



UNIVERSITY *of the*
WESTERN CAPE

FACULTY OF LAW

**INVESTMENT LAW IN A GLOBALISED ENVIRONMENT: A PROPOSAL FOR A
NEW FOREIGN DIRECT INVESTMENT REGIME IN ZIMBABWE**

Thesis submitted in fulfilment of the requirements for the LL.D degree



By
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June 2017

DECLARATION

I declare that Investment Law in Globalised Environment: A Proposal for a New Investment Regime in Zimbabwe is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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ABSTRACT

Most developed countries that enjoy the lion's share of foreign investment do not have domestic legal frameworks on foreign direct investment. This is because investors are attracted by a holistic picture of these countries. Such countries have strong institutions of governance, enjoy political and economic stability, embrace democracy, have respect for rights, and have high levels of development – factors which attract investors. In terms of regulation, many of these countries are heavily reliant on bilateral investment treaties. However, this is not the case in developing countries such as Zimbabwe. The existence of an effective and efficient legal framework on the governance of foreign direct investment is an important consideration for investors. This emanates from the fact that developing countries often have weak legal systems, shaky economies and uncertain political environments.

Zimbabwe has numerous instruments which govern the treatment and protection of foreign investment. However, these laws have rather discouraged foreign investment. Most notably, the Indigenisation and Economic Empowerment Act, requires foreign investors to cede a 51 per cent stake of the ownership and control of their companies to indigenous Zimbabweans, a condition of which most foreign investors find unacceptable. This untenable state of affairs is further exacerbated by the fact that Zimbabwe has in the past disregarded property rights. This has seen Zimbabwe receiving lower foreign investment levels than many of its counterparts in Southern Africa, despite having a diversified economy and an educated human resource base.

This study therefore, *inter alia*, formulates a proposal for a reformed foreign investment regulatory framework in Zimbabwe. The thesis compares the legislative, institutional and policy frameworks in Turkey, Tanzania and Ghana with those in Zimbabwe, in order to learn lessons that could be useful to Zimbabwe in framing its regulatory reform of foreign investment. It argues that Zimbabwe's investment framework is splintered and archaic. Accordingly, the thesis proposes the harmonisation of Zimbabwe's

investment framework into a domestic legislation that is guided by a sober investment policy. To ensure the implementation of this law, the thesis further proposes the reworking of Zimbabwe's institutional framework on foreign investment.



DEDICATION

This thesis is dedicated to my parents, Mr F & Mrs C Kondo.



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ACKNOWLEDGEMENTS

I would like to extend my appreciation to the following individuals:

- My supervisors, Prof P Lenaghan and Prof R Wandrag, for their immense contribution to the completion of this thesis.
- I am also indebted to Dr Y Mupangavanhu and Dr T Chigwata who proof-read and gave comments on the final draft of the thesis.
- I am also grateful to Prof I Leeman who edited a substantial part of this thesis.
- The postgraduate division who organised research retreats where a fair amount of the chapters of this thesis were completed.
- The organisers and respondents of the Doctoral Colloquium where I received a lot of critical and constructive feedback.
- To the Graduate Lecturing Program at the University of the Western Cape which supported the first year of my study.



KEYWORDS

Economic development

Bilateral investment treaties

Economic empowerment

Foreign direct investment

Globalisation

Indigenisation

Institutional framework

International investment agreements

International investment law

Investment reform



ACRONYMS AND ABBREVIATIONS

AAG	Affirmative Action Group
Abs-Shawcross Draft Convention	1959 Draft Convention on Investment Abroad
ACHPR	African Charter on Human and People's Rights
AEC treaty	Treaty Establishing the African Economic Community
ARIPO	African Regional Intellectual Property Organisation
AU	African Union
BEE	Black Economic Empowerment
Bogota Agreement	Economic Agreement of Bogotá
CIIA Agreement	Common Investment Area Agreement
CEO	Chief Executive Officer
CERDS	Charter of Economic Rights and Duties of the State
COMESA	Common Market for East and Southern Africa
Convention Establishing MIGA	Convention Establishing the Multilateral Investment Guarantee Agency
Directorate	The General Directorate of Incentive Implementation and Foreign Investment Disputes
Drago-Porter Convention	Convention Respecting the Limitation of the Employment of Force for the Recovery of Contractual Debts of 1907
ECOWAS	Economic Community of West African States



EIB	European Investment Bank
EPZs	Export Processing Zones
ESA	Eastern and Southern Africa
ESAP	Economic Structural Adjustment Program
EU	European Union
FCN treaties	Bilateral Treaties on Friendship, Commerce and Navigation
FDI Law	Foreign Direct Investment Law No. 4875
FDI	Foreign Direct Investment
FIC	Foreign Investment Centre
French Declaration	French Declaration of the Rights of Man and of the Citizen
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCIA	Ghana Capital Investments Act
GICP Act	Ghana Investment Centre Promotion Act
GDP	Gross Domestic Product
GG	Government Gazette
GN	General Notice
GOZ	Government of Zimbabwe
Havana Charter	Final Act of the United Nations Conference on Trade and Employment
IAC	Investment Advisory Council of Turkey
IBDC	Indigenous Business Development Centre
ICC	International Chamber of Commerce



ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID Additional Facility	Additional Facility Rules of the Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
ICSID	International Centre for Settlement of Investment Disputes
ICT	Information and Communication Technology
IEEA	Indigenisation and Economic Empowerment Act
IEPA	Interim Economic Partnership Agreement
IIL	International Investment Law
IIRT	International Investors Round Table
ILA	International Law Association
ILC Articles	International Law Commission's Responsibility of States for International Wrongful Acts, 2001
IMF	International Monetary Fund
Indigenisation General Regulations	Indigenisation and Economic Empowerment (General) Regulations 2010
International Code	International Code of Fair Treatment for Foreign Investments
IOS	International Organisation for Standardisation
IPC	Investment Promotion Centre



ISPAT	Investment Support and Promotion Agency of Turkey
ITO	International Trade Organisation
Kellogg-Briand Pact	Kellogg-Briand Pact of 1928
LDCs	Least Developed Countries
LIRT	The Local Investors Round Table
MAI	Multilateral Agreement on Investment
MFN treatment	Most-Favoured-Nation Treatment
MIGA	Multilateral Investment Guarantee Agency
MNC	Multi-National Company
NAFTA	North American Free Trade Agreement
NEEB Bill	Namibian National Equitable Empowerment Bill
New TCC	New Turkish Commercial Code No. 6102
NGOs	Non-Governmental Organisations
NIPP	National Investment Promotion Policy
NIPPPC	National Investment Promotion Policy and Promotion Code
NISC	National Investment Steering Committee
NT	National Treatment
OAU	Organisation for African Unity
OECD Declaration	Declaration on International Investment and Multinational Enterprises
OECD MAI	OECD Multilateral Agreement on Investment



OECD	Organisation for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
OSS	One-Stop-Shop
PIA	Protection of Investment Act 22 of 2015
PNDC Law 116	Investment Code of Ghana
SADC	Southern African Development Community
SCA	Supreme Court of Appeal
SEID	Department for State Enterprises and Indigenisation
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
The Old Law	Foreign Investment Promotion Law No. 6224
TIC	Tanzania Investment Centre
TNBC	Tanzania National Business Council
TRIMs	Agreement on Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TSIPP	Technical Support for the Indigenisation Policy Program
Ujamaa	Arusha Declaration launching the African Socialism Programme
UN	United Nations
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law



UNCITRAL	United Nations Convention on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
USA	United States of America
WIPO	World Intellectual Property Organisation
World Bank Guidelines	World Bank Guidelines on the Treatment of Foreign Direct Investment
WTO	World Trade Organisation
YOIKK	Coordination Council for the Improvement of the Investment Environment
ZIA Act	Zimbabwe Investment Authority Act
ZIA	Zimbabwe Investment Authority
ZIC	Zimbabwe Investment Centre
ZimAsset	Zimbabwe Agenda for Socio-Economic Transformation
ZIMPREST	Zimbabwe Program for Economic and Social Transformation 1996 – 2000



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CHAPTER 1

INTRODUCTION AND BACKGROUND

Reductio ad absurdum¹

1.1 INTRODUCTION

Foreign direct investment (FDI) refers to cross-border investments which are made by an investor who is resident in one country, but has control or a great amount of influence over the management of an enterprise in another country.² More and more, FDI is becoming a subject of discussion in developed and developing countries alike because of its ability to directly and indirectly stimulate economic and human development.³

In a globalised world, FDI plays a leading role in creating links between economies and promoting technology transfer.⁴ Moreover, FDI in the form of greenfield investments (ground up investments) assists in capital formation and the development of local production capacities.⁵ Notwithstanding these direct positives, there are also



¹ Translated into English, the Latin phrase means 'argument to absurdity'. The reason why this is an argument into absurdity is that this thesis will validate the necessity for a new investment regime by examining the untenable results of the current regime. See Vallario K *Reductio Ad Absurdum: Five Considerations for the 21st Philosopher Sage* (2011).

² Legal Information Institute 'Foreign Direct Institute' available at https://www.law.cornell.edu/wex/foreign_direct_investment (accessed 18 May 2016). Foreign direct investment can be made in the financial and non-financial sectors of the economy by a non-resident. The non-resident, according to the United Nations, must at least control more than 10 per cent of the voting powers in an organisation that has been registered in the particular country or must own 10 percent of the enterprise. See Direct Investment Technical Group 'Direct Investment – 10 Percent Threshold of Voting Power/Equity Ownership, Employment' available at <https://www.imf.org/External/NP/sta/bop/pdf/diteq2.pdf> (accessed 18 May 2016). See further, Chen C *Foreign Direct Investment in China: Location Determinants, Investment Behaviour and Economic Impact* (2011) 1.

³ De Schutter O, Swinnen J & Wouters J *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (2012) ch 3.

⁴ Legal Information Institute 'Foreign Direct Institute' available at https://www.law.cornell.edu/wex/foreign_direct_investment (accessed 18 May 2016).

⁵ De Schutter O, Swinnen J & Wouters J (2012) ch 3. This concept will be further discussed in chapter 2. See part 2.2.1 below.

some spill-over effects emanating from the presence of foreign companies, such as; an increased demand for goods and services, and increased employment.⁶

Typically, research on FDI has grown significantly.⁷ Broadly, this research can be classified into three categories, namely: research on FDI policies and legal and institutional frameworks; research on the characteristics of FDI; and research on how trade liberalisation affects FDI.⁸ Of growing interest is the need for research on FDI policies as well as the legal and institutional frameworks governing investments made by foreign investors. This area remains a potent issue, especially in developing countries where there is a greater need to create an investment friendly climate through legal certainty espoused in a clearly formed legal framework.

Foreign direct investment is governed through six main ways, namely; bilateral investment treaties (BITs), customary international law, preferential trade and investment agreements (PTIAs), international taxation agreements (ITAs) and double tax treaties (DTTs),⁹ domestic legal frameworks,¹⁰ and investment contracts between States and investors. While developed countries mostly rely on BITs and customary international law, developing countries also make use of domestic legal frameworks (as well as institutional and policy frameworks) in addition to BITs and customary international law.¹¹

To date, developing countries, such as; Uganda, Ghana, Fiji, Tanzania, Cuba and Zimbabwe have therefore created legal and institutional frameworks for the treatment

⁶ De Schutter O, Swinnen J & Wouters J (2012) ch 3.

⁷ Chen C (2011) 3.

⁸ Chen C (2011) 3.

⁹ International Taxation Agreements and Double Tax Treaties are also considered as a form of International Investment Agreements (IIAs), as more often than not, taxation has important consequences for foreign investment. See Sauvant KP & Sachs S *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009). BITs and PTIAs are the two types of IIAs. See Jovanović (ed) MN *International Handbook on the Economics of Integration: Factor Mobility, Agriculture, Environment and Quantitative Studies* (2011) 49.

¹⁰ In addition to a domestic legal framework, a country may also have an institutional or policy framework on investment.

¹¹ This is a fairly new trend that is starting to take root in developing countries.

of FDI, pursuant to their investment policies.¹² However, this process has not been without its own challenges. For example, instead of Zimbabwe's legal and institutional frameworks assisting in the improvement of the investment climate, the opposite has in turn transpired.¹³ It is against this backdrop that this thesis critically assesses the legal, institutional and policy frameworks governing FDI in Zimbabwe, and attempts to reform these frameworks by learning from what other countries have done successfully in legislating FDI towards creating a better investment climate.

1.2 BACKGROUND

The Indigenisation and Economic Empowerment Act [*Chapter 14:33*] (IEEA)¹⁴ is debatably the primary legislation governing FDI in Zimbabwe. The IEEA is implemented through the Indigenisation Regulations; which are the delegated legislation.¹⁵ To date, the Indigenisation Regulations have been amended several times.¹⁶ Furthermore, from time to time, the Government of Zimbabwe (GoZ) also publishes General Notices regarding compliance and enforcement of the IEEA and the Indigenisation Regulations.¹⁷ Therefore, in order to establish the legislative and regulatory positions with regards to FDI in Zimbabwe, the IEEA must be read with the Indigenisation Regulations and the General Notices.

The IEEA, its implementing Regulations and the subsequent General Notices are not a self-contained foreign investment regulatory scheme; they are supplemented by other pieces of legislation such as the Zimbabwe Investment Authority Act [*Chapter*

¹² See Uganda Investment Code Act 1991 Cap 92, Ghana Investment Promotion Centre Act 865 of 2013, Fiji Foreign Investment Act 1 of 1999, Tanzania Investment Act 1997, Cuban Foreign Investment Act 118 of 2014 and Zimbabwe Investment Authority Act [*Chapter 14:30*].

¹³ See part 3.4.3 below. It is important to note that there are other factors constraining foreign invest in Zimbabwe other than the legal framework. This discussion however falls outside the scope of this thesis. See further part 1.7 below.

¹⁴ Act 14 of 2007.

¹⁵ Statutory Instrument (SI) 21 of 2010.

¹⁶ SI 21 of 2010 as amended by SI 116 of 2010, 34 of 2011 and 84 of 2011 and the Indigenisation Regulations 2011.

¹⁷ General Notice (GN) 114 of 2011; GN 459 of 2011 and GN 280 of 2012 and GN 9 of 2016 [substituted and replaced the General Notice published in the Government Gazette (GG) on 24 December 2015].

14:30] (ZIA Act).¹⁸ The ZIA Act establishes the Zimbabwean Investment Authority (ZIA), a one-stop shop for the facilitation of domestic and foreign investment.¹⁹ More specifically, ZIA is charged with the main function of promoting and co-ordinating investment in Zimbabwe.²⁰ Pursuant to s 7(a) of the ZIA Act, all new foreign investors must apply for an investment licence issued by the ZIA.²¹

In terms of ownership, the ZIA only allows full ownership in the mining and manufacturing industries, 70 per cent shareholding in reserved sectors and a maximum of 35 per cent foreign interest in reserved sectors.²² However, a tension seems to exist between the ownership scheme envisaged by the ZIA and that contained in the IEEA. Section 3(1)(b) of the IEEA asserts that at least 51 per cent of the shares of every public company or any other business shall be owned by indigenous Zimbabweans.²³ Such controlling shareholding or interest must be given²⁴ up within five years of the date of coming into operation of the Regulations (1 March 2010) or within the first five years of the commencement of operations of a business.²⁵

To complicate matters, the Indigenisation Regulations as the implementing tool dealing with the administrative matters of the IEEA, allows for the variance of the “51-49 per cent” rule, as demanded by social or economic imperatives, subject to the

¹⁸ Act 4 of 2006. The ZIA Act repeals the Export and Processing Zones Act [*Chapter 14:07*] and the Zimbabwe Investment Centre Act [*Chapter 24:16*] and takeover all matters related to or incidental to the promotion and co-ordination of investment.

¹⁹ ZIA Act, s 3. The ZIA was meant to make investment quicker and easier. The ZIA is working on further streamlining the process.

²⁰ ZIA Act, s 7. This will be further discussed as part of the institutional framework in part 3.3.2 below.

²¹ The investment licence is valid for two years, after which it must be renewed before expiry. See s 7 of the ZIA Act.

²² See <http://www.investzim.com/>.

²³ Section 2 of the IEEA defines an indigenous Zimbabwean as ‘any person who, before 18th April 1980, was disadvantageded by unfair discrimination on the grounds of his or her own race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold a controlling interest’.

²⁴ It is also not clear who among indigenous Zimbabweans must benefit from this and if compensation should be given.

²⁵ The Indigenisation and Economic Empowerment (General) Regulations 2010 – SI 21 of 2010 as amended by SI 116 of 2010, 34 of 2011 and 84 of 2011. The challenge, however, is that it is not clear what happens if a controlling interest is not given up. For most firms, this 5 years deadline, including the extension have lapsed. However, to date, no action has been taken against non-compliant firms. In all likelihood, the probability is that, at most, these businesses may have their investment licenses terminated in terms of s 5(2) of the IEEA.

approval of the minister (Minister of Youth, Indigenisation and Economic Empowerment).²⁶

This legislative and regulatory scheme, because of its onerous nature, has been less than successful in meeting its mandate. It has rather dampened the investment climate, creating widespread criticism for the scheme – most of which criticism emanates from the controversial 51 per cent ownership requirement.²⁷ This has resulted in foreign investors becoming more tentative when it comes to investing in Zimbabwe.²⁸

Further to the above, the GoZ is also not sure about the direction it intends to take with the IEEA. For example, on 24 December 2015, the Minister of Finance, Patrick Chinamasa, announced the promulgation of GN 394A/25 which was titled “Frameworks, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act” in a GG Extraordinary. The next day, the Minister of Youth, Indigenisation and Economic Empowerment (Indigenisation Minister), Patrick Zhuwao, issued a statement to the press distancing himself from the notice.²⁹ Shortly after New Year, the Governor of the Reserve Bank, the Indigenisation Minister and the Minister of Finance appeared at a press conference announcing that their differences regarding the interpretation of the IEEA had been ironed out.³⁰

Soon after the foregoing press conference, the Indigenisation Minister on 8 January, published GN 9 of 2016, which he had executed on 4 January. The notice substituted

²⁶ Statutory Instrument 21 of 2010 as amended by SI 116 of 2010, 34 of 2011 and 84 of 2011. See further, Indigenisation Framework, 4 January 2016.

²⁷ Taffs C ‘Why is Zimbabwe a Good Investment Destination’ available at http://www.sanec.org/themes/sanec/uploads/files/INVESTMENT%20CLIMATE%20IN%20ZIMBABWE%20-%202012_CFU.pdf (accessed 23 May 2016).

²⁸ Njanike K *The Investor’s Guide: Secrets of Investing in the Developing World* (2013) 82.

²⁹ Hussein Ranchod & Co ‘Zimbabwe Indigenisation Law’ available at <http://www.huranco.com/2016/01/07/zimbabwe-indigenisation-law/> (accessed 22 May 2016).

³⁰ Hussein Ranchod & Co ‘Zimbabwe Indigenisation Law’ available at <http://www.huranco.com/2016/01/07/zimbabwe-indigenisation-law/> (accessed 22 May 2016).

and replaced in its entirety, GN 394A/25. The notice also provides for frameworks, procedures and guidelines for the implementation of the IEEA.

Unlike the preceding framework which was geared towards “encouraging private sector investment”; the new indigenisation framework seeks to address the rampant non-compliance with the IEEA,³¹ resolve inconsistencies between the ZIA Act and the IEEA, as well as raise funds for the National Indigenisation and Economic Empowerment Board (NIEEB), the National Indigenisation and Economic Empowerment Fund (NIEEF) and the National Indigenisation and Economic Empowerment Charter (NIEEC).³² These changing goal posts support the argument raised above that the government is unclear about the investment imperatives and indigenisation considerations; thus, the foreign investment framework would be better served by a clear law on foreign investment.³³ However, the GoZ is still optimistic about the fact that the indigenisation policies can be applied in a manner that promotes investment, increases the ease of doing business, and renders the services sectors of the economy conducive for FDI.³⁴

Beyond the indigenisation framework, Zimbabwe also has other laws which have a bearing on investment, For instance, the Joint Venture Act 6 of 2015 [Chapter 22:22]

³¹ A new deadline for non-complying firms to adhere to the prescriptions of the IEEA was set as 31 March 2016. The Indigenisation Framework in various sections, quotes the President of Zimbabwe, Robert R.G. Mugabe, speaking to the fact that non-compliance with the IEEA in 2016 would no longer be tolerated and permissible. Furthermore, pursuant to s 17 of the IEEA, which allows for the imposition of levies on companies, both private and public, the Indigenisation Framework imposes an Indigenisation and Economic Empowerment Levy, which will be levied at a standard rate for all businesses, based on a standard formula linked to gross income. The Indigenisation Framework also provides for an Indigenisation Compliance and Empowerment Rebate awarded on the basis of (1) Indigenisation legislation compliance rebates (2) Good Corporate Citizenship Rebate and (3) Indigenous shareholding rebates. This deadline has since passed and no tangible action has been taken by the government against offenders. However, the government has hinted that non-compliance will result in the termination of the operating license of the offender. See Mataranyika M & Sharara M ‘Zim Talk Tough on Indigenisation’ available at <http://www.fin24.com/economy/zim-talks-tough-on-indigenisation-laws-20160324> (accessed 13 July 2016).

³² See Indigenisation Framework, 4 January 2016. See further, Moyo S ‘Indigenisation law clarification: The facts’ *Zimbabwe Independent* 15 January 2016. According to the Indigenisation Framework, the NIEEB, the NIEEF and the NIEEC have been set up but are in need of funding to enhance operational capacity. See s 3 of the Indigenisation Framework.

³³ In formulating such a proposal, there is a need to align policies and clarify the roles of the various government departments with regard to foreign investments.

³⁴ See s 7 of the Indigenisation Framework.

which came into effect on the 27th of May 2016 governs how joint ventures in Zimbabwe are conducted. This Act presents onerous requirements such as that no joint venture agreement may be awarded or signed without the approval of cabinet.³⁵ Such provisions increase the red tape that has to be navigated when trying to establish operations in the country.

Another legislation worth mention is the Special Economic Zone Act 7 of 2016 [Chapter 14:34] which came into operation on the 1st of November of 2016. The Act seeks to, *inter alia*, provide for the establishment of special economic zones.³⁶ It makes provision for the administration, control, regulatory measures and incentives in this regard. In additions to these two, other pieces of legislation that ought to be considered include, but are not limited to the: Arbitration Act [Chapter 7:05], Arbitration (International Disputes) Act [Chapter 7:03], Immigration Act [Chapter 4:02], Income Tax Act [Chapter 23: 06], Labour Act [Chapter 28:01], Trade Marks Act [Chapter 26: 04] and the Civil Matters (Mutual Assistance) Act [Chapter 8:02].³⁷ This is indicative of Zimbabwe's fragmented regime which has an array of numerous pieces of legislation in its inventory.

Despite the negative effects of Zimbabwe's laws and policies governing FDI, the GoZ has tried to put in place measures and incentives to attract FDI in various sectors of the economy.³⁸ For example, in order to protect foreign investors, Zimbabwe is a signatory to various investment institutions and conventions, such as; the Overseas Private Investment Corporation (OPIC), the United Nations Convention on

³⁵ Section 13 of the Joint Venture Act 6 of 2015 [Chapter 22:22].

³⁶ See preamble of the Special Economic Zone Act 7 of 2016 [Chapter 14: 34]

³⁷ Important to note that these pieces on law are worth noting but are not covered in detail for practical purposes.

³⁸ Grant Thornton 'Doing Business in Zimbabwe' available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> (accessed 21 March 2016) 5.

International Trade Law (UNCITRAL) and the New York Convention on Enforcement of Foreign Arbitral Awards.³⁹

Furthermore, Zimbabwe has also opened its markets to international trade, in the same process also becoming a global market player by becoming a member of: (1) The Common Market for East and Southern Africa (COMESA) (2) Southern African Development Community (SADC) (3) Interim Economic Partnership Agreement (IEPA) between Eastern and Southern Africa (ESA)⁴⁰ and the European Union (EU) (4) the World Trade Organisation (WTO)⁴¹ (5) The World Intellectual Property Organisation (WIPO) and 6) The African Regional Intellectual Property Organisation (ARIPO).⁴²

In addition to the above protection, s 32 of the ZIA Act also provides for the protection of investment. In terms of this provision, '[t]he property or interest or right of every licensed investor to whom an investment license has been issued in terms of [the] Act shall be accorded every protection afforded by the laws of Zimbabwe'.⁴³ Moreover, the GoZ provides a guarantee that should the foreign investor want to disinvest, they will be able to repatriate their entire capital investment.⁴⁴

Naturally, such protection of investments should in theory be able to brighten the investment climate in Zimbabwe. However, in practice, these protections are viewed

³⁹ Grant Thornton 'Doing Business in Zimbabwe' available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> (accessed 21 March 2016) 5. Zimbabwe has also signed various BITs and to some extent also uses customary international law.

⁴⁰ ZimTrade 'EU – The Interim Economic Partnership Agreement (iEPA)' available at <http://www.zimtrade.co.zw/EU-The-Interim-Economic-Partnership.html> (accessed 22 March 2016).

⁴¹ WTO Agreement: Marrakesh Agreement establishing the World Trade Organisation (with final act annexes and protocol), concluded in Marrakesh on 15 April 1994 (1995) 39. This agreement will be referred to in this paper as the WTO Agreement.

⁴² See generally, Grant Thornton 'Doing Business in Zimbabwe' available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> (accessed 21 March 2016) 5.

⁴³ ZIA Act, s 32.

⁴⁴ Grant Thornton 'Doing Business in Zimbabwe' available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> (accessed 21 March 2016) 13.

by investors as just window dressing. To support this argument, one can cite the economic meltdown, pre-2009, when property rights were disregarded and the judicial process marred by political interference.⁴⁵ The question that therefore arises is: what then should Zimbabwe do in order to improve its investment climate? The answer lies in part in engaging in legislative reform of the laws governing FDI.⁴⁶ It is against this background that this thesis should therefore make a contribution in evolving the legal, institutional and policy frameworks governing FDI in Zimbabwe.

1.3 RESEARCH QUESTION

The question posed by this thesis is therefore: how can Zimbabwe tailor its legislative, institutional and policy frameworks on the treatment of FDI in order to create a positive and certain investment climate?

1.4 RESEARCH OBJECTIVES

This study seeks to assess how Zimbabwe can create bespoke legislative, institutional and policy frameworks governing FDI. It is against this backdrop that the aims of this study are as follows:

- (i) To determine whether Zimbabwe's legislative, institutional and policy frameworks on the treatment of FDI adequately incorporate International Investment Law (IIL).
- (ii) To assess whether Zimbabwe should adopt a standalone FDI legislative framework.
- (iii) To identify Zimbabwe's obligations arising from its BITs.

⁴⁵ See Kanyenze G *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy in Zimbabwe* (2011) 145.

⁴⁶ In chapter 3, as will be noted, key challenges, include, but are not limited to: the nature of the IEEA, the question whether the IEEA should be the primary investment law, non-uniform implementation of the IEEA, and the absence of a predictable legal regime on investment.

- (iv) To determine if Zimbabwe has any obligations that should inform its FDI legislative, institutional and policy frameworks as a result of its free trade agreements and trade liberalisation.
- (v) To determine if Zimbabwe can improve its FDI legislative, institutional and policy frameworks by adopting what has been done in other jurisdictions.
- (vi) To propose reforms to Zimbabwe's current FDI investment regime.

1.5 SIGNIFICANCE OF THE STUDY

This thesis is important because the GoZ is currently seeking to redesign the investment framework so that it can attract the much-needed foreign investors (the GoZ is currently in consultations on enhancing and refining the foreign investment policy). This is because foreign investment has a key role to play in the economic recovery of Zimbabwe. The thesis should therefore be able to ignite a high-level discussion on the contents of an investment agenda. As a result, this thesis will be useful to law students, policy makers, practitioners, advisors and consultants operating in the area of investment.



1.6 RESEARCH METHODOLOGY

This is a desktop study that is heavily reliant on primary and secondary sources. In terms of primary sources, the thesis relies on bilateral treaties, conventions, agreements, acts and regulations, case law, amongst others. Secondary sources include, but are not limited to journal articles, books, discussion papers, working papers, and policy documents (electronic and hard copies alike). The regulation of FDI in Zimbabwe is a relatively new area of study, and not much has been written on this area.

The study therefore employs three research methodologies. First, the study employs a legal historical approach to trace the evolution of investment principles and laws. After which, an analytical approach is used to assess and critique Zimbabwe's

legislative, institutional and policy frameworks. Finally, the study uses a comparative approach to see what Zimbabwe can learn from other jurisdictions that have laws governing FDI.

Three countries have therefore been chosen as comparators. However, were relevant, brief reference may be made to legislation from other countries such as Fiji and Vietnam.

(1) Turkey - Turkey was chosen because it has a simple investment legislative scheme (Encouragement of Investment and Employment Law No. 5084, Foreign Direct Investment Law No. 4875 and the Regulation on the Implementation of the Foreign Direct Investment Law) that is compliant with international standards; while at the same time offering equal treatment of all investors.⁴⁷ Furthermore, in the early 2000s, Turkey had severe challenges regarding its investment climate and undertook the Reform Program for Improving the Investment Climate. Lessons from such a process could be instructive in improving Zimbabwe's attractiveness for investment.⁴⁸

(2) Ghana – Ghana was chosen because it has a legislative framework (the Ghana Investment Act), an institutional framework (the Ghana Investment Promotion Centre in terms of the Ghana Investment Promotion Centre Act 865 of 2013) and an investment policy. In addition, the Government of Ghana has also made attracting FDI a major priority.⁴⁹ This strategy has paid off for Ghana as FDI inflows increased by an annual growth rate of 41% between 2006 and 2010, which is from \$636 million to \$2.527 billion. From 2010 to 2012, FDI inflows increased from \$2.527 billion to \$6.821 billion – a growth of 46%. This led Ghana to be ranked third in Africa in terms of FDI.

⁴⁷ Investment Support and Promotion Agency 'Investment Legislation' available at <http://www.invest.gov.tr/en-US/investmentguide/investorsguide/Pages/BusinessLegislation.aspx> (accessed 22 May 2015). In addition to the abovementioned pieces of legislation, there are also multilateral and bilateral investment treaties, as well as sub-regulation for the promotion of sectorial investments.

⁴⁸ Hoekman BM & Togan S *Turkey: Economic Reform and Accession to the European Union* (2005) 284.

⁴⁹ United States Department of State '2013 Investment Climate Report – Ghana' available at <http://www.state.gov/e/eb/rls/othr/ics/2013/204648.htm> (accessed 22 May 2016).

As a result of its success story in attracting FDI in the African context, as well as having a comprehensive legislative and institutional framework, Ghana makes a good comparator.

(3) Tanzania – Tanzania was selected because its legislative and institutional framework is condensed into one document, the Tanzania Investment Act, 1997. This will be instructive in providing Zimbabwe with options when reforming its legislative, institutional and policy frameworks on FDI. Furthermore, the Tanzanian government generally has a very favourable attitude towards investment.⁵⁰ In addition, the legal framework on FDI in Tanzania provides a new dimension in terms of property rights, in that it provides for strong guarantees against nationalisation and expropriation, conditions of which are of outmost importance to potential investors in Zimbabwe because of the land reform program and the disregard for property rights. Furthermore, in contrast to the ZIA, registration with the Tanzanian Investment Authority (TIC) is not mandatory, while incentives are offered for those who register.⁵¹ With the unique perspective Tanzania provides, it makes an interesting comparator.

Through lessons learnt as a result of comparing Zimbabwe's FDI framework to those of Ghana, Tanzania and Turkey, the research will make its findings and furnish recommendations. It is important to note that South Africa has the Protection of Investment Act 22 of 2015 (PIA) which was signed into law on 15 December 2015 by the South African President, Jacob Zuma.⁵² While the PIA was considered as a comparator, it could not be employed because, by the time of completion of this thesis, the Act was yet to come into force. Nonetheless, at certain points in this thesis,

⁵⁰ Rex Attorneys 'Tanzania Investment Legal Framework' available at <http://www.tanzaniainvest.com/economy/tanzania-investment-legal-framework> (accessed 22 May 2016).

⁵¹ Mkono NE & Tetteh-Kurjojie OA 'Foreign Investment in Tanzania' available at <http://www.corporatelivewire.com/top-story.html?id=foreign-investment-in-tanzania> (accessed 22 May 2016).

⁵² Jourbet N 'New Protection of Investment Act – The Implications for Foreign Investors' available at <http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/> (accessed 6 June 2016).

reference is made to this Act as it contains socio-economic imperatives⁵³ and departs from the traditional protections afforded to investors, towards a more progressive investment scheme set to be more beneficial for the locals.⁵⁴ Also, while Venezuela was also considered as a comparator because of its domestic law which balances the rights and obligations of investors and host states, it was not deemed an appropriate comparator because of the economic crisis the country is undergoing, owing, in part, to a failure to attract investment.

1.7 LIMITATIONS OF THE STUDY

- It should be noted that the reform of the investment regime in Zimbabwe is highly dependent on political will.
- Although certain pieces of legislation analysed in this study apply both to domestic and foreign investment, the discussion in this thesis will be limited to foreign investment.
- The study acknowledges the need for a broader perspective on factors affecting FDI such as the size of the economy, infrastructure, transport, tax rates, exchange rates, wage rates, political stability and labour skills; however, due to the 100 000 word limit, this study adopts a narrow approach.

1.8 OVERVIEW OF CHAPTERS

This thesis has six further chapters:

Chapter 2: Historical origin and development of international investment law up to the current international legal framework

This chapter traces the historical origin of IIL as it relates to FDI. The chapter conceptualises FDI and its rise, and outlines the development of investment protection

⁵³ See, for example, PIA, s 12(1).

⁵⁴ See PIA, s 12(1).

from the Phoenicians up until the later developments like the Organisation for Economic Cooperation and Development (OECD) Multilateral Agreement on Investment (OECD MAI). Thereafter, the chapter outlines the current international framework for investment.

Chapter 3: An analysis of Zimbabwe's domestic foreign direct investment framework

This chapter follows the history of how, and process by which, laws and regulations relating to FDI in Zimbabwe were made. In addition, the chapter considers which investment policies were instrumental in the drafting of these laws and regulations. More importantly, the chapter assesses whether Zimbabwe's legislation and institutional frameworks have been successful in clarifying critical investment climate related issues, such as, market access, rights and obligations, institutions regulating FDI and the accessibility and enforcement of dispute resolution.

Chapter 4: An examination of Zimbabwe's commitments from its bilateral investment treaties

This chapter examines Zimbabwe's BITs which have been signed and are in force. The objective of the chapter is to uncover Zimbabwe's commitments from its BITs. The chapter considers the exact guarantees made by Zimbabwe in these agreements, such as, national treatment (NT), most-favoured-nation treatment (MFN treatment), dispute resolution avenues and tax incentives. The chapter then unpacks the exact nature and scope of these commitments and determines if these are reflected in Zimbabwe's FDI legislative and regulatory framework.

Chapter 5: Regional trade agreements and the protection and facilitation of foreign direct investment in Zimbabwe

This chapter assesses the extent to which free trade agreements and trade liberalisation measures adopted by Zimbabwe limit or enhance the FDI legislative tools

in Zimbabwe. The chapter considers agreements ratified by Zimbabwe, under the African Union, COMESA and SADC. Non-binding instruments under these organisations are also considered.

Chapter 6: A comparison of Zimbabwe's foreign direct investment frameworks with those of Turkey, Ghana and Tanzania

This chapter compares Zimbabwe's legislative, institutional and policy frameworks governing FDI with the similar frameworks in Ghana, Tanzania and Turkey. The objective of the chapter is to see what lessons, if any, Zimbabwe can learn from other jurisdictions that have legal frameworks on the treatment of FDI.

Chapter 7: Conclusion and Recommendations

This chapter provides the conclusions of the study and furnishes recommendations.



CHAPTER 2

THE HISTORICAL ORIGIN AND DEVELOPMENT OF IIL UP TO THE CURRENT INTERNATIONAL LEGAL FRAMEWORK

*'Modern International Investment not only forms a spearhead of legal and economic globalisation ...but it has also evolved as a highly specialised and relatively autonomous sphere of international law.'*⁵⁵

2.1 INTRODUCTION

Foreign Direct Investment has grown to be a key vehicle for growth and development in virtually all economies and markets in today's globalised world.⁵⁶ The World Economic Forum Global Agenda Council on Global Trade and FDI notes that there is a need to develop and boost FDI inflows so as to stimulate the global economy, promote knowledge, create employment and enhance productivity.⁵⁷ Coupled with trade, these two become factors driving the world economy and cultivating prosperity.⁵⁸ The development of IIL has arguably been characterised by wide-ranging changes.⁵⁹ The policy space has shifted, between codes, agreements and charters

⁵⁵ Kläger R *'Fair and Equitable Treatment' in International Investment Law* (2011) 89. Robert Kläger discusses in his book the idea that modern international investment laws have developed into an autonomous field of international law. It is interesting to note the origins of International Investment Law and how it is currently regulated in the international domain. This is what this chapter is concerned with.

⁵⁶ Sauvart KP, Maschek & McAllister G 'Foreign Investment by Emerging Market Multinational Enterprises, the Impact of the Financial Crisis and Recession and Challenges Ahead', OECD Global Forum on Investment, 7-8 December 2008.

⁵⁷ World Economic Forum 'Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case of a Multilateral Investment Agreement' available at http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf (accessed 8 May 2016).

⁵⁸ It is worth noting that despite the fact that international trade and investment are often related to each other, they are conceptually distinct. On the one hand, trade involves the exchange of goods/service for a payment (usually in the form of money). On the other hand, investment is more a continuing relationship based on a sum of invested money. See Salacuse J *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (2013) 23.

⁵⁹ Weiler T *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment* (2013) 1.

aimed at multilateralising investment protection, BITs and presently the policy space is gravitating towards domestic regulation of foreign investments.

Recently, many countries and regions are in the process of exploring new ways and means to regulate foreign investment, especially because of the sustainable development goals (SDGs) and the general thrust for sustainability.⁶⁰ The general thrust for reform of IIL necessitates a rear-view glance at the past and a look to the future. Such an approach is beneficial because IIL has a rich history that should be utilised to assess the nature, character and function of modern-day ILL.⁶¹

This chapter, therefore, examines the conception and rise of FDI, summarises the historical origins of IIL and outlines the current international legal framework of FDI. While the chapter engages in a robust discussion of the historical origins and development of IIL, it does not purport to be a total manuscript on the development and origin of IIL. Focus is rather placed on the most important developments, particularly around the protection and treatment of foreign investment and the desire of the international community to formulate uniform rules on the regulation of foreign investment. The chapter mostly focuses on the substantive issues rather than the procedural issues in IIL.⁶²

⁶⁰ UNCTAD 'World Investment Report 2015: Reforming International Investment Governance' available at http://ec.europa.eu/finance/capital/third-countries/bilateral_relations/index_en.htm (accessed 13 June 2016)

⁶¹ Weiler T (2013) 1.

⁶² Substantive issues in IIL deal with matters, such as, admission and establishment, standards of treatment, MFN treatment and expropriation. On the other hand, procedural issues deal with matters, such as, methods of dispute resolution, procedural transparency, the independence and impartiality of arbitrators, consent to arbitration and jurisdiction and admissibility. See Muchlinski P, Ortino F and Schreuer C (eds) *The Oxford Handbook of International Investment Law* (2008) 227 – 1245.

2.2 FOREIGN DIRECT INVESTMENT: CONCEPTION AND RISE

2.2.1 Conception

FDI is a 'catchy' phrase that is often used loosely in many discussions and forums.⁶³ Over the years, interest in FDI has grown in a number of disciplines; ranging from international economics and business to law. Notwithstanding its popular usage, there is no general consensus as to what the term 'FDI' actually entails. In the 1960s, when FDI started to increase in volume, it was deemed to form part of the neo-classical theory which viewed it as a part of international capital trade.⁶⁴ The main underlying assumption of this theory was that countries were differently endowed in respect of labour and capital, and as such, a decision to invest had to take the relevant factors into consideration in a market based on perfect competition.⁶⁵

Since then, many scholars have attempted to define FDI. Froot advances that, simply put, FDI is the expansion or creation of enterprises into markets/economies beyond their borders.⁶⁶ His conception is based on his argument that FDI is an economic concept and should be viewed from the perspective of economic theory through the theory of the firm rather than as a concept of international trade and capital movements.⁶⁷ Froot's argument seems valid; however, in the new globalised era, his definition would fall short of international standards and usage as it does not qualify whether such investment should be of a lasting nature.

⁶³ From the outset it is important to clarify the difference between FDI and equity investment which will later be discussed in detail in this chapter. Briefly, FDI entails the acquisition of physical property (bought, built or otherwise acquired), such as, plantations and manufacturing plants, in another country. While equity investment, on the other hand, represents the movement of money, from one country to another, for the purpose of acquiring shares in a business enterprise in another country. According to Sornarajah the major difference between these two is that in the case of equity investment, there is a division between management and control of the business enterprise and the share ownership of a company. See Sornarajah M *The International Law on Foreign Investment* 3ed (2010) 8.

⁶⁴ Jones J & Wren C *Foreign Direct Investment and the Regional Economy* (2016) 27. See also Faeth I *Foreign Direct Investment in Australia: Determinants and Consequences* (2010) 37.

⁶⁵ Letto-Gillies G *Transnational Corporations and International Production: Concepts, Theories and Effects* 2ed (2012) 44. See also Faeth I (2010) 37.

⁶⁶ Froot KA *Foreign Direct Investment* (2008) 21.

⁶⁷ Froot KA (2008) 21.

According to the International Monetary Fund (IMF), FDI is an investment that is made by an investor who is resident in one country but acquires a lasting interest in an enterprise(s) in another country.⁶⁸ Such interest does not only entail ownership but should also involve control – a voice in the effective management of the enterprise.⁶⁹ Moreover, FDI is not only limited to investments by individuals but also encompasses foreign investment made by organisations.⁷⁰ Combined, the parent company (investing company) and the foreign company (affiliate company) make a multi-national company (MNC).⁷¹

While most definitions of FDI do not quantify how much ownership or control a foreign investor must acquire for it to qualify as FDI, the United Nations (UN) does, however, furnish a quantified definition. Pursuant to this definition of the UN, the control acquired by the foreign investor in the foreign company should be 10 per cent or more of the ordinary shares or voting power of an incorporated firm or its equivalent for an unincorporated firm.⁷² Investments falling below this threshold would therefore not qualify as FDI but would rather be classified as portfolio investments.⁷³

Sornarajah's conception of foreign investment goes beyond the fact that an investment has been made but also alludes to the nature of such investment.⁷⁴ His submission is that foreign investment involves, for the purposes of creating wealth, the transfer of

⁶⁸ International Monetary Fund 'Balance of Payments Manual' available at <https://www.imf.org/external/np/sta/bop/BOPman.pdf> (accessed 30 May 2016). See also United Nations Conference on Trade and Development 'Foreign Direct Investment (FDI)' available at [http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-\(FDI\).aspx](http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx) (accessed 30 May 2016). Wren and Jones also offer a similar definition. They advance that '[f]oreign direct investment (FDI) is the name given to the process where a firm from one country provides capital to an existing or newly-created firm in another country'. See Jones J & Wren C *Foreign Direct Investment and the Regional Economy* (2012) 7.

⁶⁹ United Nations Conference on Trade and Development 'Foreign Direct Investment (FDI)' available at [http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-\(FDI\).aspx](http://unctad.org/en/Pages/DIAE/Foreign-Direct-Investment-(FDI).aspx) (accessed 30 May 2016).

⁷⁰ Sayek K 'Foreign Direct Investment and Inflation' (2009) 76 *Southern Economic Journal* 419.

⁷¹ Blaine HG *Foreign Direct Investment* (2009) vii.

⁷² Direct Investment Technical Group 'Direct Investment – 10 Percent Threshold of Voting Power/Equity Ownership, Employment' available at <https://www.imf.org/External/NP/sta/bop/pdf/diteg2.pdf> (accessed 18 May 2016). See further Blaine HG (2009) vii.

⁷³ Blaine HG (2009) vii.

⁷⁴ Somarajah M (2010) 8.

physical or intangible assets from one jurisdiction to another.⁷⁵ The investor can possess partial or total control over the transferred assets.⁷⁶ More importantly, Sornarajah asserts that the transfer of tangible assets amounts to FDI, while the transfer of intangibles in the form of money for the purpose of purchasing shares amounts to portfolio investment.⁷⁷ Sornarajah's definition clearly differs from the definition of FDI as envisaged by the UN. To his credit, Sornarajah alludes to the fact that the definition of FDI may vary depending on the purpose for which it is crafted.⁷⁸

Wren and Jones are of the view that the standard definition of FDI is the one offered by the OECD.⁷⁹ According to the OECD:

'Foreign direct investment reflects the objective of obtaining a lasting interest by a resident entity in one economy ("direct investor") in an entity resident in an economy other than that of the investor ("direct investment enterprise"). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transaction between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.... [The] OECD recommends that a direct investment enterprise be defined as an incorporated enterprise in which an investor owns 10 percent or more of ordinary shares or voting power of an incorporated enterprise or the equivalent of an unincorporated enterprise.'⁸⁰

This definition offered by the OECD is the same as the one that has been offered by the UN, mostly in terms of the '10% ordinary shares or voting power' (10 per cent requirement). The OECD, however, is of the view that this '10 per cent requirement'

⁷⁵ Somarajah M (2010) 8.

⁷⁶ Somarajah M (2010) 8.

⁷⁷ Somarajah M (2010) 8. Sornarajah argues that the distinguishing feature of portfolio investment is that it is characterised by share ownership rather than management and control.

⁷⁸ Somarajah M (2010) 8.

⁷⁹ Jones J & Wren C (2012) 8. See original text of the benchmark definition in OECD *Benchmark Definition of Foreign Investment* 3ed (1996) 8.

⁸⁰ OECD (1996) 7 – 8.

must be applied strictly, while acknowledging the need by other countries to want to apply the 10 per cent requirement loosely.⁸¹ The argument offered by these countries is that a 10 per cent stake may not necessarily lead to a significant amount of influence. In other words, it does not guarantee an effective voice in the entity.⁸² In such instances of non-conformity with the 10 per cent requirement, the OECD suggests that such countries note the volume of transactions that fall below the 10 per cent cut-off, so as to facilitate international comparability.⁸³

In a globalised environment, it also becomes challenging to differentiate between transactions that qualify as FDI and those which would not ordinarily fall within the scope of such definition. This is as a result of the interconnectedness of economies and business, as evidenced through cross-border transactions; some transactions could at face value appear to be FDI, yet in effect they would not meet the criteria.⁸⁴ Therefore, it is important to note that FDI investment is not the only form of international investment.

Salacuse argues that similar to domestic investment, foreign investment can take various forms.⁸⁵ He advances the view that the most common forms are: (a) FDI; (b) foreign portfolio equity investment; (c) international loans; (d) international bonds; (e) supplier and other credits; and (f) other contractual arrangements.⁸⁶ Salacuse notes that FDI is an equity or ownership investment of more than 10 per cent by an investor in one country in a foreign enterprise.⁸⁷ Salacuse opines: 'Foreign direct investment has the effect of giving investors in one country ownership rights in and control over economic assets in another country.'⁸⁸ However, Salacuse's most important contribution to this debate lies in the distinction he makes between FDI and foreign

⁸¹ OECD (1996) 8.

⁸² OECD (1996) 8.

⁸³ OECD (1996) 8.

⁸⁴ OECD (1996) 8.

⁸⁵ Salacuse J (2013) 14.

⁸⁶ Salacuse J (2013) 14.

⁸⁷ Salacuse J (2013) 14.

⁸⁸ Salacuse J (2013) 15.

portfolio equity investment. He acknowledges the similarity of the two in the sense that they are both dependent on the amount of control attained. This similarity is unwittingly the greatest distinction between the two concepts since, unlike FDI, foreign portfolio equity investment occurs when a resident of one country makes a purchase of shares of a value less than 10 per cent of the overall voting power.⁸⁹

Having reviewed the literature, this thesis proposes that a sound and simplified definition of FDI would be: FDI is a direct investment by a resident of one country into the economy of another country, for the purpose of creating a lasting strategic relationship.⁹⁰ Having reviewed the conceptual definition of FDI, it becomes important to examine the rise of FDI to the centre stage it now enjoys in global policy and law.

2.2.2 Rise of FDI

Globalisation has had many positives: of note, the integration of capital markets.⁹¹ As a result, foreign investment has been on the rise in the last three decades. For example, between 1990 and 2005, global FDI inflows increased significantly from USD203 billion to USD974 billion.⁹² In 2010, global FDI inflows were set at USD1.2 trillion.⁹³ By 2015, global FDI inflows had risen to USD1.7 trillion (a 36 per cent increase from 2014).⁹⁴ Despite this upward trend of FDI globally, it is worth noting that most of the FDI outflows emanate from developed economies, and only a few of them at that.⁹⁵

⁸⁹ Salacuse J (2013) 15.

⁹⁰ This position mainly draws its strengths from the OECD benchmark definition. See OECD *OECD Investment Policy Reviews: China 2008 – Encouraging Responsible Business Conduct* (2008) 62,

⁹¹ Patterson NK *Foreign Direct Investment: Trends, Data Availability, Concepts and Recording Practices* (2004) 4,

⁹² Sayek (2009) 419.

⁹³ UNCTAD 'World Investment Report 2011: Non-equity Modes of International Production and Development' available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=84> (accessed 1 May 2017).

⁹⁴ UNCTAD 'Global Investment Trend Monitor' available at http://unctad.org/en/PublicationsLibrary/webdiaeia2016d1_en.pdf (7 June 2016).

⁹⁵ Jones J & Wren C (2016) ch 1.

In terms of inflows, developed countries have enjoyed more FDI inflows than developing countries. For example, in 2015 FDI to developed countries accounted for 55 per cent of global FDI inflows.⁹⁶ In 2010, developed countries had FDI inflows of USD602 billion, while developing countries only received FDI worth USD574 billion. Thus, it is noteworthy to recognise that despite the fact that FDI has increased over time, most FDI outflows flow into developed countries, as is generally the case with most forms of international investment.⁹⁷ As with most concepts, there develops a need to regulate it. Similarly, over time, laws have been developed to govern the movement of FDI at a domestic level as well as at an international level. The next section explores the historical origin of IIL.

2.3 ORIGINS OF INTERNATIONAL INVESTMENT LAW

2.3.1 Introduction

In recent times, very few areas of the law excite a legal mind as much as the law relating to foreign investment.⁹⁸ Much of the current discourse on the protection of foreign investment seems to point one in the direction that the law in this area is treaty based – which is, however, a relatively new trend.⁹⁹ An examination of this assertion would reveal that this has not always been the case. The focus has mostly been on what the law is and not what the law was. The origins of IIL are important because these allow for an analysis of whether the original form of the law has an effect on its current manifestation.

⁹⁶ UNCTAD 'Global Investment Trend Monitor' available at http://unctad.org/en/PublicationsLibrary/webdiaeia2016d1_en.pdf (7 June 2016). This was mostly as a result of surges in FDI in the EU and in the United States of America (US) where FDI increased fourfold. The bulk of these changes can largely be attributed to increases in cross-border mergers and acquisitions (M&As). To a lesser extent, there were also some minor contributions for greenfield investments.

⁹⁷ Salacuse J (2013) 15.

⁹⁸ Sornarajah M (2010) 1.

⁹⁹ Miles K *The Origins of International Investment Law* (2013) 19.

Only recently have there been a few works acknowledging the importance of the laws that existed before the system of BITs.¹⁰⁰ The origins of IIL are however as contestable as its current form. No general consensus exists as to how IIL has evolved.¹⁰¹ It is important that the history of IIL be clearly established as it informs the substance of the current framework.¹⁰² As a result, this section maps how IIL has evolved from basic promises of protection and security which were offered unilaterally or exchanged by States for their citizens or envoys to stay temporarily in another state, to the more recent robust BITs which offer specific protection for foreign investment.¹⁰³

2.3.2 Early history: fragments of the future system

The history of the treatment of the property of aliens (foreigners/outside) is not robust (in volume), but can be traced over centuries.¹⁰⁴ It is evident that historically, early politico-economic systems were highly sensitive towards the participation of aliens in their communities. As a result, more often than not, aliens were denied their legal capacities and rights.¹⁰⁵ Therefore, much emphasis in reviewing the historical origins of IIL must be placed on the tensions between territorial and personal sovereignty that were firmly grounded in interstate tensions.¹⁰⁶

2.3.2.1 The Phoenicians, 1550 BC – 300 AD

The Phoenicians were one of the earlier civilisations and trading nations (1550 BC – 300 AD) with a mercantile and agricultural economy. They were involved in business activities such as the value-addition of raw materials into crafts and luxury items and

¹⁰⁰ See Miles K (2013) 19 -70, Fahner K 'The Contested History of International Investment Law From a Problematic Past to a Current Controversies' (2015) 17 *International Community Law Review* 373 – 388, Newcombe AP & Paradell L (2009) 11 – 74, Vandeveld KJ (2005) 157 - 194 and Dolzer R & Schreuer C (2012) ch 1.

¹⁰¹ See Fahner J (2015) 373 – 378.

¹⁰² Miles K (2013) 20.

¹⁰³ Weiler T (2013) 3.

¹⁰⁴ Newcombe A & Paradell L (2009) 3. Writings on the history of foreign investment are very sparse and not detailed. Much about the history of IIL remains unwritten.

¹⁰⁵ Newcombe A & Paradell L (2009) 3.

¹⁰⁶ Douglas Z, Pauwelyn J & Viñuales JE (eds) (2014) ch 4.

the cultivation of products for export.¹⁰⁷ These goods were then traded in various areas of the Mediterranean. Through this trade in the Mediterranean, the Phoenicians were able to establish trade centre ports in areas such as Malta.¹⁰⁸ Their seafaring exploits would later lead them to colonise areas such as Carthage.¹⁰⁹ Moreover, as a result of their sea-trade, the Phoenicians were able to develop debt instruments, which were very sophisticated, on the basis of which debt instruments in current international trade have evolved.¹¹⁰ In terms of foreign investment, the Phoenicians made direct investments in ancient Israel.¹¹¹ The FDI took various forms such as those evidenced in the modern economy: for example, joint ventures, strategic alliances, and greenfield investments. Importantly, the FDI made by the Phoenicians crystallised an ‘important vacuum’, that there was no identifiable global law to regulate cross-border investments.

2.3.2.2 The Roman Empire, 27 BC – 476 AD

After the Phoenicians, the most common influence on IIL in early history was the Roman Empire (27 BC – 476 AD).¹¹² The Roman Empire had a systematic regime of contract law which also had a significant impact on the law of foreign investment.¹¹³ Cicero noted that: “[t]here shall not be one law at Rome, another at Athens, one now, another hereafter, but one everlasting and unalterable law shall govern all nations for all time.”¹¹⁴ These Roman ideas would forever influence modern private and

¹⁰⁷ Vaughn AG & Killebrew AE (eds) *Jerusalem in Bible and Archaeology: The First Temple Period* (2003) 126. See also Williamson JP *The Investment Banking Handbook* (1988) 157 & George FH *The Science of Investment* (1984) 71.

¹⁰⁸ Bishop RD, Crawford J & Reisman WM *Foreign Investment Disputes: Cases, Material, and Commentary* (2005) 2. See also International Business Publications *Malta Business and Investment Opportunities Yearbook Volume 1 Practical Information and Opportunities* (2009) 23.

¹⁰⁹ Moore K & Lewis DC *The Origins of Globalisation* (2009) 84.

¹¹⁰ Boulton CP *Cutting Through the Fog of Investment Wars: Prerequisites for Success* (2009) 38.

¹¹¹ Alvarez JE *The Public International Law Regime Governing International Investment* (2011) 13.

¹¹² Trackman L & Ranieri N (eds) *Regionalism in International Investment Law* (2013) 15.

¹¹³ Fu J *Modern European and Chinese Contract Law: A Comparative study of Party Autonomy* (2011) 23.

¹¹⁴ Fu J (2011) 23.

international law.¹¹⁵ Trackman and Rainieri contend that traces of the modern-day ILL can be found in the Roman Empire.¹¹⁶ They argue that the practices of the Roman Empire were later adopted by civil law jurisdictions and thereafter incorporated into the common law.¹¹⁷ Vadi, therefore, recognises that the origins of international law are inspired by civil law, which in turn recognised Roman law as the unit of measurement by which justice should be measured.¹¹⁸ This argument would, therefore, reinforce the often cited that international law, in particular ILL, espouses a Western character and culture which it conversely tries to universalise.¹¹⁹

2.3.2.3 The Hanseatic League, 1300

In the 13th century, the Hanseatic League (Hanse or Hansa)¹²⁰ was formed along the coast of Northern Europe (from the Baltic Sea to the North Sea) and inland.¹²¹ It is argued that initially the Hansa was a group of low-lying German towns which were involved in a commercial confederation.¹²² However, the League grew to be an economic alliance of trading cities who dominated trade along the coast of Northern Europe.¹²³ The League protected the commercial interests and privileges of its members which had been granted by foreign rules in cities abroad where they practiced their merchant trade. The main outcome of the trade of the Hansa as it relates to foreign investments is that NT obligations emerged as a result of concessions granted between host States and foreign merchants.¹²⁴ The idea behind

¹¹⁵ Fu J (2011) 23.

¹¹⁶ Trackman L & Ranieri N (2013) 15.

¹¹⁷ Trackman L & Ranieri N (2013) 15.

¹¹⁸ Vadi V *Analogies in International Investment Law and Arbitration* (2015) 71.

¹¹⁹ Vadi V (2015) 71.

¹²⁰ The word Hansa means a community or group of people with their membership dues or common law.

¹²¹ Jahnke C 'The City of Lübeck and the Internationality of Hanseatic Trade' in Wubs-Mrozewicz J & Jenks S (eds) *The Hanse in Medieval and Early Europe* (2012) 37.

¹²² Postel P 'The Hanseatic League and Its Decline' available at <http://www.hartford-hwp.com/archives/60/039.html> (accessed 13 June 2016).

¹²³ Eteris E 'Baltic Sea States' Integration History: Hanseatic League' available at <http://www.baltic-course.com/eng/analytics/?doc=41994> (accessed 11 September 2016).

¹²⁴ Yannaca-Small K *Arbitration* (eds) *Under International Investment Agreements: A Guide to Key Issues* (2010) 412.

these NT obligations, which are still at play in today's modern international investment system, was to 'insulate domestic investors and producers from foreign competition'.¹²⁵ Investors therefore had to be afforded treatment no less than that provided to domestic investors.¹²⁶ Miles contends that States therefore had equal bargaining power which they employed to ensure that their citizens investing in the region could be afforded the minimum standards of treatment.¹²⁷ Thus, it can be noted that Europe became a cradle of the rules on the protection of foreign investments.¹²⁸

2.3.3 Middle history: more formalised protection

2.3.3.1 Treaties of friendship, commerce and navigation; around and after 1700

In the Middle Ages, a new phenomenon arose which involved the signing of bilateral treaties on friendship, commerce and navigation (FCN treaties). These treaties became a staple of international diplomacy and many such treaties were signed during this era.¹²⁹ The bulk of these treaties addressed issues relating to amity, peace, friendship, commerce and navigation.¹³⁰ These treaties were well-known for addressing a myriad of issues, such as, human rights, trade and investment protection all in one document.¹³¹

¹²⁵ Yannaca-Small K (2010) 412.

¹²⁶ Schill SW (ed) *International Investment Law and Comparative Public Law* (2010) 579.

¹²⁷ Miles K (2013) 21.

¹²⁸ Miles K (2013) 21. Noticeably, one can note that gradually the tensions that were deep-seated in the concept of sovereignty were beginning to recede.

¹²⁹ Coyle JF 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 *Columbia Journal of Transnational Law* 302.

¹³⁰ Plischke E *U.S. Department of State: A Reference History* (1999) 54.

¹³¹ These FCN treaties also covered other issues, such as, intellectual property, immigration, taxation, shipping, inheritance, establishment and workers' rights. The protection offered by FCN treaties was quite vast. More recently, countries now prefer to conclude more specialised treaties dealing with specific issues. For example, specific bilateral agreements such as BITs and Double Taxation Agreements now cover investment and tax issues, respectively. More broadly, States have also done away with these FCN treaties by signing multilateral agreements, such as, the General Agreement on Tariffs and Trade (GATT) which now almost exclusively deals with trade matters or the International Covenant for Civil and Political Rights (ICCPR) to deal with the issues of human rights. These treaties have become relics of a past gone by. The USA, for example, has not concluded an FCN treaty in over 40 years. See Coyle JF (2013) 304 for a more detailed analysis of FCN treaties.

Furthermore, these treaties provided for compensation in cases of expropriation and guaranteed foreign nationals MFN treatment and NT for transactions conducted within the jurisdiction of the other party.¹³² Moreover, FCN treaties sought to clarify the legal protection and status of citizens of one country party to the agreement who were residing in the other country party to the agreement.¹³³ The breadth of the FCN treaties was therefore their distinguishing feature. As stated by Coyle, FCN treaties signified a 'meeting of the minds' in an assortment of areas.¹³⁴

In 1778, for example, the United States of America (USA) signed its first FCN treaty with France.¹³⁵ The treaty allowed for mutual MFN status to be accorded to areas related to commerce and navigation.¹³⁶ In addition, the treaty allowed for the mutual right of citizens of each country to own land in the other country.¹³⁷ Vessels of each country were also given protection while in the waters of the other, while France also was to keep at least one of its ports open for USA vessels.¹³⁸ In essence, the France and USA FCN treaty provided for the domestic protection of alien property.

Over the course of the next few decades, the USA would continue to sign FCN treaties with other countries, such as, the Netherlands, Sweden, Britain and Prussia.¹³⁹ Arguably, the FCN treaty between the USA and Great Britain still has legal force today.¹⁴⁰ The contents of these treaties however did not remain static, but rather shifted in focus over time, moving towards a wider breadth and scope.¹⁴¹ In so doing, greater protection of foreign property was realised over time, but only after World War II.¹⁴² By 1968, these treaties would die, which some attribute to foreign nationalisations

¹³² Vandeveldel KJ (2005) 159.

¹³³ Coyle JF (2013) 304.

¹³⁴ Coyle JF (2013) 304.

¹³⁵ Treaty of Friendship, Commerce and Navigation: France and USA, 1976.

¹³⁶ Treaty of Friendship, Commerce and Navigation: France and USA, 1976.

¹³⁷ Treaty of Friendship, Commerce and Navigation: France and USA, 1976.

¹³⁸ Treaty of Friendship, Commerce and Navigation: France and USA, 1976.

¹³⁹ Coyle JF (2013) 307.

¹⁴⁰ Coyle JF (2013) 307.

¹⁴¹ Coyle JF (2013) 307.

¹⁴² Coyle JF (2013) 307.

in the 1960s and diplomatic pressures of the Cold War.¹⁴³ FCN treaties also fell away from the diplomatic domain in other areas across the globe. What was, however, important was that FCN treaties were written guarantees between nations providing for foreign nationals to enjoy legal and economic rights in another country – in particular, the right to the protection of investments in foreign jurisdictions.

2.3.3.2 The French Declaration of the Rights of Man and of the Citizen, 1789

The French Declaration of the Rights of Man and of the Citizen (French Declaration) was based on the principles of equality and liberty for all citizens.¹⁴⁴ The French Declaration harmonised into one document numerous rights and guarantees.¹⁴⁵ These rights and guarantees were afforded to citizens and foreigners alike, as they were human rights.¹⁴⁶

The French National Assembly was however of the view that the ignorance, contempt and neglect of these rights of man were the reasons why there were so many tragedies and venality in governments.¹⁴⁷ The simple and incontestable principles provided for were thus sacred, inalienable rights of man which had to be respected and promoted.¹⁴⁸

Pursuant to the French Declaration, foreign investors, therefore, had an inviolable and sacred right to property, of which they could only be deprived in cases of public necessity.¹⁴⁹ However, before nationalisation could occur, it had to be determined

¹⁴³ Coyle JF (2013) 307. While the US no longer signed any more treaties after 1968, there are still at least 40 of these treaties that are still deemed to be in use.

¹⁴⁴ See French Declaration, Art 1 read with Art 4. Available at http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 20 June 2016).

¹⁴⁵ Censer JR & Hunt L *Liberty, Equality, Fraternity* 3ed (2004) 45.

¹⁴⁶ Many questions could however be raised about these inalienable rights of man. For example, how would these rights find application in the case of stateless persons? Gines KT *Hannah Arendt and the Negro Question* (2014) 70.

¹⁴⁷ French Declaration, Preamble.

¹⁴⁸ French Declaration, Preamble.

¹⁴⁹ French Declaration, Art 17.

whether it was legally possible to do so.¹⁵⁰ In cases where nationalisation was permissible, equitable compensation had to be afforded to the foreign investor.¹⁵¹ While the French Declaration had importance mostly in France, it signalled a clear paradigm shift in the rights which could accrue to foreign citizens, including foreign investors. The French Declaration marked an interesting end to the middle history of the IIL. The next segment scrutinises the early modern history of IIL.

2.3.4 Early modern history: towards the creation of uniform international investment law

International scholars are of the view that, in this era, it had become accepted that international law safeguarded the right to travel and trade of *aliens*.¹⁵² Moreover, customary international law was deemed at this stage to protect ‘the physical property of the foreign investor and other assets directly invested through principles of diplomatic protection and [S]tate responsibility’.¹⁵³ Tied to the international law doctrine of State responsibility for injuries to aliens was the standard of minimum treatment or international minimum standard,¹⁵⁴ below which States could not sink in the treatment of aliens.¹⁵⁵ The international minimum standard had by this era (early modern history)

¹⁵⁰ French Declaration, Art 17. See further, Dattu R ‘A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Investment on Investment’ (2000) 24 *Fordham International Law Journal* 280.

¹⁵¹ French Declaration, Art 17.

¹⁵² Newcombe A & Paradell L (2009) 4.

¹⁵³ Sornarajah M (2010) 9.

¹⁵⁴ The presence of the international minimum standard of treatment in international law has been traced as far back as ancient Greece. The minimum standard of treatment evolved simultaneously with the FCN treaties, the Calvo doctrine and later on with BITs. It has been defined by the OECD as ‘a norm of customary international law which governs the treatment of aliens, by providing a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property’. See Mussi AS ‘International Minimum Standard of Treatment’ available at <https://asadip.files.wordpress.com/2008/09/mst.pdf> (accessed 11 September 2016).

¹⁵⁵ See Sihata IF *Legal Treatment of Foreign Investment: “The World Bank Guidelines”* (1993) 79. See further the Issue Brief by the Centre for International Environmental Law Issue on International Investment Law and the Minimum Standard.

already developed to be a norm of customary international law.¹⁵⁶ However, its contents and status as a norm of customary international law was fiercely debated.¹⁵⁷

Some of the specific protections of customary international law that played a key role in this era included:¹⁵⁸ (1) the principle that foreign owned property must not be subjected to discriminatory legislation and therefore had to be treated similarly to domestically owned property; (2) the public purpose principle that dictated that the property of aliens could only be acquired for the purpose of public utility so as to protect foreign property from arbitrary seizures; (3) the principle of full compensation that needed alien property to be fairly compensated for when it was acquired; (4) the principle of *pacta sunt servanda* that spoke to the notion that a State was bound by its treaty obligations on the protection of foreign property; (5) the idea that a State could only claim for injury to the property of its national after the national had exhausted all avenues for recourse under domestic law; and (6) that it was generally acceptable for reparations to be made in a monetary form.

These protections offered by customary international law to alien property were, however, not adequate.¹⁵⁹ This was so as the provisions of customary international law were harder to apply where a developing country was the host State. For example, a host State would not be able to provide full compensation for the taking of alien property acquired for a public purpose. Not only was customary law inadequate in the case of developing countries, but some developed countries, such as the USA, also found the principles of customary international law rudimentary and unable to resolve

¹⁵⁶ Tudor I *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008) 61.

¹⁵⁷ Dimunopoulos A *EU Foreign Investment Law* (2011) 53. Falsafi argues that the international minimum standard of treatment of foreign investors' property is a contingent standard which may not operate *per se*. He argues that the international minimum standard is rather contingent upon the existence of well-established specific rules of international law. See Falsafi A 'The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard' (2007) 30 *Suffolk International Law Review* 317.

¹⁵⁸ Franci J & Nicholson SJ 'The Protection of Foreign Property Under Customary International Law' (1965) 6 *Boston College Law Review* 391 – 415.

¹⁵⁹ Vandeveldel KJ (2005) 159.

all the issues relating to the protection of alien property. As will be also be evidenced by the discussion below, there were also contestations as to the applicability of customary international law in favour of other emerging doctrines, such as the Calvo doctrine.¹⁶⁰

2.3.4.1 The Calvo doctrine, 1868

Up to this point, the main view was that ‘customary international law imposed an international minimum standard of the treatment of foreign investment’.¹⁶¹ In the 1860s however, the Argentine foreign minister and jurist, Carlos Calvo, formulated the ‘Calvo doctrine’ to contest this dominant view.¹⁶² Essentially, the Calvo doctrine was a treatise dealing with the pertinent issue of the protection of Latin American countries from diplomatic and military intervention by external parties as had happened in the past – thus safeguarding their political and economic independence.¹⁶³ The Latin American countries felt that the right to the diplomatic protection of citizens abroad was being abused.¹⁶⁴

The Calvo doctrine, in response to the abuse, thus entitled foreign investors only to the same standard of treatment as was given by the host country to domestic investors.¹⁶⁵ The doctrine espoused the principle of equality between aliens and nationals.¹⁶⁶ Essentially, aliens would, therefore, have the same rights as locals.¹⁶⁷

The Calvo doctrine stated:

¹⁶⁰ Vandevelde KJ (2005) 159.

¹⁶¹ Vandevelde KJ (2005) 159.

¹⁶² Salacuse JW (2ed) *The Law of Investment Treaties* (2015) 59.

¹⁶³ Baker JC *Foreign Direct Investment in Less Developed Countries: The Role of the ICSID and MIGA* (1999) 90. See also Hirsch M *Invitation to the Sociology of International Law* (2015) 78.

¹⁶⁴ Biglieri E & Prati J *Encyclopaedia of Public International Law* (2014) 62.

¹⁶⁵ Vandevelde KJ (2005) 159.

¹⁶⁶ Biglieri E & Prati J (2014) 62.

¹⁶⁷ Kuokkanen T *International Law and the Environment: Variations on a Theme* (2002) 186.

'It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended.'¹⁶⁸

The implication of this provision was that if, for example, the domestic country did not give its citizens compensation on expropriation of their property, it was, therefore, under no obligation to compensate foreigners in a similar position.¹⁶⁹ Aliens would thus have to surrender their rights under international law to a situation where matters involving aliens would be dealt with by domestic law.¹⁷⁰

The Calvo doctrine, therefore, rested on the twin pillars of non-intervention and absolute equality between aliens and locals.¹⁷¹ To supplement these twin pillars, the Calvo doctrine also gave the host nation jurisdiction over any disputes with an alien and denied the responsibility of the host to compensate the foreign investor for losses in case of *force majeure* (any form of war or civil unrest).¹⁷² It is worthwhile noting that the Calvo doctrine did not completely bar the use of internal law mechanisms but simply required that all internal avenues be exhausted first.¹⁷³

The principles laid down by the Calvo doctrine were espoused in the treaties between Latin American countries,¹⁷⁴ as well as in their municipal laws and constitutions.¹⁷⁵ Notwithstanding the fact that the Calvo doctrine was popular in the Latin American countries, it never achieved the standing of a legitimate principle of customary international law, despite the fact that it attempted to alter the international rules relating to relations between sovereign States and relations between host countries

¹⁶⁸ Cited in United Nations *Yearbook on the International Law Commission* 2002 vol 2 part 1 (2010) 76.

¹⁶⁹ Metzger SD *Private Foreign Investment and International Organizations* (1968) 290.

¹⁷⁰ Kuokkanen T (2002) 186.

¹⁷¹ Newcombe AP & Paradell L (2009) 13. In addition to the twin pillars, one could also add that the host country has jurisdiction over all disputes with foreign investors.

¹⁷² Filho MTF, Lixinski L & Giupponi MBO (eds) *The Law of MERCOSUR* (2010) 280.

¹⁷³ Fru ND (2011) 18.

¹⁷⁴ For example, the Andean Commission Pact 1970 and the 1976 Opinion on Transnational Enterprises of the Inter-American Judicial Committee. Thus the attempts to codify the Calvo doctrine in Latin America were to a greater extent successful.

¹⁷⁵ Lu KW, Verheyen G & Perera SM (eds) *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (2009) 3.

and investors.¹⁷⁶ While the Calvo doctrine might have inspired Latin American countries to engage in what could be termed a 'denial of justice' to foreign investors in their jurisdictions, this doctrine did however not bar countries involved in investment disputes not involving Latin American countries from claiming on behalf of their citizens their rights under customary international law.¹⁷⁷

The Calvo doctrine thus grew to be a dissenting voice expressed by the Latin American developing countries against the views of the developed countries. By 1903, the tensions between these two diverging camps had intensified significantly, with the situation gradually becoming untenable following the seizure of property belonging to foreign nationals by the Venezuelan government without compensation.¹⁷⁸ The Venezuelan government insisted that this was not an inter-State dispute but rather a dispute between the government and private individuals residing within their borders.¹⁷⁹ Therefore, in their view, the situation did not necessitate a military strategy by the sovereign countries to which these private actors were citizens. As a result, the British, the Germans and the Italian authorities decided to take action by blockading Venezuelan ports so as to bar any form of trade through these ports.¹⁸⁰

The Calvo doctrine thus was of a great significance in the development of foreign investment jurisprudence. It underpinned a 'fundamental doctrinal division' in the treatment of foreign investment under international law.¹⁸¹ Notwithstanding the fact that by rejecting the international minimum standard and replacing it with a much lower NT standard based on equality, the Calvo doctrine inspired military responses, there was in principle no problem with the arguments of the Calvo doctrine.¹⁸² This can be

¹⁷⁶ Newcombe AP & Paradell L (2009) 13. See also Lu KW, Verheyen G & Perera SM (2009) 3.

¹⁷⁷ Lu KW, Verheyen G & Perera SM (2009) 4.

¹⁷⁸ Filho MTF (2010) 280. The tensions between these the Latin American countries and the developed countries was also exacerbated by grudges that arose from the past period of colonialisation.

¹⁷⁹ Filho MTF (2010) 280.

¹⁸⁰ Filho MTF (2010) 280

¹⁸¹ Schwebel S 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 *American Society of Internal Law Proceedings* 27.

¹⁸² Paparinskis M *The International Minimum Standard and Fair and Equitable Treatment* (2013) 24.

evidenced by the acceptance of some of the arguments of the Calvo doctrine in subsequent practice with some of its principles influencing certain provisions in BITs and municipal law.¹⁸³ However, the Calvo doctrine was only partially incorporated into general international law.¹⁸⁴

2.3.4.2 The Drago doctrine, 1902

The intervention by the British, German and Italian governments between 1902 and 1903 in Venezuela had far-reaching implications. One of the results was the founding of the Drago doctrine. The Drago doctrine emerged out of a letter that was written by the Argentine foreign minister at the time, Luis M Drago, to the USA, in which he set out a narrower claim after the 1902 Venezuelan saga.¹⁸⁵ In this letter, Drago claimed that 'the issuance of a foreign debt is a sovereign act and that the use of military force to collect it was not justified under international law or the domestic law of nations, such as the United States'.¹⁸⁶

The premise of this note was founded on the theory of modern public international law which dictates that non-intervention is vital to the realisation of freedom, independence and equality in the contemporary environment.¹⁸⁷ The underlying argument was that if an interventionist approach was allowed to prevail, it would result in stronger States hiding behind the veil of non-payment of debts as a pretext for a military occupation to advance imperialistic agendas.¹⁸⁸ Drago, however, cautioned that the non-

¹⁸³ Paparinskis M (2013) 24. See also Hirsch M (2015) 79.

¹⁸⁴ Hirsch M (2015) 79. The Calvo doctrine as, mentioned before, had a wider effect in Latin American countries. It was taught in law schools in Latin America and was widely entrenched as Latin American thinking that reflected the values of the region.

¹⁸⁵ King J *The Doctrine of Odius Debt in International Law* (2016) 9.

¹⁸⁶ King J (2016) 9.

¹⁸⁷ Likosky M (ed) *Foundations of World Order: The Legalist Approach to International Relations (1898-1922)* (1999) 81.

¹⁸⁸ Waibel M *Sovereign Defaults before International Courts and Tribunals* (2011) 35. See also Boyle FA (1999) 81 & King J (2016) 9.

interventionist approach was no defence for 'bad faith, disorder, and deliberate and voluntary insolvency'.¹⁸⁹

The Drago doctrine was codified through the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contractual Debts of 1907 (Drago-Porter Convention) at the Second Hague Peace Conference.¹⁹⁰ The Drago-Porter Convention was inspired by some clauses in the Calvo doctrine but introduced certain elements of its own.¹⁹¹ However, unlike the Drago doctrine, the Drago-Porter Convention had a much wider scope.¹⁹² The Drago-Porter Convention not only dealt with bonded debts but also with other contractual debts.¹⁹³ The Drago-Porter Convention declared that international investment related disputes in Latin American countries should be submitted for arbitration pursuant to the procedure in Part IV, Chapter III of the Convention for the Pacific Settlements of International Disputes (Hague 1).¹⁹⁴ The practical consequences of the Drago-Porter Convention for investment law was therefore that States could not use armed force to recover debts unless there was a refusal to submit the claim to arbitration.¹⁹⁵

2.3.4.3 The Kellogg-Briand Pact, 1928

The evolution of the doctrine on the restriction of force in the recovery of debts did not end with the Drago doctrine. It continued with a raft of measures adopted taken in treaties and agreements in later years. In 1919, the League of Nations imposed

¹⁸⁹ Cited in Waibel M (2011) 35.

¹⁹⁰ United Nations (2010) 76.

¹⁹¹ Fru ND (2011) 18.

¹⁹² Megliani M *Sovereign Debt: Genesis - Restructuring - Litigation* (2014) 26.

¹⁹³ Megliani M (2014) 26.

¹⁹⁴ Drago-Porter Convention, Art 1 as read with Art 2. See further Yale Law School 'Laws of War: Pacific Settlements of International Disputes (Hague 1) available at http://avalon.law.yale.edu/19th_century/hague01.asp (accessed 11 September 2016).

¹⁹⁵ Sauvart KP (ed) *Yearbook on International Investment Law & Policy 2010-2011* (2012) 557.

diplomatic restrictions on the use of force.¹⁹⁶ Soon after, the USA together with other powers signed the Kellogg-Briand Pact of 1928 (Kellogg-Briand Pact).

The Kellogg-Briand Pact arose as a result of the work of the French Foreign Minister, Aristide Briand, and the USA Secretary of State, Frank B. Kellogg.¹⁹⁷ Briand proposed that the USA and France should outlaw war between them. This proposal was then universalised by Kellogg in an attempt to have all signatories renounce war as a solution to international controversy or as a tool of national policy.¹⁹⁸

This treaty formally outlawed war, and removed war as an instrument of national policy.¹⁹⁹ War would only be an option if it was undertaken in self-defence or if force was used as a sanction for the violation of the Pact.²⁰⁰ The Pact was marred by several challenges, such as the fact that: (1) it did not contain any enforcement mechanisms;²⁰¹ (2) it could only come into force, after all the signatories ratified it, the ratification of which was not forthcoming from many countries;²⁰² (3) the issue of self-defence was not clearly articulated in the Pact;²⁰³ (4) the treaty did not reflect the view of the entire international community, and; (5) there were no clear limits as to when war would be legal. As a result, the treaty was of little significance and had limited effect in preventing World War II or the militarism that occurred in the 1930s.²⁰⁴ After

¹⁹⁶ Blokker NM & Schrijver N (eds) *The Security Council and the Use of Force: Theory and Reality, a need for change?* (2005) 32. When the treaty was initially signed, only 15 countries did so. However, the number soon grew to 62 and much later to 68.

¹⁹⁷ Office of the Historian 'The Kellogg-Briand Pact, 1928' available at <https://history.state.gov/milestones/1921-1936/kellogg> (accessed 17 June 2016).

¹⁹⁸ Lynch TJ *The Oxford Encyclopaedia of American Military and Diplomatic History* (2013) 609.

¹⁹⁹ Kellogg-Briand Pact of 1928, Art 1 as read with Art 2.

²⁰⁰ Howe B & Kondoch B (eds) *The Legality and Legitimacy of the Use of Force in North-East Asia* (2013) 14. The use of war in self-defence was however not clearly dealt with in the treaty.

²⁰¹ Yilmaz S *Turkish-American Relations, 1800-1952: Between the Stars, Stripes and the Crescent* (2015) 86.

²⁰² Karski J *The Great Powers and Poland: From Versailles to Yalta* (2014) 104.

²⁰³ Howe B & Kondoch B (2013) 14.

²⁰⁴ Dinstein Y *War, Aggression and Self Defence* 3ed (2011) 85. See also Lynch T (2013) 608.

the Kellogg-Briand Pact, an outright prohibition on the use of force would later emerge in the UN Charter of 1945 (Havana Charter).²⁰⁵

2.3.4.4 The Hull doctrine, 1938

The tensions between countries that subscribed to international customary law and those that favoured the Calvo doctrine continued to persist over time. While in the past the tension had led to serious escalations, the tension climaxed in 1938 when Mexico relied on the “Calvo clause” to defend its expropriation of property owned by citizens of the USA.²⁰⁶ The view under customary international law is:

‘For expropriation to be lawful, the taking must be made in in the public interest, on a non-discriminatory basis, under due process of law, and provision must be made for prompt, effective and adequate compensation.’²⁰⁷

The expropriation without compensation of US property was thus contrary to customary international law. In response to the actions by the Mexican government, the then US Secretary of State, Cordell Hull, sent a note detailing the response of the USA.²⁰⁸ This note was to be later known as the “Hull doctrine”. Hull wrote in his note:

“[U]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof.”²⁰⁹

²⁰⁵ The Final Act and Related Documents of the United Nations Conference on Trade and Employment, Havana, Cuba, 21 November 1947 to 24 March 1948 (Havana Conference), included the draft Charter for the International Trade Organisation.

²⁰⁶ Wellhausen RL *The Shield of Nationality* (2014) 201. The Hull doctrine is still being applied by many States today. For example, the Botswana Constitution, in compliance with the Hull doctrine allows for the speedy payment of adequate compensation in cases of any compulsory acquisition of property. See Wouters J et al *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* vol 6(2015) 153.

²⁰⁷ Brown C (ed) *Commentaries on Selected Model Investment Treaties* (2013) 677. See also, Switzerland – Colombia BIT.

²⁰⁸ Wellhausen RL (2014) 201.

²⁰⁹ Hackworth G (ed) *Digest of International Law* (1943) 657.

In dealing with the Hull rule in an investment dispute, the Court in *Banco Nacional de Cuba v Chase Manhattan Bank*²¹⁰ said that the Hull doctrine can be reflected as follows:

“The right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective, and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement.”²¹¹

Pursuant to this doctrine, the award of full compensation was granted at market value.²¹² The foreign investor was also entitled to approach an overseas tribunal for relief if the remedies offered by the host country proved to be inadequate.²¹³

This concept of ‘full compensation’ has been contested by numerous developing countries who are of the view that they were entitled to only award ‘appropriate compensation’.²¹⁴ The Hull doctrine also clashed with the Calvo doctrine which required that a foreign investor be afforded no more favourable treatment than that which is accorded to citizens in the domestic country.²¹⁵ The proponents of the Calvo doctrine argued that by entering the domestic market, the foreign investor willingly assumed risks to his investment, and should on the basis of this decision be entitled to the same standard of treatment as that accorded to citizens.²¹⁶

As noted earlier in this thesis, the implication of the Calvo doctrine would be that if the host State does not afford compensation for expropriation, property of foreign investors could also be expropriated without compensation.²¹⁷ Botchway concedes that the ultimate victor in the Calvo-Hull contest was the Hull doctrine – which was

²¹⁰ 658 F.2d 875.

²¹¹ *Banco Nacional de Cuba v Chase Manhattan Bank*, 514 F. Supp. 5 (S.D.N.Y. 1980), 888 – 893. The USA thus sought to enforce diplomatic protection and also rejected the notion that it could not come to the aid of its citizens who stayed abroad. See Dugan C et al *Investor-State Arbitration* (2011) 432.

²¹² Brown C (2013) 677.

²¹³ Sornarajah (2010) 36.

²¹⁴ Brown C (2013) 677.

²¹⁵ Sornarajah (2010) 36.

²¹⁶ Sornarajah (2010) 37.

²¹⁷ Part 2.3.4.1 above.

in essence, a victory for the investors.²¹⁸ The standard espoused by the Hull doctrine of 'adequate, effective and prompt compensation' would in the first half of the 20th century define how expropriation claims were dealt with at an international level.²¹⁹ Thereafter, new thoughts on the protection of alien property would again surface. The Havana Charter would be the next major concept in these developments.

2.3.4.5 The Havana Charter, 1947

The modern global trading system had its historical origins in 1947 when a group of countries led by the USA committed to tackle the inertia that had characterised the global economy after World War 2.²²⁰ The initial idea to resolve this stagnation was to create a global institution, the International Trade Organisation (ITO), which would fill the vacuum in trade coordination. The ITO would be a specialised institution of the UN and was supposed to join the World Bank and the IMF as 'a third 'Bretton Woods' institution, dealing with the trade side of international cooperation. This is how the Bretton Woods Conference of 1944, which established the international institutions for monetary policy, saw the need to have a comparable institution which would facilitate matters in the area of trade.²²¹ In the meantime, the parties decided to negotiate a multilateral agreement on the reduction of tariffs as an interim measure until deliberations on the ITO were finalised.

In November 1947, a month after the signing of the GATT,²²² the United Nations Conference on Trade and Development (UNCTAD) took place in Cuba.²²³ The

²¹⁸ Botchway FN (ed) *Natural Resource Investment and Africa's Development* (2011) 12.

²¹⁹ Dugan C (2011) 432.

²²⁰ Shi J *Free Trade and Cultural Diversity in International Law* (2013) 125.

²²¹ Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* (2017) 82.

²²² The GATT 1947 did not provide for any rules for foreign investment. GATT 1947, however, still in part succeeded in advancing the idea of multilateral rule making rather than bilateral rule making, but only in the context of trade regulation.

²²³ These discussions were finalised in March 1948.

outcome of the conference was the creation of the Havana Charter.²²⁴ Amongst other things, the Havana Charter provided for policy on employment and economic activity, economic development and reconstruction, commercial policy, settlement of differences and the establishment of the ITO.²²⁵ The scope of the Havana Charter was too broad and this would prove to be one of the things that underscored the failure of the Charter. Article 12 of the Havana Charter recognised the role that international investment, both private and public, could play in aiding economic development, reconstruction and social development.²²⁶ Article 12(1)(a) of the Charter provided that ‘the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments’.²²⁷ Article 12(1)(b) showed a clear intention to allow foreign investment to take place amongst the Member States. Similarly, Article 12(1)(b) acknowledged the need for the safeguarding of these investments. Importantly, Article 12(1)(d) of the Havana Charter encouraged Members to enter into bilateral and multilateral agreements on investment in order to promote economic development amongst the Member States.²²⁸ This was the first time that a charter or treaty actually encouraged Members to enter into specific bilateral or multilateral treaties on investment.

While Art 12 encouraged foreign investments, this was, however, not without limitations. In terms of Art 12(1)(c), a Member has a right:

²²⁴ World Trade Organisation ‘Pre-WTO texts’ available at https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm (accessed 20 June 2016).

²²⁵ See Havana Charter. Arts 71 – 91 of the Havana Charter dealt specifically with the establishment of the ITO. Due to a variety of reasons, the ITO was never established. See Kim DW *Non-violation Complaints in WTO Law: Theory and Practice* (2006) 26, Budzinski OT *The Governance of Global Competition: Competence Allocation in International Policy Competition* (2008) 136 & Spero JEE & Hart JA *The Politics of International Economic Relations* 7ed (2009) 74. Pending the entry of the ITO, the GATT was implemented to protect and implement tariff concessions that had been negotiated.

²²⁶ Havana Charter, Art 12.

²²⁷ Havana Charter, Art 12(1)(a).

²²⁸ Havana Charter, Art 12(1) (d). If Members were to enter into such bilateral or multilateral treaties on investment, they would however need to be prepared to grant the rights in Art 12(1)(c) of the Charter.

- (i) 'to take any appropriate safeguard measures necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
- (ii) to determine whether and, to what extent and upon what terms it will allow future foreign investment;
- (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;
- (iv) to prescribe and give effect to other reasonable requirements with respects to existing and future investments.'²²⁹

Art 12(2) of the Charter reinforced the rights in Art 12(1)(c) by providing for the protection and promotion of Art 12(1)(c) as well the duty to avoid discrimination between investments.

Despite the success of the Havana Charter in encouraging foreign investment, providing for rights of host Member States to determine terms for inward bound foreign investment, and calling for non-discrimination of investments, 'the Havana Charter contained no specific obligations or duties granting access to foreign investment'.²³⁰

The Members rather favoured addressing the issue through the negotiation of bilateral and multilateral treaties.²³¹ The implication of such terms was that Members' trade obligations would co-exist with bilateral and multilateral treaties on investment.²³² This ended the 'natural alliance' that had been witnessed for so long in the FCN treaties.²³³ Furthermore, the provisions of the Havana Charter on foreign investment were not adequate. 'Every positive statement was closely circumscribed by qualifications and exceptions whose extent could not be determined without any precision.'²³⁴

²²⁹ Havana Charter, Art 12 (1)(b).

²³⁰ Echandi R & Sauvé P (eds) *Prospects in International Investment Law and Policy: World Trade Forum* (2013) 108.

²³¹ Echandi R & Sauvé P (2013) 108.

²³² Baetens F (ed) *Investment Law Within International Law: Integrationist Perspectives* (2013) 263.

²³³ Baetens F (2013) 263. See section 2.3.3.1 of this paper.

²³⁴ Fatouros AA 'An International Code to Protect Private Investment - Proposals and Perspectives' (1961) *University of Toronto Law Journal* 80.

As a result of these challenges, the Havana Charter died at birth, never entering into force despite numerous attempts to try to resuscitate it.²³⁵ In part, the reason why the Havana Charter did not succeed was because the USA, the country leading the negotiations, refused to submit the Havana Charter for ratification to its Senate.²³⁶ The Havana Charter was however, by and large, one of the most formidable earlier attempts at the codification of treatment standards for foreign investment. The next most important such attempt was the Bogota Agreement.

2.3.4.7 Bogota Agreement, 1948

Shortly after the Havana Charter fell through and was succeeded by the much more docile GATT; the Ninth International Conference of American States adopted another multilateral treaty, the Economic Agreement of Bogotá (Bogota Agreement), which like the Havana Charter attempted to deal with the protection of foreign investment.²³⁷ Unlike the Conference on the adoption of the Havana Charter which represented 52 countries from different parts of the globe; the Bogota Agreement had a purely regional character, and was signed by 20 Latin American countries.²³⁸

The Bogota Agreement focused on two main areas, namely, investment policy and financial and technical cooperation.²³⁹ The Bogota Agreement was crippled by the same challenges that hamstrung the Havana Charter. The USA which was one of the key parties in both negotiations boasts of a vibrant and technologically enabled economy. Such an economy is able to churn out high volumes of goods and maintain a high standard of life for citizens. As a result, the USA was all for the idea of freedom

²³⁵ Kim DW (2006) 26, Budzinski OT (2008) 136 & Spero JEE & Hart JA (2009) 74.

²³⁶ Douglas Z, Pauwelyn J & Viñuales JE *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) ch 6.

²³⁷ American Treaty on Pacific Settlement "Pact of Bogota", signed at Bogota, 30 April 1948.

²³⁸ Newcombe AP & Paradell L (2009) 23.

²³⁹ Lockwood JE 'The Economic Agreement of Bogota' (1948) 42 *The American Journal of International Law* 612.

of private international trade and investment to the fullest extent possible – an approach that was not favoured by the other contracting parties.²⁴⁰

In terms of regulation, the Americans wanted adequate laws which provided effective protection against expropriation and the discriminatory application of judicious laws – to which the other countries in turn argued sovereignty.²⁴¹ The result was a myriad of compromises. Against this background, it is, therefore, noteworthy to consider some of the provisions contained in the Bogota Agreement. Article 22 stated:

‘Foreign capital shall receive equitable treatment. The States therefore agree not to take, unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied.’

Similarly, Article 23 of the Bogota Agreement provided that there should be equitable treatment of workers, both foreign and domestic. This equitable treatment would also extend to the training of all employees.²⁴² The Bogota Agreement thus had in the form of Articles 22 and 23 a clear ‘equitable treatment’ policy that was to inform many treaties and pieces of legislation after it. Modifications such as ‘fair and equitable treatment’ would soon emerge based on the original wording in the Bogota Agreement (and in part the League of Nations Covenant 1919). Article 24 of the Bogota Agreement highlighted the need to subject foreign investment to domestic laws and that foreign investors should not interfere in domestic issues. Article 25 mandated that should the host country expropriate any property of a foreign investor; such expropriation should be accompanied by fair compensation that is afforded in a

²⁴⁰ Lockwood JE (1948) 612.

²⁴¹ Lockwood JE (1948) 612.

²⁴² Article 23 however observed that a reasonable number of foreign employees and executives should be appointed.

timeous, effective and adequate manner.²⁴³ Eventually, the quantum of the compensation would be determined through the applicable municipal law.²⁴⁴

In summary, the Bogota Agreement therefore dealt with five main issues, namely: (1) equitable treatment; (2) prohibition of unjustifiable restrictions on earnings transfers; (3) emphasis on the importance of foreign investment which not only promoted profit but also uplifts the development of the host country; (4) provision of timeous, effective and adequate compensation in the case of expropriation; and (5) non-intervention by foreign investors in domestic matters. The Bogota Agreement also covered other minor matters, such as, the providing of uniform accounting standards and fair disclosure to foreign investors (Art 26) as well as the liberalisation of tax laws, the elimination of double taxation and the avoidance of cumbersome or discriminatory taxes (Art 27). Efforts to supplant these provisions in order to address some of the reservations that were raised, in particular to Art 25,²⁴⁵ were, however, unsuccessful. Despite the compromises made, the Bogota Agreement was never ratified and was subject to numerous reservations at the time of signing.²⁴⁶

2.3.4.8 ILA Draft Statutes of the Arbitral Tribunal for Foreign Investment, 1948

Up to this point, the main focus of customary international law had been on the substantive provisions related to investment. While there had been lukewarm discussions on the procedure of resolving investment disputes (for example, in the Havana Charter), there was no dedicated institution to deal with investment disputes. In 1948, an arbitral tribunal was proposed by the International Law Association (ILA) as a means to resolve international investment disputes.²⁴⁷

²⁴³ Bogota Agreement, Art 25.

²⁴⁴ This was drawn from certain restatements of the Calvo doctrine in the Bogota Agreement.

²⁴⁵ There were 8 reservations to Art 25.

²⁴⁶ Montt S *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT* (2009) 68.

²⁴⁷ Laird et al (2015) 129. The ILA Draft Statutes would provide for both investor-state dispute settlement and state-state dispute settlement.

Article 1 of the ILA Draft Statutes thus provided for the establishment of a 'foreign investments court'.²⁴⁸ The foreign investment court would have jurisdiction over 'any dispute arising out of any unreasonable or discriminatory impairment within the territory of any contracting party of the property of the nationals of the other Parties'.²⁴⁹ The scope of the foreign investments court would also extend to the interpretation or observance of any undertakings in relation to the investments of nationals of the other parties which the host state would have given.²⁵⁰ In the absence of an agreement to submit the dispute to the foreign investments court, the dispute could thus be submitted by either party to the International Court of Justice (ICJ).²⁵¹

Although the ILA Draft Statutes provided for investment disputes to be heard by the foreign investments court, the court could only be accessed after local remedies had been exhausted.²⁵² Once this pre-condition had been satisfied, the home state State could then institute arbitration proceeding by issuing a notice detailing the nature of the relief sought and the name of the arbitrator who had been appointed by the instituting party.²⁵³ At the Brussels Conference, the Parties resolved to adopt 'the applicable principle of arbitration in disputes between States and private parties concerning the protection of property and the enforcement of contracts between States and foreign private properties'.²⁵⁴

Despite the fact that the ILA Draft Statutes had their own shortcomings, such as the failure to clearly articulate the power of the arbitral tribunal, it was another landmark in the historical development of foreign investment law. It depicted yet another attempt

²⁴⁸ ILA Draft Statutes, Art 1.

²⁴⁹ ILA Draft Statutes, Art 1(a).

²⁵⁰ ILA Draft Statutes, Art 1(b).

²⁵¹ ILA Draft Statutes, Art 2.

²⁵² ILA Draft Statutes, Art 4(a).

²⁵³ ILA Draft Statutes, Art 5.

²⁵⁴ Sitjhoff AJ *Recueil Des Cours* vol 113 (1968) 156. The focus of the ILA Draft Statutes was therefore on investor-State arbitration. Even in modern times, where State-State arbitration is also provided for in treaties, its role has significantly been undermined. Only recently has State-State arbitration started to gain more prominence. See Roberts A State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 *Harvard International Law Journal* 1.

towards multilateral initiatives for the protection of foreign investment.²⁵⁵ In this instance, the process was driven by a non-governmental organisation. More importantly, the ILA Draft Statutes were evidence of the emerging drift away between investment protection and the regulation of trade and commerce, as had been previously witnessed in prior agreements, such as FCN treaties.²⁵⁶ The ILA Draft Statutes also represented a semantic and conceptual shift away from the mainstream protections afforded to aliens and their property.²⁵⁷ While the ILA Draft Statutes were progressive, they were, however, not adopted.

2.3.4.9 International Code of Fair Treatment for Foreign Investments, 1949

In 1949, the International Chamber of Commerce's (ICC) Committees on Foreign Investments and Foreign Establishments prepared the International Code of Fair Treatment for Foreign Investments (International Code), which was approved by the Quebec Congress, of the same year.²⁵⁸ The contracting parties were bound by their desire to expand the world economy and the idea that a generous flow of private investments was essential for realising the welfare of their people.²⁵⁹ In order to achieve these aspirations, the contracting parties decided to use civil, legal and fiscal safeguards to ensure the fair and non-discriminatory treatment of foreign investments of natural or juristic persons by host States.²⁶⁰

The International Code was applicable to a wide variety of investments, such as in relation to: real property; natural resources; commercial; financial; agricultural; industrial or transport services and equity investments in company shares and similar

²⁵⁵ Shan W & Su J *China and International Investment Law: Twenty Years of ICSID Membership* (2014) 131.

²⁵⁶ Shan W & Su J (2014) 131.

²⁵⁷ Newcombe AP & Paradell L (2009) 21.

²⁵⁸ See ILA Draft Statutes of the Arbitral Tribunal on Foreign Investments, Art 1(a).

e of Fair Treatment for Foreign Investments, drawn up by the ICC's Committees on Foreign Investments and approved by the ICC's Quebec Congress, June 1949. It is vital to note that the International Code was binding between the contracting parties.

²⁵⁹ International Code, preamble.

²⁶⁰ International Code, preamble.

holdings.²⁶¹ The contracting parties pursuant to Art 3 could not adopt any political, legal or administrative measures that were crafted to deter investments by citizens of other contracting parties within the respective domestic countries.²⁶² Article 4 of the International Code reinforces Art 3 by providing for non-discrimination against foreign nationals through administrative or legislative means.²⁶³

Therefore, the legal and judicial protection of the person, property (movable or immovable), and interest of foreign nationals could not be less favourable to that which what was to be afforded to local citizens²⁶⁴ – the treatment of which also extended to taxation.²⁶⁵ Foreign nationals were therefore, able to safeguard their legal rights and interests through the municipal courts as if they were citizens of the host country, without any distinction. More importantly, the International Code clarified an important issue on equitable treatment of citizens and foreign investors. Article 5 articulated that if citizens of the domestic country were denied their civil rights or rights under international law, this was not a valid reason for depriving foreign investors of their rights under the guise of avoiding preferential treatment.²⁶⁶ Subject to Article 9, the host country could not prevent foreign investors from transferring their profits abroad.

With regard to expropriation: the host country had to follow legal procedures and afford fair compensation to all foreign investors whose property has been expropriated.²⁶⁷ If a municipal law were to allow for expropriation, the State was then obliged to furnish the purpose and conditions of such expropriation.²⁶⁸ The basis for and the value of such expropriation had to be determined before the actual dispossession or

²⁶¹ International Code, Art 2.

²⁶² International Code, Art 3.

²⁶³ International Code, Art 4.

²⁶⁴ International Code, Art 5.

²⁶⁵ International Code, Art 7. To strengthen the protection of investments from double taxation, the contracting parties would also sign bilateral double taxation agreements.

²⁶⁶ International Code, Art 5.

²⁶⁷ International Code, Art 11. Recall the principle of customary international law discussed earlier which provides that alien property needed to be fairly compensated through full compensation when it is acquired.

²⁶⁸ International Code, Art 11.

expropriation took place.²⁶⁹ Furthermore, exchange control regulations could not be a factor in the non-compliance with the transfer of compensation to the affected parties.²⁷⁰ The compensation would then be payable in cash or other market securities of equal value.²⁷¹

The International Code did not address some important issues such as those addressed by the Bogota Agreement. One of these issues was the prohibition of interference of investors in domestic matters and politics. This issue had been partially tackled in the introduction report but was however not included in the final draft of the International Code.²⁷²

While the International Code catered for a wide number of issues discussed above, such as: national treatment, MFN treatment, the prohibition or restriction of transfer of funds, fair compensation, and binding international arbitration (before the ICC International Court of Arbitration), the contracting States were not keen to accept such a broad-ranging investment regime.²⁷³ Despite the failure of the International Code to materialise, it was one of the initiatives that had an important significance in rallying States towards a multilateral agreement on investment (MAI). The International Code thus signalled a conceptual and semantic change away from the outdated philosophies on the protection of aliens and their property.²⁷⁴

2.3.4.10 Inter-American Economic Agreement, 1957

A few years after the failure of the Bogota Agreement, there was an attempt to resuscitate the Agreement through a 'half-hearted and foredoomed effort to update and hence revive the draft Bogota Agreement (which had never entered into force)'²⁷⁵

²⁶⁹ International Code, Art 11.

²⁷⁰ International Code, Art 11.

²⁷¹ International Code, Art 11.

²⁷² See section 2.3.4.6 of this thesis.

²⁷³ Newcombe PA & Paradell L (2009) 21.

²⁷⁴ Newcombe PA & Paradell L (2009) 21.

²⁷⁵ Metzger (1968) 294.

at the 1957 Buenos Aires Economic Conference in Argentina. The sought outcome was to conclude a convention based on the submissions of the Inter-American Economic and Social Council in their Preliminary Draft of a General Inter-American Economic Agreement. The preliminary draft thus had similar provisions to those in the Bogota Agreement (and the Havana Charter), such as discrimination, transfer of capital and income, and fair treatment.

The parties agreed to protect investments by focusing their policies and measures on the protection of foreign investments by granting equitable treatment or compensation in the case of expropriation.²⁷⁶ Such expropriation would have to be fair and be discharged in a prompt, adequate and effective manner.²⁷⁷ Article 25 qualified the provision in the Bogota Agreement on the subjection of foreign capital to municipal laws. Article 25 stated:

'Foreign Private Investments are regulated by the Constitution and the laws in the country in which they are made, and are subject to jurisdiction of the ordinary courts of that country.'²⁷⁸

Article 25 thus gave express jurisdiction to municipal courts to deal with foreign private investments, contrary to the treatment under international law. Article 26 of the Inter-American Economic Agreement, on the other hand developed the concept in the Bogota Agreement that foreign investors should not interfere in the domestic affairs of the host country.²⁷⁹

By and large, the contracting parties had different views on the treatment of foreign investment. As a result, the final Convention that was developed was therefore

²⁷⁶ Inter-American Economic Agreement, Art 25.

²⁷⁷ Inter-American Economic Agreement, Art 25. Nwogugu argues that the provision on expropriation of property did not accord with international law and was therefore simply crafted to facilitate for certain objectives to be attained. See Nwogugu (1965) 142.

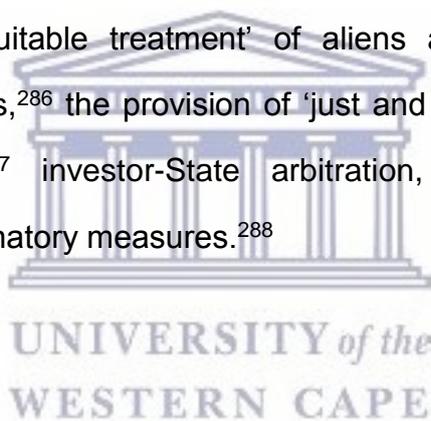
²⁷⁸ Inter-American Economic Agreement, Art 25.

²⁷⁹ The host country could therefore put in place measures to ensure that foreign investors do not interfere in domestic politics.

unsatisfactory to the majority of the States that participated.²⁸⁰ Not surprisingly, the outcome of the process was the same as that of its predecessor.²⁸¹

2.3.4.11 Abs-Shawcross Draft Convention on Foreign Investment, 1959

The 1959 Draft Convention on Investment Abroad (Abs-Shawcross Draft Convention) was the third non-governmental initiative to try to establish an international legal framework for investment (multilateral agreement).²⁸² This Draft Convention was created under the leadership of Hermann Abs, who was the Director-General of the Deutsche Bank, and Lord Shawcross, a former Attorney General of the United Kingdom (UK).²⁸³ The Abs-Shawcross Draft Convention harmonised two existing separate drafts into one unified text.²⁸⁴ Amongst other issues, the Draft Convention provided for 'fair and equitable treatment' of aliens and their property,²⁸⁵ the observance of undertakings,²⁸⁶ the provision of 'just and effective' compensation in cases of expropriation,²⁸⁷ investor-State arbitration, and protection against 'unreasonable and discriminatory measures'.²⁸⁸



²⁸⁰ Nwogugu EI *The Legal Problems of Foreign Investment in Developing Countries* (1965). The Inter-American Conferences that followed after this unsuccessful attempt at a treaty never raised the property protection issue which was the subject of much debate in the making of the Inter-American Economic Agreement. Both the USA and the Latin American countries felt that the debate was an outdated one which did not deserve further attention. See Metzger (1968) 295.

²⁸¹ Nwogugu EI *The Legal Problems of Foreign Investment in Developing Countries* (1965) 141.

²⁸² Newcombe PA & Paradell L (2009) 21.

²⁸³ Newcombe PA & Paradell L (2009) 21.

²⁸⁴ Rahman FE & Sheikh AEI 2ed *The Legal Regime of Foreign Private Investment in Sudan and South Arabia* (2003) 163. The one was the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries that was prepared by the Society to Advance the Protection of Foreign Investments (led by Herman Abs); while the other was the a draft constructed by a group of legal practitioners (led by Lord Shawcross). Prior to the unification of these drafts, the two had been separately published. See Shihata IFI(1993) 272 & Voss JO *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors* (2010) 226.

²⁸⁵ Abs-Shawcross Draft Convention, Art I. The 'fair and equitable treatment'/ 'fair treatment' of aliens and their property was first evidenced in the FCN treaties. See part 2.3.3.1 above. See further Bjorklund AK, Laird IA & Ripinsky S (eds) *Investment Treaty Law: Current Issues. Remedies in international investment law emerging jurisprudence in international investment law* (2009) 211.

²⁸⁶ Abs-Shawcross Draft Convention, Art II.

²⁸⁷ Abs-Shawcross Draft Convention, Art III.

²⁸⁸ Abs-Shawcross Draft Convention, Art III. See also Laird IA et al *Investment Treaty Arbitration and International Law vol 8* (2015) & Newcombe PA & Paradell L (2009) 21.

The authors of the Abs-Shawcross Draft Convention were of the view that the Draft Convention reaffirmed the traditional rules of international law relating to the treatment of property rights and the interests of aliens.²⁸⁹ The Draft Convention closely resembled modern investment agreements but however adopted a wider formulation of what was to be deemed property.²⁹⁰

The Abs-Shawcross Draft Convention was deliberated on by the OECD [for possible adoption by Members and non-Members alike],²⁹¹ but it did not receive adequate support from OECD Members and was therefore subsequently never formally adopted.²⁹² Schwarzenberger commented that the political price to pay to ratify conventions such as the Abs-Shawcross Draft Convention, was a price too high to pay even for moderate capital importing countries.²⁹³ Amongst other challenges, the Abs-Shawcross Draft Convention failed to adequately address the interests of host States and failed to strike a balance between the rights of investors and developing States.²⁹⁴ Notwithstanding these challenges to the Abs-Shawcross Draft Convention, the underlying issue was that there was simply no appetite to be bound by a binding MAI.²⁹⁵ The bulk of the provisions of the Abs-Shawcross Draft Convention would find their way into the 1967 Draft Convention on the Protection of Foreign Property proposed by the OECD, which would, however, suffer the same fate as the Abs-Shawcross Draft Convention.²⁹⁶

As a result of its deliberations by the OECD in documents such as the Abs-Draft Convention, the 1961 Code of Liberalisation of Capital Markets, and the 1967 Draft

²⁸⁹ Rahman FE & Sheikh AEI (2009) 21. See also Brown C (2013) 7.

²⁹⁰ Sasson M *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship Between International Law and Municipal Law* (2010) 74.

²⁹¹ Parra AR *The History of the ICSID* (2012) 15.

²⁹² Caliskan Y *The Development of International Investment Law: Lessons from the OECD MAI Negotiations and Their Application to a Possible Multilateral Agreement on Investment* (2008) 90.

²⁹³ Cited in Schill SW *The Multilateralization of International Investment Law* (2009) 36.

²⁹⁴ Rahman FE & Sheikh AEI (2009) 163.

²⁹⁵ Nieuwenhuys E & Brus M (eds) *Multilateral Regulation of Investment* (2001) 22.

²⁹⁶ Subedi SP *International Investment Law: Reconciling Policy and Principle* 3 ed (2016) ch 4.

Convention on the Protection of Foreign Property, principles such as NT and fair and equitable treatment were further entrenched in international law.

2.3.5 Recent modern history: re-establishing the need for common standards

In the preceding period, there was a dramatic change in the treatment and protection of foreign investments. Investment protection was no longer a part of broader trade agreements such as FCN agreements, but was rather fashioned through specialised multilateral efforts on the treatment and protection of foreign investments which emerged in the period. There was now a clear focus to give adequate protection to the foreign investments. This desire to protect foreign investments was further fuelled by the expropriation of foreign investments by Latin American countries, such as Mexico and Venezuela, in the early 1900s.²⁹⁷ In this period, there were, therefore, efforts to build on the concepts and principles established in the preceding period. The Charter of Economic Rights and Duties of the State (CERDS) was the most notable recent effort to protect foreign investments.

2.3.5.1 Charter of Economic Rights and Duties of the State, 1974

The 1974 CERDS was not directly focused on the protection of foreign investments but was rather an outcome of the attempts to modernise the legal framework for international economic relations.²⁹⁸ The CERDS recognised the sovereign and inalienable right of every State to choose its economic system and also provides for certain measures relating to foreign investment.²⁹⁹ The CERDS incorporated some of the arguments of the Calvo doctrine.³⁰⁰ For instance, Article 2(2) affirmed the right of States to exercise jurisdiction over foreign investment disputes in terms of their municipal laws.³⁰¹ Furthermore, Article 2(2) of the CERDS gave protection to host

²⁹⁷ Part 2.3.4.1 and 2.3.4.2 above.

²⁹⁸ Newcombe AP & Paradell L (2009) 34.

²⁹⁹ See CERDS, Art's 1 & 2.

³⁰⁰ McRae DM & De Mestral ALC *Canadian Yearbook of International Law* (2011) 238.

³⁰¹ CERDS, Art 2.

States from being compelled to provide preferential treatment to foreign investments.³⁰² Article 2(2) of the CERDS was further reinforced by Article (1) which afforded all States the right to freely exercise full sovereignty.³⁰³

The host country, however, had the power, as far as allowed by domestic laws and regulations, to supervise and regulate transnational entities.³⁰⁴ These multinational enterprises were prohibited from interfering in the domestic affairs of the host country.³⁰⁵ The CERDS allowed for the expropriation of property in the event that compensation was paid and the expropriation took into account all relevant laws and regulations deemed pertinent by the domestic State.³⁰⁶ In terms of dispute settlement, domestic remedies had to be sought unless other peaceful dispute arbitration means were agreed upon by the concerned States on the basis of sovereignty and freedom of choice.³⁰⁷ The CERDS, because of its attempts at championing sovereignty, was adopted by the vast majority of States, the majority of whom were developing countries.³⁰⁸ The bulk of the developed countries chose to vote against the adoption of the CERDS, while the others simply abstained from the vote.³⁰⁹

Two important points are worth mentioning after considering the foreign investment implications of the CERDS. First, the CERDS did not contain any new ideas that had not been raised in the earlier periods. The CERDS simply crystallised principles that had been established in early modern history, for example, the incorporation of principles of the Calvo doctrine. Secondly, although the CERDS did not expressly refer

³⁰² CERDS, Art 2. The challenge, however, was that some countries, such as the USA, were signatories to the CERDS but retained their rights under international law as regarded the protection of foreign investments. This, therefore, presented a challenge in the form of the true nature of the acceptance of Art 2(2) and the understanding that ought to be attributed to the rights of aliens under international law. See United Nations (2010) 76.

³⁰³ CERDS, Art 1.

³⁰⁴ CERDS, Art 2(2)(b).

³⁰⁵ CERDS, Art 2(2)(b).

³⁰⁶ CERDS, Art 2(2)(c).

³⁰⁷ CERDS, Art 2(2)(c). Other than Art's 1 & 2 of the CERDS, Art 16 links colonialism to investment. For example, Art 16(2) states: 'no state has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force'.

³⁰⁸ Newcombe AP & Paradell L (2009) 35.

³⁰⁹ Newcombe AP & Paradell L (2009) 35.

to international law, it implied that sovereignty could be limited under international law in instances where foreign interests were affected.³¹⁰ The CERDS was however a progressive document which challenged the traditional legal framework for foreign investment.³¹¹ While the CERDS was approved by the General Assembly, the UN failed to implement the Charter,³¹² as a handful of economically powerful States that sat on the UN Security Council rejected the Charter. Notwithstanding its shortfalls, the CERDS was a reminder of the attempts at international standardisation of investment protection that had been initiated in earlier periods and was being continued in modern times but with greater success.³¹³

2.3.5.2 The Declaration on International Investment and Multinational Enterprises, 1976³¹⁴

Not long after the conclusion of the CERDS, the OECD adopted the Declaration on International Investment and Multinational Enterprises (OECD Declaration) in 1976, the text of which has been reviewed in 1979, 1984, 1991, 2000, 2001 and 2011.³¹⁵ Currently, the OECD Declaration has been adopted by all 34 OECD countries as well as 12 non-OECD countries.³¹⁶ The OECD Declaration is geared to improving the

³¹⁰ Bishop RD (2005) 939.

³¹¹ Salacuse JW (2015) 84.

³¹² Rosenberg JM *Reawakening: The New, Broader Middle East* (2007) 147.

³¹³ With regard to the earlier multilateral texts, there were serious issues relating to their adoptions. Most States would ratify but never adopt these agreements or conventions.

³¹⁴ Note the present tense as the OECD declaration is still in force.

³¹⁵ OECD 'Text of the OECD Declaration on International Investment and Multinational Enterprises' available at <http://www.oecd.org/investment/investmentpolicy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm> (accessed 8 June 2016).

³¹⁶ The current members of the OECD are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Japan, Latvia, Luxemburg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States of America. The non-OECD countries that have adopted the OECD Declaration are: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

investment climate in the economies of adopting States and enabling the positive contributions of multinational enterprises to domestic economies.³¹⁷

Substantively, the OECD Declaration covers 4 main areas, namely: guidelines for MNCs, NT, the avoidance of conflicting requirements, and international investment incentives and disincentives. The OECD Declaration recognises the vital role that international investment plays in the world economy and the need for international co-operation to facilitate the presence of a foreign investment climate. The OECD Declaration acknowledges that the benefits of such international co-operation could be enhanced through a sound framework of interrelated instruments on international investment and multinational enterprises.³¹⁸

While the OECD Declaration reinforces the long established concept of NT, it also brought to the table two important new ideas for international investment law jurisprudence – that is, the avoidance of conflicting requirements for multinational enterprises and the provision of international investment incentives and disincentives for multinational enterprises as deemed necessary by the domestic State. To some extent, the OECD Declaration also expanded on the existing conduct of foreign companies in host countries by adding principles and standards, such as those related to human rights, disclosures, industrial relations, combating bribery, and the environment.³¹⁹ The idea of codifying the conduct of MNCs was also adopted in the UN Code on Conduct of Transnational Enterprises (1976) in the same year. Unfortunately the OECD Declaration does not have binding status in international law like the OECD Codes (for instance, the OECD Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisibles).³²⁰ Despite not being

³¹⁷ OECD 'The OECD declaration on International Investment and Multinational Enterprises: Basic Texts' available at <https://www.oecd.org/investment/investment-policy/ConsolidatedDeclarationTexts.pdf> (accessed 8 July 2016).

³¹⁸ OECD 'The OECD declaration on International Investment and Multinational Enterprises: Basic Texts' available at <https://www.oecd.org/investment/investment-policy/ConsolidatedDeclarationTexts.pdf> (accessed 8 July 2016) 8.

³¹⁹ Deva S *Regulating Corporate Human Rights Violations: Humanising Business* (2012) 80.

³²⁰ Trebilcock MJ & Howse R *The Regulation of International Trade* (2005) 468.

binding, the OECD Declaration is important in that it is a non-binding recommendation speaking to the conduct of MNCs in foreign jurisdictions.³²¹

2.3.5.3 The Convention Establishing the Multilateral Investment Guarantee Agency, 1985

In October 1985, the Convention Establishing the Multilateral Investment Guarantee Agency (the Agency) [Convention Establishing MIGA] was submitted to the Board of Governors of the International Bank for Reconstruction and Development and came into force in April 1988 with the establishment of the Agency.³²² Recently, the Convention Establishing MIGA was amended by the Council of Governors of MIGA with effect from November 2010.³²³

The contracting States to the Convention recognised the role of foreign investment (in particular, private foreign investment) in strengthening international cooperation for economic development.³²⁴ The contracting parties acknowledged that FDI flows to developing countries could only be encouraged by eliminating non-commercial risks.³²⁵ One of the ways of aiding these FDI flows to developing countries identified by the contracting parties to the Convention Establishing MIGA was the adoption of 'fair and stable standards for the treatment of foreign investment'.³²⁶ The establishment of the Agency would, therefore, supplement this process by complementing national and regional investment guarantee programs in their efforts to mitigate non-commercial risks.³²⁷

³²¹ Bjorklund AK (eds) *Yearbook on International Investment Law and Policy 2014-2015* (2016) 289.

³²² Convention Establishing MIGA.

³²³ Convention Establishing MIGA.

³²⁴ Convention Establishing MIGA, preamble.

³²⁵ This is one of the central ideas which this thesis is premised: the thought that FDI in Zimbabwe can be improved by alleviating non-commercial risks, one of them being an unsound legal framework protecting foreign investments.

³²⁶ Convention Establishing MIGA, preamble.

³²⁷ Convention Establishing MIGA, preamble.

It is against this backdrop that the MIGA was established³²⁸ as a juristic persona with the capacity to contract, acquire and dispose of property (both movable and immovable), and the power to institute legal proceedings.³²⁹ The Agency would seek to encourage the flow of investments, particularly among developing countries, thus supporting the functioning of the International Bank for Reconstruction and Development, the International Finance Cooperation and similar international development finance institutions.³³⁰ Pursuant to these objectives and functions, the Agency could:

- (a) 'issue guarantees, including coinsurance and reinsurance, against non-commercial risks in respect of investments in a member country which flow from other member countries;
- (b) carry out appropriate complimentary activities to promote the flow of investments to and among developing countries; and
- (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objective.'³³¹

The non-commercial risks covered by the Agency include restrictions on currency transfer,³³² expropriation or similar measures,³³³ breach of contract,³³⁴ and losses caused by war or civil disturbance.³³⁵

³²⁸ Convention Establishing MIGA, Art 1(a).

³²⁹ Convention Establishing MIGA, Art 1(b)(i) – (iii).

³³⁰ Convention Establishing MIGA, Art 2.

³³¹ Convention Establishing MIGA, Art 2(a) – (c).

³³² Article 11(a)(i) of the Convention Establishing MIGA defines this as 'any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee ...'.

³³³ Article 11(I)(a)(ii) of the Convention Establishing MIGA defined expropriation as 'any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories'.

³³⁴ Article 11(I)(a)(iii) of the Convention Establishing MIGA qualified breach of contract as 'any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of the guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach'.

³³⁵ Convention Establishing MIGA, Art 11(I)(a)(iv).

The investments that are eligible for such guarantee include equity interests, medium or long-term loans guaranteed by the holders of equity in the entity, and any other form of direct investment as determined by the Board.³³⁶ Any natural or juristic person is eligible to receive the Agency's guarantees subject to meeting certain conditions.³³⁷ The Agency can however not issue a guarantee 'before the host government has approved the issuance of the guarantee by the Agency against the risks designated for cover'.³³⁸

The terms and conditions of each guarantee contract are determined by the Board and do not however cover the total cost of the guaranteed investment.³³⁹ According to the Commentary on the Convention Establishing MIGA, this is in order to prevent what is known in investment insurance as a 'moral hazard' – irresponsible conduct of an investor relying on the fact that they have total loss cover.³⁴⁰ Furthermore, the claim for the guaranteed investment cannot be granted before the investor has exhausted domestic administrative remedies available under the laws of the host country.³⁴¹ Thus, such contracts may require the lapsing of certain reasonable periods after the instituting incident before the payment of a claim can be made.³⁴²

In the fashion typical of insurance companies, once the contract of guarantee has been concluded, the Agency is subrogated to such rights or claims (meaning that the

³³⁶ Convention Establishing MIGA, Art 12.

³³⁷ Convention Establishing MIGA, Art 13. Examples of these conditions include that (1) the natural person is a member of a member other than the domestic country (2) the juristic person is owned/ or incorporated by members or nationals of a member other than the host country (3) the juristic entity must be a commercial entity (4) where an investor has more than more than one nationality, the nationality of a member shall take precedence (5) upon application of the investor and the host country, protection can also be extended to a person of originates from the host country/ or a juristic person incorporated in the domestic country with the majority ownership and control in the hands of nationals of the host state, provided that the assets invested are transferred from outside the host country. See Convention Establishing MIGA, Art's 13(a) – (c).

³³⁸ Convention Establishing MIGA, Art 15.

³³⁹ Convention Establishing MIGA, Art16.

³⁴⁰ MIGA 'Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency' available at https://www.miga.org/documents/commentary_convention_november_2010.pdf (accessed 3 May 2017) 7.

³⁴¹ Convention Establishing MIGA, Art 17.

³⁴² Convention Establishing MIGA, Art 17.

Agency assumes the duty to pay compensation to the holder of a guarantee) subject to the terms and conditions of the appropriate contract of guarantee.³⁴³ This is done in cooperation with national and regional entities, which may provide reinsurance or coinsurance.³⁴⁴

Distinguishably, the Agency is also tasked in Article 23 of the Convention Establishing MIGA with the function of investment promotion. Herein, the Agency was assigned the responsibility of performing research and distributing information on investment opportunities in developing Member Countries as well as engaging in activities that work to promote foreign investment.³⁴⁵ This is a notable phenomenon of investment promotion at a multilateral level. The Convention Establishing MIGA does however have some similarities with existing efforts, for example, the provisioning of the Agency to encourage the amicable settlement of investment disputes,³⁴⁶ the duty of the Agency to facilitate investment protection treaties between Members, or the agency promoting the NT of investments through bilateral or multilateral agreements with Members.³⁴⁷

Once again, the Convention Establishing MIGA, like many other multilateral frameworks, represented the need to provide fair and adequate protection to foreign investments; however, the Agency undertakes this mandate in a reasonably different manner (for example, providing guarantees, reinsurance, coinsurance etc.). The Agency brought to the table new ideas of how foreign investment protection could be re-envisioned. Consequently, the idea was bought into by a significant number of countries. The result was that, by 2002, at least 157 countries had joined the Agency.³⁴⁸ Currently, the membership has grown to 181 countries, with 156 of those

³⁴³ Convention Establishing MIGA, Art 18.

³⁴⁴ Convention Establishing MIGA, Art's 19 & 20.

³⁴⁵ Convention Establishing MIGA, Art 23(a) as read with Art 2(b).

³⁴⁶ Convention Establishing MIGA, Art 23(b)(i).

³⁴⁷ Convention Establishing MIGA, Art 23(b)(ii).

³⁴⁸ Correa CM & Kumar N *Protecting Foreign Investment: Implications of a WTO Regime and Policy Option* (2003) 37.

countries being developing countries.³⁴⁹ Its ability to insure up to 90% of an investment with a maximum payment of \$USD50 million per project is quite useful for investors, both State and private alike. While the next major development in the development of foreign investment protection, the World Bank Guidelines on the Treatment of Foreign Direct Investment (World Bank Guidelines), were not as successful as the Convention Establishing MIGA and the Agency, they do have considerable influence in the international community.³⁵⁰

2.3.5.4 The World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992

The World Bank Guidelines were developed on the heels of a French initiative in 1991 by the Development Committee, a joint committee of the Board of Governors of the IMF and the World Bank, in the context of their broader work on the role of good governance in economic development.³⁵¹ While the World Bank Guidelines were not a multilateral agreement, the Guidelines represented inter-governmental effort through the World Bank to continue the efforts to create a set of universally acceptable standards for the treatment and protection of foreign investments.³⁵²

Essentially, the World Bank Guidelines was a voluntary instrument premised on the idea that an increased flow of FDIs would have significant benefits for the world economy and more importantly substantial benefits for developing countries in particular.³⁵³ The influx of FDI has numerous benefits for the host country, such as,

³⁴⁹ Multilateral Investment Guarantee Agency 'MIGA Member Countries (181)' available at <https://www.miga.org/who-we-are/member-countries> (accessed 13 September 2016).

³⁵⁰ Wang G *International Investment Law: A Chinese Perspective* (2014) 16.

³⁵¹ Shihata IFI *The World Bank in a Changing World: Selected Essays and Lectures* (1995) 587. See also Newcombe AP & Paradell A (2009) 49 & Schrijver N *Sovereignty Over Natural Resources: Balancing Rights and Duties* (2008) 183.

³⁵² The World Bank Guidelines did not attempt to codify customary international law with regard to the treatment of foreign investments. See Hveem H & Lapadre L (eds) *The Global Governance of Knowledge* (2011) 151.

³⁵³ World Bank Guidelines, shortened version, preliminary text. See further Weiler T & Baetens F *New Directions in International Economic Law: In Memory of Thomas Waide* (2011) 192.

greater competition, enhanced market access, expansion of international trade, and the transfer of capital, technology and managerial skills.³⁵⁴ The World Bank Guidelines thus encouraged investor of other States to invest in other economies and for the host states to accept such investments in terms of the principles and ideas expressed in the Guidelines.³⁵⁵

In accordance with the foregoing principle, each State therefore had to 'facilitate the admission and establishment of investments by nationals of other States, and avoid making unduly cumbersome or complicated procedural regulations for, or imposing unnecessary conditions on, the admission of such investments'.³⁵⁶ In this bid, developed States were called upon to refrain from intentionally obstructing the flow of investments from their economies to developing countries.³⁵⁷

While the host country was obliged to take steps to facilitate the inflow of FDI into its economy, it still reserved the right to create regulations to control the admission of private foreign investments.³⁵⁸ The Guidelines suggested that practice had shown that the imposition of performance requirements is often an ineffective exercise that only leads to the discouragement of investment. The World Bank Guidelines called for an open approach on admission, possibly subject to a restrictions list. Such restrictions list should however be adopted with care as it could encourage and promote evasion and corruption. Where restrictions were applied on domestic investments based on public policy, public health or the protection of the environment; such measures would equally apply to foreign investment.³⁵⁹

In terms of the treatment of foreign investments, the World Bank Guidelines called on host States to afford foreign investments fair and equitable treatment pursuant to the

³⁵⁴ World Bank Guidelines, preliminary text.

³⁵⁵ World Bank Guidelines, I (1).

³⁵⁶ World Bank Guidelines, I (2).

³⁵⁷ World Bank Guidelines, III (10).

³⁵⁸ World Bank Guidelines, I (3).

³⁵⁹ World Bank Guidelines, I (5).

standards laid out in the Guidelines.³⁶⁰ As regards the protection of foreign investments and investors, in respect of their property rights, their security of the person, the granting of import and export licenses, the issuance of entry and stay visas to their foreign staff, or any other matter concerning the legal rights of an investor; foreign investors had to be accorded fair and equitable treatment, which would be as favourable as that accorded to national investors in similar circumstances.³⁶¹ The domestic State was thus prohibited from discriminating between foreign investors on the basis of nationality.³⁶² The Guidelines also extended to expropriation, contracts, the promotion of accountability in all matters and affairs related to foreign investors, the control and protection of dishonest business activities, and the settlement of disputes.³⁶³ The World Bank Guidelines, therefore, resoundingly provided for the full protection and security of an investor's rights in all instances. As a result of the robustness of the Guidelines, the provisions contained therein are quite similar to those contained in modern day BITs.³⁶⁴ A notable difference was only with regard to the application of the NT provision with regards to establishment of the investment.

The World Bank Guidelines were thus, in a sense, a bridge between the earlier non-binding codes/guidelines and future efforts such as the Multilateral Agreement on Investment (MAI).³⁶⁵ The Guidelines showed the need for 'an enforceable set of standards [on]: the rule of law, due process, non-discrimination, prohibitions or arbitrary conduct, and the protection of legitimate expectations and property rights',³⁶⁶ as regards foreign investments. The Guidelines also reinforced the gradual movement toward the protection of foreign investors.³⁶⁷

³⁶⁰ World Bank Guidelines, III (1).

³⁶¹ World Bank Guidelines, III (3a).

³⁶² World Bank Guidelines, III, (3b).

³⁶³ World Bank Guidelines. See also Newcombe AP & Paradell A (2009) 49.

³⁶⁴ Schill SW (2009) 97.

³⁶⁵ Wallace CD *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalisation* (2002) 1118.

³⁶⁶ Segger MCC, Gehring MW & Newcombe AP *Sustainable Development in World Investment Law* (2011) 122.

³⁶⁷ Aguirre D *The Human Right to Development in a Globalised World* (2008) 128.

The Guidelines forms part of today's soft law on foreign investment and have a significant influence on the international community.³⁶⁸ Pollan argues that the World Bank Guidelines are perhaps the most important influence on soft law as they were crafted with a strong intention to integrate extensive research rather than to make a political statement.³⁶⁹ Wang sums up the discussion on the Guidelines by noting:

'The Guidelines are characteristic of a changing attitude of international organizations, whose focus has shifted from the responsibilities of foreign investors and multinational companies to regulating the treatment given by host countries to foreign investors, including the standards of compensation for nationalizations and expropriation.'³⁷⁰

2.3.5.5 The OECD Multilateral Agreement on Investment, 1995 – 1998

In 1995, Member States of the OECD launched high-level negotiations to strengthen the multilateral system by developing a comprehensive framework for international investment, the MAI.³⁷¹ In making a case for the MAI, the OECD was of the view that the MAI would provide standards for investment protection and effective dispute settlement, which would also be accessible to non-Member countries.³⁷² The contracting parties recognised the need for an effective, fair and predictable investment system that would have downstream benefits on the world economy.³⁷³ It

³⁶⁸ Pollan T *Legal Framework for the admission of FDI* (2006) 132. The World Bank Guidelines do not have the force of law. They were not created with the intention to supersede national laws or treaties. The only possibility of attaining binding status would be if States incorporated the Guidelines into their domestic laws. See Irwin T et al (eds) *Dealing with Public Risk in Private Infrastructure* (1997) 62 & Shihata IFI (1993) 199.

³⁶⁹ Pollan T (2006) 132.

³⁷⁰ Wang G (2014) 16. The Guidelines does not create rules on the conduct of MNCs in foreign countries. It rather adopts a narrow approach as compared to the wide approach adopted by the OECD which not only provided for the obligations of the host State but of the investor as well. The narrow focus of the Guidelines can however be viewed as a challenge. For example, the failure to encourage good conduct by MNCs has serious implications for the ability of the host State to attain sustainable development. See Treves T, Seatzu F & Trevisanut S (eds) *Foreign Investment, International Law and Common Concerns* (2013) 123 & Aguirre D *The Human Right to Development in a Globalised World* (2008) 128.

³⁷¹ OECD 'OECD Begins Negotiations on a Multilateral Agreements on Investments' available at <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestme nt.htm> (accessed 12 July 2016).

³⁷² Subedi SP (2016) ch 4.

³⁷³ MAI, consolidated text, preamble.

was their belief that in doing so, this effort would catalyse economic growth which was a vital component of economic development.³⁷⁴

In terms of the treatment of investors and investments, the MAI provided for MFN treatment and NT. In this regard, a contracting party could not offer an investor from another contracting party, treatment that was less favourable than that which it offers its own citizens and investments (NT).³⁷⁵ Furthermore, a contracting party could not offer an investor from another contracting party treatment less than which it provided to any other contracting parties or non-members (MFN treatment).³⁷⁶ Having regard to these ideas of NT and MFN treatment, the host contracting party was therefore obligated to accord investors from other contracting parties the better of the two treatments – ‘whichever was favourable to those investors or investments’.³⁷⁷

The principles of NT and MFN treatment were also applicable to all types of privatisation, regardless of the method of privatisation.³⁷⁸ The MAI also provided for rules related to transparency, employee requirements, work and residence permits of investors and employees, and rules related to the appointments of executives, managers and board of directors; which were important provisions related to the functionality of the entity invested in. Investment incentives were also permissible within the MAI regime.

As is now an established trend, the MAI also provided for investment protection in addition to the treatment of investments.³⁷⁹ In this regard, all contracting states had to accord investments of other contracting members within its borders ‘fair and equitable treatment’ and ‘full and constant security and protection’.³⁸⁰ In terms of expropriation,

³⁷⁴ MAI, preamble.

³⁷⁵ MAI, III(1).

³⁷⁶ MAI, III(2).

³⁷⁷ MAI, III(3).

³⁷⁸ MAI, III para 1.

³⁷⁹ MAI, III.

³⁸⁰ MAI, IV(1.1).

a contracting party could not expropriate or nationalise any investment within its jurisdiction belonging to an investor from another contracting party unless:

- a) 'it was for a purpose which was in the public interest
- b) it was done on a non-discriminatory basis
- c) it was in accordance with due process of the law, and
- d) it was accompanied by prompt, adequate and effective compensation payment.'³⁸¹

Furthermore, in terms of indirect expropriation, a contracting party could not take any unreasonable or discriminatory measures impairing the operation, maintenance, use, enjoying or disposal of the investments of another contracting party.³⁸²

In cases of strife in the host country, such as, armed conflicts, revolutions, civil disturbances, or similar events, a contracting state had to provide restitution, indemnification, compensation or any measures necessary to foreign investors from other contracting parties in the same manner as it would compensate or indemnify its own citizens.³⁸³ A host country could also not impose any unnecessary impediments to investment related transfers into and out of its territory.³⁸⁴ Such transfers, included but were not limited to:

- (a) 'the initial capital and additional amounts to maintain or increase and investments;
- (b) returns;
- (c) payments made under a contract including a loan agreement;
- (d) proceeds from the sale or liquidation of all or part of an investment;
- (e) payments of compensation;
- (f) payments arising out of a settlement of a dispute; and
- (g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.'³⁸⁵

³⁸¹ MAI, IV(2.1). These conditions were further clarified in the MAI; however, for the purposes of this thesis, it is not necessary to delve into the final details.

³⁸² MAI, IV(1.2).

³⁸³ MAI, IV(3).

³⁸⁴ MAI, IV(4.1).

³⁸⁵ MAI, IV(4.1).

The host State had a duty to ensure that such transfers would be made in a freely tradable currency.³⁸⁶ A host country could also not prevent the transfer of information or the processing of information outside its borders.³⁸⁷ In instances of subrogation, rights and claims to which a third party was entitled still had to be respected.³⁸⁸ Another important issue in the protection of investments dealt with by the MAI was that of existing investments. All investments made before the entry into force of the MAI would be subject to the MAI (in line with the legislation of the host country).³⁸⁹

Another common concept which had featured in earlier codes and guidelines which the MAI provided for was that of dispute settlement. In terms of State – State disputes, the provisions related to dispute settlement would be applied in order to avoid any conflict and settle any disputes between contracting parties related to the interpretation of the MAI.³⁹⁰ The parties could, however, agree to apply any other rules and procedures than those contained in the MAI.³⁹¹ The MAI provided for processes, such as, consultation, conciliation, arbitration and mediation. A Tribunal also had to be set up for the purpose of resolving the dispute. The awards made by such Tribunal had to be in accordance with the MAI and had to be interpreted and applied in terms of the applicable rules of international law.³⁹² Such award made by the Tribunal could be nullified in the event that the reason for the challenge was one which fell within the listed grounds.³⁹³ Investor-State disputes, on the other hand, could be resolved by means of negotiation or consultation.³⁹⁴ If the dispute could not be resolved by negotiation or consultation, an investor could then resolve the matter by:

³⁸⁶ MAI, IV(4.2).

³⁸⁷ MAI, IV(5).

³⁸⁸ MAI, IV(6).

³⁸⁹ MAI IV(7).

³⁹⁰ MAI, V(A1.1).

³⁹¹ MAI, V(A1.1).

³⁹² MAI, V(C6).

³⁹³ MAI, V(C6).

³⁹⁴ Investor – State disputes occur when there is a dispute between an investor of another contracting party over an alleged breach of obligations by a host country, which is also a contracting party.

- (a) 'applying to any competent court or administrative tribunals of the Contracting Party to the dispute;
- (b) settling it in accordance with any dispute settlement procedure agreed upon prior to the dispute arising; or
- (c) by arbitration under:
 - i. 'the Convention on the Settlement of Investment Disputes between State Nationals of other States (the ICSID Convention);
 - ii. the Additional Facility Rules of the Centre for Settlement of Investment Disputes (the ICSID Additional Facility);
 - iii. the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or
 - iv. the Rules of Arbitration of the International Chamber of Commerce (ICC).³⁹⁵

The provisions related to dispute settlement were very broad and detailed, covering a variety of issues that could possibly arise within the process of resolving a dispute. This wide-ranging nature of the MAI was one of its shortcomings. For example, one of the arguments raised by dissenting voices in the negotiations was that the dispute settlement mechanism should only be available to sovereign nation States to the exclusion of private investors.³⁹⁶ Furthermore, in terms of expropriation, the clauses relating to expropriation had to be narrowly defined in order to prevent governments from being exposed to the risk of compensating investors 'for the mere exercise of their normal regulatory power and for [an] open, accessible, and transparent procedure for dispute settlement'.³⁹⁷

In addition, it was the view of these dissenting voices, that the expropriation clause was not balanced and neglected something that had been seen in earlier codes – duties of investors. This, in the view of some (such as the European parliament) would

³⁹⁵ MAI, V(C6).

³⁹⁶ Neumayer E Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD-negotiations' (1999) 46 *Wirtschaftspolitische Blätter* 12.

³⁹⁷ Neumayer E (1999) 12.

provide a better balance between rights and obligations.³⁹⁸ Non-governmental organisations (NGOs) also had significant issues with the substantive and procedural investment protections that were being advanced through treaty regimes.³⁹⁹ These challenges were given further prominence because at the time negotiations took place, North American Free Trade Agreement (NAFTA) investment claims had taken centre stage in the investment arena, giving rise to some countries developing cold feet about committing to further investment protections.⁴⁰⁰ As a result of the compounded net effect of the shortcomings of the MAI and its bad timing, the negotiations were abandoned in 1998.⁴⁰¹ While the MAI negotiations were unsuccessful, it was important to consider in depth the final draft of the negotiations as there are important lessons for future treaty making and crafting of effective domestic legislations, making the MAI very instructive.⁴⁰² Events in other investment related areas such as trade and tax have also contributed to the development of IIL.

2.3.5.6 The efforts of the World Trade Organisation, 2001

In the trade arena, the discussions on the protection of foreign investors have not been left behind. Previously, the members of the WTO failed to reach a consensus on investment issues in the Uruguay Round of Agreements (1986 – 1994).⁴⁰³ In the Doha Round of negotiations, the EU and Japan championed the inclusion of investment as a part of the ‘Singapore issues’.⁴⁰⁴ However, the efforts of these developed countries would prove to be fruitless, as they faced a significant amount of resistance from

³⁹⁸ Neumayer E (1999) 12.

³⁹⁹ Nieuwenhuys E & Brus M *Multilateral Regulation of Investment* (2001) 137.

⁴⁰⁰ NAFTA provided the opportunity for investors to challenge the domestic regulations of some of its members such as Canada and the USA. See, for example, *Ethyl Corporation v Canada*. Mouyal LW *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016) ch 3 & Newcombe AP & Paradell L (2009) 55.

⁴⁰¹ Caliskan Y (2008) 111.

⁴⁰² Carbonneau TE (ed) *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (2008) 131.

⁴⁰³ Newcombe AP & Paradell L (2009) 55.

⁴⁰⁴ Weiler T & Baetens F *New Directions in International Economic Law: In Memory of Thomas Walde* (2011) 192.

developing countries who were opposed to the idea of a greater investment liberalisation scheme within the WTO.⁴⁰⁵

Despite the fact that direct efforts to have investment protection included on the WTO agenda have failed, there have been submissions that, indirectly, the WTO does to some extent provide for multilateral rules on foreign investment. The rationale behind this argument is that numerous WTO instruments and texts deal with areas of foreign investment.⁴⁰⁶ For example, while the Havana Charter never came into force, it has had a significant influence on various agreements and treaties. Other examples are: the TRIMS, which provides for performance requirements pertaining to foreign investment; the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which provides for intellectual property, an area also deemed to fall squarely within the ambit of investment; and the General Agreement on Trade in Services (GATS) which provides for commercial presence in a foreign country.⁴⁰⁷

While this argument might seemingly be convincing, it is far from the truth. As has been seen in the outlines and discussions of numerous codes, draft agreements, conventions, guidelines, and so forth, multilateral rules on investment would be much broader than the isolated provisions on investment in the WTO regime. Moreover, as has been witnessed, the major substantive issues of foreign investment revolve around foreign investment treatment and protection, while the procedural matters centre on dispute settlement, which the above-mentioned provisions hardly even begin to cover.

An emerging question, as highlighted previously, therefore becomes: is the WTO the best forum to discuss and address investment concerns? The sound answer to this question is 'no'. Singh in his paper on the issues and illusions relating to a MAI in the

⁴⁰⁵ Lester S, Mercurio B & Davies A *World Trade Law: Text, Materials and Commentary 2ed* (2012) ch 17.

⁴⁰⁶ Vadi V (2012) 14.

⁴⁰⁷ See WTO 'Trade and Investment' available at https://www.wto.org/english/tratop_e/invest_e/invest_e.htm (accessed 19 July 2016).

WTO seems to believe that this is the correct position to take.⁴⁰⁸ This argument has merit in that it is undeniable that the discussions take place in an environment where all negotiating parties are advancing their own agendas as far as they benefit their existing trade regimes, rather than negotiating with intention of enhancing the protection of foreign investments internationally. There is also a measured view that the WTO is also not the best forum to negotiate investment matters as negotiators would be clouded by a conflict of interest as a result of free trade commitments.⁴⁰⁹

While this is so, numerous arguments can also be raised in support of the WTO as a perfect platform to address investment issues; for example, it has been established that there are positive linkages between trade and investment. It would only be logical that the WTO also have rules pertaining to investment. Those who do not believe in multilateral investment protection remain unmoved and maintain their steadfast position that there is no need for any multilateral investment rules be it on the multilateral investment level or within the WTO.⁴¹⁰ This is so because these MAI sceptics harbour the sentiment that even if a MAI could be concluded within the WTO, for example, because of its inclusive nature, the time for such an agreement has not yet come.⁴¹¹ This is evidenced by unresolved issues, such as, whether multilateral protection should focus on investor protection or provide a balance between protection and regulation of rights and obligations,⁴¹² the negotiation of exceptions and environmental issues.⁴¹³ The contesting arguments for and against a MIA within the

⁴⁰⁸ Singh K 'Multilateral Investment Agreement in the WTO' 2003 *Asia-Pacific Research Network* 26.

⁴⁰⁹ Farrell JE *The Interface of International Trade Law and Taxation* (2013) 235.

⁴¹⁰ See, for instance, Crawford J & Lowe V *British Yearbook of International Law* (2009) 346.

⁴¹¹ Dattu R A 'Journey from Havana to Paris: The Fifty-year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24 *Fordham International Law Journal* 277.

⁴¹² Muchlinski PT 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now?' (2000) 34 *The International Lawyer* 1038.

⁴¹³ Canner SJ 'The Multilateral Agreement on Investment' 1998 (31) *Cornel International Law Journal* 677.

WTO, therefore, have to be carefully evaluated in order to decide the correct position in the matter.⁴¹⁴

2.3.5.7 Post OECD MAI and WTO Doha Round of Negotiations: the future of a potential Multilateral Agreement on Investment; 2004 and beyond

An important question to be answered is: what is the future of multilateral foreign investment protection after the failure of the investment negotiations at the WTO and the OECD? Foreign investors need transparency, predictability and legal security which can be best offered by uniform multilateral investment rules.⁴¹⁵ With the growing importance of FDI at a global level, it makes the quest for uniform foreign investment rules an imperative. While domestic laws do provide a measure of protection, they are however by no means an alternative to multilateral protection. The protection at a domestic level is also compromised by the fact that different jurisdictions have different laws which are variably enforced. Despite their immense growth since the 1980s, BITs are also no effective substitute for multilateral rules on investment.⁴¹⁶ In as much as BITs are helpful in promoting investment protection, the contents of these treaties do not necessarily lead to international custom that is binding on all states.⁴¹⁷

It is evident that at the present moment, the case for re-animating multilateral negotiations on investment is quite weak, especially in the aftermath of the collapsed

⁴¹⁴ Singh A & Zammit JA 'Foreign Direct Investment, Development and the New Global Economic Order. A Policy Brief for the South' 1997 *MPRA Paper No 53533* 10. For a further discussion see Mosoti V Bilateral Investment Treaties and the Possibility for a Multilateral Framework on Investment at the WTO: Are the Poor Caught in Between (2006) 26 *Northwestern Journal of International Law & Business* 95 – 138.

⁴¹⁵ Drabek Z A 'Multilateral Agreement on Investment: Convincing the Sceptics' 1998 *World Trade Organisation* 4.

⁴¹⁶ Kurtz J *The WTO and International Investment Law: Converging Systems* (2016) 61. According to the World Investment Report 2016 prepared by United Nations Conference on Trade and Development, 31 new IIAs were concluded in 2015 (20 of them being BITs), bringing the total of IIAs to 3 304. Of the 3304 IIAs, 2 946 are BITs. See UNCTAD 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf xii.

⁴¹⁷ Leal-Arcus et al *International Energy Governance: Selected Legal Issues* (2014) 50. See also Arp B (eds) *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Texts with Commentary* (2008) 68 & Fru VN (2011) 58.

OECD MAI negotiations and WTO Doha negotiations.⁴¹⁸ Positives exist in the fact that in the context of the procedural issues, more specifically, dispute resolution (both investor–State disputes and State–State disputes alike), there has been success through a common system, the World Bank, and the International Centre for Settlement of Investment Disputes (ICSID).⁴¹⁹ Furthermore, with the new-found powers of the EU on investment protection, it will hopefully be a first small step towards substantive foreign investment consolidation, which could possibly springboard similar consolidations at a multilateral level.⁴²⁰

The hope is that at a multilateral level, States can tap into the vast literature that emerged after the failure of the multilateral investment talks at the OECD and WTO on what an ideal MAI would consist of. The current fragmented foreign investment protection driven by investment agreements, chiefly, BITs, is untenable and unsustainable and is in need of significant reform. For example, BITs have failed to address key issues affecting foreign investment, such as market access, which could be easily resolved in an augmented version of these treaties.⁴²¹ A new MAI draft should ideally be based on ‘socially responsible business practices’. This is because liberalisation of the capital flow without the concomitant responsible practices and considerations, such as, human rights considerations, and environmental imperatives, sustainable development deliberations, would lead to a ‘race to the

⁴¹⁸ Tietje C (eds) *International Investment, Protection and Arbitration: Theoretical and Practical Perspectives* (2011) 73.

⁴¹⁹ Cremona et al (eds) *International Economic Law: Liber Amicorum for Ernst-Ulrich Petersman* (2013) 221. ICSID has come under threat in recent times as many countries such as Venezuela have indicated their intention to from the ICSD Convention, following in the footsteps of countries such as Bolivia and Ecuador who have done so already.

⁴²⁰ Article 206 of the Treaty on the Functioning of the European Union (TFEU) states that: the Union shall contribute to the ... progressive abolition of restrictions on international trade and foreign direct investment’. One of the arguments with regards to this provision is that the powers granted in Art 206 also include the power to agree on standards on foreign investment. It is not clear, however, whether Art 206 of the TFEU is applicable to all forms of investment. See Harrison J (eds) *The European Union and South Korea: The Legal Framework on Strengthening Trade, Economics and Political Relations* (2013) 115. See further Bungenburg M, Griebel J & Hindelang S (eds) *International Investment Law and EU Law* (2011) 42.

⁴²¹ Dimopoulos A (2011) 15.

bottom' for developing and least developed countries (LDCs) who cannot effectively compete with developed countries as they can only offer cheap labour.⁴²²

2.4 THE CURRENT INTERNATIONAL INVESTMENT LAW SYSTEM

In the previous part, a thorough examination was undertaken of the evolution of IIL. From the discussion above, what was missing was an outline of the current system of ILL. It becomes vital to establish what the current system of IIL has become in order to determine the principles and standards that can be used as yardsticks to measure foreign investment treatment and protection in later chapters. Thus, in order to enhance the usefulness of this chapter, this part divides the current IIL system into three components, namely, soft law, hard law and customary international law. An overview of soft law is undertaken first.

2.4.1 Soft law

While there were numerous draft treaties which failed to materialise, the bulk of them aimed at codifying foreign investment treatment and protection. These draft treaties, despite lacking legal force, do have a significant influence on IIL.⁴²³ These efforts, both those aimed at codification and those aimed at a multilateral treaty, arguably form part of what has been termed 'soft law', which has had a significant impact on International Economic Law. These 'quasi-legal' instruments, therefore, have an inherent limitation⁴²⁴ and are thus inevitably weaker than traditional pieces of law (hard law).⁴²⁵ Article 38 of the Statute of the ICJ furnishes a list of sources which are largely recognised as sources of general international law. As is clear from the fact that these

⁴²² Schrijver NJ & Weiss F (eds) *International Law and Sustainable Development: Principles and Practice* (2004) 302.

⁴²³ Caliskan Y (2008) 112.

⁴²⁴ Alvarez et al (eds) *The Evolving International Investment Regime: Expectations, Realities, Options* (2011) 241.

⁴²⁵ Schefer KN *International Investment Law: Text, Cases and Materials* (2015) ch 2.

are 'general sources of international law', they will not be useful at all times in the interaction between States and investors, private and public alike.⁴²⁶

A list summarising the current soft law on foreign investment will include: the UN Codes of Transnational Property and the World Bank Guidelines. These are what are often referred to as the universal soft law on investment.⁴²⁷ These can be described as codes and guidelines that have been drafted by the UN or other international organisations. In addition to the universal soft laws, there are also soft laws that are applicable to certain groups of people. For example, the Asia Pacific Economic Co-operation Organisation (APEC) Principles on Investment could be regarded as soft law for China and, while the OECD Draft Convention on the Protection of Foreign Property and the OECD MAI could be viewed as soft law for OECD member states.⁴²⁸

As advanced by Caliskan, '[s]oft law does not create legally binding obligations; however, it does have an indirect impact on the development of international law'.⁴²⁹ Investment arbitrators will, for example, from time to time make reference to soft law.⁴³⁰ In a sense, soft law, therefore, adds value to the IIL jurisprudence. Hirsch interestingly notes that 'while it is analytically possible to disentangle "soft" from "hard" laws, they are almost seamlessly woven into the fabric of international investment law'.⁴³¹ Ideally, the pieces of soft law which have invariably grown in number should be able to aid in the unification of IIL.⁴³² It is however important to bear in mind that soft law could be attractive for the mere reason that it is 'soft'. Soft law, therefore, remains an area of key interest in IIL despite the fact that it is not enforceable.⁴³³

⁴²⁶ Hirsch M 'Sources of International Investment Law' in Bjorklund AK & Reinisch A (eds) *International Investment Law and Soft Law* (2012) 9.

⁴²⁷ Shan W *The Legal Framework of EU-China Investment Relations: A Critical Appraisal* (2005) 93.

⁴²⁸ Shan W (2005) 93.

⁴²⁹ Caliskan Y (2008) 114.

⁴³⁰ Soft law might be used to fill a gap in the law and therefore function in a complementary and regulatory manner. The interactions between binding and nonbinding sources of law therefore enrich IIL.

⁴³¹ Hirsch M in Bjorklund AK & Reinisch A (2012) 9.

⁴³² Mouyal LW (2016) 88.

⁴³³ Schefer KN (2013) 27.

2.4.2 Hard law

Within the context of IIL, efforts at attaining hard law codification have been unsuccessful.⁴³⁴ This has been witnessed through a number of wide-ranging initiatives discussed in this thesis which never materialised, such as, the attempts to create an MAI. This is unlike the success that has been attained in trade law, its counterpart, with which it is seemingly converging. Trade law has been quite progressive with a significant number of treaties and agreements having been ratified which deal with a broad spectrum of issues. Bjorklund and Reinisch also point out that within the WTO dispensation, provision is also made to harden soft law. For example, rules provided for by the International Organisation for Standardisation (IOS) are sometimes integrated with the TBT (Technical Barriers to Trade) and SPS (Sanitary and Phytosanitary Measures) Agreements.⁴³⁵ It is, however, possible that countries may decide to also harden specific concepts of soft law in IIL by incorporating them in their investment agreements between themselves.⁴³⁶

Of note with regard to the hard law are the IIAs (by and large, at a regional level, such as the NAFTA) which have grown to be the main source of investment law.⁴³⁷ While IIAs are not binding on non-parties, they create uniform legal standards for State Parties for dealing with foreign investment.⁴³⁸ Investment agreements create contractual certainty in investor-State relations. Importantly, these treaties prevent a State from imposing measures which, at a domestic level, are inconsistent with the principles enunciated within these treaties.⁴³⁹ For example, a State cannot treat investments from another State Party less favourably than it treats investments from

⁴³⁴ Bjorklund AK & Reinisch A 'ILA Study Group on the Role of Soft-Law Instruments in International Investment Law' 2012 ILA Conference, Sofia 4.

⁴³⁵ Bjorklund AK & Reinisch A (2012) 4.

⁴³⁶ Sauvart KP (2013) 588.

⁴³⁷ Noortman M & Ryngaert C (eds) *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (2016) ch 1.

⁴³⁸ Douglas Z, Pauwelyn J & Vinuales JE (2014) ch 4.

⁴³⁹ Salacuse JW (2013) 306.

its own citizens, or expropriate property of a foreign investor without a just reason and speedy and fair compensation offered in return. In today's day and age, the protections offered by IIAs are no longer enough as, IIAs must also focus on issues such as sustainable development and the need for more policy space for governments to regulate in national interest.⁴⁴⁰

The majority of IIAs that have been signed to date, as earlier noted are BITs.⁴⁴¹ The first BIT between the Federal Republic of Germany and Pakistan was signed in the late 1950s.⁴⁴² Since then, BITs have exploded with almost 3000 BITs having been signed to date. To some extent, these BITs can be viewed as instruments of investment liberalisation.⁴⁴³ Most of these BITs mimic, in broad terms, the Abs-Shawcross Draft Convention and the 1967 OECD Draft Convention on the Protection of Foreign Property.⁴⁴⁴ These BITs have been accused of circumventing a sovereign state's right to 'subject foreign investors to its domestic legal system'.⁴⁴⁵ In addition, another challenge arises when international arbitration tribunals give BITs and international law a broad interpretation which may undermine the intention of the parties. Furthermore, BITs have also had a less than desired effect in regions, such as sub-Saharan Africa, because the treaties signed follow model treaties which do not factor in the particular circumstances of a country.⁴⁴⁶

⁴⁴⁰ Sauvart KP 'The Evolving International Investment Law and Policy Regime: Ways Forward' (2016) 5 *Bridges Africa* 1. The issue of policy space will be treated in more detail later in this section.

⁴⁴¹ Lim LC *International Economic Law after the Global Crisis* (2015) 329.

⁴⁴² Hindelang S & Krajewski M (eds) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Isolated* (2016) 3.

⁴⁴³ Vandeveld KJ 'Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaty' (1998) 36 *Colombia Journal of Transnational Law* 505. Generally, liberalisation refers to the outward-oriented approach of facilitating FDI. Notably, in some countries investment liberalisation remains a very sensitive matter.

⁴⁴⁴ Huaqum Z 'Initiative and Implications of Hong Kong's Bilateral Investment Treaties' (2010) 11 *Journal of World Investment and Trade* 669.

⁴⁴⁵ Jamieson S 'A Model Future: The Future of Foreign Direct Investment and Bilateral Investment Treaties' (2012) 53 *South Texas Law Review* 608.

⁴⁴⁶ Johnson AR 'Rethinking Bilateral Investment Treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 922.

A particularly important role is played by BITs in developing countries which want to attract investment by providing guarantees against nationalisations and expropriations. As advanced by Akgul, BITs because of their central role as a source of international investment law provide for investment neutrality and security.⁴⁴⁷ While BITs provide for the obligations of a host State towards foreign investors, their main focus is however on State-State relations.⁴⁴⁸ In a sense, for the foreign investor, BITs reduce non-commercial risk and provide legal protection for their investment, whereas for the host-State BITs are a means of attracting investment and catalysing economic development.⁴⁴⁹ However, much remains unknown as to the extent to which BITs actually contribute to enhanced foreign investments as they are only one of a handful of confidence building measures for investors.⁴⁵⁰ It could also be argued that while it is unclear to what extent BITs lead to foreign investment, BITs could also work to retain foreign investments. Interestingly, Perera opines that the role of BITs is to 'create a legal environment for the promotion and protection of foreign investment'.⁴⁵¹

Other sources of investment law also interlink with BITs. To a limited extent, some BITs also make specific reference to customary international law when determining which laws are applicable.⁴⁵² The reference to customary international law, sometimes for purposes of interpretation, is, however, not enough to guarantee customary international law's former relevance in international investment law. In relation to domestic laws, BITs play a complementary role in that while these laws offer significant protections for investment, these laws are subject to a change of government and

⁴⁴⁷ Akgul Z *The Development of International Arbitration on Bilateral Investment Treaties: Disputes Between States and Investor, ICSID Case Against Turkey Regarding Energy Sector* (2008) 8.

⁴⁴⁸ Schefer KN (2013) 33.

⁴⁴⁹ Bosman K 'South Africa: Trading International Investment for Policy Space' (2016) 4 *Stellenbosch Economic Working Papers* 5.

⁴⁵⁰ Caliskan Y (2008) 55.

⁴⁵¹ Perera AR 'The Role and Implications of Bilateral Investment Treaties' (2000) 26 *Commonwealth Law Bulletin* 607.

⁴⁵² Gazzini T & De Brabandere E (eds) *International Investment Law. The Source of Rights and Obligations* (2012) 20.

policy. However, BITs are cushioned from this as no State can unilaterally cancel a BIT.⁴⁵³

Traditionally, BITs are relatively short pieces with no more than 14 Articles. For the most part, these treaties provide for the treatment of investment, expropriation, currency transfer, subrogation, dispute settlement, and also have a preamble and investor definitions.⁴⁵⁴ More recent BITs contain more qualified protections, for example, two separate provisions on dispute settlement, one on State-State arbitration and another on investor-State arbitration.⁴⁵⁵ Over the years, another new feature that has developed within the IIAs is that of 'umbrella clauses'.⁴⁵⁶ The exact meaning of this term remains a bone of contention – an issue which has also puzzled investment arbitrators.⁴⁵⁷ Umbrella clauses provide different protections, with some only providing for direct violations under the BIT and others extending to any dispute relating to investment.⁴⁵⁸ It can thus be inferred that these umbrella clauses are tailored towards strengthening the legitimate expectation of investors on investment protection.⁴⁵⁹ According to Sinclair, umbrella clauses can be best traced to the Abs-Shawcross Draft Convention.⁴⁶⁰ The following construction of an umbrella clause was framed in Article 4 of the (1956 – 1959) Abs-Shawcross Draft Convention:

⁴⁵³ Subedi SP (2016) ch 5.

⁴⁵⁴ Akgul Z (2008) 8.

⁴⁵⁵ Dolzer Z & Schreuer C (2012) 13.

⁴⁵⁶ Other names have been given for this clause such as sanctity of contract, mirror effect, elevator, parallel effect and respect clause. See OECD 'International Investment Law: Understanding Concepts and Tracking Innovations' available at <https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf> (accessed 20 July 2016) 101.

⁴⁵⁷ For instance, in *SGS v Pakistan* and *SGS v Philippines*, ICSID was concerned with the interpretations to be given to umbrella clauses. Unfortunately, this was a missed opportunity as the tribunal did not shed light on this question. See <http://www.italaw.com/cases/1009> & <http://www.italaw.com/cases/1018> for the judgements. See further Wong J 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 *George Mason Law Review* 139.

⁴⁵⁸ Yannaca-Small K 'Interpretation of the Umbrella Clause in International Agreements' available at https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf (accessed 15 September 2016) 3.

⁴⁵⁹ Mouyal LW (2016) 204.

⁴⁶⁰ Sinclair AC 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20 *Arbitration International* 411 – 434.

'In so far as better treatment is promised to non-nationals than to nationals either under intergovernmental or other agreements or by administrative decrees of one of the High contracting Parties, including most-favoured nation clauses shall prevail.'⁴⁶¹

This umbrella clause would be reworked in a later draft and appeared in the 1959 Abs-Shawcross Draft Convention as:

'Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party.'⁴⁶²

The wording in this later draft would appear, almost verbatim, in the 1959 Germany – Pakistan BIT. The draft MAI also had a similar formulation which appeared as a respect clause. By 2008, almost 2500 BITs had been concluded, of which 40% contained umbrella clauses.⁴⁶³ Other than the umbrella clause, MFN clauses have also been a consistent feature in BITs worldwide. For example, on the one hand, Germany, a prominent user of BITs, has an MFN clause in its 1998 Model Treaty, which is combined with NT; while on the other hand, the US and Canada have MFN clauses that cover post-establishment phases as well as pre-establishment phases.⁴⁶⁴ Unlike umbrella clauses, MFN clauses are quite variable, as evidenced above, with some leaning towards a narrow approach, while others adopt a general approach.⁴⁶⁵

Iqbal opines that while the clauses that are contained in BITs are variable, the more prominent provisions are: umbrella clauses, MFN clauses, expropriation clauses, fair treatment clauses, performance clauses, admissions clauses and non-precluded

⁴⁶¹ Abs-Shawcross Draft Convention (1956 – 1959), Art 4.

⁴⁶² Abs-Shawcross Draft Convention (1959), Art 2

⁴⁶³ OECD 'International Investment Law: Understanding Concepts and Tracking Innovations' available at <https://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf> (accessed 20 July 2016) 101.

⁴⁶⁴ OECD 'International Investment Law: Understanding Concepts and Tracking Innovations' available at <https://www.oecd.org/investment/internationalinvestmentagreements/40077165.pdf> (accessed 20 July 2016) 139.

⁴⁶⁵ OECD 'International Investment Law: Understanding Concepts and Tracking Innovations' available at <https://www.oecd.org/investment/internationalinvestmentagreements/40077165.pdf> (accessed 20 July 2016) 139.

measures clauses.⁴⁶⁶ As can be noted from the evolving salient features of BITs, BITs are in a constant state of development. Muchlinski, Ortino and Schreuer have raised an interesting view on BITs:

[BITs can] be said to constitute a special juridical regime designed to restate, in treaty form, international minimum standards of treatment of foreign investors as accepted by capital-exporting states, and to merge these with established, treaty-based, standards of commercial conduct that do not possess the character of international law, despite the widespread usage over many centuries, notably, the most-favoured-nation (MFN) standard and the national treatment standard. The result is an integrated system of norms for the delocalized regulation of a bilateral investment relationship between a developed capital-exporting state and a less developed capital-importing state, in a manner conducive to efficient capital accumulation by investors from the capital-exporting state.⁴⁶⁷

The idea of these authors is quite similar to the sentiment that IIL is becoming multilateral on the back of IIAs and BITs. However, this is not without question. Investment agreements have not remained static. In certain instances, such as in the case of countries, such as, Germany, Japan and Finland in the 1990s, these BITs have been re-negotiated to reflect current pronouncements on IIL, for instance, a focus on sustainable development, good governance and the rule of law.⁴⁶⁸ Moreover, in 2008 alone, 11 investment agreements were denounced, with Ecuador denouncing 9 out of the 11 agreements.⁴⁶⁹ In a similar vein, as mentioned before, some States have also denounced the ICSID Convention. Currently, India has suspended all ongoing BIT negotiations and has begun to undertake a review of all existing BITs, as a means of protecting its interests.⁴⁷⁰ South Africa has terminated some of BITs and also served

⁴⁶⁶ Iqbal Z 'Investment Treaty Law: Impact of Umbrella Clauses on State Liability – Pakistan' available at <https://www.hg.org/article.asp?id=28925> (accessed 15 September 2016).

⁴⁶⁷ Muchlinski P, Ortino F & Schreuer R (2008) 17.

⁴⁶⁸ Hindelang S & Krajewski M (2016) ch 10.

⁴⁶⁹ Noortman M & Ryngaert C 2010) 31.

⁴⁷⁰ Subedi SP (2016) ch 8.

notices to more BITs.⁴⁷¹ However, some of these BITs remain in force for a further 10-15 years as a result of survival clauses in these BITs. States have cited the 'restriction of national policy space' as a key challenge to the existing BITs.⁴⁷²

The issue of 'national policy space' is a very interesting one in the regulation of the protection of foreign investment. Mayer in his submission to the UNCTAD notes that 'the role of national policies in economic development has long been debated with much of current debate concerning the concept of 'policy space' focuses on the tensions between international economic integration and the autonomy available to nation [S]tates to pursue policies that effectively support their economic development'.⁴⁷³ One policy question stems from the fact that since it is unclear whether BITs increase FDI, it would in the view of the host State be prudent to regulate foreign investment with their domestic legal regime, rather than sign potentially one-sided BITs.⁴⁷⁴ Some countries, such as South Africa, have subscribed to this ideology. Bosman in her paper titled 'South Africa: trading international investment for policy space' notes that South Africa's thirst for policy space to regulate investment can be described as follows:

'Recent policy and legislative developments, including the termination of South Africa's bilateral investment treaties with EU trading partners and the introduction of the Protection of Investment Act are however raising concern among international investors and bringing into question the attractiveness and reliability of South Africa as a destination for foreign investment. These concerns are compounded by increasing

⁴⁷¹ Mutsau S Revisiting *Bilateral Investment Treaties in the 21st Century: A Kenyan and South African Experience* (2017) 54.

⁴⁷² Noortman M & Ryngaert C (2010) 31.

⁴⁷³ Own emphasis added. Mayer J 'Policy Space: What, For What, For Where?' available at http://unctad.org/en/docs/osgdp20086_en.pdf (accessed 15 September 2016) 1.

⁴⁷⁴ Tobin J & Rose-Ackerman S 'Developing Countries: The Impact of Bilateral Investment Treaties' (2005) 293 *Yale Law School, Center for Law Economic and Public Policy* 3. Tobin concludes that despite the arguments by proponents of FDI that BITs can substitute a weak investment climate, his empirical study found that there is a weak relationship between BITs and FDI. Crucial is also the complex relationship between the political environment, BITs and FDI. He makes an important observation from his data that there must be a certain level of political stability in a country before BITs can start to have a positive effect on the FDI of a particular country. Therefore, for developing countries, the contraction of FDI may not likely be related to BITs.

regulatory restrictions upon foreign investors, including stricter visa requirements, and the introduction of various other pieces of legislation that have implication upon the level of protection of property rights in South Africa.⁴⁷⁵

The excerpt above provides an example of how many States are beginning to want to reclaim their policy space by concluding less BITs and enacting more pieces of regulation, on and around, foreign investment. In a similar sentiment, Yu and Marshall note that recent national FDI legislation has focused on increasing regulatory restriction on FDI.⁴⁷⁶ This is a deviation from earlier periods where policy changes were more focused on investment promotion and establishing fiscal and financial incentives.

The 2004 American Model BIT also recognised the need for policy space of host States and thus allowed the domestic country to adopt regulatory measures which would otherwise lead to claims for compensation.⁴⁷⁷ Schill, Tams and Hoffman opine that the adoption of legitimate domestic regulatory measures, such as those on human rights, cultural protection and environmental protection, can assist host States to escape litigation arising from exposure to broad BITs.⁴⁷⁸ Some policy space enthusiasts have even gone as far as couching the term as the 'right to regulate' in a bid to assert the right of the host State to regulate foreign investment.⁴⁷⁹ This idea has further been refined through the adoption of a standpoint similar to that of the EU Free Trade Agreements (FTAs), that there must be a 'minimum threshold for host state

⁴⁷⁵ Bosman K (2016) 1. Adeleke argues that reasons could be advanced as to why South Africa has engaged in a substantial policy shift with regard to foreign investments. These potential reasons include that, there have been constitutional guarantees that have been set to mitigate risk, the government has a constitutional obligation to reclaim policy space, the volatile nature of BIT interpretations, the need to develop home-grown institutions and the recognition of the pedestal role of IIAs in attracting investment.

⁴⁷⁶ Yu V & Marshall F 'Investors Obligations and Host State Policy Space' available at https://www.iisd.org/pdf/2008/dci_inv_obligations.pdf (accessed 15 September 2016). 1.

⁴⁷⁷ United States Department of State '2004 Model BIT' available at <http://www.state.gov/documents/organization/117601.pdf> (accessed 15 September 2015). See Mouyal I (2016) ch 4.

⁴⁷⁸ Schill SW, Tams CJ & Hofmann R *International Investment Law and Development: Bridging the Gap* (2015) 143.

⁴⁷⁹ Titi C *The Right to Regulate in International Investment Law* (2014) 111. See further Wagner M 'Regulatory Space in International Trade Law and International Investment Law' (2015) 36 *University of Pennsylvania Journal of International Law* 4.

policy space' in a similar fashion to minimum standards of treatment.⁴⁸⁰ While the State is in a good position to measure positions and respond with appropriate policy positions, there needs to be more of a balancing act between policy space, government objectives and foreign investment protection.⁴⁸¹ Bosman distils this idea and notes the following:

'A balance needs to be found between the government's sovereign right to implement policy in order to achieve its socio-economic goals, its duty to protect foreign investments, and its overall objective in promoting sustainable economic growth.'⁴⁸²

Gallagher suggests that maybe there is a need to reform current and future agreements so as to facilitate better policy space.⁴⁸³ He further contends that in view of the global financial crisis, whose effects are still fresh, 'policy space reclamation and coordination' would aid to escape discrimination and jurisdictional inconsistency.⁴⁸⁴ Some countries are already moving towards this approach, with Indonesia, for example, in the process of finalising its draft Model BIT which is characterised by 'carve-outs, safeguards and clarifications aimed at striking a balance between the right of the State to regulate and the rights of investors, while maintaining its policy space'.⁴⁸⁵ A similar balance has been attempted in the recent Indian Model BIT.

⁴⁸⁰ Shan W & Su J (eds) *China and International Investment Law: Twenty Years of ICSID Membership* (2014) 327.

⁴⁸¹ On the current trend, investor protection are to continue to lose ground while domestic policy spaces become more popular. Spears notes that one of the biggest challenges of our times with regards to international investment law is to strike a balance between the protection and promotion of foreign investment and the protection of society and the environment. See Spears AZ 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037.

⁴⁸² Bosman K (2016) 1.

⁴⁸³ Gallagher KP 'Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements' available at http://unctad.org/en/Docs/gdsmdpg2420101_en.pdf (accessed 15 September 2016) 17.

⁴⁸⁴ Gallagher KP 'Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements' available at http://unctad.org/en/Docs/gdsmdpg2420101_en.pdf (accessed 15 September 2016) 17.

⁴⁸⁵ United Nations Conference on Trade and Development 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (accessed 15 September 2016) 124.

Unarguably, the creation of domestic regulation takes place against the background that governments need to increase FDI, and that policy space for national rule making is more likely than not going to be at odds with this objective.⁴⁸⁶ The changing values in the composition of foreign investment frameworks have therefore put into question the credibility of the current IIL framework.⁴⁸⁷ With the somewhat diminishing stature of investment agreements, despite their numerical growth, it becomes important to examine the role of customary international law in IIL.

2.4.3 Customary international Law

The actions taken by States at an international level do not always result in these actions forming part of international customary law.⁴⁸⁸ The test for this is two legged: first, the actions of the State must be necessitated by legal obligation; and second by, pursuant to Article 38 of the Statute of the ICJ, earlier discussed, the practice should occur in a manner that manifests a legal obligation. In the context of IIL, the question of which practices would form part of customary international law remains a potent one. In the earlier discussion above on the emergence of doctrines, the motivation for these doctrines, starting with the Calvo doctrine, was actually the inadequacy of and disagreements on the content and application of customary international law. The legitimacy of customary international law has thus been called into question, leaving unanswered queries about its very existence.

Within the multiplicity of divergent ideas on customary international law, there is generally a consensus that in terms of customary international law, foreign investors can only make investments in a host country subject to the sovereignty of that country.⁴⁸⁹ In essence, States can determine which investments can enter their

⁴⁸⁶ Sauvart KP 'The Evolving International Investment Law and Policy Regime: Ways Forward' 2016 Policy Options Paper for the E 15 Initiative on Strengthening the Global Trade and Investment System for Sustainable Development 15.

⁴⁸⁷ Schill SW, Tams CJ & Hofman R (2015) 170.

⁴⁸⁸ Salacuse JW (2013) 308.

⁴⁸⁹ Caliskan Y (2008) 14.

borders. Another accepted principle within the context of customary international law is that of 'fair and equitable treatment'. Recalling once again that up to the creation of the Calvo doctrine, it was generally understood that 'customary international law imposed an international minimum standard on the treatment of foreign investment'.⁴⁹⁰

The minimum standards offered by customary international law are also applied to the protection of foreign investments. For example, it is generally understood that according to customary international law there is a doctrine on the responsibility of the State for harm to aliens and their property. Therefore, if a host State were to expropriate property, it should compensate the injured party. Other accepted principles of customary international law included MFN treatment and NT. Customary international law, on the other hand, does not give an investor the right to shift his capital from one State to another.⁴⁹¹

In addition to the above rules, it is possible that some rules in BITs have become custom. Gazzini and Brabandere argue that not all rules contained in BITs can, however, be mechanically equated to rules of customary law.⁴⁹² To advance this idea, they argue that there is a thorny and delicate field through which a rule must pass before it can be said to be part of customary international law. They identify the candidates for customary law status in investment law as: (1) the international minimum standard, (2) fair and equitable treatment, (3) protection against (and conditions for) expropriation, (4) standards of compensation, (5) denial of justice, and (6) due process.⁴⁹³

With the entrenched culture of IIAs and BITs, the relevance of customary law has been significantly undermined and its relevance in IIL must be re-examined. Some of the potential benefits of customary international law include: filling the *lacuna* left by

⁴⁹⁰ Vandevelde KJ (2005) 159.

⁴⁹¹ Salacuse JW (2013) 309.

⁴⁹² Gazzini T & De Brabandere (2012) 25

⁴⁹³ Gazzini T & De Brabandere (2012) 25.

BITs,⁴⁹⁴ providing a basis for the interpretation of BITs, providing an extra level of protection for foreign investments in cases where BITs cease to be operational, providing a multilateral basis for investment protection, and legitimising the jurisprudence and precedent of arbitral courts.⁴⁹⁵

2.5 CONCLUSION

In tracing the historical origins and development of ILL, three facets of international investment became distinguishably clear as the foremost important concepts. These were: (a) the treatment of foreign investment; (b) the protection of foreign investment⁴⁹⁶ and (c) the settlement of disputes.⁴⁹⁷ Under these umbrella concepts numerous concepts were uncovered, such as, NT, MFN treatment, and fair and equitable treatment. While there are other concepts that could be discussed in greater detail (for example, subrogation), these other concepts would be better suited for a discussion on the content of a multilateral framework for investment.

It is interesting to note that while there were three main classifications of IIL, namely, soft law, hard law and customary international law, many of the principles within these classifications overlapped. These overlaps included principles such as, MFN treatment and NT. The principles and concepts discussed in this chapter are vital in setting standards against which domestic legal systems will be evaluated. In terms of soft law, the principles espoused in universal soft law, such as, the UN Codes of Transnational Property and the World Bank Guidelines, are often referred to as the universal soft law of investment law. In terms of 'hard law', Zimbabwe's BITs and FTAs will be used as tools of analysis, to a limited extent, as these agreements will be considered in more detail in chapter 4 and 5 below. With regard to customary international law, an international minimum standard on the treatment of foreign

⁴⁹⁴ Lacuna-Filling Effect.

⁴⁹⁵ Gazzini T & De Brabandere (2012) 25.

⁴⁹⁶ (a) and (b) part of the substantive formulation of IIL.

⁴⁹⁷ This is a procedural concept.

investment, fair and equitable treatment, MFN treatment, NT, protection against expropriation and standards of compensation, are relevant for the next chapter (as well as further chapters) which provides a critical analysis of Zimbabwe's domestic legal framework on foreign investment.



CHAPTER 3

AN ANALYSIS OF ZIMBABWE'S DOMESTIC FOREIGN DIRECT INVESTMENT FRAMEWORK

3.1 INTRODUCTION

'Government of Zimbabwe (GOZ) officials generally recognize that foreign investment is needed to bring necessary capital, technology and skills to create the jobs and opportunity that its rapidly growing workforce needs. However, over the last two years the investment and operating climate in Zimbabwe has worsened. Potential investors need to assess carefully this tougher environment, and to also factor in and plan for the government's goals for indigenization (black economic empowerment), privatisation and land reform.'⁴⁹⁸

The above quote by International Business Publications in its handbook on Zimbabwe's business laws throws light on the prevailing situation in Zimbabwe where investors find themselves at a crossroad because, on the one hand, the GOZ seeks to enhance foreign investment in the country, while, on the other hand, the laws and policy being crafted by the government serve as impediments to investment. This chapter explores the law, policy and institutional frameworks that govern FDI in Zimbabwe.

3.2 POLICY FRAMEWORK

3.2.1 Early Formulations

Since independence in 1980, till around 1991, the GOZ had been very defensive towards foreign investments, particularly those from Western countries.⁴⁹⁹ In this

⁴⁹⁸ International Business Publications *Zimbabwe Business Law Handbook: Strategic Information and Laws* vol 1(2013) 71.

⁴⁹⁹ International Business Publications *Zimbabwe Mining Laws and Regulations Handbook* (2008) 235.

period, inward FDIs averaged 18 per cent of the Gross Domestic Product (GDP).⁵⁰⁰ As a result of sustained low levels of foreign investments,⁵⁰¹ in May 1989, the government decided to set new guidelines for foreign investment. The new regulations envisaged a paradigm shift in the treatment of 'new foreign investments' in Zimbabwe. These regulations amended the definition of a foreign company to one in which at least 25 per cent of the shares are owned by a non-Zimbabwean.⁵⁰² Furthermore, under the new regulations, it was possible for investors, particularly those involved in high priority projects, to remit a higher percentage of their profits.⁵⁰³ The 1989 regulations were, therefore, a dynamic event in the government's position, moving from a state of investment phobia to investment inclusivity.

In 1991, the GOZ revised the 1989 investment regulations and issued a new Investment Code titled the Promotion of Investment: Policy and Regulations, in a bid to promote foreign investment. In this Code, the government continued to flirt with indigenisation, with the Code still stressing the need for indigenous citizens to play a larger role in the country's economy.⁵⁰⁴ To this end, the Investment Code noted that local ownership would be a key consideration in the evaluation of investment proposals.⁵⁰⁵ To some extent, the Investment Code assisted in improving the investment climate, with Zimbabwe's foreign investment rising to 20 per cent of the GDP, up from 18 per cent in the 1980s.⁵⁰⁶ The government prioritised key areas for capital investments while other sectors were reserved for locals. Incentives geared towards attracting capital investment, technology transfer, raw material utilisation and the development of rural areas were provided. Such incentives included tax free holidays and customs free trade.

⁵⁰⁰ Nyakazeya P 'FDI Elusive' *The Financial Gazette* 31 October 2013.

⁵⁰¹ See Kanyenze G et al (eds) *Beyond the Enclave: Towards a Pro-poor and Inclusive Development Strategy for Zimbabwe* (2011) 145.

⁵⁰² Herbst JI *State Politics in Zimbabwe* (1990) 133.

⁵⁰³ Herbst JI (1990) 133.

⁵⁰⁴ International Business Publications (2013) 71.

⁵⁰⁵ International Business Publications (2013) 71.

⁵⁰⁶ Nyakazeya P 'FDI Elusive' *The Financial Gazette* 31 October 2013.

In 1994, the government introduced Statutory Instrument 108 of 1994. In terms of this Instrument, certain sectors, such as, agriculture, forestry, transport services (excluding air) and retail and wholesale trade, were deemed to be reserved sectors.⁵⁰⁷ The crux of this Instrument was that reserving a greater number of sectors for indigenous Zimbabweans would encourage joint ventures, consequently stimulating local participation. Foreign investors would only be able to acquire a maximum of 25 per cent of a company in these joint ventures.⁵⁰⁸ The gains of the Statutory Instrument 108 of 1994 and the Investment Code would, however, be short-lived as they were soon undone by the implementation of the Zimbabwe Program for Economic and Social Transformation 1996 - 2000 (ZIMPREST) in 1996, which came as an alternative to the failed ESAP.⁵⁰⁹ This policy greatly increased investor risk and made the country a less attractive investment destination. This state of affairs was further exacerbated by the fact that the government announced in 1998 that foreign investors could only invest up to a maximum of between 15 per cent – 20 per cent.⁵¹⁰

3.2.2 Land reform program

3.2.2.1 Background

The GOZ had promised its citizens that after independence it would re-distribute land to indigenous Zimbabweans who had lost this land during white colonial rule. During the negotiation at Lancaster House just before independence in 1980, the issue of land had been a very contentious one, and almost led to the collapse of the talks.⁵¹¹ However, the impasse was resolved by a commitment by the British to fund the land reform program on a 'willing buyer, willing seller' basis.⁵¹² Therefore, it was envisaged

⁵⁰⁷ Statutory Instrument 108 of 1994.

⁵⁰⁸ Chikuhwa JW *A Crisis of Governance: Zimbabwe* (2004) 221.

⁵⁰⁹ See Saunders R 'Economic Structural Adjustment Programme (ESAP)'s Fables II' (1996) 11 *Southern African Report* 8. Unwittingly, one of the desired objectives of ZIMPREST was to facilitate investment. See Chidede T (2016) 139.

⁵¹⁰ International Business Publications (2013) 71.

⁵¹¹ Brownwell J *Collapse of Rhodesia: Populist Demographics and the Politics of Race* (2010) 7.

⁵¹² Mario P *Zimbabwe Pray For Hope* (2009) 14.

that the British would supply the government with the necessary resources for this costly program to 'buy out' willing White commercial farmers. Such compensation would be paid in foreign exchange, as was decided in a last minute amendment to the Lancaster House Agreement.⁵¹³

The main threat to the 'willing buyer, willing seller' program would always be that in a perfect market demand would always exceed supply. This challenge was further heightened by the fact that the government had set the target for resettlement at an imposing figure of 162 000 households by the end of 1984.⁵¹⁴ This did not take into account the fact that there would not always be 'willing buyers' and resources, as well as that there was only a limited amount of land abandoned at independence.⁵¹⁵ The viability and sustainability of the program was thus always in question. By 1990, the government had only managed to resettle 50 000 families, securing 40 per cent of the projected 8 million hectares.⁵¹⁶ These marginal acquisitions did little to ameliorate the demand for land. Funding for the program was not coming, however, at the desired rate. For example, in 1983, the British government provided close to €40 million for the program.⁵¹⁷ The international community also chipped in, with donations coming from organisations, such as, United States Agency for International Development (USAID), the EU, the World Bank and the Overseas Development Institute.⁵¹⁸

⁵¹³ Dashwood HS *Zimbabwe: The Political Economy of Transformation* (2000) 52.

⁵¹⁴ Laurie AC *The Land Reform Deception: Political Opportunism in Zimbabwe's Land Seizure Era* (2016) 4.

⁵¹⁵ Dashwood HS (2002) 52.

⁵¹⁶ Human Rights Watch 'Fast Track Land Reform in Zimbabwe' available <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm> (accessed 16 August 2016).

⁵¹⁷ Masiwa M 'Land Reform Policy in Zimbabwe: Disparity between Policy Design and Implementation' 2004 *Institute of Development Studies* 3.

⁵¹⁸ Masiwa M (2004) 3.

3.2.2.2 Legal Regime

In 1992, the government enacted a new Land Acquisition Act, replacing the 1985 Land Acquisition Act.⁵¹⁹ The Act was preceded by the Constitution of Zimbabwe Amendment Act which weakened the constitutional protection of property, in particular, agricultural land.⁵²⁰ This Act sought to create a legal regime for the compulsory acquisition of land and other immovable property by the government in certain situations, with a fair compensation being payable.⁵²¹ The Land Acquisition Act allowed those affected by compulsory acquisition the right to approach the courts to contest the price of the acquisition. The idea behind the Act was therefore to solidify the government's intention to distribute land.⁵²² As tensions and impatience heightened, this Act marked the beginning of the end of the era of the 'willing buyer, willing seller' policy, towards mandatory acquisitions.

As the government implemented the Land Acquisition Act, corruption and bribery became rampant, with the acquired land falling into the hands of greedy politicians and business moguls. This in turn led the British to later renege on their aid to the land reform program after the government insisted on the application of the Act at the Land Reform Donor Conference (1998) in Harare.⁵²³ At this point, Britain, the main funder of the program, had only contributed an alleged amount of €17 million, a figure which Britain generously estimated at €44 million.⁵²⁴ Britain further alleged that since

⁵¹⁹ Act 3 of 1992. The Land Acquisition Act has been amended several times since its enactment. Another important Act was the Communal Land Act 20 of 1982 (Chapter 20:04).

⁵²⁰ The Lancaster House Constitution limited the power of the government to acquire land for resettlement.

⁵²¹ Land Acquisition Act 3 of 1992. See further, Land Acquisition Act [Chapter 20:10], section's 1-2. The process involved compulsory acquisition and land designation.

⁵²² Chinamasa MG 'The Human Right to Land in Zimbabwe: The Legal and Extra-Legal Resettlement Processes' (unpublished LLM thesis, University of Pretoria) 26 – 27. The Land Acquisition Act, however, had a marginal effect. By 1995, the government had only acquired 21 of the designated farms. See Watt P *Social Investment and Economic Growth: A Strategy to Eradicate Poverty* (2000) 112.

⁵²³ Mario P *Zimbabwe, Land and the Dictator* (2009) 15.

⁵²⁴ Mario P (2009) 15.

Independence, they had given Zimbabwe €500 million in support; €100 million of which was for budgetary support and €47 million purposed for land reform.⁵²⁵

After the withdrawal of support by Britain for the program, progress with regard to the implementation of the Land Acquisition Act seemed to stall. A list of farms intended to be purchased by the government was published in 1997.⁵²⁶ The land in question was approximately 45 per cent of the land held by the country's 4500 commercial farmers.⁵²⁷ These farmers lost the title to the land and could thus not claim the land as their own. Tensions continued to escalate. In 1999, the Commercial Farmers Union tried to ease the situation by offering 15 000km² for sale, an offer which was not taken up by the government as some farmers dragged their feet.⁵²⁸ In response, the government decided to hold a referendum to amend the Constitution.⁵²⁹ The citizens disagreed with this draft Constitution in principle, and asserted their right by rejecting the draft Constitution.

Nonetheless, the government opted to amend the Constitution through Parliament in April 2000.⁵³⁰ The victims of the land reform program would thus immediately lose their interest in the property. The practical effect of the constitutional amendment was that the government could expropriate farms without compensating for the land itself, but was only obligated to pay for the improvements on the land. Non-government land invasions soon started in addition to the government seizures. These were not even mitigated by the constitutional amendment.⁵³¹

The violent land grabs led by liberal war veterans would be later known as the 'Fast Track Land Reform Program'. The 'Fast Track Land Reform Program' allocated over 4 500 farms, totalling about 7.6 million hectares, which is about 20 per cent of the land

⁵²⁵ Mario P *The Haunted Nation* (2006) 32.

⁵²⁶ Meredith M *Mugabe: Power, Plunder and the Struggle for Zimbabwe* (2009) 139.

⁵²⁷ Meredith M (2009) 139.

⁵²⁸ Mario P *Zimbabwe Cry for Hope* (2009) 16.

⁵²⁹ Raftopoulos B & Savage T *Zimbabwe: Injustice and Political Reconciliation* (2004) 249.

⁵³⁰ Masiwa M (2004) 14.

⁵³¹ Masiwa M (2004) 142.

in Zimbabwe.⁵³² This situation raised important questions about the respect for property rights and the rule of law in Zimbabwe.⁵³³ The government attempted to window-dress the issue by passing the Land Acquisition Amendment Act as a means of putting a legal face to a militia process. Through this Act and as a means of formalisation, the government would adopt two models for the resettlement process. In terms of the A1 Model, the government would settle people who lived in overcrowded communal areas, while the A2 Model sought to establish small to medium commercial farms which were to be run by black farmers.⁵³⁴

The formalisation of unconstitutional acts did not distract those who were receiving the short end of the stick of the land reform process. Faced with mounting pressure, legal and otherwise, the government then decided to once again amend the Constitution to further formalise the Fast Track Land Reform Program. The Constitution of Zimbabwe Amendment (No.17) Act of 2005⁵³⁵ was then enacted. The 17th Constitutional Amendment afforded protection from deprivation of property.⁵³⁶ Section 16(1) stated that compulsory acquisitions of any property, right or interest were prohibited unless under the authority of a law that requires the acquisition of land for redistribution. Section 16A(1) dealt specifically with the acquisition of agricultural land, noting that such acquisition was permissible for the purpose of a land reform program.⁵³⁷

Interestingly, the section noted that the former colonial master (Britain) had an obligation to pay compensation, through a fund established for the purpose, for land

⁵³² Scoones et al 'Zimbabwe's Land Reform Program: A Summary of Findings' available at <http://zimbabweland.net/Zimbabwe's%20Land%20Reform%20Booklet%20Web.pdf> (accessed 16 August 2016).

⁵³³ International Business Publications *Zimbabwe Investment and Business Guide Volume 1 Strategic and Practical Information* (2015) 110.

⁵³⁴ Mabaye TM & Lusignan BB 'Land Reform in Zimbabwe: An Examination of the Past and Present Policy, Shortcomings and Success and Recommendations for Improvement' 2005 *Ethics of Development in a Global Environment* 12.

⁵³⁵ Act 5 of 2005.

⁵³⁶ Section 16 of the Constitution of Zimbabwe Amendment Act (No.17) of 2005.

⁵³⁷ The section went on to note justifying factors for such acquisitions: (1) the people of Zimbabwe had unjustifiably been dispossessed of their land without compensation; (2) the people had taken up arms in order to regain the land, leading to Independence in 1980; and (3) that the people of Zimbabwe must be allowed to reassert their rights by regaining their land.

compulsorily acquired for resettlement.⁵³⁸ Furthermore, s 16A(1)(c)(ii) stated that where the former colonial power failed to pay such compensation, the government was under no obligation to pay compensation for agricultural land acquired for the purpose of resettlement. Clearly, this provision was a deliberate ploy by the government to evade paying compensation as Britain had already withdrawn its support for the land reform program in the 1990s.⁵³⁹

The government managed to maintain these provisions when a new constitutional dispensation emerged in 2013, with the enactment of a new Constitution.⁵⁴⁰ Section 72 of the new Constitution provides for the right to agricultural land, and expropriation without compensation for resettlement is permissible. This is notwithstanding the fact that the new Constitution also provides for an express guarantee of property rights in s 71. However, in contradiction, the 2013 Constitution allows for the payment of full compensation for agricultural land owned by indigenous Zimbabweans that is acquired, in contrast to the prevailing position in the case of non-indigenous Zimbabweans.⁵⁴¹ Furthermore, s 295(2) of the 2013 Constitution provides:

‘Any person whose agricultural land was acquired by the State before the effective date and whose property rights at that time were guaranteed or protected by an agreement concluded by the Government of Zimbabwe with the government of another country, is entitled to compensation from the State for the land and any improvements in accordance with that agreement.’⁵⁴²

Section 295(2) therefore offers protection to foreign nationals and their property, whose countries had signed a BIT with Zimbabwe. Section 295(3) clarifies the issue

⁵³⁸ Section 16A(1)(c)(i) of the Constitution of Zimbabwe Amendment Act of 2005. At this point, as indicated above, Britain, the former colonial master, had already cut its losses and stated that it would not fund the land reform program due to the mismanagement of the program, in part 3.3.2 above.

⁵³⁹ See s 3.3.1 of this thesis.

⁵⁴⁰ Constitution of Zimbabwe Amendment (No.20) Act 1 of 2013.

⁵⁴¹ Chapter 16 of the Constitution of Zimbabwe Amendment (No.20) Act 1 of 2013. Section 295(1) of the 2013 Constitution provides: ‘Any indigenous Zimbabwean whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired,’

⁵⁴² Section 295(2) of the 2013 Constitution of Zimbabwe Amendment (No.20) Act 1 of 2013.

of compensation by stating that where the land of a person other than those referred to s 295(1) and s 295(2) was expropriated,⁵⁴³ only compensation for improvements made at the time the land was acquired would be provided.

3.2.2.3 Legal challenges to the land reform program

3.2.2.3.1 Domestic challenges

As noted in the foregoing section, the land reform program raised many questions about the respect for property rights in Zimbabwe. Naturally, there were many objections to the program. At first these objections were raised in the courts.⁵⁴⁴ For example, the case of *CFU v Minister of Lands*⁵⁴⁵ can be cited. This was one of the earlier cases in which a party had sought legal refuge in order to protect their farm from expropriation. The applicant sought to enforce an earlier court order which declared farm invasions during the Fast Tract Land Reform Program unlawful.⁵⁴⁶ The order required the police to inform the invaders of the unlawfulness of their conduct within 72 hours of the issue of the order.⁵⁴⁷ According to the order, police also had to disregard any executive instructions requiring them to act to the contrary.⁵⁴⁸

An application was, however, made attempting to have the provision to disregard executive orders set aside.⁵⁴⁹ The rationale behind the application was that the police lacked the resources to undertake such a resource intensive mandate.⁵⁵⁰ No effort was even made to enforce the earlier part of the order which was not contested. The

⁵⁴³ This is in reference to land that was acquired before the effective date.

⁵⁴⁴ The courts in question here are the domestic courts.

⁵⁴⁵ 2000 (2) ZLR 486 – 7.

⁵⁴⁶ *Commissioner of Police v Commercial Farmers' Union* (2000) 1.

⁵⁴⁷ *Commissioner of Police v Commercial Farmers' Union* (2000) 1.

⁵⁴⁸ *Commissioner of Police v Commercial Farmers' Union* (2000) 1.

⁵⁴⁹ *Commissioner of Police v Commercial Farmers' Union* (2000) 1.

⁵⁵⁰ *Commissioner of Police v Commercial Farmers' Union* (2000) 2.

High Court held that the farm owners and the workers had been deprived of protection under s 18 of the Constitution.⁵⁵¹

Later cases were not as successful as the case of *CFU v Minister of Lands*, as a result of the changes in the legislative regime on land reform. For example, in *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement*, the applicant filed an urgent application seeking a provisional order declaring the amendments to s 7, 8, 9 and 10 of the Land Acquisition Amendment Acts of 2002 and 2004 to be unconstitutional and therefore invalid.⁵⁵² The applicant had been issued with a land acquisition order pursuant to s 8 of the Land Acquisition Act [Chapter 20:10].⁵⁵³ In terms of such order, the applicant had to cease all farming operations within 45 days of the issue of the order.⁵⁵⁴ The Court found that the matter was not of an urgent nature as the order had been executed in terms of a valid piece of legislation.⁵⁵⁵ The Court was also of the view that until such a time that the law was legally abrogated or lawfully invalidated, there was no *per se* illegality tainting the order.⁵⁵⁶ The court expressed the sentiment that an intention to challenge a law did not transpose into invalidity of the law.⁵⁵⁷ Accordingly, the Court dismissed the matter without costs, ruling that the matter was not urgent.

This case showed the importance of the legislative changes that had been made by the government on the legality of the land reform process. The implication of these

⁵⁵¹ *Commissioner of Police v Commercial Farmers' Union* (2000) 3. See further, Constitution of Zimbabwe Amendment (No.17) Act 5 of 2005.

⁵⁵² *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 1.

⁵⁵³ *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 1.

⁵⁵⁴ *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 1.

⁵⁵⁵ *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 2.

⁵⁵⁶ *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 2.

⁵⁵⁷ *Lynhust Estate (Private) Limited v Minister of Special Affairs in the President's Office in Charge of Lands, Land Reform and Land Resettlement* (2004) 2. The applicant had lodged a motion with the Supreme Court of Appeal (SCA) to declare the amendments to the Land Acquisition Act unconstitutional.

changes was that until such time that a competent court of law had declared such laws to be unconstitutional and invalid, no applicant would be able to apply to rescind an order issued to acquire their land for purposes of land reform. This position was further solidified in *Cedor Farm Park (Pvt) v Minister of State for National Security, Land, Land Resettlement in the President's Office*.⁵⁵⁸ In this case, the parties were farm owners whose farms had subject to s 5 of the Land Acquisition Amendment Act [Chapter 20:10] been earmarked for compulsory acquisition.⁵⁵⁹ The Court noted:

'The law is now settled that once a farm has been acquired then the rights over it vest in the State. That being the case the former owner and title holder has no *locus standi* to approach the court for an interdict because he or she cannot establish a clear right. The lack of *locus standi* prevails even if the matter is pending before the Administrative Court because the right would be speculative.'⁵⁶⁰

This position was further crystallised in the landmark judgement of *Campbell Private Limited v the Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor*.⁵⁶¹ In this matter, the applicant sought redress on the basis that the Constitutional Amendment Act (No.17), 2005 which introduced s 16B into the Constitution allowing the acquisition of land, was in violation of his constitutional rights to property (including the right not to have private property compulsorily expropriated without authority of the law),⁵⁶² protection of law,⁵⁶³ a fair hearing and determination

⁵⁵⁸ HC 153 & 154 [2010] ZWBHC 65.

⁵⁵⁹ *Cedor Farm Park (Pvt) v Minister of State for National Security, Land, Land Resettlement in the President's Office* (2010) 1. Their farms appeared in the 7th Schedule of the Constitutional Amendment Act (No 17) after an agreement had been reached between the parties to withdraw the matter in the Administrative Court until confirmation of the acquisition order.

⁵⁶⁰ *Cedor Farm Park (Pvt) v Minister of State for National Security, Land, Land Resettlement in the President's Office* (2010) 2. See further *Airfield Investment (Pvt) Ltd v Minister of Land & Ors* 2004(1) ZLR 511(5) and *Airport Game Park (Pvt) Ltd v Kambidza & Anor* 2004(1) ZLR 391(5).

⁵⁶¹ 124/06 (PVT) [2008] ZWSC 1.

⁵⁶² Sections 11 and 16(1) of the Constitution.

⁵⁶³ Section 18(1) of the Constitution.

of civil rights or obligations by a court of law,⁵⁶⁴ and not be treated in a discriminatory manner on the grounds of race and colour.⁵⁶⁵

The applicant was of the view that these rights were vital features of the Constitution, and as such, the constitutional amendment allowing for the abrogation of these rights was null and void.⁵⁶⁶ In addition, the claimant argued that his right to the payment of timeous and fair compensation for the acquisition of property in s 16(1)(c) of the Constitution had been violated.⁵⁶⁷ The Court rejected these arguments and dismissed the matter without costs. The findings of the Court were: (1) to begin with, neither the Land Acquisition Act nor s 16B of the Constitution made reference to race or colour, therefore race was not an issue; (2) the legislature has the power to amend or change the Constitution; and (3) the government has the inherent right to acquire property compulsorily. Consistent with the argument in *Cedor Farm Park (Pvt) v Minister of State for National Security, Land, Land Resettlement in the President's Office*, the court noted that an 'application to a Court of law to challenge a lawful acquisition would in effect be abuse of the right to protection of the law'.⁵⁶⁸

3.2.2.3.2 Regional courts: SADC Tribunal

The case did not, however, end with the ruling of the Supreme Court. The claimant pursued the matter at a regional level by lodging a case with the Southern African Development Community (SADC) Tribunal, based in Windhoek, Namibia.⁵⁶⁹ At the SADC Tribunal, the case was cited as *Mike Campbell (Pvt) Ltd et al v Republic of*

⁵⁶⁴ Section 18(9) of the Constitution.

⁵⁶⁵ Section 23(1) of the Constitution. These rights are entrenched in the Bill of Rights in the Constitution.

⁵⁶⁶ *Campbell Private Limited v the Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor*, para 1.

⁵⁶⁷ In the alternative, the claimant sought to receive compensation for improvements made to the land. See s 6(1) of the Constitution as read with sections 29B and 29C of the Land Acquisition Act [Cap. 20:10].

⁵⁶⁸ *Campbell Private Limited v the Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor*, para 7.

⁵⁶⁹ The proceedings at the SADC Tribunal had been initiated on 11 October 2007 before the ruling of the SCA on 22 January 2008. It is also important to note that the case was joined by 77 other applicants.

Zimbabwe (Campbell case).⁵⁷⁰ The SADC Tribunal was established by the Protocol on the Tribunal and Rules Thereof and is charged with the task of ensuring proper interpretation and adherence to the SADC Treaty (and subsidiary instruments), as well as adjudicating matters referred to it.⁵⁷¹

Before the Tribunal handed down its judgement, it first granted an interim measure barring the Zimbabwean government from taking any measures to evict Campbell from the land or interfering with his use and enjoyment of the land.⁵⁷² In dealing with the main relief sought, the Court focussed on four particular issues: (1) whether or not the Tribunal has jurisdiction to entertain the application; (2) whether or not the applicants had been denied access to the courts in Zimbabwe; (3) whether or not the applicants had been discriminated against on the basis of race; and (4) whether or not compensation is payable for the lands compulsorily acquired from the applicants by the respondent.⁵⁷³

The Tribunal found as follows on the four issues: (1) the Tribunal had jurisdiction to hear the matter as the 17th Constitutional Amendment Act had created a situation where the applicants' access to the courts had been eliminated, thus allowing the parties leave to seek relief from the Tribunal;⁵⁷⁴ (2) the Tribunal came to the conclusion that the applicant's right to a fair trial had been violated;⁵⁷⁵ (3) on racial discrimination, the Court reached the conclusion that although there was no direct discrimination, the 17th Constitutional Amendment Act was tantamount to a form of *de facto* or indirect

⁵⁷⁰ SADC (T) 2/2007.

⁵⁷¹ Southern African Development Community 'SADC Tribunal' available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (accessed 23 August 2016).

⁵⁷² The applicant had applied for this interim order in terms of Art 28 of the Protocol on Tribunal (the Protocol), as read with Rule 61(2) – (5) of the Rules of Procedure of the SADC Tribunal. See *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2/07) [2007] SADCT 1.

⁵⁷³ *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2008) 16 – 7.

⁵⁷⁴ In terms of Art 14 (basis of jurisdiction) of the Protocol on the Tribunal and Rules of Procedure Thereof as read with Art 15 (scope of jurisdiction), the Tribunal has the power to hear all matters referred to it in terms of the SADC Treaty including disputes between States and those between natural or legal persons and States. See *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2008) 17 – 26.

⁵⁷⁵ *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2008) 26 – 40.

discrimination, as it was only applied to white people;⁵⁷⁶ and (4) on the issue of compensation, the Court made a determination that the applicants had a legitimate claim for compensation for the expropriation of their land.⁵⁷⁷

This case became a landmark test case for the Tribunal as it was its first judgement.⁵⁷⁸ However, challenges would soon emerge in relation to the decision, particularly with regard to enforcement. Not long after the judgement, Richard Thomas Etheredge lodged an application to find the Zimbabwean government in contempt of the earlier order of the Tribunal in the *Campbell* case. The Tribunal then noted that it would report its findings to the Summit of the SADC. After the 2010 Summit, the Tribunal was *de facto* suspended after several judgements against the GOZ which were not complied with.⁵⁷⁹ The resolution of the SADC Summit was that a new Tribunal should be renegotiated and established within a period of six months. This was despite the fact that Zimbabwe had not furnished the Tribunal or the Summit with any reasons for its apathy towards complying with the Tribunal's ruling.⁵⁸⁰ The new Tribunal would resurface with a limited scope, only focussing on the interpretation of the SADC Treaty and Protocols.⁵⁸¹ In terms of jurisdiction, the reformulated Tribunal would be competent to hear only disputes between Member States.

As noted by Ndlovu, the decision regarding the SADC Tribunal was a travesty of justice, in that the Summit should have rather taken the opportunity to assert the

⁵⁷⁶ *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2008) 41 – 55.

⁵⁷⁷ *Mike Campbell (Pvt) Ltd et al v Republic of Zimbabwe* (2008) 55 – 57.

⁵⁷⁸ Naldi GJ *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe: Zimbabwe's Land Reform Held in Breach of the SADC Treaty* (2009) 53 *Journal of African Law* 318. See also, Mike Campbell Foundation 'The SADC Tribunal Court Case' available at <http://www.mikecampbellfoundation.com/page/the-campbell-case-single-page-summary> (accessed 22 August 2016).

⁵⁷⁹ Southern African Development Community 'SADC Tribunal' available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (accessed 23 August 2016). The decisions of the SADC Tribunal are binding on all Member States; however, the ultimate decision to enforce the decision on a Member lies with the SADC Summit.

⁵⁸⁰ President Mugabe noted that the land reform program was irreversible and therefore dismissed the ruling of the Tribunal.

⁵⁸¹ Southern African Development Community 'SADC Tribunal' available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (accessed 23 August 2016).

position and influence of the Tribunal.⁵⁸² Nathan, in a similar vein, articulated that the SADC Summit demonstrated that 'SADC's hierarchy of values, in terms of the organization's formal commitment to human rights and a regional legal order is subordinate to the political imperatives of regime solidarity and respect for solidarity'.⁵⁸³ This was a clear reminder that while integration is desirable, States resist ceding their sovereignty to regional institutions.

3.2.2.3.3 Foreign courts: South Africa

As aggrieved parties were fast running out of options for recourse on their land expropriated for land reform, one party, Fick, decided to throw caution to the wind and first approached the North Gauteng High Court to enforce the cost order granted against Zimbabwe by the SADC Tribunal.⁵⁸⁴ The High Court in *Government of the Republic of Zimbabwe v Fick and Others* developed the common law on the enforcement of foreign judgements and made an order allowing the registration of the order of costs against property owned by the Zimbabwean government in South Africa, thus giving effect to the SADC Tribunal judgement. The majority of the judges were of the view that the Court had a duty to develop the common law, and that the Court had to enable the enjoyment of rights enshrined in the Bill of Rights, such as, access to courts and compensation for expropriation. The farmers in Zimbabwe had been denied these rights through the new constitutional amendment and the absence of the rule of law. As a result, their application had to succeed.

On appeal, the Supreme Court of Appeal (SCA) dismissed the appeal with costs, noting that there were no grounds of defence against the enforcement of the cost order

⁵⁸² Ndlovu PN *Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal* 79

⁵⁸³ Nathan L 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* 1.

⁵⁸⁴ *Government of the Republic of Zimbabwe v Fick and Others* 47954/2010. See *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 122 & *Government of the Republic of Zimbabwe v Fick and Others* CCT 101/12

of the Tribunal.⁵⁸⁵ Similarly, the Constitutional Court in a landmark ruling found that, as determined by the SCA, there was a need to develop the common law rules upon which foreign judgements could be enforced.⁵⁸⁶ From the case, it is worth noting that by signing the SADC Treaty and the Protocol on the Tribunal, Zimbabwe had in a sense negated any immunity it may have enjoyed from South African courts.⁵⁸⁷ This case presents many ideas, such as the potential for the property of Zimbabwe in other countries to be seized on the basis of applications for registration of cost orders in by foreign nationals whose farms were also expropriated.

3.2.2.3.4 International challenges: ICSID

Later on, affected parties went beyond the regional level, seeking relief from international organs such as ICSID. For example, there were disputes on the land reform program which were taken to ICSID. One of these cases heard by ICSID in 2009 was the challenge brought by 15 Dutch farmers in the case of *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*.⁵⁸⁸ The claimants in the case were in possession of direct and indirect interests in large commercial farms in Zimbabwe.⁵⁸⁹ They contended that they had unlawfully been dispossessed of their investments, in terms of land and improvements, in direct violation of the BIT between the Netherlands and Zimbabwe (Netherlands BIT) which had been concluded on 11 December 1996 and entered into force on 1 May 1998.

It was argued that their 'interest' fell within the ambit of the definition of 'investments' in Art 1(a) of the Netherlands BIT.⁵⁹⁰ Article 3 of this BIT recognised the need to treat

⁵⁸⁵ *Government of the Republic of Zimbabwe v Fick and Others* (657/11) [2012] ZASCA 12, para 47 – 50.

⁵⁸⁶ *Government of the Republic of Zimbabwe v Fick and Other* CCT 101/12, para 105.

⁵⁸⁷ De Wet E 'The Case of the Republic of Zimbabwe v Luis Karel Fick: A First Step Towards Developing a Doctrine on the Status of International Judgements Within The Domestic Legal Order' (2014) 17 *PER* 557.

⁵⁸⁸ ICSID Case No.ARB/05/06.

⁵⁸⁹ *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe* (2009) 6.

⁵⁹⁰ *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, para 38. See further Art 1(a) of the Zimbabwe – Netherlands BIT.

investments from either country in a manner that is fair and equitable.⁵⁹¹ One contracting party to the Treaty could not impose any discriminatory or unreasonable measures that impaired the operation, use or enjoyment of the investment of a national of the other contracting party.⁵⁹² The exception to this rule would only be in the case of deprivations made in the public interest and in accordance with due process of law subject to just compensation being paid.⁵⁹³ Moreover, a contracting party could not treat investments of nationals of the other contracting party less favourably than it treated investments of its own nationals.⁵⁹⁴

The Tribunal found in favour of the claimants, deciding that Zimbabwe's land reform program was inconsistent with Art 6(c) of the BIT which necessitated the payment of just compensation.⁵⁹⁵ Further to that, the government had to pay each of the claimants, within three months of the award, the amounts specified by the Tribunal for each of the claimants in respect of their farms, and in some cases for the loss of movable assets and for disturbances.⁵⁹⁶ This case was a clear example of how even after the government of Zimbabwe had constitutionally window-dressed the issue of expropriation without compensation by tampering with the Constitution, it could not escape its international obligations and commitments.⁵⁹⁷

Another matter heard by ICSID (award in 2015) was the case of *Bernhard von Pezold and Others v Republic of Zimbabwe*,⁵⁹⁸ which was later joined with the case of *Border Timbers Limited et al v Republic of Zimbabwe*.⁵⁹⁹ In dispute, once again, was the

⁵⁹¹ Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of Netherlands.

⁵⁹² Article 3(1) of the Netherlands BIT.

⁵⁹³ Article 3(1) of the Netherlands BIT as read with Art 6(c).

⁵⁹⁴ Article 3(2) of the Netherlands BIT.

⁵⁹⁵ *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, para 148.

⁵⁹⁶ *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, para 148.

⁵⁹⁷ Zimbabwe is still, however, yet to honour its obligations in terms of this judgement. See <http://www.bilaterals.org/?zimbabwe-admits-word-bank-ruling> and <http://www.bilaterals.org/?icsid-tribunal-orders-zimbabwe-to>.

⁵⁹⁸ ICSID Case No.ARB/1/15. This thesis only focusses on the main case of *Bernhard von Pezold and Others v Republic of Zimbabwe* as the awards made in the two cases were different.

⁵⁹⁹ ICSID Case NO. ARB/10/25

expropriation of land which was owned by the Pezold claimants.⁶⁰⁰ The claimants argued that the land reform program was contrary to BITs between the Federal Republic of Germany and Zimbabwe⁶⁰¹ (Germany BIT) and the Swiss Confederation and Zimbabwe⁶⁰² (Swiss BIT).⁶⁰³ These alleged violations ranged from breaches of MFN treatment to non-discrimination and expropriation without compensation.⁶⁰⁴ As a result of these violations, the von Pezold claimants sought declaratory relief, restitution and compensation.⁶⁰⁵ In granting declaratory relief, the Tribunal found that there were breaches of international law.⁶⁰⁶ By implementing the land reform program, the government had grossly failed to 'fulfil its obligation arising under a peremptory norm of general international law, namely not to discriminate against people based on race or colour'.⁶⁰⁷ This was so as the land reform program only disenfranchised white farm owners, thus discriminating against them on the basis of their colour.

Under customary international law, the expropriation of property had to be for a public purpose, be non-discriminatory, observe due process of law, and be complemented with prompt, adequate and effective compensation – with which, the land reform program, particularly in its fast track version, did not comply.⁶⁰⁸ As a result, the consequences denoted in Art 41 of the International Law Commission's Responsibility of States for International Wrongful Acts, 2001 (ILC Articles) ensued. Article 41 speaks to the fact that States must cooperate, thorough lawful means, to

⁶⁰⁰ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 2.

⁶⁰¹ The Germany BIT was signed on 29 September and entered into force on the 14 April 2000. The Germany BIT is also supported by the Protocol to the German BIT (German Protocol) which was signed on the 29 September 1995.

⁶⁰² The Swiss BIT was signed on 15 August 1996 and entered into force on 9 February 1996. The Swiss BIT is supported by the Protocol to the Swiss BIT (Swiss Protocol) which was signed on 15 August 1996.

⁶⁰³ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶⁰⁴ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88. See further the Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments & the Agreement between the Republic of Zimbabwe and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments.

⁶⁰⁵ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶⁰⁶ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶⁰⁷ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶⁰⁸ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

end such unlawful action.⁶⁰⁹ In so doing, the international community cannot render assistance to Zimbabwe, if that assistance would help to perpetuate the land reform program.⁶¹⁰

The land reform program was also inconsistent with s 18(1) and 23 of the Constitution and fell foul of various BITs and international law.⁶¹¹ In this regard, the Tribunal ordered restitution in kind (of some of the properties) and compensation.⁶¹² The Zimbabwean government also had to pay the costs and expenses of the Tribunal incurred by the von Pezold claimants.⁶¹³ This case therefore reinforced the findings of the tribunal in *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe* on the legality of land appropriation for land reform without compensation. The next section will examine the effect of the land reform program on FDI.

3.2.2.4 The influence of the land policy on foreign direct investment

The land reform program had numerous implications for FDI in Zimbabwe. The first notable implication is the reduction of FDI due to the infringement of property rights.⁶¹⁴ Property rights are especially important in the field of FDI as they represent the 'legal protection necessary to support entry into a foreign market for investment (or trade), and to maintain a competitive position of the market'.⁶¹⁵ Empirical research has also proven that the composition of FDI is highly related to property rights.⁶¹⁶ The property need not even be physical property all the time, even intellectual property rights are a

⁶⁰⁹ ILC Articles, Art 41(1).

⁶¹⁰ ILC Articles, Art 41(3).

⁶¹¹ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶¹² *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88.

⁶¹³ *Bernhard von Pezold and Others v Republic of Zimbabwe*, para 88. The parties have however filed a rejoinder on the continuation of the stay of the enforcement of the award on the 31st July 2016. See International Centre for Settlement of Disputes. Zimbabwe is yet to honour its obligations in terms of this judgement. See <http://www.bilaterals.org/?zimbabwe-admits-word-bank-ruling> and <http://www.bilaterals.org/?icsid-tribunal-orders-zimbabwe-to>.

⁶¹⁴ See Mafa et al *Gender, Politics and Land Use in Zimbabwe 1980-2012* (2015) 7.

⁶¹⁵ Vanhonnaeker L *Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration* (2015) 50.

⁶¹⁶ Oxelheim L & Ghauri PN *European Union and the Race for Foreign Direct Investment in Europe* (2004) 363.

vital consideration for investors when making a decision on FDI.⁶¹⁷ As a result, the land policy has a direct bearing on foreign investment.

Secondly, the implementation of the land policy as shown above was conducted in a haphazard fashion. For example, constitutional amendments would follow expropriations rather than the reverse. Such conduct is counterproductive as foreign investment thrives on certainty. If land tenure becomes threatened by changing land policy and a resultant uncertain environment, FDI flows tend to be restricted.⁶¹⁸ Furthermore, governments operate under the human rights umbrella in the international regime, from which the government derives obligations.⁶¹⁹ Many of these obligations were violated in Zimbabwe through conduct, such as, the intimidation of and assault on white land owners.⁶²⁰ These human rights violations perpetrated during the implementation of the land policy therefore also created an environment not conducive to foreign investment.

Finally, land policy and foreign investment enjoy a special relationship through BITs. Due to these BITs, foreign owners of land enjoy enhanced rights and protection which would not ordinarily accrue to them.⁶²¹ The land policy in Zimbabwe was in clear violation of these BITs, thus severing the 'special relationship'. Land policy should principally not violate important provisions in these agreements, such as; national treatment, the payment of fair and adequate compensation, and non-discrimination. For example, the cases discussed above, including, *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, *Bernhard von Pezold and Others v Republic of Zimbabwe* and *Border Timbers Limited et al v Republic of Zimbabwe*, can be recalled.

⁶¹⁷ Francioni F *Environment, Human Rights and International Trade* (2001) 273.

⁶¹⁸ Tagini P 'The Effect of Land Policy on Foreign Direct Investments in the Solomon Islands' (2009) 13 *Journal of South Pacific Law* 1.

⁶¹⁹ Peterson LE & Garland R 'Bilateral Investment Treaties and Land Reform in Southern Africa' 2010 *Rights and Democracy* 3.

⁶²⁰ See Norland R 'White Farmers Beaten in Zimbabwe' *Newsweek* 30 June 2008, Tendi BM *Making History in Mugabe's Zimbabwe: Politics, Intellectuals, and the Media* (2010) 141, Wiafe-Amoako *Africa 2016-2017* (2016) 343 & Norman A *Robert Mugabe and the Betrayal of Zimbabwe* (2004) 120.

⁶²¹ De Luca A *General Interests of Host States in International Investment Law* (2014) 258.

In these cases, various foreign nationals sought recourse from ICSID for their private land expropriated for the purpose of land reform despite the protection these farmers had under BITs signed between Zimbabwe and their home States.

Non-compliance by the Zimbabwean government with the orders of ICSID continue despite the fact that Zimbabwe is a signatory to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. This is a grave concern for potential foreign investors and indicative of the collapse of the rule of law and the potential for them to lose their investments.⁶²²

3.2.3 Indigenisation policy

Inequality was always poised to be one of the key issues that a new government in the post-colonial and democratic Zimbabwe would be confronted with. This inequality arose out of the systematic disenfranchisement of black people from the productive sectors of the economy under colonial rule.⁶²³ As a result, the GoZ tried to resolve this imbalance by implementing programs, such as, the land reform program and the indigenisation program, to empower indigenous Zimbabweans.⁶²⁴ The indigenisation program is based on the idea that the economy and the productive factors should be in the hands of the indigenous people.⁶²⁵ This meant that ownership of wealth would be all encompassing, in all sectors of the economy and for all classes of indigenous people.⁶²⁶

⁶²² International Business Publications (2015) 111.

⁶²³ Chidede T (2016) 157.

⁶²⁴ The indigenisation policy is largely believed to be synonymous with economic empowerment due to its objective of empowering the black majority.

⁶²⁵ Both the indigenisation policy and the land reform policy were therefore founded on the ideas of social justice and fairness. See Magaisa AT 'The Trouble With Zimbabwe's Indigenisation Policy' *NehandaRadio* 21 October 2016.

⁶²⁶ Terminal Evaluation for the Project Technical Support to Indigenisation.

The indigenisation policy began to gain momentum in the 1990s when the government established the Indigenous Business Development Centre (IBDC) as a response to the Economic Reform Program.⁶²⁷ The IBDC consisted of a mix of Black lobby groups, such as, Women in Business, Zimbabwe National Farmers Union, and the National Chamber of Commerce. The aim of the IBDC was 'to push for greater black participation and control of the economy'.⁶²⁸ Consistent with the ideals of the IBDC, in 1992, the government injected Z\$ 150 million into the economy for the creation of Black businesses and also allocated 30 per cent of government business to small business, amongst a raft of other measures.⁶²⁹ The hope was that by creating new Black businesses, fighting unemployment and growing the size of the economy; the ownership structure of the economy would also change.⁶³⁰

Be that as it may, the IBDC was not as successful as would have been anticipated. Disgruntled businessmen would soon form an offshoot of their own named the Affirmative Action Group (AAG).⁶³¹ The AAG sought to undertake a 'more aggressive campaign for the localisation of ownership in foreign-owned companies', an agenda with which it was successful.⁶³² While the AAG enjoyed more success and got more attention from the government, the IBDC was founded on better values as its idea of indigenisation was not racially motivated. It envisaged indigenisation as the 'creation of new black business' rather as the 'acquisition of white owned business enterprises'.⁶³³

By 1997, the idea of indigenisation had further intensified on the part of black pressure groups and government alike. The major challenge was, however, the lack of a clear

⁶²⁷ Dashwood HS *Zimbabwe: The Political Economy of Transformation* (2000) 95.

⁶²⁸ See Raftopoulos B & Mlambo A *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008* (2008) 191 & John A *Digital Bridges: Developing Countries in the Knowledge Economy* (2002) 173.

⁶²⁹ Mumbengegwi C *Macroeconomic and Structural Adjustment Policies in Zimbabwe* (2001) 102

⁶³⁰ Raftopoulos B & Mlambo A (2008) 191. See further Moore D, Kriger N & Raftopoulos B 'Progress' in *Zimbabwe? The Past and Present of a Concept and a Country* (2013) 70.

⁶³¹ Raftopoulos B & Mlambo A (2008) 191. The AAG was formed in 1994.

⁶³² Raftopoulos B & Mlambo A (2008) 191.

⁶³³ Moore D, Kriger N & Raftopoulos B (2013) 70.

framework for indigenisation, a challenge which had to be addressed given the vital role that was being given to indigenisation at the time.⁶³⁴ The general idea of the government at this point was the following:⁶³⁵

- to economically empower indigenous Zimbabweans by increasing their participation through economic expansion and their productive investment in the economy so as to create more wealth for poverty eradication;
- to create conditions that will allow disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity;
- to develop a broad-based domestic private sector which is the engine of economic growth and development in a growing market economy;
- to democratise ownership relations of the economy; and
- to eliminate racial differences arising from economic disparities.

In line with this agenda, the GoZ and the United Nations Development Program (UNDP) signed the Technical Support for the Indigenisation Policy Program (TSIPP).⁶³⁶ As noted by the UNDP, the overall objective of the Program 'was to come up with a Policy Framework on Indigenisation that sought to empower indigenous groups in order to eradicate poverty through various instruments of empowerment'.⁶³⁷ At the beginning, the Program was run via the Department for State Enterprises and Indigenisation (SEID). Later on, however, the Program was moved to the Office of the President and then to the Ministry of Industry and International Trade.⁶³⁸

⁶³⁴ This challenge led to further challenges, such as, the narrow interpretation of the indigenisation program and the lack of a clearly defined policy.

⁶³⁵ Terminal Evaluation for the Project Technical Support to Indigenisation.

⁶³⁶ The operations in this project commenced in June 1997.

⁶³⁷ The Program sought to indigenise and economically empower the people of Zimbabwe who were constrained by the skewed ownership of productive assets. Furthermore, the Program also sought to formulate alternative policy implementation strategies and operational guidelines as well create a monitoring and evaluation plan for the indigenisation program. See, Terminal Evaluation for the Project Technical Support to Indigenisation.

⁶³⁸ While the Program was run through government departments predominantly, it also received funding for its operation from the UNDP. For the two years of operation of the program, the UNDP committed USD 780 300 for the functioning of the project

Significant progress was made on developing the policy framework. However, at the time the UNDP withdrew from the Program, a lot of work regarding the modalities of implementation remained incomplete. Of note was the need to work on 'changing the legal and regulatory environment to make it more conducive to indigenisation without discouraging foreign investors'.⁶³⁹ The UNDP made three important recommendations. First, SEID needed technical assistance in order to carry out its mandate (institutional strengthening). Secondly, there was a need to develop instruments of empowerment. Lastly, there was a need to catalyse entrepreneurship and skills development by rendering assistance to entrepreneurs, capacity building programs, training, and technical assistance.

While TSIPP did not manage to create a complete indigenisation policy framework, it was able to undertake a significant amount of work on a draft policy, as noted above. The GoZ continued to develop this policy as indigenisation continued to take centre-stage in the economy. By 2007, the government had a complete policy which was introduced through an Act, the IEEA. This Act sought to achieve the following:

'[T]o provide for support measures for the further indigenisation of the economy; to provide for support measures for the economic empowerment of indigenous Zimbabweans; to provide for the establishment of the National Indigenisation and Economic Empowerment Board and its functions and management; to provide for the establishment of the National Indigenisation and Economic Empowerment Fund; to provide for the National Indigenisation and Empowerment Charter; and to provide for matters connected with or incidental to the foregoing.'⁶⁴⁰

As noted in Chapter 1 of this thesis, the main substantive provisions of the IEEA have become part of the *de facto* foreign investment legal framework, as they address the important issues, such as foreign investor shareholding requirements. As such, the

⁶³⁹ Terminal Evaluation for the Project Technical Support to Indigenisation.

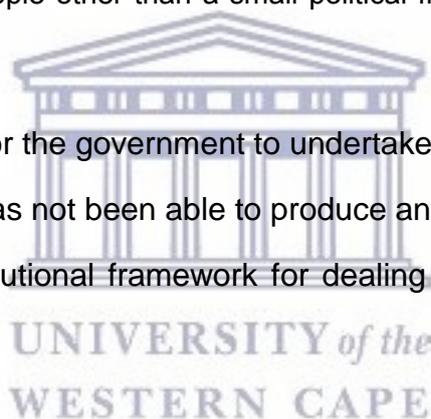
⁶⁴⁰ Indenisation and Economic Empowerment Act [Chapter 14:33].

IEEA will, by and large, be discussed in the section on the legal framework for foreign investment in Zimbabwe.

It is however important to note that, to date, very few benefits have been reaped from the Program. The few benefits that have been derived thus far have also not filtered down to the ordinary man on the street. Cheat notes in his book, *The Anthropology of Power*:

‘The fuzziness of the definitions of indigenisation and black empowerment and the nebulous and questionable instruments for achieving the desired goals, the undifferentiated and superficial analyses of the economy, the participants, their profiles, roles and other non-racial-conflicts in the economy, do not augur well for the empowerment of black people other than a small political fragment of the ‘new class’ variety.’⁶⁴¹

There is therefore a need for the government to undertake further work to re-think the indigenisation policy as it has not been able to produce any tangible results. The next section discusses the institutional framework for dealing with foreign investment in Zimbabwe.



3.3 INSTITUTIONAL FRAMEWORK

3.3.1 Early formulations

After independence in 1980, the Zimbabwean government adopted a defensive stance towards foreign investment.⁶⁴² According to Gwenhamo, foreign capital amounted to 70% of the total capital stock and foreign capital inflows.⁶⁴³ Each proposal for investment had to be subjected to a meticulous verification process conducted by the Foreign Investment Centre (FIC), before a new business enterprise could be set up.

⁶⁴¹ Cheater A *The Anthropology of Power* (2003) 129.

⁶⁴² As a result, foreign investment in Zimbabwe in the 1980s was very low.

⁶⁴³ Gwenhamo F 'Foreign Direct Investment in Zimbabwe: The Role of Institutional Factors' (2009) 44 *Economics Research Southern Africa Working Paper 3*.

Foreign investment projects of up to a maximum of 100 per cent foreign ownership were accepted, except in cases of investments falling squarely within a priority area. The FIC also had a bias for joint ventures where the domestic indigenous partner had at least 30 per cent ownership.

In 1989, when the new regulations on foreign investment were drafted, they eliminated the FIC and in turn replaced it with a new one-stop facility, the Investment Centre.⁶⁴⁴ The idea behind replacing the FIC with the Investment Centre was that a one stop facility would be able to furnish foreign investors with a response to their proposals for investment within 90 days. Initially, the Investment Centre was hosted by the Ministry of Finance, Economic Planning and Development, but would later develop into an autonomous institution.⁶⁴⁵

In 1992, the government introduced the Zimbabwe Investment Centre (ZIC) as a part of the Economic Structural Adjustment Program (ESAP).⁶⁴⁶ The legal basis of the ZIC was the Zimbabwe Investment Centre Act [Chapter 24: 16] (ZIA Act),⁶⁴⁷ which was promulgated to give legal force to the Centre.⁶⁴⁸ In terms of the ZIC Act, the ZIC was tasked with being the sole institution through which applications for the approval of

⁶⁴⁴ Herbst JI (1990) 133.

⁶⁴⁵ Herbst JI (1990) 133.

⁶⁴⁶ International Business Publications *Zimbabwe Mining Laws and Regulations Handbook* (2008) 235. After independence, up to 1991, Zimbabwe imposed several measures of control, such as, on foreign currency control and on the exchange rate. In 1991 the government decided to pursue market-based economic reforms. Consequently, the idea of ESAP was to undertake 'trade liberalisation including the abolition of quantitative controls and the reduction and harmonisation of tariffs and duties'. The ESAP enjoyed the support of Bretton Woods Institutions: The IMF and the World Bank. See Tekere M The 'Poverty Reduction Forum: Structural Adjustment Program Review Initiative' 2001 *University of Zimbabwe Trade and Development Studies Centre* 5, Raftopoulos B & Savage T *Zimbabwe: Injustice and Political Reconciliation* (2004) 31, Gibbon P *Structural Adjustment and the Working Poor in Zimbabwe: Studies on Labour, Women Informal Sector Workers and Health* (1995) 46 & Alwang JR, Mills BF & Taruvinga N *Why has Poverty Increased in Zimbabwe* (2002) 5.

⁶⁴⁷ Act 16 of 1992. The criteria for accepting projects under the ZIC were considerably different to those that under the Investment Centre as foreign investment projects with up to 100 per cent foreign ownership could be allowed in preferred sectors, such as, mining, agriculture and manufacture; however, joint projects with local investors were encouraged. See *International Business Publications Zimbabwe Business Law Handbook: Strategic Information and Laws* (2013) 103.

⁶⁴⁸ The ZIC Act was subsequently amended in 1994. See Zimbabwe Investment Centre Act 23 of 1994.

projects would be made.⁶⁴⁹ In this regard, the ZIC was responsible for the requisite approvals of investment proposals and the issue of licences and permits.⁶⁵⁰

Additionally, the ZIC, similarly to the FIC and the Investment Centre, was charged with the mandate of encouraging and coordinating foreign and domestic investment.⁶⁵¹ In accordance with the government's development policy, the ZIC also had to ensure the decentralisation of the government's investment activities.⁶⁵² Moreover, the ZIC also had to supervise and evaluate the implementation of all approved projects, including ensuring that all projects were compliant with environmental, safety and health regulations.⁶⁵³ Pursuant to this mandate, the ZIC therefore had the power to 'visit premises and inspect financial statement books and other documents in order to ensure compliance with any conditions subject to which any project was approved'.⁶⁵⁴

Compared to its predecessors, the ZIC had a very broad mandate which gave it a pivotal role in creating an investment regime that could work for the country. To a greater extent, the ZIC was largely successful in meeting its mandate, as foreign investors generally found the Centre helpful.⁶⁵⁵ Furthermore, the ZIC had a shorter turnaround time for the acceptance of new projects; it had 15 days from the receipt of the proposal to refer it to the Investment Committee for consideration (or back to the applicant).⁶⁵⁶ Thereafter, the Investment Committee had 45 days to make a decision on the proposal, thus taking the maximum period for consideration of the proposal to 60 days, down from 90 days under the Investment Centre era.⁶⁵⁷ However, the ZIC was accused of being susceptible to political influence, slow and very opaque.⁶⁵⁸

⁶⁴⁹ ZIA Act, s 19(1)(a).

⁶⁵⁰ ZIA Act, s 19(1)(a).

⁶⁵¹ ZIC Act, s 19(1)(h) as read with s 19(1)(c).

⁶⁵² ZIA Act, s 19(1)(f). See also, Collier P & Pattillo C *Investment and Risk in Africa* (2016) 252.

⁶⁵³ ZIA Act, s 19(1)(g). See also, Dashwood HS (2002) 156.

⁶⁵⁴ ZIA Act, s 20(a).

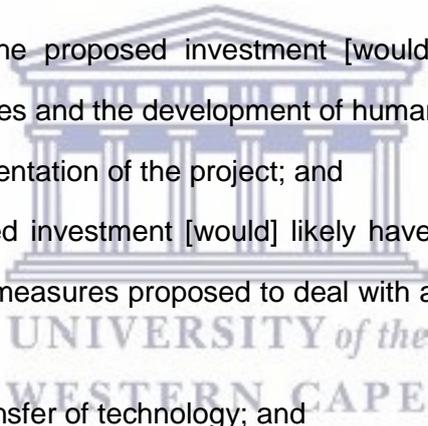
⁶⁵⁵ International Business Publications (2008) 235.

⁶⁵⁶ ZIA Act, s 25(2)(a).

⁶⁵⁷ ZIA Act, s 25(3).

⁶⁵⁸ International Business Publications (2008) 235.

At the behest of the Bretton Woods Instructions, the GOZ promulgated the Export Processing Zones (EPZs) Act [Chapter 14: 07] in 1994.⁶⁵⁹ Essentially, EPZs are 'industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported'.⁶⁶⁰ The aim of this enactment therefore was to encourage foreign investment.⁶⁶¹ The EPZ Authority had the responsibility of granting investment licences in EPZs, regulating activities in EPZs, granting permits to developers of EPZs and advising the Minister on all investment related matters,⁶⁶² amongst other duties.⁶⁶³ Therefore, all foreign investors seeking to establish their enterprise in an EPZ had to lodge an application with the EPZ Authority.⁶⁶⁴ In considering whether or not to grant the investment licence, the EPZ Authority had to take the following into account:

- 
- (a) 'the extent to which the proposed investment [would] lead to the creation of employment opportunities and the development of human resources; and
 - (b) the degree of export orientation of the project; and
 - (c) the impact the proposed investment [would] likely have on the environment and, where necessary, the measures proposed to deal with any adverse environmental consequences; and
 - (d) the possibility of the transfer of technology; and
 - (e) any other considerations that the Authority considers appropriate.⁶⁶⁵

⁶⁵⁹ The EPZ Act was subsequently amended in 2001 and 2002. The Act commenced on the 4th of August 1995. See Export Processing Zones Act 22 of 2001 and Export Processing Zones Act 14 of 2002.

⁶⁶⁰ International Labour Organisation (ILO) definition. See International Labour Organisation 'Export Processing Zones' available at http://www.ilo.org/actrav/areas/WCMS_DOC_ATR_ARE_EPZ_EN/lang--en/index.htm (assessed 29 August 2016). See further Carter C & Harding A *Special Economic Zones in Asian Market Economies* (2010) ch 1.

⁶⁶¹ Madhuku L *Labour Law in Zimbabwe* (2015) 22.

⁶⁶² "Minister" means the Minister of Industry and Commerce or any other Minister [to] whom the President may, from time to time, assign the administration of this Act.' See s 2 of the EPZ Act.

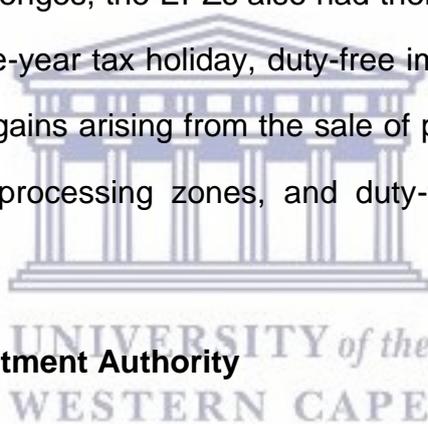
⁶⁶³ See EPZ Act, s 18.

⁶⁶⁴ EPZ Act, s 23 (a) – (b).

⁶⁶⁵ EPZ Act, s 25.

After the EPZ Authority had exercised its discretion in terms of s 25 of the EPZ Act, the Authority, without delay, had to approve or reject the application for an investment licence.⁶⁶⁶ If the investor was aggrieved by the decision of the Authority, he had 30 days within which to submit to the Minister, an appeal against the decision to the Minister.

The EPZs were not as successful as envisaged. One of the major challenges for the EPZs was that there was a trade performance statute which required eligible enterprises to export at least 80 per cent of their output, a requirement which restricted foreign investment.⁶⁶⁷ Another challenge was the inadequacy of essential infrastructure in EPZs, such as, telecommunications, water, and electric utilities. Notwithstanding these challenges, the EPZs also had their own merits. For example, investors could enjoy 'a five-year tax holiday, duty-free importation of raw materials, no tax liability from capital gains arising from the sale of property forming part of the investment in designated processing zones, and duty-free importation of capital equipment in the EPZ'.⁶⁶⁸



3.3.2 The Zimbabwe Investment Authority

3.3.2.1 Mandate and Function

In 2006, a new statutory body, the ZIA, was established by the ZIA Act [Chapter 14: 30].⁶⁶⁹ The ZIA was created as a result of the merger of the ZIC and the EPZ Authority.⁶⁷⁰ The ZIA was established as an autonomous entity (body corporate),

⁶⁶⁶ EPZ Act, s 26.

⁶⁶⁷ International Business Publications (2008) 239.

⁶⁶⁸ International Business Publications (2008) 239. The EPZs were a brilliant idea in that they would be able to improve Zimbabwe's comparative advantages, particularly in relation to resource based projects, as the country was naturally endowed with a variety of resources. See Ngugama E *My Life: Mysteries and Achievements* (2013) 75.

⁶⁶⁹ Act 4 of 2006.

⁶⁷⁰ Zimbabwe Investment Authority 'Investment Legislation' available at http://www.investzim.com/index.php?option=com_content&view=article&id=262&Itemid=678 (accessed 29 August 2016).

which is capable of suing or being sued in its own name.⁶⁷¹ The vision of the ZIA is to adequately perform its function as a one-stop-shop (OSS) for investment. Some of the functions of the Authority include: encouraging investment,⁶⁷² approving investment licences for new enterprises and joint ventures,⁶⁷³ identifying attractive sectors in the economy for domestic and foreign investment,⁶⁷⁴ promoting decentralisation of investment in accordance with government policy and objectives,⁶⁷⁵ to monitor and evaluate approved projects,⁶⁷⁶ promoting and co-ordinating investment in priority sectors⁶⁷⁷ and to advise the Minister on all matters related to or incidental to investment, including investment policy and incentives.⁶⁷⁸

3.3.2.2 Facilitating the Establishment of Investment

According to the ZIA, Zimbabwe is an agro-based economy that provides opportunities for horticulture, wildlife ranching, floriculture, processing of cotton lint, poultry farming, the production of food and cash crops and game.⁶⁷⁹ In addition to the agro-based investment opportunities, investors can also invest in other key sectors, such as, the energy sector, transport sector, manufacturing sector, information and communication technology (ICT) sector, real estate sector, mining sector, health care sector, media sector, and mobile banking and payments sectors.⁶⁸⁰ Investors are therefore entitled to commit resources to these sectors once their application has been approved by the ZIA. The investment authority allows investors to enter in to a myriad of investment arrangements, such as, equity and non-equity partnerships; public-private

⁶⁷¹ ZIA Act, s 3.

⁶⁷² ZIA Act, s 7(b).

⁶⁷³ ZIA Act, s 7(a) as read with s 7(d).

⁶⁷⁴ ZIA Act, s 7(c).

⁶⁷⁵ ZIA Act, s 7(e).

⁶⁷⁶ ZIA Act, s 7(f).

⁶⁷⁷ ZIA Act, s 7(g).

⁶⁷⁸ ZIA Act, s 7(j) as read with s 7(i) and s 7(h).

⁶⁷⁹ Lemarchand GA & Schneegans S *Mapping Research and Innovation in the Republic of Zimbabwe* (2014) 18.

⁶⁸⁰ See Chikuhwa JW *Zimbabwe: The End of the First Republic* (2013) 344 & Youth Village '10 Investment Opportunities in Zimbabwe' available at <http://youthvillage.co.zw/2015/04/10-investment-opportunities-in-zimbabwe/> (accessed 29 August 2016).

partnerships; build, operate and transfer arrangements; contract farming; and joint ventures.⁶⁸¹

Once the investor has identified a sector for investment and the potential investment arrangement, the investor must submit an application for foreign investment to the ZIA.⁶⁸² This application must accordingly be accompanied by the prescribed fee for an investment licence and any other documents the ZIA may deem necessary.⁶⁸³ The Chief Executive Officer (CEO) has to either refer the application to the Investment Committee for consideration or refer it back to the applicant within 14 days of receipt of such application.⁶⁸⁴ Similar to the EPZ Authority (but slightly different),⁶⁸⁵ the Investment Committee then makes a recommendation to the Board on the investment applications submitted by any prospective domestic or foreign investors.⁶⁸⁶ In turn, the Board, within 21 days, either has to: approve the application,⁶⁸⁷ refer the application back to the Investment Committee for further consideration,⁶⁸⁸ or reject the application.⁶⁸⁹ The Board may also decide to issue a conditional licence, with terms which may be varied or amended at any intervening time.⁶⁹⁰ In addition, where necessary, incentives may be given to investors, both foreign and domestic.⁶⁹¹ These

⁶⁸¹ Lemarchand GA & Schneegans S (2014) 18.

⁶⁸² ZIA Act, s 13(1)(a).

⁶⁸³ ZIA Act, s 13(1)(a).

⁶⁸⁴ ZIA Act, s 13(2)(a) as read with s 13(2)(b).

⁶⁸⁵ In this case, the subtle difference between the EPZ Authority and the ZIA is that the ZIA Investment Committee makes a determination on an investment application, but it only serves as a recommendation to the Board, rather than as a final order.

⁶⁸⁶ ZIA Act, s 6(1) as read s 13(3)(1).

⁶⁸⁷ ZIA Act, s 13(4)(a).

⁶⁸⁸ ZIA Act, s 13(4)(b).

⁶⁸⁹ ZIA Act, s 13(4)(c). In approving applications for an investment licence, the Board has to have regard to:⁶⁸⁹ the extent to which skills will be transferred to local people; the extent to which the proposal will create employment opportunities and develop human resources; the extent to which local resources are used and benefited, the value of convertible foreign currency transferred to Zimbabwe; the potential impact of such a project on the environment; the potential impact of such an investment on existing businesses and industries in the economy; and the possibility for transfer of technology. The Board may also take account of any other considerations it deems appropriate. See s 14(1) of the ZIA Act.

⁶⁹⁰ ZIA Act, s 15(2) as read with s 15(4).

⁶⁹¹ ZIA Act, s 24(1)(a).

incentives may be blanket incentives,⁶⁹² specific incentives⁶⁹³ or sectorial incentives.⁶⁹⁴ It is important to note that every licence issued must be for a definite period of time determined by the Board.⁶⁹⁵ Such licence may be renewed in the manner and form prescribed, before its expiry.⁶⁹⁶ Where applicable, the application for renewal has to be accompanied by a prescribed fee.⁶⁹⁷

3.3.2.3 Ensuring compliance with investment licences

The ZIA has to ensure that investors comply with their investment licences. In this regard, the ZIA has the power to visit premises and inspect documents.⁶⁹⁸ These documents can be financial statements or any other documents which can be used to determine compliance with any conditions subject to which the licence was issued.⁶⁹⁹ Where the investor is unable to implement the investment described in his licence, he should within 30 days of becoming aware of such inability, notify the ZIA of the reasons for the inability to implement the licence.⁷⁰⁰ In the event that the investor wants to transfer or cede his licence, the approval of the ZIA will be required.⁷⁰¹ Consequently, the ZIA therefore has to maintain a register of investment licences, where the conditions of and amendments to every licence issued are kept.⁷⁰²

Licences issued can be suspended or terminated for a number of reasons including: fraud or misrepresentation in acquiring an investment licence,⁷⁰³ the transfer of

⁶⁹² Blanket incentives will be given to everyone with an investment licence.

⁶⁹³ These will be given to a specific investor pursuant to s 24(c) of the ZIA Act.

⁶⁹⁴ ZIA Act, s 24(1)(a). Sectorial incentives will be given to particular sectors, such as producers or exporters.

⁶⁹⁵ ZIA Act, s 16.

⁶⁹⁶ ZIA Act, s 17.

⁶⁹⁷ ZIA Act, s 17.

⁶⁹⁸ ZIA Act, s 21.

⁶⁹⁹ ZIA Act, s 21.

⁷⁰⁰ ZIA Act, s 19(1). The investor should also notify the Authority of any changes in any information or particulars used to apply for the licence. See s 19(2) of the ZIA Act.

⁷⁰¹ ZIA Act, s 20.

⁷⁰² ZIA Act, s 18.

⁷⁰³ ZIA Act, s 22(1)(a). In terms of s 30 of the ZIA Act, where an individual makes a materially false statement when submitting an application for an investment licence, such person shall be guilty of an offence not exceeding level, six or to imprisonment of a period not exceeding a year, or to both imprisonment and a fine.

cession of any licence without prior permission,⁷⁰⁴ and the failure to implement or comply with an investment licence.⁷⁰⁵ However, before any action is taken, the Board has to notify the investor of its intention to suspend or cancel the investment licence and provide the investor with the reasons for such action.⁷⁰⁶ The investor has a reasonable period of time within which to make a case against the suspension or termination of his licence, after which the ZIA will make a determination of the final course of action it deems fit in the circumstances.⁷⁰⁷

If the investor (or any other person) is aggrieved by the decision of the Board, they may within 30 days after the date of the decision, lodge an appeal on the decision with the Minister.⁷⁰⁸ The Minister, within 60 days, has to confirm, vary or set aside the decision of the Board.⁷⁰⁹ Although the ZIA is primarily the main institution dealing with the establishment of investment in Zimbabwe, it is however not the only relevant institution in this regard. The Reserve Bank of Zimbabwe (RBZ), to a limited extent, also provides rules for investments.

3.3.3 The Reserve Bank of Zimbabwe

As briefly noted earlier in this Chapter, foreign investments can be ‘new investments’ or ‘old investments’. Principally, ‘old investments’ are foreign investments in a company that is already incorporated in the host State while ‘new investments’ are technically ‘ground up’ investments. In Zimbabwe, new investments have to go through the ZIA, while old investments have to go through the RBZ for approval.⁷¹⁰ Such approval is granted in terms of exchange control regulations when a foreign

⁷⁰⁴ ZIA Act, s 22(1)(b).

⁷⁰⁵ ZIA Act, s 22(1)(c) as read with s 22(1)(d).

⁷⁰⁶ ZIA Act, s 22(2).

⁷⁰⁷ ZIA Act, s 22(2) as read with s 22(3). The ZIA may suspend the licence, terminate it, or make any other order considered appropriate, including the termination of incentives. See s 22(3) of the ZIA Act.

⁷⁰⁸ ZIA Act, s 23(1).

⁷⁰⁹ ZIA Act, s 23(2).

⁷¹⁰ The RBZ is an institution under the Ministry of Finance which governs all activities in the financial sector, except for the insurance sector which is regulated by the Insurance and Pensions Commission.

national acquires shares in an existing company.⁷¹¹ The foreign investor has to lodge an application with the Exchange Control Department of the Reserve Bank through the bank of the company (or authorised dealer) in which the investor is investing.⁷¹² In most instances, exchange control regulations will not allow ‘the dilution of local shareholding in favour of foreign shareholding of more than 40 [per cent]’.⁷¹³ Once the investment authorisation has been given, then the ‘investor may apply for other post-approvals, like residence and work permits, and other licen[c]es required in their areas of operation’.⁷¹⁴

3.4 LEGAL FRAMEWORK

3.4.1 Substantive law

3.4.1.1 The Indigenisation and Economic Empowerment Act

As earlier noted, the IEEA was introduced as a means to continue the indigenisation agenda after the work on TSIPP was inconclusive in formulating a complete indigenisation policy.⁷¹⁵ The IEEA was passed by Parliament in 2007 and was subsequently signed into law on 17 April 2008.⁷¹⁶ The IEEA became the first legal basis for indigenisation;⁷¹⁷ concretising the government’s work on indigenisation which began in the 1980s, just after Independence.⁷¹⁸ In terms of s 3(1)(a) of the IEEA, the government should endeavour to ensure that ‘at least 51 *per centum* of the shares of

⁷¹¹ Deloitte ‘Doing Business in Zimbabwe: The Jewel of Africa’ 2013 13.

⁷¹² International Business Publications *Zimbabwe Mineral & Mining Sector Investment and Business Guide* (2007) 249.

⁷¹³ Deloitte (2013) 13.

⁷¹⁴ International Business Publications *Zimbabwe Investment and Business Guide Volume 1 Strategic and Practical Information* (2015) 100.

⁷¹⁵ See part 3.2.3 above. This thesis will only discuss the main operative provisions of the IEEA, the Indigenisation Regulations, and the General Notices.

⁷¹⁶ Lemarchand GA & Schneegans S *Mapping Research and Innovation in the Republic of Zimbabwe* (2014) 14.

⁷¹⁷ In terms of s 1 of the IEEA, ‘indigenisation’ means ‘a deliberate involvement of Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation’s resources’.

⁷¹⁸ Cuevas A *Zimbabwe: Staff Report for the 2012 Article IV Consultation* (2012) 43.

every public company and any other business shall be owned by indigenous Zimbabweans'.⁷¹⁹ The Minister⁷²⁰ may, however, by means of a notice in a statutory instrument, prescribe that less than 51 per cent ownership or control be acquired by indigenous Zimbabweans when a controlling interest is relinquished, where a business is merged, restructured or unbundled, or in any similar instance.⁷²¹ In such instances, the Minister must furnish a timeframe in which the 51 per cent share ownership or control should be attained.⁷²²

According to s 3(1)(e) of the IEEA, the 51 per cent requirement for indigenous ownership is applicable to both domestic and foreign investments in all sectors of the economy.⁷²³ Therefore, the ZIA cannot grant an investment licence until an investor requiring it for investment has reserved the majority ownership of shares or controlling interest of the company to indigenous Zimbabweans.⁷²⁴ Where a company engages in a merger or restructuring of shareholding or acquires a controlling interest, which requires notification to the Competition Commission pursuant to PART IV A of the Competition Act [Chapter 14:28], such merger will not be approved unless 51 per cent of the shares are owned by indigenous Zimbabweans and indigenous Zimbabweans are 'equitably represented in the governing body of the merged or restructured entity'.⁷²⁵ Similarly, no demerger or unbundling of two or more business will be permissible if the resulting effect is that less than 51 per cent of the demerged or unbundled company is owned or controlled by indigenous Zimbabweans.⁷²⁶ If a person

⁷¹⁹ IEEA, s 3(1)(a). Indigenous Zimbabweans are defined in s 1 of the IEEA as 'any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, [and] includes any company, association, syndicate, or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest'.

⁷²⁰ Any reference to 'Minister' in the context of the IEEA points to the Minister of Youth Development, Indigenisation and Empowerment.

⁷²¹ IEEA, s 3(5).

⁷²² IEEA, s 3(5).

⁷²³ Where a business enterprise is not compliant with the indigenisation requirements, it has to dispose of a controlling interest or control to an indigenous Zimbabwean. Section 2 of Statutory Instrument 21 of 2010 (as amended 25 March 2011) provides that 'dispose' in relation to shares or a controlling interest means 'sell, donate or otherwise dispose'.

⁷²⁴ IEEA, s 3(1)(d).

⁷²⁵ IEEA, s 3(1)(b)(i) – (iv).

⁷²⁶ IEEA, s 3(1)(c)(i) as read with s 3(1)(c)(ii).

wants to relinquish a controlling interest in a business of a value above the prescribed threshold, such relinquishment will not be allowed unless if the shares are relinquished to an indigenous Zimbabwean.⁷²⁷

The indigenisation requirements are not only applicable to the ownership and control of entities. Section 3(1)(f) of the IEEA extends the indigenisation requirements to public procurement. In terms of this provision, government departments have to procure at least 51 per cent of the goods which are procured in terms of the Procurement Act [Chapter 14:30] from enterprises where the controlling interest or ownership is held by indigenous Zimbabweans.⁷²⁸ In instances where goods are purchased from businesses that are not owned or controlled by indigenous Zimbabweans, 'any subcontracting required to be done by the supplier shall be done to the prescribed extent in favour of businesses in which a controlling interest is held by indigenous Zimbabweans.

Moreover, s 3(3) of the IEEA allows the government to further prioritise certain groups within the indigenous category. These privileged groups are: women, young people (under a prescribed age), and disabled persons.⁷²⁹ This is consistent with the principles espoused in the Constitution. For example, one of the founding values and principles of the Constitution is to attain gender equality.⁷³⁰ Section 13(2) of the Constitution also provides that the government 'must protect and enhance the right of the people, particularly women, to equal opportunities in development'.⁷³¹ More specifically, s 14 of the Constitution on empowerment and employment creation provides that the State and all institutions and agencies of government must take measures to empower, through appropriate, transparent, fair and just affirmative

⁷²⁷ IEEA, s 3(1)(d).

⁷²⁸ IEEA, s 3(1)(f).

⁷²⁹ Disabled persons who fall under the definition of disabled in the Disabled Persons Act [Chapter 17:01].

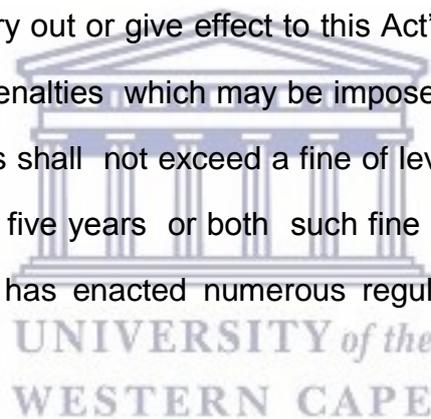
⁷³⁰ Constitution of Zimbabwe, s 3(1)(g).

⁷³¹ Constitution of Zimbabwe, s 13(2).

action, all marginalised persons, groups and communities in Zimbabwe.⁷³² In accordance with such obligations, the State also has to prioritize women and the youth's employment creation.⁷³³ It is abundantly clear from s 14 of the Constitution that it is permissible for the government to further prioritise certain groups within the indigenisation agenda. It becomes important to also look at the indigenisation regulations which implement the IEEA.

3.4.1.2 The Indigenisation Regulations

Section 21 of the IEEA states that the 'Minister, after consultation with the Board, may make regulations providing for any matters which are by this Act required or permitted to be prescribed or which, in his or her opinion, are necessary or convenient to be provided for in order to carry out or give effect to this Act'.⁷³⁴ These regulations may provide for 'offences and penalties which may be imposed for contravention of the regulations, which penalties shall not exceed a fine of level twelve or imprisonment for a period not exceeding five years or both such fine and such imprisonment'.⁷³⁵ Thus far, the government has enacted numerous regulations which appeared as Statutory Instruments.⁷³⁶



The most important regulation is SI 21 of 2010.⁷³⁷ This regulation was framed with the objective of having every business concerned comply with the 51/49 share ownership and control rule, by means of disposal,⁷³⁸ within five years from the date of operation

⁷³² Constitution of Zimbabwe, s 14.

⁷³³ Constitution of Zimbabwe, s 14.

⁷³⁴ IEEA, s 21(1).

⁷³⁵ IEEA, s 21(2). In a similar fashion, the Minister may also make regulations to implement the ZIA Act. See s 33 of the ZIA Act.

⁷³⁶ The Indigenisation Regulations are very detailed and cover a lot of issues on the implementation of the IEEA; this thesis will only discuss the parts that are deemed relevant to foreign investment.

⁷³⁷ Most of the other regulations amended this regulation. For example, Statutory Instrument 95 of 2010, Statutory Instrument 116 of 2010, Statutory Instrument 34 of 2011, Statutory Instrument 84 of 2011 and Statutory Instrument 66 of 2013 all amended this regulation. As far as possible, these amendments have been reflected in the discussion, where necessary.

⁷³⁸ The word 'disposed' was inserted in the amended Statutory Instrument 21 of 2010, published on 27 July 2011. Section 2 of Statutory Instrument 21 of 2010 (as amended 25 March 2011) provides that 'dispose' in relation to shares or a controlling interest means 'sell, donate or otherwise dispose'.

of the regulation or within the first five years of operation of the business, as the case maybe.⁷³⁹ The only exceptions to this rule would be in cases where ‘in order to achieve socially or economically desirable objectives, a lesser share of indigenisation or a longer period within which to achieve it is justifiable’⁷⁴⁰ or where the business enterprise has submitted an indigenisation plan together with IDG 01 Form⁷⁴¹ which has been approved by the Minister. In terms of s 4(2) of the Statutory Instrument, every business that had a net asset value of more than USD 500 000 had to notify, within 45 days of the fixed date,⁷⁴² the extent of present or future compliance with indigenisation (51 per cent of the shares or a controlling interest owned by indigenous Zimbabweans).⁷⁴³

Where a business was established after the fixed date, such business had to submit a duly completed IDG 01 form and an indigenisation plan within 45 days of commencing business. This time frame was later amended to 75 days after the amended regulation was published on 27 July 2011.⁷⁴⁴ The regulation also provides for penalties in cases where the Minister was of the view that a business did not submit an IDG 01 Form within 45 days of the fixed date or 45 days of commencing operations.⁷⁴⁵ Such penalty could be a fine not exceeding level 12 or imprisonment not longer than five years, or both a fine and imprisonment.⁷⁴⁶ Statutory Instrument 21 of 2010, as amended 25 March 2011, provides that subject to s 5A of the regulations, the Minister may through publication; prescribe in relation to each sector and subsector of the economy, a lesser share of the indigenisation quota which may be

⁷³⁹ Statutory Instrument 21 of 2010, s 3(a). This date was however changed by General Notice 9 of 2016 as will be discussed later in this Chapter.

⁷⁴⁰ Statutory Instrument 21 of 2010, s 3(a).

⁷⁴¹ The IDG 01 form is a document that shows the extent of indigenisation and the indigenisation implementation plan.

⁷⁴² In terms of s 2 of Statutory Instrument 21 of 2010 on the interpretation of the statute, the fixed date meant the date given in s 1(2) of the Statutory Instrument on the coming into operation of the Statutory Instrument. Section 1(2) of the Statutory Instrument stated this date as 1 March 2010.

⁷⁴³ Statutory Instrument 21 of 2010, s 4(1). See also s 4(2) of Statutory Instrument 21 of 2010.

⁷⁴⁴ Statutory Instrument 21 of 2010, as amended 27 July 2011, s 4(b).

⁷⁴⁵ Statutory Instrument 21 of 2010, s 4(4).

⁷⁴⁶ Statutory Instrument 21 of 2010, s 4(4).

held by indigenous Zimbabweans in a non-indigenous business.⁷⁴⁷ The Minister could also prescribe the maximum amount of time in which the business could continue to operate without meeting the minimum indigenisation and empowerment quota.⁷⁴⁸

By considering the provisions of the regulation against those of the Act, one can note that the penalties are consistent with the provisions of s 21(2) of the IEEA. However, the monetary provision in s 4(2) of the regulation providing that only a business with a net asset value of USD 500 000 had to comply with the indigenisation requirements within the 45-day period is inconsistent with the Act. The language in the Act is very clear. The indigenisation requirements apply to every public company and any other businesses, irrespective of net asset value or any other requirement. Rather than giving effect to the IEEA as required in s 21 of Act, the regulation creates new conditions which are inconsistent with the empowering Act.

3.4.1.3 The Indigenisation General Notices

Other than Indigenisation Regulations, the government has also published General Notices. To date, the Minister has published four official notices in the GG, namely; GN 114 of 2011, GN 459 of 2011, GN 280 of 2012, and GN 9 of 2016.⁷⁴⁹ These notices clarified certain aspects of the IEEA as they related to various sectors of the economy, including: mining; manufacturing; finance; tourism; education and sport; arts, entertainment and culture; engineering and construction; energy; telecommunications; and the transport and motor industry.⁷⁵⁰

⁷⁴⁷ Statutory Instrument 21 of 2010, as amended 25 March 2011, s 5(4)(a).

⁷⁴⁸ Statutory Instrument 21 of 2010, as amended 25 March 2011, s 5(4)(b).

⁷⁴⁹ IEEA, s 4. It is important to note that General Notices are defined in the Interpretation Act as Statutory Instruments.

⁷⁵⁰ See General Notice 114 of 2011, General Notice 459 of 2011, General Notice 280 of 2012 and General Notice 9 of 2016.

3.4.1.3.1 General Notice 114 of 2011

The GN of 114 of 2011 focussed on the minimum threshold for which indigenisation implementation plans were required in the mining sector, and the minimum timeframes within which the 'indigenisation and empowerment quotas'⁷⁵¹ in this sector had to be met.⁷⁵² On these points of importance, the Notice therefore provided that every mining business with a net asset value of or above USD 100 000 which had not met the 'indigenisation and empowerment quota' had to submit an indigenisation plan within 45 days if the issue of the Notice in terms of s 5(1) of the Indigenisation and Economic Empowerment (General) Regulations, 2011.⁷⁵³ In addition, after the Minister had approved its indigenous implementation plan, every non-indigenous mining business had to finalise its indigenous and empowerment quota no later than six months from the publication of the Notice.⁷⁵⁴ The value of the shares or interest to be disposed of to indigenous Zimbabweans had to be in accordance with the valuation agreed upon between the Minister and the non-indigenous mining company, taking into account the value of the minerals exploited or to be exploited by such a company.⁷⁵⁵

3.4.1.3.2 General Notice 459 of 2011

The GN 459 of 2011 dealt with the requirements for the indigenisation of businesses in the manufacturing sector.⁷⁵⁶ The foundation of this regulation was based on the s 5(4) of the as read with s 5A(4) of the Indigenisation and Economic Empowerment

⁷⁵¹ According to s 1 of General Notice 114 of 2011, 'minimum indigenisation quota' means:

- (a) a controlling interest or fifty-one *per-centum* of the shares or interests which in terms of the Act is required to be held by indigenous Zimbabweans in the non-indigenous mining business concerned; or
- (b) if the minimum indigenisation and empowerment quota is partly fulfilled by the non-indigenous mining business concerned at the date of this notice, the share of that quota that is remaining to be disposed of to indigenous Zimbabweans in order to be completely filled.

⁷⁵² General Notice 114 of 2011, s 2 as read with s 3.

⁷⁵³ General Notice 114 of 2011, s 2(a) as read with s 2(b).

⁷⁵⁴ General Notice 114 of 2011, s 3(1).

⁷⁵⁵ General Notice 114 of 2011, s 3(2).

⁷⁵⁶ See General Notice 459 of 2011.

(General) Regulations, 2010.⁷⁵⁷ This Notice set out three important issues, namely, the minimum net asset value for indigenisation, a lesser share for indigenous Zimbabweans in a non-indigenous business and the maximum time frame for compliance. A business with a net asset value of USD 100 000 had to comply with the principal regulation.⁷⁵⁸ Pursuant to this Notice, indigenous Zimbabweans could also hold less than 26% of the interest or shares in a manufacturing company.⁷⁵⁹ The percentage held by indigenous Zimbabweans, however, had an effect on the time frame in which the non-indigenous business had to comply with the indigenisation requirements. For example, the business had: one year to comply with a 26 per cent indigenous ownership, two years to comply with a 36 per cent indigenous ownership, and three years to comply with a 46 per cent indigenous ownership and four years to comply with a 51 per cent indigenous ownership.⁷⁶⁰

3.4.1.3.3 General Notice 280 of 2012

The GN 280 of 2012 was broader than the first two Notices published. It dealt with the requirements for businesses in the finance; tourism; education and sport; entertainment and culture; engineering and construction; energy services; telecommunications; and transport and motor industry sectors to indigenise.⁷⁶¹ Similar to GN 459 of 2011, it dealt with three important matters, namely; the minimum net asset value for indigenisation, a lesser share for indigenous Zimbabweans, in a non-indigenous business and the maximum time frame for compliance.⁷⁶² With regards to these three issues, they were dealt with differently for all the eight different industries. For example: (a) in the financial sector, the minimum asset value would be prescribed by the RBZ, the lesser share for non-indigenous businesses was 51 per cent, and the

⁷⁵⁷ See General Notice 459 of 2011.

⁷⁵⁸ See General Notice 459 of 2011.

⁷⁵⁹ See General Notice 459 of 2011.

⁷⁶⁰ See General Notice 459 of 2011.

⁷⁶¹ General Notice 280 of 2012.

⁷⁶² General Notice 280 of 2012.

period of compliance was one year; (b) in education and sport, the minimum asset value was USD 1, the lesser share for non-indigenous businesses was 51 per cent and the period of compliance was one year; and (c) in telecommunications, the minimum asset value was USD 1, the lesser share for non-indigenous businesses varied between subsectors,⁷⁶³ and the compliance period was capped at a year.⁷⁶⁴

3.4.1.3.4 General Notice 9 of 2016: The current implementation framework

The GN 9 of 2016 is popularly known as the Indigenisation Framework, as derived from the title of the notice, 'Frameworks, Procedures, and Guidelines for Implementing the Indigenisation and Economic Empowerment Act [Chapter 14: 33]'. General Notice 9 of 2016 is the most detailed Notice published to date. The main reason for this detail was that previously there had been interpretive conflict on the IEEA between the different government departments and officials. The tensions on interpretation had cause a great rift between the Minister of Finance and Economic Development, Honourable Patrick Chinamasa, and the Minister of Indigenisation, Youth and Economic Empowerment, Honourable Patrick Zhuwao.⁷⁶⁵ Analysts attributed this to the 'disjuncture between the law (as it is), government pronouncements of the law (as they would like the public to believe it to be) and the policy in practice.'⁷⁶⁶

The Notice is geared to addressing the rampant non-compliance of non-indigenous businesses with the IEEA because they deem the IEEA to be inhibiting.⁷⁶⁷ As a result, the Notice tries to give impetus to the reduction in non-compliance by giving effect to

⁷⁶³ For example, advertising required 51 per cent indigenous ownership, film making needs at least 40 per cent indigenous ownership, and fixed telephone businesses had to have a 30 per cent local ownership, amongst others.

⁷⁶⁴ General Notice 280 of 2012.

⁷⁶⁵ Magaisa A 'The Trouble with Zimbabwe's Indigenisation Policy' available at <http://alexmagaisa.com/2015/10/21/the-trouble-with-zimbabwes-indigenisation-policy/> (accessed 3 September 2016).

⁷⁶⁶ Matyszak D 'Madness and Indigenisation - A History of Insanity in the Age of the Lawlessness Report' available at <http://www.financialgazette.co.zw/madness-in-zimbabwes-indigenisation-policy/> (accessed 3 September 2016).

⁷⁶⁷ General Notice 9 of 2016, s 4.

the pronouncements of the President of the Republic of Zimbabwe, RG Mugabe, on resolving non-conformity.⁷⁶⁸ The Notice purportedly implements the 'indigenisation policies in a manner that promotes investment and eliminates discretionary application of the law'.⁷⁶⁹ In pursuit of this vision, the Notice, in addition to addressing issues of compliance, also clarifies the position on the indigenisation of businesses in the resource, non-resources and reserved sectors.⁷⁷⁰

Quoting from the speech of the President, the Notice outlines that in the resource-based sector, where the technology used is usually new, a 50/50 approach can be adopted in some cases, and in others a sustainable and equitable ratio can be adopted, as it is not feasible to apply the 51/49 rule in all instances.⁷⁷¹ In the same breath, the Notice also cites other instances where the President alluded to the fact that minerals are a natural resource that deplete and cannot renew once they have been exploited. In view of this argument, therefore in his view, a 51 per cent indigenous ownership would be ideal.⁷⁷² The Notice also makes reference to GN 114 of 2011 which clearly articulates that businesses operating within the mining sector must dispose of 15 per cent of their business to designated entities.⁷⁷³ After these contradicting positions, the Notice then adopts a final position in s 16, stating: 'designated entities shall acquire 5 [per cent] equity in businesses exploiting natural resources'.⁷⁷⁴ The designated entities include:

- the National Indigenisation and Economic Empowerment Fund (NIEEF);
- the Sovereign Wealth Fund;
- Employee Share Ownership Trusts;

⁷⁶⁸ Interestingly, these pronouncements were made at the Zanu PF 15th National People's Conference on 12 December 2015. See General Notice 9 of 2016, s 5.

⁷⁶⁹ General Notice 9 of 2016, s 6.

⁷⁷⁰ General Notice 9 of 2016, s 7.

⁷⁷¹ General Notice 9 of 2016, s 11.

⁷⁷² General Notice 9 of 2016, s 12 read with s 13.

⁷⁷³ General Notice 9 of 2016, s 10. It is however not clear how such disposition should take place.

⁷⁷⁴ General Notice 9 of 2016, s 16.

- Community Share Ownership Trusts;
- the Zimbabwe Mining Development Cooperation (ZMDC);
- the Zimbabwe Consolidated Diamond Company (ZCDC); and
- Any other company incorporated by government or in which government has a controlling interest.

In respect of the non-resource sectors, the Notice refers to the other two earlier Notices: GN 459 of 2011 providing the requirements in the manufacturing sector⁷⁷⁵ and GN 280 of 2012 which furnished the requirements for other sectors.⁷⁷⁶ The figures for these other sectors are represented in Table 1 below:

Table 1: Current Specific Sector Compliance Provisions

	Sector	Lesser Share	Years to Comply
1	General Notice 459 of 2011 – Manufacturing	26%	1 st year
		36%	2 nd Year
		46%	3 rd Year
		51%	4 th Year
General Notice 280 of 2012 – Other Sectors			
2	Financial Services	51%	1 year
3	Tourism	51%	1 Year
4	Education and Sport	51%	1 Year
	Arts, Entertainment and		

5	Culture	51%	1Year
6	Engineering and Construction	51%	1 Year
7	Energy	51%	1 Year
8	Services	51%	1 Year
9	Telecommunications	30 – 51%	1 Year
10	Transport and Motor Industry	51%	1 Year

The empowering provision relied on by the Notice is s 3(5) of the IEEA which provides that ‘the line Minister may prescribe a lesser share than *fifty-one* per centum or a lesser

⁷⁷⁵ See part 3.4.1.3.2 above. The provisions were developed in line with s 5(4) read with s 5A(4) of the Indigenisation and Economic Empowerment (General) Regulations, 2010.

⁷⁷⁶ See also part 3.4.1.3.3 above.

interest than a controlling interest may be acquired by indigenous Zimbabweans'.⁷⁷⁷
 The Notice also quotes the Third Schedule of the Indigenisation and Economic Empowerment (General) Regulations 2010 which lists the reserved sectors for Zimbabweans as:

Table 2: Reserved Sectors

Agriculture, primary production of food and cash crops
Transportation: passenger buses, taxis and car hire services
Retail and wholesale trade
Barber shops, hairdressing and beauty salons
Employment agencies
Estate agencies and real estates
Bakeries
Advertising agencies
Provision of local and craft, marketing and distribution
Tobacco grading and packaging
Cigarette manufacturing
Valet services
Milk processing
Grain milling
Fuel retailing
Artisanal mining of all minerals (except diamonds)

According to s 23 of the Notice, new non-indigenous businesses would not be allowed to invest in these reserved sectors, save for exceptional circumstances where line

⁷⁷⁷ IEEA, s 3(5).

Ministries would make a determination which would need to be approved by Cabinet.⁷⁷⁸

In terms of implementation, the Notice factors in the broad vision of the Zimbabwe Agenda for Socio-Economic Transformation (ZimAsset), a government economic blueprint that advances the ruling party's (ZANU-PF) development initiatives.⁷⁷⁹ To facilitate this development mandate, the Notice aims to invoke s 17 of the IEEA which allows the government to provide incentives, such as rebates, to compliant businesses. Furthermore, the Notice envisages that all applications for investment must include an indigenisation implementation plan.⁷⁸⁰ Existing businesses, pursuant to the Indigenisation Regulations have to notify the extent of indigenisation and present a plan for achieving compliance.⁷⁸¹ The Notice set the new deadline for the submission of Implementation Plans to the ZIA as 31 March 2016.⁷⁸² The notice suggests two possible avenues for facilitating compliance.⁷⁸³ The first pathway proposes a lesser share for indigenous Zimbabweans; the second pathway suggests an Indigenisation Compliance and Empowerment Levy.⁷⁸⁴ Section 39 of the Notice suggests that the Indigenisation Compliance and Empowerment Levy can be earned from Indigenisation Legislation Compliance Rebates, Good Corporate Citizen Rebates and Indigenous Shareholding Rebates.⁷⁸⁵ Despite clarifying a lot of issues, General Notice 9 of 2016 is far from being adequate. It is still marred by numerous challenges, in particular technicalities. The next part will therefore discuss the challenges and implications of the General Notices.

⁷⁷⁸ General Notice 9 of 2016, s 23.

⁷⁷⁹ General Notice 9 of 2016, s 25.

⁷⁸⁰ General Notice 9 of 2016, s 27.

⁷⁸¹ General Notice 9 of 2016, s 26.

⁷⁸² General Notice 9 of 2016, s 45. Therefore, all applications for investment licences or compliance licences have to be done through ZIA, in accordance with the simplified Indigenisation and Economic Empowerment Framework, the objective being that this would enhance the operationalisation of the One-Stop Shop as well as improve the ease of doing business. See s 44 of General Notice 9 of 2016.

⁷⁸³ General Notice 9 of 2016, s 29.

⁷⁸⁴ General Notice 9 of 2016, s 29.

⁷⁸⁵ General Notice 9 of 2016, s 39.

3.4.1.3.5 The validity of the General Notices

It is clear that the Notices deviated from the provisions of the IEEA. For example, GN 459 of 2011 allows a non-indigenous company to vary its indigenous ownership (26 per cent, 36 per cent, 46 per cent or 51 per cent) in contrast to s 3 of the IEEA which articulates that 'at least 51 *per centum* of the shares of every public company and any other business shall be owned by indigenous Zimbabweans'.⁷⁸⁶ Similarly, GN 280 of 2012 and GN 9 of 2016 also deviate from the provisions of s 3 in this regard. The Notices, in particular GN 9 of 2016, follow the assertions of President R.G. Mugabe, some of which are not particularly true.⁷⁸⁷ These assertions centre on the main idea that the indigenisation and empowerment quotas are not 'cast in stone', but are rather negotiable in all sectors except for mining.⁷⁸⁸ However, Matyszak argues that a careful review of s 3(5) of the IEEA which is relied upon by the Minister in both the Regulations and the Indigenisation Framework, will expose that the ability of the Minister to prescribe a lesser shareholding is limited in ss 3(1)(b)(iii), 3(1)(c)(i), 3(1)(d) and 3(1)(e) of the IEEA, to instances where a controlling interest is relinquished, or a business is merged, restructured or unbundled, or in any similar instance.⁷⁸⁹ The careful omission of s 3(1)(a) from the list of exceptions implies that the legislature did not intend to have the 51/49 rule as a free-floating rule whose application could be varied on a case by case basis.

More importantly, it has been submitted that the General Notices have no legal effect.⁷⁹⁰ To begin with, it can be argued that the General Notices are *ultra vires* the Constitution. Secondly, proper procedure was not followed in the drafting of the Notices. For example, GN 114 of 2011 notes the Minister in its opening statement, yet

⁷⁸⁶ IEEA, s 3(1)(a).

⁷⁸⁷ See, for example, GN 9 of 2016, ss 11 – 14.

⁷⁸⁸ See GN 9 of 2016, ss 12 – 13.

⁷⁸⁹ Matyszak D 'Chaos Clarified – Zimbabwe's "New" Indigenisation Framework' 2016 *Research and Advocacy Unit* 16.

⁷⁹⁰ Willsmer NM 'Effects of Indigenisation Notice 9 of 2016' *The Zimbabwean* 3 September 2016.

in fact, the Notice was issued by the Secretary for Youth Development, Indigenisation and Empowerment. Similarly, GN 280 of 2012 was signed by the acting Secretary for Youth Development, Indigenisation and Empowerment. In contradistinction, GN 459 of 2011 does not have any signature appended to the document. Only, GN 9 of 2016 was signed by the Minister himself. The Notices that were not signed by the Minister personally only contain a notification, as opposed to a declaration, that their content was published by the Minister.⁷⁹¹ While this only establishes a *prima facie* case that proper procedure may not have been followed, it is not enough proof to make it a certainty. The fact however remains that, in practice, these General Notices remain law as they are deemed to be authentic Statutory Instruments.

3.4.2 The legitimacy of the legal framework

Having reviewed the IEEA, the Indigenisation Regulations and the General Notices, one question quickly comes to mind. The question is: whether or not there are justifiable legal grounds that make the indigenisation economic empowerment program legitimate? In a constitutional democracy such as Zimbabwe, the first point of departure would be the Constitution.⁷⁹² Section 2 of the Constitution, one of the founding provisions, provides that the Constitution is the supreme law of the land and that any law, practice, custom or conduct must be consistent with the Constitution.⁷⁹³ It is therefore imperative to determine whether or not the laws and provisions on indigenisation discussed above are consistent with the Constitution. Chapter 2 of the Constitution on national objectives provides for empowerment and employment creation in s 14.⁷⁹⁴ Section 14(1) states:

⁷⁹¹ Willsmer NM 'Effects of Indigenisation Notice 9 of 2016' *The Zimbabwean* 3 September 2016.

⁷⁹² Constitution of Zimbabwe Amendment (No.20) Act, 2013.

⁷⁹³ Constitution of Zimbabwe, s 2.

⁷⁹⁴ Constitution of Zimbabwe, ch 2.

‘The State and all institutions and agencies of government at every level must endeavour to facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities’.⁷⁹⁵

Essentially, s 14(1) tries to empower previously disadvantaged groups through government policies and programs. The indigenisation and empowerment program is therefore an example of such programs adopted in accordance with the mandate provided by the Constitution. Notably, its predecessor, the 1979 Lancaster House Constitution, did not contain any provisions on empowerment. The introduction of s 14 was therefore a deliberate effort by the government to constitutionalise the indigenisation and empowerment program in the new 2013 Constitution. The question which could be raised by a person with a critical eye is that empowerment and employment creation are simply national objectives and are therefore not justiciable.⁷⁹⁶ Zanzi argues that while the national objectives impose no obligations on the State, the provisions assist the State to take into account these issues when enacting legislation and establishing policies.⁷⁹⁷

Naturally, the interpretation that would be given is therefore that the national objectives inform the legal framework on indigenisation. This would lead to a second question on the fact that the legal framework on indigenisation preceded the Constitution, and thus the Constitution could not have informed the making of the relevant law. A plausible response to this question would be that even though the legislative framework of the indigenisation program preceded the Constitution, it is still in accordance with the national objectives contained in the Constitution. Other than consistency with the Constitution, a question could also be raised on the consistency of the legal framework with international instruments. It is, however, vital that before a discussion is

⁷⁹⁵ Constitution of Zimbabwe, s 14(1).

⁷⁹⁶ A similar argument has been raised for other provisions which appear as national objectives. See Zanzi LF ‘Is There Political Will to Translate it into Reality?’ available at <http://www.lrfzim.com/gender-equality-in-zimbabwe/> (accessed 5 September 2016).

⁷⁹⁷ Zanzi LF ‘Is There Political Will to Translate it into Reality?’ available at <http://www.lrfzim.com/gender-equality-in-zimbabwe/> (accessed 5 September 2016).

undertaken on whether Zimbabwe's laws on indigenisation are consistent with international treaties and conventions, that a look is taken at whether these treaties and conventions have legal effect in the jurisdiction.

The Constitution provides for the domestication of international instruments. Section 34 states that the 'State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.⁷⁹⁸ The challenge, however, is that s 327(2)(a) of the Constitution provides that an international treaty⁷⁹⁹ that has been concluded by the President or under his authority does not bind Zimbabwe until it has been approved by Parliament. Section s 327(2)(a) is therefore indicative of the fact that while the state must ensure that international treaties are incorporated into domestic law, they are not binding until they are approved by Parliament. The situation is further complicated by s 327(b) of the Constitution which states that an international treaty does not form part of the law of Zimbabwe unless it has been incorporated in its law by an Act of Parliament.⁸⁰⁰ Section 327(6) which provides guidance on the interpretation to be attached to the legal status of treaties provides that courts and tribunals must where reasonably necessary prefer an interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe.⁸⁰¹

Section 327(6) is however handicapped by the fact that it was crafted to apply to a situation where an international treaty had already been deemed binding by earlier provisions. This leaves the situation unclear on what the status of international treaties is? The Court in *Minister of Foreign Affairs v Jenrich & Others*⁸⁰² was faced with the challenge of determining the status of international treaties that have been signed and

⁷⁹⁸ Constitution of Zimbabwe, s 34.

⁷⁹⁹ Section 327 of the Constitution defines these documents as international treaties. The section states that 'international treaty' means 'a convention, treaty, protocol, or agreement between one or more foreign States or governments or international organisations'.

⁸⁰⁰ Constitution of Zimbabwe, s 327(a) as read with s 327(b).

⁸⁰¹ Section 327(6) applies to BITs and RTAs.

⁸⁰² ZWHHC 232.

ratified by Zimbabwe.⁸⁰³ One of the parties relied on 327(2)(a) which implied that an international treaty is binding on Zimbabwe once Parliament has given approval, while the other relied on s 327(2)(b) whose interpretation provided that if an international treaty was not domesticated by an Act of Parliament then such treaty would not form part of Zimbabwe's law.⁸⁰⁴ Uchena J noted the following with regard to an international treaty:

'The only impediment to attaining binding status is its approval by Parliament. Mrs Wood's [legal counsel for the first respondent] attempt to link the Agreements' binding effect after their approval by Parliament to the domestication of the law by incorporation through an Act of Parliament is a result of inseparably linking s 327(a) and (b) which is not consistent with the literal [meaning of the] words [used] and has the effect of excluding customary international law contrary to the provisions s 326(2) of the Constitution. Section s 327(a) standing alone gives the Agreements a binding effect even if they have not [yet] been incorporated into Zimbabwean law.'⁸⁰⁵

Uchena J is clear on the fact that once Parliament has approved an international agreement it is binding on the State. The learned judge also articulated that courts could also enforce international treaties even if they had not been incorporated into law.⁸⁰⁶ This interpretation of s 327(2)(a) is consistent with s 327(6) of the Constitution. In *The State v Shepherd Banda and The State v Everton Chakamoga*,⁸⁰⁷ Charewa J expressed the following view:

'Section 327(6) of the Constitution effectively means that, gone are the days when it was enough for a judicial officer to be insular in his jurisprudence, but that attention must be paid to international best practices, particularly on matters that impinge [on] the rights of vulnerable groups, such as children. [The learned Judge further stated that he

⁸⁰³ *Minister of Foreign Affairs v Jenrich & Others* (2015) 11.

⁸⁰⁴ *Minister of Foreign Affairs v Jenrich & Others* (2015) 11.

⁸⁰⁵ *Minister of Foreign Affairs v Jenrich & Others* (2015) 12. Section 326 will be examined in detail in part 3.5 below where consideration will be given to the consistency of Zimbabwe's domestic framework with international law and norms.

⁸⁰⁶ *Minister of Foreign Affairs v Jenrich & Others* (2015) 12.

⁸⁰⁷ HH 47-16 CRB GVE 644/15 CRB Mhw 450/15.

noted a worrying trend] that judicial officers seem not to be aware that, s 327(6) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (the Constitution), requires them, in interpreting legislation, to adopt any reasonable interpretation that is consistent with international conventions, treaties, agreements that are binding on Zimbabwe.’⁸⁰⁸

The direction to be adopted is therefore that for Zimbabwe’s legal framework on indigenisation to be deemed legitimate, it must also be consistent with international treaties that have been approved by Parliament, and which are applicable in this particular instance. Two important instruments can be noted, namely: the African Charter on Human and Peoples Rights (ACHPR) and the ICESCR. The ACHPR in Article 20(1) provides:⁸⁰⁹

‘All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.’

This section allows States to determine their own issues, in particular issues of economic and social development. Furthermore, Article 21(1) read with Article 22(1) states that ‘freely all peoples shall dispose of their wealth and natural resources’. Similarly, Article 2 of the ICESCR provides that all citizens of a country must derive benefit from the wealth and natural resources of the country. From these provisions it is clear that the indigenisation program finds a legal basis as it furthers the idea that States must dispose of their wealth and natural resources in accordance with their policies of economic and social development. Having regard to this discussion, it becomes important to analyse the effects of the legal framework on investment in Zimbabwe.

⁸⁰⁸ *The State v Shepherd Banda and The State v Everton Chakamoga* (2016) 5 & 2. No

⁸⁰⁹ African Charter on Human and Peoples Rights, Art 20.

3.4.3 Effect of indigenisation laws on FDI

Arguably, the indigenisation laws in Zimbabwe have had an effect on investment. These laws, invariably, are tied to investment as they have significant implications for investors. The IMF notes that '[t]he indigenisation policy and investment are intrinsically linked and it would be desirable that authorities come up with one single harmonized law on investment'.⁸¹⁰ While this is yet to materialise, indigenisation laws continue to adversely affect investment. As a result, Zimbabwe has failed to realise its investment potential, as compared to its regional partners.⁸¹¹ For example, if one compares investment levels in Zimbabwe with those of its neighbouring countries since the implementation of the indigenisation laws, one can clearly see that FDI levels in Zimbabwe have been significantly lower.

Table 3: FDI levels in Zimbabwe and its neighbouring countries

COUNTRY	FDI INFLOWS (USD MILLIONS)						
	2009	2010	2011	2012	2013	2014	2015
ZIMBABWE	105	166	387	400	400	545	421
ZAMBIA	426	634	1 110	2433	1810	2484	1653
MOZAMBIQUE	898	1018	3559	5629	6175	4902	3711
SOUTH AFRICA	7502	3636	4243	4559	8300	5712	1722
NAMIBIA	506	793	816	1133	801	414	1078
ANGOLA	2206	3227	3024	6898	7120	3881	8681

Source: World Investment Report 2016

⁸¹⁰ International Monetary Fund *Zimbabwe: Start Report for the 2016 Article IV Consultation and the Third Review of the Staff Monitored Program –Press Release; Staff Report; and Statement by the Executive Director of Zimbabwe* (2016) 43.

⁸¹¹ International Monetary Fund (2016) 43.

Table 3 above shows the movement of FDI in Zimbabwe and five other Southern African countries.⁸¹² As can be seen from the table, in 2009 just after the IEEA came into force, Zimbabwe had FDI inflows of USD105 million, which were not far off from those of its neighbours.⁸¹³ Zambia had inflows of USD426 million, Mozambique had USD898 million, Namibia had USD506 million, Angola had USD2 206 million and South Africa had an inflow of USD7 502 million. At the time, South Africa and Angola were the only two countries that had managed to receive over a billion dollars in FDI. By 2015, every one of the other countries except for Zimbabwe had FDI inflows of over USD1 billion.⁸¹⁴

The legal provisions requiring foreign companies to cede 51 per cent have thus contributed immensely to Zimbabwe's failure to move with its regional counterparts in terms of FDI inflows. This challenge is further exacerbated by the fact that the



⁸¹² In this table, four countries in Southern Africa, namely, Botswana, Lesotho, Malawi and Swaziland, have been deliberately left out, because these economies are not comparable to Zimbabwe as they do not have diversified economies, and are relatively small countries in population (for the most part). It is of interest that, in 2015, Botswana had an FDI inflow of USD393 million, Lesotho had USD 46 million, Malawi had USD 130 million, and Swaziland had inflows of USD 13 million.

⁸¹³ It is interesting to note that in 1998, Zimbabwe had FDI of over USD 444 million. By 2001, FDI inflows had slumped to USD5.4 million. Before this, FDI had grown by 0.24% of the Gross Domestic Product (GDP), yearly. However, this growth was eliminated by the land reform program, which threatened the property rights of investors. The downward trend of FDI continued until 2008 when the government in part renewed its interest to try to protect property rights. The crux of the matter is that whenever property rights or the interests of investors are threatened, FDI inflows are restricted. See Chiwunze G 'Economic Empowerment and Foreign Direct Investment: The Cases of Botswana, South Africa and Zimbabwe' available at <http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13> (accessed 8 September 2016).

⁸¹⁴ While FDI in Zimbabwe has steadily increased, the highest inflow was the USD 545 million received in 2014. Much of the increase in Zimbabwe could be attributed to FDI increases globally, after the global economic crisis of 2008 – 2009. For example, in 2015, FDI to developing countries reached an all-time high of USD 765 billion. This was just under the inflows of developed economies which almost doubled (84% increase), reaching a grand total of USD 962 billion, in the same year. Another reason for the increase in FDI in Zimbabwe was also the focus on greenfield investments in Land-Locked Least Developed Countries (LLDCs) in Africa, such as Zimbabwe. As a result, countries, such as, Zimbabwe, Uganda, Ethiopia, Burundi, Malawi and Zambia, were all targets for the expansion of banking services. These inflows were also amplified by intra-Africa investments in communications. In addition, relaxations in the enforcement of the investment quota can also be attributed to the marginal increases in FDI in Zimbabwe. For instance, in 2015, Zimbabwe permitted foreign investors to invest up to a maximum of 49 per cent of the shares of a company on the Zimbabwe Stock Exchange, up from 40 per cent in the previous years. See United Nations Conference on Trade and Development 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 8 September 2016).

legislative regime, more broadly, is viewed as subjective and discretionary.⁸¹⁵ While the Indigenisation Framework may have improved clarity on certain issues relating to indigenisation and investment, much remains in question. As a result, investors remain sceptical about investing in Zimbabwe, in particular, where the risk is high or the capital needed is large. Moreover, the legal framework, in particular, the 51-49 rule violates many of Zimbabwe's international commitments.

Despite these submissions, some scholars have also argued that Zimbabwe's failure to attract investment post-2000 lies squarely within its economic crisis.⁸¹⁶ Granted, the economic crisis has had a significant effect on foreign investment in Zimbabwe, as has already been argued in Chapter 1. This does not however deny the fact that bad law and policy have also been a contributors to low levels of investment.⁸¹⁷ The major investments that have been recorded are mostly from Chinese and Indian companies which are not concerned about the security of their investments, but are rather focussed on resource extraction.⁸¹⁸ Munyedza opines that some of these investors have already reconciled themselves to the fact that Zimbabwe is a high-risk investment destination.⁸¹⁹ Munyeza gives an interesting and nuanced opinion of the indigenisation laws and FDI, which sums up the discourse as follows:

'As a rule, empowerment laws should not significantly affect [foreign investment]. However, historical backgrounds seem to suggest evidence of rampant systematic inefficiencies resulting from previous empowerment laws implemented in Zimbabwe.

⁸¹⁵ IMF Zimbabwe: Third Review Under the Staff-Monitored Program and Successor Staff-Monitored Program-Staff Report; and Press Release (2014) 11.

⁸¹⁶ Kanyenze G (2011) 145.

⁸¹⁷ It is important to note the empirical study done by Sikwila. In his study focussing on the factors affecting FDI in Zimbabwe, Sikwila found that the hypothesis that the non-respect of property rights and indigenisation had an effect on FDI in Zimbabwe was unsubstantiated. He, however, notes that the data used was not reliable and therefore a strong reliance could not be placed on the results of the study. See Sikwila MN 'Foreign Direct Investment: Does it Matter? A Case for Zimbabwe (2015) 11 *Research in Business and Economics Journal* 8.

⁸¹⁸ Watson J, Major R & Hamilton J 'The Impact of the Indigenisation Legislation on Foreign Investments' available at <http://www.lexology.com/library/detail.aspx?q=026290c7-77eb-427f-8299-cfc707e89d13> (accessed 8 September 2016).

⁸¹⁹ Munyedza P 'The Impact of the Indigenous Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities' (2011) 37 *Business and Economics Journal* 10.

This background seems to have induced investment phobia and apprehension among investors. This fear appears to have scared away investors, initially from trading in counters whose ownership structures are likely to be affected by empowerment policies, and ultimately all other counters.⁸²⁰

Rightly, Munyeza's analysis correctly points out that in a perfect situation, the indigenisation laws ought not to have a significant impact on foreign investment; however, Zimbabwe finds itself in a peculiar situation because of its history and the way in which it has dealt with empowerment policies in the past. Similarly, Shangahaidonhi and Gundani expressed the following view:

'The obvious negative effect implication of the [indigenisation law] is its stalling of the [i]nvestment drive. The policy obviously makes the country an undesirable investment destination. The condition of surrendering 51 per cent to locals is too much a price to pay. This makes the whole exercise a disempowerment drive to investors. In contrast, the Namibian Black Economic Empowerment (BEE) has been met with greater acceptance from foreign investors than the Zimbabwe Indigenisation policy, all owing to these adverse conditions.'⁸²¹

To sum up the discussion, Zimbabwe's indigenisation laws have therefore had an adverse effect on FDI in the country, and consequently undo some of the measures implemented by the government to stimulate investment.⁸²² The effect on FDI is further compounded by the failure to respect property rights, particularly in land. Now that it has been established that indigenisation laws have a negative effect on investment, the next part assesses the consistency of Zimbabwe's domestic framework on investment with international norms and standards on investment.

⁸²⁰ Own emphasis added. See Munyedza P (2011) 10.

⁸²¹ Shangahaidonhi T & Gundani B 'The Feasibility of Value Addition in the Mining Sector in the Wake of the Indigenisation Policy in Zimbabwe' (2014) 5 *Journal of Emerging Trends in Economics and Management Sciences* 128 -129.

⁸²² United States of America Department of State 'Zimbabwe: Investment Climate Statement 2015' available at <http://www.state.gov/documents/organization/242012.pdf> (9 September 2016) 3.

3.5. THE CONSISTENCY OF ZIMBABWE'S DOMESTIC FRAMEWORK ON FDI WITH INTERNATIONAL NORMS AND STANDARDS ON INVESTMENT

The Constitution of Zimbabwe entrenches the position of customary international law in the jurisdiction. Section 326(1) of the Constitution provides that '[c]ustomary international law is the part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament'.⁸²³ Similar to the position in s 327(6) on international treaties, the courts must adopt a position that favours consistency with customary international law.⁸²⁴ The Court in *Minister of Foreign Affairs v Jenrich & Others* also confirmed this position. The Court clearly stated that a reading of s 326 of the Constitution together with the obiter dicta of the Court in three key *Barker McCormac* cases would confirm that customary international law is part of the law in Zimbabwe.⁸²⁵ It therefore becomes important to determine if Zimbabwe's legal framework on investment is consistent with customary international law.⁸²⁶

As discussed in Chapter 2, the international minimum standard refers to the minimum standard to be offered to foreign investors, and below which States cannot go. The State is obligated under customary international law to offer these minimum protections to the property owned by aliens.⁸²⁷ The minimum standard to be offered however remains elusive and amorphous. To some, the minimum standard consists of the rights to life, liberty, property, free access to the courts, and the protection of property.⁸²⁸ It is argued that derivatives of the minimum standard rule have led to fair

⁸²³ Constitution of Zimbabwe, s 326(1).

⁸²⁴ Constitution of Zimbabwe, s 326(2). This was also reinforced in the case of *Minister of Foreign Affairs v Jenrich & Others*.

⁸²⁵ *Minister of Foreign Affairs v Jenrich & Others* (2015) 11.

⁸²⁶ The following rules of customary international law outlined in chapter 2 will now be used as tools for analysis: (1) the international minimum standard on the treatment of foreign investment; (2) fair and equitable treatment; (3) MFN treatment; (4) national treatment; (5) protection against expropriation; and (6) and standards of compensation. However, it is not worth noting that not all of these rules are applicable.

⁸²⁷ Sprankling JG *The International Law of Property* (2014) ch 10.

⁸²⁸ USLegal 'International Minimum Standard Law & Legal Definition' available at <http://definitions.uslegal.com/i/international-minimum-standard/> (accessed 15 September 2016).

and equitable treatment.⁸²⁹ As a result of the uncertainty around the international minimum standard, the analysis to be provided will therefore not apply the rule independently, but will combine the rule with other rules.

Foreign investors and their property must be given treatment that is fair and equitable. In Zimbabwe, this has not been the case. Thus, when foreigners establish their businesses in Zimbabwe, being non-nationals, they are obligated to dispose of 51 per cent of the ownership or control of their businesses to indigenous citizens under the guise of empowerment.⁸³⁰ Furthermore, already existent foreign businesses had five years (extended to 31 March 2016) in which to dispose of a controlling ownership or interest in their businesses. The IEEA, read with the Indigenisation Regulations, discriminates against foreign investors to the benefit of indigenous Zimbabweans.

For example, some companies were not able to sell their shares before the date for compliance and had to give away some of their shares in order to comply with the Regulations as locals could not afford to purchase the shares.⁸³¹ Some companies are also currently in the process of making plans to distribute their shares. For instance, Zimplats, a subsidiary of the South African based Implats, has crafted a plan to transfer 10% of its shares to its employees, another 10 per cent to a community scheme in the local area of the mine (Ngezi), and the last 31 per cent to the National Indigenisation and Economic Empowerment Fund.⁸³² Some of the companies which have refused to submit to the demands have decided to close down and sell assets.⁸³³ Foreign

⁸²⁹ Kläger R (2011) 48.

⁸³⁰ See IEEA, s 3(1)(a).

⁸³¹ Karombo T 'Mugabe Pauses on Indigenous Control of Mining Firms' available at <http://www.moneyweb.co.za/news-fast-news/mugabe-pauses-indigenous-control-mining-firms/> (accessed 15 September 2016)

⁸³² Mashavave R 'Zimbabwe Business Grabs Scares Investors' available at <http://www.cfuzim.org/index.php/newspaper-articles-2/indigenisation/2431-zimbabwe-business-grab-scares-investors> (accessed 15 September 2016).

⁸³³ Moore D, Kriger N & Raftopoulos B *'Progress' in Zimbabwe?: The Past and Present of a Concept and a Country* (2013) 78.

investors have therefore been denied their customary international law right to fair and equitable treatment.

The treatment of foreign investment in Zimbabwe as a result of the indigenisation laws also conflicts the principle of national treatment in customary international law. As discussed in Chapter 2, in terms of national treatment, a host country cannot afford a foreign investor and his property treatment that is less favourable than that which it provides to its own investors and investments in like circumstances.⁸³⁴ Foreign investors are placed on an uneven footing when compared to domestic investors in a 'like circumstances' as a result of the indigenisation laws.⁸³⁵ Therefore, to a greater extent the indigenisation laws violate the principle of national treatment which is central to eliminating protectionism and facilitating investment liberalisation. Consequently, by not providing national treatment and fair and equitable treatment to foreign investors, Zimbabwe's indigenisation laws violate the international minimum standards of treatment that must be afforded to foreign investors.⁸³⁶

In addition to the shortcomings of Zimbabwe's legal framework relating to foreign investment, its policies have also been questionable. More specifically, Zimbabwe's land reform program which is aimed at re-distributing land from White farm owners to landless Black farm owners has been called into question. The argument is that properties belonging to foreign investors, as discussed earlier in this chapter, were expropriated without compensation, in violation of international law. Zimbabwe's actions can be assessed in terms of two principles of customary international law, namely: protection against expropriation and standards of compensation. Customary international law, as was seen in Chapter 2, has long provided for prompt, adequate

⁸³⁴ Sanders AK *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (2014) 184.

⁸³⁵ See Collins D *An Introduction to International Investment Law* (2016) 105.

⁸³⁶ See generally Van Duzer JA, Simons P & Mayeda G *Integrating Sustainable Development into International Investment Agreements: A Guide to a Developing Country* (2013) 111.

and effective compensation.⁸³⁷ The protection of private property is an important right in international law.⁸³⁸

As discussed earlier, expropriations must generally be for a public purpose for them to be permissible. If they are granted, then fair compensation must be paid. The redistribution of land is a public purpose; however, the fair compensation due was not paid for the farms of foreign investors which were expropriated, in violation of the standards of compensation. Not only was the failure to pay compensation inconsistent with customary international law, but it also violated numerous BITs which Zimbabwe had signed.⁸³⁹ In *Bernhard von Pezold and Other v Zimbabwe* the Tribunal found that the expropriation of land without compensation for the purpose of land reform policy is in breach of the expropriation, fair and equitable treatment and other provisions in the Swiss BIT and the Germany BIT.⁸⁴⁰ The expropriation also conflicted with soft law protections for investor property contained in instruments, such as, the UN Codes of Transnational Property and the World Bank Guidelines. International Investment Law permits land reforms, however, these land reforms must comply with the rule of law, to which the Zimbabwean land reform fell short.⁸⁴¹ In conclusion, Zimbabwe's domestic framework on FDI falls short of expectations. The framework is inconsistent with customs and norms of IIL and is in need of significant review.

3.6 CONCLUSION

This chapter has examined the current domestic legal framework on the regulation of FDI in Zimbabwe. The chapter discussed the policy framework, the institutional framework and the current legal framework on the matter. It was shown that the current policy framework on FDI is the land reform policy and the indigenisation policy. While

⁸³⁷ See Escarcena SL *Indirect Expropriation in International Law* (2014) 118.

⁸³⁸ Mouyal LW (2016) 42.

⁸³⁹ See *Funnekotter v Zimbabwe*.

⁸⁴⁰ The Tribunal ordered that land seized in 2005 without compensation had to be returned to its owners.

⁸⁴¹ Elderman M, Oya C & Boras SM *Global Land Grabs: History, Theory and Method* (2016) ch 3.

these policies do not specifically speak to foreign investment, they are intrinsically linked to FDI. It was shown that the land reform program has had an important effect on FDI as farms of foreign investors were expropriated without compensation, while the indigenisation policy is tied to FDI as indigenous Zimbabweans are given priority over foreign investors as the government tries to empower its citizens.

The chapter also showed the role of the RBZ and the ZIA in facilitating and promoting investment in Zimbabwe. A distinction was drawn between the role of the RBZ in dealing with 'old investments' and that of the ZIA in encouraging 'new investments'. The chapter then outlined the legal framework regulating FDI in Zimbabwe. It was noted that the main substantive elements refer to the IEEA, the Indigenisation Regulations and the Indigenisation Notices. It was then argued that the challenge with the substantive law on FDI is that the Indigenisation Regulations are inconsistent with the IEEA, and that the Indigenisation Notices are not aligned to the Regulations. Questions on the legitimacy of the legal framework were also raised with the answer provided being in the affirmative, namely, that the legal framework does indeed have the force of law. The legal framework was, however, found to impede the free flow of FDI into the country. The chapter concluded that the legal framework is inadequate and conflicts with customary international standards and norms of investment.

The next chapter will discuss the obligations that Zimbabwe has assumed from its BITs, and whether the country is fulfilling these obligations with regard to FDI. A detailed analysis of Zimbabwe's BITs which are in force will therefore be undertaken.

CHAPTER 4

AN EXAMINATION OF ZIMBABWE'S COMMITMENTS FROM ITS BILATERAL INVESTMENT TREATIES

*A man's name is only as good as his word, so his signature is only as good as his
word*⁸⁴²

4.1 INTRODUCTION

Zimbabwe has a relatively short history of bilateral investment protection. Its history began with the signing of the BIT between Zimbabwe and Mozambique in 1990.⁸⁴³ Since then, Zimbabwe has signed at least 54 BITs,⁸⁴⁴ with 10 of those BITs having been ratified.⁸⁴⁵ This non-ratification of signed BITs by parliament remains an amusing mystery.⁸⁴⁶

A review of the literature seems to however display that the non-ratification of BITs can be attributed to the land reform program discussed in chapter 3.⁸⁴⁷ Here, the argument is that BITs had hampered the government's efforts to redistribute land to the masses in the early 2000s as they gave farm owners whose countries had BITs with Zimbabwe, protection against expropriation.⁸⁴⁸ As a result, an inter-ministerial

⁸⁴² This quote is profound especially in the context of Zimbabwe. The country has signed numerous BITs but it has in many instances refused to honour its commitments from these BITs. See Martin FP *The Kingdom's Economy: A Guide to Proper Giving* (2011) 148.

⁸⁴³ The Zimbabwe-Mozambique BIT was signed on the 12th of September 1990.

⁸⁴⁴ Referred to in other circles as Bilateral Investment Protection and Promotion Agreements (BIPPAs).

⁸⁴⁵ See Musarurwa T 'Zimbabwe: Mashakada 'Unfruitful' BIPPAS' *The Herald* 19 March 2012.

⁸⁴⁶ In Zimbabwe, BITs need to be ratified by Parliament before they become law. This is in line with s 327(2) of the Constitution which provides that 'an international treaty which has been concluded or executed by the President or under the President's authority does not bind Zimbabwe until it has been approved by parliament'. See part 3.4.2 above.

⁸⁴⁷ See part 3.2.2 above.

⁸⁴⁸ Matondi, Havnevik K and Beyene (eds) *Biofuels, Land Grabbing and Food Security in Africa* (2011). In some cases, Zimbabwe clandestinely encouraged settlers to grab land protected by BITs. A case in point in this regard is the case of *Bernahrd von Pezold and others v Zimbabwe* discussed in chapter 3. The encouragement of seizures by the government encouraged this kind of seizure which was in turn found by the ICSID tribunal to be in breach of several provisions of the Zimbabwe-Switzerland BIT. Most notably, it violated the provisions on fair and equitable treatment standard, expropriation and compensation, full protection and security and free transfer of payments. The Tribunal interesting

taskforce found it pertinent not to ratify the remaining BITs as it would extend protection to more farm owners and hamper the land reform program.⁸⁴⁹ Furthermore, the fallout between Zimbabwe and western countries, which ultimately led to sanctions, could explain Zimbabwe's disenchantment with BITs as it felt no need to protect the assets of countries with whom it no longer had viable relationships.

The discussion above provokes many interesting ideas. A particularly interesting question that arises is: to what exactly did Zimbabwe commit in its BITs? It is against this backdrop that this chapter examines Zimbabwe's BITs with the aim of unearthing Zimbabwe's obligations from these treaties. In doing so, the provisions in these BITs are explained and compared to provisions in other treaties so as to determine if they follow usual practice.

Where appropriate, considerations are made as to whether these provisions are consistent with customary international law and the 2013 Zimbabwean Constitution. In certain instances, these provisions are also compared to best practices from other treaties.

The chapter uncovers that while most of Zimbabwe's BITs follow common-practice in BITs, in order to induce greater FDI flows in the future and reduce wide interpretations, some of the provisions in its BITs need to be reviewed. It is then argued that a balancing act must be conducted with regards to the rights and obligations of investors

applied restitution, a rarely used standard in investment arbitration as a remedy. Coupled with this, the Tribunal also ordered Zimbabwe to pay USD 65 million as compensation so as to account for the value lost (this amount will climb to USD 196 million should Zimbabwe fail to return title of the farms). A similar finding had also been made in the case of *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*. In this case, Zimbabwe was ordered to pay compensation to the affected Dutch farmers to the tune of USD 25 million. It is these cases that have soured Zimbabwe's relationship with BITs. See part 3.2.2.3.4 of this thesis. (Interesting to note that Zimbabwe has moved to annul this award).

⁸⁴⁹ For those BITs that had been signed, the government sought to find a manner of delisting some of the farms from protection. To do so the government examined whether or not the farms in question had met investment thresholds since the concluding of the BITs. Where a farm was found short, the owners of the land were evicted on the basis of the non-compliance. In some instances where the eviction was problematic, the farm would have to give a part of their farm to settlers in exchange for compensation which the government knew it had no resources to pay. See Matondi, Havnevik K and Beyene (eds) (2011) for a detailed discussion on BITs and land reform in Zimbabwe.

and the host-state. Before a discussion is led on these issues, the next section however first discusses the admission and promotion of FDI in Zimbabwe pursuant to its BITs as well as domestic law.

4.2. ADMISSION AND PROMOTION OF FDI IN ZIMBABWE

Under international law, a state has an absolute right to regulate the entry of aliens into its borders.⁸⁵⁰ Within the context of foreign investment, equally, a state has a right to control the admission and establishment of FDI within its shores.⁸⁵¹ These 'rights' have in certain instances been referred to as the right of admission and the right of establishment.⁸⁵² The two rights must be distinguished from each other.

The right of admission is concerned with the entry of investment into an economy while the right of establishment deals with the conditions under which an investor operates his business during the lifetime of the investment.⁸⁵³ Classically, the right to admission is concerned with pre-establishment issues, such as; the registration of a foreign enterprise, the acquisition of a license or the definition of economic sectors in which a foreign investment can be made.⁸⁵⁴ This is in contrast to the issues, such as, the expansion of investments, the transfer of funds or the payment of taxes; which are dealt with by the right to establishment.⁸⁵⁵ While the right to admission is important, it has not been dealt with by many investment treaties, as the focus of many BITs has

⁸⁵⁰ Muchlinski P, Ortino F & Schreuer C (2008) 20.

⁸⁵¹ Therefore, every sovereign state has the right to determine its own admission policies in line with its development objectives and economic policy goals. In doing so, other considerations, such as, national security, the environment and public health are also considered.

⁸⁵² Amusingly, some authors have distinguished them by captioning them as 'freedom of investment' and 'freedom of establishment'. See Newcombe AP & Paradell L (2009) 132.

⁸⁵³ Dolzer R & Schreuer R *Principles of International Investment Law* (2012) 88.

⁸⁵⁴ United Nations Conference on Trade and Development *Investor-state Dispute Settlement and Impact on Investment Rulemaking* (2007) 38.

⁸⁵⁵ In instances where an investment is of a relatively short-term nature, the right of admission would suffice. However, where an investment is of a relatively permanent nature, the right of establishment becomes necessary as it determines important issues such as the transfer of investment funds. Sauvant notes that the distinction between the two is, however, rendered irrelevant when a BIT contains a broadly phrased clause on the admission of foreign investment. Polan goes further and highlights that in the case of FDI, the distinction between the two is of little value as FDI is characterised by long-term investment. See Pollan T (2006) 54 & Sauvant KP (2012) 207.

been matters related to post-establishment.⁸⁵⁶ Also, because the focus of most first generation BITs was to attract FDI, there was therefore no incentive to limit the entry of investment.⁸⁵⁷

In Zimbabwe, the right to admission is dealt with in part by the ZIA Act. As was discussed in chapter 3,⁸⁵⁸ in order for an investment to be admitted into the country, the investor must make an application to ZIA.⁸⁵⁹ This application must be accompanied by the prescribed fee for an investment license as well any supporting documents that may be requested by ZIA.⁸⁶⁰ These investment licenses can be issued for a wide-ranging number of investment arrangements, including: equity and non-equity partnerships; public-private partnerships; build, operate and transfer arrangements; contract farming; and joint ventures.⁸⁶¹

Further to these requirements for admission under the ZIA Act, some BITs also provide additional requirements. One such example is the Swiss BIT which provides for the 'promotion and admission' of foreign investments. Article 3(1) of the Swiss BIT states that as far as is possible, each state has to promote and admit investments from the other Contracting Party in accordance with its laws.⁸⁶² This Article is further reinforced by Article 3(2) which provides that:

'Each Contracting Party shall grant, in accordance with its laws, the necessary permits in connection with such investments, including permits for the carrying out of licensing

⁸⁵⁶ Sasse JP (2011) 140.

⁸⁵⁷ Sauvart KP & Chiswick-Patterson M (eds) *Appeal Mechanism in International Dispute Settlement* (2008) 11

⁸⁵⁸ See section's 3.3.2 and 3.3.3 of this thesis.

⁸⁵⁹ See section 3.3.2.2 of this thesis

⁸⁶⁰ ZIA Act, s 13(2)(a) as read with s 13(2)(b). This is consistent with the definition of the right to admission given above.

⁸⁶¹ Lemarchand GA & Schneegans S (2014) 18.

⁸⁶² Zimbabwe-Switzerland BIT, Article 3(1).

agreements and contracts for technical, commercial or administrative assistance, as well as authorisations required for the activities of consultants of experts.⁸⁶³

In terms of Article's 3(1) and 3(2) of the Swiss BIT Zimbabwe, therefore, has to admit foreign investments from Switzerland, subject to its registration and licensing requirements in terms of the ZIA Act. Moreover, these investments must also comply with the indigenisation requirements contained in the IEEA.⁸⁶⁴

One of the shortcomings of the Swiss BIT is that it does not clarify, to a wide degree, the exact licensing and registration requirements mentioned in Article 3(1).⁸⁶⁵ This gives the host state a wide discretion on the domestic front on what constitutes licensing and registration requirements.⁸⁶⁶ This, in some cases, may be to the detriment of foreign investors, where restrictive domestic laws are implemented.

An option to consider for Zimbabwe, in future BITs, is to have an admissions clause which speaks to FDI which can be admitted into the country. Apart from reducing the discretion of Zimbabwe to willy-nilly legislate to refuse investments, such a clause would aid in creating a consistent and predictable investment regime.⁸⁶⁷ For example, the BIT between Canada and Nigeria only has a promotion of investment clause which states that:

⁸⁶³ Zimbabwe-Switzerland BIT, Article 3(2). It is important to note that two BITs which are known to have been ratified by Zimbabwe are not available, namely, the Iran BIT and the Serbia. Furthermore, there are two more BIT which Zimbabwe has concluded which are yet to be disclosed.

⁸⁶⁴ See section 3.3.2.2 of this thesis. The IEEA also deals with matters of establishment.

⁸⁶⁵ See Fox G 'A Future for International Investment? Modifying BITs to Drive Economic Development' (2014) 246 *Georgetown Journal of International Law* 252.

⁸⁶⁶ A counter argument may be raised that despite the benefits of clarifying licensing and registration requirements, this may unduly limit a state's right to regulate, thereby impeding a state's sovereignty.

⁸⁶⁷ Generally, however, admissions clauses in BITs do not refer to the specific domestic requirements to which a host state must comply with, as the different contracting parties may have different requirements for admission. This is in itself a big challenge because if a dispute were to arise, it would be unclear if admission requirements have been met as the one party might not be aware of the changes that have taken place in the domestic law of the other party.

‘Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party and shall admit those investments in accordance with this Agreement.’⁸⁶⁸

The novel approach taken in the Canada-Nigeria BIT might be a model for Zimbabwe to draw lessons from as it moves away from the admission of investment in terms of domestic regulation by gravitating towards the admission of foreign investment in terms of the BIT.⁸⁶⁹ A grave challenge, however, of this approach is that it restricts policy space. For example, the host state may now be constrained by the BIT when it comes to restricting sensitive sectors or adjusting licensing requirements for a legitimate purpose.⁸⁷⁰

Despite the weaknesses of the admissions clause in the Swiss BIT, it does, however, have its own merits. Notably, unlike many other treaties which contain aspirational language in their admissions clauses, the language in the Swiss BIT is peremptory/obligatory.⁸⁷¹ The Swiss BIT, therefore, creates an enforceable right of entry of foreign investors, subject to qualifications under domestic law. However, while this is so, the right established is not an independent right of entry.

The drafting of the admissions clause is indicative of the tentative approach that Zimbabwe has adopted to the admission of foreign investment within its BIT regime. While it moved towards granting the investments of the other Contracting Parties into its market, it retained a significant amount of control on the conditions in which

⁸⁶⁸ Article 3 of the Agreement between Canada and the Federal Republic of Nigeria for the Promotion and Protection of Investments.

⁸⁶⁹ The promotion of investment clause in the BIT between Nigeria and Canada was a significant deviation from the position Nigeria had adopted in other BITs. For example, in Article 2(1) of the Agreement between the Government of the Italian Republic and the Government of the Federal Republic of Nigeria on the Reciprocal Promotion and Protection of Investments states that: ‘Each Contracting Party shall encourage investors of the other Contracting Party to invest in its territory and shall admit such investments in accordance with its legislation’.

⁸⁷⁰ See part 2.4.2 above for a discussion on national policy space.

⁸⁷¹ For example, the admissions clauses of the United Kingdom Model BIT is marked by aspirational language. Article 2(1) of the Model BIT states that: ‘each Contracting Party shall encourage and create favourable conditions for nationals or companies of nationals to invest capital in its territory, and, subject to this right to exercise powers conferred by its laws, shall admit such capital’.

investments are allowed into the country.⁸⁷² This is, however, in line with approach that has been adopted by many BITs, that foreign investors do not have an absolute right of entry.

While Zimbabwe's approach to admission may not be optimal, given its local equity requirements in domestic law,⁸⁷³ it is more liberal than the approach adopted by some countries. For example, China 'maintains some performance requirements on the entry of foreign investment, such as local equity requirements, investor qualification requirements, minimum registered capital requirements, and investment duration requirement'.⁸⁷⁴

One suggestion is that Zimbabwe should seek to further liberalise its admission requirements so as to create an attractive FDI environment, which is an important stepping stone in winning heavily competed FDI inflows.⁸⁷⁵ Such measures of liberalisation would include affording foreign investors pre-establishment national treatment and extinguishing local content requirements. This is, however, very contestable, as many countries, as seen in chapter 2, are moving towards reclaiming their national policy space.⁸⁷⁶ De Schutter, for example, argues that:

'The admission clause thus amplifies the effects of the other investment protection provisions of BITs which erode a State's capacity progressively to realize human rights through reform policies that may include performance requirements, favour local over foreign investors, require nationalization or indigenisation of private property or restrict cross-border capital transfers.'⁸⁷⁷

⁸⁷² This is not necessarily a bad thing, it depends on the perspective in which you view it.

⁸⁷³ Zimbabwe's local content requirements, are reminiscent of an era gone by where developing countries used to apply various forms of restrictions to FDI before they liberalised their investment policies. See Squire L & Fanelli JM *Economic Reforms in Developing Countries* (2008) 131.

⁸⁷⁴ Shan W *Legal Framework of EU-China Investment Relation: A Critical Appraisal* (2005) 284. While China has a restrictive admission policy, it has in recent times taken measures to relax its admission requirements.

⁸⁷⁵ See United Nations Conference on Trade and Development *Prospects for Foreign Direct Investment and the Strategies of Transnational Corporations, 2005 – 2008* (2005) 53.

⁸⁷⁶ See section 2.4.2 of this thesis.

⁸⁷⁷ De Schutter O (ed) *Transnational Corporations and Human Rights* (2006) 126.

From the discussion above, what is clear is that the admissions policy on foreign investment in Zimbabwe needs some revision. Perhaps the approach to be adopted should be one that undertakes a balancing act, levelling policy space and liberalisation.

4.3 THE OBLIGATIONS IN ZIMBABWE'S BITs⁸⁷⁸

As noted earlier, Zimbabwe has ratified only 10 of its signed BITs.⁸⁷⁹ These BITs are detailed in the table below:

Table 4: Ratified Bilateral Investment Treaties in Zimbabwe

Partner	Date of signature	Date of entry into force	Availability of text
China	21/05/1996	01/03/1998	Yes
Denmark	25/10/1996	07/02/1999	Yes (Dutch)
Germany	29/09/1995	14/04/2000	Yes
Iran	09/05/1999	26/01/2015	No
Kuwait	07/03/2000	22/11/2008	No
Netherlands	11/12/1996	01/05/1998	Yes
Russian Federation	07/10/2012	10/09/2014	Yes (Russian)
Serbia	19/09/1996	22/07/1996	No
South Africa	27/11/2009	15/09/2010	Yes

⁸⁷⁸ Instead of addressing the protections offered by Zimbabwe's binding BITs on an individual basis the discussion will be combined for all the treaties, however, the discussion will be undertaken on various protections individually.

⁸⁷⁹ See part 4.1 of this thesis.

Switzerland	15/08/1996	09/02/2001	Yes
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Source: UNCTAD Investmetpolicyhub

Only the BITs with South Africa and Russia were negotiated and ratified after 2000. The rest of the BITs were negotiated before 2000. What is interesting to note, however, is the fact that the pre-2000 BITs and the post-2000, for the most part, remain the same in terms of content.⁸⁸⁰

The range of provisions covered by both earlier and newer BITs include: the definition of investors and investments; the scope of application; promotion, admission; fair and equitable treatment; MFN treatment (with exceptions); NT; free transfer of funds; protection against expropriation; full protection and security; subrogation and dispute settlement.

Perhaps the only significant development in Zimbabwe's new BITs is with regard to the content of the provisions. Most notably, MFN treatment and NT are qualified so as to facilitate for preferential treatment of previously disadvantaged persons.⁸⁸¹ This will be discussed in greater detail in part 4.3.2.1.2 below.

Useful to examine also is the language used in the drafting of Zimbabwe's newer and older BITs. All of these BITs are similar in that they are drafted in a manner that imposes firm commitments. This is evidenced by the peremptory language that is used in the substantive text. For instance, if one examines the Zimbabwe-South Africa BIT, Article 2 on the promotion of investments provides:

⁸⁸⁰ This is in contra-distinction to the development of BITs in other jurisdictions. For example, China's BITs before 1998 offer a low-level of protection to investors whilst maintaining a lot of policy space. Its post-1998 BITs, however, offer more protection to investors. As an example, its BITs now provide for NT which was not provided for in earlier BITs. See generally Wu G & Lansdowne H (eds) *China's Transition from Communism – New Perspectives* (2015) ch 8.

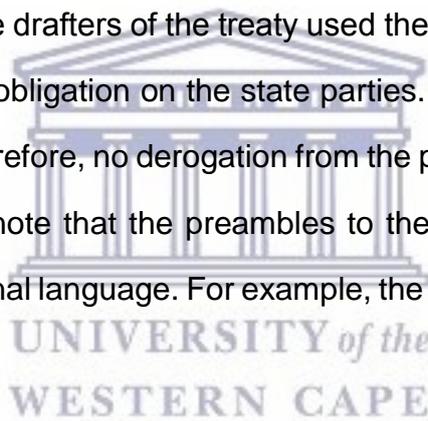
⁸⁸¹ See Article 3(4) of the Zimbabwe-South Africa BIT.

'Each Party **shall** grant, in accordance with the domestic law of its country, the necessary permits in connection with such investments and with the carrying out of licensing agreements and contracts for technical, commercial and administrative assistance'.⁸⁸²

Similarly, Article 3(1) of the Zimbabwe-South Africa BIT which provides:

'Investments and returns that are reinvested of investors of either Party **shall at all times** be accorded fair and equitable treatment and **shall** enjoy full protection in the territory of the Other Party. Neither Party **shall** in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of in its territory of investors of the other Party.'⁸⁸³

In both these provisions, the drafters of the treaty used the words "shall" or "shall at all times" in order to place an obligation on the state parties. This language is clear and difficult to misconstrue. Therefore, no derogation from the provisions can be permitted. It is however important to note that the preambles to these BITs, as with any other preamble, contain aspirational language. For example, the preamble of the Zimbabwe-South-Africa BIT provides:



'**Desiring** to create favourable conditions for greater investment by investors of either Party in the territory of the other Party.'⁸⁸⁴

The use of the word 'desiring' in the text above shows the intention of the parties to work towards achieving the particular aspiration. This informs the parties in making any decisions relating to the treaty.

Given the discussion above, it is abundantly clear that Zimbabwe's BITs place obligations on the state. It is against this backdrop that this section examines the

⁸⁸² Article 2(2) of the Zimbabwe-South Africa BIT.

⁸⁸³ Article 3(1) of Zimbabwe-South Africa BIT.

⁸⁸⁴ Preamble of Zimbabwe-South Africa BIT.

obligations arising from Zimbabwe's 'in-force' BITs. The section is structured as follows. Firstly, the scope of application of the BITs is reviewed. Second, the substantive obligations arising from Zimbabwe's BITs are analysed. Here, a distinction is made between treatment and investment protection.

4.3.1 The scope of application

The scope of application clause is a key clause in any BIT.⁸⁸⁵ Generally, most BITs contain an article/s dealing with scope issues. Zimbabwe's in force BITs are no exception; and usually contain definitions on investments, investor, returns, nationals, companies, territory and laws. There are, however, variances amongst its BITs, as to which of these provisions they define. For example, the Netherlands BIT defines investments, nationals, territory and laws; while the Chinese BIT⁸⁸⁶ defines an investment, investors, returns and laws. This section will, however, focus on the two definitions, namely, that of an 'investor' and 'investments'.

4.4.1.1 Definition of 'investments'

The definition of investments is one of the common standards which are shared by many BITs.⁸⁸⁷ More often than not, BITs contain a circular definition of investment which is often qualified in an indicative list.⁸⁸⁸ The purpose of these lists is, therefore, to define who can benefit from the protection of a treaty. In many instances, these lists are illustrative; consequently, an asset does not need to be contained in the list for it to be regarded as an asset.⁸⁸⁹

In the minority of cases, parties may agree to have the investments protected under the BIT limited to those agreed at the conclusion of the BIT.⁸⁹⁰ Vandeveldt argues that

⁸⁸⁵ Horn N & Kröll S *Arbitrating Foreign Investment Disputes* (2004) 201.

⁸⁸⁶ Zimbabwe-China BIT.

⁸⁸⁷ Gwynn MA *Power in the International Investment Framework* (2016) 92.

⁸⁸⁸ Billet J *International Investment Arbitration: A Practical Handbook* (2016) 45.

⁸⁸⁹ Vandeveldt KJ *Bilateral Investment Treaties: History, Policy and Interpretation* (2010) ch 5.

⁸⁹⁰ Sornarajah M (2010) 194.

such an approach negates the principled approach that is adopted by BITs in their protection.⁸⁹¹ This principled approach dictates that assets should not be arbitrarily excluded. As a result of this principled approach, most models including those of the USA and the OECD, adopt a broad and descriptive definition of investment.⁸⁹² Another distinction lies in the fact that while some BITs qualify an investment as just being the ownership of an asset, other BITs extend the definition to include the control of assets.⁸⁹³ The Australia – Uruguay BIT is an example of a BIT that also recognises the control of assets as an investment.⁸⁹⁴

Zimbabwe's BITs recognise investments as 'any kind of assets'.⁸⁹⁵ This is in line with the open ended approach adopted in most of Zimbabwe's BITs which favours an expansive definition of investment. The wide language used in recognising investments is commendable, from an investor's perspective, as it allows most investments to qualify as assets.⁸⁹⁶ As a result, this is the approach has been adopted in many first generation BITs.⁸⁹⁷

The challenge, however, with this approach is that it opens the floodgates of interpretation. This is as the words 'any kind of assets' can be interpreted without any limitations by tribunals, thus making the definition of an investment, an unpredictable one.⁸⁹⁸ For instance, recognising investments as 'any kind of assets' has a net effect of giving legal standing to both tangible and intangible property. But, the difficulty of this is that it may extend protection to aspects such as intellectual property rights or contractual rights that should not be covered in BITs (when these rights are not assets

⁸⁹¹ Vandeveld KJ (2010) ch 5.

⁸⁹² Dugan et al (2011) 250.

⁸⁹³ Hamilton J, Garcia-Bolivar OE & Otero H (eds) *Latin American Investment Protections: Comparative Perspectives on Laws, Treaties, and Disputes for Investors, States and Counsel* (2012) 559.

⁸⁹⁴ Australia – Uruguay BIT, Article 1(1). See also US – Uruguay BIT, Article 1.

⁸⁹⁵ Recognising investments as 'any kind of assets' has a net effect of giving legal standing to both tangible and intangible property.

⁸⁹⁶ This is an open-ended asset-based definition. See part 5.3.3.2 below for a further discussion of the types of investment definitions.

⁸⁹⁷ See commentary on Article 2 of the SADC Model BIT.

⁸⁹⁸ See commentary on Article 2 of the SADC Model BIT.

of a functioning business enterprise in the host state). This is why, for example, South Africa's Promotion and Protection of Investment Bill initially contained a narrow definition of investment. It contained an enterprise-based definition of investment which covered similar assets to those in the asset-based definition, but only to the extent that those assets were assets of an enterprise in the host state.⁸⁹⁹ As will be discussed in chapter 5, this approach has been now adopted in the 2017 SADC FIP.⁹⁰⁰ Furthermore, the broad definition of investment adopted by Zimbabwe in most of its BITs could have an effect of curtailing its regulatory discretion and space.⁹⁰¹ An example of this is can be found in the case of *Fedax v Venezuela*⁹⁰² where one of the contracting parties agreed to a broad definition of investment without properly understanding the consequences, a decision of which, led to the extension of protection to areas not envisaged.⁹⁰³

In future, Zimbabwe could therefore look to revisit this expansive definition of investment. Two options exist in this regard. The first, would be to clarify the wide notion of 'every kind of asset' by discussing the meaning of an inherent investment.⁹⁰⁴ This is the so called Salini test. The following text would therefore be added to the existing definition of investment:

'In order to qualify as investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development.'⁹⁰⁵

⁸⁹⁹ Section 2 of South Africa's Promotion and Protection of Investment Bill (2013).

⁹⁰⁰ See Article 1(2) of the SADC FIP. See part 5.3.3.1 below for a further discussion.

⁹⁰¹ Raanjan P Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion (2009) 26 *Journal of International Arbitration* 9.

⁹⁰² ICSID Case No Arb/96/3.

⁹⁰³ *Fedax v Venezuela*, para 99.

⁹⁰⁴ *Salini Costruttori SpA v Kingdom of Morocco* ICSID Case no ARB/00/4.

⁹⁰⁵ *Salini Costruttori SpA v Kingdom of Morocco*

The second option would be to adopt an enterprise based definition similar to the one suggested in option 1 of Article 2 of the SADC Model BIT. Preferably option 2 should be adopted as, in some cases, option 1 may not in practice limit the definition of an investment.

4.5.1.2 Definition of ‘investor’

Closely related to the definition of an investment is the definition of an investor. Unlike in the definition of investment where investments are sometimes listed, investors are merely made to be identifiable.⁹⁰⁶ In this regard, most treaties usually make a distinction between natural persons and juristic persons.⁹⁰⁷ For example, Article 1(d) of the Australia-India BIT⁹⁰⁸ defines an investor as a national or company of one of the contracting parties, deriving this status from domestic law.⁹⁰⁹ Therefore, in cases involving natural persons, it might fall to a person’s nationality, citizenship or domicile to determine if an individual should receive protection under a treaty.⁹¹⁰ For instance, the Australia-Argentina BIT⁹¹¹ notes a natural person as a citizen or permanent resident of Australia.⁹¹² In cases involving a legal person, it may become even more complex, as will be seen later in this discussion to determine the nationality of such a legal person.⁹¹³ This may give rise to ‘outside’ parties claiming protection under a BIT.

⁹⁰⁶ Nikièma SH ‘Best Practices: Definition of Investor’ available at http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf 1 (accessed 5 October 2016).

⁹⁰⁷ Campbell D *International Protection of Foreign Investment* vol 2 (2008) 57. According to Ortino, some treaties define investors as ‘comprising both “natural persons” (sometimes called “individuals” or “nationals”) and “legal entities” (sometimes called “legal persons” or, more often, “companies”), [while other BITs] refer to “nationals”, drawing a distinction between “individuals” (or “natural persons”) and companies (or “legal entities”). See Ortino F (2007) 261.

⁹⁰⁸ See Australia-India BIT.

⁹⁰⁹ In the case of Australia, the definition of national is also extended to permanent residents.

⁹¹⁰ Kao CC ‘Definition of Investors and Related Issues in Investment Treaty Arbitration under the Proposed Taiwan-China Bilateral Investment Agreement’ (2011) 4 *Contemporary Asian Arbitration* 183. For example, the Australia-Argentina BIT notes a natural person as a citizen or permanent resident of Australia.

⁹¹¹ Australia-Argentina BIT.

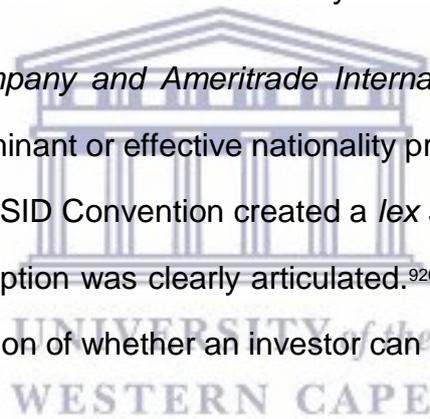
⁹¹² Australia-Argentina BIT, Article 1(1)(c)(i)(A).

⁹¹³ Yannaca-Small C ‘Definition of Investor and Investment in International Investment Agreements’ available at <https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> 17.

It is important to note that when a natural person makes a claim of a particular nationality, that nationality has to be determined in terms of the domestic law of that particular country alleged.⁹¹⁴ This is a well-grounded principle of international law. Hence, the window remains open to the effect that in terms of a particular legal system, a person may be allowed to have dual nationality.⁹¹⁵

Resultantly, in some treaties, qualifications as to the protection of dual citizens are made. A principal example is the 2012 USA Model BIT.⁹¹⁶ This Model BIT denotes that an investor is a national or enterprise of one contracting party that makes or attempts to make an investment in the territory of the other party.⁹¹⁷ However, where a natural person is a dual national, such person will be deemed as 'exclusively a national of the State of his or her dominant and effective nationality'.⁹¹⁸

In *Champion Trading Company and Ameritrade International (Inc) v Egypt*,⁹¹⁹ the Tribunal stated that the dominant or effective nationality principle had to be respected because the BIT and the ICSID Convention created a *lex specialis* regime that had to be followed unless an exception was clearly articulated.⁹²⁰ Nationality is, therefore, a key factor in the determination of whether an investor can qualify as an investor in the



⁹¹⁴ Yannaca-Small C 'Definition of Investor and Investment in International Investment Agreements' available at <https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf> 8.

⁹¹⁵ See generally Aghahosseini M *Claims of Dual Nationals and the Development of Customary International Law: Issues before the Iran-United States Claims Tribunal* (2007) 120. Also note that in some jurisdictions, while it is possible to have dual nationality, it is difficult to do so. See International Business Publications *China Immigration Policy, Laws and Regulation Handbook: Strategic Information and Basic Laws* (2015) 73.

⁹¹⁶ See the 2012 USA Model BIT. The USA has followed this approach in its BITs, for example, the USA-Paraguay BIT.

⁹¹⁷ USA 2012 Model BIT, Article 1.

⁹¹⁸ USA 2012 Model BIT, Article 1. The doctrine of effective or dominant nationality is a customary international law principle that is used by Tribunals to determine the effective nationality of a dual-national. See Bjorkuland AK, Laird IA & Ripinsky S (eds) (2009) 188.

⁹¹⁹ ICSID Case No. ARB/02/9. Where the definition of an investor in a treaty is contested, reference can be made to Articles 31 and 31 of the Vienna Convention on the Law of Treaties, which provide for general rule of interpretation and the supplementary means of interpretation, respectively. See Mbengue MM 'Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)' (2016) 31 *ICSID Review* 388.

⁹²⁰ *Champion Trading Company and Ameritrade International (Inc) v Egypt* (2003) 288.

context of a BIT. Hence, the International Court of Justice in the case of *Liechtenstein v Guatemala (Nottebohm case)*⁹²¹ opined that:

‘Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties ...’⁹²²

Despite the fact that individuals can be investors, primarily, investors are companies.⁹²³

Where an investor is a company, it could be entitled to protection under a BIT on the basis that it has been incorporated in one of the contracting parties even if there was no substantive connection between the company and the state in question.⁹²⁴ For example, the Australia-Hong Kong BIT⁹²⁵ defines ‘companies’ as ‘corporations, partnerships, associations, trusts or other legally recognised entities incorporated or constituted or other-wise duly organised under the law in force in its area or under the law of a Contracting Party’.⁹²⁶

An issue that arises is that of companies that are established in one country but are effectively managed in another country.⁹²⁷ To deal with this quagmire, some BITs have focused on the ‘seat of control’. For example, the Germany-China BIT⁹²⁸ avers that an investor is ‘any juridical person as well as commercial or other company or association with or without legal personality having its seat in the territory of [a Contracting Party],

⁹²¹ [1955] ICJ 1.

⁹²² *Nottebohm case* (1955) 22. In another case, *Eudoro Olguin v Paraguay*, it was held that the claimants claim could not succeed because his genuine and effective nationality was Peruvian rather than that of the USA. The claimant could therefore not find protection under the United States-Paraguay BIT.

⁹²³ Schreuer C ‘Investments, International Protection’ available at http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf (accessed 5 October 2016) 6.

⁹²⁴ Kao CC (2011) 187.

⁹²⁵ Australia-Hong Kong BIT.

⁹²⁶ Australia-Hong Kong BIT, Article 1(b).

⁹²⁷ See Mintz JM & Weichenrieder AJ *The Indirect Side of Direct Investment: Multinational Company Finance and Taxation* (2010) 16. See further Maisto G *Residence of Companies Under Tax Treaties and EC Law* (2009) 305, Günter et al (eds) *Readings and Cases in International Human Resources Management and Organisational Behaviour* (2012) 137 & Longenecker JG et al *Small Business Management* (2013) ch 18.

⁹²⁸ Germany-China BIT.

irrespective of whether or not its activities are directed at profit'.⁹²⁹ The Netherlands-Philippines BIT also adopted a similar approach, noting that a company is situated at its place of effective management.⁹³⁰ To counter this approach, some countries such as the USA have adopted the 'denial of benefits' approach. This method proposes that if an enterprise does not have 'substantial business activities' in the territory of the other party, such party may deny the benefits of the treaty, as a result of it.⁹³¹

When defining an investor, it is also important to consider investments made in a company in another jurisdiction. In *CMS v Argentine Republic*,⁹³² the Tribunal held that it was not essential for one to qualify as an investor and receive protection under a BIT, as it was not necessary to wholly own an investment.⁹³³ The arguments of the Tribunal were founded on Article 1(1) of the Argentina-United States BIT which provides that an investor could own or control directly or indirectly an investment in the territory of the other contracting party. Similarly, in *Compañía de Aguas del Aconquija (Vivendi case)*⁹³⁴ the Tribunal held that it was not material whether or not a foreign investor had overall control of the enterprise to qualify as investor and invoke the protections offered in the relevant BIT.⁹³⁵

In Zimbabwe, some of the binding BITs define expressly define 'investors'. However, this has been done differently. For example, the Zimbabwe-Switzerland BIT provides that an investor refers to:

'(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

⁹²⁹ Germany-China BIT, Article 2(a) as read with Article 2(b).

⁹³⁰ Article 1(b)(ii) of the Netherlands-Philippines BIT.

⁹³¹ 2012 USA Model BIT, Article 17.

⁹³² ICSID Case No Arb/01/08.

⁹³³ *CMS v Argentine Republic*, para 47-8. The Tribunal was of the view that there is no bar in current international law preventing minority or non-controlling shareholders instituting a claim under a BIT.

⁹³⁴ *CME v Czech Republic*, Partial Award of 13 September 2001.

⁹³⁵ *CME v Czech Republic*, para 50.

(b) **legal entities**, including companies, corporations, business associations and other organisations, which are **constituted or otherwise duly organised under the law of that Contracting Party** and have their **seat in the territory of the same Contracting Party**;

(c) **legal entities not established under the law of that Contracting Party but effectively controlled** by natural persons as defined in (a) above or by legal entities as defined in (b) above.⁹³⁶ [emphasis added]

The definition above first defines investors as natural persons legally recognised under the laws of the host-state as is well-settled in international law. Thereafter, the definition notes that investors could also be legal entities that are constituted or duly organised under the laws of the host state. More importantly, the definition denotes that such a legal entity must have its 'seat' in the host state. Interestingly, the provision clearly articulates that where a legal entity is not established under the law of the host state, but is effectively controlled by natural or legal persons recognised domestically, such a legal entity would fall under the protection of the BIT.

A different example can be found in the Zimbabwe-China BIT. It provides that investors are:

(a) **natural persons** deriving their status as nationals of Zimbabwe from the laws in force in Zimbabwe; and

(b) **corporations, firms and associations incorporated or constituted** under the laws in force in Zimbabwe and **having their principle place of business in Zimbabwe**.⁹³⁷ [emphasis added]

With regards to natural persons, this definition is similar to that in the Zimbabwe-China BIT. Also, in terms of legal persons, both BITs require the juristic person to have

⁹³⁶ Article 1(1) of the Zimbabwe-Switzerland BIT.

⁹³⁷ Article 1(2) of the Zimbabwe-China BIT.

a seat of control or principle place of business in the host state.⁹³⁸ Differences however emerge when it comes to the basket of entities recognised as legal entities. The Zimbabwe-China BIT only recognises legal entities as being ‘corporations, firms and associations’.⁹³⁹ The Zimbabwe-Switzerland BIT adopts a wider approach, recognising legal entities as ‘including companies, corporations, business associations and other organisations’.⁹⁴⁰ A more important distinction between the two BITs is that an entity can be recognised under the Swiss BIT as a legal person even when it’s not incorporated or legally constituted under the law of the host state; but when it is effectively managed by a company natural or legal persons in the Republic.⁹⁴¹

The more recent Zimbabwe-South Africa BIT adopts a different definition as compared to the Zimbabwe-Switzerland BIT and the Zimbabwe-China BIT with respect to legal persons. It provides that an investor means:

- ‘(a) the nationals of a Party, being those **natural persons** deriving their status as nationals of a Party from the domestic law in force in the territory of that Party; and
- (b) the “companies” of a Party, being any **legal person, corporation, firm or association incorporated or constituted** in accordance with the domestic law in force in the territory of that Party.’⁹⁴² [emphasis added]

Quite visibly, the definition of a legal entity in the Zimbabwe-China BIT does not expressly require such entity to have its seat of control or its principle place of business in the host state. This omission may pave way for businesses which are not effectively managed in the host state to claim protection under the BIT. It is quite interesting to

⁹³⁸ No practical differences arise out of the different drafting language. The ‘seat’ of a company refers to its place of ‘effective management’. See generally, Dolzer R and Schreuer C (2012) 49 and Guzman AT and Sykes O (eds) *Research Handbook on International Economic Law* (2008) 220.

⁹³⁹ Article 1(2) of the Zimbabwe-China BIT.

⁹⁴⁰ Article 1(1) of the Zimbabwe-Switzerland BIT.

⁹⁴¹ Interestingly, both the Zimbabwe-Switzerland BIT and the Zimbabwe-China BIT do not address the issue of dual nationality with respect to natural persons.

⁹⁴² Article 1 of the Zimbabwe-South Africa BIT.

note that the drafting of the definition of investment has actually worsened in a later BIT.

There are, however, BITs that do not define an investor expressly, but do so indirectly by defining nationals and companies. The Zimbabwe-Germany BIT is one of such BITs. Article 1(3) of the Zimbabwe-Germany BIT provides that a national is a natural person as derived from the domestic law of a contracting state. The provision, however, does not elaborate on the issue of dual nationality, thus, leaving a *lacuna* which can be exploited by foreign investors with dual nationality.

With respect to companies, Article 1(4)(a) of the Zimbabwe-German BIT provides that in respect of Zimbabwe, companies are 'corporations, firms and associations incorporated or constituted under the laws in force in Zimbabwe, and having the principal place of business in Zimbabwe'.⁹⁴³ This article focuses on companies 'incorporated' and having their 'principal place of business in Zimbabwe'. In essence, the foreign company must have a permanent establishment in Zimbabwe.⁹⁴⁴ Similarly, Article 1(4)(b) of the Zimbabwe-German BIT asserts that, in respect of Germany, companies are 'any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether its activities are directed at profit'.⁹⁴⁵

The failure in some of Zimbabwe's BITs such as the Zimbabwe-South Africa BIT to deal with the place of effective management is a noteworthy concern. This creates challenges particularly in this digital age where, for example, a business might be incorporated in Zimbabwe but is effectively managed in another country. In such an

⁹⁴³ Zimbabwe-Germany BIT, Article 1(4)(a). Other BITs that have not yet been ratified such as the Zimbabwe-Britain BIT also adopt this approach. See Article 1 of the Zimbabwe-United Kingdom BIT.

⁹⁴⁴ A permanent establishment is a fixed place at which a business operates in order to earn income. See Rawal R *The Taxation of Permanent Establishments: An International Perspective* (2006) 410, Kobetsky M *International Taxation of Permanent Establishments: Principles and Policy* (2011) 110 & Van de Vijer AV *The New US-Belgium Double Tax Treaty: A Belgian and EU Perspective* (2009) 87.

⁹⁴⁵ Zimbabwe-Germany BIT, Article 1(4)(b).

instance, such an investor should not be able to receive protection under Zimbabwe's BITs. Furthermore, the failure by Zimbabwe to address the issue of dual nationality, which is guaranteed in the 2013 Constitution for citizens by birth, is also a significant point of concern.⁹⁴⁶

The current definitions of investors are therefore open to abuse by non-parties to Zimbabwe's BITs which wish to also gain protection from these treaties. Options for future BITs include adopting the USA approach of employing the denial of benefits clause to prevent nationals of third countries from receiving benefits under a BIT by incorporating in one of the contracting parties.⁹⁴⁷ If the denial of justice is not deemed as a viable approach, the drafting in Article 1 of the Zimbabwe-Switzerland BIT, with regards to legal persons, which clearly articulates the issue of effective management, could also be replicated in other BITs. To address the issue of dual nationality, the dominant or effective nationality principle discussed in the *Champion Trading Company* case can also be used as a plausible option.

4.3.2 Substantive obligations

4.3.2.1 Treatment

As shown in chapter 2, treatment obligations are one of the key protections in IIL. Within the context of BITs, these clauses have an important role to play. Some BITs apply these standards to the post-establishment phase whilst others apply them to both the pre-establishment and post-establishment phases.⁹⁴⁸ European BITs, for example, have focused on post-established treatment obligations, while other

⁹⁴⁶ See s 42(e) of the Constitution of Zimbabwe. See also *Mutumbwa Dziva Mawere v The Registrar General & 3 ORS CCZ 4/15*, where the Constitutional Court confirmed the constitutional recognition of dual citizenship under Zimbabwean law.

⁹⁴⁷ Guzman AT & Sykes AO (2008) 220.

⁹⁴⁸ See Nieuwenhuys E *Multilateral Regulation of Investment* (2001) 73 & Brown C (2013) 331. MFN treatment is one of the standards in BITs that focus on non-discrimination. Non-discrimination requires host state to refrain from treating giving foreign investors. See Dolzer R & Stevens M *Bilateral Investment Treaties* (1995) 65.

countries such as the USA and Canada have dealt with both pre-establishment and post-establishment obligations.⁹⁴⁹ Treatment obligations are, therefore, rich in variety, and thus it is necessary to examine how Zimbabwe's BITs provide for the treatment of foreign investments.

4.3.2.1.1 Most Favoured Nation Treatment

One of the most commonly adopted treatment obligations within the investment treaty system is that of MFN treatment.⁹⁵⁰ MFN treatment is one of the standards in BITs that focus on non-discrimination. In some BITs, MFN treatment appears as a standalone provision, whilst in most other BITs, it appears in the same provision as national treatment.⁹⁵¹ On occasion, it has also been combined with other standards of treatment such as full protection and security or fair and equitable treatment.⁹⁵² Worth mentioning is also the fact non-discrimination is also implicit in other clauses such as the expropriation and compensation clause.

In most instances, this provision has been applied to only the post-establishment phase. However, there have been cases it was applied to both pre-establishment and post-establishment phases.⁹⁵³

An MFN clause typically provides that each contracting party shall afford nationals or companies of the other contracting parties within its territories treatment no less favourable treatment that it provides to investors under other treaties.⁹⁵⁴ In recent times, the MFN clause has come under the spotlight.⁹⁵⁵ This was largely due to the

⁹⁴⁹ De Mestral AD & Lévesque C (eds) *Improving International Investment Agreements* (2013) 27.

⁹⁵⁰ Shan W 'The Protection of Foreign Investment' in Brown KB & Snyder DV *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (2011) 478.

⁹⁵¹ Dolzer R & Stevens M (1995) 65

⁹⁵² Newcombe AP & Paradell L (2009) 156. See also Dolzer R & Stevens M (1995) 65.

⁹⁵³ Its application could also be extended to the settlement of disputes (this practice has however not been generally accepted). See Pei Z & Zheng W *China's Outbound Foreign Direct Investment Promotion System* (2015) 57.

⁹⁵⁴ See, for example, Douglas Z, Pauwelyn J & Viñuales JE (2014) 120.

⁹⁵⁵ Hermann C & Terhechte JP (eds) *European Yearbook of International Law 2010* (2009) 81.

arbitral decision in *Maffezini v Spain* in 2000 where the correct application and interpretation of the MFN clause was contested.⁹⁵⁶ One of the central issues in this case was whether an Argentinian national could rely on an MFN clause in the BIT between Argentina and Spain to subvert an 18 month waiting period requirement by invoking the dispute settlement clause in the Chile-Spain BIT. The tribunal in this case interpreted the MFN clause as allowing the importation by reference of the dispute settlement provisions in Chile-Spain BIT.⁹⁵⁷ This approach has been favoured by tribunals in a larger number of cases such as *Gas Natural v Argentina*,⁹⁵⁸ *Suez v Argentina*⁹⁵⁹ and *Cammuzzi v Argentina*.⁹⁶⁰

The challenge, however, with this approach is that it has the tendency to reduce policy space and encourage 'treaty shopping'. 'Treaty shopping' occurs when foreign investors can import more favourable provisions, both substantively and procedurally, from other BITs.⁹⁶¹ This allows them to enjoy benefits not originally envisaged under the BIT they derive protection from. It is therefore debatable whether or not contracting parties intended to allow their obligations to extend this far.⁹⁶² As a result, this approach has been rejected by other tribunals.⁹⁶³ For example, in *Telenor v Hungary*, the tribunal refused to apply an MFN clause to a dispute resolution provision on the basis that this was contrary to the intention of the contracting parties.⁹⁶⁴ The view of the tribunal was that allowing this to happen was tantamount to subverting the dispute resolution conditions in the BIT through the use of an MFN clause.⁹⁶⁵ Therefore, while

⁹⁵⁶ *Maffezini v Spain* ICSID Case No ARB/97/7, para 53.

⁹⁵⁷ The consequence of this decision is therefore that the MFN clause is to be interpreted broadly as applying not only to substantive matters, but procedural ones as well.

⁹⁵⁸ ICSID Case No ARB/03/10.

⁹⁵⁹ ICSID Case No ARB/03/17.

⁹⁶⁰ ICSID Case No ARB/03/2.

⁹⁶¹ Baumgartner J *Treaty Shopping in International Investment Law* (2016) 11.

⁹⁶² De Schutter O, Swinnen JFM & Wouters T (2013) 61.

⁹⁶³ See, for example, *Plama v3 Bulgaria* No ARB/04/24.

⁹⁶⁴ *Telenor v Hungary* ICSID Case No ARB/04/15, para 100.

⁹⁶⁵ As noted in *Berschader v Russia* SSC Case No 080/2004 (para's 179 and 181): 'There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand'. '[T]he present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT

the general approach has been to interpret MFN clauses widely, this is still not well-settled in arbitral practice.

Zimbabwe's BITs have followed the European model which focuses on post-establishment MFN treatment. In granting these obligations, Zimbabwe's BITs usually contain one provision dealing with 'national treatment and MFN treatment',⁹⁶⁶ 'protection and treatment'⁹⁶⁷ or 'fair and equitable treatment, national treatment and MFN treatment'.⁹⁶⁸ The Zimbabwe-Netherlands BIT, for instance, provides that 'each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded to its own nationals or to investments of nationals of any third state, whichever is more favourable to the national concerned'.⁹⁶⁹

Consistent with the trend discussed above of granting exceptions, some of Zimbabwe's BITs contain exceptions. For example, the Zimbabwe-Switzerland BIT provides that a contracting party will not be obliged to grant advantages to investors of the other contracting party which it grants to other states through an agreement establishing a free trade area, a customs union, a common market or a similar regional organisation or through an agreement on the avoidance of taxation.⁹⁷⁰

Zimbabwe's MFN clauses however have their own shortcomings. Firstly, these MFN clauses have been characterised by the use of general (vague) language that opens the floodgates of competing interpretations. For example, Zimbabwe's BITs do not clarify whether MFN treatment is applicable to only the substantive protections on

clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties'.

⁹⁶⁶ See Article 3 of the Zimbabwe-Germany BIT.

⁹⁶⁷ See Article 4 of the Zimbabwe-Switzerland BIT.

⁹⁶⁸ See Article 3 of the Zimbabwe-China BIT and Article 3 of the Zimbabwe-Netherlands BIT.

⁹⁶⁹ Article 3(2) of the Zimbabwe-Netherlands BIT.

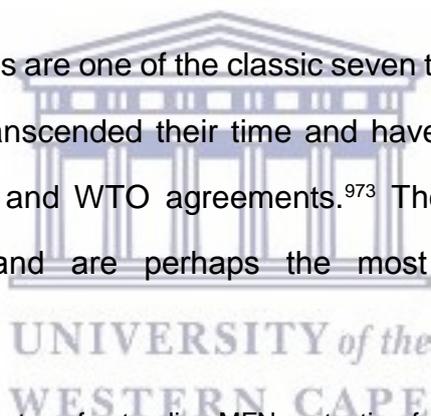
⁹⁷⁰ Article 4 of the Zimbabwe-Switzerland BIT.

investment such as fair and equitable treatment or is applicable to the procedural protections such as dispute settlement.⁹⁷¹

Second, MFN clauses do not address issues such as whether the definitions of an ‘investor’ and ‘investments’ can be subjected to MFN treatment.⁹⁷² There is, therefore, a need to further clarify Zimbabwe’s MFN clauses and limit their scope so as to eliminate possible negative obligations which may arise as a result of the loopholes of the current broad framing of MFN provisions. A balancing act between the scope of MFN provisions and the promotion of economic and investment liberalisation would thus be desirable.

4.3.2.1.2 National Treatment

National treatment standards are one of the classic seven treatment standards in FCN agreements which have transcended their time and have appeared in more recent agreements such as BITs and WTO agreements.⁹⁷³ They are a ‘core element of investment agreements’ and are perhaps the most common guarantees in



⁹⁷¹ There have been many advocates of extending MFN protection from merely substantive issues to also procedural protections since the landmark case of *Maffezini v Spain* [ICSID Case No ARB/97/7] where the Tribunal noted that while the MFN clause did not specifically refer to dispute settlement, in today’s day and age, dispute settlement mechanisms were ‘inextricably related’ to the protection of investors. Similarly, in *Gas Natural SDV v Argentina* [ICSID Case No ARB/03/10], the Tribunal was of the view that dispute resolution was a default aspect of MFN clauses. The Tribunal noted that: ‘[u]nless it appears clearly that the state parties to a BIT or the parties to a BIT or the other parties to a particular investment agreement settled on a different method of dispute resolution of disputes that may arise, most-favoured nation provisions in BITs should be understood to be applicable to dispute settlement’. See also Figamense IA ‘The Impact of the Maffezini Decision on the Interpretation of MFN Clauses in Investment Treaties’ (2011) 8 *Ankara Law Review* 224 & Pei C & Zheng W (2015) 57.

⁹⁷² This issue was treated in the case of *Vanessa Ventures v Venezuela* [ICSID Case No ARB (AF)/04/6], where a claimant tried to rely on the contents of an MFN clause to expand the definition of investment in the Canada-Venezuela BIT. The Tribunal held that ‘[t]he MFN clause cannot be used to expand the category of investments to which the Canada-Venezuela BIT applies’. In *Metal-Tech Ltd v Republic of Uzbekistan* [ICSID Case No ARB/10/3], the Tribunal held that with regards to MFN clause and the definition of ‘investors’ and ‘investments’, ‘one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke treaty protections, of which MFN treatment forms part of. Or, in fewer words, one must be under the treaty to claim’.

⁹⁷³ The seven standards of treatment are: national treatment, MFN treatment, the standard of identical treatment, the open door standard, the standard of fair and equitable treatment, the minimum standard of international law and the standard of preferential treatment. See Figamense IA (2011) 8 224. See also Schwarzenberger G & Brown ED *A Manual of International Law* 6ed (1976) 86-87.

contemporary investment treaties.⁹⁷⁴ Dolzer captions their ubiquitous presence in investments treaties as being part of the 'standard repertoire' of BITs.⁹⁷⁵ The main difference between MFN clauses and a NT clause is that MFN provisions focus on treating other foreigners equally while a NT clause focusses on the treatment between foreign investors and locals.⁹⁷⁶

Principally, NT clauses provide for formal equality between foreign and domestic investors.⁹⁷⁷ Foreign investors are, therefore, placed in a comparable setting or 'like situation' with domestic investors.⁹⁷⁸ A typical NT provision will dictate foreign investors receive treatment standard no less favourable than that which is accorded by a state to its own investors.⁹⁷⁹ If an investor alleges that the national treatment standard has been violated, the discrimination would consequently be assessed against domestic investors in a 'like situation' or 'like circumstance'.⁹⁸⁰

Essentially, by requiring states to treat investments by aliens similarly to how it would treat investments by its own citizens, the national treatment obligation provides a 'relative standard of treatment'.⁹⁸¹ Put more clearly, the national treatment standard does not set a standard or a guarantee for a particular level of protection for foreign investments. The NT standard is, therefore, a standard based on comparison.⁹⁸²

⁹⁷⁴ Albites-Bedoya 'A Closer Look at the National Treatment Standard: Stocktaking of Venezuelan BITs and Review of Arbitral Practice' (2008) 2 *Transnational Dispute Management* 1.

⁹⁷⁵ Dolzer R 'National Treatment: New Developments' available at <https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf> (accessed 10 October 2016) 1.

⁹⁷⁶ See generally World Trade Organisation 'Principles of the Trading System' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 11 October 2016).

⁹⁷⁷ Ortino F 'From "Non-discrimination" to "Reasonableness": A Paradigm Shift in International Economic Law' 2005 *Jean Monnet Working Paper* 6.

⁹⁷⁸ Collis D *An Introduction to International Investment Law* (2016) 105.

⁹⁷⁹ Weiler TJ Treatment No Less Favourable Provisions Within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conception at the Door" (2014) 12 *Santa Clara Journal of International Law* 90.

⁹⁸⁰ Park P & Park DM *Energy Law and the Sustainable Company: Innovation and Corporate Social Responsibility* (2016) ch 4.

⁹⁸¹ Broude T, Busch ML & Porges A (eds) *The Politics of International Economic Law* (2011) 172.

⁹⁸² At a normative level, distinctions should be consequently made between the standard of fair and equitable treatment and the national treatment standard. Moreover, the national treatment standard is a lesser treatment standard than the international minimal standard of treatment.

National treatment obligations are generally applicable to the post-entry treatment of foreign investors, although in some BITs such as treaties following the USA and Canadian Model BITs, these obligations have also been extended to pre-entry circumstances.⁹⁸³ According to UNCTAD:

'This has raised the question of the proper limits of national treatment, in that such an extension is normally accompanied by a "negative list" of excepted areas of investment activity to which national treatment does not apply, or a "positive list" of areas of investment activity to which national treatment is granted.'⁹⁸⁴

Some recent treaties such as China's post-2000 BITs provide qualifications on national treatment.⁹⁸⁵ For example, Article 3(2) of the 2003 China-Guyana BIT provides a conditioning for national treatment by stating that '[w]ithout prejudice to its laws and regulations, each Contracting Party shall accord to its investments or returns and activities associated with the investments by the other contracting party, treatment not less favourable than that accorded to the investments, returns and associated activities of its own investors'.⁹⁸⁶ The 'without prejudice' qualification allows a state to limit the operation of a national treatment clause, making them a 'best efforts clause' of some sort.⁹⁸⁷ The implication of such a limitation is, therefore, that unless relevant domestic laws and regulations allow, there will be no NT.⁹⁸⁸

Almost all of Zimbabwe's BITs to date contain NT obligations.⁹⁸⁹ This is vital because it serves to promote foreign investment by safeguarding discrimination against

⁹⁸³ See de Schutter O (2006) 112 & United Nations Conference on Trade and Development International *Investment Agreements: Key Issues* Vol 1 (2004) 161 – 187. See also Polan T (2006) 77.

⁹⁸⁴ United Nations Conference on Trade and Development 'National Treatment' available at <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf> (accessed 27 September 2017) 10.

⁹⁸⁵ Deva S *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China* (2015) ch 7.

⁹⁸⁶ China-Guyana BIT.

⁹⁸⁷ Broude T, Busch ML & Porges A (2011) 172.

⁹⁸⁸ Wang W *China's Banking Law and the National Treatment of Foreign Funded Banks* (2016) 1856.

⁹⁸⁹ The Zimbabwe-Chinese BIT, for example, does not refer to national treatment expressly in order to avoid extending preferential treatment reserved for national enterprises to their foreign counterparts. Such practice is, however, outdated as many modern BITs seek to have qualified national treatment provisions. For example, China in more recent BITs (post-2000) with developing countries has started

investors and their investments on the mere basis of their nationality. According to Polan, the national treatment standard is the main instrument for investment liberalisation,⁹⁹⁰ and is, therefore, a key tool for economic development.

As noted earlier, variations exist in how MFN treatment and NT have been dealt with. Some of Zimbabwe's BITs follow the model of combining NT obligations with MFN treatment while other BITs treat these two treatment standards separately. In addition, there are slight differences between Zimbabwe's NT clauses in its first generation BITs concluded in the 1990s and those in second generation BITs concluded after the turn of the new millennium.

A typical NT clause in Zimbabwe's first generation BITs read:

'Neither Contracting Party shall in its territory subject investments owned by nationals or companies of the other Contracting Party to treatment less than that which it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.'⁹⁹¹

This NT clause would usually be moderately qualified in order to reflect regional commitments. Such a qualification would provide:

'The treatment granted under this Article shall not relate to the benefit of any treatment or preference or privilege which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs, monetary, or economic union or a common market or free trade area.'⁹⁹²

introducing substantive but qualified national treatment clauses allowing for preferential treatment of nationals. See Park P & Park DM (2016) ch 4, Broude T, Busch ML & Porges A (eds) (2011) 178. See further Nakagawa J (ed) *Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance* (2012) ch 11, Leathly C *International Dispute Resolution in Latin America: An Institutional Overview* (2007) 19 and De Mestral A & Lévesque C (2013) 61.

⁹⁹⁰ See Polan T (2006) 77.

⁹⁹¹ Article 3(1) of the Zimbabwe-Germany BIT.

⁹⁹² Article 3(3) of the Zimbabwe-Germany BIT.

While Zimbabwe's second generation BITs retain the textual formulation discussed above, they also contain qualifications. For example, the 2009 Zimbabwe-South Africa BIT provides in the relevant parts of Article 3 as follows:

'(2) Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investors and returns of its investors or to investments and returns of investors of any third State....

(4) The provisions of sub-Articles (2) and (3) shall not be construed so as to oblige on Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from –

(a) any existing or future customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such customs union, free trade area, or common market to which either Party is or may become a party; or

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or

(c) **any domestic law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.**⁹⁹³ [own emphasis added]

This provision therefore facilitates for the preferential treatment for its citizens in order to achieve equality within Zimbabwe. This accords with Zimbabwe's constitutional mandates as well as with its indigenisation policy discussed in chapter 3.⁹⁹⁴ Moreover the re-affirms the right to regulate and moves in line with the new thrust of reclaiming policy space.

⁹⁹³ Article 3(2) of the Zimbabwe-South Africa BIT.

⁹⁹⁴ See part 3.2.3 as read with part 3.4.1 above.

A challenge however, with Article 3 of the Zimbabwe-South Africa BIT, existent in both generations of Zimbabwe's BITs, is that it does refer to 'like circumstances'.⁹⁹⁵ In recent times, the test for 'likeness' has become important in determining the application of the NT clause.⁹⁹⁶ There is, however, no set criteria for assessing 'like circumstances'.⁹⁹⁷ It has been argued that when assessing 'like circumstances', the key to this analysis is competition.⁹⁹⁸ This has however been disputed. The contesting argument is that a proper determination of 'likeness' should concentrate on finding a 'proper comparator' in the domestic market which is 'like' or 'close to like' the foreign firm.⁹⁹⁹ A considered assessment of the competing views makes the exposition that the second argument is more valuable when determining likeness.¹⁰⁰⁰ However, a thorough assessment of 'likeness' would require more analysis than simply looking at a comparable entity.

To resolve this challenge of determining 'likeness', a new trend of including an indicative list for what is considered a 'like circumstance' is included in the NT clause. A good case in point is the NT clause in the South African Protection of Investment Act. The relevant part of the clause reads:

'For the purpose of this section, "like circumstances" means requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the –

⁹⁹⁵ It also worth noting that some provisions have referred to 'similar circumstances' or 'identical situations' or 'similar situations' or 'similar enterprises'. See generally, Bishop RD, Crawford J & Reisman WM (2005) 1152.

⁹⁹⁶ Subedi SP (2015) ch 5.

⁹⁹⁷ Segger MC, Gehring MW & Newcombe GA (2011) 279.

⁹⁹⁸ Meessen KM, Bungenberg M & Puttler A *Economic Law as an Economic Good: Its Rule Function and its Tool Function in the Competition of Systems* (2009) 312.

⁹⁹⁹ Meessen KM, Bungenberg M & Puttler A (2009) 312. While it is possible that there may be instances when there is no comparable firm on the domestic market, this situation does not however compromise the analysis. In such a situation, the foreign investor would simply have to show that the domestic law or measure has a discriminatory effect.

¹⁰⁰⁰ Reinisch A (ed) *Standards of Protection* (2008) 38.

- (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;
- (b) sector that the foreign investments are in;
- (c) aim of any measure relating to foreign investments;
- (d) factors relating to the foreign investor or the foreign investment in relation to the measure concerned;
- (e) effect on third persons and the local community;
- (f) effect on employment; and
- (g) direct and indirect effect on the environment.¹⁰⁰¹

Furthermore, Zimbabwe's NT clauses are also crafted very broadly. There are no hard and fast rules as to how these clauses should be interpreted.¹⁰⁰² For instance, there is no clarity as to whether Zimbabwe's NT clauses in BITs are applicable to dispute settlement.¹⁰⁰³ Furthermore, Zimbabwe's BIT are silent on whether NT is extended to pre-entry transactions as has been irregularly done in other BITs. Future BITs could contain a clause that provides that national treatment is extended to dispute settlement, however, it is not afforded to pre-entry transactions.



4.3.2.2 Investment Protection

There is a difference between investment treatment and protection. Investment treatment, on the one hand, is more relative and dependent on the treatment afforded to domestic investors or other foreign investors. Investment protections, on the other hand, are more absolute, in the sense that they are not dependent on how other investors are being treated for them to accrue to an investor. They are rather unconditional guarantees (in most instances) undertaken by the host government

¹⁰⁰¹ Section 8(2) of the South African Protection of Investment Act.

¹⁰⁰² Dolzer R 'National Treatment: New Developments' available at <https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf> (accessed 10 October 2016) 1.

¹⁰⁰³ See Parker SL 'A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Provisions' (2012) 2 *The Arbitration Brief* 45.

imposing obligation on it to render a certain level of protection to a covered foreign investment. It is against this background that investment treatment and protections have been discussed separately. This section will examine the relevant protections that are granted by Zimbabwe in its BITs.

4.3.2.2.1 Fair and equitable treatment

A vast majority of the BITs signed to date contain the obligation to grant fair and equitable treatment, despite its non-usage by countries such as Pakistan, Singapore and Saudi Arabia.¹⁰⁰⁴ This obligation is linked to international law as well as the minimum standard of treatment obligation in customary international law.

In chapter 2, it was noted that within the context of international investment law, fair and equitable treatment can be traced back to the Havana Charter.¹⁰⁰⁵ However, the first outright use of the fair and equitable clause only came much later in the Abs-Shawcross Draft Convention.¹⁰⁰⁶ From that point, this standard developed into one of the fundamental protections offered by states to foreign investors. From the broader IIAs, the fair and equitable clause also found its way into BITs.

Fair and equitable treatment clauses gained prominence as a result of the failure of classical treatment standards such as the NT clause to give adequate protection to investors as they were contingent on the host-state granting its citizens or other foreign investor's better investment protection.¹⁰⁰⁷ The standard is closely related to transparency, stability and the protection of the legitimate expectations of the investor.¹⁰⁰⁸

¹⁰⁰⁴ United Nations Conference on Trade and Development 'Fair and Equitable Treatment' 2012 *UNCTAD Series on Issues in International Investment Agreements* xiii.

¹⁰⁰⁵ See section 2.3.4.7 of this thesis.

¹⁰⁰⁶ See section 2.3.4.11 of this thesis.

¹⁰⁰⁷ Bronfman MK 'Fair and Equitable Treatment: An Evolving Standard' 2006 *Estudios Internacionales* 611.

¹⁰⁰⁸ Schreuer C 'Fair and Equitable treatment' available at http://www.univie.ac.at/intlaw/wordpress/pdf/99_fair_equit_treatm_zuerich.pdf (accessed 12 October 2016) 126. See also *CMS Gas Transmission Company v Argentina* 44 ILM (2005).

The fair and equitable standard is, therefore, a non-contingent standard prescribing a 'basic and general standard' which is not related to a host-state's domestic law on the treatment of foreign investment.¹⁰⁰⁹ This is, however, a broad framing of the fair and equitable standard. At least six or seven prominent variations of the fair and equitable standard are existent within BITs.¹⁰¹⁰ According to UNCTAD, these can be classified as:¹⁰¹¹

- Treaties that grant investments fair and equitable treatment without making any reference to international law or to any other criteria to determine the content of the standard.
- Treaties that state that investments will receive fair and equitable treatment no less favourable than accorded to its own investors or to investors of any third State.
- Treaties that couple the fair and equitable treatment standard with an obligation to abstain from impairing the investment through unreasonable or discriminatory measures.
- Treaties that require investments to be granted "fair and equitable treatment in accordance with the principles of international law".
- Treaties that similarly require fair and equitable treatment in accordance with the principles of international law, but that in addition expressly identify some requirements of the standard. These specific inclusions may broaden the scope of the standard.
- Treaties that make the fair and equitable treatment standard contingent on the domestic legislation of the host country.
- Finally, some recent BITs and free trade agreements provide a more precisely defined scope of the fair and equitable treatment standard. These oblige the contracting parties to accord covered investments treatment in accordance with the minimum standard of treatment under customary international law. Some also

¹⁰⁰⁹ Dolzer R & Stevens M (1995)59.

¹⁰¹⁰ Ortino et al *Investment Treaty Law: Current Issues Vol II: Nationality and Investment Treaty Claims, Fair and Equitable Treatment in Investment Treaty Law* (2007) 119.

¹⁰¹¹ See Marshall F 'Fair and Equitable Treatment in International Investment Agreements' 2007 *International Institute for Sustainable Development* 4-5.

make it express that fair and equitable treatment is part of the minimum standard and does not create additional substantive rights.¹⁰¹²

As a result, the interpretation to be given to a fair and equitable treatment clause is highly dependent on the drafting of the clause. This in turn has an effect on the scope to be attributed to a fair and equitable treatment clause. However, where in doubt, an ordinary meaning of fair and equitable treatment has to be attributed to the customary international minimum standard.¹⁰¹³ This is as it gives the standard greater legitimacy in terms of international legal obligations.¹⁰¹⁴

In the context of dispute settlement, the fair and equitable treatment standard has been favoured by investors because it is vague, broad ranging and interpreted on a case by case basis. Since the *Maffezini*¹⁰¹⁵ case in 2000, the fair and equitable treatment standard has been the most invoked clause in arbitral cases. In this case, the tribunal noted that the lack of transparency of the host state (Spain) was incompatible with its commitment under the Argentine-Spain BIT to provide fair and equitable treatment.¹⁰¹⁶ The challenge with this decision was that the tribunal failed to 'substantiate its view on the particular weight of transparency in the determination of this alleged violation of fair and equitable treatment'.¹⁰¹⁷ In another case, *Tecmed v Mexico*, the tribunal found

¹⁰¹² In other BITs, the fair and equitable treatment clause has not been included.

¹⁰¹³ Paparinskis M 'The International Minimum Standard and Fair and Equitable Treatment' available at <http://www.ejiltalk.org/the-international-minimum-standard-and-fair-and-equitable-treatment/> (accessed 11 October 2016). The general understanding of the international minimum standard of treatment is that it is a broad standard which covers the denial of justice as well as some elements of the doctrine of state responsibility. This customary international law view of this standard is however largely undeveloped.

¹⁰¹⁴ Porterfield MC 'A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law By Tribunals' available at <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/> (accessed 11 October 2016).

¹⁰¹⁵ *Maffezini v Spain* ICSID Case No. ARB/97/7.

¹⁰¹⁶ *Maffezini v Spain* ICSID Case No. ARB/97/7.

¹⁰¹⁷ Kläger R (2011) 232.

that the fair and equitable treatment standard required the host state to act in a manner that is transparent, consistent and free from ambiguity.¹⁰¹⁸

In *Iona Micula and other v Romania*, the first majority held that Romania had breached the fair and equitable treatment standard by repealing incentives granted to investments made in certain regions.¹⁰¹⁹ The tribunal in this case expressed the view that the determination of the contents of the fair and equitable treatment standard should be based on state practice and judicial arbitral or other sources of international law. However, this has not been the practice. In many cases, a breach of the fair and equitable treatment standard has been assessed against the legitimate expectations of the investor. Furthermore, the arbitral system does not have binding precedent and therefore there can be no judicial precedence.¹⁰²⁰

Notwithstanding the above, five concepts have emerged in arbitral cases as forming the core of this controversial standard. These are the:

- 
- (a) Prohibition of manifest arbitrariness in decision making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;
 - (b) Prohibition of the denial of justice and disregard of the fundamental principles of due process;
 - (c) Prohibition of targeted discrimination on manifestly wrongful grounds, such as, gender, race or religious belief;
 - (d) Prohibition of abusive treatment of investors, including coercion, duress and harassment;

¹⁰¹⁸ *Techmed v Mexico* ICSID Case No. ARB(AF)/00/2.

¹⁰¹⁹ *Iona Micula and other v Romania* ICSID Case no. ARB/05/20.

¹⁰²⁰ Arbitral tribunals are independent and are therefore not bound by decisions of past tribunals.

(e) Protection of legitimate expectations of investors arising from a government's specific representations or investment-inducing measures, although balanced with the host State's right to regulate in the public interest.¹⁰²¹

Challenges have emerged with the fair and equitable treatment standard. These include: (1) an expansive interpretation that gives rise to unpredictability; (2) the lack of a precise threshold for assessing a breach of the standard; and the failure by tribunals to balance competing interests when dealing with the standard. This has led to some treaties omitting the standard and some limiting it. For example, the Comprehensive Economic and Trade Agreement (CETA) has restricted the definition of fair and equitable treatment. Their formulation in Article 8 of CETA is as follows:

'(1) **Each Party shall accord in its territory** to covered investments of the other Party and to investors with respect to their covered investments **fair and equitable treatment** and full protection and security in accordance with paragraphs 2 through 7. [own emphasis added]

(2) A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or belief;

¹⁰²¹ UNCTAD 'Fair and Equitable Treatment: UNCTAD Series on Issues on International Investment Agreements' available at http://unctad.org/en/Docs/unctad-dia-eia2011d5_en.pdf (accessed 27 September 2017) xvi. The investor's conduct has also been considered in cases involving factors such as fraud or misrepresentation.

(e) abusive treatment of investors, such as coercion, duress and harassment; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

(3) The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2.1(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

(4) When applying the fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

An analysis of Article 8(2) shows that all the 5 core concepts that have emerged as the fundamental elements of fair and equitable treatment are represented. The only difference is that CETA provides a further avenue to review this list.

In Zimbabwe, while most of the BITs that are in force provide for fair and equitable treatment, it is usually juxtaposed with other treatment standards such as MFN and NT clauses. This is evidenced in BITs such as the Zimbabwe-China BIT,¹⁰²² the Zimbabwe-Netherlands BIT¹⁰²³ and the Zimbabwe-Switzerland BIT.¹⁰²⁴

In terms of content, most of Zimbabwe's BIT follow the approach of granting 'investments fair and equitable treatment without making any reference to international

¹⁰²² See Article 3 of the Zimbabwe-China BIT.

¹⁰²³ See Article 3 of the Zimbabwe-Netherlands BIT.

¹⁰²⁴ See Article 3 of the Zimbabwe-Netherlands BIT. See generally, Klager R (2011) 16.

law or to any other criteria to determine the content of the standard'.¹⁰²⁵ This could be improved in future BITs by making reference to international law and the international minimum standard so as to improve the legal standing of the provision.

Moreover, the provision on fair and equitable treatment could also be given a precise scope so as to dispel any misunderstandings or assumptions on the scope of the provision. This would circumvent the wide interpretations that are usually associated with the fair and equitable treatment standard which have led to very onerous obligations being imposed on states.

Furthermore, the fair and equitable standard has been tied to other standards of protection.¹⁰²⁶ It is recommended that this standard should be separated from the other treatment standards as they have their own separate legal existence.

4.3.2.2.2 Full protection and security

The standard of full protection and security is one which had not had much popularity within BITs as well as in ICSID jurisprudence until the last decade or so.¹⁰²⁷ The standard has, however, grown to be one of the consistently controversial provisions in IIL, particularly because of the different formulations of it that have arisen.¹⁰²⁸

More often than not, the captioning of the standard involves words like 'constant', 'full', 'protection', 'continuous' and 'security'. While the standard has been expressed differently, the three main formulations are: 'full protection and security', 'resurgence'

¹⁰²⁵ Marshall F (2007) 4-5.

¹⁰²⁶ For example, the Tribunal in *PSEG v Turkey* illustrated the relationship between the fair and equitable standard and expropriation as that: '[t]he standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that the other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate. This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached'.

¹⁰²⁷ Gerbay R 'The Full Protection and Security Standard in Practice' available at <http://kluwerarbitrationblog.com/2009/04/16/the-full-protection-and-security-standard-in-practice/> (accessed 12 October 2016).

¹⁰²⁸ Foster GK 'Recovering "Protection and Security": The Treaty Standards Obscure Origins, Forgotten Meaning, and Key Current Significance' (2012) 45 *Vanderbilt Journal of Transnational Law* 1095.

and 'continuous protection and security'. It is, however, plausible to argue that the 'continuous protection and security is a lesser level of protection than 'full protection and security'.¹⁰²⁹ However, these relaxed standards of protection have been accepted as variations of the full protection and security standard.

Generally, the full protection and security standard finds application when a foreign investment has been affected by 'civil violence' and 'strife'.¹⁰³⁰ As articulated by Schreuer:

'The concept of full protection and security has its origin in a guarantee of physical protection of security for investments. The host State is under an obligation to provide some measure of protection against forcible interference by private persons such as employees, business partners or demonstrators. In addition, the standard of full protection and security is also directed against forcible interference by State organs such as the police and the armed forces.'¹⁰³¹

In *Asian Agricultural Products (AAPL) v Sri Lanka*,¹⁰³² where investments were destroyed during a counter-insurgency operation by Sri Lankan security forces, although it was unclear if ultimately it was the rebels that destroyed the investments, the Tribunal held that the government had a duty of protection regardless of whether destruction of the investments was a result of state forces or rebels.¹⁰³³ Similarly, in *CME v Czech Republic*,¹⁰³⁴ it was asserted that there was a responsibility on the state for injury to an alien investor. Whether or not it was the sole cause of the injury was

¹⁰²⁹ Walde T (ed) *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996) 339.

¹⁰³⁰ *American Manufacturing & Trading, Inc. (AMT)(USA) v Republic of Zaire*, ICSID Case No. ARB(AF)/00/2, paras 175-7.

¹⁰³¹ Schreuer C 'Full Protection and Security' (2010) 1 *Journal of Dispute Settlement* 2.

¹⁰³² ICSID Case No. ARB/87/3.

¹⁰³³ *Asian Agricultural Products (AAPL) v Sri Lanka*, paras 38-71. While the Tribunal found in favour of full protection and security and potentially being an absolute standard, many arbitral Tribunals have found against such an approach.

¹⁰³⁴ Partial Award, 13 September 2001.

immaterial.¹⁰³⁵ This was an accepted practice in terms of the Articles on the Responsibility of State for Intentionally Wrongful Acts.

While the full and protection standard seems to be straight forward, this is, however, not the case, as the meaning to be attributed to the standard, is quite a troublesome issue. One could group the views on this standard into two schools of thought. These are those that believe the full protection and security standard only extends to the physical protection of covered investments, and those that believe that legal security is extended in addition to physical security.¹⁰³⁶

In *Saluka Investments B.V. v The Czech Republic*,¹⁰³⁷ the Tribunal noted that '[t]he practice of Arbitral Tribunals seems to indicate that the "full security and protection" clause is not meant to just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by force'.¹⁰³⁸ Similarly, in *BG Group v Argentina*¹⁰³⁹ where it was held by the UNCITRAL Arbitral Tribunal that 'it was improper to depart from the originally understood standard of 'protection and constant security''.¹⁰⁴⁰

In contradistinction, the Tribunal in *Azurix Corp v. Argentine Republic*¹⁰⁴¹ was of the view that 'it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view'.¹⁰⁴² In *Biwater v Tanzania*,¹⁰⁴³ the Tribunal also adopted a similar stance, noting that 'full security and

¹⁰³⁵ *CME v Czech Republic*, para 580. It was also averred that in addition to the duty to provide due diligence, states were also prohibited from modifying their legal systems so as to destabilise or devalue investments covered by an investment treaty.

¹⁰³⁶ Foster GK (2012) 1095.

¹⁰³⁷ Partial Award, 17 March 2006.

¹⁰³⁸ *Saluka Investments B.V. v The Czech Republic*, para 484.

¹⁰³⁹ Final Award, 24 December 2007.

¹⁰⁴⁰ *BG Group v Argentina*, para 326. See also *Eastern Sugar v Czech Republic*, Partial Award, 27 March 2007, para 203 & *Rumeli v Kazakhstan*, Award 29 July 2008, para 180.

¹⁰⁴¹ ICSID Case No. ARB/01/12.

¹⁰⁴² *Azurix Corp v. Argentine Republic*, para 408.

¹⁰⁴³ ICSID Case No. ARB/05/22.

protection implies a State's guarantee of stability in a secure environment, both commercial and legal'.¹⁰⁴⁴

From these cases, it is clear that there is no consensus as to the meaning of the full protection and security standard. Seemingly, however, despite lack of clarity on the approach to be adopted, the Tribunals seem to be leaning more the latter interpretation, which provides for an expansive approach.¹⁰⁴⁵

To complicate matters, the Tribunal in *Azurix Corp v Argentine Republic* was also convinced that there was an important relationship between the full protection standard and the fair and equitable treatment standard.¹⁰⁴⁶ Some BITs such as the USA and Canadian Model BITs have referred to the two standards together.

For example, Article 5 of the 2004 USA Model BIT provides that, in terms of the minimum standard of treatment: '[e]ach party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security'.¹⁰⁴⁷ This article also defines the scope of both standards, noting in terms of the full protection and security standard, that there is no need to provide treatment beyond what is required by the standard. The implication is that each party must provide the level of police protection desired under customary international law.¹⁰⁴⁸ The 2004 USA Model BIT therefore adopts the approach in the *Saluka* case.¹⁰⁴⁹

¹⁰⁴⁴ *Biwater v Tanzania*, para 729.

¹⁰⁴⁵ Malik M 'The Full Protection and Security Standard Come of Age: Yet Another Challenge for States in Investment Arbitration' 2011 *The International Institute for Sustainable Development Best Practices Series* 5.

¹⁰⁴⁶ *Azurix Corp v. Argentine Republic*, para 408.

¹⁰⁴⁷ 2004 USA Model BIT, Article 5(1). This approach has been followed in BITs following the USA Model Treaty such as the Paraguay-USA BIT.

¹⁰⁴⁸ 2004 USA Model BIT, Article 5(2).

¹⁰⁴⁹ In this context, Schreuer has argued that: 'it is beyond doubt that the standard of full protection and security relates to the physical protection of the investor and its assets'. See Schreuer C 'Full Protection and Security' 2010 *Journal of International Dispute Settlement* 2.

In the Zimbabwean context, not all of its binding BITs provide for the standard of full protection and security. Some treaties such as the Zimbabwe-China BIT and the Zimbabwe-Netherlands BIT do not speak to this standard. Those that provide for this standard include the Zimbabwe-Switzerland BIT¹⁰⁵⁰ and the Zimbabwe-Germany BIT.¹⁰⁵¹ These BITs have favoured the use of the wording ‘full protection and security’. For example, Article 4(1) of the Zimbabwe-Germany BIT provides that ‘[i]nvestments by nationals or companies of either contracting party shall enjoy full protection and security in the territory of the other Contracting Party’.¹⁰⁵² What is visibly lacking from this provision (as well as in other in force and published BITs) is a qualification on the scope of the standard. Such a qualification is vital given the polarised arbitral interpretations of the full protection and security standard.

The broad provisions for full security and protection present numerous challenges. Notably, these broad provisions expose Zimbabwe’s limited resources to an onerous level of liability, witnessed in cases such *Bernadus Funekkoter v Republic of Zimbabwe*, *Border Timbers et al v Republic of Zimbabwe* and *Bernhard von von Pezold and Others v Republic of Zimbabwe*. There is, therefore, a need for Zimbabwe to rethink the standard with options such as streamlining or deletion of the standard on the cards.¹⁰⁵³ The most viable option would be to streamline it in terms of the approach in the *Saluka* case and the USA Model BITs. A suggestion by Roterodamus envisages that an ideal full protection and security clause would provide that:

¹⁰⁵⁰ See Article 4 of the Zimbabwe-Switzerland BIT.

¹⁰⁵¹ See Article 4 of the Zimbabwe-Germany BIT.

¹⁰⁵² Zimbabwe-Germany BIT, Article 4(1).

¹⁰⁵³ Some authors are of the view that complete safety and protection for investors and their invested assets in the best approach. See Roterodamus DE ‘The Full Protection and Security Standard and Reciprocal Obligations in BITs’ available at http://www.latinlawyer.com/cdn/files/ll/news/Rogelio_submission.pdf (accessed 12 October 2016) 12.

'Each Party shall accord physical protection and security in its territory to investors of the other Contracting Party. That implies to accord foreign investors protection and security no less favourable than that accorded to domestic investors'.¹⁰⁵⁴

Possibilities also exist of also adding cyber-attacks as civil disturbances protected by Zimbabwe's BIT, subject to emergency situation rules and the guidelines given in the *AMT* case.¹⁰⁵⁵ This would be consistent with the findings in *Occidental v Ecuador*¹⁰⁵⁶ and *Occidental Exploration and Production Company v Ecuador*¹⁰⁵⁷ that the full protection and security standard could be violated despite the absence of physical violence or damage. However, this would, however, go against the suggested approach of restricting the standard to physical violence, so as to limit Zimbabwe's exposure to claims.¹⁰⁵⁸ As noted by Schreuer; '[i]t is beyond doubt that the standard of full protection of security relates to the physical protection of the investor and its assets'.¹⁰⁵⁹ Importantly, future BITs should note that the physical protection offered to investments must, however, be subject to the availability of resources.¹⁰⁶⁰ This will ensure that Zimbabwe's economic position is not unnecessarily strained in bid to protect foreign investments.

4.3.2.2.3 Expropriation and compensation

In terms of customary international law, states have a sovereign right to expropriate property in certain circumstances.¹⁰⁶¹ The determination of how much compensation

¹⁰⁵⁴ Roterodamus DE 'The Full Protection and Security Standard and Reciprocal Obligations in BITs' available at http://www.latinlawyer.com/cdn/files/II/news/Rogelio_submission.pdf (accessed 12 October 2016) 12.

¹⁰⁵⁵ See *AMT v Zaire*, ICSID Case No. ARB/93/1. See further Collins DA 'Applying the Full Protection and Security Standard of International Investment Law to Digital Assets' (2011) 12 *Journal of World Investment and Trade* 243.

¹⁰⁵⁶ ICSID Case No. ARB/06/11.

¹⁰⁵⁷ LCIA Case No. UN3467.

¹⁰⁵⁸ While this is not ideal, given Zimbabwe's current financial situation, policies and treaties alike should engage in a balancing act between granting investor rights and resulting obligations on the host-state.

¹⁰⁵⁹ Schreuer C (2010) 17.

¹⁰⁶⁰ See s 9 of the South African Protection of Investment Act.

¹⁰⁶¹ OECD *OECD Investment Policy Reviews: Jordan 2013* (2013) 102.

should be paid is a question that has polarised many scholars.¹⁰⁶² As a result, many differences exist within the literature as to when compensation should be granted and what kind of compensation (for example, ‘full compensation’ or ‘appropriate compensation’) should be paid. To complicate matters, there are also arguments around what compensation should be payable within the prescriptions of international law.¹⁰⁶³

In contrast to FCN treaties, which as discussed in chapter 2,¹⁰⁶⁴ allow for expropriation in case of public necessity, BITs prescribe that a host-state can only exercise the right to expropriate property when: it’s done in a non-discriminatory manner, due process is taken, it’s for a public purpose¹⁰⁶⁵ and payment of prompt, adequate and effective compensation is guaranteed.

Despite being the most frequently used formula,¹⁰⁶⁶ The Hull standard for ‘prompt, adequate and effective compensation’ has, however, been rejected by some countries such as China.¹⁰⁶⁷ This is notwithstanding that, in practice, the protection given for expropriation in Chinese BITs might actually be materially be the same as that of the Hull rule.¹⁰⁶⁸ Correctly, the Tribunal in *CME v Czech Republic* noted that despite the variations in BITs when property is expropriated, full compensation must be paid.¹⁰⁶⁹

Where property is expropriated for a purpose which is not public, such an expropriation will be unlawful. In *ADC v Hungary*,¹⁰⁷⁰ the Tribunal averred that the general view is that BITs can be considered as *lex specialis*, whose provisions prevail over those of

¹⁰⁶² A detailed discussion of the development of the expropriation and compensation standard is contained in chapter 2.

¹⁰⁶³ Ripinsky S & Williams K *Damages in International Investment Law* (2008) 80.

¹⁰⁶⁴ See section 2.3.3.1 of this thesis.

¹⁰⁶⁵ Generally, international law requires that expropriations be for a public purpose. See Reed L, Paulsson J and Blackaby N *Guide to ICSID Arbitration* (2004) 53.

¹⁰⁶⁶ Brown KB & Snyder DV (eds) *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (2011) 495.

¹⁰⁶⁷ Trakman L & Ranieri R (2013) 239.

¹⁰⁶⁸ Brown KB & Snyder DV (2011) 495.

¹⁰⁶⁹ *CME v Czech Republic*, para 497.

¹⁰⁷⁰ ICSID Case No. ARB/03/16.

customary international law.¹⁰⁷¹ However, where a BIT only provides for the measure of compensation for lawful expropriation; where an unlawful expropriation occurs, such unlawful expropriation would be dealt with in terms of customary international law, as was suggested in the *Chorzow Factory* case.¹⁰⁷²

Another issue worth noting is that expropriation could also be 'indirect'. Direct expropriation, on the one hand, as described above, focuses on the nationalisation or direct expropriation through physical seizure or formal transfer of title; while on the other hand, indirect expropriation arises as a result of interference by the state with the use of the property or with the enjoyment of its benefits.¹⁰⁷³ It is important to note that 'indirect expropriation' does not affect the legal title to the property. Consequently, it must also be borne in mind that not all government action or measure amounts to direct expropriation, however, it may have a 'creeping' effect on the use or enjoyment of the investment.¹⁰⁷⁴ Picotti argues that in the developing country context, formal/direct expropriation is now rare and indirect expropriation 'represents the most serious and recurrent interference with foreign investor's rights'.¹⁰⁷⁵ As result, Picotti contends that the issue of indirect expropriation is one which has generated 'hot debates' in scholarly circles as well as in investment arbitration.

A prominent case in the developing country context as regards indirect expropriation is the *Piero Foresti* case.¹⁰⁷⁶ In this case, South Africa made certain changes to its mining laws so as to address the imbalances created by injustices of the past pursuant to s 25(8) of the South African Constitution. The consequence of this was that investors

¹⁰⁷¹ *ADC v Hungary*, para 481.

¹⁰⁷² *ADC v Hungary*, paras 480-99. See also *Germany v Poland* (1928) [*Chorzow Factory* case].

¹⁰⁷³ OECD "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (accessed 27 September 2017) 2.

¹⁰⁷⁴ OECD "Indirect Expropriation" and the "Right to Regulate" in International Investment Law' available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (accessed 27 September 2017) 2.

¹⁰⁷⁵ Picotti L 'Indirect Expropriation in International Investment Law Between States Regulatory Powers and Investors Protection' available at http://www.univr.it/documenti/AllegatiOA/allegatooa_36511.pdf (accessed 27 September 2017) 2-3.

¹⁰⁷⁶ *Piero Foresti, Laura de Carli and others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.

claimed that their investment had been indirectly expropriated as it made their investment less valuable. They contended that South Africa's conduct was in violation of South Africa's obligations under the Italy and Luxemburg's BITs. From this case, it became clear that differential treatment pursuant to national interests can land developing countries in distinctive challenges. These emanate from allegations of breach of NT, fair and equitable treatment, and possible cases for indirect expropriation of property.¹⁰⁷⁷

Zimbabwe's BITs are no exception to the general variance in expropriation and compensation provisions. Its earlier BITs as well as more recent BITs could possibly be split into 2 categories, namely: (1) those that provide for the Hull rule based 'prompt, adequate and effective compensation' and (2) those that do not provide for the Hull rule, but adopt other formulations such as 'just compensation' and 'genuine value'. The Zimbabwe-Germany BIT provides contains a Hull formulation in Article 4(2). This provision raises two main issues: First, expropriation can only take place when there is a public purpose. Second, if expropriation is permissible, it should be accompanied by the payment of 'prompt, adequate and effective compensation'. The provision makes certain clarifications on the Hull rule.

For example, the 'adequate' value of the compensation would be the value of the expropriated investment immediately before the date on which the actual or impending expropriation.¹⁰⁷⁸ In terms of 'promptness', payment had to be made without delay and carried normal commercial interest.¹⁰⁷⁹ In terms of 'effectiveness', the compensation had to be effectively realisable and freely transferable.¹⁰⁸⁰ The Zimbabwe-Switzerland BIT also has a slightly different Hull formulation. In addition to prescribing that the

¹⁰⁷⁷ See Breau SC & Samuel KLH (eds) *Research Handbook on Disasters and International Law* (2016) 222.

¹⁰⁷⁸ Article 4(2) of the Zimbabwe-Germany BIT.

¹⁰⁷⁹ Article 4(2) of the Zimbabwe-Germany BIT.

¹⁰⁸⁰ Article 6 of the Zimbabwe-Germany BIT.

expropriation must be for a public purpose, it also provides that the expropriation must be done on a non-discriminatory basis.¹⁰⁸¹

The Zimbabwe-China BIT is an example of those BITs that do not contain a Hull formulation (it, however, contains materially similar provisions). In terms of the circumstances under which expropriation can take place, the Zimbabwe-China BIT goes further than the Zimbabwe-Switzerland BIT and the Zimbabwe-Germany BIT. In addition to noting non-discrimination, the payment of compensation and public interest, the BIT also provides for the conditions under domestic law which must be met. In terms of the compensation to be paid, the Zimbabwe-China BIT opines that the 'genuine value' must be paid. This genuine value is calculated by taking into account the net asset value of the property as well as its market value.¹⁰⁸²

As can be noted, while there are variations in Zimbabwe's BITs on the issue of expropriation and compensation, the idea behind them is similar, that where an expropriation is done outside a set criteria, compensation based on the provision in the BIT must be paid. It is recommended that future BITs provide for fair and adequate compensation on expropriation. Such compensation should balance the interests of the public and of the affected parties.

This would still be consistent with Zimbabwe's 2013 Constitution which provides in s 71(c) that the acquiring authority must (a) within a reasonable time notify everyone who has an interest in the property or will be affected by the acquisition of their intention to acquire the property (b) pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition, and (c) apply to a competent court not later than thirty days after the

¹⁰⁸¹ Another subtle difference is that value of the property before the expropriation is referred to as the 'real value'; however, this has no material implications.

¹⁰⁸² Article 4(2) of the Zimbabwe-China BIT.

acquisition for an order confirming the acquisition not later than thirty days after the acquisition, if the acquisition of a property is contested.¹⁰⁸³

Furthermore, Zimbabwe's BITs should also detail the procedure for dealing with indirect expropriation. Guidance for this could be drawn from Zimbabwe's regional treaties.¹⁰⁸⁴

4.3.2.2.4 Free transfer of funds and repatriation of profits

The free transfer of funds is almost a pre-cursor for the free-flow of investment across international borders.¹⁰⁸⁵ As a result, many BITs contain a guarantee for the unrestricted transfer of funds.¹⁰⁸⁶ These provisions on the free transfer of funds and repatriation of profits are essential as they provide more guarantees than those existent in multilateral agreements such as the IMF Agreement.¹⁰⁸⁷ It is against this background, that one of the major challenges raised by investors to the MIGA, is the restrictive environment on the transfer of funds or repatriation of profits in host-states.¹⁰⁸⁸

In exceptional circumstances, the transfer of funds and repatriation of profits can be limited.¹⁰⁸⁹ These limitations are often imposed to allow the host-state room for administering its monetary and fiscal policy, and in other cases, for the purposes of 'national security'. For example, Article 6 of the France-Uganda BIT allows for the temporary and non-discriminatory limitation of the free transfer of funds in the case of

¹⁰⁸³ The constitutional protection of property also enhances the protections offered to investors, as the foreign investors from all walks of life can be afforded protection for their property under the Constitution.

¹⁰⁸⁴ See part 5.3 below.

¹⁰⁸⁵ OECD *OECD Investment Policy Reviews: Nigeria 2015* (2015) 101.

¹⁰⁸⁶ Zimmermann CD *A Concept of Monetary Sovereignty* (2013) 49. See also Dimopoulos A (2011) 312. Some BITs go as far as providing for investment repatriation guarantees to the passive or active repatriation of investments and returns as a result of expropriation. See Pei Z & Zheng W (2015) 59.

¹⁰⁸⁷ See Articles of Agreement of the International Monetary Fund.

¹⁰⁸⁸ Leathly C (2007) 23.

¹⁰⁸⁹ Das US, Mazarei A & van der Hooft A *Economics of Sovereign Wealth Funds: Issues for Policy Makers* (2010) 77.

'serious balance of payments difficulties and external financial difficulties or the threat thereof'.¹⁰⁹⁰

Generally, domestic exchange rules in Zimbabwe dictate that an investor may: (1) 'bring an unlimited amount of foreign currency into the country', (2) may repatriate '100% of the original capital investment in the case of disinvestment', and (3) may remit 'up to 100% of dividends from net after tax profit' unless the investor has become a permanent resident in Zimbabwe.¹⁰⁹¹

Consistent with domestic law, Zimbabwe's BITs provide for the free transfer of payments particularly those related to the principal investment, returns, the repayment of loans, royalties and fees, proceeds from disinvestment or compensation for expropriation, amounts other listed payments.¹⁰⁹² These payments should be made 'without delay in a freely convertible currency at the rate of exchange applicable on the date of transfer'.¹⁰⁹³

Interestingly, Zimbabwe's binding BITs do not contain any limitations or restrictions on the transfer of funds. Instead, they adopt an open ended approach so as to afford foreign investors the broadest possible coverage. A similar approach has been adopted in most of the recent treaties. In the context of Zimbabwe as a developing country (a financially distressed one for that matter), it would be advisable that in the future, Zimbabwe restricts the transfer of funds to subject to limitations in the case of severe economic constraints. This approach balances the rights of the investor and the host state and promotes the culture of sustainable foreign investments.

¹⁰⁹⁰ See France-Uganda.

¹⁰⁹¹ Zimbabwe Investment Centre 'Comprehensive Investment Guide To Zimbabwe' available at http://www.assecaa.org/images/investment_law/English/Zimbabwe_investment_guide.pdf (accessed 15 October 2015) 3. See also International Business Publications (2013) 78.

¹⁰⁹² See Article 5 of the Zimbabwe-Germany BIT.

¹⁰⁹³ Article 6(2) of the Zimbabwe-China BIT. Some BITs such as the Zimbabwe-Germany BIT contain a separate provision on the currency of payment and rate of earnings.

4.3.2.2.5 Subrogation

There is a great deal of variance in terms of the state practice on subrogation in BITs.¹⁰⁹⁴ On the one hand, there are states that have included subrogation in their BITs, while on the other hand, there are those that have not done so. These clauses allow investors to claim for harm suffered under their insurance contracts without prejudice to their claim against the state.¹⁰⁹⁵

A survey of the Zimbabwean BITs that are in force shows that all of these BITs provide for subrogation. Invariably, there are, however, variances in how the principle of subrogation is articulated. For instance, Article 9 of the Zimbabwe-Switzerland BIT provides that:

'Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.'¹⁰⁹⁶

The wording of the provision is different to that used in the Zimbabwe-Netherlands BIT, that:

'If the investments of a national of the one Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investments under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or Agency designated by the one Contracting Party to the rights of the said national pursuant to the terms of such insurance or under any other indemnity given shall be recognized by the other Contracting Party. For this

¹⁰⁹⁴ Alvarez JE *The Public International Law Regime Governing International Investment* (2011) 129.

¹⁰⁹⁵ OECD *OECD Investment Policy Reviews: Russian Federation 2006 Enhancing Policy Transparency* (2006) 73.

¹⁰⁹⁶ Zimbabwe-Switzerland BIT, Article 9.

purpose, the insurer or re-insurer or Agency shall not be entitled to assert any rights other than the rights which the said national would have been entitled to assert.¹⁰⁹⁷

The Zimbabwe-Netherlands BIT, in addition to providing for the right to subrogation, furnishes the scope of the claim. This is in contradistinction to the Zimbabwe-Switzerland BIT which focuses on the principle of subrogation. Both BITs are, however, less detailed than subrogation clauses in other BITs. Based on international best practices, it is against this background that it is proffered that Zimbabwe's future BITs should have more detailed subrogation clauses.

4.3.2.2.6 Scope of application/ temporal scope

Perhaps one of the shortest provisions within BITs is the scope of application clause.¹⁰⁹⁸ Generally, a scope of application clause makes a statement on whether a BIT is applicable to investments made before or after the entry into force of the BIT.¹⁰⁹⁹ Most of Zimbabwe's binding BITs apply to investments made before and after the entry into force of the BIT. One exception is the Zimbabwe-China BIT, which provides amongst other things, that:

'This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures have been fulfilled, and shall remain in force for a period of ten years.'¹¹⁰⁰

The Zimbabwe-China BIT, therefore, does not expressly provide for the retrospective operation of the BIT. Zimbabwe's BITs are consistent with international practice as they provide for a 10 year period for the operation of a BIT, the BIT of which, will

¹⁰⁹⁷ Zimbabwe-Netherlands BIT, Article 8. This provision is similar to the Article 8 of the India-China BIT.

¹⁰⁹⁸ This clause is often limited by the definition of foreign investment given in a BIT. See Gwynn MA (2016) 92.

¹⁰⁹⁹ Patel BN *India and International Law: Introduction* (2008) 304.

¹¹⁰⁰ Zimbabwe-China BIT, Article 12(1).

continue in operation if written notice is not given a year before the expiry of the Agreement.¹¹⁰¹

There is, however, a variance amongst Zimbabwe's BITs in the manner in which temporal scope issues are dealt with. For example, the Zimbabwe-Switzerland BIT has one provision cited as 'final provisions'¹¹⁰² The Zimbabwe-Germany BIT takes a different approach providing for a 'scope of application' clause in Article 9 and an 'entry into force, duration and termination' clause in Article 12. Differently from the first two BITs discussed, the Zimbabwe-China BIT contains an article (Article 12) which has no heading but details the issues of 'scope of application' and 'entry into force, duration and termination'. It is suggested that future Zimbabwean BITs follow the approach in the Zimbabwe-Germany BIT,¹¹⁰³ however, these clauses must be placed in successive provisions to augment 'reader friendliness'.

4.3.2.2.7 Umbrella clauses

As widely discussed in chapter 2, one of the new features of BITs is that which is known as an 'umbrella clause'.¹¹⁰⁴ These 'are blanket provisions in a BIT that require the host government to observe, or guarantee the observance of, specific promises and obligations towards investors, such as investor-state contracts or national investment laws'.¹¹⁰⁵ The challenge with these provisions is that they have no standard framing/phrasing.¹¹⁰⁶

¹¹⁰¹ OECD *OECD Investment Policy Reviews: Malaysia 2013* (2013) 106.

¹¹⁰² Zimbabwe-Switzerland BIT, Article 12.

¹¹⁰³ That is, having a scope of application clause and a separate entry into force clause.

¹¹⁰⁴ See section 2.4.2 of this thesis.

¹¹⁰⁵ Dewar J *International Project Finance: Law and Practice* (2011) 437.

¹¹⁰⁶ Ripinsky S (2009) 175.

Zimbabwe's BITs also contain umbrella clauses. For example, the Zimbabwe-Switzerland BIT contains an umbrella clause listed as an 'other obligations' clause. It provides that:¹¹⁰⁷

- (1) If provisions in the laws of either Contracting Party or in international agreements entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.
- (2) Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

As with most umbrella clauses, the challenge with this provision is that it is formulated in broad terms. This is one of the reasons why an increasing number of countries are of the view that umbrella clauses should not form part of their BITs, regardless of how they are framed.¹¹⁰⁸ The USA is an example of such countries. It deleted umbrella clauses in its 1994 Model BIT and future BITs following this model.¹¹⁰⁹ Also, some countries such as Chile have opted not to use umbrella clauses in their BITs.¹¹¹⁰ Based on international best practices, Zimbabwe's future BITs should not include umbrella clauses as their utility is limited. The clause is also problematic as it has given rise to a large number of disputes, with cases such as *SGS v Philippines*¹¹¹¹ and *SGS v Pakistan*¹¹¹² being examples.

4.3.2.2.8 Other clauses

The substantive obligations discussed above are by no means a *numerous clausas*. They are merely a reflection of the common provisions within Zimbabwe's binding

¹¹⁰⁷ Zimbabwe-Switzerland BIT, Article 8(1).

¹¹⁰⁸ Fauchald OK & Hunter D *Yearbook of International Investment Law and Environmental Protection* vol 17 (2006) 26.

¹¹⁰⁹ Moore JN *International Arbitration: Contemporary Issues and Innovation* (2013) 149.

¹¹¹⁰ Tanzi A et al *International Investment Law in Latin America: Problems and Prospects* (2016) 82.

¹¹¹¹ ICSID Case No. ARB/03/11.

¹¹¹² ICSID Case No. ARB/01/13.

BITs. It is, therefore, important to note that there are also other important substantive provisions contained in Zimbabwe's BITs and other treaties. These include clauses on transparency, health and the environment, labour standards,¹¹¹³ the right to regulate, non-derogation, the denial of benefits, performance requirements, corporate social responsibility, corruption and the lowering of standards.

Some of these are important particularly in the context of Zimbabwe as a developing country. A good example is the right to regulate. Essentially, 'the right to regulate gives host states autonomy to control how investments are regulated within their territories'.¹¹¹⁴ It is derived from the concept of state sovereignty which denotes a state's freedom (Hohfeldian liberty) to regulate in the public interest.¹¹¹⁵ According to Daza-Clark, the prerogative to include the right to regulate in agreements has mostly been exercised in multilateral agreements as opposed to bilateral ones (such as BITs).¹¹¹⁶ This notwithstanding, the use of the right to regulate has practical benefits such as the giving the host state sufficient room to manoeuvre and the opportunity to fill in the gaps left open in the drafting of clauses.¹¹¹⁷ Consequently, it was noted in chapter 2 that, in recent times, the right to regulate is perhaps one of the most important rights in modern investment law.¹¹¹⁸ Focus is now turned to provisions on the settlement of disputes.

¹¹¹³ Zimbabwe has inconsistently addressed the issue of the entry and sojourn of foreign nationals in relation to their investment.

¹¹¹⁴ Kondo T 'A Comparison with Analysis of the SADC FIP before and after its Amendment' (2017) 20 *PER/PELJ* 20.

¹¹¹⁵ Giannakopoulos C 'The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962686 10.

¹¹¹⁶ Daza-Clark AM *International Investment Law and Water Resource Management: An Appraisal of Indirect Expropriation* (2016) 105.

¹¹¹⁷ Bungenberg M, Griebel J & Hindelang S (2011) 162.

¹¹¹⁸ See part 2.4 above. A further discussion on the right to regulate is also contained in part 5.3.3.2 below.

4.3.3 Dispute settlement

As noted earlier, in addition to substantive rules for the protection of investors, there are also procedural rules. In most BITs, a distinction is made between state-state disputes and investor-state disputes.¹¹¹⁹ This is not surprising as BITs promote foreign investments, most of which are private.¹¹²⁰ In theory and practice, this distinction is key, and has, therefore, been the subject of a raging debate in investment arbitration.

While there are similarities between rules on state-state arbitration and investor-state arbitration, there is more that sets them apart than brings them together. As a result, these two concepts will be discussed separately. A brief analysis will first be made on state-state dispute resolution in BITs in Zimbabwe. Thereafter, a similar approach will be undertaken with regards to investor-state dispute resolution clauses.

4.3.3.1 Settlement of disputes between contracting parties (state-state)

A state-state dispute is an unresolved dispute between the contracting parties which arises as a result of divergent interpretations or application of a BIT by the contracting parties. The settled practice in this regard is that any dispute between the contracting parties should, as far as possible, be resolved by consultation through diplomatic practice.¹¹²¹

While some of Zimbabwe's BIT are silent on the issue of how much time should lapse before an unresolved dispute can be forwarded to a tribunal,¹¹²² some BITs such as the Zimbabwe-China BIT propose a period of 6 months.¹¹²³ In contra-distinction, the

¹¹¹⁹ See Akgul Z (2008) 13.

¹¹²⁰ Leathly C (2007) 23.

¹¹²¹ See Article 8(1) of the Zimbabwe-China BIT.

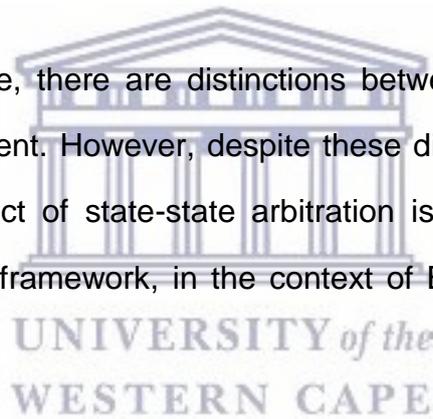
¹¹²² See, for example, Article 10(2) of the Zimbabwe-Germany BIT.

¹¹²³ See Article 8(2) of the Zimbabwe-China BIT.

Zimbabwe-Netherlands BIT provides that the dispute can be submitted for arbitration after 'a reasonable lapse of time'.¹¹²⁴

Zimbabwe's BITs generally advocate that the dispute must be submitted to an 'arbitral tribunal composed of three members'. Some of the BITs such as the Zimbabwe-China BIT note that the dispute must be resolved in accordance with the principles of international law recognised by both parties and the current agreement, while others such as the Zimbabwe-Netherlands BIT, recognise in addition to these two sources, any other treaties that are in force between the two parties.¹¹²⁵ Moreover, BITs like the Zimbabwe-Germany BIT and the Zimbabwe-Germany BIT prescribe that the Tribunal must reach a decision based on a majority of votes,¹¹²⁶ a of decision of which, shall be binding on all the parties.

Inevitably, as shown above, there are distinctions between how the various BITs provide for dispute settlement. However, despite these differences, the idea behind Zimbabwe's BITs in respect of state-state arbitration is the same. It is therefore submitted that the current framework, in the context of BITs, does not need to be revised.



4.3.3.2 Settlement of disputes between a contracting party and an investor from a contracting party (investor-state)

Typically, an investor-state dispute involves a national or company of one contracting party and the other contracting party. The practice is that, as far as possible, attempts are first made to settle the dispute amicably. However, where a dispute cannot be settled amicably, such dispute shall within a prescribed time referred to the relevant Tribunal for arbitration.¹¹²⁷

¹¹²⁴ Zimbabwe-Netherlands BIT, Article 13(1).

¹¹²⁵ Zimbabwe-Netherlands BIT, Article 13(4).

¹¹²⁶ See Article 10(6) of the Zimbabwe-Germany BIT and Article 8(6) of the Zimbabwe-China BIT.

¹¹²⁷ Chen A *The Voice from China: An Chen on International Economic Law* (2014) 276.

For example, Article 10(1) of the Zimbabwe-Switzerland BIT provides that if there is a dispute between the parties, consultations should first take place. If such consultations do not result in the creation of a solution within six months, with the written consent of the investor concerned, the dispute shall be submitted to ICSID.

Most of Zimbabwe's BITs prescribe that the tribunal that is dealing with the investor-state dispute shall reach a decision based on the laws of the host state, including its rules on conflict of laws and general principles of international law. Some BITs such as the Zimbabwe-China BIT also propose that the Tribunal must determine its own procedures for the resolution of the dispute.¹¹²⁸

There are benefits for using investor-state arbitration. Sherwin, Vermal and Figuera note a few of these benefits.¹¹²⁹ Firstly, the fact that the parties are allowed to choose competent and neutral decision makers. This is especially useful given the fact that parties to arbitration are usually unwilling to submit their dispute before a court in one of the states as they may be biased towards the other party. Second, until recently, international arbitration had been a fast way of resolving disputes, free from the delay of usual court processes.¹¹³⁰ Third, while it is now debatable, arbitration is often viewed as a speedier way of resolving disputes. Fourth, arbitration had until recently been a cost effective method of resolving disputes. Fifth, arbitration proceedings can be made confidential where the parties desire so. This is particularly useful in cases where there are companies working with confidential information.

¹¹²⁸ There are some variances between Zimbabwe's BITs. Some, to the exclusion of others, discuss issues such as the binding nature of the award, the implications of referring the matter for conciliation, the reaching of a decision by a majority of votes, and the implications of an insurance contract, amongst others.

¹¹²⁹ Sherwin P, Vermal A & Figuera E 'The Decision to Arbitrate' available at <http://www.proskauerguide.com/arbitration/19/> (accessed 4 July 2017).

¹¹³⁰ In recent times however, arbitration has become unnecessarily lengthy.

Sixth, parties are able to select the place and language of arbitration.¹¹³¹ Seventh, there is flexibility of process. Parties are able to tailor the procedures for arbitration according to their specific needs. Furthermore, in instances where they submit their dispute under arbitral institution rules, these rules still allow a degree of flexibility unlike litigation under national courts. Eighth, the absence of an appeal mechanism, notwithstanding its demerits, facilitates enforcement of awards with unnecessary appeal delays. Ninth, arbitral awards given in one country can generally be enforced in another country with relative ease. This is facilitated by laws such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which has been ratified by more than 140 States.

Investor-state dispute settlement has however been heavily criticised. For instance, Cosmas contends that the current system: (1) is plagued by the challenge of conflict of interest as 75 per cent of them come from OECD countries and North America, yet 85% of the respondents are developing countries, (2) encroaches on state regulatory space and the duty to provide public services, (3) is *ad hoc* in nature, and therefore has no jurisprudence, thus impeding the development of international investment law jurisprudence, (4) lacks an appellate body to which can address the short-coming of trial tribunals, and (5) is susceptible to forum shopping, where in the past, parallel proceeding on the same matter have occurred.¹¹³² Further challenges include the fact that arbitrators are unable to consolidate actions and join parties as well as difficulties arising when there is a need for court intervention.

As a result, drafters of investment treaties, laws and policies are now on the search for better options with regard to investor-state arbitration. For instance, in two of EU's recently concluded agreements, the EU-Canada Comprehensive Economic and Trade

¹¹³¹ Sherwin P, Vermal A & Figuera E 'The Decision to Arbitrate' available at <http://www.proskauerguide.com/arbitration/19/1> (accessed 4 July 2017).

¹¹³² Cosmas J 'Investor-state International Arbitration System: Is ICSID the Appropriate Forum for Developing Countries Like Tanzania' (2014) 5 *Open University Law Journal* 32 – 35.

Agreement and the EU-Vietnam Free Trade Agreement, the ad hoc system of investment arbitration was replaced by standing bilateral bodies consisting of first-instance and appellate tribunals. Other proponents of change are moving towards proposals for the formation of a multilateral investment court. Kaufmann-Kohler and Potestà, however, note that the establishment of this court raises many issues which need to be addressed in order for the court to be successful.¹¹³³ These include: (a) the recruitment of independent, impartial and well qualified judges, (b) the selection of the law governing proceedings, (c) the manner in which the court will be controlled (for example, how appeals will be done), (d) the enforcement of its orders, and (e) how disputes will become subject to the jurisdiction of the courts. These are important matters that ought to be addressed before such an idea can take of the ground. The International Criminal Court has faced similar challenges, more especially with regards to the enforcement of its orders, as witnessed in the recent *Al Bashir* case.¹¹³⁴ The efficacy of such an international platform is therefore called into question.

It is evident however that the quest for a multilateral investment court is one that will continue to be elusive. In the interim developing countries such as Zimbabwe may consider renegotiating their BITs so as to limit their exposure from investor-state arbitration. This is however hamstrung by the fact that re-negotiation requires the other party to consent. This gives rise to further challenges. For example, the other party may not want to re-negotiate the terms of the treaty as it would result in lessened protection for their investors. Furthermore, such party may also 'hold up' changes to treaty in exchange for more concessions. A more radical approach may then be to terminate existing BITs. This follows the thinking that exposure to international arbitral claims may be reduced 'either by eliminating a forum for investors' claims or by

¹¹³³ Kaufmann G & Potestà M *Challenges on the Road Toward a Multilateral Investment Court in Savaunt* KP & Scroth M 'Colombia FDI Perspectives 2017 *Colombia Centre on Sustainable Investment*, available at <http://mailchi.mp/law/perspective-2017?e=d7e6acea1b>.

¹¹³⁴ In this case, South Africa refused to act in accordance with an arrest warrant for Al Bashir which had been issued by the court.

eliminating their rights under treaties'.¹¹³⁵ This, notwithstanding, is troubled by survival clauses which extend the effect of BITs for up to 15 years, tacit renewal clause which hinder the termination of a BIT for a specified period of time or possibility for termination only at certain time intervals. A final option may be to use termination as a strategic option to negotiate for better treaty provisions.

4.4 CONCLUSION

In conclusion, this chapter has examined Zimbabwe's obligations from its BITs. It was shown that while Zimbabwe's BITs provided protections to foreign investments, these protections were characterised by many weaknesses. Broadly, these weakness centred on the limitations on the right to regulate; unbalanced protections granting investors more rights than obligations; the inability of the BITs to adapt with changing circumstances, including the need to leave room for more policy options; and interpretation issues given rise to by broad provisioning. To this effect, it was demonstrated that while provisions in Zimbabwe's BITs were to a larger degree consistent with Zimbabwe's Constitution as well as customary international law, these provisions were not in line best practices.

Arguments were made in favour ideas such as the: modification of certain protection provisions to allow for investment liberalisation; clarification of investment protections; adoption more concise definitions of investors and investments; and alignment of investor-state dispute settlement provisions with recent trends. Most of these ideas are then integrated into the final chapter of this paper. The next chapter will discuss the role of Zimbabwe's Regional Trade Agreements (RTAs) and trade liberalisation in enhancing FDI.

¹¹³⁵ Lavopa FM, Barreiros LE & Bruno V 'The Challenges of Denoncnng BITs: Why it is Better to Renegotiate' available at <http://investmentpolicyhub.unctad.org/Blog/Index/19> (accessed 5 July 2017).

CHAPTER 5

**REGIONAL TRADE AGREEMENTS AND THE PROTECTION AND
FACILITATION OF FDI IN ZIMBABWE**

*Trade agreements have a major impact on trade and investment worldwide.*¹¹³⁶

5.1 INTRODUCTION

In recent times, there has been an inexorable change in the global economic topography which has brought to the fore the importance of building trade and investment relations.¹¹³⁷ As noted by the WTO, there are 'growing economic, institutional and legal inter-linkages between trade and foreign direct investment'.¹¹³⁸ Questions however arise as to whether States should continue to rely on concluding BITs or if there should be alternative responses which factor these linkages.¹¹³⁹ In response to these questions, many States concluded RTAs with investment provisions,¹¹⁴⁰ most of which are Preferential Trade Agreements (PTAs) or Preferential Trade and Investment Agreements (PTIAs), as referred to in some circles.¹¹⁴¹

Zimbabwe is no exception to this current trend. To date, Zimbabwe has signed a couple of RTAs. These include the: EU-SADC EPA (2016), COMESA Investment

¹¹³⁶ The quote above is an extract from a piece by John Manzella. He argues that for a businesses to succeed in the international environment, it needs to be aware of the impact that trade agreements have on their investments. See Manzella J 'The Impact of Trade Agreements' available at <http://manzellareport.com/index.php/trade-finance/401-the-impact-of-trade-agreements> (accessed 7 November 2016).

¹¹³⁷ Department of Trade and Industry Republic of South Africa 'Trade Agreements' available at https://www.thedti.gov.za/trade_investment/ited_trade_agreement.jsp (accessed 8 November 2016).

¹¹³⁸ World Trade Organisation 'Trade and Foreign Direct Investment' *WTO News: 1996 Press Releases* 9 October 1996.

¹¹³⁹ World Trade Organisation 'Trade and Foreign Direct Investment' *WTO News: 1996 Press Releases* 9 October 1996.

¹¹⁴⁰ Since the first RTA was signed in 1958 (the European Community), they have grown in number, contributing to the surge in IIAs. Since 1992, this increase has been around 16% per annum. The growth of these RTAs has contributed to the boom in the numbers of IIAs. See Jang YJ 'The Impact of Free Trade Agreements on Foreign Direct Investment' 2007 Indiana University, Department of Economics 2.

¹¹⁴¹ These treaties are sometimes also referred to as Treaties with Investment Provisions (TIPs).

Agreement, SADC Protocol on Investment and Finance, COMESA-US TIFA, Cotonou Agreement, COMESA Treaty, SADC Treaty and AU Treaty.¹¹⁴² Most of these treaties have entered into force, thus imposing obligations on the country. Zimbabwe is, however, yet to ratify the COMESA Investment Agreement, the EU-SADC Interim Agreement and the EU-SADC EPA.

This chapter discusses and analyses Zimbabwe's obligations from RTAs. In doing so, the chapter assesses the extent to which these obligations have been incorporated into the investment regime. Furthermore, non-binding regional instruments, in particular, the SADC Model BIT are also discussed. Recommendations are made on how some of these provisions can enhance current laws. Structurally, the chapter will first discuss the nexus between RTAs and FDI. After which, an analysis of Zimbabwe's commitments from RTAs is conducted. Lastly, the chapter concludes on the issues discussed.

5.2 THE NEXUS BETWEEN RTAs AND FOREIGN INVESTMENT

The theoretical literature seems to be *ad idem* on the fact that regional integration, more specifically, RTAs, lead to further FDI. One of the arguments is that non-member investors are likely to invest in these areas because they want to take advantage of a free trade area which offer better economies of scale and larger integrated markets.¹¹⁴³ Jaumotte argues that despite the fact that RTAs increase the overall level of FDI, this

¹¹⁴² This thesis will only discuss the African regional agreements to the exclusion of the mega-regional agreements such as the EU-SADC EPA, the COMESA-US TIFA and the Cotonou Agreement. The rationale behind this decision is that the parties to these treaties are yet to conclude investment protocols, and as such, investment is mentioned more generally than specifically. Noting the depth of the discussions undertaken in this chapter, deliberations on these treaties, despite their current nature, would therefore not fit well into this chapter.

¹¹⁴³ Berger A, Busse M, Nunnenkamp P & Roy M (2010) 2.

growth is unlikely to equally spread across the member states.¹¹⁴⁴ Rather, Jaumotte avers that FDI will be focused on members who have a geographical advantage.¹¹⁴⁵

Cherif and Dreger, however, argue that the 'impact of RTAs on FDI is not obvious'.¹¹⁴⁶ His contention is that there are a multiplicity of issues at play, such as; economic, social and political issues. For example, the investment in the region could be a result of a bright economic perspective of the region rather than the convenience or adequacy of the investment provisions in the RTA.

While no conclusive evidence can be furnished on whether or not there is a nexus between RTAs and FDI, RTAs do however impose binding commitment on State Parties.¹¹⁴⁷ As a result, the next section explores the investment provisions in Zimbabwe's regional treaties.

5.3 ANALYSING ZIMBABWE'S AFRICAN REGIONAL COMMITMENTS

5.3.1 African Union

The African Union (AU),¹¹⁴⁸ formerly the Organisation for African Unity (OAU), was established with the intention, *inter alia*, of encouraging, through co-operation, sustainable economic, social and cultural development at all levels and integration amongst African countries.¹¹⁴⁹ In pursuit of this mandate, the Treaty Establishing the African Economic Community (AEC treaty) was developed.¹¹⁵⁰ Consistent with the Constitutive Act of the AU, the AEC Treaty was aimed at enhancing 'socio-economic

¹¹⁴⁴ Jaumotte F Foreign Direct Investment and Regional Trade Agreements: The Market Size Issue Revisited 2004 *IMF Working Paper WP/04/206* 4.

¹¹⁴⁵ Jaumotte F (2004) 4. '

¹¹⁴⁶ Cherif M & Dreger C The Impact of South-South Trade Agreements on FDI' 2015 *DIW Discussion Paper 1461* 8.

¹¹⁴⁷ This occurs after a State Party has ratified the instrument.

¹¹⁴⁸ Zimbabwe signed the AU Treaty on the 3rd of June 1991 and the treaty came into force on the 12th May 1994.

¹¹⁴⁹ See Article 3(e) of the Constitutive Act of the African Union. In promoting co-operation, due regard, in this instance, has to be given to the human rights enshrined in the Charter of the United Nations and the Universal Declaration on Human Rights.

¹¹⁵⁰ See Article 33(2) of the Constitutive Act of the African Union.

development of Africa and to face more effectively the challenges posed by globalization'.¹¹⁵¹ Against this background, it was noted in Article 3(c) of the Treaty that the members affirm to catalyse inter-state co-operation, harmonise policies and integrate programs.¹¹⁵²

In order to harmonise investment policies, the AEC Treaty¹¹⁵³ encourages the strengthening of joint investment programmes in the production of key inputs and outputs.¹¹⁵⁴ More specifically, the AEC Treaty advocates for the adoption of measures 'designed to promote investment in tourism with a view to the establishment of competitive African tourist enterprises'.¹¹⁵⁵ In addition, the AEC Treaty encourages members to promote trade through extra-community participation on the trade and investment front in the South-South Co-operation.¹¹⁵⁶ The idea behind the AEC Treaty, and other similar instruments, is, therefore, that regional integration should help to attract more foreign investment.

While the AEC Treaty actively encourages investment, it, however, has its inherent weaknesses. To begin with, the Treaty is couched in aspirational language. Despite the fact that such language has aspirational qualities in that it serves to encourage member states to engage in joint investment programs, it falls short in giving the members an absolute direction on investment matters. Moreover, the provisions related to investment in the AEC Treaty lack depth. They do not provide specific investment protections as is done in other treaties.

As the implementation of the AEC Treaty continues, it remains to be seen whether the community will enact a protocol to map out further ideas for increasing investment and undertake more detailed work in this regard as has been done in existing communities

¹¹⁵¹ Constitutive Act of the African Union, preamble.

¹¹⁵² Treaty Establishing the AEC, Article 3(c).

¹¹⁵³ Zimbabwe is a signatory to the AEC Treaty.

¹¹⁵⁴ Treaty Establishing the AEC, Article 4(2)(c).

¹¹⁵⁵ Treaty Establishing the AEC, Article 65(1)(b).

¹¹⁵⁶ Treaty Establishing the AEC, Article 42(b)(iii).

such as SADC, COMESA and the Economic Community of West African States (ECOWAS).¹¹⁵⁷ It becomes pertinent to discuss the work of these smaller communities in which Zimbabwe is a state partner and how they affect FDI. The next section discusses the COMESA Treaty and the Common Investment Area Agreement (CCIA Agreement).

5.3.2 The Common Market for Eastern and Southern Africa

Foreign investments in COMESA find protection under two instruments, namely; the COMESA Treaty and the CCIA Agreement. The COMESA Treaty does well in promoting FDI and improving the business climate. However, it is hamstrung by limited protections for FDI. However, many of these challenges are addressed in the CCIA Agreement.¹¹⁵⁸ These two documents will therefore be discussed in the subsequent sections.

5.3.2.1 COMESA Treaty

The COMESA Treaty was signed on the 21st of December 1981 and came into force on the 30th of September 1982. The Treaty establishes a preferential trade area (PTA) with a view to stimulate deeper integration amongst the members.¹¹⁵⁹ In addition, the Treaty also established a FTA, with the hope of establishing a monetary union by 2025.¹¹⁶⁰ Similar to the AEC Treaty, COMESA is built around the principle of international co-operation. In line with this idea of co-operation, Article 6(c) of the

¹¹⁵⁷ It is important to note that Article 6 of the AEC Treaty provides a timeline for the full operation of the EAC. This timeline contains six stages articulating that a transitional period not exceeding 34 years. The stages are:

- 1) The creation of regional economic communities that would provide the foundation for the initial integration. [This stage has been completed].
- 2) The creation of harmonised tariffs and inter and intra cooperation among blocs.
- 3) The establishment of FTAs.
- 4) The establishment of a continental customs union.
- 5) The creation of a continental monetary common market.
- 6) The merger of the various blocs into one single monetary and customs union.

¹¹⁵⁸ See CCIA Agreement.

¹¹⁵⁹ Tralac 'COMESA Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/by-region/comesa.html> (accessed 14 November 2016).

¹¹⁶⁰ Europa Publications Staff *The Europa World Book 2004* 45ed (2004) 171.

COMESA Treaty denotes that members must promote inter-state co-operation, policy harmonisation and stimulate integration programs amongst members.¹¹⁶¹

Under this section, obligations arising from the COMESA Treaty will be discussed under the following subheadings: (i) investment promotion (ii) scope of application (iii) fair and equitable treatment (iv) expropriation and compensation and (v) repatriation of funds and transfer of profits.

Investment promotion

The COMESA Treaty requires members to grant incentives as a matter of priority, members should also grant investment incentives, particularly to those investors who employ local materials and labour.¹¹⁶² Strategically, contracting parties should also improve the investment climate for investors, both national and foreign alike.¹¹⁶³ Herein, priority should be given to industrial and technology investment opportunities.¹¹⁶⁴ In addition, members should work to create a favourable investment climate for public and private investment in the development and utilisation of energy resources.

In relation to energy and industrial development, special consideration has to be given to economically depressed economies in the common market and LDCs, so as to better the investment climate in these areas.¹¹⁶⁵ Similarly, member states have to improve investment conditions in the services sector for nationals and foreigners.¹¹⁶⁶

In strengthening co-operation, members have to exchange important information on investment promotion through their centres,¹¹⁶⁷ particularly that relating to energy systems and investment opportunities.¹¹⁶⁸ Moreover, they should promote new

¹¹⁶¹ COMESA Treaty, Article 6(c).

¹¹⁶² COMESA Treaty, Article 100(f).

¹¹⁶³ COMESA Treaty, Article 100(h).

¹¹⁶⁴ COMESA Treaty, Article 104(1)(e).

¹¹⁶⁵ COMESA Treaty, Article 106.

¹¹⁶⁶ COMESA Treaty, Article 148(ii)

¹¹⁶⁷ COMESA Treaty, Article 105(3)(c).

¹¹⁶⁸ COMESA Treaty, Article 106(2)(d).

investments so as to grow the number of export products into the common market.¹¹⁶⁹

In co-operating in natural resources, the contracting parties have to move towards the development of 'uniform investment guidelines for inland and marine waters'.¹¹⁷⁰

In improving the business environment/climate and promoting investment, members noted the need to 'create and maintain a predictable, transparent and secure investment climate in Member States'.¹¹⁷¹ Pursuant to this mandate, members undertook to promote 'conducive investment codes' where property and contractual rights are respected.¹¹⁷² Within the common market, members have to work to eliminate administrative, fiscal and legal restrictions so as to briskly move towards the deregulation of investment.¹¹⁷³ Furthermore, members have to 'facilitate and support the exchange of experience and pooling of resources through, inter alia, cross-border investments'.¹¹⁷⁴ Additionally, members also had to take measures to bolster awareness to potential investors about investment incentives, practices, legislation or activities with an effect on investment.

On a similar note, Article 3(c) denotes that, in relation to the common market, members should co-operate in creating a conducive environment in which cross border and domestic investment can thrive.¹¹⁷⁵ This is further concretised in Article 159(1)(b) of the COMESA Treaty which proposes that members should adopt 'a program for the promotion of cross-border investment'.¹¹⁷⁶ In this regard, members should also fully utilise investment opportunities created by the common market.¹¹⁷⁷ Members should,

¹¹⁶⁹ COMESA Treaty, Article 144(1)(a).

¹¹⁷⁰ COMESA Treaty, Article 123(4)(c).

¹¹⁷¹ COMESA Treaty, Article 159(1)(c).

¹¹⁷² COMESA Treaty, Article 151(2)(a).

¹¹⁷³ COMESA Treaty, Article 151(2)(a) as read with Article 151(2)(b). The ECOWAS Agreement takes a slightly different approach and advocates for the 'harmonisation of national investment codes leading to the adoption of a single Community investment code'. See Article 3(2)(i) of the ECOWAS Agreement.

¹¹⁷⁴ COMESA Treaty, Article 151(2)(e).

¹¹⁷⁵ COMESA Treaty, Article 3(c).

¹¹⁷⁶ COMESA Treaty, Article 159(1)(b).

¹¹⁷⁷ COMESA Treaty, Article 84(c).

therefore, amongst other things, use the opportunity to harmonise macro-economic policies so as to attract investors.¹¹⁷⁸

The scope of application

Similar to most BITs, Article 159 of the COMESA Treaty provides a list of what can be deemed as an 'investment'.¹¹⁷⁹ The Article notes that the following can be classified as investments:¹¹⁸⁰

- (a) movable and immovable property and other property rights such as mortgages, loans and pledges;
- (b) shares and other rights of participation in the management or economic results of a company or firm, whether incorporated or not, including minority shares, corporate rights and any other kind of shareholding;
- (c) stocks, bonds, debentures, guarantees or other financial instruments of a company or firm, government or other public authority or international organisation;
- (d) claims to money, goods, services or other performance having economic value;
- (e) intellectual and industrial property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business; and
- (f) such other activities that may be declared by the Council as investments.

This article is functionally similar to the provision in Zimbabwe's BITs on the definition of an 'investment'.¹¹⁸¹ However, unlike Zimbabwe's BITs,¹¹⁸² or BITs in general, Article 159 of the COMESA Treaty does not furnish the definition of an investor. It is noteworthy to emphasise that in the context of RTAs this is not entirely problematic as some RTAs do not even provide for either definition.¹¹⁸³

¹¹⁷⁸ COMESA Treaty, Article 158.

¹¹⁷⁹ COMESA Treaty, Article 159(2).

¹¹⁸⁰ COMESA Treaty, Article 159(2).

¹¹⁸¹ See section 4.4.1.1 of this thesis.

¹¹⁸² See section 4.4.1.2 of this thesis.

¹¹⁸³ See Article 159 of the COMESA Treaty. The ECOWAS Agreement also does not define investment or have a comprehensive section focusing on investment.

Fair and equitable treatment

Fair and equitable treatment is also afforded to investors under the COMESA Treaty.¹¹⁸⁴ As discussed in chapter 4, fair and equitable treatment is one of the bedrock principles in the protection of investment.¹¹⁸⁵ As articulated by Kläger, 'it is unlikely that future investment treaties or a multilateral investment agreement – will omit a reference to fair and equitable treatment.'¹¹⁸⁶ As such, numerous other FTAs such as the North American Free Trade Agreement (NAFTA) contain references to fair and equitable treatment.¹¹⁸⁷

Expropriation and compensation

The COMESA Treaty also provides for expropriation. However, similar to the provisions of most BITs and RTAs, such expropriation is subject to limitations. To this end, s 159(3) of the COMESA Treaty provides that members should 'subject to the accepted principle of public interest, refrain from nationalising or expropriating private investment; and in the event private investment is nationalised or expropriated, pay adequate compensation'. This is mostly consistent with most of Zimbabwe's BITs and the 2013 Constitution. However, the provision does not specify that the payment of compensation should be prompt and effective. This could have important implications for the affected party.¹¹⁸⁸ This may have fundamental implications on the manner in which compensation is given. For instance, an aggrieved party may receive 'adequate

¹¹⁸⁴ COMESA Treaty, Article 159(1)(a).

¹¹⁸⁵ See section 4.3.2.2..1

¹¹⁸⁶ Kläger R (2011) 21-2.

¹¹⁸⁷ NAFTA Agreement, Article 1105. Chapter 11 of NAFTA

¹¹⁸⁸ COMESA Treaty, Article 159(3). Article 159(4) makes further comments and clarifications on expropriation. It notes that any measure taken by a Member State which may have an effect of 'depriving an investor of his ownership or control of, or a substantial benefit from his investment and shall be interpreted to include all forms of expropriation such as nationalisation and attachment as well creeping expropriation in the form of imposition of discriminatory taxes, restrictions in the procurement of raw materials, administrative action or omission where there is a legal obligation to act or measures that frustrate the exercise of the investors rights to dividends, profits and proceeds of the right to dispose of the investment'.

compensation', however, since there is no question of time in the provision, such compensation can be given in a manner that is not prompt and effective.

Repatriation of funds and transfer of profits

Under the COMESA Treaty, the free transfer of funds and the repatriation of profits is guaranteed.¹¹⁸⁹ The Treaty prescribes that private investors have the right to repatriate investment returns, royalties and other payments, funds for the repayment of loans, proceeds from the sale or liquidation of investments, payments for maintaining or developing investment projects and remit the earnings of all expatriate staff working on investment projects.¹¹⁹⁰ This is consistent with the provisions of domestic law where foreign investors are granted leeway to repatriate all of the dividends and proceeds related to the original investment.¹¹⁹¹ The result is that foreign investors are granted enough opportunity to repatriate their funds.

5.3.2.2 The COMESA Common Investment Agreement (CCIA)

The third COMESA Summit resolved in June 1998 to establish the CCIA.¹¹⁹² The aim of the CCIA agreement is to attract more investment into the region in a manner which is sustainable through improving the investment climate.¹¹⁹³ Unlike, the COMESA Treaty which applies to both foreign investors and COMESA investors, the CCIA only applies to investments between Member States.

The CCIA is built upon the principle of co-operation in the region. Article 3(a) of the CCIA states that a coordinated investment program should be established so as to

¹¹⁸⁹ COMESA Treaty, Article 159(5).

¹¹⁹⁰ COMESA Treaty, Article 159(5). Article 159(5) also allows investors the rights to benefit from exemptions related to customs duties or any other fiscal commitments.

¹¹⁹¹ Zimbabwe Investment Centre 'Comprehensive Investment Guide To Zimbabwe' available at http://www.assecaa.org/images/investment_law/English/Zimbabwe_investment_guide.pdf (accessed 15 October 2015) 3. See also International Business Publications (2013) 78.

¹¹⁹² CCIA, preamble.

¹¹⁹³ Sauvart KP (2013) 174.

improve internal and external investments into the region.¹¹⁹⁴ In this spirit of co-operation, member states resolved to set up regional institutional structures, including the; COMESA Regional Investment Agency and COMESA Investment Area Committee. These institutions have the capacity to improve foreign investment in the region through the better co-ordination of capital flows.

In attempting to improve investments into the region, the CCIA imposes rights and obligations on its members.¹¹⁹⁵ The key rights and obligations created thereof will be considered under the following: scope of application; MFN treatment; national treatment; expropriation and compensation; full protection security; general exceptions, emergency safeguards and the right to regulate and dispute settlement. Each of these rights and obligations will be discussed.

(i) Scope of application

To begin with, the CCIA limits the scope of application of the Treaty to investments and investors within the region. In this regard, Article 1(4) provides for the definition of a 'COMESA investor'. Herein, a distinction is made between natural or juristic person in another Member State.¹¹⁹⁶ In terms of natural persons, such investor must have citizenship in the originating jurisdiction. The CCIA, however, fails to deal with the issue of dual nationality, as has been the challenge with most of Zimbabwe's BITs.

With regards to juristic persons, two issues are worth noting. Firstly, a juristic person must be duly incorporated in a Member State. Second, such juridical person must maintain substantial business activity in the Member State where it is duly organised or constituted. This is the approach which has been followed by the USA, as noted in chapter 4. This approach bears significant merit as it undermines companies which

¹¹⁹⁴ CCIA, Article 3(a). This is in line with Article 3(c) of the COMESA Treaty which denotes that, in relation to the common market, members should co-operate in creating a conducive environment in which foreign (FDI), cross border and domestic investment can thrive.

¹¹⁹⁵ See part two of the CCIA.

¹¹⁹⁶ CCIA, Article 1(4).

want to use mere registration to enjoy benefits under a treaty. It deviates from the approaches followed in Zimbabwe's BITs where the focus has been on incorporation rather than the amount of business activity.

(ii) *MFN Treatment*

Shifting to substantive rights, MFN treatment under the CCIA is extended to pre-and post-entry treatment.¹¹⁹⁷ Similar to some of Zimbabwe's BITs, this treatment is accorded in 'like circumstances' as is done with national treatment.¹¹⁹⁸ Moreover, the CCIA provides exceptions such as those related to international tax agreements, international conventions or other preferential agreements.¹¹⁹⁹ More importantly, a limitation is placed on the application of MFN treatment. In this regard, it is noted that the treaty does not find application to investment agreements entered into by member states with non-member states before the entry into force of the CCIA.

(iii) *National treatment*

Third, the national treatment provision in Article 17 of the CCIA is structured broadly so as to extend greater protection.¹²⁰⁰ Members are accorded no less favourable treatment by other members than that afforded to investors in the host-state. Article 17 goes a step further and provides factors which will be taken into consideration when treating the issue of 'like circumstances'.¹²⁰¹ These, *inter alia*, include; the sector where the investment was made, the regulatory process that was used on the measure concerned, the effect on the local community third persons, the purpose of the measure and other matters which are of relevance to the investor or the investment.

¹¹⁹⁷ CCIA, Article 19(1).

¹¹⁹⁸ Lim CL (2016) 181.

¹¹⁹⁹ CCIA, Article 19(1).

¹²⁰⁰ CCIA, Article 18(1).

¹²⁰¹ CCIA, Article 18(2).

It would be useful to incorporate these considerations in Zimbabwe's investment regime, as current provisions on national treatment do not do so.¹²⁰²

(iv) Expropriation and compensation

Importantly, the CCIA provides for detailed protections against expropriation. In a framing similar to that contained in most BITs, Article 19(1) of the CCIA provides that except in the interest of the public, consistent with due process of law, on the payment of prompt adequate compensation and on a non-discriminatory basis; members states cannot expropriate or nationalise investments within their jurisdictions or adopt any measures which have a similar effect.¹²⁰³ This is consistent with Zimbabwe's BITs and its Constitution which are underpinned by the fundamental idea that expropriation is only possible when it is in the interest of the public,¹²⁰⁴ subject to the law and the payment of fair, prompt, adequate and effective compensation.¹²⁰⁵

Additionally, Article 20(2) speaks to the issue of the payment of fair compensation.¹²⁰⁶ Herein, it is prescribed that a fair market value of the property determined on the basis of the date of expropriation should be paid. Moreover, if payment is not paid immediately, a commercial interest is payable so that the investor receives the actual value at the time of expropriation.¹²⁰⁷ Eventually, when the payment is made, such proceeds must be made freely transferable so as to remove barrier to the movement of the proceeds.¹²⁰⁸

¹²⁰² For interest sake, it is worth noting that this provision is similar to the NT provision in the South African Act.

¹²⁰³ CCIA, Article 19(1).

¹²⁰⁴ Interest of the public would include issues such as public safety, public morality, public health, town/country planning, defence or any other purpose beneficial to the community.

¹²⁰⁵ See section 4.3.2.2.3 of this thesis. See also s 71(3) of the Constitution of Zimbabwe.

¹²⁰⁶ This is in a similar fashion to s 71(c) of the Constitution.

¹²⁰⁷ CCIA, Article 20(3) as read with Article 20(4).

¹²⁰⁸ CCIA, Article 20(5).

Notably, in terms of expropriation, the CCIA gives the host-state a wide discretion to regulate in the public interest. This is encapsulated in Article 20(8) which provides that, in terms of the right to regulate and customary international law:

‘[P]olice powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance public welfare initiatives, such as public health, safety and the environment, shall not constitute an indirect expropriation ...’¹²⁰⁹

This provision reinforces the new literature which favours an approach that leans towards reclaiming policy space through enforcing the right to regulate.¹²¹⁰

Notwithstanding the above, it is important to note that an investor still has rights under the domestic law of the host-state to seek judicial review or review under any other relevant body of that state.¹²¹¹ This is in line with customary international law which generally reserves such right to an investor affected by expropriation.¹²¹²

(v) *Full protection and security*

A fifth important obligation imposed on members is that related to the full protection and security of investments. While the CCIA does not expressly use the words full protection and security, it does, however, provide for the protection of investments by providing compensation for losses under circumstances generally protected by a full protection and security clause.¹²¹³ In this regard, Article 21 of the CCIA provides that:

‘COMESA investors whose investments in the territory of the Member States suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded treatment, as regards restitution,

¹²⁰⁹ CCIA, Article 20(8).

¹²¹⁰ See, for example, Titi C (2014) 32, Mouyal LW (2016) 199 & Sprankling JG *The International Law of Property* (2014) 272.

¹²¹¹ CCIA, s 20(9). It noteworthy to remember that the host-state has a duty to ensure that such a review is conducted promptly.

¹²¹² See section 2.3.4 of this thesis.

¹²¹³ A full protection and security clause provides protection to foreign investments in times of ‘civil violence’ or ‘strife’. See part 4.3.2.2.2 above.

indemnification, compensation or other settlement, not less favourable than which Member States accord to their own investors or to investors of any third State....¹²¹⁴

At present, a good number of Zimbabwe's BITs do not provide for the full protection and security standard. It is worth noting that, going forward, investment should be granted full protection and security. However, as discussed in chapter 4, such a provision must be couched as a 'physical protection and security' clause so as to limit its application and curb wide interpretations by tribunals.¹²¹⁵

(vi) *General exceptions, emergency safeguards and the right to regulate*

A hidden gem in the CCIA, with peculiar implications for the right to regulate, lies in Article 22 of the CCIA. This Article notes that, as a general exception, member states are allowed to design and enforce measures relating to the protection of national security and public morals, human, animal or plant life or health, environment, and any other measures determined by the CCIA Committee.¹²¹⁶ However, such measures cannot be enforced in a manner that unjustifiably or arbitrarily discriminates between investors or surreptitiously limit the free-flow investment.

In addition, Article 24 of the CCIA allows a host-state to take emergency safe-guards in order to protect itself from serious injury.¹²¹⁷ This could be when the domestic market is threatened by injury or even when it is suffering from such injury.¹²¹⁸ This is a significant plus in terms of the right to regulate as member states can take emergency safeguard measures, which are generally protectionist in nature, granted that the 14 day notification period with the CCIA Committee has been complied with.

Also, Article 25 of the CCIA allows a host-state to adopt measures to safeguard balance of payments. Amongst other things, this could involve restrictions on

¹²¹⁴ CCIA, Article 21(1). The state of emergency envisaged in this Article excludes natural disasters. See Article 21(3) of the CCIA.

¹²¹⁵ See part 4.3.2.2.3 above.

¹²¹⁶ CCIA, Article 22(1).

¹²¹⁷ CCIA, Article 24(1).

¹²¹⁸ CCIA, Article 24(1).

investment contrary to earlier noted protections.¹²¹⁹ As is clearly articulated above, the CCIA unequivocally promotes the rights to regulate, consistent with more modern trends, of allowing the host-state more policy wiggle-space. This provision is of great importance to Zimbabwe's investment regulatory regime which does not clearly articulate the importance of the right to regulate of the host-state.

(vii) *Dispute settlement*

The CCIA signifies a refreshing departure from the general norms in investor-state dispute settlement, a current topical issue.¹²²⁰ Article 28(1) of the CCIA provides that if a COMESA investor and a host-state cannot resolve a dispute amicably and in good faith, such dispute can be referred to a competent court in the host-state, to the COMESA Court of Justice in terms of the COMESA Treaty or could be referred for international arbitration under the ICSID or its rules; otherwise, the dispute has to be resolved under UNCITRAL Arbitration Rules.¹²²¹ Interestingly, once a claimant submits a claim in any one of these *fora*, they cannot resubmit the same claim in the other platforms.¹²²² Moreover, '[p]rocedural and sustentative oral hearing [are] open to the public'.¹²²³ Interestingly, arbitral tribunals also have to accept *amicus curae* submissions.¹²²⁴ The dispute settlement clause in the CCIA is therefore an interesting clause that is in sync with the developmental needs of the region.¹²²⁵ Zimbabwe's BITs generally provide an investor access to international arbitration mechanism. It would

¹²¹⁹ CCIA, Article 25(1). Safeguards on balance of payments may be taken, however, they must be done in accordance with s 25(3) of the CCIA. Section 25(3) provides that, such measure: (a) shall not discriminate amongst member states (b) should be consistent with Article III of the IMF Agreement (c) should desist from imposing unwarranted commercial, economic or financial harm to the interests of any other Member State (d) should sole be designed to secure the balance of payments and (e) should be of a temporary nature and should be scrapped of when the balance of payment problem is resolved.

¹²²⁰ See Baker & McKenzie *The Baker and McKenzie International Arbitration Yearbook 2014-2015* (2015) 15.

¹²²¹ CCIA, Article 28(1).

¹²²² CCIA, Article 28(3).

¹²²³ CCIA, Article 28(6).

¹²²⁴ CCIA, Article 28(8).

¹²²⁵ Muchlinski P (2010) 3.

be useful to include that future investment texts provide that investors can access international arbitration after the exhaustion of local remedies.

(viii) Enforceability of award and entry into force

Finally, when an award is granted, it is important to note that the host-state has to take appropriate measures to domesticate the final award so as to make it enforceable.¹²²⁶ This is as the Treaty came into force when it was signed by the first six members.¹²²⁷ Therefore, members have to comply with the provisions of the Treaty.

To sum up the discussion, the CCIA adopts an approach of trying to balance rights and obligations. This entails imposing obligations on the host-state such as MFN treatment, national treatment, compensation for expropriation, full protection and security and guidelines for dispute settlement. This is then balanced with the rights of the host state particularly through the implementation of the right to regulate in wide-ranging areas. This then makes the CCIA a forward thinking treatise for the promotion of intra-COMESA investments. The next section examines the SADC Finance and Investment Protocol (FIP) and the SADC Model BIT.

5.3.3 The Southern African Development Community

SADC was established by the SADC Treaty as an international organisation with its seat in Gaborone, Botswana.¹²²⁸ At present, SADC consists of 15 Member States,¹²²⁹ all of whom are committed to economic liberalisation of the region.¹²³⁰ The purpose of SADC is therefore, *inter alia*, to encourage, through co-operation, the free-flow of public and private investments in the region.¹²³¹ Article 21(3)(c) of the SADC Treaty

¹²²⁶ CCIA, Article 30.

¹²²⁷ CCIA, Article 37.

¹²²⁸ SADC Treaty, Article 2 as read with Article 3.

¹²²⁹ Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See Article 7 of the SADC Treaty as read with the Preamble.

¹²³⁰ SADC Treaty, Preamble.

¹²³¹ SADC Treaty, Article 2(i).

further notes the importance of members to co-operate in growing investment.¹²³² Article 22 of the SADC Treaty denotes that in promoting such co-operation, member states are obliged to create Protocols as the need arises.¹²³³ Following this recommendation, the SADC FIP was developed.

5.3.3.1 SADC Finance and Investment Protocol

The SADC FIP is a broad and binding document which details co-operation in numerous areas related to investment.¹²³⁴ Amongst other things, the SADC FIP aims to harmonise investment policies of member states and coordinate investment sectors so as curtail low levels of investment rampant in the region.¹²³⁵ To achieve this, the SADC FIP aims to create a favourable investment climate which can help grow investment in the region.¹²³⁶

The initial SADC FIP (2006 SADC FIP) was recently amended.¹²³⁷ This was because of its failure to balance the rights and obligations of investors and host parties. The 2006 SADC FIP had been biased in favour of investors offering antiquated provisions that were characteristic of first generation BITs. These provisions exposed member states to troublesome invest-state arbitral claims. The 2016 SADC FIP, to a greater degree, resolves most of these challenges.

This section will, therefore, detail and discuss the important provisions in the SADC FIP in the following order: (1) scope of application (2) expropriation and compensation (3) fair and equitable treatment (4) MFN treatment (5) general exceptions (6) transparency (7) repatriation of funds and transfer of profits (8) corporate social

¹²³² SADC Treaty, Article 21(3)(c).

¹²³³ SADC Treaty, Article 22(1).

¹²³⁴ See Article 22 of Annex 1 of the SADC FIP.

¹²³⁵ SADC FIP, Article 2(1) as read with Article 2(2) and the Preamble. See also Article 19 of Annex 1 of the SADC FIP. As noted in the Preamble that 'without effective policies on investment promotion, the Region will continue to be marginalised in terms of investment inflows and sustainable economic development'. See SADC FIP, Preamble.

¹²³⁶ SADC FIP, Article 2(2)(a). See also Article 3 of the SADC FIP.

¹²³⁷ See Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment.

responsibility (9) optimal use of natural resources (10) the right to regulate and (11) the settlement of disputes. In so doing, changes between the amended document and the original text will be discussed.

(i) *Scope of application*

The 2006 SADC FIP contained a problematic scope of application. Firstly, the definition of investment advanced was too broad and loosely fashioned. Article 1(1) of Annex 1 of the 2006 SADC FIP provided that an investment:

‘[M]eans the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes:

- (a) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (b) shares, stocks and debentures of companies or interest in the property of such companies;
- (c) claims to money or to any performance under contract having a financial value, and loans;
- (d) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trademarks, industrial designs and trade names;
- (e) rights conferred by law or under contract, including licenses to search for, cultivate, extract or exploit natural resources.¹²³⁸

The 2016 SADC FIP, however, narrows the definition of an investment. It adopts an enterprise-based definition as had been suggested by South Africa.¹²³⁹ This definition covers a similar list of assets, however, only when they are related to an enterprise within the host state.¹²⁴⁰ This definition is more precise than asset-based definitions which could have been used in the alternative.

¹²³⁸ Article 1(1) of Annex 1 of the 2006 SADC FIP.

¹²³⁹ The textual formulation of the provision is similar to the enterprise-based definition in Article 2 of the SADC Model BIT.

¹²⁴⁰ Parliamentary Monitoring Group ‘Summary of the Key Amendments to Annex 1 of the SADC Protocol on Finance and Investment’ available at pmg.org.za/files/150922summary.pdf (accessed 5 July 2017).

The 2006 SADC FIP defined an investor as ‘a person that has been admitted to make or has made an investment’.¹²⁴¹ Herein, a person was defined as a natural or justice person.¹²⁴² The challenge, however, is that this definition leaves a lot of unresolved issues. For instance, it did not address the issue of natural persons who have dual citizenship or companies that are not effectively managed in the country of incorporation. Despite these inherent weaknesses, the definition of an investor was meritable as it does not limit investors to those in a particular geographic region, for example, SADC Members, as is done in the CCIA.¹²⁴³

The 2016 SADC departs from the above approach. It moved from the all-inclusive coverage of investors to the exclusive coverage of SADC investors.¹²⁴⁴ This goes against the approach taken by countries such as South Africa in their domestic laws. Furthermore, this approach is problematic in that it reduces the stature of the SADC FIP as an instrument providing binding standards on investment in SADC for the benefit of all investors. Rather, it now extends protection to intra-SADC investments which are in all honesty, insignificant.

At this juncture, it becomes interesting to note that member states would also now have conflicting protection standards in their BITs, the SADC FIP and other RTAs such as the COMESA Agreement and the CCIA. For example, the SADC FIP eliminates fair and equitable treatment for intra-SADC investments, but member states would still need to provide such treatment to COMESA investors and investors under existing BITs. This creates a contradictory investment regime.

¹²⁴¹ 2006 SADC FIP, Article 1 of Annex 1.

¹²⁴² The definition of a company is also provided in Article 1 of Annex 1 of the 2006 SADC FIP.

¹²⁴³ Claypoole C ‘The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa’ available at <http://www.lexology.com/library/detail.aspx?q=e420a271-0395-4751-ada5-dcb985104307> (accessed 26 November 2016).

¹²⁴⁴ 2016 SADC FIP, Article 1 of Annex 1.

(ii) *Expropriation and compensation*

The 2006 SADC FIP guaranteed investors a Hull-based protection against expropriation. It was noted in Article 5 of Annex 1 of the 2006 SADC FIP that:

'Investments shall not be nationalised or expropriated in the territory of any State party except for a public purpose, under due process of the law, on a non-discriminatory basis and subject to the payment of **prompt, adequate and effective compensation**.¹²⁴⁵ [own emphasis added]

This protection was consistent with the Constitution of Zimbabwe and customary international law.

The 2016 SADC FIP provides a different and more detailed provision on expropriation.¹²⁴⁶ Instead of providing for a Hull-based formulation (fair, adequate and prompt compensation), it states that compensation should only be fair and adequate. It further provides for a less than market value compensation. This is determined by balancing the interests of those affected and the public, having regard to all relevant circumstances and taking into account, *inter alia* the current and past use of the property, the history of its acquisition, the fair market value of the acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment and the duration of the investment. This is line with the standard of compensation in s 25 of the South African Constitution and the Protection of Investment Act. It is however inconsistent with the market value compensation that is awarded in terms of customary international law.

The 2016 SADC FIP also deals with the issue of indirect expropriation. It provides that:

¹²⁴⁵ 2006 SADC FIP, Article 5 of Annex 1.

¹²⁴⁶ 2016 SADC FIP, Article 5 of Annex 1.

‘A measure of general application by a State Party that is designed and applied to protect and enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation’.

This safeguards the state’s right to regulate in the public interest. As discussed in chapter 4, indirect expropriation as a result of the exercise of the right to regulate has become a key issue in international investment law.

A final issue that was further raised under the 2016 SADC FIP was that of the right of the investor to seek review when their property is expropriated. The relevant provision reads:

‘The investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of the investor’s case and the valuation of the investment in accordance with the principles set out in this Article.’

This provision is vital in ensuring that investors’ property is not expropriated without just cause.

(iii) *Fair and equitable treatment*

Substantively also, the 2006 SADC FIP provided for the fair and equitable treatment standard.¹²⁴⁷ Like most of Zimbabwe’s BITs, however, the 2006 SADC FIP did not clarify the meaning of fair and equitable treatment or tie it to some international standard.¹²⁴⁸ This exposed members to potential litigious litigation on the basis of this standard which is often used as a ‘cure it all’ remedy by investors. Resultantly, the 2016 SADC FIP does not contain a clause on fair and equitable treatment. While the drafters could have opted to clarify the standard, they were of the view that the

¹²⁴⁷ 2006 SADC FIP, Article 6(1) of Annex 1.

¹²⁴⁸ See section 4.3.2.2.1 of this thesis.

provision failed to adequately balance investor protection and development policy space for host states.¹²⁴⁹

(iv) *MFN treatment*

Similar to most RTAs, the 2006 SADC FIP also extended MFN treatment to investors.¹²⁵⁰ Here, investors of a State Party may not be provided less favourable treatment than that which is provided to investors of any other third state.¹²⁵¹ This provision did not state, however, whether such treatment should be accorded in 'like circumstances'. Neither did it provide an indicative list of what can be considered to be like circumstances. Moreover, the 2006 SADC FIP was silent on whether MFN treatment was applicable to both pre-establishment and post-establishment. More importantly, this provision as discussed in chapter 4, leads to the problematic practice of treaty shopping.¹²⁵² It is against this background that the 2016 SADC FIP does not include this problematic provision. The omission of this provision as well as the fair and equitable treatment standard raises fresh questions on whether the quest for balancing rights and obligations of investors and host states significantly lowers protection and treatment standards for investors.

(v) *General exceptions*

In order to facilitate economic and social policies, the 2006 SADC FIP allowed members to apply differential treatment in certain instances. The exceptions were particularly with regard to the application of the fair and equitable treatment standard and MFN treatment. For example, subject to their domestic laws, State Parties could, in terms of their national development objectives, afford an investor or an investment preferential treatment.¹²⁵³ This approach of having an all-out general exceptions

¹²⁴⁹ 2016 SADCC FIP, Preamble.

¹²⁵⁰ Steger DP (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2010).

¹²⁵¹ 2006 SADC FIP, Article 6(2) of Annex 1.

¹²⁵² See part 4.3.2.1.1 below.

¹²⁵³ SADC FIP, Article 7(1) of Annex 1.

clause was similar to the one adopted in the CCIA. However, in most BITs, Zimbabwe's included, these exceptions are contained in the individual clauses.¹²⁵⁴

The 2016 SADC FIP does not have a general exceptions clause. Rather, the exception to grant preferential treatment has been integrated into the non-discrimination clause in Article 6(3).¹²⁵⁵ However, it is worth noting that this preferential treatment is now given as an exception to the newly included national treatment standard.

(vi) Transparency

While transparency is not a popular clause in Zimbabwe's BITs, the 2006 SADC FIP provided for it.¹²⁵⁶ It provided that in order to create confidence, trust and predictability, State Parties had to adopt transparent laws and policies related to investment.¹²⁵⁷ This provision was novel particularly when viewed from the prism that in the post financial crisis era, investors crave for certainty, which is in part established through transparency. As a result, the 2016 SADC FIP maintains this provision in Article 7.¹²⁵⁸ The only change is that Article 7 of the 2016 SADC FIP requires State Parties to notify the Secretariat within a period of 3 months of introducing provisions that affect the contexts of the SADC FIP.¹²⁵⁹

(vii) Repatriation of funds and transfer of profits

The rules on the repatriation of funds in the 2006 SADC FIP were slightly different to the ones contained in the COMESA Treaty or Zimbabwe's BITs.¹²⁶⁰ In these treaties, the repatriation of funds and transfer of funds is guaranteed. However, the 2006 SADC

¹²⁵⁴ See sections 4.3.2.1.1 and 4.3.2.2.1 of this thesis.

¹²⁵⁵ 2016 SADC FIP, Article 6(3) of Annex 1.

¹²⁵⁶ 2006 SADC FIP, Article 8 of Annex 1.

¹²⁵⁷ 2006 SADC FIP, Article 8 of Annex 1.

¹²⁵⁸ 2016 SADC FIP, Article 7 of Annex 1.

¹²⁵⁹ A similar provision was contained in Article 15(3) of the 2016 SADC FIP with regard to the restriction of capital movements.

¹²⁶⁰ See also Article 15 of Annex 1 of the SADC FIP that encourages the free movement of capital.

FIP provided that the repatriation of funds may be limited subject to the domestic law of the host-state when necessitated by economic constraints.¹²⁶¹

In the developing country context, where a state may be faced by numerous economic constraints, this provision is quite useful and novel. As a result, the 2016 SADC FIP maintains this provision. A notable change is however existent in the fact that an indicative list of what could qualify as economic constraint has been included. Herein, economic constraints are envisioned to include, but are not limited to; difficulties for balance of payment purposes, external financial difficulties and difficulties for macro-economic management including monetary policy or exchange rate policy. This list acts a safeguard against future abuse by host states.

(viii) Corporate responsibility

Uniquely, the 2006 SADC FIP afforded for investor obligations. To this end, Article 10 of Annex 1 of the SADC FIP affords that foreign investors should comply with domestic laws, policies, regulations and administrative guidelines.¹²⁶² This is unlike Zimbabwe's which do not provide for this as a result of their structural bias which leans towards more investor rights than obligations. Due to the novelty of this provision, the 2016 SADC FIP adopts the text of this provision verbatim in Article 8 which is couched as 'investor responsibility'.

(ix) Optimal use of natural resources and environmental measures

Article 12 of Annex 1 of the 2006 SADC FIP provided for the optimal use of natural resources. This provisions imposed an obligation on the host-state to guarantee that natural resources are used in a manner and form that is sustainable and environmental friendly. This was supplemented by Article 13 of Annex 1 of the 2006 SADC FIP which provided for domestic, health and safety measures. It stated that Member States had to ensure that investments made in their territory would not violate health, safety and

¹²⁶¹ 2006 SADC FIP, Article 15(2) of Annex 1.

¹²⁶² 2006 SADC FIP, Article 10 of Annex 1.

environmental measures.¹²⁶³ These provisions thus encouraged the Member States to act responsibly by ensuring that investments do not have an adverse effect on the natural environment. Accordingly, the 2016 SADC FIP contains similar provisions in Articles 10 and 11 of Annex 1, respectively.

(x) *The right to regulate*

The right to regulate is another key right of the state in investment law.¹²⁶⁴ As a result of the inherent invasive nature on foreign investment, it is incumbent upon host-states to exercise this right in accordance with their laws and regulations so as to ensure that the process is adequately controlled.¹²⁶⁵ Therefore, it is within the parameters of the powers of the host-state to only allow investments which they deem to be beneficial to their country. While there are many ways to assert this right, Lim argues that asserts that the exercise of this right should be done bearing in mind the right to property.¹²⁶⁶

What is particularly interesting is that the 2006 SADC FIP expressly provided for the right to regulate. Article 14 of Annex 1 of the 2006 SADC FIP states that a state could exercise its right to regulate in the interests of the public or when health, safety and environmental imperatives dictate.¹²⁶⁷ This provision has been maintained in the 2016 SADC FIP. This right should however to be understood from the prism that the exercise of the right to regulate should be viewed as forming part of the process of balancing the rights and obligations of investors and host states.¹²⁶⁸

(xi) *Settlement of disputes*

Where disputes arise, foreign investors generally enjoy the privilege of being able to use multiple *fora* at their disposal where they can settle their dispute.¹²⁶⁹ Article 28(2)

¹²⁶³ 2006 SADC FIP, Article 13 of Annex 1.

¹²⁶⁴ Sornarajah M *The International Law on Foreign Investment* (1994) 273.

¹²⁶⁵ See Mouyal LW (2016) 32.

¹²⁶⁶ Lim CL (2016) 117.

¹²⁶⁷ 2006 SADC FIP, Article 14 of Annex 1.

¹²⁶⁸ 2016 SADC FIP, Article 12(2) of Annex 1.

¹²⁶⁹ In terms of the SADC FIP investors also have the right to access courts as well as judicial and administrative tribunals. See Article 27(1) of Annex I of the 2006 SADC FIP.

of Annex 1 of the 2006 SADC FIP provided that the dispute could be referred to either the SADC Tribunal, the ICSID or under an international arbitrator or *ad hoc* tribunal established in terms of UNCITRAL rules.¹²⁷⁰ In cases where the parties failed to agree to any of these procedures after 3 months, the default position in terms of Article 28(3) of Annex 1 of the 2006 SADC FIP was that the dispute would be submitted for resolution under UNCITRAL rules.¹²⁷¹ As put forward by Claypoole, the ability of the investor to be able to initiate arbitration under ICSID or UNCITRAL rules is key as these are the prominent dispute resolution rules.¹²⁷² The SADC Tribunal, on the other hand, is a different story as earlier discussed, it lost its ability to influence investment conflicts after the *Mike Campbell* case.¹²⁷³

The 2016 SADC FIP makes a radical and dramatic drift from the above procedure. Investors can only access local courts and tribunals,¹²⁷⁴ while State Parties must approach the SADC Tribunal for state-state arbitration. The failure to include investor-state arbitration in the developing country context is particularly worrying in SADC context where local courts in countries such as Zimbabwe are notorious for losing their impartiality, at times, at the behest of political actors.

In summary, the 2016 SADC FIP imposes extensive rights and obligations on members as regards foreign investment. To a greater degree, it balances the interests of investors and state parties. However, this document raised fresh issues such as the lowering of treatment and protection standards as well as the implications of the failure to provide for investor-state arbitration. Some aspects of this document might need to be revisited in future so as to re-assess their practicality.

¹²⁷⁰ 2006 SADC FIP, Article 28(2) of Annex 1.

¹²⁷¹ SADC FIP, Article 28(3) of Annex 1.

¹²⁷² Claypoole C 'The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa' available at <http://www.lexology.com/library/detail.aspx?g=e420a271-0395-4751-ada5-dcb985104307> (accessed 26 November 2016).

¹²⁷³ See section 3.2.2 of this thesis.

¹²⁷⁴ See Article 26 of Annex 1 of the 2016 SADC FIP.

5.3.3.2 SADC Model BIT

In 2012, SADC published its Model BIT after an 18 months process driven by donor funding, particularly from the EU.¹²⁷⁵ The document was developed with the purpose that it would facilitate the overall objective of the SADC FIP – to harmonise the law and policy of Member States.¹²⁷⁶ The SADC FIP is entrenched in the public policy doctrine which sets out to establish BITs which promote sustainable development.¹²⁷⁷ The rationale behind such an approach is that FDI should have a developmental impact.¹²⁷⁸ To that effect, like new model BITs, it shifts ‘the focus of investment treaties from investment protection and seek to balance them against other interests, such as the environment, labour standards and other public interests’.¹²⁷⁹

The SADC Model BIT is, however, plagued by one major shortcoming. The challenge is that the Model BIT was only meant to be a template for creation of members’ own model BITs or to serve as the basis for future negotiations.¹²⁸⁰ As articulated in the introductory section of Model BIT, the document is ‘not intended to be and is not a legally binding document’.¹²⁸¹ This lessens the value that can be attached to document as states are not obliged to follow the template. However, such an approach steers away from the potential conundrum that could arise as a result of individual states having to agree to specific provisions.¹²⁸²

The SADC Model BIT is, however, a very detailed piece consisting of 37 Articles and 4 schedules. This is in sheer contrast to most BITs which consist of no more than 14

¹²⁷⁵ Ngulube P (ed) *Handbook of Research on Social, Cultural, and Educational Considerations of Indigenous Knowledge in Developing Countries* (2016) 31.

¹²⁷⁶ SADC Model BIT with Commentary, Introduction.

¹²⁷⁷ Martinez-Fraga PJ & Reetz RC *Public Purpose in International Law* (2015) 161.

¹²⁷⁸ Bjorklund AK *Yearbook on International Investment Law & Policy, 2013-2014* (2015) 54. One could find clarification in Article 1 of the SADC Model BIT which provides that the main objective of the Model BIT is to catalyse FDI in a manner that promotes sustainable development. This is also in line with the approach adopted in the SADC FIP. See Article 2 of the SADC FIP as read with the Preamble.

¹²⁷⁹ Schill SW, Tams CJ & Hofmann R (2015) 2015.

¹²⁸⁰ Woolfrey S ‘The SADC Model Bilateral Investment Treaty Template: Towards a New Standard of Investor Protection in Southern Africa’ 2014 *Tralac Trade Brief* 3.

¹²⁸¹ SADC Model BIT with Commentary, Introduction.

¹²⁸² Ngulube P (2016) 31.

Articles, in most instances. Further, the provisions are divided into 6 sections, namely, common provisions, investor rights post-establishment, rights and obligations of investors and state parties, general provisions, dispute settlement and final provisions. This section will therefore dwell on the provisions that are useful to Zimbabwe in developing its investment regime. In doing so, provisions in the Model BIT are sometimes measured the provisions in Zimbabwe's BITs and the SADC FIP and to a lesser extent, the CCIA.

The key provisions in this Model BIT will now be discussed under the following heading: (a) scope of application (b) the promotion and admission of investment (c) expropriation and compensation (d) fair and equitable treatment (e) non-discrimination: national treatment and general exceptions (f) repatriation of profits and transfer of funds (g) transparency (h) common obligations against corruption (i) investor liability (j) the right to pursue development goals (k) the right to regulate (l) corporate governance standards (m) obligations of states on the environment and labour standards (n) minimum standards for human rights, environment and labour and (o) dispute settlement.

(i) Scope of application

In response to the controversy surrounding the definition of investment, the SADC Model BIT provides various methods for this purpose. These options are presented as: (a) an enterprise-based definition (b) a closed-list asset based approach, and (c) an open-list asset based approach. The coverage of these definition varies.¹²⁸³

The enterprise-based definition is the least expansive definition. This is as, in addition to the indicative list of assets which maybe owned by the enterprise, the definition also

¹²⁸³ See commentary on investment in the SADC Model BIT.

contains exclusions. The enterprise-based definition, therefore, clearly provides the kind of assets of investment that are covered by the treaty.¹²⁸⁴

The asset-based definition takes a notional middle ground between the enterprise-based definition and the open-ended asset-based test.¹²⁸⁵ It provides for a closed list articulating assets defined as investments. However, most of these assets are subject to a wide interpretation by Tribunals.¹²⁸⁶ This is, however, not as problematic as the interpretations that can be attached to the open-ended asset based test which contains loose and wide language such as 'every asset'.¹²⁸⁷

Zimbabwe's BITs have followed the open-asset based test which is characterised by wide language.¹²⁸⁸ This creates a disjuncture between the definition of investment in BITs and policy making in Zimbabwe. Zimbabwe favours social policies and has been advancing towards sustainable development and therefore would be better served with an enterprise-based definition. South Africa, for example, in its PIA has adopted enterprise-based definition in line with the recommendation of the commentary to the SADC Model BIT. It is worthwhile to note that an enterprise-based definition would not mean 'other assets cannot be owned by foreign investors or foreign citizens ... , [r]ather it simply means that they will be protected through domestic law processes and not through international treaties'.¹²⁸⁹

In terms of the definition of an investor, the SADC Model BIT proposes a novel provision which addresses important issues such treaty shopping and dual nationality raised in chapter 4. Article 2 provides that an investor is either a natural person or juridical person.¹²⁹⁰ If the natural person is a dual citizen, then such person should be

¹²⁸⁴ See the commentary on Article 2 of the SADC Model BIT.

¹²⁸⁵ See the commentary on Article 2 of the SADC Model BIT.

¹²⁸⁶ See the commentary on Article 2 of the SADC Model BIT.

¹²⁸⁷ SADC Model BIT, Article 2.

¹²⁸⁸ See part 4.2 above.

¹²⁸⁹ See the commentary on Article 2 of the SADC Model BIT.

¹²⁹⁰ SADC Model BIT, Article 2.

predominantly resident in the host-state.¹²⁹¹ As regards juristic persons, such a company should be: legally incorporated in the host-state, effectively owned or controlled by a natural person in the host state and should have substantial business in the host-state. While the various states may vary the contents of this definition,¹²⁹² this definition is treats all the important issues and forestalls harmful practices.

(ii) The promotion and admission of investment

Article 3 of the SADC Model BIT addresses the promotion and admission of investment in a similar manner to the SADC FIP. It provides that 'State Parties shall promote and admit investments in accordance with their applicable law, and shall apply such laws in good faith'.¹²⁹³ This is consistent with Article 2(1) of Annex 1 of the 2016 SADC FIP. This preserves the sovereignty of the host state and is consistent with the right to regulate.

(iii) Expropriation and compensation

As with most investment instruments, the SADC Model BIT also provides for expropriation. Article 6(1) notes that investments cannot be expropriated or nationalised unless if: it is in the public interest, it is in accordance with due process of the law and fair and adequate compensation is paid within a reasonable time. This is consistent with the right to expropriate property under customary international law. This also accords with the hull rule and Zimbabwe's 2013 Constitution.¹²⁹⁴

Interestingly, three options are given for Article 6(2) on assessing what can be classified as fair and adequate compensation. The first option proposes there should be an equitable balance between the interest of affected parties and that of the public.¹²⁹⁵ In so doing, due regard must be given to the past and current use of the

¹²⁹¹ SADC Model BIT, Article 2.

¹²⁹² For example, the COMESA definition speaks to substantial operations and not effective control.

¹²⁹³ SADC Model BIT, Article 3.

¹²⁹⁴ See s 71 of the Constitution of Zimbabwe.

¹²⁹⁵ Article 6(2), Option 1, of the SADC Model BIT.

property, the fair market value of the property, the amount of profit made by the investor on the investment and all other relevant circumstances.¹²⁹⁶ The second proposes a fair value to be the market value of the property immediately before expropriation. However where necessary, the considerations discussed in the first option are also employed. Lastly, it is advanced that the market value at the date of expropriation be adopted without regard for other considerations (no valuation of damages).

Of these options, option 2 seems to be more favourable. This is mainly because it adopts a balancing approach that factors the competing interests. For example, the fair market value generally accorded in customary international law may be forgone so as to provide adequate compensation which is in the public interest. Furthermore, this option is consistent with Article 5(2) of the 2016 SADC FIP.

(iv) *Fair and equitable treatment*

The drafters of the SADC Model BIT included, with reservations, a clause on fair and equitable treatment.¹²⁹⁷ Their reservations are similar to the arguments raised in chapter 4 of this thesis that the fair and equitable treatment clause is a broad clause that is open to interpretation as has been evidenced in arbitral decisions.¹²⁹⁸ As a result, the SADC Model BIT sets out two options for dealing with the issue.

The first option proposes a clause on fair and equitable treatment which accords such treatment in line with customary international law.¹²⁹⁹ This is unlike the 2006 SADC FIP and most of Zimbabwe's BIT which provide for fair and equitable treatment without tying it to customary international law or any other international standards (for example, the minimum standard of treatment).

¹²⁹⁶ Article 6(2), Option 1, of the SADC Model BIT.

¹²⁹⁷ See Special Note on Article 5 of the SADC Model BIT.

¹²⁹⁸ See section 4.3.2.2.1 of this thesis.

¹²⁹⁹ Article 5, Option 1, of the SADC Model BIT.

The second option suggests an approach where fair administrative treatment is provided in the place of fair and equitable treatment.¹³⁰⁰ Pursuant to this provision, an investor is granted administrative rights which include the option to appeal or seek review for decisions.¹³⁰¹ This provision seeks to prevent arbitrary decision making in administrative, legal and judicial processes.

While both options are equally plausible, a measured analysis would reveal that a better approach would be to clarify what is meant by the phrase 'fair and equitable treatment'. This would ensure that there is greater clarity regarding the interpretation given to this clause. This is notwithstanding the fact that the 2016 SADC FIP no longer contains a clause on fair and equitable treatment.

(v) *Full protection and security*

The SADC Model BIT has an independent full protection and security standard. It states that foreign investments should receive protection not less than that which is afforded to domestic investors or other investors.¹³⁰² Furthermore, when there is civil war or strife, investors shall receive compensation, indemnification, restitution or any other statement which is not less than that which is afforded to investor of a third party.¹³⁰³ While the 2016 SADC FIP does not provide for this clause, the CCIA however makes provision for it. Also, most of Zimbabwe's BITs contain similar protections. However, the challenge noted in chapter 4 of the 'scope issue' regarding this clause therefore arise. A potential approach would be follow the South African Protection of Investment Act which accords such protection pursuant to the 'minimum standards of customary international law and subject to available resources and capacity'.¹³⁰⁴

¹³⁰⁰ Article 5, Option 2, of the SADC Model BIT.

¹³⁰¹ Article 5(3), Option 2, of the SADC Model BIT.

¹³⁰² Article 9(1) of the SADC Model BIT.

¹³⁰³ Article 9(2) of the SADC Model BIT.

¹³⁰⁴ Article 9 of the Protection of Investment Act.

(vi) *Non-discrimination: National treatment and general exceptions*

The SADC Model BIT contains a broad-ranging clause on non-discrimination. This provision covers issues discussed separately under the SADC FIP. Furthermore, it adds extra issues such as national treatment and omits others such as MFN treatment.

In relation to national treatment, the Model BIT states in Article 4(1) that:

'[E]ach State Party shall accord to Investors and their Investments treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory'.¹³⁰⁵

This provision provides formal equality between local and foreign investors. In addition, its application is clear as it is provided that such treatment applies to post-establishment as cleverly ensured by the language such as 'management, operation and disposition' in Article 4 of the SADC Model BIT as opposed to language such as 'establishment, acquisition and expansion'; in other treaties.¹³⁰⁶ This is unlike Zimbabwe's BITs¹³⁰⁷ which are unclear about this position. Moreover, 'like circumstances' are further explained in Article 4(2) of the Model BIT.¹³⁰⁸

General exceptions to national treatment are also covered in the SADC Model BIT. Article 4(5) of the Model BIT provides that:

'Nothing in this Article shall be construed to prevent a party from adopting or maintaining a measure that prescribes special formalities in connection with the Investments of Investors, such as a requirement that their Investments be legally constituted under the laws or regulations of the State Party, provides that such formality do not materially

¹³⁰⁵ SADC Model BIT, Article 4(1).

¹³⁰⁶ See the commentary on Article 4 of the SADC Model BIT. Also, Article 4 falls under post-establishment rights in the Model BIT.

¹³⁰⁷ See section 4.3.2.1.2 of this thesis.

¹³⁰⁸ SADC Model BIT, Article 4(2).

impair the protections afforded by a State Party to Investors of the State Party and their Investments pursuant to this agreement.¹³⁰⁹

Equally important is Article 4(4) of the Model BIT which states that:

‘Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or any other measures that may result from:

- (a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or
- (b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating.¹³¹⁰

In addition, the SADC Model BIT recommends in a similar fashion to the Canada-Tanzania BIT that qualifications be made to the national treatment clause by ‘scheduling a list of present and future non-conforming measures, sectors and activities which will be permanently excluded from the scope of the national treatment provision’.¹³¹¹

What is interesting, however, is the decision to leave out MFN treatment which is a prominent feature of Zimbabwe’s BITs as well as BITs in general.¹³¹² The argument as noted in the commentary to the SADC Model BIT is that MFN treatment does not fall squarely in the context of BITs as it has the unintended effect of multilateralisation.¹³¹³ The Drafting Committee of the SADC Model BIT noted that ‘the MFN provision has been very broadly, and on several occasions unexpectedly,

¹³⁰⁹ SADC Model BIT, Article 4(5).

¹³¹⁰ SADC Model BIT, Article 4(4).

¹³¹¹ Woolfrey S (2014) 5. See also the primary text in Article 4.3 of the SADC Model BIT.

¹³¹² It is fascinating to note that some countries such as China have opted to exclude the national treatment obligation as opposed to the MFN treatment clause. See Trakman L & Ranieri (2013) 235.

¹³¹³ See commentary on Article 4 of the SADC Model BIT.

interpreted in arbitrations, making it unpredictable in practice'.¹³¹⁴ The averments of the Drafting Committee are true in practice.¹³¹⁵

However, the challenge is that MFN treatment standard is a prominent feature of the BIT system.¹³¹⁶ Also, the omission of the MFN treatment standard creates a vacuum as regards the mechanism levelling the playing field between investors of different countries.¹³¹⁷ It is therefore recommended that Zimbabwe keep the MFN clause in its BITs, but limit it by clearly dealing with grey areas such as whether it applies to pre-establishment or to procedural obligations. This is validated by Article 9 on protection and security which provides that:

'A State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.'¹³¹⁸

Without any shadow of doubt, the provision makes reference to both national treatment and MFN treatment. Therefore, it may be more reasonable to clearly articulate and address the meaning, scope and implication of MFN treatment.

(vii) *Repatriation of profits and transfer of funds*

In terms of repatriation of profits and transfer of funds, the SADC Model BIT has a provision couched as the 'repatriation of assets'. Article 8(1) of the SADC Model BIT provides that each state party should accord investors of the other party the right to:¹³¹⁹

- (a) repatriate the capital invested and the Investment returns;
- (b) repatriate funds for repayment of loans;

¹³¹⁴ Commentary on Article 4 of the SADC Model BIT. This is consistent with the fact that MFN treatment was contained in the SADC FIP and not the Model BIT.

¹³¹⁵ See Pei C & Zheng W (2015) 15.

¹³¹⁶ De Mestral AD & Lévesque C (2013) 27.

¹³¹⁷ See generally Shan W (2011) 478.

¹³¹⁸ SADC Model BIT, Article 9.

¹³¹⁹ Article 8(1) of the SADC FIP.

- (c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase in of the investment capital;
- (d) remit the unspent earnings of expatriate staff of the Investment project;
- (e) any compensation to the Investor pursuant to this Agreement; and
- (f) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

The SADC Model BIT further specifies that transfers should also be permissible at the current market rate.¹³²⁰

Importantly, these rights to repatriate and transfer funds are not without limitations. Two limitations are imposed by Article's 8(3) and 8(4) of the SADC Model BIT. The former notes that:

'Notwithstanding the paragraphs 8.1 and 8.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) criminal or penal offenses and the recovery of the proceeds of crime;
- (d) financial reporting or record keeping transactions when necessary to assist law enforcement of financial regulatory authorities;
- (e) ensuring compliance with orders or judgements in judicial or administrative proceedings;
- (f) taxation;
- (g) social security public retirement or compulsory savings schemes;
- (h) severance entitlements of employees; and
- (i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.¹³²¹

¹³²⁰ Article 8(2) of the SADC FIP.

¹³²¹ Article 8(3) of the SADC Model BIT.

The latter, a safeguard provision, denotes that;

- (a) Where in the opinion of a State Party, payments and capital movements under this Agreements cause or threaten to cause serious
- (i) difficulties for balance of payments purposes,
 - (ii) external financial difficulties, or
 - (iii) difficulties for macroeconomic management including monetary policy or exchange rate policy, the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period not longer than 12 months if it considers such measures to be necessary.¹³²²

If the other State Party is concerned about the potential impact of the safeguard measure, they may, however, request the other party to engage in consultations with a view to review the measures and lessen their potential impact.¹³²³ While technically, the other state cannot prevent host-state from invoking or extending the safeguards, this process does create a certain level of accountability in terms of how this powers are exercised, thus curbing the potential for abuse.

The provision on the repatriation of assets is consistent with the COMESA CCIA, discussed earlier, as well as with other provisions in the Model BITs of countries like the USA and Canada.¹³²⁴ The only difference is that this provision puts across more clearly how exceptions on the general right to repatriate funds and transfer profits are dealt with. This allows a state a significant level of flexibility and well the space to execute domestic policy. Moreover, this provision is practically equipped to deal with prudential issues and crises such as the global economic crisis, making it a noteworthy tool in an investment policy toolbox.

¹³²² If more time is needed, consultations may be done, with a maximum additional time of 12 months allowed as an extension. See Article 8(4)(c) of the SADC Model BIT.

¹³²³ Article 8(4)(b) of the SADC Model BIT.

¹³²⁴ See the Commentary on Article 8 of the SADC Model BIT.

(viii) Transparency

The SADC Model BIT, similar to the 2016 SADC FIP, also provides for transparency. However, unlike the 2016 SADC FIP, it provides for two separate provisions on transparency. The first relates to contracts and payments.¹³²⁵ This obligation is primarily imposed on the investor and their investment. Article 18 of the SADC Model BIT provides that investors or their investments should make the public aware, in a timeous manner, of all contracts or rights to operate and investment that investor may have.¹³²⁶ Furthermore, such investor should make public all payments made to a government, including taxes, for the establishment or right to operate an investment.¹³²⁷ To further promote transparency, this information, as regards contracts and payments, should where possible be made publicly made accessible on the internet.¹³²⁸ Where there is sensitive information, such information can, however, be redacted.¹³²⁹ This provision is instructive particularly in the fight to combat corruption which is rampant amongst African states. It provides an additional 'information safety net' where malpractice is discouraged due the availability of information relating to investments and payments.¹³³⁰

The second transparency provision in the SADC Model BIT is in reference to transparency of investment information.¹³³¹ In contra-distinction to Article 18, Article 24 places the burden of transparency on the host-state. It requires a state to speedily publish or make accessible 'its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party'.¹³³² Furthermore, policies and administrative guidelines which may affect

¹³²⁵ See Article 18 of the SADC Model BIT.

¹³²⁶ Article 18(1) of the SADC Model BIT.

¹³²⁷ Article 18(2) of the SADC Model BIT.

¹³²⁸ Article 18(3) of the SADC Model BIT.

¹³²⁹ Article 18(5) of the SADC Model BIT.

¹³³⁰ This reinforces BITs themselves which are in themselves a mechanism of promoting transparency.

¹³³¹ See Article 24 of the SADC Model BIT.

¹³³² Article 24(1) of the SADC Model BIT.

investment should also be made public.¹³³³ The dual provision on transparency in the SADC Model BIT allows for the balancing of the rights and duties of investors and state parties.

(ix) Common obligation against corruption

A peculiar clause in the SADC Model BIT is the common obligation against corruption.¹³³⁴ This provision is geared towards stamping down corruption in investment transactions, a practice that is considered one of the most abhorrent in society. Article 10 of the SADC Model BIT prohibits investors and their investments from, directly or indirectly, attempting to bribe a public official or people in close proximity to such official (such as family or business associates) so as to receive permits, business licenses or contracts.¹³³⁵ In the strictest sense, aiding and abetting, incitement or conspiracy to commit such acts or incitement to perform such acts is prohibited.¹³³⁶ If the investor breaches this provision, it is, therefore, regarded as viewed as breach of the domestic laws of the host-state as regards the establishment of foreign investment and the investor concerned is liable for prosecution.¹³³⁷ This provision is very relevant particularly in the African context where corruption is rampant and unduly influences decision-making.¹³³⁸ It further reinforces the fight against corruption on the international scene in documents such as the United Nations Convention against Corruption (UNCAC).

(x) Investor liability

There is a new movement of having BITs and other investment regulations, not only contain investment protections, but also provide for obligations of investors and host-states. In this regard, the new draft Indonesian Model BIT, for instance, contains

¹³³³ Article 24(2) of the SADC Model BIT.

¹³³⁴ This is as in general, BITs do not provide for measures against corruption.

¹³³⁵ Article 10(1) of the SADC Model BIT.

¹³³⁶ Article 10(2) of the SADC Model BIT.

¹³³⁷ Article 10(3) of the SADC Model BIT as read with Article 10(4) of the SADC Model BIT.

¹³³⁸ According to the 2015 Corruption Perception Index, an estimated 40 out of 46 countries in Africa have a serious challenge in terms of corruption.

provisions such as principles of good governance, investor accountability, the right to achieve developmental goals, minimum standards for human rights, environment and labour and general exceptions related to public morals, health and the security of the state.¹³³⁹

In accordance with the central debate of holding both investors and host-states accountable, the SADC Model BIT provides for a clause on investor liability.¹³⁴⁰ It states that investors and their investments shall be subject to civil actions in accordance with the judicial process of their home-states.¹³⁴¹ Examples of where such action is possible include where; a commission or omission leads to significant damage, personal injury or loss of life in the host-state.¹³⁴² Where claims are brought forward, the host-state has to desist from placing any unnecessary legal hurdles to frustrate such claims.¹³⁴³ This clause would, therefore, be a beneficial addition to Zimbabwe's investment regime as it removes jurisdictional barriers that could impede the process of holding an investor liable.

(xi) *The right to pursue development goals*

In line with the thrust of the SADC FIP and other regional instruments, the SADC Model BIT provides for the right to pursue developmental goals.¹³⁴⁴ This means that states can grant preferential treatment in terms of the domestic laws to any enterprise so as to achieve national or subnational developmental goals.¹³⁴⁵ Examples of developmental goals include the creation of local entrepreneurs, increases in

¹³³⁹ See Draft Indonesian Model BIT.

¹³⁴⁰ See Article 17 of the SADC Model BIT.

¹³⁴¹ Article 17(1) of the SADC Model BIT.

¹³⁴² Article 17(1) of the SADC Model BIT.

¹³⁴³ Article 17(2) of the SADC Model BIT. Restrictions that can be place by a home-state include the *forum non convenience rule* which places a jurisdictional bar. See also Commentary on Article 17 of the SADC Model BIT.

¹³⁴⁴ See Commentary on Article 21 of the SADC Model BIT.

¹³⁴⁵ Article 21(1) of the SADC Model BIT.

employment levels, the development of human resource capacity and training, the creation of new technologies and the generation of new research.¹³⁴⁶

Article 21(3) speaks to a very critical aspect of developmental goals in Southern Africa, economic empowerment.¹³⁴⁷ It states that:

‘Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.’¹³⁴⁸

This provision is key especially in the Zimbabwean context as it grants validity to the indigenisation and economic empowerment policy which has wide effects on foreign investment. Article 21 of the SADC Model BIT, therefore, adds a unique perspective with regard to the need for a state to pursue an investment policy that allows developmental goals.

(xii) *The right to regulate*

Consistent with general principles of international law, customary international law and the SADC FIP, the SADC Model BIT provides for the right to regulate. Article 20(1) provides that a ‘state has a right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives’.¹³⁴⁹ Article 20(2) notes that apart from exceptional cases,¹³⁵⁰ the exercise of this right should, however, be done in a manner and form that balances the rights and obligations of hosts-states and investors.¹³⁵¹ Zimbabwe's BITs do not provide for the

¹³⁴⁶ Article 21(2) of the SADC Model BIT.

¹³⁴⁷ Countries like Zimbabwe, South Africa and more recently Namibia, have a strong economic empowerment thrust.

¹³⁴⁸ Article 21(3) of the SADC Model BIT.

¹³⁴⁹ Article 20(1) of the SADC Model BIT.

¹³⁵⁰ For instance, non-discriminatory measures taken in order to comply with other agreements. See Article 20(3) of the SADC Model BIT.

¹³⁵¹ Article 20(2) of the SADC Model BIT.

right to regulate. It is, therefore, imperative that moving forward, Zimbabwe's investment regime include the right to regulate. This is important for two main reasons. First, it ensures that Zimbabwe's investment regime is modernised and also conforms to a generally accepted right afforded in the SADC FIP. Second, the provision also compliments other rights of the state such as the right to pursue developmental goals which are currently topical in the 'balancing of investor and host-states' rights discourse'.

(xiii) Corporate governance standards

The SADC Model BIT also provides for the relatively new and under-utilised provision on corporate governance standards.¹³⁵² This provision is of practical importance as it deviates from the current practice of voluntary compliance with corporate governance to a duty of compliance.¹³⁵³ In a world where companies have caused significant challenges, with the most significant example being the 2008 global economic crisis triggered by the Lehman Brothers,¹³⁵⁴ it is paramount that foreign investments subscribe to practices of good corporate governance. More so, in the context where corporate governance has not been a key consideration, the addition of provision the Zimbabwean investment regime would work to improve corporate practices in the country.

(xiv) Obligations of states on environment and labour standards

The SADC Model BIT places an obligation on states to respect and promote environment and labour standards.¹³⁵⁵ Article 22(1) of the SADC Model BIT states that:

'Each State Party has the right to establish its own domestic environmental protection and developmental policies and priorities, and labour laws and standards and policies.

¹³⁵² See the 2015 Indian Model BIT and the 2012 Canadian Model BIT which included this provision.

¹³⁵³ Titi (2014) 110.

¹³⁵⁴ See Benner M (ed) *Before and Beyond the Global Economic Crisis: Economics, Politics and Settlement* (2013) 136.

¹³⁵⁵ Article 22 of the SADC Model BIT.

In the exercise of this right, each State Party shall strive to ensure that it provides for high levels of environmental and labour protection, taking into account internationally accepted standards, and shall strive to continue to improve their standards.

Article 22 (1) of the SADC Model BIT is reinforced by Article 22(2) which prevent the lowering of standards to attract investment. This is a binding version of a clause which first appeared in Chapter 11 of NAFTA in 1992.¹³⁵⁶ It provides that:

The State Parties recognise that it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation. Accordingly, the State Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment. If a State Party considers that the other State Party has offered such an encouragement, it may request consultations with the other State Party.

This provision is, therefore, adequately equipped to protect important standards related to labour and the environment. In the Zimbabwean context, the inclusion of such a provision would assist in promoting good environmental and labour practices by investors. This is particularly important given the fact that, in the past, foreign investors have not adhered to these practices. For instance, numerous Chinese companies have in the past been engaged in unfair labour practices.¹³⁵⁷

(xv) *Minimum standards for human rights, environment and labour*

Article 22 of the SADC Model BIT on the obligations of the state on environmental and labour standards is complimented by Article 12 on the minimum standards for human rights, environment and labour. Article 12(1) speaks specifically to human rights. It notes that investors have a duty to respect human rights in their workplaces and communities.¹³⁵⁸ Thus neither investors nor their investments can expressly or

¹³⁵⁶ Commentary on Article 22 of the SADC Model BIT.

¹³⁵⁷ Mapure C Chinese Investments in Zimbabwe and Namibia: A Comparative Legal Analysis 2014 *Centre for Chinese Studies, Stellenbosch University* 17-20.

¹³⁵⁸ Article 15(1) of the SADC Model BIT.

complicity breach these rights.¹³⁵⁹ This accords with corporate duty to respect human rights proposed by Professor John Ruggie, UN Secretary-General Special Representative on Business and Human Rights.¹³⁶⁰ This provision is particularly important because human rights are yet to be included in Zimbabwe's BITs despite the modern discourse on including human rights in investment instruments.¹³⁶¹

(xvi) Dispute Settlement

The SADC Model BIT astoundingly contains 5 provisions on dispute settlement. These Articles focus on state-state dispute settlement,¹³⁶² investor-state dispute settlement,¹³⁶³ interpretive statement of state parties,¹³⁶⁴ governing law in dispute settlement¹³⁶⁵ and the service of documents.¹³⁶⁶ While much of these clauses are drawn from other treaties such as the CCIA, the provisions on dispute settlement are too bulky. Most of Zimbabwe's BITs, at present, provide for fairly detailed dispute settlement clauses including both state-state arbitration and investor-state arbitration. The discussion rather should be on whether investor-state arbitration should be included at all. This discussion was undertaken at great length in chapter 4.¹³⁶⁷

5.4 CONCLUSION

In conclusion, this chapter has shown that Zimbabwe has obligations from regional instruments such as those of the AU, COMESA and SADC. These obligations relate to the promotion of investment, the scope of application, fair and equitable treatment,

¹³⁵⁹ Article 15(1) of the SADC Model BIT.

¹³⁶⁰ See Commentary of Article 15 of the SADC Model BIT.

¹³⁶¹ See Dumberry P and Aubin GD 'How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?' available at <https://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/> (accessed 16 January 2016). See also Gatto A *Multinational Enterprises and Human Rights: Obligations Under EU Law and International Law* (2011), Mouyal LW (2016) 140 & *Transnational Corporations and Human Rights* (2006) 74-160.

¹³⁶² Article 28 of the SADC Model BIT.

¹³⁶³ Article 29 of the SADC Model BIT.

¹³⁶⁴ Article 30 of the SADC Model BIT.

¹³⁶⁵ Article 31 of the SADC Model BIT.

¹³⁶⁶ Article 32 of the SADC Model BIT.

¹³⁶⁷ See part 4.3.3 above.

expropriation and compensation, repatriation of funds and transfer of profits, MFN treatment, general exceptions, transparency, corporate social responsibility, the optimal use of natural resources, the right to regulate and the settlement of disputes. While most of these are recognised in Zimbabwe's investment regime, a couple of these obligations are not provided for.

The discussion also showed that in addition to the obligations from binding instruments, important considerations can also be found in the non-binding instruments. The prime example in this case was the SADC Model BIT. It was shown that this Model BIT contains numerous provisions which could be useful in reforming Zimbabwe's investment regime. These provisions include those on corruption, investor liability, the right to pursue developmental goals, corporate governance standards, the right to regulate and minimum standards for human rights, environment and labour. The next chapter compares Zimbabwe's regulatory framework on investment to that of Turkey, Ghana and Tanzania.



CHAPTER 6

A COMPARISON OF ZIMBABWE'S DOMESTIC FDI REGULATORY FRAMEWORK WITH THAT OF TURKEY, GHANA AND TANZANIA

*'Life is constantly teaching us that we are mirrors of one another and no one is an island'*¹³⁶⁸

6.1 INTRODUCTION

Investment codes, policies and institutions have grown, not only in number, but also in form. These variances are usually explained by differences in economic policies and needs of the governments.¹³⁶⁹ Furthermore, the contents are also informed by whether or not the country is a developed or developing country.¹³⁷⁰ As mentioned in chapter 1, investment frameworks of developing countries tend to be wider than those of developed countries. This chapter compares the investment framework in Zimbabwe against those of other developing countries, specifically; Turkey,¹³⁷¹ Tanzania and Ghana. It builds on the work undertaken in chapter 3 of this thesis.¹³⁷² Structurally, it looks at the investment frameworks in Turkey, Tanzania and Ghana, respectively. After which, a comparison between the four countries is conducted. To sum up the discussion, a conclusion is then furnished.

¹³⁶⁸ The quote above is by Auliq Ice, an author from Chicago. It reminds us that there is so much that we can learn from others. Moreover, we are all but the same.

See Ice A 'The Law of the Universe' available at <https://www.goodreads.com/book/show/24472593-the-law-of-the-universe> (accessed 10 July 2017).

¹³⁶⁹ Biglieri E & Prati G *Encyclopaedia of Public International Law* (2014) 248.

¹³⁷⁰ Sornarajah M (2010) 23-4.

¹³⁷¹ Interestingly, while most economist place Turkey as a developing country, some are of the view that it is a developed country.

¹³⁷² See part 1.6 above for the reasons why these countries were selected.

6.2 THE TURKISH FRAMEWORK

6.2.1 Introduction

The main focus of this section is to lay out the framework of the regulation of foreign investment in Turkey. The section is structured as follows. First, a background with regard to foreign investment in Turkey is provided. Here, two issues are presented; namely: the status of FDI in Turkey is presented and the openness to and restriction on foreign investment. Second, Turkey's institutional framework relating to FDI is furnished. On this aspect, five institutions are discussed. Lastly, the legal framework which governs foreign investment is presented.

6.2.2 Background issues

6.2.2.1 Status of FDI in Turkey¹³⁷³

Turkey receives a significant amount of FDI each year onto its shores. For the most part, it is viewed by investors as a sound investment destination. This view is reinforced by the figures on foreign investments in Turkey. In terms of foreign companies establishing their presence in the Republic, Turkey has had a growing number. Between 1954 and 2010, 25 000 foreign companies set up operations. This number surged to 49 095 by March 2016, representative of an increase of 24 000 in the last half a decade. The challenge, however, is that foreign investors are gravitating towards the wrong fields.¹³⁷⁴ More specifically, 82% of the foreign investors are

¹³⁷³ It is important to note that there is a significant dearth in the source materials, particularly scholarly articles, for Turkey as well as for Ghana and Tanzania. As a result, for figurative data and new developments, much reliance will be placed on online sources. While on the other hand, for facts and referral materials, pointers will be given to reports, scholarly books and any other relevant documents.

¹³⁷⁴ Cetingulec M Foreign Investment in Turkey Rising, But Not The Type It Needs' available at <http://www.al-monitor.com/pulse/originals/2016/06/turkey-foreign-companies-increase-shrink-in-size.html> (accessed 23 January 2017).

engaged in non-productive fields as compared to the 8% who are participating in the manufacturing sector.¹³⁷⁵

To balance this view, the actual sums invested should also be taken into consideration. According to the official figures on the website of the Investment Support and Promotion Agency of Turkey (ISPAT), Turkey receives significant foreign investments. The investment inflows according to the 2015 World Investment Report make Turkey the biggest destination for FDI in West Asia.¹³⁷⁶ The challenge, however, is that these FDI inflows have not been consistent. For example, in 2010 Turkey had FDI inflows of USD 9 billion, which then rose to USD 16.1 billion in 2011, and then plummeted to USD 13.2 billion in 2012.¹³⁷⁷

Recently, the changing political climate in Turkey has also had an effect on foreign investment. An attempted coup by the military on state institutions in numerous key areas such as Ankara and Istanbul has forced investors to be wary about the risks of investing in Turkey.¹³⁷⁸ This was further exacerbated by a recent distrust of the certainty of the law and Turkey's involvement in the Syrian war and recent terrorist attacks in Turkey which threaten the security of investments. As a result, foreign investment inflows for 2016 plunged by at least 50 per cent as compared to similar periods in the previous year.¹³⁷⁹

¹³⁷⁵ Most of these foreign investors are engaged in wholesale and retail commerce. Another smaller section is invested in the real estate sector.

¹³⁷⁶ UNCTAD 'World Investment Report 2015: Reforming International Investment Governance' available at http://ec.europa.eu/finance/capital/third-countries/bilateral_relations/index_en.htm (accessed 13 June 2016).

¹³⁷⁷ Investment Support and Promotion Agency of Turkey 'FDI in Turkey' available at <http://www.invest.gov.tr/en-US/investmentguide/investorsguide/Pages/FDIinTurkey.aspx> (accessed 23 January 2017).

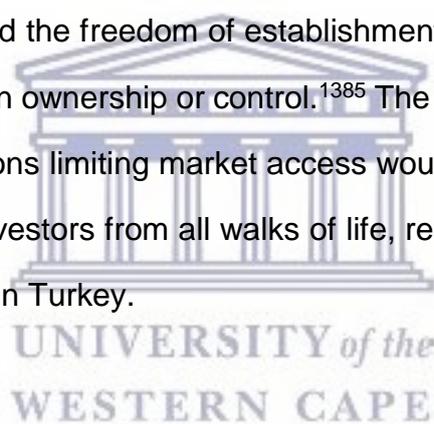
¹³⁷⁸ See Shafak E 'After Turkey's Failed Coup, A Sense of Fatalism Has Set In' available at <https://www.theguardian.com/world/2016/dec/21/turkey-failed-coup-fatalism-president-erdogan-crackdown-liberals-secularists> (accessed 24 February 2017).

¹³⁷⁹ See Cetingulec M 'Where has Turkey's Foreign Direct Investment Gone?' available at <http://www.al-monitor.com/pulse/en/originals/2016/10/turkey-foreign-investments-hit-bottom.html> (accessed 23 January 2016).

6.2.2.2 Openness to and Restriction on Foreign Investment

Turkey is the 7th largest economy in Europe and 18th largest economy in the world. With an average growth rate of around 8.81% (2015 figures) and an USD 800 billion dollar economy, Turkey makes a compelling case as an investment destination.¹³⁸⁰ This is further supported by the liberal investment regime which the government has adopted as a measure of catalysing FDI inflows.¹³⁸¹ However, Turkey has not fared well in terms of ease of doing business. For instance, in 2016 Turkey had an ease of doing business score of 69.16, placing it at number 55 out of 189 economies surveyed.¹³⁸² Resultantly, Turkey's government has taken a number of measures to improve the investment climate.¹³⁸³

First of all, it has guaranteed the freedom of establishment.¹³⁸⁴ This entails that there are no restrictions on foreign ownership or control.¹³⁸⁵ The rationale behind this is that any sector-specific restrictions limiting market access would contradict the provisions of WTO Regulations.¹³⁸⁶ Investors from all walks of life, regardless of their nationality are therefore free to invest in Turkey.



¹³⁸⁰ Ministry of Foreign Affairs, Republic of Turkey 'Economic Outlook of Turkey' available at <http://www.mfa.gov.tr/prospects-and-recent-developments-in-the-turkish-economy.en.mfa> (accessed 24 January 2017).

¹³⁸¹ International Business Publications *Turkey Mineral and Mining Sector Investment and Business Guide* (2007) 73.

¹³⁸² World Bank Group 'Doing Business 2016: Measuring Regulatory Quality and Efficiency' 13 ed A World Bank Group Flagship Report. A higher ease of doing business score serves as evidence that the regulatory environment is geared towards the setting up of new enterprises. Key indicators used in developing this ranking included the protection of property rights and the important laws affecting businesses in an economy.

¹³⁸³ See International Business Publications *Turkey Energy Policy, Laws and Regulations Handbook Vol 1: Strategic Information and Basic Laws* (2015) 107.

¹³⁸⁴ See generally Aydin-Düzgüt S & Tocci N *Turkey and the European Union* (2015) 143.

¹³⁸⁵ See International Business Publications *Turkey Oil, Gas Sector Business and Investment Opportunities Year Book: Strategic Information, Regulations, Contracts* (2016) 242.

¹³⁸⁶ U.S. Department of State '2015 Investment Climate Statement – Turkey' available at <https://www.state.gov/e/eb/rls/othr/ics/2015/241775.htm> (accessed 24 February 2017).

Furthermore, foreign investors are also able to acquire property.¹³⁸⁷ This includes land as well as industrial and commercial buildings. However, such acquisition is subject to the condition that the home-country of the investor applies the principle of reciprocity.¹³⁸⁸ This is representative of a limitation on ownership and a restriction on the free movement of capital. Despite this shortcoming, once investments are made, they are protected against expropriation.¹³⁸⁹ Expropriation of property can only take place in exceptional instances where the expropriation is for a public purpose, non-discriminatory and in accordance with due process of the law.¹³⁹⁰

In addition, since 2001, the government has also undertaken reforms to improve the investment climate. On the functional front, the government has embarked on progressive democratic and economic reforms. More specific to investment, the government has also embarked on the Reform Program for the Improvement of the Investment Climate.¹³⁹¹ The aim of this program was to streamline and modernise the current legal, administrative and regulatory framework on foreign investment.¹³⁹² Later on, this program would partner with a sister project of the EU titled 'Towards Improving the Investment Climate in Turkey: Comments on the YOIKK Reform Process'.¹³⁹³ Structurally, the government also established the Investment Advisory Council of Turkey (IAC) with the mandate of furnishing an international perspective to Turkey's investment reform agenda.¹³⁹⁴

¹³⁸⁷ See Turkey's Foreign Direct Investment Law. See also Oxford Business Group *The Report: Turkey 2012* (2012) 146. Before the implementation of this law in 2003, the 1934 Turkish Property Act placed a legal barrier on the foreign ownership of property in Turkey.

¹³⁸⁸ Togan S *Economic Liberalisation and Turkey* (2010) 44.

¹³⁸⁹ See Article 46 of the Turkish Constitution.

¹³⁹⁰ See International Business Publications Turkey Company Laws and Regulations Handbook vol 1 (2009) 223.

¹³⁹¹ Herzberg B *Investment Climate Reform- Going the Last Mile: The Bulldozer Initiative in Bosnia and Herzegovina* (2004) 30.

¹³⁹² Hoekman BM & Togan S *Turkey: Economic Reform and Accession to the European Union* (2005) 31.

¹³⁹³ See European Union Twinning Project for Turkey 'Towards Improving the Investment Climate in Turkey: Comments on the YOIKK Reform Process' Overall Report and Conclusions, September 2006.

¹³⁹⁴ International Business Publications *Turkey Investment and Business Guide: Strategic and Practical Information* vol 1 (2013) 13.

Notwithstanding the positives of the current measures to open up Turkey to foreign investments, there are however challenges when investing in Turkey. Most notably, investors are exposed to endemic corruption, excessive bureaucracy, shaky property rights, a slow judicial system, inadequately developed infrastructure, high and inconstantly applied taxes, weak corporate governance, government red tape, unpredictable decision making at the local government level, weak law enforcement and frequent changes in the legal and regulatory environment.¹³⁹⁵

6.2.3 Institutional Framework

According to Karaagac, the reform of the legal and institutional structure of the state in Turkey has taken a dual form.¹³⁹⁶ The first focused on the elimination of inter-state conflicts on neo-liberal reforms. This he points out was addressed by constitutional amendments on privatisation and internationalisation. The second form focused on building a more intimate relationship between the state and capital. On this matter he notes that institutions were set up by the government to manage this relationship. Most notably, the government established the IAC, the Coordination Council for the Improvement of the Investment Environment (YOIKK) and Investment Support and Promotion Agency of Turkey (ISPAT). In time, these institutions were also complemented by others as the investment climate reforms ensued. These institutions governing foreign investment in Turkey will now be discussed, albeit in no order of importance.

6.2.3.1 Coordination Council for the Improvement of Investment

YOIKK was established in December 2001 by the Decree on Improving the Investment Environment in Turkey aimed at showcasing the resolve of the government to support

¹³⁹⁵ Export.gov 'Turkey – Openness to and Restriction on Foreign Investment' available at <https://www.export.gov/article?id=Turkey-Openness-to-Investment> (accessed 23 January 2016). See also U.S. Department of State 'Department of State: 2014 Investment Climate Statement' available at <https://www.state.gov/documents/organization/228639.pdf> (accessed 24 January 2017) 2.

¹³⁹⁶ Karaagac B (ed) *Accumulation, Crises, Struggles* (2013) 212.

the reform process.¹³⁹⁷ This Decree was a cog in the wheel of the Turkish government's broader strategy on enhancing the business climate, refining competitiveness and boosting productivity. YOIKK consists of high level delegates from both the public and private sectors.¹³⁹⁸ In terms of reporting structure, YOIKK accounts to the Undersecretariat of the Prime Ministry.¹³⁹⁹

The task of YOIKK is two-fold: (a) to facilitate critical reforms and (b) to review the legal framework governing foreign investment.¹⁴⁰⁰ In terms of reviewing the legal framework, much focus has been placed on streamlining business regulations. While in terms of spearheading critical reforms, YOIKK has focused on:¹⁴⁰¹ (i) identifying the main obstacles to market entry and doing business on the basis of the practical experience of private sector operators; (ii) achieving a consensus within the public and between the public and private sectors on reform priorities; (iii) taking leadership in setting specific performance targets and an associated timetable; and (iv) providing a platform for accountability on reform policies.

To promote efficiency and practicality, YOIKK is managed by 12 technical committees. These committees promote business climate reforms in the following areas: employment, corporate governance, licensing, small and medium-sized enterprises, licensing, legislation of FDI, research and development (R & D), location of investment, investment promotion, taxation and incentives, intellectual property rights and foreign trade and customs.¹⁴⁰²

¹³⁹⁷ Hoekman BM & Togan S (2005) 286.

¹³⁹⁸ See Stevenson L *Private Sector and Enterprise Development: Fostering Growth in the Middle East and North Africa* (2010) 251.

¹³⁹⁹ Sak G 'Investment Policy Framework for Turkey in the Twenty-First Century' 2014 *Economic Policy Form Working Paper* 9.

¹⁴⁰⁰ OECD *OECD Economic Surveys: Turkey* 2010 (2010) 129

¹⁴⁰¹ Gönenç R & Rawdanowicz L 'Regulatory Reforms to Unlock Long-Term Growth in Turkey' 2010 *OECD Economics Department Working Papers No 821* 23.

¹⁴⁰² See Cebeci A 'New Institutions of Reform Process; Investment Advisory Councils' 2010 *Scientific Papers of the University of Pardubice, Series D, Faculty of Economics and Administration* 35-36.

YOIKK is a very useful organisation and has as a result enjoyed a fair amount of success. Amongst other achievements, it has managed to successfully create a considerable amount of investment legislation. This is particularly important bearing in mind the intention of Turkey to accede to EU law which requires domestic laws to be consistent with it.¹⁴⁰³ Moreover, at least 56% of its recommendations on company registration, the recruitment of foreign nationals, FDI and labour have been implemented.¹⁴⁰⁴

6.2.3.2 The Investment Advisory Council

As part of its 'Turkish model of restructuring', the Turkish government set up the IAC in 2004.¹⁴⁰⁵ The IAC is tasked with the charge of infusing an international perspective to Turkey's investment climate reform strategies and works closely with YOIKK to meet this mandate.¹⁴⁰⁶ The organisation includes numerous executives from key MNCs and organisations such as the World Bank, European Investment Bank (EIB) and IMF, as well as captains of industries in the private sector NGOs.¹⁴⁰⁷

The IAC which is chaired by the Prime Minister meets annually to brainstorm on Turkey's investment climate reforms and advise the government accordingly.¹⁴⁰⁸ The recommendations of the IAC are held in the highest regard. Every year the government provides feedback on the progress made in implementing recommendations of the previous year. To date, measures have been taken to begin the challenging work recommended by the IAC on 'simplifying the tax regime; strengthening corporate governance; reducing administrative and bureaucratic

¹⁴⁰³ See Hoekman BM & Togan S (2005) 286. The most important laws developed out of these process is the Foreign Direct Investment Law No. 4875 of 2003.

¹⁴⁰⁴ Jacobs SH & Coolidge JG 'Reducing Administrative Barriers to Investment: Lessons Learnt' (2006) 19.

¹⁴⁰⁵ Ozsumer et al *Turkey Real Estate Year Book 2007* (2007) 28.

¹⁴⁰⁶ See section 6.2.2.2 of this thesis.

¹⁴⁰⁷ Leitner J & Meissner H (ed) *State Capture, Political Risks and International Business: Cases from Black Sea Region Countries* (2016).

¹⁴⁰⁸ International Business Publications (2013) 31.

barriers; accelerating the privatisation program and; reforming the social security system'.¹⁴⁰⁹

6.2.3.3 Investment Support and Promotion Agency of Turkey

ISPAT is Turkey's official investment promotion and support entity. It was incorporated by Law no 5523 as a legal entity with its own financial and administrative autonomy but reporting to the office of the Prime Minister.¹⁴¹⁰ ISPAT is one of the success stories of YOIKK, which serves as a beacon of Turkey as international destination for foreign investments.¹⁴¹¹

The main functions of the Agency are provided for in Article 3 of Law no 5523 as follows:

- 
- (a) To designate and to implement, in cooperation with development agencies and other relevant institutions, investment support and promotion strategies at an international level;
 - (b) To coordinate and support investment and promotion activities carried out at an international level by public institutions and corporations, development agencies and private sector organisations;
 - (c) To undertake planning and presentation of information and guidance for investors; to provide, in cooperation with development agencies, information and guidance services that may be required by the investor during pre/current/post investment stages;
 - (d) To perform and conclude license approval formalities;¹⁴¹²

¹⁴⁰⁹ Great Britain: Parliament, House of Commons and Business and Enterprise Committee *Keeping the Door Wide Open: Turkey and EU Accession, Seventh Report of Session 2007-08, Oral and Written Evidence* vol 2 (2008) 134.

¹⁴¹⁰ See Article 1 of Law no 5523 (Law for the Incorporation of the Investment Support and Promotion Agency of Turkey).

¹⁴¹¹ Terterov M & Rosenblatt P *Turkey: A Business and Investment Review* (2006) 24.

¹⁴¹² Key to note that ISPAT usually deals with investments in excess of USD 50 million, however, depending on the contribution to the local economy, lesser sums can be considered.

- (e) To predict the impediments and problems likely to be encountered by investors and to make attempts for solutions to these problems;
- (f) To develop or to collect from relevant institutions and corporations all kinds of information and data which will contribute to increase investments in Turkey, and to arrange updating and distribution of such information, and to cooperate with national and international organisations on this subject;
- (g) To make attempts before the relevant authorities to provide designation of necessary policies which will increase the level of effectiveness of investment support and promotion activities, (ğ) To contribute to reform processes aimed at the improvement of investment climate, and to launch offers within this scope;
- (h) To provide technical and financial support to national and international conventions; seminars and similar other meetings on the subjects relating to its functions, and to ensure continued participation in such organisations;
- (i) To issue and to support issuance of printed matters and electronic publications in Turkish and other foreign languages providing details of the Agency's tasks;
- (j) To perform other duties vested upon it by law.

The detailed list above provides an in-depth insight into the exact functions of ISPAT.¹⁴¹³ ISPAT goes beyond the traditional facilitation of investment done by other promotion agencies, but it also engages in follow-ups on investments. This is attributable to its unique philosophy it coined as the 'before, during and after' service approach.¹⁴¹⁴ Furthermore, it plays a collaborative role by supporting other institutions such as YOIKK and the IAC.

To aid the execution of its tasks, ISPAT is divided into 4 main service units. These are the Directorate of Investment Promotion Services, Directorate of Investor Services,

¹⁴¹³ Law no 5523 also detail other functional and procedural issues related to ISPAT such as the function of the board, the duties of the President, its consultancy and advisory services, however, these are not pertinent to the discussion at hand.

¹⁴¹⁴ Korkmaz A 'Agency of Change' in *The Oil and Gas Year: Turkey 2010* (2010) 22.

Department of Collaboration with Developmental Agencies and Department of Public-Private Sector Collaboration.¹⁴¹⁵ This division of work aids in spreading the footprint of ISPAT as well as in increasing public awareness about investment related issues.¹⁴¹⁶

6.2.3.4 The Undersecretariat of Treasury

The Undersecretariat of Treasury is an 'institution accepted as a pioneer in ensuring economic development and a model in institutional governance'.¹⁴¹⁷ Its main function is to regulate and supervise financial, economic and sectorial policies. As a result of its mandate, its functions also extend to FDI. In terms of the Foreign Direct Investment Law No. 4875 (FDI Law), the Undersecretariat of Treasury (the Undersecretariat) is granted power to act as a supervisory authority for the establishment of liaison offices by foreign companies provided they don't engage in commercial activities.¹⁴¹⁸ Article 6 of the Regulation on the Implementation of the FDI Law stipulates:

'The Undersecretariat is authorized to grant permits and extend such permits to companies established in accordance with laws of foreign countries to open liaison offices in Turkey, provided that they do not carry out commercial activities in Turkey.'¹⁴¹⁹

It is important to note that the final establishment is, however, subject to the approval of the Ministry of Economy. This facility represents an excellent investment vehicle for foreign investors to enter into the Turkish market. It gives them an opportunity to undertake critical work such as market research and sector-related information

¹⁴¹⁵ See Article 7 of Law no 5523 as read with the Official Gazette of 4 July 2011 Pursuant to the Repeated Issue of the Decree Law Nr. 644.

¹⁴¹⁶ See International Business Publications *Turkey Business Law Handbook* (2013) 108.

¹⁴¹⁷ Undersecretariat of Treasury 'Vision, Mission and Values' available at <http://www.treasury.gov.tr/en-US/Pages/Vision-Mission-Values-> (accessed 26 January 2016).

¹⁴¹⁸ Article 3(h) of the FDI Law. Liaison offices will be further discussed in the next section on the legal framework.

¹⁴¹⁹ Article 6 of the Regulation on the Implementation of the FDI Law.

gathering. The Undersecretariat, therefore, plays a very important and unique role in the promotion of FDI in Turkey.

6.2.3.5 General Directorate of Incentive Implementation and Foreign Investment

The General Directorate of Incentive Implementation and Foreign Investment (Directorate) is an entity that reports to the Ministry of Economy.¹⁴²⁰ The organisation is responsible for promotion activities related to ‘bringing foreign capital into Turkey, permission, registration, granting of incentives to investors, cancelling permission certificates and registrations, within the framework of [the] Decree’.¹⁴²¹ It is also involved in organisation and coordination of build-to-operate programs in instances where high technology is needed or the project is resource intensive.

Some of its other duties include the amendment of data forms and the issue of Permit Certificates.¹⁴²² Provisional Article 1 of Article 11 of the Regulation notes with relation to Permit Certificates that:

‘The General Directorate is authorized to deal with the Investment Permit Certificates issued in accordance with Foreign Investment Encouragement Law No: 6224 and Foreign Investment Framework Decree that was put into effect by Council of Ministers’ Decree No: 95/6990 on 7 June 1995 and the Communique concerning this Decree, until the investments involved are finalized and provided that the acquired rights are uphold.’¹⁴²³

The Directorate is, therefore, also an important part of the institutional mechanism dealing with foreign investment in Turkey. Its ability to offer incentives to investors to investors is also very instructive.

¹⁴²⁰ International Business Publications *Turkey: Doing Business and Investing in Turkey Guide: Strategic and Practical Information* vol 1 (2009) 69.

¹⁴²¹ International Business Publications *Turkey Privatisation Programs and Regulations Handbook: Strategic Programs, Regulations and Opportunities* (2015) 209.

¹⁴²² See Article 11 of the Regulation & Provisional Article 1 of Article 11 of the Regulation.

¹⁴²³ Provisional Article 1 of Article 11 of the Regulation.

Despite the multiplicity of investment institutions in Turkey, these institutions function well together. While they each have their core competence area, they however assist each other. For instance, the other bodies all contribute to the reform process conducted by YOIKK. The next section will now detail the legal framework on foreign investment.

6.2.4 Legal framework

The FDI Law and its Regulation form the backbone of the domestic legal framework on FDI in Turkey. They are read with numerous other pieces of legislation such as the Encouragement of Investment and Employment Law No. 5084, the New Turkish Commercial Code No. 6102 (New TCC), and other laws and sub-regulations related to sectorial investments which have a bearing on foreign investments.¹⁴²⁴ However, this section only discusses the FDI Law and its Regulation as they are the most authoritative documents regarding the governance of foreign investment in Turkey.

6.4.2.1 Foreign Direct Investment Law No. 4875

The enactment of the FDI Law in Turkey was one of the main successes in the formative years of YOIKK.¹⁴²⁵ It replaced the Foreign Investment Promotion Law No. 6224 (the Old Law) which had governed foreign investments in the preceding era. The Old Law had been ineffective in promoting investment, largely due to how it dealt with ownership rights of foreign investors.¹⁴²⁶ The new FDI Law was, therefore, a fitting successor as it broadly underscored the need to open up the investment environment by eliminating bureaucratic barriers holding back investment.¹⁴²⁷

¹⁴²⁴ See for example, Law on Competition, Execution and Bankruptcy Law and the Turkish Code of Obligations.

¹⁴²⁵ In the broader sense, it was part of the continued efforts to reform the investment climate pursuant to the 2001 Decree on Improving the Investment Environment in Turkey.

¹⁴²⁶ Sadik G *American Image in Turkey: U.S. Foreign Policy Dimensions* (2009) 55.

¹⁴²⁷ The new FDI Law abrogates the Old Law.

6.4.2.1 The aim of the FDI Law

The purpose of the FDI Law, briefly put, is to: (i) regulate the encouragement of investments, (ii) protect foreign investor's rights, (iii) define investor and investment in line with international standards (iv) create a notification system for FDI rather than one which screens and approves FDI, and (v) increase FDI through established policies.¹⁴²⁸

6.4.2.2 Definitions: investor and investors

Article 2 of the FDI Law furnishes a definition of an investor which distinguishes between legal and juristic persons.¹⁴²⁹ It states that a foreign investor is any real person who possesses foreign nationality or a Turkish national who is resident abroad.¹⁴³⁰ This is interesting because it views citizens resident in other countries as foreign investors. In the same vein, the FDI Law provides that an investor could also be a foreign legal entity established under the laws of foreign countries and institutions. The challenge, however with Article 2 of the FDI Law is that it does provide clarity as to how dual citizens will be treated. Neither does it propose mechanisms of dealing companies that are effectively managed (or have a seat of control) in another country.¹⁴³¹

In terms of what constitutes an investment, the FDI Law first defines FDI. It advances that FDI is the establishment of a new company or branch of a foreign company by a foreign investor or the acquisition of shares of a company.¹⁴³² An indicative list of assets of such a company is then provided.

¹⁴²⁸ Article 1 of the FDI Law.

¹⁴²⁹ Article 2 of the FDI Law.

¹⁴³⁰ Article 2(a) of the FDI Law.

¹⁴³¹ See section 4.5.1.2 for a discussion on the definition of an investor.

¹⁴³² Article 2(b) of the FDI Law note these as: reinvested earnings, revenues, financial claims, or any other investment-related rights of financial value; commercial rights for the exploration of natural resources.

This definition of an investment is similar to a stock definition of an investment in BITs. In the same vein, the definition of an investor is in many respects substantially similar to the definition furnished in most IIAs. It is without doubt one can, therefore, easily note that the definitions of an investor and investment in the FDI Law have been made consistent with international standards.¹⁴³³

The FDI Law also tackles important principles relating to FDI.¹⁴³⁴ These include; the freedom of investment, national treatment, expropriation and nationalisation, the guarantee of transfer, access to real estate, dispute settlement, the employment of expatriates, the establishment of liaison offices and the valuation of non-cash capital. These will now be discussed below.

6.4.2.3 Freedom of Investment and National Treatment

Under the FDI Law, foreign investors are guaranteed the freedom of investment, which is a cornerstone principle in any liberal investment system.¹⁴³⁵ This guarantee is particularly important especially when viewed from the context of Turkey's upcoming accession to the EU, where this guarantee is a fundamental freedom.¹⁴³⁶ The freedom of investment is also complemented by the equal treatment principle (national treatment principle). This ensures that foreign investors are afforded the same treatment as domestic investors.¹⁴³⁷ Pursuant to this principle, only a few sector specific exceptions remain as impediments to the free establishment of enterprises in Turkey.¹⁴³⁸ Notable, however, is the absence of an MFN provision in the FDI Law. This

¹⁴³³ Neeta B *Handbook of Research on Higher Education in the MENA Region: Policy and Practice* (2014) 112.

¹⁴³⁴ See Article 3 of the FDI Law.

¹⁴³⁵ Article 3(a)(1) of the FDI Law.

¹⁴³⁶ See Article 49 of the Treaty on the Functioning of European Union (TFEU).

¹⁴³⁷ Article 3(a)(2) of the FDI Law.

¹⁴³⁸ See International Business Publications *Gas Sector Business & Investment Opportunities Yearbook* (2007) 91. It is important to note these principles are available to investor's subject only to the provisions of international agreements or special agreements.

follows a similar approach to the SADC Model BIT, for example, which provides for national treatment to the exclusion of MFN treatment.¹⁴³⁹

6.4.2.4 Expropriation and nationalisation

The general rule is that investments cannot be nationalised or expropriated unless such expropriation or nationalisation is for a public purpose and the expropriation takes place upon payment of compensation and in accordance with due process of the law. This is generally consistent with the Turkish Constitution which provides that the right to property may only be limited in the view of public interest.¹⁴⁴⁰ It makes a distinction between expropriation and nationalisation. The Constitution further notes that expropriation should be done subject to the payment of compensation in advance while nationalisation should be carried out on the basis of real value. Both of these should, however, be done in accordance with the law.¹⁴⁴¹

In the context of Turkey where property rights have been inconsistently applied, the provision for expropriation and nationalisation in the FDI Law represents a crystallisation of the will of the state to protect property rights of foreign investors and shows the intention to implement the Constitution as regards property rights. The provision could, however, have been improved by providing how the compensation should be determined.

6.4.2.5 Transfers

In terms of the FDI Law, foreign investors can freely transfer abroad: 'profits, dividends, proceeds from the sale or liquidation of all or any part of an investment, compensation payments, amounts arising from license, management and similar agreements, and reimbursements and interest payments arising from foreign loans

¹⁴³⁹ See section 5.3.3.2(vi) of this thesis.

¹⁴⁴⁰ Article 35 of the Constitution of the Republic of Turkey, 1982.

¹⁴⁴¹ Article 46 of the Constitution of Turkey as read with Article 47.

through banks or special financial institutions'.¹⁴⁴² This codifies the guarantees for the repatriation of capital and the transfer of profits, fees, and royalties in Turkey's BITs such as the Turkey-US BIT.¹⁴⁴³

This allowance by the FDI Law for the free transfer of capital and the repatriation of profits is an essential guarantee for investors. Investors want to know whether they will be able to transfer their profits or receive proceeds from a partial/full disinvestment. Turkey's open system for the movement of capital, however, makes it a country of concern to the Financial Action Task Force (FATF)¹⁴⁴⁴ due to its inadequate measures on terrorist financing.¹⁴⁴⁵

6.4.2.6 Access to real estate

The FDI Law contains a unique provision on access to real estate. This provision introduces a new dispensation with regard to the acquisition of real estate by foreign nationals. Herein, companies are free to 'acquire real estate or limited rights in rem through a legal entity established or participated by foreign investors in Turkey, provided such acquisition are permitted for Turkish citizens'.¹⁴⁴⁶

To further improve access, an amendment to the conditions of obtaining Turkish citizenship published in the Government Gazette on the 12th of January 2017 provides that foreign nationals who purchase property of at least USD 1 million, make a capital investment of at USD 2 million, have deposited USD 3 million in a bank account for at least 3 years or have created 100 jobs or more in Turkey are eligible for citizenship.¹⁴⁴⁷

¹⁴⁴² Article 3(c) of the FDI Law.

¹⁴⁴³ See Article 4 of the Turkey-US BIT.

¹⁴⁴⁴ The FATF is a global body responsible for setting standards for antimoney laundering (AML) and combating the financing of terrorism (CFT). See Gardner KL 'Fighting Terrorism the FATF Way' (2007) 13 *Global Governance* 326 & Heng YK & Mc Donagh K 'The Other War on Terror Revealed: Global Governmentality and the Financial Action Task Force's Campaign Against Terrorist Financing' (2008) 34 *Review of International Studies* 555.

¹⁴⁴⁵ See FATF Public Statement – Advisory Warning No.1 of 2010 (31 March 2010).

¹⁴⁴⁶ Article 3(d) of the FDI Law.

¹⁴⁴⁷ See the Regulation on the Amendment of the Regulation on the Implementation of the Turkish Citizenship Regulation. See further Turkish Citizenship Law Act No. 5901.

This new dispensation represents a significant departure from the previous practice where foreign citizens faced tumultuous barriers when attempting to acquire property under the 1934 Turkish Property Act. More so, the fact that investors are offered incentives for making significant property purchases is also heart-warming. Turkey has, therefore, made significant strides to ensure that foreign investors have access to real estate.

6.4.2.7 Dispute settlement

Like most documents on investment law, the FDI Law contains a clause on dispute settlement. It states that where disputes arise from Investment Agreements or from public service concessions concluded with foreign investors, these disputes can be settled either by authorised local courts, national or international arbitration or any form of legitimate dispute settlement.¹⁴⁴⁸ While the clause on dispute settlement provides the options for recourse available to investors, it, however, lacks significant detail similar to that found in BIT dispute settlement clauses. In addition, the clause fails to address numerous important issues, most of which are procedural. For instance, the clause does not stipulate after how long a dispute can go unresolved before it is submitted for settlement.¹⁴⁴⁹ Neither does it specify which Arbitration Rules find application (for example, UNCITRAL Rules or ICSID Rules).¹⁴⁵⁰ The lack of attention to detail of the dispute settlement clause makes it open to interpretation. There is therefore a need to rework this clause to make it more practical.

6.4.2.8 Valuation of non-cash capital

A provision on the valuation of non-cash capital is uncommon in investment law and perhaps unique to the Turkish system. It provides that:

¹⁴⁴⁸ Article 3(e) of the FDI Law.

¹⁴⁴⁹ See Article 12(6) of the Turkey-Colombia BIT.

¹⁴⁵⁰ See, for example, Article 8(2) of the Turkey-Netherlands BIT.

'Non-cash capital is valued within the regulations of Turkish Commercial Law. In case that stocks and bonds of companies residing abroad are used as foreign capital share of foreign investors, the values determined by the relevant authorities in the home country, or by the experts designated by the courts of the home country, or any other international institutions performing valuations will be accepted.'¹⁴⁵¹

Despite its novelty, the valuation of non-cash capital clause is a non-essential clause which deals with a matter that could have easily been treated in other laws or regulations. In the context of an investment code, its role is significantly questionable. The FDI Law could have addressed more important principles relating to foreign investments such as full protection and security or fair and equitable treatment.

6.4.2.9 Employment of expatriates

Another commonly used provision which is provided for by the FDI Law is the employment of expatriates (entry and sojourn of personnel as known in other circles) clause.¹⁴⁵² The provision notes that the responsibility to issue working permits of foreign investors vests with the Ministry of Labour and Social Security.¹⁴⁵³ Such appointments are to be made in accordance with the Law on Foreign Personnel Working Permits No. 4817. The main purpose of this provision is therefore to establish a legal regime under which foreign workers can work or undertake activities connected to an investment in Turkey for a foreign investor.¹⁴⁵⁴ The strength of this provision is that it broadly allows the foreign investor to bring in any expatriates whom they feel will add value to their business. This is unlike similar clauses in BITs and RTAs which restrict expatriates to key technical and managerial personnel.¹⁴⁵⁵ However, such safeguards are necessary tools for protecting the domestic job market and creating jobs for the indigenous people.

¹⁴⁵¹ Article 3(h) of the FDI Law.

¹⁴⁵² See Collins D (2016) 228.

¹⁴⁵³ Article 3(g) of the FDI Law.

¹⁴⁵⁴ See generally Klabbers J (eds) *International Law Documents* (2016) & Brown C (2013) 420.

¹⁴⁵⁵ See chapters 4 and 5 of this thesis.

6.4.2.10 Liaison offices

The provision allowing for the establishment of liaison offices in the FDI Law is perhaps the most forward thinking in the FDI Law. As earlier noted, it allows foreign companies with the permission of the Undersecretariat to establish a liaison office which does not engage in commercial activities.¹⁴⁵⁶ This provides foreign investors an opportunity to scope the market, network and gain a deeper understanding of the investment climate in which they are investing. Furthermore, it enables the various institutions dealing with investment to build relations with the investor. However, this avenue also has the potential to be abused by foreign investors. For instance, the offices may be used by a foreign investor to engage in corrupt activities such as 'greasing the wheel' to get favours from authorities. The office could even be used by foreign governments to send their operatives to perform intelligence gathering activities, under the guise of investment. Like most good things, the liaison office is also susceptible to such misuse.

6.4.2.11 Determination of policies and data collection

Other than the issues canvassed so far, the FDI Law also speaks to the determination of policies and data collection. Herein, the Undersecretariat is assigned the mandate of determining the general framework concerning FDI. In this regard, the enactment or amendment of any piece of legislation pertaining to FDI would require the consent of the Undersecretariat. This gives the Undersecretariat vast power in determining the course of FDI reform in Turkey making it one of the foremost important institutions dealing with FDI.

6.4.2.12 Other provisions

The FDI Law also speaks to other functional issues pertaining to its implementation. The first point it makes is that all investments established under the Old Law are now subject to FDI Law. Just as importantly, it notes that the Old Law has been repealed

¹⁴⁵⁶ Article 3(h) of the FDI Law.

and that the FDI Law will be implemented through its Regulations. Lastly, it is noted that the FDI Law came into force on the date of publication and that its enforcement vests with the Council of Ministers.

6.4.2.13 Remarks on the FDI Law

It is remarkable to note that the principles canvassed in the FDI Law do not only speak to generally accepted issues such as national treatment and dispute settlement, but they also speak to local issues such as access to real estate and the establishment of liaison offices. This bears the hallmark of a proprietary domestic process driven by YOIKK, to generate home-grown investment reforms to Turkey's investment challenges.

Furthermore, the FDI Law, to a greater degree, succeeds in streamlining administrative processes. Stellar examples can be found in the departure from screening and pre-approval procedures when establishing a new investment to the notification of investments,¹⁴⁵⁷ as well as the elimination of all minimum capital and share transfer requirements. This success can largely be attributed to the law's shift from an 'ex-ante control to a promotion and facilitation approach with minimal ex-post monitoring to continuously improve an investor-friendly climate for growth and success'.¹⁴⁵⁸

However, as noted earlier, the FDI Law does not tackle other important issues relating to foreign investment. For instance, it fails to provide for fair and equitable treatment (or fair administrative treatment), the physical security of property or the right to regulate which are found in the South African Protection of Investment Act and other

¹⁴⁵⁷ Mostly, regulatory authorities supervise and monitor the activities of foreign investors and determine whether they are in line with regulations. See International Business Publications Turkey *Oil, Gas Sector Business and Investment Sector Opportunities: Strategic Information, Regulations, Contacts* (2016) 243.

¹⁴⁵⁸ Doing Business With Turkey 'New Foreign Direct Investment Law and What New About the Law?' available at http://doingbusinesswithturkey.com/foreign_direct_investment_law.htm (accessed 28 January 2016).

Codes.¹⁴⁵⁹ Neither does it deal with emerging issues in foreign investment law such as human rights, labour rights, sustainable development, corporate governance, corporate social responsibility, environmental standards and investor liability. While these issues have generally not been treated in BITs, they are of vital importance.¹⁴⁶⁰ They reflect the changing face of international investment law and envisage the new mantra of balancing the rights and obligations of investors and host-states. Despite these shortcomings, on the whole, the FDI Law has left an indelible mark with regard to how Turkey regulates foreign investments.

6.4.2.2 Regulation for Implementation of FDI Law

The Ministry of State issued the Regulation in the Official Gazette No 25205 of 20 August 2003. The Regulation deals with 6 main issues, namely, the data sharing protocols between authorities and institutions, the kind of data which can be requested from companies and branch offices, the establishment of liaison offices, the governance of liaison offices, application documents and general miscellaneous provisions.¹⁴⁶¹ The Regulation does not make any substantive contribution to how FDI is governed. As with any regulation, its main function is to implement its parent act, the FDI Law.¹⁴⁶²

6.3 THE TANZANIAN FRAMEWORK

6.3.1 Introduction

At an African level, Tanzania has taken great strides to improve its investment climate over the years. This has been driven by a dedicated policy on foreign investment, an investment code and several institutions enhancing investment, including an investment promotion centre. This section will discuss Tanzania's framework on FDI.

¹⁴⁵⁹ See Article's 6, 9 & 12 of the Protection of Investment Act.

¹⁴⁶⁰ Model BITs such as the SADC Model BITs are starting to include these provisions.

¹⁴⁶¹ See Article's 4-13 of the Regulation.

¹⁴⁶² See Article 1 of the Regulation.

Structurally, the section will first canvass the background issues. Thereafter, the three institutions governing and promoting foreign investment are reviewed. Finally, the legal framework on foreign investment in Tanzania is analysed.

6.3.2 Background issues

6.3.2.1 Status of FDI in Tanzania

Tanzania has generally fared well in terms of FDI inflows. In recent years, it has received the largest share of FDI in East Africa.¹⁴⁶³ However, at a continental level, the success of Tanzania in attracting FDI has been modest. According to the 2016 Africa Investment Report of the Financial Times, Tanzania is placed in 10th position in terms of FDI by project numbers in 2015.¹⁴⁶⁴ With regard to FDI by capital, Tanzania failed to make it into the first 10 spots in the same period.¹⁴⁶⁵

Tanzania's current performance in terms of FDI inflows is, however, commendable given its historical background. For instance, in 1992, Tanzania only had an FDI inflow of USD 12 million.¹⁴⁶⁶ This figure grew to USD 517 million by 1999 and now currently stands at USD 1.532 billion.¹⁴⁶⁷ This is despite a drop of 25% in FDI inflows in 2014 amounts due to stressed commodity prices. With the recent discovery of natural gas, the hope is that foreign investment in Tanzania will continue to grow. This is as in 2015, coal, oil and natural gas topped African capital investments with a combined

¹⁴⁶³ 'FDI' available at <http://www.tanzaniainvest.com/fdi> (accessed 2 February 2016).

¹⁴⁶⁴ 2016 Africa Investment Report of the Financial Times. Tanzania had a total of 20 projects, up 25% from the preceding period. The countries that exceeded the project levels in Tanzania were: Uganda (20), Côte d'Ivoire (26), Ethiopia (27), Mozambique (29), Ghana (40), Nigeria (51), Egypt (59) Morocco (71), Kenya (85) and South Africa (118).

¹⁴⁶⁵ UNCTAD 'World Investment Report 2015: Reforming International Investment Governance' available at http://ec.europa.eu/finance/capital/third-countries/bilateral_relations/index_en.htm (accessed 13 June 2016). The top 10 countries by capital investment in 2015 were Egypt (USD 14.5 billion), Nigeria (USD 8.6 billion), Mozambique (USD 5.1 billion), South Africa (USD 4.7 billion), Morocco (USD 4.5 billion), Côte d'Ivoire (USD 3.5 billion), Angola (USD 2.7 billion), Kenya (USD 2.4 billion), Senegal (USD 1.9 billion) and Cameroon (USD 1.8 billion).

¹⁴⁶⁶ Lema NC & Dimoso R Foreign Direct Investment and Economic Growth in Tanzania: The Granger-Causality Analysis (2011) 22 *Uongozi Journal of Management and Development Dynamics* 24.

¹⁴⁶⁷ UNCTAD 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 28 September 2017) 197.

sum of USD 15.7 billion.¹⁴⁶⁸ Moreover, the growth of known coal reserves from 1.5 billion tonnes to 5 billion tonnes will also assist to attract the much needed foreign investment.¹⁴⁶⁹

6.3.2.2 Openness to and Restriction on Foreign Investment

Generally, the Tanzanian government has been very receptive to FDI.¹⁴⁷⁰ This is represented by the USD 18.43 billion FDI stock which the country currently has.¹⁴⁷¹ The main drive behind this reception has been the government's policy to actively pursue FDI through measures such as the streamlining of procedural requirements and the provision of tax incentives.¹⁴⁷² Investors in productive and extractive sectors, for example, are eligible to receive 100% capital expenditure deductions.

These reforms have also been complemented by numerous structural and economic reforms. To this end, many foreign investors have commented that the business climate in Tanzania has significantly improved.¹⁴⁷³ However, the country still needs to implement more reforms in order to improve its competitiveness.¹⁴⁷⁴ According to the 2016 Doing Business Report prepared by the World Bank, Tanzania is ranked 139th out of 189 countries in terms of the ease of doing business.¹⁴⁷⁵

¹⁴⁶⁸ 2016 Africa Investment Report of the Financial Times.

¹⁴⁶⁹ Santander 'Tanzania: Foreign Investment' available at <https://en.portal.santandertrade.com/establish-overseas/tanzania/investing-3> (accessed 2 February 2017).

¹⁴⁷⁰ U.S. Department of State 'Tanzania Investment Climate Statement 2015' available at <https://www.state.gov/documents/organization/244606.pdf> (accessed 2 February 2017) 4.

¹⁴⁷¹ UNCTAD 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 28 September 2017) 201.

¹⁴⁷² World Bank *Tanzania: Country Brief* (2011) 30.

¹⁴⁷³ U.S. Department of State 'Tanzania Investment Climate Statement 2015' available at <https://www.state.gov/documents/organization/244606.pdf> (accessed 2 February 2017) 4.

¹⁴⁷⁴ The country needs to further industrialise, improve compliance with legislation and address concerns relating to the environment. Furthermore, socialist attitudes which still linger infuse suspicion in administrators about the kind of investment that is been let into the country. This in turn causes slow decision making and ineffectiveness. See generally International Monetary Fund *United Republic of Tanzania: Ex-Post Assessment of Longer-Term Program Engagement* (2006).

¹⁴⁷⁵ 2016 Doing Business Report by the World Bank.

Investment opportunities in Tanzania are considerably diversified. Most foreign investors, however, gravitate towards mining (39%), manufacturing (22%), tourism (13%) and agriculture (7%).¹⁴⁷⁶ Despite most investors opting for the afore-mentioned sectors, foreign investors are allowed to fully own businesses in almost any type of business in any sector. When foreign investors invest in EPZs, they are granted preferred benefits.¹⁴⁷⁷

Furthermore, land laws have also been amended to allow foreign companies to have long-term access to land through the issue of 99 year leases. This addressed one of the challenges noted by the OECD Investment Policy Review of Tanzania that the government should increase land tenure for agricultural investors.¹⁴⁷⁸ However, despite this progress, the process of obtaining land tenure can be extremely lengthy and tedious for both foreign and domestic investors alike.¹⁴⁷⁹ There is, therefore, still more room to improve Tanzania's openness to investment.

6.3.3 Policy framework

The policies in Tanzania have not always been investor centred. For instance, after an unsuccessful period of promoting a market economy between 1961 and 1967, Tanzania initiated the Arusha Declaration launching the African Socialism Programme (Ujamaa).¹⁴⁸⁰ As a result of this program, exports were severely restricted, trade was tightly controlled and numerous private companies were nationalised.¹⁴⁸¹ These

¹⁴⁷⁶ Lema NC & Dimoso R (2011) 24. These statistics are based on 2003 figures. The structure of the economy has, however, not changed since then.

¹⁴⁷⁷ World Bank (2011) 30.

¹⁴⁷⁸ See OECD Investment Policy Reviews: Tanzania 2013 available at <https://www.oecd.org/daf/inv/investment-policy/IPR-Tanzania-2013-Overview-Progress-Policy-Challenges.pdf> (accessed 28 September 2017).

¹⁴⁷⁹ See generally, Kibugi R et al *Enabling Legal Frameworks for Sustainable Land-use Investments in Tanzania: Legal Assessment Report* (2015) 35.

¹⁴⁸⁰ Mkwandire T *African Intellectuals: Rethinking Politics, Language, Gender and Development* (2005) 197.

¹⁴⁸¹ OECD Investment Policy Reviews: Tanzania 2013 available at <https://www.oecd.org/daf/inv/investment-policy/IPR-Tanzania-2013-Overview-Progress-Policy-Challenges.pdf> (accessed 28 September 2017).

policies led to depressed investment levels as investors were uncertain about the future of their investments.

To stimulate investment, particularly in the agricultural sector, the government introduced the National Economic Survival Plan in 1981. The policy did not survive for long and was replaced in 1983 by an IMF driven program, the Economic Reform Program.¹⁴⁸² This saw significant changes being made in improving the investment climate. To further these investment climate reforms, the government introduced the National Investment Promotion Policy and Promotion Code (NIPPPC) in 1990. The NIPPPC dealt with various issues related to investment promotion and improving the investment climate. In addition, it also established the Investment Promotion Centre (IPC).

The NIPPPC was, however, reviewed in 1996 as a result of legal, institutional and administrative challenges which hampered the performance of the policy.¹⁴⁸³ This gave birth to the National Investment Promotion Policy (NIPP).¹⁴⁸⁴ The policy underscored the need to: incentivise private investment, improve the legal recognition of property rights, create transparency in the legal framework, balance market forces and administrative controls and deregulate the investment approval process.¹⁴⁸⁵ From NIPP, the Tanzanian Investment Act of 1997 was then drafted.¹⁴⁸⁶

6.3.4 Institutional framework

Tanzania, like most other countries, has several institutions driving its investment policy. Three institutions, in particular, are key in this institutional set-up. These are:

¹⁴⁸² This program was in many respects similar to the Zimbabwean ESAP.

¹⁴⁸³ Embassy of Tanzania, Germany 'The National Investment Promotion Policy' available at <http://www.tanzania-gov.de/investment/investing-in-tz/2-stories/documents/14-the-national-investment-promotion-policy> (accessed 3 February 2017).

¹⁴⁸⁴ See Tanzania National Investment Promotion Policy, 1996.

¹⁴⁸⁵ See Tanzania National Investment Promotion Policy, 1996.

¹⁴⁸⁶ OECD *OECD Global Forum on International Investment: Attracting International Investment for Development* (2003) 171.

the Tanzania Investment Centre (TIC), the National Investment Steering Committee (NISC) and the Tanzania National Business Council (TNBC). The roles and functions of these institutions will now be discussed.

6.3.4.1 The Tanzanian Investment Centre

The Tanzania Investment Act 26 of 1997 established the TIC.¹⁴⁸⁷ The TIC, which replaced the IPC, functions as a 'One Stop Agency' for investment.¹⁴⁸⁸ In terms of its function, the TIC acts as a body corporate under the supervision of the Minister.¹⁴⁸⁹ The main functions of the TIC are to:¹⁴⁹⁰

- initiate support measures that will enhance the investment climate in the country for both local and foreign investors;
- collect, collate, analyse and disseminate information about investment opportunities and sources of investment capital, and advise investors upon request on the availability, choice or suitability of partners in joint-venture projects;
- in consultation with Government institutions and agencies identify investment sites, estates, or land together with associated facilities of any sites, estates or land for the purposes of investors and investments in general;
- assist all investors including those who are not bound by the provision of this Act [Tanzania Investment Act], to obtain all necessary permits, licenses approval consents, authorizations, registrations, and other matters required by law for a person to set up and operate and investment; and to enable certificates issued by the Centre to have full effect;

¹⁴⁸⁷ Section 4 of the Tanzania Investment Act 26 of 1997.

¹⁴⁸⁸ Section 4(5) of the Tanzania Investment Act 26 of 1997.

¹⁴⁸⁹ Section 4(2) as read with section 4(3) of the Tanzania Investment Act of 1997.

¹⁴⁹⁰ Section 4(6) of the Tanzania Investment Act 26 of 1997. Further working details of the TIC are also provide the Tanzania Investment Act. See section's 7-14 of the Tanzania Investment Act 26 of 1997. These provisions deal with the board, proceedings of the board, the executive director, the secretariat, the limitation of liability of staff and members, funds of the centre, accounting, audits and reports.

- provide, develop, construct, alter, adapt, maintain and administer investment sites, estates, land and subject to relevant law, the creation and management of export processing zones;
- provide and disseminate up-to-date information on benefits or incentives available to investors;
- carry out and support local investment promotion activities which are necessary to encourage and facilitate increased local investments, including entrepreneurial development programmes; [and]
- perform any functions which are incidental to the attainment of the objectives of this Act.

The TIC is an important player when it comes to investing in Tanzania. The establishment of zonal offices in Kilimanjaro, Mwanza and Mbeya assist the fast-tracking of permits, licenses and approval.¹⁴⁹¹ The issue of Certificates of Incentives and Protection for enterprises to enjoy tax and not-tax benefits also aids in stimulating investments into the country.¹⁴⁹² The TIC is, therefore, an important player when it comes to investing in Tanzania.

6.3.4.2 National Investment Steering Committee

The NISC was formed by the government as a means of trying to better the investment environment and stimulate economic growth.¹⁴⁹³ This idea emerged as one of the key outcomes of the National Investment Stakeholders Workshop held in May 2002 at the Sea Cliff Hotel in Dar es Salaam. This committee is chaired by the Prime Minister and also contains other key players such as the Minister of Industry and Trade, the Minister of Finance, the Attorney General, the Minister of Investment and Empowerment, the Governor of the Bank of Tanzania and the Executive Director of the TIC.

¹⁴⁹¹ White et al *Private Health Sector in Assessment in Tanzania* (2013) 184.

¹⁴⁹² Ongwamuhana K *Tax Compliance in Tanzania: Analysis of Law and Policy Affecting Voluntary Taxpayer Compliance* (2011) 158.

¹⁴⁹³ OECD *OECD Global Forum on International Investment: Attracting International Investment for Development* (2003) 173.

Broadly, the NISC seeks to expedite the resolution of investment challenges and to formulate investment. More specifically, the NISC is responsible for 'identifying and resolving legal, regulatory and administrative barriers to investment; for addressing legal and administrative issues involving two or more ministry/government agencies; and for building the confidence of investors'.¹⁴⁹⁴ On the backdrop of its mandate, the NISC has managed to resolve and approve 29 strategic investment projects, 12 of which were agricultural projects.¹⁴⁹⁵

6.4.3.3 The National Business Council

The TNBC was established by the Presidential Circular No. 1 of 2001 to enhance government/private sector partnership.¹⁴⁹⁶ The mission of the TNBC is:

'to promote a healthy and robust economy where the guiding hand of government, through enlightened legislation and transparent governance enhances the development of private initiatives, encourages local and foreign investments and provides and provides enabling environment for economic growth.'¹⁴⁹⁷

The hope is that this would assist in creating a dynamic, versatile and competitive economy.¹⁴⁹⁸ As part of its operations, the TNBC conducts 3 important programmes, namely; the Smart Partnership Dialogue, the Local Investors Round Table (LIRT) and the International Investors Round Table (IIRT).

The IIRT is a forum where key international business people (around 30-40) meet with at least 12 business people to facilitate the exchange of ideas. The purpose of this

¹⁴⁹⁴ United Nations Conference on Trade and Development *Investment Policy Review: The United Republic of Tanzania* (2002) 77.

¹⁴⁹⁵ 'National Investment Steering Committee' available at <http://tanzaniazalendo.org/web/strategic-investors/> (accessed 3 February 2017). Another important project overseen by the NISC is the special incentives packaged designed to benefit the textile industry to enable to maximise the African Growth Opportunity Act (AGOA).

¹⁴⁹⁶ 12 business have also been set up at regional level. The Zanzibar Business Council has also been formulated as another initiative.

¹⁴⁹⁷ Tanzania National Business Council 'Background' available at <http://tnbc.go.tz/v2/> (accessed 3 February 2017).

¹⁴⁹⁸ Tanzania National Business Council 'Background' available at <http://tnbc.go.tz/v2/> (accessed 3 February 2017).

forum is to promote both domestic investment and FDI.¹⁴⁹⁹ The forum is chaired by the President of Tanzania and the recommendations of the forum are given to the government as areas needing improvement. These recommendations have been one of the main contributors to the continuing reform process. Moreover, the engagements through the various TNBC processes has contributed to building trust between the public and private sectors.

6.3.5 Legal framework

In the past, Tanzania's legal framework on foreign investment was not uniform. This was as a result of different policies being applied in Zanzibar and on the mainland. For instance, the Investment Promotion Act 1986 passed by the Zanzibar House of Representatives was the legal basis for the protection of FDI in Zanzibar.¹⁵⁰⁰ While on the other hand, on the mainland, the National Investment (Protection and Promotion) Act was only introduced to govern foreign investments in June 1990. This situation was only rectified in 1997 with the introduction of the Tanzania Investment Act. The Act became principal legal basis for governing foreign investment in a United Republic and was applicable to all investors. The next section reviews the contents of the Tanzania Investment Act.

6.3.5.1 Tanzania Investment Act 26 of 1997

The main purpose of the Tanzania Investment Act is to 'make provision for investment in Tanzania, to provide for more favourable conditions for investors, and for related matters'.¹⁵⁰¹ This makes it a 'one-stop-shop document' for all investment related provisions. The Act is divided into four parts, namely: preliminary provisions, the centre and its functions, provisions relating to investment and general provisions. The TIC

¹⁴⁹⁹ United States Department of State '2013 Investment Climate Statement: Tanzania' available at <https://www.state.gov/e/eb/rls/othr/ics/2013/204744.htm> (accessed 10 July 2017).

¹⁵⁰⁰ United Nations Conference of Trade and Development 'Investment Policy Review Policy: Tanzania' available http://unctad.org/en/Docs/iteipcmisc9_en.pdf 29 (accessed 28 September 2017).

¹⁵⁰¹ Tanzania Investment Act 26 of 1997.

and its functions were already covered in the previous section dealing with institutional frameworks and therefore will not be discussed. This section will, therefore, focus on the three remaining aspects, with focus placed on features which are comparable to other regimes.

6.3.5.1.1 Preliminary provisions

(a) Entry and establishment

Foreign investors seeking to set up a commercial enterprise in Tanzania should be licensed as a business entity.¹⁵⁰² After this process is completed, the business can register with the TIC and receive a certificate of investment.¹⁵⁰³ The Tanzania Investment Act, however, establishes a new minimum level of capital for a foreign investor to be eligible to receive this certificate. For a business wholly owned by a foreign investor or a joint venture, such business should have a minimum capital investment of USD 300 000.¹⁵⁰⁴ Where the business is locally owned, the minimum capital investment expected from the foreign investor is pegged at USD 100 000.¹⁵⁰⁵ The implications of these provisions are that an investor seeking to invest less than the prescribed minimum capital requirement cannot enjoy benefits and protection of the Act.¹⁵⁰⁶

(b) Definitions: 'Foreign investor' and 'investment'

The Tanzania Investment Act defines many terms such as capital, centre, business enterprise, Minister, foreign investor and investment. However, as was noted in

¹⁵⁰² See Business Licensing Act of 1972.

¹⁵⁰³ United Nations Conference of Trade and Development 'Investment Policy Review Policy: Tanzania' available http://unctad.org/en/Docs/iteipcmisc9_en.pdf (accessed 28 September 2017) 31.

¹⁵⁰⁴ Section 2(2)(a) of the Tanzania Investment Act 26 of 1997.

¹⁵⁰⁵ Section 2(2)(b) of the Tanzania Investment Act 26 of 1997.

¹⁵⁰⁶ See s 2(2) of the Tanzania Investment Act 26 of 1997.

chapter 4, the most debated definitions are those of an investor and an investment.¹⁵⁰⁷ As a result, focus will be placed on these two definitions.

The Tanzania Investment Act defines a foreign investor as a natural or juristic person.¹⁵⁰⁸ In the case of a natural person, such individual should not be a citizen of Tanzania. Where the foreign investor is a company, such company should be incorporated under the laws of a foreign country with more than 50% of the shares owned by a person who is not a citizen of Tanzania. In the case of partnerships, the Act stipulates a non-citizen of Tanzania should own a controlling interest.

This definition is fundamentally different to similar definitions in other investment codes or in BITs. By and large, most definitions note foreign investors as foreign natural or juristic persons. A different version was encountered in the Turkish code which noted that a foreign investor could also be a Turkish citizen abroad. However, the Tanzania Investment Act notes further how much interest a foreign investor have.

An investment is defined as 'the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise'.¹⁵⁰⁹ This definition is complemented by the definition of foreign capital. Foreign capital in terms of this definition means:

'convertible currency, plant, machinery, equipment, spare parts, raw materials and other business assets other than goodwill that enters Tanzania with no initial disbursement of foreign exchange and are intended for the production of goods and services related to an enterprise to which this Act applies'.¹⁵¹⁰

After considering both definitions (investment and foreign capital) it is clear that clarity is lacking on what is considered as investment. The Act would better be served with a standard definition of investment which provides for an investment as the

¹⁵⁰⁷ See section 4.3.1 of this thesis.

¹⁵⁰⁸ Section 3 of Tanzania Investment Act 26 of 1997.

¹⁵⁰⁹ Section 2 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁰ Section 2 of the Tanzania Investment Act 26 of 1997.

establishment of an enterprise, the holding of shares debentures and ownerships instruments of an enterprise or the merger of a local enterprise with a foreign one.¹⁵¹¹ Such a definition would also include examples of the assets which such an enterprise may possess. To some degree, this would be an amalgamation (with some modifications and clarifications) of the definitions of an investor and foreign capital in the Tanzania Investment Act.

6.3.5.1.2 Provisions relating to investment

Part III of the Tanzania Investment Act focuses on provisions relating to investments. Some of these are quite general and administrative. For example, the provisions on investment opportunities,¹⁵¹² the relationship of the TIC with ministries and other public authorities,¹⁵¹³ application for certificates and registrations,¹⁵¹⁴ the establishment of enterprises,¹⁵¹⁵ benefits¹⁵¹⁶ and benefits for strategic,¹⁵¹⁷ major investments,¹⁵¹⁸ obtaining credit from domestic sources by foreign investors¹⁵¹⁹ and technology transfer agreements.¹⁵²⁰ Most of these matter are actually incidental to the operations of the TIC. The provisions on investment guarantees, transfer of capital, profits and dividends,¹⁵²¹ guarantee against expropriation,¹⁵²² settlement of disputes¹⁵²³ and immigration quotas¹⁵²⁴ are, however, important investor protections.

(a) Investment guarantees, transfer of capital, profits and dividends

¹⁵¹¹ See Article 2 of the Protection of Investment Act 22 of 2015 in South Africa.

¹⁵¹² Section 15 of the Tanzania Investment Act 26 of 1997.

¹⁵¹³ Section 16 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁴ Section 17 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁵ Section 18 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁶ Section 18 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁷ Section 19 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁸ Section 20 of the Tanzania Investment Act 26 of 1997.

¹⁵¹⁹ Section 25 of the Tanzania Investment Act 26 of 1997.

¹⁵²⁰ Section 26 of the Tanzania Investment Act 26 of 1997.

¹⁵²¹ Section 21 of the Tanzania Investment Act 26 of 1997

¹⁵²² Section 22 of the Tanzania Investment Act 26 of 1997.

¹⁵²³ Section 23 of the Tanzania Investment Act 26 of 1997.

¹⁵²⁴ Section 24 of the Tanzania Investment Act 26 of 1997.

This provision provides that any business enterprise which is protected under the Act is guaranteed the right to unconditionally transfer through any authorised dealer, in freely convertible currency:

- (a) net profits or dividends attributable to the investment;
- (b) payments in respect of loan servicing where a foreign loan has been obtained;
- (c) royalties, fees and charges in respect of any technology transfer agreement registered under this Act;
- (d) the remittance of proceeds (net of all taxes and other obligations) in the event of sale or liquidation of the business enterprise or any interest attributable to the investment;
- (e) payments of emoluments and other benefits to foreign personnel employed in Tanzania in connection with the business enterprise.

While this provision is detailed, it however fails to make provision for economic restrictions subject to challenges such as balance of payments deficits.

(b) Guarantee against expropriation

The Tanzania Investment Act contains a very poorly drafted provision on expropriation and compensation.¹⁵²⁵ It allows expropriation under the due process of the law, subject to the payment of fair, adequate and prompt compensation, in a freely convertible currency.¹⁵²⁶ The investor is also granted the right to access a court and the right to seek arbitration to determine the investor's interest, right or amount of compensation to which the investor is entitled.¹⁵²⁷ This accords with the s 24 of the Constitution of Tanzania which provides that: everyone has the right to the protection of his property and that such property may only be deprived for purposes of nationalisation or any

¹⁵²⁵ The provision repeats itself and could have been laid out more accurately and concisely.

¹⁵²⁶ Section 22(1)(a) as read with s 22(2) of the Tanzania Investment Act 26 of 1997.

¹⁵²⁷ Section 22(1)(b) of the Tanzania Investment Act 26 of 1997.

other purpose determined by authority of law, subject to the payment of fair and adequate compensation.¹⁵²⁸

Such kind of compensation is generally associated with a negotiable payment method where an appropriate valuation, near full market value, is given.¹⁵²⁹ This has given rise to the Hull rule being associated with a fair market value. Such valuation has been resorted to in some prominent arbitral cases such as *CMS v Argentina*.¹⁵³⁰ Other than the market value, the provision could also have cited the net book value method or the net present value of discounted future cash flow method. These methods are considered more realistic than the market value method as they account for practical considerations such as depreciation and future cash flows and depreciation, respectively.¹⁵³¹

(c) Settlement of disputes

In term of dispute settlement, the Tanzania Investment Act provides that when disputes arise, the prime focus should be on resolving the dispute via negotiation.¹⁵³² Where a dispute between the foreign investor and the TIC or government is not settled via negotiation, such dispute can be submitted for arbitration in terms of the methods mutually agreed by the parties.¹⁵³³ The available methods to choose from are: Tanzanian arbitration laws, ICSID rules or any BIT rules.¹⁵³⁴

This is generally a fair and well-crafted provision. The option to submit a dispute in terms of a BIT framework is quite novel. It, in part, fills the void left by the lack of state-state arbitration mechanisms in investment codes. The dispute settlement provision could, however, have also considered UNCITRAL arbitral rules which are cited by

¹⁵²⁸ Section 22 of the Constitution of the United Republic of Tanzania, 1977.

¹⁵²⁹ Ripinsky S & Williams K (2008) 72.

¹⁵³⁰ *CMS v Argentina* Case No. ARB/01/8, para 151. In this case, the award relied on a fair market value calculated using the discounted cash flow method.

¹⁵³¹ See Nikièma SH (2013) 13 -15.

¹⁵³² Section 23(1) of the Tanzania Investment Act 26 of 1997.

¹⁵³³ Section 23(2) of the Tanzania Investment Act 26 of 1997.

¹⁵³⁴ Section 23(2) of the Tanzania Investment Act 26 of 1997.

numerous BITs. Furthermore, the provision could have also provided for time frames in which disputes can remain unresolved before they are submitted for arbitration.

(d) Immigration quotas

In terms of the employment of expatriates, the Tanzania Investment Act contains a provision on immigration quotas.¹⁵³⁵ This provides that every business which received a certificate of incentives under the Act is entitled to 'an initial automatic quota of up to five persons during the start-up period'.¹⁵³⁶ An application may, however, be made with the TIC to grant additional personnel visas. The TIC will, in consultation with the Immigration Department, make a decision bearing in mind the complexity of technology employed by the business as well as the availability of qualified Tanzanians.¹⁵³⁷ This provision is quite strict compared to provisions on expatriates in other investment codes, BITs or RTAs. This is because these other comparable provisions do not impose a cap on how many expatriates may be employed. For instance, the 2003 investment law in Jordan provides that 'foreign investors shall be free to manage the project in the manner they deem appropriate through the manner of their choice'.¹⁵³⁸ At most, safeguards for the domestic labour market in such a clause limit the entry of expatriates to key personnel or technical staff.

6.3.5.1.3 Remarks on the Tanzania Investment Act

While the Tanzania Investment Act is remarkable in the sense that it condenses all matters related to investment in one document, the content of the Act is, however, uninspiring. Its contents are quite similar to the Fiji investment code which deals mostly with preliminary and miscellaneous issues and superficially addresses investment protections.¹⁵³⁹ The provisions on investment guarantees, transfer of

¹⁵³⁵ See s 24 of the Tanzania Investment Act 26 of 1997.

¹⁵³⁶ Section 24(1) of the Tanzania Investment Act 26 of 1997.

¹⁵³⁷ Section 24(2) of the Tanzania Investment Act 26 of 1997.

¹⁵³⁸ Jordan Investment Law, 2003.

¹⁵³⁹ See Fiji Investment Act 1 of 1999. Part 1 of the Act deal with preliminary issues, part 2 deals with the issue of foreign investment certificates, part 4 speaks to appeals to the Minister and part 5 contains miscellaneous issues. Part 3 titled investment guarantees is the only one dealing with investment

capital and dividends; guarantee against expropriation; the settlement of disputes and immigration quotas are only but a tip of the iceberg in terms of matters which ought to be addressed in an investment code or any investment document even. The Tanzania Investment Act, therefore, needs significant work in this regard so as to make the Act more current and useful to investors. Reform could perhaps take a leaf from the Vietnamese Law on Investment, for example, which regulates investment activities with greater detail.¹⁵⁴⁰

6.4 THE GHANAIAN INVESTMENT FRAMEWORK

6.4.1 Introduction

Ghana has put in a lot of work in nurturing its investment climate and increasing FDI. However, the kind of FDI remains far from desirable. Ideally, any modern economy would want investment in technology driven investment rather than in the primary and extractive industries. This section will provide an analysis of Ghana's investment framework. A background will, however, be provided first.

6.4.2 Background

6.4.2.1 Status of FDI in Ghana

Ghana's economy is significantly informal and built around low value service activities. On the formal side, however, Ghana has strong mineral, manufacturing, agricultural and export industries.¹⁵⁴¹ Most of these sectors are, however, controlled by small to medium enterprise (SMEs).¹⁵⁴² Notwithstanding the structure of its economy, Ghana

protection. It only provides for guarantees on expropriation and repatriation of profits and transfer of funds.

¹⁵⁴⁰ See Vietnam Law on Investment 59 of 2005. Of note in this code is chapter 2 with detailed investment guarantees and chapter 3 that is dedicated to the rights and obligations of investors. This is novel in an investment code as it balances investor's rights with obligations. Chapter 4 on forms of investment is also worth mentioning.

¹⁵⁴¹ International Business Publications Ghana *Investment and Business Guide: Strategic and Practical Information* (2015) 28.

¹⁵⁴² Ofori-Dankwa J *Comparative Case Studies on Entrepreneurship in Developed and Developing Countries* (2015) 158.

has done significantly well, in recent times, in growing its economy, improving the investment climate and boosting FDI inflows.

In 2012, Ghana was one of the fastest growing economies, not only in Africa, but in the world (8% growth rate).¹⁵⁴³ The growth was mostly due to large inflows of FDI into Ghana's oil and gas industries.¹⁵⁴⁴ In 2013 and 2014, Ghana continued to make headways increasing FDI and improving its investment climate. This was despite low commodity prices that crippled investments in West Africa in that period.

In the latest World Investment Report (2016), Ghana was one of the top five FDI host economies in Africa.¹⁵⁴⁵ The inflows of these countries, from highest to lowest were as follows: Angola (USD 8.7 billion), Egypt (USD 6.9 billion), Mozambique (USD 3.7 billion), Ghana (USD 3.2 billion) and Morocco (USD 3.2 billion). Ghana has, therefore, done well in creating an enabling environment for FDI, as compared to most of its West-African colleagues.

6.4.2.2 Openness to and restriction on FDI

Reforms in the regulatory environment have been at the centre of Ghana's struggle to open up the economy to foreign investment.¹⁵⁴⁶ As noted in the 2015 Investment Climate Report, the government of Ghana recognises that an enabling legal environment is vital in improving FDI.¹⁵⁴⁷ These reforms have been starting to bear fruit for Ghana. For instance, according to the 2017 Doing Business Report, Ghana is

¹⁵⁴³ Riley FD, Singh J & Blankson C (eds) *The Routledge Companion to Contemporary Brand Management* (2016) 381.

¹⁵⁴⁴ International Monetary Fund *Ghana: Request for a Three-Year Arrangement Under the Extended Credit Facility; Staff Report; Press Release; and Statement by the Executive Director for Ghana* (2015) 44.

¹⁵⁴⁵ These are 2015 figures. See UNCTAD 'World Investment Report 2016: Investor Nationality – Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 28 September 2017) 39.

¹⁵⁴⁶ See Efobi U *Economics and Political Implications of International Financial Reporting Standards* (2016) 345.

¹⁵⁴⁷ U.S. Department of State '2015 Investment Climate Statement' available at <https://www.state.gov/documents/organization/241784.pdf> (accessed 28 September 2017) 4.

now ranked 108th out of 190 countries surveyed, in terms of ease of doing business.¹⁵⁴⁸ Only a few other African countries such as Morocco (68), Botswana (71), South Africa (74), Tunisia (77), Kenya (92), Seychelles (93), Zambia (98) and Lesotho (100) fared better than Ghana. Also, in terms of the 2016 Index of Economic Freedom, Ghana is placed 72nd out of 178 countries surveyed.¹⁵⁴⁹

A huge benefit for foreign investors is that Ghana provides constitutional protection for property against nationalisation and expropriation.¹⁵⁵⁰ Article 20 of the Constitution of Ghana provides that deprivation of property can only be done under a law that provides for fair and adequate compensation 'in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public'.¹⁵⁵¹

Despite Ghana's openness to receive foreign investment, there are, however, restrictions to investment. For example, Ghana has imposed restrictions on certain domestic sectors. These sectors include; small-scale trading, taxi operations and car rentals with small fleets of under 25, the distribution of bottled water, the manufacture of exercise books, the operation of bet-houses, lotteries, beauty salons and barber shops, oil and gas operations, among others.¹⁵⁵² Another example is that there remain complexities in business establishment, mostly related to compliance with laws and regulations.¹⁵⁵³ For instance, the time-frame for registering a business is extremely lengthy and involves interaction with at least 5 government agencies.¹⁵⁵⁴ Moving

¹⁵⁴⁸ World Bank Group 'Doing Business 2017: Equal Opportunity for All' available at <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> (accessed 8 February 2017) 7.

¹⁵⁴⁹ 2016 Index of Economic Freedom 'Country Rankings' available at <http://www.heritage.org/index/ranking> (accessed 8 February 2016).

¹⁵⁵⁰ Article 120 of the Constitution of the Republic of Ghana, 1992.

¹⁵⁵¹ Article 120(1)(a) as read with Article 120(2)(a) of the Constitution of Ghana.

¹⁵⁵² Nevertheless, there remain very little differences in how domestic citizens and foreign investors are treated. S

¹⁵⁵³ See International Business Publications *Ghana: Doing Business and Investing in Ghana Handbook: Strategic, Practical Information, Regulations, Contacts* (2015) 102.

¹⁵⁵⁴ U.S. Department of State 'Department of State: 2014 Investment Climate Statement' available at <https://www.state.gov/documents/organization/227349.pdf> (accessed 15 February 2017).

forward, these restrictions ought to be eliminated as they violate Ghana's Constitution which places an obligation on the state to ensure a healthy economy.¹⁵⁵⁵

6.4.3 Policy

Ghana has allowed foreign investments onto its shores for a prolonged period of time.¹⁵⁵⁶ However, its policy on foreign investment is not as equally matured. One of the earliest notable policies on foreign investment in Ghana was only enacted in 1959 - the Pioneer Industries and Companies Act.¹⁵⁵⁷ This Act was amended in 1960¹⁵⁵⁸ and 1962,¹⁵⁵⁹ and subsequently repealed by the Ghana Capital Investments Act (GCIA).¹⁵⁶⁰ The GCIA was meant to encourage foreign investment and deal with matters incidental to it.¹⁵⁶¹ Substantively, the GCIA was ahead of its time, as it amongst other things, balanced investor protections¹⁵⁶² with obligations¹⁵⁶³ and created a Capital Investment Board¹⁵⁶⁴ similar to modern day Investment Centres or Investment Authorities.

The GCIA was, however, rendered obsolete by the 1973 Capital Investments Decree due to substantial price distortions which intensified in the mid-1970s.¹⁵⁶⁵ The Decree introduced a raft of new measures. Most notably, the 1973 Decree introduced local

¹⁵⁵⁵ See Article 34(2) as read with Article 36(2)(e) of the Constitution of Ghana.

¹⁵⁵⁶ United Nations Conference on Trade and Development 'Investment Policy Review: Ghana' available at http://unctad.org/en/Docs/itejpcmisc14rev1_en.pdf (accessed 28 September 2017) 3.

¹⁵⁵⁷ See Pioneer Industries and Companies Act 63 of 1959. See also *Lall S & Pietrobelli C Failing to Compete* (2002) 145.

¹⁵⁵⁸ Pioneer Industries and Companies (Amendment) Act 28 of 1960.

¹⁵⁵⁹ Pioneer Industries and Companies (Amendment) Act 98 of 1962.

¹⁵⁶⁰ See s 27(1) of the Capital Investment Act 172 of 1963.

¹⁵⁶¹ See Capital Investment Act 172 of 1963.

¹⁵⁶² Part III of the Capital Investment Act 172 of 1963. The protection extended to investors included, compensation for nationalisation, the free transfer of funds and repatriation of profits and exemptions from indirect taxes and charges.

¹⁵⁶³ Part II of the Capital Investment Act 172 of 1963.

¹⁵⁶⁴ Section 1(1) of the Capital Investment Act 172 of 1963. This Board was constituted by 8 members: a representative of the Bank of Ghana, the Head of the Ministry of Finance, the Head of the Ministry of Industry, the Managing Director of the National Investment Bank, the Executive Secretary of the State Planning Board, and three other members appointed by the President.

¹⁵⁶⁴ Part II of the Capital Investment Act 172 of 1963.

¹⁵⁶⁵ Huq MM *The Economy of Ghana: The First 25 Years of Independence* (1989) 131. See also Kantor M, Nolan MD & Sauvart KP *Reports on Overseas Private Investment Corporation Determinants* (2011) 470. Agreements executed under the GCIA and its amendments would, however, remain in force.

content requirements. For instance, retail and wholesale sectors were reserved for locals while quotas of 30%, 45% and 55% were ear-marked for certain other sectors. In addition, the 1973 Decree established an Investment Implementation Committee (IIC) which facilitated investment through programs such as mandatory training schemes aimed at transferring skills between expatriates and foreign employees.

A brand new Decree was issued in 1975 (1975 Capital Investment Decree) to supersede the 1973 Capital Investment Decree.¹⁵⁶⁶ The decree, *inter alia*, provided intensified limits on foreign control. It required '51% Ghanaian equity participation in most foreign firms, but the government took 40% in specific industries'.¹⁵⁶⁷ These limits on foreign control imposed a substantial limitation on the attractiveness of Ghana as a foreign investment destination and lowered FDI inflows. Notwithstanding two successive amendments in 1976¹⁵⁶⁸ and 1977,¹⁵⁶⁹ the 1975 Decree was replaced by the 1981 Investment Code. This Code sought to create a legal regime for investment policy.¹⁵⁷⁰

In 1985, the government enacted a newer code, the Investment Code of Ghana (PNDC Law 116). One of the main aims of the new Investment Code was to promote joint ventures between locals and foreign investors.¹⁵⁷¹ The challenge with the new Investment Code was that, despite offering generous investment incentives, it was to a greater extent, unduly restrictive. For instance, the 1985 Code placed limitations on activities that could receive incentives from road construction and real estate development.¹⁵⁷² As a result of its shortfalls, the 1985 Investment Code was replaced

¹⁵⁶⁶ The 1975 Decree became operative in January 1977. See Investment Policy Decree, 1975 (NRCD 329).

¹⁵⁶⁷ Internationals Business Publications *Ghana Investment and Business Guide: Strategic and Practical Information* (2015) 30.

¹⁵⁶⁸ Investment Policy (Amendment) (No 2) Decree 1976.

¹⁵⁶⁹ Investment Policy (Amendment) Decree 1977.

¹⁵⁷⁰ See Bannerman RE 'Foreign Investment in Ghana' (1986) 37 *International Financial Law Review* 37 – 38.

¹⁵⁷¹ See Amann E (ed) *Regulating Development: Evidence from Africa and Latin America* (2006) 243.

¹⁵⁷² Bannerman RE (1986) 37 – 38.

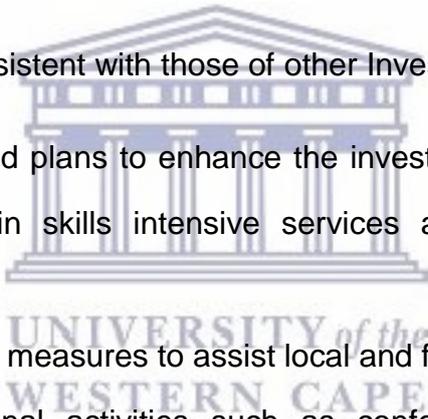
in 1994, with the Ghana Investment Promotion Centre Act (GIPC Act),¹⁵⁷³ which was overhauled in 2013 (2013 GIPC Act).¹⁵⁷⁴

6.4.4 Institutional framework

6.4.4.1 Ghana Investment Promotion Centre

The GIPC is established under the 2013 GIPC Act as the agency of the government responsible for ‘the encouragement and promotion of investments in Ghana foreign investment in Ghana, to provide for the creation of an attractive incentive framework and a transparent, predictable and facilitating environment for investments in Ghana and for related matters’.¹⁵⁷⁵ It is a body corporate that can be sued in its own name and has the power to discharge any of its functions, or matters incidental to them.¹⁵⁷⁶

Its functions, generally consistent with those of other Investment Centres, are to;¹⁵⁷⁷

- 
- formulate policies and plans to enhance the investment climate for local and foreign companies in skills intensive services and advanced technology industries;
 - create viable support measures to assist local and foreign investors;
 - engage in promotional activities such as conferences, exhibitions and seminars which would raise the image of Ghana as an investment destination and enhance the investment climate;
 - collect and synthesize data about investment opportunities and sources of capital and advising investors on potential joint investment projects;
 - register and keep records of enterprises;

¹⁵⁷³ Ghana Investment Centre Promotion Act 478 of 1998.

¹⁵⁷⁴ See Ghana Investment Promotion Centre Act 865 of 2013. Recently, investment policy has also become part of Ghana’s economic policy. This has seen the government embarking on numerous investment promotion trips to countries such as the USA to promote investment. See United States International Trade Commission ‘U.S. Trade and Investment with Sub-Saharan Africa, Second Annual Report’ 2001 Investigation No. 332-415 113.

¹⁵⁷⁵ See preliminary text of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁷⁶ See s 2 of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁷⁷ Section 4 of the Ghana Investment Promotion Centre Act 865 of 2013.

- find potential investors to join specific projects; ‘
- maintain relations of investors with relevant government agencies and departments;
- register and maintain records of all investment related technology transfer agreements; and
- perform such other functions as are incidental to the attainment of the object of this Act.

These functions are slightly different from those in the 1998 GIPC. For instance, the 1998 GIPC Act provided that the functions of the GIPC are also to provide investors with support such as the acquisition of permits and evaluate the impact of the Centre on investments in the country and recommend the appropriate changes where necessary;¹⁵⁷⁸ functions of which are no longer provided for. Also, it provides for new focuses such as the formulation of policies and plans with a key focus on attracting investment in technologically intensive industries and skill intensive services.¹⁵⁷⁹

The constitution of the governing body of the GIPC has also changed. For example, under the 1998 GIPC Act, the Board consisted of: a Chairman, a Vice-Chairman, the Chief Executive of the Centre, and five other members, at least three of who are selected from outside the public services.¹⁵⁸⁰ While on the other hand, the 2013 GIPC Act provides that the Board consists of: a chairperson; the Governor of the Bank of Ghana or a representative of the Governor, not below the rank of Deputy Governor; the Director-General of National Development Planning Commission; a representative of the Ministry of Trade not below the rank of Deputy Minister; a representative of the Ministry of Finance not below the rank of Deputy Minister; the Chief Executive Officer of the Centre; and four other members appointed from outside the Public Service at least two of whom are women and one nominated by the Private Enterprise

¹⁵⁷⁸ Section 3 of the Ghana Investment Centre Promotion Act 478 of 1998.

¹⁵⁷⁹ Section 4 (a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁸⁰ Section 4(2) of the Ghana Investment Promotion Centre Act 478 of 1998. While the Board of the GIPC has 8 members like the previous Capital Investments Board, their compositions are fairly different.

Federation.¹⁵⁸¹ The changes to the composition of the Board provide for the greater representation of women, more diversity in the Board and it allows for greater flexibility (by letting members appoint representatives).

It is also important to note that, while the GIPC has autonomy, it has to account to the Presidency responsible to the President.¹⁵⁸² This ensures that the GIPC has enough support and its operations are in line with government policy and thinking. In certain instances, the Board may also establish committees consisting of members of the Board or non-members,¹⁵⁸³ to fulfil a function ear-marked by the board.¹⁵⁸⁴ Where such a committee is entirely composed of non-board members, its output will merely be advisory.¹⁵⁸⁵

The GIPC is, therefore, hands-on with matters related to foreign investment and has ample opportunity to stimulate FDI in Ghana. Its approach of inter-departmental co-operation and stakeholder integration as opposed to working in silos is also highly commendable.



6.4.5 Legal framework

To a certain degree, one could say that the GIPC Act is the Investment Code in Ghana. The basis of this claim is that the GIPC Act goes beyond establishing the GIPC and

¹⁵⁸¹ Section 5(1) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁸² Section 14(1) of the Ghana Investment Promotion Centre Act 478 of 1998.

¹⁵⁸³ The members of the technical committee are: (a) two representatives of the Centre including the Chief Executive Officer (b) one representative, not below the rank of Director or analogous grade, of - (i) the Ministry responsible for Finance (ii) the Ghana Revenue Authority (iii) the Bank of Ghana (iv) Environmental Protection Agency (v) Ghana Ports and Harbours Authority (vi) National Communications Authority (vii) Registrar-General's Department (viii) the Lands Commission (ix) Ghana Immigration Service; the National Development Planning Commission; and (c) one representative of the private sector nominated by the Private Enterprise Federation. See s 11 of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁸⁴ Section 10(1) of the Ghana Investment Promotion Centre Act 864 of 2013. One of the committees which may be established is the technical committee. It is composed of representatives of the GIPC and from numerous other stakeholders. Some of its functions include; advising investors on the process of securing permits and licenses, furnishing advice on enhancing the tax environment for greater investment, assisting investors on operational challenges, attracting and retaining FDI, giving technical assistance on regulations and policies, and performing any other tasks determined by the board. See s 11 of the Ghana Investment Promotion Centre Act 864 of 2013.

¹⁵⁸⁵ Section 10(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

providing for matters incidental to it; it also deals with matters related to investment such as entry, admission and protection of investment. These matters will now be discussed below.

6.4.5.1 Entry and establishment

6.3.5.1.1 Activities reserved for Ghanaians and Ghanaian owned enterprises

The 2013 GIPC Act extends the activities which are solely reserved for citizens or companies owned by citizens. Under this Act, 8 areas are listed as being ring-fenced for locals.¹⁵⁸⁶ These are:¹⁵⁸⁷

- the sale of goods or provision of services in a market, petty trading or hawking or selling of goods in a stall at any place;
- the operation of taxi or car hire service in an enterprise that has a fleet of less than twenty-five vehicles;¹⁵⁸⁸
- the operation of a beauty salon or barber shop;
- the printing of recharge scratch cards for the use of subscribers of telecommunications services;
- the production of exercise books and other basic stationery;
- the retail of finished pharmaceutical products;
- the production, supply and retail of sachet water; and
- all aspects of pool betting business and lotteries, except football pool.

While this provision might give a growing sense of protectionism, it is also important to view it from the prism that it is important to safeguard opportunities for locals in low-capital sectors, so as to improve job-creation for locals and socio-economic conditions.

¹⁵⁸⁶ Section 27(1) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁸⁷ Section 27(1)(a)-(h) of the Ghana Investment Promotion Centre Act 865 of 2013. A comparison of the reserved sectors in the 2013 GIPC Act and those in the 1998 GIPC Act reveals that the last four sectors are new additions to the list. See s 18 of the Schedule to the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁸⁸ In the 1994 GIPC Act, a foreign investor only had to have a fleet of more than 10 vehicles.

Also, reserved sectors are not cast in stone and can be amended as need arises by the Minister, in consultation with the Board, via a legislative instrument.¹⁵⁸⁹

6.4.5.1.2 Enterprises eligible for foreign participation and minimum capital requirements

The 2013 GIPC Act provides higher capital requirements for enterprises with foreign participation. In cases of joint-enterprises with citizens in non-reserved sectors, the foreign investor should have invested capital of not less than USD 200 000 in cash, capital goods or a combination of both.¹⁵⁹⁰ Importantly, the domestic partner should not have an equity participation of less than 10% in the joint enterprise.¹⁵⁹¹ Where the foreign investor wholly owns an enterprise, the foreign capital invested should be not less than USD 500 000 in cash, capital or a combination of both.¹⁵⁹² If a foreign investor wants to participate in a trading enterprise that amongst things, purchases and sells imported services, such investor must make an investment of not less than USD 1 million.¹⁵⁹³ Furthermore, such enterprise cannot employ less than 20 skilled Ghanaians.¹⁵⁹⁴

Interestingly, there are exceptions in terms of compliance with these minimum foreign capital requirements. For instance, in terms of natural persons, a foreign spouse to a Ghanaian citizen is exempt from these requirements, provided that they have been married for a period of more than 5 years continuously and holds a permanent residence permit, prior to the application.¹⁵⁹⁵ Furthermore, a citizen of the Republic who loses their citizenship by means of assuming another citizenship shall also be exempt from complying with the minimum capital requirements.¹⁵⁹⁶ In the same vein,

¹⁵⁸⁹ Section 27(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹⁰ Section 28(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹¹ Section 28(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹² Section 28(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹³ Section 28(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹⁴ Section 28(4) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹⁵ Section 28(5) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹⁶ Section 28(6) of the Ghana Investment Promotion Centre Act 865 of 2013.

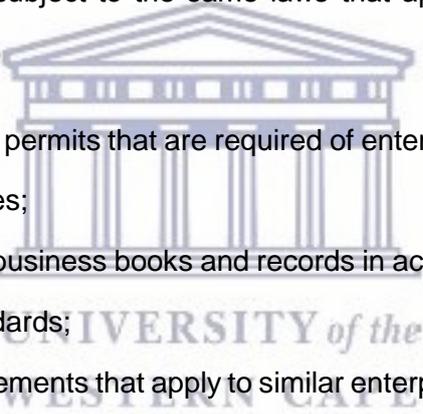
as regards companies, the minimum capital requirements do not apply to portfolio investments or enterprises established for the sole purpose of export trading and manufacturing.¹⁵⁹⁷

6.4.5.2 Investment guarantees

6.4.5.2.1 Prohibition against discrimination

The 2013 GIPC Act contains strong guarantees against discrimination. With regards to national treatment, s 30(a) of the Act provides that 'a foreign investor, employer or worker, shall enjoy the same rights and be subject to the same duties and obligations applicable to citizens'.¹⁵⁹⁸ Subsection (c) of the same provision notes that:

[A] foreign investor is subject to the same laws that apply to domestic enterprises, particularly in relation to

- 
- (i) licenses or other permits that are required of enterprises for conducting specific business activities;
 - (ii) maintenance of business books and records in accordance with the recognised accounting standards;
 - (iii) insurance requirements that apply to similar enterprises which engage in similar activities; and
 - (iv) taxes required to be paid by enterprises which engage in similar activity.¹⁵⁹⁹

Cumulatively, these two subsections read together entail that a foreign investor cannot be treated less favourably than any Ghanaian citizens or enterprises. In terms of MFN treatment, s 30(b) of the 2013 GIPC Act provides that investors are to be treated equally by the Centre and no investor may be discriminated upon on the basis of nationality.¹⁶⁰⁰

¹⁵⁹⁷ Section 29(1) of the Ghana Investment Promotion Centre Act 865 of 2013. Section 29(2) of the 2013 GIPC Act provides that 'export trading', includes produce or export goods, farmed or produced in Ghana.

¹⁵⁹⁸ Section 30(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁵⁹⁹ Section 30(c) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁰ Section 30(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

6.4.5.2.2 Guarantee against expropriation

Similar to most jurisdictions, expropriation or nationalisation in Ghana is only possible in exceptional circumstances.¹⁶⁰¹ Consequently, the acquisition of property can only be done in national interest or for a public purpose.¹⁶⁰² Furthermore, such acquisition must be done in terms of the law, subject to the payment of fair and adequate compensation and 'a right of access to the High Court for the determination of the investor's interest or right and the amount of compensation to which the investor is entitled'.¹⁶⁰³ This compensation is payable without undue delay and in freely convertible currency, where necessary.¹⁶⁰⁴ As can be witnessed, the investors are adequately protected from expropriation, and when it does occur, they are assured of timeous, fair and adequate compensation.

6.3.5.2.3 Investment guarantees, transfer of capital, profits and dividends and personal remittances

Subject to the Foreign Exchange Act 723 of 2006 and Regulations and Notices issued to implement the Act, foreign investors in Ghana are guaranteed the free transfer of capital, profits and dividends and personal remittances.¹⁶⁰⁵ These also include payments received in terms of loan servicing, fees and charges in lieu of a technology transfer agreement and any interest earned from investments made by the enterprise.¹⁶⁰⁶ This provision therefore allays the fear of investors on the potential of not receiving the benefits of their investment, which is a genuine concern in many investment destinations.

¹⁶⁰¹ See s 31 of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰² Section 31(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰³ Section 31(2)(a) as read with s 31(2)(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁴ Section 33(c) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁵ Section 32 of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁶ Section 32 of the Ghana Investment Promotion Centre Act 865 of 2013.

6.4.5.2.4 Dispute settlement

The 2013 GIPC Act provides for investor-state arbitration.¹⁶⁰⁷ However, before a dispute between an investor and the government, in respect of an enterprise, can be submitted for arbitration, efforts should first be made to settle the dispute amicably.¹⁶⁰⁸ If an amicable settlement is not reached by the parties in 6 months, then the parties may submit the dispute through one of the prescribed mechanisms for arbitration.¹⁶⁰⁹ These are: (a) arbitration in terms of the UNCITRAL rules and procedures, (b) arbitration in terms of the rules and procedure of a BIT between Ghana and the home-state of the investor or any multilateral agreement on investment to which these countries are a party to, and (c) via any other national or international platform for the settlement of disputes to which the parties may agree. Should the parties disagree on the medium of arbitration, where there is no other agreement to the contrary, the Act provides that the default mechanism of arbitration shall be the Alternative Dispute Resolution Act 798 of 2010.

All in all, the dispute settlement provision is articulately put across and covers the main issues in dispute settlement. For instance, it clearly specifies how long a dispute may remain unresolved before it is submitted for arbitration. What's more, the provision gives several options for settling the dispute. Interestingly, the dispute settlement clause awkwardly prefers UNCITRAL rules, as opposed to the widely accepted ICSID rules. However, the situation is eased by the allowance of any other arbitration procedures, which may in turn include UNCITRAL rules.¹⁶¹⁰ Finally, the default mechanism of dispute resolution in cases where the parties do not reach consensus on a medium of dispute resolution is mediation under the Alternative Dispute Resolution Act.

¹⁶⁰⁷ See s 33 of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁸ Section 33(1) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁰⁹ Section 33(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹⁰ Ghana signed and ratified the ICSID Convention in 1996.

6.4.5.3 Expatriate labour and employment

6.4.5.3.1 Labour and employment

Generally, an enterprise may regulate its relationship with employees via agreements.¹⁶¹¹ Investors are free to employ 'person of any nationality to positions of management for the purpose of the conduct of investments and business activities'.¹⁶¹² In the case of non-managerial staff, the enterprise may make use of employees of any nationality, on the condition that a suitably qualified and experienced citizen is prioritised.¹⁶¹³ Importantly, the standards set in these agreements cannot go below those which are prescribed by Ghanaian law, particularly, labour legislation.¹⁶¹⁴ The benefit of this provision is that labour participation in management is not limited, investors are not forced to share profits with employees¹⁶¹⁵ and that the legal restrictions on the appointment of non-managerial staff is not totalitarian. Some of the benefits are, however, to some degree, limited by the next provision on automatic expatriate quotas.

6.4.5.3.2 Automatic expatriate quotas

Notwithstanding the operation of the labour and employment clause, due regard has to be paid to the operation of automatic expatriate quotas. These are typically fashioned in terms of capital contributions of the enterprise. For instance, an enterprise with a capitalisation of not less than USD 50 000 but less than USD 250 000 can only employ 1 expatriate worker.¹⁶¹⁶ Similarly, an enterprise which has a capital of not less than USD 250 000 and not more than USD 500 000 is entitled to an expatriate automatic quota of 2 persons.¹⁶¹⁷ Correspondingly, firms with capital of not less than

¹⁶¹¹ Section 34(1) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹² Section 34(3)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹³ Section 34(3)(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹⁴ Section 34(2) as read with s 34(1) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹⁵ At most, employers are supposed to, in terms of bargaining agreements, offer fringe benefits such as retirement benefits and year-end bonuses.

¹⁶¹⁶ Section 35(1)(a)(i) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹⁷ Section 35(1)(a)(ii) of the Ghana Investment Promotion Centre Act 865 of 2013.

USD 500 000 and less than USD 700 000, can only utilise the service of 3 expatriate employees.¹⁶¹⁸ Enterprises having capital of more than USD 700 000 can only automatically appoint 4 expatriates.¹⁶¹⁹

To make use of these automatic quotas, enterprises must make an application specifying the number of expatriates to be employed to the GIPC.¹⁶²⁰ A decision will then be made by the GIPC 'on the advice of the Ghana Immigration Service in consultation with the regulator of the relevant sector'.¹⁶²¹ Notwithstanding the fact that these are automatic quotas, a visa may still be denied on the basis that the expatriate in question is an undesirable person who should not be granted access in to the Republic.¹⁶²² Understandably, automatic expatriate quotas should not entail that the government relinquishes control over who should enter the country or not. There is, however, potential for this provision to be exploited for political reasons or otherwise.

6.4.5.4 Remarks on the Ghana Investment Promotion Centre Act

For a 'code of sorts' which is built into an Act establishing a promotion centre, the substantive and procedural provisions of the 2013 GIPC Act do hold their own weight against some of the more prominent investment codes. The Act has a well-articulated dispute resolution clause as well as clearly thought out provisions on labour and expatriates.¹⁶²³ Further to that, its provisions on expropriation, transfer of funds, national treatment, MFN treatment and dispute settlement, are just as competent as any other.

What is worrying, however, is the government's growing appetite for increasing reserved sectors and higher capital requirements for foreign enterprise participation.

¹⁶¹⁸ Section 35(1)(a)(iii) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶¹⁹ Section 35(1)(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶²⁰ Section 35(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶²¹ Section 35(3) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶²² Section 35(4) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶²³ See ss 32 and 33 of the Ghana Investment Promotion Centre Act 865 of 2013

This plays into current right-wing thinking of protecting domestic markets for local players; as opposed to the more liberal thinking on global markets and the free movement of people, goods and services. Another scathing problem to the current provisions is their failure to move with times by balancing the rights and obligations of investors and host parties.

For instance, investors are not given any obligations. This deprives the state of the opportunity to hold foreign investors accountable to standards such as those related to human rights and corporate social responsibility. Moreover, the Act does not provide for widely used, but controversial, standards such as fair and equitable treatment and full protection of security. This raises questions on the compliance of the 2013 GIPC Act to international standards. There is therefore need to revamp and modernise the 2013 GIPC Act so as to move with current schools of thought and to keep abreast with the rapidly changing needs of international investment.

6.5 COMPARATIVE ANALYSIS

6.5.1 Introduction

The objective of this section is to undertake the arduous task of comparing the foreign investment frameworks in Turkey, Ghana and Tanzania against those in Zimbabwe. This is quite challenging, because at times, the provisions of the different countries are not comparable. Further to that, Zimbabwe's laws and policies are quite haphazard and complex, and to some degree, structured differently from those of the comparators. Therefore, to avoid comparing apples and oranges, the section will not do independent country versus country analyses;¹⁶²⁴ rather, the section examines specific comparable aspects as distinct units and then sheds light on aspects which

¹⁶²⁴ For example, comparing the entire framework in Zimbabwe against that in Ghana.

are invariably different.¹⁶²⁵ Focus is placed on where Zimbabwe can learn lessons from other jurisdictions in terms of its investment law reforms.

6.5.2 Comparable aspects

6.5.2.1 Policy aspects

While in the past, Zimbabwe has had various policies affecting investment; at present, the most important policies are the land reform policy and the indigenisation and economic empowerment policy. As witnessed in the cases discussed in chapter 3, the land reform has led to the expropriation without compensation of numerous white owned farms. The indigenisation and economic empowerment policy, has equally been catastrophic. The disingenuous 51 per cent rule discourages investors and forces them to invest in neighbouring countries which have less stringent laws. To make matters worse, these policies are not even fully-fledged investment policies.

Although Ghana's policy situation is not as dire as Zimbabwe's, it does show some form of resemblance. This is as Ghana does not have a *per se* policy on investment. Turkey's situation is no different from that of Ghana. Currently, the basis of developments in Turkey have been on the back of the 2001 Council of Minister's Decree on the 'Reform Programme for the Improvement of the Investment Environment in Turkey'.¹⁶²⁶

In contradistinction, Tanzania has the NIPP whose function is to *inter alia* enhance a 'transparent legal framework that facilitates the promotion and protection of all investments'.¹⁶²⁷ The policy sets up perfectly three important issues: First, it outlines the National Investment Policy Objectives. Second, the policy clearly articulates the

¹⁶²⁵ See Vito GF, Kunselman JC & Tewksbury R *Introduction to Criminal Justice Research Methods: An Applied Approach* 3ed (2014) 105.

¹⁶²⁶ It is important to note that a Decree is a rule of law with the force of law and not a policy.

¹⁶²⁷ Tanzania Embassy in Paris 'The National Investment Promotion Policy' available at <http://tanzaniaembassy.fr/2-stories/documents/14-the-national-investment-promotion-policy> (accessed 16 February 2016).

National Investment Policy Strategies. Here, it speaks to the institutional framework that should be used to promote investment, the investment incentives which should be offered to investors and the legal framework that should govern investments.¹⁶²⁸ Finally, the policy also imposes obligations on investors.

Zimbabwe (as well as Turkey and Ghana) should learn from Tanzania that a sound government policy is a solid asset which serves as bed rock for the government's vision on investment. If incorporated into the investment framework in Zimbabwe, a fully-fledged framework on investment could lay out the vision of the government as regards FDI and it would inspire the creation of institutional and legislative frameworks which are able to drive this agenda forward.

6.5.2.2 Institutional aspects

While Zimbabwe is yet to adequately tap into the potential of a well-minted investment policy; its institutional framework, on the other hand, is well matured. It dates back to the 1980s, when the FIC was established. This institution later on evolved into the Investment Centre, thereafter the ZIC, and finally ZIA. As noted in Chapter 3, ZIA is governed by a very comprehensive Act, the ZIA Act. The Act clearly lays out its functions which include; ensuring compliance with investment licenses, offering incentives and facilitating the establishment of investment.¹⁶²⁹ The institutional framework in Zimbabwe is therefore articulately set up.

However, lessons can be learnt from other jurisdictions on how the institutional framework can be augmented. For instance, the Turkish model for providing institutional support is quite remarkable. Impressively, the framework has five key institutions, specifically; the IAC, YOIKK, ISPAT, the Undersecretariat and the Directorate. ISPAT is similar to Zimbabwe's ZIA, as it functions as the flagship

¹⁶²⁸ It speaks specifically to the protection and guarantees to investors and arbitration of investments.

¹⁶²⁹ See section 3.3.2 of this thesis.

institution dealing with investment promotion and support. While there are slight variances in the activities of these two, they remain functionally the same.

Turkey's other four institutions provide services which are largely not offered by ZIA. Firstly, YOIKK provides a sustainable platform for facilitating critical reforms in the investment climate and reviewing the legal framework governing investment. In executing this mandate, it also engages both private and public players. This is ideal for fair representation and the generation of sound and informed policies.

Second, the IAC offers the opportunity to introduce an international perspective to the discourse on investment reforms. The wide representation in its discussions (for example, executives of MNCs, the World Bank, EIB and IMF) is something that is lacking in the current framework in Zimbabwe.

Third, the Undersecretariat provides the opportunity of policy cohesion of investment policies with other policies through the regulation and supervision of financial, economic and sectorial policies. Its supervision of liaison offices is something that could be tapped into in the Zimbabwean context as well.

Lastly, the Directorate offers a specialised service for the granting of incentives and other subsidiary activities. This is crucial in a market where investment opportunities cannot continue to be offered to enterprises such as the natural resource sector where investments are not sustainable. Rather, they should be offered to firms investing into the future, for example, those working on renewable energy.

Unlike the Zimbabwean framework, and similar to the Turkish system, Tanzania also has 3 institutions dealing with investment. These are; the TIC, the NISC and the TNBC. Just like ZIA and ISPAT, the TIC is merely an investment promotion and support institution. The NISC and the TNBC, however, undertake different functions. The NISC is a mini-version of Turkey's YOIKK, minus the public participation. It also focuses on resolving investment challenges. The TNBC, on the other hand, is similar to the

Turkish IAC, which seeks to infuse an international perspective to the investment discourse.

Quite evidently, there is therefore a need to have separate institutions driving investment climate and regulation reforms. These institutions should not overlap, but rather they should complement each other. Zimbabwe and Ghana which both have one stop institutions dealing with limited matters can both learn from how Tanzania and Turkey have used institutions to create and drive a vibrant investment climate.

6.5.2.3 Legal aspects

6.4.2.3.1 Ownership restrictions (Indigenisation)

Of the four countries discussed in this paper, Zimbabwe is the only country that places a limitation how much equity can be owned by a foreign investor in an enterprise. Section 3(1)(a) of the IEEA provides that least 51 per cent of the shares of every public company and any other business shall be owned by indigenous Zimbabweans.¹⁶³⁰ The fact that the 51 per cent requirement, as noted in chapter 3, may be lowered by way of notice in a statutory instrument by the Minister of Indigenisation and Economic Empowerment, does not ease the situation.¹⁶³¹

The provisions on indigenisation place a severe limitation on foreign investment in Zimbabwe. The lack of transparency on empowerment policies also increases the suspicion of foreign investors on this policy.¹⁶³² Foreign investors are forced to consider neighbouring countries such as South Africa, which contain no equity limitations on foreign investors, as potential destinations for their investments.¹⁶³³

¹⁶³⁰ Section 3(1)(a) of the IEEA.

¹⁶³¹ Section 3(5) of the IEEA. See further s 3.4.1.1 of this thesis.

¹⁶³² See Chiwunze I 'Economic Empowerment and Foreign Direct Investment: The Cases of Botswana, South Africa and Zimbabwe' available at <http://www.polity.org.za/article/economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe-2014-02-13> (accessed 19 February 2017).

¹⁶³³ See Kawaza K 'Poor FDI Inflows Reflect Zim's Hostile Business Environment' available at <https://www.theindependent.co.zw/2015/07/03/poor-fdi-inflows-reflect-zims-hostile-business-environment/> (accessed 19 February 2017).

There is perhaps a need for Zimbabwe to lower or dispense with its local content requirement. For example, the Namibian National Equitable Empowerment Bill (NEEB) proposes a 25 per cent local ownership requirement.¹⁶³⁴

6.4.2.3.2 Activities reserved for locals

General Notice 9 of 2016 in Zimbabwe prescribes numerous sectors as reserved sectors.¹⁶³⁵ Although Ghana has also reserved certain activities for locals, these are numerically lower than those provided for by Zimbabwe. Ghana only has 8 reserved sectors,¹⁶³⁶ as compared to Zimbabwe's 16. On the other hand, Turkey and Tanzania have gone in the opposite direction in terms of restrictions. Both these countries do not restrict entry into any of their sectors.¹⁶³⁷ Rather, they focus on encouraging foreign investment and reducing barriers to it.

It might be worth considering opening up some of the reserved sectors in Zimbabwe to foreign investors. This would allow some other smaller players from the region to invest in Zimbabwe. For example, Turkey has benefited from such investments. By March 2016, 17 905 small to medium enterprises operate in Turkey's wholesale and retail commerce.¹⁶³⁸ This is a huge chunk of Turkey's 49 095 foreign enterprises. While this might not be the ideal kind of foreign investment, it does stimulate the economy. This could be complemented by incentivising high technology and industrial investments, so as to provide a balance between small and big investments.

¹⁶³⁴ Section 23(1) of the NEEB. This approach is also better as it only affects private sector business that are established after the commencement of the Act.

¹⁶³⁵ Section 23 of General Notice 9 of 2016. See also section 3.4.1.3.4 of this thesis. These are: agriculture (primary production of food and cash crops); transportation (passenger buses, taxis and car hire services); retail and wholesale trade; barber shops, hairdressing and beauty salons; employment services; estate and real estate agencies; bakeries, advertising agencies; provision of local craft; tobacco grading and packaging; cigarette manufacturing; valet services; milk processing; grain milling; fuel retailing and artisanal mining of minerals (except diamonds). See s 23 of General Notice 9 of 2016.

¹⁶³⁶ Section 27(1)(a)-(h) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶³⁷ See Turkey's FDI Law and the Tanzania Investment Act 26 of 1997.

¹⁶³⁸ Cetingulec M 'Foreign Investment in Turkey is Rising, But Not the Type it Needs' available at <http://www.al-monitor.com/pulse/originals/2016/06/turkey-foreign-companies-increase-shrink-in-size.html> (accessed 19 February 2017).

6.5.2.3.3 Minimum capital requirements

There are currently no minimum capital requirements in Zimbabwe for foreign investments.¹⁶³⁹ These only exist when setting up businesses such as banks where, by law, any bank, local or otherwise, should have a certain minimum capital.¹⁶⁴⁰ This is similar to the situation in Turkey where no minimum capital requirements are prescribed. A certain amount of capital is, however, required to set up specific types of companies. For example, USD 37 000 is required to set up a Joint Stock Company and USD 3704 for a Limited Company¹⁶⁴¹

In contradistinction, Tanzania's Investment Act establishes minimum capital requirements for foreign enterprises to enjoy protection under the Act. Herein, a business enterprise wholly owned by a foreign investor or a joint venture requires a minimum capital of USD 300 000.¹⁶⁴² When a business is locally owned, foreign investors must invest at least USD 100 000.¹⁶⁴³ Similarly, Ghana also provides for minimum capital requirements. The capital required is, however, lower than that required in Tanzania. For example, foreign investors need more than USD 200 000 in cash, capital or a combination of both for joint-ventures in non-reserved sectors,¹⁶⁴⁴ as compared to Tanzania's USD 300 000. For the foreign investor to wholly own an investment in Ghana, they must invest at least USD 500 000.¹⁶⁴⁵ Unlike Tanzania, Ghana's minimum capital requirements are subject to exceptions. For instance, a foreigner holding a permanent residence permit, who is married to a Ghanaian for a

¹⁶³⁹ There are, however, minimum asset requirement for compliance with indigenisation laws. See General Notice 459 of 2011. See further section 3.4.1.3.2 of this thesis.

¹⁶⁴⁰ Kararach G & Otieno RO (eds) *Economic Management in a Hyperinflationary Environment: The Political Economy of Zimbabwe, 1980-2008* (2016) 278.

¹⁶⁴¹ See International Business Publications *Turkey: Starting Business (Incorporating) in Turkey – Practical Information and Regulations* (2015) 59.

¹⁶⁴² Section 2(2)(a) of the Tanzania Investment Act 26 of 1997.

¹⁶⁴³ Section 2(2)(b) of the Tanzania Investment Act 26 of 1997.

¹⁶⁴⁴ Section 28(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁴⁵ Section 28(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

period a continuous period of 5 years, is exempted from the minimum capital requirements.¹⁶⁴⁶

While minimum capital requirements encourage large investments, act as a rough screening for 'non-serious' investment and protect other investments from poorly set up investments; they represent a restriction on the freedom of establishment.¹⁶⁴⁷ Furthermore, high minimum capital requirements also pose a danger to healthy competition.¹⁶⁴⁸ Ghana and Tanzania can, therefore, learn from Zimbabwe which does not provide for any minimum capital requirements.

6.5.2.3.4 Definitions: investors and investments

As the IEEA is not an investment Act, there are no definitions for investors and investments provided. Ghana's GIPC Act also faces the same challenge. The Act centres on the establishment of the GIPC. Accordingly, no definitions for investors and investments are provided. On the other hand, Turkey's and Ghana's laws on investment expressly provide for the definition of investors and investments.¹⁶⁴⁹ Turkey's provisions are, however, more preferable to those of Ghana. This is because of the lack of clarity in these definitions. Zimbabwe could, therefore, learn from how Turkey defines investors and investments. However, there is a need to account for the missing issues in these definition, specifically: the treatment of dual-citizens and companies effectively managed in other jurisdictions.

6.5.2.3.5 Freedom of investment, national treatment and MFN treatment

Amongst the countries compared, Turkey is currently the only country that provides for freedom of investment in its law.¹⁶⁵⁰ National treatment is provided for in the Turkish

¹⁶⁴⁶ Section 28(5) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁴⁷ See Paschalidis P Freedom of Establishment and Private International Law for Corporations (2012) ch 2.

¹⁶⁴⁸ World Bank *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises* (2013) 43.

¹⁶⁴⁹ Article 2 of the FDI Law.

¹⁶⁵⁰ Article 3(a)(1) of the FDI Law.

FDI Law and the 2013 Ghanaian GIPC Act. Only the GIPC Act, however, provides for MFN treatment.¹⁶⁵¹ While this provision is quite important in ensuring non-discrimination in the investment process, it is however not necessary in national legislation. Zimbabwe can thus learn from some aspects of the 2013 GIPC Act as well as from Turkey's freedom of investment.

6.5.2.3.6 Expropriation and nationalisation

The IEEA and the ZIA Act do not have an express provision on expropriation and nationalisation. However, this is not entirely problematic. Section 32 of the ZIA Act provides that the property of licenced investors is extended the protection of all domestic laws in Zimbabwe.¹⁶⁵² Zimbabwe's Constitution, as discussed in chapters 3 and 4, provides for expropriation and compensation.¹⁶⁵³ Furthermore, investors from countries with which Zimbabwe has signed BITs are extended further protection under these.¹⁶⁵⁴

Ghana, Tanzania and Turkey, however, have made firmer commitments in this regard. All three of them have express guarantees against expropriation in their investment laws. Nevertheless, existent are differences in how these provisions have been structured. For instance, in addition to providing for 'fair and prompt compensation', Tanzania's FDI Law provides for the option to access a court or seek arbitration in determining how much compensation should be claimed.¹⁶⁵⁵ With some resemblances, Ghana affords a foreign investor 'fair and adequate' compensation as

¹⁶⁵¹ The MFN clause has been at the centre of many arbitral proceedings. This might explain its exclusion in the Turkish FDI Law. See *Maffezini v Spain* ICSID Case No. ARB/97/7, *Asian Agricultural Products Ltd v Sri Lanka* ICSID Case No. ARB/87/3, *ADF v USA* ICSID Case No. ARB (AF)/00/1, *Tecmed v Mexico* ICSID Case No. ARB/AF/00/2 and *Siemens v Argentina* ICSID Case No. ARB/02/8.

¹⁶⁵² Section 32 of the ZIA Act.

¹⁶⁵³ Section 71(3) of the Constitution of Zimbabwe. See also section 4.3.2.2.3 of this thesis. See further section 3.2.2 of this thesis.

¹⁶⁵⁴ See generally section 4.3.2.2.3 of this thesis.

¹⁶⁵⁵ Section 22(1)(b) of the Tanzania Investment Act 26 of 1997.

well as a right of access to the High Court in order to show how much compensation can be received.¹⁶⁵⁶

In contrast, however, Turkey's FDI law is more general, providing for expropriation upon payment of compensation in accordance with due process of the law. Therefore, as demonstrated earlier, one can only determine the amount of compensation payable by turning to the Turkish Constitution.¹⁶⁵⁷ Zimbabwe (as well as Turkey) could learn lessons from Ghana in what should be contained in this provision. Its scant protections, and subsequent violations which peaked during the land reform,¹⁶⁵⁸ bear testimony to this need. Notwithstanding this, all four countries can improve by being specific on the methods that will be used to calculate the amount payable.

6.5.2.3.7 Investment guarantees, transfer of capital, profits and dividends and personal remittances

Generally, the RBZ allows investors in Zimbabwe to repatriate 100 per cent of their profits or earnings.¹⁶⁵⁹ There are no express guarantees in the current laws that touch on foreign investment. This provision is, however, one of the hallmarks of a good investment law. As such, Turkey, Tanzania and Ghana all have a provision in this regard. Although the wording of these provisions are somewhat different, their content and object remains largely the same. However, Turkey's and Tanzania's provisions are more preferable as role models for Zimbabwe due to their clarity on what exactly can be repatriated/transferred.

6.5.2.3.8 Dispute settlement

Investors in Zimbabwe can only appeal a decision made by the ZIA Board, within 30 days of such decision, to the Minister of Indigenisation and Economic

¹⁶⁵⁶ Section 31(2)(a) as read with s 31(2)(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁵⁷ See section 6.4.2.4 of this thesis.

¹⁶⁵⁸ Section 3.2.2 of this thesis.

¹⁶⁵⁹ International Business Publications *Zimbabwe Business Law Handbook: Strategic Information and Laws* (2013) 79.

Empowerment.¹⁶⁶⁰ These appeals generally deal with procedural issues such as the suspension or termination of investment licenses. What is not provided for, however, is a means of settling disputes regarding the actual investment. As has been mentioned at many intervals in this thesis, any modern-day investment document should contain a clause on dispute settlement. In BITs, such dispute settlement is done at as a state-state level and investor-state level. In investment codes, provision is usually made for the use of domestic courts as well as the use of investor-state arbitration. Similar provision is accorded Turkey, Ghana and Tanzania's laws.

There is definitely value in all three provisions, despite their slight variances, which Zimbabwe can benefit from. Tanzania provides the most help in terms of drafting. It provides for an emphasis on negotiation, as a first point of call, when a dispute arises.¹⁶⁶¹ Furthermore, the disputing parties are given the option to choose between Tanzanian arbitration laws, ICSID rules or any BIT rules.¹⁶⁶² This gives the parties wide latitude to settle on a mutually acceptable option. If, however, more discretion is required; Turkey's options of local courts, national or international arbitration or any form of legitimate dispute settlement,¹⁶⁶³ would also be appreciable. Also, Ghana's upfront statement of a timeline (6 months) in which a dispute may remain unresolved,¹⁶⁶⁴ is also a good measure to ensure that initial negotiations are not unnecessarily dragged.

6.5.2.3.9 Immigration/ Labour/ expatriates

At the heart of many international discourses, of late, has been the issue of immigration and the employment of expatriates.¹⁶⁶⁵ Zimbabwe's ZIA Act speaks to employment

¹⁶⁶⁰ Section 23 of the ZIA Act.

¹⁶⁶¹ Section 23(1) of the Tanzania Investment Act 26 of 1997.

¹⁶⁶² Section 23(2) of the Tanzania Investment Act 26 of 1997.

¹⁶⁶³ Article 3(e) of the FDI Law.

¹⁶⁶⁴ Section 33(2) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁶⁵ González D & Nowicki D 'Governments Across the Globe Struggling With Immigration' available at <http://archive.azcentral.com/news/articles/global-immigration-main.html> (accessed 23 February 2017).

creation for locals as a significant consideration in granting investment licenses.¹⁶⁶⁶ Therefore, '[a]ny investment proposal that involves the employment of expatriates must present a strong case for doing so in order to obtain a work and residence permit'.¹⁶⁶⁷ The employment of expatriate labour is expressed more succinctly in the other jurisdictions under comparison. These provisions are, however, significantly variable.

For instance, Turkey's clause focuses on vesting power to issue permits to expatriates on the Ministry of Labour and Social Security,¹⁶⁶⁸ in line with the Law on Foreign Personnel Working Permits No. 4817. Unlike some of its counterparts, this provision does not restrict expatriate labour to those with technical and managerial expertise.¹⁶⁶⁹

Ghana's clause, on the other hand, does not provide for such leeway. It allows expatriates to be employed in position of management in the business enterprise.¹⁶⁷⁰ This is subject to the condition that there are any suitably qualified local candidates.¹⁶⁷¹ Ghana also has an extra provision dealing with automatic quotas of expatriates.¹⁶⁷² Here, an enterprise is (roughly) guaranteed an expatriate worker for every USD 250 000.¹⁶⁷³ Despite the fact that an application can be made to make a case for the employment of more expatriates, for the amounts involved, and the potential scale of business with such capitalisation, these are very small numbers of expatriates.

Tanzania adopted a system similar to Ghana's automatic quota. Herein, a business enterprise is allowed a maximum of 5 expatriates at its start-up phase.¹⁶⁷⁴ A review of all three provisions would suggest that Zimbabwe is better suited adopting the provision in Turkey. While it limits expatriates to technical and managerial employees,

¹⁶⁶⁶ Section 14(b) of the ZIA Act.

¹⁶⁶⁷ 75.

¹⁶⁶⁸ Article 3(g) of the FDI Law.

¹⁶⁶⁹ See generally Klabbers J (eds) (2016) & Brown C (2013) 420.

¹⁶⁷⁰ Section 34(3)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁷¹ Section 34(3)(b) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁷² See s 35(1)(a) of the Ghana Investment Promotion Centre Act 865 of 2013.

¹⁶⁷³ See section 6.3.5.3.2 of this thesis for how the automatic expatriates system in Ghana works.

¹⁶⁷⁴ Section 24(1) of the Tanzania Investment Act 26 of 1997.

it does not provide a cap on how many can be employed. This is a more balanced approach than that adopted by Ghana and Tanzania.

6.5.3 Distinct aspects

6.5.3.1 Legal aspects

While a comprehensive discussion has been done on aspects which are similar in all four countries, there are aspects worth noting which are only provided for in Turkey's FDI Law. Of note are provisions on access to real estate, liaison offices and the determination of policies and data collection.

The provision on access to capital does have some merit. In many instances, it is a big question on what property can be owned by foreign businesses and how much. This provision is more distinguishable when viewed from the perspective of Zimbabwe and its land reform. It may address questions such as whether foreign businesses can own farms or large tracks of land for business purposes. Furthermore, the offering of incentives such as citizenship to investors who invest heavily in real estate will catalyse the attraction of the much needed FDI.

A provision allowing for the establishment of liaison offices is an excellent idea for a country such as Zimbabwe. Many investors are now reluctant to invest in Zimbabwe as a result of bad media publicity as well as the bad record the government has earned over the years. However, on the ground it's not all doom and gloom. Much of the statements made by the government in relation to investment are all theatrics poised at garnering electoral votes. In actual fact, the government is slowly moving towards an inclusive economy which is investment friendly. An opportunity to 'test the market', so to say, would provide investors with invaluable information about the richness of Zimbabwe as an investment destination.

Finally, a provision on the determination of investment policies would be quite novel for Zimbabwe. As discussed in chapter 1, there are severe variances in opinion on

who must set the agenda for investment in Zimbabwe. Such a provision would provide clarity to investors on who will drive investment law and policy in Zimbabwe, and how will they execute such a task.

6.6 CONCLUSION

This chapter has discussed the laws, policies and institutions in Ghana, Tanzania and Turkey. These were then compared to those in Zimbabwe in a detailed comparative analysis. This analysis revealed that while there are aspects that Zimbabwe does better than the comparators (such as having a detailed investment promotion centre Act), in most instances, Zimbabwe has much to learn from what is being done in other countries. In relation to policy, it was noted that there is a need to develop a standalone policy for investment which will form the base for the government's stance on investment. It was noted that Tanzania's NIPP is a good policy to model upon.

It was further highlighted that, in terms of institutions, Zimbabwe's flagship one-stop-shop investment promotion centre was now outmoded. Evidence from Turkey suggests that there is perhaps a need to have more interdependent institutions on foreign investment. If but anything, Turkey's system of high powered institutions exposed that more institutions are not necessarily a bad thing. However, care must be taken so as to ensure that there are no significant overlaps between the institutions.

Lastly, it was also shown that Zimbabwe's *de facto* system regulating investment (the IEEA, the ZIA Act and the Land Reform Policy) has not done particularly well in protecting and promoting investment. There is therefore a need to fill the gaps in terms of common aspects such as: ownership restrictions, activities reserved for locals, the definition of investors and investments, freedom of investment, expropriation and nationalisation, investment guarantees, dispute settlement and the employment of expatriates. Furthermore, Zimbabwe could benefit from aspects in other jurisdictions

such as provisions on access to real estate, liaison offices and the determination of policies.

Importantly, however, all four countries can also investigate into providing commonly provided for clauses such as fair and equitable treatment and full protection and security which are also essential guarantees for investors. Further to that, in view of the discussion undertaken in previous chapters, all four countries should seek to balance the rights and obligations of investors and state parties in their codes, to the fullest extent possible. The next chapter furnishes a conclusion and provides recommendations.



CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

*'Laws evolve as do societies. To be relevant and effective, laws have to keep pace with global changes within the particular societies to which they apply. Investment laws are no exception'*¹⁶⁷⁵

7.1 INTRODUCTION

The aim of this thesis was to determine how Zimbabwe can tailor its legislative, institutional and policy frameworks on investment in a manner that creates a positive and certain investment climate. It was demonstrated that in order to do any meaningful reform, due regard had to be given to Zimbabwe's bilateral, regional and international obligations. However, an important finding was that for the reform process to succeed, it is important that the process also factor in global trends and the Zimbabwean context in which the reforms will operate. Against this background, an FDI law, a new institutional setup and an FDI policy are suggested.¹⁶⁷⁶ This chapter summarises the key findings of this thesis and details the aforementioned recommendations.

7.2 KEY FINDINGS

Chapter 1 introduced the concept of FDI and set out the background to this study. Chapter 2 then discussed the historical development of international investment law up to the current international framework. In tracing the historical development, focus was placed on key international documents and codes on investment law which influenced the current state of affairs.¹⁶⁷⁷ Importantly, it was noted some of these

¹⁶⁷⁵ Investment Services Advisory Group.

¹⁶⁷⁶ It is vital to note that after the completion of this thesis, the government has begun the process to amend the indigenisation laws and published investment guidelines that ought to inform the reform process of the investment climate in Zimbabwe.

¹⁶⁷⁷ See part 2 above.

documents form part of the soft law on international investment law. A topical discussion which also emerged was that of the failure to establish global standards entrenched in a multilateral investment agreement.¹⁶⁷⁸ It was noted that while this process had been fruitless, the depth and content of some of the provisions and discussions are particularly instructive when drafting investment law documents.¹⁶⁷⁹

Despite the failure to establish multilateral standards, earlier codes and draft treaties developed many key principles and standards, which today play a key role in investment law. Most notably, four factors have emerged as the foremost important issues in international investment law.¹⁶⁸⁰ These are: (a) the treatment of foreign investment, (b) the protection of investment, (c) the settlement of disputes, and (d) the provision of policy space.¹⁶⁸¹ In terms of the treatment of foreign investment, it was discussed that two principles stand out, namely; MFN treatment and national treatment. As regards the protection of investment, numerous principles such as fair and equitable treatment, the international minimum standard, full protection and security standard, expropriation and compensation were canvassed.¹⁶⁸² These principles were important as they would become the foundation of investment law. Today, these can be found in all forms of investment documents; including BITs, investment contracts, RTAs and domestic codes. As a result, these principles were discussed in all later chapters.

Chapter 3 explored the domestic law on FDI in Zimbabwe, the institutional framework and the policy framework. In terms of policy, the chapter showed that while there is no defined policy on investment, the indigenisation policy and the land reforms policy

¹⁶⁷⁸ See parts 2.3.4 and 2.3.5 above.

¹⁶⁷⁹ See part 2.5 above.

¹⁶⁸⁰ See part 2.3 above.

¹⁶⁸¹ See part 2.3 above.

¹⁶⁸² See part 2.3 above.

were the most influential policies.¹⁶⁸³ As regards these policies, the chapter also reflected on the inherent challenges abound in them.

In terms of the indigenisation policy, on the one hand, it was noted that while the policy sought to address the scathing challenge of inequality, the policy was however plagued by numerous challenges.¹⁶⁸⁴ For one, it was noted that the implementation of the program had largely been ineffective, resulting in the program benefiting a few black elite.¹⁶⁸⁵ The benefits of this program had largely not filtered to the ordinary man on the street. The program also had a consequential effect of obscuring the dream of a non-racial society as it constantly reminded people of their racial difference through classification.

Furthermore, the requirement, as crystallised in the IEEA, that companies have to cede 51 per cent of their shareholding to indigenous Zimbabweans left more questions than answers. Whilst this idea espouses a transformative vision of creating a just and equitable society where the injustices of the past are redressed; the findings of the thesis in this regard was that the idea impeded investment as investors were not keen to invest in a country where they had to give up majority shareholding.¹⁶⁸⁶ In business, the ultimate objective is to make a profit and business sense cannot be found where an investor has to give up their controlling interest in a business.¹⁶⁸⁷

It was also noted that the relevant parts of the indigenisation policy affecting investment did not mesh well with the current international system of investment.¹⁶⁸⁸ As noted in chapter 2, the current system of investment focuses on investor protection, and as such, investors make investments in jurisdictions where they get the most protection. It is, therefore, counter-intuitive to keep the indigenisation provisions in

¹⁶⁸³ See part 3.2 above. The look east policy was not considered because it was deemed to be rather a political policy.

¹⁶⁸⁴ See part 3.2.3 above.

¹⁶⁸⁵ See part 3.2.3 above.

¹⁶⁸⁶ See part 3.4.3 above.

¹⁶⁸⁷ See part 3.4.3 above.

¹⁶⁸⁸ See part 3.5 above.

their current state. The suggestion was therefore that there was a need to rethink the indigenisation policy, particularly the aspects that have a bearing on investment.

The land reform policy, on the other hand, quite similar to the indigenisation policy, was also born out of the need to redress systematic inequality brought about by colonialism.¹⁶⁸⁹ Despite the noble intentions of the program, the implementation of the program, as found in chapter 3, left much to be desired.¹⁶⁹⁰ For example, constitutional amendments stripped land holders of their right to compensation for expropriation. Foreign investor's farms which were protected under BITs and international law were also expropriated. This was evidenced in cases such as *Bernadus Henricus Funnekotter and Others v Republic of Zimbabwe*, *Bernhard von Pezold and Others v Republic of Zimbabwe* and *Border Timbers Limited et al v Republic of Zimbabwe* heard at the ICSID.¹⁶⁹¹

Furthermore, in cases heard at the SADC Tribunal, Zimbabwe also refused to submit to the jurisdiction of the SADC Tribunal.¹⁶⁹² To make matters worse, the government also enacted laws *ex-post facto* to allow arbitrary expropriation.¹⁶⁹³ The land reform policy therefore raised numerous questions about the respect for property rights and the rule of law. More so, the policy eliminated legal certainty which is a necessity in developing countries. From the discussion, it can already be noted that there is need for clarity on the part of the government as regards property rights. Current utterances by politicians of continuing the land reform program only serve the purpose of agitating existing investors and scaring away potential ones.

In terms of the institutional framework, chapter 3 noted that there were two main institutions dealing with foreign investment, namely; ZIA and the RBZ. It was shown that ZIA has a key role to play in terms of investment promotion. An analysis of its

¹⁶⁸⁹ See part 3.2.2 above.

¹⁶⁹⁰ See part 3.2.2 above.

¹⁶⁹¹ See part 3.2.2 above.

¹⁶⁹² See part 3.2.2 above.

¹⁶⁹³ See part 3.2.2 above.

enabling statute showed that there were ample legislative mandate for the promotion authority to perform its mandate. However, in chapter 6, further discussions on the institutional framework were undertaken.

Finally, the legal framework on FDI in Zimbabwe was also examined. The chapter found that while there was no *per se* domestic law on investment, the IEEA and its regulations were the *de facto* law on investment.¹⁶⁹⁴ This was because while they were the legal basis of indigenisation, they contained over-arching provisions which had a significant impact on investment. There were, however, significant challenges with the IEEA and its regulations. For instance, it was shown the Regulations conflicted with the provisions of the empowering statute, the IEEA. Moreover, it was noted that the IEEA and its Regulations had the unintended effect of diminishing foreign investment as investors were not keen on investing in a country where they could not own a controlling interest, as discussed above. Equally important, it was found that the *de facto* legal framework on investment fouled numerous international standards and norms.¹⁶⁹⁵

Chapter 4 of the thesis outlined the obligations that emanated from Zimbabwe's BITs. It was found that Zimbabwe has made many commitments to investors as regards investor protection.¹⁶⁹⁶ Most notably, Zimbabwe had committed to provide MFN treatment, NT, fair and equitable treatment, full protection and security, compensation for expropriation, free transfer of funds and repatriation of profits, subrogation and provision for dispute settlement. Worth noting is the fact that the mentioned provisions are not a *numerous clausus*. There are other provisions which Zimbabwe is bound by, but these were the most common. The challenge with these provisions is that they did not balance the rights and obligations of investors and host parties. This means that important considerations in the modern era such as the right to regulate, policy space,

¹⁶⁹⁴ See part 3.4 above.

¹⁶⁹⁵ See part 3.5 above.

¹⁶⁹⁶ See part 4.3 above.

transparency, corruption, the lowering of standards and corporate social responsibility are not taken into account.

Chapter 5 examined RTAs, focusing on their role in protecting and facilitating FDI. The exposition of this chapter was that Zimbabwe had regional obligations emanating from instruments of regional bodies such as the AU, COMESA and SADC. These obligations related to the promotion of investment, the scope of application, fair and equitable treatment, expropriation and compensation, repatriation of funds and transfer of profits, MFN treatment, general exceptions, transparency, investor responsibility, the optimal use of natural resources, the right to regulate and the settlement of disputes.¹⁶⁹⁷ Some of these principles were found to yet be reflected within Zimbabwe's investment regime. The chapter also found that in reforming Zimbabwe's investment regime guidance could also be sought from non-binding regional documents, more specifically, the SADC Model BIT.¹⁶⁹⁸

Chapter 6 surveyed the domestic investment frameworks of Turkey, Ghana and Tanzania. Thereafter, the contents of these frameworks were compared to those in Zimbabwe. The findings of this discussion were that while there were some similarities in the way in which the investment framework in Zimbabwe was situated, as compared to these countries, there remained significant differences from which Zimbabwe could draw lessons.¹⁶⁹⁹ In terms of policy, Zimbabwe could learn from Tanzania which has a solid and definitive policy on foreign investment informing government action in this regard.¹⁷⁰⁰

On the institutional front, it was highlighted that Zimbabwe has a very robust and detailed institutional framework, empowered by the ZIA Act. However, the operationalisation of the one-stop shop model of investment promotion had failed to

¹⁶⁹⁷ See part 5.3 above.

¹⁶⁹⁸ See part 5.3.3 above.

¹⁶⁹⁹ See part 6.4 above.

¹⁷⁰⁰ See part 6.4.2.1 above.

yield fruits. The suggestion in this regard was therefore that Zimbabwe could borrow from the Turkish model of investment promotion which utilises a multi-faceted approach comprising of smaller and different-functioning entities.¹⁷⁰¹

As regards the legal framework, discussions were led on many issues regarding the domestic regulation of investment, such as; ownership restrictions, activities reserved for locals, minimum capital requirements, the definition of investors and investments, the freedom of investment, national treatment, MFN treatment, expropriation and nationalisation, transfer of funds and repatriation of profits, dispute settlement, immigration, access to capital, the determination of investment policies and the establishment of liaison offices.¹⁷⁰² It was noted that in developing the domestic law on investment, some of these provisions such as the MFN provision were not entirely suited for a domestic code, whilst for other provisions such as ownership restrictions and activities reserved for locals, revisions had to be made. Finally, newer provisions such as the establishment of liaison offices in the Republic could also be adapted from other countries.

7.3 PROPOSAL FOR REFORM

From the discussion above, and the thesis more broadly, it is clear that there are a lot of issues arising from Zimbabwe's FDI regime. These include the need to: (1) comply with divergent regional obligations, (2) harmonise Zimbabwe's fragmented laws dealing with foreign investment, (3) create a better functioning institutional framework for investment, (4) comply with international standards, (5) balance rights and obligations of investors and the Republic, (6) create more policy space for the state, (7) avert future challenges arising from problematic provisions in BITs, (8) adequately address the issue of indigenisation and economic empowerment, (9) have a firm policy on foreign investment guiding state practice, and (10) create legal certainty. This

¹⁷⁰¹ See part 6.4.2.2 above.

¹⁷⁰² See part 6.4.2.3 above/

section therefore makes a proposal for reform. The proposal is threefold, to reflect the three aspects covered by this thesis - policy, institutions and the laws.

7.3.1 Proposal for an FDI policy

The term FDI law is often used to refer to FDI policy, hence most countries save for a few exceptions like Ghana, do not have a policy document for investment. While FDI laws are important in articulating the rights and obligations of the investors and the state, they, for the most part, do not articulate the government's policy position with regard to FDI. To clarify this position in Zimbabwe, a concise FDI policy setting out the position of the government in terms of investment has been recommended. The text of this proposal has been detailed in the annex to this chapter.

7.3.2 Proposal for the augmentation of the institutional framework

Whilst the role of institutions in promoting and advancing the investment agenda is often underplayed by a focus on substantive law, institutions nonetheless have an important role to play in improving investments in a country. The current institutional framework in Zimbabwe, as discussed in chapter 6, is quite detailed and articulately laid out.¹⁷⁰³ Notably, the ZIA Act establishes ZIA as a one-stop-shop for investment in the country. The main challenge, however, has been the successful operationalisation of this model. Furthermore, another challenge has been the failure to create an intimate relationship between the state and capital. It is against this background that this thesis makes suggestions to complement rather than supplant ZIA.

The suggestions are derived from the discussion in chapter 6 where the "Turkish model of restructuring" was examined. Two of Turkey's 5 institutions, the IAC and YOIKK, are used as models for this purpose. Operationally, ZIA remains the sole institution dealing with investment promotion and support. The proposed institutions,

¹⁷⁰³ See chapter 6.4.2.2 of this thesis.

the Directorate for the Continuous Improvement of Investment Conditions (the Directorate) and the National Advisory Council on Investment (Advisory Council), shall be responsible for driving the investment reform agenda through state-investor-stakeholder relations.

7.3.3 Proposal for a law on FDI in Zimbabwe

In terms of the legal context, this thesis proposes an FDI Law to govern FDI in Zimbabwe. Such a law will address a number of issues identified throughout this thesis. These include:

(a) Fragmented provisions

One of the main challenges identified in this thesis was the fragmented approach undertaken with regard to the regulation of foreign investment in Zimbabwe. The law harmonises all investment provisions under one roof. Issues under separate laws such as restrictions to investment, ownerships restrictions and minimum capital requirements are all brought under the Act.

(b) Compliance with divergent regional standards

Another issue that arose was that of the divergent regional standards. For example, the 2016 SADC FIP does not provide for fair and equitable treatment, while the COMESA Treaty provides for this standard.¹⁷⁰⁴ In cases such as this the middle ground is adopted. The standard is maintained, albeit in a qualified form. The inclusion of these provision is also done having regard to the discussion below.

(c) Bilateral investment treaties and their problematic provisions

In chapter 4, Zimbabwe BITs were examined at great length. Problems with the unbalanced provisions in these BITs were identified. In assessing these challenges, potential solutions were also suggested. However, a more general discussion led in

¹⁷⁰⁴ See parts 5.3.2 and 5.3.3 above.

chapter 2 highlighted the fact that there is no proven correlation between BITs and increases in foreign investment.¹⁷⁰⁵ In a review of its BIT system, South African came to the same conclusion. While it could be argued that BITs create a legal environment for the promotion and protection of foreign investment, this could equally be done through a domestic law.¹⁷⁰⁶

Given the fact that BITs create numerous problems for the host state with no verifiable benefit, it is therefore deemed prudent, in the view of this thesis, to terminate all of Zimbabwe's BITs, and integrate the protections contained in the BITs into the proposed law, albeit in a form that balances rights and obligations of investors and the host state. This is until such a time that Zimbabwe can establish compelling economic interests for the conclusion of new BITs. In which case, the recommendations in chapter 4, as read with the proposed law, can serve as a guideline for future treaty practice. Some investors will however continue to enjoy protection from these BITs until their sunset clauses run out. New investors or investors whose country had no BIT with Zimbabwe will however be protected in terms of the proposed law.

The following changes were then made to the problematic provisions in the proposed law:

(1) The definition of investors

In terms of the definition of investors, the issue of dual nationality is resolved. Where an investor has dual nationality, such investor shall be regarded as being exclusively a national of state where they are predominantly resident. As regards juristic persons, such entities are deemed to be a legal entity in the country where it has its seat of control. Furthermore, unlike the definition in BITs where only an investors of the State Parties are covered, all investors in Zimbabwe are covered by the definition in the Act.

¹⁷⁰⁵ See part 2.4.2 above.

¹⁷⁰⁶ The only difference is that Zimbabwe will not benefit from the protection of its outward investment. However, given the current economic climate in Zimbabwe, these are negligible.

(2) The definition of investments

The wide open-list asset-based definition in Zimbabwe's BITs has been replaced with the narrower enterprise based definition. This provision has the effect that assets will be considered as forming part of an investment if they are assets of the enterprise. This narrows the assets covered and makes the definition more precise.

(3) National Treatment

Zimbabwe's BITs, except for the Zimbabwe-South Africa BIT, do not provide for a qualified NT standard. However, in term of its regional obligations from documents such as the 2016 SADC FIP, Zimbabwe can qualify the NT standard. Accordingly the proposed law qualifies the NT standard. Herein, the state is entitled to take measures to redress injustices of the past. Another challenge addressed in this provision is that NT is qualified to be accorded in 'like circumstances'. Herein, an indicative list is provided detailing what could constitute 'like circumstances'. This is important because it reduces confusion with regard to when foreign investors and local investors should be treated equally.

(4) Fair and equitable treatment

The proposed law, unlike the 2016 SADC FIP, includes a provision on fair and equitable treatment. As opposed to the basic provision of fair and equitable treatment in Zimbabwe's BITs and RTAs, a qualified provision is furnished. To this end, a closed list on instances when the fair and equitable treatment standard can be breached is given. This means that the standard can no longer be misconstrued through broad interpretations.

(5) Physical protection and security

The full protection and security standard was also incorporated into the proposed law, albeit, in a more precise form. To begin, the standard is now couched as a clause on 'physical protection and security'. This addresses the challenges with regards to the

scope of the clause. Secondly, a qualification that physical protection and security will be provided to foreign investors, subject to the availability of resources is introduced. This ensures that the state is not overburdened by the obligation to protect foreign investments.

(6) Expropriation and compensation

A departure is made from the expropriation and compensation standards in Zimbabwe's IIAs. In these agreements, fair, prompt and adequate compensation, generally associated with the full market value is given. However, in the proposed law, fair and adequate compensation which, may in certain cases be below the full market value, is prescribed. This was so as to align Zimbabwe's expropriation provision with the 2016 SADC FIP. This is also consistent with the wide discretion to regulate afforded to the host state by the expropriation provision in the CCIA. This flexibility on valuation strikes a balance between the public interest and the interests of those affected.

Secondly, the provision also addresses the issue of indirect expropriation which was yet to be addressed in Zimbabwe's BITs. Here, it is noted that an exercise of the right to regulate by the host state does not constitute an infringement of the right to regulate. This reaffirms the right to regulate and grants the government policy space to regulate in the public interest.

Lastly, the provision gives the investor a right in domestic law to approach the domestic courts to seek relief if they are aggrieved by a decision to expropriate their property.

(7) Repatriation of profits and transfer of funds

An interesting qualification that is made with regard to provision is that of a temporary and non-discriminatory limitation on transfers in cases of severe economic constraints. This qualification ensures that transfers do not affect the state's ability to meet its commitments such as balance of payments.

(8) Dispute settlement

In terms of dispute settlement, because the proposed law is a domestic law, no provision is made for state-state arbitration. As regards investor-state arbitration, this has been made an option of a last resort, pursuant to the exhaustion of local judicial and administrative remedies. This reduces, to an extent, exposure to the costly and sometimes ineffective process of international arbitration.

(d) Balancing rights and obligations of investors and state parties

One of the key issues that consistently arouse throughout this thesis was the need to balance the rights and obligations of investors and state parties. In so doing, the proposed law introduces new provisions which were not contained in Zimbabwe's BITs. These are: the right to regulate, transparency, sustainable development, corporate governance, common obligation against corruption and investor liability. Through the inclusion of these provisions, the proposed laws steers away from the provision of investor-biased provisions, as has been done in Zimbabwe's BITs.

(e) A new direction for the issue of indigenisation and economic empowerment

The enactment of this proposed legislation will repeal the IEEA which has been at the centre of much of the pains of investors. Whilst the Act contains very novel aims and objectives, its application has been less than desirable. Indigenisation will be reviewed under the new proposed institutional framework and newer options that are consistent with sustainable investment will be considered. Meanwhile, the proposed law still leaves room for measures to be taken as exceptions to national treatment. Until more research is done, it is suggested that preferential procurement remain the only exception to NT.¹⁷⁰⁷

¹⁷⁰⁷ It is important that the twin goals of foreign investment and black economic empowerment be pursued. While it is ideal for them to be pursued concurrently, for the meanwhile it makes sense to focus on foreign investment which is key to revitalising the economy.

(f) Creating legal certainty

The adoption of a domestic law on foreign investment, notwithstanding its shortcomings, to a greater degree, stimulates legal certainty. This is as there is only one law providing for rules on foreign investment. This addresses challenges in BITs such as treaty shopping and the importation of treaty provisions through the MFN provision.

7.4 FINAL REMARKS

As countries continue to fight to receive a piece of the global FDI cake, the debate of how much and what kind of protection should be given to investors continues to rage. This has now been further complicated by new discussions on the rights host states should have in addition to their obligations. Zimbabwe is no exception to these discussions. This thesis made a proposal for a law on foreign investment. This law provides clear, precise and qualified provisions that are consistent (to the extent possible) with customary international law, regional obligations and the Constitution of Zimbabwe. Moreover, fragmented provisions under domestic law are also integrated into this law. This creates a sound and certain legal environment necessary for investment. To ensure that the proper functioning of this law, a sound investment policy as well as a functional and effective institutional framework for managing foreign investments are also proposed. These are fleshed out in the annex below.

Word count: 80 756 (excluding footnotes)

ANNEX TO CHAPTER 7

(A) National Policy on Investment

Foreword

In line with the government's vision for accelerated economic growth and wealth creation, the government has prioritised the attraction of FDI as a chief monetary contributor for economic growth. This policy is therefore founded upon the measured liberalisation of the economy without the negation of constitutional obligations on redressing injustices of the past.

National Investment Policy Objectives

The government will be guided by the following objectives, amongst others:

- 1) The need to reaffirm the desire to be guided by the rule of law.
- 2) The endeavour to utilise the resources of the country, natural or otherwise, in a manner that is optimum and sustainable.
- 3) The aspiration to encourage foreign investment in all sectors of the economy open to foreign investment.
- 4) The creation of an efficient, modern and transparent legal framework governing foreign investment.
- 5) The need to advance economic development particularly in sectors that use technology.
- 6) The urge to liberalise investment laws.
- 7) The objective of balancing the rights and obligations of investors and host-parties.
- 8) The desire to encourage Zimbabweans to own businesses and participate in all sectors of the economy.
- 9) The impetus to create jobs and alleviate unemployment.

Implementation Strategy

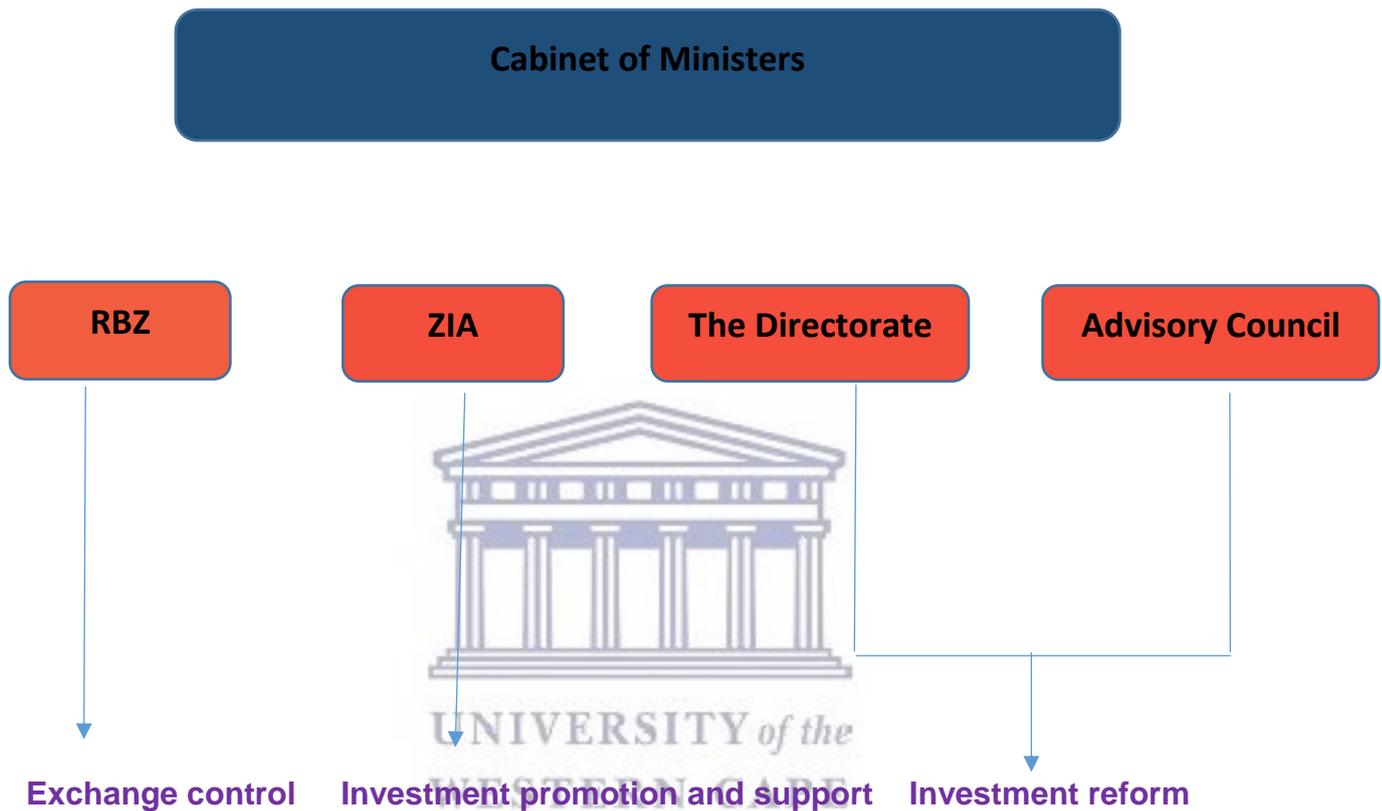
In order to ensure the implementation of the above policy objectives, the government:

- (a) commits to uphold property rights;
- (b) undertakes to take measures to ensure the progressive liberalisation of investment policies;
- (c) agrees to work with all stakeholders to continuously reform the legal framework on investment;
- (d) promises the availability of an adequate system for the resolution of disputes;
- (e) undertakes to align investment guarantees in line with its commitments from its memberships to international institutions and its obligations from international law;
- (f) denotes the need to ensure the complementarity of investment institutions;
- (g) strives to ensure that foreign investment operations are properly facilitated;
- (h) shall work to relax approval requirements and streamline registration procedures;
- (i) commits to incentivise partnerships between local and foreign investors;
- (j) pledges to progressively reduce restrictions to investment.

(B) Investment Institutions

Graphically depicted, the new institutional framework shall be as follows:

Investment Institutions in Zimbabwe



The functioning of the proposed new institutions is detailed below.

7.3.2.1 Directorate for the Continuous Improvement of Investment Conditions

The Directorate will be charged with the task of improving investment conditions in Zimbabwe in the long term. The focus of this institution is therefore to ensure that conditions for sustainable foreign investment are fostered.

Accordingly, the two main functions of the Directorate, similar to YOIKK, are to: facilitate critical reforms and (b) review the legal framework governing foreign investment. This process shall be managed by a steering committee. The steering committee shall be composed of 10 specialists in the areas of Investment law,

International law, Economics and International Relations. One is considered a specialist in one of these fields if they hold a masters or PHD qualification in a particular field or they are practitioners with at least 5 years of experience.

Under the steering committee are 10 task teams charged to perform functions in 10 different areas affecting investment, namely: (a) employment creation (b) enhancing ease of doing business and competitiveness (c) alignment of the investment framework with international trends and standards (d) indigenisation and economic empowerment (e) location of investment (f) R & D (g) investment promotion and facilitation (h) taxation and incentives (i) legislation of FDI and (j) access to land and property. All appointees in these technical teams shall be experts in their fields.

In terms of procedure, the steering committee reports directly to the Minister of Finance and Economic Development, who will in turn, approve the recommendations, liaise with other government stakeholders to facilitate the recommendations or table the recommendations of the Directorate before parliament.

So as to ensure that the recommendations of the Directorate are consultative and feasible, the Directorate shall have public and private sector representative in its processes. On the public sector front, the following entities shall be represented:

- (a) Ministry of Agriculture, Mechanisation and Irrigation;
- (b) Ministry of Energy and Power Development;
- (c) Ministry of Finance;
- (d) Ministry of Home Affairs;
- (e) Ministry of Industry and Commerce;
- (f) Ministry of Public Service, Labour and Social Welfare;
- (g) Ministry of Lands and Rural Settlement;
- (h) Ministry of Mines and Mining Development;
- (i) Ministry of Small and Medium Enterprises and Cooperative Development;
- (j) Ministry of Tourism and Hospitality Industry;

- (k) Ministry of Transport and Infrastructure Development;
- (l) Ministry of Environment, Water and Climate Resources;
- (m) Ministry of Youth Indigenisation, and Economic Empowerment;
- (n) Ministry of Foreign Affairs;
- (o) Zimbabwe Investment Authority; and
- (p) The Reserve Bank of Zimbabwe.

From the private sector, the following shall entities shall be represented:

- (a) Zimbabwe National Chamber of Commerce;
- (b) Chamber of Mines of Zimbabwe; and
- (c) Any Association of Foreign Investors.

Through this representation, a balance of public and private sector interests in making any investment reforms can be struck.

7.3.2.2 National Advisory Council on Investment

The Advisory Council shall be tasked with ensuring that there is an international perspective in Zimbabwe's investment law and policy. To achieve this, the Advisory Council shall be composed of executives of international companies; representatives of business associations; important executives from multilateral organisations such as the IMF and the World Bank, heads of NGOs representing the private sector, representatives of ZIA, representatives of the Directorate, the Minister of Finance and Economic Development, the President of the Republic of Zimbabwe and any other relevant government official. The President chairs the annual meeting (1 week summit) of the Advisory Council which is supposed to share perspectives on enhancing Zimbabwe's competitive position as an investment destination.¹⁷⁰⁸ Discussions on the changes in the investment climate will also be undertaken at this meeting. The findings of this meeting are then documented in a report that is delivered to the Directorate. At

¹⁷⁰⁸ It is important that the President chairs this meetings so that investors are afforded a chance to engage with the executive on important issues such as policy.

this meeting also, progress of the implementation of the recommendations to the Directorate in the previous year are also discussed. This is therefore a practical way of bringing government, investors and other stakeholders to the table to explore practical ways of attracting and retaining foreign investment.¹⁷⁰⁹ Furthermore, this serves an important instrument of informing the investment reform agenda.

(C) FDI Law¹⁷¹⁰

CHAPTER _:_

FOREIGN INVESTMENT ACT

Act _/ _

To afford investors and their investments protection; to balance the rights and obligations of the investors and the Republic; to facilitate the development of the economy through international co-operation, to ensure the efficient exploitation of national resources, and to deal with matters incidental to the

afore-mentioned.¹⁷¹¹

PREAMBLE¹⁷¹²

¹⁷⁰⁹ See United Nations Conference on Trade and Development 'IAC- Investment Advisory Council' available at <http://unctad.org/en/Pages/DIAE/IAC%20-%20Investment%20Advisory%20Council/IAC---Investment-Advisory-Council.aspx> (accessed 23 April 2017).

¹⁷¹⁰ The FDI Law is composed of unique provisions that were drafted bearing in mind the environment in which these provisions are supposed to operate. It also draws provisions from Zimbabwe's various piece-meal laws. Finally, some provisions are drawn from best practices and Zimbabwe's regional treaties.

¹⁷¹¹ As discussed throughout this thesis, the primary purpose of investment laws is to protect investors. However, with time, it has also become important to balance the interests of the investors and the host state. The drafting language of the purpose of the Act is adapted, in part, from the South African Protection of Investment Act and the Vietnamese Law on Foreign Investment.

¹⁷¹² While most domestic codes do not contain a preamble, a preamble is an interesting way of capturing and reflecting the intention of the drafters.

Conscious of the supremacy of the Constitution and the need to respect, protect and promote the rights enshrined therein;¹⁷¹³

Firmly convinced of the duty to protect and promote foreign investment in the Republic;

Recognising the role played by foreign investment in increasing competitiveness in the domestic market, stimulating economic growth, creating jobs and improving the welfare of the people of Zimbabwe;

Recalling the challenges that have been faced in attracting and retaining investment;

Noting the role of the state in ensuring the creation of a sound legislative framework to support foreign investment;

Desirous to create an efficient, transparent and certain investment climate;

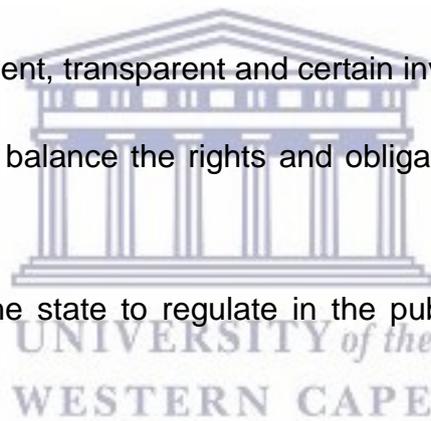
Convinced of the need to balance the rights and obligations of investors and host states;

Reaffirming the right of the state to regulate in the public interest or for a public purpose;

Mindful of the constitutional obligation on the state to take measures to advance the interests of historically marginally groups or persons;

Acknowledging the fact that investments must be protected in terms of the law; and

Cognisant of the duty of the state to respect international law.



¹⁷¹³ Zimbabwe is a constitutional democracy. It is therefore important to note that the constitution is the primary document guiding and informing all laws.

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2. Interpretation of Act.
3. Definitions.
4. Purpose of the Act.
5. Application of the Act.

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7. Restrictions to invest in sensitive sectors.
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PART I

General Provisions

1 Short title and date of commencement

This Act may be cited as the Foreign Investment Act [*Chapter*_:_] and comes into operation on a date that is determined by president and published in the Government Gazette.

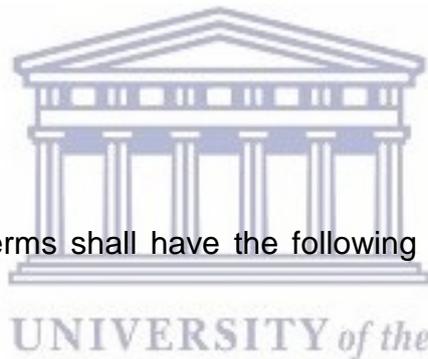
2 Interpretation of Act

This Act must be interpreted and applied in a manner that is consistent with –

- (a) the Constitution, including –
 - (i) the interpretation of the Declaration of Rights in section 46 of the Constitution; and
 - (ii) customary international law as envisaged in section 326 of the Constitution.
- (b) its purpose as articulated in section 4;
- (c) any applicable convention or international treaty which Zimbabwe has signed, ratified and domesticated by an Act of Parliament in terms of section 327 of the Constitution.

3 Definitions

In this Act, the following terms shall have the following meaning ascribed to them hereunder–



“Constitution” means the Constitution of the Republic of Zimbabwe, 2013;

“Dispute” means a claim by an investor against the government or a claim by the government against the investor that is instituted in accordance with section 21 of this Act.

“Enterprise” means a business entity that is incorporated in Zimbabwe.

“Government” means government of the Republic of Zimbabwe;

“Investment” means an enterprise within the Republic established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise *established* or acquired in accordance

with the laws of the Republic and registered in accordance with the legal requirements of the Republic. The enterprise may possess assets such as such as:¹⁷¹⁴

- (a) shares, stock, debentures, and other equity instruments of the enterprise or another enterprise or another enterprise;
- (b) a debt security of another enterprise;
- (c) loans to an enterprise;
- (d) movable or immovable property and other property rights such as mortgages, liens or pledges;
- (e) claims to money or to any performance under contract having a financial value;
- (f) copyrights, know-how, goodwill and industrial property rights such as patents, trade names, to the extent they are recognised under the law of the Host State; and
- (g) rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources.

Investment shall not include:

- (a) debt securities issued by a government or loans to a government;
- (b) portfolio investments;
- (c) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

¹⁷¹⁴ See part chapter 4.4.3.1 above. This definition is drawn from the 2016 SADC FIP. See also part 5.3.3.1 above. This is also the narrowest definition in terms of the proposals set out in the SADC Model BIT. See Article 2 of the SADC Model BIT.

“Investor” means:

- (a) real persons with foreign nationality and Zimbabwean nationals who are permanent residents in other jurisdictions. Where such persons have dual nationality, they are deemed exclusively as a national of the state here they are predominantly resident¹⁷¹⁵ and
- (b) corporations, partnerships, associations, trusts, or other legally recognised entities incorporated or duly organised under the laws of a foreign country or international institution.¹⁷¹⁶ Where such entity is incorporated or established in one country but effectively managed in another country, it shall be deemed as a legal entity of the country where it has its seat of control;¹⁷¹⁷

“Measure” refers to binding governmental action directly affecting an investor or its investment, and includes laws, regulations and administrative action;¹⁷¹⁸

“Minister” means Minister of Finance and Economic Development;

“Regulation” means a regulation crafted in terms of this Act;

“Republic” means the Republic of Zimbabwe; and

“This Act” means the Foreign Investment Act.

4 Purpose of this Act is to –

- (1) is to afford investors and their investments protection that accords with the Constitution, customary international law and any treaties or convention which are binding upon the Republic;

¹⁷¹⁵ See the recommendations in this regard in chapter 6.4.2.3.4 and chapter 4.5.1.2.

¹⁷¹⁶ This incorporates aspects of Article 2(2) of the Turkish FDI Law and the Australia-Hong Kong BIT. See also chapter 4.5.1.2 of this thesis and chapter 6.4.2.3.4 of this thesis.

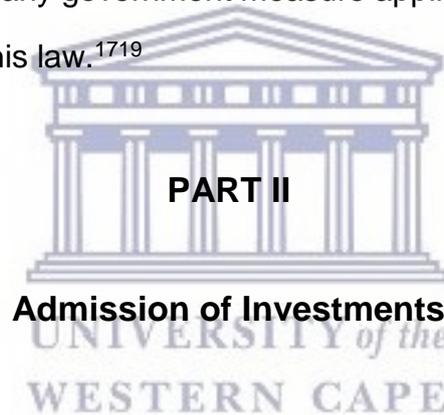
¹⁷¹⁷ See chapter 4.5.1.2 of this thesis. This provision is particularly important in the digital age where businesses can be managed in another part of the globe over the internet.

¹⁷¹⁸ This is derived from the definition section in the South African PIA.

- (2) ensure that the protection offered to investors is balanced with the interests of the Republic; and
- (3) create a sound and certain legislative framework that catalyses investment and aids in the creation of a sound economy.

5 Application of the Act

- (1) This Act applies to all investments, conforming to the definition of investment in section 3 of this Act, made in the Republic before and after the coming into force of this Act unless they are still protected under a survival clause of a terminated bilateral investment treaty.
- (2) This Act applies to any government measure applied or adopted after the entry into force of this law.¹⁷¹⁹



6 Freedom of investment

- (1) Subject to the provision of any special law or any international agreement binding on the Republic:¹⁷²⁰

¹⁷¹⁹ Adapted from Article 4(2) of the Myanmar Investment Law of 2015.

¹⁷²⁰ The idea behind this provision is drawn from the Turkish FDI Law. However, the drafting language in subsection (2) is adapted from the discussion in chapter 4.3.2.1.2 of this thesis. The MFN clause is however not included in this provision because the assumption is that all investors will be treated the same under the FDI Law. Therefore, the MFN clause, in the perspective of this proposed code, would simply be restating the obvious.

(a) foreign investors are free to make foreign direct investments in the Republic with the exception of restricted sectors covered in section 7 of this Act and any corresponding Regulations,¹⁷²¹

(b) foreign investments in the country are subject to the regular process of enterprise registration, which is complemented by licensing and permit requirements.¹⁷²²

(2) After the establishment of the investment, such investments are entitled to national treatment, subject to exceptions, as provided for in section 10.

7 Restrictions to invest in sensitive sectors¹⁷²³

(1) In application of its right to regulate investment in section 12 of this Act and in view of the need to pursue national policy objectives based on the principle of progressive liberalisation, the government has identified a limited number of sectors and business activities where restrictions to invest are maintained.¹⁷²⁴

(2) There are 8 restrictions to entry as follows:¹⁷²⁵

- (a) Barber shops, hair dressing and beauty salons;
- (b) Grain milling;
- (c) Employment agencies;
- (d) Estate agencies and real estates;
- (e) Bakeries;

¹⁷²¹ Given the importance of FDI in a developing country like Zimbabwe, it is important that the freedom to invest be reaffirmed in the FDI Law.

¹⁷²² Adapted, in part, from s 8(2) of the Myanmar Investment Law of 2015.

¹⁷²³ For the avoidance of doubt, this provision does not affect fair and equitable treatment or national treatment. This is as this protection is only afforded to sectors open to foreign investors.

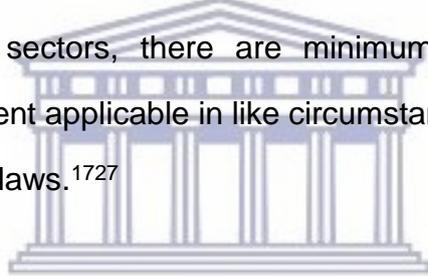
¹⁷²⁴ While restricting certain sectors is not the best approach, in the current economic set up in Zimbabwe, a good case can be made to maintain these. Furthermore, xenophobic attacks as those evidenced in South Africa can be curbed if a few restricted sectors are maintained for local. See chapter 6.4.2.3.2 of this thesis.

¹⁷²⁵ This list is a streamlined list of the restricted sectors listed in GN 9 of 2016. See chapter 3.4.1.3.4 of this thesis.

- (f) Provision of local craft, marketing and distribution;
 - (g) Tobacco grading and packaging; and
 - (h) Valet services.¹⁷²⁶
- (3) These restrictions will be reviewed annually by the Zimbabwean Investment Authority, in partnership with line ministries, and in consultation with any relevant stakeholders.
- (4) If necessary, these restrictions can be reviewed and changed.

8 Minimum capital requirements

- (1) To facilitate foreign investment and liberalisation, there are no blanket minimum capital requirements prescribed for foreign investments.
- (2) However, in some sectors, there are minimum capital requirements for business establishment applicable in like circumstances to foreign investors as determined by other laws.¹⁷²⁷



9 Ownership restrictions

- (1) In terms of shareholding, a foreigner investor can own up to a 100 per cent shareholding of an enterprise in any sector.¹⁷²⁸
- (2) In terms of land and real estate:

¹⁷²⁶ This opens up industries which had been restricted like fuel retailing, agriculture and retail and wholesale trade which are currently restricted subject to exceptions by line ministries.

¹⁷²⁷ These operate in special fields such as banking for both local and foreign investors alike.

¹⁷²⁸ This in effect over-rides the major substantive provision of the IEEA, s 3(1)(a), which forces foreign investors to give up 51 per cent of their company. While a reduction to 25% was considered, this was still determined not to be feasible because investors would (for the most part) still be unwilling to invest in a country where they cannot have full ownership. A major reason for this is that, in the neighbouring countries, with similar natural resources and even bigger markets, no similar obligation is imposed on investors. These countries would therefore continue to operate as 'safe havens' for investment. Furthermore, indigenisation continues to benefit the few who are politically connected. While further regulations protecting against conduct such as those against fronting may be proposed, corruption in Zimbabwe is now deep rooted and endemic. Resultantly, these changes would likely have no practical consequences. It the economic state Zimbabwe is, it makes greater sense to forgo indigenisation, for the meanwhile, while stimulating the economy and creating jobs for a country where only an estimated 500 000 people have formal jobs.

- (a) A foreign investor who has received an investment license for the purposes of agriculture from the Zimbabwe Investment Authority has the right to lease land from the government or from a private individual for a period of 99 years.
- (b) A foreign investor can own real estate, other than agricultural land, without any limitations.
 - (i) Where the investment by a foreign investor in real estate exceeds USD 10 million, such foreign investor is eligible to receive citizenship, subject to the approval of the investment by Zimbabwe Investment Authority and the fulfilment of the conditions set by the Department of Immigration.



10 National treatment

- (1) Foreign investors will receive treatment no less favourable than that which is accorded to local investors in like circumstances with respect to the management, operation and disposition of investments in its territory.
- (2) Like circumstances, *inter alia*, include; the sector where the investment was made, the regulatory process that was used on the measure concerned, the effect on the local community or third persons, the purpose of the measure and other matters which are of relevance to the investor or the investment.¹⁷²⁹
- (3) Notwithstanding subsections 1 and 2, the provisions of this section shall not apply to concessions, advantages, exemptions or any other measures that may result from:

¹⁷²⁹ See part 5.3.2 above.

- (a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or
 - (b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating.
- (4) Nothing in this Article shall be construed to prevent the Republic from adopting or maintaining a measure that prescribes special formalities in connection with redressing injustices of the past.

11 Fair and equitable treatment

- (1) The Republic shall guarantee that foreign investors investing in Zimbabwe receive treatment that is fair and equitable.¹⁷³⁰
- (2) A breach of the fair and equitable treatment obligation only occurs where a measure or a series of measures constitutes:
- (a) Denial of justice in criminal, civil or administrative proceedings;
 - (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;¹⁷³¹
 - (c) Manifest arbitrariness;
 - (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

¹⁷³⁰ The FET standard is a problematic provision prone to wide interpretation. Notwithstanding this, it remains one of the most highly desired, if not the most desired provision by investors. The FET standard is also one of the standards Zimbabwe has committed to provide to investors under the COMESA Treaty. It is therefore vital to include it in the Model Law as it focuses on attracting investors through strong and certain legislative provisions. See *Waste Management v United Mexican States* ICSID Case No.ARB(AF)/00/3 para 99 and *Railroad Development Corp v Guatemala* ICSID Case No.ARB/07/23 for discussions on the interpretive challenges of the FET standard. It is with strong reservations that the FET standard is included in the Model Law. Notwithstanding this, it was however found not to prudent to eliminate the FET standard as was done in the 2016 SADC FIP.

¹⁷³¹ In promoting FET, the state is also obligated to give effect to the right to administrative justice in section 68 of the Constitution. This requires the state to provide investors administrative conduct that is lawful, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Administrative justice also enjoins the state to provide investors who have been adversely affected by an administrative decision to be given prompt and written reasons. See s 68 of the Constitution of Zimbabwe.

(e) Abusive treatment of investors, such as coercion, duress and harassment.¹⁷³²

12 Physical protection and security

- (1) The Republic shall accord physical protection and security to foreign investors and their investment which is no less favourable than that accorded to domestic investors in like circumstances.¹⁷³³
- (2) Investors whose investments in the Republic suffer losses as a result of a breach of subsection (1) above owing in particular to war or other armed conflict, revolution, a state of national emergency, insurrection or riot in the Republic shall be accorded restitution, indemnification, compensation or other settlement no less favourable than that accorded to domestic investors.
- (3) Treatment accorded in terms of this standard should be consistent with minimum standards of treatment in customary international law.
- (4) This treatment should however be subject to the availability of resources.¹⁷³⁴

13 Expropriation and compensation

- (1) Foreign investments in Zimbabwe shall not be expropriated unless such expropriation is done on a non-discriminatory basis and under due process of the law, in the interest of the public or for a public purpose in terms of section 71(3) of the Constitution.

¹⁷³² While tribunals have attempted to limit the FET standard in cases such as *Railroad Development Corp v Guatemala* ICSID Case No.ARB/07/2, these efforts have not borne much fruit. As a result, the textual formulation of the subsection is a direct extraction from the Comprehensive Economic Trade Agreement (CETA) which has definitively limited the scope of the FET obligation by imposing a list of instances where the FET standard can be violated. Although the list in CETA is not a *numerous clausus*, for the purposes of legal certainty, this document adopts a closed list approach. In the alternative, the FET standard could have been linked to the international minimum standard, as has been done in numerous treaties. However, this drafting scheme has been unsuccessful in limiting wide interpretations of the clause which have caused headaches for many developing countries.

¹⁷³³ A discussion on qualifying this provision is led in section 4.3.2.2.2 of this thesis.

¹⁷³⁴ This further adaptation comes from the South African Protection of Investment Act. It is a clever way of restricting liability by noting the availability of resources as a limitation.

- (2) The acquiring authority is required to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition.¹⁷³⁵
- (3) Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard to all relevant circumstances and taking account of:¹⁷³⁶
- (a) the current and past use of the property;
 - (b) the history of its acquisition;
 - (c) the fair market value of the investment;
 - (d) the purpose of the expropriation;
 - (e) the extent of previous profit made by the investor through investment; and
 - (f) the duration of the investment.
- (4) A measure of general application adopted by the Republic that is designed and applied to protect or enhance legitimate public welfare objectives such as public health, safety and the environment, shall not constitute an indirect expropriation.¹⁷³⁷
- (5) An investor affected by expropriation shall have a right under the law of the Republic to a review of their case by a judicial or other independent authority in the Republic.

¹⁷³⁵ See s 71(3)(c)(ii) of the Constitution. See also chapter 4.3.2.2.3 and chapter 6.4.2.3.7 of this thesis. See further chapter 5.3.3.1 of this thesis.

¹⁷³⁶ Adopted from Article 5(2) of Annex 1 of the 2016 SADC FIP.

¹⁷³⁷ Adopted from Article 5(7) of Annex 1 of the 2016 SADC FIP. See also part 4.3.2.2.3 above.

14 Repatriation of profits and transfer of funds

- (1) Foreign investors in Zimbabwe can freely transfer abroad: net profits, dividends, proceeds from the sale or liquidation of all or part of an investment, compensation payments, amounts arising from license, management or similar agreements, and reimbursements and interest payments arising from foreign loans through banks or special financial institutions.¹⁷³⁸
- (2) Such transfers can be made in a freely convertible currency.
- (3) In cases of severe economic constraints such as balance of payments difficulties, external financial difficulties or the treat thereof, or difficulties for macroeconomic management including monetary policy or exchange rate policy, a temporary and non-discriminatory limitation may however be imposed.¹⁷³⁹



15 Sourcing of requisite skills

- (1) Work permits will be granted without reservations to key personnel and other necessary human resources if:
 - (a) such skills are not available in Zimbabwe or Southern Africa, more broadly.¹⁷⁴⁰

¹⁷³⁸ This text is derived from the Turkish FDI Law in a manner of 'textual borrowing'. See the recommendation in this regard in chapter 6.4.2.3.8 of this thesis.

¹⁷³⁹ This is a departure from the general provisions in domestic law pursuant to the RBZ exchange control regulations which allow for the unrestricted transfer of funds. This was also the same position that was uncovered in the 3 jurisdictions that served as comparators. However, in an earlier discussion in chapter 4, a compelling case was made for placing a temporary limitation of the transfer of funds. This is necessary as in the developing country context so as to foster sustainable development. Further, this reaffirms the states right to regulate and allocates space for policy. Furthermore, this is in line with Article 12(2) of the Annex 1 of the 2016 SADC FIP which provides that in times of economic constraint, a state may regulate the movement of capital within its domestic law. Alterations to the RBZ provisions will therefore have to be made accordingly to reflect this new position.

¹⁷⁴⁰ See chapter 6.4.2.3.9 of this thesis. The objective of this provision is to create employment for locals. Notwithstanding the drive towards the employment of locals, safeguards must be put in place so

(b) such sourcing would enhance the development of local capacity through skills transfer.¹⁷⁴¹

PART IV

Rights and Obligations of Investors and Host State

16 The right to regulate

(1) The state has the right to regulate in the public interest, subject to the Constitution:¹⁷⁴²

- (a) to ensure that investment activity is undertaken in a manner that is sensitive to public health, safety, environmental standards, public morals, human rights, labour rights and resource management,¹⁷⁴³
- (b) to redress historic socio-economic injustices of the past,¹⁷⁴⁴
- (c) to advance economic development and participation, and
- (d) to promote cultural practices and indigenous knowledge.

(2) The exercise of the right to regulate shall be understood as embodied within a balance of the rights and obligations of investors and investments and the Republic, as set out in this Act.

that laws are not inward looking and protectionist. In doing so, care is taken so as to not open the proverbial Pandora's Box

¹⁷⁴¹ See Article 9 of Annex 1 of the SADC FIP.

¹⁷⁴² Partially adapted from s 12 of the South African Protection of Investment Act;

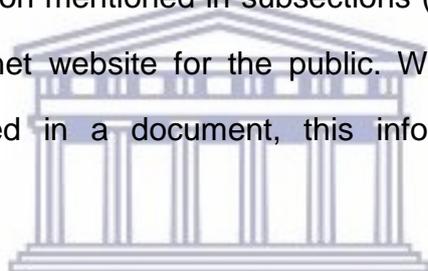
¹⁷⁴³ The right to regulate is provided for under the SADC FIP. This discussion is detailed in chapter 5.3.3.1 of this thesis. This right is critical in ensuring that investor protection is balanced with the interests of the public. See Sornarajah M (2010) 223. Further adaptations are also drawn from the Norway Model BIT which encompasses human rights and labour standards in addition to health, safety and environmental standards encompassed under the SADC FIP.

¹⁷⁴⁴ Subsections (b)-(d) are derived from s 12 of the South African Protection of Investment Act which contains a novel provision promoting the progressive use of the right to regulate to foster legitimate socio-economic objectives.

(3) In the event that investors are aggrieved by the exercise of the right to regulate, they can approach any High Court in the Republic to contest such adverse use of this right.

17 Transparency

- (1) The Republic shall promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies and practices, regulations and procedures as they relate to investment.¹⁷⁴⁵
- (2) Foreign investors should make available, in a timely fashion, all contracts and payments between them and the state regarding establishment or the right to operate an investment, inclusive of taxes, royalties or similar payments.¹⁷⁴⁶
- (3) Ordinarily, the information mentioned in subsections (1) and (2) should be freely accessible on an internet website for the public. Where confidential business information is contained in a document, this information can be redacted accordingly.



18 Sustainable development

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The Republic must guarantee, pursuant to its right to regulate in section 15, that natural resources in the Republic are used and applied in a manner that is environmentally friendly and sustainable.¹⁷⁴⁷

¹⁷⁴⁵ This is derived from the transparency obligation in Article 7(1) of Annex 1 of the 2016 SADC FIP with minor alterations. This provision is particularly important in the Zimbabwean context, where as evidenced in chapter 3 of this paper, the domestic laws not predictable. Furthermore, in chapter 4, it was shown that many of Zimbabwe's

¹⁷⁴⁶ This provision is derived from Article 18 of the SADC Model BIT which extends the obligation of transparency to foreign investors. In the developing country spectrum where corruption is rife and endemic, this provision is a necessity.

¹⁷⁴⁷ See generally Bradlow DD 'A Framework for Assessing Global Economic Governance' (2013) 4 *Boston College International and Comparative Law Review* 987 – 988.

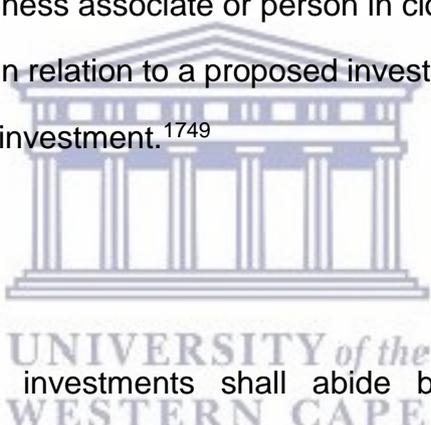
19 Corporate governance

Foreign investors are obliged to conduct their investment activities in a manner that complies with the OECD Guidelines for Multilateral Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact.¹⁷⁴⁸

20 Common obligation against corruption

Investors and their investments shall in their dealings not offer, given or promise, directly or indirectly, any undue pecuniary or other advantage, to a public official of Zimbabwe, their family, business associate or person in close proximity to the official, so as to receive any favour in relation to a proposed investment, any license, contract or other rights related to an investment.¹⁷⁴⁹

21 Investor responsibility

- 
- (1) Investors and their investments shall abide by the laws, regulations, administrative guidelines and policies of the Republic within the full life cycle of those investments.¹⁷⁵⁰
- (2) Investors have a duty not to interfere in domestic politics in the Republic.¹⁷⁵¹

¹⁷⁴⁸ This is a direct derivative of Article 31 of the 2015 Norway Model BIT which contains novel clause on corporate social responsibility. See also Bradlow DD 'Can Parallel Lines Ever Meet? The Strange Case of International Standards on Sovereign Debt and Business and Rights' (2016) 41 *The Yale Journal of International Law Online* 219.

¹⁷⁴⁹ This provision is adapted from Article 10 of the SADC Model BIT. This provision is supportive of the UN and OECD Conventions on Bribery. Given Zimbabwe's current struggles with corruption, this provision would be important in ensuring that the rule of law prevails even in investment circles.

¹⁷⁵⁰ Adopted from Article 8 of Annex 1 of the 2016 SADC FIP. This provision is key in providing investors with responsibilities.

¹⁷⁵¹ This is adopted from the Bogota Agreement. See part 2.3.4.7 above.

PART V

Dispute Settlement

22 Dispute settlement

- (1) The Zimbabwe Investment Authority shall set up proactive measures to allow for claims and settlement of losses so as to prevent issues from escalating to legal claims.
- (2) Where a dispute arises between an investor and any other party, all parties shall take reasonable steps in ensuring that the dispute is settled amicably.¹⁷⁵²
- (3) If the dispute is unresolved within 6 months, the parties may then submit the dispute to an authorised local court (High Court), any national arbitration forum, or any other domestic means of dispute settlement.
- (4) Having diligently pursued domestic remedies and determining that the pursuit of domestic remedies will be futile because (1) there are no reasonably available domestic remedies capable of providing relief for the dispute concerning the underlying measure, or (2) that the process for obtaining legal relief provides no reasonable relief within a reasonable period of time, the investor may seek recourse from an international arbitral forum.¹⁷⁵³
- (5) Importantly, however, an international tribunal constituted under this provision shall not have the jurisdiction to:
 - (a) re-examine any legal issue which has been finally settled by any judicial authority in the Republic; and

¹⁷⁵² See chapter 6.4.2.3.8 of this thesis. See further Article 3(e) of the Turkish FDI Law.

¹⁷⁵³ Subsections (4) and (5) were adapted from the Article 13 of the Indian Model BIT. The rationale for these provisions is that there needs to be safeguard for investors in cases where domestic law is ineffective. This is a more balanced approach as opposed to the approach take in the 2016 SADC FIP of completely eliminating international investor-state arbitration. Furthermore, unlike in the South African PIA, the investor does not need the consent of the government to access international arbitration. See s 15(5) of the South African PIA.

(b) review the merits of a decision made by a judicial authority in the Republic.

(6) The law governing arbitration shall be Zimbabwean law, including rules on conflict of laws and general principles of international law. The procedure, however, shall be done in terms of UNCITRAL rules or ICSID rules as the parties deem appropriate.

PART VI

Other Provisions

23 Establishment of liaison offices

As part of the commitment to revolutionise investment, foreign investors are allowed to set up liaison offices, with the permission of the Zimbabwe Investment Authority, provided that this opportunity is not used to undertake commercial activity.¹⁷⁵⁴

24 Determination of Policies

The Minister is responsible for determining the overall policy framework regarding investment. This is done in consultation with all the relevant stakeholders, public and private alike, and in line with the development plans of country and trends in international investment.¹⁷⁵⁵

¹⁷⁵⁴ This provision is drawn from Article 3(h) of the Turkish FDI Law. See chapter 6.4.3.1 of this thesis.

¹⁷⁵⁵ Given the challenge that has been experienced in Zimbabwe as regards who sets the investment agenda, it was only prudent to have the Minister of Finance and Economic Development set the tone for investment policy. See chapter 1.2 of this thesis.

25 Enforcement

This law shall be enforced by the Cabinet of Ministers.¹⁷⁵⁶

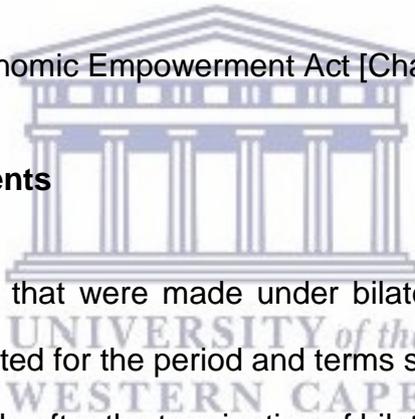
26 Regulations

The Minister, after consultation with relevant stakeholders, may make Regulations providing for any matter which by this Act are required or permitted to be prescribed or which, in his or her opinion, are necessary or convenient to be provided for in order to carry out our give effect to this Act.

27 Amended Provisions

The Indigenisation and Economic Empowerment Act [Chapter 14:33] is repealed.

28 Transitional arrangements

- 
- (1) Existing investments that were made under bilateral investment treaties will continue to be protected for the period and terms stipulated in the treaties.¹⁷⁵⁷
 - (2) Any investments made after the termination of bilateral investment treaties, but before the promulgation of this Act, will be governed by Zimbabwean Law.

¹⁷⁵⁶ Whilst the Minister of Finance and Economic Development is charged with determining the policy, it is necessary for other Ministers such as the Minister of Indigenisation and Economic Empowerment, Minister of Mines and Mining Development, Minister of Agriculture, Mechanisation and Irrigation, Minister of Environment, Water and Climate and the Minister of Energy and Power Development to be involved and oversee the needs of their particular sectors.

¹⁷⁵⁷ This provision is derived from the South African PIA. It creates a framework in which investments which were covered under BITs can be transitionally protected.

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