

BALANCING COMPETING INTERESTS IN FDI POLICY – A DEVELOPING COUNTRY PERSPECTIVE*

*Laurence Boule***

ABSTRACT

In March 2012 a decision of the Competition Appeal Court of South Africa considered the validity of an “investment remedy” in its consideration of a “substantial public interest” test relating to a major foreign investment. In the absence of specific domestic regulation on foreign direct investment (FDI), the judgment was situated in the framework of local competition law and it highlighted some of the policy considerations surrounding foreign investment, market competition and economic development in emerging economies. The outcome prompted domestic industry to urge finalisation of policies and regulations on FDI, including that relating to corporate acquisitions and mergers, and for a legal regime which would ensure “harmonised, consistent and transparent approaches” to assessing the public interest in proposed complex foreign investments. The potential impact of FDI on domestic competition policy is one of the issues which could be included in a comprehensive policy framework on the subject. These considerations raise questions as to how a middle-income country

* This is a revised version of a paper presented at the Third Biennial Conference of the Society of International Economic Law, National University of Singapore, Singapore, 10-12 July 2012. The author is grateful to Jessie Chella, PhD candidate at Bond University, Australia, and Michelle Le Roux, Senior Fellow in the Mandela Institute, University of the Witwatersrand, Johannesburg, for their assistance and advice.

** Laurence Boule is Professor of Law and Associate Director, Dispute Resolution Centre, Bond University, Australia, and Professor of Law, University of the Witwatersrand, Johannesburg. The author can be reached at lboule@bond.edu.au.

which both imports and exports capital should develop its FDI policy framework in an evolving global investment context. Aspects of this multi-faceted question are addressed in the article, with specific reference to South Africa in its regional context where issues of economic development, social and economic transformation and poverty reduction are paramount and require both foreign investment and the ability of respective states to operate their domestic regulatory levers. Reference is made in this regard to the Investment Policy Framework for Sustainable Development included by UNCTAD in its 2012 World Investment Report.

KEYWORDS: *investment remedy, FDI, competition law, sustainable development, UNCTAD*