

**THE UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW**

**AN EXAMINATION OF THE LEGAL FRAMEWORK GOVERNING
OPPORTUNITIES AND BARRIERS TO ECONOMIC DEVELOPMENT IN
SOUTHERN AFRICA: A CASE STUDY OF ZIMBABWE**

Thesis submitted in fulfilment of the requirements for the award of the LLD Degree

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DEDICATION

To Abigail and Ernest, my pillars of strength and my biggest inspiration,

‘We are confident that Africa has the capability to realise her full potential in development, culture and peace and to establish flourishing, inclusive and prosperous societies. We thus, commit to act together towards achieving the following aspirations... for the Africa we want:

1. A prosperous Africa based on inclusive growth and sustainable development
2. An integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance
3. An Africa of good governance, democracy, respect for human rights, justice and the rule of law
4. A peaceful and secure Africa
5. An Africa with a strong cultural identity, common heritage, values and ethics
6. An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children
7. Africa as a strong, united, resilient and influential global player and partner.’

~Article 8 African Union Agenda 2063~

ABBREVIATIONS AND ACRONYMS

ACP	Africa-Caribbean-Pacific
AEC	African Economic Community
AGOA	African Growth Opportunity Act
AROO	Agreement on Rules of Origin
ATC	Agreement on Textiles and Clothing
AU	African Union
BIS	Bank for International Settlements
CBCA	Consignment Based Conformity Assessments
CFTA	African Union Continental Free Trade Area
CMT	Committee of Ministers responsible for Trade Matters
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
EU	European Union
FAO (UN)	Food and Agriculture Organisation of the United Nations
FTA	Free Trade Area
G10	Group of Ten
G20	Group of Twenty
G77	Group of Seventy Seven
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GSP	Generalised System of Preferences
HS	Harmonized Commodity Description and Coding System
ICJ	International Court of Justice
iEPA	Interim Economic Partnership Agreement
IFIA	International Federation of Inspection Agencies
IL	Import Licencing

IMF	International Monetary Fund
ITC	International Trade Centre
ITO	International Trade Organisation
LDC	Least Developed Country
MFN	Most Favoured Nation
NIEO	New International Economic Order
NTBs	Non-Tariff Barriers
OECD	Organisation for Economic Cooperation and Development
PSI	Pre-shipment inspection
PTA	Preferential Trade Agreement
PVoC	Pre-Export Verification of Conformity Programs
REC	Regional Economic Community
ROOs	Rules of Origin
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAZ	Standards Association of Zimbabwe
SME	Small to Medium Enterprises
TBT	Technical Barriers to Trade
TDM	Trade Defence Mechanism
TFA	Trade Facilitation Agreement
TFTA	Tripartite Free Trade Area
UN	United Nations
UNCITRAL	United Nations Conference on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WCO	World Customs Organisation
WTO	World Trade Organisation
ZIMRA	Zimbabwe Revenue Authority
ZTCC	Zimbabwe Tariff and Competition Commission

KEY WORDS

Development

Economic development

Economic growth

Emerging markets

Financial services sector

Foreign direct investment

Free trade

Gross domestic product

Infrastructural growth

International and regional treaties

International relations

Investment

Legal instruments

Policy

Sustainable development



GLOSSARY OF TERMS

Asset	A resource with economic value that an individual, corporation, or country owns or controls with the expectation that it will provide future benefit.
Capital Buffer	Mandatory capital that financial institutions are required to hold in addition to other minimum capital requirements.
Equity	The value of an asset less the value of all liabilities of that asset
Financial Institution	An establishment that focuses on dealing with financial transactions such as investments, loans and deposits.
Financial System	A financial system can be defined at the global, regional or firm-specific level.
Domestic Financial System	A set of implemented procedures that track the financial activities of the company.
Regional Financial System	The system that enables lenders and borrowers to exchange funds.
Global Financial System	A broader regional system that encompasses all financial institutions, borrowers and lenders within the global economy.
Leverage financing	Buying assets with borrowed money so as to gain the purchase price back as well as to profit. Examples are futures and options.
Liquidity	The degree to which an asset or security can be quickly bought or sold in the market without affecting the asset's price.
Liquidity Crisis	A negative financial situation characterised by a lack of cash flow.
Loan-to-deposit Ratio	A commonly used statistic for assessing a bank's liquidity by dividing the bank's total loans by its total deposits, expressed as a percentage. If the ratio is too high, it means that banks might not have enough liquidity to cover any unforeseen fund requirements; if the ratio is too low, banks may not be earning as much as they could be.

Regulatory arbitrage	A practice which entails the circumvention of regulatory provisions by identifying loopholes and capitalising on them.
Return on Average Assets	An indicator used to assess the profitability of a firm's assets.
Risk	The chance that an investment's actual return will be different than expected. Risk includes the possibility of losing some or all of the original investment.



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CHAPTER 1

INTRODUCTION

‘In the absence of fair and just global rules, globalization has increased the ability of the strong to advance their interests to the detriment of the weak, especially in the areas of trade, finance and technology. It has limited space for developing countries to control their own development, as the system makes no provision for compensating the weak. The conditions of those marginalized in this process have worsened in real terms. A fissure between inclusion and exclusion has emerged within and among nations.’¹

1 INTRODUCTION

This thesis examines the legal framework of Zimbabwe to determine if the laws and policies which are in place create opportunities for, or barriers to, economic development. Specifically, it examines the legal framework governing trade, investment and financial services. The thesis focuses on Zimbabwe as a case study and draws lessons from South Africa. It proceeds from the premise that despite the numerous attempts made at international, regional and domestic levels to increase economic development (such as through liberalisation of markets and access to international development finance), Zimbabwe has failed to attain ‘developed country’ status. The purpose of the thesis is to examine the causes of poor economic performance in Zimbabwe post-independence (post-1980).

At independence, the Zimbabwe dollar is recorded as having been stronger than the United States (US) dollar.² The economy grew relatively well for a few years after independence, but then gradually collapsed. It reached crisis levels post-2000. The crucial question is whether the

¹ Article 33 Treaty of the New Partnership for African Development (NEPAD), October 2001, Abuja, available on <http://www.dirco.gov.za/au.nepad/nepad.pdf> (accessed 11 October 2016); see generally Adejumobi S ‘Globalisation and Africa’s development agenda: From the WTO to NEPAD’ *UNECA Development Policy Forum* available on www.dpmf.org/images/OccasionalPaper12pdf (accessed 7 October 2015); see generally Gelb S ‘The New Partnership for Africa’s Development (NEPAD): Overview’ (June 2002) 19 *EDGE* 1-4.

² Noko notes that the Zimbabwe dollar ‘was valued at US\$1.47 at the time of *de jure* independence’. Noko J ‘Dollarization: The Case of Zimbabwe’ (2011) 31 (2) *Cato Journal* 339-341

economic decline or underperformance in Zimbabwe is due to the absence of a conducive legal framework.

The thesis broadly focuses on the post-colonial period. However, Chapter 1 discusses economic performance of countries pre- and post-World War II in order to put the current economic disparities into context. Some explanations will require a brief look at earlier periods: for example, paragraph 1.3.1 briefly discusses how the economic gap was created and paragraph 1.3.2 notes various efforts made to bridge the economic gap in selected countries. Below are some definitions to contextualise the title of the thesis.

1.1 TITLE

This paragraph explains selected words in the thesis title which are deemed crucial. These are: 'legal framework', 'trade', 'investment', 'financial services', 'economic development', 'opportunities', and 'barriers'.

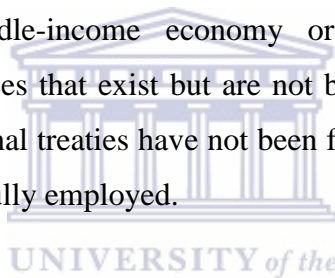
For purposes of this thesis 'legal framework' is defined as a 'system of rules, laws, [and] agreements that establish the way that something operates in business, politics or society' and includes the relevant institutions.³ 'Trade', 'investment' and 'financial services' are important factors contributing to the growth and development of economies, and consequently form a central part of the thesis. These are also referred to in this thesis as 'tools for economic development' and are defined and discussed in more detail in their respective chapters.⁴ This thesis does not aim to discuss every conceivable aspect of trade, investment and financial services. Notably, the thesis looks at each of these tools from the perspective of whether they constitute opportunities for or barriers to economic development.

³ FAO *Legal Framework Analysis for Rural and Agricultural Investment Projects: Concepts and Guidelines* (2000)
² FAO: Zimbabwe, also available on <file:///C:/Users/admin/Documents/How%20to%20do%20an%20analysis%20of%20a%20legal%20framework.pdf> (accessed 5 June 2016); Natural Resource Governance Institute 'Legal framework: Navigating the web of laws and contracts governing extractive industries' available on http://www.resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf (accessed 5 June 2016); Macmillan Dictionary 'Framework' available on <http://www.macmillandictionary.com/dictionary/british/framework> (accessed 8 April 2016); see further paragraph 2.1.

⁴ See Chapters 3, 4 and 5, respectively.

Moreover, trade, investment and financial services are interrelated. First, financial services form part of trade facilitation and market liquidity. They also feed into investment as financing for investment projects. Secondly, investment feeds into trade with regard to infrastructure development and capital injection. Investment also feeds into financial services because borrowing creates money through interests and other financial instruments. Thirdly, trade feeds into investment because investors trade in either goods or services, and trade impacts on investors' perceptions of the economy's performance. Trade also feeds into financial services, because trade generates money and income, which can be used in the financial services sector to generate more money.

'Opportunities' for economic development can be defined as prospects or chances to develop the economy, and gain a higher ranking, such as changing status from being a low-income economy to a middle-income, upper-middle-income economy or even a high-income economy. 'Opportunities' also refer to chances that exist but are not being utilised or are not being fully explored, such as where international treaties have not been fully incorporated into domestic law or their provisions have not been fully employed.



The concept of 'economic development' assumes that there is an economic gap between developed and developing countries. Chapter 2 explores this concept and looks at economic development as consisting of both economic growth and human and social development.

'Barriers' in this thesis refers to obstacles standing in the way of economic development. These obstacles may be found in the language of the law, the lack of legislative provisions, legal gaps, and lack of implementation of legislative provisions, as well as the lack of complementarity between policy and law. The thesis therefore studies the national, regional and domestic law and policy governing trade, investment, and financial services in Zimbabwe in order to determine whether these laws and policies facilitate economic development, and if not propose legal reform in specific areas.

1.2 CHOICE OF JURISDICTION

The thesis undertakes a case study of Zimbabwe and draws lessons from South Africa. Zimbabwe is selected because of its former status as ‘the bread-basket of Africa’, its tragic economic downfall, and its subsequent pursuit of economic recovery.⁵ Zimbabwe is a country with numerous natural endowments, including mineral wealth and good weather patterns. It has a high literacy rate and concentration of human skills, but the Zimbabwean economy has experienced negative growth for several years.⁶ Moreover, Zimbabwe has received aid in the form of international development finance and donor funding, and it has liberalised trade, especially in the years immediately after independence in 1980; nevertheless, it has experienced short-lived economic growth and has failed to industrialise fully.⁷

The thesis considers South Africa as a jurisdiction from which Zimbabwe can learn valuable lessons. Although its economy has been struggling in recent years, South Africa has one of the largest economies in Southern Africa.⁸ The country is in the upper-middle-income range according to the World Bank, meaning it is performing better than Zimbabwe, which is ranked as a low-income economy.⁹ The upper-middle-income category comprises countries with gross national

⁵ Hegland C ‘Zimbabwe: From breadbasket to basket case’ (2002) 363 (8279) *The Economist* 43-44; see generally Makina D ‘Historical perspective on Zimbabwe’s economic performance: A tale of five lost decades’ (2010) 26 (1) *Journal of Developing Societies* 99-123; see generally Munangagwa C ‘The economic decline of Zimbabwe’ (2009) 3 (9) *Gettysburg Economic Review* 109-129.

⁶ SABC ‘Zimbabwe leads literacy rate in Africa’ 12 June 2014 available on <http://www.sabc.co.za/news/a/5c11890044581c8fbd02fd744a7933f3/Zimbabwe-leads-literacy-rate-in-Africa-20140612> (accessed 5 June 2016); Hegland C ‘Zimbabwe: From breadbasket to basket case’ (2002) 363 (8279) *The Economist* 43-44; See generally Knight J and Jenkins C *The Economic Decline of Zimbabwe: Neither Growth, Nor Equity* (2001).

⁷ See generally Knight J and Jenkins C *The Economic Decline of Zimbabwe: Neither Growth, Nor Equity* (2001).

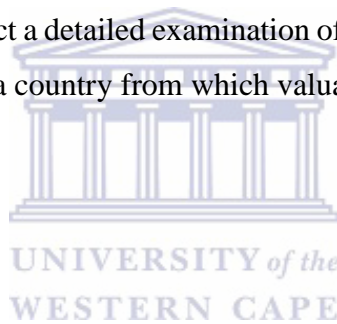
⁸ Business Reporters ‘RBZ rules out the rand’ <http://www.herald.co.zw/rbz-rules-out-adoption-of-rand/> *The Herald* 14 October 2016 (accessed 19 November 2016); Botswana has been the fastest growing economy in Africa for the last 50 years and has been one of the fastest growing economies in the world at a rate of 7 per cent per year on average. However, Botswana is not selected as a comparator for this study for various reasons, including that it primarily trades in minerals as opposed to agricultural goods and has a different geographical terrain, unlike South Africa. Botswana has a significantly lower population of about 2 million people, whereas Zimbabwe is geographically smaller but has a population of about 13 million people; Dzimiri P ‘Exploring the nexus between geopolitics and intervention for human protection purposes: Lessons from the Southern African Development Community (SADC), responses to the humanitarian crisis in Zimbabwe’ (2013) 36 (3) *Journal for Social Science* 269-270.

⁹ World Bank ‘Country data: South Africa’ available on <http://data.worldbank.org/country/south-africa> (accessed 6 September 2016); World Bank ‘Country Data: Zimbabwe’ available on <http://data.worldbank.org/about/country-and-lending-groups> (accessed 11 February 2016).

income (GNI) per capita of between US\$4 126 and US\$12 735.¹⁰ As at July 2017, the GDP of South Africa was US\$294 841 billion, and the GNI per capita US\$5 840.¹¹

South Africa and Zimbabwe are both party to the Southern African Development Community (SADC) and share, inter alia, a colonial history, climate, geographic proximity, and cultural idiosyncrasies. South Africa is part of the Rand Union to which there have been several calls for Zimbabwe to join in the light of Zimbabwe's continued liquidity challenges since 2008.¹² South Africa also shares a border with Zimbabwe and has been Zimbabwe's main trading partner historically, alongside the European Union (EU).¹³ South Africa has similar terrain, weather patterns, and in some regions, similar native languages as Zimbabwe. This places South Africa as a strategic partner in Zimbabwe's journey towards economic development.¹⁴

The thesis does not intend to conduct a detailed examination of the South African legal framework, but rather, South Africa is used as a country from which valuable lessons can be drawn.



¹⁰ World Bank 'Country profile data: South Africa' available on <http://data.worldbank.org/about/country-and-lending-groups> (accessed 11 February 2016).

¹¹ World Bank 'South Africa' available on <http://data.worldbank.org/country/south-africa> (accessed 09 November); World Bank 'South Africa GDP' available on <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2016&locations=ZA&start=1960&view=chart> (accessed 05 July 2017); World Bank 'South Africa GNI per Capita Atlas Method' available on <http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=ZA> (accessed 05 July 2017).

¹² Marawanyika G and Latham B 'Use of Rand as Primary Currency' *Bloomberg Markets* 07 November 2016 available on <http://www.bloomberg.com/news/articles/2016-11-07/zimbabwe-business-lobby-urges-switch-to-rand-as-primary-currency> (accessed 19 November 2016); see generally Tavlas GS 'The benefits and costs of monetary union in Southern Africa: a critical survey of the literature' Bank of Greece Working Paper (2008) available on <http://www.bankofgreece.gr/BogEkdoseis/Paper200870.pdf> (accessed 19 November 2016); Business Reporters 'RBZ rules out the rand' <http://www.herald.co.zw/rbz-rules-out-adoption-of-rand/> *The Herald* 14 October 2016 (accessed 19 November 2016).

¹³ Zimbabwe Trade and Development Studies Centre Trust (TRADES Centre) 'Zimbabwe-South Africa trade relations' (2011) 1 available on [www.thetradebeat.com>doc_download](http://www.thetradebeat.com/doc_download) (accessed 6 February 2016).

¹⁴ Other African countries in this group are Algeria, Angola, Botswana, Gabon, Libya, Mauritius, Namibia, and Tunisia, World Bank 'Upper middle income countries: 2015' available on data.worldbank.org/income-level/UMC (accessed 6 February 2016); BRICS is an acronym for emerging economies Brazil, Russia, India, China and South Africa.

1.3 BACKGROUND TO THE THESIS

1.3.1 Categorisation into Developed and Developing Countries

This paragraph discusses the emergence of the classification into ‘developed’ and ‘developing’ countries. After World War II, political and economic alliances continued to be established between the United States of America (USA), Canada, the United Kingdom (UK), France, Italy, Japan, and Germany (the so-called group of seven, G7) due to shared ideals of capitalism and a free market, as well as previous war alliances through their membership of the North Atlantic Treaty Organisation (NATO).¹⁵ The Soviet Union at the time had a strong communist ideology and alienated itself from NATO, instead allying itself in the Warsaw Pact with countries such as China and Albania, Czechoslovakia, Bulgaria, Hungary, East Germany, Poland, and Romania (members of the Soviet bloc).¹⁶ This classification initially bore no indication of the economic state of the relevant countries, but merely indicated political alliances.¹⁷

During the Cold War, from late 1944 to about 1960, these alliances became stronger and more significant.¹⁸ The former was referred to as the ‘First World’ and the latter as the ‘Second World’.¹⁹ There was a third category, referred to as the non-aligned countries (including Zimbabwe), which constituted the so-called ‘Third World’.²⁰ Towards the end of the Cold War, there was a conceptual shift, in that the earlier classification of ‘First World’, ‘Second World’ and ‘Third World’ no longer

¹⁵ Council on Foreign Relations ‘The group of seven (G7)’ available on [www.cfr.org>group-seven-g7](http://www.cfr.org/group-seven-g7) (accessed 8 February 2016); Jorgenson DW and Vu K ‘Economic growth in the G20 and G7’ available on http://scholar.harvard.edu/files/jorgenson/files/34_world.klems_12_0810_revised1210.pdf (accessed 3 February 2016); Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

¹⁶ See generally Mastny V and Byrne M (eds) *A Cardboard Castle? An Inside History of the Warsaw Pact, 1955-1991* (2006); Gawdiak I (ed) *Czechoslovakia: A Country Study* (1987) 307; Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

¹⁷ Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

¹⁸ Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

¹⁹ Roy AN *The Third World in the Age of Globalisation: Requiem or New Agenda* (1999) 108.

²⁰ Solarz MW ‘North-South, commemorating the first Brandt report: Searching for the contemporary spatial picture of the global rift’ (2012) 33 (3) *Third World Quarterly* 559-569; Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

referred merely to alliances, but rather to economic, social and political standing.²¹ The ‘Third World’ was the least industrialised, still recovering from colonialism, and the countries in this category had recently begun developing their infrastructure and other political structures as states independent of their colonial rulers.²²

The period immediately after World War II saw the widening of the economic gap between countries. This period is sometimes called ‘the world economic boom’ or the ‘post-war economic boom’, in reference to World War II. Indeed, at this stage some countries were already largely industrialised, such as those in Western Europe and North America, despite the damage caused by the war. Post-war reconstruction in Western Europe is largely credited to the USA-led Marshall Plan, under President Truman, former President of the USA.²³ Other countries were still colonised, including South Korea and Taiwan, which were Japanese colonies,²⁴ and most of Africa, including Zimbabwe and South Africa. Most of Asia, South America and Africa were not yet industrialised and their economies lagged behind those of North America and Western Europe.²⁵

In the 1970s Willy Brandt and his Independent Commission first used the distinction between North and South when they drew an imaginary line, now called the Brandt Line, which ran between what they termed the rich North (comprising North America, Europe and Australia) and the poor South (comprising South America, Africa, and Asia).²⁶ The Brandt Report recommended dialogue

²¹ See generally Escobar A *Encountering Development: The Making and Unmaking of the Third World* (1995).

²² Greene BW ‘Toward a definition of the term Third World’ (1980) 1 (1) *Boston College Third World Law Journal* 13-14; Roy AN *The Third World in the Age of Globalisation: Requiem or New Agenda* (1999) 113; Folsom RH, Gordon MW, Spanogle JA and Fitzgerald J *International Business Transactions: Trade & Economic Relations* (2009) 18; Sauvy A ‘Trois mondes, une planète’ *L’observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

²³ Grose P ‘Editor’s note: The Marshall Plan, then and now’ (1997) 76 *Foreign Affairs* 159; also see generally Hogan MJ *The Marshall Plan* (2002); Killick J (2008) ‘The Relevance of the Marshall Plan for the 21st Century’ Sorrel E and Padoan PC (eds) *The Marshall Plan Revisited: Lessons Learned for the 21st Century*.

²⁴ Jacobs JB ‘Taiwan and South Korea: Comparing East Asia’s two third wave democracies’ (2007) 43 (4) *Issues & Studies* 227-230.

²⁵ Tai ZC ‘Is the North-South divide model outdated?’ available on <https://www.kes.hants.sch.uk> (accessed 9 February 2016).

²⁶ The Brandt Commission *A Programme for Survival: Report of the Independent Commission on International Development Issues 1st Draft from Scanned Book* (2002) 22 available on http://files.globalmarshallplan.org/inhalt/psu_2.pdf (accessed 11 October 2016); the Brandt Line was further developed by James Quilligan in the Brandt Equation, see generally Quilligan JB *The Brandt Equation: 21st Century Blueprint for the New Global Economy* (2002).

between the North and the South to facilitate a global response to world poverty.²⁷ The sequel to this report was the *Common Crisis*, 2002, which discussed the impacts of the early 1980s recession on developing countries, and also noted key areas for development as being finance, food, trade, energy and revisiting the negotiation processes in the North-South dialogue, but maintaining the Brandt Line.²⁸

This conceptual shift led to a new classification from First, Second and Third Worlds to 'developed' and 'developing' countries, reflecting the rich North and the poor South as illustrated by the Brandt Line. Pursuant to the New International Economic Order (NIEO), a new technical distinction was created to distinguish countries on the basis of their economic growth (in terms of infrastructural development, GNI per capita, market growth, communications, technology, and socio-economic and political rights). Gradually, a new classification was created with the categories 'Developed Countries', 'Developing Countries' and 'Least Developed Countries'. The First World became the 'Developed Countries', the Second World was re-classified to form part of the group of 'Developing Countries', and the Third World was divided between some countries that became part of the 'Developing Countries' and others that formed part of the 'Least Developed Countries' (LDCs).²⁹ Zimbabwe is currently classified as an LDC.

The factors that contributed to Africa's slower development include: exploitation through the slave trade, colonisation, cheap and often forced labour for farming and for the construction of infrastructure such as buildings, road and rail networks, and factories, mostly in North America and Western Europe.³⁰ Triangular trade contributed significantly to the enrichment of the North

²⁷ The Brandt Commission *A Programme for Survival: Report of the Independent Commission on International Development Issues 1st Draft from Scanned Book* (2002) 22 available on http://files.globalmarshallplan.org/inhalt/psu_2.pdf (accessed 11 October 2016).

²⁸ The Brandt Commission *Common Crisis: North-South Cooperation for World Recovery* The Brandt Commission 1983, 1st Draft from scanned book (2002) available on http://files.globalmarshallplan.org/inhalt/coc_2.pdf (accessed 11 October 2016).

²⁹ Sauvy A 'Trois mondes, une planète' *L'observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

³⁰ Folsom RH, Gordon MW, John A Spanogle JA and Fitzgerald J *International Business Transactions: Trade & Economic Relations* (2009) 18; Sauvy A 'Trois mondes, une planète' *L'observateur Magazine* 14 August 1952 also available on <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html> (accessed 10 February 2015).

and the impoverishment of the South.³¹ While Zimbabwe was not subjected to the slave trade, indigenous (native) Zimbabweans were subjected to forced labour, forced evictions from tribal lands, and systemic racial segregation which was legitimised by unjust laws and institutions under the colonial rule of England.³²

Some developing countries have achieved substantial economic development, including emerging economies such as the BRICS group,³³ the Four Asian Tigers, the Newly Industrialised Countries (NICs), and the Advanced Developing Countries (ADCs) such as Mexico and Argentina. The Four Asian Tigers are Korea, Taiwan, Hong Kong, and Singapore; the name arose from the ‘economic miracle’ experienced in these countries during the world economic boom.³⁴ NICs include Malaysia, Indonesia and Thailand.³⁵

The main categories now rank as follows in order of highest development to least development: the first category are developed countries (also called Advanced Economies), which are also mostly classified as high-income countries by the World Bank; the second are advanced developing countries (including the countries forming part of the Four Asian Tigers, NICs, and BRICS, as well as Mexico and Argentina) which are mostly classified as upper-middle-income countries; the third are developing countries, which are mostly classified as lower-middle-income

³¹ The New Economic Order (NIEO) is a new paradigm of viewing and assisting developing countries which acknowledges their earlier disadvantages and disenfranchisement under colonial rule, and aims to set all countries on a more equal footing with regard to independence, self-determination, and trade inter alia, UN Declaration on the Establishment of a New International Economic Order, UN General Assembly Resolution A/RES/ S-6/3201, available on <http://www.un-documents.net/s6r3201.htm> (accessed 06 February 2016).

³² Oxford Dictionaries ‘Imperialism’ available on <http://www.oxforddictionaries.com/definition/english/imperialism> (accessed 22 April 2016).

³³ Consisting of Brazil, Russia, India, China and South Africa.

³⁴ Grier R ‘Toothless tigers? East Asian economic growth from 1960 to 1990’ (2007) 7 (3) *Review of Development Economics* 392 392; GNI per capita for Korea (middle income) US\$26 970 (as at 2014), Hong Kong (high income) US\$41 000 (as at 2015), Singapore (high income) US\$52 090 (as at 2014), no data available for Taiwan; however, China is US\$7 820 (as at 2015) and Macao, Sar China US\$76 300 (as at 2014) available on data.worldbank.org/country (accessed 15 November 2016).

³⁵ Folsom RH, Gordon MW, Spanogle JA and Fitzgerald J *International Business Transactions: Trade & Economic Relations* (2009) 18; also see paragraph 1.3.2.

countries; and the fourth category are the least developed countries, usually classified as low-income countries.³⁶ Zimbabwe is classified as a low-income country.³⁷

The next part of the chapter looks at advances made to bridge the economic gap. The aim is to highlight some of the key factors that facilitated economic development during the period post-World War II (1945 up to 1990). During this period the economic gap widened most definitively, further separating developed countries from developing and least developed countries.

1.3.2 Bridging the Gap Post-World War II (1945-1990)

The economic gap keeps widening because developed country economies are not static. However, measures can be taken to reduce the gap incrementally.³⁸ Most economies grew significantly in the golden years post-1945.³⁹ East Asia is part of the group of countries that experienced an economic miracle between 1945 and 1990.⁴⁰

1.3.2.1 East Asia: High-Performing Asian Economies

Between 1965 and 1990 the economies of all 23 countries in Asia grew faster than any other country.⁴¹ The Four Asian Tigers, China, and three (NICs) Malaysia, Indonesia and Thailand, are collectively called high-performing Asian economies (HPAEs).⁴² According to Meier and Rauch, capital accumulation, private investment, high levels of exports of manufactured goods, and human

³⁶ World Bank 'Data: country classification' available on <http://data.worldbank.org/about/country-and-lending-groups> (accessed 10 February 2016).

³⁷ World Bank 'Zimbabwe' available on <http://data.worldbank.org/country/zimbabwe> (accessed 09 November 2016).

³⁸ Wade R 'The rising inequality of world income distribution' in Seligson M and Passe-Smith J (eds) *Development and Underdevelopment: The Political Economy of Global Inequality* 3ed (2003) 33.

³⁹ Terborgh A 'The post-war rise of world trade: Does the Bretton Woods System deserve the credit?' Working Paper 78/03 (2003) *Department of Economic History London School of Economics* also available on <http://www.lse.ac.uk/economicHistory/pdf/wp7803.pdf> (accessed 11 May 2016).

⁴⁰ Page J 'The East Asian economic miracle: four lessons for development policy' in Fischer S and Rotemberg JJ (eds) (1994) 4 *NBER Macroeconomics Annual* 219-220.

⁴¹ World Bank *The East-Asian Miracle: Economic Growth and Public Policy* (1993) 1.

⁴² World Bank *The East-Asian Miracle: Economic Growth and Public Policy* (1993) 1; for other NIEs see generally Boddin D 'The role of newly industrialized economies in global value chains: IMF Working Paper WP 16/207' (2016) 6 available on <https://www.imf.org/external/pubs/ft/wp/2016/wp16207.pdf> (accessed 9 November 2016).

capital development were essential to achieving economic development in East Asia.⁴³ Private investment was facilitated by high financial savings and opening the banking sector to persons who traditionally did not save, while human capital development was facilitated by an education-focused policy.⁴⁴ HPAEs managed to increase their economic performance and distribute income more efficiently, as reflected in their reduced levels of inequality. For example, Indonesia reduced inequality from 58 per cent in 1972 to 17 per cent in 1982.⁴⁵

Export-oriented industrialisation (EOI) strategy was an important factor facilitating economic development in the Four Asian Tigers.⁴⁶ EOI is a form of central planning by the government that directs resources towards export trade, where trade is seen as a key area for economic growth.⁴⁷ However, other arguments propose that economic success was achieved through factors used in conjunction with an EOI strategy, such as basing industrial development on foreign capital investment, exploiting cheap labour, geographical location, economic stability, providing resources such as credit financing to strategic industries, importing technologies, human capacity-building through education, prioritising careers in science and technology, and private-public partnerships.⁴⁸ In the HPAEs, faster economic growth was experienced in Hong Kong and Singapore, which employed the EOI strategy, than in South Korea and Taiwan, which employed

⁴³ Balassa B 'The lessons of East Asian development: An overview' (1988) 36 (3) *Economic Development and Cultural Change Supplement: Why Does Overcrowded, Resource-Poor East Asia Succeed: Lessons for the LDCs?* S273-S276; Meier GM and Rauch JE *Leading Issues in Economic Development* 7ed (2000) 40.

⁴⁴ See paragraph 6.2 on financial inclusion; Meier GM and Rauch JE *Leading Issues in Economic Development* 7ed (2000) 40.

⁴⁵ Meier GM and Rauch JE *Leading Issues in Economic Development* 7ed (2000) 36.

⁴⁶ Page J 'The East Asian economic miracle: four lessons for development policy' in Fischer S and Rotemberg JJ (eds) (1994) 4 *NBER Macroeconomics Annual* 219-224.

⁴⁷ Grier R 'Toothless tigers? East Asian economic growth from 1960 to 1990' (2007) 7 (3) *Review of Development Economics* 392; Page J 'The East Asian economic miracle: four lessons for development policy' in Fischer S and Rotemberg JJ (eds) (1994) 4 *NBER Macroeconomics Annual* 219-224; central planning was also successfully implemented in the USA and Western Europe post-World War II reconstruction. See De Long JB and Eichengreen B 'The Marshall Plan: History's most successful structural adjustment program' (1991) Prepared for the Centre for Economic Performance and Landeszentralbank Hamburg conference on Post-World War II European Reconstruction, Hamburg, September 5-7, 1991 available on http://www.j-bradford-delong.net/pdf_files/marshall_large.pdf (accessed 9 November 2016).

⁴⁸ Asien ER 'Japan, Asian tigers and effect dragon' (2015) 7 (2) *Journal of Alternative Perspectives in the Social Sciences* 334.

the import-substituted industrialisation (ISI) strategy and experienced slower growth.⁴⁹ As at 2003, Hong Kong and Singapore were the third wealthiest economies, after the USA and Japan.⁵⁰

In essence, an analysis of the economies above shows that HPAEs had some elements of export-led development. This appears to be critical for development, despite its apparent deviation from the free market, classical economics approach.⁵¹ It tends to support the views of Keynes, who notes that both the private sector through the market, and the public sector through regulations and policy, play a role in facilitating economic development.⁵² This prompts the idea that in order to achieve economic development, some parts of the economy must be controlled or manipulated and others left to market determination.

1.3.2.2 Africa

The slave trade occurred prior to 1945, but it constitutes an integral part of the colonial history of Africa. It is particularly important because in 1945 several African countries were subjugated. The development narrative tends to ignore an essential factor that supported industrialisation, namely the exploitation of the South through the slave trade, colonisation, and use of cheap and often free labour to finance the construction of infrastructure in the North.⁵³ The slave trade had direct economic impacts. For example, slaves were shipped off to join production processes outside Africa instead of creating wealth within Africa.⁵⁴ This also meant loss of a young able-bodied labour force, since slave traders preferred slaves between the ages of 15 and 35.⁵⁵

⁴⁹ Gulati UC 'The foundations of rapid economic growth: A case of the four tigers' 2001 *American Journal of Economics and Sociology* 162-172.

⁵⁰ Grier R 'Toothless tigers? East Asian economic growth from 1960 to 1990' (2007) 7 (3) *Review of Development Economics* 392 392; Asien ER 'Japan, Asian tigers and effect dragon' (2015) 7 (2) *Journal of Alternative Perspectives in the Social Sciences* 334; also see generally Balassa B 'The lessons of East Asian development: An overview' (1988) 36 (3) *Economic Development and Cultural Change Supplement: Why Does Overcrowded, Resource-Poor East Asia Succeed: Lessons for the LDCs?* S273 S276.

⁵¹ Classical economics defined in paragraph 2.1.

⁵² Phelps ES 'Capitalism and Keynes: From the treatise on probability to the General Theory' Conference Commemorating Keynes 1883-1946 Palazzo Mundell, Santa Colomba (Siena) 4-6 July 2006 available on <http://www.columbia.edu/~esp2/CapitalismAndKeynes2007June22.pdf> (accessed 19 November 2016).

⁵³ Forstater M 'Taxation: A secret of colonial capitalist (so-called) primitive accumulation' Working Paper No. 25 *University of Missouri* available on www.cfeps.org/pubs/wp-pdf/WP25-Forstater.pdf (accessed 30 April 2016).

⁵⁴ Whatley W and Gillezeau R 'The impact of the slave trade on African economies' (2009) 4 available on www-personal.umich.edu/~baileymj/Whatley_Gillezeau.pdf (accessed 30 May 2016).

⁵⁵ Rodney W *How Europe Underdeveloped Africa* (1973) 4.

The imposition of taxes forced indigenous Africans to seek paid work, despite low subsistence wages.⁵⁶ The colonial legacy of racial segregation at worst, and racial supremacy at best, prevented indigenous Africans from owning property, and subsistence wages prevented them from amassing savings. Furthermore, while the developed North followed ideals proclaimed by classical economics, namely, free enterprise and private ownership of property, it did not apply these ideals uniformly across the world. The same countries that idolised the private ownership of property, through their transnational corporations enforced restrictive laws against the ownership of property by indigenous Africans, including restrictions on owning land, animals, and minerals.⁵⁷

1.4 PROBLEM STATEMENT

The gap between the rich and the poor is increasing. In this regard, Makwana states:

Over the last 25 years, the income inequalities have increased dramatically, both within and between countries. Between 1980 and 1998, the income of the richest 10% as share of poorest 10% became 19% more unequal; and the income of the richest 1% as share of poorest 1% became 77% more unequal [excluding China].⁵⁸

As noted in the Introduction above, the Zimbabwean economy is poorer today than it was in the first ten years of independence. Zimbabwe is a country with abundant natural resource endowments, skills, laws, rules and regulations, a high literacy rate and numerous international and regional agreements for liberalisation of markets.⁵⁹ However, these positive factors appear to

⁵⁶ Forstater M 'Taxation: A secret of colonial capitalist (so-called) primitive accumulation' Working Paper No. 25 *University of Missouri* available on www.cfeps.org/pubs/wp-pdf/WP25-Forstater.pdf (accessed 30 April 2016).

⁵⁷ See generally Williams D *International Development and Global Politics: History, Theory and Practice* (2012). One might argue that most exporters in sub-Saharan countries are large multinational corporations, meaning that it is these corporations that choose to export primary goods, perhaps with the hope to feed their supply chains in other countries.

⁵⁸ Makwana R 'Globalization' available on www.stwr.org/globalization/neoliberalism-and-economic-globalization.html (accessed 15 October 2011).

⁵⁹ African Economic Outlook 'Building on a strong primary sector as the basis for structural transformation' Box 6.3 referring to Africa's natural factor endowments available on <http://www.africaneconomicoutlook.org/en/theme/structural-transformation-and-natural-resources/building-on-a-strong-primary-sector-as-the-basis-for-structural-transformation/> (accessed 27 April 2016); Nyikadzino P 'Zimbabwe, the former bread basket of Africa' *Continental News Network* 17 April 2011 available on <http://allnewsnetwork.wordpress.com/2011/04/17/zimbabwe-the-former-bread-basket-of-africa/> (accessed 9 February 2012).

have done little to improve its economy. Zimbabwe's GDP remains tiny compared to developed countries.⁶⁰ This thesis seeks to determine whether the poor economic performance and lack of economic development of Zimbabwe can be attributed to the legal framework governing trade, investment and finance.

1.5 RESEARCH OBJECTIVES

The thesis aims to determine whether the national legislative framework influences economic development, how economic development is defined and whether it is a realistic goal for Zimbabwe. Bearing in mind that there is no singular law but rather a web of economic laws, the thesis seeks to determine, with regard to trade, investment, and financial services:

- whether Zimbabwean law complies with regional and international law;
- whether the regional law of the Southern African Development Community and the Common Market for Eastern and Southern Africa aligns with international law; and
- whether the respective existing legal frameworks are conducive to economic development within Zimbabwe.



1.6 RESEARCH HYPOTHESIS

The attainment of economic development as signified by 'developed country' status is an unrealistic goal for Zimbabwe, unless Zimbabwe reviews and reforms its existing legal framework in the key economic areas of trade, investment and financial services.

1.7 SIGNIFICANCE OF THE RESEARCH

The need for economic development and reduction of poverty is a common cause for African countries. First, the thesis will add to the body of knowledge a legal perspective on multidisciplinary interactions of trade, investment and financial services unique to the Zimbabwean context. Secondly, it questions the legal framework of Zimbabwe to determine the extent to which the legal framework supports the attainment of economic development, and the

⁶⁰ For example, German GDP US\$3,356 trillion as at 2015 World Bank 'Country profile: Germany data' available on <http://data.worldbank.org/country/germany> (accessed 7 February 2016).

attainment of a higher economic ranking for Zimbabwe. This is particularly important because country-specific literature is lacking in this area.

1.8 LIMITATIONS OF THE RESEARCH

The thesis is a case study of Zimbabwe, drawing lessons from South Africa. It does not follow the traditional form of comparison in which two like things are analysed in equal detail, but rather, South Africa provides valuable lessons for Zimbabwe. Moreover, other countries may be referred to briefly for purposes of illustration.

The thesis will be limited to aspects of economic law, specifically the role of trade, investment and financial services as means of facilitating economic development. It will not constitute a study of the entire legal framework or entire economy of Zimbabwe.

While the Zimbabwean economic crisis can be attributed to a number of geopolitical issues, the thesis will discuss and analyse only the legal framework inadequacies. The thesis may touch on pertinent sub-factors such as politics and history, but it will not discuss these in any detail. As the thesis analyses economic development, it will be imperative to briefly discuss economic performance and economic theory to place the thesis in context.

The thesis will not discuss socio-economic, political and cultural rights in any detail because its purpose is not to discuss human rights. Lastly, the thesis is limited to specific time periods. Chapter 1 specifies historical periods in relevant paragraphs. Chapters 2 through 6 consider the time periods of post-independence Zimbabwe (1980 to the present) and post-Apartheid South Africa (1993 to the present).

1.9 METHODOLOGY

The thesis will involve two broad activities running concurrently. A review of literature (from print and electronic formats), policy and legal instruments; and a brief estimation of the impacts of policies, law and treaties on economic growth targets. Key documentation will include official documents of the SADC, EU, United Nations (UN), COMESA, the African Union (AU), World

Trade Organisation (WTO), International Monetary Fund (IMF), World Bank Group (WBG), OECD, and UN Conference on Trade and Development (UNCTAD). Countries other than selected jurisdictions are referred to in certain places to augment the discussion and for illustrative purposes.

1.10 CORE ELEMENT OF THE RESEARCH/RESEARCH QUESTIONS

The thesis focuses on the effect of the current regulation of trade, investment, and financial services on the development of the Zimbabwean economy.

The aim of Chapter 2 is two-pronged. In the first part, the chapter explains the legal framework of Zimbabwe in general, and the importance of the rule of law in relation to economic development, particularly its definition and general principles, as well as the need for policy space and social inclusion. This part aims to set the tone of the interplay of law and economics in the development discourse. In the second part, the chapter examines the concept of development in order to determine what 'development' is and how it is measured. Chapter 2 conducts a review of selected economic schools of thought to better understand and explain the concept of development. It starts with a general overview of the three main economic systems: capitalist, command and mixed economies. Then it explains selected indicators and economic growth theories, with the understanding that economic development is a combination of economic growth, and human and social development. The chapter intends to identify an economic system and growth theories that will support economic development in Zimbabwe.

Chapter 3 questions the role of trade liberalisation in facilitating economic development. It analyses regional and international treaties, preferential trade areas, domestic instruments, policies and regulations in order to determine whether the existing legal framework for trade is conducive to Zimbabwe's economic development. This is done by exploring selected treaties and protocols of the WTO as an example of international trade agreements, SADC and the Common Market for Eastern and Southern Africa (COMESA) as examples of regional trade agreements. The thesis refers to the COMESA-EAC-SADC Tripartite Agreement (EAC refers to the East African Community), which seeks to encourage harmonisation and liberalisation of trade and competitive

strategies.⁶¹ The chapter conducts a two-level analysis, which entails an examination of the alignment of regional trade agreements (RTAs) with international law, and the alignment of Zimbabwe's domestic trade law with the RTAs and the WTO. In other words, Chapter 3 explores trade as a tool for economic development. Underlying themes of this chapter include the attainment of WTO objectives, including the reduction and elimination of tariff and non-tariff barriers.⁶²

Chapter 4 focuses on agricultural trade and has an interwoven theme advocating for the integration of small, micro- and medium-sized enterprises into both domestic and foreign markets. It examines the extent to which the regulatory framework supports production and trade in the selected agricultural goods. The chapter estimates the impact of the land redistribution programme implemented in Zimbabwe, and the potential for agro-processing to boost the manufacturing sector in line with the objectives of the Zimbabwe Agenda for Sustainable Social Transformation (ZimAsset) to achieve export-led development.

Chapter 5 examines the investment climate of Zimbabwe in order to determine whether it is conducive to economic development. The chapter focuses on foreign direct investment and examines standards of treatment and protection of investors' property. It also explores the need for increasing the development impact of investment. The chapter notes the need for balancing the interests of investors and investment host states and highlights the need for strategic linkages in production value chains.

Chapter 6 examines the role of the financial services sector on the economic development of Zimbabwe. This chapter is particularly important because of the close link between finance and both trade and investment. The chapter discusses international development finance, financial inclusion, and financial regulation. Financial services form the backbone of the economy and play an integral role in the running of the country through liquidity in the banks and financial markets. Rules and regulations in the financial services sector have a direct impact on trade and investment.

⁶¹ Article 4 Draft COMESA-EAC-SADC Tripartite Agreement.

⁶² The Results of The Uruguay Round of Multilateral Trade Negotiations: Marrakesh Agreement Establishing the World Trade Organization 15 April 1994, 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

1.11 CHAPTER CONCLUSION

This chapter has provided the general structure and background to the thesis. The background entailed a brief synopsis of how the world became divided into categories that define economic performance, the incidence of an economic gap between the rich North and the poor South as demarcated by the Brandt line, as well as efforts which have been made in specific regions of East Asia and Africa to bridge the economic gap. Key issues that one can identify from this discourse are that trade and investment, as well as planning, were crucial to the industrialisation and economic development of the countries that are presently developed, and HPAEs. This chapter also highlighted the objectives, core elements, significance, limitations and methodology of the research, and noted the hypothesis that ‘developed country’ status is an unrealistic and unattainable ideal for countries presently styled ‘developing’. The pivotal questions “What is ‘development’?” and “How is ‘development’ influenced by the ‘rule of law’?” are examined in the next chapter.



CHAPTER 2

THE RULE OF LAW AND THE DEVELOPMENT DISCOURSE

‘Economic advancement is not the same thing as human progress.’⁶³

2 INTRODUCTION

The first chapter noted the existence of an economic gap between the rich North and the poor South, as well as efforts to bridge this gap, particularly in high performing Asian economies (HPAEs) and Africa. The chapter further noted the reasons for the thesis, its objectives and limitations, and highlighted its aim, which is to determine whether the legal framework governing trade, investment and financial services presents opportunities for or barriers to economic development in Zimbabwe. Chapter 2 provides a theoretical and conceptual framework to support the arguments that are presented in later chapters.

PART A: THE ZIMBABWEAN LEGAL FRAMEWORK

2.1 AN OVERVIEW OF THE ZIMBABWEAN LEGAL FRAMEWORK

Zimbabwe enjoys state sovereignty.⁶⁴ The legal framework of Zimbabwe includes a network of domestic, regional and international laws, and institutions (organs of state, regional organs and international organisations). International and regional trade instruments interact with domestic laws on the basis of state sovereignty.⁶⁵ This means that for any international laws to apply in Zimbabwe, Zimbabwe must first ratify and domesticate them.

⁶³ Roux A *Everyone's Guide to the South African Economy* (1995) 104.

⁶⁴ Article 4(a) United Nations Declaration on the Establishment of a New International Economic Order United Nations General Assembly Resolution A/RES/ S-6/3201 available on <http://www.un-documents.net/s6r3201.htm> (accessed 06 February 2016), sovereignty is also entrenched in Article 4 The Consolidated Treaty of the SADC, 2011).

⁶⁵ See Dugard J *International Law: A South African Perspective* 4 ed (2011) 125-142.

2.1.1 Domestic Law

According to Madhuku, ‘law refers to rules and regulations that govern human conduct or other societal relations and are enforceable by the state’.⁶⁶ The sources of Zimbabwean law include common law, custom, legislation, case law, and authoritative works of modern authors such as textbooks and academic journals.⁶⁷ Zimbabwe has a pluralistic legal system in which customary law co-exists with civil law. The common law in Zimbabwe is ‘a collection of rules and principles made by judges in previous cases, and rules and principles contained in that portion of the body of law called Roman-Dutch law that is not reflected in previous court decisions’.⁶⁸ This is different from the concept of common law under English Law, which refers to ‘that portion of the law which is not derived from legislation and emanates from a collection of principles made by judges in the course of resolving issues brought before the courts’.⁶⁹

Organs of state are guided by the doctrine of separation of powers, in terms of which the legislature is responsible for enacting the law, while the judiciary is responsible for the application of the law and the executive for enforcement of the law.⁷⁰ Section 88(2) provides that executive authority vests in the President and Cabinet, subject to the Constitution, while section 162 provides that judicial authority is vested in the courts.⁷¹ The impartiality and judicial independence of Zimbabwean courts has come into question in relation to politically tainted cases, such as land reform and alleged human rights violations.⁷² Political and media pressure as well as corruption tend to reduce the credibility of the legal process, and undermine principles of natural justice and international treaties. The *audi alteram partem* principle guarantees that:

⁶⁶ Madhuku L *Introduction to Zimbabwean Law* 1 (2010); Kleyn D and Viljoen F *Beginner’s Guide for Law Students* 4 Ed (2014) 2.

⁶⁷ The Law in Zimbabwe Madhuku L *Introduction to Zimbabwean Law* 2 (2010).

⁶⁸ Madhuku L *Introduction to Zimbabwean Law* 17 (2010).

⁶⁹ Madhuku L *Introduction to Zimbabwean Law* 15 (2010).

⁷⁰ Sections 117 Constitution of Zimbabwe Amendment (No. 20) Act 2013.

⁷¹ Section 162 Constitution of Zimbabwe, 2013.

⁷² Chiduzo L ‘Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?’ (2014) 17 (1) *Potchefstroom Electronic Law Journal* 368-418.

all persons shall be equal before the courts and tribunals and ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁷³

Legislative power vests in Parliament, which consists of the National Assembly (NA) and Senate.⁷⁴ Bills must be passed by both houses and referred to the President for assent in order to become binding statute.⁷⁵ According to section 132, statutes come into effect on the day the statute is published in the Government Gazette, or on another day that may be stipulated in the Act of Parliament.⁷⁶ Members of the NA are appointed in terms of section 124. The NA comprises 210 members elected by secret ballot to represent each of the 210 constituencies, and an additional 60 women, six women per province, elected under a party-list system of proportional representation. The members of senate are appointed in terms of section 120.

The senate is composed as follows: six members elected from each of the ten provinces by a system of proportional representation, 16 chiefs, the president and deputy president of the National Council of Chiefs, as well as two elected representatives of persons with disabilities. These large numbers of members of Parliament and Senate increase the financial burden on the state as they widen the civil wage bill. A big wage bill can create a legitimacy crisis for tax payers and translates to reductions in funds available for the provision of essential public services.

While the Constitution states that Parliament may delegate legislative power to make regulations called statutory instruments in terms of section 134, it does not set specific parameters for the exercise of this power.⁷⁷ Often individual statutes provide that the relevant minister has authority to make regulations. This creates a crossing-over of roles, which creates a risk for the full realisation of the separation of powers which is discussed further in 2.2.1. Moreover, the present system gives wide powers and discretion to Ministers. This has created an untenable situation in

⁷³ Article 14(1) United Nations International Covenant on Civil and Political Rights adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976.

⁷⁴ Section 116 Constitution of Zimbabwe, Amendment (No. 20) Act 2013.

⁷⁵ Section 131 Constitution of Zimbabwe, 2013.

⁷⁶ Constitution of Zimbabwe, 2013.

⁷⁷ Constitution of Zimbabwe, 2013.

Zimbabwe, where there is a proliferation of regulatory legal instruments that are sometimes contradictory and other times *ultra vires*.

The Constitutional Court is the highest court on constitutional matters.⁷⁸ This marks a shift from the previous dispensation of parliamentary sovereignty, at least in theory.⁷⁹ The following paragraph discusses international law.

2.1.2 International Law

As a member of the United Nations, Zimbabwe is bound by the provisions of the Charter of the United Nations, including the Statute of the International Court of Justice (ICJ).⁸⁰ Article 38(1) of the Statute of the ICJ identifies sources of international law as

international conventions, whether general or particular, establishing rules expressly recognised by the consenting states; international customs, as evidence of a general practice accepted as law; the general principles of law recognised by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law...⁸¹

International law includes not only positive law, but also natural law. The *Corfu Channel* and *Nicaragua* cases considered principles of humanity and equity as general principles of international law.⁸² In *South West Africa* cases the dissenting judgment of Tanaka J noted:

[I]t is undeniable that in article 38 (1) (c) some natural-law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which,

⁷⁸ Section 167(a) Constitution of Zimbabwe, 2013.

⁷⁹ Constitution of Zimbabwe Amendment (No. 20) Act 2013.

⁸⁰ Article 3 Charter of the United Nations read with Article 1 of the Statute of the International Court of Justice, 1945, San Francisco.

⁸¹ Charter of the United Nations and the Statute of the International Court of Justice, 1945, San Francisco; Sources of international law under modern international law have increased over time, in comparison to classical international law.

⁸² *Corfu Channel (Merits)* 1949 ICJ Reports 4 at 22; *Nicaragua Case* 1986 ICJ Reports 14 at 114; Dugard J *International Law: A South African Perspective* 3ed (2010) 39.

the states being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the state.⁸³

A practical illustration of this is where domestic law legalises conduct which is perceived as immoral by the international community. This is often followed by punitive measures such as the imposition of sanctions. For example, when allegations of human rights violations in Zimbabwe were made in connection with the land redistribution programme as well as the diamonds discovered in the Marange area, the international community responded with trade restrictions.⁸⁴ Although under classical international law all sources of international law had equal weight, treaties appear to carry more weight under modern international law.⁸⁵

2.1.2.1 Treaties and Conventions

Treaties are agreements to which states or international organisations can be party.⁸⁶ The Vienna Convention on the Law of Treaties (Vienna Convention) governs international treaties.⁸⁷ The Preamble notes that principles of good faith, free consent, and *pacta sunt servanda* are universally recognised as law.⁸⁸ *Pacta sunt servanda* is defined in Article 26 to mean simply that each state is bound by the treaties to which it is party, and its obligations under that treaty must be performed in good faith.⁸⁹ Although Zimbabwe is not party to the Vienna Convention, it is subject to the principle of *pacta sunt servanda* that forms part of customary international law.⁹⁰

⁸³ *South West Africa (Ethiopia v South Africa)* joined with *South West Africa (Liberia v South Africa)* Second Phase, 18 July 1966 ICJ Reports 298; Dugard J *International Law: A South African Perspective* 3ed (2010) 39.

⁸⁴ These examples will be discussed in more detail in later chapters, see further in Chapter 3.

⁸⁵ Dugard J *International Law: A South African Perspective* 3ed (2010) 27.

⁸⁶ UNICEF defines 'treaty' as: 'a formally concluded and ratified agreement between States. The term is used generically to refer to instruments binding at international law, concluded between international entities (States or organizations). Under the Vienna Conventions on the Law of Treaties, a treaty must be (a) a binding instrument, which means that the contracting parties intended to create legal rights and duties; (2) concluded by states or international organizations with treaty-making power; (3) governed by international law and (4) in writing' UNICEF Introduction to the Convention on the Rights of the Child: Definition of key terms' available on www.unicef.org/french/crc/files/Definitions.pdf (accessed 8 September 2016).

⁸⁷ United Nations The Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155.

⁸⁸ Vienna Convention, 1969.

⁸⁹ Vienna Convention 1969.

⁹⁰ See further on customary international law in 3.1.2.2 below; United Nations Treaty Collection available on https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&TEMP=mtdsg3&lang=en (accessed 04 February 2016).

The Agreement Establishing the World Trade Organisation (the Marrakesh Agreement) and other agreements under the WTO and the treaties establishing SADC and COMESA are important in the context of Zimbabwean regulation of trade. Zimbabwe ratified GATT on 11 July 1948 and has been a WTO member states since 5 March 1995.⁹¹ It is a founding member of the Southern African Development Community (SADC),⁹² and the Common Market for Eastern and Southern Africa (COMESA).⁹³

When it comes to the translation or domestication of regional and international treaties, Zimbabwe has a dualistic legal system in which international treaties need to be translated into domestic law in order to be legally binding.⁹⁴

2.1.2.2 Customary International Law

Customary international law refers to rules of international law that emanate from state practices, provided there is evidence of substantial uniformity over a long time by a substantial number of states.⁹⁵ For new rules to become custom they must constitute a practice, generally recognised by states to be settled enough to create binding obligations on states in international law.⁹⁶ The *Columbia v Peru* case highlighted two requirements for custom, first that the conduct should be a settled practice, and secondly, that there should be an acceptance to be bound by the obligation, also called the *opinio juris sive necessitatis*.⁹⁷

In order to be considered a settled practice, it must have constant and uniform usage.⁹⁸ According to the *Fisheries Jurisdiction Case*, this acceptance need not be universal but widespread.⁹⁹ A state

⁹¹ WTO 'Member information: Zimbabwe and the WTO' available on https://www.wto.org/english/thewto_e/countries_e/zimbabwe_e.htm (accessed 8 September 2016).

⁹² Treaty of the Southern African Development Community, 17 August 1992, Windhoek.

⁹³ Treaty Establishing a Common Market for Eastern and Southern Africa, adopted 5 November 1993, Kampala, entered into force 8 December 1994.

⁹⁴ Section 327(1) Constitution of Zimbabwe Amendment (No. 20) Act 2013.

⁹⁵ Malanczuk P *Akehurst's Modern Introduction to International Law* 7 ed (1997) 35.

⁹⁶ Malanczuk P *Akehurst's Modern Introduction to International Law* 7 ed (1997) 35.

⁹⁷ *Columbia v Peru* 1950 ICJ Reports 266 at 277; *North Sea Continental Shelf Cases (West Germany v Netherlands and Denmark)* 2002 ICJ Reports 3.

⁹⁸ Dugard J *International Law: A South African Perspective* 3 ed (2010) 30.

⁹⁹ *Fisheries Jurisdiction Case* 1974 ICJ Reports 3, 23-26.

must be a persistent objector to a new practice in order to be regarded as ‘having established an exception to the new rule of custom’.¹⁰⁰

2.1.2.3 Soft Law

Soft law is also a source of international law, and it comprises international standards, guidelines, and recommendations that, inter alia, carry a normative value and are not binding law, such as the Rio Declaration on the Environment and Development, and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.¹⁰¹

2.2 THE RULE OF LAW

It is debatable whether the rule of law is the cause or effect of economic development, but it is clear, that it forms part of the discourse on economic development.¹⁰² Tamanaha states that the rule of law is ‘an exceedingly elusive notion’ and that it can be understood in many different ways.¹⁰³ The existing academic debate pertaining to the presence of absence of the rule of law in Zimbabwe is biased towards issues of civil and political rights, which are on high alert for human rights organisations. However, the rule of law is not simply an issue of civil and political rights. The absence of the rule of law in the framework of laws, or in the institutions that create, apply and enforce laws can have a menacing effect on the economy of the country in question (and conversely the state of the economy can also result in increased or decreased observance of the rule of law). With respect to Zimbabwe, it is not a single a law that requires reform, but a series of laws.

This thesis argues that the absence of the rule of law in Zimbabwe is a significant contributor to the negative economic performance experienced in Zimbabwe, especially in recent years where

¹⁰⁰ There is debate whether resolutions of international organisations and soft law constitute customary international law. Malanczuk P *Akehurst’s Modern Introduction to International Law* 7 ed (1997) 35; Dugard J *International Law: A South African Perspective* 3 ed (2010) 34; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* 1986 ICJ Reports 14.

¹⁰¹ 1992, 31 ILM 874.

¹⁰² Matsuo H ‘The rule of law and economic development: A cause or a result?’ *Centre for Asian Legal Exchange* 59 also available on http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20117/1/8_CALE%20Books2.pdf (accessed 04 July 2017).

¹⁰³ Tamanaha B *On the Rule of Law* (2004) pg, also cited in Bingham ‘The rule of law’ *The Cambridge Law Journal* (66) 1 (2007) 67-85 at 68.

law-making has been tainted by political agendas, and a hurriedness, and lack of transparency particularly between 2000 to present. This thesis argues further that the unfettered powers of the legislature and the executive, and the interference with the independence of the judiciary have compromised the separation of powers.

This section below explores the definition of the rule of law and how the rule of law relates to the need for policy space and the right to regulate, and also how inclusiveness facilitates the observance of the rule of law.

2.2.1 The Definition of the Rule of Law

Article 3 African Union Agenda 2030 envisages '[a]n Africa of good governance, democracy, respect for human rights, justice and the rule of law'. This shows a link between good governance and the rule of law. Locke posits that '[w]herever law ends, tyranny begins'.¹⁰⁴ The rule of law was first defined by Dicey, who, inter alia submitted that there are three ways to view the rule of law.¹⁰⁵ Firstly, the rule of law is 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.¹⁰⁶ This would mean that the 'law' itself is supreme and not the 'law-maker'.¹⁰⁷ In other words, observance of the rule of law requires that:

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'[n]o man is punished or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In

¹⁰⁴ Locke J *Second Treatise of Government* (1690) Chapter XVII s.202 (1988) 400.

¹⁰⁵ Neumann M *The Rule of Law: Politicising Ethics* (2002) 1; S Beaulac 'The rule of law in international law today' in G Palombella & N Walker (eds) *Relocating the Rule of Law* (2009) 197-198; Mujuzi JD 'The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states' 2012 (12) African Human Rights Law Journal 89-111 at 92.

¹⁰⁶ Bingham T *The rule of law* (2010) 10-32; Mujuzi JD 'The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states' 2012 (12) African Human Rights Law Journal 89-111 at 92.

¹⁰⁷ Paine T *Common Sense* (1994) 279; Bingham T *The rule of law* (2010) 10-32; Mujuzi JD 'The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states' 2012 (12) African Human Rights Law Journal 89-111 at 92.

this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.’¹⁰⁸

Secondly, the rule of law establishes that ‘every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’. Thirdly, the rule of law sees the Constitution not as a source, but as ‘the consequence of the rights of individuals, as defined and enforced by courts’.¹⁰⁹

There is criticism as to the absoluteness of the stance taken by Dicey, for example, Bingham argues that there must be room for some discretion depending on the nature of the matter.¹¹⁰ This is true even in the case of Zimbabwe, where there is need for redistributive justice to undo the inequality which resulted from colonisation. It is argued that developing countries need to have policy space in which to exercise their right to regulate. There must be some discretion to change laws, and a necessary deviation from positive law, in favour of natural law. A deeper investigation on policy space and the right to regulate is conducted in 5.5.2. The concept of the rule of law has been developed over time to mean different things in different contexts, however, it can be said to espouse the following general principles: equality, legal certainty, separation of powers, independence of the judiciary, and non-retrospective application of law.¹¹¹

2.2.1.1 Equality before the Law

Gubbay J expresses the climate in which the rule of law exists as ‘a society in which no man is punishable, or can be made to suffer bodily or proprietary loss, except for a breach of the law as established by ordinary courts of the land’. In Zimbabwe, this aspect of the rule of law has become

¹⁰⁸ S Beaulac ‘The rule of law in international law today’ in G Palombella & N Walker (eds) *Relocating the Rule of Law* (2009) 197-198; Mujuzi JD ‘The rule of law: Approaches of the African Commission on Human and Peoples’ Rights and selected African states’ 2012 (12) *African Human Rights Law Journal* 89-111 at 92.

¹⁰⁹ S Beaulac ‘The rule of law in international law today’ in G Palombella & N Walker (eds) *Relocating the Rule of Law* (2009) 197-198; Mujuzi JD ‘The rule of law: Approaches of the African Commission on Human and Peoples’ Rights and selected African states’ 2012 (12) *African Human Rights Law Journal* 89-111 at 92.

¹¹⁰ Bingham T *The rule of law* *Cambridge Law Journal* (66) 1 (2007) 67-85 at 72.

¹¹¹ Independence of the judiciary is not discussed in this thesis, see Chiduzo L ‘Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?’ (2014) 17 (1) *Potchefstroom Electronic Law Journal* 368-418; Mujuzi JD ‘The rule of law: Approaches of the African Commission on Human and Peoples’ Rights and selected African states’ 2012 (12) *African Human Rights Law Journal* 89-111 at 92.

questionable in light of the Indigenisation and Economic Empowerment Act, as well as the Land Acquisition Act which resulted in proprietary loss, and allegations of bodily injury.¹¹² The long string of reported unlawful arrests and detentions for reasons other than the breach of an existing law have also brought the executive under scrutiny.¹¹³

Gubbay J further asserts that the rule of law requires that ‘everyone should be subject to the law equally, and that no one should be above the law; that law enforcement agencies and the courts enforce and apply the law impartially’.¹¹⁴ This is currently a slippery slope, as Parliament has become notorious for changing laws by amending or replacing existing legislation in order to address specific issues. This has resulted in a myriad of laws being amended, or enacted post 2000, the most significant of which are the Presidential Powers Act (Temporary Measures Act),¹¹⁵ which grants the President wide discretionary powers to make laws. This exceeds the mandate of the executive to enforce law. In this regard, it can be argued that the law-making process has ceased to be objective.

Further, the ability of the courts to review legislation and conduct is in theory existent, although some authors have argued that the independence of the judiciary is not uncompromised. Gubbay J, for instance, writes of Judges receiving flat screen television sets, and free satellite television packages from the Reserve Bank, in other words, not from the treasury, and he argues that this undermines the independence of the judiciary.¹¹⁶ The resignation of white Judges owing to undue

¹¹² Chapter 14:33 see 5.5.3; and Chapter 20:10 see 4.1.2 respectively.

¹¹³ Zimbabwe Civic Education Trust ‘Statement of unlawful detention of Makoni and Muchadehama’ (08 May 2007) available on http://archive.kubatana.net/html/archive/cact/070508zimcet.asp?sector=LEGAL&year=2007&range_start=31 (accessed 10 July 2017); Laiton C ‘Activists sue Chombo, Chihuri for unlawful detention’ *Newsday* 16 September 2016; *Jestina Mukoko v The Attorney-General* Judgment No. SC 11/12 Constitutional Application No. 36/09 Harare, June 25, 2009 & March 20, 2012; International Commission of Jurists ‘Zimbabwe: ICJ condemns the arrest and detention of Beatrice Mthetwa’ Press Release 18 March 2013 available on <https://www.icj.org/zimbabwe-icj-condemns-the-arrest-and-detention-of-beatrice-mtsetwa/> (accessed 04 July 2017).

¹¹⁴ Zimbabwe Supreme Court Judge Gubbay AR ‘The progressive erosion of the rule of law in independent Zimbabwe’ Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall, London (09 December 2009) 1.

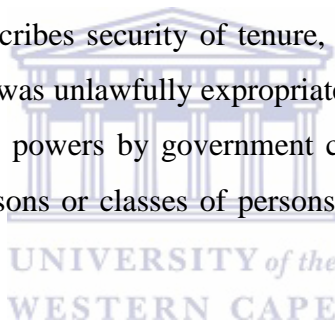
¹¹⁵ Chapter 10:20.

¹¹⁶ Zimbabwe Supreme Court Judge Gubbay AR ‘The progressive erosion of the rule of law in independent Zimbabwe’ Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall, London (09 December 2009) 1.

influence is a further indicator of the absence of the rule of law.¹¹⁷ Chiduzza conducts a thorough investigation on the independence of the judiciary, which is beyond the scope of this thesis.¹¹⁸

2.2.1.2 Legal Certainty

The rule of law as coined by Dicey necessitates that the law must be clear, and certain, otherwise how else would it be possible to ascertain whether there was compliance with it. But what happens when the law can be changed arbitrarily. Can obedience to such changed law amount to an observance of the rule of law? The observance of the rule of law ensures that no one is above the law, and creates a level of predictability and certainty in respect of binding legal rules.¹¹⁹ When legal rules are clear and certain and there is a clear process for contracting, and registration of deeds of title, this reduces transaction costs because people are certain that ownership vests in whomever the deeds nominate, and that once transferred, there is security from eviction. However, although the letter of the law prescribes security of tenure, the case of *Mike Campbell and 72 others*,¹²⁰ where his Chegutu farm was unlawfully expropriated without compensation, illustrates how the use of wide discretionary powers by government can undermine the rule of law, and ultimately deny protections to persons or classes of persons within the country.¹²¹ This case is discussed further in 5.5.1.



Legislative Process

Firstly, the legislative process is partly described in the Constitution, and partly left to the discretion of Parliament to set out in terms of Parliamentary Standing Orders in sections 133 and

¹¹⁷ Baumann VD 'Reforming microfinance to suit developing economies: The right way for Zimbabwe' Washington University Global Studies Law Review (14) 2 (2015) 337-536 at 337.

¹¹⁸ Chiduzza L 'Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 368-418.

¹¹⁹ Matsuo H 'The rule of law and economic development: A cause or a result?' *Centre for Asian Legal Exchange* 59 also available on http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20117/1/8_CALE%20Books2.pdf (accessed 04 July 2017).

¹²⁰ *Mike Campbell (Pty) Ltd and William Michael Campbell v The Republic of Zimbabwe*, SADC (T) 2/07; Dube M and Midgley R 'Land reform in Zimbabwe: Context, process, legal and constitutional issues and implications for the SADC region' *Monitoring Regional Integration in Southern Africa Yearbook* (2008) available on www.tralac.org/files/uploads (accessed 10 July 2017).

¹²¹ This case is discussed further in chapter 5; also see for a detailed discussion Moyo A 'Defending human rights and the rule of law by the SADC Tribunal: *Campbell* and beyond' *African Human Rights Law Journal* 590-614 at 593.

139 of the Constitution.¹²² The legislative process is only briefly explained in section 312 as follows: that either house can introduce a bill, only the National Assembly can introduce a money bill, and after both houses have passed a bill, the bill must be assented to by the President before it can become law.¹²³ However, the actual procedure of introducing and passing bills is referred to in section 139 and put to the discretion of the two houses of Parliament.¹²⁴ The law-making process is not entrenched in the Constitution as it can be changed or in some instances suspended, by either Senate or the National Assembly according to section 139(1) Constitution, 2013.

Secondly, the result of this discretion and unprotected legislative process is that there is a general tendency to change laws to suit the situation by enacting new legislation that permits previously impermissible state action. Implication of this loophole can easily be seen in the case of *Biti and Another v the Minister of Justice, Legal and Parliamentary Affairs*.¹²⁵ In this case, the ruling party sought to introduce a new law, the General Laws Amendment Act 2 of 2002. The facts of this case were that the General Laws Amendment Bill was introduced into Parliament, and went through the first, second and third reading, at which point, the majority voted against the Bill 36 to 24 votes. Shortly thereafter, the Minister of Justice then moved a motion for the rescission of the vote in terms of Standing Order 69, and to suspend the provisions of Standing Order 127 which prohibited the introduction of the same Bill twice in the same session. He also relied on Standing Order 190 which states in relevant part, that ‘any Standing or Sessional Order or Orders of the House may only be suspended upon motion moved after notice...’ Both motions were affirmed, and the third reading (voting) was re-done, and this time, by a 69 to 49 vote, thereby passing the General Laws Amendment Act 2 of 2002. Biti contested the procedural correctness of the legislative process. The majority decision found the Act unlawful and invalid because Parliament failed to follow the correct legislative process, and the separate judgment noted that the Bill ought to have been introduced again at the first reading stage, and not the third reading, despite the suspended Standing Orders.¹²⁶

¹²² Constitution of Zimbabwe (No. 20) 2013).

¹²³ Constitution of Zimbabwe (No. 20) 2013.

¹²⁴ Constitution of Zimbabwe (No. 20) 2013.

¹²⁵ *Biti and Another v Minister of Justice, Legal and Parliamentary Affairs* SC10/02 [2002] ZWSC 10 (27 February 2002).

¹²⁶ SC10/02 [2002] ZWSC 10 (27 February 2002).

The decision of the court in the *Biti* case raises confidence in the checks and balances created by the separation of powers, particularly that the court has the power to review actions of the legislature which are contrary to the Constitution. It is concerning that the *Biti* case was based on the previous Constitution of 18 April 1980 (as amended), and yet the legislative process remains largely unchanged in the new Constitution (No. 20) 2013.

Thirdly, although section 119 (2) acknowledges that the constitution is supreme, this provision is immediately contradicted by section 119 (3) which states that ‘all institutions and agencies of the State and government at every level are accountable to Parliament’. This presents the tug of war between constitutional supremacy which exists on paper, and parliamentary sovereignty, which exists in reality. Furthermore, this single clause, re-positions Parliament as supreme, and this has been seen in the general conduct of Parliament, where the Zimbabwean Parliament exhibits traces of the pre-constitutional ‘Parliamentary Sovereignty’ regime. In a state where parliament is sovereign, there is often a proliferation of legislation. Especially in times of political conflict, past parliamentary sovereign regimes such as the Smith government in Rhodesia, and the Apartheid government in South Africa, often enacted radical legislation in response to specific political needs. Zimbabwe seems to have carried this legacy into the constitutional dispensation. Although Zimbabwe had a constitution since 1979, the Lancaster House Constitution, this constitution first existed as subsidiary to parliament, owing to the inherited governance structures. It is important to heed the majority decision in *Chairman, Public Service Commission & Ors v Zimbabwe Teacher’s Association & Ors*,¹²⁷ which confirmed the ruling in *Smith v Mutasa* that:

We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament, but a supreme law (the Constitution).¹²⁸

¹²⁷ 1996 (1) ZLR 637 (SC) 651, 1997 (1) SA 209 (ZS) 218-219.

¹²⁸ *Smith v Mutasa* ZLR 183 (SC) 192, 1990 (3) SA 756 (ZS) 761-762.

The Biti case is just but one example, out of many instances, where the government has created new laws or rules, to bypass existing laws or rules.¹²⁹ This wide discretionary power substantially limits the rule of law, and not only impacts political outcomes, but taints the entire legal system, including that part in which the economy exists.

2.2.1.3 The Separation of Powers

In 2007 under the previous Constitution, Manwere wrote that ‘the current legislative process is partisan, undemocratic and subject to political abuse by the incumbent party...’ and that:

‘there is therefore an urgent need for stakeholders to push for a new constitution which should make provision for the specific role of parliament to promote a new culture of democracy and tolerance and ensure that the House is not used to merely rubber stamp unpopular laws and policies which end up affecting the country’s development’.¹³⁰

It is argued that these words are still relevant under the new dispensation. Whereas, legislative authority vests in Parliament and the President in terms of section 116 of the Constitution, there are loopholes in respect of the separation of powers particularly with regard to law-making. The Presidential Powers (Temporary Measures) Act¹³¹ provides wide discretionary legislative powers to the President which erodes the separation of powers between the executive and the legislature.

Section 2 provides:

2 Making of urgent regulations

(1) When it appears to the President that—

- (a) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and

¹²⁹ SC10/02 [2002] ZWSC 10 (27 February 2002).

¹³⁰ Manwere O ‘Zimbabwe: Law-making process undemocratic’ Zimbabwe Independent, 15 June 2007 available on allafrica.com/stories/200706150713.html (accessed 06 July 2017).

¹³¹ Chapter 10:20.

- (b) the situation cannot adequately be dealt with in terms of any other law; and
- (c) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation;

then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.¹³²

Section 2 of the Presidential Powers (Temporary Measures) Act¹³³ allows the President to make any law pertaining to any matter, in any instance where there is a need for urgency, and undergoing the legislative process through Parliament is perceived as inexpedient. Section 5 elevates Presidential regulations by stating that these ‘prevail over any other law’.¹³⁴ If the rule of law is ‘the antithesis of the existence of wide, arbitrary and discretionary powers in the hands of the executive’ then the Presidential Powers (Temporary Measures) Act¹³⁵ in its mere formulation disregards the rule of law.¹³⁶

Several regulations have been enacted by the President based on the Presidential Powers Act as the enabling statute, relevant here is the Presidential Powers (Temporary Measures) (Amendment of the Reserve Bank Act and Issue of Bond Notes) Regulations, Statutory Instrument 133 of 2016, which is discussed further in 6.6.2.2.

Secondly, the constitution, like several in the region, allows for Parliament to delegate legislation to other organs of state, such as Ministers. Zimbabwe has seen in a number of instances, very wide discretionary powers granted to Ministers, which in essence undermines the separation of powers. In Zimbabwe, the enactment of subordinate legislation by Ministers is not provided for in a composite document, but rather in each enabling statute. The broad wording of the enabling statutes renders it nearly impossible for Ministers to act *ultra vires* of the enabling Act owing to

¹³² Presidential Powers (Temporary Measures) Act Chapter 10:20.

¹³³ Chapter 10:20.

¹³⁴ Chapter 10:20.

¹³⁵ Chapter 10:20.

¹³⁶ Zimbabwe Supreme Court Judge Gubbay AR ‘The progressive erosion of the rule of law in independent Zimbabwe’ Third International Rule of Law Lecture: Bar of England and Wales Inner Temple Hall, London (09 December 2009) 1.

the wide discretionary powers given. Although it is necessary and expedient to allow Ministers to enact subordinate legislation, there is an immediate risk arising owing to the absence of monitoring, and public engagement prior to the enactment. This discretionary law making power given to Ministers although necessary for the good governance of any country, has been abused such that the proper law making process in which the legislature is at the centre appears to have become more of an exception than a general rule. It is also resulting in a proliferation of regulations, and similar to the Presidential Regulations, Parliament is relegated to rubber stamping regulations which are already in force.¹³⁷ This is untenable in a constitutional democracy which Zimbabwe ought to be pursuing based on its Constitution.

2.2.2 Policy Space and the Right to Regulate

For a country such as Zimbabwe, the next logical question would be, the rule of which ‘law’? For there is a just law and an unjust law.¹³⁸ Since attaining its independence in 1980 until 2000, the government, has struggled to create policy space as a result of having an inherited legal framework. Certain laws, could not be altered in terms of the Lancaster House Constitution discussed further in 4.1.2,¹³⁹ and others because of the straight jacket approach of the IMF-led Economic Structural Adjustment Programme (ESAP) discussed in 2.6.2 below.

The government of Zimbabwe, seems to have held on to this approach to legal reform, where it perceives the need for fast-tracked, intentional or targeted law amendments. Upon the expiry of the Lancaster House ban, in 2000,¹⁴⁰ the government was able to get a foothold through the Land Redistribution Programme, and from there forth, began a form of radical legislative transformation. Cooter and de Soto argue that instead of supplanting western rules, ‘it is generally

¹³⁷ Presidential regulations are brought to Parliament within 8 days of regulation becoming effective, Section 4 (1) Chapter 10:20.

¹³⁸ King ML ‘Letter from a Birmingham jail’ available on [www.africa.upenn.edu>Letter_Birmingham.html](http://www.africa.upenn.edu/Letter_Birmingham.html) (accessed 11 July 2017) illustrates the theory of natural law, and argues that an unjust law is no law at all.

¹³⁹ FAO ‘Corporate Document Repository: Zimbabwe’ 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016); Lancaster House Agreement, 21 December 1979 London (Southern Rhodesia Constitutional Conference Held at Lancaster House, London, September-December 1979 Report).

¹⁴⁰ Lancaster House Agreement, 21 December 1979 London (Southern Rhodesia Constitutional Conference Held at Lancaster House, London, September-December 1979 Report).

useful for formal legal norms to mimic the content of local non-legal norms, so as to ensure that informal mechanisms associated with non-legal norms work to enhance the potency of legal norms'.¹⁴¹ Saki and Chivare submit that:

Zimbabwe is a hybrid, or plural, legal system in the sense that the law currently in force was adopted from foreign jurisdictions and imposed [on] the country by settlers during the colonial era. Zimbabwe's law after several years of independence still exposes residual traits of the process of transplantation of historical disempowerment and colonial takeover.¹⁴²

The resultant struggle for policy space, combined with a concoction of bad ingredients, inclusive of a lack of technical expertise, the furtherance of political agendas, and the so-called urgency, and perceived lack of recourse have contributed to the arbitrary 'transformative' reform in Zimbabwe. It has also led to inconsistencies wherein Zimbabwe has ratified numerous treaties which favour liberalisation of markets, but has later enacted highly restrictive, protectionist legal instruments, such as the indigenisation Act.

Although the motive for laws is moving away from politics, it is moving more towards financing the large government wage bill, and increasing statutory instruments serve the purpose of creating fines and penalties, and licences. The law enforcement has been so inhumane as to allow police officials to throw spikes in front of speeding minibuses which are the main form of public transport, needless to say, several have been left injured, and some dead, all in the 'law enforcement'.

Moreover, although Zimbabwe has ratified numerous treaties, it must be examined whether Zimbabwe is benefitting from these.

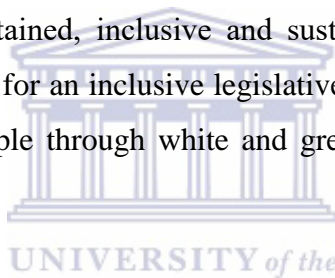
¹⁴¹ Matsuo H 'The rule of law and economic development: A cause or a result? *Centre for Asian Legal Exchange* 59 also available on http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20117/1/8_CALE%20Books2.pdf (accessed 04 July 2017).

¹⁴² Saki O and Chivare T *The Law in Zimbabwe* (2007) 1 University of Zimbabwe: Harare.

2.2.3 Inclusiveness

There is a need for more inclusive and consultative processes in the law-making process. There is a broad network of laws governing trade and other areas, but the laws do not favour citizens. It begs the question ‘What is the purpose of the law?’ Zhou and Zvoushe argue that ‘the public motive is best served where public policy making processes are inclusive, transparent, accountable and responsive.’¹⁴³ It is argued that basis of legal rules should be so tied to the public good, or public interest, that there will not be a legitimacy crisis. Participation is discussed further in 2.5.3.2 in the context of development.

Article 8(1) Agenda 2030 of the African Union envisions ‘A prosperous Africa based on inclusive growth and sustainable development’.¹⁴⁴ Moreover, whereas Zimbabwe does not clearly provide for public engagement, or participation, it is well in line with the Article 27 calls for ‘peaceful, just and inclusive societies’, and ‘sustained, inclusive and sustainable economic growth’.¹⁴⁵ It is important in this regard to provide for an inclusive legislative process in which ordinary citizens can make contributions, for example through white and green papers, similar to neighbouring jurisdictions.



In this regard Zimbabwe could draw lessons from South Africa which has a clearer and entrenched legislative process, and places an obligation on the legislature to ensure public engagement through white and green papers prior to the introduction of a Bill in Parliament.¹⁴⁶ The reasoning for this is that it reduces the risk of bias, and quick-fix legislation geared towards political objectives.¹⁴⁷ It also allows for subject matter experts to make meaningful contributions, where they would

¹⁴³ Zhou G and Zvoushe H ‘Public policy making in Zimbabwe: A three-decade perspective’ *International Journal of Humanities and Social Science* 2(8) Special Issue April 2012 212-222 at 213.

¹⁴⁴ African Union Agenda 2063 Framework Document: The Africa We Want (September, 2015).

¹⁴⁵ United Nations General Assembly Outcome Document, Transforming our world, the Agenda 2030 for Sustainable Development, 12 August 2015.

¹⁴⁶ Constitution of South Africa, 1996.

¹⁴⁷ Samarasinghe N ‘How can parliaments better protect the rule of law and human rights?’ available on https://www.law.ox.ac.uk/sites/files/oxlaw/conference_speech_by_natalie_samarasinghe.pdf (accessed 12/07/2017).

otherwise have deferred to a legislature selected based on popularity and not necessarily competence.¹⁴⁸

From the discussion above, it can be seen that the economy hinges on the presence or absence of the rule of law, and corruption lurks in the shadows. The following section of this chapter defines ‘development’ in the context of this thesis and how development is measured.

PART B: THE DEVELOPMENT DISCOURSE

Paragraph 2.3 defines development, 2.4 discusses selected indicators of economic growth and social indicators, 2.5 discusses theories of economic development that form the framework for this thesis. Paragraph 2.6 examines postcolonial economic policies of Zimbabwe (from 1980) in relation to economic performance as reflected by socio-economic indicators. The purpose of this paragraph is to highlight the three most significant economic policies of Zimbabwe since 1980, and this is important to place trade, investment and financial services into context. This thesis focuses on legal regulation as opposed to economics, and therefore the selected theories will not be dealt with in great detail. Neither will calculations, economic formulas and models be used to prove or disprove economic theories.

2.3 DEFINING ECONOMIC DEVELOPMENT

The definition of development varies depending on the nature and objectives of the organisation or individual defining it. International organisations such as the World Trade Organisation (WTO),¹⁴⁹ International Monetary Fund (IMF), World Bank Group (WBG),¹⁵⁰ and the United

¹⁴⁸ Organisation for Security and Cooperation in Europe ‘Transparency and public participation in law-making processes: Comparative overview and assessment of the situation in Macedonia’ Final Draft Skopje (2010) 13 available on http://www.ecnl.org/dindocuments/381_Transparency%20in%20Law%20Making%20Eng.pdf (accessed 12/07/2017).

¹⁴⁹ The WTO takes a laissez-faire approach: a country declares its own development status, subject to approval by the international community. WTO ‘Who are the developing countries in the WTO?’ available on https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (accessed 5 August 2016).

¹⁵⁰ World Bank ‘Development’ available on www.worldbank.org (accessed 15 October 2011). More recently, the World Bank has begun to incorporate concepts of social development. See generally World Bank ‘State-NGO partnerships aid development in Afghanistan, Myanmar and Yemen’ available on <http://www.worldbank.org/en/news/feature/2016/03/22/state-ngo-partnerships-aid-development-in-afghanistan-myanmar-and-yemen> (accessed 8 June 2016).

Nations (UN),¹⁵¹ have divergent determinants of what constitutes development. Three schools of economic thought have attempted to explain ways in which development can be achieved. These schools are free market, socialist and Keynesian,¹⁵² and stem from three main economic systems, namely capitalist (also called free market economy), command (also called planned economy), and mixed economies, respectively.¹⁵³ Economic systems describe how an economy runs, especially with regard to ownership of resources and decision-making power.¹⁵⁴

A capitalist system is one in which the market determines supply and demand, and the market regulates itself. It follows the contentions that ‘human beings are motivated by profit and self-interest’, that businesses should have free reign (free from state intervention) and that competition is good for the economy.¹⁵⁵ Some characteristics of the free market economy are specialisation, trade, efficiency, incentives, co-ordination, flexibility and choice.¹⁵⁶ Classical theorists such as Rostow’s stages of growth, as well as Harrod and Domar proposed that economic growth facilitates development.¹⁵⁷ The free market argument is that if businesses are allowed to trade free from state interference, they will be able to maximise profits and these profits will trickle down to benefit workers through increased salaries and wages, and trickle down further to benefit the local communities.¹⁵⁸ However, there is increasing acceptance that economic growth, on one hand, and human and social development, on the other, must co-exist in order for economic development to occur.¹⁵⁹

¹⁵¹ The UN bases development on socio-economic factors as measured by Sustainable Development Goals (which replaced millennium development goals (MDGs)). The MDGs were a set of eight socio-economic targets, including goals to reduce infant mortality, and encourage poverty reduction. UN ‘Sustainable development goals’ available on <https://sustainabledevelopment.un.org/?menu=1300> (accessed 8 June 2016).

¹⁵² There are different variations of these schools. See generally Phelps ES *Seven Schools of Economic Thought* (1990).

¹⁵³ Blecher E, Thomas K, Muradzika S, Smith L and de Villiers P *Economics* 2 ed (2009) 17.

¹⁵⁴ Blecher E et al. *Economics* 2 ed (2009) 17.

¹⁵⁵ Pape J *Economics: An Introduction for South African Learners* (2000) 41.

¹⁵⁶ Blecher E et al. *Economics* 2 ed (2009) 26-9.

¹⁵⁷ Rostow WW *The Stages of Economic Growth: A non-Communist Manifesto* (1960) 4-16; see section 2.5.1.

Guillermo E, Omar PS, López JH, Maloney WF and Servén L *Poverty Reduction and Growth: Virtuous and Vicious Circles* (2006) 57; World Bank *Entering the 21st Century- World Development Report 1999/2000* (2000); Pape J *Economics: An Introduction for South African Learners* (2000) 41.

¹⁵⁸ Pape J *Economics: An Introduction for South African Learners* (2000) 41.

¹⁵⁹ China reduced poverty levels down to 8 per cent of the population between 1981 and 2000 and this is attributed to the steady annual GDP per capita growth rate of about 8.5 per cent. Similarly, Vietnam reduced poverty from 58 to 29 per cent between 1993 and 2002 annual GDP growth rate per capita grew by almost 6 per cent per capita;

Despite Adam Smith's theory of the invisible hand, which states that the market brings itself back to equilibrium, theorists such as John Maynard Keynes have found that the market does not automatically allocate resources to poorer people or to the provision of free services.¹⁶⁰ This is one of the reasons why Keynes became prominent after the Great Depression. The United States of America (USA) waited for the market to revert to equilibrium, but it did not, and many people lost their jobs and incomes. Keynes argued that the state ought to actively regulate fiscal and monetary policy so as to manipulate the market. In other words, the government should use its fiscal and monetary policy to regulate the conduct of private firms and individuals, so as to ensure equitable allocation of resources. Blecher et al. define economic growth as the 'increase in actual output', where output refers to the total goods and services produced.¹⁶¹ Nafgizer notes that while economic growth refers to increased production and income, economic development refers to 'economic growth accompanied by changes in output distribution and economic structure'.¹⁶²

This thesis uses the Keynesian theory as a basis because it is holistic and reduces the incidence and extent of inequality, as opposed to the classical theory. The thesis acknowledges the need for government intervention and market forces (the invisible hand) to co-exist so as to achieve economic growth and human and social development.¹⁶³ This means drawing elements from the capitalist system and linking them with some elements from the socialist system and combining them, such as in the mixed economy of Zimbabwe. Economic development is thus defined as 'economic growth accompanied by changes in general welfare and standard of living'.¹⁶⁴

Guillermo E, Omar PS, López JH, Maloney WF and Servén L *Poverty Reduction and Growth: Virtuous and Vicious Circles* (2006) 57; World Bank *Entering the 21st Century- World Development Report 1999/2000* (2000).

¹⁶⁰ Rebelo S *The Role of Knowledge and Capital in Economic Growth* (1998) 3.

¹⁶¹ Blecher E et al. *Economics* 2ed (2009) 66.

¹⁶² Nafgizer EW *The Economics of Developing Countries* 3 ed (1997) 9; Greenwood D & Holt R *Local Development in the 21st Century: Quality of Life and Sustainability* (2015) 10.

¹⁶³ See generally Smith A *The Wealth of Nations* (1776) Cnaan E (ed) 1994; Blecher et al. *Economics* (2009) 66; Nafgizer EW *Economics of Developing Countries* 3 ed (1997), Pape J *Economic: An Introduction for South African Learners* (2000).

¹⁶⁴ Roux A *Everyone's Guide to the South African Economy* (1995) 104; Nafgizer EW *The Economics of Developing Countries* 3 ed (1997) 9.

2.4 MEASURING ECONOMIC GROWTH

According to Brown, indicators are essential for the monitoring and tracking of development.¹⁶⁵ Development indicators are ‘measures that assist in understanding the impact of various government policies and programmes on the country and its citizens’.¹⁶⁶ The indicators below are divided into broad groups: indicators that reflect economic growth and those that reflect human and social development.

2.4.1 Economic Indicators

This section discusses economic indicators that measure economic growth, specifically gross domestic product (GDP), gross national income (GNI), inflation and interest rates.

2.4.1.1 Gross Domestic Product (GDP)

GDP is defined as ‘the total value of all final goods and services produced within the geographic boundaries of a country during a particular period (usually one year).’¹⁶⁷ GDP takes into account the value of production for final consumption to avoid double counting of intermediate goods.¹⁶⁸ The goods need not have been sold, but must have been produced within the geographical area of the country in question and within a specific time period under assessment (also called current production period).¹⁶⁹

¹⁶⁵ Brown D (ed) ‘Good practice guidelines for indicator development and reporting’ (2009) available on <http://www.oecd.org/site/progresskorea/43586563.pdf> (accessed 5 August 2013). Brown recommends that in order for development indicators to be of use to countries, the relevant authorities ought to first establish a specific purpose for the indicators which they are using; secondly, design a conceptual framework; thirdly, select and design the indicators, as well as interpret and report the indicators; and finally, maintain and review them.

¹⁶⁶ Government of South Africa ‘Millennium development goals: Country Report’ (2010); see generally foreword by Manuel TA, former Minister of Finance and Member of Parliament. Mohr proposes that economic indicators can be divided into financial, fiscal and social indicators, and more particularly, that there are some indicators which are considered to be ‘pure economic indicators’: these include GDP, the rate of economic growth, the consumer price index (CPI), the production price index (PPI), the inflation rate, various interest rates, the money supply (or money stock), exchange rates, the budget deficit as well as national debt (Mohr P *Economic Indicators* (2001) 1).

¹⁶⁷ Blecher E et al. *Economics* 2 ed (2009) 292; Mohr P *Economic Indicators* (2001) 19.

¹⁶⁸ Mohr P *Economic Indicators* (2001) 19.

¹⁶⁹ Blecher E et al. *Economics* 2 ed (2009) 292; Mohr P *Economic Indicators* (2001) 35.

Mohr argues that GDP is the best method of assessing the level of economic activity in a country.¹⁷⁰ However, Roux argues that GDP does not explain the distribution of the income, and that when GDP of a country increases, it is also possible that it is a reflection of an increase in the income of the high-income earners.¹⁷¹ His argument stems from the premise that although GDP may grow from one year to another, the day to day lives of the population can still remain unimproved. For example, if the GDP grows by ten per cent in one year and the population increases by ten per cent as well, then there can really not be any improvement in the quality of life.

Although GDP may reflect the total production, it does not account for funds repatriated from the investment host state, nor does it take into account illicit financial flows and capital flight.¹⁷² While GDP was used as an important measure of economic growth for a long time, the recent trends are to use Gross National Income (GNI).

2.4.1.2 Gross National Income

GNI is also referred to as Gross National Product (GNP). Whereas GDP takes into account all production in a country, GNI takes into account the profits, interest, and other income of the country's permanent residents, as well as all interest paid by permanent residents to foreign lenders and dividends paid to foreign shareholders in domestic companies; however, it excludes the income of foreign entities and foreign workers.¹⁷³ To calculate the GNI, the following formula may be used:

$$\text{GNI (or GNP)} = \text{GDP} + \text{primary income from the rest of the world} - \text{primary income to the rest of the world}$$

It is argued that while GDP indicates the level of economic activity in a country, the GNI is a measure of the standard of living in a country.¹⁷⁴ However, the GNI has shortcomings.¹⁷⁵ For

¹⁷⁰ Mohr P *Economic Indicators* (2001) 36.

¹⁷¹ Roux A *Everyone's Guide to the South African Economy* (1995) 105.

¹⁷² See paragraph 5.7.

¹⁷³ Blecher E et al. *Economics* 2 Ed (2009) 292; Mohr P *Economic Indicators* (2001) 35.

¹⁷⁴ Mohr P *Economic Indicators* (2001) 36.

¹⁷⁵ Mohr P *Economic Indicators* (2001) 36.

example, while the GNI gives an indication of domestic production, it fails to show the distribution of this production. Moreover, the GNI does not show the nature of goods produced and whether they are harmful to society, such as arms or pollutants.

2.4.1.3 Inflation

Inflation is measured by the Consumer Price Index (CPI),¹⁷⁶ which is a calculation of the average national basket of goods and services used by a regular resident per month.¹⁷⁷ Inflation may be caused by increased spending in excess of goods produced (so-called ‘demand-pull inflation’) or by increased production costs, which push the price of goods up (‘cost-push inflation’).¹⁷⁸ Inflation is an indicator of economic growth, and changes in inflation rate can have direct impacts. Higher inflation means a more expensive basket and so the CPI is said to measure the cost of living.¹⁷⁹ A more expensive basket in the absence of increased wages means that the poorest in communities become less able to purchase basic goods and access basic services such as health care. This increases risks of malnutrition, poverty, lack of access to education and other important resources.

Deflation is when prices fall, resulting in a drop in the CPI and wages. Munzara argues that Zimbabwe is experiencing monetary deflation resulting from reduced money supply (liquidity crisis), as opposed to price deflation which would have resulted from increased production and reduced demand.¹⁸⁰ Deflation tends to have negative effects on the economy: buyers may stop buying goods, leading to reduced sales, and companies may end up downsizing and closing.¹⁸¹ Reduced consumer spending affects economic growth in that it ‘sets in motion a vicious cycle – unsold goods, lower production, still lower prices, lower profits, layoffs, and even more reduced consumer spending’.¹⁸² Unemployment tends to increase during deflationary periods.¹⁸³

¹⁷⁶ Mohr et al. *Economics for South African Students* (2002) 590; Blecher E et al. *Economics* 2 Ed (2009) 296.

¹⁷⁷ Blecher E et al. *Economics* 2 Ed (2009) 296.

¹⁷⁸ Blecher E et al. *Economics* 2 Ed (2009) 296.

¹⁷⁹ Mohr et al. *Economics for South African Students* (2002) 594.

¹⁸⁰ Munzara AT ‘Escaping deflation in Zimbabwe: The role of fiscal and monetary policies’ (2015) 6 (6) *IOSR Journal of Economics and Finance*’ 23 24.

¹⁸¹ IMF *Zimbabwe: 2014 Article IV Consultation-Staff Report Press Release and Statement by the Director for Zimbabwe* (2014) 10; Brezina C *How Deflation Works* (2011) 29; read further in Kumar MS, Baig T, Decressin J, Faulkner MacDonagh C and Feyzioglu T *Deflation: Determinant, Risks and Policy Options* (2003).

¹⁸² Brezina C *How Deflation Works* (2011) 29.

¹⁸³ Brezina C *How Deflation Works* (2011) 29.

Munzara further notes two main responses to deflation are monetary policy and fiscal policy remedies briefly discussed below.¹⁸⁴ Quantitative easing is a monetary policy remedy which requires government to increase money supply. However, because Zimbabwe is not using its own currency, but rather a multi-currency system, this remedy would not be easy to use. Currently, Zimbabwe has introduced an alternative currency called a ‘bond’ in terms of the Presidential Powers (Temporary Measures) (Reserve Bank and Issue of Bonds) Regulation 133 of 2016 as a means to increase money supply and ease the ongoing liquidity crisis.¹⁸⁵ Fiscal remedies, on the other hand, require tax reductions, so as to reduce the financial burden on firms and individuals and encourage spending. Fiscal remedies might not be a suitable remedy in Zimbabwe because the country relies on tax revenues to support its large wage bill, in the absence of foreign direct investment, and international loans. Moreover, there is a general trend of broadening the tax base through instruments such as the Control of Goods (Import and Export) (Agriculture) Order, 2007 and Control of Goods (Standards Assessment) discussed further in 3.3.2.¹⁸⁶

In the first half of 2015 the CPI in Zimbabwe declined by 7.7 per cent, while production increased by 3 per cent.¹⁸⁷ These negative effects of deflation are already being experienced in Zimbabwe where industrial capacity has shrunk from 57 to 34 per cent in 2016 and the economic situation has worsened due to the depreciation of the South African Rand.¹⁸⁸

¹⁸⁴ Munzara AT ‘Escaping deflation in Zimbabwe: The role of fiscal and monetary policies’ (2015) 6 (6) *IOSR Journal of Economics and Finance* 23 24.

¹⁸⁵ See sections 2.2.1.2 and 6.6.2.2.

¹⁸⁶ Statutory Instrument 138 of 2007; and Statutory Instrument 132 of 2015, respectively.

¹⁸⁷ Mangudhla T ‘Deflation a major threat to economy’ available on <http://www.theindependent.co.zw/2015/10/23/deflation-a-major-threat-to-economy/> (accessed 19 February 2016).

¹⁸⁸ Zimbabwe imports the bulk of its imported goods from South Africa; Pilling D and England A ‘Zimbabwe swaps hyperinflation for deflation with use of US dollar’ available on <http://www.ft.com/cms/s/0/9eb1c2d8-c341-11e5-b3b1-7b2481276e45.html#axzz4AR08DCaU> (accessed 02 June 2016); Kachembere J ‘Zim sinks deeper into deflation’ available on <https://www.dailynews.co.zw/articles/2016/04/19/zim-sinks-deeper-into-deflation> (accessed 2 June 2016).

2.4.1.4 Interest Rates

Interest rates can have a positive or negative effect on economic development.¹⁸⁹ Similar to inflation, interest rates are used to measure economic growth. A reduction in interest rates on various forms of loans can increase economic activity, and thereby help both firms and individuals borrow more money and invest more.¹⁹⁰ Investment has spill-over effects of increased income and increased spending. An increase in interest rates, on the other hand, is likely to have the opposite effect: more people would have less money to spend, fewer investments, reduced spending capacity and consequently reduced access to social services such as quality education, housing and health care. Indicators of economic growth indicate wealth, but do not indicate how that wealth is distributed. This is the gap that is filled by social indicators.

Zimbabwe's economic indicators show fluctuations, but the general trend is an increase of both GDP and GNI, and a reduction of inflation and interest rates.¹⁹¹ The GDP peaked from US\$4, 416 billion in 2008 to US\$14,419 billion in 2015, reflecting increased production since the contraction of both the international and domestic economies experienced during the global financial crisis of 2008. The GNI per capita increased from US\$300 in 2008 to US\$860 in 2015. The CPI dropped from US\$97.00 in January 2016 to US\$96.10 in October 2016, and interest fell from 14.25 per cent to 10.75 per cent during the same period.¹⁹² The falling CPI reflects the current deflationary economic conditions in Zimbabwe, which may have negative effects because deflation is closely tied to falling wages. The impact is that although goods are cheaper to access, fewer people earn adequate salaries to be able to benefit from the reduced price of the shopping basket, and fewer people are able to access social services.

2.4.2 Social Indicators

This paragraph discusses indicators that reflect human and social development, specifically the Human Development Index (HDI), sustainable development goals (SDGs), unemployment and

¹⁸⁹ Kliesen K 'Low interest rates have benefits and costs' (2011) 15 (1) *Inside the Vault* 1-2.

¹⁹⁰ Sanderson A 'Domestic savings are key in reducing interest rates' available on <http://baz.org.zw/consumer-centre/banking-basics/domestic-savings-are-key-reducing-interest-rates> (accessed 19 February 2016).

¹⁹¹ World Bank 'Zimbabwe' available on <http://data.worldbank.org/country/zimbabwe> (accessed 17 December 2016).

¹⁹² Trading Economics 'Zimbabwe consumer price index (CPI)' available on <http://www.tradingeconomics.com/zimbabwe/consumer-price-index-cpi> (accessed 17 December 2016).

equity. These are selected because they are the most contemporary and most efficient measures of human and social development. As discussed in paragraph 2.3 above, human and social development must be added to economic growth in order to create economic development. These indicators measure the attainment of basic needs such as education, primary health care, and quality of life.¹⁹³

2.4.2.1 Human Development Index

The HDI is a social development indicator that looks at longevity by assessing life expectancy at birth, knowledge as determined by assessing the population's average years of schooling, and income as GDP per capita.¹⁹⁴ HDI is calculated as a decimal where 1,0 indicates the highest level of development and 0,0 the lowest.¹⁹⁵ According to the UNDP in the Human Development Report of 1999, Zimbabwe and South Africa are both in the category of countries with 'medium' human development.¹⁹⁶ As noted in below in 2.5.3, knowledge is a critical component for development and it does not have diminishing returns, hence it is important to measure it as aided by the HDI.

2.4.2.2 Sustainable Development Goals

The Sustainable Development Goals (SDGs) superseded the Millennium Development Goals (MDGs). The MDGs comprised eight objectives which the UN encouraged developing countries to achieve by the year 2015.¹⁹⁷ It is argued that the SDGs, might face similar criticisms as the MDGs, particularly that the goals are ambitious.¹⁹⁸ Clemens and Moss argue that MDGs had a ten-year compliance period, which was equivalent to asking developing countries to do in ten years

¹⁹³ The physical quality of life index is calculated as a figure marked out of one hundred. This figure takes into account percentages of literacy rate, life expectancy and infant mortality in a country within a period of one year, as further explained. Pape J *Economics: An Introduction for South African Learners* (2000) 71. There is no statistical measure of democracy, but certain questions may be asked in order to assess whether a country is democratic; see generally United Nations International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966 and Optional Protocol Ref No. 14668.

¹⁹⁴ Mohr P *Economic Indicators* (2001) 209.

¹⁹⁵ Pape J *Economics: An Introduction for South African Learners* (2000) 71.

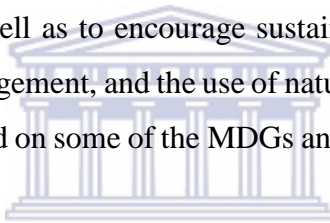
¹⁹⁶ United Nations Development Program 'Human Development Report' (1999); Mohr P *Economic Indicators* (2001) 211.

¹⁹⁷ See generally United Nations *The Millennium Development Goals Report* (2010) Ref: En 20100604.

¹⁹⁸ See generally International Council for Science and International Social Science Council *Review of Targets for the Sustainable Development Goals: The Science Perspective* (2015).

what most developed countries did over centuries.¹⁹⁹ They argue further that for MDGs to be successful, they would have required an additional US\$50 billion in aid, as well as a sustained GDP growth rate of at least 7 per cent per year.²⁰⁰ The MDGs coincided with Zimbabwe's worst post-independence economic periods during which Zimbabwe introduced land reform and had not yet implemented security of tenure for new farmers. Zimbabwe was also under economic sanctions and experienced hyperinflation. The final MDG Report for Zimbabwe notes that although Zimbabwe experienced poor economic conditions, it made some gains, such as increased access to primary education, information and communication technologies, and antiretroviral treatment for HIV. However, there was still a high incidence of new HIV infections, gender equality gaps, high maternal mortality and high income poverty.²⁰¹

Countries are expected to meet SDGs by 2030.²⁰² SDGs are set to follow through with some of the outstanding MDG objectives, as well as to encourage sustainable growth insofar as it relates to environmental protection and management, and the use of natural resources. In setting out 17 goals and 169 targets,²⁰³ the SDGs expand on some of the MDGs and introduce new factors. These goals



¹⁹⁹ Clemens M and Moss T 'What's wrong with the Millennium Development Goals?' available on http://www.cgdev.org/files/3940_file_WWMGD.pdf (accessed 23 November 2016);

²⁰⁰ UN General Assembly Resolution *Transforming our World: the 2030 Agenda for Sustainable Development* Resolution adopted by the General Assembly on 25 September Ref: A/RES/70/1 seventieth session.

²⁰¹ Government of Zimbabwe and UN Zimbabwe *Zimbabwe Millennium Development Goals: 2000-2015 Final Progress Report* (2015).

²⁰² Article 2 UN General Assembly (UNGA) *Transforming our World: the 2030 Agenda for Sustainable Development* Resolution adopted by the General Assembly on 25 September 2015 A/RES/70/1 seventieth session.

²⁰³ Goal 1. End poverty in all its forms everywhere; Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 3. Ensure healthy lives and promote well-being for all at all ages; Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Goal 5. Achieve gender equality and empower all women and girls; Goal 6. Ensure availability and sustainable management of water and sanitation for all; Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all; Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; Goal 10. Reduce inequality within and among countries; Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable; Goal 12. Ensure sustainable consumption and production patterns; Goal 13. Take urgent action to combat climate change and its impacts; Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development; Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development; UN General Assembly Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1.

are seen as stepping stones or milestones to the achievement of economic development. The concern, however, is that if developing countries fail to achieve eight goals, is it not overly ambitious to assume they will now meet seventeen goals? Moreover, provisions such as goal 10 on reducing inequalities between countries seem vague because the SDGs are framed as goals that each country should individually pursue, and yet a goal such as goal 10 requires the combined efforts of states. Nevertheless, having a blueprint may assist in keeping countries accountable.

2.4.2.3 Unemployment

In order for a country to ensure full production, it has to use all its available resources.²⁰⁴ This is why the employment rate is important for policy-makers and economists. The aim is to ensure that as many people as possible are gainfully employed.²⁰⁵

A few factors to be considered include the ‘total number of people who are willing and able to work, called the labour force or the economically active population’ (EAP).²⁰⁶ The EAP includes the formal and informal sector, self-employed people, employers, and unemployed persons.²⁰⁷ Blecher et al. submit that a person is classified as ‘unemployed’ if such person is ‘above fifteen years of age’, ‘under sixty-five years’, ‘wants to work’, ‘is able to work’, ‘is immediately available for work’, ‘is not currently in paid employment’, ‘and has actively looked for a job for the last four weeks’.²⁰⁸ According to Mohr, there are certain factors that influence the EAP such as age distribution of a population, regulations pertaining to retirement, gender, structure of the economy and the availability of institutions such as childcare centres, which would enable women to work outside their homes.²⁰⁹ This is important in the social inclusion dialogue because it relates to measures that enable women to participate in gainful employment.

²⁰⁴ Blecher E et al. *Economics* 2 ed (2009) 10.

²⁰⁵ UN Human *Development Report: Work for Human Development* (2015) also available on http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf (accessed 19 February 2016).

²⁰⁶ Mohr P *Economic Indicators* (2001) 79.

²⁰⁷ Mohr P *Economic Indicators* (2001) 35.

²⁰⁸ Blecher E et al. *Economics* 2 ed (2009) 300.

²⁰⁹ Mohr P *Economic Indicators* (2001) 35.

Unemployment results in a loss of income that impacts directly on access to food, health care, and housing, especially where social services are not free.²¹⁰ Unemployment has also been linked to political uprisings, protests and crimes.²¹¹ The result is that the physical quality of life is negatively affected, and lack of income trickles down to education, literacy and life expectancy, resulting in underdevelopment.²¹² Moreover, labour lost today cannot be saved and used later, and often people who stay unemployed for several years may lose their skills.²¹³ Unemployment in Zimbabwe is currently 94 per cent of the population, which means that many lack income and access to primary services such as health care, education, food and clean water.

2.4.2.4 Equity

Equity refers to fairness in the distribution of income.²¹⁴ In this context, equity means the fairness of how production is distributed within a country. While there are numerous ways of determining equity, one of these measures is called the GINI co-efficient. The GINI co-efficient is an index used to measure the distribution of income, that is, how income is earned and shared. It is calculated as a decimal between 0, which refers to a state of equal distribution, and 1, which refers to a state of extreme inequity. Pape contends that although the GINI co-efficient explains how income is distributed within a state, it does not explain the subject of the distribution, and consequently a country with a low GINI co-efficient may have equally poor people. Another measure of equity is the Lorenz Curve, which is a graph illustrating the distribution of income across various income ranges. The graph has a 45-degree line that depicts perfectly equal distribution (also called line *Oe*) and a curve being the graph for the specific country.²¹⁵ The closer the curve is to line *Oe*, the more equal the distribution, and the further away, the less equal the distribution.²¹⁶

²¹⁰ Mohr P and Fourie L *Economics for South African Students* 2 ed (2002) 583.

²¹¹ Mohr P and Fourie L *Economics for South African Students* 2 ed (2002) 583.

²¹² Mohr P *Economic Indicators* (2001) 79.

²¹³ Mohr P *Economic Indicators* (2001) 79.

²¹⁴ Pape J *Economics: An Introduction for South African Learners* (2000) 75.

²¹⁵ Blecher E et al. *Economics* 2 ed (2009) 304.

²¹⁶ Blecher E et al. *Economics* 2 ed (2009) 304.

The social indicators show that Zimbabwe made some improvements regarding MDGs, but some areas require attention such as employment and equity.²¹⁷ However, as noted above, MDGs coincided with one of Zimbabwe's worst economic declines and consequently some goals were not met. Notably, there was room to improve on certain critical areas such as maternal health, food insecurity and gender gaps.²¹⁸ The SDGs first annual report is not yet available to determine Zimbabwe's current performance in this regard. In terms of employment, Zimbabwe shows a contracting formal sector being replaced by an expanding informal sector, reflected by high unemployment in the formal sector rated as 94 per cent.²¹⁹ Zimbabwe had a GINI Index of 50.10 in 2005,²²⁰ however more recent statistics do not provide its GINI Index, or Lorenz Curve. For example the UN refers instead to various forms of inequality, including income inequality and human inequality for which Zimbabwe is rated 35.8 and 26 respectively.²²¹ In order to address the gaps noted above, there must be targeted efforts towards attaining economic development. The following paragraph explores selected theories of economic development.

2.5 THEORIES OF ECONOMIC DEVELOPMENT

Development economics emerged during the period following World War II.²²² Based on Zimbabwe's mixed economic system, it is necessary to select growth theories that support the mixed economy ideology as coined by John Maynard Keynes (and noted in 2.3 above).²²³

²¹⁷ Government of Zimbabwe and UN Zimbabwe *Zimbabwe Millennium Development Goals: 2000-2015 Final Progress Report* (2015).

²¹⁸ Government of Zimbabwe and UN Zimbabwe *Zimbabwe Millennium Development Goals: 2000-2015 Final Progress Report* (2015).

²¹⁹ Luebker M 'Employment, unemployment and informality in Zimbabwe: Concepts and data for coherent policy-making' Issue Paper No. 30 and Integration Working Paper No. 90, ILO Harare sub-Regional Office for Southern Africa and Policy Integration and Statistics Department ILO, Geneva (2008) 26.

²²⁰ Knoema 'Zimbabwe GINI Index' available on <https://knoema.com/WBWDIGDF2013Dec/world-development-indicators-wdi-december-2013?tsId=2999820> (accessed 18 December 2016).

²²¹ UN *Human Development Report: Statistical Annex* (2015) 218

²²² McKinnon RI *The Order of Economic Liberalisation: Financial Control in the Transition to a Market Economy* 2 ed (1993) 1.

²²³ Below is a brief discussion of other economic theories which are not relied on, but inform the discussion. Some economic growth theories include the neo-classical theory.

Neo-classical theory: The main difference between the classical and neo-classical theories is that neo-classical theory adds technology as a factor of production; see Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 88; Agenor P & Montiel PJ *Development Macro-Economics* (1996) 513; see generally Parkin M, Powell M and Matthews K *Economics* 7 ed (2008) 7; Sandilands RJ 'Solovian and new growth theory from the perspective of Allyn Young on macroeconomic increasing returns' (2009) 41 *History of Political Economy* 286; Wei Y, Liu X, Song H and Romilly P 'Endogenous innovation growth theory and regional income convergence in China' (2001)

The thesis takes a holistic approach to economic development, which requires both economic growth and social development. The paragraphs below will discuss selected economic growth theories, the first two of which relate to economic growth, and the last one relates to social development.

2.5.1 Harrod-Domar Growth Model

The Harrod-Domar model is selected for its usefulness in Chapter 5, which looks at investment as a tool for economic development. This model emphasises the creation of an enabling environment

13 *Journal of International Development* 153-154; Solow RM 'A contribution to the theory of economic growth' (1956) 70 (1) *Quarterly Journal of Economics* 65.

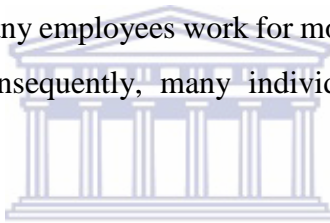
Neo-classical counterrevolution: The neo-classical counterrevolution is very closely tied to the classical theory. It reinforces liberalism and freedom from state intervention. See Williamson J 'Democracy and the Washington Consensus' *World Development* (August 1993) 1329-1336 & Williamson J (ed) *The Political Economy of Policy Reform* (1994) at 26-8 as cited in Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 110-11; Williamson J 'The Washington Consensus as policy prescription for development' available on <http://www.iie.com/publications/papers/williamson0204.pdf> (accessed 19 February 2016). Some of the concepts include: advocacy for the immediate removal of price controls, maintenance of small government deficits to avoid inflationary financing, encouraging developing country governments to disinvest in political areas such as national defence and administration, and to reinvest into the provision of socio-economic rights such as health care and education, tax reform, financial liberalisation, maintenance of competitive exchange rates, trade liberalisation, increased fiscal discipline and increased domestic savings, reduced barriers to foreign direct investment, privatisation, deregulation and security of property rights. See Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 110-111. Williamson states that the 'Washington Consensus' is a misnomer and that this consensus is more of a 'universal convergence' of economies of developing and developed countries. See O'Connor DE *The Basics of Economics* (2004) 56; Pape J *Economics: An Introduction for South African Learners* (2000) 41. Other theories that are associated with the command economic system, such as the international dependence revolution and the transformation approach, will also not be discussed in the main body of the thesis.

International Dependence: Dependency theory stems from the premise that developed countries (also referred to as 'the centre') have developed due to their exploitation of underdeveloped countries (also referred to as 'the periphery'). See Hein S 'Trade strategy and the dependency hypothesis: A comparison of policy, foreign investment, and economic growth in Latin America and East Asia' (1992) 40 (3) *Economic Development and Cultural Change* 495-521; Ferraro V 'Dependency theory: An introduction' available on http://marriottschool.net/emp/WPW/pdf/class/Class_6-The_Dependency_Perspective.pdf (accessed 22 February 2016); Pape J *Economics: An Introduction for South African Learners* (2000) 49; Ferraro V 'Dependency theory: An introduction' available on http://marriottschool.net/emp/WPW/pdf/class/Class_6-The_Dependency_Perspective.pdf (accessed 22 February 2016). Another example is that of alleged imperialism in Latin America by the US United Fruit Company, also called the 'Banana Republic'; Buchelli M 'Good dictator, bad dictator: United Fruit Company and economic nationalism in Central America in the Twentieth Century' (2006) available on https://business.illinois.edu/working_papers/papers/06-0115.pdf (accessed 10 February 2016); Weinstein BL 'Developing China's hinterland: from autarky to anarchy' (March-April 1996) 39 (2) *Challenge* 55-59; Nayer BR *India's Globalisation: Evaluating the Economic Consequences* (2006) 8.

Transformation Approach: transformation advocates total change and participation in resource ownership and decision-making at grassroots level, and emphasise democracy and co-operation; Pape J *Economics: An Introduction for South African Learners* (2000) 49.

for savings and investment as a means to increase economic growth.²²⁴ A discussion of the Harrod-Domar model is critical as it may inform the investment arena of Zimbabwe. The Harrod-Domar model is an extension of the Keynesian theory,²²⁵ and suggests that when people earn bigger incomes, they will be able to earn their subsistence as well as save the excess, and that this excess, once in the banks, can be accessed by investors who take loans in order to finance their investment.²²⁶ As a result of the investment, more jobs are created, creating more income, and the cycle continues, fuelling economic development.²²⁷

The Harrod-Domar model shows the importance of income and investment to economic development. It is argued that the more income that people earn, the more money they can spend on important services such as education, health care, and housing. These services in turn improve people's quality of life. However, as explained further in 6.2, one of the obstacles Zimbabwe experiences in this regard is that many employees work for months without receiving their salaries due to the liquidity crisis.²²⁸ Consequently, many individuals are not able to afford daily subsistence, let alone invest.²²⁹



2.5.2 Vicious Circle and Balanced Growth Theory of the

The concept of the 'vicious circle' aligns with the Harrod-Domar model, and states that development can be stifled by the cycle of poverty.²³⁰ In other words, 'poverty perpetuates itself in mutually reinforcing vicious circles on both the supply and demand sides'.²³¹ On the supply side, low incomes lead to a situation where the population does not have enough surplus income

²²⁴ Roux A *Everyone's Guide to the South African Economy* (1995) 104.

²²⁵ Roux A *Everyone's Guide to the South African Economy* (1995) 104.

²²⁶ Mankiw NG and Taylor MP *Economics* 2 ed (2011) 535.

²²⁷ Mankiw NG and Taylor MP *Economics* 2 ed (2011) 535.

²²⁸ Discussed in paragraph 6.6.3.2; Mangudla T 'Panic over liquidity crisis' *Zimbabwe Independent* 08 April 2016 available on <http://www.theindependent.co.zw/2016/04/08/panic-liquidity-crisis/> (accessed 29 May 2016); Mabika H 'Liquidity crisis and service delivery in Zimbabwe local authorities' (2015) 3 (3) *Journal of Political Sciences and Public Affairs* 1.

²²⁹ Mangudla T 'Panic over liquidity crisis' *Zimbabwe Independent* 8 April 2016 available on <http://www.theindependent.co.zw/2016/04/08/panic-liquidity-crisis/> (accessed 29 May 2016); Mabika H 'Liquidity crisis and service delivery in Zimbabwe local authorities' (2015) 3 (3) *Journal of Political Sciences and Public Affairs* 1.

²³⁰ Bauer PT 'The vicious circle of poverty: Reality or myth?' (1965) available on <http://www.panarchy.org/bauer/viciouscircle.html> (accessed 23 February 2016).

²³¹ Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 94.

to put aside for savings and as a result no capital can be accumulated. On the demand side, because there is low income the population has less to spend; thus, the market is small and there is no incentive for investors, with the result that productivity and incomes continue to be low.

This theory assumes that developing countries are too poor to save, when in fact they are able to save but perhaps choose not to; as Nafziger suggests, people tend to overspend to 'keep up with the Joneses'.²³² However, savings are not limited to individuals but include firms and governments.²³³ In this regard, it is important to note that some of the largest corporate entities in the developing world are foreign-owned, and more often than not do not reinvest their profits in the host state, instead repatriating a substantial amount of their profits (as discussed in paragraph 5.4.4).

In line with the proposition of Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) for export-led-development, Nurkse submits that in order for developing countries to escape the vicious circle they would have to increase capital accumulation and increase exportation of value-added finished goods.²³⁴ Zimbabwe is a primary commodity exporter. Balanced growth requires a 'big push' which is achieved by increasing capital significantly and developing one essential sector, which will stimulate development in other sectors.²³⁵ The Lewis-Fei-Ranis Model also supports the view that increasing physical capital has the effect of boosting industry and encouraging economic growth. He suggests that agriculture and an emerging modern economy anchor each other and facilitate economic development. Further, Hirschman argues that it is necessary for poor countries to 'develop a strategy that spurs investment decisions' and that developing countries should maximise backward and forward linkages.²³⁶ This is to say that developing countries should, for example, concentrate investments in a sector that will be itself an investment into another sector, in order to create the big push.

²³² Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 94.

²³³ Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 95.

²³⁴ Jain TR and Ohri VK *Development Economics* (2007) 187; Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 96.

²³⁵ Jain TR and Ohri VK *Development Economics* (2007) 187.

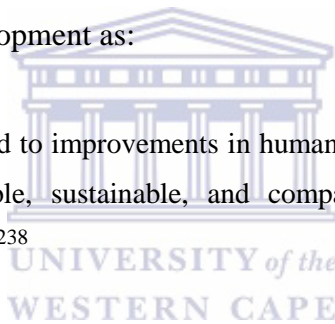
²³⁶ Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 96.

This approach was used in Europe, where the steel industry supported the development of other sectors, and in South Africa, where mining was used as an anchor to create a big push for other sectors such as clothing and textiles. There is potential in this growth model for Zimbabwe, which has two fairly strong sectors, agriculture and mining, one of which can be used as an anchor for the big push, as will be explained further in Chapter 4. This approach will also be considered as part of the framework for this thesis.

2.5.3 Social Development

While the Harrod-Domar model, the vicious circle and balanced growth models discussed above focus on economic growth, social development focuses on two intertwined concepts namely social inclusion and participation. Social development refers to access to socio-economic rights such as food, water, education, housing, and health care.²³⁷ Social development is defined by the UN Research Institute for Social Development as:

[p]rocesses of change that lead to improvements in human well-being, social relations and social institutions, that are equitable, sustainable, and compatible with principles of democratic governance and social justice.²³⁸



This definition notes the importance of people, institutions and processes in facilitating development, focusing on the redistribution of resources that ought to occur simultaneously with

²³⁷ Addison T Niño-Zarazúa M and Tarp F 'Aid, social policy and development' (2015) 27 *Journal of International Development* 1351-1352.

²³⁸ UN Research Institute for Social Development (UNRISD) 'Social development in an uncertain world 2011-2014' (March 2011) 2 available on <http://www.unrisd.org/research-agenda> (accessed 16 February 2016).

the attainment of economic growth.²³⁹ Social development also includes aspects of social inclusion,²⁴⁰ which is sometimes framed as ‘pro-poor growth’ or ‘inclusive growth’.²⁴¹

2.5.3.1 Social Inclusion

Social inclusion is defined as a society ‘where all people feel valued, their differences are respected, and their basic needs are met so they can live in dignity’.²⁴² Section 73(a) of the Zimbabwean Constitution guarantees citizens the rights to ‘an environment that is not harmful to their health or well-being’.²⁴³ It guarantees progressive realisation of rights to basic education for children and adults alike, and basic health care.²⁴⁴

²³⁹ UN Research Institute for Social Development (UNRISD) ‘Social development in an uncertain world 2011-2014’ (March 2011) 3 available on <http://www.unrisd.org/research-agenda> (accessed 16 February 2016).

²⁴⁰ UN World Summit for Social Development Copenhagen Declaration on Social Development, Annex 1: Article 2 Ref: A/CONF.166/9 Copenhagen, 1995; UN Unnikrishnan R and Jagannathan L ‘A Study on mediation effect of social inclusion on global human development’ (2015) 8 (1) *BVIMR Management Edge* 42 42; UNGA Declaration on Social Progress and Development Resolution 2542 (XXIV) 11 December 1969 also provides in Article 10(a) The assurance at all levels of the right to work and the right of everyone to form trade unions and workers’ associations and to bargain collectively; promotion of full productive employment and elimination of unemployment and under-employment; establishment of equitable and favourable conditions of work for all, including the improvement of health and safety conditions; assurance of just remuneration for labour without any discrimination as well as a sufficiently high minimum wage to ensure a decent standard of living; the protection of the consumer; (b) The elimination of hunger and malnutrition and the guarantee of the right to proper nutrition; (c) The elimination of poverty; the assurance of a steady improvement in levels of living and of a just and equitable distribution of income; (d) The achievement of the highest standards of health and the provision of health protection for the entire population, if possible free of charge; (e) The eradication of illiteracy and the assurance of the right to universal access to culture, to free compulsory education at the elementary level and to free education at all levels; the raising of the general level of life-long education; (f) The provision for all, particularly persons in low income groups and large families, of adequate housing and community services. Social progress and development shall aim equally at the progressive attainment of the following main goals.

²⁴¹ UNDP ‘Inclusive development’ available on http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_inclusive_development.html (accessed 19 February 2016); International Labour Organisation ‘Rural economy: promoting decent work in the rural economy’ available on <http://www.ilo.org/global/topics/economic-and-social-development/rural-development/lang--en/index.htm> (accessed 19 February 2016).

²⁴² Unnikrishnan R and Jagannathan L ‘A study on mediation effect of social inclusion on global human development’ (2015) 8 (1) *BVIMR Management Edge* 42.

²⁴³ Section 75 Constitution of Zimbabwe, Amendment No. 20 (2013) appears to copy section 29 Constitution of South Africa, 1996.

²⁴⁴ Section 75 Constitution of Zimbabwe, Amendment No. 20 (2013); Section 29 Constitution of South Africa, 1996.

The fact that over 50 per cent of Africa's population is below the age of 25 indicates a need for laws and policies that take into account youths' particular needs and constraints.²⁴⁵ A new addition to the Zimbabwean Constitution is the right not to have one's home demolished, which is probably in response to the *Murambatsvina* large scale clean-up campaign, where the government demolished all structures illegally constructed.²⁴⁶ Moreover, the Zimbabwean Constitution guarantees the right to 'safe, clean, potable water and sufficient food'.²⁴⁷ These reforms guarantee legal protection of minority groups and disadvantaged people at least in theory.

With regard to social inclusion of rural communities, the International Labour Organisation (ILO) Decent Work Agenda aims to

[increase] the voice of rural people through organisation of communities and promotion of rights, standards and social dialogue; promoting an employment based rural development model through diversified livelihoods, sustainable enterprises and better integration in value chains; and providing social protection floors which guarantee minimum income and access to basic services in rural economies which are often very vulnerable to external shocks.²⁴⁸

Social inclusion of women in economic life is also of particular importance because women tend to be disproportionately affected as unpaid primary caregivers.²⁴⁹ Women form the majority of the population of Zimbabwe, yet they tend to be marginalised in employment and management opportunities and leadership.²⁵⁰ Inclusive growth encourages better distribution of resources

²⁴⁵ FAO 'Banana boom improves food, nutrition and income security for smallholder farmers in Zimbabwe' available on <http://www.fao.org/in-action/banana-boom-improves-food-nutrition-and-income-security-for-smallholder-farmers-in-zimbabwe/en/> (accessed 20 September 2016).

²⁴⁶ Section 74 Constitution of Zimbabwe, Amendment No. 20 (2013).

²⁴⁷ Section 77 Constitution of Zimbabwe, Amendment No. 20 (2013).

²⁴⁸ ILO 'Rural economy: promoting decent work in the rural economy' available on <http://www.ilo.org/global/topics/economic-and-social-development/rural-development/lang-en/index.htm> (accessed 19 February 2016).

²⁴⁹ Maybud S 'Women and the future of work: Taking care of care givers' (2015) *ILO's Work in Progress 2* available on http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_351297.pdf (accessed 6 June 2016); UNESCO 'The implications of HIV/AIDS on women's unpaid labour burden' (2008) Series 1 *Gender Equality Series 2* available on <http://unesdoc.unesco.org/images/0019/001914/191470e.pdf> (accessed 6 June 2016).

²⁵⁰ Maybud S 'Women and the future of work: Taking care of care givers' (2015) *ILO's Work in Progress 2* available on http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_351297.pdf

through participation, non-discrimination and accountability.²⁵¹ These factors help in circumventing abject poverty and facilitating rural development and women's empowerment.²⁵² This is an important consideration in the context of Zimbabwe where the majority of the population living in rural areas lives in poverty. Participatory development is discussed below.

Human Capabilities

Human capabilities approach aligns with social inclusion. Amartya Sen introduced the capabilities approach, which measures human development or social development as 'a person's ... actual ability to achieve various valuable functionings as a part of living'.²⁵³ Functionings may include elementary aspects of being and doing such as being in good health, having sufficient food to eat and clean water to drink, and being able to attend school and obtain a basic education.²⁵⁴ The capabilities approach was embraced by the UN and is noted in the Human Development Report

[travail/documents/publication/wcms_351297.pdf](#) (accessed 6 June 2016); UNESCO 'The implications of HIV/AIDS on women's unpaid labour burden' (2008) Series 1 *Gender Equality Series 2* available on <http://unesdoc.unesco.org/images/0019/001914/191470e.pdf> (accessed 6 June 2016).

²⁵¹ UNDP 'Inclusive development' available on http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_inclusive_development.html (accessed 19 February 2016); International Labour Organisation 'Rural economy: promoting decent work in the rural economy' available on <http://www.ilo.org/global/topics/economic-and-social-development/rural-development/lang--en/index.htm> (accessed 19 February 2016).

²⁵² UNDP 'Inclusive development' available on http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_inclusive_development.html (accessed 19 February 2016); International Labour Organisation 'Rural economy: promoting decent work in the rural economy' available on <http://www.ilo.org/global/topics/economic-and-social-development/rural-development/lang--en/index.htm> (accessed 19 February 2016).

²⁵³ Sen A 'Capability and well-being' available on <http://existencia.org/files/alt-eco/quality.pdf> (accessed 19 February 2016).

²⁵⁴ Sen explains functionings as follows: 'Perhaps the most primitive notion in this approach concerns "functionings". Functionings represent parts of the state of a person—in particular the various things that he or she manages to do or be in leading a life. The capability of a person reflects the alternative combinations of functionings the person can achieve, and from which he or she can choose one collection. There are several technical problems in the representation and analysis of functioning n-tuples and capability sets, on which see Sen (1985b: chs. 2, 4, and 7). The approach is based on a view of living as a combination of various 'doings and beings', with quality of life to be assessed in terms of the capability to achieve valuable functionings. Some functionings are very elementary, such as being adequately nourished, being in good health, etc., and these may be strongly valued by all, for obvious reasons. Others may be more complex, but still widely valued, such as achieving self-respect or being socially integrated. Individuals may, however, differ a good deal from each other in the weights they attach to these different functionings—valuable though they may all be—and the assessment of individual and social advantages must be alive to these variations. In the context of some types of social analysis, for example, in dealing with extreme poverty in developing economies, we may be able to go a fairly long distance with a relatively small number of centrally important functionings and the corresponding basic capabilities (e.g. the ability to be well nourished and well sheltered, the capability of escaping avoidable morbidity and premature mortality, and so forth), read further Sen A 'Capability and well-being' available on <http://existencia.org/files/alt-eco/quality.pdf> (accessed 19 February 2016).

2015 as part of the definition of human development. The United Nations Development Program (UNDP) states that ‘human development is about enlarging human choices – focusing on the richness of human lives rather than simply the richness of economies’.²⁵⁵

2.5.3.2 Participatory Development

Participation may take the form of project planning, design, implementation and decision making.²⁵⁶ It creates a safety net for when public institutions fail or are non-functional, incapacitated, corrupt or not accountable. It reduces information gaps between planners and beneficiaries, and fosters transparency and answerability. It also promotes equity, inclusiveness, empowerment, and efficiency in planning and allocation of resources.

However, participation also has disadvantages.²⁵⁷ It tends to have limitations such as a disjuncture between traditional approaches and new approaches introduced by facilitators; power dynamics within the local community; and power imbalances between facilitators and beneficiaries, where facilitators tend to hold decision-making power.²⁵⁸ For example, in supply-driven projects, the donors might have predetermined priority sectors. Instead of projects that compete with existing local structures, there should rather be more collaboration and respect for traditional hierarchies in order to build sustainable partnerships for economic development.

Endogenous Growth Theory/New Growth Theory

This theory fits well with the discussion of participatory development, because it places an emphasis on the human resource, and empowerment through knowledge creation. The endogenous growth theory can be seen as illustrating capacity-building, which also forms an integral part of participation and of developing human capabilities, as discussed in paragraph 2.5.3.1 above.

²⁵⁵ UNDP *Human Development Report* (2015) 1.

²⁵⁶ Kyamusugulwa PM ‘Participatory development and reconstruction: A literature review’ (2013) 34 (7) *Third World Quarterly* 1265 1271.

²⁵⁷ Kyamusugulwa PM ‘Participatory development and reconstruction: A literature review’ (2013) 34 (7) *Third World Quarterly* 1265 1272.

²⁵⁸ See generally Jancowicz AV ‘Limits to knowledge transfer: What they already know in the post-command economies’ (2001) 7(2) *Journal of East-West Business* 39-61.

Romer's endogenous growth theory postulates that technology is an endogenous factor, which is found in human capital.²⁵⁹ The model argues that it is imperative to advance human capital and invest in knowledge institutions, research and development.²⁶⁰ Romer viewed ideas as goods and stated that ideas created have increasing returns to scale.²⁶¹ It is important to invest in human capital, knowledge and knowledge-intensive industries because knowledge can be used repeatedly at no additional cost and has positive spill-over effects.²⁶² He also argued that knowledge allows for sustained growth, unlike labour and capital, which both undergo diminishing returns.²⁶³

Endogenous growth theories refer to spill-over effects in other sectors or externalities. Externalities in this model may include technological knowledge and newer methods of producing goods.²⁶⁴ Lucas suggests that human capital and financial intermediation are endogenous factors crucial for economic growth, a notion characteristic of the so-called 'new-growth literature'. These externalities are facilitated by the accumulation of physical and human capital, as well as disembodied knowledge.²⁶⁵ It is submitted that '[t]he presence of externalities implies that if, say, one firm doubles its inputs, the productivity of the inputs of other firms will also increase.'²⁶⁶ Agenor notes that 'individual workers are more productive, regardless of their skill level, if other workers have more human capital'.²⁶⁷



²⁵⁹ Durand R 'Thinking and growing: towards a reconciliation of exogenous growth theories' 38 (2013) *Journal of Economic and Social Measurement* 187 187.

²⁶⁰ Durand R 'Thinking and growing: towards a reconciliation of exogenous growth theories' 38 (2013) *Journal of Economic and Social Measurement* 187 187.

²⁶¹ Rebelo S *The Role of Knowledge and Capital in Economic Growth* (1998) 10; The Economist 'The growth of growth theory' available on <http://www.economist.com/node/6943519> (accessed 14 February 2016).

²⁶² Romer PM 'Endogenous technological change' (1990) 98 (5) *Journal of Political Economy* S71 S72; Parkin M, Powell M and Matthews K *Economics* 7 ed (2008).

²⁶³ Romer PM 'Endogenous technological change' (1990) 98 (5) *Journal of Political Economy* S71 S72; Parkin M, Powell M and Matthews K *Economics* 7 ed (2008).

²⁶⁴ There are exceptions, see Agenor P & Montiel PJ *Development Macro-Economics* (1996) chapter 5.

²⁶⁵ Hugo S, Squalli J, and Wilson K 'What explains market access?' (May 2006) 5 Working Paper Series: Working Paper No. 06-08 Zayed University Economic and Policy Research Unit.

²⁶⁶ King RG and Rebelo ST 'Transitional dynamics and economic growth in the neoclassical mode' (1989) Working Paper National Bureau of Economic Research Working Paper Series No. 3185 1 & 35; Agenor P & Montiel PJ *Development Macro-Economics* (1996) 520.

²⁶⁷ Agenor P & Montiel PJ *Development Macro-Economics* (1996) 521.

It is also argued that financial development is important for economic growth. According to Agenor and Montiel, it is the duty of financial institutions to allocate resources to investments that have the highest return to capital. This view supports the assertion of Adam Smith that institutions should be established to supply money in the appropriate quantities.²⁶⁸ Financial institutions play an important role as providers of information because they are in a position to influence customers to choose the most appropriate investments that can help to boost the economy.²⁶⁹ However, the population may not be inclined to make savings through financial institutions because of the cost of service fees and commissions imposed by these institutions.²⁷⁰ Levine and Renelt find that investment rates for physical and human capital correlate to average growth rates and that free trade is linked to economic growth and investment, but that it is difficult to separate the effects of trade from those of investment.

In line with the mixed economic system and specifically the Keynesian theory, this thesis relies on the Harrod-Domar and balanced growth models for economic growth, and on participatory and inclusive development models for human and social development. This is in line with the selected definition of economic development for the purposes of this thesis as framed in paragraph 2.3 that economic development consists of economic growth on one hand, and human and social development on the other. The following section discusses selected economic and social policies implemented in Zimbabwe since 1980, and highlights gains and losses with reference to the growth theories discussed above.

2.6 THE ECONOMY OF ZIMBABWE FROM POST INDEPENDENCE TO PRESENT

This paragraph briefly analyses the policy transitions in Zimbabwe in the first ten years of independence, and under various policies including the Economic and Structural Adjustment Programme (ESAP), Zimbabwe Programme for Economic and Social Transformation (ZIMPREST), Short Term Economic Recovery Programmes (STERP I and II), and Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset). These selected policies highlight the major policy shifts in Zimbabwe and the economic impacts of those shifts.

²⁶⁸ Nafziger EW *The Economics of Developing Countries* 3 ed (1997) 88.

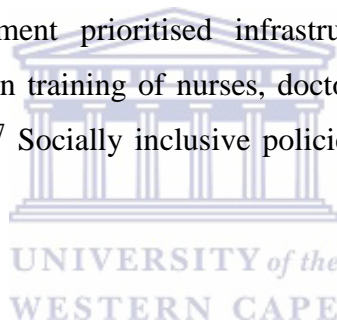
²⁶⁹ See paragraph 6.2; Agenor P & Montiel PJ *Development Macro-Economics* (1996) 523.

²⁷⁰ Agenor P & Montiel PJ *Development Macro-Economics* (1996) 523.

2.6.1 The First Ten Years of Independence, 1980-1990

In the first ten years of independence in Zimbabwe legal reform was prioritised to undo racially oppressive laws.²⁷¹ In 1981, the government introduced the Growth with Equity Plan (GEP), the Transitional National Development Plan (TNDP) 1982-85, and the First Five Year National Development Plan (FNDP) 1986-1990.²⁷² GEP aimed to achieve sustained economic growth, promote investment and trade, stabilise prices and balance of payments, and create and maintain employment.²⁷³ The FNDP aimed to facilitate social inclusion by improving the provision of and access to social services for previously marginalised black indigenous Zimbabweans.²⁷⁴ The government improved access to public services through free basic education, feeding schemes, and through Health for All and Education for All policies.²⁷⁵ These policy objectives resulted in improved health and education outcomes, especially in rural areas.²⁷⁶

During this period, the government prioritised infrastructure development and post-war reconstruction. It also embarked on training of nurses, doctors, and village health workers and provided subsidised health care.²⁷⁷ Socially inclusive policies significantly increased access to



²⁷¹ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1 2.

²⁷² Chiripanhura BM and Makwavarara T 'The labour market and economic development 1980-2000' 9 available on http://www.saprin.org/zimbabwe/research/zim_labour_market.pdf (accessed 6 June 2016).

²⁷³ Chiripanhura BM and Makwavarara T 'The labour market and economic development 1980-2000' 9 available on http://www.saprin.org/zimbabwe/research/zim_labour_market.pdf (accessed 6 June 2016).

²⁷⁴ Kanyenze G 'Economy, policy making, progress, implementation and impact in Zimbabwe' 1 Paper prepared for the Centre for Rural Development Zimbabwe (2006) Labour and Economic Development Research Institute of Zimbabwe (LEDRIZ).

²⁷⁵ Matshalaga N 'Macroeconomic policies and their impact on health in Zimbabwe in the 1980s and 1990s: an analysis of the prevalence of diarrhoea, malnutrition, maternal mortality and access to health services' (December 2000) 17 (5) *Development Southern Africa* 669-770; Zhou G and Zvoushe H 'Public policy making in Zimbabwe: A three decade perspective' (2012) 2 (8) *International Journal of Humanities and Social Science* 212-214; De Maeseneer J, Willems S, De Sutter A, Van de Geuchte I and Billings M 'Primary health care as a strategy for achieving equitable care: A literature review Commissioned by the Health Systems Knowledge Network' (2007) available on http://www.who.int/social_determinants/resources/csdh_media/primary_health_care_2007_en.pdf (accessed 6 June 2016).

²⁷⁶ Zhou G and Zvoushe H 'Public policy making in Zimbabwe: A three decade perspective' (2012) 2 (8) *International Journal of Humanities and Social Science* 212-214.

²⁷⁷ Zhou G and Zvoushe H 'Public policy making in Zimbabwe: A three decade perspective' (2012) 2 (8) *International Journal of Humanities and Social Science* 212-214; Matshalaga N 'Macroeconomic policies and their impact on health in Zimbabwe in the 1980s and 1990s: an analysis of the prevalence of diarrhoea, malnutrition, maternal mortality and access to health services' (December 2000) 17 (5) *Development Southern Africa* 669-770.

healthcare services for rural and urban communities.²⁷⁸ The government expenditure on primary health care increased by 185 per cent during this period, and the country experienced reductions in maternal mortality and infant mortality.²⁷⁹ The policies implemented during the first ten years of independence aligned with both social inclusion and participatory development explained above,²⁸⁰ and also eased the vicious circle (particularly with regards to social development) by developing human capabilities and increasing employment and earning capacity.²⁸¹

With regard to international trade, Zimbabwe implemented an import-substituted industrialisation (ISI) strategy inherited from the colonial government.²⁸² Imports constituted on average 31 per cent of the GDP, whereas exports constituted mainly raw materials, semi-processed goods mainly from agriculture, mining and manufacturing. Trade with neighbouring countries was small, and trade with South Africa was the most prevalent.²⁸³ Foreign investors dominated manufacturing and service sectors, and profits from these investments appear to have been largely externalised.²⁸⁴ This externalisation of profits reduced the amount of resources available for reinvestment, without which, the economic growth envisaged under the Harrod-Domar model could not be realised.²⁸⁵

The result was that foreign corporations were in a position to ‘influence pricing of exports and industrial inputs’.²⁸⁶ In other words, price distortions are highly likely to have occurred in the chain

²⁷⁸ In 2012 the government stopped ‘bonding’ nurses because there are no vacancies to place them. Mushawatu Z ‘Zimbabwe: Releases all bonded graduates’ *Financial Gazette* 13 January 2012 available on <http://allafrica.com/stories/201201161214.html> (accessed 8 June 2016).

²⁷⁹ Matshalaga N ‘Macroeconomic policies and their impact on health in Zimbabwe in the 1980s and 1990s: an analysis of the prevalence of diarrhoea, malnutrition, maternal mortality and access to health services’ (December 2000) 17 (5) *Development Southern Africa* 669-770.

²⁸⁰ See paragraphs 2.5.3.1 and 2.5.3.2 above.

²⁸¹ See paragraphs 2.5.2 and 2.5.3.1 above.

²⁸² Seidman A ‘A development strategy for Zimbabwe’ (1982) X (i) *Zambezia* 13-14; USA Department of State ‘Zimbabwe 11/95’ available on <http://www.state.gov/outofdate/bgn/zimbabwe/6217.htm> (accessed 9 June 2016).

²⁸³ The United Nations Organisation *Zimbabwe towards a New Order: An Economic and Social Survey* (1980) 168 UNDP/UNCTAD Project PAF/78/010).

²⁸⁴ The United Nations Organisation *Zimbabwe towards a New Order: An Economic and Social Survey* (1980) 170 UNDP/UNCTAD Project PAF/78/010).

²⁸⁵ See paragraph 2.5.1 above.

²⁸⁶ The United Nations Organisation *Zimbabwe towards a New Order: An Economic and Social Survey* (1980) 170 UNDP/UNCTAD Project PAF/78/010).

of production and marketing of imports to and exports from Zimbabwe, and the prevailing system during this period enabled the transfer of substantial amounts of surpluses to investor states.²⁸⁷

The enactment of the Labour Relations Act provided more protection for workers and helped reduce unemployment from 10.8 per cent in 1982 to 7.8 per cent in 1987.²⁸⁸ The HDI value rose from 0.437 in 1980 to 0.499 in 1990.²⁸⁹ These figures and other data are reflected in Table 1 below.²⁹⁰



²⁸⁷ The United Nations Organisation *Zimbabwe towards a New Order: An Economic and Social Survey* (1980) 170UNDP/UNCTAD Project PAF/78/010); also note the Table 8.2.

²⁸⁸ Act 16 of 1985; Ruwo N 'In economic policies, can we trust?' available on <http://www.thestandard.co.zw/2014/10/19/economic-policies-can-trust/> (accessed 3 June 2016); ZimStat 'Zimbabwe Data Portal' available on <http://zimbabwe.opendataforafrica.org/apps/atlas/Unemployment-Rate> (accessed 6 June 2016).

²⁸⁹ Refer to Table B in Annexure 1 of this chapter exported from UNDP 'Work for human development: Brief note for countries on the 2015 human Development Report: Zimbabwe' Human Development Report 2015 (2015) 3 available on http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZWE.pdf (accessed 6 June 2016).

²⁹⁰ Refer to Table B in Annexure 1 of this chapter exported from UNDP 'Work for human development: Brief note for countries on the 2015 human Development Report: Zimbabwe' Human Development Report 2015 (2015) 3 available on http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZWE.pdf (accessed 6 June 2016).

Table 1

Zimbabwe's HDI Trends based on consistent time series data and new goalposts²⁹¹

	Life expectancy at birth	Expected years of schooling	Mean years of schooling	GNI per capita (2011 PPP\$)	HDI value
1980	59.4	6.5	3.2	2.314	0.437
1985	61.9	9.7	4.0	2.318	0.498
1990	59.6	9.8	4.5	2.432	0.499
1995	50.3	9.8	5.5	2.286	0.465
2000	41.7	9.9	6.5	2.363	0.428
2005	41.8	9.6	6.8	1.600	0.411
2010	49.6	10.5	7.3	1.442	0.461
2011	51.6	10.7	7.3	1.491	0.474
2012	53.7	10.9	7.3	1.605	0.491
2013	55.7	10.9	7.3	1.624	0.501
2014	57.5	10.9	7.3	1.615	0.509

The socialist approach to human and social development during this period worked well in post-colonial Zimbabwe because it enabled the government to significantly increase access for black indigenous Zimbabweans to public services, such as health care, housing, and free basic education. However, government spending impacted economic growth in the short and long term due to foreign debt, as the average GDP growth rate was 3.2 per cent between 1980 and 1989.²⁹² Although more people were able to access social services in the short term in socialist Zimbabwe, the

²⁹¹ Table exported from UNDP 'Work for human development: Brief note for countries on the 2015 human Development Report: Zimbabwe' Human Development Report 2015 (2015) 3 (available on http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZWE.pdf (accessed 6 June 2016).

²⁹² Mumvura T 'Understanding reform: The case of Zimbabwe research proposal to Global Development Network' 3 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013); Kanyenze G 'Economy, policy making, progress, implementation and impact in Zimbabwe' 1 Paper prepared for the Centre for Rural Development Zimbabwe (2006) Labour and Economic Development Research Institute of Zimbabwe (LEDRIZ).

government lacked resources to continue providing these social services. By 1989, the effects of government overspending and over borrowing became noticeable because there was ‘low economic growth, high levels of unemployment, increased poverty, low investment ... disappointing export growth and an unstable macroeconomic environment’.²⁹³ Moreover, when the Soviet Union fell in 1989, this created an ideological vacuum in the application of socialism. There was also pressure from foreign donors to implement the five-year ESAP.²⁹⁴ As a result, economic reforms were introduced by the then Minister of Finance, Dr Bernard Chidzero. These are discussed below.²⁹⁵

2.6.2 The Economic and Structural Adjustment Program (ESAP) (1991-1995)

ESAP is an economic reform policy introduced in 1991 which marked a shift from socialist to market economy principles, also in line with later ratification of the WTO Agreement in 1995.²⁹⁶ This plan was designed to address several issues, specifically, ‘macro-economic issues and financial reform’, ‘trade’, ‘domestic regulations’, ‘supporting sectoral initiatives’, ‘social dimensions of adjustment’ and ‘implementation’ of ESAP.²⁹⁷ This was in line with modernisation theories which hoped to transfer institutions of the developed world to the developing world as an exogenous catalyst for industrialisation.²⁹⁸

²⁹³ Mumvura T ‘Understanding reform: The case of Zimbabwe research proposal to Global Development Network’ 4 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

²⁹⁴ Sichone O ‘Zimbabwe economic policies’ (2003) X (2) *Development Policy Management Forum* 1-2.

²⁹⁵ Mumvura T ‘Understanding reform: The case of Zimbabwe research proposal to Global Development Network’ 5 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

²⁹⁶ Tekere M ‘Trade liberalisation under structural economic adjustment: Impact on social welfare in Zimbabwe’ Paper for the Poverty Reduction Forum Structural Adjustment Program Review Initiative (April 2001) 6 available on <https://pdfs.semanticscholar.org/e6e9/281bd261a2fa186a72eb3951307b507fdbea.pdf> (accessed 09 July 2017); Zimbabwe Ministry of Economic Development *A Framework for Economic Reform: ESAP (1991-95)* 1991 1 Zimbabwe: Government Printers. Many African countries have introduced IMF Structural adjustment programs, and several dropped and re-adopted them, such as Ghana, Nigeria, Kenya, Benin. See further Mahuku DN and Mbanje BBC ‘Economic Structural Adjustment Programmes (ESAP) and multi-party politics: A new threat to African nationalist parties in Zambia and Zimbabwe’ (2013) 3 (1) *African Journal of Social Sciences* 1.

²⁹⁷ Zimbabwe Ministry of Economic Development *A Framework for Economic Reform (1991-95)* 1991 58.

²⁹⁸ Matsuo H ‘The rule of law and economic development: A cause or a result?’ *Centre for Asian Legal Exchange* 59 also available on http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20117/1/8_CALE%20Books2.pdf (accessed 04 July 2017).

ESAP was to be supported by various sectoral initiatives including family planning and health care as measures to improve the quality of life,²⁹⁹ and expand primary and secondary education.³⁰⁰ However, land resettlement remained skewed for years due to the perceived ‘critical economic importance’ of commercial farms.³⁰¹ ESAP aimed to increase real incomes and reduce unemployment by transforming the economy from a highly regulated command economy, to a more liberal market economy, where market forces would determine prices, interest rates, wages, and exchange rates.³⁰² ESAP mainly focused on economic growth and set out to achieve a 5 per cent GDP growth rate per year by 1995.³⁰³ This thesis will not delve into the full content and depth of ESAP, but will briefly discuss trade, investment and financial liberalisation envisaged under that plan.

Liberalisation of Trade, Investment and Financial Services

In an effort to encourage investment and savings, and in line with the Harrod-Domar model,³⁰⁴ ESAP encouraged foreign trade liberalisation and the simplification of procedures for investment approval for new projects and expansion of existing projects.³⁰⁵ ESAP phased out quantitative controls and replaced the import licencing regime with an open general import licence (OGIL).³⁰⁶ In 1994 OGIL was replaced by an open import system, and the existing two-tier exchange rate was replaced by a market determined rate that created a liberalised trade regime.³⁰⁷ However, by 1995, tariffs were re-introduced and capped at 10 per cent.³⁰⁸ Price controls which had been used

²⁹⁹ ESAP III (A) para 59 at 13.

³⁰⁰ ESAP III (A) para 60 at 10; during the first decade after attaining independence, Zimbabwe had a higher expansion rate than any country in the world in secondary education.

³⁰¹ ESAP III (A) para 61 at 14.

³⁰² ESAP para III (A) 16 at 3.

³⁰³ ESAP para III (A) 16 at 3.

³⁰⁴ See paragraph 2.5.1 above.

³⁰⁵ Mandiwanza A ‘Privatisation in Zimbabwe the experience of Dairiboard Zimbabwe Limited’ available <http://library.fes.de/fulltext/bueros/simbabwe/01056003.htm> (accessed 6 June 2016); ESAP para III (A) 16 at 3.

³⁰⁶ Food and Agriculture Organisation (FAO) ‘Corporate Document Repository: Zimbabwe’ 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016); Mumvura T ‘Understanding reform: The case of Zimbabwe research proposal to Global Development Network’ 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³⁰⁷ Mumvura T ‘Understanding reform: The case of Zimbabwe research proposal to Global Development Network’ 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³⁰⁸ Sichone O ‘Zimbabwe economic policies’ (2003) X (2) *Development Policy Management Forum* 1-2; Mumvura T ‘Understanding reform: The case of Zimbabwe Research Proposal to Global Development Network’ 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013); Price controls are

particularly in the agricultural sector to ensure the supply of essential commodities at reasonable prices, where removed.³⁰⁹

In terms of investment, initially investors were required to re-invest their profits and dividends in 12- or 20-year bonds prior to repatriation; however, this requirement was later removed.³¹⁰ Such a requirement could perhaps have been useful for Zimbabwe by placing additional money in circulation, considering the ongoing liquidity crisis and boosting much needed re-investment.³¹¹ The financial sector was opened up to allow new banks and financial institutions to be established.³¹² Some interest rates were decontrolled, but others were not, such as mortgages, which were seen as a politically sensitive area.³¹³

Impact of ESAP

By 1996, some ESAP goals had been achieved but others had not.³¹⁴ Mahuku and Mbanje argue that the IMF-led structural adjustment programmes (SAPs) did not improve economic performance of the country, and that in fact SAPs across the African continent undid the gains of independence:

The Bretton Woods institutions and the former colonising countries, through economic policies like SAPS, kill infant industries in the developing countries, eroding benefits brought about by independence. This is aggravated by the imposed 'economic straight jacket' [sic], the 'one size fits all' model that is considered the panacea of all ailing economies.³¹⁵

a form of government intervention in the market, and are often associated with command economics because it deprives the market of the opportunity to regulate itself, as explained in 2.3 above.

³⁰⁹ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2; ESAP III (A) para 46 at 10.

³¹⁰ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2.

³¹¹ See 5.4.4.

³¹² Mumvura T 'Understanding reform: The case of Zimbabwe research proposal to Global Development Network' 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³¹³ Mumvura T 'Understanding reform: The case of Zimbabwe research proposal to Global Development Network' 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³¹⁴ Kanyenze G 'Economy, policy making, progress, implementation and impact in Zimbabwe' 1 Paper prepared for the Centre for Rural Development Zimbabwe (2006).

³¹⁵ Mahuku DN and Mbanje BBC 'Economic Structural Adjustment Programmes (ESAP) and multi-party politics: A new threat to African nationalist parties in Zambia and Zimbabwe' (2013) 3 (1) *African Journal of Social Sciences* 1 2.

ESAP promised 5 per cent growth rate and only achieved an average of 1.2 per cent.³¹⁶ ESAP sought to reduce government expenditure, to reduce budget deficit from 10 per cent of GDP to 5 per cent by 1994 or 1995, reduce subsidies, cut the civil service wage-bill, and allocate some funds to the unemployed, retrenched and the poor.³¹⁷ However, reduced government spending meant that the cost of education and healthcare services increased, and these challenges, coupled with high inflation and repeated devaluation of the Zimbabwe dollar, increased the incidence and gravity of poverty.³¹⁸ Reduced government spending in the provision of crucial social services in effect intensified the vicious circle of poverty as explained above.³¹⁹

These negative outcomes resulted in a higher incidence of illness among poor urban and rural communities, especially malnutrition in children under the age of five, and diarrhoea.³²⁰ The Poverty Assessment Study (PASS) conducted by the Zimbabwean government in 1995 indicated that 62 per cent of the population was living in poverty, while 72 per cent of the rural population was living below the total consumption poverty line.³²¹

During the implementation of ESAP the economy grew by small margins, while human and social development decreased significantly. Moreover, these failings, coupled with the restrictive property clause of the Lancaster House Agreement, led to the disgruntlement of liberation war veterans. This not only led to the granting of pensions and gratuities to them in 1997, but possibly contributed to the war veterans' disastrous land grabs of 2001.³²² The drought experienced in 1992 and the textile import tariff imposed by South Africa during this period had a significant negative effect on the economy, as Zimbabwe relied primarily on agriculture as a source of revenue.³²³

³¹⁶ Saunders R 'Economic Structural Adjustment Programme (ESAP)'s Fables II' (July 1996) 11 (4) *Southern Africa Report Archive* 8 30.

³¹⁷ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1 2; Mumvura T 'Understanding reform: The case of Zimbabwe research proposal to Global Development Network' 6 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³¹⁸ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1 2.

³¹⁹ See paragraph 2.5.2 above.

³²⁰ Matshalaga N 'Macroeconomic policies and their impact on health in Zimbabwe in the 1980s and 1990s: an analysis of the prevalence of diarrhoea, malnutrition, maternal mortality and access to health services' (2000) 17 (5) *Development Southern Africa* 669-770.

³²¹ See generally Government of Zimbabwe 'Poverty Assessment Study' (1995).

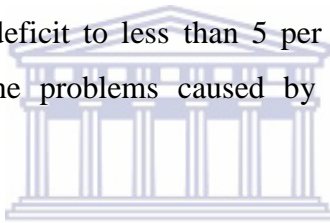
³²² Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2.

³²³ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2.

South Africa's textile import tariffs made it more expensive to export fabrics and garments from Zimbabwe to South Africa, thereby limiting trade between the two countries. This limitation resulted in reduced export earnings for Zimbabwe. The failings of ESAP noted above might indicate that the implementation of ESAP as an exogenous catalyst for development was premature for Zimbabwe. As a result, another structural adjustment policy, Zimbabwe Program for Economic and Social Transformation (ZIMPREST), was initiated as a follow-up to ESAP.³²⁴

2.6.3 Zimbabwe Program for Economic and Social Transformation (ZIMPREST) (1996-2001)

ZIMPREST was introduced and implemented during the period 1996 to 2001 as a follow-up to ESAP for macro-economic reforms.³²⁵ Some of its aims were to achieve a real GDP growth rate of 6 per cent per annum, create 44,000 jobs per year, increase savings and investments to 23 per cent of GDP, reduce the budget deficit to less than 5 per cent, and encourage democracy.³²⁶ ZIMPREST sought to address the problems caused by ESAP such as repeated currency devaluation.³²⁷



The Zimbabwean government had been promised US\$193 000 in terms of a Standby Agreement with the IMF. However, the IMF reneged on its promise on two grounds, the first being Zimbabwe's failure to resolve the budget deficit, and the second and probably more decisive reason being Zimbabwe's involvement in the DRC war against the general will of the international community, this is discussed further in chapter 6.³²⁸ This highlights the importance of international relations and the crippling power of economic sanctions.

³²⁴ Mumvura T 'Understanding reform: The case of Zimbabwe research proposal to Global Development Network' 8 available on http://depot.gdnet.org/cms/grp/general/Zimbabwe_proposal.pdf (accessed 13 September 2013).

³²⁵ African Development Bank AfDB 'Zimbabwe – 1999-2001- Country Strategy Paper' (October 1999) para 2.2.

³²⁶ African Development Bank AfDB 'Zimbabwe – 1999-2001- Country Strategy Paper' (October 1999) para 2.2; Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2.

³²⁷ Sichone O 'Zimbabwe economic policies' (2003) X (2) *Development Policy Management Forum* 1-2.

³²⁸ See paragraph 6.1.3; MacLean SJ 'Mugabe at war: The political economy of conflict in Zimbabwe' (2002) 23 (3) *Third World Quarterly* 513 520; SAPA AFP 'Zim's \$200m DRC war under fire' *News 24 Archives* 2 September 2000 available on <http://www.news24.com/xArchive/Archive/Zims-200m-DRC-war-under-fire-20000831> (accessed 20 November 2016).

Between 1996 and 1999, the GDP fell by an average rate of 0.7 per cent, while the budget deficit, which had been 0.3 per cent of GDP in 1993, rose to 23.7 per cent of GDP in 2000.³²⁹ The government was forced to set price controls again but this led to the creation of the parallel market where people could trade goods more profitably in an informal unregulated environment.³³⁰ Between 1995 and 2000, HDI fell from 0.465 to 0.428, while GNI per capita rose from 2.286 to 2.363.³³¹ This highlights that growth in the economy does not necessarily translate to human and social development.

The second PASS conducted in 2002 showed a 6 per cent increase in poverty, raising the figure to 80 per cent.³³² Inflation spiked from 58.5 per cent per annum to 365 per cent in 1999.³³³ New factors in the economic environment included the land redistribution programme³³⁴ and the emergence of stronger political opposition. The economy continued to experience negative growth until it reached crisis hyperinflationary levels in 2008. However, the Short-Term Economic Recovery Programs (STERPs) helped renew the economy, albeit temporarily.

2.6.4 Short Term Economic Recovery Programs (STERP I and II) (2009-2011)

The STERP was introduced in March 2009 pursuant to the Global Political Agreement of 15 September 2008 which brought together ZANU PF and the MDC in Cabinet to ‘resuscitate and rehabilitate the economy’.³³⁵ STERP aimed to facilitate constitutional reform, socio-economic

³²⁹ Kanyenze G ‘Economy, Policy making, progress, implementation and impact in Zimbabwe’ (2006) 2.

³³⁰ Sichone O ‘Zimbabwe economic policies’ 2 (2003) X (2) *Development Policy Management Forum* also available on <http://www.dpmf.org/images/zimbabwe-economic-policy-sichone.html> (accessed 21 February 2016).

³³¹ Refer to Table B in Annexure 1 of this chapter exported from UNDP *Work for Human Development: Brief note for Countries on the 2015 Human Development Report: Zimbabwe* (2015) 3 available on http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZWE.pdf (accessed 6 June 2016).

³³² Kanyenze G ‘Economy, policy making, progress, implementation and impact in Zimbabwe’ (2006) 6.

³³³ See paragraph 6.6.2.1; Kanyenze G ‘Economy, policy making, progress, implementation and impact in Zimbabwe’ (2006) 6.

³³⁴ See paragraph 4.1.2.

³³⁵ United Nations Development Program ‘Zimbabwe recovery on course but challenges remain, say experts’ available on <http://www.undp.org.zw/news/132-zimbabwe-recovery-on-course-but-challenges-remain-say-experts> (accessed 29 October 2013); Articles 1 and 3 Zimbabwe Government Policy: Short Term Emergency Recovery Program (STERP) (2009) available on http://www.zimeye.org/wp-content/live_images/2009/03/sterp.pdf (accessed 23 September 2013).

rights and measures for the lifting of sanctions on Zimbabwe.³³⁶ The use of foreign currency was accepted in response to the harsh economic conditions and hyperinflation experienced between 2006 and 2008 through policy instruments such as the Foreign Licence Wholesalers and Retail Shops (FOLIWARS), introduced in October 2008, and later in terms of the Foreign Exchange Guidelines to Authorised Dealers and the Exchange Control Regulations.³³⁷

These Guidelines allowed the use of the US dollar as legal tender in specific situations, for specific registered users, subject to the FOLIWARS regulation.³³⁸ The US dollar became official legal tender in Zimbabwe from February 2009 as reflected in the case of *Samanyau and Others v Fleximail (Private) Limited*.³³⁹

³³⁶ Articles 8 (a), 14 and 17 STERP 2009; Article 17 STERP 2009; ZIDERA was an Act passed by the Congress of the USA to impose economic sanctions on Zimbabwe, including trade restrictions. ZIDERA gave the USA power to veto all requests for funding from International Financial Institutions to which Zimbabwe and the USA are party, and reduce financial support of US funded projects in Zimbabwe; Tungwarara, O. (2011). 'Sanctions: In aid of transition or an obstacle to democracy' in Lee R (ed) *Zimbabwe at the Crossroads* (2011) 110-113 available on http://www.osisa.org/sites/default/files/sup_files/Sanctions.pdf (accessed 5 September 2016).

³³⁷ Issued as a Directive ECD1/2009 (July 2009) in terms of section 35 (1) of the Exchange Control Regulations: Statutory Instrument 109 of 1996; Application For Registration As Foreign Exchange Licenced Warehouses And Retail Shops (FOLIWARS), RBZ 'Foreign Exchange Licence Oil Companies (FELICOS), Foreign Exchange Licenced Outlets For Petrol And Diesel (FELPADS)'; Prosper Chitambara 'Unpacking dollarisation: Part 2' available on http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CGMQFjAJ&url=http%3A%2Fwww.ledriz.co.zw%2Findex.php%3Foption%3Dcom_phocadownload%26view%3Dcategory%26download%3D70%3Aunpacking-part2%26id%3D5%3Anewspaper-articles%26Itemid%3D59%26start%3D20&ei=LQdAUrOJFMmThQepwoCYCA&usg=AFQjCNFggBQJSzjxzFeq0jq8R8CkkWfreg (accessed 23/09/2013); The Reporter 'Zimbabwe: Foliwars or folly wars, Dubious measures' *The Standard* 13 September 2008 available on <http://allafrica.com/stories/200809150467.html> (accessed 20 November 2016).

³³⁸ Prosper Chitambara 'Unpacking dollarisation: Part 2' available on http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CGMQFjAJ&url=http%3A%2Fwww.ledriz.co.zw%2Findex.php%3Foption%3Dcom_phocadownload%26view%3Dcategory%26download%3D70%3Aunpacking-part2%26id%3D5%3Anewspaper-articles%26Itemid%3D59%26start%3D20&ei=LQdAUrOJFMmThQepwoCYCA&usg=AFQjCNFggBQJSzjxzFeq0jq8R8CkkWfreg (accessed 23 September 2013).

³³⁹ *Samanyau & Others v Fleximail (Private) Ltd* [2011] ZWHHC 108. This case dealt with the payment of damages in lieu of reinstatement. The employees had been dismissed while the Zimbabwean dollar was in use, and then appealed against the dismissal and won, but the employer opted to pay damages instead of reinstatement. The Supreme Court gave a ruling that required the employer to pay in US Dollars although US dollars were not legal tender yet.

Between 2010 and 2011, life expectancy at birth increased from 49.6 to 51.6 years, while mean years of schooling remained constant at 7.3.³⁴⁰ GNI per capita increased slightly from 1.442 to 1.491 and HDI value rose from 0.461 to 0.474. STERP was followed by other policies,³⁴¹ but the most important for this discussion is the current Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset), which is briefly noted below.

2.6.5 Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) (2012-2018)

ZimAsset was introduced in October 2013 and is anticipated to last until December 2018. It is different from previous policies in that it anticipates export-led development and pays specific attention to implementation through a results-based monitoring and evaluation mechanism in which reporting is carried out under four strategic clusters. These clusters are: food security and nutrition; social services and poverty eradication; infrastructure and utilities; and value addition and beneficiation.³⁴² In terms of economic performance, ZimAsset projects GDP growth of 3.4 per cent in 2013, 6.2 by 2014, and 9.9 per cent by 2018.³⁴³ GDP growth for 2013 was 4.5 per cent,³⁴⁴ and 1.1 per cent for 2015.³⁴⁵ It is argued that in order for ZimAsset objectives to be met, the implementation of ZimAsset must necessarily incorporate the two economic growth models (Harrod-Domar model, and balanced growth model counteracting the vicious cycle), and the two social development models (social inclusion and participatory development) discussed above.³⁴⁶

³⁴⁰ Refer to Table B in Annexure 1 of this chapter exported from *UNDP Work for Human Development: Brief note for Countries on the 2015 Human Development Report- Zimbabwe* (2015) 3 (available on http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ZWE.pdf (accessed 06 June 2016)).

³⁴¹ United Nations Development Program 'Zimbabwe recovery on course but challenges remain, say experts' available on <http://www.undp.org.zw/news/132-zimbabwe-recovery-on-course-but-challenges-remain-say-experts> (accessed 29 October 2013).

³⁴² Government of Zimbabwe Ministry of Economic Planning and Investment Promotion *Medium Term Plan* (2010-2015) also available http://www.zimottawa.com/files/pdf/Zimbabwe_MidTermPlan-2011-2015.pdf (accessed 21 February 2016).

³⁴³ Government of Zimbabwe Ministry of Economic Planning and Investment Promotion *Medium Term Plan* (2010-2015) 27.

³⁴⁴ Monyau MM and Bandara A 'Zimbabwe' (2015) *African Economic Outlook* available on http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/CN_Long_EN/Zimbabwe_GB_2015.pdf (accessed 21 February 2016).

³⁴⁵ The World Bank 'Country profile: Zimbabwe' available on <http://www.worldbank.org/en/country/zimbabwe> (accessed 21 February 2016).

³⁴⁶ See paragraphs 5.3 above.

Another evident challenge to the ZimAsset blueprint is that it anticipates export-led development, but does not fully take cognisance of the need for industrialisation, improved technologies, and the role of the regional and international community. Zimbabwe cannot trade alone, and as it stands, trading partners are wary of the uncertain legal environment, and the resulting transaction costs, for example, the incidence where import licencing requirements were imposed overnight and made applicable to goods already consigned might have the effect of dissuading traders from using Zimbabwean borders, and rather opting for neighbouring countries which may present a more stable legal environment.³⁴⁷

2.7 CHAPTER CONCLUSION

This chapter explained the meaning of the term ‘economic development’ in the context of the thesis and discussed how economic development is measured using economic and social indicators. It described how Zimbabwe joined several countries which adopted IMF-led SAPs to their own demise and how the economy has not recovered since. Zimbabwe has traditionally had short-term economic policies spanning on average five years, and continues to use such policies. This kind of planning is likely to be affected by changes in the elected government and lacks long-term strategy and continuity. However, earlier socialist policies reduced inequality at the expense of economic growth. The liberalisation of markets has been on the agenda from ESAP to ZimAsset, and it is important to examine whether the legal framework actually supports economic development in Zimbabwe. The chapter noted important gaps and loopholes in the legislative process, and the risks created thereby. It noted in particular the risk of increased transaction costs, and loss of potential trade and investment in the absence of due regard for the rule of law. The following chapter examines the role of international trade in facilitating economic development in Zimbabwe.

³⁴⁷ Discussed further in 3.3.

CHAPTER 3

FACILITATING ECONOMIC DEVELOPMENT THROUGH TRADE

If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?³⁴⁸ - (Act III, scene I).”

3 INTRODUCTION

Chapter 2 provided in Part A, a brief overview of the Zimbabwean legal framework. It also analysed some of the gaps evident in the legislative process, and noted contradictions in the Constitution which blur the separation of powers. It averred further that such contradictions and legal gaps tend to lead to a loss of confidence in the entire legal system, and also particularly in the laws and institutions responsible for the regulation of the economy (including trade, investment and finance).

Part B of Chapter 2 provided a theoretical and conceptual framework in which the Keynesian theory was selected as the foundation of this thesis. The Keynesian theory recognises the need for economic growth, and human and social development as prerequisites for economic development.³⁴⁹ It estimated social impacts of various policies followed post-1980, and briefly discussed the current economic blueprint, the Zimbabwe Agenda for Sustainable Social and Economic Transformation (ZimAsset). One of the critical goals of ZimAsset is export-led development and liberalisation of trade,³⁵⁰ similar to the approach taken by the Four Asian Tigers.³⁵¹ Chapter 3 explores the regulation of the entry of goods into Zimbabwe to determine the extent of liberalisation of domestic markets and the impacts thereof.

It is argued that to ensure that trade facilitates human and social development, laws regulating trade must be socially inclusive. Trade instruments must facilitate the integration of small to

³⁴⁸ William Shakespeare ‘The Merchant of Venice’ Act III, Scene 1.

³⁴⁹ See paragraph 2.3.

³⁵⁰ Government of Zimbabwe *Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) Towards an Empowered Society and a Growing Economy: 2013-2018* (2014).

³⁵¹ See paragraph 1.3.2.

medium enterprises (SMEs) and the informal sector into both regional and international trade.³⁵² This is particularly important in the context of Zimbabwe, which has over 94 per cent unemployment.³⁵³ Out of a population of 15 million people, 3.6 million were formally employed as at 2003; this figure dropped to 480 000 by 2008.³⁵⁴ Consequently, most of the population is engaged in the informal sector, and there is a growing number of SMEs.³⁵⁵

Importance of Trade

First, according to Makwana, commercial trade accounts for 75 per cent of gross domestic product (GDP) in the world.³⁵⁶ Bartels and Vinanchiarachi support this view and submit that international trade is an essential driver of economic prosperity and that industrialisation is a prerequisite for development.³⁵⁷



³⁵² Malungisa D 'The informal trade sector in SADC: Legal, policy, and programmatic support' *A Desk Study by the Ecumenical Service for Socio-Economic Transformation (ESSET)* available on <http://www.esset.org.za/content/Resources/Publications/2015%20ESSET-Informal-Trade-SADC.pdf> (accessed 21 June 2016).

³⁵³ Zihumwe C 'The youth and unemployment in Zimbabwe' Remarks presented at the National Youth Conference, 'Building a future with decent work for young people', Harare, 29 March 2012 available on www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/statement/wcms_227249.pdf (accessed 8 September 2016); News 24 'Breaking News: Zim unemployment soars to 94%' *News 24* 29 January 2009 available on www.news24.com/Africa/Zimbabwe/Zim-unemployment-soars-tot94-20090129-2 (accessed 8 September 2016).

³⁵⁴ Zihumwe C 'The youth and unemployment in Zimbabwe' Remarks presented at the National Youth Conference, 'Building a Future with Decent Work for Young People', Harare, 29 March 2012 available on www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/statement/wcms_227249.pdf (accessed 8 September 2016).

³⁵⁵ Zihumwe C 'The youth and unemployment in Zimbabwe' Remarks presented at the National Youth Conference, 'Building a Future with Decent Work for Young People', Harare, 29 March 2012 available on www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/statement/wcms_227249.pdf (accessed 8 September 2016); News 24 'Breaking News: Zim Unemployment soars to 94%' *News 24* 29 January 2009 available on www.news24.com/Africa/Zimbabwe/Zim-unemployment-soars-tot94-20090129-2 (accessed 8 September 2016).

³⁵⁶ See paragraph 2.3.1.2.

³⁵⁷ See paragraph 4.8; Bartels FL and Vinanchiarachi J 'South-South cooperation, economic and industrial development of developing countries: Dynamics, opportunities and challenges' 2009 *UNIDO Research and Statistics Branch Working Paper REF/02/2009*.

This point of view is confirmed in the Draft Report prepared for the Government of Zimbabwe, in terms of which it is stipulated that

in order for Zimbabwe to fully address problems associated with the productive and manufacturing sectors, comprehensive economic, trade and industrial policies should be put in place as a matter of urgency.³⁵⁸

Secondly, trade encourages economic growth and creates knowledge spill-overs to the rest of the economy in the form of ‘international transmission of ideas, international flow of goods and services, and international flows of capital’.³⁵⁹ Trade necessitates the production of excess, which necessitates the division of labour, and results in specialisation.³⁶⁰

Thirdly, international trade encourages the exchange of currency between countries, thereby boosting foreign reserves and improving the balance of payments.³⁶¹ Openness of an economy fosters economic growth and development.³⁶² This study supports the views of Edwards that openness creates opportunities for economic growth and ultimately for economic development.³⁶³ The export-oriented strategy has been shown to result in significantly higher and sustained economic growth in the post-Second World War period in comparison to import orientation.³⁶⁴

³⁵⁸ Zimbabwe Ministry of Industry and International Trade in partnership with the African, Caribbean and Pacific (ACP) and European Union (EU)- Capacity-building Program for negotiations of Economic Partnership Agreement and Trade and Development Studies (TRADES CENTRE), June 2004.

³⁵⁹ Clause 2.4.3 Zimbabwe National Trade Policy (2012-2016); Hugo S, Squalli J, and Wilson K ‘What explains market access’ (May 2006) Working Paper Series: Working Paper No. 06-08 *Zayed University Economic and Policy Research Unit 5*; Edwards S ‘Openness, productivity and growth: What do we really know?’ (1998) 108 *The Economic Journal* 383-396.

³⁶⁰ Refer to paragraph 2.2.2; although classical theory is not one of the main theories forming the framework of this thesis, it informs the study in so far as it relates to economic growth, which is part of the two-pronged approach taken in this study as a means to ensure economic development.

³⁶¹ WTO ‘Trade statistics’ (2015) 13; also see generally United Nations ‘Balance of payments’ (1996) ST/ESCAP/1616.

³⁶² Edwards S ‘Openness, productivity and growth: What do we really know?’ (1998) 108 *The Economic Journal* 383-396; also cited in Hugo S, Squalli J, and Wilson K ‘What explains market access’ (May 2006) Working Paper Series: Working Paper No. 06-08 *Zayed University Economic and Policy Research Unit 5*.

³⁶³ See paragraph 1.4.2.1 above; United Nations ‘Balance of payments’ (1996) 79 Ref: ST/ESCAP/1616.

³⁶⁴ See paragraph 1.4.2.1 above.

However, trade is affected by barriers that have an impact on market access, final sale price of goods, and the trade balance of the country as a whole.³⁶⁵ When customs duties are high, the cost trickles down to consumers who ultimately pay a higher purchase price and whose spending power is thus reduced. However, when customs duties are low, the selling price of goods may remain low, allowing the consumer to purchase more goods. In terms of macro-economic impacts, higher customs duties translate to increased revenue for the state which may be used to facilitate the provision of public services. On the other hand, low customs duties may result in imported goods flooding the market and pushing the domestic industry out of business especially where there is predatory pricing. It is therefore necessary to find a balance between protectionism and liberalisation.

Regulation of Trade at International, Regional and Domestic Levels

Trade is regulated at international, regional, and domestic levels. In the context of Zimbabwe, the international level is primarily regulated through the World Trade Organisation (WTO), whereas the regional level is regulated through the Southern Africa Development Community (SADC), and the Common Market for Eastern and Southern Africa (COMESA). These two regional economic communities are significant for Zimbabwe because most trade currently occurs at a regional level.³⁶⁶ For this reason, Chapter 3 places more emphasis on preferential trade agreements (PTAs). Although PTAs might appear to be inconsistent with the non-discrimination provisions of the WTO, they are not necessarily in conflict with it.³⁶⁷

SADC is selected because Zimbabwe is a founding member and its neighbouring countries are also part of SADC, including South Africa, which is Zimbabwe's biggest trading partner.³⁶⁸ Similarly, COMESA is selected because Zimbabwe is a founding member and COMESA widens the scope of preferential trade for Zimbabwe beyond Southern Africa into East Africa. The East

³⁶⁵ Kaupilla J 'Effective Protection, Tariffs and GDP Growth: Tariffs in Finland during the inter-War Period' in Olsen SO (Ed) *Managing Crises and De-Globalisation: Nordic Foreign Trade and Exchange 1913-1939* (2010) 60; OECD *Economic Surveys: Israel* (2016) 80; Suranovic SM 'Welfare effects of tariffs: Small country' available on <http://internationalecon.com/Trade/Tch90/T90-11.php> (accessed 21 June 2016).

³⁶⁶ Kaminski B and Ng F *Zimbabwe's Foreign Trade Performance during the Decade of Economic Turmoil: Will Exports Recover?* (2011) 6.

³⁶⁷ See paragraph 3.1.2.3 for a brief discussion on non-discrimination principles of the WTO; Viner J *The Customs Unions Issue* (1950) 480.

³⁶⁸ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

African Community (EAC) will only be referred to for illustrative purposes and insofar as it is necessary in the mention of the COMESA-EAC-SADC Tripartite Free Trade Area (TFTA).

The four main international and regional institutions that have a direct bearing on Zimbabwean trade are the WTO, SADC, COMESA, and the COMESA-EAC-SADC Tri-partite Free Trade Area (TFTA). The TFTA aims to integrate trade and harmonise existing regional trade agreements (RTAs), namely COMESA, EAC and SADC.³⁶⁹ The TFTA is also leading towards the establishment of a continental free trade area under the auspices of the African Union (CFTA).³⁷⁰ The TFTA is still a work in progress and will not be discussed further in this chapter, save to explain the need for regional integration. The following paragraph provides a brief overview of the Zimbabwean legal framework in order to illustrate how rules interact domestically, regionally and internationally.

Although tariffs are the most common and obvious barrier to trade, WTO member states have made tariff concessions that outline the maximum tariff that can be charged on goods imported for intra-WTO trade, the so-called 'bound rate'.³⁷¹ Tariff concessions also note an 'applied rate' which is the actual tariff that is payable for imports.³⁷² Zimbabwe has complied with its bound rates.³⁷³ Consequently, tariffs will not form part of the discussion in this chapter. However, there are other

³⁶⁹ See generally Mold A and Mukwaya R 'The effects of the Tripartite Free Trade Area: Towards a new economic geography in Southern, Eastern and Northern Africa?' (2015) CREDIT Research Paper No 15/04 also available on <https://www.nottingham.ac.uk/credit/documents/papers/2015/15-04.pdf> (accessed 8 September 2016); Scholvin S and Wrana J 'From Cape to Cairo? The Potential of the Tripartite Free Trade Area' *SAAIA Occasional Paper* 221 (September 2015) 1.

³⁷⁰ Article 6(2)(b) and (e) Treaty Establishing the African Economic Community 3 June 1991, Abuja, Nigeria; African Union Constitutive Act 11 July, 2002.

³⁷¹ UNCTAD Agriculture: Trade & Competition policy papers presented at the 61st Session of the Trade and Development Board, 15-26 September 2014, Geneva, Switzerland, Comparison of MFN Bound and Applied Tariffs Trade Weighted Averages on Agricultural Products of Developed, Developing and Least Developed Countries (LDCs): Current Status Reference UNCTAD Discussion paper, 22 September 2014 3 available on http://unctad.org/meetings/en/Contribution/tdb61_c03_UNCTAD.pdf (accessed 25 November 2016); see generally, *WTO Trade Grows as Tariffs Decline* (2013); UNCTAD Agriculture: *Trade & Competition Policy Papers* presented at the 61st Session of the Trade and Development Board 15-26 September 2016, Geneva, Switzerland.

³⁷² See generally, *WTO Trade Grows as Tariffs Decline* (2013); UNCTAD Agriculture: *Trade & Competition Policy Papers* presented at the 61st Session of the Trade and Development Board 15-26 September 2016, Geneva, Switzerland.

³⁷³ See generally *WTO Trade Grows as Tariffs Decline* (2013); UNCTAD Agriculture: *Trade & Competition Policy Papers* presented at the 61st Session of the Trade and Development Board 15-26 September 2016, Geneva, Switzerland.

trade concerns which are not tariffs. Chapter 3 focuses on selected non-tariff barriers (NTBs), namely pre-shipment inspection (PSI), and import licencing (IL). The chapter also examines selected trade defence mechanisms (TDMs), namely anti-dumping, countervailing duties and safeguards.

3.1 INTERNATIONAL TRADE LAW

This paragraph looks at selected international agreements governing trade. While there are several organisations that regulate aspects of international trade such as the United Nations Conference on Trade and Development (UNCTAD), the United Nations Conference on International Trade Law (UNCITRAL), the Organisation for Economic Cooperation and Development (OECD) and the WTO, Chapter 3 describes UNCTAD and then focuses on the WTO.

3.1.1 United Nations Conference on Trade and Development (UNCTAD)

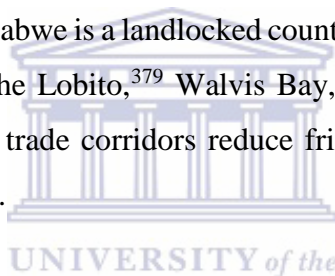
UNCTAD is described here particularly because it was created in response to the needs of developing countries, paved the way for the WTO generalised system of preferences (GSP), and continues to provide support to developing countries. UNCTAD was established in 1964 pursuant to the Cairo Declaration, wherein developing countries sought an international conference devoted to addressing development issues in terms of a new international economic order (NIEO).³⁷⁴ UNCTAD gained authority in its early years, notably between 1964 and 1974, when it became internationally recognised as ‘an intergovernmental forum for North-South dialogue and negotiations on issues of interest to developing countries, including debates on the “New International Economic Order” [and] for its analytical research and policy advice on development issues’.³⁷⁵

³⁷⁴ When important international organisations were being created, there was very little, if any representation of developing countries, many of which had not yet gained their independence. These international organisations were designed to facilitate economic recovery after the Great Depression as well as after the Second World War. The west then established the Organisation for Economic Cooperation and Development (OECD) and the Organisation for European Economic Cooperation (OEEC); UNCTAD *The History of UNCTAD 1964-1984* (1985) 7; The United Nations Conference on Trade and Development (UNCTAD) ‘A brief history of UNCTAD’ available on <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (accessed 28 February 2016).

³⁷⁵ The United Nations Conference on Trade and Development (UNCTAD) ‘A brief history of UNCTAD’ available on <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (accessed 28 February 2016).

UNCTAD is responsible for pioneering important trade agreements including the generalised system of preferences (GSP) in 1968 and several international commodity agreements. It introduced trade and competition rules,³⁷⁶ and highlighted the plight of LDCs in 1974, defining the 0.7 development aid that was pioneered under the NIEO. From the 1980s to the present UNCTAD provided technical assistance to developing countries for debt restructuring and building south-south trade.

Recent technical assistance of UNCTAD in Zimbabwe includes the UNCTAD partnership with the International Trade Centre (ITC) and European Union (EU) in the ‘Trade and Private Sector Development Project’ done in collaboration with the Zimbabwe Tariff and Competition Commission (ZTCC) to build capacity of trainers on competition law and policy in 2015.³⁷⁷ Another key area of support over the years has been in logistics and transit management. This is of particular importance since Zimbabwe is a landlocked country.³⁷⁸ Goods are transported through various trade corridors including the Lobito,³⁷⁹ Walvis Bay,³⁸⁰ Maputo,³⁸¹ Beira,³⁸² Nacala and Dar es Salaam corridors.³⁸³ These trade corridors reduce frictions in the flow of trade, thereby reducing the cost of doing business.



³⁷⁶ Called ‘A set of multilaterally agreed equitable principles and rules for the control of restrictive business practices’ The United Nations Conference on Trade and Development (UNCTAD) ‘A brief history of UNCTAD’ available on <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (accessed 28 February 2016).

³⁷⁷ UNCTAD ‘UNCTAD organizes training courses on competition in Zimbabwe under the Trade and Private Sector Development Project - A programme funded by the EU’ available on http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=925&Sitemap_x0020_Taxonomy=UNCTAD%20Home (accessed 28 February 2016).

³⁷⁸ Simuyemba S ‘Transit transport systems in Southern Africa: Issues, actions and constraints’ (6 September 1994) Ref: UNCTAD/LDC/93 available on unctad.org/en/poldcd93.en.pdf (accessed 28 February 2016).

³⁷⁹ The Benguela railway line links Lobito and Shaba province, Zaire, while the Zaire railways link with the Zambian railways along the Copper Belt.

³⁸⁰ Walvis Bay Namibian railways link with the trunk road system to Zambia, via Botswana and Zimbabwe.

³⁸¹ The Limpopo rail system links with Zimbabwe, while the Maputo-Ressano Garcia rail links with the South African rail system Spoornet (now called Transnet) and the Goba rail links Maputo with Swaziland. There is also a road connection from Maputo to Naamacha, Swaziland, and from Maputo to Ressano Garcia, in South Africa.

³⁸² The Beira corridor is well connected. Beira-Machipanda railway and trunk roads link Mozambique to Zimbabwe. Zimbabwe National Railways links Zimbabwe and Mozambique via Mutare, and also proceeds to Victoria Falls, Zimbabwe. Zambia is linked to Mozambique via trunk roads, as well as through railway lines from Livingstone to the Copperbelt. Mozambique is linked to Malawi through the Sena rail line which connects with the Beira-Machipanda line, as well as through the road between Chingara and Vandusi, Mozambique. There is also a link through the Nyamapanda-Zobue road which lies between Zimbabwe and Malawi via Tete town.

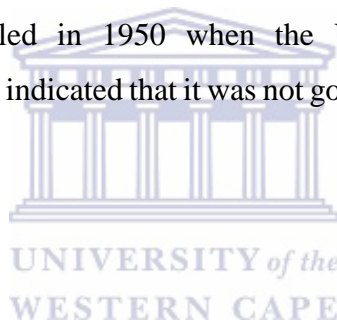
³⁸³ Simuyemba S ‘Transit Transport Systems in Southern Africa: Issues, Actions and Constraints’ (6 September 1994) Ref: UNCTAD/LDC/93 available on unctad.org/en/poldcd93.en.pdf (accessed 28 February 2016).

3.1.2 World Trade Organisation (WTO)

This chapter only focuses on the WTO in relation to the regulation of international trade and to the extent that the WTO permits and co-exists with regional PTAs. The WTO has 164 member states, over two-thirds of which are developing countries and least developed countries.³⁸⁴ Moreover, both the domestic law of Zimbabwe and regional agreements under SADC and COMESA, to which Zimbabwe is party, adhere to the rules and provisions of the WTO.³⁸⁵

3.1.2.1 Establishment of the World Trade Organisation (WTO)

The UN was established in 1945 with the responsibility of creating the International Trade Organisation (ITO). The ITO would draft the ITO Charter, prepare tariff-reduction schedules, and create an international trade treaty called the General Agreement on Tariffs and Trade (GATT).³⁸⁶ GATT was completed in 1947 and came into operation prior to the completion of the ITO Charter.³⁸⁷ The ITO Charter failed in 1950 when the United States of America (USA) administration of President Truman indicated that it was not going to seek the approval of Congress



³⁸⁴ The WTO 'Members and observers' available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 8 September 2016).

³⁸⁵ The WTO 'A unique contribution' available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm (accessed 8 September 2016).

³⁸⁶ Zimbabwe ratified the WTO Agreement on 5 March 1995, but had already been a member of GATT 1944 since 11 July 1948 see WTO 'Zimbabwe and the WTO' available on https://www.wto.org/english/thewto_e/countries_e/zimbabwe_e.htm (accessed 21 November 2016); UN Economic and Social Council named the International Trade Organisation (ITO); Hoekman B 'Competition policy and the global trading system: A developing country perspective' (1997) *Working Paper No. 1735 World Bank Policy Research 1*; also available on file:///C:/Users/mimi/Downloads/Hoekman_1997.pdf (accessed 11 December 2015); United Nations 'History of the United Nations' available on <http://www.un.org/en/sections/history/history-united-nations/> (accessed 11 June 2016).

³⁸⁷ The GATT was completed in 1947, before the completion of the ITO Charter, and it was agreed to adopt the Protocol of Provisional Application of the GATT as from 1 January 1948. The ITO Charter was further negotiated at the Havana Conference and detailed in the all-inclusive Havana Charter, which contained the GATT 1947 provisions; see chapter IV of the Charter; Article 71-73. The Havana Charter detailed the membership, functions and structure of the ITO. It was an all-inclusive trade document addressing a wide range of trade-related areas such as contract, competition, trade and employment; United Nations Conference on Trade and Employment, The Final Act and Related Documents Havana Charter for an International Organisation, 21 November 1947-24 March 1948, Havana, Cuba also available on https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed 26 January 2016).

for the ratification of the ITO,³⁸⁸ after which GATT 1947 transitioned into an organisation.³⁸⁹ The provisions of GATT 1947 were later incorporated as one of the agreements annexed to the Marrakesh Agreement Establishing the WTO on 1 January 1995,³⁹⁰ together with several international trade agreements that were concluded over the years through various rounds,³⁹¹ including the GATT 1994.³⁹²

³⁸⁸ The USA had signed the ITO treaty under the authority of President Truman, however, the Republicans gained more voting power in Congress in the 1948 elections; Matsushita M, Schoenbaum TJ & Mavroidis P *The World Trade Organisation: Law, Practice and Policy* 2ed (2006) 2; Hoekman B 'Competition policy and the global tradings: A developing country perspective' *World Bank Policy Research Working Paper* No. 1735 (1997) 1 also available on file:///C:/Users/mimi/Downloads/Hoekman_1997.pdf (accessed 11 December 2015).

³⁸⁹ GATT was plagued by 'birth defects' and 'grandfather rights', and was also limited by the provisional application of its provisions and ambiguity about its authority and legal status. Matsushita M, Schoenbaum TJ & Mavroidis P *The World Trade Organisation: Law, Practice and Policy* 2ed (2006) 2; Birth defects include, for example, that the GATT was intended to be an agreement facilitating tariffs and trade and it was meant to rely on the ITO for an institutional framework, powers of contracting parties were clearly defined, it had an unclear legal status and risk of abuse of the system altogether. Jackson JH 'Effective dispute resolution procedures' in Krueger A (ed) *The WTO as an International Organisation* (1998) 64.

³⁹⁰ This was an outcome of the Uruguay Round negotiations adopted on 15 April 1994 in Marrakesh, Morocco. The Doha Round was called in November 2001 in terms of the Doha Ministerial Declaration to discuss the Doha Agenda and is still ongoing. WTO 'What is the WTO?' available in https://www.wto/english/thewto_e/whatis_e/whatis_e.htm (accessed 28 April 2015); Article XIV Agreement Establishing the WTO, 15 April 1994, Marrakesh; Bethlehem et al. (eds) *The Oxford Handbook of International Trade Law* (2009) 24.

³⁹¹ Ancey 1949, Torquay 1951, Geneva 1956, Dillon 1960-61, Kennedy 1963-67, Tokyo 1973-79, Uruguay 1986-96, and lastly Doha 2001. The Uruguay Round which was concluded on 15 December 1993 founded the World Trade Organisation as a UN specialised agency, and this was noted in the Draft Final Act of the Uruguay Round in the functioning of the GATT system (FOGS) as a proposal for the establishment of a new Multilateral Trade Organisation, whose name later changed to the World Trade Organisation; The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed by ministers in April of 1994. The Final Act also contains the texts of various ministerial declarations and decisions; WTO 'What is the WTO?' Three major concerns of the Doha Round have been the agricultural concerns of developing countries, particularly on aspects relating to agricultural subsidies, agricultural market-access, as well as non-agricultural market-access (NAMA); Bethlehem et al. (eds) *The Oxford Handbook of International Trade Law* (2009) 26 WTO; Doha Ministerial Declaration, WT/Min (01)DEC/1 (20 November 2001) available on https://www.wto/english/thewto_e/whatis_e/whatis_e.htm (accessed 28 April 2015); Bethlehem et al. (eds) *The Oxford Handbook of International Trade Law* (2009) 14; Matsushita M, Schoenbaum TJ & Mavroidis P *The World Trade Organisation: Law, Practice and Policy* 2 ed (2006) 3; Marrakesh, 15 April 1994, also available on www.wto.org/english/docs_e/legal_e/ursum_e.htm#Introduction (accessed 19 January 2016).

³⁹² WTO 'GATT' available on www.wto.org (accessed 26 January 2016). Other agreements include the General Agreement on Trade in Services (GATS), Understanding on Rules and Procedures Governing the Settlement of Disputes, Trade Related aspects of Intellectual Property Rights (TRIPs), and the Agreement on Trade Related Investment Measures (TRIMs), Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing (which is no longer in force), Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Pre-shipment Inspection, Agreement on Safeguards, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement), Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) and

3.1.2.2 Purpose of the WTO

Article III Marrakesh Agreement states that the functions of the WTO include the administration of WTO agreements, the creation of a forum for trade negotiations, dispute resolution, trade policy review, provision of technical assistance and institutional support for developing countries, as well as cooperation with other international organisations.³⁹³ The Preamble to the Marrakesh Agreement highlights that one of the main objectives of the WTO is to facilitate trade liberalisation by reducing tariffs, as well as, where possible, eliminating NTBs.³⁹⁴

Developed countries are encouraged to reduce and, where possible, eliminate tariffs, and not impose tariffs and NTBs on imports from Least Developed Countries (LDCs), although developing countries and LDCs need not make reciprocal commitments.³⁹⁵ The WTO operates on the basis of non-discrimination. There are some exceptions, such as in agriculture, wherein the WTO allows the introduction of TDMs to protect domestic industry in instances where, for example, there is an excess in agricultural and fisheries produce.³⁹⁶

The paragraph below provides a brief overview of GATT, taking into account its origins as GATT 1947 and its present status as GATT 1994, now under the auspices of the WTO.

3.1.2.3 General Agreement on Trade in Goods (GATT)

GATT 1994 consists of GATT 1947 and various documents concluded under GATT 1947, including protocols and certifications, decisions on waivers, and other decisions.³⁹⁷ It also includes

annexures; WTO 'Legal texts: The WTO agreements' available on https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Introduction (accessed 19 January 2016).

³⁹³ WTO Agreement, 1994, Marrakesh also available on https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed 28 April 2015).

³⁹⁴ Trade liberalisation refers to the reduction and removal of tariff and non-tariff barriers, including licencing requirements and quotas inter alia; Preamble Agreement Establishing the WTO, 15 April 1994, Marrakesh; Bautista RM, Lofgren H & Thomas M 'Does trade liberalisation enhance income growth and equity in Zimbabwe? The role of complementary policies' TMD Discussion Paper No. 32 (September 1998) *International Food Policy Research Institute* 1.

³⁹⁵ Article XXXVI (8) GATT 1994; Preamble Agreement Establishing the WTO, 15 April 1994, Marrakesh.

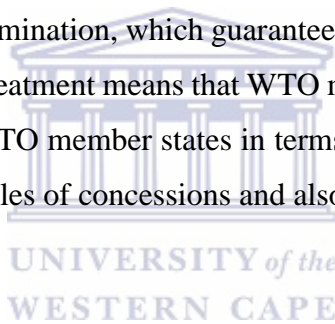
³⁹⁶ There is an exception in the interests of safeguarding a country's balance of payments when its foreign reserves are low. There are also exceptions for developing and least developed countries which allow these countries to introduce import quotas in order to encourage infant industries, and also in the interests of national security and strategic controls such as those relating to intellectual property and public morals.

³⁹⁷ Article 1 GATT 1994.

understandings,³⁹⁸ explanatory notes,³⁹⁹ and the Marrakesh Protocol.⁴⁰⁰ GATT provides for key issues that encourage trade liberalisation in international and regional trade, such as principles of non-discrimination (Article I and Article II), anti-dumping and countervailing duties (Article VI), and trade and development (Article XXXVI), *inter alia*.⁴⁰¹

The main purpose of GATT 1947 is to reduce tariffs through tariff negotiations,⁴⁰² and to ensure non-discrimination amongst trading partners.⁴⁰³ The GATT negotiations facilitated the reaching of concessions,⁴⁰⁴ and from these concessions a code of conduct and set of agreements were codified under the GATT 1947.⁴⁰⁵ The binding commitments made by GATT contracting states to reduce, or where possible, eliminate tariffs as well as NTBs, are appended to the Final Act in the form of schedules.⁴⁰⁶

GATT has two pillars of non-discrimination, which guarantee most favoured nation (MFN)⁴⁰⁷ and national treatment (NT).⁴⁰⁸ MFN treatment means that WTO member states are obliged to provide equal treatment to imports from WTO member states in terms of ‘advantage, favour, privilege or immunity’, subject to WTO schedules of concessions and also to the exclusion of PTAs.⁴⁰⁹



³⁹⁸ Article 1 (c); Understanding on the Interpretation of Article II:I (b) of the General Agreement on Tariffs and Trade 1994, Understanding on the Interpretation of Article XVII of GATT 1994, Understanding on Balance of Payments Provisions of GATT 1994, Understanding on the Interpretation of Article XXIV GATT 1994, Understanding in Respect of Waivers of Obligations under GATT 1994, and Understanding on the Interpretation of Article XXVIII GATT 1994.

³⁹⁹ Article 2 and 3 GATT 1994.

⁴⁰⁰ Article 1(d) GATT 1994.

⁴⁰¹ GATT 1947.

⁴⁰² Article XXVIII *bis* GATT 1947.

⁴⁰³ Article I GATT 1947.

⁴⁰⁴ Tariff concessions consist of agreements that WTO member states reached pertaining to bound and applied tariffs and set out in schedules of commitments; Article II GATT 1947.

⁴⁰⁵ Lowenfeld AF *International Economic Law* (2008) 27.

⁴⁰⁶ WTO ‘Legal texts: The WTO agreements’ available on https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Introduction (accessed 19 January 2016).

⁴⁰⁷ Article I (1) GATT 1947.

⁴⁰⁸ Article III (1) GATT 1947.

⁴⁰⁹ Article I(1) GATT 1947.

With regard to NT, Article III(1) provides that WTO member states should treat imported goods as favourably as domestic goods, once they are in the import country.⁴¹⁰ This also applies to internal taxation and internal regulation.⁴¹¹ Despite these non-discrimination clauses, the WTO still allows for preferential trade agreements (PTAs) in conflict with MFN provisions. The WTO provides for GSP and other non-reciprocal preferential schemes granted by the WTO General Council.⁴¹² The WTO also allows member states to enter into PTAs which are in conflict with the MFN clause through customs unions, economic partnership agreements (EPAs) and free trade areas (FTAs), discussed below.

3.2 REGIONAL TRADE: PREFERENTIAL TRADE AGREEMENTS

First, in order to facilitate trade and economic development within Southern Africa, regional economic communities (RECs) are lobbying for regional integration through monetary unions, and the reduction or elimination of duties and other regulations of commerce through free trade areas (FTAs), customs unions, and monetary unions.⁴¹³ In this regard, the African Union (AU) anticipates the establishment of an African Union Continental Free Trade Area (CFTA), and places emphasis on the strengthening of existing RECs such as SADC and COMESA.⁴¹⁴ Furthermore, in 2015, agreement was reached establishing the COMESA-EAC-SADC-TFTA to further facilitate regional integration. This is in line with the objectives of the African Union (AU) Charter on the Establishment of an African Economic Community (AEC). Zimbabwe is party to regional trading arrangements inclusive of the SADC, COMESA, Africa-Caribbean-Pacific (ACP)-EU,

⁴¹⁰ Article III(1) GATT 1947.

⁴¹¹ Article III(2) GATT 1947.

⁴¹² WTO 'Zimbabwe preferential trade arrangements' available on ptadb.wto.org/Country.aspx?code=716 (accessed 29 April 2015) Zimbabwe is currently a beneficiary under the Generalised System of Preferences with Australia, Canada, Japan, New Zealand, Norway, Russian Federation, Belarus, Kazakhstan, Switzerland, Turkey and the United States.

⁴¹³ World Customs Organisation SAFE Framework of Standards, June, 2007.

⁴¹⁴ Article 6(2)(b) AU Treaty establishing the African Economic Community 3 June 1991, Abuja, Nigeria; African Union Constitutive Act 11 July 2002; Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

agreements, and six preferential trade agreements, and over 40 bilateral trade agreements,⁴¹⁵ which constitute steps towards the achievement of an AEC and the CFTA.⁴¹⁶

Secondly, customs unions are agreements between customs territories to eliminate duties and other regulations of commerce ‘with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories’.⁴¹⁷ Agreements to form customs unions must not impose generally higher restrictions for countries that are not party to the customs union than those existing prior to the formation of the customs union.⁴¹⁸ Currently, there is one customs union in Southern Africa, called the Southern African Customs Union (SACU).⁴¹⁹ Zimbabwe is currently not a member of this customs union hence SACU will not be discussed further.

Thirdly, Zimbabwe signed the Interim Economic Partnership Agreement (iEPA) between the European Union and the Eastern and Southern Africa *bloc* (ESA *bloc*).⁴²⁰ This iEPA is a preferential trade agreement between the ESA *bloc*, on one hand, and the European Union, on the other hand.⁴²¹ Article 2 iEPA encourages regional integration and integration of the ESA *bloc* into the world market, facilitation of value addition and export-led economic growth, and establishment of a framework for increasing trade and investment, *inter alia*.⁴²² The iEPA is in operation pending

⁴¹⁵ Clause 2.4.3 Zimbabwe National Trade Policy (2012-2016); Article 4, AU Treaty Establishing the African Economic Community 03 June 1991, Abuja, Nigeria; Hartzenburg T ‘Regional integration in Africa’ *World Trade Organisation, Economics and Statistics Department Staff Working Paper ERSD 2011/14* (2011) 2.

⁴¹⁶ AU ‘Progress report: Update on the Continental Free Trade Area’ 4 available on http://www.au.int/en/sites/default/files/newsevents/workingdocuments/12582-wd-update_on_the_report_on_the_continental_free_trade_en.pdf (accessed 21 June 2016).

⁴¹⁷ Article XXIV (8) (a) GATT 1994.

⁴¹⁸ Article XXIV (5)(a) GATT 1994.

⁴¹⁹ SACU is a customs union between five neighbouring countries South Africa, Botswana, Lesotho, Namibia and Swaziland. The objectives of SACU are to facilitate the free movement of goods, and a common external tariff on all goods entering any of the SACU countries; The Southern African Customs Union 2002.

⁴²⁰ Zimbabwe signed the iEPA in August 2009; Clause 5.2.2 Zimbabwe National Trade Policy (2012-2016).

⁴²¹ Clause 5.2.2 Zimbabwe National Trade Policy (2012-2016).

⁴²² Article 2 Interim Agreement Establishing a Framework for an Economic Partnership Agreement between Eastern and Southern Africa States on the one part, and European Community and its Member States on the other part Brussels (EPA-ESA Agreement) (30 April 2009).

the final EPA for which negotiations are still under way. The iEPA will not be discussed further in this chapter.⁴²³

Fourthly, although SADC and COMESA are pursuing various objectives such as establishing customs unions and common markets, they each constitute FTAs as well. FTAs facilitate trade liberalisation.⁴²⁴ FTAs are agreements between two or more customs territories ‘in which the duties and other restrictive regulations of commerce ...are eliminated on substantially all the trade between the constituent territories in products originating in such territories’.⁴²⁵ FTAs should not impose on states which are not members of the FTA, generally higher restrictions than those existing prior to the formation of the FTA.⁴²⁶ Zimbabwe is party to regional programmes in ‘agriculture, gender, infrastructure, climate change, trade facilitation and harmonisation of standards in the region’.⁴²⁷ Zimbabwe is also party to the COMESA-EAC-SADC Tri-partite negotiations for harmonisation of trade.⁴²⁸

Fifthly, in order to facilitate trade and development within Southern Africa, RECs are lobbying for regional integration through harmonisation of trade laws, customs regulations, and monetary unions.⁴²⁹ Wolfgang submits that harmonisation is a key driver to international trade and the development of the domestic economy.⁴³⁰ In this regard, the AU anticipates the establishment of the CFTA and places emphasis on the strengthening of existing RECs such as SADC and COMESA.⁴³¹ Furthermore, in 2015 agreement was reached establishing the TFTA to further facilitate regional integration.⁴³² This is in line with the objectives of the AU Charter on the

⁴²³ See paragraph 4.4.1.

⁴²⁴ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁴²⁵ Article XXIV (8) (b) GATT 1994.

⁴²⁶ Article XXIV (5)(b) GATT 1994.

⁴²⁷ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁴²⁸ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁴²⁹ WCO SAFE Framework of Standards, June, 2007.

⁴³⁰ Wolfgang HM ‘Emerging issues in European customs law’ (2007) 1(1) *The World Customs Journal* 3 3.

⁴³¹ Article 6(2)(b) and (e) Treaty Establishing the African Economic Community 3 June 1991, Abuja Nigeria; African Union Constitutive Act 11 July, 2002; Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁴³² The TFTA is undergoing amendments and continuing negotiations, and consequently is not analysed in this chapter. Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, The East African Community and the Southern African Development Community signed as at 10 June 2015, Zimbabwe has signed, available on <https://www.tralac.org/images/docs/7531/tfta-agreement-june-2015.pdf> (accessed 23 November 2016).

Establishment of an African Economic Community (AEC),⁴³³ and constitutes another step closer to the achievement of an AEC and the AU CFTA.⁴³⁴ The following paragraph will discuss trade liberalisation in the context of COMESA and SADC, as well as note concerns with regard to overlapping membership.

3.2.1 Common Market for Eastern and Southern Africa (COMESA)

COMESA was established in December 1994, replacing a PTA which had been established in terms of the Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern Africa.⁴³⁵ The main objective of COMESA is to create a common market, and to eventually constitute an economic community not only in Eastern and Southern Africa, but also to meet the objectives of the AU of establishing a CFTA and an AEC.⁴³⁶ COMESA is meant to increase sustainable economic growth and development in all its member states as well as to increase co-operation.⁴³⁷ Some of the aims of COMESA regarding trade liberalisation and customs cooperation are to establish a customs union, eliminate non-tariff barriers, increase cooperation for customs purposes, and establish a common external tariff.⁴³⁸

Having noted some of the regional trade agreements above, it is clear there is a need for coordination and integration of the efforts made by the various regional organs. The paragraph below examines this interaction within the scope of regional integration.

⁴³³ Article 4, AU Treaty Establishing the African Economic Community, 3 June 1991, Abuja; Hartzenburg T 'Regional Integration in Africa' *World Trade Organisation, Economics and Statistics Department Staff Working Paper ERSD 2011/14* (2011) 2.

⁴³⁴ AU 'Progress Report: Update on the Continental Free Trade Area' 4 available on http://www.au.int/en/sites/default/files/newsevents/workingdocuments/12582-wd-update_on_the_report_on_the_continental_free_trade_en.pdf (accessed 21 June 2016).

⁴³⁵ 30-31 January 1992 Lusaka, Zambia.

⁴³⁶ Preamble to the Treaty Establishing a Common Market for Eastern and Southern Africa, December 1994, Lilongwe, Malawi; Article 6(2)(b) and (e) Treaty Establishing the African Economic Community 03 June 1991, Abuja Nigeria; Zimbabwe ratified the EAC Treaty on 6 November 1991.

⁴³⁷ Article 3 Treaty for the Establishment of a Common Market for Eastern and Southern Africa, December 1994 Lilongwe, Malawi.

⁴³⁸ Articles 4(1)(a) and 45 COMESA Treaty, 1994.

3.2.2 Southern Africa Development Community (SADC)

The SADC Trade Protocol establishes an FTA in the SADC region. The Protocol takes into account the various agreements concluded under the WTO and is mindful of the outcomes of the Uruguay Round of negotiations.⁴³⁹ This is in accordance with WTO provisions that allow for PTAs amongst trading partners. Article 1(5) aims to eliminate tariffs and non-tariff barriers for intra-SADC trade, the modalities of which are the responsibility of the Committee of Ministers responsible for Trade Matters (CMT).⁴⁴⁰

Member states are also prohibited from imposing and applying quantitative restrictions on exports to other Member States except as provided in the Protocol. The listed general exceptions include measures introduced for protection of public morals or public order, protection of human, plant and animal life, natural resources and the environment, protection of national treasures, transfer of gold, silver, precious and semi-precious stones, as well as precious and strategic minerals, protection of intellectual property, prevention of deceptive trade practices, prevention of food shortages and compliance with WTO provisions.⁴⁴¹

An example is the security exception provided in Article 10 SADC Trade Protocol that allows states to impose quantitative restrictions for security purposes.⁴⁴² Negotiations for these reductions are through the SADC Trade Negotiating Forum.⁴⁴³ The phased reduction of tariffs, tariff barriers, and import duties was set to be completed in eight years and is now complete.⁴⁴⁴ The SADC Trade Protocol provides for non-discrimination in Article 11 and the content is similar to WTO provisions pertaining to same.⁴⁴⁵

⁴³⁹ Preamble, SADC Protocol on Trade, August 1996, Maseru.

⁴⁴⁰ Article 1(5) read with Article 3 SADC Trade Protocol.

⁴⁴¹ Article 9 SADC Trade Protocol.

⁴⁴² SADC Trade Protocol.

⁴⁴³ Article 3(1)(b) SADC Trade Protocol.

⁴⁴⁴ Sandrey R 'An analysis of the SADC Free Trade Area' TRALAC Trade Brief No. 13TB01/2013 (2013) also available on <http://www.tralac.org/files/2013/06/D13TB012013-Sandrey-Analysis-of-SADC-Free-Trade-Area-20130619-fin.pdf> (accessed 23 November 2016).

⁴⁴⁵ See paragraph 3.1.2.3 above.

Article 11 provides that

Member States shall accord, immediately and unconditionally, to goods traded within the Community the same treatment as to goods produced nationally in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.⁴⁴⁶

Imported goods from other SADC member states should be treated in the same manner as domestically produced goods, and should not be discriminated 'in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'. This is similar to the WTO provision in Article III GATT 1994, which states that contracting parties should not use 'internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations' as a means to discriminate against imported goods in order to protect domestic goods.⁴⁴⁷ However, Article III GATT is more detailed and specific than Article 11 of the SADC Trade Protocol.

The SADC Regional Indicative Strategic Development Plan intended to establish a Free Trade Area by 2008, and complete negotiations for an SADC Customs Union by 2010, as well as establish both a SADC Common Market by 2015 and a SADC Monetary Union by 2016.⁴⁴⁸ These goals were set in March 2001 and there was good foresight into the necessity of establishing such structures in the SADC region, yet only the SADC FTA has been completed. Poor implementation of targets within the region is an indication of the challenges associated with regional integration such as overambitious targets and overlapping membership.⁴⁴⁹

⁴⁴⁶ SADC Trade Protocol.

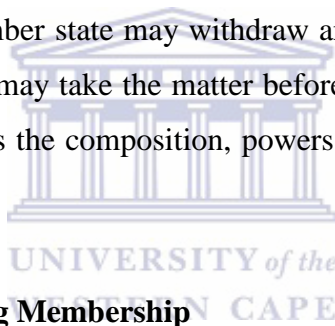
⁴⁴⁷ Article III GATT 1994.

⁴⁴⁸ SADC 'Integration milestones' available on www.sadc.int/about-sadc/integration-milestones/ (accessed 08 September 2016).

⁴⁴⁹ Mapuva J and Muyengwa-Mapuva L 'The SADC regional bloc: What challenges and prospects for regional integration' (2014) 18 *Law, Democracy and Development* 22-26.

Overlapping membership also implicitly means that member states would choose which of the two RECs to give more priority to. It appears that it would be difficult to arrive at a SADC customs union, since several members of SADC are members of two or more RECs. For example, Zimbabwe is a member of SADC and also of COMESA. Should SADC customs negotiations take a different direction from similar negotiations in COMESA, chances are there will be resistance to finalise negotiations in either grouping, unless Zimbabwe spearheads negotiations in favour of one of the RECs and pushes the same agenda in the second REC.

Regarding dispute settlement, SADC provides that the first port of call for dispute settlement is consultation, similar to provisions of the WTO.⁴⁵⁰ Article 32(1) provides that ‘member states shall make every effort, through cooperation and consultation, to arrive at a mutually satisfactory agreement’. This could mean the removal of a non-conforming provision in terms of Article 2, or failing settlement, the injured member state may withdraw an equivalent concession in terms of Article 3.⁴⁵¹ Alternatively, parties may take the matter before a panel of trade experts appointed by the CMT. The CMT determines the composition, powers and functions of the panel of trade experts.⁴⁵²



3.2.3 Challenges of Overlapping Membership

Countries in Africa, and particularly in Southern Africa, are either developing or least developed countries.⁴⁵³ For this reason, each of the countries pursues economic growth and development by entering into trade agreements to ensure the most benefit in terms of tariffs and quantitative restrictions. However, this has caused some challenges. While several sub-regional groupings have been established over the years, there is little integration and trade has not significantly increased

⁴⁵⁰ The WTO dispute settlement mechanism is regulated in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding on Dispute Settlement) which applies to all WTO members for consultations and dispute settlement.

⁴⁵¹ SADC Trade Protocol.

⁴⁵² Article 32(5) SADC Trade Protocol.

⁴⁵³ See UNCTAD The Least Developed Countries Report, 2014 Ref: UNCTAD/LDC/2014.

despite the presence of these organs.⁴⁵⁴ To date, each country in Africa falls under one or more economic grouping.

Zimbabwe's membership of SADC and COMESA means that it is subject to two regimes that do not always coincide when it comes to 'trade liberalisation commitments, rules of origin and tariff phase-down schedules'.⁴⁵⁵ The tariffs for Zimbabwe's preferential trading partners range from 0.2 per cent in other countries in Southern Africa, to 11.4 per cent, which is the rate applied to South Africa.⁴⁵⁶ Regional integration would ideally address overlapping areas and bring about harmonisation across the region and across different RECs, especially if members of two or more RECs actively advocate harmonisation of the rules in the different RECs to which they are party.

There are several reasons put forward in favour of regional integration. First, as mentioned briefly above, there is significant overlap between regulations of some organs. Secondly, Africa consists mainly of small landlocked countries which are either developing or least developed, often having low per capita incomes and small markets. In the absence of integration of markets, each country continues to be limited.⁴⁵⁷ Thirdly, transaction costs tend to be high in Africa. For example, there is a lack or inadequacy of transportation and infrastructure, a prevalence of badly damaged roads, poor road and rail networks, and expensive and prohibitive pricing of air travel owing to lack of domestic competition and restrictive domestic regulations, which all limit the movement of goods and services.⁴⁵⁸

⁴⁵⁴ Tekere M 'Regional Integration and EPAs' 1-5 SAIIA/TIPS Workshop available on <https://www.saiia.org.za/images/upload/SADC%20EPA%20Tekere.pdf> (accessed 09 July 2017).

⁴⁵⁵ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁴⁵⁶ World Trade Organisation 'Zimbabwe country report summary' (2010) Ref: WT/TPR/S/252 available on (accessed 10 October 2011).

⁴⁵⁷ Hartzenburg T 'Regional integration in Africa' (2011) *Staff Working Paper ERSD 2011/14 World Trade Organisation, Economics and Statistics Department* 2.

⁴⁵⁸ Government of Zimbabwe, National Report on the Status of Implementation of the ALMATY Programme of Action (2013); see generally UNCTAD 'Challenges and opportunities for further improving the transit systems and economic development of landlocked and transit developing countries' Ref: UNCTAD/LDC/2003/8 (2003); Hartzenburg T 'Regional integration in Africa' (2011) *Staff Working Paper ERSD 2011/14 World Trade Organisation, Economics and Statistics Department* 4.

Fourthly, there are also often concerns with ports of entry. Border processes tend to be time consuming, with cumbersome administrative processes and tedious customs control procedures that tend to undermine regional trading preferences.⁴⁵⁹ Finally, the lack of modern information and communication technologies, expensive phone tariffs and prohibitive pricing of access to the internet all tend to restrict intra-regional trade.⁴⁶⁰ According to the SADC Industrialisation Strategy and Roadmap, regional integration increases the economies of scale and promotes industrialisation.⁴⁶¹ Some steps have been taken to integrate the African market and economy, but to date the intended time frames have come and gone without significant implementation.

3.3 NON-TARIFF BARRIERS

The aim of this paragraph is to analyse the regulation of selected NTBs, namely, sanitary and phytosanitary measures and technical barriers to trade including pre-shipment conformity assessment procedures, and technical regulations such as import licencing requirements. It further seeks to determine the extent to which international, regional and domestic laws are aligned in this regard. Zimbabwean domestic law incorporates and makes use of international and regional trade agreements. NTBs consist of all measures that do not relate specifically to the tariff being charged, but to other factors that make import or export more difficult, valuation processes, PSI and import or export licencing, which have the effect of reducing trade.⁴⁶² Some non-tariff barriers are regulated under the Trade Facilitation Agreement (TFA).⁴⁶³ NTBs increase the cost of importing goods for traders, and in extension they increase the cost of purchasing goods for consumers, as explained in the introduction to this chapter.

⁴⁵⁹ Mhlanga P 'B order delays damage economy' (21 June 2016) *The Financial Gazette* available on <http://www.financialgazette.co.zw/border-delays-damage-economy/> (accessed 21 June 2016); Ensor L 'Beitbridge delays hugely costly but are easily solved' (28 January 2015) *Business Day* available on <http://www.bdlive.co.za/business/trade/2015/01/26/beitbridge-delays-hugely-costly-but-are-easily-solved> (accessed 21 June 2016); Hartzenburg T 'Regional integration in Africa' (2011) *Staff Working Paper ERSD 2011/14 World Trade Organisation, Economics and Statistics Department* 4.

⁴⁶⁰ Hartzenburg T 'Regional integration in Africa' (2011) *Staff Working Paper ERSD 2011/14 World Trade Organisation, Economics and Statistics Department* 4.

⁴⁶¹ Clause 2.1 SADC Regional Industrialisation Strategy and Roadmap 2015-2063, 29 April 2015, Harare; Hartzenburg T 'Regional integration in Africa' (2011) *Staff Working Paper ERSD 2011/14 World Trade Organisation, Economics and Statistics Department*.

⁴⁶² Kadirire H 'Delays, corruption rife at Zim borders' *Daily News* available on <https://www.dailynews.co.zw/articles/2015/04/06/delays-corruption-rife-at-zim-borders> (accessed 03 May 2016).

⁴⁶³ See paragraph 4.8 in Chapter 4 below.

3.3.1 Pre-shipment Inspection (PSI)

PSI is a tool used to impose assessments on goods prior to importation. Typically, PSI is conducted outside the country of import, through an appointed agent. PSI assessments examine fundamental aspects such as quality of goods and whether the quantity on the accompanying documentation matches the actual quantity of goods in the shipment. This paragraph will analyse PSI regulation in the context of international, regional and domestic legal instruments of the WTO, SADC COMESA, and Zimbabwe, respectively.

3.3.1.1 World Trade Organisation (WTO)

PSI is the practice of appointing a private company for a specified purpose, which is to examine shipment details such as quantity, quality, and price of goods imported.⁴⁶⁴ This is used as a means to protect the importing country from financial risks such as capital flight, fraud, and evasion of customs duties as set out in Article 20 of the Agreement on Pre-shipment Inspection: '[u]ser members shall ensure that, in order to prevent over- and under-invoicing and fraud, pre-shipment inspection entities conduct price verification' in accordance with the guidelines set out in subparagraphs (b) to (e).⁴⁶⁵ For example, the price of the imported goods may be compared with that of identical or similar goods 'offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale...'.⁴⁶⁶

Furthermore, Article 1(6) of the WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement) recognises 'technical regulations, standards and conformity assessment procedures' as TBTs.⁴⁶⁷ This appears to include pre-shipment inspection in the ambit of TBTs. Article 2(1) places an obligation on member states to apply TBTs on imports in a manner that is not less favourable than on domestically produced goods. In the furtherance of harmonisation, Article 5 of the TBT Agreement provides procedures for conformity assessment which is non-discriminatory, transparent, expedient, in line with international standards, and confidential. Article 8 extends this obligation to non-governmental bodies. The WTO PSI Agreement appears to encourage

⁴⁶⁴ Article 1(3) WTO Agreement on Pre-shipment Inspection, 1994.

⁴⁶⁵ WTO 'Pre-shipment inspection' available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm#origin (accessed 2 May 2016).

⁴⁶⁶ Article 20(b) WTO Agreement on Pre-shipment Inspection, 1994.

⁴⁶⁷ WTO Agreement on Technical Barriers to Trade, 1994.

competition, and consumer protection because it allows member states to regulate on ‘quality, quantity and price’ of goods. Furthermore, capital flight has come to the fore in recent years following former South African President Thabo Mbeki’s observation that Africa is losing over US\$50 billion in capital flight and illicit financial flows annually.⁴⁶⁸ The Global Financial Integrity Report (GFIR) notes that Zimbabwe lost US\$5 526 million in illicit financial flows between 2004 and 2013.⁴⁶⁹ The PSI provisions will consequently be useful in the fight against illicit financial flows.

3.3.1.2 Common Market for Eastern and Southern Africa (COMESA)

Article 4(1) COMESA Treaty stipulates as one of its aims to ‘abolish all non-tariff barriers’ for intra-regional trade. COMESA focuses on harmonisation of laws and not so much unification. COMESA does not specifically provide rules for pre-shipment inspection. However, it encourages the reduction and eventual elimination of non-tariff barriers.⁴⁷⁰ Pre-shipment inspection is also a TBT, however, Article 50 allows member states to impose trade restrictions in the interests of national security, animal, plant, and human life, environmental protection, control of arms, movement of minerals, and to ensure food security.⁴⁷¹

Article 75(1)(c) EAC Treaty also creates a customs union and aims to eliminate all non-tariff barriers. However, COMESA and EAC do not specifically prohibit pre-shipment inspection. Perhaps this is because of the relative importance of the justifiable objectives of pre-shipment inspection such as quality control.⁴⁷²

⁴⁶⁸ UNECA *Report of the High Level Panel on Illicit Financial Flows from Africa, Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development* (2014) 2.

⁴⁶⁹ Kar D and Spanjers J *Illicit Financial Flows from Developing Countries: 2004-2013* (2015) 33.

⁴⁷⁰ Article 49 COMESA Treaty, 1994.

⁴⁷¹ Article 49 COMESA Treaty, 1994; also refer to paragraph 4.1.4.

⁴⁷² Other African countries with pre-shipment inspection requirements are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Comoros, Republic of Congo (Brazzaville), Democratic Republic of Congo (Kinshasa), Côte d’Ivoire, Ecuador, Ethiopia, Guinea, India (see note below), Indonesia (see note below), Iran, Kenya (under review), Kuwait (see note below), Liberia, Madagascar, Malawi, Mali, Mauritania, Mexico (see note below), Mozambique, Niger, Senegal, Sierra Leone, Togo, Uzbekistan; Export.Gov ‘When is pre-shipment inspection required’ available on http://www.export.gov/logistics/eg_main_018120.asp (accessed 14 June 2016).

3.3.1.3 Southern African Development Community (SADC)

In the context of SADC, pre-shipment inspection is regulated in terms of Article 17 SADC Trade Protocol and the TBT Annex to the SADC Trade Protocol as at 2014.⁴⁷³ The SADC Trade Protocol encourages member states to align their technical regulations with international standards. It further encourages consistency in the application of technical regulations, and notes that individual member states are free to have standards which are different from other member states in Article 17(4).⁴⁷⁴ Pre-shipment inspection currently takes place in the form of Consignment Based Conformity Assessments (CBCA) and Pre-Export Verification of Conformity Programs (PVoC).⁴⁷⁵ PSI in SADC has various aims, including to

protect consumers from dangerous, substandard or counterfeit products, to protect the environment, to protect domestic industry from unfair competition from non-compliant goods, [and] to facilitate trade through the avoidance of consignment testing upon arrival or multiple testing requirements.⁴⁷⁶

The Annex encourages SADC member states to develop national standards in line with Annex III: Code of Good Practice for the Preparation, Adoption and Application of Standards of the WTO TBT Agreement.⁴⁷⁷ The adoption of this code facilitates further harmonisation. It is unclear whether SADC member states have in fact complied with this provision and developed national TBT standards.

3.3.1.4 Domestic Regulation

Although PSI is permissible in terms of the regional and international infrastructure, Zimbabwe's introduction of the Control of Goods (Open General Import Licence) (Standards Assessment) Notice, 2015 in July 2015 still represents a step back in the pursuit of trade liberalisation.⁴⁷⁸ These

⁴⁷³ SADC Trade Protocol, 1996.

⁴⁷⁴ SADC Trade Protocol, 1996.

⁴⁷⁵ Du Plessis A *Consignment Based Conformity Assessment (CBCA) and Pre-Export Verification of Conformity to Standards (PVoC) Programmes in SADC Countries* (2015) 1.

⁴⁷⁶ Du Plessis A *Consignment Based Conformity Assessment (CBCA) and Pre-Export Verification of Conformity to Standards (PVoC) Programmes in SADC Countries* (2015) 1.

⁴⁷⁷ Article 7(3) TBT Annex 1 to the SADC Trade Protocol, 2014.

⁴⁷⁸ Statutory Instrument 132 of 2015; also see generally Bureau Veritas 'Zimbabwe: Consignment-based conformity assessment (CBCA) programme' available on

Regulations introduced pre-shipment inspection for certain goods upon importation into Zimbabwe. To this end, Zimbabwe appointed the services of a French-based private company, Bureau Veritas, to conduct pre-shipment inspections for listed goods, which inspection in terms of section 3 of the Control of Goods (Open General Import Licence) (Standards Assessment) Notice,⁴⁷⁹ and also according to the WTO rules.⁴⁸⁰ Once the inspection is complete, if the goods are compliant they will be issued a CBCA compliance certificate. It is not immediately clear why the government opted to outsource this service as the Zimbabwe Revenue Authority has a capable workforce. Instead of working at border posts conducting time consuming physical searches, (which create opportunities for corruption) customs officials could be trained and re-assigned to the role of pre-shipment inspection. The country is already losing out in terms of developing technical expertise, and also in terms of costs paid out to Veritas. Nonetheless, pre-shipment inspection can in theory be seen as a positive step as should facilitate quality control of goods entering Zimbabwe because the Standards Association of Zimbabwe still requires significant capacity-building. However, it is also a clear indication of the desperation of the state to broaden its tax base and increase revenues as far as possible.

In countries such as Mozambique, Kenya, Tanzania and Uganda, PSI increased the lag time by three to seven days. Several delays were experienced at the onset of the system, and complaints were made through the TFTA online mechanism for reporting, monitoring and eliminating NTBs. For example, in the complaint of Malawian company Nampak Malawi against Zimbabwe, the complainant made an application to Bureau Veritas for a CBCA certificate for export into Zimbabwe on 1 March 2016, the goods were inspected by Bureau Veritas on 10 March 2016 but only issued a CBCA certificate after 22 April 2016. Due to such delays, Bureau Veritas was compelled to improve its services and it undertook to improve its efficiency regarding issuance of the CBCA certificates within 48 hours from the date of request. Moreover, a service fee of 0.7 per cent of the Free on Board value of the consignment is charged by the independent company Bureau

<https://verigates.bureauveritas.com/wps/wcm/connect/verigates/local/en/home/list-of-programmes/zimbabwe> (accessed 14 June 2016).

⁴⁷⁹ Statutory Instrument 132 of 2015.

⁴⁸⁰ Article 2(3) WTO Agreement on Pre-Shipment Inspection, 1994.

Veritas for its pre-shipment inspection services at the cost of the exporter.⁴⁸¹ Such a service is clearly costly pushes up transaction costs for importers as well as end-users. In other words, the ordinary Zimbabwean who will buy the imported goods will do so at an increased cost, and this places consumers at a disadvantage, undermining the development objective.

PSI increases transaction costs for trade. Whereas multinational corporations may spread costs and enjoy economies of scale, the sole trader, SMEs, or informal trader often bears the brunt of compliance. This reduces the income of traders and PSI costs are transferred to consumers, making goods more expensive and, as a result, less competitive compared to large corporations, which enjoy large economies of scale. Reduced income and reduced sales directly impact the standard of living and access to basic social services including primary education, health care, maternal care, and access to shelter, food and sanitation. The protest action at the Beitbridge border post highlights the practical implications of customs regulations. *In casu*, ICBTs spoke out against Regulation 64 of 2016 which prohibited the import of basic commodities.⁴⁸² Importers should have been made aware prior to crossing the South African side of the border that they would not be able to cross over into Zimbabwe without CBCA certificates.

Approximately 137 products at HS4 level in 41 HS Chapters form part of the listed goods requiring pre-shipment inspection. Trade with some countries may be affected, such as Singapore, for which 99.62 per cent of its exports to Zimbabwe in 2014 are listed products.⁴⁸³ Goods that are compliant should be issued with a Certificate of Compliance, but those that are not compliant should not be allowed entry into Zimbabwe.⁴⁸⁴

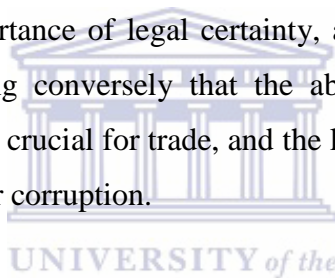
⁴⁸¹ Viljouen W 'Pre-shipment inspection for certain goods exported to Zimbabwe – Adding to the cost of doing business' (16 September 2015) *TRALAC* available on www.tralac.org/discussions/article/8087-pre-shipment-inspection-for-certain-goods-exported-to-zimbabwe-adding-to-the-cost-of-doing-business.html (accessed 2 May 2016).

⁴⁸² Muleya T 'Updated: ZIMRA suspends new import rules' *The Herald Zimbabwe* 20 June 2016 available on <http://www.herald.co.zw/breaking-news-zimra-suspends-implementation-of-import-regulations/> (accessed 23 June 2016).

⁴⁸³ Statutory Instrument 132 of 2015; also see generally Bureau Veritas 'Zimbabwe: Consignment-based conformity assessment (CBCA) programme' available on <https://verigates.bureauveritas.com/wps/wcm/connect/verigates/local/en/home/list-of-programmes/zimbabwe> (accessed 14 June 2016).

⁴⁸⁴ Sections 6 and 7 Statutory Instrument 132 of 2015.

Furthermore, the introduction of PSI created serious bottlenecks, especially at the Beitbridge border post where several trucks had to wait to be processed, or were forced to take back their cargo to the nearest Bureau Veritas in order to obtain a CBCA certificate prior to passing the Zimbabwean side of the border post.⁴⁸⁵ The Beitbridge border post is the busiest border in Southern Africa.⁴⁸⁶ It gives passage to over 3 500 vehicles and 9 000 people per day and the Zimbabwe Revenue Authority (ZIMRA) is collecting over US\$60 million per month.⁴⁸⁷ Apart from increasing the costs for importers such as demurrage and loss of perishable goods, such delays have a big impact on collection of revenue as well. Moreover, the bottlenecks also indicate that there was a lack of proper planning and coordination when the regulation was introduced. Poorly planned laws are commonplace in Zimbabwe. Proper planning requires an adequate timeframe to notify the consumers because trade often involves costly storage and shipping. Poorly planned laws create legal uncertainty for those bound by the law and those who are to enforce the laws. Paragraph 2.2.1.2 briefly explained the importance of legal certainty, and particularly that legal certainty reduces transaction costs, meaning conversely that the absence of legal certainty increases transaction costs. Legal certainty is crucial for trade, and the law-making process. Legal certainty would also reduce opportunities for corruption.



Du Plessis raises several questions with regard to CBCA and PVoC programmes, for example whether these programmes should be implemented despite the lack of equivalent requirements for domestic goods.⁴⁸⁸ In other words, he questions whether pre-shipment inspection requirements do not conflict with principles of non-discrimination under the WTO.⁴⁸⁹ In respect of non-discrimination, it is uncertain whether current PSI requirements applied in Zimbabwe (or any other

⁴⁸⁵ The Herald Zimbabwe ‘ZIMRA: Challenges to new clearance regulations’ (10 March 2016) available on <http://www.herald.co.zw/challenges-to-new-clearance-regulations/> (accessed 05 May 2016).

⁴⁸⁶ SAAIA ‘Non-tariff barriers at Beitbridge border post: Case Study’ 07 available on <http://www.saiia.org.za/special-publications-series/611-sadc-business-barriers-case-7-non-tariff-barriers-at-beit-bridge/file> (accessed 05 May 2016).

⁴⁸⁷ Kadirire H ‘Delays, corruption rife at Zim borders’ *Daily News* 06 April 2015 available on <https://www.dailynews.co.zw/articles/2015/04/06/delays-corruption-rife-at-zim-borders> (accessed 03 May 2016).

⁴⁸⁸ Du Plessis A *Consignment Based Conformity Assessment (CBCA) and Pre-Export Verification of Conformity to Standards (PVoC) Programmes in SADC Countries* (2015) 10.

⁴⁸⁹ Du Plessis A *Consignment Based Conformity Assessment (CBCA) and Pre-Export Verification of Conformity to Standards (PVoC) Programmes in SADC Countries* (2015) 10.

jurisdiction) would pass the test for non-discrimination. Apart from the general principles of non-discrimination as per GATT, the TBT Agreement also specifically states in Article 2(1) that

members shall ensure that in respect of technical regulations, products imported from the territory of any member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.⁴⁹⁰

The PSI requirement through Bureau Veritas most probably would pass the MFN test, but it may fail in respect of the NT clause because domestic goods are not necessarily exposed to scrutiny and conformity assessments in practice, even though in theory the Standards Association of Zimbabwe (SAZ) has the mandate to oversee standards, quality and quantity assurance for domestically produced goods.⁴⁹¹ At the moment, it is not clear whether any quality inspections are conducted on goods domestically produced in Zimbabwe, meaning Zimbabwe could be violating the non-discrimination provisions of the GATT.⁴⁹²

Moreover, in terms of trade facilitation, pre-shipment inspection for imports into Zimbabwe is currently not reducing transaction time, precisely because importers may still be required to undergo additional customs inspections upon entry which present both delays and opportunities for bribery. Border delays tend to increase damage of goods pending customs clearance.

Another challenge is that although pre-shipment inspection is permissible under the WTO, SADC does not address it directly save for the provision in the TBT Annex mentioned above. Moreover, it tends to undermine the progress made by tariff reductions in the SADC region.

It has been argued that there is a lack of coordination and harmonisation of customs software between South African and Zimbabwean customs authorities, and this increases transaction costs

⁴⁹⁰ 1994.

⁴⁹¹ Masanganise KE, Matope G and Pfukenyi DM 'A survey on auditing, quality assurance systems and legal frameworks in five selected slaughterhouses in Bulawayo, south-western Zimbabwe '(2013) 80 (1) *Onderstepoort Journal of Veterinary Research* 1-8; Standards Association of Zimbabwe 'Standards development' available on <http://www.saz.org.zw/> (accessed 21 June 2016).

⁴⁹² See Paragraph 3.1.2.3 above.

on both sides of the border.⁴⁹³ While Zimbabwe has pre-shipment inspection, South Africa does not. This reduces transaction costs for trade across South Africa to some extent. With regard to compliance of non-governmental bodies with Article 5 TBT Agreement, Bureau Veritas is part of an established select few companies that provide specialised services for PSI.⁴⁹⁴

3.3.2 Import Licencing (IL)

IL comprises obligations on exporters to obtain licences as a prerequisite for shipping goods into the country. Typically, import licences would be required for specific listed goods, and not for every single good on the HS classification list. Licences must be obtained from the export destination state prior to shipping the goods otherwise the goods will normally not be allowed entry. The following paragraph discusses the WTO regulation of import licencing.

3.3.2.1 World Trade Organisation (WTO)

Article 1(3) of the WTO Agreement on Import Licencing provides that ‘the rules for import licencing procedures shall be neutral in application and administered in a fair and equitable manner’.⁴⁹⁵ Import licensing can be based on an automatic or non-automatic system. In an automatic import licensing system, approval is granted in all cases, whereas in a non-automatic import licensing system approval is not always granted.⁴⁹⁶ Non-automatic licensing must not be restrictive or distortive to trade in terms of Article 3(2).⁴⁹⁷

Import licencing constitutes a TBT and is also governed by the TBT Agreement. This means that, similar to PSI, import licencing should be implemented in a manner that is not less favourable than domestically produced goods. TBTs may not be used to impose unnecessary obstacles to

⁴⁹³ SAAIA ‘Non-tariff barriers at Beitbridge border post’ 72 Case Study 7 available on <http://www.saiia.org.za/special-publications-series/611-sadc-business-barriers-case-7-non-tariff-barriers-at-beit-bridge/file> (accessed 5 May 2016).

⁴⁹⁴ Bureau Veritas is a member of the International Federation of Inspection Agencies (IFIA) and must comply with the IFIA Code of Conduct and inspection guidelines. IFIA *Compliance Code* 3 ed (2007) International Federation of Inspection Agencies: London; IFIA *Compliance Code: Guidelines on Implementation* 5 ed (2013) International Federation of Inspection Agencies: London; IFIA ‘Membership: Members directory’ available on <http://www.ifia-federation.org/content/ifa-membership/members-directory/> (accessed 21 June 2016).

⁴⁹⁵ WTO Agreement on Import Licencing, 1994.

⁴⁹⁶ Article 2 and 3 WTO Agreement on Import Licencing, 1994

⁴⁹⁷ WTO Agreement on Import Licencing, 1994

international trade, and must not be ‘more trade-restrictive than is necessary to fulfil legitimate objectives [which are] national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment’.⁴⁹⁸

However, this is limited by Article 2(5) TBT Agreement, which provides that where a technical regulation is imposed, and it meets at least one legitimate objective and accords with international standards, the regulation ‘shall be rebuttably presumed not to create an unnecessary obstacle to international trade’. Transparency is an important element for TBTs in that the government is required to have a designated place or forum for enquiries pertaining to the technical regulations imposed and to provide relevant documents and information on the specific standards, and conformity assessment procedures.⁴⁹⁹

3.3.2.2 Common Market for Eastern and Southern Africa (COMESA)

COMESA does not specifically provide for import licencing; however, it takes a general position against the imposition of NTBs. Article 49(1) requires each member state to remove all NTBs for goods originating in other member states.⁵⁰⁰ Article 49(2) allows the imposition of NTBs to protect an infant industry for a specified period, provided it is applied without discrimination and all reasonable steps have been taken to overcome the difficulties, and further NTBs may be imposed in response to balance of payments difficulties.⁵⁰¹ These provisions do not clearly distinguish between NTBs and TDMs. Instead COMESA seems to allow the use of NTBs as a form of TDM.⁵⁰² This is different from the position taken by the WTO, which treats NTBs and trade defence mechanisms differently.

Article 50 also allows trade restrictions and prohibitions in listed instances, such as state security, control of arms and ammunition, protection of human, plant and animal life, and health, public morality, minerals and other goods of national importance, as well as to maintain food security.⁵⁰³

⁴⁹⁸ Article 2(2) WTO TBT Agreement.

⁴⁹⁹ Article 10(3) WTO TBT Agreement.

⁵⁰⁰ COMESA Treaty 1994.

⁵⁰¹ COMESA Treaty, 1994.

⁵⁰² COMESA Treaty, 1994.

⁵⁰³ COMESA Treaty, 1994.

In this regard, import licencing may be perceived to be permissible under COMESA Article 50, provided it relates to restrictions and prohibitions that are listed in this Article. Similar to the position in SADC, the lack of region-specific instruments specifically addressing import licencing leaves it open to interpretation.

3.3.2.3 Southern African Development Community (SADC)

SADC provides for authorised and certified importers who may import restricted goods under licence, for example for the import of pharmaceuticals.⁵⁰⁴ This means that where importation is subject to an import licence, people or companies that import pharmaceuticals on a regular basis may be allowed to register as importers. This facilitates trade by reducing the processing time for the licences over time.

Moreover, Article 17 SADC Trade Protocol allows for the imposition of technical regulations provided they are applied consistently, and that they are aligned with international standards.⁵⁰⁵ In other words, import licencing regulations applied within SADC would have to be aligned to international standards and be applied consistently in line with the non-discrimination principles. The very nature of import licencing implies that NT provision may be undermined, as explained similarly in 3.3.1.4 in reference to PSI. The fact that SADC does not have a stand-alone import licencing agreement creates a legal gap in the regional legal framework, because the WTO provisions on this issue are not expounded so as to be meaningful and impactful at a domestic level because the provisions are left to wide interpretation.

3.3.2.4 Zimbabwean Regulation

As explained in Chapter 2, Zimbabwe gradually removed import licences under ESAP between 1990 and 1995, but in the wake of the economic crisis and lack of state revenue, the country re-introduced import licencing for specific listed goods in terms of the Control of Goods (Import and Export) (Agriculture) Order, 2007 and Control of Goods (Standards Assessment).⁵⁰⁶ These listed

⁵⁰⁴ SADC 'Guidelines on import and export procedures for pharmaceutical products' (2006) available on www.ich.org/fileadmin/Public_Web_Site/ABOUT_ICH/Organisation/SADC/Guidelines_for_Import_and_Export.pdf (accessed 2 May 2016).

⁵⁰⁵ SADC Trade Protocol, 1996.

⁵⁰⁶ Statutory Instrument 138 of 2007; and Statutory Instrument 132 of 2015, respectively.

goods may be imported without a licence only if they are goods in transit, or they are being imported 'by a person or family residing in Zimbabwe for their personal domestic consumption and not for sale or disposal to any other persons; or as a *bona fide* gift from a person residing outside Zimbabwe to a person or family residing in Zimbabwe, provided that in both instances, the goods do not exceed the value of US\$250 per month'.⁵⁰⁷ New import licencing procedures are also in response to the high incidence of fake import and export licences in Zimbabwe.⁵⁰⁸ The exceptions for gifts and exemptions for US\$250 per month are helpful to importers for consumption, but in effect penalise importers for trade, especially where the importers are Zimbabwean cross-border traders.

Import licences are in theory a response to the need to revive the manufacturing industry, which is operating below 40 per cent.⁵⁰⁹ It is in theory because the reality is that there has not been a marked interest in facilitating the growth of the domestic industry. Moreover, listed goods may be prohibited in order to protect domestic consumers, for example, harmful drugs, hazardous materials, expired medicine, pornographic and objectionable materials, and harmful substances such as skin-lightening products. Other prohibited goods are banned in order to protect the environment from destruction of fauna or flora, and to protect endangered species.⁵¹⁰ However, the country's policy position has been forced from prohibiting certain genetically modified foods, to allowing them in the context of increased hunger and the need for food security.⁵¹¹

Restricted goods are those subject to licencing requirements such as wildlife, agricultural products, plants, firearms, currency, apparatus for the production or refining of alcohol, and relics. There are

⁵⁰⁷ Section 2(2)(b) Control of Goods (Import and Export) (Agriculture) Order, Statutory Instrument 138 of 2007.

⁵⁰⁸ African Cargo News 'Zimbabwe introduces new import and export licenses' available on www.africancargonews.com/?p=544 (accessed 2 May 2016).

⁵⁰⁹ Zimbabwe Situation 'Government to introduce import licences' *Sunday Mail* available on www.zimbabwesituation.com/news/zimsit_govt-to-introduce-import-licences-sunday-mail/ (accessed 2 May 2016).

⁵¹⁰ ZIMRA 'Restricted and prohibited goods on import and export' available on www.zimra.co.zw/index.php?option=com_content&view=article&id=99:restricted-and-prohibited-goods-on-import-export&catid=21:did-you-know&Itemid=91 (accessed 2 May 2016).

⁵¹¹ Tekere M (ed) *Regional Trade Integration, Economic Growth and Poverty Reduction in Southern Africa* (2012) 226 Africa Institute of South Africa: Pretoria and Trade and Development Studies Centre: Harare.

allegations of corruption in the import licencing procedures.⁵¹² Article 7(1) of SI 132 of 2015 states that goods that are not accompanied by a certificate of conformity will not be allowed entry into Zimbabwe. The WTO Import Licencing Agreement requires member states to publish ‘in the sources notified to the Committee on Import Licensing provided for in Article 4 in such as manner as to enable governments and traders to become acquainted with them’.⁵¹³ This notice must be published 21 days before the import licencing rules come into operation. The last notification on the WTO website is dated 1996.⁵¹⁴ Zimbabwe did not make notification prior to enforcing the Import Licencing Rules. However, the WTO also allows member states to change rules without notification if they want to in their own domestic interests.

To conclude on NTBs. First, Zimbabwe is underutilising available instruments, and must seek to improve trade facilitation. Failure to provide requisite notification of changes to domestic law affects trade flows and creates a negative impression on trading partners. This is because it creates uncertainty, which reduces the ease of doing business and reduces confidence in traders, who might opt to trade with other countries within the region which have more stable regulatory frameworks, such as South Africa. For example, complaint NTB-000-751 which is currently before the TFTA NTB Monitoring Mechanism notes that traders are opting to use the Kazungula border to avoid Zimbabwean borders due to serious border delays, high costs, poor road infrastructure and harassment at police road blocks.⁵¹⁵

Thirdly, Zimbabwean law must take into account the unique circumstances of the country, including the developmental needs of the people of Zimbabwe, especially the needs of SMEs, informal sector, women and youths. For example, cross-border traders are already at a

⁵¹² The Zimbabwean News ‘Corruption rocks maize import licences’ available on www.thezimbabweanews.com/business-10550-corruption-rocks-maize-import-licenses.html (accessed 3 May 2016).

⁵¹³ WTO Import Licencing Agreement, 1994.

⁵¹⁴ WTO Committee on Import Licencing, Agreement on Import Licencing Procedures Notification under Articles 1 (4) (a) and 8 (2): Zimbabwe, Reference G/LIC/N/1/ZWE/1, 2 July 1996; also available on <file:///C:/Users/Dr.%20Mima/Downloads/N1ZWE1.pdf> (accessed 8 September 2016).

⁵¹⁵ COMESA-EAC-SADC TFTA Non-Tariff Barriers Reporting, Monitoring and Eliminating Mechanism Complaint No. NTB-000-751 (lodged 15 June 2017) available on <http://www.tradebarriers.org/complaint/NTB-000-751> (accessed 08 July 2017).

disadvantage because of the conditions under which they earn their livelihoods, especially women, because informal cross-border trade often involves risks to personal safety and security, sexual abuse, manipulation and bribery by customs officials, which disproportionately affect women.⁵¹⁶ The position of women in Zimbabwe needs to be continuously examined to ensure that laws do not continue to disadvantage women. This is particularly important in view of the often burdensome role that women tend to play as unpaid caregivers.

3.4 TRADE DEFENCE MECHANISMS

First, international trade arrangements provide opportunities for their members to prevent certain unfair trade practices, as well as measures to protect infant industries, inter alia. The WTO provides in Article XVIII (2) GATT that

contracting parties [in this case developing countries] should enjoy additional facilities to enable them to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry...⁵¹⁷

This means that while contracting parties are obliged to comply with the tariff concessions, this is limited by Article XVIII, which allows for flexibility in order to protect certain infant industries. It is an opportunity which perhaps has not been fully utilised by Zimbabwe. Pursuant to the Land Redistribution Program, several foreign-owned firms closed down, including farmers and manufacturers. This left a gaping hole in the production levels of Zimbabwe, and contributed to the downward spiral of the economy. Zimbabwe has managed to salvage a few manufacturing operations only on a fairly small scale compared to pre-2001 production. Zimbabwe needs to be domestically productive in order to boost its balance of payments by increasing exports in relation to imports. Zimbabwean industry has struggled to compete with imports because of the relatively

⁵¹⁶ Chiliya N, Masocha R and Zindiye S 'Challenges facing Zimbabwean cross-border traders trading in South Africa: A review of literature' *Chinese Business Review* (11) 6 (2012) 564-570; also see paragraph 4.3.5.1.

⁵¹⁷ Article XVIII (2) GATT 1994; also see Lee YS *Development and the World Trade Organisation: A Developing World Perspective* (2008) 6.

high production costs within Zimbabwe.⁵¹⁸ For example, producing a plough locally costs US\$58, whereas an imported plough costs US\$35.⁵¹⁹

Secondly, Article XVIII GATT also provides in relation to quotas, that

contracting parties should enjoy additional facilities to enable them to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.⁵²⁰

This means that, where necessary, each member is permitted to set quotas in order to limit certain imports in order to assist it with meeting its own balance of payments objectives. This is a provision which has not been fully utilised by Zimbabwe until recently. Although Zimbabwe cannot utilise TDMS as a means of promoting the competitiveness of its domestic industries, it can however, use TDMS as a means of counteracting anti-competitive behaviour by its trading partners, provided it complies with the strict conditions required when by the WTO.⁵²¹

The Zimbabwe National Trade Policy concedes that trade defence mechanisms are to be employed in accordance with the WTO rules, more specifically anti-dumping and countervailing duties as well as safeguard measures for the correction of competition and unfair trade practices as well as in cases of import surges, respectively.⁵²² These are explained briefly below.

⁵¹⁸ Nyoni M 'Influx of cheap imports hurts Zim firms' *Newsday* 28 July 2016 available on <https://www.newsday.co.zw/2016/07/28/influx-cheap-imports-hurt-zim-firms/> (accessed 8 September 2016); Ndlovu R 'Industry reels from Harare imports ban' *The Sunday Times Business* 31 July 2016 (available on <http://www.timeslive.co.za/sundaytimes/business/2016/07/31/Industry-reels-from-Harare-imports-ban> (accessed 8 September 2016).

⁵¹⁹ Nyoni M 'Influx of cheap imports hurts Zim firms' *Newsday* 28 July 2016 available on <https://www.newsday.co.zw/2016/07/28/influx-cheap-imports-hurt-zim-firms/> (accessed 8 September 2016).

⁵²⁰ Article XVIII (2) GATT 1994; also see Lee YS *Development and the World Trade Organisation: A Developing World Perspective* (2008) 7.

⁵²¹ Article 1 Agreement on Implementation of Article VI of the GATT 1994; Article 7(1) Subsidies and Countervailing Duties Agreement; and Article 5(1) Safeguard Agreement, GATT 1994.

⁵²² Clause 6.3 Zimbabwe National Trade Policy (2012-2016).

3.4.1 Dumping and Anti-Dumping Duties

Dumping relates to the importation of goods at a lower price than that which is applicable in the exporting country for similar goods. Dumping is analysed in the context of international, regional and domestic legal instruments of the WTO, SADC and COMESA, and Zimbabwe, respectively.

3.4.1.1 World Trade Organisation (WTO)

WTO defines dumping as the practice of exporting goods and selling them at a lower price in the receiving country than the normal value of that product.⁵²³ GATT defines dumping as

[the introduction of a good] into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.⁵²⁴

Anti-dumping duties are put in place to prevent the practice of dumping by importers into the country.⁵²⁵ Anti-dumping and countervailing duties are put in place to protect consumers and to protect the domestic producers and local industry.⁵²⁶ Generally, dumping presents imported goods at a lower price, and this means the dumped goods are more affordable for consumers in the short term.⁵²⁷ Where dumped goods are not at lower prices, the increase of goods on the market, may cause a reduction in market price as supply increases.⁵²⁸ However, if predatory dumping occurs, this will have the effect of pushing domestic competitors out of the market.⁵²⁹ This would have a negative impact on the domestic industry.

⁵²³ Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* 2 ed (2011) 508.

⁵²⁴ Article 2 of the Agreement on the Implementation of Article VI (GATT).

⁵²⁵ WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 Article 2.

⁵²⁶ Article VI (1) GATT, 1994.

⁵²⁷ Andersson K and Thuresson C 'The impact of an anti-dumping measure: A study on EU imports of Chinese Footwear' Bachelor Thesis Jonkopping International Business School (2008) 5.

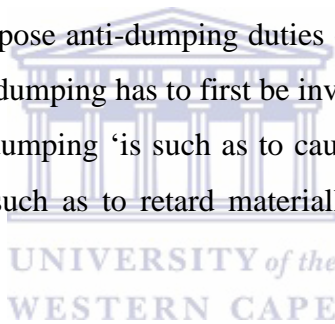
⁵²⁸ Andersson K and Thuresson C 'The impact of an anti-dumping measure: A study on EU imports of Chinese Footwear' Bachelor Thesis Jonkopping International Business School (2008) 5.

⁵²⁹ Andersson K and Thuresson C 'The impact of an anti-dumping measure: A study on EU imports of Chinese Footwear' Bachelor Thesis Jonkopping International Business School (2008) 5.

3.4.1.2 Common Market for Eastern and Southern Africa (COMESA)

Dumping is defined in Article 51(1) as the situation when ‘goods are introduced into the commerce of another member state at less than the normal value of the products’. Goods are considered to be dumped if they are introduced at a price lower than the ‘comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting country’.⁵³⁰ This is very similar to the phrasing of GATT Article VI (1) above.

Article 51 COMESA further provides that if there is no such domestic price, then the goods are considered as dumped if the export price is less than ‘either the highest comparable price for the like product for export to any third country in the ordinary course of trade, or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit’.⁵³¹ Member states are permitted to impose anti-dumping duties on dumped goods in order to offset the margin of dumping. However, dumping has to first be investigated and it must be determined whether the effect of the alleged dumping ‘is such as to cause or threaten material injury to an established domestic industry or such as to retard materially the establishment of a domestic industry’.⁵³²



3.4.1.3 Southern African Development Community (SADC)

Similar provisions can be found in the SADC Trade Protocol. SADC defines dumping in Article 1 SADC Trade Protocol, by referring to Article VI GATT 1994, and allows member states to apply anti-dumping measures in accordance with WTO provisions.

3.4.1.4 Domestic Regulation

Zimbabwe has had two trade policy reviews under the WTO, one in 1994, and another in 2011. Such reports are crucial for both transparency and progress as they can guide research. The absence of further reviews creates an information gap, particularly for Zimbabwe which has fragmented

⁵³⁰ Article 51(2) COMESA Treaty, 1994.

⁵³¹ Article 51(4) COMESA Treaty, 1994.

⁵³² Article 51(4) COMESA Treaty, 1994.

regulatory and policy frameworks.⁵³³ Currently the organ responsible for investigating unfair trade practices is the Competition and Tariff Commission.⁵³⁴ The Zimbabwe National Trade Policy does well to clarify the body that is accountable as this will assist in the implementation of policy.⁵³⁵ There are two main regulatory instruments applicable, namely the Competition (Anti-Dumping and Countervailing Duty) (Investigations) Regulations 2002 and the Competition (Safeguards) (Investigations) Regulation, 2006. Anti-dumping rules are translated into domestic law through the Customs and Excise Act, which provides that for anti-dumping rules to apply:

Imported goods or goods likely to be imported shall be deemed to be dumped if the export price of such goods is less than the domestic price of such goods, which means the price at which identical or comparable goods are being sold in the ordinary course of trade in the country of exportation or, where such price is fixed by the government in the country of exportation, such price as the investigating authority may determine...⁵³⁶

The legal provisions pertaining to the state's preferred response to dumping is in line with international standards set out in GATT VI (1) and Article 2 of the Agreement on Implementation of Article VI of the GATT, 1994. The provision above also complies with both SADC and COMESA Trade Protocols. Pertaining to concessions, 'nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product any anti-dumping or countervailing duty applied consistently with the provisions of Article VI'.⁵³⁷

Secondly, despite access to trade defence mechanisms under the WTO framework, Zimbabwe has not instituted any claims, and appears to be under-capacitated in this regard.⁵³⁸ However, it also appears that some goods imported under the Look East policy may have been dumped, although

⁵³³ Hurungo JT 'Trade policy review: Zimbabwe' (2010) 7 *Tralac*: Stellenbosch; WTO 'Zimbabwe: Trade policy review' available on https://www.wto.org/english/tratop_e/tpr_e/tp352_e.htm (accessed 09 July 2017).

⁵³⁴ Clause 6.3.1 Zimbabwe National Trade Policy (2012-2016).

⁵³⁵ Clause 6.3.1 Zimbabwe National Trade Policy (2012-2016).

⁵³⁶ Section 90(1)(a) Zimbabwe Customs and Excise Act, Chapter 23:02.

⁵³⁷ Article II WTO Agreement on Implementation of Article VI, 1994.

⁵³⁸ Hurungo JT 'Trade policy review: Zimbabwe' (2010) 7 *Tralac*: Stellenbosch 30 -31.

no investigations were ever conducted.⁵³⁹ The Look East policy was adopted at the time when Zimbabwe was facing political and economic sanctions from the USA and Western Europe, and when the domestic industrial sector was shrinking due to adverse economic conditions.⁵⁴⁰ This led to the importation of cheap Chinese goods, which were potentially priced lower upon export than their domestic price.⁵⁴¹ It is argued that ‘the general idea is for Zimbabwe to protect its borders from substandard goods, as well as from undervaluation’.⁵⁴² However, proving dumping is a complicated process requiring thorough investigations in order to determine whether there was material harm to the domestic market. There have also been submissions that Zimbabwe lacks technical expertise to investigate unfair trade practices, and as a result has feared instituting claims under the WTO Dispute Settlement Mechanism (DSM).⁵⁴³

Although the use of WTO protections is necessary as explained above, it is subject to compliance with strict rules set out in the Antidumping, and Countervailing and Safeguards Agreements.⁵⁴⁴ Zimbabwe can make use of WTO protections such as by investigating dumping, and where necessary imposing anti-dumping duties or may re-visit existing bilateral agreements with China to make these more beneficial for Zimbabwe. The Agro Export Project notes that Zimbabwe lacks ‘skills and expertise in responsible authorities (Tariff Commission, Attorney General’s Office, Department of Customs’ and that there is a ‘reluctance on the part of the private sector to pursue cases, lack of institutional capacity and lack of expertise in defending its interests in possible AD litigation by major partners’.⁵⁴⁵ Hurungo reiterates that Zimbabwe has not been able to ‘adequately participate in the WTO DSM, and has faced several complaints brought against it.’⁵⁴⁶ In this regard,

⁵³⁹ Mugano G ‘Time to tighten screws on dumping’ (31 October 2013) *The Herald* 31 October 2013 available on <http://www.herald.co.zw/time-to-tighten-screws-on-dumping/> (accessed 29 February 2016).

⁵⁴⁰ Mugano G ‘Time to tighten screws on dumping’ *The Herald* available 31 October 2013 on <http://www.herald.co.zw/time-to-tighten-screws-on-dumping/> (accessed 29 February 2016).

⁵⁴¹ Mugano G ‘Time to tighten screws on dumping’ *The Herald 31 October 2013* available on <http://www.herald.co.zw/time-to-tighten-screws-on-dumping/> (accessed 29 February 2016).

⁵⁴² Ensor L ‘Zimbabwe tightens border controls on imported goods’ *Business Day Live* 10 April 2015 available on <http://www.bdlive.co.za/africa/africanbusiness/2015/04/10/zimbabwe-tightens-border-controls-on-imported-goods> (accessed 29 February 2016) citing Stefan Sakoschek (Executive Chairman of the European Union Chamber of Commerce and Industry of Southern Africa).

⁵⁴³ Hurungo JT ‘Trade policy review: Zimbabwe’ *Tralac* (2010) available on http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Hurungo_Final_20110126_edu.pdf (accessed 07 July 2017).

⁵⁴⁴ WTO Agreement on Implementation of Article VI of the GATT 1994 (see Article 2); Agreement on Subsidies and Countervailing Measures (see Articles 4 and 7); and Safeguard Agreement (see Article 5 and 6) inter alia.

⁵⁴⁵ Hurungo JT ‘Trade policy review: Zimbabwe’ *Tralac* (2010) 7.

⁵⁴⁶ Hurungo JT ‘Trade policy review: Zimbabwe’ (2010)7 .

it is imperative for Zimbabwe to invest in capacity building particularly for technical expertise and skills transfer. These submissions are likely to be true as there are no reported cases under the WTO DSM instituted by Zimbabwe.

It is interesting to note that despite the possibility of dumping by Chinese exporters, Zimbabwe does not have any matters which have appeared before the WTO Dispute Settlement Body in its own capacity except as a third-party observer. This might indicate that there is inadequate awareness of the opportunities to institute claims under the WTO, or perhaps simply that the country is not fully utilising the recourse available to it through the WTO dispute settlement mechanism.

Secondly, in 2008, the economy was at its worst since independence and at that time the Look East policy appeared to be the most attractive option. However, in 2017, nine years later, it is important for Zimbabwe to revisit its strategy for trade and re-industrialisation. Domestic policy as framed in the ZimAsset economic blueprint document seeks export-oriented industrialisation, however, there lacks an integrated effort to support trade in terms policy, law and practice.⁵⁴⁷ One important step is to restore the rule of law, and restore confidence in the regulatory framework.

Thirdly, Zimbabwe can take a lesson from South Africa, which uses the ‘Proudly South African’ brand. ZimTrade, which is responsible for marketing Zimbabwean goods, has begun driving the ‘Buy Zimbabwe’ campaign, but it would be better for a private entity to run the campaign, so as not to violate the NT principle. It should be noted however, that gaining support and recognition for this campaign might be in vain if there is a negative perception of the country and there is a legitimacy crisis, as displayed in the Beitbridge Border Post protests, the #ThisFlag protests and #Tajamuka protests of 2016.⁵⁴⁸ Where local goods are of poor quality and highly priced, the people will tend to opt for cheaper imports even if they would otherwise amount to dumping. This requires

⁵⁴⁷ Hurungu JT ‘Trade policy review: Zimbabwe’ (2010) 30-31.

⁵⁴⁸ See generally Raftopoulos B and Savage T *Zimbabwe: Injustice and Political Reconciliation* (2004); Kamhungira T and Mashaya B ‘Zanu PF suffering legitimacy crisis’ Daily News 31 May 2016 available on <https://www.dailynews.co.zw/articles/2016/05/31/zanu-pf-suffering-legitimacy-crisis> (accessed 08 September 2016); ENCA ‘Zimbabwe’s #Tajamuka warns of more protests’ ENCA 7 July 2016 available on <https://www.enca.com/africa/zimbabwe-tajamuka-warns-of-more-protests> (accessed 8 September 2016).

an investigation into the development of domestic industry, perhaps by using the big push approach motivated in 2.5.1.

3.4.2 Safeguards

3.4.2.1 World Trade Organisation (WTO)

Article XIX GATT 1994 provides for emergency action on imports of particular products. Article XIX (A) makes the following stipulation:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.⁵⁴⁹

Article 2 of the Agreement on Safeguards, reinforces the provision of Article XIX GATT, by stipulating that:

‘a member may apply a safeguard measure to a product only if that Member has determined... that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products’.⁵⁵⁰

Article 4 (1) Agreement on Safeguards defines serious injury as ‘significant overall impairment’, while threat of serious injury means ‘serious injury that is clearly imminent’.⁵⁵¹ A threat of serious injury may not be based on allegations and speculation, but must be based on facts.⁵⁵²

⁵⁴⁹ GATT 1994.

⁵⁵⁰ Article 2 (1) Agreement on Safeguards.

⁵⁵¹ Article 4(1) Agreement on Safeguards.

⁵⁵² Article 4(1) (b) Agreement on Safeguards.

Furthermore, if any imported product is causing or threatening serious injury to domestic producers of like or directly competitive products, the importing member state may suspend its WTO obligations in whole or in part, or withdraw or modify the relevant concession.⁵⁵³ In other words, safeguards are used in accordance with WTO rules to regulate the influx of imports, and to monitor compliance with preferential treatment provisions and to temporarily protect ‘seriously injured local industry’.⁵⁵⁴

Member states must first give notice to other contracting parties and allow those with a substantial export interest an opportunity to consult prior to imposing safeguard measures.⁵⁵⁵ However, a party may continue to impose safeguards if agreement is not reached in terms of Article XIX (2) GATT, explained above. Safeguards may only be introduced after the party has conducted investigations through which public notice should be given to interested parties and hearings conducted to allow them to present their views.⁵⁵⁶ In Zimbabwe, the relevant statutory instrument is the Competition (Safeguards) Investigations Regulations 2006 and the relevant international treaty is Article XIX GATT.⁵⁵⁷ The following paragraph analyses safeguards in the context of regional instruments.

3.4.2.2 Common Market for Eastern and Southern Africa (COMESA)

Safeguard measures are permissible in the case of economic disturbances resulting from the application of Chapter 6 of the COMESA Treaty on co-operation in trade liberalisation and development.⁵⁵⁸ According to Article 61 COMESA Treaty, safeguard measures may be introduced by a member state, provided the member state has adequately notified the Secretary-General and the COMESA member states. Safeguard measures may not be used indefinitely.⁵⁵⁹ They are limited to one year, unless a request for extension of the safeguard measures is made by the affected member state and is approved by the Council.⁵⁶⁰ The member state will have to show the Council

⁵⁵³ Article XIX(1)(b) GATT 1994.

⁵⁵⁴ Clause 6.3.2 Zimbabwe National Trade Policy (2012-2016).

⁵⁵⁵ Article XIX(2) GATT 1994.

⁵⁵⁶ Article 3(1) Agreement on Safeguards.

⁵⁵⁷ Clause 6.3.2 Zimbabwe National Trade Policy (2012-2016).

⁵⁵⁸ Article 61 COMESA Treaty, 1994.

⁵⁵⁹ Article 61(2), and Article 83 COMESA Treaty, 1994.

⁵⁶⁰ Article 61(2), and Article 83 COMESA Treaty, 1994.

what efforts have been made to address the economic imbalance that necessitated the introduction of safeguard measures.⁵⁶¹ This is similar to the WTO provisions except that it grants a shorter period of one year for reliance on safeguard measures, subject to renewal, unlike the Article 7 WTO Safeguards Agreement which sets out a preliminary period of four years, subject to renewal. This means there is a wide divergence of seven years permissible for safeguard measures between the COMESA provision and the SADC provision.

3.4.2.3 Southern African Development Community (SADC)

SADC has a similar perspective. It provides in Article 20(1) Agreement on Safeguards that

[a] Member State may apply a safeguard measure to a product only if that Member State has determined that such product is being imported to its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.⁵⁶²

Safeguard measures apply despite SADC origin of goods; however, they may only be used for the extent and time necessary to remedy or prevent serious injury and to facilitate adjustment of the affected industry. While the WTO refers to safeguards as means to remedy and prevent serious injury, the SADC Trade Protocol takes it a step further and allows safeguards as a means to facilitate adjustment of industry. The Protocol defines primary industry and extends protection in terms of Article 21.⁵⁶³ Similar to GATT XIX(1)(b), the SADC Trade Protocol allows member states to withdraw from their concessions in part or in whole, or to suspend application of certain obligations.⁵⁶⁴

However, the main difference is that while the WTO requires contracting parties to make public notice and allow for consultations by interested parties, the SADC Trade Protocol requires member states to first make an application in order to be permitted to make such withdrawal or suspension of obligations. Moreover, Article 21(1) SADC Trade Protocol applies specifically to withdrawals

⁵⁶¹ Article 61(2), and Article 83 COMESA Treaty, 1994.

⁵⁶² Agreement on Safeguards.

⁵⁶³ SADC Trade Protocol, 1996.

⁵⁶⁴ Article 21 SADC Protocol, 1996.

and suspensions which have as their aim the protection of infant industry. This is a more limited application than the WTO framework, which refers to withdrawals and suspensions in response to a serious injury or threat of serious injury to domestic producers, one not necessarily restricted to infant industries but relating to all producers of like or directly competitive goods.

This means that SADC Trade Protocol provides less protection in terms of intra-regional trade than COMESA when it comes to the application of safeguards. However, the time limits for applications are identical, as provided in Article 20(5), which provides that the safeguard should be used for a period not exceeding four years unless the injury or threat continues to exist as per Article 7 WTO Agreement on Safeguards. However, the SADC Trade Protocol limits this period further to a maximum of eight years in terms of Article 20(6).

3.4.2.4 Domestic Regulation

There is a wide disparity between time periods permissible for safeguard measures under COMESA and SADC: seven years.⁵⁶⁵ This kind of disparity would make it difficult for a country such as Zimbabwe to fully benefit from its membership to both RECs when introducing safeguard measures, because in reality, Zimbabwe would have to weigh the opportunity cost for each REC and select the most convenient, even if it means risking non-compliance with the other REC.

3.5 CHAPTER CONCLUSION

First, Chapter 3 provided an overview of selected key international and regional trade agreements to which Zimbabwe is party. The chapter examined specific NTBs, namely pre-shipment inspection and import licencing. It also discussed three TDMs, namely anti-dumping duties in response to dumping, countervailing duties in response to subsidies and safeguards in response to changes in the balance of payments or economic needs of the country. The chapter drew from provisions in the WTO, and compared the corresponding provisions from COMESA and SADC to analyse the extent of compliance of the REC provisions with the WTO provisions.

⁵⁶⁵ See paragraph 3.4.3.3 above.

Secondly, it appears that to a large extent regional trade agreements align with WTO agreements. In many places, SADC rules appear to copy the WTO Agreement almost verbatim. COMESA provisions, although similar to WTO provisions, are phrased differently and show a level of originality, as opposed to corresponding provisions in the SADC Trade Protocol. In the analysis of NTBs and TDMs, the chapter noted that although SADC and COMESA rules are in many places congruent, some aspects remain divergent, and there is need for further harmonisation. The overlap of jurisdiction and capacity of the two bodies leave loopholes in the regulatory framework. This may be remedied through the new TFTA and would make it easier for domestic law to comply with both regimes where a country has dual membership.

Thirdly, Zimbabwe's formal law appears to comply with COMESA and SADC as well as with the WTO. However, with regard to practical implementation, there are gaps, for instance in relation to the full utilisation of international agreements. One such area pertains to the imposition of anti-dumping duties in response to dumping. The chapter noted that to date Zimbabwe has not registered any complaints or instituted consultations under the WTO dispute settlement mechanism despite potential dumping. It has also not conducted investigations into dumping since ratifying the Marrakesh Agreement in 1995. Fourthly, Zimbabwe should take measures that encourage social inclusion especially with regard to the informal sector and cross-border traders.⁵⁶⁶ Currently, import licencing requirements and pre-shipment inspection may be inaccessible to most of the population that make up the informal sector.

Finally, Chapter 3 noted that the Zimbabwean legal environment is unstable, in that it lacks legal certainty and laws are changed frequently, confusing both consumers and traders. The government has relied on regulations made under the Control of Goods Act Regulations to impose and amend customs regulations for goods imported into Zimbabwe through a proliferation of laws. The changes are frequent, reflecting either a lack of adequate planning or a panicked response by the government to liquidity challenges. Lack of legal certainty makes it very difficult to establish business and trade because both small cross-border traders and large investing corporations lack

⁵⁶⁶ See paragraph 3.3 above.

confidence in the system.⁵⁶⁷ Further, although Zimbabwe's regulation of trade through various legal instruments is aligned with international and regional legal instruments discussed in 3.3 and 3.4 above, the increasing restrictions can be seen as regressing from trade liberalisation towards protectionism, which ultimately undermines the objectives of the WTO.

The next chapter explores trade regulations in the agricultural sector. It takes the position that agriculture facilitates food security and is traditionally a mainstay for Zimbabwean exports such as tobacco, cotton and maize. Chapter 4 explores agricultural market access. This chapter looks at trade from the position of exporting goods from Zimbabwe to facilitate improved trade balance through an export-oriented, inclusive development strategy.



⁵⁶⁷ See paragraph 2.2.1.2 above.

CHAPTER 4

TRADE IN AGRICULTURE:

FROM PRIMARY GOODS TO VALUE ADDED GOODS

‘I could go into the whole [theory] of discrimination in legislation, in residency, in economic opportunities, in education, I could go into that, but I will restrict myself to the question of land because I think this is very basic. To us the essence of exploitation, the essence of white domination, is domination over land. That is the real issue.’⁵⁶⁸

4 INTRODUCTION

The previous chapter discussed international trade agreements and paid particular attention to selected non-tariff barriers (NTBs) and trade defence mechanisms (TDMs). Chapter 4 first places agricultural trade in context, and then focuses on market access at the international, regional and domestic level. It is important to understand agriculture in the context of Zimbabwe to fully appreciate its relevance and importance in the development discourse. Agriculture is selected particularly because of its centrality as provider of employment, export earnings, and food security. The following section begins by explaining agricultural trade in the context of Zimbabwe’s development discourse.

4.1 PLACING AGRICULTURAL TRADE IN THE CONTEXT OF ZIMBABWE’S DEVELOPMENT DISCOURSE

Although other factors such as industrialisation, information and communication technologies (ICTs), and services are important, agriculture is particularly important in the development discourse of Zimbabwe. Zimbabwe is a primary economy which exports mostly primary

⁵⁶⁸ Chitepo H Speech Australia, 1973 as cited in Zimbabwe Embassy ‘Land Reform in Zimbabwe’ available on www.zimembassy.se/documents/Land.pdf (accessed 30 April 2015).

commodities, particularly agricultural products such as tobacco, cotton and sugar.⁵⁶⁹ The paragraph below examines the land issue insofar as land is a key factor of production and agriculture a priority sector for economic growth and poverty alleviation.

4.1.1 Priority Sectors

The Zimbabwe Industrial Policy identifies four priority sectors, crucial for economic development in Zimbabwe.⁵⁷⁰ These are agribusiness, fertiliser and chemicals, pharmaceuticals, and metals and electricals.⁵⁷¹ Each of the priority sectors is sub-divided into four sub-sectors. Agribusiness has four sub-sectors, namely food and beverages, clothing and textiles, leather and footwear, and wood and timber.

A plain-language interpretation of ‘priority’ indicates one thing that is seen as more important than others. Having 16 priorities may render the system inefficient because prioritising, in essence, requires that most resources be directed to the priority sector, including financing, training, capacity-building, time and manpower. Prioritising one sector in which Zimbabwe has a comparative advantage may enable the government to more effectively plan its trade policy and allocate resources efficiently.⁵⁷²



It is argued that Zimbabwe should focus on and indeed prioritise agriculture, a single sector and establish it as a mainstay that will provide a ‘big push’ for developing other sectors.⁵⁷³ Agriculture is traditionally seen as a precursor to large scale industrialisation, and can facilitate the big push for manufacturing in Zimbabwe through agro-processing. Agro-processing refers to various

⁵⁶⁹ Aspiration 6 *African Union Agenda 2063: The Africa We Want* 2ed (2014) Preamble United Nations Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1; Food and Agriculture Organisation of the United Nations (UN-FAO) ‘Zimbabwe’ available on <http://www.fao.org/docrep/005/y4632e/y4632e0y.htm> (accessed 16 August 2016).

⁵⁷⁰ Government of Zimbabwe ‘National Industrial Policy 2012-2018’.

⁵⁷¹ Government of Zimbabwe ‘National Industrial Policy 2012-2018’; Government of Zimbabwe ‘ZimAsset’ (2013).

⁵⁷² GRMI Capital ‘Comparative advantage key’ *The Herald* 08 November 2013 available on <http://www.herald.co.zw/comparative-advantage-key/> (accessed 29 July 2016).

⁵⁷³ See paragraph 2.5.1 above.

manufacturing processes that transform primary agricultural goods into secondary goods such as processed foods, fabrics and textiles.⁵⁷⁴

4.1.2 The Land Issue in relation to Agriculture

Although this thesis is generally limited to the post-World War II period, for this part of the work it is important to explore the historical development of rights to land ownership in Zimbabwe. Land rights relate directly to the ownership of productive resources, which directly influences production capacity and income.⁵⁷⁵ Land is a factor of production that influences the increase or decline in the wealth of nations,⁵⁷⁶ and has been one of the most contentious issues affecting the political, economic and social conditions of Zimbabwe especially in recent years. The Food and Agriculture Organisation of the United Nations (UN-FAO) notes that '[f]or centuries, land ownership has been at the centre of all struggles, revolutions, power and control of the country in both political and economic terms.'⁵⁷⁷

To properly examine the land issue, it is critical to look at the legal developments around tenure of land, from laws legitimising racial segregation and unequal land distribution due to colonialism, leading up to and including the land redistribution programme implemented from 2000 to 2001 in Zimbabwe, to current government policy on the use of land, particularly in agriculture.

A brief look at history shows that indeed the land issue continues to be at the centre of Zimbabwe's political and economic struggles, from the signing of the Rudd Concession to the Land Redistribution Programme of 2000-2001.⁵⁷⁸ Between 1896 and 1897, indigenous Zimbabweans

⁵⁷⁴ Government of South Africa Department of Agriculture, Forestry and Fisheries (DAFF) 'Agro-processing support' available on <http://www.daff.gov.za/daffweb3/Branches/Economic-Development-Trade-Marketing/Agro-processing-support> (accessed 16 August 2016).

⁵⁷⁵ Smith A *An Enquiry into the Nature and Causes of the Wealth of Nations* Cannan E ed (1904) Library of economics and Liberty available on <http://www.econlib.org/library/Smith/smWN5.html> (accessed 29 April 2015).

⁵⁷⁶ Smith A *An Enquiry into the Nature and Causes of the Wealth of Nations* Cannan E ed (1904) Library of economics and Liberty available on <http://www.econlib.org/library/Smith/smWN5.html> (accessed 29 April 2015).

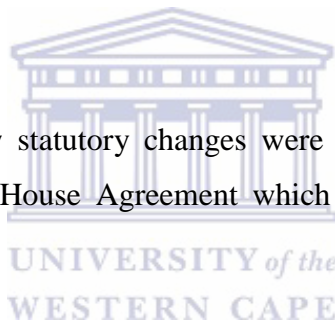
⁵⁷⁷ Food and Agriculture Organisation of the United Nations (FAO) 'Corporate Document Repository: Zimbabwe' 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁵⁷⁸ The Rudd Concession was concluded in 1888, when the Ndebele King, Lobengula, was tricked by John Rudd into signing an agreement based on a false interpretation of the document; The Rudd Concession, 1888 Zimbabwe; The Rudd Concession entitled European settlers to farm and mine in parts of the country, but soon they took over

fought back against forced removals and rule of the white settlers in the 1st *Chimurenga/Imfazwe* (1st Liberation War). In 1898, Britain enacted the Southern Rhodesia Order in Council which codified racial segregation and the establishment of more 'Native Reserves'. Further legislative reforms in 1908 led to the dispossession of land from indigenous Zimbabweans.⁵⁷⁹

The Morris Carter Land Commission of 1925 under the Responsible Government of Rhodesia conducted an enquiry into segregation, the findings of which resulted in legal reform in terms of the Land Apportionment Act, 1930, which allowed indigenous Zimbabweans to buy land in designated native purchase areas.⁵⁸⁰ The objectives of the Land Apportionment Act were supported by the enactment of the Native Husbandry Act of 1951.⁵⁸¹ Continued racial segregation and mistreatment of indigenous Zimbabweans led to the 2nd *Chimurenga/Imfazwe* (2nd Liberation War) and culminated in the Lancaster House Agreement in 1979 and Zimbabwean independence on 18th April 1980.⁵⁸²

After attaining independence, few statutory changes were made pertaining to land tenure in Zimbabwe, due to the Lancaster House Agreement which prohibited the amendment of any



more land. European settlers invaded the Ndebele Kingdom in 1893 and won the war which ensued between the Ndebele Kingdom and the white settlers. This resulted in the creation of the Gwaai and Shangani Reserves in the South of Zimbabwe which empowered the European settlers to forcibly remove the Ndebele from their native lands into demarcated reserves under the Matebeleland Order in Council, 1894; The Statute Law of Southern Rhodesia (From the Charter to December 31st 1898), pp 21-31: The Matebeleland Order in Council, 1894, Part IV Land Commission, and Report of Land Commission, under Mr Justice Vincent, dated 29 October 1894 as cited in Walker *The Cambridge History of the British Empire* (1963) Vol. 2.

⁵⁷⁹ Palmer R *Land and Racial Discrimination in Rhodesia* (1977); by 1914, 23 730 white settlers owned 19 032 320 acres of land in Zimbabwe, while 752 000 blacks occupied 21 390 080 acres, a huge disparity.

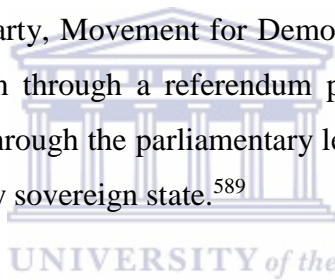
⁵⁸⁰ Under this statute, land ownership was divided such that 51 per cent of the total land area was owned by white settlers, while natives owned 22 per cent, and unassigned land comprised 18.5 per cent, native purchase area 7.8 per cent, forest area was 0.6 per cent, and undetermined area was 0.1 per cent. The removal of blacks from large scale farming in fertile lands to Native Reserves led to subsistence farming in infertile lands; Zimbabwe Embassy 'Land Reform in Zimbabwe' available on www.zimembassy.se/documents/Land.pdf (accessed 30 April 2015); In 1955, a further 100 000 blacks were forcibly removed through wholesale evictions, and were placed in Native Reserves. The Land Apportionment Act of 1930 was repealed by the Land Tenure Act which provided for blacks and whites to hold fifty per cent of the land each.

⁵⁸¹ This was enacted to address some of the challenges caused by the overcrowding of blacks such as overgrazing and poor crop production.

⁵⁸² In 1977, agreement was almost reached for the independence of Zimbabwe, save for the contentious land issue. The UK and USA made a concession to financially support the redistribution of land to black Zimbabweans.

legislation pertaining to farm lands for the first ten years of independence.⁵⁸³ Furthermore, Article V provided that sale of farming land was restricted to a willing buyer, willing seller clause, and required immediate compensation.⁵⁸⁴ In practice, land was expensive and *ad hoc* sales made it difficult for the government to implement any meaningful resettlement.⁵⁸⁵ Later, the Constitution was amended to reflect an agreement that had been made for co-financing of land redistribution by donor agencies.⁵⁸⁶ Compensation was to be paid in foreign currency, but donor support was minimal, and the government failed to match the funding of the United Kingdom, making land purchases by the government expensive and often beyond reach.⁵⁸⁷

The land issue continued to be unresolved until 2000-2001, when unofficial land redistribution started, through forced evictions, initiated by disgruntled war veterans, who had not received the land for which they had fought, and it was propelled by the political motive to undermine the establishment of a new political party, Movement for Democratic Change (MDC).⁵⁸⁸ An initial attempt to amend the Constitution through a referendum proved unsuccessful, and the Land Acquisition Act was later passed through the parliamentary legislative process, since at that time Zimbabwe was still a parliamentary sovereign state.⁵⁸⁹



While land reform in itself was not necessarily a bad policy, the manner in which it was implemented has had significant negative impacts for Zimbabwe.⁵⁹⁰ Farm-workers and farm-owners were displaced, in some instances violently.⁵⁹¹ Furthermore, land redistribution was met

⁵⁸³ FAO 'Corporate Document Repository: Zimbabwe' 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁵⁸⁴ Lancaster House Agreement, 21 December 1979 London (Southern Rhodesia Constitutional Conference Held at Lancaster House, London, September-December 1979 Report).

⁵⁸⁵ FAO 'Corporate Document Repository: Zimbabwe' 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁵⁸⁶ FAO 'Corporate Document Repository: Zimbabwe' 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁵⁸⁷ FAO 'Corporate Document Repository: Zimbabwe' 3 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁵⁸⁸ Labour and Economic Development Research Institute of Zimbabwe (LEDRIZ) *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁵⁸⁹ Land Acquisition Act Chapter 20:10; LEDRIZ *Pro-Poor And Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

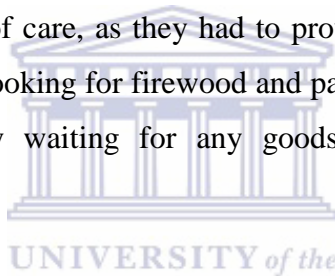
⁵⁹⁰ LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁵⁹¹ LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 44.

with disapproval by the international community because of allegations that the government had sanctioned human rights violations and disregarded the rule of law by systematically legitimising the dispossession of property.⁵⁹²

Economic sanctions on Zimbabwe resulted in reduced trade and foreign currency earnings that contributed to shortages of basic commodities, electricity and fuel.⁵⁹³ This contributed to the weakening of the Zimbabwe dollar against other currencies because the Zimbabwe dollar was no longer convertible.⁵⁹⁴ A negative trade balance meant that the government had reduced spending capacity for the provision of essential services such as education and health care.⁵⁹⁵

Cortright and Lopez acknowledge that sanctions tend to have unintended negative consequences on vulnerable groups such as women and children.⁵⁹⁶ Women were disproportionately affected and experienced an increased burden of care, as they had to provide support to families such as by caring for sick relatives at home, looking for firewood and paraffin for cooking and lighting, and standing in long queues all day waiting for any goods that would be available in the supermarkets.⁵⁹⁷



The land reform also marked the beginning of Zimbabwe's economic downturn as agricultural production fell. Cotton production fell from 353 000 metric tonnes (mt) in 2000 to 247 000mt in

⁵⁹² See paragraph 5.3.

⁵⁹³ Noko J 'Dollarisation: The case of Zimbabwe' (Spring/ Summer 2011) 31 (2) *Cato Journal* 339 365; also see generally Reserve Bank of Zimbabwe (RBZ) 'Sanctions' available on http://www.rbz.co.zw/assets/im_san.pdf (accessed 16 August 2016); Kairiza T 'Unbundling Zimbabwe's journey to hyperinflation and official dollarisation' (2012) Discussion Paper: 09-12 *GRIPS Policy Information Center* 8.

⁵⁹⁴ See paragraph 6.8.2 below.

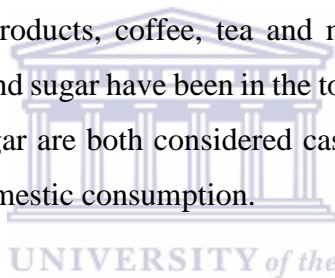
⁵⁹⁵ Kairiza T 'Unbundling Zimbabwe's journey to hyperinflation and official dollarisation' (2012) Discussion Paper: 09-12 *GRIPS Policy Information Center* 8.

⁵⁹⁶ Cortright D and Lopez GR 'Learning from the sanctions decade' (2000) *Global Policy Forum* available on <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/sanctions/49076.html> (accessed 29 July 2016); Paul JA and Akhtar S 'Sanctions: An analysis' (August 1998) *Global Policy Forum* available on <https://www.globalpolicy.org/component/content/article/202/41612.html?itemid=934> (accessed 29 July 2016).

⁵⁹⁷ The impacts of these economic sanctions on women as unpaid caregivers are not well documented.

2008 and tobacco sales dropped in 2000 from 236 000mt to about 64 000mt by 2008.⁵⁹⁸ Some reasons given for the low agricultural production since the land reform are that new farmers lacked resources such as plant and machinery, agricultural inputs, and capabilities such as technical skills.⁵⁹⁹ Zimbabwe traditionally had a dual agricultural sector dominated by few white-owned commercial farms with established supply chains, supplemented by numerous small scale unsophisticated subsistence farms.⁶⁰⁰ Currently, there are several large commercial farms distributed under the A2 scheme, small-holder farms under the A1 scheme and rural subsistence farming. There is also currently a marked increase in urban subsistence farming.⁶⁰¹

In previous years, commercial farming occupied highly fertile land and focused production on cash crops such as tobacco, which constituted about 60 per cent of total agricultural production, cotton lint (10 per cent) and raw sugar (9 per cent). In years not affected by droughts, other important cash crops such as horticultural products, coffee, tea and maize were produced for export.⁶⁰² However, in recent years tobacco and sugar have been in the top five exports, but maize and cotton have fallen back. Tobacco and sugar are both considered cash crops because they are produced primarily for export and not for domestic consumption.



Moreover, in recent years, agricultural production has been stunted owing to poorly implemented policy decisions and the land redistribution programme.⁶⁰³ Contract farming has also become more popular over the years especially in chicken farms under the auspices of Irvines Ltd and Lunar Chickens Ltd. There is also increased contract farming in tobacco, sugar cane, and tea, inter alia.⁶⁰⁴

⁵⁹⁸ FAO and WFP 2009 *Special Report: FAO/WFP Crop and Food Security Assessment Mission to Zimbabwe* (22 June 2009) available on <http://www.fao.org/docrep/011/ai483e00.htm> (accessed 21 September 2016); LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 46.

⁵⁹⁹ Sithole J 'New farmers fail to deliver' available on <https://iwpr.net/global-voices/new-farmers-fail-deliver> (accessed 16 August 2016); African Development Bank (AfDB) and Organisation for Economic Cooperation (OECD) *African Economic Outlook: Zimbabwe* (2003) 356.

⁶⁰⁰ Munangagwa CL 'The Economic Decline of Zimbabwe' (2009) 3 (9) *Gettysburg Economic Review* 110-115; LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁶⁰¹ LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁶⁰² LEDRIZ *Pro-Poor and Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁶⁰³ Sithole J 'New farmers fail to deliver' available on <https://iwpr.net/global-voices/new-farmers-fail-deliver> (accessed 16 August 2016); LEDRIZ *Pro-Poor And Inclusive Development in Zimbabwe: Beyond the Enclave* (2012) 43.

⁶⁰⁴ Mutenga T 'Contract farming: Zim's necessary evil' *The Financial Gazette* 29 July 2016 available on <http://www.financialgazette.co.zw/contract-farming-zims-necessary-evil/> (accessed 29 July 2016).

As can be seen from the above discussion, agriculture carries particular economic significance. This is explored in paragraph 4.1.2 below.

4.1.3 Economic Significance of Agriculture

Traditionally, agriculture contributed 15-19 per cent of annual GDP and provided employment and income for about 60-70 per cent of the population, as well as 60 per cent of the raw materials for industry.⁶⁰⁵ As at 2012, agriculture accounted for 15-18 per cent of GDP and contributed over 40 per cent of national export earnings; it supported the livelihood of about 70 per cent of the population,⁶⁰⁶ and continues to provide 60 per cent of raw materials to industry.⁶⁰⁷

Social inclusion in agricultural production and trade is integral for Zimbabwe's economic development because small-holders and communal farmers occupy about 21 million hectares of land out of 33 million hectares available for agricultural purposes.⁶⁰⁸ Investing in the rural economy and integrating rural producers into the international trade arena has the potential to increase export earnings, and also to reduce the incidence of hunger, malnutrition and poverty.⁶⁰⁹ Small-holder farmers tend to produce agricultural goods such as maize, which is the staple food of Zimbabwe, and 'groundnuts, other grains, beans, vegetables, meat, milk and fuelwood' for consumption.⁶¹⁰

⁶⁰⁵ FAO 'Corporate Document Repository: Zimbabwe' 1 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁶⁰⁶ Diao X, Hazell D, Thurlow J 'The Role of Agriculture in Development: Implications for Sub-Saharan Africa' (2007) 11; See generally Anseeuw W, Kapuya T & Saruchera D 'Zimbabwe's agricultural reconstruction: Present state, ongoing projects and prospects for reinvestment' (2012) Working Paper Series No. 32 *Development Bank of Southern Africa in collaboration with L'agence Francaise de Developpement Development Planning Division*.

⁶⁰⁷ GoZ 'Comprehensive Agricultural Policy Framework (2012-2032) Executive Summary' (April 2012) 1.

⁶⁰⁸ Total land area is 39 million hectares; FAO 'Corporate Document Repository: Zimbabwe' 1 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁶⁰⁹ FAO 'Corporate Document Repository: Zimbabwe' 1 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁶¹⁰ FAO 'Corporate Document Repository: Zimbabwe' 1 available on <http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

According to a report of UN-FAO, agriculture is so important to the Zimbabwean economy that when the agricultural sector suffers, the rest of the economy suffers.⁶¹¹ The African Union Declaration on Agriculture and Food Security in Africa (Maputo Declaration) requires African States to ‘implement as a matter of urgency, the Comprehensive Africa Agriculture Development Programme (CAADP) and flagship projects and evolving Action Plans for agricultural development, at the national, regional and continental levels ... [and to allocate] 10% of national budgetary resources for their implementation within five years’.⁶¹² Zimbabwe has an established institutional framework in the agricultural sector with key stake-holders such as the Zimbabwe Commercial Farmers’ Union and the Commercial Farmers’ Union, inter alia.⁶¹³

The agricultural sector creates decent work in accordance with the International Labour Organisation Decent Work in Agriculture programme.⁶¹⁴ In Zimbabwe, minimum wages in the agricultural sector are reached by way of collective bargaining in accordance with the provisions of the Labour Act, and at present are set by employment grade.⁶¹⁵ The Collective Bargaining Agreement Statutory Instrument 21 of 2015 sets the lowest grade A1 at a minimum monthly wage of US\$72, and the highest grade C2 is set at US\$144, reflecting an increase of 10.77 per cent effective from 1 August 2014.⁶¹⁶ Wages enable workers to pay for essential services such as education, water, and health care. Wages are important in the context of Zimbabwe, which used to

⁶¹¹ FAO ‘Corporate Document Repository: Zimbabwe’ 1 available on

<http://www.fao.org/docrep/005/y4632/y4632e0y.htm> (accessed 20 January 2016).

⁶¹² Article 2 *Maputo Declaration, African Union Declarations* Assembly/AU/Decl.4-11 (II) (10-12 July 2003, Maputo, Mozambique; Orlet C ‘From Breadbasket to Dustbowl’ available on spectator.org/articles/48721/breadbasket-dustbowl (accessed 29 April 2015).

⁶¹³ Zimbabwe Tobacco Association, Zimbabwe Agricultural Employers Organisation, the General Agriculture and Plantation Workers’ Union, and the Horticulture, General Agriculture and Plantation Workers’ Union of Zimbabwe.

⁶¹⁴ Read further in *ILO Decent Work in Agriculture: Background Paper* International Workers’ Symposium on Decent Work in Agriculture, Geneva, 15-18 September 2003 Ref: IWSDWA/2003 available on http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_161567.pdf (accessed 20 September 2016); ILO *The Decent Work Agenda in Africa 2007-2015 Eleventh African Regional Meeting Addis Ababa, April 2007 Report of the Director General* (2007) ILO: Switzerland.

⁶¹⁵ Chapter 28:01.

⁶¹⁶ Schedule of the National Employment Council for the Agricultural Industry of Zimbabwe: Collective Bargaining Agreement: Agricultural Industry Statutory Instrument 21 of 2015 amending the General Agriculture Wages Effective 1st August 2014 Statutory Instrument 116 of 2014; Section 65 Constitution of the Republic of Zimbabwe 20th Amendment, (2013).

have forced labour and unfair wages under colonial rule.⁶¹⁷ Furthermore, agricultural trade is important because Zimbabwe has a comparative advantage in it.

4.1.4 Comparative Advantage

A comparative advantage will secure better revenue from goods and result in more efficient production. Comparative advantage is one of the main reasons for trade and is defined as

[t]he ability of a country to produce a specific good at a lower opportunity cost than its trading partners ... [where opportunity cost is] the most desired goods or services that are forgone in order to obtain something else.⁶¹⁸

It is argued that based on historical trade statistics, acumen, experience, and generally fair weather patterns, Zimbabwe has greatest potential for comparative advantage in producing and specialising in agriculture.⁶¹⁹ Key agricultural exports for Zimbabwe include tobacco, cotton, horticulture, raw sugar, beef, maize, groundnuts, soya beans, and animal feed, particularly cotton cake, and molasses.⁶²⁰ Some of the key agricultural exports are foodstuffs such as beef, and maize and could ease ongoing challenges of food insecurity in Zimbabwe.

4.1.5 Food Security

Human Rights Watch noted that half of the Zimbabwean population, comprising approximately 7 million people, were food-insecure as at 2003, meaning that they lived 'in a household that was unable to obtain enough food to meet basic needs'. This resulted from various factors, including:

⁶¹⁷ Section 65 Constitution of the Republic of Zimbabwe (20th Amendment) 2013.

⁶¹⁸ Schiller BR *The Economy Today* 7 ed (1997) 776; Blecher E et al. *Economics* (2009) 254-5.

⁶¹⁹ Maiyaki AA 'Zimbabwe's agricultural industry' 2010) 4 (19) *African Journal of Business Management*: 4159-4160.

⁶²⁰ Clause 3.3 Zimbabwe National Trade Policy (NTP) (2012-2016).

[a] three-year drought, international sanctions and the withdrawal of international non-humanitarian support, the government's mismanagement of the economy, and the fast-track land reform program [which] all worked together to cause the current food emergency.⁶²¹

Food insecurity is projected to increase from 15 per cent in 2015 to 30 per cent (2.8 million people) in 2016, according to the Zimbabwe Vulnerability Assessment Report.⁶²² Agricultural production is at the heart of the right to food and was stressed in SDG goals one and two to reduce poverty and hunger.⁶²³ The SADC Declaration on Agriculture confirms that 'agriculture is the backbone of the economy of the SADC region and that about 80% of the people in the region depend on agriculture for food, income and employment'.⁶²⁴ Agricultural trade is such a wide area, that there is a need to focus on only those areas in which Zimbabwe has a comparative advantage, and also to add value to goods set for export through processing, so as to increase export earnings, and in extension reduce the current trade deficit.

4.1.6 Industrialisation and the Need for Value Addition and Strategic Linkages

Value chain management is essential for transforming primary goods into manufactured goods for export in order to reduce risks associated with primary commodities.⁶²⁵ The government must improve its institutions, raise skills, introduce and maintain policies and laws that encourage innovation and FDI in order to increase human capabilities and specialisation, and to facilitate gains from value chains, and increased valued-added exports.⁶²⁶

⁶²¹ These are statistics as at 2003. Human Rights Watch 'The politicisation of food in Zimbabwe' *Human Rights Watch* 24 October 2003 available on <https://www.hrw.org/report/2003/10/24/not-eligible/politicization-food-zimbabwe> (accessed 12 September 2016).

⁶²² Zimbabwe Vulnerability Assessment Committee *Rural Livelihoods Assessment* (2016) 10.

⁶²³ United Nations Development Programme (UNDP) 'Goal 2: Zero hunger' available on www.undp.org/content/undp/en/home/sdgooverview/post-2015-development-agenda/goal-2.html (accessed 17 May 2016); UNDP 'Goal 1: No poverty' available on www.undp.org/content/undp/en/home/sdgooverview/post-2015-development-agenda-1.html (accessed 17 May 2016).

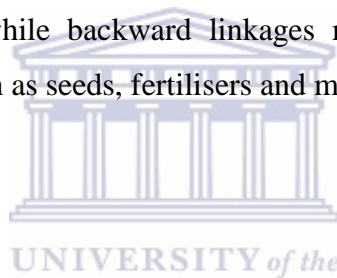
⁶²⁴ SADC *Declaration on Agriculture and Food Security in the SADC Region*, 2004, Dar-es-Salaam.

⁶²⁵ See generally WTO 'Supply chain perspectives' 36 available on https://www.wto.org/english/res_e/booksp_e/aid4tradesupplychain13_part1_e.pdf (accessed 18 September 2016);

⁶²⁶ OECD, WTO OMC and the World Bank 'Global value chains: challenges, opportunities, and implications for policy' Report prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014, 35-42.

Agro-processing would create important and strategic forward linkages from the agricultural sector into the manufacturing sector.⁶²⁷ Diao et al. argue that in order to attain economic development, it is important to develop both the agricultural sector and a non-agricultural sector to complement or support the agricultural sector, and vice versa.⁶²⁸ The argument is based on the economic reasoning that agriculture tends to have diminishing returns over time, but, on the other hand, ensures food security, which is essential for the survival of industry. Agricultural growth has substantial benefits for the poor and in fact ‘favours’ the poor.⁶²⁹

Agriculture also needs to be supported by technological advancements to overcome endowment constraints such as limitations of both land and labour factors.⁶³⁰ Hirschman notes the importance of creating and managing linkages between the agricultural sector and non-agricultural sector.⁶³¹ Strategic linkages may include forward production linkages by way of agro-processing and marketing of processed foods, while backward linkages may be established by facilitating agricultural supply side inputs such as seeds, fertilisers and machinery.⁶³²



⁶²⁷ See generally World Bank ‘Using value chain approaches in agribusiness and agriculture in sub-Saharan Africa’ available on <http://www.technoserve.org/files/downloads/vcguidenov12-2007.pdf> (accessed 18 September 2016); See generally Anseeuw W, Kapuya T and Saruchera D *Zimbabwe’s Agricultural Reconstruction: Present State, Ongoing Projects And Prospects for Reinvestment* (2012); Webber C and Labaste P *Building Competitiveness in Africa’s Agriculture A Guide To Value Chain Concepts and Applications* (2010).

⁶²⁸ Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 3.

⁶²⁹ UN Thematic Group on Sustainable Agriculture and Food Systems of the Sustainable Development Solutions Network *Solutions for Sustainable Agriculture and Food Systems: Technical Report for the post-2015 Development Agenda* (2013) 7 available on <http://unsdsn.org/wp-content/uploads/2014/02/130919-TG07-Agriculture-Report-WEB.pdf> (accessed 25 November 2016); Diao X ‘Economic importance of agriculture for sustainable development and poverty reduction: findings from a case study of Ghana’ Global Forum on Agriculture 29-30 November 2010 Policies for Agricultural Development, Poverty Reduction and Food Security OECD Headquarters, Paris (2010) 35; Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 11.

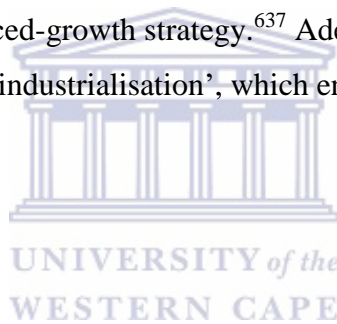
⁶³⁰ This is also part of the ‘induced innovation model’ Hayami & Ruttan (1985) as cited in Diao et al. ‘Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 5.

⁶³¹ Hirschman AO *The Strategy of Economic Development* (1958) 217 New Haven: Yale University Press; Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 3.

⁶³² Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007).

Technological advancement also boosts agricultural growth and is endogenous to the economy.⁶³³ The introduction of communal ICT facilities and networks for agricultural markets within rural areas in Kenya, Tanzania and India are examples.⁶³⁴ Moreover, Zimbabwe needs to tap into water management and renewable energy systems to support agricultural production.⁶³⁵

Agricultural growth is not without challenges. These include arguments that agricultural growth can be bypassed by importing cheap foodstuffs while exporting other natural resources, and that the focus should be on large-scale farms as opposed to small-scale rural households in order to achieve significant returns.⁶³⁶ However, in the context of Zimbabwe, it is submitted that small-holder farming is integral to economic development because small-holders occupy 63 per cent of arable land and consequently cannot be overlooked. Moreover, agricultural trade is essential to agrarian economies as it provides an opportunity for equitable growth (also called pro-poor growth) of the economy, the balanced-growth strategy.⁶³⁷ Adelman developed this theory to what he terms ‘agricultural-demand-led-industrialisation’, which entails the following:



⁶³³ UN Thematic Group on Sustainable Agriculture and Food Systems of the Sustainable Development Solutions Network *Solutions for Sustainable Agriculture and Food Systems: Technical Report for the post-2015 Development Agenda* (2013) 7 available on <http://unsdsn.org/wp-content/uploads/2014/02/130919-TG07-Agriculture-Report-WEB.pdf> (accessed 25 November 2016); Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 7.

⁶³⁴ See generally, Rao SS ‘The Role of ICTs in India’ (2009) 5 (1) *The Journal of Community Informatics*; *The World Bank ICT in Agriculture* (2011) 15; Asenso-Okyere K and Mekonnen DA ‘The Importance of ICTs in the Provision of Information for Improving Agricultural Productivity and Rural Incomes in Africa’ (2012) *UNDP Working Paper WP 2012-015* available on [http://www.zef.de/module/register/media/ece1 ICT%20Productivity%20\(1\).pdf](http://www.zef.de/module/register/media/ece1 ICT%20Productivity%20(1).pdf) (accessed 16 August 2016); Waema TM Ndung’u MN ‘Understanding what is happening in ICT in Kenya: A supply- and demand-side analysis of the ICT sector’ Evidence for ICT Policy Action Policy Paper Research ICT Africa.Net available on <http://www.researchictafrica.net/publications/Evidence for ICT Policy Action/Policy Paper 9 - Understanding what is happening in ICT in Kenya.pdf> (accessed 16 August 2016).

⁶³⁵ Read further UN-Women ‘Circles of life: Community groups in Zimbabwe turn early warnings into early action’ available on <http://www.unwomen.org/en/news/stories/2012/5/circles-of-life-community-groups-in-zimbabwe-turn-early-warnings-into-early-action#sthash.gZmHJeKP.dpuf> (accessed 18 September 2016); Catley-Carlson M ‘More crop per drop’ (2006) *UNEP* 8-9.

⁶³⁶ FAO *Price volatility from a global perspective: Technical background document for the high-level event on: Food price volatility and the role of speculation* 6 July 2012, Rome 1-7.

⁶³⁷ See paragraph 2.5.2.

[i]ncreasing agricultural productivity expands internal demand for intermediate and consumer goods produced by domestic industries and, in turn, helps support the drive toward industrialisation.⁶³⁸

A further challenge to agricultural trade is that international market prices are volatile. There is a need for Zimbabwe to prioritise value addition through agro-processing, and to focus on high value goods as a means of improving the balance of payments and reducing risks typically associated with the volatility of commodity prices.⁶³⁹ Furthermore, security of tenure under the redistributed farms is not yet clearly regulated and this increases transaction costs, and reduces access to lines of credit, as there is not viable collateral. Zhou and Zvoushe note with regards to the importance of security of tenure, further elucidated in 5.3 and 5.5.1 that:

‘For instance, the property rights protection by creating the formal transferable title system reduced transaction cost to constantly test the title of the transferor and removed obstacles to rapid transaction, increased certainty of the property and facilitated the mortgage system, provided the financial transactions with calculability and attracted investments, and thus fostered economic development (Mehren and Sawers 1992).’⁶⁴⁰

The following paragraph discusses international regulation of trade in agriculture, focusing on the WTO.

4.2 INTERNATIONAL REGULATION OF AGRICULTURAL TRADE UNDER THE WORLD TRADE ORGANISATION (WTO)

This paragraph analyses market access for goods being exported from Zimbabwe, not imports into Zimbabwe. This is because Zimbabwe has made it clear – through the Zimbabwe Agenda for Social and Economic Transformation (ZimAsset) economic blueprint and the National Trade

⁶³⁸ Diao X, Hazell D, Thurlow J ‘The Role of Agriculture in Development: Implications for Sub-Saharan Africa’ (2007) 8.

⁶³⁹ Anderson DP and Hanselka D ‘Risk management: Adding value to agricultural products’ available on <http://agecoext.tamu.edu/files/2013/10/rm1-8.pdf> (accessed 18 September 2016).

⁶⁴⁰

Policy –it is currently pursuing export-led development, similar to the strategy followed by the Four Asian Tigers during the Asian economic miracle.⁶⁴¹ Zimbabwe intends to increase opportunities for economic development by exporting more value-added goods. Therefore, it is important to examine the regulatory framework for exporting agricultural goods at an international level.

Agricultural market access means ‘the terms and conditions under which agricultural products [can] be imported into WTO member countries’.⁶⁴² In other words, market access is a measure of how easy or difficult it is to export goods into the market of another country. Earlier studies and documentation of the WTO focus primarily on the WTO regulatory framework, which deals with tariffs and quotas, whereas more recent studies consider a wider spectrum of indicators. For example, Hugo et al. measure openness of markets based on trade intensity, meaning the ratio of exports or imports to gross domestic product (GDP), while others measure openness as income growth.⁶⁴³ The World Bank refers to the ease of doing business, while some authors, such as Hugo et al., argue in favour of the creation of a Market Access Index (MAI Index) that takes into account factors such as trade policy, quality of public institutions and networks.⁶⁴⁴ The Global Competitiveness Report (GCI) 2015-2016, takes into account some of the factors under MAI Index, but is wider reaching.⁶⁴⁵ Zimbabwe ranks 124th, with an index of 3.45,⁶⁴⁶ whereas South Africa ranks 56th, with an index of 4.39 on the GCI.⁶⁴⁷ Increasing market access is one of the

⁶⁴¹ See paragraph 1.4.2.1 above.

⁶⁴² Desta MG ‘Legal Issues in International Agricultural Trade’ (May 2006) *Legal Papers Online* 9; Bagwell K and Staiger RW ‘The WTO as a mechanism for securing market access- property rights: Implications for global labour and environmental issues’ (2001) 15 69 71.

⁶⁴³ Hugo S, Squalli J, and Wilson K ‘What Explains Market Access’ (May 2006) *Working Paper Series: Working Paper No. 06-08 Zayed University Economic and Policy Research Unit* 5.

⁶⁴⁴ See generally World Bank *Doing Business 2017: Equal Opportunity for All* (2016); Hugo S, Squalli J, and Wilson K ‘What Explains Market Access’ (May 2006) *Working Paper Series: Working Paper No. 06-08 Zayed University Economic and Policy Research Unit* 2.

⁶⁴⁵ GCI has 12 pillars, institutions, infrastructure, macro-economic environment, health and primary education; efficiency enhancers: higher education and training, goods market efficiency, labour market efficiency, financial market development, technological readiness, market size; and innovation and sophistication factors: business sophistication and innovation GCI Schaub K Ed *The Global Competitiveness Report 2015-2016: Full Data Edition* (2014) World Economic Forum: Switzerland.

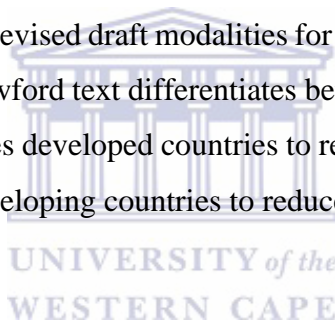
⁶⁴⁶ Schaub K Ed *The Global Competitiveness Report 2015-2016: Full Data Edition* (2014) 370.

⁶⁴⁷ Schaub K Ed *The Global Competitiveness Report 2015-2016: Full Data Edition* (2014) 326.

main objectives of the WTO in its agenda to liberalise trade. The following paragraph analyses the manner in which the WTO regulates agricultural trade.

4.2.1 Brief Developments in Agriculture Negotiations under the WTO

There are two main types of barriers to market access: tariff barriers or NTBs, as explained in Chapter 3.⁶⁴⁸ The Uruguay Round of negotiations resulted in the reduction of several tariffs and tried to eliminate NTBs by requesting WTO member states to convert all NTBs into equivalent tariffs through a process called tariffication.⁶⁴⁹ The process of tariffication was implemented individually by member states, but the process was not spared the risk of bias and abuse by member states. Zimbabwe was accused of dirty tariffication, which occurs when NTBs are converted to tariffs that are much higher than the original NTB.⁶⁵⁰ The reduction of tariffs in agricultural products has taken long to negotiate, and negotiations are still underway. As at December 2008, the Crawford Committee prepared revised draft modalities for agriculture which takes into account July 2008 negotiations.⁶⁵¹ The Crawford text differentiates between tariff reductions of developed and developing countries. It requires developed countries to reduce their bound tariffs in six equal instalments over five years and developing countries to reduce theirs in 11 equal instalments over 10 years.⁶⁵²



The Preamble to the WTO Agreement on Agriculture states its commitment to achieving definite binding commitments in three key areas – market access, domestic support, and export competition – as well as reaching an agreement on aspects of sanitary and phyto-sanitary (SPS) measures insofar as they hinder or facilitate market access.⁶⁵³ The remainder of this chapter limits itself to a discussion on market access.

⁶⁴⁸ See paragraph 3.3.

⁶⁴⁹ Desta MG 'Legal Issues in International Agricultural Trade' (May 2006) *Legal Papers Online* 9.

⁶⁵⁰ Desta MG 'Legal Issues in International Agricultural Trade' (May 2006) *Legal Papers Online* 9.

⁶⁵¹ WTO Revised Draft Modalities for Agriculture Committee on Agriculture Special Session TN/AGw/4/Rev.4 (06 December 2008).

⁶⁵² Articles 61 and 63 WTO Revised Draft Modalities for Agriculture Committee on Agriculture Special Session TN/AGw/4/Rev.4 (06 December 2008).

⁶⁵³ WTO Agreement on Agriculture, 15 April 1994.

4.2.2 Market Access

Market access in agricultural goods continues to be one of the most controversial issues in trade liberalisation.⁶⁵⁴ Agricultural tariffs negotiations were initially left out of GATT 1947 and were first included in WTO Agreements in the Uruguay Round of Negotiations 1994.⁶⁵⁵ The Uruguay Round established deadlines for the negotiation of tariffs in the following round of negotiations which would be held in Cancun.⁶⁵⁶ The Cancun Round was unsuccessful due to failure to agree on agricultural commitments. The USA, for example, continued to provide significantly high levels of agricultural export subsidies, and made reservations under Article XI (2) (c) of the Agreement on Agriculture.⁶⁵⁷

The USA and the European Union (EU) drafted a proposal framework for agricultural negotiations, but this proposal was rejected by the Group of 20 (G20), which made proposals in the interests of agricultural provisions that encouraged economic development in developing countries.⁶⁵⁸ The Harbinson Committee prepared a report on agriculture containing modalities such as tariff harmonisation recommendations, which was forwarded to the Doha Round of Negotiations.⁶⁵⁹ The G20 raised important developmental concerns including the role of agriculture in developing economies and the implication of tariff reductions in developing countries. The Harbinson Committee attempted to draft new modalities for tariff reductions towards elimination of tariffs, and these were presented at the Hong Kong Conference, which had some support, but not as much as was intended.⁶⁶⁰ These negotiations continued and are explained in the Crawford Committee report.⁶⁶¹

⁶⁵⁴ Brockmeier M and Pelikan J 'Agricultural market access: A moving target in the WTO negotiations' (March 2006) *IIS Discussion Paper No. 125*, 1.

⁶⁵⁵ Punta Del Este, Uruguay (Round began in 1986 and was finally closed in December 1993).

⁶⁵⁶ WTO Final Act Embodying the Results of The Uruguay Round Of Multilateral Trade Negotiations, 15 April 1994, Marrakesh, Morocco.

⁶⁵⁷ Desta MG 'Legal Issues in International Agricultural Trade' (May 2006) *Legal Papers Online* 9.

⁶⁵⁸ WTO 'The Uruguay Round' available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed 18 September 2016).

⁶⁵⁹ WTO Negotiations on Agriculture Report by the Chairman, Stuart Harbinson, to the TNC available on https://www.wto.org/english/tratop_e/agric_e/negoti_modtnc_july03_e.htm (accessed 18 September 2016).

⁶⁶⁰ See WTO 'Tariff reduction formulas' WTO Negotiations on Agriculture Report by the Chairman, Stuart Harbinson, to the TNC available on https://www.wto.org/english/tratop_e/agric_e/negoti_modtnc_july03_e.htm (accessed 18 September 2016).

⁶⁶¹ WTO Committee on Agriculture Special Session Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4 6 December 2008.

There continues to be controversy as interests of developed countries and developing countries are competing.⁶⁶² It may be a long time before consensus is reached because the consideration of developing country interests often means an encroachment into developed country interests, and as it stands the power dynamics of the international trading system are not balanced. This means that developed countries may use their *status quo* power to delay the conclusion of any changes to the WTO agreements.

Market access is dependent on various factors including tariff rate quotas (TRQs), special agricultural safeguards (SSGs), trade facilitation and sanitary and phytosanitary (SPS) measures. Each of the selected factors contributes to either the ease, or the difficulty of entry of goods into another jurisdiction, and thus limit market access. The four factors noted above, are each discussed below, starting with TRQs.

4.2.2.1 Tariff Rate Quotas

The aim of introducing TRQs was to encourage countries to make commitments regarding the minimum quantity (in-quota) of goods that would be allowed into the country on a reduced tariff level, such that the in-quota goods would attract a lower tariff than the out-of-quota goods.⁶⁶³ The Crawford text requires in-quota tariffs reductions to coincide with phasing out of quotas, and for developed countries, ‘all in-quota tariffs shall be reduced either by 50 per cent or to a threshold of 10 per cent, whichever results in the lower tariff’, whereas developing countries and small vulnerable economies are expected to reduce tariffs by 15 per cent and 7.5 per cent respectively.⁶⁶⁴

The Doha Round continues to negotiate TRQs and their administration which has caused some challenges over the years due to WTO members using different methods to administer their TRQs.⁶⁶⁵

⁶⁶² See WTO ‘Tariff reduction formulas’ WTO Negotiations on Agriculture Report by the Chairman, Stuart Harbinson, to the TNC available on https://www.wto.org/english/tratop_e/agric_e/negoti_modtnc_july03_e.htm (accessed 18 September 2016).

⁶⁶³ Desta MG ‘Legal Issues in International Agricultural Trade’ (May 2006) *Legal Papers Online* 15.

⁶⁶⁴ Articles 109 and 111 WTO Committee on Agriculture Special Session Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4 6 December 2008.

⁶⁶⁵ Desta MG ‘Legal Issues in International Agricultural Trade’ (May 2006) *Legal Papers Online* 16.

4.2.2.2 Special Agricultural Safeguard (SSG)

The WTO negotiations lean towards establishing a special agricultural safeguard (SSG) that enables member states which tariffed to impose safeguard duties provided they had indicated the SSG in their schedule of commitment in terms of Article 5 Agreement on Agriculture.⁶⁶⁶ They would consequently not have to prove injury as would ordinarily be required under normal safeguard measures discussed in Chapter 3.⁶⁶⁷ The Crawford text requires developed countries to reduce SSGs to 1 percent of tariff lines on the first day of implementation, and to eliminate all SSGs by the end of the seventh year, whereas developing countries are expected to reduce their SSGs to 2.5 percent on the first day of implementation, and to reduce to no more than five per cent of tariff lines by the end of the twelfth year.⁶⁶⁸ Moreover, developing countries are permitted to reserve 12 per cent of tariff lines as special products ‘based on criteria for food security, livelihood security and rural development’. Article 132 of the Crawford text allows for Special Safeguard Mechanisms for all products.⁶⁶⁹

Although Zimbabwe has not listed any reservations in its schedules,⁶⁷⁰ it is already evident that if the Zimbabwean economy continues in its current state, and if the line of reasoning used to implement import licencing requirements under the current trade regulations remains,⁶⁷¹ and considering that the bulk of the listed goods, apart from arms, comprises agricultural goods⁶⁷² then Zimbabwe is likely to designate several products. Already, Zimbabwe has reserved several tariff lines under SADC Treaty as special products in line with current agricultural trade policy, which currently leans towards protectionism.⁶⁷³ Over and above TRQs and SSGs, there are numerous factors that delay or interrupt trade flows. These are discussed below.

⁶⁶⁶ Agreement on Agriculture, GATT 1994.

⁶⁶⁷ See paragraph 3.4 above; Desta MG ‘Legal Issues in International Agricultural Trade’ (May 2006) *Legal Papers Online* 17

⁶⁶⁸ Articles 109 and 111 WTO Committee on Agriculture Special Session Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4 6 December 2008.

⁶⁶⁹ Articles 109 and 111 WTO Committee on Agriculture Special Session Revised Draft Modalities for Agriculture TN/AG/W/4/Rev.4 6 December 2008.

⁶⁷⁰ Clause 5.3 NTP (2012-2016).

⁶⁷¹ Control of Goods (Import and Export) (Agriculture) Order, 2007 under the enabling statute: Control of Goods Act Chapter 14:05.

⁶⁷² See Chapter 3 in paragraph 3.3.2.4 above.

⁶⁷³ Ministry of Agriculture ‘Command Agriculture Programme’ Zimbabwe Vice President Emmerson Munangagwa Video Conference available on <https://www.youtube.com/embed/KzKG5SctYq0> (accessed 20 September 2016).

4.2.2.3 Trade Facilitation

Trade facilitation is an umbrella term that refers to measures taken to ease the burden of cross-border transactions, particularly in trade and transit of goods.⁶⁷⁴ Trade facilitation takes into account various factors such as accessibility of information pertaining to customs procedures,⁶⁷⁵ clarity and volume of customs documentation,⁶⁷⁶ the possibility to issue and process customs documentation prior to the actual physical shipment, expediting customs procedures and encouraging customs cooperation.⁶⁷⁷ The paragraphs below discuss trade facilitation in relation to goods in transit, and the release and clearance of goods.

Article 3 of the WTO Trade Facilitation Agreement (TFA) discusses members' commitments to provide information regarding advance rulings within a reasonable time, and Article 3(9) of the same defines advance rulings as

a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to the good's tariff classification and the origin of the good.⁶⁷⁸

Article V(1) GATT provides that goods shall be deemed to be in transit when they pass through a country, and such passage constitutes only a portion of the journey and that the journey must begin and end beyond the territory of the country through which the goods are transiting.⁶⁷⁹ Member states must respect the principle of non-discrimination in respect of goods in transit.⁶⁸⁰ Although member states are permitted to charge administrative and other service fees for goods transit, these fees must be reasonable and may not constitute customs duties or transit duties. Article V(3) GATT

⁶⁷⁴ OECD *Aid for Trade at a Glance 2015: Reducing Trade Costs for Inclusive, Sustainable Growth* (2015) 46.

⁶⁷⁵ Article 1 WTO Trade Facilitation Agreement (TFA), 2013.

⁶⁷⁶ Article 10(1) WTO TFA, 2013.

⁶⁷⁷ Article 3 WTO TFA, 2013.

⁶⁷⁸ Article 3(9) of the WTO Trade Facilitation Agreement (TFA).

⁶⁷⁹ GATT 1947.

⁶⁸⁰ Article V(5) GATT 1947.

further provides that customs processes must not cause ‘unnecessary delays or other restrictions’. This is reiterated in Article 11(2) of the WTO TFA, which stipulates that

traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.⁶⁸¹

The TFA guarantees freedom of transit under Article 11(4), which requires transit goods to be afforded non-discriminatory treatment. Transit procedures may also not be used simply to restrict trade or to restrict transit.⁶⁸² Transit controls and formalities should not be more burdensome than is necessary.⁶⁸³ Traffic in transit should enable the identification of goods and not have to undergo conformity assessment procedures.⁶⁸⁴

Transit procedures tend to be cumbersome and time consuming. The TFA advocates for reduced and simplified customs formalities and documentation.⁶⁸⁵ The TFA provides for means through which transit processes can be developed in order to enhance trade. Article 4 TFA also encourages the use of ICTS to support single-window customs procedures as a means to simplify customs formalities and reduce customs processing time.⁶⁸⁶ In order to further expedite transit, the TFA encourages member states to provide for advance filing and processing of goods in transit.⁶⁸⁷ It is also important that goods in transit be allowed temporary admission into the country and undergo inward processing under the laws of the transit country in terms of Article 10(9) TFA. However, member states must allow importers, within a reasonable period, to re-consign or return goods to the exporter if the goods are rejected on the basis of SPS measures or other TBTs.⁶⁸⁸

⁶⁸¹ Article 11(2) WTO TFA.

⁶⁸² Article 11(1)(b) WTO TFA, 2013.

⁶⁸³ Article 11(6) WTO TFA, 2013.

⁶⁸⁴ Article 11(6) read with Article 11(8) WTO TFA, 2013.

⁶⁸⁵ Article 10(1) WTO TFA, 2013.

⁶⁸⁶ Article 10(4) WTO TFA, 2013.

⁶⁸⁷ Article 11(9) WTO TFA, 2013.

⁶⁸⁸ Article 10(8) WTO TFA, 2013.

The OECD Aid for Trade at a Glance works closely with the WTO on issues of trade facilitation, and appears to have taken all the above explanations for market access into account and translated them into one coherent diagram. It is interesting to note that the OECD looks at similar factors when examining trade costs (for the exporting country), noting in particular costs associated with getting to the border, costs at the border, and costs beyond the border. Getting to the border costs include access to trade finance through credit, foreign currency and competitive exchange rates, infrastructure such as roads and rail for inland transit, and sea and air ports accessibility, as well as logistics services including competition policy and private sector participation. At the border costs include direct costs such as export restrictions, and documentation requirements at entry and exit borders. Indirect border costs include procedural delays and opportunity costs at the export border, and inventory holding costs at the import border. Other hidden costs also include illicit flow of goods (smuggling) and information trade on the export side and corruption and bribery on the import side of the border.

4.2.2.4 Sanitary and Phytosanitary (SPS) Measures

The WTO SPS Agreement allows member states to adopt and enforce measures for the protection of human, animal and plant, life and health.⁶⁸⁹ This is subject to the measures being applied in a non-discriminatory manner and only to the extent necessary to protect human, animal and plant life or health.⁶⁹⁰ The SPS measures may not be used to disguise restrictions on trade, and may not be used arbitrarily or unjustifiably.⁶⁹¹ The SPS Agreement seeks to facilitate harmonisation of SPS standards by encouraging reliance on international standards such as those created by the *Codex Alimentarius* Commission, and the International Office of Epizootics, standards created under the International Plant Protection Convention.⁶⁹² However, Article 3(3) SPS Agreement allows member states to impose higher SPS standards than those set out in international standards.

While the SPS Agreement enables member states to regulate on matters affecting plant, human and animal health and life, the regulatory powers appear to be so open as to allow abuse, and also

⁶⁸⁹ Preamble, Sanitary and Phytosanitary Measures (SPS Agreement), 1994.

⁶⁹⁰ Article 2(2) WTO SPS Agreement, 1994.

⁶⁹¹ Article 2(3) WTO SPS Agreement, 1994.

⁶⁹² Article 3(2) WTO SPS Agreement, 1994.

amount to trade barriers in themselves. Developing countries seeking to export goods into developed countries often fail to meet SPS standards, and lack adequate infrastructure to support SPS compliance for exportation into developed countries. Although the WTO recommends alignment of domestic law with international standards for SPS compliance, developing countries tend to fail SPS compliance, because they adopt different SPS standards. There are at least three different codes that can be selected, each entailing different scientific methods for determining SPS compliance. This is a further barrier to trade. Having considered the international regulation of agricultural trade, the chapter now analyses trade under RECs, SADC and COMESA.

4.3 REGIONAL REGULATION OF AGRICULTURAL TRADE

This paragraph analyses the extent of compliance of COMESA and SADC with the WTO provisions on agricultural trade, with particular reference market access. Similar to paragraph 4.2.2 above, this paragraph examines market access as determined by four main factors namely TRQs, trade facilitation, and SPS measures. SSGs are excluded from this discussion on the basis that WTO negotiations in this regard have not yet been concluded.

4.3.1 Common Market for Eastern and Southern Africa (COMESA)

This paragraph will examine COMESA regulation of market access, domestic support, and export subsidies.

4.3.1.1 Market Access

This paragraph discusses market access as an umbrella term that includes tariff rate, trade facilitation, and SPS compliance as a means to improve market access.

Tariff Rate Quotas (TRQs)

COMESA is a Free Trade Area (FTA) and its member states enjoy tariff-free market access and quota-free access for intra-COMESA trade.⁶⁹³ The COMESA customs union (CU) was launched

⁶⁹³ COMESA Business Council ‘COMESA Free Trade Area’ available on <http://comesabusinesscouncil.org/comesabusinesscouncil/?q=Free%20Trade%20Area> (accessed 25 September 2016).

in 2009, with expectations of full compliance by all member states by 2012. The CU would have a common external tariff (CET) of zero per cent tariff for capital goods and raw materials, 10 per cent for intermediate goods, and 25 per cent for finished goods.⁶⁹⁴ These tariffs align with the East African Community CU to which some COMESA members concurrently belong.⁶⁹⁵ This means that while adoption of the COMESA CET might have been easier for EAC members which already complied with the same tariffs under the EAC CU, it will inevitably be more difficult for member states that have overlapping membership with conflicting provisions.

Moreover, for COMESA member states which are also members of SADC, such as Zimbabwe, compliance has taken longer and is more difficult because of the dual membership, particularly because SADC is also negotiating a CU, which might eventually have a different CET from COMESA. Other COMESA member states are part of Southern African Customs Union (SACU), whose member states are bound to enter into trade negotiations as a trade bloc using the bloc's CET.⁶⁹⁶ For example, SACU has an FTA with the member states of the European Free Trade Association (EFTA),⁶⁹⁷ a PTA with the member states of the Common Market of the South (MERCOSUR),⁶⁹⁸ and the Trade, Investment and Cooperation Agreement (TIDCA) with the USA.⁶⁹⁹ For each of these preferential agreements, SACU has negotiated a CET. It would be difficult to sway or persuade SACU member states to alter their existing trade agreements to meet the requirements of the COMESA CU, which is not yet operational. However, the TFTA will be useful in addressing the challenges caused by overlapping membership.

⁶⁹⁴ The 12th Summit of the COMESA Authority of Heads of State and Government was held in Nairobi, Kenya, on 22nd and 23rd May 2007 under the theme: 'Deepening Regional Integration for Diversification and Value Addition' 7 available on <https://www.issafrica.org/uploads/COMESA12COM.PDF> (accessed 12 September 2016); Preamble to the COMESA Council, at its Twenty-Sixth Meeting held from 2nd to 4th June, 2009 at Victoria Falls, Zimbabwe issued the following Legal Notice: No. 1 of 2009, Council Regulations Governing the COMESA Customs Union; Mugano G 'No need to rush into COMESA Customs Union' *The Herald* 26 June 2013 available on <http://www.herald.co.zw/no-need-to-rush-into-comesa-customs-union/> (accessed 12 September 2016).

⁶⁹⁵ Treaty for the Establishment of the East African Community, 30 November 1999; (Member states 'partner states': Kenya, Burundi, Rwanda, Uganda and the United Republic of Tanzania); The Establishment of the East African Customs Union, 2 March 2004, Arusha, Tanzania.

⁶⁹⁶ Article Southern African Customs Union (SACU) Agreement 2002.

⁶⁹⁷ Iceland, Liechtenstein, Norway and Switzerland.

⁶⁹⁸ Argentina, Brazil, Paraguay and Uruguay.

⁶⁹⁹ SACU *Annual Report* (2014) 23.

Trade Facilitation

COMESA Simplified Trade Regime (STR) facilitates simplified procedures for trade for informal cross-border traders who are importing or exporting goods that are valued at US\$1 000 or less per consignment. The STR targets SMEs and ICBTs, acknowledging that ICBT ‘contributes to economic growth, job creation and food security for the majority of the region’s population’.⁷⁰⁰

The STR has less paperwork, simpler procedures, a help desk, and all documentation is available at the port of entry or exit. The STR also provides for a simplified certificate of origin that is completed as the trader enters the country to which the goods are being exported. For the STR to be freed of the risk of bribery and corruption, it may be necessary to have independent help-desk personnel to avoid the imbalance of power that would ordinarily exist between traders and customs officials. Furthermore, language can be a barrier, and perhaps customs forms should be bilingual for ease of transacting. The STR shows that COMESA has made some progress in increasing participation of informal traders in regional trade.

However, gains from this initiative may be lost owing to inadequate regional SPS support within the region. Notwithstanding COMESA STR, goods still have to comply with SPS regulations and acquire relevant import and export permits. This is still a challenge in COMESA and SADC, but even more so in Zimbabwe. The recent national protests against the introduction of regulations SI 68 of 2016 are a case in point.⁷⁰¹

COMESA aligns itself with the CAADP, established under the New Partnership for Africa’s Development (NEPAD) as an arm of the African Union (AU). The CAADP strategy emphasises incentives, inputs, institutions, and infrastructure.⁷⁰² The COMESA Regional CAADP Compact outlines some domestic and regional goals that contribute to the achievement of NEPAD’s continental objectives such as inclusive development through gender mainstreaming and rural development, as well as capacity-building for small-scale farmers.⁷⁰³

⁷⁰⁰ COMESA Business Council

⁷⁰¹ Control of Goods (Open General Import Licence) (No.2) (Amendment) Notice, 2016.

⁷⁰² COMESA Regional CAADP Compact Draft Version 19, 19 April 2010.

⁷⁰³ COMESA Regional CAADP Compact Draft Version 19, 19 April 2010; NEPAD ‘Gender, climate change, and agriculture support programme’ available on http://nepad-caadp.net/sites/default/files/Flagship%20Programmes/Gender_Climate_Change_and_Agric_Support.pdf (accessed 5

COMESA agriculture strategy also places great emphasis on social inclusion, particularly on the integration of women and youth into agricultural trade, as well as capacity-building for small-holder farmers and ICBTs.⁷⁰⁴ The COMESA Regional Strategy for Mainstreaming Gender in Agricultural Climate Change mirrors the CAADP flagship programmes on gender, agriculture, and climate change.⁷⁰⁵ This is also in line with the objectives reaffirmed in the Malabo Declaration,⁷⁰⁶ such as the goal to end hunger by 2025,⁷⁰⁷ the commitment to triple intra-Africa trade by 2025,⁷⁰⁸ and by facilitating integration of economically marginalised persons, such as youths, women, and small-holder farmers into ‘gainful and attractive agri-business’.⁷⁰⁹

Sanitary and Phytosanitary (SPS) Measures

SPS measures have a direct impact on market access, especially of agricultural goods. First, COMESA facilitates SPS compliance (and essentially market access) through various instruments. COMESA has partnered with international organisations such as the United Nations Food and Agriculture Organisation (UN FAO), the World Health Organisation (WHO), the African Development Bank (AfDB) and United States Aid (USAID). COMESA encourages alignment of the regions’ SPS requirements with international guidelines such as the *Codex Alimentarius* Commission (Codex), International Plant Protection Convention (IPPC), and those of the World Organisation for Animal Health (OIE).⁷¹⁰

July 2016); cross-ref COMESA ‘Regional strategy for mainstreaming gender in agriculture and climate change: Strategic framework 2011-2015’ available on http://programmes.comesa.int/attachments/article/82/Regional%20Strategy%20on%20Mainstreaming%20Gender%20in%20Agriculture%20and%20Climate%20Change_RESTRAP.pdf (accessed 5 July 2016).

⁷⁰⁴ See paragraph 2.5.3.1.

⁷⁰⁵ For more on NEPAD and CAADP refer to NEPAD ‘CAADP’ available on <http://nepad-caadp.net/> (accessed 5 July 2016).

⁷⁰⁶ African Union (AU), Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods, Doc. Assembly/AU/Decl. 1/(XXIII) 26-27, June 2014, Malabo, Equatorial Guinea.

⁷⁰⁷ Article III(3) AU *Malabo Declaration* 2014.

⁷⁰⁸ Article V(a) AU *Malabo Declaration* 2014.

⁷⁰⁹ Article IV(e) AU *Malabo Declaration* 2014.

⁷¹⁰ Preamble to the COMESA Regulations on the Application of Sanitary and Phytosanitary Measures, December 2009.

COMESA has also requested the support of USAID⁷¹¹ and AfDB for institutional support and capacity-building for the establishment of Regional SPS Reference Laboratories (SPS RRLs) to monitor compliance, process samples, validate and standardise procedures, collect and disseminate technical information and provide scientific backing for dispute settlement procedures. The SPS RRLs are also responsible for assisting member states with risk analysis, and training of veterinarians, plant pathologists, and other personnel.⁷¹² Satellite laboratories for SPS compliance may also be established in terms of Article 17 of the regulations.⁷¹³

Secondly, COMESA confers the WTO definition of SPS measures on the COMESA SPS Regulations.⁷¹⁴ COMESA SPS Regulations also introduce a COMESA Green Pass, which is a commodity-specific SPS certification scheme authorising the movement of agricultural goods and food within COMESA.⁷¹⁵ The purpose of the Green Pass is to facilitate movement of food and agricultural commodities and also to protect human, animal, and plant life and health.⁷¹⁶ Article 11 of the Regulations provides that COMESA member states may establish National Green Pass Authorities to receive and consider applications for Green Passes.⁷¹⁷ The Green Pass serves as proof of SPS compliance with regard to a specific commodity.⁷¹⁸ Issuance of a Green Pass is not permanent, it may be withdrawn or suspended, and members are required to monitor business entities that have been issued with Green Passes to ensure that they continue to comply.⁷¹⁹

Thirdly, COMESA encourages harmonisation and mutual recognition of regional SPS requirements and strict adherence with SPS requirements in order to facilitate the movement of

⁷¹¹ One of the specialised agencies of COMESA in partnership with USAID is the Alliance for Commodity Trade in Eastern and Southern Africa read further on COMESA 'Select activities and achievements' available on <https://www.usaid.gov/sites/default/files/documents/1860/COMESA%20IPAA%20One%20Pager%20Nov%202015.pdf> (accessed 5 July 2016).

⁷¹² Article 16 COMESA SPS Regulations, 2009.

⁷¹³ Article 20(1) COMESA SPS Regulations, 2009.

⁷¹⁴ Article 1 COMESA SPS Regulations, 2009.

⁷¹⁵ Article 7(1) COMESA SPS Regulations, 2009.

⁷¹⁶ Article 8 COMESA SPS Regulations, 2009.

⁷¹⁷ Article 12 COMESA SPS Regulations, 2009.

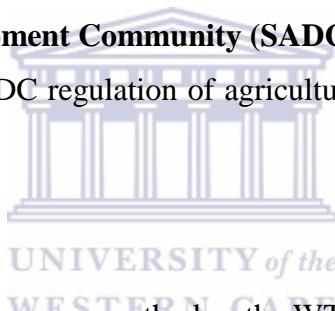
⁷¹⁸ Article 12(1) COMESA SPS Regulations, 2009.

⁷¹⁹ Article 11 COMESA SPS Regulations, 2009.

‘safe food’ and prevent the spread of diseases originating from plants and animals.⁷²⁰ COMESA seeks to harmonise SPS measures with regard to ‘surveillance, emergency preparedness, traceability, control, inspection and approval procedures’.⁷²¹ It also encourages member states to use the Green Pass as a bargaining tool for entering into mutual recognition agreements with third party states for SPS compliance. If all COMESA states use a unified SPS compliance standard within the region, this would reduce delays resulting from country-to-country compliance assessments upon shipment, and would also facilitate trade between the region and third parties. COMESA recently introduced the Seed Harmonization Implementation Plan (COMSHIP) and the COMESA Biotechnology and Biosafety Policy Implementation Plan (COMBIP), through US\$200 000 000 funding availed in terms of the COMESA Integrated Partnership Assistance Agreement (IPAA).⁷²² The following paragraph explores SADC regulation of market access.

4.3.2 Southern African Development Community (SADC)

The paragraph below analyses SADC regulation of agricultural trade in relation to international regulation under the WTO.



4.3.2.1 Market Access

Although SADC does not follow the same method as the WTO, it addresses agricultural trade in the SADC Trade Protocol and in the regional agricultural policy.⁷²³ The SADC Regional Agricultural Policy (SADC-RAP) takes into account the need for dedicated and intentional policy pertaining to agriculture as a source of economic development and also as a source of food security.⁷²⁴

⁷²⁰ Simemba M ‘Sanitary and phytosanitary measures: The COMESA experience’ available on http://famis.comesa.int/com/option.com_prices/task.analysis/analysis_id.5/Itemid.129/pillar.sps/lang./sectionid/ (accessed 5 July 2016).

⁷²¹ Article 6(2)(a) COMESA SPS Regulations, 2009.

⁷²² Partnership between COMESA and USAID, 29 September 29, 2009 available on <https://www.usaid.gov/sites/default/files/documents/1860/COMESA%20IPAA%20One%20Pager%20Nov%202015.pdf> (accessed 12 September 2016).

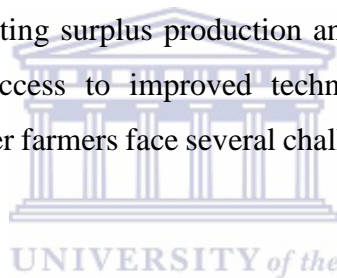
⁷²³ SADC Trade Protocol, 1996.

⁷²⁴ SADC *Regional Agricultural Policy*, 7 June 2013, Gaborone, Botswana.

The SADC Trade Protocol does not address agricultural market access directly, although its general provisions may be interpreted in the context of agricultural trade. Moreover, SADC does not regulate SPS measures specifically, instead they are viewed generally as technical barriers to trade (TBTs). For this reason the discussion on SADC will focus on SPS measures as a form of TBTs. The paragraphs below highlight some key areas of concern noted in the SADC-RAP.

First, the SADC-RAP acknowledges the need for inclusive development and supports small-holder farmers. This goes to the heart of participatory development, which is the basis of this thesis, as explained in Chapter 2.⁷²⁵ Small-holder farmers are particularly important in Zimbabwe's development discourse because they constitute the majority of farming operations in the country pursuant to the land redistribution programme outlined above.⁷²⁶

Agricultural growth in the small-scale/small-holder farming sectors has the potential to leverage the rest of the economy by generating surplus production and increasing returns of investment, which would in turn increase access to improved technologies and improved production processes.⁷²⁷ However, small-holder farmers face several challenges. Clause 60 SADC-RAP notes that



[s]mall holder farmers are also generally scattered and not well serviced by major transport, communication and power infrastructure. Resultantly, the provision of high cost inputs to small holder farmers comes at a premium. There is therefore a real challenge to cost-effectively assemble their produce into exportable supplies with predictable quantities and quality.⁷²⁸

The SADC-RAP further encourages investment and seeks measures to address the various risks associated with the production of agricultural goods, such as the volatility of commodity prices, unpredictable weather changes, limited storage infrastructure, poor market research and resultant market inefficiency and poor trade performance. In order to respond to these challenges, the SADC-RAP encourages member states to promote competition, build regional value chains,

⁷²⁵ See paragraph 2.5.3.2 above.

⁷²⁶ See paragraph 4.2.3 above.

⁷²⁷ Paragraph 14(1) Clause 59 SADC Regional Agricultural Policy, 2012.

⁷²⁸ SADC Regional Agricultural Policy, 2012.

encourage contract farming, harmonise procedures, facilitate and integrate information and intelligence systems, reduce and where possible eliminate tariff and non-tariff barriers, encourage investment in storage infrastructure and facilitate ‘the participation of informal traders, small to medium enterprises and marginalised groups such as women and children’.⁷²⁹

Secondly, the SADC Trade Protocol prohibits the imposition of tariffs,⁷³⁰ NTBs,⁷³¹ and quantitative restrictions⁷³² on intra-SADC imports and exports, subject to phasing down modalities set out under Article 3 of the same.⁷³³ The reduction and elimination of tariff barriers would reduce transaction costs for small-holder farmers and informal traders, and enable them to retain more profits and to participate in international trade. This potentially increases competition by allowing more players into the market, and widening choices for consumers. As at 2008, 85 per cent of intra-SADC trade reached zero-duty upon the establishment of the SADC FTA.⁷³⁴ The phase-down period contributed to an increase in intra-SADC trade from about US\$13.2 billion in 2000 to about US\$34 billion in 2008, although this is only 18.5 per cent of total SADC trade.⁷³⁵

Tariff Rate Quotas

Whereas COMESA has already established a CET and is merely awaiting compliance of its member states, SADC still intends to have negotiations pertaining to establishing a CET. The SADC negotiations have been postponed indefinitely. This means that establishing regional compliance with the WTO TRQs is likely to take a long time, and might occur in response to rule setting by the WTO, once the TRQs are confirmed at an international level.

⁷²⁹ Paras 14(2) Clauses 62 and 63; paras 15(2) Clauses 67 and 69 SADC Regional Agricultural Policy (SADC-RAP) 2012.

⁷³⁰ Article 4 and 5 SADC Trade Protocol, 1996.

⁷³¹ Article 6 SADC Trade Protocol, 1996.

⁷³² Article 7 and 8 SADC Trade Protocol, 1996.

⁷³³ Article 4, 5, 6 and 7.

⁷³⁴ SADC ‘Free trade area’ available on <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 28 June 2016).

⁷³⁵ SADC ‘Free Trade area’ available on <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> (accessed 28 June 2016).

Trade Facilitation

SADC-RAP notes that agricultural development within the region is affected by high transport costs, which are worsened by the poor state of road and border infrastructure, onerous transit procedures, the lack of adequate storage facilities, intermittent supply of power and water, as well as the lack of technologies, skills and know-how for agro-processing.⁷³⁶ All of these factors add to the cost of doing business, and specifically to the cost of trading in agricultural products within the region. In response to these challenges, the SADC-RAP encourages the development of inter-country transport corridors, regional commodity exchange networks, and shared water resources for agriculture, such as through cross-border schemes.⁷³⁷ This aligns with the Annex III to the SADC Trade Protocol, which encourages trade facilitation, and Annex VI of the same, which regulates transit procedures. Annex III SADC Trade protocol defines trade facilitation as

the coordination and rationalisation of trade procedures and documents relating to the movement of goods in international trade, from the place of consignment to the destination.⁷³⁸

Article 3 of Annex III of the SADC Trade Protocol provides ways through which trade costs can be reduced, such as by aligning documentation with international standards, reducing the number of institutions required to handle documents, and centralising the issuing and processing of these documents.⁷³⁹ Aligning national legislation and customs documentation with international standards, practices and guidelines would facilitate the standardisation of documents for intra- and extra-SADC trade.⁷⁴⁰ This also aligns with Article 10(3)(1) WTO Trade Facilitation Agreement, which encourages member states to ‘use relevant international standards or parts thereof as a basis for their importation, exportation or transit formalities and procedures’.⁷⁴¹

⁷³⁶ Paragraph 16(1) Clause 72 SADC-RAP, 2012.

⁷³⁷ Article 22 SADC Trade Protocol encourages cross-border investments and this would take into account cross-border irrigation schemes envisaged in the SADC-RAP; Paragraph 16(1) Clause 72 SADC-RAP, 2012.

⁷³⁸ Article 1, Annex III, SADC Trade Protocol, 1996.

⁷³⁹ SADC Trade Protocol, 1996.

⁷⁴⁰ Article 4(3), Annex III, SADC Trade Protocol, 1996.

⁷⁴¹ WTO Agreement on Trade Facilitation Ministerial Conference, Ninth Session, Bali 3-6 December 2013 WT/MIN (13)/36 WT/L/ 911.

The SADC Trade Protocol encourages member states to incorporate ICTs into customs procedures, by allowing alternatives to paper-based documentary requirements such as replacing handwritten and paper-signed documents with electronic documents and electronic signatures respectively, and allowing electronic documents as documentary evidence in courts.⁷⁴² In order to facilitate trade, Article 5 requires member states to reduce the cost of documents and the volume of paperwork, to adopt common customs procedures, coordinate trade and transport, and to initiate training programmes for trade facilitation.⁷⁴³

Although the TFA encourages customs cooperation, it appears that the requirement for members to adopt a common customs procedure set out in the SADC Protocol is not in line with 'Article 12(10) WTO Trade Facilitation which provides that members shall not be required to modify the format of their import and export declarations or procedures'. However, this may be justified by the greater need for harmonisation that exists in the SADC region and the objectives laid out in the Treaty establishing the African Economic Community to harmonise trade law with the vision of creating a continental free trade area.⁷⁴⁴

With regard to transit, member states undertake not to levy tariffs on goods in transit, although they may impose administrative fees.⁷⁴⁵ Article 6, Annex IV stipulates that transit traffic shall be subject to the payment of a customs bond or surety, and shall be accompanied by a SADC or other approved transit document.⁷⁴⁶ The following paragraph discusses SPS measures.

SPS Measures

As noted above, SADC does not regulate SPS measures directly, instead they are treated as NTBs. NTBs affect about a third of SADC agricultural trade.⁷⁴⁷ NTBs include technical barriers to trade (TBTs) customs procedures, and sanitary and phytosanitary measures (SPS), which are scientifically tested compliance standards in the interests of human, animal and plant life and

⁷⁴² Article 4, Annex III SADC Trade Protocol, 1996.

⁷⁴³ Annex III SADC Trade Protocol, 1996.

⁷⁴⁴ See Introduction.

⁷⁴⁵ Article 2(2) Annex IV, SADC Trade Protocol, 1996.

⁷⁴⁶ SADC Trade Protocol, 1996.

⁷⁴⁷ Paragraph 15(1) SADC-RAP, 2012.

health.⁷⁴⁸ Article 16 SADC Trade Protocol provides that member states should align their SPS measures with international standards as a means to facilitate harmonisation of standards. NTBs impact trade significantly, especially small-holder farmers who often lack technical expertise, skills and technology to ensure compliance with these standards. This tends to limit the participation of small-holder farmers and informal traders in areas in which technical standards and certifications exist, due to the preference for simplified procedures.

Thirdly, SADC-RAP notes the importance of safeguard mechanisms for sensitive products in agricultural trade and reinforces the provisions of Article 20 SADC Trade Protocol. Article 20(1) provides that

[a] member state may apply a safeguard measure to a product only if that Member State has determined that such product is being imported to its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like, or directly competitive products.⁷⁴⁹

Article 20(2) further provides that serious injury is to be determined in accordance with Article 4 of WTO Agreement on Safeguards.⁷⁵⁰ Furthermore, considering that all SADC member states are developing countries, SADC countries stand to benefit under the proposed SSM should the traditional WTO SSG be done away with,⁷⁵¹ and SADC member states also stand to benefit under the changes proposed under the Doha Declaration, such as the preferential provisions envisaged in the Harbinson modalities draft with regard to TRQs.⁷⁵²

SADC-RAP envisioned the reduction of intra-SADC agricultural tariffs to zero by 2012, and the reduction of extra-SADC tariffs relating to production factors such as green technology and water

⁷⁴⁸ Article 2(2) WTO TBT Agreement; Article 2 WTO SPS Agreement; Article 16 SADC Trade Protocol, also see paragraph 3.3 above.

⁷⁴⁹ SADC Trade Protocol, 1996.

⁷⁵⁰ SADC Trade Protocol, 1996.

⁷⁵¹ See paragraph 4.3.1.3 above.

⁷⁵² See paragraph 4.3.1.1 above.

equipment.⁷⁵³ It appears that Zimbabwe disregarded this aspiration as most agricultural goods are not only on a 40 per cent import tariff, but also on the list of restricted goods that require import licences, comprising both tariff barriers and NTBs.⁷⁵⁴

4.4 DOMESTIC REGULATION OF AGRICULTURAL TRADE

This paragraph analyses compliance of Zimbabwean domestic law with WTO, COMESA and SADC instruments. This section focuses on market access, again with specific regard to trade facilitation and SPS measures. A note on Zimbabwe's TRQs is included in the general discussion on market access in paragraph 4.4.1 which follows below.

4.4.1 Market Access

Exports fall under the main authority of the Reserve Bank of Zimbabwe (RBZ), in terms of the RBZ Act.⁷⁵⁵ Part VIII of the Act enables the RBZ to set the exchange rate policy and to facilitate clearing and payment agreements.⁷⁵⁶ Zimbabwean domestic law and policy on key agricultural trade has evolved over time and consists of several pieces of fragmented statutes and regulations.

The most pressing obstacles to market access of goods entering Zimbabwe are first, the proliferation of regulations, and secondly, high transaction costs associated with border delays, numerous police road blocks, lack of recognition of foreign roadworthy certificates for conveyors of goods in transit, discussed under the section on trade facilitation,⁷⁵⁷ and thirdly what one could term the 'revenue motive'.⁷⁵⁸ In terms of market access of Zimbabwean goods exported, the biggest presenting concern is exclusion for key international agreements such as AGOA, lack of market knowledge and lack of compliance with technical regulations, such as SPS compliance.

⁷⁵³ Para 15(2) Clause 67 and Clause 69 SADC-RAP, 2012.

⁷⁵⁴ See paragraph 3.3 above.

⁷⁵⁵ Sections 6(1)(e), 47 and 48 Reserve Bank (RBZ) Act, Chapter 22:15.

⁷⁵⁶ Sections 6(1)(e), 47 and 48 RBZ Act, Chapter 22:15.

⁷⁵⁷ Khumalo S 'Unlocking South African cross-border transport challenges: A case study of Beitbridge border post' Proceedings of the 33rd Southern African Transport Conference (SATC 2014) 834-848 also available on http://repository.up.ac.za/bitstream/handle/2263/45526/Khumalo_Unlocking_2014.pdf?sequence=1 (accessed 09 July 2017).

⁷⁵⁸ Koester U 'Agricultural trade between Malawi, Tanzania, Zambia and Zimbabwe: Competitiveness and Potential in Valdes A and Muir-Leresche K (eds) Agricultural Policy Reforms and Regional Market Integration in Malawi, Zambia and Zimbabwe (1993) 26 International Food Research Institute: Washington DC.

First, concerning proliferation of laws, The Control of Goods Act 14:05 authorises the Minister of Industry and International Trade to pass regulations under the authority of the President of Zimbabwe in terms of section 3(3). This has led to a proliferation of regulations. OGIL which was introduced under ESAP, has since been replaced by stricter licensing requirements such as those enacted in terms of the Control of Goods (Import and Export) (Agriculture) Order, 2007. Section 2(2) Control of Goods Order 2007 stipulates that goods in transit, and goods for domestic use falling above the monthly threshold of US\$250 per month are subject to import licencing requirements.⁷⁵⁹ Import licences are administered by the Secretary for Industry and International Trade in terms of section 6 of the Control of Goods Order.⁷⁶⁰ Section 6 of the Control of Goods Order also provides restrictions for import permits issued under the Animal Health (Import) Regulations, 1989.⁷⁶¹ This indicates that Zimbabwe has reduced market access since 1995 as importing goods into Zimbabwe has become more restricted due to higher tariffs imposed and increased NTBs by the Zimbabwe Revenue Authority (ZIMRA).

Secondly, as noted in 2.2.2, the struggle for policy space appears to have caused the legislature's frustrations to 'burst at the seams' as it were. The enactment of the Indigenisation and Economic Empowerment Act and the Land Acquisition Act led to the imposition of economic sanctions against Zimbabwe by major trading partners including the United States of America and European Union.⁷⁶² A major restriction is the exclusion of Zimbabwe from the Agriculture and Growth Opportunity Act of (AGOA).⁷⁶³ The result of exclusion from this agreement is appears to be tied to the political decision to expropriate land from white farmers, and also a response to the radical legal transformation from a somewhat liberal market economy, to a protectionist state governed by the radical laws of the Indigenisation and Economic Empowerment Act and the Land

⁷⁵⁹ Control of Goods (Import and Export) (Agriculture) Order, 2007 under the enabling statute: Control of Goods Act Chapter 14:05; see paragraph 3.3.2.

⁷⁶⁰ Control of Goods (Import and Export) (Agriculture) Order, 2007 under the enabling statute: Control of Goods Act Chapter 14:05.

⁷⁶¹ Section 8 Control of Goods (Import and Export) (Agriculture) Order, 2007 under the enabling statute: Control of Goods Act Chapter 14:05.

⁷⁶² Baumann VD 'Reforming microfinance to suit developing economies: The right way for Zimbabwe' Washington University Global Studies Law Review (14) 2 (2015) 337-536 at 337.

⁷⁶³ Baumann VD 'Reforming microfinance to suit developing economies: The right way for Zimbabwe' Washington University Global Studies Law Review (14) 2 (2015) 337-536 at 337.

Redistribution Act. The author does not propose that these laws be repealed, but rather that they should have been implemented over a longer period of time, and should not have been tied to the political agenda which ended up tainting a just cause for the previously disadvantaged Zimbabweans. Baumann argues that the Indigenisation Act should be repealed in order for any true benefits of economic recovery to be experienced.⁷⁶⁴ However, it is argued that repealing the Act would undo the gains of a more equitable distribution of wealth in Zimbabwe, and also undermine the independence of Zimbabwe which was in essence a struggle for land. What can perhaps be revisited is the computation of the minimum ownership requirements and increased transparency of the process. It can be argued that because there is no law that allows independent countries to claim back land expropriated from black indigenous Zimbabweans prior to the attainment of independence, and even if there were such a law, the international community would still face such a claim with great resistance. Colonisation was an injustice. Zimbabwe has taken a position on the injustice, and has paid immensely for its choice, especially between 2000 and 2017.

Thirdly, while Zimbabwe benefits from the WTO MFN tariff due to its membership of the WTO, it also stands to benefit from regional trade agreements (RTAs) that give Zimbabwean exports preferential access to regional markets. In terms of cotton and textiles trade, however, Zimbabwe is currently at a great disadvantage owing to exclusion from AGOA. Zimbabwe does not benefit from the preferential market access of textiles to the USA, unlike Zimbabwe's neighbours. Moreover, Zimbabwe textiles trade with neighbouring countries is also impacted because AGOA only allows importation of goods that have originated from AGOA member states, or undergone single transformation. In other words, Zimbabwe cannot trade with neighbouring countries to the same extent that it could have, had Zimbabwe not been excluded from AGOA.

In contrast, a consideration of South African law and policy shows an interest in protecting local producers.⁷⁶⁵ For example, South Africa allegedly concluded the Africa Growth Opportunity Act Agreement (AGO) with an exclusion of third party countries and requiring double transformation

⁷⁶⁴ Baumann VD 'Reforming microfinance to suit developing economies: The right way for Zimbabwe' *Washington University Global Studies Law Review* (14) 2 (2015) 337-536 at 337.

⁷⁶⁵ Mangudhla T 'Textiles industry at 10% capacity' *Zimbabwe Independent* 27 June 2014 available on <http://www.theindependent.co.zw/2014/06/27/textiles-industry-10-capacity/> (accessed 19 September 2016).

of textiles in order to protect local textiles producers in South Africa.⁷⁶⁶ Double transformation means that the fabric must be manufactured and sewn into clothing in South Africa in order to benefit from preferential access under AGOA. This thus excludes Zimbabwe, which is not party to AGOA.

The clothing and textiles industry used to employ 24 000 people in urban centres and as at 2014 numbers fell to 4 000. From over 250 000 rural farmers who earned a living from cotton farming, the figures dropped to 170 000 as at 2015.⁷⁶⁷ The importation of cheap clothing resulted in reduced demand for cotton and textiles, and unfair competition because the cost of production was higher than the cost of untaxed imports, and there were no anti-dumping duties to balance the trade-offs.⁷⁶⁸ Textiles and clothing is one of the areas where Zimbabwe traditionally had a comparative advantage, domestic law and policy, especially the Look East Policy, appear to undermine the critical importance of this sub-sector, especially in the context of alleged dumping of cheap clothing by China, which was never investigated.⁷⁶⁹ This may have been caused by the evident lack of capacity and technical expertise alluded to in chapter 3 which is also causing the under-utilisation or lack of implementation of existing protections under regional and international law is costing Zimbabwe, and undermining the development agenda.⁷⁷⁰

Paragraph 2.2.3 noted the lack of implementation of available remedies under regional and international frameworks, this lack can be seen in the instance when Zimbabwe was faced with potential dumping. Whereas South Africa when it faced a similar unfair trade practice, it utilised

⁷⁶⁶ Hazelhurst E 'SA weighs AGOA rule on fabrics with rivals in SADC' *Business News* 26 September 2013 available on <http://www.iol.co.za/business/news/sa-weighs-agoa-rule-on-fabrics-with-rivals-in-sadc-1582617> (accessed 19 September 2016); Section 112 read with 113 African Growth Opportunity Act One Hundred Sixth Congress of the United States of America At The Second Session Trade and Development Act of 2000.

⁷⁶⁷ See paragraph 4.1.5 above; Marukutira D 'Look East Policy: Final blow on Zim textile industry' *Newsday* 11 September 2015 available on <https://www.newsday.co.zw/2015/09/11/look-east-policy-final-blow-on-zim-textile-industry/> (accessed 19 September 2016).

⁷⁶⁸ Marukutira D 'Look East Policy: Final blow on Zim textile industry' *Newsday* 11 September 2015 available on <https://www.newsday.co.zw/2015/09/11/look-east-policy-final-blow-on-zim-textile-industry/> (accessed 19 September 2016).

⁷⁶⁹ See paragraph 3.4.1.4 above; Mangudhla T 'Textiles industry at 10% capacity' *Zimbabwe Independent* 27 June 2014 available on <http://www.theindependent.co.zw/2014/06/27/textiles-industry-10-capacity/> (accessed 19 September 2016); see paragraph 4.1.4.

⁷⁷⁰ See paragraph 3.4.

TDMs availed under the WTO and imposed anti-dumping duties on Brazil for dumping of chicken;⁷⁷¹ Zimbabwe ignored recourse under international agreements and opted for domestic remedies by imposing import licencing requirements, further digressing from its international and regional commitments.⁷⁷²

Fourthly, small holder farmers are of particular importance to Zimbabwe and count for about 60 per cent of maize production, for example.⁷⁷³ NGO-run programmes, including the DANIDA Rural Agricultural Revitalisation-Commercialisation of Small-holder Farming (RARP-CSF) Programme have facilitated value chain development, matching small-holder farmers to grants, value-chain financing, e-extension, food security, R&D and facilitating certification.⁷⁷⁴ SNV has supported Zim Organic and Zimbabwe GAP (together called Shurugwi Small-holder Horticultural Association) with certification and value chain development for contractual supply of vegetables to Servicor Catering Services, Pick n Pay and Spar supermarkets. SNV also facilitated certification of Honde Valley Tea Growers Association under the UTZ and Rainforest Alliance, resulting in an increase of 357 per cent to annual income.⁷⁷⁵ The Lake Harvest Fish Farm supports the rural communities living on the banks of Kariba dam, and supports inclusive development. The fish farm's aquaculture is expected to produce 20 000 tons of tilapia fish per year. According to the

⁷⁷¹ Marais J 'Chicken imports row rages on' *Business Day* 20 April 2014 available on <http://www.bdlive.co.za/business/trade/2014/04/20/chicken-imports-row-rages-on> (accessed 19 September 2016); also see South African Poultry *Meat Exports: Country Report* July 2016 available on <http://www.sapoultry.co.za/pdf-statistics/country-report.pdf> (accessed 19 September 2016).

⁷⁷² South Africa Department of Agriculture, Forestry and Fisheries *Strategic Plan 2011/2012-2014/2015* (2011).

⁷⁷³ Whande W, Mutopo P and Chikwanha A 'Smallholder agriculture, food security and governance in Southern Africa' IDASA available on http://www.southernafricatrast.org/docs/Food_Security_Dialogue-Discussion_Document_20110623.pdf (accessed 09 July 2017).

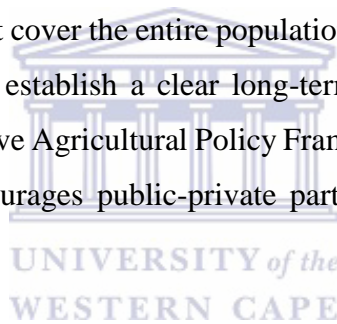
⁷⁷⁴ SNV 'Rural Agriculture Revitalisation Programme - Commercialising Farming (RARP-CSF)' available on http://www.snv.org/public/cms/sites/default/files/explore/download/rarp_commercialising_smallholder_farming.pdf (accessed 20 September 2016).

⁷⁷⁵ *The Herald* 'Organic farming brings hope' *The Herald* 28 May 2015 available on <http://www.herald.co.zw/organic-farming-project-brings-hope/> (accessed 20 September 2016); Staff Writer 'Tea farmer's increase production' *Daily News* 19 November 2015 available on <https://www.dailynews.co.zw/articles/2015/11/19/tea-farmers-increase-production> (accessed 20 September 2016); SNV 'Tea farmers increase production' available on <http://www.snv.org/update/tea-farmers-increase-production> (accessed 20 September 2016).

AfDB, most of the fish will be sold by women traders and the fish farm will contribute to food security and improve Zimbabwe's trade balance through increased exports.⁷⁷⁶

Furthermore, FAO supported Zimbabwe's Harmonised Social Cash Transfer Programmes (ZHSCPT), as well as the Honde Valley banana value chains by providing capacity-building, education of farming techniques, new seed varieties, and linking rural small-holder farmers with an international banana exporter, 'Matanuska Limited', under contract farming.⁷⁷⁷ However, the fall of the Rand value resulted in Matanuska offering farmers less money, and farmers began side-marketing in conflict with their contractual obligations.⁷⁷⁸ Contract farming has also contributed towards capacity-building and increased income and exports particularly of bananas, tea and coffee in Chiredzi and Honde Valley.⁷⁷⁹

However, these programmes do not cover the entire population of Zimbabwe, and neither are they obligatory. The government must establish a clear long-term laws, and sustainable gricultural strategies beyond the Comprehensive Agricultural Policy Framework,⁷⁸⁰ which are separated from political terms of office and encourages public-private partnerships that develop global value chains.⁷⁸¹



⁷⁷⁶ AfDB 'Lake Harvest Fish Farm: Enhancing sustainable food security in Zimbabwe' (14 August 2013) available on <http://www.afdb.org/en/news-and-events/article/lake-harvest-fish-farm-enhancing-sustainable-food-security-in-zimbabwe-12193/> (accessed 6 August 2016).

⁷⁷⁷ ZHSCPT discussed further in chapter 6; FAO 'ZHSCPT: Impacts of productive capabilities and labour allocation' (2015) available on <http://www.fao.org/3/a-i5214e.pdf> (accessed 20 September 2016); see generally *Qualitative Research and Analyses of the Economic Impacts of Cash Transfer Programmes in Sub-Saharan Africa: Zimbabwe Country Case Study Report* (2013).

⁷⁷⁸ Manicaland Correspondent 'Zimbabwe: Matanuska stops banana export to South Africa as rand continues to fall' *New Zimbabwe* 2 November 2015 available on <http://www.newzimbabwe.com/business-25820-Falling+Rand+Zim+firm+stops+SA+exports/business.aspx> (accessed 20 September 2016).

⁷⁷⁹ FAO 'Banana boom improves food, nutrition and income security for smallholder farmers in Zimbabwe' available on <http://www.fao.org/in-action/banana-boom-improves-food-nutrition-and-income-security-for-smallholder-farmers-in-zimbabwe/en/> (accessed 20 September 2016).

⁷⁸⁰ Zimbabwe Comprehensive Policy for Agriculture 2012-2032, Harare; Mutambara J 'Some advice for Zim Government' *Sunday Mail* 1 November 2015 available on <http://www.sundaymail.co.zw/some-advice-for-zim-government/> (accessed 20 September 2016).

⁷⁸¹ Mutambara J 'Some advice for Zim Government' *Sunday Mail* 1 November 2015 available on <http://www.sundaymail.co.zw/some-advice-for-zim-government/> (accessed 20 September 2016).

Finally, the need for revenue is overriding the country's regional and international commitments to liberalise trade⁷⁸² The purpose of the law continues to be a central factor, and the public good should not be compromised in the interest of the revenue motive. Due to the high wage bill and liquidity constraints, the government has been trying to broaden its revenue base, including through customs duties. This is evidenced by the reforms to the Open General Import Licence (OGIL) regulations which have been reformed over ten times since 2002. It is argued that government is trying to increase its revenue by intentionally imposing highly restrictive trade regulations, and that the objectives officially sought by the import licencing requirements explained in chapter 3 are not the real underlying reason, but rather the need for increased revenue is the underlying reason. There is argument that liberalising under WTO agreements has resulted not truly benefited Zimbabwe due to structural deficiencies which prevent Zimbabwe from making the most of tariff cuts.⁷⁸³

Owing to the increase in small-holder chicken and pig producers, instead of blocking the space for entrepreneurs, Zimbabwe could facilitate partnerships or central collection points such as the Cold Storage Company so that small-holder chicken and pig producers can bring their products for consolidated quality control in line with the Food and Food Standards (Poultry and Poultry Products) Regulations,⁷⁸⁴ packaging and marketing for foreign markets. Currently, Zimbabwean laws are seen to be posing barriers at every opportunity for entrepreneurs and new entrants into domestic markets owing to stringent licencing requirements and high transaction costs. Furthermore, quality control is important in the light of past experiences where some producers were found to be mixing antiretroviral drugs with chicken feed to improve the size of birds, as well as using embalming fluid as a preservative for chickens.⁷⁸⁵ Support for small-scale producers will

⁷⁸² Hurungo JT 'Trade policy review: Zimbabwe' (2010) 7.

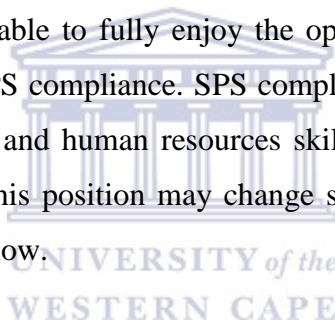
⁷⁸³ Tekere M 'Trade liberalisation under structural economic adjustment: Impact on social welfare in Zimbabwe' Paper for the Poverty Reduction Forum Structural Adjustment Program Review Initiative (April 2001) 6 available on <https://pdfs.semanticscholar.org/e6e9/281bd261a2fa186a72eb3951307b507fdbea.pdf> (accessed 09 July 2017).

⁷⁸⁴ Section 2(2) Statutory Instrument 103 of 1990.

⁷⁸⁵ Herald Reporter 'Don't feed chickens ARVs warns NAC' The Herald 4 March 2015 available on <http://www.herald.co.zw/dont-feed-chickens-with-arvs-warns-nac/> (accessed 24 November 2016); Ngondonga M 'ARVs fed to chickens' *The Zimbabwean* 24 November 2016 available on <http://thezimbabwean.co/2012/09/arvs-fed-to-chickens/> (accessed on 24 November 2016).

improve their position in the market in which four oligopolies have market control.⁷⁸⁶ This would increase the economies of scale and spread risks for individual producers, making it easier to enter foreign markets.

Zimbabwe is party to the SADC FTA and the COMESA FTA, the preferential terms of which allow several zero-rated tariffs. Zimbabwe's membership to SADC and COMESA means it is subject to two regimes that do not always coincide when it comes to 'trade liberalisation commitments, rules of origin and tariff phase-down schedules'.⁷⁸⁷ Zimbabwe is also party to the COMESA-EAC-SADC Tri-partite Negotiations for harmonisation of trade regimes, free movement of business persons, joint implementation of regional infrastructure projects and programmes and legal and institutional arrangements for regional cooperation.⁷⁸⁸ Zimbabwe's membership of COMESA and SADC creates immense opportunity for trade in both RECs. However, Zimbabwe may not be able to fully enjoy the opportunity especially with regard to agricultural goods and required SPS compliance. SPS compliance requires capital injection into laboratories, scientific equipment, and human resources skills training. These three factors are lacking in Zimbabwe. However, this position may change soon, owing to the capital injection envisaged by the EU, explained below.



Under the Economic Partnership Agreement (EPA) between the EU and Eastern and Southern African states, Zimbabwe enjoys free trade under the 'everything but arms' provision.⁷⁸⁹ Zimbabwe ratified the EPA in 2016, and has been slowly increasing trade to the EU.⁷⁹⁰ However,

⁷⁸⁶ Irvines, Suncrest, Lunar Chickens and Ostrinda are oligopolies in producing chickens and chicken feed. Irvines and Suncrest have monopoly over imports of breed grandparent chickens. Zengeni T 'The Competitiveness and performance of the Zimbabwe poultry industry' available on https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55b8733ae4b036c899c6fd4d/1438151482303/Tatenda+Zengeni_Competitiveness+of+the+Zimbabwe+Poultry+industry.pdf (accessed 24 November 2016).

⁷⁸⁷ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁷⁸⁸ Clause 5.2.1 Zimbabwe National Trade Policy (2012-2016).

⁷⁸⁹ ZimTrade 'The interim Economic Partnership Agreement' available on <http://www.zimtrade.co.zw/EU-The-Interim-Economic-Partnership.html> (accessed 17 September 2016); Delegation of the European Union to the Republic of Zimbabwe 'Trade' available on http://eeas.europa.eu/delegations/zimbabwe/eu_zimbabwe/trade_relation/index_en.htm (accessed 17 September 2016).

⁷⁹⁰ ITC News 'Zimbabwe to improve health and safety compliance with support from ITC, European Union' ITC Press Release 15 July 2016 available on <http://www.intracen.org/news/Zimbabwe-to-improve-health-and-safety-compliance-with-support-from-ITC-European-Union/> (accessed 1 August 2016).

to fully benefit from the free market access availed under the EPA, Zimbabwe needs to invest in SPS and TBT compliance for agricultural goods and non-agricultural goods. In this regard, there is a need for capacity-building in Zimbabwe to ensure that more goods meet the SPS and TBT requirements of the EU in order to facilitate trade. The EU reported that it will fund 950 000 Euro in 2015 to the ITC for purposes of capacity-building in Zimbabwe, specifically with regard to SPS and TBT compliance.⁷⁹¹ ITC has been mandated to improve knowledge on TBT and SPS measures, strengthen agencies, and build and upgrade SPS compliance laboratories.⁷⁹²

Trade policy helps to create an environment conducive to the widening of market access, but policy is not sufficient on its own. Hugo et al. argue that market access is not only about applicable tariffs, but also about other important factors such as public institutions and network industries that provide support and necessary forward, backward and lateral linkages.⁷⁹³

Trade Facilitation

The WTO regulates trade facilitation in terms of both the GATT, 1947 and the WTO Agreement on Trade Facilitation.⁷⁹⁴ The WTO encourages alignment of regional and domestic trade regulation with international standards. The OECD is an international organisation that sets such standards and guidelines, and recently introduced the Trade Facilitation Index (TFI).

The OECD uses the TFI to examine the ease of accessing foreign markets and conducting business in those markets. The TFI considers 16 factors, including information availability, involvement of trade community, advance rulings, appeal procedures, fees and charges, formalities (documents), formalities (automation), formalities (procedures), internal border agency cooperation, external

⁷⁹¹ ITC News ‘Zimbabwe to improve health and safety compliance with support from ITC, European Union’ ITC Press Release 15 July 2016 available on <http://www.intracen.org/news/Zimbabwe-to-improve-health-and-safety-compliance-with-support-from-ITC-European-Union/> (accessed 1 August 2016).

⁷⁹² ITC News ‘Zimbabwe to improve health and safety compliance with support from ITC, European Union’ ITC Press Release 15 July 2016 available on <http://www.intracen.org/news/Zimbabwe-to-improve-health-and-safety-compliance-with-support-from-ITC-European-Union/> (accessed 1 August 2016).

⁷⁹³ Hugo S, Squalli J, and Wilson K ‘What Explains Market Access’ (May 2006) *Working Paper Series: Working Paper No. 06-08 Zayed University Economic and Policy Research Unit 3*.

⁷⁹⁴ WTO TFA, 2013.

border agency cooperation, governance and impartiality.⁷⁹⁵ It is interesting to note that the TFI was drafted prior to the adoption of the WTO Trade Facilitation Agreement, and both documents use the same headings and make reference to the same factors. The OECD 2014 Trade Facilitation Report further notes:

Zimbabwe matches or exceeds best performance across the sample as regards streamlining of procedures and external border agency cooperation. Zimbabwe matches or exceeds the average performance of low income countries in all TFI areas. Performance has improved between 2012 and 2015 in the areas of internal border agency cooperation. Performance in the other areas is stable, with the exception of information availability, involvement of trade community, advance rulings, automation, streamlining of procedures, and governance and impartiality, where some ground was lost. Performance in the areas of information availability, involvement of trade community, advance rulings, appeal procedures, fees and charges, simplification and harmonisation of documents, automation, internal border agency cooperation and governance and impartiality is below best performance.⁷⁹⁶

While the national trade policy boasts of Zimbabwe's one-stop border post, Zimbabwe's TFI identifies several areas that still need to be improved upon to reach optimal trade-facilitation levels.⁷⁹⁷ Specifically, the TFI identifies necessary reforms for Zimbabwe as follows.⁷⁹⁸ Zimbabwe is encouraged to increase the availability of information pertaining to rules of customs classification, agreements with third countries, and changes in regulations. It is encouraged to engage the private sector, make information concerning advance rulings available to the public where such information is in the general interest, increase the period of validity of advance rulings and publish such periods. Other areas of concern are the formalities of documents, automation and clearance procedures. General concerns include reducing clearance time and the time consumed

⁷⁹⁵ OECD 'Trade facilitation indicators' available on http://www.oecd.org/tad/facilitation/Zimbabwe_OECD-Trade-Facilitation-Indicators.pdf (accessed 18 September 2016).

⁷⁹⁶ OECD 'Trade facilitation indicators: Country profiles- Zimbabwe' available on <http://compareyourcountry.org/trade-facilitation> (accessed 31 January 2016).

⁷⁹⁷ OECD 'Trade facilitation indicators: Country profiles- Zimbabwe' available on <http://compareyourcountry.org/trade-facilitation> (accessed 31 January 2016).

⁷⁹⁸ OECD 'Trade facilitation indicators: Country profiles- Zimbabwe' available on <http://compareyourcountry.org/trade-facilitation> (accessed 31 January 2016).

by physical inspections, and that the country should aim to release goods pending final determination of duties and payment of duties.

Although it is practical and meaningful to reduce clearance time and physical inspections, it is not immediately clear what benefit would arise from allowing importers access to goods and in fact access to the market prior to them paying determined duties. Despite the delays caused by this system, a procedure requiring *ex-post-facto* payment of duties would create unnecessary obligations on the Zimbabwe Revenue Authority to track unpaid duties after goods have already been sold on the market.

The OECD also encourages the creation of simplified customs procedures, increased ICT infrastructure and quality to support the automation of border processes. This appears to be under way as ZIMRA has adopted the COMESA STR.⁷⁹⁹ Another recommendation pertains to the finalisation of single window border processing, currently being developed under the Zimbabwe one-stop border post initiative. Zimbabwe has since established the Chirundu One-Stop Border Post between Zimbabwe and Zambia which is the first of its kind in Africa.⁸⁰⁰ Finally, Zimbabwe is encouraged to monitor and hold accountable corrupt border officials, and support ethical customs clearance, made transparent by annual customs activity reports.

As explained in paragraph 3.4.1.4 above, Zimbabwe should not only support the movement of goods across its borders, but create an enabling environment for domestic industry to develop.

Zimbabwe is a landlocked country, and corporations interested in trading with Zimbabwe must consider how their goods or services will be transported to Zimbabwe, considering all ports of transit such as South Africa's Durban and Mozambique's Beira ports of entry, which have direct access to ocean freight.⁸⁰¹ Other supporting services such as electricity, water and available

⁷⁹⁹ See 4.4.4.1 above.

⁸⁰⁰ Clause 5.2.1 Zimbabwe NTP (2012-2016).

⁸⁰¹ OECD at 38.

technologies also increase transaction costs that may limit the exportation or importation of goods.⁸⁰²

Sanitary and Phytosanitary Measures

Other factors that may limit market access are sanitary and phytosanitary measures as well as non-trade barriers. For example, the import of animals and infectious things into Zimbabwe is prohibited, unless a special import license is obtained in terms of section 4(1) Animal Health (Import) Regulations.⁸⁰³ This provision falls within the ambit of the rights of member states in terms of Article 2 (1) Agreement on Sanitary and Phytosanitary Measures, which allows member states to take sanitary and phytosanitary measures for the protection of human and plant life or animal life, and the protection of health.⁸⁰⁴ This measure has the effect of protecting other animals in Zimbabwe from infection from the imported animal or infectious thing. Specific diseases such as foot and mouth disease, African swine fever and rinderpest are particularly contagious and are common in Africa, and consequently these are banned and animals must be accompanied by veterinary certificates with a clean bill of health for the preceding six months, while East Coast fever requires a clean bill for the preceding three years prior to import.⁸⁰⁵

Although Zimbabwe has SPS measures, it does not have sufficient support in terms of technical expertise, R&D and laboratory infrastructure, unlike South Africa which provides significant SPS compliance support for traders. South Africa established SPS compliance laboratories that help ease trade in agricultural goods and is in partnership with the USA under the Trade and Investment Framework Agreement (TIFA), which is a platform to address common interests such as AGOA.⁸⁰⁶ The potential reach of the Indigenisation Act makes it financially unsound for potential investors to invest in SPS infrastructure in Zimbabwe, for example, because there is no substantive security of tenure, and there is a high risk that their financial investment can be expropriated in part or in whole. This means there is need to revisit the Indigenisation and Economic

⁸⁰² OECD at 38.

⁸⁰³ Statutory Instrument 57 of 1989.

⁸⁰⁴ WTO SPS Agreement, 1994.

⁸⁰⁵ Section 6(4) Animal Health (Import) Regulations, Statutory Instrument 57 of 1989.

⁸⁰⁶ See paragraph 4.4.1.1 above.

South Africa further benefits from the SACU-USA Trade, Investment and Development Cooperation Agreement (TIDCA), which is a platform for bilateral negotiations regarding SPS measures, TBTs and customs cooperation. TIDCA is also a forum for capacity-building and trade promotion and development. This implies that South African goods have the benefit of compliance support, which means in effect that fewer goods from South Africa would be refused entry to the USA market because of the SPS and TBT support enjoyed as a consequence of TIFA and TIDCA. Zimbabwe, on the other hand, has an ailing Standards Association of Zimbabwe (SAZ). SAZ is governed by a weak regulatory framework and lacks technical expertise, monitoring and evaluation, to the extent that certification does not always equate to compliance or conformity.⁸⁰⁷

4.5 CHAPTER CONCLUSION

This chapter has discussed the importance of agricultural production and agricultural trade within the context of Zimbabwe. It explained the international regulation of agricultural market access by the WTO and regional regulation of agricultural market access and trade facilitation. Key issues that arose include the need for further harmonisation and possibly unification of SPS compliance standards within the SADC and COMESA in order to improve trade facilitation. There is also a pressing need for investment in research and development and capacity building, especially in developing the legislative framework around SPS compliance laws and policy in line with regional and international standards. The Chapter noted further that there is a critical need for investment in SPS infrastructure such quarantine facilities, and investment in inspection and certification systems to ease the flow of goods (especially agricultural goods) across borders into and out of Zimbabwe. Such support will enable Zimbabwe to benefit more meaningfully from preferential tariffs of the SADC, COMESA and EPA. Such support will also facilitate export and boost export earnings as envisaged by ZimAsset.

⁸⁰⁷ Clause 1.4 Zimbabwe Standards Association Zimbabwe Country Paper for the ISO/TC Workshop on Linking Trade Promotion Organisations and National Standards Bodies for Export Success, 21-23 June 2011, Dar-es-Salaam, Tanzania.

CHAPTER 5

FOREIGN DIRECT INVESTMENT AND DOMESTIC INVESTMENT

‘In this triangular trade, England-France and Colonial America equally supplied the exports and the ships, Africa, the human merchandise, the plantations and colonial raw materials. ... By 1750 there was hardly any a trading or a manufacturing town in England which was not in some way connected with the triangular, or direct colonial trade. The profits obtained provided one of the main streams of that accumulation of capital in England which financed the Industrial Revolution.’⁸⁰⁸

5 INTRODUCTION

The previous chapter highlighted the need for prioritising the agricultural sector as a means to boost economic development through increased market access. Increasing market access will require significant financial support from the government to ensure, for example, sanitary and phytosanitary (SPS) compliance and improve infrastructure such as roads and storage facilities that would facilitate trade. However, the government does not have the capacity to provide the financial support required because of low revenue, recurring negative trade balances, and international debt.⁸⁰⁹ Consequently, the government has to find other ways to provide financing, such as through financial intermediaries or by inviting foreign investment.⁸¹⁰

Chapter 5 examines whether laws pertaining to protection of foreign direct investment (FDI) encourage investment in Zimbabwe and whether investment laws promote or hinder economic development. Foreign investment may be defined as a ‘process or transaction, as well as the asset[s] acquired as a result of the process or transaction’,⁸¹¹ and as ‘the transfer of tangible and

⁸⁰⁸ Williams E *Capitalism and Slavery* (1944) 51-52; Hill R and Katarere Y ‘Colonialism and inequity in Zimbabwe’ in Matthew R, Halle M and Switzer J (eds) *Conserving the Peace: Resources, Livelihoods and Security* (2002) 252 also available on https://www.iisd.org/pdf/2002/envsec_conserving_5.pdf (accessed 11 October 2016); Roy AN *The Third World in the age of Globalisation: Requiem or New Agenda* (1999) 108.

⁸⁰⁹ World of Information Africa Review 2003/4 25 ed (2003) 374.

⁸¹⁰ Financial services are discussed in Chapter 6.

⁸¹¹ Salacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 3; increasingly BITs define what constitutes investments, see for example Article 1

intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets'.⁸¹² There are numerous forms of investment, but this chapter restricts itself to FDI.⁸¹³

5.1 FOREIGN DIRECT INVESTMENT

In many instances, FDI enjoys special protections, unlike domestic investments.⁸¹⁴ In *Patrick Mitchell v the Democratic Republic of Congo*, Mitchell, an American citizen residing in the DRC, owned a law firm, which was shut down by armed forces during the armed conflict in 1999.⁸¹⁵ The panel held that the law firm did not constitute an 'international investment' as envisaged in the national investment code and therefore could not enjoy the same protection as international investment.⁸¹⁶ The next section provides examples of FDI.



Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, signed 27 November 2009, not yet in force.

⁸¹² Sornarajah M *The International Law on Foreign Investment* (2010) 8.

⁸¹³ Sornarajah M *The International Law on Foreign Investment* (2010) 8; Salacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 15.

The IMF and OECD define a foreign direct investment enterprise as 'an incorporated or unincorporated enterprise in which a foreign investor owns 10 per cent or more of the ordinary shares or voting power of an incorporated enterprise or the equivalent of an unincorporated enterprise. The numerical guideline of ownership of 10 per cent of ordinary shares or voting stock determines the existence of a direct investment relationship. An effective voice in the management, as evidenced by an ownership of at least 10 per cent, implies that the direct investor is able to influence or participate in the management of an enterprise; it does not require absolute control by the foreign investor' (§7 and §8 *OECD Benchmark Definition*); IMF 'IMF Committee on balance of payments statistics and OECD Workshop on international investment statistics direct investment Technical Expert Group (DITEG)' (2004) Issue Paper No. 20 available on <http://www.imf.org/external/np/sta/bop/pdf/diteg20.pdf> (accessed 23 July 2014). Salacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 15.

⁸¹⁴ *Patrick Mitchell v the Democratic Republic of the Congo (DRC)* ICSID Case No.ARB/99/7 available on <https://icsid.worldbank.org/ICSID/FrontServlet> (accessed 22/07/2014).

⁸¹⁵ ICSID Case No.ARB/99/7 available on <https://icsid.worldbank.org/ICSID/FrontServlet> (accessed 22 July 2014); World Movement for Democracy 'A short history of the conflict in the Democratic Republic of Congo and the involvement of NGOs in the peace process' available on www.wmd.org/resources/whats-being-done/ngo-participation-peace-negotiations/history-conflict-democratic-republic (accessed 30 September 2014); Mortenson JD 'The meaning of "Investment": ICSID's travaux and the domain of international investment law' (2010) 51 (1) *Harvard International Law Journal* 258; University of Michigan Public Law Working Paper No. 249 available at <http://ssrn.com/abstract=1911364> (accessed 30 September 2014).

⁸¹⁶ ICSID Case No.ARB/99/7 available on <https://icsid.worldbank.org/ICSID/FrontServlet> (accessed 22 July 2014).

5.1.1 Types of FDI

There are different types of FDI, such as mergers and acquisitions, greenfield and brownfield, and joint ventures.⁸¹⁷ Greenfield investments are of most importance and have the highest occurrence in Zimbabwe, in comparison with mergers, acquisitions and brownfields. Joint ventures experienced a brief surge owing to nationalisation policies implemented under the Indigenisation and Economic Empowerment Act, Chapter 14:33 of Zimbabwe (Indigenisation Act).⁸¹⁸ The Indigenisation Act requires a 51 per cent share local ownership, which means in essence that in all sectors to which this applies, mergers and acquisitions would not be permissible unless they constitute a joint venture that complies with the conditions of the Indigenisation Act.⁸¹⁹

5.1.2 Relevance and Importance of FDI for Zimbabwe

When FDI is implemented well, it creates opportunities for economic development. However, as explained in 2.3, the government needs to co-exist with private enterprise and regulate in a way that ensures efficient allocation of resources. Bearing in mind that this thesis has defined economic development as a combination of economic growth and social development through equitable distribution of resources, it is important to find a balance. The government must regulate in a manner that takes into account the unique development needs of Zimbabwe as well as investors' interests.⁸²⁰

The agricultural and manufacturing sector both have a compelling need for FDI as a means to fill the void caused by low state revenue, foreign debt and negative trade balances.⁸²¹ Without production, there can be no export, and without exports, there can be no export earnings to boost

⁸¹⁷ Read further in Chidede T *Legal Protection of Foreign Direct Investment: A critical Assessment with focus on South Africa and Zimbabwe* (2016) 11; *United Nations Conference on Trade and Development World Investment Report* (2013); Asafo-Adjei A *Foreign Direct Investment and its Importance to the Economy of South Africa* (unpublished LLM thesis, 2007) 1; Musarurwa 'Zimbabwe green-fields projects stall' *The Herald* 10 July 2012 available on <http://www.herald.co.zw/zim-greenfield-projects-stall/> (accessed 25 November 2016); Marinescu N and Constantin C 'Greenfield vs. acquisition in FDI: Evidence from Romania' Paper Presented at the 10th ETSG Annual Conference - Warsaw September 2008.

⁸¹⁸ Chapter 14: 33; Musarurwa 'Zimbabwe green-fields projects stall' *The Herald* 10 July 2012 available on <http://www.herald.co.zw/zim-greenfield-projects-stall/> (accessed 25 November 2016); Marinescu N and Constantin C 'Greenfield vs. acquisition in FDI: Evidence from Romania' Paper Presented at the 10th ETSG Annual Conference - Warsaw September 2008 3.

⁸¹⁹ Chapter 14:33.

⁸²⁰ See paragraph 2.2.2 above.

⁸²¹ Bernasconi-Osterwalder N and Johnson L *Key Cases From 2000–2010* (2010).

trade balance. It is argued that in order to advance the development needs of Zimbabwe, FDI must be directed towards rural and agricultural development, and formalisation of the informal sector. Incorporating a policy of inclusive development requires strategic forward and backward linkages and public-private partnerships. The next section analyses the extent to which Zimbabwean investment law aligns with international and regional investment frameworks.

5.1.3 Development of Investment Regulation

This part traces the development of international investment regulation under customary international law and treaty law. It provides a brief historical overview. The development of investment regulation has taken many years and continues to evolve. In order to fully understand the current frameworks of investment regulation, it is necessary to begin with a brief historical overview.

5.1.3.1 Pre-Havana

The Hanseatic Treaty between Hamburg, Lubeck and Denmark is one of the earliest forms of globalisation facilitating and increasing trade between these three territories and Western Europe.⁸²² During this era, investments were protected on the basis of state sovereignty and diplomatic protections.⁸²³ By the early nineteenth century, states had begun concluding treaties of friendship that extended certain protections to the property of aliens, for example, the United States of America (USA) and Algeria Treaty of Peace and Amity of 1816.⁸²⁴ Some states went beyond the diplomatic protections secured in the treaties of friendship, and entrenched equal rights for the protection of aliens' property in domestic law.⁸²⁵

In 1938, the Hull formula was introduced by Stuart Hull, former USA Secretary of State as 'prompt, adequate, and effective compensation'. It arose out of USA-Mexico disputes concerning

⁸²² Bernasconi-Osterwalder N and Johnson L *Key Cases From 2000–2010* (2010); Denzel MA and Weber B *State and Finance in the Holy Roman Empire from c.1650 to c.1800. A Survey*.

⁸²³ UNCTAD *International Investment Agreements: Key Issues Vol I, REF: UNCTAD/ITE/IIT/2004/10* (2004) 5.

⁸²⁴ Zimbabwe only joined in written forms of such treaties after attaining independence in 1980, see Zimbabwe and Tanzania Treaty of Friendship and Cooperation, December 5, 1980.

⁸²⁵ Articles 1 and 17 France Declaration of the Rights of Man, 26 August 1789; also available on http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 30 September 2016).

the nationalisation by Mexico of USA investment interests in agrarian land.⁸²⁶ Carlos Calvo, foreign Prime Minister of Argentina, came up with a doctrine which opposed the Hull formula and essentially the customary international law (CIL) position regarding diplomatic protection and state intervention on the basis that expropriation was a matter under domestic law, and under the exclusive jurisdiction and regulatory space of investment host states.⁸²⁷ Latin America played a pivotal role in arguing for the interests of developing countries, especially through the legal reforms which incorporated the doctrine. In 1907 the Drago-Porter Convention came into effect, and it proposed the use of force, in effect reinforcing the use of diplomatic protection.⁸²⁸

5.1.3.2 The Havana Charter and the OECD International Investment Agreement (MAI)

The Havana Charter of 1948 was the first concerted effort to create an international investment agreement drafted with the intention of creating an all-encompassing International Trade Organisation (ITO) which would regulate, at an international level, various areas of economic law including trade, investment and competition.⁸²⁹ The ITO failed when the USA pulled out. Later the USA and United Kingdom (UK) lobbied for a Multilateral Agreement on Investment (MAI) within OECD. This was tabled in May 1995.⁸³⁰ However, efforts to create the MAI failed in 1998 after three years of intensive negotiations when France pulled out.⁸³¹

WESTERN CAPE

⁸²⁶ Schachter O 'Editorial comment: Compensation for expropriation' (1984) 78 (1) *The American Journal of International Law* 121 121.

⁸²⁷ Freeman AV Recent aspects of the Calvo doctrine and the challenge to international law' (1946) 40 (1) *American Journal of International Law* 121 131.

⁸²⁸ Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 18 October 1907, Treaty Series 537 (entered into force 26 January 1910), available at http://avalon.law.yale.edu/20th_century/hague072.asp (accessed 4 October 2016).

⁸²⁹ UNCTAD *International Investment Agreements: Key Issues Vol I, REF: UNCTAD/ITE/IIT/2004/10* (2004) 6.

⁸³⁰ General Agreement on Tariffs and Trade (GATT) Geneva, 1 January 1948; Tieleman K 'Failure of the MAI and the absence of a global public policy network' 4 available on old.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (accessed 4 August 2016); Tieleman K 'Failure of the MAI and the absence of a global public policy network' 8 available on old.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (accessed 4 August 2016).

⁸³¹ Three of the main contentions were that the MAI failed to balance investor interests and development needs, negotiations affecting developing countries were done in private meetings to which developing countries were not invited, but they were expected to accede, and it favoured investors over developing country host states. Read further in UNCTAD *International Investment Agreements Key Issues Vol I, REF: UNCTAD/ITE/IIT/2004/10* (2004) 6; Neumayer E 'Multilateral Agreement on Investment: Lessons for the WTO from the failed OECD negotiations' 1999 46 (6) *Wirtschaftspolitische Blätter* 618-628 available on p. 12 <http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20WiPo.pdf> (accessed 4 August 2016); Lalumiere C and Landau JP Report on the MAI, Intermediary Report, September 1998, Paris.

5.1.3.3 Current Trends post-Havana Charter

After the failure of the MAI, the use of Bilateral Investment Treaties (BITs) became the main form of agreement regulating foreign investment in both developed and developing countries.⁸³² The first set of BITs entered into by developing countries are generally referred to as first generation BITs. These first generation BITs were time-bound, generally to apply over periods of between ten and 20 years.

Currently, some states are renewing their BITs in so-called second generation BITs. The second generation BITs tend to reflect developmental issues, such as performance rights and sustainable development. One of the main reasons for the shift from first to second generation BITs is that developing countries are realising they have not in fact benefitted from the economic development which was expected to result from FDI. Other states are opting to eliminate BITs and revert to regulation of investment under domestic law, based on the customary international law principle of state sovereignty and the right to regulate: examples include South Africa, Bolivia, India and Australia.⁸³³

International Investment Agreements (IIAs) are becoming popular. They involve more than two state parties and are often not bound strictly to investment but also include trade and tariffs.⁸³⁴ There is also an increase in preferential trade and investment agreements (PTIAs),⁸³⁵ normally at regional levels, such as the COMESA Treaty and the SADC Treaty. There is also an increase in investment contracts negotiated directly by the individual investor and the host state representative or agency.

⁸³² Newcombe A and Paradell L *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 1 Kluwer: Netherlands.

⁸³³ Olivet C, Garganera J, Sevilla F and Purugganan J *Signing away sovereignty How investment agreements threaten regulation of the mining industry in the Philippines* (2016).

⁸³⁴ UNCTAD *Trends in International Investment Agreements: An Overview* UNCTAD Series on Issues in International Investment Agreements Ref: UNCTAD/ITE/IIT/13 (1999) 2 and 43.

⁸³⁵ UNCTAD 'South-south investment agreements proliferating' IIA Monitor No. 1 (2005) International Investment Agreements Ref: UNCTAD/WEB/ITE/IIT/2006/1 1-6.

5.2 STANDARDS OF TREATMENT

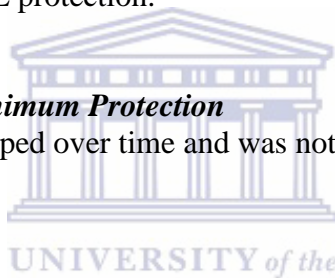
Standards of treatment explain the general manner in which foreign investments will be treated within the territory of the host state. These standards are discussed below in the context of international, regional and domestic law.

5.2.1 International Regulation

As noted in 2.2.1 investments are made with an expectation of protection from arbitrary or harmful conduct by the host state or within its territory.⁸³⁶ Bearing in mind that there is no all-inclusive international investment treaty, this part analyses selected treaties, customary international law, and soft law. The standard of treatment is normally determined by general principles of customary international law (CIL) and by treaty law as found in relevant BITs and IIAs. A country can elect to apply different standards, and there is some overlap between them, as will be seen below. First to be discussed is the minimum CIL protection.

Customary International Law Minimum Protection

The CIL minimum standard developed over time and was not initially geared towards investment relations. Sornarajah notes that



the international minimum standard concerned physical injury to the person of the individual alien and not to damage to his property. The cases that concerned damage to the property of aliens considered damage that took place during social upheavals and revolutionary situations that posed danger to life and to property.⁸³⁷

The CIL minimum standard is often equated with the ‘free and equitable treatment’ (FET) which is discussed below.

⁸³⁶ Shrestha OK *A Host State Regulatory Right in Fair and Equitable Treatment (FET) in Bilateral Investment Treaties (BITs)* (unpublished Master thesis, University of Lapland, 2016) 10.

⁸³⁷ Sornarajah M *The International Law on Foreign Investment* 2 ed (2004) 150 Cambridge: Cambridge University Press.

Free and Equitable Treatment

The Havana Charter was the first instrument to refer to the FET standard. The FET standard requires in the first instance ‘fairness’, which means conduct that is ‘just, equitable, unbiased [and] in accordance with rules’. In the second instance, it calls for equity, which ‘requires a balancing process, weighing up what is right in all circumstances’.⁸³⁸ Arbitral tribunals have interpreted the FET standard as the opposite of ‘denial of justice and due process’, ‘manifest arbitrariness’ and defeating legitimate expectations of investors, and discrimination against investors.⁸³⁹

The FET standard was later used in various bilateral and international agreements.⁸⁴⁰ More recent international agreements also provide for the FET standard, for example the Convention Establishing the Multilateral Investment Guarantee Agreement (MIGA Convention), 1985, stipulates that in order for investments to be guaranteed under MIGA, the host state must offer the FET standard of treatment.⁸⁴¹ Again the World Bank Guidelines on Treatment of Foreign Direct Investment state that

each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines.⁸⁴²

Moreover, the Draft OECD Multilateral Agreement on Investment states that ‘[e]ach contracting Party shall accord fair and equitable treatment and full and constant protection and security to foreign investments in their territories’.⁸⁴³ The FET standard appears in numerous bilateral and international agreements, and has been expressed as constituting part of customary international

⁸³⁸ UNCTAD ‘Fair and equitable treatment’ available on http://investmentpolicyhub.unctad.org/Upload/Documents/PACER_6%20Fair%20and%20Equitable%20Treatment.pdf (accessed 24 November 2016).

⁸³⁹ UNCTAD ‘Fair and equitable treatment’ available on http://investmentpolicyhub.unctad.org/Upload/Documents/PACER_6%20Fair%20and%20Equitable%20Treatment.pdf (accessed 24 November 2016).

⁸⁴⁰ OECD *Fair and Equitable Treatment Standard in International Investment Law OECD Working Papers on International Investment 2004/3* (2004) 2; Article 11 Havana Charter for an International Trade Organisation 2; Article 1 Draft Convention on Investments Abroad, 1959; Article 1(a) Draft Convention on the Protection of Foreign Property by the OECD Council on 12 October 1967; The Draft United Nations Code of Conduct on Transnational Corporations 24, similarly states in Article 48.

⁸⁴¹ Article 12(d) MIGA Convention, 1985.

⁸⁴² Article III(2) World Bank Guidelines, 1992.

⁸⁴³ 1998; The Energy Charter Treaty also provides for the FET standard.

law.⁸⁴⁴ There are also standards of treatment relating to non-discrimination. These are discussed below.

Non-Discrimination

Two main terms used to express non-discrimination are largely associated with the World Trade Organisation. They are national treatment (NT) and most-favoured nation (MFN) treatment.⁸⁴⁵ These terms have found application in international investment. NT standard requires investors to be given treatment no less favourable than domestic investors. MFN treatment requires foreign investors to be given treatment no less favourable than other foreign investors. The NT and MFN standards are relative to the peculiar circumstances of the states involved, and therefore they have often been discounted in favour of the FET standard, which does not depend on the treatment of other investors whether domestic or foreign. The OECD states that

[t]he obligation to provide “fair and equitable treatment” ... is an “absolute”, “non-contingent” standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the “relative” standards embodied in “national treatment” and “most favoured nation” principles which define the required treatment by reference to the treatment accorded to other investment.⁸⁴⁶

The NT standard aligns with the Calvo doctrine. This is a particularly useful standard in the context of developing countries to the extent that it does not provide foreign investors better treatment than domestic investors. Another standard of treatment used is the full protection and security standard (FPS) which is discussed below.

Full Protection and Security

Full Protection standard of treatment (FPS standard) is still moot to the extent that it is not yet clear whether the FPS standard refers to the minimum CIL standard which relates to FET, or

⁸⁴⁴ OECD *Fair and Equitable Treatment Standard in International Investment Law OECD Working Papers on International Investment 2004/3* (2004) 9.

⁸⁴⁵ Article 2 WTO Agreement on Trade Related Investment Measures, 1994; Article 3 GATT, 1994; see paragraph 3.1.2.3.

⁸⁴⁶ OECD *Fair and Equitable Treatment Standard in International Investment Law OECD Working Papers on International Investment 2004/3* (2004) 2.

whether it is a higher treaty norm that requires absolute protection from both physical and legal conduct.⁸⁴⁷ Arbitral tribunals have reached divergent decisions on the question of what constitutes the FPS standard. In *AES v Hungary*, the arbitral tribunal noted that the FPS standard goes further than physical security, but it

“does not protect against a state’s right [as was the case here] to legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances with a view to achieving objectively rational public policy goals”.⁸⁴⁸

The FPS potentially carries significant consequences for developing countries in dispute settlement procedures, especially where FPS is defined to include both physical and legal protection. The case of *Biwater Gauff v Tanzania*⁸⁴⁹ is a case in point. In this regard, it is argued that in the light of the serious financial implications that the FPS standard potentially creates, the FPS standard should be avoided by developing country host states. This is because higher standards of treatment place higher obligations on the host state. As in the case of *Biwater Gauff v Tanzania*, where the host state was required to compensate for damage caused by protests, this would create an increased burden for developing countries, which tend to have violent protests resulting in serious damage to property. Compensation for such damage would undeniably result in redirection of public funds to foreign investors, at the expense of the provision of public services.

5.2.2 Regional Regulation

Within the regional context, both the Common Market for Eastern and Southern Africa (COMESA)⁸⁵⁰ and the Southern African Development Community (SADC),⁸⁵¹ are integral to

⁸⁴⁷ UNCTAD Series on International Investment Policies for Development, Investor-State Disputes Arising from Investment Treaties: A Review (2005) 40-41; *A MT v Congo*, Award of 21 February 1997, paras. 6.05, 6.06; *Asian Agricultural Products Ltd. v Sri Lanka* (ICSID Case No. ARB/87/3), Award of 27 June 1990; *Biwater Gauff v Tanzania* ICSID CASE NO. ARB/05/22.

⁸⁴⁸ Malik M ‘The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?’ (2011) *IISD* 9.

⁸⁴⁹ Para 724-728 ICSID CASE NO. ARB/05/22.

⁸⁵⁰ Treaty Establishing a Common Market for Eastern and Southern Africa adopted 5 November 1993, Kampala, entered into force 8 December 1994.

⁸⁵¹ Treaty Establishing the Southern African Development Community, Windhoek, 1992.

Zimbabwe's investment relations. The COMESA Treaty and SADC Treaty constitute preferential trade and investment treaties (PTIAs), in that they provide for trade and investment in great detail.

5.2.2.1 Common Market for Eastern and Southern Africa (COMESA)

Article 159(1)(a) COMESA Treaty provides that

[i]n order to encourage and facilitate private investment flows into the Common Market, Member States shall accord fair and equitable treatment to private investors.⁸⁵²

The text of the COMESA Treaty aligns with the CIL minimum standard of treatment to the extent that this standard relates to the FET standard. Article 159(1)(c) further states that member states 'shall create and maintain a predictable, transparent and secure investment climate in the Member States.'⁸⁵³ It is unclear if future tribunals can read this as constituting the 'legal protection' element of the FPS standard, which is a higher standard of treatment.

Similarly, the COMESA CCIA makes reference to the FET standard. The CCIA deals with the FET more extensively, dedicating an entire Article to explaining the FET standard. Article 14 COMESA CCIA states that

Member states shall accord fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.⁸⁵⁴

Article 14 not only assigns the FET to the CIL minimum protection, but also limits the application of the FET. In Article 14(3), the COMESA CCIA makes provision for progressive realisation of the FET standard, noting that member states are not deemed to be equal in terms of the quality of

⁸⁵² COMESA Treaty, 1994.

⁸⁵³ COMESA Treaty, 1994.

⁸⁵⁴ COMESA CCIA, 2012.

their systems and institutions, and that as a result of these inequalities the FET standard is not identical across member states. This is an important clarification that takes into account the unique needs of the region. Although it is an impressive introduction to the investment arena, perhaps such a clause would carry even more weight if it constituted part of COMESA-Third Party BITs to which COMESA member states are party. Moreover, Article 14(2) notes that Article 14(1):

prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard.⁸⁵⁵

This provision dictates a clear dissociation from the FPS standard for purposes of intra-COMESA investment. Furthermore, non-discrimination appears to be embedded in the COMESA Treaty, although the chapter on investment does not specifically discuss the NT and MFN. These are found in Article 56 and 57, which state that '[m]ember States shall accord to one another the most favoured nation treatment' and that '[m]ember States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Member States' respectively.⁸⁵⁶

Although these provisions fall under Chapter 6 COMESA Treaty which deals with trade relations, these provisions can be inferred from Chapter 26 COMESA Treaty, dealing with investment relations because they fall within the same treaty document, reflecting the general intention of the drafters.⁸⁵⁷ This position is strengthened by the objectives of the Treaty for the Establishment of the African Economic Community (AEC Treaty) noted in the Preamble to the COMESA Treaty, and in Article 6, which seeks 'equality and interdependence of Member States'.⁸⁵⁸ The next section explains the development of SADC investment law briefly and analyses the standards of treatment applicable under SADC treaty law.

⁸⁵⁵ Article 14(2) COMESA CCIA, 2012.

⁸⁵⁶ COMESA Treaty, 1994.

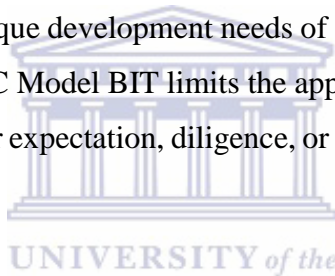
⁸⁵⁷ COMESA Treaty, 1994.

⁸⁵⁸ COMESA Treaty, 1994.

5.2.2.2 Southern African Development Community (SADC)

Whereas the SADC Treaty does not expressly provide for national treatment and MFN treatment, the SADC Investment Protocol and the SADC Model BIT provide for non-discrimination. The SADC Investment Protocol provides for the FET standard in Article 6, which states that ‘[i]nvestments and investors shall enjoy fair and equitable treatment in the territory of any State Party’. Moreover Article 6(2) provides for MFN treatment.⁸⁵⁹ It states that ‘[t]reatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State.’⁸⁶⁰

Similarly, Article 4 SADC Model BIT provides for non-discrimination. The SADC Model BIT acknowledges the difficulties raised by the FET standard and proposes two clauses in the alternative, one relating to FET and the other creating a new standard called ‘fair administrative treatment’ (FAT). Whereas the FET is aligned with the minimum CIL standard of protection, the FAT appears to incorporate the unique development needs of SADC member states. Should states opt for the FET standard, the SADC Model BIT limits the application of the FET such that it does not create a higher norm, or a higher expectation, diligence, or duty of care on the host state. Article 5.1 option 1 states:



[f]or greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.⁸⁶¹

On the other hand, option 2 states in relation to the FAT standard that

[t]he State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].⁸⁶²

⁸⁵⁹ SADC Investment Protocol, 1996.

⁸⁶⁰ Article 6(2) SADC Investment Protocol, 1996.

⁸⁶¹ Article 5 SADC Model BIT, 2012.

⁸⁶² Zimbabwe-South Africa BIT signed 27 November 2009; Article 5(1) SADC Model BIT, 2012.

Some SADC Member States' BITs reflect a partial adoption of the SADC Model BIT, whereas other member states have continued to rely on the first generation BITs formulation. Other states have incorporated more restrictive provisions on the host state in their second generation BITs, such as the South Africa-Zimbabwe BIT (which is not yet in force). It uses the full protection (FP) standard over and above the FET standard. The BIT provides that

[i]nvestments 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 investments in its territory of investors of the other Party.⁸⁶³

5.2.3 Domestic Regulation

Although Zimbabwe has a statute regulating the Investment Authority, it does not have a statute designed specifically to address investments, unlike South Africa which recently passed the Investment Promotion Act.⁸⁶⁴ Consequently, substantive provisions such as those determining the standard of treatment cannot be drawn from the Zimbabwe Investment Authority Act. The Constitution speaks to the protection of property and guarantees the right to property, which is explained further in paragraph 5.5.3. However, section 71(3) discusses appropriate compensation in the event of expropriation and not the standard of treatment for investments in general. Since statute law does not detail the applicable standard of treatment for investments in Zimbabwe and there is no international investment agreement, this leaves the determination of the standard of treatment from BITs and PTIAs applicable to Zimbabwe. The most significant PTIAs in the context of Zimbabwe are SADC and COMESA, as explained above.

In terms of PTIAs, both SADC and COMESA appear to favour the FET standard, although there are nuances to their interpretation of it. Whereas COMESA interprets FET as equating to the minimum CIL protection, SADC moves towards reducing the burden of treatment on the host state. Moreover, SADC introduces the FAT standard. Both PTIAs also provide for NT and MFN.

⁸⁶³ Article 3(1) South Africa- Zimbabwe BIT, signed 27 November 2009, but not yet in force.

⁸⁶⁴ Act 22 of 2015.

In alignment with CIL, SADC and COMESA, Zimbabwe provides for NT and MFN in most of its BITs as the basic standard of treatment. For example, the Zimbabwe-China BIT and the Zimbabwe-Germany BIT guarantee NT and MFN treatment.⁸⁶⁵ Similarly, the Zimbabwe-Netherlands BIT provides for NT and MFN treatment in Article 4. In the context of Zimbabwe, the NT and MFN standards are supplemented by either the FET or the FPS, and in some instances both. The Zimbabwe-Netherlands BIT provides for NT, MFN, FET and FPS standards. Article 3 of the BIT states:

Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.⁸⁶⁶

The Zimbabwe-Switzerland BIT also provides for full security and protection. Article 4 provides that

[i]nvestments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

As mentioned above, the FPS standard is arguably a higher standard of treatment than CIL minimum protection and FET. It is also one of the reasons why the arbitral tribunals in the *Funnekotter* and *Pezold* cases imposed such a high penalty on Zimbabwe for unlawful expropriation, as discussed below.⁸⁶⁷

⁸⁶⁵ Article 3 Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments, 21 May 1996, effective 1 March 1998; Article 3 Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments, signed 29 September 1995, effective 14 April 2000.

⁸⁶⁶ Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands, signed 11 December 1996, effective 1 May 1998.

⁸⁶⁷ See paragraph 5.6.3.

There are the few BITs which are in force and available for public viewing in English.⁸⁶⁸ The BIT concluded between Zimbabwe and South Africa is one of Zimbabwe's most recent BITs and by its reference to FP standard, it seems to provide onerous obligations on the host state. For example, Article 3 states:

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 investments in its territory of investors of the other Party.⁸⁶⁹

It would appear that Zimbabwe has not had the upper hand in drafting BITs to which it is party, as all the BITs have differing standards of treatment, which could imply that Zimbabwe has acceded to the standards of treatment proposed by its investment partners. It is also interesting to note that Zimbabwe's BITs have in fact become more restrictive to the host state over time. This can be seen from comparing the dates of the BITs between Zimbabwe, China, Netherlands, Germany, Switzerland and South Africa above. However, the lack of transparency in Zimbabwe's treaties, and absence of access to the text of more recent treaties makes it difficult to determine the actual developments in the drafting of Zimbabwe's BITs.

Having considered the above, it is noted that in theory Zimbabwe's BITs appear to provide higher protection than the minimum CIL standard and FET standards provided for in SADC and COMESA instruments. Zimbabwe's BITs are increasingly providing FP and FPS standard, disregarding the proposal made under the SADC Model BIT to use a relaxed form of FET or to use the FAT standard. This translates to an increased burden on Zimbabwe to ensure the protection of investors' interests. The decision to disregard the SADC Model BIT places Zimbabwe in a compromising position. Considering Zimbabwe's recent civil protests and vandalism of property

⁸⁶⁸ UNCTAD 'Investment Hub' available on <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iiaInnerMenu> (accessed 11 November 2016).

⁸⁶⁹ Agreement between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, 2009.

under the ‘This Flag’ and ‘Tajamuka’ campaigns, the use of the FPS standard is a threat to the state. The next section discusses protection of the property of the investor.

5.3 PROTECTION OF PROPERTY

Investors are particularly interested in creating profits and safeguarding their investment interests. This part will again examine how the property of investors is protected under international, regional and domestic regulation.

5.3.1 International Regulation

There is a recent trend for investors to negotiate investment terms individually through investment contracts. However, to a large extent investors are protected through agreements negotiated by their home states through BITs or IIAs. The protection of investors’ property and interests is regulated in terms of expropriation clauses. These clauses aim to guarantee the protection of investors’ property, or otherwise compensation for lawful taking of property, or reparation for unlawful taking of property. Because BITs and IIAs are international treaties, the primary rule of customary international law expressed in the maxim *pacta sunt servanda* must be observed.⁸⁷⁰ The maxim means that states are bound to comply with the terms of the treaties they enter into. The following part briefly discusses direct expropriation.

5.3.1.1 Direct Expropriation

Direct expropriation is often used interchangeably with ‘taking, nationalisation, deprivation, and dispossession’.⁸⁷¹ Nationalisation occurs where states take private properties on a large scale in order to obtain full control of the economy.⁸⁷² In some instances, the state may redistribute the assets taken, for example through land redistribution.⁸⁷³ Nationalisation was mostly used in the period after World War II as part of decolonisation efforts. The Land Redistribution Act and the Indigenisation and Economic Empowerment Act are examples of nationalisation in Zimbabwe.⁸⁷⁴

⁸⁷⁰ Francis J and Nicholson SJ ‘The protection of foreign property under customary international law’ (Spring 1965) VI (3) *Boston College Industrial and Commercial Law Review* 391 393; also see 2.1.2.1.

⁸⁷¹ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 5.

⁸⁷² UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 5.

⁸⁷³ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 6.

⁸⁷⁴ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 5.

5.3.1.2 Indirect Expropriation

Expropriation can also occur indirectly, through so-called ‘creeping’, whereby the host state does not necessarily nationalise the investment but slowly increases its encroachment on foreign investors’ property rights so as to diminish the value of the investment.⁸⁷⁵ In other words, indirect expropriation does not involve change in ownership or physical taking of property, but rather conduct that ‘permanently destroy[s] the economic value of the investment, and deprive[s] the owner of its ability to manage, use, or control its property in a meaningful way’.⁸⁷⁶ In the *Starret Housing* case the arbitral tribunal found that

it is recognised under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.⁸⁷⁷

However, not all state conduct amounts to expropriation; some state regulation in the public interest is not subject to compensation, as discussed below.

5.3.1.3 State Regulation not amounting to Expropriation

Every state has a right to regulate within its own territory on the basis of state sovereignty. The distinction between indirect expropriation and state regulation, which does not amount to expropriation (state regulation), is not set in stone and is often determined on a case-by-case basis. Leading authors such as Nikiema argue that four main factors ought to be considered in

⁸⁷⁵ Woolfrey S *The SADC Model Bilateral Investment Treaty Template: Towards a New Standard of Investor Protection in Southern Africa* (2014) 8.

⁸⁷⁶ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 7; UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 7; *Starret Housing Corp v Iran* Iran-US Claims Tribunal, 16 IRAN-U.S. C.T.R; also see the case concerning certain German Interests in Polish Upper Silesia (the *Chorzow Factory* case); The *Norwegian Ship owners’* claims case.

⁸⁷⁷ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 11 New York and Geneva: UN; Australian-Chile Free Trade Agreement (FTA) (2006); Japan-Philippines FTA (2008); Article 7 of the Mexico-United Kingdom BIT (2006); Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) (2006) Annex 10 (c).

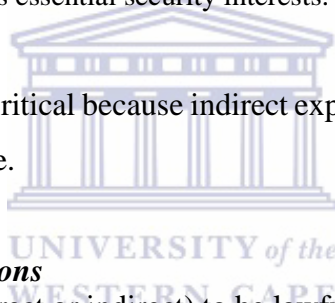
determining if specific conduct amounts to indirect expropriation or state regulation in the public interest.

Recent BITs reflect that although state regulation may impair investments, it does not necessarily amount to compensable expropriation.⁸⁷⁸ Similarly, PTIAs such as COMESA CCIA incorporate similar provisions. For example, Article 22(3) COMESA CCIA (2007) states that

[n]othing in this Agreement shall be construed to:

- (a) preclude a Member State from applying measures that it considers necessary for the fulfilment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests; or
- (b) require a Member State to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.⁸⁷⁹

The distinction between the two is critical because indirect expropriation is compensable, whereas, state regulation is non-compensable.



Lawful and Wrongful Expropriations

For both forms of expropriation (direct or indirect) to be lawful, the state conduct must meet three requirements in accordance with CIL, that is, the expropriation ‘must have been enacted in the public interest, it must not be discriminatory, [and] it must be accompanied by compensation for adversely affected investors’.⁸⁸⁰ This is supported by provisions in the World Bank Guidelines which state that

[a] state may not expropriate or otherwise take in whole or in part a foreign private investment or take measures which have similar effects, except in accordance with applicable legal procedures,

⁸⁷⁸ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 13 New York and Geneva: UN; Canada-Jordan BIT (2009); Canada-Slovak Republic (2010); Colombia-India BIT (2009)

⁸⁷⁹ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 9 New York and Geneva: UN; USA-Australia FTA (2003); Central America-Dominican Republic FTA (2004); Chile (2003); Morocco (2004); China-Peru FTA (2009); *Saluka Investments v Czech Republic*.

⁸⁸⁰ Nikiema SH *Compensation for Expropriation* (2013) 1.

in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.⁸⁸¹

UNCTAD also adds a fourth requirement: that the conduct must be in accordance with due process of law.⁸⁸² These requirements are discussed briefly below.

Public interest

Customary international law does not define specifically what constitutes public interest, but rather leaves it to the discretion of individual states or arbitral tribunals to determine.⁸⁸³ Public purpose is expressed interchangeably by terms such as public interest,⁸⁸⁴ public order,⁸⁸⁵ and national interest.⁸⁸⁶ The conduct in question ought to have been for a ‘legitimate welfare objective’.⁸⁸⁷ The case of *ADC v Hungary* emphasised this:

[A] treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.⁸⁸⁸

The public interest must also have existed at the time of the state conduct in question, and not at a later stage.⁸⁸⁹ In most instances, domestic law will also make expression of public interest, such as in the national constitution.⁸⁹⁰

⁸⁸¹ Article IV World Bank *Guidelines on the Treatment of Foreign Investments* (1992).

⁸⁸² UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 6.

⁸⁸³ *Amoco case*; Dixon M *Textbook on International Law* 7ed (2013) 276.

⁸⁸⁴ China-Peru FTA (2009).

⁸⁸⁵ Canada-Colombia FTA (2006).

⁸⁸⁶ Chile-Philippines BIT (1997).

⁸⁸⁷ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 29; UN *Land Rights and Expropriation in Ethiopia* 169

⁸⁸⁸ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 30.

⁸⁸⁹ Draft Convention on the International Responsibility of States for Injury to Aliens, 1961.

⁸⁹⁰ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 30.

Discrimination

Expropriation may not be discriminatory such that it targets nationals of a specific state. However, according to Newcombe and Paradell, some distinctions may be permissible, such as where legitimate government policies affect nationals of specific states.⁸⁹¹ For example, in *GAMI Investments v Mexico*, discrimination was seen to exist, but it was not on the basis of nationality, but rather on the legitimate policy objective to move sugar industry ‘into the hands of solvent enterprises’.⁸⁹²

Due Process

The principle of due process prescribes three main things: first, that the expropriation is compliant with domestic procedural law and international rules; secondly, that the investor may have the expropriation reviewed; and thirdly, that expropriation is not arbitrary.⁸⁹³ In *ADC v Hungary*, the tribunal noted elements of due process as ‘some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator’ as well as ‘a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard’.⁸⁹⁴

5.3.2 Regional Regulation

This part explores the regulation of property under COMESA and SADC.

5.3.2.1 Common Market for Eastern and Southern Africa (COMESA)

COMESA explicitly defines expropriation by including both direct and indirect expropriation. Article 159(4) COMESA Treaty is a catch-all clause which anticipates some of the common problem areas surfacing in international arbitrations relating to expropriation. It states that

expropriation shall include any measures attributable to the government of a Member State which have the 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 as creeping expropriation in the form of imposition of excessive and

⁸⁹¹ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 34.

⁸⁹² UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 34.

⁸⁹³ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 40.

⁸⁹⁴ UNCTAD *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012) 39.

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.⁸⁹⁵

Similarly the COMESA CCIA, which is binding on the member states of COMESA and regulates intra-COMESA investment, incorporates indirect expropriation through the use of the word 'tantamount'. In this regard, Article 20(1) COMESA Investment Agreement provides that

Member States shall not nationalise or expropriate investments in their territory or adopt any other measures tantamount to expropriation of investments except: in the public interest; on a non-discriminatory basis; in accordance with due process of law; and on payment of prompt adequate compensation.⁸⁹⁶

Article 20(1) COMESA Investment Agreement matches the definition found in the SADC Investment Protocol almost verbatim. The COMESA Investment Agreement is in line with the World Bank's definition of lawful expropriation noted above in paragraph 5.3.1. By Article 20(1) stating that 'Member States shall not nationalise or expropriate ... except in the public interest' it appears to allow for state regulation in the public interest, not constituting indirect expropriation, and consequently non-compensable.

5.3.2.2 Southern African Development Community (SADC)

SADC regulates foreign direct investment through the SADC Protocol on Finance and Investment (SADC Investment Protocol)⁸⁹⁷ and encourages harmonisation through the SADC Model Investment Treaty.⁸⁹⁸ On the face of it, the SADC Investment Protocol only refers to direct expropriation in Article 5, which states that

⁸⁹⁵ COMESA Treaty, 1992.

⁸⁹⁶ Investment Agreement for the COMESA Common Investment Area (COMESA CCIA).

⁸⁹⁷ SADC Protocol on Finance and Investment, 18 August 2006, Maseru, Lesotho.

⁸⁹⁸ SADC *Model Investment Treaty* (2012) SADC Publishers: Gaborone, Botswana.

[i]nvestments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.⁸⁹⁹

However, it can be implied that indirect expropriation must be read into Article 5. Although the SADC Investment Protocol is somewhat silent on indirect expropriation, and non-compensable regulation in the public interest, the SADC Model BIT seeks to fill this gap. The SADC Model BIT notes that certain measures in the public interest do not amount to indirect expropriation, for example measures ‘designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment’.⁹⁰⁰

5.3.3 Domestic Regulation

The Zimbabwean Constitution of 2013 guarantees the right to property. Section 71(1) regulates property rights where property is defined as ‘property of any description and any right or interest in property’.⁹⁰¹ While the right to ‘acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property’ is guaranteed in section 71(2), such right is limited under section 71(3) of the Zimbabwean Constitution.

Zimbabwe allows exceptions with regard to deprivation of property ‘in the interests of defence, public safety, public order, public morality, public health, town and country planning or [community development]’.⁹⁰² These could be perceived as numerous exceptions, although they all mean the same thing as public purpose. The insertion of ‘community development’ might be problematic because it appears to exceed the ambit of public purpose. This provision was most likely included in the Constitution to take into account community development objectives set out under the Indigenisation and Economic Empowerment Act, which was passed shortly before the 2013 Constitution.

⁸⁹⁹ SADC Investment Protocol, 2006.

⁹⁰⁰ Article 6 (7) SADC Model BIT, 2012.

⁹⁰¹ Constitution of the Republic of Zimbabwe (20th Amendment) 22 May 2013.

⁹⁰² Section 71(3) Zimbabwe Constitution (20th Amendment) 2013.

Section 32 guarantees the property, interest and right of foreign investors who hold investment licences in accordance with Zimbabwean laws.⁹⁰³ It is argued that Zimbabwean law pertaining to property rights and the amended Constitution now adequately address the protection of foreign owned property, and therefore it appears to encourage investment. These amendments can be attributed to the need to reverse the impacts of the land reform of 2001, particularly economic sanctions.⁹⁰⁴ Past experiences, specifically the land grabs, the Land Reform Act and indigenisation, coupled with fear of lack of the rule of law associated with political process, may have the effect of scaring away investors.⁹⁰⁵

Zimbabwean law in theory provides adequate protection for investors and now exceeds regional law standards of treatment and protection. This should motivate investors at least insofar as the legal environment is concerned. It is argued, however, that in practice the lack of enforcement of the letter of the law, perceived partiality and political bias of judges especially in land reform cases,⁹⁰⁶ and poor enforcement of arbitral decisions of the ICSID have significantly reduced investor confidence.⁹⁰⁷ Again, there is a lack of legitimacy of regional institutions. For example, the SADC Tribunal which was dissolved after being called on to decide on alleged expropriation by the Government of Zimbabwe.⁹⁰⁸

Moreover, erratic law-making and amendments, restrictive and protectionist legal reforms in related economic fields, particularly in trade law and financial law, has created an environment of uncertainty which is inconsistent with long-term investment and re-investment. These legal aspects have caused investors to consider Zimbabwe more cautiously, and have contributed to the grave

⁹⁰³ Zimbabwe Investment Authority Act, Chapter 14:30.

⁹⁰⁴ Read further Miller et al. 'Zimbabwe- Fast Track Land Reform' (2002) 14 (1A) *Human Rights Watch* available on www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf (accessed 30 September 2014).

⁹⁰⁵ See further on the history of land in Zimbabwe in Preston M *Ending Civil War: Rhodesia and Lebanon in Perspective* (2004) 25; the Lancaster House Agreement.

⁹⁰⁶ Read further in Chiduzo L 'Towards the protection of human rights: do the new Zimbabwean constitutional provisions on judicial independence suffice?' (2014) 17 (1) *Potchefstroom Electronic Law Journal* 368-418.

⁹⁰⁷ *Bernardus Henricus Funnkotter and others v The Republic of Zimbabwe* ARB/05/06; *Bernhard von Pezold and others v The Republic of Zimbabwe* ARB/10/15 (pending); *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v The Republic of Zimbabwe* ARB/10/25 (pending).

⁹⁰⁸ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); Read further in Ndlovhu P 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' 2011 (1) SADC Law Journal 63-79.

lack of confidence of investors in the Zimbabwean economy, both foreign and domestic. This is a serious barrier to economic development.

5.4 ZIMBABWE INVESTMENT CLIMATE

This paragraph discusses the investment climate of Zimbabwe in general. The ZimAsset policy document specifically aims to achieve export-led industrialisation through value addition. In order to fully realise this objective, there is a critical need to foster strategic linkages between FDI and rural producers, informal traders and small to medium enterprises (SMEs). Areas of support may include capital injection, plant and machinery, transfer of technology and transfer of skills. This chapter examines the FDI landscape of Zimbabwe. The following paragraph explores the ease of establishing and operating investments in Zimbabwe.

5.4.1 Establishment and Operation

Investment is governed in terms of the Zimbabwe Investment Act and the Constitution of Zimbabwe.⁹⁰⁹ Zimbabwe offers investors favourable immigration regulations. The Immigration Act, as a law of general application, governs the entry into and exit from Zimbabwe by all persons.⁹¹⁰ Investors may obtain temporary work permits and residence permits as regulated by the Minister through Statutory Instruments and in compliance with the enabling Act.⁹¹¹

Section 16(1)(c) Immigration Regulations provides for the entry and permanent residence of investors into Zimbabwe, provided the investors possess substantial financial means and intend to reside in Zimbabwe for purposes of investing substantially in Zimbabwe.⁹¹² For joint ventures, the

⁹⁰⁹ Chapter 14:30; Constitution of Zimbabwe (20th Amendment) 2013.

⁹¹⁰ Short Title of the Zimbabwe Immigration Act, Chapter 4:02; Immigration Officers are entitled search any person, property or vehicles, including ships and aircraft for immigration purposes, and may detain any person for a maximum of 14 days in order to investigate the lawfulness or otherwise of the detainee's entry and presence in Zimbabwe; Sections 7 and 8 Zimbabwe Immigration Act, Chapter 4:02.

⁹¹¹ Section 19 Zimbabwe Immigration Act, Chapter 4:02.

⁹¹² Section 16(1)(c) Immigration Regulations Statutory Instrument 195 of 1998 as Amended by Immigration (Amendment) Regulations, 2005 (No. 1) Statutory Instrument 126 of 2005; Finally, an investment of US\$100,000 renders the applicant eligible for permanent residence, if the applicant has resided in Zimbabwe for a minimum period of three years at the time of making the application, and invested the said amount or more in the form of capital equipment, in a joint venture. Section 17(1)(e) Immigration Regulations Statutory Instrument 195 of 1998 as Amended by Immigration (Amendment) Regulations, 2005 (No. 1) Statutory Instrument 126 of 2005; An investment of US\$300,000 renders the applicant eligible for permanent residency, subject to the applicant having

applicant must be a professional or technical person and the joint venture must be entered into with a *bona fide* Zimbabwean partner.⁹¹³ Although the investors are required to bring a certain amount of money into the country, it need not be at once. This means, however, that an investor would be able to pull out of his or her investment without actually bringing in the total agreed investment amount and without accomplishing any meaningful economic development.

5.4.2 Bank Accounts and Access to Finance

Moreover, Zimbabwean law allows foreign investors to open individual or corporate foreign currency accounts and to borrow locally for working capital, but not for capital projects. For capital projects, investors have to seek foreign funding, or otherwise use funds from retained earnings.⁹¹⁴ The Foreign Exchange Act 2009 allows investors to retain all foreign currency receipts from their international transactions, as well as to repatriate ‘capital appreciation, dividend income, and after tax profits without exchange control approval’.⁹¹⁵

5.4.3 Taxation

Tax coordination is one of the factors identified as crucial to promoting investment within the SADC region.⁹¹⁶ The SADC Treaty emphasises the need for members to facilitate coordinated tax policies in the region for the mutual good. In this regard, SADC has issued a Memorandum of Understanding on Cooperation in Taxation and Related Matters, 2002 to ‘foster harmonisation of financial and investment policies’ and to establish mutually beneficial tax agreements.⁹¹⁷ Capacity-

resided in Zimbabwe for a minimum period of three years at the time of making such application. Section 17(1)(d) Immigration Regulations Statutory Instrument 195 of 1998 as Amended by Immigration (Amendment) Regulations, 2005 (No. 1) Statutory Instrument 126 of 2005; If the investor has transferred US\$1 000 000 or more into Zimbabwe for purposes of an investment project, the investor may be eligible for a permanent residence permit in Zimbabwe. Section 17(1)(c) Immigration Regulations Statutory Instrument 195 of 1998 as Amended by Immigration (Amendment) Regulations, 2005 (No. 1) Statutory Instrument 126 of 2005.

⁹¹³ Section 17(1)(e) Immigration Regulations Statutory Instrument 195 of 1998 as Amended by Immigration (Amendment) Regulations, 2005 (No. 1) Statutory Instrument 126 of 2005.

⁹¹⁴ Zimbabwe Investment Authority ‘Investment Guide’ (March 2012) 4.

⁹¹⁵ United States Department of State ‘Zimbabwe investment climate’ 2015 available on <http://www.state.gov/documents/organization/242012.pdf> (accessed 10 July 2016).

⁹¹⁶ SADC Protocol on Investment; SADC ‘Investment’ available on www.sadc.int/themes/economic-development/investment/tax-coordination/ (accessed 23/09/2014).

⁹¹⁷ Articles 2 (1) & 3 SADC Protocol on Investment (2006).

building with regard to investment generally and taxation specifically are advocated in Article 5, where this would include training on ‘tax design, policy and best practices’.⁹¹⁸

It is also considered important to provide tax incentives that encourage investment; however, these should not be so low as to be prohibitive of investment in other countries in the region.⁹¹⁹ Article 5(3) also encourages Member States to avoid investment barriers and double taxation.⁹²⁰ To facilitate the various aspects of tax coordination, SADC has created an online tax database, where Members are encouraged to provide information relating to tax exemptions, tax incentives, relevant due dates for payment of taxes, conditions, bilateral tax agreements, as well as direct and indirect levies.⁹²¹ Furthermore, the Protocol encourages Members to create a Model Tax Agreement in Article 5(5).⁹²²

Domestically, with regard to corporate tax, all foreign investments are tax-free for the first five years, and thereafter, the rates vary depending on the sector as follows: investments in industry, 25 per cent; tourism, 25 per cent tax; BOOT and BOT arrangements, 15 per cent; mining, 15 per cent for special mining leaseholders and 20 per cent for other mining permits, but taxes are reduced for mining companies exporting more than half of their output.

FDI within the agricultural sector also benefits from special deductions for farmers, such as amounts used for fencing, sinking boreholes and clearing land. Zimbabwe offers tax breaks to investors, allows deductions for capital expenditure and waives tariffs on the importation of capital goods.⁹²³ Moreover, there are tax breaks for value added tax (VAT) in the agricultural sector,

⁹¹⁸ SADC Protocol on Investment (2006).

⁹¹⁹ Article 5 SADC Protocol on Investment (2006).

⁹²⁰ SADC Protocol on Investment (2006).

⁹²¹ See generally SADC Protocol on Investment (2006).

⁹²² SADC Protocol on Investment, 2006; Factors for consideration in this regard, ‘investment allowances, full depreciation allowances, investment tax credits where a certain percentage of the acquisition cost is deducted in addition to normal depreciation deduction from the tax liability, the full cost of acquisition of the asset is allowed as a deduction from the taxable profits of the year in which the investment was made, accelerated depreciation allowances, declining balance depreciation allowances, tax privileged export processing or enterprise zones, and tax holidays’ available on www.sadc.int/themes/economic-development/investment/tax-coordination/ (accessed 23/09/2014).

⁹²³ United States Department of State ‘Zimbabwe investment climate’ 2015 available on <http://www.state.gov/documents/organization/242012.pdf> (accessed 10 July 2016).

wherein several inputs are zero-rated for VAT, such as fertilisers, capital equipment, pesticide, and animal feed. Investors in the mining sector are expected to pay royalties at the rate of 5 per cent of the net turnover, together with 2 per cent of turnover as fees for management, technical and administrative agreements.⁹²⁴

This is not the case for domestic investments. While these provisions are in line with the objectives of the SADC Trade Protocol to provide tax incentives, these incentives harm domestic investors, because they have the effect of reducing competition among them. Incentives are discussed further below.⁹²⁵ There is also a lot of uncertainty and lack of transparency when it comes to financial flows emanating from FDI. While investors are allowed to repatriate profits to the investor state or other third party, in instances where corporate conduct of multinational corporations (MNCs) is not closely monitored, governments risk losing billions in illicit financial flows (IFFs) such as through transfer pricing and tax avoidance.⁹²⁶ It is argued that the lost funds could have been used to improve living standards of society, develop rural areas, and increase access to education, health care, and basic services such as water and electricity.

Mauritius is noted as the biggest source of investment from Zimbabwe with investment flows of US\$4.56 billion, and the British Virgin Islands is the sixth with investment flows of US\$760.54 million during the period 2009-2015.⁹²⁷ Mauritius and the British Virgin Islands are both offshore financial centres and they offer ‘no capital gains tax, no withholding tax, no capital duty on issued capital, confidentiality of company information, exchange liberalisation, and free repatriation of

⁹²⁴ ZIMRA ‘Rates of mining royalties’ available on http://www.zimra.co.zw/index.php?option=com_content&view=article&id=1883:what-is-the-basis-of-charging-mining-royalties&catid=21:did-you-know&Itemid=91 (accessed 24 November 2016) in accordance with section 89 Mines and Minerals Development Act 11 of 2015.

⁹²⁵ See 5.7.2.1 below host state interests.

⁹²⁶ Mwilima N ‘Foreign direct investment in Africa’ 41 Africa Labour Research Network Social Observatory Pilot Project available on http://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pdf (accessed 24 November 2016).

⁹²⁷ The Herald ‘Mauritius leads investment flows into Zim’ 18 January 2016 *The Herald Newspaper* available on <http://www.herald.co.zw/mauritius-leads-investment-flows-into-zim/> (accessed 12 August 2016); other top investors include China in second place with US\$2.81 billion, the USA with \$US1.6 billion, South Africa with US\$1.54 billion and Nigeria with US\$1.45 billion. However, these investments have not all been implemented, in fact only \$US2.42 billion worth of investments has been implemented in Zimbabwe.

profits and capital'.⁹²⁸ These destinations encourage illicit capital flows. It is reported that Africa has been losing US\$50 billion a year through IFFs since the year 2000.⁹²⁹

5.4.4 Repatriation of Profits and Access to Financing

An investor is permitted during the normal operation of business to repatriate all the dividends gained from net-after-tax profit and can also repatriate the whole original capital investment when disinvesting. However, investors who have become permanent residents are required to obtain prior approval from Exchange Control Authorities should they wish to repatriate dividends. An investor is permitted to repatriate 100 per cent dividends from his or her net-after-tax profit during the normal operation of business.⁹³⁰ Foreign investors are allowed to borrow from local banks and to repatriate 100 per cent of profits. This often means less money is available on the domestic market for other investments and for circulation because investors are using the available working cash.

The risk that laws can change at any minute pushes foreign and domestic investors to put their savings in foreign banks in jurisdictions that have more stable financial systems and investment regulations.⁹³¹ This appears to have been the case in Zimbabwe where foreign investors prefer to repatriate the majority of their profits to the investor state, or to re-invest in another country within the region rather than re-invest in Zimbabwe.⁹³² As a result there is little money in circulation and little money getting into the banks as savings. This feeds the vicious circle described in Chapter 2 because banks end up with less and less money to issue loans for further investments.⁹³³

⁹²⁸ The Herald 'Mauritius leads investment flows into Zim' 18 January 2016 *The Herald Newspaper* available on <http://www.herald.co.zw/mauritius-leads-investment-flows-into-zim/> (accessed 12 August 2016).

⁹²⁹ Report of the High Level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 13 available on http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 25 November 2016).

⁹³⁰ Zimbabwe Investment Authority 'Investment Guide' (March 2012) 4.

⁹³¹ See generally Wagner H 'Legal Uncertainty – Is Harmonization of Law the Right Answer? A Short Overview' Discussion Paper No. 444 *Diskussionsbeiträge der Fakultät für Wirtschaftswissenschaft der FernUniversität in Hagen* (2009).

⁹³² Cross E 'Why investors don't invest in Zimbabwe' *New Zimbabwe* 22 March 2014 available on <http://www.newzimbabwe.com/business-14999-Why+investors+dont+invest+in+Zimbabwe/business.aspx> (accessed 25 November 2016).

⁹³³ See paragraph 2.5.2.

5.5 INCREASING THE DEVELOPMENTAL IMPACT OF FOREIGN DIRECT INVESTMENT (FDI)

FDI is supposed to facilitate economic development, but is currently not doing so. This part of the chapter explores ways in which the developmental impact of FDI can be increased or encouraged and discusses the conflict between legal certainty and the right to regulate. The section also discusses nationalisation and explores ways of creating an enabling environment for both foreign and domestic investors in Zimbabwe.

5.5.1 Legal Certainty

There are three main issues eroding legal certainty in Zimbabwe, especially as it relates to investments. The first is the proliferation of laws, the second is arbitrariness in the law-making process, and the third is judicial independence.

Proliferation of Regulations

Section 134 Constitution enables Parliament to delegate its legislative powers.⁹³⁴ These powers are often delegated to relevant Ministers or to the President.⁹³⁵ The Interpretation Act of Zimbabwe provides that

where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof.⁹³⁶

Statutory instruments are delegated legislation and are supposed to give effect to the enabling statute. It is argued that Parliament's 'primary law-making power' should not be left to Ministers (Executive) otherwise it would undermine the principle of separation of powers.⁹³⁷ The purpose of separation of powers is to ensure checks and balances between different organs of state. Currently,

⁹³⁴ Constitution of Zimbabwe (20th Amendment) 2013; see paragraph 2.2.1.2.

⁹³⁵ For example, section 14 Customs and Excise Act Chapter 23:02; section 40(2) Reserve Bank Act Chapter 23:02.

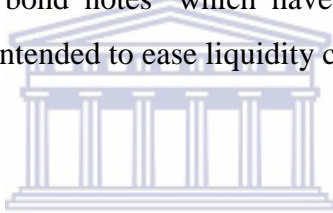
⁹³⁶ Section 24(2) Interpretation Act Chapter 1:01.

⁹³⁷ Veritas Human Rights Advocacy 'Parliament's law-making power must not be delegated' available on <http://www.theindependent.co.zw/2014/01/31/presidential-powers-act-longer-constitutional/> *Zimbabwe Independent* 31 January 2014 (accessed 24 November 2016).

the extent to which there is a proliferation of regulations (Statutory Instruments) is alarming, and is a reflection of the absence of review of law-making of delegated legislation. For example, the Open General Import Licence Regulations have been amended more than ten times since 2002.⁹³⁸ Such regulation reflects a lack of long-term strategy, and results in loss of confidence for both domestic and foreign investors.

Arbitrariness in the Law-Making Process

Since 2001, the law-making process has been arbitrary and often in the interests of political agendas. The Presidential Powers (Temporary Measures) Act⁹³⁹ gives wide legislative powers to the President. Although this Act could have been a necessary measure to address numerous political and economic crises, some civil society organisations have disputed the continued existence of this statute. The Presidential Powers (Temporary Measures) Act has become more controversial in the light of the ‘bond notes’ which have recently come into circulation in Zimbabwe.⁹⁴⁰ The Bond notes are intended to ease liquidity challenges, and are discussed further in Chapter 6.⁹⁴¹



Judicial independence

As noted in 2.2.1.2 above, the alleged expropriations under the Land Redistribution Programme and amendments in terms of the Land Acquisition Act in 2001 resulted in investors losing confidence in Zimbabwe.⁹⁴² The ICSID cases of *Funnekotter, von Pezold, and Border Timbers Limited* illustrate how the three lines of defence available to investors have not necessarily or in real terms.⁹⁴³ The domestic courts were perceived to be lacking judicial independence, which

⁹³⁸ Zimbabwe Revenue Authority ‘Statutory Instruments’ available on http://www.zimra.co.zw/index.php?option=com_phocadownload&view=category&id=25:statutory-instruments&Itemid=112 (accessed 24 November 2016).

⁹³⁹ Chapter 10:20.

⁹⁴⁰ Veritas Human Rights Advocacy ‘Parliament’s law-making power must not be delegated’ available on <http://www.theindependent.co.zw/2014/01/31/presidential-powers-act-longer-constitutional/> *Zimbabwe Independent* 31 January 2014 (accessed 24 November 2016).

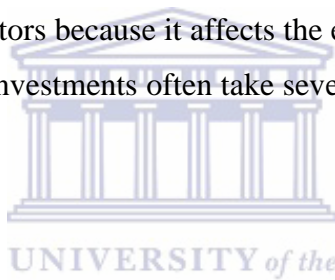
⁹⁴¹ See paragraph 6.6.2.

⁹⁴² Chapter 20:10.

⁹⁴³ *Bernardus Henricus Funnekotter and others v The Republic of Zimbabwe* ARB/05/06; *Bernhard von Pezold and others v The Republic of Zimbabwe* ARB/10/15 (pending); *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v The Republic of Zimbabwe* ARB/10/25 (pending).

resulted in investors losing claims. The domestic law was amended to ensure that investors could only be compensated for improvements on the land, which meant there was no access to review the decision pertaining to the taking of the land itself. The regional protection became questionable after the decision in *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*,⁹⁴⁴ after which the SADC Tribunal was dissolved. This shows that the absence of a legitimate regional tribunal to address investment disputes is a significant contributor to the lack of investor confidence in Zimbabwe. Finally, although recourse was available under ICSID international arbitration, this is not effective unless the decision is enforced. Zimbabwe's ratification of the New York Convention compels Zimbabwe to comply with international arbitration awards, however the final outcome and actual compensation in the above-mentioned expropriation arbitration cases are yet to be seen.

Constantly changing laws, and arbitrary law making, create uncertainty in the legal system. Legal uncertainty is undesirable for investors because it affects the existence, productivity and outcome of their investments, and because investments often take several years before coming to maturity and yielding dividends.



5.5.2 The right to regulate

As explained briefly in 2.2.2 there is an ongoing tension between the need for legal certainty, and the right to regulate requires a balancing act, where interests are weighed against each other. FDI is supposed to facilitate economic development, but in reality there is a disjunction between investors' interests and domestic development objectives and development needs and that is one of the reasons why countries should exercise their right to regulate.⁹⁴⁵ According to Nikièma:

⁹⁴⁴ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); Read further in Ndlovhu P 'Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal' 2011 (1) *SADC Law Journal* 63-79; Moyo A 'Defending human rights and the rule of law (2009) 9 *African Human Rights Law Journal* 590-614 at 596.

⁹⁴⁵ Bernasconi-Osterwalder N, Cosbey A, Johnson L and Vis-Dunbar D *Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers* (2012) 27.

Foreign direct investment (FDI) can play an important role in the development of host countries; however, the positive impacts of FDI do not occur automatically, because the commercial interests of companies do not always coincide with states' development goals.⁹⁴⁶

She argues further that the host state must put policies in place to create a connection between FDI and positive impacts of FDI leading to sustainable development.⁹⁴⁷ Such policies when translated into law would constitute performance requirements (PRs). PRs are obligations placed on investors in order for them to be allowed to operate in the host state or to benefit from incentives. The next section explores the international position regarding performance requirements.

5.5.2.1 Performance Requirements

Investment treaties that limit host states' power to impose performance requirements hinder the attainment of economic development because they impede the very things which form the basic need for investment. Investment is needed to boost the economy and support economic growth. Preventing performance requirements allows investors to 'free ride' at the expense of the host state. The host state stands to lose out on critical support that would inevitably boost economic development, such as technology and skills transfer.⁹⁴⁸ Mann argues that 'there is a growing right for a foreign investor to invest and repatriate all profits, there is only limited, and often no, liability placed on that same right-holder for how those profits are made' and that there is a critical need to regulate investment in such a way as to tie investors rights to responsibilities.⁹⁴⁹ His argument is that

this perpetuates the sense of IIAs as part of a well organised corporate agenda disconnected from any negative impacts created by the beneficiaries of the rights they contain. An international

⁹⁴⁶ Nikièma SH *Performance Requirements in Investment Treaties: Best Practices Series - December 2014* (2014) 1.

⁹⁴⁷ Nikièma SH *Performance Requirements in Investment Treaties: Best Practices Series - December 2014* (2014) 1.

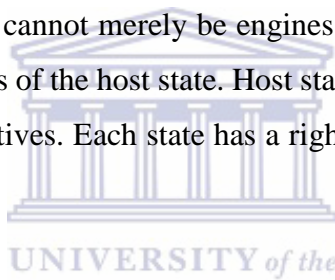
⁹⁴⁸ Bernasconi-Osterwalder N, Cosbey A, Johnson L and Vis-Dunbar D *Investment Treaties & Why they Matter to Sustainable Development: Questions & Answers* (2012) 29.

⁹⁴⁹ Mann H 'The right of states to regulate and international investment law: A commentary' Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available on http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 12 August 2016).

agreement that eliminates the *forum non conveniens* rule will ensure that the right to make a profit is coupled with the liability for how that profit is made.⁹⁵⁰

However, one of the main purposes of FDI for host states is the productive capacity that FDI brings about through various factors of production including the necessary transfer of ‘know-how, skills, management capability’ as well as funding, physical capital and technology.⁹⁵¹ The government, in partnership with private enterprise, should conduct investment impact assessments in order to gauge the real impacts of FDI in Zimbabwe, so as to regulate accordingly.

These spill-overs are not necessarily enjoyed, and as explained in 2.3, there is a need for government intervention to assist where the invisible hand is not moving to re-allocate resources more equitably and more efficiently.⁹⁵² Investment host states ought to be able to benefit from the investments in their countries, and cannot merely be engines for the enrichment of MNCs at the expense of the developmental needs of the host state. Host states need to regulate in a manner that reinforces their development objectives. Each state has a right to regulate inherent in the right to state sovereignty.



5.5.2.2 Regulation in the Domestic Development Interest

The UN Charter states that

[e]ach state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.⁹⁵³

⁹⁵⁰ Mann H ‘The right of states to regulate and international investment law: A commentary’ Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available on http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 12 August 2016).

⁹⁵¹ Salacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 15.

⁹⁵² See paragraph 2.3.

⁹⁵³ Article 2(2)(a) UN Charter on Economic Rights and Duties of States, 12 December 1974, Resolution adopted by the General Assembly Resolution (XXIX) Resolution A/RES/29/3281.

The UN Charter on Economic Freedom reaffirms the right of every state to freely exercise ‘full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.’⁹⁵⁴ There is a clear right in international law to self-regulate, yet Zimbabwe appears to not be fully utilising this right. In the instances where it does self-regulate, such as with regard to the land reform programme, it undermines guiding principles of international law such as *pacta sunt servanda*.

Investors are expected to develop the human capital by transferring skills and technology. This factor appears to lag behind in that there seems to be no statutory requirement on investors to undertake initiatives that promote socio-economic development.⁹⁵⁵ Investors are expected to contribute to infrastructural improvements; however, there is to date no legal requirement on foreign investors, except insofar as it is provided for in specific bilateral agreements and specific contracts entered into by the state with private investors. Infrastructural improvements have traditionally formed part of philanthropic activities.

The SADC Investment Protocol also notes and permits member states to regulate in a manner that provides ‘up-stream and down-stream linkages and have a favourable effect on attracting foreign direct investment and generating increased employment’.⁹⁵⁶ Article 3 SADC Investment Protocol stipulates further that

State parties shall support the development of local and regional entrepreneurs and enhance regional productive capacity within the Region through, inter alia: skills development and enhancement programmes; SMME development; appropriate investments into supporting infrastructure; and other supply-side measures and policies necessary to enhance global competitiveness.⁹⁵⁷

⁹⁵⁴ Article 2(1) UN Charter on Economic Rights and Duties of States, 12 December 1974, Resolution adopted by the General Assembly Resolution (XXIX) Resolution A/RES/29/3281.

⁹⁵⁵ Read further in Maziwisa MR ‘A Case for the Establishment of a Legal Framework within the Zimbabwean Mining Sector to Effectively Regulate the Corporate and Social Responsibilities of Multinational Corporations’ (unpublished LLM thesis, University of Cape Town, 2010).

⁹⁵⁶ SADC Investment Protocol.

⁹⁵⁷ SADC Model BIT.

It is argued Zimbabwe can draw important lessons from South Africa, which has elected to regulate investments through its national laws and policies in line with the overarching principles of national treatment that govern both trade and investment. Moreover, South Africa has essentially eliminated foreign forums in the dispute settlement proceedings. This is in line with arguments against the use of *forum non conveniens*. In other words, a requirement to exhaust domestic dispute resolution mechanisms gives more control to the host state, albeit at the expense of the investor. The position taken by South Africa enables it to better regulate, administer and implement its developmental objectives through the exercise of its state sovereignty and right to regulate.

Alternatively, it is argued that Zimbabwe can introduce performance requirements that are not mandatory but are tied to incentives such as tax breaks, instead of providing blanket tax breaks for all foreign investors. That way, Zimbabwe would still be compliant with its international law obligations but would be in a better position to regulate in the development interest. Such regulation needs to be well planned and have long-term objectives as well as a credible implementation plan. Furthermore, economic development resulting from such incentive-based performance requirements must be distributed fairly, in a non-partisan way, and may not be used as part of campaign resources.

However, the right to regulate should not be used arbitrarily. To fully benefit from FDI and to take development needs into account, Zimbabwe must regulate in a manner that encourages strategic linkages to be forged between foreign investors and small to medium-sized enterprises, including small-holder farmers.

Thirdly, Zimbabwe needs to regulate in manner that encourages investors to give back to the communities in which they operate. In this regard, Article 2(2) of the Covenant on the Eradication of all forms of Racial Discrimination provides that

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of

certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.⁹⁵⁸

Article 2 above can be interpreted as permitting states to regulate and put in place measures that may achieve affirmative equality, such as measures constituted under both the Zimbabwean Indigenisation and Economic Empowerment Act and the South African BEE Act.

5.5.3 Nationalisation

As expressed in 2.2.2, the need for policy space, and the right to regulate manifested itself in a series of Statutes aimed at reversing the equity distribution inherited from the colonial powers. The colonial legacy of racial segregation and racial supremacy embedded inequality in the system of land ownership and in income generating activities due to the skewed access to productive resources as discussed in chapter 4.⁹⁵⁹ Nationalisation was used in Zimbabwe as a tool to address these inequalities. On 17 April 2008, the Government of Zimbabwe brought the Indigenisation Act Chapter 14:33 into operation.⁹⁶⁰ The enactment of the Act brought with it increased investor uncertainty pursuant to the political and economic uncertainties experienced in the country during the period 2000 leading up to and including 2008. The Indigenisation Act aimed to increase the equitable distribution of wealth in line with aspirations of Keynesian economic scholars.⁹⁶¹ The Indigenisation Act is an important factor because it often determines whether investors will invest or disinvest.⁹⁶²

The main provisions of the Indigenisation and Economic Empowerment Act provide that the government shall ensure that at least 51 per cent of shares held in every public company and other

⁹⁵⁸ UN Covenant on the Eradication of all forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

⁹⁵⁹ See paragraph 4.1.2.

⁹⁶⁰ Act 14 of 2007.

⁹⁶¹ Equitable Distribution is one of the Economic Indicators explained briefly in Chapter 2 in paras 2.2 and 2.2.5 (d) above.

⁹⁶² Indigenisation Act Chapter 14:33; One such case is that of five farmers in the *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* ICSID Case No. ARB/05/06 available on <http://ita.law.uvic.ca/documents/ZimbabweAward.pdf> (accessed 22 July 2014).

business shall be owned by indigenous Zimbabweans,⁹⁶³ where an indigenous Zimbabwean is defined 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, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.⁹⁶⁴

This provision applies equally to the approval of mergers, acquisition, unbundling, and de-mergers relinquishment of controlling interest, where the 51 per cent requirement will apply to the resulting company.

The Indigenisation Act is accompanied by a National Indigenisation and Economic Empowerment Charter as an appendix.⁹⁶⁵ A key aspect of the Charter is the monitoring and evaluation envisaged in section 4(2) wherein the Secretary of the Ministry is required to prepare an Annual Report on compliance of entities with the Charter.⁹⁶⁶ The Charter sets out six governing principles, objectives and a code of ethics for all stakeholders. The governing principles include ‘good corporate governance, development of a highly competitive, sustainable and industrialised economy benefiting from the country’s endowments including its natural resources, equal opportunities for all, including gender sensitive ownership and participation in the economy by indigenous Zimbabweans, accelerated rural development, development and utilisation of modern science and technology, and sustainable natural resource utilisation’.⁹⁶⁷ The Code of Ethics identifies key objectives as corporate governance, behavioural responsibility, production responsibility, employment responsibility, safety and health responsibility, environmental responsibility, legal responsibility and social responsibility. Like South Africa, Zimbabwe could use a scorecard for compliance and as an incentive for state procurement contracts, which would facilitate community development.

⁹⁶³ Section 3 Indigenisation Act Chapter 14:33.

⁹⁶⁴ Section 2 Indigenisation Act Chapter 14:33.

⁹⁶⁵ Schedule 4 (Section 16) Indigenisation Act Chapter 14:33.

⁹⁶⁶ National Indigenisation and Economic Empowerment Board (NIEEB) ‘Annual Report’ (2011).

⁹⁶⁷ Section 1 Schedule 4 (Section 16) Indigenisation Act Chapter 14:33.

5.5.4 Creating an Enabling Environment for Domestic and Foreign Investors

This section discusses some ways in which Zimbabwe can improve the investment climate, particularly with regards to financial regulation, policy making and special export zones.

5.5.4.1 A Conducive Financial Environment: A note on the Press Statement⁹⁶⁸

Both domestic and foreign investors have low confidence and motivation to keep cash in the banking system. From an investment perspective, foreign investors are worried about numerous issues, including: 1) which currency will they be able to receive their money in; and 2) whether they will be able to retrieve their money.

The RBZ noted a dysfunctional multicurrency system, low usage of plastic money and real time gross settlement (RTGS) as the main causes of cash shortages; it also noted that there is low production, which means higher demand for foreign currency needed to import consumer goods. The governor argued that bond notes were being introduced to reduce the risk of capital flight, but there are concerns that the currency is not convertible. The governor has set cash withdrawal limits at US\$1 000. This is clearly problematic for investors, especially in the light of the guarantee of the right to repatriate 100 per cent of the original investment and profits secured in the Investment Authority Act and in numerous BITs.

As proposed in the Harrod-Domar model discussed in 2.5.1 above, laws must encourage savings. The current legal environment encourages foreign investors to repatriate and domestic investors to bank under the pillow, because of the uncertainty of currency and liquidity, which is discussed further in 6.6.2 below. The law should also ensure wages are above subsistence in order to encourage savings.

5.5.4.2 Policy Making and the Race to the Bottom

Developing countries continuously compete for investments and over the years they have offered increasing incentives to potential investors as a means of luring them into the country, the so-called

⁹⁶⁸ RBZ 'Measures to deal with cash shortages whilst simultaneously stabilising and stimulating the economy' Press Statement (4 May 2016) available on <http://www.rbz.co.zw/assets/press-statement-on-cash-shortages-challenge---04-may-2016.pdf> (accessed 23 November 2016).

‘race to the bottom’. Recently, there have also been calls to plug illicit capital flows, which include transfer pricing and tax avoidance. It is argued that the race to the bottom has negative ripple effects on local communities, especially the poorest communities, which have to forgo certain social services in order for the state to accommodate investors through various incentives. Moreover, exemption from taxes for the first five years of operation reduces state revenue at the expense of the citizens of Zimbabwe. For all the tax breaks granted to foreign investors, several social services could have been availed. However, because there is zero tax for the first five years, the government is depriving its nationals directly of the social services such as health care and education, they otherwise would have gained through FDI. The government has in fact forced this burden onto citizens in attempting to deepen its tax base by increasing customs duties, a measure that potentially affects domestic investors more directly than international investors.

Secondly, with regard to performance requirements, applications for investment licences are considered by the Investment Board, which considers various factors before issuing such a licence.⁹⁶⁹ Some of the factors it considers (in theory) are potential skills transfer, employment opportunities and human resource development, extent of reliance on local raw materials and beneficiation, injection of convertible foreign currency, possible environmental impact, technology transfer and impact on the domestic industry.⁹⁷⁰ However, in practice it is not clear whether these requirements are enforced.

Thirdly, two of the priorities under ZimAsset are value addition and export-oriented development. It may be argued that this policy decision is not reflected in the application of laws governing foreign investments, and an analysis of Chinese exports from Zimbabwe reflects that the bulk of these exports are primary commodities, such as unprocessed agricultural goods and unprocessed minerals.⁹⁷¹ Incentives place foreign investors in a better position than domestic investors primarily because they have the effect of subsidising production and ultimately trade. This is

⁹⁶⁹ Section 14(1) Zimbabwe Investment Authority Act, Chapter 14:30.

⁹⁷⁰ Section 14(1) Zimbabwe Investment Authority Act, Chapter 14:30.

⁹⁷¹ Blomstrom M and Kokko A ‘The economics of foreign direct investment incentives’ Working Paper 168 January 2003 available on <http://earthmind.net/fdi/misc/eijs-fdi-incentives.pdf> (accessed 24 November 2016).

illogical when one considers that the WTO is based on two main principles of non-discrimination, the first of which is national treatment.

5.5.4.3 Special Export Zones (SEZs)

Zimbabwe has recently enacted the Special Economic Zones (SEZ) Act⁹⁷² as a tool to encourage both FDI and domestic investment.⁹⁷³ Chakravati notes that '[h]igh power costs, high labour costs, lack of reliable utilities, labour laws which are not flexible and the controversial Indigenisation and Economic Empowerment Act are some of the factors that have discouraged investment into Zimbabwe in the past 15 years'.⁹⁷⁴

There was criticism of the Bill insofar as it permitted investors exemptions from the application of the Labour Act and the Indigenisation and Economic Empowerment Act.⁹⁷⁵ The SEZ Bill was only assented to after the President had sent it back to Parliament to address the unconstitutionality of its section 56. Section 56 allowed exemptions from application of the Labour Act within the SEZ, which directly conflicted with section 65 of the Constitution of Zimbabwe, 2013. The Bill was finally assented to on 1 November 2016, and became an Act. SEZs have the potential to boost production, add value through manufacturing, and increase export earnings for Zimbabwe. There is a need to provide separate SEZs for SMEs initially, so as to prevent them from being squeezed out of the market by big corporations.

It is critical at this point to ensure that SEZs are vetted for quality assurance as this will facilitate market access abroad. It is argued that Zimbabwe should only offer incentives against performance requirements. For example, investors need not be obliged to meet performance requirements in order to be admitted into Zimbabwe, but incentives currently given with a blanket application to

⁹⁷² Signed 1 November 2016

⁹⁷³ Mavhondo C 'A delicate balancing exercise' *The Independent* 20 May 2016 available on <https://www.theindependent.co.zw/2016/05/20/delicate-balancing-exercise/> (accessed 19 November 2016); Mabeza F 'Zimbabwe warned about special economic zones' *Financial Gazette* 20 May 2016 available on <http://www.financialgazette.co.zw/zimbabwe-warned-about-special-economic-zones/> (accessed 19 November 2016); The Source 'Special economic zones could boost Zim economy- ZEPARU' *New Zimbabwe* 06 February 2016 available on <http://www.newzimbabwe.com/business-27567-Special+economic+zones+can+boost+Zim/business.aspx> (accessed 19 November 2016).

⁹⁷⁴ Mavhondo C 'A delicate balancing exercise' *The Independent* 20 May 2016 available on <https://www.theindependent.co.zw/2016/05/20/delicate-balancing-exercise/> (accessed 19 November 2016).

⁹⁷⁵ Mavhondo C 'A delicate balancing exercise' *The Independent* 20 May 2016 available on <https://www.theindependent.co.zw/2016/05/20/delicate-balancing-exercise/> (accessed 19 November 2016).

foreign investors, such as a tax-free first five years, should be offered only for investments that meet prescribed performance requirements. This would help to address the current disjunction between FDI and development in Zimbabwe.

5.6 CHAPTER CONCLUSION

This chapter noted that FDI is important for economic development, but that economic development can only be achieved when FDI is tied to specific performance requirements that further the development interests of Zimbabwe. On the face of it, the Zimbabwean environment offers favourable incentives for potential investors. However, these incentives are undermined by the unstable political environment, legal uncertainty resulting from changing laws and a perception of the unenforceability of laws. These incentives cause the government to forfeit more revenue than is necessary. Zimbabwe appears to be in the race to the bottom as it tries to win investors in competition with other African countries, at the expense of economic development.

The main arguments made in this chapter are as follows: First, the laws currently regulating foreign investment are skewed in favour of foreign investors at the expense of domestic investors and at the expense of developing the host state. Secondly, since attaining independence, Zimbabwe has concluded a series of BITs and IIAs that undermine its economic development needs. Thirdly, Zimbabwe's national policy objectives do not align with its international obligations, which reflects a major disjunction between policy objectives and legally binding commitments under bilateral and international treaties. Lastly, Zimbabwe has failed to fully utilise available international law instruments and principles which are designed to empower the country to regulate the use of its own natural resources in a manner that is both sustainable and in the interests of its citizens. In order to fulfil its policy objectives, Zimbabwe needs significant legal reform to address the existing laws that disfavour its citizens, along with capacity-building for policy-makers and law-makers, especially with regard to treaty negotiation.

CHAPTER 6

THE ROLE OF FINANCIAL INSTITUTIONS

IN THE DEVELOPMENT DISCOURSE

‘If money go before, all ways do lie open.’⁹⁷⁶

6 INTRODUCTION

Chapter 5 established that foreign direct investment (FDI) has the potential to support socio-economic development through improved infrastructure and liquidity. It discussed the need for balancing investor interests and host states’ development needs. The chapter established that the standards of treatment of investments and property rights in Zimbabwean law align with regional and international law and that Zimbabwe provides adequate protection for investors, but these cannot motivate investors’ confidence unless the impartiality of the court system is re-established. Chapter 6 examines the role of the financial services sector to determine whether the laws in this sector encourage economic development.

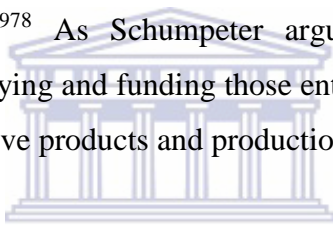
First, the chapter analyses the role of development finance, focusing on the International Monetary Fund (IMF), World Bank and the African Development Bank (AfDB). These international financial institutions (IFIs) have played a crucial role in Zimbabwe since independence in 1980 by providing development finance, but in recent years Zimbabwe has become over-indebted. It is important to examine these IFIs to determine whether they in fact facilitate economic development in Zimbabwe.

Secondly, the chapter discusses the need for financial inclusion as a means to facilitate financial stability. Financial inclusion has the potential to boost economic development as it increases access to essential financial services for the poorest, least reached communities.

⁹⁷⁶ These are the words of Ford in William Shakespeare’s *The Merry Wives of Windsor*, Act 2, Scene 2 available on http://shakespeare.mit.edu/merry_wiv-es/merry_wives.2.2.html (accessed 8 September 2016).

Thirdly, the chapter notes the critical need for financial stability. It explores financial stability through supervision and regulation of banks as guided by the Basel Accords at an international level, and by the Common Market for Eastern and Southern Africa (COMESA) and Southern Africa Development Community (SADC) at a regional level. As explained in the Introduction to this chapter, these two regional economic communities (RECs) are selected because they are integral to facilitating regional integration, which in turn encourages economic development domestically and regionally.

The Zimbabwean financial services sector is fairly developed and includes banking, insurance, and securities as stand-alone firms and as conglomerates.⁹⁷⁷ This chapter focuses on the banking sector in its discussion of regulation and supervision. The relevance of this chapter lies in the integral role that financial institutions play in facilitating economic development, alleviating poverty, and strengthening economic stability.⁹⁷⁸ As Schumpeter argues, ‘well-functioning banks spur technological innovation by identifying and funding those entrepreneurs with the best chances of successfully implementing innovative products and production processes’.⁹⁷⁹



6.1 INTERNATIONAL DEVELOPMENT FINANCE

The IMF,⁹⁸⁰ World Bank Group (WBG),⁹⁸¹ and AfDB⁹⁸² have been key lenders to Zimbabwe since its attainment of independence in 1980 and have continued to be directly and indirectly involved

⁹⁷⁷ See generally The World Bank Group *Zimbabwe Diagnostic Review of Consumer Protection and Financial Literacy Volume I: Key Findings* (2015).

⁹⁷⁸ Cihak M, Demirguc-Kunt A, Feyen E and Levine R Policy Research Working Paper No. 6175 ‘Benchmarking Financial Systems around the World’ (August 2012) 2.

⁹⁷⁹ See generally Schumpeter J *The Theory of Economic Development: An inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (1912); Levine R ‘Financial development and economic growth: Views and agenda’ (June 1997) XXXV *Journal of Economic Literature* 688-692.

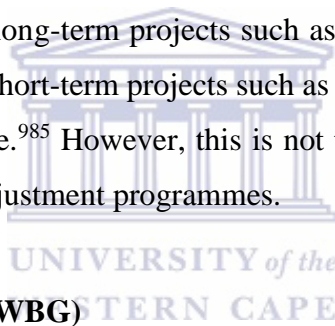
⁹⁸⁰ The International Monetary Fund (hereinafter, IMF) was created at Bretton Woods, New Hampshire, USA on 22 July 1944 when 45 states agreed on a framework of international economic cooperation to avoid the challenges experienced during the Great Depression of the 1930s; Preamble IMF Articles of Agreement of the International Monetary Fund available on <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf> (accessed 29 September 2015); also available on International Monetary Fund (IMF) ‘History of the IMF’ available on www.imf.org/external/about/histcoop.htm (accessed 18 November 2013).

⁹⁸¹ World Bank ‘International Bank for Reconstruction and Development’ available on <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html> (accessed 18 November 2013).

⁹⁸² African Development Bank (AfDB) Zimbabwe Rural Health Centres Project: Project Performance Evaluation Report Operations Evaluation Department (1995) Ref: ADF/OPEV/94/19.

in the formulation of domestic law and policy in Zimbabwe. One of the main reasons for considering the role of IFIs is that there are mixed views about whether international organisations and their policies have been beneficial to developing countries or not, especially in the African context. While this chapter considers the WBG, certain parts of it will refer specifically to the International Bank for Reconstruction and Development (IBRD) and IDA, which together are referred to as the World Bank. This chapter does not seek to make a comprehensive analysis of these IFIs.

The roles of the IMF and the World Bank used to be distinct, but they have become blurred and often interchanging. At first, the World Bank provided long-term loans for infrastructure development, ranging between five and fifteen years (Arts I; III (1));⁹⁸³ the IMF, on the other hand, provided short- and medium-term loans of between three to five years (Arts I; V(3)).⁹⁸⁴ At present, the IMF has been seen to finance long-term projects such as structural adjustment programmes, while the World Bank has funded short-term projects such as finance for socio-economic projects including education and health care.⁹⁸⁵ However, this is not to say that the World Bank was not involved in the IMF's structural adjustment programmes.



6.1.1 The World Bank Group (WBG)

The WBG is made up of five organs, namely the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).⁹⁸⁶ This part will be restricted to a discussion of the World Bank. IBRD was the original institution of the World Bank.⁹⁸⁷

⁹⁸³ Articles of Agreement, International Monetary Fund and International Bank for Reconstruction and Development, United Nations Monetary and Financial Conference Bretton Woods, N.H. July 1 to 22, 1944.

⁹⁸⁴ Articles of Agreement, International Monetary Fund and International Bank for Reconstruction and Development, United Nations Monetary and Financial Conference Bretton Woods, N.H. July 1 to 22, 1944.

⁹⁸⁵ Lowenfeld *AF International Economic Law Series: International Economic Law* 2 ed (2008) 750.

⁹⁸⁶ World Bank 'About the World Bank' available on <http://www.worldbank.org/en/about> (accessed 18 November 2013).

⁹⁸⁷ World Bank 'International Bank for Reconstruction and Development' available on <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html> (accessed 18 November 2013).

Zimbabwe signed the Articles of Agreement of IBRD on 29 September 1980⁹⁸⁸ and Articles of Agreement of IDA on 29 September 1980.⁹⁸⁹ Over and above IDA loans and grants, IDA also provides debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief (MDRI) Initiative.⁹⁹⁰

First, Zimbabwe as a newly independent country in 1980 inherited from the colonial Rhodesian government debt in excess of US\$700 million, which were funds used by the government of Ian Smith to purchase weapons in the 1970s and to wage war against indigenous Zimbabweans.⁹⁹¹ As a result of the UDI's self-proclaimed independence from the United Kingdom (UK) in 1969, sanctions and oil embargoes were declared by the UK and the United Nations Security Council.⁹⁹² Although the World Bank had been involved in projects in Rhodesia before 1970, no funding support or projects were undertaken by the World Bank in the then Rhodesia until post-1980.⁹⁹³

Secondly, when Zimbabwe attained independence in 1980, the government incurred debt in order to repay the inherited debt. The World Bank's Accelerated Development in Sub-Saharan Africa:



⁹⁸⁸ World Bank 'Archives- World Bank Group Historical Chronology: 1980 to 1989' available on web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,contentMDK:20035663~menuPK:56318~pagePK36726~piPK:437378~theSitePK:29506,00.html (accessed 7 October 2015).

⁹⁸⁹ World Bank 'Archives- World Bank Group Historical Chronology: 1980 to 1989' available on web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,contentMDK:20035663~menuPK:56318~pagePK36726~piPK:437378~theSitePK:29506,00.html (accessed 7 October 2015).

⁹⁹⁰ Lowenfeld *AF International Economic Law Series: International Economic Law* 2 ed (2008) 752.

⁹⁹¹ In 1965 Rhodesia broke away from the United Kingdom in terms of the Unilateral Declaration of Independence of Ian Smith, and Rhodesia left the Commonwealth in 1966, and at the same time sanctions were placed on Rhodesia to cease British Aid and preferential treatment as well as banning tobacco imports. See generally Mobley R 'The Beira Patrol: Britain's failed blockade against Rhodesia' (2002) IV (1) *Naval War College Review* 63-84; Prinslow KE 'Economic sanctions and Zimbabwe' available on <http://peacepalacelibrary.nl/ebooks/files/328860700.pdf> (accessed 21 November 2016); Openshaw KS and Terry P 'Zimbabwe's odious inheritance: Debt and unequal land distribution' (2015) 11(1) *McGill International Journal of Sustainable Development Law and Policy (JSDLP RDPDD)* 43 44; Jones T 'Uncovering Zimbabwe's debt' (2011) 6 Jubilee Debt Campaign available on http://erlassjahr.de/wordpress/wp-content/uploads/2016/03/ZIM_Uncovering_Zimbabwes_debt.pdf (accessed 21 November 2016).

⁹⁹² United Nations Security Council Resolution 253, 29 May 1968; National Archives of Australia 'Your Story, Our History' available on www.naa.gov.au/collection/fact-sheets/fs263.aspx (accessed 7 October 2015).

⁹⁹³ Electric Power Project of 1952, Kariba Electric Development Project in 1956, Railways Project in 1985, Agricultural Development Project in 1960, and phase two of the Kariba Electric Power Project in 1964; World Bank 'Zimbabwe Projects' available on www.worldbank.org/en/country/zimbabwe/projects/all?qterm=&lang_exact=English&os=40 (accessed 8 October 2015).

Plan for Action, the so-called Berg Report responded to the Lagos Plan of Action.⁹⁹⁴ The Lagos Plan of Action placed great emphasis on the failings of international development strategies, and on pan-Africanism and self-reliance, while on the other hand the Berg Report prioritised new strategies for development in Africa and focused on outward-looking policies and free trade. One of the main criticisms of the Berg Report (similar to the MAI) is that it presented the ‘economic reality’ of Africa according to the Review Group, which consisted largely of non-Africans.⁹⁹⁵

Thirdly, the World Bank facilitated the IMF Economic Structural Adjustment Program (ESAP) in the Structural Adjustment Credit Project.⁹⁹⁶ It is interesting to note that one of the conditions set out in the Schedule to this agreement of the IBRD was to prohibit Zimbabwe from using the loan amount for purchasing certain items, including alcoholic beverages, tobacco, radioactive and nuclear material, jewellery, gold and, more interestingly, tobacco-processing machinery.⁹⁹⁷ The prohibition from using funds to purchase and import tobacco-processing machinery strikes the writer as odd, taking into account that tobacco has been since pre-independence one of Zimbabwe’s top export products. It raises the question whether the intention of this provision was to protect foreign (and in particular Western) interests in holding a tobacco manufacturing monopoly, or simply to ensure that Zimbabwe continued to be a primary producer of raw materials. It is in my view difficult to consider this specific provision as beneficial to the Zimbabwean economy at that time.

Fourthly, aid and loans from the West were tied to obligations which were not priorities for Zimbabwe, such as to import various goods from the West such as military aircraft (which was eventually used in the Congo War of 1998), police vehicles, and other products from specified

⁹⁹⁴ Berg E *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (1981) 1.

⁹⁹⁵ African Affairs (London) Oxford Journals (1982) 81 (323); 281-282 also available on afraf.oxford.org/content/81/323/281.full.pdf+html (accessed 7 October 2015).

⁹⁹⁶ World Bank Project No. P003302, see generally World Bank ‘Zimbabwe Projects’ available on www.worldbank.org/en/country/zimbabwe/projectsall?qterm=&lang_exact=English&os=40 (accessed 8 October 2015); see paragraph 5.2.1.2.

⁹⁹⁷ Section 2, Schedule to the Danish Grant Related to Loan Number 3434 Zimbabwe, 11 March 1993; group reference for tobacco processing machinery 728.43.

British companies.⁹⁹⁸ No payments could be made from these funds below US\$2 000, or for local currency payments, or for goods supplied from Zimbabwe. In other words, Zimbabwe was forced to import, thereby creating an unfair competitive advantage for foreign firms and weakening the domestic industry.⁹⁹⁹ In essence, the agreement created a market for goods from the developed countries in the West and ensured repatriation of its funds to other developed countries in the West, as opposed to creating an opportunity for re-investment and development of local industry in Zimbabwe. It is argued that the conditions set by the World Bank and the IMF-tied aid eroded Zimbabwe's right to regulate in the interests of its people and undermined its sovereignty.

Fifthly, while GATT objectives of trade liberalisation were furthered under ESAP, Zimbabwe experienced a trade deficit after ESAP, whereas before ESAP there had been trade surpluses. It is argued by some social interest groups such as the Jubilee Debt Campaign that there needs to be an audit to 'identify where all the debt comes from, who[m] the loans did or did not benefit, whether or not debts are legitimate, and learn lessons to prevent debt playing a destructive role in the future'.¹⁰⁰⁰ It is argued that of the 8 billion USD borrowed by Zimbabwe, it has paid 11 billion back, and owes 7 billion. In other words, a large portion of Zimbabwe's current debt comprises interests and loans taken out to repay loans which were taken by the oppressive colonial government, and loans to engage in programmes that were not priorities for independent government, but were conditions set by their funders.

Sixthly, currently Zimbabwe cannot access any funding from the World Bank because of its arrears, despite the said long repayment period and grace period. The World Bank has financed over US\$1.6 billion since Zimbabwe gained independence, and will be availing US\$20 million in

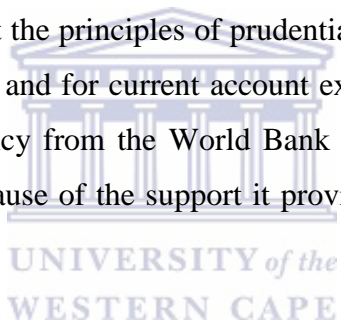
⁹⁹⁸ Openshaw KS and Terry P 'Zimbabwe's odious inheritance: Debt and unequal land distribution' (2015) 11(1) *McGill International Journal of Sustainable Development Law and Policy (JSJLP RDPDD)* 43-44; Jones T 'Uncovering Zimbabwe's debt' (2011) 6 *Jubilee Debt Campaign* available on http://erlassjahr.de/wordpress/wp-content/uploads/2016/03/ZIM_Uncovering_Zimbabwes_debt.pdf (accessed 21 November 2016).

⁹⁹⁹ Section 2, Schedule to the Danish Grant Related to Loan Number 3434 Zimbabwe Legal Dept of World Bank (1992) Conformed Copy C2331 Structural Adjustment Credit- Danish Grant Agreement, Washington DC, in force 11 March 1993; group reference for tobacco processing machinery 728.43; also available on documents.worldbank.org/curated/en/1992/02/5076729/conformed-copy-c2331-structural-adjustment-credit-danish-grant-agreement (accessed 8 October 2015).

¹⁰⁰⁰ Jubilee Debt Campaign 'Zimbabwe' available on jubileedebt.org.uk/countries/Zimbabwe (accessed 7 October 2015).

grants.¹⁰⁰¹ World Bank Statistics show Zimbabwe's commitment to IBRD and IDA (World Bank) as US\$3 million in 2011, US\$16 million in 2010, none in 2013, US\$28 million in 2014, and none in 2015.¹⁰⁰²

Recently, the WBG announced that its lending programme to Zimbabwe is inactive due to arrears and its current role is limited to the provision of technical support and analytical work.¹⁰⁰³ This is confusing because there is data showing Zimbabwe's obligations to IBRD and IDA as US\$16 million as at 2012, US\$28 million as at 2014, and US\$53 million as at 2016.¹⁰⁰⁴ Moreover, the World Bank continues to be involved in projects such as the Public Procurement Modernisation Technical Assistance¹⁰⁰⁵ and the Hwange-Sanyati Biological Corridor Project.¹⁰⁰⁶ When the World Bank states that it is withdrawing support but there is evidence of continued support this creates confusion. It is questionable why the World Bank is lending to a country that is clearly unable to repay its debts, as this goes against the principles of prudential banking. Currently, Zimbabwe is borrowing money to pay off debts and for current account expenses such as the civil wage bill. There is need for more transparency from the World Bank concerning international debt. The World Bank is also important because of the support it provided to Zimbabwe through country projects.



6.1.1.1 Country Projects

Country projects of the World Bank resumed after Zimbabwe attained independence in 1980. These include import rehabilitation projects for manufacturing and transport in 1981, provisionally

¹⁰⁰¹ The Financial Gazette 'Zimbabwe: World Bank Says it has funded US\$1.6 billion Worth of Development Projects since 1980' *Financial Gazette* 03 September 2015 available on allafrica.com/stories/201509030617.html (accessed 8 October 2015).

¹⁰⁰² World Bank 'Zimbabwe: Projects' available on www.worldbank.org/en/country/zimbabwe/projects (accessed 07 October 2015).

¹⁰⁰³ Government of Zimbabwe 'Environmental Analysis and Environmental Management Plan for the Land Reform Support Project', 19 November 1999, Harare E-360; World Bank 'Zimbabwe Land Reform Support Project: Environmental Analysis and Environmental Management Plan' available on <http://documents.worldbank.org/curated/en/1999/11/437137/zimbabwe-land-reform-support-project-environmental-analysis-environmental-management-plan> (accessed 8 October 2015).

¹⁰⁰⁴ World Bank 'Overview' available on <http://www.worldbank.org/en/country/zimbabwe/overview> (accessed 21 November 2016).

¹⁰⁰⁵ 3 August 2015.

¹⁰⁰⁶ 16 May 2014.

valued at US\$65 million and US\$42 million, respectively.¹⁰⁰⁷ The World Bank also extended a small farm credit project in 1982, and continued with infrastructural projects covering petroleum, power, manufacturing, roads, afforestation, agriculture, railways, urban development, small-scale enterprises, and health by 1991.¹⁰⁰⁸

One project that stands out in the period post-ESAP is the World Bank's Land Reform Support project implemented and closed on 2 September 1999. Its purpose was 'to support the Inception Phase of Zimbabwe Land Reform and Resettlement Program by financing improved government models and complementary approaches'.¹⁰⁰⁹

6.1.2 The African Development Bank (AfDB)

The AfDB was established in August 1963 and has similar functions as the World Bank.¹⁰¹⁰ Between 1982 and 1989 the AfDB had approved five development projects in Zimbabwe, the last of which had been completed by 1996 to facilitate resettlement of indigenous Zimbabweans to newly acquired farms from white owners in areas such as Chinyika.¹⁰¹¹ One of the projects, an irrigation feasibility project in Dande, was terminated prior to completion owing to the conflict that arose between the traditional spiritual leaders and the administrative processes.

Later projects that commenced between 1990 and 1996 were mostly geared towards infrastructural development. Project areas include electricity, railways, rural road infrastructure, as well as rural and urban water supply. Other AfDB projects were multi-sectoral such as funding towards ESAP

¹⁰⁰⁷ World Bank 'Zimbabwe projects' available on www.worldbank.org/en/country/zimbabwe/projectsall?qterm=&lang_exact=English&os=40 (accessed 8 October 2015).

¹⁰⁰⁸ World Bank 'Zimbabwe projects' available on www.worldbank.org/en/country/zimbabwe/projectsall?qterm=&lang_exact=English&os=40 (accessed 8 October 2015).

¹⁰⁰⁹ Government of Zimbabwe 'Environmental analysis and environmental management plan for the land reform support project' 19 November 1999, Harare E-360; World Bank 'Zimbabwe land reform support project: Environmental Analysis and Environmental Management Plan' available on <http://documents.worldbank.org/curated/en/1999/11/437137/zimbabwe-land-reform-support-project-environmental-analysis-environmental-management-plan> (accessed 8 October 2015).

¹⁰¹⁰ Agreement Establishing the African Development Bank, 10 September 1964 as amended by Resolutions B/BG/97/05, B/BG/98/04 and B/BG/2001/08; also available on www.afdb.org (accessed 11 August 2015).

¹⁰¹¹ African Development Bank (AfDB) 'Zimbabwe: AfDB Projects in Zimbabwe from 1982 to May 2013' available link on <http://www.afdb.org/en/countries/southern-africa/zimbabwe/> (accessed 06 August 2016).

and funding through ZimFund, ZAMDO and Capacity-building Project for Public Finance and Economic Management (CBPFEM). This capacity-building project was targeted at the Zimbabwean Aid and Debt Management Office, Zimbabwe National Statistics Agency (ZIMSTAT), and the Zimbabwe Revenue Authority (ZIMRA).¹⁰¹²

More recent projects were directed towards urban water supply, specifically in Harare and Chitungwiza and the Lake Harvest Fish Farm, which is the AfDB's first private sector funding in Zimbabwe. The Lake Harvest Fish Farm supports the rural communities living on the banks of Kariba dam and supports inclusive development. The fish farm's aquaculture is expected to produce 20 000 tons of tilapia fish per year. According to the AfDB, most of the fish will be sold by women traders and the fish farm will contribute to food security and improve Zimbabwe's trade balance through increased trade.¹⁰¹³

6.1.3 The International Monetary Fund (IMF)

The functions of the IMF include monitoring the global economy, providing policy advice and technical assistance to governments and central banks, and financing.¹⁰¹⁴ The IMF played a significant role in Zimbabwe as a provider of development finance. However, as indicated in Chapter 2, there is an argument that IMF-facilitated debts under the Economic Structural Adjustment Facilities in the late 1980s to the mid-1990s may have caused more harm than good to the receiving countries. For example, it is noted in paragraph 1 of the Preamble to the Lagos Plan of Action that¹⁰¹⁵

¹⁰¹² AfDB 'AfDB approves US \$24.7 million project to support capacity-building in economic and public finance management in Zimbabwe' available on <http://www.afdb.org/en/news-and-events/article/afdb-approves-us-24-7-million-project-to-support-capacity-building-in-economic-and-public-finance-management-in-zimbabwe-10095/> (accessed 6 August 2016).

¹⁰¹³ AfDB 'Lake Harvest Fish Farm: Enhancing sustainable food security in Zimbabwe' (14 August 2013) available on <http://www.afdb.org/en/news-and-events/article/lake-harvest-fish-farm-enhancing-sustainable-food-security-in-zimbabwe-12193/> (accessed 6 August 2016).

¹⁰¹⁴ IMF 'About IMF' available on www.imf.org/external/about/whatwedo.htm (accessed 18 November 2013).

¹⁰¹⁵ Organisation of African Unity (OAU) (now African Union (AU)), Lagos Plan of Action for the Economic Development of Africa (1980-2000), April 1980, Lagos.

[t]he effect of unfulfilled promises of global development strategies has been more sharply felt in Africa than in the other continents of the world. Indeed rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialised countries.¹⁰¹⁶

Some authors also question the intention of the IMF when implementing these adjustments, which in practice left the recipient economies in a poorer state, while promoting trade liberalisation.¹⁰¹⁷ Naiman finds that in most developing countries where ESAF was implemented, those countries experienced lower economic growth compared to countries outside this programme:

For many years, non-governmental organisations concerned with African development have asked whether the policies imposed by the IMF in Africa have actually helped or hindered the objective of increasing living standards for the majority of Africans.¹⁰¹⁸

The objective of ESAP was poverty reduction so as to ensure access to health care, sanitation, and education, inter alia. ESAF programmes forced governments to reduce spending on those key deliverables.¹⁰¹⁹ This shows classical economic principles of economic growth in anticipation of the invisible hand. However, a balance between economically sound principles of liberalism and government intervention would have potentially produced better social and economic outcomes. Naiman argues that neither the ESAF programmes nor the Heavily Indebted Poor Countries (HIPC) programmes have significantly reduced countries' debt: in fact, external debt in these countries was at 71.1 per cent in 1985 and increased to 87.8 per cent in 1995. IMF structural

¹⁰¹⁶ Organisation of African Unity (OAU) (now African Union (AU)), Lagos Plan of Action for the Economic Development of Africa (1980-2000), April 1980, Lagos.

¹⁰¹⁷ Naiman R & Watkins N 'A Survey of the Impacts of the IMF Structural Adjustment in Africa: Growth, Social Spending, and Debt Relief' Centre for Economic and Policy Research (1999) 1 available on www.cepr.net/documents/publications/debt_1999_04.htm (accessed 5 October 2015).

¹⁰¹⁸ Naiman R & Watkins N 'A Survey of the Impacts of the IMF Structural Adjustment in Africa: Growth, Social Spending, and Debt Relief' Centre for Economic and Policy Research (1999) 1 available on www.cepr.net/documents/publications/debt_1999_04.htm (accessed 5 October 2015).

¹⁰¹⁹ See paragraph 2.6.2.

adjustment programmes have in the past caused more harm than good.¹⁰²⁰ Examples are Chile, Peru, and Zambia, which experienced severe economic failure post-IMF instructed structural adjustment programmes. Perhaps the challenge is not so much the programmes, but the one-size-fits-all approach often taken by the IMF based on economic theories that do not always match real scenarios within the African context.

As at January 2015, although Zimbabwe is a member of the IMF, it had no access to IMF lines of credit, owing to Zimbabwe's arrears in excess of US\$120 million. By April 2015, a first review of the IMF Staff-Monitored Program (SMP) had been completed. This entailed a 15-month review towards strengthening Zimbabwe's relation with its debtors, so that arrears clearance may begin, debts may be serviced and the country may have access to external financing.¹⁰²¹ The Review noted that Zimbabwe has made some progress in terms of structural adjustment and macro-economic reform. This reflects changes made in terms of clarifying the scope and application of the Indigenisation and Economic Empowerment Act,¹⁰²² as well as improved public sector finance management and increased confidence in and soundness of the financial sector.¹⁰²³

This might be disputed on the grounds that a liquidity crunch still persists in Zimbabwe, the result of which has been several business and factory closures, unpaid employees and reduced investment, including FDI and portfolio investment.¹⁰²⁴ The third review was completed by 29

¹⁰²⁰ Kolko G 'Ravaging the Poor' Multinational Monitor Ref: 01974637 Vol. 19, Issue 6 (June 1998) also available on <http://web.b.ebscohost.com.ezproxy.uwc.ac.za/ehost/detail/detail?vid=5&sid=0bc9d74c-5226-4861-bf4b-1a2680b791cf%40sessionmgr112&hid=125&bdata=JnNpdGU9ZWhvc3QtbG12ZQ%3d%3d#AN=978175&db=a9h> (accessed 29 September 2015).

¹⁰²¹ IMF 'Zimbabwe-IMF Management Completes Review of Staff-Monitored Program' Press Release No 15/175 (21 April 2015) available on <https://www.imf.org/external/np/sec/pr/2015/pr15175.htm> (accessed 29 September 2015).

¹⁰²² Indigenisation Act Chapter 14:33.

¹⁰²³ IMF 'Zimbabwe-IMF Management Completes Review of Staff-Monitored Program' Press Release No. 15/175 (21 April 2015) available on <https://www.imf.org/external/np/sec/pr/2015/pr15175.htm> (accessed 29 September 2015).

¹⁰²⁴ Latham B 'IMF says Zimbabwe must repay debt to be eligible for more credit' *Bloomberg Business News* 23 September 2014 available on www.bloomberg.com/news/articles/2014-09-23/imf-says-zimbabwe-must-repay-debt-to-be-eligible-for-more-credit (accessed 29 September 2015); IMF *Zimbabwe Second Review Of The Staff-Monitored Program—Press Release; And Staff Report IMF Country Report No. 15/279* (2015) available on <https://www.imf.org/external/pubs/ft/scr/2015/cr15279.pdf> (accessed 10 November 2016). The timelines of the second and third review appear to be mixed up somehow.

October 2014. Zimbabwe is indebted not only to the IMF but to several IFIs, such as the African Development Bank, to which it owes over US\$528 million, the World Bank about US\$926 million and the IMF about US\$124 million.¹⁰²⁵ According to the IMF Staff-Monitored-Program Director Domenico Fanizza, the IMF is ready to finance Zimbabwe, on condition that the arrears in excess of US\$1.2 billion are serviced.¹⁰²⁶ The IMF and other IFIs are prohibited from funding Zimbabwe until it has cleared its arrears.¹⁰²⁷ This funding would then be under the umbrella of the Paris Group.¹⁰²⁸ One is immediately aware of the challenge that this provision poses. On one hand, there is a generous offer to provide funding, while on the other there is a nearly impossible prerequisite to first repay outstanding loans. Furthermore, the current IMF Staff Monitored Program in Zimbabwe sets restrictions on Zimbabwe that prevent it from borrowing funds from new creditors to a certain extent. While the logic of repaying loans is clear (that a loan must be repaid before more can be requested), it seems Zimbabwe is stuck between a rock and a hard place. In reality this means that the liquidity crisis currently in Zimbabwe might last longer, since there is very low investment and reduced financial support from the main international financial institutions, namely the IMF and the World Bank, through IBRD and IDA.

Lastly, this debt cycle has continued and Zimbabwe has recently repaid outstanding IMF debt through a new multi-donor fund – which is again confusing, as the IMF imposed restrictions on Zimbabwe’s obtaining funding from other donors yet also facilitated this multi-donor fund. Zimbabwe is operating from a position of desperation, with little or no bargaining power. As a result, it is subjected to conditions that often are not in the best interests of Zimbabwean economic development. In the absence of investment and development finance from IFIs, Zimbabwe needs

¹⁰²⁵ Gahadza N ‘Zim told to normalise relations with IMF’ The Herald Zimbabwe Online available on www.herald.co.zw/zim-told-to-normalise-relations-with-imf/ (accessed 29 September 2015).

¹⁰²⁶ Latham B ‘IMF says Zimbabwe must repay debt to be eligible for more credit’ *Bloomberg Business News* 23 September 2014 available on www.bloomberg.com/news/articles/2014-09-23/imf-says-zimbabwe-must-repay-debt-to-be-eligible-for-more-credit (accessed 29 September 2015); Langa V ‘IMF ready to finance Zim’ *Newsday* available on <https://newsday.co.zw/2015/03/05/imf-ready-finance-zim/> (accessed 29 September 2015).

¹⁰²⁷ Latham B ‘IMF says Zimbabwe must repay debt to be eligible for more credit’ *Bloomberg Business News* 23 September 2014 available on www.bloomberg.com/news/articles/2014-09-23/imf-says-zimbabwe-must-repay-debt-to-be-eligible-for-more-credit (accessed 29 September 2015).

¹⁰²⁸ IMF ‘Zimbabwe-IMF Management Completes Review of Staff-Monitored Program’ Press Release No. 15/175 21 April 2015 available on <https://www.imf.org/external/np/sec/pr/2015/pr15175.htm> (accessed 29 September 2015).

to seriously consider the state of access to financial services of Zimbabwe's population as this plays a role in securing financial stability.

6.2 FINANCIAL INCLUSION

Financial inclusion is a term used to express the targeted integration of poor and disadvantaged people into the mainstream economy and the creation of opportunities for their access to financial services such as banking and insurance.¹⁰²⁹ Financial inclusion draws in the marginalised and gives them access to goods and services, and platforms which they would otherwise not have access to. Financial inclusion bridges a critical gap and aligns with the concept of social inclusion discussed in chapter two.¹⁰³⁰ According to the World Bank, two billion people do not have access to formal financial services and 73 per cent of poor people do not have access to banks due to numerous barriers to entry such as stringent requirements for opening bank accounts, high service costs, and logistical barriers such as transportation.¹⁰³¹

The World Bank notes that there is link between income levels and access to formal financial services.¹⁰³² The richest 20 per cent have two times more access to financial services than the poorest 20 per cent.¹⁰³³ The use of information and communication technologies (ICTs) is integral to the improvement of access to financial services through increased access to the internet, point-of-sale transactions and cell phone banking, inter alia.¹⁰³⁴ The Financial Inclusion Data Working Group of the Alliance for Financial Inclusion (AFI-FIDWIG) identifies three dimensions of financial inclusion, namely access, usage and quality.¹⁰³⁵ The World Bank has conducted research

¹⁰²⁹ The World Bank 'Financial inclusion overview' available on <http://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed 21 August 2016).

¹⁰³⁰ See paragraph 2.5.3.1.

¹⁰³¹ The World Bank 'Financial inclusion overview' available on <http://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed 21 August 2016).

¹⁰³² The World Bank 'Financial inclusion overview' available on <http://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed 21 August 2016).

¹⁰³³ The World Bank 'Financial inclusion overview' available on <http://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed 21 August 2016).

¹⁰³⁴ The World Bank 'Financial inclusion overview' available on <http://www.worldbank.org/en/topic/financialinclusion/overview#1> (accessed 21 August 2016).

¹⁰³⁵ Alliance for Financial Inclusion 'Financial inclusion in Africa-Setting the stage: Defining and measuring financial inclusion' in Triki T and Faye I (eds) *Financial Inclusion in Africa* (2013) 31.

into possible national financial inclusion strategies (NFIS).¹⁰³⁶ Financial inclusion is perceived to be more effective when based on planned strategies that garner

[a]ccess to financial services and products; usage of financial services and products; and quality of financial services and products, defined by consumer ability to benefit from new financial services and products (and linked to consumer protection and financial capability).¹⁰³⁷

In other words, financial inclusion ought to widen access to financial services, but it should be supported by ingrained values and regulations which ensure consumer protection.¹⁰³⁸ There is also the argument that financial inclusion on its own is insufficient as a means to foster economic growth, but must be supported by financial literacy and financial independence.¹⁰³⁹ It is further argued that although it is imperative to have financial inclusion strategies, it is in fact more important to translate the strategies into binding and enforceable law, and to implement them.¹⁰⁴⁰ Regulation is of utmost importance because it provides legal certainty and facilitates compliance by all stakeholders. Regulation is discussed further in paragraph 6.6. Moreover, financial inclusion reduces the risks associated with financial stability on the national and regional level.

¹⁰³⁶ The World Bank 'National financial inclusion strategies overview' available on <http://www.worldbank.org/en/topic/financialinclusion/brief/national-financial-inclusion-strategies> (accessed 21 August 2016).

¹⁰³⁷ The World Bank Financial Inclusion Strategies Reference Framework (2012) 6.

¹⁰³⁸ The World Bank Financial Inclusion Strategies Reference Framework (2012) 6.

¹⁰³⁹ Cohen M and Nelson C 'Financial literacy: A step for clients towards financial inclusion' (2011) Global Microcredit Summit Commissioned Workshop Paper November 14-17, 2011, Valladolid, Spain 4, also see generally Financial Literacy and Education Trust Fund Russia 'The role of financial education in financial inclusion OECD/INFE evidence, policies and illustrative case studies' (2003) available on <https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-the-role-of-financial-inclusion-oecdinfe-evidence-policies-and-illustrative-case-studies-jun-2013.pdf> (accessed 26 August 2016); Subbarao D 'Financial literacy and financial inclusion are integral to each other' Inaugural remarks, Governor of the Reserve Bank of India, at the India-OECD-World Bank Regional Conference on Financial education, New Delhi, 4 March 2013 also available on <http://www.bis.org/review/r130305j.pdf> (accessed 26 August 2016).

¹⁰⁴⁰ Cohen M and Nelson C 'Financial literacy: A step for clients towards financial inclusion' (2011) Global Microcredit Summit Commissioned Workshop Paper November 14-17, 2011, Valladolid, Spain 4, also see generally Financial Literacy and Education Trust Fund Russia 'The role of financial education in financial inclusion OECD/INFE evidence, policies and illustrative case studies' (2003) available on <https://www.microfinancegateway.org/sites/default/files/mfg-en-paper-the-role-of-financial-inclusion-oecdinfe-evidence-policies-and-illustrative-case-studies-jun-2013.pdf> (accessed 26 August 2016); Subbarao D 'Financial literacy and financial inclusion are integral to each other' Inaugural remarks, Governor of the Reserve Bank of India, at the India-OECD-World Bank Regional Conference on Financial education, New Delhi, 4 March 2013 also available on <http://www.bis.org/review/r130305j.pdf> (accessed 26 August 2016).

Zimbabwe

Zimbabwe joined the Alliance for Financial Inclusion Maya Declaration in February 2012; however, it did not implement or publish a national financial inclusion strategy for a long time.¹⁰⁴¹

It eventually launched its national strategy in March 2016. The policy document notes:

National financial inclusion strategies provide an important opportunity to introduce an evidence-based, prioritised, better resourced, and more comprehensive approach to expanding access and usage of financial services. A national strategy with clear goals and targets supports coordination among public and private sector stakeholders and provides an organizing framework for financial inclusion policies and regulations to be implemented.¹⁰⁴²

The economic blueprint of Zimbabwe (ZimAsset) makes no mention of the National Financial Inclusion Strategy (NFIS) for Zimbabwe. However, in practice, several financial institutions have already begun implementing measures that promote financial inclusion. This is shown by the period 2011 and 2014 during which Zimbabwe managed to reduce financial exclusion from 40 per cent to 23 per cent despite not having a national strategy.¹⁰⁴³ It is argued that more can be achieved if a national strategy is put in place. The national strategy ought to take into account several demand-side barriers such as low income, irregular payments of due income, low financial literacy and unemployment, and strict requirements for opening bank accounts, as well as supply-side barriers such as high costs of financial services and the logistics of travelling far to reach the nearest bank.¹⁰⁴⁴ There are also regulatory barriers such as the lack of national coordination, lack

¹⁰⁴¹ Clauses 6.4 Zimbabwe National Financial Inclusion Strategy, 2016-2020; As at October 2015, the Government of Zimbabwe had not drafted an NFIS, although the governor of the Reserve requested all banks to submit their financial inclusion strategies to the reserve bank by December 2015. It is unclear what the bank strategies were supposed to be based on since there was no streamlining by the RBZ of the national strategy at that stage. In the absence of benchmarks, the efforts of individual banks may lead to divergent strategies which do not address financial inclusion needs and which may deviate from national objectives; Nyakwawa M 'Zimbabwe financial inclusion: What will banks do?' (18 October 2015) *The Standard* available on <http://allafrica.com/stories/201510191341.html> (accessed 21 August 2016); four other SADC countries have adopted national financial inclusion strategies so far: Mozambique, Tanzania, Malawi and Rwanda.

¹⁰⁴² Clauses 1.5 and 1.6 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁴³ Nyakwawa M 'Zimbabwe financial inclusion: What will banks do?' (18 October 2015) *The Standard* available on <http://allafrica.com/stories/201510191341.html> (accessed 21 August 2016).

¹⁰⁴⁴ Clauses 3.59 Zimbabwe National Financial Inclusion Strategy, 2016-2020; Nyakwawa M 'Zimbabwe financial inclusion: What will banks do?' (18 October 2015) *The Standard* available on <http://allafrica.com/stories/201510191341.html> (accessed 21 August 2016).

of a regulatory framework for consumer protection with regard to financial services, and lastly, capacity and resource constraints.¹⁰⁴⁵ The Zimbabwe NFIS defines ‘financial inclusion’ as

[t]he effective use of a wide range of quality, affordable & accessible financial services, provided in a fair and transparent manner through formal/regulated entities, by all Zimbabweans.¹⁰⁴⁶

This definition takes into account the three factors recommended by the AFI-FIDWG above. In this regard, the definition speaks to access by stating that ‘affordable and accessible financial services’ must be provided fairly and transparently.¹⁰⁴⁷ The definition notes the need for ‘effective use’ and ‘a wide range of quality... financial services’ thereby capturing the usage and quality components of financial inclusion as per the definition by the Alliance for Financial Inclusion given above.¹⁰⁴⁸

The Zimbabwe NFIS has four strategic goals targeted for 2020, namely to increase the level and quality of access to financial services from 69 per cent as at 2014 to 90 per cent in 2020, and to bank 60 per cent of the population by 2020 as opposed to 2014 figures of 30 per cent.¹⁰⁴⁹ Moreover, the Zimbabwe NFIS intends to facilitate sustainable financial inclusion of all adults, and particularly women, youths, small to medium enterprises (SMEs), small-holder agricultural farmers and the rural population.¹⁰⁵⁰ The integration of these marginalised groups is especially important and is in line with the UN Sustainable Development Agenda 2030 motto to ‘leave no one behind’.¹⁰⁵¹ The Zimbabwe NFIS clause 2.3 notes special groups which are targeted for financial inclusion as ‘Micro, Small and Medium Enterprises [SMEs], women, youth, rural population and the small scale agricultural sector’.¹⁰⁵²

¹⁰⁴⁵ Clauses 3.59 Zimbabwe National Financial Inclusion Strategy, 2016-2020; Nyakwawa M ‘Zimbabwe financial inclusion: What will banks do?’ (18 October 2015) *The Standard* available on <http://allafrica.com/stories/201510191341.html> (accessed 21 August 2016).

¹⁰⁴⁶ Clause 4.32 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁴⁷ Clause 4.32 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁴⁸ Clause 4.32 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁴⁹ Clause 4.32 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁵⁰ Clauses 4.33 and 4.34 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁵¹ See generally UN Sustainable Goals Agenda 2030.

¹⁰⁵² Zimbabwe National Financial Inclusion Strategy, 2016-2020.

To integrate these marginalised groups, some Zimbabweans informally established home-grown financial services solutions operating at a grassroots level and within the ambit of micro-finance, called Savings and Credit Cooperative Societies (SACCOS) and Rotating Savings and Credit Associations (ROSCAs) colloquially known as ‘rounds’ or ‘*mukando*’.¹⁰⁵³ These types of informal financial services tend to cater for those who are traditionally excluded from the formal banking sector for reasons explained above, and also those whose small cash denominations are not easily bankable. SACCOS and ROSCAs not only alleviate poverty but reduce financial exclusion and empower women and youths to manage their own finances.

SMEs employ about 5.7 million people, of whom most are women, and only 14 per cent of SMEs are currently banked.¹⁰⁵⁴ For rural inclusion, the NFIS envisages the introduction of group lending and affordable agricultural loans for small-holder farmers.¹⁰⁵⁵ Over 65 per cent of the population lives in rural areas, and the rural population is disproportionately affected by financial exclusion such that only 5 per cent of the rural population is banked.¹⁰⁵⁶ Rural communities often lack the very basic requirements needed to open a bank account, live in underdeveloped areas lacking proper road infrastructure, rendering physical banks inaccessible, and also lack digital devices to access virtual banking platforms.¹⁰⁵⁷ The policy notes the need for vocational training, financial literacy and general capacity-building for youths because they tend to be excluded on presumptions that they are unqualified, inexperienced, risk-takers, and lack collateral.¹⁰⁵⁸

The discussion above ought to cause alarm and inspire accelerated financial inclusion, taking into account that banks as financial intermediaries rely on deposits and loans to fund various investment projects as well as to fund trade finance, thereby facilitating liquidity, creation of money and export

¹⁰⁵³ Clauses 5.23 and 5.27 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁵⁴ Clauses 6.4 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁵⁵ Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁵⁶ Nyakawa M ‘Financial inclusion predictions for 2016’ *The Standard* (3 January 2016) available on <http://www.thestandard.co.zw/2016/01/03/financial-inclusion-predictions-for-2016/> (accessed 21 August 2016); Mago S and Chitokwindo J ‘The impact of mobile banking on financial inclusion in Zimbabwe: A case for Masvingo Province’ (May 2014) 5 (9) *Mediterranean Journal of Social Sciences* 221 222.

¹⁰⁵⁷ See generally Makoni PL ‘From financial exclusion to financial inclusion through microfinance: The case of rural Zimbabwe’ (2014) 14 (4) *Corporate Ownership and Control* 63-81.

¹⁰⁵⁸ See generally Makoni PL ‘From financial exclusion to financial inclusion through microfinance: The case of rural Zimbabwe’ (2014) 14 (4) *Corporate Ownership and Control* 63-81.

and economic growth. Although there are other permutations such as confidence in the banking sector, having increased access to banks is likely to improve liquidity as more people entrust banks to hold their funds. Access to credit finance also plays a critical role in supporting human development through access to funds for capital investments, such as mortgage bonds, that directly impact on quality of life and access to the socio-economic right to housing.¹⁰⁵⁹ Moreover, credit finance can be useful in instances where the state is unable to provide free quality health care and where individuals do not have health insurance. In this regard, credit finance can bridge financial obligations and thereby secure increased access to health care.¹⁰⁶⁰

The Zimbabwean NFIS targets financial innovation, financial capability, consumer protection and microfinance.¹⁰⁶¹ It further notes the integral and strategic role that financial inclusion can play as a means to increase the potential for savings and investments, which would help to improve the country's liquidity. The Reserve Bank of Zimbabwe is spearheading capacity-building for financial inclusion, while the legislature is tabling the Consumer Protection Bill, which deals to a large extent with issues of consumer education and access to information and financial services.¹⁰⁶² The content and structure of the Zimbabwe Consumer Protection Bill appears to have been guided by the South African Consumer Protection Act and the United Nations Consumer Protection Guidelines.¹⁰⁶³ Positive steps towards financial inclusion have been pioneered by the private sector, where mobile network operators (MNOs), banks and micro-finance institutions (MFIs) are entering into strategic partnerships that promote financial inclusion.

¹⁰⁵⁹ Ikhide SI 'The finance and growth debate in Africa: What role for financial inclusion?' Inaugural lecture delivered on 26 November 2015 available on <http://www.sun.ac.za/english/Inaugurallectures/Inaugural%20lectures/InauguralLectureProfIkhide.pdf> (accessed 26 August 2016);

¹⁰⁶⁰ Ikhide SI 'The finance and growth debate in Africa: What role for financial inclusion?' Inaugural lecture delivered on 26 November 2015 available on <http://www.sun.ac.za/english/Inaugurallectures/Inaugural%20lectures/InauguralLectureProfIkhide.pdf> (accessed 26 August 2016).

¹⁰⁶¹ Clause 2.12 Zimbabwe National Financial Inclusion Strategy, 2016-2020.

¹⁰⁶² Sections 9 and 13 Zimbabwe Consumer Protection Bill, 2014.

¹⁰⁶³ See section 3(c) United Nations Guidelines for Consumer Protection (as expanded in 1999) (2003); see structure of rights set out in South African Consumer Protection Act 68 of 2008.

The RBZ press release attempts to encourage a culture of savings, but unfortunately misses the mark because it only targets the rich. The RBZ has requested all banking institutions to have special savings products offering for a minimum balance of US\$10 000, or 10,000 Euro, or 20 000 Rand, for a minimum of six months, tax-free saving at an interest of 5 per cent for US and Euro denominations, and 10 per cent for Rand denominations.¹⁰⁶⁴ This savings amount clearly ousts SMEs, most informal sector traders, individuals and potential domestic investors (who constitute the majority of the population) because the savings amount is so high. There should simultaneously be special savings products for different income brackets for a fully inclusive financial services sector and to truly effectively encourage savings. This is essential because savings will avail funds for other investments, and thereby create money, which is so desperately needed in the system. Interest rates should be low enough to encourage borrowing, but high enough to encourage investments. Service fees and commissions should not be exorbitant, but should not push banking corporations out of business. The lack of savings means that banks and financial intermediaries have less money that can be granted as credit financing for large and small investments, as well as business and personal investments, such as start-up capital for new businesses. In other words, the lack of an enabling environment for savings propels the vicious circle of poverty in the economy. In this way financial inclusion will support financial stability. The following part discusses financial stability.

6.3 MODELS OF FINANCIAL SUPERVISION

Financial stability necessitates financial regulation and supervision. Supervision is ‘the monitoring aspect undertaken by one or more public authorities in order to ensure compliance with regulations’.¹⁰⁶⁵ Mwenda defines regulation as ‘a set of binding rules issued by a private or public body’.¹⁰⁶⁶ He further explains that the rules

¹⁰⁶⁴ RBZ ‘Measures to deal with cash shortages while stabilising and stimulating the economy’ Press Statement (4 May 2016) available on <http://www.rbz.co.zw/assets/press-statement-on-cash-shortages-challenge---04-may-2016.pdf> (accessed 23 November 2016).

¹⁰⁶⁵ Nhavira JDG, Mudzonga E and Mugocho E *Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options* (2013) Zimbabwe Economic Policy Analysis and Research Unit (ZEPARU): Harare.

¹⁰⁶⁶ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 5.

can be defined as those rules that are applied by all regulators in the fulfilment of their functions; in the financial services area, they include such prudential rules as those influencing the conditions of access to the market (intended to prevent the emergence of entities with doubtful reputation or without financial capacity necessary for the operations they intend to implement) and those aimed at controlling the risks associated with financial activities, corporate governance and internal control systems, conduct-of-business rules, and methods of supervision.¹⁰⁶⁷

There are four main models of regulation and supervision, namely functional, vertical (also called silo), the horizontal (also called the peaks or twin peaks model), and unified (also called the integrated model).¹⁰⁶⁸ These methods are discussed briefly below in relation to country examples that fall outside the scope of this thesis but provide important insight into this part of the study.

6.3.1 Silo Model

The silo model emphasises on the legal status of institutions and requires that each type of institution be supervised by a different agency. This position is found in Zimbabwe wherein each sub-sector is regulated and supervised by a different entity within that specific sector.¹⁰⁶⁹ In Zimbabwe, three organs have supervisory roles: the RBZ, which supervises banks and microfinance institutions, the Securities Commission, which supervises financial institutions in securities, and the Insurance and Pension Commission for financial institutions in the insurance and pensions sectors.¹⁰⁷⁰ There is no harmonisation in terms of accounting practices, in that each sector follows different accounting methods, for example, the Insurance and Pension Commission follows the returns-at-cost method, whereas the banking sector follows the mark-on-market method.¹⁰⁷¹

¹⁰⁶⁷ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 5.

¹⁰⁶⁸ Nhavira JDG, Mudzonga E and Mugocha E *Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options* (2013) 14.

¹⁰⁶⁹ There are many statutes and corporations established in terms of statutes such as the Reserve Bank Act Chapter 22:15, Deposit Protection Corporation Chapter 24:29, and Banking Act Chapter 24:01 in the banking sector, the Securities Act Chapter 24:25 and Collective Investment Schemes Act Chapter 24:19 in the securities sector, and finally the Insurance and Pensions Act Chapter 24:21 in the insurance sector; Nhavira JDG, Mudzonga E and Mugocha E *Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options* (2013) 14.

¹⁰⁷⁰ Reserve Bank of Zimbabwe 'Financial stability report' (2014) 44 para 4.2.3.

¹⁰⁷¹ Nhavira E, Mudzonga E & Mugocha E 'Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options' 3 Zimbabwe Economic Policy and Research Unit (ZEPARU) adapted from Conference Paper (26 July 2013) available on

Zimbabwe has a fragmented financial services sector governed by fragmented legal instruments. The financial regulation and supervision framework was inherited from colonial authorities, although several amendments have been made.¹⁰⁷² The Reserve Bank of Zimbabwe (RBZ) is responsible for the supervision of banking institutions and to promote smooth payment systems within Zimbabwe in terms of section of the RBZ Act.¹⁰⁷³ The RBZ has a primary role of supervising and regulating banks. RBZ supervision has on-site and off-site components such that, on one hand, the bank examines periodic returns under risk-based supervision and, on the other hand, examines records and books of the bank to ensure compliance with statutory regulations and the RBZ Prudential Guidelines, respectively.¹⁰⁷⁴

Section 6 of the RBZ Act stipulates that the Reserve Bank of Zimbabwe is responsible for the regulation and stability of the monetary system of Zimbabwe, and to achieve and maintain the stability of the national currency, foster liquidity, solvency, and proper functioning of the system.¹⁰⁷⁵ The RBZ is further tasked with the supervision of banking institutions and promotion of smooth operation of the payment system.¹⁰⁷⁶ In terms of its more public functions, the RBZ is empowered to act as a banker, financial advisor and fiscal agent of the state, and is required through its governor to formulate and execute the national monetary policy.¹⁰⁷⁷ In terms of international obligations, the RBZ is responsible for representing the interests of Zimbabwe at international and inter-governmental meetings, as well as interacting with international agencies insofar as it relates to the monetary policy, and it infers to the monetary system in general as well.¹⁰⁷⁸ The RBZ is obliged in terms of section 6 RBZ Act to ‘take part in international organisations whose objective is to pursue financial and economic stability’.¹⁰⁷⁹

<http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 03 September 2015).

¹⁰⁷² Nhavira E, Mudzonga E & Mugocho E ‘Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options’ 3 Zimbabwe Economic Policy and Research Unit (ZEPARU) adapted from Conference Paper (26 July 2013) available on

<http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (Accessed 03 September 2015).

¹⁰⁷³ Reserve Bank of Zimbabwe *Financial Stability Report* (2014) 44.

¹⁰⁷⁴ Reserve Bank of Zimbabwe *Financial Stability Report* (2014) 44.

¹⁰⁷⁵ Section 6(1)(c) Reserve Bank of Zimbabwe Act Chapter 22:15.

¹⁰⁷⁶ Section 6(1)(e) Reserve Bank of Zimbabwe Act Chapter 22:15.

¹⁰⁷⁷ Section 6(1)(g) Reserve Bank of Zimbabwe Act Chapter 22:15.

¹⁰⁷⁸ Section 6(1)(i) Reserve Bank of Zimbabwe Act Chapter 22:15.

¹⁰⁷⁹ Section 6(1)(i) Reserve Bank of Zimbabwe Act Chapter 22:15.

In Zimbabwe, financial regulation is mostly done by agencies. According to Nhavira et al., these agencies, such as the RBZ, have power in and of themselves to shut down financial institutions and dispossess depositors of their savings and incomes, which raises questions of legitimacy. Challenges common to the silo approach include isolation of sectors, which masks risk. For example, a bad debt in one bank will not easily be picked up by another bank and without a centralised register it is difficult to collate credit data. This creates cracks through which risk can go undetected. Demetriades argues in this regard for

an additional market-wide risk management strategy in order to prevent a recurrence of such a huge debt overhang, that is the establishment of a national credit register listing all borrowers and beneficial owners from both commercial banks and cooperatives to enable them to conduct checks on new loan applications against the register. This entails a waiver of some privacy rights and a widening of access to private data.¹⁰⁸⁰

Zimbabwe could benefit significantly from the proposed national credit register. Some potential challenges may include the political risk associated with tampering with the balance of power, especially where top-level officials may be borrowers and may be reluctant to make their names and private borrowing data publicly available. However, this could be a good mechanism to monitor debt to avoid situations such as those experienced by Cyprus where Greek debt to Cypriot banks and contingent liability exceeded 25 per cent and 140 per cent of Cyprus' GDP, respectively.

Cyprus and Hong Kong are further examples of the silo model. Cyprus uses the silo approach, having several stand-alone supervisory and regulatory bodies, including the Central Bank, Securities Exchange Commission, Cooperative Credit Societies' Supervision and Development Authority, Commissioner of Insurance, supervisor of pension funds and relevant laws. In Hong Kong there is a different regulator and supervisor for each sub-sector, such that there is a Monetary

¹⁰⁸⁰ Nhavira E, Mudzonga E & Mugocho E 'Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options' Zimbabwe Economic Policy and Research Unit (ZEPARU) adapted from Conference Paper (26 July 2013) 21 available on <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

Authority responsible for matters of currency and banking, an Insurance Commissioner responsible for insurance matters, and a Securities and Futures Commission responsible for securities.¹⁰⁸¹ Regionally, most COMESA member states had silo models as at 2013, except Madagascar which has a unified supervision model.¹⁰⁸² The SADC on the other hand has very diverse financial services sectors in its member states, which illustrates the differences in the extent and sophistication of financial systems as well as political environments.¹⁰⁸³ This chapter will discuss the role of the RBZ as a regulator and supervisor of domestic banks.

6.3.2 Twin Peaks Model (Horizontal/Peaks)

The second model is the twin peaks model, which is an objectives-based model and one in which each objective is supervised by a specific agency. The global financial crisis of 2007 and 2008 led several countries to revisit their financial regulation and supervision. In this model, there are two regulators for prudential and market conduct regulation, respectively. Market conduct refers to ‘how firms conduct their business, design and price their products’, whereas prudential regulation refers to ‘regulating financial institutions’ solvency and liquidity’.¹⁰⁸⁴

This means that while the twin peaks model incorporates the benefits of the integrated model, it also has an added advantage in that it maintains a balance between the soundness and security of the financial services sector on one hand, and consumer protection and transparency on the other hand. South Africa is one of the countries that has taken the twin peaks approach, retaining the supervisory role of the central bank and also creating the Financial Services Board in 2012.¹⁰⁸⁵ The objectives and purposes of this shift were primarily to separate the regulation and supervision of market conduct and that of prudential regulation.¹⁰⁸⁶

¹⁰⁸¹ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 5 The World Bank: Washington DC.

¹⁰⁸² Chirozva *Comesa Financial System Development & Stability Sub-Committee Report and Proposed Guidance on Effective Harmonisation of Financial System Development & Stability in COMESA* (2013) 105.

¹⁰⁸³ Cabello M, Hands R, Grossman J, and Hayes J ‘Cross-border banking supervision in the SADC region’ (2013) 4 (2) *ACM-Insight* 36 36.

¹⁰⁸⁴ Gordhan P ‘Implementing a twin-peaks model of financial regulation in South Africa’ (2013) 3 available on <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf> (accessed 21 August 2016).

¹⁰⁸⁵ FRRSC (2013)

¹⁰⁸⁶ Nhavira E, Mudzonga E & Mugocho E ‘Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options’ 3 Zimbabwe Economic Policy and Research Unit (ZEPARU) adapted from Conference Paper

South Africa is moving towards the twin peaks model, although currently it has not fully transitioned. South African banking supervision is guided by the BIS 29 Core Principles for Effective Banking Principles (Core Principles),¹⁰⁸⁷ as well as Basel II, 2.5 and III. The Reserve Bank of South Africa (RBSA) houses the Banks Supervision Division (BSD) which monitors and regulates the banking sector.¹⁰⁸⁸ The RBSA is responsible for prudential regulation of the financial services sector, while the Financial Services Board is responsible for market conduct regulation.¹⁰⁸⁹ South Africa is also party to a Common Monetary Area with Lesotho, Namibia, and Swaziland which meets regularly to facilitate continued compliance with the monetary area and to discuss the implementation of monetary and fiscal policies.¹⁰⁹⁰

6.3.3 Unified Model (Integrated)

The third is an integrated model which entails the entire sector being supervised centrally by a single authority. An example is the United Kingdom, which moved the supervision of banks from the Bank of England to the Financial Services Authority (FSA). The FSA has the role of regulating and supervising the entire financial system.¹⁰⁹¹ Other countries that transferred regulatory and supervisory authority from the central bank to a unified system include Norway, Iceland, Denmark, Sweden, Austria, Germany, Belgium, Finland and, in Africa, only Rwanda.¹⁰⁹²

(26 July 2013) available on

<http://elibrary.acbfact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

¹⁰⁸⁷ Basel Committee on Banking Supervision (BCBS);

¹⁰⁸⁸ The Reserve Bank of South Africa 'Banking Supervision' available on

<http://www.resbank.co.za/AboutUs/Departments/Pages/BankSupervision.aspx> (accessed 2 August 2016).

¹⁰⁸⁹ Gordhan P 'Implementing a twin-peaks model of financial regulation in South Africa' (2013) 3 available on

<http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf> (accessed 21 August 2016).

¹⁰⁹⁰ Cabello M, Hands R, Grossman J, and Hayes J 'Cross-border banking supervision in the SADC region' (2013) 4 (2) *ACM-Insight* 36-38.

¹⁰⁹¹ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 5.

¹⁰⁹² Nhavira E, Mudzonga E & Mugocho E 'Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options' Zimbabwe Economic Policy and Research Unit (ZEPARU) Adapted from Conference Paper (26 July 2013) available on

<http://elibrary.acbfact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

6.3.4 Functional Model

The fourth model is the functional model, which entails a specific focus on the functions performed by the specific financial institution. This model has not been used to a great extent. However, some countries have used a combination of the functional model and another model. For example, the USA uses a functional and institutional approach, where the banking sector is regulated by the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, State Regulator, as well as the Federal Reserve.¹⁰⁹³ Australia uses a functional and twin-peaks approach as follows: it has a Securities and Investment Commission, which is responsible for market conduct regulation, a Prudential Regulatory Authority, responsible for prudential regulation, and the Reserve Bank, which regulates monetary policy and systemic stability.¹⁰⁹⁴

There is a risk that countries will try to use a one-size-fits-all approach without first examining the domestic environment to see whether such a move would be compatible. Each country ought to use a model or a combination of models that best suits its unique requirements. For Zimbabwe to continue using a silo model could be detrimental to the financial stability of the country. A twin peaks approach would enable Zimbabwe to better regulate specific objectives such as prudential regulation, market conduct and consumer protection.

It will be very difficult practically for the RBZ to monitor each of these aspects within the banking sector simply because they involve many factors, and the banking sector currently houses conglomerated institutions. It is not clear whether the RBZ would have sufficient capacity to conduct both on-site and off-site regulation. Moreover, it is unclear whether the RBZ is itself suitable as a regulator, bearing in mind that it also needs to be held accountable somehow. Recently, US\$15 billion was found to be missing and unaccounted for,¹⁰⁹⁵ and it has been argued that independence of the RBZ is compromised by political agendas.¹⁰⁹⁶ The RBZ has also been accused of making unsound monetary decisions, such as the introduction of highly controversial

¹⁰⁹³ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 6.

¹⁰⁹⁴ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 9.

¹⁰⁹⁵ Ndlovu M 'RBZ Governor speaks on missing \$15 billion' *The Southern Daily* 14 May 2016 available on <http://thesoutherndaily.co.zw/2016/05/14/rbz-governor-speaks-missing-15-billion/> (accessed 24 November 2016);

¹⁰⁹⁶ New Zimbabwe 'After RBZ, Moyo pushes \$66m ZBC debt on government' available on <http://thezimbabwean.co/2015/05/after-rbz-moyo-pushes-66m/> (accessed 24 November 2016).

bond notes in October 2016. A twin peaks model would allow another entity which is separate from the RBZ to have oversight, a situation that would facilitate financial stability.

A unified model wherein the regulator is not the RBZ would be unlikely in Zimbabwe because it would be perceived as undermining the authority and sovereignty of the state, especially if such a regulator is a private entity. Although regulation and supervision are different in nature, the supervisor often plays a dual role as both supervisor and regulator. There are different aspects of regulation, including systemic (macro-prudential), prudential (micro-prudential), and market conduct.¹⁰⁹⁷ Regulation facilitates stability within the financial system by promoting a safe and sound financial services sector, and by protecting consumers from monopolistic tendencies of financial institutions.¹⁰⁹⁸

6.4 INTERNATIONAL REGULATION OF BANKS FOR FINANCIAL STABILITY UNDER THE BANK FOR INTERNATIONAL SETTLEMENTS (BIS)

The section below discusses the general framework that regulates financial services at an international level. This section focuses on the Bank for International Settlements (BIS) and a few of the organs that work closely with the BIS. The BIS is a bank for central banks.¹⁰⁹⁹ Since the global financial crisis, there has been a general shift towards systemic and macro-prudential regulation, not just micro-prudential regulation.¹¹⁰⁰

The Basel Committee on Banking Supervision (BCBS) works together with the Financial Services Board (FSB) and other organs to coordinate and regulate financial system stability across the

¹⁰⁹⁷ Nhavira E, Mudzonga E & Mugocho E 'Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options' Zimbabwe Economic Policy and Research Unit (ZEPARU) Adapted from Conference Paper (26 July 2013) available on <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

¹⁰⁹⁸ Nhavira E, Mudzonga E & Mugocho E 'Financial regulation and supervision in Zimbabwe: an evaluation of adequacy and options' Zimbabwe Economic Policy and Research Unit (ZEPARU) Adapted from Conference Paper (26 July 2013) available on <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

¹⁰⁹⁹ Lowenfeld *AF International Economic Law Series: International Economic Law* 2 ed (2008) 754.

¹¹⁰⁰ Tresselt T & Verdier T 'Optimal Prudential Regulation of Banks and the Political Economy of Supervision' IMF Working Paper WP/14/90 (2004) 4.

world.¹¹⁰¹ Particular emphasis is placed on the role played by the BIS in the financial regulation of banks. The paragraphs below focus on the governing framework, credit risk, and capital adequacy. These are selected because they address the peculiar challenges that Zimbabwe is currently facing in its banking sector, for example, the liquidity crisis.

The BCBS supervises financial services through four main instruments: Core Principles on Banking Supervision, 2012, is one of the main instruments.¹¹⁰² The Basel Accords apply to banks that are internationally active, and their subordinate banks.¹¹⁰³ The global financial crisis of 2008 occurred after Basel III had been drafted, but had not yet come into effect, indicating that policy-makers and law-makers in BIS had correctly identified gaps in the existing financial regulatory framework.¹¹⁰⁴ This chapter focuses on the Basel Capital Accords and the Core Principles of Banking Supervision in its discussion of international regulation of banks for financial stability. This part provides an overview of the Basel Capital Accords and focuses on the changes introduced by Basel II and III.

Although Basel I and II were already in existence by 2008, they existed amid regulatory loopholes. For example, on paper it may have appeared as though banks were compliant with Basel capital standards, but in practice banks displayed excessive actual and effective leverage, participated in regulatory capital arbitrage, masked true leverage using over-the-counter derivatives and certain unexpected risks such as liquidity were at the forefront of causes for financial contagion during

¹¹⁰¹ While the BIS regulates different kinds of financial services, this discussion will be limited to banks. The BIS is home to the Financial Services Institute and the Committee on Payment and Settlement Systems. Other organs include the International Accounting Standards Board (IASB), the global committees of securities regulators (IOSCO), and insurance supervisors (IAIS); Black J 'Prudential Regulation of Banks' in OECD ed *International Regulatory Co-operation: Case Studies*, Vol. 2 Canada-US Co-operation, EU Energy Regulation, Risk Assessment and Banking Supervision (2013) 70 DC.

¹¹⁰² Black J 'Prudential Regulation of Banks' in OECD ed *International Regulatory Co-operation: Case Studies*, Vol. 2: Canada-US Co-operation, EU Energy Regulation, Risk Assessment and Banking Supervision (2013) 73.

¹¹⁰³ Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 11.

¹¹⁰⁴ Basel Committee on Banking Supervision 'A brief history of the Basel Committee' 4 available on <http://www.bis.org/bcbs/history.pdf> (accessed 1 September 2016).

this period.¹¹⁰⁵ Regulatory changes were made to address these concerns through Basel II.5 and Basel III.¹¹⁰⁶

Basel II introduced three pillars: the first being a set of rules for banks regarding capital adequacy, the second pillar being supervision, and the third pillar being disclosure and market discipline.¹¹⁰⁷ These pillars did not fall away when Basel III was concluded; instead, Basel III co-exists with Basel II and provides for more strict requirements in certain areas such as credit risk, which falls under the first pillar. The part below discusses credit risk and prudential regulation as regulated by Basel III, keeping in mind that Basel III incorporates Basel II. Credit Risk falls under the first pillar, while prudential regulation is one of the three aspects of regulation that fall under the second pillar.

The following part explores the three pillars of Basel II as adopted and modified under Basel III. The focus here is on two main aspects: first, credit risk, which encompasses capital adequacy, liquidity, and consumer protection; and, secondly, supervision, which falls under the second pillar. Market conduct is only given cursory consideration. This is because the first two pillars are of critical importance in Zimbabwe for reasons further explained in paragraph 6.8.3. The Zimbabwean banking sector has had a considerable struggle with credit risk, and the supervision model is currently a silo model that tends to perpetuate insufficient supervision, as explained in paragraph 6.5.1.

¹¹⁰⁵ Fullenkamp C & Rochon C ‘Reconsidering Bank Regulation: A New Combination of Rules, Regulators and Market Discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

¹¹⁰⁶ Changes were also made to national legislation through statutes such as the Dodd Frank Wall Street Reform and Consumer Protection Act Public Law 111–203—July 21, 2010, in the United States.

¹¹⁰⁷ Fullenkamp C & Rochon C ‘Reconsidering Bank Regulation: A New Combination of Rules, Regulators and Market Discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

6.4.1 Credit Risk

Minimum capital requirements under the first pillar must take three factors into account, namely credit risk, operational risk and market risk.¹¹⁰⁸ The most important for the purposes of this discussion is credit risk.

Credit risk can be calculated using the standardised approach or the internal rating- based approach (IRB), and sometimes it is covered under the securitisation framework.¹¹⁰⁹ However, this chapter does not discuss securities, as explained above in 6.3. The standardised approach means measuring credit risk in a standardised manner, and in terms of external credit assessments.¹¹¹⁰ The IRB approach means that each bank will use its own internal assessment of credit risk, subject to approval by the bank's supervisor.¹¹¹¹ Capital adequacy is one of the tools used to reduce credit risk.

6.4.2 Capital Adequacy

Capital adequacy refers to the relationship between the banks activities and its capital base, or its ability to repay bankers should they request their funds. This means that over and above the banks' investment activities with bankers' moneys, the banks need to have a solid capital base that serves to protect their clients' interest. The BCBS Core Principles of Effective Banking Supervision (Core Principles) stipulate certain measures which regulators ought to incorporate in domestic laws to govern banks operating within their territories. Principle 16.1, for example, requires supervisors

¹¹⁰⁸ Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 6 'This document is a compilation of the June 2004 Basel II Framework, the elements of the 1988 Accord that were not revised during the Basel II process, the 1996 Amendment to the Capital Accord to Incorporate Market Risks, and the 2005 paper on the Application of Basel II to Trading Activities and the Treatment of Double Default Effects. No new elements have been introduced in this compilation' Bank for International Settlements: Basel Switzerland.

¹¹⁰⁹ For quantification and calculation models see generally Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006).

¹¹¹⁰ Article 50 Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 19.

¹¹¹¹ Article 51 Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 19; Black J 'Prudential regulation of banks' in OECD ed *International Regulatory Co-operation: Case Studies, Vol. 2: Canada-US Co-operation, EU Energy Regulation, Risk Assessment and Banking Supervision* (2013) 76.

to ‘calculate and constantly observe prescribed capital requirements’.¹¹¹² The Core Principles note that

[p]rescribed capital requirements reflect the risk profile and systemic importance of banks in the context of the markets and macroeconomic conditions in which they operate and constrain the build-up of leverage in banks and the banking sector.¹¹¹³

Basel III addresses two main issues in an effort to boost resilience in the financial services sector.¹¹¹⁴ First, it adds onto the capital requirements of Basel II, and, secondly, it introduces new provisions regarding liquidity.¹¹¹⁵

With regard to capital adequacy, Basel III aims to reduce the pro-cyclical nature of banking, by introducing minimum capital requirements and counter-cyclical capital buffers.¹¹¹⁶ Basel III introduced minimum capital conservation requirements where banks are expected to have capital buffers.¹¹¹⁷ The buffers are meant to prevent the fluctuation of lending and GDP, which tends to follow the movement of the economy.¹¹¹⁸ For example, banks are more likely to increase lending when the economy is growing and reduce lending when the economy is shrinking: this is an example of the pro-cyclical nature of lending, whereas measures under Basel III aim to reduce this fluidity.¹¹¹⁹

¹¹¹² Principle 16 (1) BCBS Core Principles on Effective Banking Supervision.

¹¹¹³ Principle 16 (4) BCBS Core Principles on Effective Banking Supervision.

¹¹¹⁴ Article 7 Basel III.

¹¹¹⁵ Article 7 Basel III; Fullenkamp C & Rochon C ‘Reconsidering bank regulation: A new combination of rules, regulators and market discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

¹¹¹⁶ Basel III: A global regulatory framework for more resilient banks and banking systems - revised version June 2011 available on <http://www.bis.org/publ/bcbs189.pdf> (accessed 5 September 2016); Fullenkamp C & Rochon C ‘Reconsidering Bank Regulation: A New Combination of Rules, Regulators and Market Discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

¹¹¹⁷ Articles 7 and 26 Basel III, June 2011.

¹¹¹⁸ Fullenkamp C & Rochon C ‘Reconsidering Bank Regulation: A New Combination of Rules, Regulators and Market Discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

¹¹¹⁹ See generally Caruana J ‘Basel III: Towards a safer financial system’ presented at the 3rd Santander International Banking Conference Madrid, 15 September 2010.

Banks need to have a sufficient capital base to fall on if their debtors fail to repay loans. Pro-cyclical capital requirements include the use of ‘long term data horizons to estimate probabilities of default, the introduction of so called downturn loss-given-default (LGD) estimates and the appropriate calibration of the risk functions, which convert loss estimates into regulatory capital requirements’.¹¹²⁰ Banks are also required to conduct stress tests to evaluate their credit portfolios.¹¹²¹ Moreover, Basel III notes the importance of banks referred to as banks of systemic importance, ones which cannot be allowed to fail due to their significance to the financial services sector as a whole. Basel III anticipates migration of leverage ratios to Pillar 1 (referring to Basel II Pillars).¹¹²²

Unlike Basel I and II, Basel III requires a minimum common equity capital Tier 1 of at least 4.5 per cent of risk-weighted assets, additional Tier 1 capital at least 6.0 per cent of risk-weighted assets, and Tier 2 capital of at least 8.0 per cent of risk-weighted assets. Basel III requires all non-core Tier 1 or Tier 2 capital to be phased out within 10 years, beginning in 2013.¹¹²³ The importance of capital adequacy is reinforced in Basel III, which requires banks to increase their equity versus asset ratio from 2 per cent to 4.5 per cent, as well as to establish a 2.5 per cent buffer such that the total equity requirement is in fact a minimum of 7 per cent by 2019.¹¹²⁴

Liquidity

With regard to liquidity, Basel III was amended in 2013 to introduce a new global liquidity standard comprising liquidity coverage ratio and net stable funding ratio.¹¹²⁵ Liquidity is essential for the proper functioning of the financial sector.¹¹²⁶ The liquidity coverage ratio aims ‘to promote short-term resilience of a bank’s liquidity risk profile by ensuring that it has sufficient high quality liquid resources to survive an acute stress scenario lasting for one month’; whereas the net stable

¹¹²⁰ Article 20 Basel III.

¹¹²¹ Article 20 Basel III.

¹¹²² Basel Phase-In; Article 16 Basel III.

¹¹²³ Article 50 Basel III; Basel III Phase in Arrangements.

¹¹²⁴ Fullenkamp C & Rochon C ‘Reconsidering Bank Regulation: A New Combination of Rules, Regulators and Market Discipline’ *IMF Working Paper Institute for Capacity Development* WP/14/169 (September 2014) 3.

¹¹²⁵ BIS, Basel III, June 2011 and 2013.

¹¹²⁶ Article 35, BASEL III; read further in BCBS Principles for Sound Liquidity Risk Management and Supervision, September 2008 BIS: Basel, Switzerland.

funding ratio aims to ‘promote resilience over a longer time horizon by creating additional incentives for a bank to fund its activities with more stable sources of funding on an ongoing structural basis’.¹¹²⁷

Supervision

The Second Pillar of Basel II deals with supervision.¹¹²⁸ As mentioned in 6.4.1 above, Zimbabwe uses the silo model of supervision. Article 722 states that ‘[s]upervisors are expected to evaluate how well banks are assessing their capital needs relative to their risks and to intervene, where appropriate’.¹¹²⁹ The BCBS notes key principles for banking supervision relating to capital adequacy, monitoring and intervention.¹¹³⁰ This part deals only with one aspect of regulation, prudential regulation.

6.5 REGIONAL REGULATION OF BANKS FOR FINANCIAL STABILITY

The discussion above highlighted the important role played by the BIS in regulating financial services at an international level. Regional economic communities (RECs) also play a critical role in harmonising financial stability within the region, thereby facilitating financial stability. The harmonisation of financial regulation and supervision creates important synergies, reduces market costs for participants, and increases economies of scale, especially in terms of increased access to

¹¹²⁷ Article 38 and following on monitoring tools Basel III.

¹¹²⁸ The supervision of banks is distinguishable between different Tiers, where Tier 1 comprises diversified financial groups; Tier 2 are holding companies; Tier 3 are internationally active banks, domestic banks and securities firms; and finally Tier 4 are internationally active banks; Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 11; Article 722 Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 204.

¹¹²⁹ Article 722 Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 204.

¹¹³⁰ BCBS notes that ‘[b]anks should have a process for assessing their overall capital adequacy in relation to their risk profile and a strategy for maintaining their capital levels. Supervisors should review and evaluate banks’ internal capital adequacy assessments and strategies, as well as their ability to monitor and ensure their compliance with regulatory capital ratios. Supervisors should take appropriate supervisory action if they are not satisfied with the result of this process. Supervisors should expect banks to operate above the minimum regulatory capital ratios and should have the ability to require banks to hold capital in excess of the minimum. Supervisors should seek to intervene at an early stage to prevent capital from falling below the minimum levels required to support the risk characteristics of a particular bank and should require rapid remedial action if capital is not maintained or restored.’ Article 722 Basel Committee on Banking Supervision *International Convergence of Capital Measurement and Capital Standards A Revised Framework Comprehensive Version* (2006) 205-212.

highly specialised personnel at a regional level.¹¹³¹ In this regard, the following part discusses SADC and COMESA. These two RECs are integral because the failure of a single financial institution of systemic importance within the region can have catastrophic effects on other countries within the region, especially because some countries in the region have significant foreign interests. Hence it is important, at a regional level, to have regulation and supervision on the financial services sector.

6.5.1 Common Market for Eastern and Southern Africa (COMESA)

This part analyses the regulatory framework of COMESA, noting the governing framework and regulation of credit risk and supervision. COMESA has established the Financial System Development and Stability Sub-Committee (FSDS),¹¹³² which was tasked to create a framework for monitoring the compliance of COMESA member states with the BCBS Core Principles.¹¹³³ The COMESA Council of Ministers adopted new regulations with the aim of facilitating regional financial integration and harmonisation.¹¹³⁴



6.5.1.1 Credit Risk

COMESA aims to bring about harmonisation by requiring as a basic minimum standard that all member states comply with the BCBS Core Principles.¹¹³⁵ However, noting that COMESA member states have different economic and political influences, and their financial sectors are not developed or sophisticated to the same extent, its members are allowed to gradually comply with the BCBS Principles, taking into account their own individual circumstances.¹¹³⁶ While this may be seen as progressive because it allows each member adequate time for compliance, it may also be seen as counter-productive because it is not supported by strict compliance time-lines. There is

¹¹³¹ Tomlinson M *Making Finance Work for Africa* (2007).

¹¹³² Chirozva G *Frameworks for Financial Stability Assessment and Monitoring Compliance with Basel Core Principles for Effective Banking Supervision* (2009) 1.

¹¹³³ Chirozva G *Frameworks for Financial Stability Assessment and Monitoring Compliance with Basel Core Principles for Effective Banking Supervision* (2009) 6.

¹¹³⁴ AfDB *Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction* (2010) 20.

¹¹³⁵ AfDB *Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction* (2010) 20.

¹¹³⁶ AfDB *Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction* (2010) 21.

therefore a risk that compliance with Basel III by 31 March 2019 may not be attained by COMESA member states. Moreover, it has been argued that the COMESA Action Plan ought to be redrafted at domestic level in order to ensure accountability at domestic levels by requiring each member state to set out clearly its time-lines in a customised domestic action plan.

As at 2010, all COMESA member states except Madagascar complied with Basel I capitalisation and liquidity requirements.¹¹³⁷ The African Development Bank noted that Zimbabwe, together with the Democratic Republic of Congo (DRC) and Djibouti, reflected high profitability which is an indication of high interest rates and other banking fees.¹¹³⁸

6.5.1.2 Capital Adequacy

The COMESA Charter Establishing the COMESA Monetary Institute (CMI) is the main monetary instrument of COMESA.¹¹³⁹ The CMI provides support to members through capacity-building programmes,¹¹⁴⁰ while the COMESA Authority of Heads of States and Governments meets annually to share ideas on banking supervision.¹¹⁴¹ However, similar to credit risk, COMESA does not have a standalone instrument to regulate capital adequacy, but it requires its member states to comply with the Basel Accords I, II, and III as well as the BCSB Core Principles.¹¹⁴²

The CMI comprises a Committee of Central Bank Governors, Bureau of the COMESA Committee of Governors of Central Banks (Bureau CCG), Finance and Monetary Affairs Committee, and a Secretariat of the Institute.¹¹⁴³ The purpose of the CMI to enhance cooperation and convergence

¹¹³⁷ AfDB Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction (2010) 24 SILDAR: Tunisia.

¹¹³⁸ AfDB Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction (2010) 24 SILDAR: Tunisia.

¹¹³⁹ Charter Establishing the COMESA Monetary Institute Vol 15 No. 5 Meeting held 7 December 2009, Lusaka, Zambia, Legal Notice Number 210 of 2009.

¹¹⁴⁰ See generally COMESA Monetary Institute available on <http://cmi.comesa.int/roadmap-for-financial-and-monetary-integration-in-comesa/> (accessed 1 September 2016).

¹¹⁴¹ See generally COMESA Monetary Institute available on <http://cmi.comesa.int/roadmap-for-financial-and-monetary-integration-in-comesa/> (accessed 1 September 2016).

¹¹⁴² AfDB Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction (2010) 20.

¹¹⁴³ Article 6 Charter Establishing the COMESA Monetary Institute Vol 15 No. 5 Meeting held 7 December 2009, Lusaka, Zambia, Legal Notice Number 210 of 2009.

and lead to the establishment of a monetary union.¹¹⁴⁴ There is potential for COMESA to directly regulate, or put guidelines in place to regulate matters such as liquidity and capital adequacy in order to fulfil its objectives. It would appear that the Bureau CCG would be the appropriate body to draft such guidelines or regulations in accordance with its mandate set out in Article 9(a) Charter of the CMI. In the absence of clearer regulations, it appears that COMESA regulates both liquidity and supervision as identical to the BIS regulation, hence it shall not be discussed further.

6.5.2 Southern African Development Community (SADC)

The SADC deals with financial regulation through institutions and legal instruments.¹¹⁴⁵ Its main institutions include the SADC Committee of Central Bank Governors (CCBG), the SADC Committee of Ministers of Finance and Investment (CMFI), and the Peer Review Panel.¹¹⁴⁶ The CMFI is responsible for monitoring the implementation of the Protocol,¹¹⁴⁷ while the CCBG, consisting of central bank governors, reports to the CMFI and must address matters specifically mandated to it by the CMFI.¹¹⁴⁸ Together, the CMFI and CCBG form the Peer Review Panel, which meets once a year with the aim of monitoring macroeconomic performance.¹¹⁴⁹

The main legal instruments regulating financial services within the SADC are the SADC Protocol on Investment and Finance (SADC Investment Protocol),¹¹⁵⁰ and the SADC Model Central Bank Statute (SADC Model Law).¹¹⁵¹ The SADC Model Law aims to harmonise laws governing central banks within the SADC by promoting principles that encourage operational independence of SADC central banks. The SADC Model Law also aims to create accountability and transparency standards for central banks within the region. The harmonisation of central bank legislation is one step closer to the desired SADC monetary union as advocated in the SADC Regional Indicative

¹¹⁴⁴ Article 5 Charter Establishing the COMESA Monetary Institute Vol 15 No. 5 Meeting held 7 December 2009, Lusaka, Zambia, Legal Notice Number 210 of 2009.

¹¹⁴⁵ Zongwe D 'Conjuring Systemic Risk through Financial Regulation by SADC Central Banks' (2011) 1 *SADC Law Journal* 99 99.

¹¹⁴⁶ Article 17 SADC Investment Protocol.

¹¹⁴⁷ Article 18 SADC Investment Protocol.

¹¹⁴⁸ Articles 19 and 22(3) SADC Investment Protocol.

¹¹⁴⁹ Article 20 SADC Investment Protocol.

¹¹⁵⁰ SADC Protocol on Finance, 2006, Maseru, Lesotho.

¹¹⁵¹ Articles 1(2) and 2 of Annex 5, SADC Investment Protocol.

Strategic Development Plan (RISDP).¹¹⁵² Such a monetary union would also support the wider objectives of the envisaged African Union Continental Free Trade Area (AU CFTA) noted in the Introduction.¹¹⁵³

The SADC Investment Protocol supports these objectives and aims to facilitate regional integration, cooperation and coordination between the financial services sector and the investment sector. Article 2 of the Protocol notes that poverty can be reduced, inter alia, by creating a good investment climate in SADC, maintaining economic stability, cooperation in relation to tax, foreign exchange controls, and convergence of legal and operational frameworks of Central Banks. The SADC Investment Protocol further encourages cooperation in the prevention of money-laundering, and on payment, clearing and settlement systems.¹¹⁵⁴ These legal instruments are discussed below in the context of credit risk and supervision, which have been established as needing the most attention in the Zimbabwean banking sector.¹¹⁵⁵

6.5.2.1 Credit Risk

This part analyses the extent of regulation of credit risk by the SADC and the extent of compliance and alignment of such regulation with international standards, particularly those found in Basel III.

6.5.2.2 Capital Adequacy

The SADC Investment Protocol speaks generally to risk and the prevention and management of systemic risk, but it does not prescribe rules or guidelines on specific issues such as capital adequacy requirements. The SADC Investment Protocol defers substantive regulation to Central Bank supervisors.¹¹⁵⁶ Central Banks are required to ‘identify and measure banking risks and establish appropriate procedures for the management of such risk’ as well as to ‘promote and

¹¹⁵² SADC ‘Monetary Union’ available on www.sadc.int/about-sadc/integration-milestones/monetary-union/ (accessed 8 October 2015).

¹¹⁵³ See paragraph 3.2 above.

¹¹⁵⁴ Article 2 Protocol.

¹¹⁵⁵ See paragraphs 6.6.2 and 6.8.

¹¹⁵⁶ Article 4(1) SADC Investment Protocol, 1992.

maintain a domestic banking regulatory and supervisory strategy in line with international best practices'.¹¹⁵⁷ The SADC Investment Protocol also shows a deference towards domestic regulation of substantive provisions pertaining to financial stability. It would appear that the above provisions would mean that SADC regulation encourages compliance with any or all international standards, including Basel III and the Core Principles. Since all SADC member states have central banks which are members of the BIS, the Basel III and the Core Principles would apply to SADC member states.

Although the SADC Investment Protocol encourages members to align domestic laws and practices with developments in international law,¹¹⁵⁸ it is argued that this hands-off approach is insufficient. Although the SADC Investment Protocol contains specific provisions, for example on the regulation of non-bank actors with regard to capital adequacy, there are no similar provisions for the banking sector. This is an area of potential harmonisation and unification, since the SADC Investment Protocol empowers the Steering Committee to establish regulations and tools for supervision of payment systems.¹¹⁵⁹

Similarly, a glance at the SADC Model Law shows an evasion of substantive regulations on capital adequacy. Zongwe argues that the SADC Model Law ought to be prescriptive on substantial issues such as capital adequacy as well as liquidity and leverage ratios, in order to achieve the harmonisation it envisages.¹¹⁶⁰ It is disturbing to note that the SADC aims to establish regional integration, yet it fails to regulate on an issue that so directly affects the region and can create systemic risk for the region. Deferring to domestic central bank regulation defeats the underlying objectives of regional integration.

Secondly, it is argued that for the SADC to simply rely on international regulation of financial services undermines the objectives set in Article 2(b) and (d) SADC Investment Protocol, which

¹¹⁵⁷ Article 4(1)(c) and (e) SADC Investment Protocol Annex 8, SADC Treaty, Windhoek, 1992.

¹¹⁵⁸ Article 4(f) SADC Investment Protocol, 1992.

¹¹⁵⁹ Articles 5(1) and 6(1)(c) Annex 6 Cooperation on Payment, Clearance and Settlement Systems, SADC Protocol on Finance and Investment.

¹¹⁶⁰ Zongwe D 'Conjuring Systemic Risk through Financial Regulation by SADC Central Banks' (2011) 1 *SADC Law Journal* 99-117.

state that '[t]he objective of this Annex is to establish a framework for cooperation and co-ordination between SADC Central Banks on banking regulatory and supervisory matters in order to establish a regional banking regulatory and supervisory strategy... [and to] promote harmonization of banking regulatory and supervisory matters, policies, practices, rules and procedures across the Region'.¹¹⁶¹

Article 7 of SADC Investment Protocol aims to 'harmoni[s]e the legal and operational frameworks of their respective Central Banks',¹¹⁶² and to achieve complementarity between national and regional strategies and programmes in accordance with Article 1(e) of the Treaty Establishing SADC.¹¹⁶³ Moreover, the SADC Investment Protocol acknowledges the need for the SADC to

[a]ccelerate growth, investment and employment in the SADC Region through increased cooperation, coordination and management of macroeconomic, monetary and fiscal policies and to establish and sustain macroeconomic stability as a precondition to sustainable economic growth and for the creation of a monetary union in the Region.¹¹⁶⁴

Other banks such as Standard Bank have a well-established presence across the SADC region, and particularly important to note is the Chinese 20 per cent stake in this bank, and resultant funding in Chinese development projects across Africa.¹¹⁶⁵ One might even propose that due to the significant dependence on cross-border finance within the SADC, it is imperative for the SADC to have a regional position on financial stability through substantive provisions that take into account the unique needs of the SADC region. For example, the SADC region has countries with contrasting financial deepening and integration. Some countries such as South Africa and Botswana have significant financial deepening and well-developed financial sectors, whereas others such as Lesotho and Swaziland have infant financial sectors which are highly dependent on foreign assets. There are also countries, such as Zimbabwe and Mozambique, which are

¹¹⁶¹ SADC Investment Protocol Annex 8, SADC Treaty, 1992.

¹¹⁶² SADC Protocol on Finance and Investment.

¹¹⁶³ SADC Treaty, 1992.

¹¹⁶⁴ SADC Protocol on Finance and Investment.

¹¹⁶⁵ The Centre for Chinese Studies and The Development Bank of Southern Africa 'China as a driver of regional integration in Africa: Prospects for the future' Conference Report 17 available on <http://www.ccs.org.za/downloads/DBSA%20Conference%20Report.pdf> (accessed 25 November 2016).

experiencing unfavourable economic conditions, and those ravaged by war, such as the Democratic Republic of Congo. Therefore, there is need for a targeted approach, which exceeds the general international framework under the auspices of the Basel Accords and the Core Principles, particularly regarding credit risk and supervision.

The SADC has recently created a SADC Credit Reporting Alliance Project, wherein it is piloting a few countries first, including Zimbabwe, Namibia and Zambia. Credit and risk information sharing is an important step towards effective risk management, especially for cross-border transactions.¹¹⁶⁶ The SADC Investment Protocol again does not speak directly to credit risk management.

Liquidity

The SADC Central Bank Model Law (SADC Model Law) notes that central banks operate as bankers to both domestic and foreign banks.¹¹⁶⁷ SADC Model Law Article 46(c) highlights that central banks may ‘grant to banks advances, whether by loans or overdrafts’ provided these are secured.¹¹⁶⁸ In exceptional circumstances central banks may grant advances or contingent interest to banks in the public interest. Central banks may also ‘grant emergency liquidity assistance to banks in distress’ at market price if the bank poses no systemic risk, and at a price the central bank (in consultation with the Minister) deems fit in the case of a bank posing systemic risk.¹¹⁶⁹ These provisions translate to the role of central banks as lenders of last resort.¹¹⁷⁰ Central banks are not bound to provide such emergency assistance, and might incorporate more conditions, such as ensuring that the borrowing bank is capable of repaying the loan and additional costs, imposing punitive prices for emergency assistance.¹¹⁷¹ The SADC Model Law empowers central banks to regulate on cash reserve requirements for banks operating within their jurisdictions.¹¹⁷²

¹¹⁶⁶ SADC Credit Reporting Alliance Project ‘SADCCRA’ available on <http://www.sacra.org.za/sacra-projects/sadc.html> (accessed 21 August 2016).

¹¹⁶⁷ Article 45 SADC Model Law on Central Banks, 2009.

¹¹⁶⁸ SADC Model Law on Central Banks, 2009.

¹¹⁶⁹ Article 46(2) SADC Model Law on Central Banks, 2009.

¹¹⁷⁰ Zongwe D ‘Conjuring systemic risk through financial regulation by Central Banks’ (2011) 1 *SADC Law Journal* 99 116.

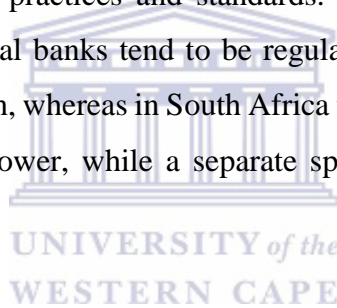
¹¹⁷¹ Article 46 SADC Model Law on Central Banks, 2009.

¹¹⁷² Article 48 SADC Model Law on Central Banks, 2009.

Central banks are also allowed to prescribe ‘different ratios for different classes of deposit and other similar liabilities and may prescribe the method of their computation, provided that the reserve ratios shall be uniform for all banks in the same class [allowing that] ... the ratios may differ between different classes of banks’. Such prescriptions will become effective only if ‘reasonable notice’ was communicated to banks.¹¹⁷³ Central banks are expected to disclose their rates for ‘discounts, rediscounts, advances, loans or overdrafts’.¹¹⁷⁴ Moreover, SADC banking regulation establishes minimum compliance requirements on the basis of the lowest common denominator, which currently means that all SADC member states must to comply with Basel Core Banking Principles discussed in paragraph 6.7 above.¹¹⁷⁵

Supervision

Article 10 SADC Investment Protocol encourages cooperation between central bank supervisors, and harmonisation of supervisory practices and standards.¹¹⁷⁶ Zongwe argues further that the model law is vague and that central banks tend to be regulators and supervisors in Zimbabwe, which has a silo model of regulation, whereas in South Africa there is a twin peaks model, wherein the reserve bank has regulatory power, while a separate specialised agency has a supervisory power.¹¹⁷⁷



Article 49 of the SADC Model Law stipulates that central banks may regulate on the types of disclosure that banks operating within their jurisdictions should comply with. For example, central banks may regulate on fees, commissions and charges, as well as annual interest rates applicable to credits and deposits.¹¹⁷⁸ The SADC Model Law provides for information sharing in Article 50 and allows central banks to perform regulatory and supervisory functions beyond their role as banks.¹¹⁷⁹

¹¹⁷³ Article 48(2) SADC Model Law on Central Banks, 2009.

¹¹⁷⁴ Article 47 SADC Model Law on Central Banks, 2009.

¹¹⁷⁵ Cabello M, Hands R, Grossman J, and Hayes J ‘Cross-border banking supervision in the SADC region’ (2013) 4 (2) *ACM-Insight* 36.

¹¹⁷⁶ SADC Investment Protocol.

¹¹⁷⁷ Zongwe 115.

¹¹⁷⁸ Article 49 SADC Model Law on Central Banks, 2009.

¹¹⁷⁹ SADC Model Law on Central Banks, 2009.

6.6 DOMESTIC REGULATION OF BANKS FOR FINANCIAL STABILITY

The Zimbabwean banking sector has faced several challenges over the last few years that have led to the closure of over 14 banks between 2000 and 2016. This is a relatively large number in the context of Zimbabwe. The main reasons for the closure of banks in Zimbabwe have been associated with credit risk management and poor corporate governance.¹¹⁸⁰ The closure of these banks necessitates a brief historical overview of the Zimbabwean banking sector from 1991 to the present. The purpose of this part is to assess whether certain regulatory positions taken by the RBZ were beneficial for growth and development or not.

6.6.1 Brief Historical Overview

1991- 2003

Zimbabwe's financial services sector was restructured significantly through liberalisation and de-regulation as a result of the IMF-led Economic Structural Adjustment Program (ESAP).¹¹⁸¹ Some of the gains from liberalisation under ESAP were that the less stringent rules enabled more people to open banks as new banking licences were issued, such that the number of registered banks increased from 21 in 1990 to 41 by 2003. However, between 1991 and early 2000, six financial institutions had already been declared insolvent: CBZ Bank, First National Building Society (FNBS), Universal Merchant Bank, United Merchant Bank, Zimbabwe Building Society and Zimbank.¹¹⁸²

Capital adequacy, liquidity, and poor corporate governance have always been at issue in Zimbabwean banks: for example, in FNBS,¹¹⁸³ the majority shareholders, Ruturi and Musana, allegedly defrauded FNBS of Z\$958 million.¹¹⁸⁴ Another example is United Merchant Bank,

¹¹⁸⁰ See paragraph 6.6.1.

¹¹⁸¹ See paragraph 2.6.2 above.

¹¹⁸² CBZ Bank, First National Building Society (FNBS), Universal Merchant Bank, United Merchant Bank, Zimbabwe Building Society and Zimbank; Mabutho S and Mhlanga R 'Transformation of the Zimbabwean banking industry: Evidence from the lifecycle model' *Journal of Global Business and Technology*

¹¹⁸³ Government Gazette of 11 March 2005; The Building Society met the definition of 'banking institution' in accordance with General Notice 101 of 2005.

¹¹⁸⁴ *RBZ v Sibanda & Anor* (22/06) ((22/06) 2007] ZWSC 20 (08 October 2007); The bank survived liquidation when the majority shareholders paid off Z\$16.217 billion to pay off creditors, depositors and expenses; Sandu N 'Zimbabwe troubled FNBS escapes litigations' *The Standard* 13 August 2006 available on allfrica.com/stories/200608140107.html (accessed 12 September 2016); Mhike C 'Zimbabwe: First National

which allegedly issued fake Cold Storage Company (CSC) bills to unsuspecting entities.¹¹⁸⁵ Furthermore, Universal Merchant Bank was shut down owing to ‘gross inefficiency and financial mismanagement’ and was taken over by CFX bank in April 2002, together with a loss of approximately Z\$800 million.¹¹⁸⁶

Banks took excessive risks, hoping for higher returns without actually having a sufficient capital base and therefore prejudicing their clients.¹¹⁸⁷ The government responded by enacting new legislation, namely the Banking Act of 2000,¹¹⁸⁸ and the Banking Regulations (Statutory Instrument 205 of 2000). The Banking Act and Banking Regulations addressed issues of corporate governance and liquidity. Section 12 of the Banking Regulations prescribed minimum equity capital for banking institutions of Z\$100 million for commercial banks, Z\$60 million for finance and accepting houses, and Z\$40 million for discount houses.¹¹⁸⁹ Section 16(1) Banking Regulations and section 35 Banks Act restricted the issuing of loans to ‘insiders’ where ‘insiders’ are defined ‘in relation to a banking institution, means any employee, officer, director or principal shareholder of the institution, and includes any related interest of such insider’.¹¹⁹⁰ This provision directly addressed the issue of corporate fraud resulting from excessive loans being taken by principal shareholders, as in the case of FNBS.

The Banking Regulations also introduced disclosure requirements through monthly and quarterly assessments of assets in terms of sections 18 and 19, whereby the RBZ exercises supervisory power. The Banks Act read with Statutory Instrument 205 of 2000 transferred responsibility for

Building Society closed indefinitely’ *The Daily News Harare* 8 February 2003 available on <http://allafrica.com/stories/200302100564.html> (accessed 12 September 2016).

¹¹⁸⁵ *Cold Storage Company Limited v Rapid Discount House Limited* (366/2000) ((366/2000)) [2003] ZWSC 64 (20 March 2003) SC 127/2002;

Chanakira N ‘MP Chapfika exposed’ *The Standard* 2 April 2004 available on <http://www.thestandard.co.zw/2004/04/02/mp-chapfika-exposed/> (accessed 12 September 2016); Majority stakeholder Roger Boka, also owns the tobacco auction floors.

¹¹⁸⁶ Chanakira N ‘MP Chapfika exposed’ *The Standard* 2 April 2004 available on <http://www.thestandard.co.zw/2004/04/02/mp-chapfika-exposed/> (accessed 12 September 2016).

¹¹⁸⁷ Kachembere J ‘Banking crisis: Causes, consequences and remedies’ *Daily News Live* 16 December 2013 also available on http://www.zimbabwesituation.com/news/zimsit_banking-crisis-causes-consequences-remedies-dailynews-live/ (accessed 6 September 2016).

¹¹⁸⁸ Chapter 24:01.

¹¹⁸⁹ Section 12 Banking Regulations Statutory Instrument 205 of 2000.

¹¹⁹⁰ Section 16(1) Banking Regulations Statutory Instrument 205 of 2000.

registration and supervision of banks from the Finance Minister to the Reserve Bank of Zimbabwe,¹¹⁹¹ and empowered the RBZ to establish minimum liquidity requirements for banking institutions.¹¹⁹² These legal reforms are a clear indication that even before the global financial crisis of 2008 and the legal reforms under international forums of the BIS, the RBZ had already identified gaps in the Zimbabwean banking system and in the regulation and supervision of the banks.

Further amendments were made in 2002 to extend the supervisory power of the Governor of the RBZ and bring Zimbabwean banking legislation into line with the Bank for International Settlement (BIS)'s 25 Core Principles for Effective Banking Supervision.¹¹⁹³ Compliance with the Core Principles also means compliance with SADC lowest common denominator provisions for financial stability. These legal reforms led to the closure of more banks due to non-compliance.¹¹⁹⁴

2004-2012

Although the RBZ had made several reforms to the banking sector, towards the end of the 2003 a banking crisis led to the closure of 11 banks owing to poor corporate governance.¹¹⁹⁵ Conglomeration of financial institutions increased and was supported by technological advancements through electronic banking services such as 'textacash' and 'Ecocash'.¹¹⁹⁶ These services have facilitated financial inclusion as they often have less stringent requirements for

¹¹⁹¹ 45 of the Reserve Bank Act Chapter 22:15.

¹¹⁹² Section 14 Banking Regulations Statutory Instrument 205 of 2000.

¹¹⁹³ BIS Core Principles for Effective Banking Supervision October 2006 (as revised 2011), Basel, Switzerland.

¹¹⁹⁴ CFX Merchant Bank, Barbican Bank, CFX Bank Limited, Intermarket Banking Corporation, Royal Bank of Zimbabwe Limited, Intermarket Discount House, Trust Bank Corporation Limited, Time Bank Zimbabwe Limited, and Intermarket Building Society also closed.

¹¹⁹⁵ Rapid Discount House, Barbican Bank, Time Bank, Intermarket Bank, Royal Bank, Trust Bank, Genesis Investment Bank, Interfin Bank, Renaissance Bank; Nhavira E, Mudzonga E & Mugocha E 'Financial regulation and supervision in Zimbabwe: An evaluation of adequacy and options' 20 Zimbabwe Economic Policy and Research Unit (ZEPARU) adapted from Conference Paper (26 July 2013) 42 available on <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015).

¹¹⁹⁶ Mpofu B 'Econet-CBZ deal to boost financial inclusion' *News Day* 6 December 2012 available on <https://www.newsday.co.zw/2012/12/06/econet-cbz-deal-to-boost-financial-inclusion/> (accessed 12 September 2016).

registration and are accessible in various parts of the country where there are no physical banks.¹¹⁹⁷ These electronic banking facilities are simple to use and have instructions available in local languages in addition to English.¹¹⁹⁸

Hyperinflation experienced between 2001 and 2008 led to the transition in 2009 from Zimbabwe dollars to US dollars, under the unity government of the Zanu-PF and MDC.¹¹⁹⁹ The Foreign Licence Wholesalers and Retail Shops (FOLIWARs), introduced in October 2008, and later in terms of the Foreign Exchange Guidelines to Authorised Dealers, facilitated the transition of dollarisation.¹²⁰⁰

2012-2016

Although banks made efforts to comply with minimum capital adequacy requirements, the operating environment and general market illiquidity have been challenging.¹²⁰¹ Instead of immediately shutting down underperforming banks, legal reform under section 52A(2)(m) of the Banking Amendment Act and the Companies Act sought to salvage these banks by placing them under time-bound curatorship.¹²⁰² For example, in 2012, Interfin Bank was placed under



¹¹⁹⁷ Mpofu B 'Econet-CBZ deal to boost financial inclusion' *News Day* 6 December 2012 available on <https://www.newsday.co.zw/2012/12/06/econet-cbz-deal-to-boost-financial-inclusion/> (accessed 12 September 2016).

¹¹⁹⁸ Mpofu B 'Econet-CBZ deal to boost financial inclusion' *News Day* 6 December 2012 available on <https://www.newsday.co.zw/2012/12/06/econet-cbz-deal-to-boost-financial-inclusion/> (accessed 12 September 2016).

¹¹⁹⁹ See paragraph 6.8.2.

¹²⁰⁰ Issued as a Directive ECD1/2009 (July 2009) in terms of section 35(1) of the Exchange Control Regulations: Statutory Instrument 109 of 1996; Application for Registration as Foreign Exchange Licenced Warehouses and Retail Shops (FOLIWARs), RBZ 'Foreign Exchange Licence Oil Companies (FELICOS), Foreign Exchange Licenced Outlets For Petrol And Diesel (FELOPADS)'; Chitambara P 'Unpacking dollarisation: Part 2' available on http://www.google.co.za/url?sa=t&rct=j&q=&esrct-s&frm=1&source=web&cd=10&ved=0CGMQFjAJ&url=http%3A%2Fwww.ledriz.co.zw%2Findex.php%3Foptio n%3Dcom_phocadownload%26view%3Dcategory%26download%3D70%3Aunpacking-part2%26id%3D5%3Anewspaper-articles%26Itemid%3D59%26start%3D20&ei=LQdAUrOJFMmThQepwoCYCA&usg=AFQjCNFggBQJSzjxzFeq0jq8R8CkkWfreg (accessed 23 September 2013); The Reporter 'Zimbabwe: Foliwars or folly wars, Dubious measures' *The Standard* 13 September 2008 available on <http://allafrica.com/stories/200809150467.html> (accessed 20 November 2016).

¹²⁰¹ Article 1.1 RBZ Quarterly Banking Sector Report, March 2014; Article 1.5 RBZ Quarterly Banking Sector Report December 2014.

¹²⁰² See section 29 of the Banking Amendment Act, Chapter 24:20.

curatorship in 2012. However its licence was eventually cancelled in December 2014 when the period of curatorship elapsed.

From the end of 2014 to the present, several improvements can be seen in the banking sector. Despite the general market illiquidity, the banking sector had an average prudential liquidity ratio of 35.63% as at 31 December 2014, in excess of the regulatory minimum of 30%.¹²⁰³ In December 2015 and September 2016 reports, all banks complied with minimum capital adequacy requirements, and were working towards Basel III compliance due in 2020.¹²⁰⁴ Asset quality also improved, resulting in improved NPL to total loan ratio of 14.27 per cent in September 2015 to 10.82 per cent in December 2015.¹²⁰⁵ Banks also maintained higher liquidity buffers and had an average prudential liquidity ratio of 45.43 per cent as at 31 December 2015, again in excess of the 30 per cent required minimum. Moreover, three microfinance institutions were licenced to take deposits, namely Getbucks Financial Services (Private) Limited, Collarhedge Finance (Private) Limited, and African Century Limited.¹²⁰⁶

As at 2016, the NPL to TL ratio declined further to 10.74 per cent, reflecting improved asset quality, and increased liquidity buffers used by the banks.¹²⁰⁷ Average prudential liquidity rose to 54.15 per cent, further exceeding the 30 per cent minimum requirement, and one additional microfinance institution was licenced. Allowing deposit-taking microfinance institution will increase financial inclusion with regards to increased access to banking services.

As illustrated above, the RBZ and parliament have been proactive and innovative in finding ways to address unique challenges in the crisis periods, and this is commendable. However, more needs to be done, considering that the enactment of laws to reduce poor corporate governance has not prevented majority shareholders from abusing their powers, and there have been few convictions for fraud associated with banking.

¹²⁰³ Article 3.38 RBZ Quarterly Banking Sector Report, December 2014.

¹²⁰⁴ Article 1.2 RBZ Quarterly Banking Sector Report, December 2015.

¹²⁰⁵ Article 1.3 RBZ Quarterly Banking Sector Report, December 2015.

¹²⁰⁶ Article 2.3 RBZ Quarterly Banking Sector Report, December 2015.

¹²⁰⁷ Articles 1.4 and 1.6 RBZ Quarterly Banking Sector Report, September 2016.

6.6.2 Crisis Mode

The Zimbabwean banking sector has been in and out of crisis mode since 2001. The most severe causes of these crises were hyperinflation in 2008 and lack of legal certainty around the use of alternative currencies such as bearer cheques, agricultural cheques, ‘bonds’ and, most recently, bond notes.

6.6.2.1 Hyperinflation

Cagan describes hyperinflation as ‘beginning in the month the rise in prices exceeds 50 per cent and as ending in the month before the monthly rise in prices drops below that amount and stays below for at least a year’.¹²⁰⁸ The Zimbabwe dollar has undergone several changes owing to hyperinflation and currently is not in circulation. In brief, the inflation rate shot up from 47 per cent in 1998 to 7982 per cent in 2007, while GDP fell from -0.8 per cent to -6 per cent in the same period.¹²⁰⁹ The Z\$100 000 000 000 000 (Z\$100 trillion) was one of the last large denominations printed in early 2009, before official dollarisation.¹²¹⁰

The hyperinflationary era reduced confidence in the banking sector and disrupted business especially for international trade and investment because the currency was not convertible. The absence of convertible currency made it difficult for investors to repatriate profits, as well as for producers to import machinery and other inputs and technologies for production. The legacy of the hyperinflationary era can still be seen in Zimbabwe where foreign investors are not forthcoming with reinvestment, but are maximising on the permissible 100 per cent repatriation guaranteed in the Zimbabwe Investment Authority Act (ZIA).¹²¹¹ On the other hand, Noko argues

¹²⁰⁸ Cagan P ‘The monetary dynamics of hyperinflation’ in *Studies in the quantity theory of money* Friedman M (ed) (1956) 25.

¹²⁰⁹ Kairiza T ‘Unbundling Zimbabwe’s journey to hyperinflation and official dollarisation’ *Discussion Paper 09-12 GRIPS Policy Information Center 2* available on <http://www.grips.ac.jp/r-center/wp-content/uploads/09-12.pdf> (accessed 11 September 2016).

¹²¹⁰ Federal Reserve Bank of Texas ‘Hyperinflation in Zimbabwe’ (2011) *Globalisation and Monetary Policy Institute Annual Report 1* available on <https://www.dallasfed.org/assets/documents/institute/annual/2011/annual11b.pdf> (accessed 11 September 2016).

¹²¹¹ See paragraph 5.4.1 above.

that inflation benefitted state-owned companies which had received financing from the RBZ because inflation eroded the value of the loans.¹²¹²

Various reasons have been offered to explain the Zimbabwean economic crisis that culminated in 2008. Ellyne and Daly argue that the government ‘too heavily relied upon monetary policy to support its political agenda, sometimes at the expense of the general economic welfare’.¹²¹³ Ellyn and Daly identify three main potential instigators of the crisis. First, the government gratuities paid out to liberation war veterans in 1997 had not been budgeted for and brought the government into deficit. Pay-outs included a once-off payment of Z\$50 000 and monthly allowances of Z\$2 000, as well as free education and health care.¹²¹⁴ Secondly, Zimbabwe’s participation in the Second DRC War in 1998 had also not been budgeted for, and cost Zimbabwe approximately US\$200 million between 1998 and 1999.¹²¹⁵ Thirdly, an unfavourable investment climate resulted from illicit flow of minerals (used as a means to secure military and political support) and the land reform programme.¹²¹⁶

Other contributing factors are that newly resettled farmers failed to access financing for agricultural production because they had no title deeds to prove ownership of the land as collateral against the loans.¹²¹⁷ Those farmers who were able to access financing especially through state-

¹²¹² Ellyne M and Daly M ‘Zimbabwe Monetary Policy 1998-2012: From hyperinflation to dollarisation’ Paper originally prepared for a Macro Economic and Financial Management Institute (MEFMI) Colloquium on Zimbabwe’s Hyperinflation, Harare, 2012, 9 available on [file:///C:/Users/admin/Downloads/essa2013_2472%20\(2\).pdf](file:///C:/Users/admin/Downloads/essa2013_2472%20(2).pdf) (accessed 11 September 2016).

¹²¹³ Ellyne M and Daly M ‘Zimbabwe Monetary Policy 1998-2012: From hyperinflation to dollarisation’ Paper originally prepared for a Macro Economic and Financial Management Institute (MEFMI) Colloquium on Zimbabwe’s Hyperinflation, Harare, 2012, 2 available on [file:///C:/Users/admin/Downloads/essa2013_2472%20\(2\).pdf](file:///C:/Users/admin/Downloads/essa2013_2472%20(2).pdf) (accessed 11 September 2016).

¹²¹⁴ Kebonang Z and Kebonang S ‘Does leadership matter to development: The case of Botswana, Zimbabwe, Nigeria and Indonesia’ (2013) 4 (4) *International Journal of Politics and Good Governance* 1-10.

¹²¹⁵ Kebonang Z and Kebonang S ‘Does leadership matter to development: The case of Botswana, Zimbabwe, Nigeria and Indonesia’ (2013) 4 (4) *International Journal of Politics and Good Governance* 1-10.

¹²¹⁶ Ellyne M and Daly M ‘Zimbabwe Monetary Policy 1998-2012: From hyperinflation to dollarisation’ Paper originally prepared for a Macro Economic and Financial Management Institute (MEFMI) Colloquium on Zimbabwe’s Hyperinflation, Harare, 2012, 6-7 available on [file:///C:/Users/admin/Downloads/essa2013_2472%20\(2\).pdf](file:///C:/Users/admin/Downloads/essa2013_2472%20(2).pdf) (accessed 11 September 2016).

¹²¹⁷ Mambondiyani A ‘Without farm title deeds, banks are still saying no to Zimbabwe’s farmers’ *Business Day Live* 20 July 2016 available on <http://www.bdlive.co.za/africa/africanbusiness/2016/07/20/without-farm-title-deeds-banks-are-still-saying-no-to-zimbabwes-farmers> (accessed 11 September 2016); Ellyne M and Daly M ‘Zimbabwe Monetary Policy 1998-2012: From hyperinflation to dollarisation’ Paper originally prepared for a Macro Economic

owned banks such as CBZ, were largely unable to repay loans owing to low production due to lack of farming implements, infrastructure, and technical expertise, and access to markets.¹²¹⁸ Consequently agricultural output fell by about 85.7 per cent between 2002 and 2009.¹²¹⁹

6.6.2.2 Alternative Currencies

Zimbabwe uses a multicurrency system in the absence of formal agreements to print US dollars, which has resulted in the shortage of denominations of US dollars.¹²²⁰ Furthermore, with regard to legal certainty, some regulations, such as the use of a multicurrency monetary regime, are expected to reduce the exchange-rate risk for investors. Investors are wary of operating in countries that have currencies that are not easily convertible. Consequently, the use of a multicurrency system dominated by the US dollar restores investor confidence.¹²²¹ Zimbabwe has since introduced bond coins, and has also allegedly paid US\$200 million for the printing of new 'bond notes' in Germany, for circulation in Zimbabwe. Zimbabwe has repeatedly used alternative currencies, from the use of agri-cheques and bearer cheques. Such a move will negatively affect investors and traders, and might cause bank runs because bond notes are not a convertible currency. Moreover, as discussed in Chapters 2 and 5, there is discontent with the Presidential Powers Act being used as the enabling statute to make proposed bond notes legal tender in 2016.¹²²² The Presidential Powers (Temporary Measures) (Amendment of Reserve Bank Act and Issue of Bond Notes) Regulations Statutory Instrument 133 of 2016 retrospectively applies to previously issued bond coins and purports to render them legal tender. Moreover, SI 133 of 2016 places the President in the capacity of the Minister, wherein the Reserve Bank Act (enabling statute) permits the Minister to make regulations in the furtherance of the Act. The President in fact acts ultra vires of that Act insofar

and Financial Management Institute (MEFMI) Colloquium on Zimbabwe's Hyperinflation, Harare, 2012, 7 available on [file:///C:/Users/admin/Downloads/essa2013_2472%20\(2\).pdf](file:///C:/Users/admin/Downloads/essa2013_2472%20(2).pdf) (accessed 11 September 2016).

¹²¹⁸ See paragraph 4.5.2 above; Noko J 'Dollarisation: The case of Zimbabwe' (Spring/Summer 2011) 31 (2) *Cato Journal* 339-342; also discussed in Chapter 3 and 4 respectively.

¹²¹⁹ Ellyne M and Daly M 'Zimbabwe Monetary Policy 1998-2012: From hyperinflation to dollarisation' Paper originally prepared for a Macro Economic and Financial Management Institute (MEFMI) Colloquium on Zimbabwe's Hyperinflation, Harare, 2012, 7 available on [file:///C:/Users/admin/Downloads/essa2013_2472%20\(2\).pdf](file:///C:/Users/admin/Downloads/essa2013_2472%20(2).pdf) (accessed 11 September 2016).

¹²²⁰ See generally Kramarenko V, Engstrom L, Verdier G, Fernandez G, Oppers SE, Hughes R, McHugh J, and Coats W *Zimbabwe: Challenges and Policy Options after Hyperinflation* (2010).

¹²²¹ United States Department of State 'Zimbabwe investment climate' 2015 available on <http://www.state.gov/documents/organization/242012.pdf> (accessed 10 July 2016).

¹²²² See paragraphs 2.2.1.2 and 5.7.1.

as he places himself in the shoes of the Minister, because the Minister may not create new currency in excess of the existing law as stipulated by the enabling statute. The Presidential Powers Amendment also seeks to equate an alternative currency ‘bond notes and bond coins’ to an existing currency without complying with any financial principles of money and the value of money. In essence, if one deposits USD100 in the bank, but is only able to withdraw 100 Bond Notes, which are not transferable in third party states, can it not be said that the banks at large have been enriched at the expense of the individual? As argued in 2.2.13 above, it would appear that the Presidential Powers Act is contrary to the principle of the separation of powers, and as such, it violates section 3 of the Constitution and ought rightfully, to be declared unconstitutional.

Despite the domestic banking challenges, Zimbabwe has obligations to comply with international guidelines that facilitate financial stability and help prevent contagion on regional and international levels. The following paragraph examines the extent of Zimbabwe’s compliance with Basel III.

6.6.3 Extent of Compliance with Basel III

Compliance with Basel III can help increase domestic financial stability. Zimbabwe complies with Basel I fully. Domestic law of Zimbabwe requires compliance with Basel III which assumes compliance with Basel II.

6.6.3.1 Credit Risk

The first pillar of Basel II addresses credit, market and operational risk. First, pertaining to credit risk management, one of the main challenges in the financial services sector was excessive risk taken by financial intermediaries, which exposed their clients significantly. Some intermediaries failed to perform proper credit risk assessment when lending money to clients, such that there was a surge in non-performing loans (NPLs), and exorbitant interest rates were charged. The impacts of credit risk are two-pronged: first, there is an increase in NPLs, and secondly, higher interest rates are imposed. The statistics for Zimbabwe show that as at 2014, NPLs increased to 16.96 per

cent from 15.92 per cent in December 2013.¹²²³ The increase in NPLs might be attributed to the fact that most loans being given out are for short-term consumption and not long-term investment.¹²²⁴ It is also argued that when banks and microfinance institutions lend, they need to conduct proper assessments to ensure that their clients are in fact capable of repaying the loans; anything less than that would surely constitute reckless lending.¹²²⁵ At least 15 banks that have been closed in Zimbabwe since 1998 have been closed because of poor corporate governance and leveraging.¹²²⁶

To address the challenges associated with non-performing loans, the RBZ is developing a policy framework and has also mandated the Zimbabwe Asset Management Corporation (ZAMCO) to ‘acquire, restructure, and dispose’ of NPLs through a special purpose vehicle.¹²²⁷ Furthermore, the RBZ is establishing a national credit registry to bridge information asymmetries between the three silos of ‘banking’, ‘securities’ and ‘insurance and pensions’.¹²²⁸ The national credit registry will enable the RBZ to assess the credit history of individual and corporate clients across the three sectors.¹²²⁹ Such a deliberate move to bridge the information gap between the three ‘silos’ is likely to improve the coordination of the financial services sector, at least with regard to credit risk management. It would appear to be a positive move in line with Basel II objectives to promote systemic stability through coordinated supervision of the financial services sector.

Moreover, interest rates on loans are very high, causing poor people to incur even higher debt. However, to some extent Zimbabwe protects consumers in the financial services sector by limiting

¹²²³ The Business Reporter ‘Credit risk remains key challenge, RBZ’ *New Zimbabwe* 5 August 2014 available on <http://www.newzimbabwe.com/business-17142-Credit+risk+remains+key+challenge,+RBZ/business.aspx> (accessed 5 September 2016).

¹²²⁴ The Business Reporter ‘Credit risk remains key challenge, RBZ’ *New Zimbabwe* 5 August 2014 available on <http://www.newzimbabwe.com/business-17142-Credit+risk+remains+key+challenge,+RBZ/business.aspx> (accessed 5 September 2016); Zimbabwe Situation ‘Banks are safe, says RBZ’ *Zimbabwe Situation* 3 July 2015 available on http://www.zimbabwesituation.com/news/zimsit_w_banks-are-safe-says-rbz-southern-eye/ (accessed 27 August 2016).

¹²²⁵ The Business Reporter ‘Credit risk remains key challenge, RBZ’ *New Zimbabwe* 5 August 2014 available on <http://www.newzimbabwe.com/business-17142-Credit+risk+remains+key+challenge,+RBZ/business.aspx> (accessed 5 September 2016).

¹²²⁶ Nhavira et al. 42.

¹²²⁷ RBZ, Financial Stability Report, 30 June 2016, 46 para 4.6.2.

¹²²⁸ RBZ, Financial Stability Report, 30 June 2016, 46 para 4.7.2.

¹²²⁹ RBZ, Financial Stability Report, 30 June 2016, 46 para 4.7.2.

the number of micro-finance institutions that are permitted to take deposits, and by limiting the interest rates in accordance with the *in duplum* rule. This rule stipulates that interest may not continue to accrue in excess of double the original loan amount.

6.6.3.2 Capital Adequacy

Every banking group must comply with a minimum of 10 per cent Capital to Risk-Weighted Assets Ratio or Capital Adequacy Ratio (CAR).¹²³⁰ This minimum capital adequacy applies to consolidated assessment of the banking group, and there is an advantage in that consolidation helps to prevent the down-streaming of capital, also called double or multiple gearing where the bank uses the parent company's capital in several other subsidiaries that ought to be assessed in their own right.¹²³¹

Zimbabwe has a recorded capital to assets ratio of 10.8 per cent, non-paying loans ratio of 9.0 per cent, return on assets ratio of 13.4 per cent, returns on expenditure ratio of 78.7 per cent and overheads as to assets ratio of 14.3 per cent.¹²³² These figures are all above the Basel I minimum requirements. The legislation in Zimbabwe sets the capital adequacy requirement above the minimum set by Basel II and only just above the minimum set by Basel III as Zimbabwe had a core-capital risk based ratio of 9.06 at 2013. Basel III requires banks to phase in its new arrangements, such that the minimum capital adequacy ratio is 3.5 per cent by 2013, 4.0 per cent by 2014, and 4.5 by 2019.¹²³³ With regard to counter-cyclical capital buffers, banks need to meet 0.625 per cent by 2016, 1.25 per cent by 2017, 1.875 per cent by 2018, and finally 2.5 per cent by 2019.¹²³⁴ Tier 1 capital must be at least 4.5 per cent by 2013, 5.5 per cent by 2014, and 6.0 per cent

¹²³⁰ RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²³¹ Paragraph 6.20 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²³² AfDB Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development, and Poverty Reduction (2010) 25.

¹²³³ Basel Committee on Banking Supervision, Basel III- Phase-In Arrangements, available on http://www.bis.org/bcbs/basel3/basel3_phase_in_arrangements.pdf (accessed 5 September 2016).

¹²³⁴ Basel Committee on Banking Supervision, Basel III- Phase-In Arrangements, available on http://www.bis.org/bcbs/basel3/basel3_phase_in_arrangements.pdf (accessed 5 September 2016).

by 2019.¹²³⁵ In terms of capital to assets ratio, also called leverage ratio, the Zimbabwe Banking Regulations stipulates a minimum leverage ratio of 9 per cent, which is considered to be well capitalised, while 6-9 per cent is considered adequate and 3-6 per cent undercapitalised.¹²³⁶

It is interesting to note that while Zimbabwe required immediate compliance with Basel III in 2014, South Africa opted to give its banks sufficient time to comply with capital adequacy requirements rather than enforcing immediate compliance. The Reserve Bank of South Africa requires South African banks to report on their progression towards compliance.¹²³⁷

6.6.3.3 Liquidity

Liquidity is another challenge that the Zimbabwean economy is currently experiencing, and lies at the heart of business failure, including bank closures. A liquidity crisis cripples the entire economy because it means there is no access to cash. The consequences of this are dire in a country not developed in terms of alternative cash-less methods of payments, adequate payment clearance systems, and adequate technologies and infrastructure.

Secondly, on liquidity, the RBZ is supposed to be the lender of last resort for Zimbabwean banks. However, because Zimbabwe has a multicurrency system and the RBZ cannot print foreign currency, the country is experiencing a liquidity crisis which means in effect that the central bank cannot act as a lender of last resort. The RBZ is undercapitalised and consequently cannot back up domestic banks when they run into crises.¹²³⁸

¹²³⁵ Basel Committee on Banking Supervision, Basel III- Phase-In Arrangements, available on http://www.bis.org/bcbs/basel3/basel3_phase_in_arrangements.pdf (accessed 5 September 2016).

¹²³⁶ Paragraph 1.15 Statutory Instrument 205 of 2000.

¹²³⁷ Reserve Bank of South Africa 'South Africa's implementation of Basel II and III' available on [https://www.resbank.co.za/RegulationAndSupervision/BankSupervision/TheBaselCapitalAccord\(Basel%20II\)/Pages/accordImplementationForum\(AIF\).aspx](https://www.resbank.co.za/RegulationAndSupervision/BankSupervision/TheBaselCapitalAccord(Basel%20II)/Pages/accordImplementationForum(AIF).aspx) (accessed 25 November 2016).

¹²³⁸ Mtomba V 'RBZ lender of last resort key to banking sector stability' *Southern Eye* available on <https://www.southerneye.co.zw/2013/06/27/rbz-lender-of-last-resort-key-to-banking-sector-stability/> (accessed 25 November 2016).

Deposit Protection

Zimbabwe protects depositors in two equally poor ways: the Deposit Protection Act (DPA) and the role of the RBZ as the Lender of Last Resort (LOLR). First, the Deposit Protection Act (DPA) was passed to address liquidity challenges experienced in failed banks especially because of unsupported high risk leveraging, and to prevent bank runs.¹²³⁹ The DPA provides for a pay-out rate of \$US150 per client. This amount is very small, which means ultimately that the DPA does not achieve the desired result of avoiding bank runs. Although the DPA is a step in the right direction, the low insurance it provides does not incentivise bankers to keep their money in the bank in times of uncertainty.

Secondly, the RBZ does not print US dollars, nor has it concluded a currency cooperation agreement with the USA and therefore cannot be a lender of last resort. This means it is tasked to prevent situations where depositors withdraw their money from banks out of panic, which results in actual risk default on the part of the bank. This came in response to the bank runs experienced in 2004 and to the need to create a more secure and stable banking environment.

Consumer Protection

South Africa has a fairly developed consumer protection legal and policy framework from which Zimbabwe could draw inspiration as it drafts the consumer protection Act for the financial services sector. South Africa responded to the 2008 global financial crisis by creating a framework for the protection of consumers of financial services, inter alia. It introduced the Treating Customers Fairly Initiative (TCFI) in 2010, the Financial Services Ombudsman Scheme (FSOS),¹²⁴⁰ and shifted to a twin peaks model of supervision.¹²⁴¹ The TCFI primarily aims to ingrain fair treatment of customers in corporate culture, increase access to information and services by consumers, and reduce barriers to consumers wishing to change products or providers.¹²⁴² The TCFI notes that

¹²³⁹ See paragraph 6.8.3.2.

¹²⁴⁰ South Africa Financial Ombuds Schemes Act, 2004.

¹²⁴¹ Department of National Treasury *A Safer Financial Services Sector to Serve South Africa Better* (2011) 42.

¹²⁴² Department of National Treasury *A Safer Financial Services Sector to Serve South Africa Better* (2011) 42.

while broad outcomes guide the implementation of the initiative, international experience is that clear enforceable rules and regulations also need to be in place to ensure that these outcomes are achieved.¹²⁴³

Consumer protection is important because service providers tend to be more knowledgeable on their own services than the clients they serve, and this creates risks that service providers might try to exploit or defraud consumers. South Africa has enacted various statutes to try and address this knowledge gap and provide protection to consumers, such as the Financial Advisory and Intermediaries Services Act,¹²⁴⁴ the National Credit Act,¹²⁴⁵ and the Consumer Protection Act.¹²⁴⁶ The National Treasury of South Africa notes that ombudsmen must be guided by principles of ‘independence, confidentiality, transparency, clarity of purpose and effectiveness’.¹²⁴⁷

6.6.3.4 Supervision

Section 45(1)(a) of the Banking Act,¹²⁴⁸ empowers the RBZ to ‘continuously’ monitor and supervise ‘banking institutions to ensure that they comply with this Act’. Section 45(1)(c) further enables the RBZ to conduct investigations, monitor and supervise associates of banking institutions.¹²⁴⁹ In line with the provisions of the Banking Act, the RBZ issued Banking, Supervision and Surveillance Guidelines No. 2 in 2007 (RBZ Guideline 2), in which Zimbabwe identifies four levels of banks for purposes of consolidated supervision.¹²⁵⁰ RBZ Guideline 2 applies to ‘every banking institution, bank holding company, financial conglomerate, mixed activity group, and their associates’.¹²⁵¹ The RBZ FSR notes that ‘the banking sector continues to

¹²⁴³ Department of National Treasury *A Safer Financial Services Sector to Serve South Africa Better* (2011) 42.

¹²⁴⁴ Act 37 of 2002.

¹²⁴⁵ Act 34 of 2005.

¹²⁴⁶ Act 68 of 2011.

¹²⁴⁷ Department of National Treasury *A Safer Financial Services Sector to Serve South Africa Better* (2011) 43.

¹²⁴⁸ Chapter 24:20.

¹²⁴⁹ Banking Act Chapter 24:20.

¹²⁵⁰ RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵¹ Paragraph 3 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

grapple with underlying vulnerabilities manifesting through limited credit creation, high lending rates, rising non-performing loans, and structural liquidity challenges'.¹²⁵²

Consolidated Supervision

Consolidated supervision is defined in RBZ Guideline 2 as

a prudential supervision approach used to evaluate the financial condition of individual banking institutions within a group and the strength of an entire group, taking into account the risks which may affect entities within the group, regardless of whether these risks are carried in the books of the bank or related entities.¹²⁵³

The RBZ Guidelines provide for four layers of supervision. The first level is supervision of regulated entities 'supervised on a standalone basis or Solo Supervision'.¹²⁵⁴ The second level comprises supervision of 'homogenous financial groups [such as] banking groups'.¹²⁵⁵ The third level consists of supervision of financial conglomerate groups that are mixed and 'predominantly active in at least two financial services sectors'. The final level also deals with conglomerate groups, but in this case the conglomerate groups are those that 'control commercial and industrial companies, as well as banking institutions'.¹²⁵⁶

Solo supervision, which applies to level one above, must be conducted by following six prescribed steps: 'understanding the institution, assessing the institutions risk, planning/scheduling supervisory work, defining examination activities, performing on-site examination, [and] ongoing off-site supervision'.¹²⁵⁷ Solo supervision differs from level two, three and four in that consolidated

¹²⁵² RBZ FSR, 30 June 2014, 47 para 4.8.5.

¹²⁵³ Section 7(vi) RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵⁴ RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵⁵ RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵⁶ RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵⁷ Section 3.4 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

supervision of banking groups and financial conglomerates is as follows: The main steps are determining the group structure, scope and technique of consolidation, ‘conducting qualitative and quantitative assessment group-wide risk, updating the supervisory plan and defining the scope of additional procedures required as a result of the assessment of group-wide risk’ and ‘determining the overall condition of the group and its entities’.¹²⁵⁸

RBZ Guideline 2 also stipulates the methods of calculating various consolidation methods.¹²⁵⁹ The RBZ Guidelines place particular emphasis on quantitative and qualitative consolidated supervision. Quantitative consolidated supervision includes financial reporting, prudential returns and prudential ratios, and requires quantitative assessments of six major components: consolidated financial reporting, capital adequacy assessment, risk concentration, risk management, intra-group transactions, large exposures and connected lending review, and liquidity management.¹²⁶⁰

Consolidated supervision entails

collection, review and analysis in the following broad categories: structure of the group and inherent risks, fit and proper principles, corporate governance/management oversight, control environment, risk management, [and] information sharing.¹²⁶¹

Lastly, the RBZ Guidelines require that all banks appoint a ‘Lead Supervisor’ who may be resident in Zimbabwe or outside Zimbabwe, and whose functions shall be to coordinate, gather and disseminate information, assess banks’ financial performance, organisational structure and compliance with minimum capital adequacy requirements, plan and coordinate on-site and off-site supervision and other necessary supervisory activities.¹²⁶² According to section 9.7, for banks whose head office is in Zimbabwe or at least 50 per cent of its operations are in Zimbabwe, the

¹²⁵⁸ Section 3.8 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁵⁹ It explains four consolidation methods, namely the full consolidation method, equity/net capital value method, fair market value, and pro-rata/proportionate method, see further in section 5.2 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD

¹²⁶⁰ Section 6.4 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁶¹ Section RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

¹²⁶² Section 9.11 RBZ Consolidated Supervision Policy Framework: Bank Licensing Supervision and Surveillance Guidelines No. 02-2007-BSD.

RBZ shall be the Lead Supervisor. Whereas for banks with less than 50 per cent of its operations in Zimbabwe and the bank does not have at least 10 per cent of its operations in any country, then the various regulatory authorities may agree that the RBZ is the Lead Supervisor. This strikes one as a potential loophole, especially where there is no consensus or when the bank uses it for arbitrage.

The recent regulation of Zimbabwean banks has been contentious and has contributed to liquidity challenges, inadequate capitalisation, and poor corporate governance, as well as the closure of 20 banks between 1980 and 2016.¹²⁶³

6.7 CHAPTER CONCLUSION

Zimbabwe faces various challenges owing to the silo model of regulation that it follows. These challenges include the over-exposure to large debtors; poor risk management; the isolated regulatory efforts of individual regulators, which allows threats to fall through the cracks; non-performing loans; and the RBZ's inability to print money which resulted from the dollarisation, which means it cannot truly operate as a Lender of Last Resort. Although several efforts have been made to address these challenges, the general market liquidity crisis makes it difficult for the banking sector to operate at full capacity.

The challenges in the banking sector infiltrate other sectors of the economy, including production, trade and investment. If banks have high levels of NPLs for example, they will have less funds available to lend for other activities such as investment. The liquidity challenge faced by banks is both cause and effect. However, it can be noted that significance progress has been made pertaining to compliance with minimum capital adequacy requirements. Generally, the sector appears to be increasing financial inclusion by allowing licencing of more MFIs. It is not clear at this stage whether the alternative currencies used to ensure the RBZ regains the position as Lender of Last

¹²⁶³ Reserve Bank of Zimbabwe Financial Stability Report, 30 June 2014, 45 para 4.5.2; Dhliwayo CL 'Limiting the risk of failure in financial institutions' Remarks on the occasion of the Public Accountants & Auditors Board conference held at Rainbow Towers in Harare, from 9-10 April 2015 para 31 available on <http://www.rbz.co.zw/assets/speech-by-dr.-dhliwayo-on-limiting-the-risk-of-bank-failures-at-the-paab-workshop---10-april-2015.pdf> (accessed 25 August 2016); read further in paragraph 6.8.1.

Resort will in fact be beneficial to the country, or if it will discourage foreign and domestic investments further.



CHAPTER 7

7 CONCLUSION AND RECOMMENDATIONS

This thesis has been written from the perspective of a developing country and highlights the peculiar development needs of Zimbabwe. Zimbabwe was one of the top-performing economies post-independence. However, it has experienced marked economic decline since 2000. Although the decline can be attributed to a number of factors, including droughts, geopolitical circumstances, and depressed commodity prices, this study has shown how the legal framework has also contributed to the poor economic performance in Zimbabwe.

The thesis questions whether it is feasible for Zimbabwe to reach developed country status. Paragraph 1.3.2.1 noted that High Performing Asian Economies (HPAEs) managed to bridge the economic gap between the rich North and the poor South by the early 1990s by following a strategy largely based on export-led growth. This showed that it is possible to transform an economy and bridge the economic gap between developing and developed countries, and that it requires the implementation of a well-planned strategy over a long time.¹²⁶⁴ For a country like Zimbabwe, this might mean that it needs to employ central planning for the entire economy or part of it for a long time before economic development can be achieved. Modern economists would dispute this. However, it was seen to work across various jurisdictions, including the USA, Western Europe post-World War II and HPAs. Furthermore, classification from developing to developed country status largely refers to the demarcations set out in the Brandt Line, although the Brandt Line is not a true reflection of economic performance.¹²⁶⁵

The research has shown that achieving developed country status will not be a realistic goal for Zimbabwe, unless Zimbabwe starts to implement legal and policy reform in certain areas of the economy, as discussed below.

¹²⁶⁴ See paragraph 1.3.2.1 above.

¹²⁶⁵ See paragraph 1.3.2.2 above.

7.1 The Rule of Law and the Development Discourse

Chapter 2 explained the legal framework of Zimbabwe, noting the application and relevance of regional and international agreements. It further highlighted rule of law concerns plaguing the legislative process, and contributing to the lack of legal certainty and resultant increase in transaction costs. Chapter 2 then explained that out of three main economic systems, Zimbabwe mostly reflects a mixed economy despite having followed command economics with underlying theories of Marxist-Leninist Socialism under the guidance of the Soviet Union prior to the collapse of socialism in the early 1990s.¹²⁶⁶ The thesis argued that the Keynesian theory was the most desirable growth theory as a basis for the achievement of economic development in Zimbabwe, because it proposes that private business can co-exist with public organs and it works in an economy such as Zimbabwe's which has elements of command and free market economics.¹²⁶⁷ The Keynesian theory places emphasis on human and social development, as opposed to traditional classical economic theories.¹²⁶⁸ It is supported by development theories of human capabilities as explained by Amartya Sen, as well as generally by the need for participatory and inclusive development, which spans all sectors of the economy. In emphasising that social inclusion is imperative in the attainment of economic development, Chapter 2 provided a conceptual framework for the arguments made in this thesis.

Chapter 2 also discussed the economic policy history of Zimbabwe from independence to the present, focusing on economic reforms made in accordance with the Economic Structural Adjustment Program (ESAP) and noting gains and failures as reflected by chosen economic and social indicators. The chapter discussed efforts to salvage the economy through a series of short-term policies that have not been fully implemented and have been replaced by similar short-term policies. It noted how there is a lack of long-term strategy and concerted efforts between the public and private sector to further economic development. Zimbabwe's land redistribution programme and its participation in the Democratic Republic of Congo war appear to be motivated by political reasons and have had a detrimental effect on the economy. Zimbabwe has not been spared economic sanctions, which have also undermined domestic policy objectives. If Zimbabwe is to

¹²⁶⁶ See paragraph 2.3 above.

¹²⁶⁷ See paragraph 2.3 above.

¹²⁶⁸ See paragraph 2.3 above.

benefit from its policies, the introduction and implementation of policies must be in the legitimate pursuance of the public good. In other words, public resources must not be used to finance individual party objectives at the expense of the public. Zimbabwe needs to separate the law-making process from the political agenda and this requires political will.

7.2 International Trade

Chapter 3 analysed the application of specific provisions found in the WTO General Agreement on Trade in Goods relating to non-tariff barriers (NTBs) and trade defence mechanisms (TDMs), and referred to similar provisions found in the SADC Treaty, the SADC Trade Protocol, the COMESA Treaty and the COMESA Trade Protocol. The SADC Treaty and the COMESA Treaty are preferential agreements that are permissible under the WTO.

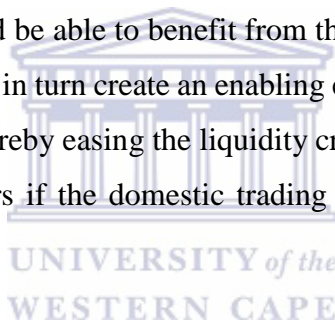
Chapter 3 analysed the extent of compliance of SADC and COMESA with the WTO provisions, and the extent of Zimbabwe's compliance with both COMESA and SADC regional instruments and with the WTO. Both analyses were in relation to specific trade rules, comprising non-tariff barriers (NTBs) and trade defence mechanisms (TDMs). Two NTBs were discussed, namely, Pre-shipment Inspection (PSI) and Import Licencing (IL); and two TDMs were discussed, namely, dumping and anti-dumping duties, and safeguards and safeguard duties.

The treaty provisions of the COMESA Treaty and the SADC Trade Protocol show compliance with the WTO, and in some places the SADC Treaty copies verbatim the provisions of the GATT, 1994. However, overlapping membership creates loopholes for non-compliance. The overlap in membership between COMESA and SADC creates challenges for Zimbabwe in terms of compliance especially where the two RECs have divergent provisions.¹²⁶⁹ However, Zimbabwe risks non-compliance with one of the RECs if it chooses to comply with the other, for example, as it stands, Zimbabwe tends to show better compliance with COMESA than with SADC. It is recommended that pending the entry into force of the Tripartite Free Trade Area (TFTA), it will be most beneficial for Zimbabwe to ensure compliance with COMESA, since COMESA proposes higher standards than SADC, and in many instances, COMESA has followed through with its

¹²⁶⁹ See paragraphs 3.3.

goals fairly within time, in comparison with SADC. Furthermore, the COMESA Court appears to have been and to continue to have more legitimacy than the now-disbanded SADC Tribunal.

Secondly, the introduction of PSI and IL increases transaction costs for traders and causes significant delays for shipment. This could deter traders and companies from importing goods into Zimbabwe. On the face of it, reducing imports would be useful as a means to protect the domestic industry. However, in reality, without a strategy to support domestic industry, preventing imports is simply a trade barrier that increases transaction costs, costs which are transferred to the consumer. This reduces capacity of consumers to access basic goods and services such as health care and education. Inasmuch as Zimbabwe is pursuing export-led development, it is recommended that Zimbabwe should put in place regulations that will improve the ease of doing business for local producers and traders such as by easing licencing requirements and costs. For example, domestic investors should be able to benefit from the new export processing zones, and not just foreign investors. This will in turn create an enabling environment in which trade can take place, and money can circulate, thereby easing the liquidity crisis. It would also make Zimbabwe more attractive to foreign investors if the domestic trading environment is conducive, and the governing laws are certain.



ZimAsset highlights the need for export-led growth, yet the law and its implementation do not create an enabling environment. Trade is associated with high transaction costs and legal uncertainty that negatively impact on trade and disadvantages cross-border traders. Zimbabwe's treatment of China appears to involve selective application of the law, perhaps for political or diplomatic reasons that are beyond the scope of this thesis, but justice must be seen to be done.¹²⁷⁰ The government cannot turn a blind eye to conduct clearly in conflict with the law, and conduct that clearly undermines the objectives set out in ZimAsset to achieve export-led economic development. To boost production, there must be sectoral support and social inclusion, which requires the government to put in place measures that will encourage the entry of entrepreneurs and SMEs into the market and survival in a competitive environment. The government should also

¹²⁷⁰ See paragraph 3.4.1.4 and 4.4.1 above.

explore renewable energy as long term solutions to electricity outages which tend to interrupt production processes, and impact trade negatively.

As it stands, Zimbabwe has reneged on several liberalisations that came out of ESAP, and has re-introduced several cumbersome licencing procedures and requirements for domestic trade which make it difficult for entrepreneurs and SMEs to enter the market and survive in it. Recalling that Zimbabwe has 94 per cent unemployment, supporting SMEs would appear to be a logical way to reduce unemployment. However, the government speaks of supporting SMEs, but in practice the regulatory environment makes it almost impossible to enter the market. For example, instead of a blanket prohibition on street vendors, the government could create spaces for small traders in open markets within or near the CBD, and reducing licencing requirements will aid in the reduction of corruption by public officials.¹²⁷¹

Thirdly, Zimbabwe has failed to fully utilise available international instruments under the WTO dispute settlement mechanism (DSM) to respond to unfair trade practices such as alleged dumping of Chinese goods.¹²⁷² In this instance, anti-dumping duties or consultations under the WTO DSM could have been employed, but they were not. This resulted in exposing consumers to low quality goods, and pushing out domestic producers, especially those within the manufacturing sector and the textiles industry. Merely having legal instruments is not enough, the legal instruments must be used, put into force, made effective. That Zimbabwe has a well-drafted Customs and Excise Act regulating international trade and is party to regional and international trade agreements is rendered meaningless if the provisions in those treaties remain unused. To see meaningful economic development, Zimbabwe needs to fully utilise the legal instruments that are available to it.

7.3 Adding Value from Agricultural Production to Agro-processing

Chapter 4 advocated for the prioritisation of the agricultural sector as a mainstay for the Zimbabwean economy, noting that this sector has the capacity to support economic development through facilitating food security, employment creation, and strategic forward and backward

¹²⁷¹ See paragraph 3.4.1.4 and 4.4.1 above.

¹²⁷² See paragraph 3.4.1.4 above.

linkages, especially towards the establishment of a sustainable manufacturing sector, starting with agro-processing.¹²⁷³ Despite the vast potential and comparative advantage created by the agricultural sector, it is not performing well economically such that both production and trade in agricultural goods is not at full capacity. A large part of the population relies on agriculture at subsistence or small-holder farms for survival, owing to the high unemployment rate in Zimbabwe, currently pegged at 94 per cent. Chapter 4 argued that agriculture and agribusiness have the potential to support the economic transformation that is envisioned by the ZimAsset economic blueprint document.

Security of tenure is one of the biggest challenges with agricultural production in Zimbabwe at present. Currently, security of tenure is uncertain in Zimbabwe, owing to the numerous legislative amendments and reforms post-2001, and also because not all redistributed farms have been registered under the Deeds Registry Act.¹²⁷⁴ This means resettled farmers are uncertain whether the land they received will continue to belong to them if the ruling party goes out of power. FDI in agriculture is also experiencing uncertainties relating to security of tenure and compensation in the event of expropriation.¹²⁷⁵ This uncertainty in property rights causes both individuals and corporations to be sceptical especially with regard to how much domestic investment to pour into the venture, and whether or not to establish technologically advanced plant and machinery due to risks involved with legal uncertainty in Zimbabwean land tenure.

Moreover, the economic crises and poor weather patterns have resulted in many Zimbabweans living below the poverty datum line and lacking agricultural support in the form of seeds and fertilisers, as well as technical expertise on farming measures for unstable weather patterns. The government's failure to timeously provide such support directly impacts on the quantity and quality of agricultural output of the country, which in turn impacts on international trade.¹²⁷⁶ It is important for Zimbabwe to translate that policy into practical implementation measures and enforceable laws, and to monitor the implementation of the policy.

¹²⁷³ See paragraph 4.1 above.

¹²⁷⁴ See paragraph 4.1.2 above.

¹²⁷⁵ See paragraph 5.5.3 above.

¹²⁷⁶ See paragraph 4.4.2 above.

The absence or shortage of these critical productive resources and technical expertise creates a major disconnect between policy objectives and policy outcomes.¹²⁷⁷ In other words, failure to provide productive resources undermines the policy objective to have export-led growth. In this regard, the Government of Zimbabwe needs to reconsider its policy and set realistic objectives aligned with available resources and the country's international obligations under the Malebo Declaration, which is to allocate a minimum of 10 per cent of the national budget towards developing the agricultural sector. These measures would facilitate agricultural production and trade.¹²⁷⁸

With regard to tariff rate quotas, Zimbabwe allows zero-tariff for the importation of restricted goods up to a threshold of US\$250 per month per person for personal use.¹²⁷⁹ However, all personal importation of restricted goods in excess of this quota are subject to a tariff of 40 per cent. Moreover, all restricted goods imported for business are subject to a 40 per cent tariff. Although Zimbabwe has no quotas and can easily comply with the WTO TRQs, it still has very high tariffs, which may act as barriers to trade and undermine the overall objectives of the WTO to facilitate free trade. It is recommended that in addition to the COMESA STR currently used in Zimbabwe, Zimbabwe needs to further streamline border processes, to avoid undue delays and physical inspections, and this would help to remove the current conditions which are conducive to corrupt behaviour by border officials and travellers.

COMESA operates as an FTA, granting zero-tariff and zero-quota for intra-COMESA trade. The proposed common external tariff is zero for raw materials and capital goods, whereas intermediate goods will attract a tariff rate of 10 per cent and finished goods incur 25 per cent. Should the COMESA customs union be achieved by all member states, then this would simultaneously guarantee compliance with the proposed WTO TRQ modalities. Currently, most COMESA member states from East Africa have already complied with the CET in anticipation of the

¹²⁷⁷ See paragraphs 4.4.1 and 4.3.1 above.

¹²⁷⁸ See paragraph 4.4.2 above.

¹²⁷⁹ See paragraph 4.4.1 above.

Customs Union. However, several Southern African COMESA member states have not complied with the COMESA CET, partly owing to concurrent membership with SADC and SACU.¹²⁸⁰

SADC on the other hand, is far from achieving the proposed WTO TRQ modalities, as negotiations for the CET are yet to start. Perhaps if this happens soon, then it can take into account the proposed TRQs and factor them into the SADC CET. More likely, however, based on SADC's drafting history, is that SADC CET negotiations will be superseded by both the WTO and the TFTA, and SADC is likely to merely copy what has been decided at those forums in a SADC instrument.

With regard to trade facilitation, Zimbabwe faces challenges with the movement of goods because of poor transport infrastructure, lack of appropriate and adequate storage facilities, border delays, and excessive documentation required for customs processes.¹²⁸¹ Both COMESA and SADC have put in place various measures to improve the flow of trade, and both appreciate the unique need in East and Southern Africa, respectively, to provide support for informal cross-border traders (ICBTs) and small to medium enterprises (SMEs).¹²⁸² Unemployment is common in both regions and consequently there is a need to ease the functioning of ICBTs. In this regard, COMESA introduced a simplified trade regime (STR) for ICBTs.

Fourthly, with regard to SPS compliance and market access, Zimbabwe's membership of the WTO, COMESA and SADC improves market access, at least on the face of it. However, SPS compliance requirements disproportionately disadvantage Zimbabwe. Although COMESA has put measures in place, including regional SPS laboratories, these have not yet been fully implemented. Zimbabwe is at a disadvantage because apart from not having adequate access to COMESA Regional SPS laboratories, its own Standards Association (SAZ) is currently underperforming, and lacks technical expertise and technologically advanced infrastructure.¹²⁸³

Moreover, Zimbabwe should make targeted efforts to fully utilise its labour force and ensure full production. It is not surprising that there may be graduates with special expertise in key productive

¹²⁸⁰ See paragraph 4.3 above.

¹²⁸¹ See paragraph 4.4.1 above.

¹²⁸² See paragraph 4.3.1 above.

¹²⁸³ See paragraph 4.4.1 above.

areas, whose skills are not being fully used because they cannot find employment. In this regard the government needs to use strategic placement of graduates from universities and technical colleges to work in priority areas, such as SPS compliance verification for agricultural trade. Zimbabwe should also explore vocational training, to ensure that there is an available workforce in industry actually producing the goods intended to be exported.

Lastly, the government must utilise the available instruments allowing domestic support and export subsidies by submitting relevant notifications to the WTO on time, to prevent disputes from arising with other WTO member states. However, to fully benefit from trade, the government must simultaneously prioritise agro-processing in order to incorporate value addition, establish value chains and increase earnings from agricultural goods exported.¹²⁸⁴ This is also a policy objective set out in the ZimAsset blueprint. Once production is secured, trade can take place; however, trade depends on the extent of market access, domestic support and export subsidies.

7.4 Foreign Direct Investment

Chapter 5 showed that investment laws tend to be skewed in favour of investors, especially where the existing laws allow for full security and protection in the event of expropriation. This is particularly important because often the damage that can be caused by a ruling to pay full compensation could be significant on the provision of already lacking public services.¹²⁸⁵

Expropriation is particularly important for the discussion in the light of recent decisions made against Zimbabwe in the *Funnkoter*, *Pezold* and *Campbell* cases. Although the amendments to the Constitution in 2013 create a compliant domestic legislative framework, the expropriations in 2001 led to a major loss of investor confidence, which has not yet been regained. Zimbabwe needs to encourage FDI in agriculture, especially trade finance for small-holder farmers, and strategic linkages between producers and markets.

Section 71(3) of the Zimbabwe Constitution allows for deprivation of property in the interests of 'defence, public safety, public order, public morality, public health, town or country planning, or

¹²⁸⁴ See paragraph 4.1.6 above.

¹²⁸⁵ See paragraph 5.5.3 above.

[community development]’. This is a far-reaching provision that extends beyond customary international law (CIL), as well as beyond provisions in the SADC Investment Protocol, COMESA Treaty and COMESA International Investment Agreement. Although the allowance of expropriation in the interests of community development appears to be in conflict with CIL, it does seem to align with the general scheme of the SADC Model BIT, which favours increased government policy space for economic development.¹²⁸⁶

The chapter also established that government policy space must be guarded and the right to regulate be exercised more meaningfully in order to secure the economic development interests of Zimbabwe. The right to regulate is guaranteed under the CIL principle of state sovereignty.¹²⁸⁷ Zimbabwe needs to employ formally correct procedures and have due regard for the law, for example, Zimbabwe could have terminated existing BITs within their ordinary termination period and prevented expropriation claims. However, because Zimbabwe prioritised political objectives over economic ones, it ended up rushing the process through a ‘fast-track’ land reform process. There could have been significant gains for ordinary Zimbabweans from the land redistribution process, but instead there was economic turmoil. Zimbabwe should take lessons from South Africa to the extent that South Africa has allowed existing BITs to terminate and has notified treaty partners that the BITs will not be renewed. In this way, South Africa has preserved its policy space without undermining its treaty obligations under international law, and now regulates investments in terms of its domestic law and domestic courts primarily.

Furthermore, Zimbabwe must find alternative ways of raising revenue apart from taxation. Most developed economies earn the bulk of their revenue from sources other than tax. The government needs to urgently reduce its wage bill, so that the budget allocation can better address the development needs of Zimbabwe. For example, the government ought to direct more resources towards reducing transaction costs by improving infrastructure such as roads, rail and storage which facilitate trade. Furthermore, the government needs to seek public-private partnerships and build information databases so that the people who are suitably qualified to fill certain positions

¹²⁸⁶ See paragraph 5.4.2 above.

¹²⁸⁷ See paragraph 5.4.1 above.

such as SPS technical support, can be pooled in and thereby ease both unemployment, and TBTs. This not only applies to SPS support, but also across various parts of the economy.

7.5 The Role of the Financial Services Sector in the Economic Development of Zimbabwe

Chapter 6 examined development finance, financial inclusion, and financial stability. Whereas Zimbabwe has in the past received development finance from international institutions such as the IMF, World Bank and the African Development Bank, it is argued that Zimbabweans did not benefit from this financing in the long term.¹²⁸⁸ The economic reforms made under ESAP resulted in reversals of gains made after attaining independence in terms of access to healthcare services, education, and even employment. Zimbabwe has perpetual debt.¹²⁸⁹ Unbridled government spending and a wage bill accounting for 90 per cent of the annual budget have rendered it nearly impossible for the international debts to be paid off.¹²⁹⁰ The government is unable to pay off its debts, which means it cannot obtain new lines of finance and therefore that the provision of social services continues to suffer due to poorly considered government spending.

Secondly, the majority of Zimbabweans do not have access to financial services. Chapter 6 argued in favour of promoting financial inclusion as a means to bolster the economy and increase financial stability.¹²⁹¹ With regard to financial stability, Zimbabwe currently uses the silo model of financial services sector supervision, wherein the Reserve Bank of Zimbabwe (RBZ) is responsible for the supervision of all banks and micro-finance institutions operating in Zimbabwe.¹²⁹² This supervision cuts across various banking services and overlooks the conglomeration of banks. Zimbabwe could learn lessons from South Africa, which is using a twin-peaks approach.¹²⁹³ This is important because a single supervisor would be overburdened and might overlook critical systemic risks as a result. It is proposed that the twin peaks model would address the problem of regulatory overlap; strengthen accountability (because two specific entities are responsible and there is no confusion as to which authority an entity falls under); increase economies of scale and

¹²⁸⁸ See paragraph 6.1 above.

¹²⁸⁹ See paragraph 6.1.1 above.

¹²⁹⁰ See paragraph 6.1.2 above.

¹²⁹¹ See paragraph 6.2 above.

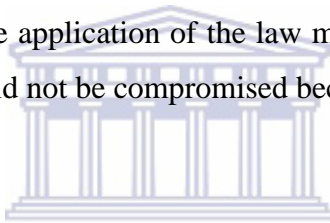
¹²⁹² See paragraph 6.4.1 above.

¹²⁹³ See paragraph 6.4.2 above.

support more efficient use of available resources; reduce regulatory arbitrage; facilitate the regulation of financial conglomerates and to eliminate potential conflicts that might arise if there are several regulators; and establish the legal certainty which is lacking in Zimbabwe at present. In contrast, a single regulator may fail to appreciate the unique nature of financial intermediaries and cause increased bureaucracy, thereby defeating the purpose of regulation and supervision.¹²⁹⁴

7.6 Recommendations

The above conclusion is interwoven with recommendations, however the following paragraphs will add to these, and highlight key areas of concern. First, the government of Zimbabwe must create a stable environment in which trade and investment can exist. This requires legal certainty. The erratic law-making tendencies of government ministers through subordinate legislation must be replaced by systematic, transparent and clear law-making processes in order to restore confidence in the legal system. The application of the law must be seen to be impartial, and the independence of the judiciary should not be compromised because the courts are the ‘gatekeepers of justice’.

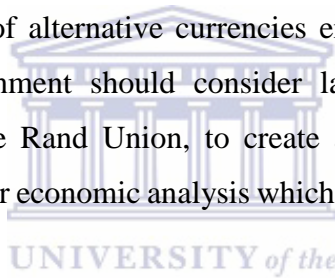


Secondly, domestic laws and international law appear to favour investor interests at the expense of development needs. Zimbabwe must revisit its investment legal framework as a whole, and revisit BITs before they are due for renewal, in order to negotiate terms that are more favourable for its own citizens. Investment incentives must be adjusted to ensure that the incentives are tied to specific development objectives such as skills or technology transfer. This will help Zimbabwe to become less dependent. Moreover, domestic law appears to favour foreign investors over domestic investors, and the domestic business environment is not conducive to entrepreneurs due to numerous licencing requirements, and costs. It is important for Zimbabwe to strike a balance between its support for foreign investors and domestic investors. The more people are doing business, the more money will come into circulation, thereby facilitating liquidity in the market.

¹²⁹⁴ Nhavira E, Mudzonga E & Mugochoa E ‘Financial Regulation and Supervision in Zimbabwe: An Evaluation of Adequacy and Options’ 20 Zimbabwe Economic Policy and Research Unit (ZEPARU) Adapted from Conference Paper (26 July 2013) Available on <http://elibrary.acbfpact.org/acbf/collect/acbf/index/assoc/HASH3ed8.dir/Financial%20Regulation.pdf> (accessed 3 September 2015); See paragraph 6.4.2 above.

Thirdly, the rule of law must be restored. The Presidential Powers (Temporary Measures) Act must be declared unconstitutional as it violates principles of the separation of powers guaranteed under Section 3 of the Zimbabwe Constitution. The Legislative process must be entrenched in the Constitution to prevent the abuse of power. The legislative powers afforded to Ministers in relevant enabling statutes must also be limited so as to prevent the abuse of power, and to reduce the promulgation of a proliferation of laws.

Fourthly, the liquidity crisis must be addressed as a matter of urgency. Banking regulations imposing daily withdrawal limits force consumers to spend several productive hours waiting in long queues to withdraw cash, and the RBZ must immediately waive part of the bank charges because consumers are forced to pay up to US\$4 per transaction, with a maximum of US\$50 withdrawal per day. This means banks are profiteering off consumers, and this is being sanctioned by the law. Furthermore the use of alternative currencies encourages bank runs which further perpetuate illiquidity. The government should consider lawfully reintroducing a legitimate currency, and possibly joining the Rand Union, to create a sense of financial stability. This recommendation would need further economic analysis which falls beyond the scope of this thesis.



Fifthly, Zimbabwe needs capacity building in the domestic sphere, and also at regional and international negotiating spaces. Capacity building is needed because many Ministers and Members of Parliament who are currently making laws are not academically qualified in their field of service, Zimbabwe should invest in capacity-.building of people in key positions, to enable them to make informed decisions about economic affairs. This will however only be useful, if the relevant leaders put aside political affiliations and put their heads together to come up with solutions that work for the public good of all Zimbabweans. Zimbabwe must also build capacity of its officials to address unfair trade practices, by fully utilising remedies available under the WTO Dispute Settlement Mechanism, and COMESA Court. TDMS available such as antidumping duties, and safeguards must be employed, despite political ties, such as in the example of alleged dumping of clothing from China. Otherwise it is futile to have legal instruments if they are not used.

Finally, because of the diverse nature of this study, there is room for further research in fields of economics, law or politics on this topic. Moreover, the recommendations proposed in this thesis are not a one size fits all, these were selected based on the research conducted and its unique findings.



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