires* the broad government or SADCC technology policy.

The Board would liaise with whatever body that might be responsible for screening investment policies and contracts. In addition, it would examine the applications and advise as to what terms are necessary to effect the transfer of a particular technology. For instance, if the investment application is for setting up a textile industry, the Board may, *inter alia*, advise that the new industry must use local cotton and perhaps set up a cotton **ginnery** in addition to a comprehensive training programme for local personnel to run the industry, etc. However, the Board would give its advise after considering the feasibility of using local resources. This being the position, it is important that the

Board be managed by well qualified personnel, to make sure that all investment agreements take into account technology transfer needs.

The above example of a textile industry which utilizes local resources would boost local production because of the availability of a local market. Secondly, the training of local personnel would save a country or SADC some forex which would have been paid to expatriates. Thirdly it would also cut down on local unemployment.

#### VII Need for Clear Contractual Terms

Another important aspect is the need for clear contractual terms. No ambiguity should be allowed. A host country must be in a position to put forward specific terms in the investment contract for example technology transfer in the investment negotiations. These would include training of local personnel (within a specified period), the use of local resources and a specific time table for implementing such terms.

In addition, to the need for clear contractual investment terms, the investment contract must specify what is to happen in the event of a

TNC's or any foreign investor's failure to fulfill his undertaking, for example, regarding the transfer of technology?

It is also advisable that in negotiations of this nature SADCC member states should make use of experts from within SADCC, and/or U.N. agencies, especially the UN Centre for Transnational Corporations (UNCTC).

#### VIII Discouragement of "Brain Drain"

SADCC member states should also discourage the reverse of transfer of technology, commonly known as "brain drain" because it reduces the effectiveness of technological independence because the need for trained personnel cannot be satisfied in the face of such an out flow of skilled manpower from the sub-region. There should be incentives for local skilled manpower.

#### IX Improvement in Management Contract Negotiations

The question of management contracts also needs our utmost attention and consideration. There is no doubt that a management contract is

one of the most needed sources of technology. However, it is fraught with pitfalls, because its success mainly depends on a number of factors, especially the skill on the part of the host country in negotiating the investment agreement. For example it is common for a TNC or any foreign investor to bring in only a nominal sum of the value of the investment and then borrow heavily internally<sup>13</sup> and externalize heavily the most wanted foreign exchange. Therefore if a developing country, especially a SADCC member country does not possess sufficient knowledge to put it at par with the TNC or any foreign investor the result of the negotiations is likely to be tilted in favour of the TNC whose expertise is unquestionable.

Management contracts have been fairly common in most SADCC member states. In Zambia, for example, the nationalization of the copper mines was followed by a management contract with the foreign partner which enabled the latter to exercise most decision-making functions. In Tanzania also, such contracts were entered into by the National Development Corporation (NDC). That is for several enterprises ini-

tiated or taken over by the NDC.

In all these cases effective control has remained in the hands of the TNCs. This being the position it is important to suggest that, management contracts must be considered as an essentially short-term arrangement, during which local or regional nationals are effectively trained to take over all management functions. This was not the case in the two examples given above.

The role of TNCs or any foreign capital participation in management contracts should not be left to remain in perpetuity. This instrument or method should therefore be selected or used or adopted with due care by SADCC member states, to ensure that national or regional companies are not unduly controlled by TNCs over a long period of time. A period of three to five years should be adequate in most cases. However, it is also important to ensure that, even for such periods, national and regional interests are fully represented and can effectively participate in the determination of basic corporate decisions, especially those relating to production, sales, recruitment, etc.

On the question of the payment of royalties and managing agents, it should be related, as far as possible, to efficient management, as reflected by profitability. Such payments are always in the form, either of a lump sum or is related to output or profitability. However, a lump sum or remuneration related to output, could prove detrimental to interests of developing country companies. Therefore a likely proper proposal is a combination of a lump sum fee to cover direct management costs, together with a share in the profits.

The provision on the training of local personnel to take over the operations within a specific period of time, must be carefully watched and reviewed from time to time. If this is not done, a management contract may prove highly disadvantageous both in terms of enterprises efficiency and in the growth of managerial capability in the host SADCC member states; both at the national and regional levels. The government should also decide which type of management contract is desirable for a particular project.

In negotiating such contracts, SADCC member states must be clear as to what they intend to achieve by the management contract. In addition, SADCC member states must scout around for alternative suppliers to sound out their terms for comparison purposes. Thirdly, a country must work out its terms in advance which encompass its objectives. In the event of a TNC providing inflexible conditions in its negotiating terms, a SADCC member state can always fall back on a strategy or choice.

Negotiating the terms of a management contract is of crucial importance because any slight oversight can frustrate the intended objectives. It is common for the supplier of technology or expertise to propose terms in a management contract which are prima facie favourable to the investee state when in actual fact performance of the agreement would convey undue advantages to the former. For instance a TNC may propose favourable terms because it wants to secure a market monopoly for its products using its influence as the management. The foreign management may then thereafter, use its influential

position to import inputs from a particular source, for example a subsidiary, which may in fact not be the cheapest source available on the open market.

Any management contract to benefit a host country or SADCC, must provide clear and definite terms. In addition it cannot accomplish much if it is devoid of an effective implementation mechanism which would make sure that the intended objectives of SADCC are attained. This could be in a form of a provision in the implementation scheme or time table. The latter could then be utilized as the barometer or yardstick against which the contract would be measured or assessed. Failure to abide by the yardstick or timetable would give a definite right to the host country to rescind the contract or seek other remedies which it deems fit. For example, in contracts requiring training of local personnel, unless there is a barometer or timetable within which a TNC trains these people, it can be very difficult to know when this objective is achieved. In the first place a given number of people in addition to a stated period of training should be given. A case in point is the Zambia

Airways - Alitalia Management agreement where Zambia Airways terminated the agreement after Alitalia failed to fulfil its functions within a stated period of time.

When negotiating management contracts and similar contracts, bilateral escape clauses must be inserted. These could take the form of a provision for the review of the contract after a stated period of time. The review is advantageous because problems which were not anticipated at the time the contract was negotiated and which have arisen since, can be sorted out. In addition, review provides the means for determining the progress made in the contract. When serious irrevocable views emerge, the contract can be terminated by mutual agreement instead of waiting for termination by effluxion of time. On the whole bilateral escape clauses allow the host state enough room to manoeuvre or manipulate a situation in the event that discoveries are made which prove the contract unfavourable. It is noteworthy that, the absence of bilateral escape clauses promotes unilateral cancellation of the contract by the host state and may lead to damages

and failure to pay the damages lead to adverse publicity which the host state would always like to avoid.

#### X Technology Licence Agreements

Most licence agreements are full of loopholes at the expense of SADCC countries. This is so because the bargaining position of licensee enterprises in SADCC member states is much weaker, both because of lack of awareness regarding technological alternatives and because of relative inexperience regarding the intricacies of licensing agreements.

While foreign technical assistance may be necessary in varying degrees, this should not take the form of management responsibilities for unduly long periods. Management and technical supervision functions should, however, be exercised by foreign licensors, only for the minimum period necessary to impart enough training and expertise to domestic managers responsible to national and regional shareholders. Management and technical supervision functions, however, should be assumed by National or

regional investor groups and managers - long before the expiry of such agreements. (i.e. three to ten years). No licensee agreement should be beyond this period.

#### XI The Nature and Extent of Incentives

The fundamental question is, the impact of the incentives on investment and on the host country's economy generally. It would appear there is a general tendency to grant incentives without adequate consideration as to their probable effects on public revenue and the balance of payment deficits of host SADCC member states. According to Ocran, in some cases a tax holiday, which is the most typical fiscal incentive may not even benefit the subsidiary company in the host state but may merely go to swell its tax liability in, and hence increase the tax revenue of its home country.<sup>14</sup> In their haste to grant incentives, SADCC member states often become entangled in a self-defeating competition which enable TNCs to play off one country against another in the setting of projects.<sup>15</sup>

This being the position, it is proposed therefore that, incentives which have to be given to both local and foreign investors, should be closely linked to the national goals taking into account their impact at the sub-regional (SADCC) level.

In other words, careful thought should be given to costs and benefits before incentives are granted. In addition it must be crystal clear that the economic benefits would be obtained which would not otherwise arise in the absence of such incentives.<sup>16</sup> In each country, there should be a procedure for a mechanism for the periodical review of such benefits.<sup>17</sup> The adoption of a rationalization and/or harmonization policy on incentives in the sub-region is imperative.

It is also important to note that, re-investment of profits is as important as attracting new investments and might in some situations have higher impact than new investments which in most cases carries with it costs such as interest and

principal repayment. What one is suggesting is that, there should be sufficient incentives to attract re-investment of profits. This will avoid the outflow of resources e.g. profits from SADCC, member states by TNCs as a direct result of lack of sufficient incentives for the re-investment of profits.

On the whole, incentives should be limited in scope and objective oriented. That is there should be a relationship between incentives granted and the development objectives. However, it should be borne in mind that, when the objective has been realised, for example, a railway has been constructed, such incentives should be removed or their impact should be assessed in order to re-orient them to changing demands. A case in point is depreciation allowances, usually granted to new industrial ventures. These should have a time limit and when that time expires they should be waived or removed.

XII The Role of National and Regional Planners 18

For any kind of regional grouping to succeed it is imperative to have both short and long-term

regional strategy, especially regional industrial strategy. It is beyond doubt that SADCC has satisfied this pre-condition. However, the question to be asked is what is the role of national and regional planners within the context of SADCC?

The national and regional planners should first and foremost understand the historical background of the political economy of SADCC since the Scramble for Africa in 1884. In other words, they need to examine in depth the distorted existing structure of inherited industries in each country and how it fosters the disarticulation of the regional economy. Thirdly, they need to consider the potential of each country's known resources for creating basic regional pole of growth industries which might help to achieve more rapid growth of an increasingly intergrated and balanced regional industrial structure. The above will enable them to co-ordinate their national plans to redirect existing industries and create new ones to ensure the spread of productivity and rising living standards in all sectors of the regional economy.

In the agricultural sector the importation of agricultural machinery and equipments from TNCs headquarters in South Africa and elsewhere must be discouraged. These are mainly used by big estates and plantations and not by majority of the poor peasant population in the sub-region. To rectify the situation, small scale industries could be constructed to produce simple, inexpensive goods which peasants could afford and would know how to use. These could be in the form of animal drawn ploughs, cutlasses, wheelbarrows, scotch-carts, hoes, axes, shovels etc. Seidman further proposes that, over time, as workers acquired the skills and peasants learned to use more complex tools and co-operated to accumulate the funds necessary to buy their output, larger regionally-based industries or factories could be built to produce more sophisticated machinery like tractors and electrically-driven water pumps for irrigation.

In the transport sector, last-stage assembly plants e.g. the Livingstone Motor Assembly would need to be stopped. Such plants mainly perpetuate dependence of SADCC member states on TNCs through the importation of spare parts, kits, and other materials. Some ways and means to use local raw

materials in the production of spare parts and other materials should be found. It would be in order to build a regional plant for the manufacture of sturdy bicycles for short distance. Regional repair shops should be established throughout the sub-region, stocking standard parts and supplies. This would need the training of workers to install them.

The Consumer goods industries, is currently dominated by TNCs, whose plants import parts and materials from their parent companies abroad. They clearly destroy the upcoming or potential small local entrepreneurs. It is proposed therefore that, planners could encourage small-scale handicraft workers to form co-operatives to purchase improved tools and equipment to expand their output. In the long run, they could accumulate sufficient capital to buy power driven machines and build small factories. Large capital intensive plants currently producing luxury and semi-luxury goods for the rich at the expense of the poor workers and peasants could be reconverted to process local materials and produce a lower cost range of goods

designed more specifically for poor workers and peasants. Over time, the construction of local industries to manufacture appropriate new machine and equipment would be realised.

Another aspect which requires the consideration of planners is the possibility of building, regionally-oriented pole-of-growth industries utilising regional resources to stimulate a more rapid regional transformation to self-reliant, balanced growth. The question of which industry should ultimately be built in which country would of course require major engineering and feasibility studies which have yet to be undertaken. It is only after these studies that SADCC states would be in a position to determine the actual location pattern. The following are the areas of the potential regionally-oriented pole-of-growth industries: and in brackets we provide the proposed locations of each such industry. These are:

- (i) Iron and steel industry (Zimbabwe);
- (ii) Copper smelting industry (Zambia);
- (iii) Oil refinery industry (Angola);
- (iv) Fertilizer industry (Tanzania); and
- (v) Meat packing industry (Botswana); etc.

It must be stated once more that all the above mentioned and other possible industries would, require careful feasibility studies. This could be mainly done through the establishment of a regional planning agency. The functions of this body would be to collect and process the necessary data to formulate a long-term regional industrial strategy which ensures that each participating state benefits from the establishment of an appropriate pole of growth industry using its basic resources. This body would also be entrusted with the task of co-ordinating the SADCC member states' policies relating to regional pole of growth, regional export, import and wholesale trade; and regional banking and financial institutions. The work of this agency would be made possible and easier if SADCC countries would be willing to bargain out differences and work out mutually beneficial agreements.

In addition the regional planning agency should make a comparative study of experiences elsewhere, for example from the Council of Mutual Economic Assistance (CMEA) or from the Andean Pact in Latin America.

All in all national and regional planners should be responsible for the co-ordination, rationalization and harmonization of the various national and regional policies. For example financial planning at the regional level would require co-ordination of national financial plans in relation to taxation; incomes policies-affecting wages, salaries and profits and money and credit. Member state ministries of finance would need to agree to guidelines for co-ordinating tax and income policies. These planners should at all times work in co-operation with the proposed Rationalization and Harmonization unit of the TNCs official sub-committee.

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Article III (4) of the "Memorandum of Understanding"
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6. President Quet Masire of Botswana "Opening Statement by the Chairman" SADCC-Summit Meeting, Harare, July 20, 1981, p.6.
7. Article III (4) of the "Memorandum of Understanding"
8. Article III (4) of the "Memorandum of Understanding"
9. Article III (7) and (8) of the "Memorandum of Understanding"
10. Article IV (1), (2) and (3) of the "Memorandum of Understanding."
11. Annex I - List of Areas of Concern Regarding the Operations and Activities of TNCs - International Legal Materials (I.L.M.) 15 (1976)
12. A Calvo Clause is a stipulation in a contract between a foreigner and a government whereby the foreigner agrees not to call upon his state of nationality for protection in agreement arising out of the contract. It therefore requires or compels an investor to exhaust all local remedies.
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14. (a) U.N. Document ST/ESA/12 - Department of Economic and Social Affairs, p. 33.  
'Acquisition of Technology from Multinational Corporations by Developing Countries'. or
- (b) T.M. Ocran, 'The Legal Framework of Foreign Investment in Africa'. Zambia Law Journal 12 (1980) p. 11.
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16. Ocran, 'The Legal Framework', p. 11.
17. Ocran, 'The Legal Framework', p. 11-12
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CHAPTER SIX

6.0 SUMMARY AND GENERAL CONCLUSIONS

It is imperative to state from the outset that most conclusions and recommendations have already been made in the preceeding discussion, however a summary and conclusions of the main findings is inevitable.

In our discussion we have seen the problems created by TNCs, in world trade, especially in host developing countries. We have also seen TNCs' negative response to various attempts including SADCC for their control and encouragement at both national, regional and international levels. In addition we have initially assessed these various attempts for the control of TNCs and have come up with possible solutions, especially <sup>1</sup> with regard to SADCC.

It was also noted that, SADCC is not a futile exercise, as SADCC has succeeded in many ways after six years of its formation.

On the whole, this thesis has been written with five interrelated objectives in mind. These are:

- (i) The nature and extent of the role of TNCs in SADCC. Is it compatible with SADCC's objectives?
- (ii) Individual SADCC member states' policies towards TNCs.
- (iii) SADCC's policy (if there is any) towards TNCs.
- (iv) Should the control of TNCs be treated as a priority sector within the framework of the SADCC priority sector by sector approach or not?
- (v) To suggest possible solutions open to SADCC.

In an attempt to resolve or answer the above interrelated problem areas, we have concluded as follows:

- (i) The role of TNCs is detrimental to the aims and objectives of SADCC and as such they need to be controlled at both national and regional (SADCC) levels.

- (ii) There is need for the rationalization of various individual SADCC member states' policies towards foreign investment, especially TNCs.
- (iii) There is no single SADCC policy on foreign investment, especially TNCs and as such there is need for one which would culminate into a single SADCC investment code.
- (iv) The control of TNCs is strategic to the success of SADCC and as a result it should be treated as one of SADCC's priority sectors.

It should be stated however that, one's main concern once again was not with the successes or failures of SADCC but with how to improve the inability of the successes of SADCC. On the question of what is to be the first approach, national or sub-regional integrated single SADCC economic strategy. It was resolved that, firstly each state should adopt a national economic strategy in orientation of a sub-regional integrated single SADCC economic

strategy. However this would be more viable if SADCC member states adopt a gradual socialist ownership of the commanding heights of the economy as the most effective weapon in combating the exploitative 'TNCs' roles.

In doing so we have recommended various legal and economic strategy options for the control of TNCs at both national and sub-regional (SADCC) levels. These are:

- (i) SADCC sector on TNCs;
- (ii) Towards an Investment and Investor Compliance code;
- (iii) What a Host state Want;
- (iv) Nationalisation;
- (v) Establishment of Research and Development Centre(s);
- (vi) Technology Acquisition Board;
- (vii) Need for Clear Contractual Terms;
- (viii) Discouragement of "Brain Drain";
- (ix) Improvement in Management Contracts;
- (x) Technology Licence Agreements;
- (xi) The Nature and Extent of Incentives;
- (xii) The Role of National and Regional Planners;
- (xiii) The Need for security and stability;

- (xiv) SADCC and the co-ordination and/or Harmonization of Marketing Policies; and
- (xv) Sovereignty and Nationality vs. Political Will.

It is argued that, if SADCC is to succeed and grow from strength to strength, there is need to make some fundamental improvements in restructuring the economies of countries in the sub-region, if not, stagnation and dependence on South Africa and world imperialism would persist and peoples suffering would worsen. The most effective way to rectify the present economic crisis is to jointly control the TNCs and step up inter sub-regional trade among member states, especially by utilizing the institutions created by SADCC.

One further strongly believes that, the whole idea of regional or sub-regional co-operation and integration is based on collective self-reliance, implying that all projects and their financing will be based on self-reliance and not on foreign aid or charity. External aid in the form of indiscriminate foreign investment would lead to foreign investors having a greater say in the implementation of projects and these tend to be projects which the

investors have interest in and therefore would dictate policy directives for SADCC. One further proposes that, there would need for national sovereignty in specific areas to be sacrificed for the benefit of SADCC.

The present situation however, demands immediate response from the SADCC member states. If not the TNCs would already have seen patterns of economic behaviour before appropriate governmental responses were formulated. Behrman has succinctly put it as follows:

"Tensions will be generated and regenerated as the enterprises pursue their own interests and as governments lag behind". 1

It is the author's sincere belief that, member states should "thank SADCC" and "act as SADCC". All countries should feel that they would gain from the formation of harmonised and rationalised policies, especially under the code. It is therefore a question of political will of the member states of SADCC that will make SADCC a reality. This will be possible if

SADCC states put more emphasis on the common interests without emphasising their differences. The SADCC investment and investor compliance code should be drawn up and implemented on the basis of the consent of interest of member states.

A hard task of economic emancipation still lies ahead of Africa in general and SADCC in particular, a task which one trusts is worthy of the talents and expertise acquired in the process of acquiring professional legal education. It is one's hope, therefore, that all lawyers will rise to the occasion, arm themselves with these talents and expertise and towards law reforms that would save Africa in general and SADCC in particular, from economic enslavement.

Last but not the least it is one's submission that this study's main findings, though limited would stimulate further research in this area or rubric of international economic relations, noting that SADCC is a response to both the Lagos Plan of Action and the demand for the creation of the New International Economic Order (NIEO).

In conclusion it is hoped that, future SADCC researchers may wish to consider the following primary issues and/or questions:

(i) First and foremost, it is clear that the various investment laws of the SADCC member states differ greatly in their degree of specificity and in the specific issues which they treat. To what extent should these laws be rationalized or harmonized?

(ii) To what extent should the existing investment laws be raised to give investors from other SADCC member states, a special status within a SADCC host country? Should investors from other SADCC states be treated strictly as "foreigners" or should they be given special privileges and rights. This is mainly with respect to the local participation requirement in the investment law; should investors from other SADCC member states be treated as "local participants" rather than as foreign investors. In addition, should the system of special incentives be devised for investors from other SADCC member states in order to specially encourage their investment?

(iii) Is there a need now, within SADCC to address the issue of technology transfers to the various states? To what extent should the SADCC member states seek to rationalize their policy with particular reference to technology transfers? To what extent should the SADCC member states as a group increase their bargaining power in technology negotiations by common standards and principles?

(iv) Should all SADCC member states become members of the International Convention on the Settlement of Investment Disputes between states and the Nationals of other states (ICSID)? Should each SADCC member state now include a reference to ICSID arbitration in its investment law? Should their investment laws offer option of ICSID arbitration to a potential foreign investor e.g. a TNC, as a further inducement for investment?

(v) While most investment laws put more emphasis on the encouragement function (i.e. incentives) than on control, few laws specifically mandate investment promotion. How and to what extent should the promotion function now be included within the investment laws? How should the investment promotion function be carried out?

(vi) To what extent should formal links and exchanges of information be established among the various investment bodies and relevant ministries within the SADCC sub-region? To what extent should such network serve to increase the total amount of capital invested within the sub-region and coordinate investment policies?

(vii) How might the SADCC states better rationalize the incentives offered to make them relate more closely to that type of the investment project desired? For example, the promotion of rural development.

(viii) To what extent and how does the individual national governments within SADCC view their socio-development process?

(ix) How does SADCC as an economic grouping see its role in promoting joint development projects?

(x) To what extent, the TNCs, as the major controllers of resources flowing into the SADCC sub-region, perceive the new grouping as a hinderance to their policies towards global profit maximisation?

(xi) To what extent should SADCC member states provide security of expatriates working on SADCC projects and foreign investors against South African destabilisation policy?

(xii) To what extent should SADCC reduce its dependence on foreign financial assistance? For example the IMF, U.S.A. EEC, Nordic countries etc, which stress full trade and comparative advantage meaning agricultural rather than industrial development and balanced development SADCC's cornerstone.

(xiii) To what extent should SADCC member states "think SADCC" or "look to SADCC first"?

(xiv) To what extent should SADCC publicize its products and industries? To what extent should SADCC member states discourage business trips to South Africa by their own officials and private individuals?

(xv) To what extent should the concept of foreign majority ownership be improved, especially with regard to management control, management contracts, joint venture arrangements, technology license requirements, work and service contracts, etc.?

(xvi) On the whole, what factors will determine a new level of economic integration and co-operation among SADCC countries? What are the pre-conditions for collective bargaining and follow-up actions to ensure positive results especially in shifting the control of the development process into the national institutions? Are there common measures that can be taken to deal with external forces in cooperation? If yes, how can these measures be isolated in order to create a new and viable generation of integrated projects and schemes that can adequately meet socio-economic development objectives and priorities.

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