



**University of Fort Hare**  
*Together in Excellence*

**The Legal Protection of Foreign Direct Investment in the New Millennium:**

**A Critical Assessment with a focus on South Africa and Zimbabwe**

A dissertation submitted in fulfilment of the requirements for the

**MASTER OF LAWS DEGREE**

By

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**2015**

## **DECLARATION**

I declare that, except for the references as well as any other assistance duly indicated and acknowledged, this dissertation, “The Legal Protection of Foreign Direct Investment in the New Millennium: A Critical Assessment with a focus on South Africa and Zimbabwe” is my own work that has never been previously submitted in part or in its entirety at any institution for degree purposes or otherwise.

Signed at East London on

.....

Talkmore Chidede

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God bless you all.

## **DEDICATION**

I dedicate this work to the Lord Almighty, the entire Nyakudya Chidede family and the late Mike Freedom Chidede (dad).

## **ABBREVIATIONS**

ACHPR	African Charter on Human and Peoples Rights
AfDB	African Development Bank
AgriB-BBEE	Agricultural Broad-Based Black Economic Empowerment
ANC	African National Congress
ASEAN	Association of South East Asian Nations
B-BBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
CARICOM	Caribbean Community
CIL	Customary International Law
COMESA	Community Market for East African States
CU	Customs Union
DLA	Department of Land Affairs
DTI	Department of Trade and Industry
EC	European Community
ECCAS	Economic Community of Central African States
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EEA	Employment Equity Act
EFF	Economic Freedom Fighters
EIP	Enterprise Investment Program
EPZs	Exporting Processing Zones
EU	European Union
FC	Freedom Charter
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FDICI	Foreign Direct Investment Confidence Index

FIRA	Foreign Investment Review Act
FPI	Foreign Portfolio Investment
FSIA	Foreign States Immunities Act
FTA	Free Trade Area
GA	General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GEAR	Growth, Employment and Redistribution
HDI	Historically Disadvantaged Individuals
IBA	International Bar Association
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDZs	Industrial Development Zones
IAs	International Investment Agreements
IIED	International Institute for Economic Development
IISD	International Institute for Sustainable Development
ILO	International Labour Organisation
IMF	International Monetary Fund
IPILRA	Interim Protection of Informal Land Rights Act
ISDS	Investor-State Disputes Settlement
ITO	International Trade Organisation
LAA	Land Acquisition Act
LCIA	Labour Court for International Arbitration
M&As	Mergers and Acquisitions
MAI	Multilateral Agreement on Investment

MFN	Most Favoured Nation
MIGA	Multilateral Investment Guarantee Agency
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
MPRDA	Minerals and Petroleum Resources Development Act
NAFTA	North American Free Trade Agreement
NEFA	National Empowerment Fund Act
NGOs	Non-Governmental Organisation
NIEO	New International Economic Order
NDP	National Development Plan
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PPPFA	Preferential Procurement Policy Framework Act
PSNRR	Permanent Sovereignty over Natural Resources Resolution
RDP	Reconstruction and Distribution Programme
REFAAA	Recognition and Enforcement of Foreign Arbitral Award Act
RRI	Regulatory Restrictiveness Index
RSA	Republic of South Africa
SADC	Southern African Development Community
SADC FIP	Southern African Development Community Protocol on Finance and Investment
SALC	South African Law Commission
SCA	Supreme Court of Appeal
SDA	Skills Development Act
SETAs	Sectoral Education and Training Authorities
SEZs	Special Economic Zones

SSA	Sub-Saharan Africa
TISA	Trade and Investment South Africa
TRALAC	Trade Law Centre
TRIMs	Trade-Related Investment Measures
TRIPs	Trade-Related Intellectual Property Rights
UDHR	Universal Declaration Human Rights
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on. Transnational Corporations
US	United State
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WEF	World Economic Forum
WTO	World Trade Organisation
WW II	Second World War
Zim Asset	Zimbabwe Agenda for Sustainable Socio-Economic Transformation
ZMDC	Zimbabwe Mining Development Corporation



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## **ABSTRACT**

The increasing investment gap and reduction in foreign aid has made several developing countries to turn to foreign investment as a mechanism to circumvent their financial constraints among other things. There is substantial empirical evidence that foreign direct investment enhances economic development, employment creation, national competitiveness and diffusion of technology from foreign firms to local firms and workers of the host states. As a result, this study firstly argues that foreign investment is much needed in South Africa and Zimbabwe to improve economic growth and development, create employment and increase their competitiveness in the global market. However, these benefits do not accrue automatically but the host states need to create an enabling environment to exploit such benefits.

The legal protection of foreign investment has become a fundamental issue in both international and national law. Efforts have been and are still being made in law as well as in practice to implement national investment legal regimes which are in line with international norms or standards. This study undertakes a contemporary assessment of the legal protection of foreign investment in South Africa and Zimbabwe with a view of examining their compliance with international minimum norms, standards and/or best practices. More recently, both South Africa and Zimbabwe have crafted and implemented investment laws and related policies which are perceived to be somewhat hostile towards foreign investment. To achieve this, selected investment laws and related policies in both jurisdictions are critically analysed. This study puts forward an argument and recommendations for policy makers in both South Africa and Zimbabwe for strategic refinements of investment laws and related policies such that they become flexible, friendly and certain to foreign investors while at the same time advancing their respective national policies aimed at the economic empowerment of local citizens.



## CHAPTER 1

### Introduction and overview of the study

#### 1.1 INTRODUCTION

Foreign Direct Investment (FDI) also known as foreign commercial property has emerged as one of the most contentious issues in global economic negotiations.<sup>1</sup> On the one hand, developing countries are more conservative in maintaining trade-restrictive investment measures based on the presumptions that FDI does not foster economic or technological development in host countries and that it has adverse effects on national sovereignty and autonomy.<sup>2</sup> For these reasons, South Africa and Zimbabwe, among other developing countries, have undertaken a number of policy initiatives aimed at regulating and limiting the legal rights of foreign investors. It should be noted that these concerns of Multinational Corporations' (MNCs) capacity to influence economic and political affairs is motivated by the colonial experience of developing countries.<sup>3</sup> On the other hand, developed countries, among other things, are looking forward to a global investment regime that will protect and promote their investment interests and increase the space for them to shape their international operations.<sup>4</sup> With this objective, developed countries seek to develop a liberalised foreign investment system through the reduction of trade-restrictive investment measures that impede flexible establishment of foreign commercial property in countries.<sup>5</sup>

Be that as it may, foreign investment is generally considered as a vehicle for economic integration of developing countries into the globalisation process that characterises the world economy.<sup>6</sup> For that reason, various developing countries and emerging economies are

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<sup>1</sup>At the Doha Ministerial Conference of the World Trade Organisation (WTO), November 2001, the finalisation of the draft Declaration was held up because of the differences and conflicts between the developed and developing countries on investment issues, among others. The Doha Declaration provided for the launch of negotiations on trade and investment after the Fifth Ministerial Conference on the basis of a decision taken by explicit consensus at that session on the modalities of negotiations. Furthermore, the failure of the attempt to adopt a Multilateral Agreement on Investment (MAI) by the Organisation for Economic Co-operation and Development (OECD) Ministers in December 1998 attests to this. See Schill *The Multilateralisation of International Investment Law* (2009) 52-58; Trebilock and Howse *The Regulation of International Trade* 3 ed 457-461; and Geiger "Multilateral Approaches to Investment: The Way Forward" in Alvarez and Sauvart (eds) *The Evolving International Investment Regime* (2011) 153.

<sup>2</sup> Kumar *Globalisation and Quality of Foreign Direct Investment* (2002) 14.

<sup>3</sup> In fact, FDI is widely viewed as a form of economic colonialism and exploitation by developed countries of developing countries and emerging economies. See Trakman "Foreign Direct Investment: Hazard or Opportunity?" 2009 *George Washington International Law Review* 10.

<sup>4</sup> Correa and Kumar *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (2003) xi.

<sup>5</sup> Ibid.

<sup>6</sup> Lall and Narula "Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda?" 2004 *The European Journal of Development Research* 447.

particularly eager to attract FDI to enhance sustainable economic growth and development. The contemporary rapid growth of FDI flows into developing countries is a consequence of the changes in world economic politics predominantly the far-reaching liberalisation of policies towards FDI and other policy reforms to improve the investment climate.<sup>7</sup> In the developing world, FDI is one of the most important driving forces of utilising the resources of MNCs for industrialisation.<sup>8</sup>

Contrary to the area of international trade where the General Agreement on Tariffs and Trade (GATT)<sup>9</sup> and the other WTO Agreements provide the general legal framework for world trade regulation, there is no comprehensive global agreement on foreign investment.<sup>10</sup> Nevertheless, there is a plethora of specialised multilateral investment treaties mainly adopted within the framework of GATT/WTO, Organisation for Economic Co-operation and Development (OECD) and the World Bank. These multilateral investment treaties include, among others, the Agreement on Trade-Related Investment Measures (TRIMs Agreement),<sup>11</sup> the General Agreement on Trade in Services (GATS),<sup>12</sup> the Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement),<sup>13</sup> the International Centre for Settlement of Investment Disputes (ICSID) Convention,<sup>14</sup> the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)<sup>15</sup> and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) which focus on certain aspects of FDI. It is also

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<sup>7</sup> UNCTAD Investment Policy Monitor 2014.

<sup>8</sup> African Development Bank (AfDB) “Regional Integration Brief” 2013 [http://www.afdb.org/admin/uploads/afdb/documents/publication/regional\\_intergation\\_brief\\_intrad-sadc\\_cross-borader\\_investments.pdf](http://www.afdb.org/admin/uploads/afdb/documents/publication/regional_intergation_brief_intrad-sadc_cross-borader_investments.pdf) (accessed 25-05-2014).

<sup>9</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S 187, 33 ILM 1153 (1994) (hereafter “GATT”).

<sup>10</sup> Leal-Arcas *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (2010) 180. See also Sauvé “Multilateral Rules on Investment: Is Forward Movement Possible?” 2006 *Journal of International Economic Law* 325-355 and Buthe and Milner “Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?” 2008 52 *American Journal of Political Science* 741.

<sup>11</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S 186 (hereafter “TRIMs Agreement”).

<sup>12</sup> General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S 183, 33 ILM 1167 (1994) (hereafter “GATS”).

<sup>13</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1 C, Legal Instruments - Results Of The Uruguay Round Vol. 31, 33 I.L.M. 1197 (1994) (hereafter “TRIPs Agreement”).

<sup>14</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (hereafter “Washington or ICSID Convention”).

<sup>15</sup> Convention Establishing the Multilateral Investment Guarantee Agency was established on 11 November 1985 at Seoul and it entered into force on 12 April 1988 T.I.A.S. 12089, 1508 U.N.T.S (hereafter “MIGA Convention”).

important to recognise that there is an array of International Investment Agreements (IIAs) at regional<sup>16</sup> and bilateral levels. Consequently, this multi-layered international investment regime is diverse and creates uncertainty and inconsistency in investment laws in that the treaties differ in legal character, scope and subject matter.<sup>17</sup>

Nonetheless, from a legal perspective it is fundamental to have a cohesive and binding multilateral investment framework because it ensures the existence of a consistent and comprehensive international investment regime.<sup>18</sup> It must be noted that this does not suggest that the existing Bilateral Investment Treaties (BITs) and regional investment agreements should be replaced. Notably, empirical studies have proved that developing countries fear a multilateral framework on investment negotiated within a single undertaking.<sup>19</sup> This is because it may curtail their ability to regulate the operations of MNCs or foreign investments in harmony with their development policy objectives and that it will not serve their interests but those of the developed countries.<sup>20</sup>

The role of a host country is essential to the domestic protection and regulation of foreign investment. In this context, the host country's legal framework is not the only important component in protecting and regulating FDI. Thus, there are other fundamental components in the domestic framework for protecting of FDI and these include quality of political, economic and financial policies and regulatory processes as well as physical and institutional infrastructure.<sup>21</sup> In this respect, Article 3 of the SADC FIP mandates all the state parties to co-ordinate their investment regimes and to co-operate in creating a favourable investment climate in the region.<sup>22</sup> Foreign investors must have certainty in the domestic framework to enable them to make sound investment decisions. For instance, South Africa has signed a BIT with

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<sup>16</sup> For example, the Southern African Development Community Protocol on Finance and Investment (hereafter "SADC FIP") which seeks to harmonise the investment policies and laws of the SADC member states.

<sup>17</sup> In 2013, United Nations Conference on Trade and Development (UNCTAD) highlighted that an unusual number of foreign investors have challenged a wide range of government investment measures that have trade-distortive effect on investment, unilateral cancellation or breaches of contracts, arbitrary expropriation, unfair taxation and revocation of licences, among others. See UNCTAD "Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making" 2013 *International Investment Agreement Issues Note* [http://unctad.org/en/publicationslibrary/webdiaepcb2013d6\\_en.pdf](http://unctad.org/en/publicationslibrary/webdiaepcb2013d6_en.pdf) (accessed 10-04-2014).

<sup>18</sup> Leal-Arcas 237.

<sup>19</sup> Ibid 178.

<sup>20</sup> Ibid.

<sup>21</sup> Investment Climate Advisory Services of the World Bank Group *Investment Law Reform: A Handbook for Development Practitioners* (2010) 1.

<sup>22</sup> See also Annex 1 of the SADC FIP.

Zimbabwe as a mechanism to promote and protect South African investments in Zimbabwe.<sup>23</sup> This BIT applies to all investments except property rights or interests compulsorily acquired by either party in its own territory before the entry into force of the treaty.<sup>24</sup>

Apparently, government policies and bureaucratic procedures governing and regulating investments are still a major problem in most developing economies.<sup>25</sup> Additionally, the legislation regulating investments, property rights and company laws are archaic and not suitable for modern business.<sup>26</sup> Recently there have been serious concerns raised about the present government policies of South Africa<sup>27</sup> and Zimbabwe<sup>28</sup> with particular reference to FDI protection.

The 2014 Foreign Direct Investment Confidence Index (FDICI) indicates that South Africa is ranked the thirteenth most attractive FDI destination globally.<sup>29</sup> However, South Africa, despite its said contentious investment protection laws, has improved from last year's FDIC rankings<sup>30</sup> and is the only African country among the world's top 25 most preferred FDI destinations. It is worth noting that this index rating is not solely dependent on the investment regulatory system. Rather, it also depends on several aspects such as political, economic and business environments that affect FDI inflows.<sup>31</sup> Traditionally, developing countries are considered to

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<sup>23</sup> 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 on November 27, 2009 (hereafter "South Africa-Zimbabwe BIT").

<sup>24</sup> Ibid.

<sup>25</sup> World Economic Forum (WEF) Africa Competitive Report 2013 101.

<sup>26</sup> Ibid.

<sup>27</sup> South Africa's most debated Promotion and Protection of Investment Bill (Investment Bill), 2013 which is intended to unilaterally terminate its BITs with the European Union (EU) countries and other non-European countries, has been contested in relation to its consequences on the protection and promotion of foreign investment. See Roux "South Africa's Revocation of its Bilateral Investment Treaties: Beware of Strangers Bringing Money, Especially if you need it" 2015 *South African Institute of International Affairs* <http://www.saiia.org.za/opinion-analysis/south-africas-revocation-of-its-bilateral-investment-treaties-beware-of-strangers-bringing-money-especially-if-you-need-it> (accessed 05-05-2015) and South African Institute of International Affairs "FDI in South Africa: Promotion and Protection of Investors... and the Public Interest" 2014 <http://www.saiia.org.za/opinion-analysis/fdi-in-south-africa-promotion-and-protection-of-investors-and-the-public-interest> (accessed 05-05-2015).

<sup>28</sup> In particular, Zimbabwe's investment legislation, the Zimbabwe Investment Authority Act (ZIA Act) 4 of 2006 and related policies including the Indigenisation and Economic Empowerment Act (Indigenisation Act) 14 of 2007, land reform policy, the much-touted economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset), have been debated extensively as constraints to the country's ability to promote and protect foreign investment. See generally Fedderke and De Kadt "Measuring Institutions: Indicators of Property Rights, Political Rights and Political Instability in Zimbabwe" (2008) Economics Research Southern Africa (ERSA) Working Paper 112.

<sup>29</sup> AT Kearney Foreign Direct Investment Confidence Index 2014 also available at <http://www.atkearney.com/gbpc/foreign-direct-investment-confidence-index> (accessed 06-06-2014).

<sup>30</sup> In 2013, South Africa was ranked the fifteenth most preferred FDI destination, see AT Kearney Foreign Direct Investment Confidence Index 2013.

<sup>31</sup> AT Kearney Foreign Direct Investment Confidence Index 2014.

be inherently risky due to investment regulatory barriers, economic instability and political volatility.<sup>32</sup> In particular, Zimbabwe is among the least attractive economies.<sup>33</sup> Its FDI inflows have seen a dramatic decrease in the past decade.<sup>34</sup> This decrease is attributed to a number of factors chief among them being the land reform policy, indigenisation policy as well as investment policy uncertainty and inconsistency.<sup>35</sup>

## 1 2 DEFINITIONS OF FDI

The absence of a generally accepted legal definition of foreign investment indicates that perhaps FDI is one of the most critical and controversial issues.<sup>36</sup> However, it is important to note that the meaning of FDI differs according to the object and purpose of different investment instruments.<sup>37</sup> Hence this part of the Chapter attempts to develop a harmonised definition of the term FDI using a holistic approach. In this regard, focus will be on the various definitions adopted by international organisations, IIAs concluded at multilateral, regional and bilateral levels as well as the jurisprudence arising out of the interpretation of FDI related instruments. In addition, it discusses the distinction between FDI and foreign portfolio investment.

### 1 2 1 FDI definition by international organisations

According to the WTO, “FDI occurs when an investor based in one country (home country) acquires an asset in another country (host country) with the intent to manage that asset.”<sup>38</sup> The International Monetary Fund (IMF) defines FDI as “an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor’s purpose being to have an effective voice in the management of the enterprise.”<sup>39</sup> The IMF reiterates this definition and states that it is “the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another country.”<sup>40</sup> In addition, the UNCTAD defines FDI as:

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<sup>32</sup> See generally Kearney FDIC “Back to Business: Optimism amid Uncertainty” 2013 also available at <http://www.atkearney.com/documents>.

<sup>33</sup> Invictus Securities Zimbabwe “March 2014 Equities Market Review and Strategy Outlook” as cited in Mangudhla “Bad Policies Hindering Investment” *Zimbabwe Independent*, 15 March 2014 <http://www.theindependent.co.zw/2014/03/15/bad-policies-hindering-investment/> (accessed 06-06-2014).

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Correa and Kumar 146.

<sup>37</sup> Ibid.

<sup>38</sup> Phelps and Alden (eds) *Foreign Direct Investment and the Global Economy: Corporate and Institutional Dynamics of Global-Localisation* (1999) 46.

<sup>39</sup> IMF *Balance of Payment Manual* 4 ed (1977) 136. See also McAlister “Classification of Corporate Enterprises” in Galbis (ed) *The IMF’s Statistical Systems in Context of Revision of the United Nations’ A System of National Accounts* (1991) 176.

<sup>40</sup> IMF *Balance of Payment Manual* 5 ed (1993) 86.

an investment made by a resident of one economy in another economy...is of a long-term nature ...the investor has a 'significant degree of influence' on the management of the enterprise...10 per cent of the voting shares or voting power is the level of ownership necessary for a direct investment interest to exist.<sup>41</sup>

The OECD indicates that foreign investment arises when an enterprise<sup>42</sup> has a direct investment that is a subsidiary or associate in another country other than its home country.<sup>43</sup> The OECD benchmark definition of FDI describes it as:

a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a strategic long-term relationship between the direct investment and the enterprise which allows a significant degree of influence by the direct investor in the management of the direct investment enterprise. The lasting interest is evidenced where the direct investor owns at least 10 per cent of the voting power of the direct investment enterprise.<sup>44</sup>

FDI entails the transfer of funds into another country to purchase a service or open a new business.<sup>45</sup> The World Bank states that FDI “is a foreign investment that establishes a lasting interest in or effective management or control over an enterprise ... can include buying shares of an enterprise in another country, re-investing earnings of a foreign enterprise in the country where it is located, and parent firms extending loans to their foreign affiliates.”<sup>46</sup>

## **1 2 2 IIAs' FDI definition<sup>47</sup>**

A number of IIAs contain an asset-based definition of foreign investment.<sup>48</sup> IIAs are treaties which govern the relationship between host states and foreign firms based in the signatory countries.<sup>49</sup> The MAI Draft broadly defines foreign investment in terms of assets.<sup>50</sup> Its interpretative note mentions that for an asset to qualify as an investment under the MAI it must have the features of an investment such as the commitment of capital or other resources, the

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<sup>41</sup> UNCTAD *Training Manual on Statistics for FDI and the Operations of TNCs* (2009) 35.

<sup>42</sup> An enterprise comprises of an “individual, an incorporated or unincorporated public or private enterprise, a government, a group of related individuals or a group of related incorporated and/or unincorporated enterprises”. See OECD *Towards Multilateral Investment Rules* (1996) 165.

<sup>43</sup> Ibid.

<sup>44</sup> OECD *OECD Benchmark Definition of Foreign Investment (Draft)* 4 ed (2008) 17.

<sup>45</sup> Leal-Arcas 166.

<sup>46</sup> Soubbotina and Sheram *Beyond Economic Growth: Meeting the Challenges of Global Development* (2000) 97.

<sup>47</sup> For more information on the definition of foreign investment in investment treaties, see Sornarajah *The International Law on Foreign Investment* 3 ed (2010) 10.

<sup>48</sup> It is worth noting that assets, in terms of foreign investment exclude the property or assets not acquired for the purpose of economic benefit or business. See Haslam “The Evolution of the Foreign Direct Investment Regime in the Americas” 2010 31 *Third World Quarterly* 1187.

<sup>49</sup> Ibid.

<sup>50</sup> Article II (2) of the Multilateral Agreement on Investment Draft, 1998.

expectation of gain or profit or the assumption of risk.<sup>51</sup> However, the MAI did not come into existence.

The ICSID Convention does not provide a definition of foreign investment. Hence this has given rise to significant case law. The absence of FDI definition in this Convention has led to fundamental issues of interpretation as the ICSID Tribunals have sought to arrive at an understanding of how the term should be properly understood for the purposes of the ICSID Convention. In *Salini Costruttori spa v. Morocco*,<sup>52</sup> the leading ICSID case, the tribunal opined that the following must exist for there to be an investment: substantial duration; regularity of profit and return; assumption of risk by both parties; substantial commitment of money and significant contribution to the development of the host state. Since this case there has been a move towards a more flexible definition of investment in the ICSID arbitration tribunals.<sup>53</sup>

Article 1 (6) of the Energy Charter Treaty (ECT) describes investment in terms of all kinds of assets and any investment associated with an economic activity in the energy sector. The ECT contains investment-related provisions that are self-implementing such as ensuring the protection of foreign energy investments based on the non-discrimination principle (NT and MFN) and seeks to create an appropriate investment climate, among other investment issues. In *Petrobart v Kyrgyz Republic*<sup>54</sup> the legal issue was whether a contract for the sale of gas condensate without transferring money or property as capital in the business constituted investment under the ECT.<sup>55</sup> The UNCITRAL Tribunal found that investment is capital or property used as a financial source for a company or business activity with the aim to produce revenue or income.<sup>56</sup> It also added that the term investment should be interpreted in the context of each particular treaty in which the term is used. This is in accord with Article 31 (1) of the Vienna Convention on the Law of Treaties<sup>57</sup> which stipulates that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. FDI is also defined under the North American Free Trade Agreement (NAFTA) to include direct investment, “portfolio investment, equity securities, partnership and other interests and tangible and intangible property acquired

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<sup>51</sup> Ibid.

<sup>52</sup> *Salini Costruttori spa v. Morocco* ICSID Case No. ARB/00/4.

<sup>53</sup> See *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* ICSID Case No. ARB/05/22; *RSM Production Corporation v. Grenada* ICSID Case No. ARB/05/14 and *Phoenix Action Ltd v. Czech Republic* ICSID Case No. ARB/06/05.

<sup>54</sup> *Petrobart v. Kyrgyz Republic*, Stockholm Chamber Case No. 126/2003, Final Award (29 March 2005).

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Vienna Convention on the Law of Treaties, 1969.

in the expectation ... of economic benefit”.<sup>58</sup> In addition, Article 2 (II) of the SADC Model BIT considers investment as an enterprise in one country acquired or expanded by a foreign investor through a constitution or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise.<sup>59</sup>

Foreign investment is also defined in BITs. These treaties define FDI in broad and open-ended terms and sometimes adopt the asset-based approach definition. BITs commonly define foreign investment so as to determine the object and scope to which the rules of the treaties shall apply.<sup>60</sup> For instance, the Republic of South Africa-Ethiopia BIT provides that investment entails the “assets invested or acquired through total ownership of enterprise or participation in ownership of an enterprise which give a significant grade of influence to the investor in the management of the asset.”<sup>61</sup> Within the South African context, FDI entails investment by foreign nationals in South Africa in which they acquire at least 10 percent of the voting rights.<sup>62</sup> In *Salini Costruttori Spa & Italstrade Spa v Morocco*<sup>63</sup> the arbitrators decided that an investment is constituted when the following elements can be found: (i) some contributions in capital, cash or kind; (ii) a certain lapse of time of performance; (iii) participation by the investors in the risks related to the investments and (iv) a contribution to the economic development of the host country.<sup>64</sup>

Though the abovementioned international organisations, IIAs and jurisprudence define FDI in different terms, it should be noted that there are essential similarities in their definitions. In this respect, FDI is commonly accepted as an investment made or acquired by an investor of one country into the territory of another. On the whole, these definitions require that an investor (natural or juristic person)<sup>65</sup> acquires control over a commercial enterprise in a foreign country.<sup>66</sup> Additionally, the definitions contain the aspect of at least 10 percent ownership or more of the total stock issued or comparable ownership stake.

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<sup>58</sup> North American Free Trade Agreement, 1994.

<sup>59</sup> South African Development Community Model Bilateral Investment Treaty Template, 2012.

<sup>60</sup> DTI “Bilateral Investment Treaty Policy Framework Review” 2009.

<sup>61</sup> South Africa-Ethiopia BIT, 2008.

<sup>62</sup> UNCTAD “Country Investment Profiles: South Africa” 2012 [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d4_en.pdf) (accessed 21-05-2014).

<sup>63</sup> *Salini Costruttori Spa & Italstrade Spa v. Morocco*, Decision of 23 July 2001, also available in International Legal Materials 2003 609.

<sup>64</sup> Ibid.

<sup>65</sup> See Article II (I) of the MAI Draft; Article 2 of the SADC Model BIT Template; OECD *Towards Multilateral Investment Rules* (1996) 165; and DTI “Bilateral Investment Treaty Policy Framework Review” 2009 30.

<sup>66</sup> Foreign investors acquire control indirectly or directly through acquisitions, mergers, subsidiaries, assets, shares, agencies or branches, among other means, see Slaughter and May “Legal Regimes Governing Foreign



## 1 2 3 Forms of FDI

This Part discusses the most common forms of FDI such as cross-border mergers and acquisitions (M&As), Greenfield, Brownfield and Joint venture investments.

### 1 2 3 1 M&As investment

M&As investment occurs when assets and operations of local firms are transferred to foreign firms or when assets and operations of firms from different countries are merged to form one new legal entity.<sup>67</sup> This form of investment has become a primary form of international investment.<sup>68</sup> M&As investment accounts for approximately 60% of the world's FDI.<sup>69</sup> It is common in South Africa.<sup>70</sup> In 2011, Zimbabwe's FDI from M&As stood at US\$27 million of the world's US\$526 billion.<sup>71</sup> This form of FDI increases certainty for foreign investors and domestic companies seeking to consolidate and expand their market positions through international partnerships.<sup>72</sup> The reform of global industry through M&As enables local firms to advance their market position and enhance their competitiveness on the regional as well as international market.<sup>73</sup> For example, in 2010 US-based retailer Wal-Mart Stores Inc. merged with the South African-based retailer Massmart.<sup>74</sup> Other notable international mergers include the 1999 Rothmans of Pall Mall/British American Tobacco merger between British American Tobacco of United Kingdom (UK), Rothmans International and Rothmans of Pall Mall Limited of Zimbabwe and the 2001 Portland Holdings/ Pretoria Portland Cement merger between Portland Holdings Limited of Zimbabwe and Pretoria Portland Cement Limited of South Africa.

M&As are however likely to benefit the foreign investors' country and result in the destruction of the host country's industry.<sup>75</sup> In addition, they lead to job losses, particularly when the

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Direct Investment (FDI) in Host Countries" 2012  
<http://a4id.org/sites/default/files/user/documents/FDI%20Legal%20Guide.pdf> (accessed 18-05-2014).

<sup>67</sup> See also the South African Competition Act 89 of 1998.

<sup>68</sup> Leal-Arcas 169.

<sup>69</sup> Ibid.

<sup>70</sup> Muradzikwa "Foreign Investment in SADC" (2002) Development Policy Research Unit (DPRU) Working Paper 02/67 also available at <http://www.uct.ac.za/depts/dpru>.

<sup>71</sup> Musarurwa "Zimbabwe Greenfield Projects Stall" *The Herald* (Zimbabwe), 10 July 2012 <http://www.herald.co.zw/zim-greenfield-projects-stall/> (accessed 21-05-2014).

<sup>72</sup> Ibid.

<sup>73</sup> Correa and Kumar 28.

<sup>74</sup> South African Competition Tribunal "Reasons for Decision in the Massmart/Walmart Merger" 2011 <http://www.comptrib.co.za/assets/uploads/wal-mart-and-massmart-decision/73lmnov10-reasons-order.pdf> (accessed 01-05-2014).

<sup>75</sup> UNCTAD World Investment Report 2000.

domestic firm is acquired by a foreign firm.<sup>76</sup> Against this background, most governments, including South Africa and Zimbabwe have implemented domestic policies to regulate M&As.<sup>77</sup> These policies seek to create a level playing field for both local and foreign firms by offsetting the monopolistic power of foreign firms.<sup>78</sup> In South Africa, there is no formal distinction between cross-border and domestic M&As.<sup>79</sup> Cross-border M&As are therefore subject to screening and approval under the Competition Act in South Africa.

### 1 2 3 2 *Greenfield investment*

A Greenfield investment is typically a horizontal form of investment that involves establishment of a new company, enterprise or business.<sup>80</sup> This form of investment is a significant target of a host nation's promotional efforts because it facilitates creation of new production capacity, employment and transfer of technology.<sup>81</sup> However, on the contrary, a Greenfield investment is said to crowd out the host industry and does not contribute meaningfully to the economic growth of the host country.<sup>82</sup> This is because the profits from Greenfield investment production are not channelled into the host economy, but rather siphoned out of the host country to the investor's home economy.<sup>83</sup> It thus provides to the investor more autonomy and possession of the new enterprise's capital.<sup>84</sup> In Zimbabwe, Greenfield form of FDI is prominent in manufacturing, mining or other physical company related structures where no previous facilities exist.<sup>85</sup> In 2012, the UNCTAD estimated Zimbabwe's Greenfield investment to be US\$5.8 billion.<sup>86</sup> Conversely, in South Africa, Greenfield FDI is relatively uncommon as most international investments are capital-intensive and directed towards existing sectors such as services and manufacturing.<sup>87</sup> According to

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<sup>76</sup> Ernst "The FDI – Employment Link in a Globalising World: The Case of Argentina, Brazil and Mexico." (2005) Employment Strategy Paper 17.

<sup>77</sup> For South Africa, see South African Competition Tribunal "Reasons for Decision in the Massmart/Walmart merger" 2011; Competition Act. For Zimbabwe, see the Competition 7 of Act 1998 (Chapter 14:28) (as amended); *British American Tobacco Zimbabwe (Holding) Limited (BAT) v Cut Rag Processors (Pvt) Limited (Cigarette Distribution case)*.

<sup>78</sup> Ibid.

<sup>79</sup> South Africa Competition Tribunal "Reasons for Decision in the Massmart/Walmart Merger" 2011.

<sup>80</sup> Freenstra and Taylor *International Trade* (2008) 162.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Musarurwa "Zimbabwe Greenfield Projects Stall" *The Herald* (Zimbabwe), 10 July 2012.

<sup>86</sup> UNCTAD World Investment Report 2012.

<sup>87</sup> Wood and Wentworth "FDI in South Africa: Promotion and Protection of Investors... and the Public Interest" *The Trade Beat*, 4 March 2014 <http://www.thetradebeat.com/opinion-analysis/fdi-in-south-african-promotion-and-protection-of-investors-and-the-public-interest> (accessed 01-05-2014).

UNCTAD, the benefits<sup>88</sup> of M&As are lower than the risks of negative effects when compared to Greenfield investment.<sup>89</sup> In the first half of 2013, global Greenfield investment remained at a similar level to 2012, dropping by only 4 percent.<sup>90</sup>

### *1 2 3 3      Brownfield investment*

As opposed to Greenfield investment, this is a vertical form of investment directed towards buying or expansion of an existing local company, enterprise or business.<sup>91</sup> Essentially, a domestic firm is integrated into the foreign parent company or re-domiciled.<sup>92</sup> Brownfield FDI is the purchase of a previously constructed factory or other facility in order to use it for new activity.<sup>93</sup> Globally it accounts for 30 percent of FDI.<sup>94</sup> Be that as it may, it is submitted that in the acquisition of existing domestic business, the benefits of foreign investment must be balanced against possible risks for local employment and production. In addition, broader economic concerns that may arise from a shift in ownership and control of successful local firms are considered.<sup>95</sup>

### *1 2 3 4      Joint venture investment*

Joint venture investment occurs when two or more companies come together to form a third or separate entity and hold agreed portions of the share capital.<sup>96</sup> Each partner thus actively participates in the decision-making and substantially contributes to the assets and operation of the newly formed entity.<sup>97</sup> Joint venture investment is usually formed to reduce financial risks in pursuing a new product or production.<sup>98</sup> This form of investment is dominant in Zimbabwe following the Indigenisation and Economic Empowerment Act (Indigenisation Act).<sup>99</sup> Recently, the Zimbabwe Investment Authority (the Authority) has reserved a number of sectors

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<sup>88</sup> The benefits include production of capital stock, transfer of technology and employment creation, and others. See the UNCTAD World Investment Report 2000.

<sup>89</sup> Ibid.

<sup>90</sup> UNCTAD “Global Investment Trends Monitor: Developing and Transition Economies Absorbed More Than 60 Percent of Global FDI Inflows - A Record Share - in the First Half of 2013” UNCTAD Working Paper (2013) 13.

<sup>91</sup> Freenstra and Taylor 161.

<sup>92</sup> Ibid.

<sup>93</sup> Samuel “The Dark Side of Foreign Direct Investment: A South Africa Perspective” *South Africa Institute of International Affairs Occasional Paper* 167 (2013) 7.

<sup>94</sup> UNCTAD World Investment Report 2013.

<sup>95</sup> Ibid.

<sup>96</sup> Rao and Guru *Joint Ventures in International Business* (2009) 4.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Indigenisation and Economic Empowerment Act 14 of 2007.

of the economy<sup>100</sup> for local investors and any potential foreign investors interested in participating in these reserved sectors must enter into a joint venture with a Zimbabwean citizen. However, foreign investors are allowed to take up to 35 percent shareholding of the venture.<sup>101</sup> An important example of a joint venture in South Africa is the International Automobile Components-Feltex between South Africa-based Feltex and Luxembourg-based IAC. In Zimbabwe, the Anjin Investments enterprise between Zimbabwe-based Matt Bronze Limited and China-based Anhui Foreign Economic Construction Group and the failed Sino-Zimbabwe Diamonds deal between Chinese-investors and the government affiliated Zimbabwe Mining Development Corporation (ZMDC), are among the prominent joint venture investments. Recently the gazetted Joint Ventures Bill seeks to provide for the implementation of joint venture agreements between contracting authorities and counterparties; and establish a set of rules governing public-private procurement.<sup>102</sup>

#### **1 2 4 Distinction between FDI and Foreign Portfolio Investment (FPI)<sup>103</sup>**

Another way to define FDI is to identify what it is not.<sup>104</sup> FDI does not include portfolio investment and trade. Portfolio investment, as opposed to direct investment, is understood as the minority holding of shares, bonds and other securities or equity instruments.<sup>105</sup> It is also known as FPI or indirect investment.<sup>106</sup> The main differences between FDI and FPI lie in the amount or control of the investment, the time period of investment and risk assessment. In terms of amount of investment, FPI constitutes less than 10 percent of the shares of the enterprise or otherwise does not give the portfolio investor the possibility to exercise effective management of the investment.<sup>107</sup> Whereas, FDI constitutes at least 10 percent of the voting power of the enterprise.<sup>108</sup> Thus in FDI an investor directly or indirectly controls the enterprise,

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<sup>100</sup> These reserved economic sectors include the following: agricultural production of food and cash crops; transport (buses, taxis and car hire services); retail and wholesale trade; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts; marketing and distribution. See <http://www.nieeb.co.zw/index.php/sectors/reserved-sectors> (accessed 02-05-2015).

<sup>101</sup> Ibid.

<sup>102</sup> Mandizha “Govt gazettes Joint Ventures Bill” *News Day*, 29 April 2015 <https://www.newsday.co.zw/2015/04/29/govt-gazettes-joint-ventures-bill/> (accessed 29-04-2015).

<sup>103</sup> For a detailed account on the distinction between portfolio investment and foreign direct investment, see Sornarajah 8.

<sup>104</sup> Phelps and Alden (eds) *Foreign Direct Investment and the Global Economy: Corporate and Institutional Dynamics of Global-Localisation* (1999) 46. See also Hymer *The International Operations of National Firms: A Study of Direct Investment* (PhD-thesis, Massachusetts Institute of Technology, 1960) 68I.

<sup>105</sup> Leal-Arcas 167.

<sup>106</sup> Ibid.

<sup>107</sup> Goode *Dictionary of Trade Policy Terms* 5 ed (2007) 336. See also Article 2 of the SADC Model BIT Template.

<sup>108</sup> UNCTAD *Training Manual on Statistics for FDI and the Operations of TNCs* (2009) 35.

whereas in portfolio investment the investor does not control it.<sup>109</sup> In respect of risk assessment, portfolio investors are more likely to accept high levels of risk whilst in direct investment high levels of risk deter the investors.<sup>110</sup> In regard to time period, FPI pursues short-term gains, while FDI seeks a long-term interest in the investment.<sup>111</sup>

### **1 3 RESEARCH PROBLEM**

Trade-restrictive policies are regarded as a significant impediment to the effective protection of foreign investment in developing countries.<sup>112</sup> In addition, investment regulatory regimes of various developing countries are still lagging behind in the protection of FDI.<sup>113</sup> Accordingly, this study seeks to critically interrogate the foreign investment regulation regimes of South Africa and Zimbabwe. For that purpose, the research problem to be addressed is whether the relevant investment laws and related policies serve the purposes for which they were adopted while simultaneously providing FDI with a level of protection consistent with minimum international standards.

### **1 4 OBJECTIVES OF THE STUDY**

The principal objective of this study is to examine and assess the existing investment policy framework of South Africa and Zimbabwe for regulating FDI. It will attempt to identify some shortcomings of the two jurisdictions' investment regimes that undermine the objective of FDI protection.

It is also the goal of this study to explore the norms, standards and/or best practices of the existing international investment frameworks. Consequently, it will examine aspects of the relevant international investment instruments concluded at multilateral, regional and bilateral levels. In the process, the study will assess the established and emerging international standards, if any, of foreign investment protection. It will also ascertain some of the obligations of South Africa and Zimbabwe and the rights of foreign investors in international investment law.

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<sup>109</sup> Hymer (PhD-thesis, Massachusetts Institute of Technology, 1960) 68I.

<sup>110</sup> Leal-Arcas 167.

<sup>111</sup> See generally CUTS Centre for Competition *Investment and Economic Regulation Investment Policy in South Africa –Performance and Perceptions* (2003).

<sup>112</sup> WEF Africa Competitive Report 2013.

<sup>113</sup> Ibid.

Lastly, it is also the objective of this study to make recommendations to the policy-makers both in South Africa and Zimbabwe for strategic refinements of the pertinent laws and related policies in order to protect and promote FDI in their respective countries.

## **1 5 RESEARCH QUESTIONS**

The study will address the following questions:

- Whether South Africa and Zimbabwe's investment regulatory frameworks provide sufficient protection for FDI?
- What are the existing international regulatory regimes of FDI and what norms, standards and/or best practices do these international investment legal mechanisms create? And
- What are the international, regional as well as domestic obligations on South Africa and Zimbabwe in terms of the protection and regulation of foreign investment?

## **1 6 DELIMITATION**

The study will not deal with the entire FDI legal regime of South Africa and Zimbabwe. Rather, it will focus mainly on comparable investment laws and relevant policies of South Africa and Zimbabwe. In particular, the national investment legislations (South Africa's proposed Investment Bill of 2013 and Zimbabwe Investment Authority Act); economic empowerment policies (BEE laws of South Africa and Indigenisation laws of Zimbabwe); land reform and ownership laws; as well as the recognition and enforcement of foreign arbitral awards in both jurisdictions.

Although a periodical overview of FDI inflow trends will be explored, it should be noted that this study will not discuss in detail the relevant economic statistics as the study is mainly focused on the legal protection of FDI. However, this must not be taken to imply that economic statistics connected to FDI inflows will not be referred to at all; where necessary, especially advancing a particular argument they may be referred to.

## **1 7 SIGNIFICANCE OF THE STUDY**

Historically, under colonial domination, the people of South Africa as well as Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation.<sup>114</sup> Given

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<sup>114</sup> Makwiramiti "In The Name of Economic Empowerment: A Case for South Africa and Zimbabwe" 2011 [http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=674:in-the-name-of](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=674:in-the-name-of)

that fact, the need for economic empowerment policies in both jurisdictions emanates from the historical marginalisation of the people in the colonial era.<sup>115</sup> Consequently, there have been significant legislative and policy changes in these countries to address the said past injustices.

In Zimbabwe, the land reform policy was implemented as an effort to redress the imbalances in the land holding system.<sup>116</sup> Though this policy was justified in the public interest, it violated property rights contained in the now defunct Lancaster House Constitution<sup>117</sup> as well as other international and regional instruments.<sup>118</sup> This policy was systematically accommodated in the design and content of relevant laws and policies through constitutional amendments. The reason was to give the government a right to acquire land from foreign owners without compensation.<sup>119</sup> In addition, in 2007, the Indigenisation Act was passed into law and it mandates all companies with a capital share above US\$500 000 operating in Zimbabwe to cede 51 percent of their shares or interest therein to indigenous Zimbabweans.<sup>120</sup>

Similarly, in 2003, South Africa introduced the Black Economic Empowerment (BEE) Act<sup>121</sup> as an attempt to address the exclusion of black South Africans from the main stream economic activities during under the apartheid era.<sup>122</sup> The aim of the BEE programme is to moderate economic imbalances among and within races at the same time increasing black management and control of business in the economy.<sup>123</sup> Another important legislative measure in South Africa is the proposed Investment Bill.

Be that as it may, the legislative and policy changes discussed above have created increasing uncertainty in the protection of FDI.<sup>124</sup> It is submitted that these policies directly and indirectly affect the existing level of FDI protection. For instance, among the Investment Bill's problematic provisions are the reduction in compensation for expropriation and removal of

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economic-empowermentacaseforsouthafricaandzimbabwe&catid=87:africanfinanceaeconomy&Itemid=294 (accessed 06-06-2014).

<sup>115</sup> Ibid.

<sup>116</sup> See the Communal Land Act 20 of 1982 (Chapter 20:04) (as amended) and the Land Acquisition Act 3 of 1992 (Chapter 20:10) (as amended).

<sup>117</sup> Chapter 3 of the Bill of Rights of the Lancaster House Constitution, 1979.

<sup>118</sup> Article 17 of the Universal Declaration on Human Rights (UDHR), 1948 and Article 14 African Charter on Human and Peoples' Rights (ACHPR), 1981.

<sup>119</sup> See the Constitution of Zimbabwe Amendment (No. 11) of 1990, Constitution of Zimbabwe Amendment (No. 12) of 1993 and Constitution of Zimbabwe Amendment (No. 14) of 1994.

<sup>120</sup> Section 3 of the Indigenisation Act.

<sup>121</sup> Black Economic Empowerment Act of 2003.

<sup>122</sup> Makwiramiti "In The Name of Economic Empowerment: A Case for South Africa and Zimbabwe" 2011.

<sup>123</sup> DTI, South Africa "Rationale for BEE" 2008 <http://www.thedti.gov.za> (accessed 06-06-2014).

<sup>124</sup> Makwiramiti "In The Name of Economic Empowerment: A Case for South Africa and Zimbabwe" 2011.

government's obligation to submit to international arbitration.<sup>125</sup> In Zimbabwe, despite the said relevant laws and policies aimed at redressing the economic imbalances of the past, they unintentionally deter foreign investors.<sup>126</sup> It is not the purpose of this study to condemn or oppose these laws and policies *per se*. Rather, it will suggest that these laws and policies should be implemented in a rational and fair manner that compliments foreign investment protection.

The significance of this study lies in its attempt to examine the FDI regime resulting from the said policy and legislative changes with a view to determining their compliance with the applicable international legal standards. Its crux further lies in its attempt to assess the impact of these changes on the quality of legal protection of FDI in the two jurisdictions. The study will propose possible refinements to the relevant existing investment laws and policies in South Africa and Zimbabwe that could enhance FDI protection.

## **1 8 RESEARCH METHODOLOGY**

This is a desktop-based qualitative study. It will utilise both primary and secondary sources. Primary materials will be in the form of international instruments, national legislations and decided international and national case law on foreign investment. Secondary sources will include textbooks, journal articles, reports, newspaper articles, critical reviews and internet sources pertinent to the subject of foreign investment regulation.

## **1 9 CHAPTER OUTLINE**

This study is divided into six Chapters.

Chapter 1 provides a succinct overview of the nature and regulation of FDI as well as related issues. It discusses the definition of the concept of FDI from various IIAs, international organisations and jurisprudence in the interpretation of foreign investment given that it is not defined in any international instrument. This Chapter also discusses the common types of FDI. It will outline the research problem, significance, objectives, methodology and delimitation.

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<sup>125</sup> See Le Roux "South Africa's Revocation of its Bilateral Investment Treaties: Beware of Strangers Bringing Money, Especially if you need it" 2015 *South African Institute of International Affairs* and South African Institute of International Affairs "FDI in South Africa: Promotion and Protection of Investors... and the Public Interest" 2014.

<sup>126</sup> Magure "Foreign Investment, Black Economic Empowerment and Militarised Patronage Politics in Zimbabwe" 2012 *Journal of Contemporary African Studies* 67-82. See also Chinamasa *The Human Right to Land in Zimbabwe: The Legal and Extra-legal Resettlement Processes* (LLM-dissertation, Makerere University, 2001) Chapter 1.



Chapter 2 will discuss the historical background of FDI and its protection. It will also discuss foreign investment as a necessity for developing host countries. This Chapter will conclude by discussing the risks and challenges faced by FDI pre and post establishment in host states.

Chapter 3 will explore the existing international investment legal framework with a focus on identifying the international norms and minimum standards on FDI protection. Those international minimum standards will be discussed as standards for assessing domestic investment laws and related policies.

Chapter 4 will critically examine selected investment laws and related policies of South Africa with regard to the regulation and protection of FDI. These laws and policies include the Promotion and Protection of Investment Bill, BEE laws, land reform policies and rules pertaining to recognition and enforcement of foreign arbitral awards.

Chapter 5 will critically examine selected investment laws and related policies of Zimbabwe with regard to the protection and regulation of FDI. These laws and policies include the Zimbabwe Investment Authority Act, indigenisation laws, land reform and ownership policies as well as recognition and enforcement of foreign arbitral awards.

Lastly, Chapter 6 will sum up the key issues and findings of the study in relation to the objectives of the study. It will make recommendations to the policy-makers in South Africa and Zimbabwe for policy refinements and modernisation of their investment policy framework in line with international norms and standards.

## **1 10    REFERENCING STYLE**

The referencing style employed is that of *Speculum Juris*, an accredited Law journal published by the Nelson R. Mandela School of Law, University of Fort Hare. The study will not have any intellectual property implications in terms of copyright law as all works used will be acknowledged.

## **1 11    ETHICAL IMPLICATIONS OF THE STUDY**

This study will not involve any ethical implications as questionnaires or interviews will not form part of the study.

## CHAPTER 2

### Historical origin of foreign direct investment protection

#### 2.1 INTRODUCTION

This Chapter is divided into three parts. The first part briefly explores the historical evolution of Foreign Direct Investment (FDI) as well as its regulation and protection. The second part makes a case that foreign investment is, in fact, a necessity for developing countries enabling sustainable economic growth and development, employment creation, technology advancement and infrastructure improvement. To that end, the second part explores major socio-economic benefits of FDI. Lastly, part three analyses the subject of FDI regulation from economic, legal, development and political perspectives in order to ground a discussion as to why there is a need for foreign investment protection in the new millennium. Significantly, this chapter adopts an interdisciplinary approach to the analysis of law, international political economy and international relations, hence, slightly departs from a textual-formalistic reading and interpretation of law.

#### 2.2 HISTORICAL ORIGIN OF FDI PROTECTION

The origin and legal protection of FDI has a long history.<sup>127</sup> Providing a concise but reasonably comprehensive account of the historical origin of foreign investment protection is thus a difficult task. This is because there are so many events that occurred as a result of FDI evolution. The existence of such events has given rise to a large body of jurisprudence, particularly of a legal nature.<sup>128</sup> The approach followed by this Chapter is to describe the topical events that established the basic framework of FDI legal protection. In this regard, a brief reference will be made to the legal protection of foreign investment pre-Havana Charter, under the Havana Charter and under the World Trade Organisation (WTO) framework.

The development of the foreign investment field was stimulated over time by a number of considerations including, among others, cross-border capital transfers or international activities of Multinational Companies (MNCs).<sup>129</sup> The historical evolution of foreign investment was also ascribed to MNCs' exploration for new markets (market-seeking investment), cheap

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<sup>127</sup> Schefer *International Investment Law: Text, Cases and Materials* (2013) 363.

<sup>128</sup> Ibid.

<sup>129</sup> See Wilkins "The History of the Multinational Enterprises" in Rugman (ed) *The Oxford Handbook of International Business* 2 ed (2008) 5 and Buthe and Milner "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?" 2008 52 *American Journal of Political Science* 741.

labour and low production costs, exploitation of natural resources as well as the need to secure sources of supply of raw materials, among others.<sup>130</sup> Though scholarly attention to investment law was in abeyance for much of the 20<sup>th</sup> century, there are centuries of development that have gone into investment law and a millennium during which laws pertinent to foreign investment activities have existed.<sup>131</sup> Bishop, Crawford and Reisman note the probability of investment in ancient (pharaohs) Egypt, the Mediterranean empires as well as the ancient empires of what is presently China, India and the Middle East.<sup>132</sup> In the 1600s, the British East India Company and the Dutch East India Company were identified as the first enterprises to invest abroad<sup>133</sup> followed by the American plants set up by Colt Firearms and Ford in the 1700s.<sup>134</sup> In addition, in the 1800s, the Scottish Singer Sewing Machines ventured abroad and expanded rapidly due to low labour costs and favourable foreign investment policies.<sup>135</sup> In the early 19<sup>th</sup> century, portfolio investment<sup>136</sup> was more significant than direct investment, from an economic and political point of view.<sup>137</sup> At the time, FDI was regarded as an alternative to international trade in global production.<sup>138</sup> In the mid-19<sup>th</sup> century, investment became increasingly important and took its present form.<sup>139</sup> This was stimulated by a rapidly-increasing rate of technological invention and the growth of corporations and other forms of business association as members as raising, accumulating and deploying capital.<sup>140</sup> It is important to note that in the early 19<sup>th</sup> century, the existing FDI was mainly concerned with the exploitation of natural resources such

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<sup>130</sup> Ibid.

<sup>131</sup> Schefer 5.

<sup>132</sup> Bishop, Crawford and Reisman (eds) *Foreign Investment Disputes, Cases, Materials and Commentary* (2005) 2. For a brief history of foreign investment, see Bishop *et al* 2-7.

<sup>133</sup> Ibid. In the 1600s and 1700s, the Dutch East India Company and British East India Company invested in several parts of Asia, the Indies and America. Ricken and Malcottsis *The Competitive Advantage of Reigns and Nations: Technology Transfer through Foreign Direct Investment* (2011) 47.

<sup>134</sup> Adewale *Policy Determinants for FDIs in South Africa* (Master of Commerce-thesis, University of South Africa, 2008) 24.

<sup>135</sup> Ibid.

<sup>136</sup> Portfolio investment occurs in many ways including securities funds or private equity and also refers to loans and the floating of government bonds. See Leal-Arcas *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (2010) 167.

<sup>137</sup> Riesenfeld "Foreign Investments" in Biglieri and Prati (eds) *Encyclopedia of Public International Law* (1985) 246. See also Nurse "Period Analysis and Inventory Cycles" *Oxford Economic Papers* 6 (1954) 203.

<sup>138</sup> For the complementarity and substitutability of FDI and international trade, see generally Fontagné "Foreign Direct Investment and International Trade: Complements or Substitutes?" *Directorate for Science, Technology and Industry Working Papers* (1999).

<sup>139</sup> Bishop *et al* 2. During this period FDI or MNC's activities became of great significance in international production surpassing growth in international trade. Dent *The European Economy: The Global Context* (1997) 234.

<sup>140</sup> Bishop *et al* 2. See also Schefer 5.

as minerals and plantations and, occasionally, operation of public utilities.<sup>141</sup> Immediately thereafter FDI was targeted towards infrastructure.<sup>142</sup>

### **2 2 1 Foreign investment protection pre-Havana Charter**

The historical development of laws protecting investors mainly relies on looking at how the law treated foreigners.<sup>143</sup> The early stages of FDI witnessed low levels of investor protection and a significant absence of investment-related regulation and policy flexibility.<sup>144</sup> State investment laws and policies were restrictive towards foreign investment.<sup>145</sup> These restrictions included limits on foreign ownership, performance requirements on exports, technology transfer or local procurement, insistence on joint ventures with local firms as well as barriers to brownfield investments through mergers and acquisitions.<sup>146</sup> For instance, in the 1880s, the United States (US) government authorised restrictions on foreign investment in land and mining.<sup>147</sup> The development of foreign investment protection was attributed to the consequences of the conflict between MNCs as foreign investors and host countries.<sup>148</sup> Thus, on the one hand, foreign investors sought ownership of FDI, no restrictions on profit repatriation or capital controls, adequate protection on technology transfer, and well-defined property rights.<sup>149</sup> Whilst on the other hand, host countries sought to maximise benefits to their economies through the retention of MNCs' profits within the host economy.<sup>150</sup> The development of foreign investment regulation was attributed to the fear that international investors' domination of host country's economic sectors would diminish domestic firms' competitiveness.<sup>151</sup> Notwithstanding national sovereignty or autonomy, foreign investors were considered as a threat to the domestic firms since domestic firms were unable to compete against the foreign firms with massive capital expenditures.<sup>152</sup>

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<sup>141</sup> Leal-Arcas 181.

<sup>142</sup> Bishop *et al* 2.

<sup>143</sup> Tiburcio *The Human Rights of Aliens under International and Comparative Law* (2001) 23.

<sup>144</sup> Haslam "The Evolution of Foreign Direct Investment Regime in the Americas" 2010 *Third World Quarterly* 1187.

<sup>145</sup> Wilkins *The History of Foreign Investment in the United States to 1914* (1989) 45.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Goldberg and Kindleberger "Toward a GATT for Investment: A Proposal for Supervision of the International Corporation" 1970 *Law and Policy in International Business* 295.

<sup>149</sup> Correa and Kumar *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (2003) xi.

<sup>150</sup> Ibid.

<sup>151</sup> Developing countries viewed FDI from their colonial rulers as a threat to new found political independence and was seen as an instrument for perpetuating the economic dependence of the third world. See Hansen and Aranda "An Emerging International Framework for Transnational Corporations" 1990/1991 *Fordham International Law Journal* 881.

<sup>152</sup> Ibid.

During this period, FDI protection was only to be found in municipal laws except for cases where international law had to address investment issues.<sup>153</sup> The *Barcelona Traction case*<sup>154</sup> reflected the absence of international investment law in this era. In this case the ICJ observed that when a state admitted foreign investments into its territory it was bound to extend legal protection to them.<sup>155</sup> The ICJ also stated that in the field diplomatic protection, international law was in continuous evolution and it had to refer to those rules generally accepted by municipal systems.<sup>156</sup> Investor-state disputes were resolved under relevant domestic laws, regulations, administrative decrees and others.<sup>157</sup> International law was applied to investment issues in the treatment of foreigners' property by the host state, the international responsibility of states for acts in violation of international law and the exercise of diplomatic protection by an investor's national state.<sup>158</sup> In 1907, an initial attempt was made to negotiate investment rules on a global level through the Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.<sup>159</sup> The Drago-Porter Convention restricted the use of armed force for the recovery of debt.<sup>160</sup> In addition, this era was characterised by a series of progressive nationalisation and expropriation of foreign-owned property as well as discrimination against foreign investors. In respect of discrimination, host states treated domestic investors more favourably than foreign investors.<sup>161</sup>

During the first half of the 20<sup>th</sup> century, issues involving FDI became more complex to solve on the basis of international law rules due to changes in host governments' measures affecting property.<sup>162</sup> Foreign commercial property became the subject of expropriation and nationalisation.<sup>163</sup> Notable here are the historical events of the Mexican revolution, land reform and nationalisation as well as the Central and Eastern European land reform. From the period 1934 to 1940, the Mexican government authorised a land redistribution policy through which

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<sup>153</sup> Leal-Arcas 181.

<sup>154</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Second Phase*, International Court of Justice (ICJ), 5 February 1970 (hereafter "*Barcelona Traction case*"). See also Sonarajah *International Law on Foreign Investment* 2 ed (2004) 213.

<sup>155</sup> *Barcelona Traction case* paras 32-201.

<sup>156</sup> Ibid.

<sup>157</sup> Leal-Arcas 181.

<sup>158</sup> Ibid.

<sup>159</sup> The Hague Convention II of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts was an international Convention adopted by the Second International Hague Conference October 1907 (hereafter "Drago-Porter Convention").

<sup>160</sup> The Drago-Porter Convention prohibited the recourse to armed force for the recovery of contract debts claimed from the government of one state by another government on behalf of its nationals.

<sup>161</sup> See generally Donald *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955).

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

foreign-owned land was nationalised and expropriated.<sup>164</sup> Mexico also expropriated all foreign oil companies in its territory.<sup>165</sup> The US-Mexican Agrarian dispute saw the establishment of the Hull Rule.<sup>166</sup> In terms of this rule, “no government is entitled to expropriate private property, for whatever purpose, without provisions for prompt, adequate and effective payment therefor.”<sup>167</sup> Similarly, after the Second World War (WW II) the indigenous people of the Central and Eastern European countries demanded the nationalisation and expropriation of all agrarian land and properties owned by foreign nationals.<sup>168</sup>

## 2 2 2 Position under the Havana Charter

The end of WW II marked the beginning of international initiatives to protect foreign investment.<sup>169</sup> It is noteworthy that following WW II, property rights were enshrined in the Universal Declaration of Human Rights,<sup>170</sup> the European Convention on Human Rights<sup>171</sup> and its protocols,<sup>172</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>173</sup> the American Human Rights Convention<sup>174</sup> as well as in the constitutions of many countries. The Havana Charter<sup>175</sup> of the now defunct International Trade Organisation contained provisions on the treatment of foreign investment but mainly dealt with international trade aspects.

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<sup>164</sup> Dwyer “Diplomatic Weapons of the Weak: Mexican Policymaking during the U.S Mexican Agrarian Dispute, 1934” 2002 *Diplomatic History* 375.

<sup>165</sup> Ibid.

<sup>166</sup> Dwyer *US-Mexican Agrarian Dispute: The Expropriation of American-Owned Rural Land in Postrevolutionary Mexico* (2008). See also Smith “The Agrarian Dispute: The Expropriation of American-Owned Rural Land in Postrevolutionary Mexico (review)” 2010 *Journal of World History* 347.

<sup>167</sup> Guzman “Explaining the Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties that Hunt Them?” 1998 *Virginia Journal of International Law* 639.

<sup>168</sup> Hungary “Land Restitutions and Compensation Procedures in Central Eastern Europe” 2002 FIG Commission 7 Annual Meeting [http://www.fig.net/commission7/pretori\\_2007/papers/sym\\_lr\\_pretoria\\_paper\\_ossko.pdf](http://www.fig.net/commission7/pretori_2007/papers/sym_lr_pretoria_paper_ossko.pdf) (accessed 19-04-2014).

<sup>169</sup> Leal-Arcas 183.

<sup>170</sup> In particular, Articles 2 and 17 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (hereafter UDHR). The UDHR was proclaimed by the United Nations General Assembly in Paris on December 10, 1948 by the General Assembly Resolution 217 A (III) as a common standard of achievements for all peoples and all nations and it sets out fundamental human rights to be universally protected.

<sup>171</sup> Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the Council of Europe on November 4, 1950 to guard fundamental freedoms and human rights in Europe.

<sup>172</sup> See, for example, Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Paris, 20.III.1952.

<sup>173</sup> Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series 993 3 (hereafter ICESCR). The ICESCR was adopted by the by General Assembly Resolution 2200A (XXI) on December 16, 1966 and entered into force on January 3, 1976.

<sup>174</sup> In particular, Article 21 of the American Convention on Human Rights "Pact of San Jose, Costa Rica" OAS Treaty Series No. 36; 1144 U.N.T.S 123; 9 ILM 99 (1969) (hereafter the “ACHR”). The ACHR was signed by many countries on November 22, 1969 in San Jose, Costa Rica.

<sup>175</sup> The Havana Charter, formerly the Final Act of the United Nations Conference on Trade and Employment was signed on March 24, 1948. See Havana Charter for an International Trade Organisation, 24 March 1948, UN Conference on Trade and Employment, UN.DOC.E/CONF.2/78 Sale No. 1948.II.D.4. For more information on the Havana Charter, see Newcombe and Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 19.

Articles 11 and 12 of the Havana Charter addressed aspects of FDI protection. In particular, Article 11 (1) (b) of the Charter provided that “no member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other members in the enterprise, skills, capital, arts or technology which they have supplied.” Article 12 of the Charter stated that members “...undertake to give due regard to the desirability of avoiding discrimination as between foreign investments.” There was a conflict between a US proposal for the protection of foreign investors and developing countries’ proposal for the inclusion of their right to expropriate foreign investment.<sup>176</sup> Consequently, the period immediately after WW II saw massive nationalisation and expropriation of foreign-owned properties.<sup>177</sup> For instance, the case of *Saudi Arabia v. Arabian American Oil Company (Aramco)*<sup>178</sup> and the so-called “*Libyan cases*” which originated from the nationalisation of foreign investments in the oil sector after 1971.

In addition, the *Anglo-Iranian Oil Co case (United Kingdom v. Iran)*<sup>179</sup> was a dispute concerning the expropriation of oil production in 1951. During this period, fears of foreign investment security heightened because of the decolonisation of the developing world and the spread of communism.<sup>180</sup> Nevertheless, provisions on foreign commercial property in the failed Havana Charter were incorporated into the General Agreement on Tariffs and Trade (GATT).<sup>181</sup> In 1947, world leaders representing 44 countries converged at Bretton Woods to establish the GATT, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) also called the World Bank. In 1955, the GATT contracting parties adopted a Resolution on International Investment for Economic Development<sup>182</sup> in which they, *inter alia*, urged countries to conclude bilateral agreements to provide protection and security for foreign investment.<sup>183</sup>

In the 1960s and early 1970s, there were several international initiatives which had a profound influence on the development of international investment law. Despite substantial attempts by

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<sup>176</sup> Wilcox *A Charter for World Trade* 145-146 (1949, reprinted 1972).

<sup>177</sup> Fatouros 1996 OECD Document 49. This led to the creation of a “New International Economic Order” a campaign by developing countries to control MNCs, see Goode *Dictionary of Trade Policy* 5 ed (2007) 301.

<sup>178</sup> *Saudi Arabia v. Arabian American Oil Company (Aramco)*, (ILM 27 (1958)). See also Lowenfeld *International Economic Law* 2 ed (2008) 475-481.

<sup>179</sup> *Anglo-Iranian Oil Co. (United Kingdom vs. Iran)*, ICJ Reports 1952. Other notable events are the expropriation of Lillamco’s concessions in Libya in 1955 and the nationalisation of the Suez by Egypt in 1966.

<sup>180</sup> Lauterpatcht “International Law and Private Foreign Investment” 1997 *Indiana Journal Global Legal Studies* 266.

<sup>181</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>182</sup> Resolution on International Investment for Economic Development, 1955.

<sup>183</sup> WTO “Trade and Investment: Agreement on Trade Related Investment Measures” [https://www.wto.org/english/tratop\\_e/invest\\_e/invest\\_info\\_e.htm](https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm) (accessed 17-05-2014).

learned societies and individuals to codify rules which govern the international responsibility of the host state,<sup>184</sup> the final Draft Convention on the International Responsibility of States for Injuries to Aliens was only published in 1961 by Harvard Law School.<sup>185</sup> The 1961 Draft Convention had a significant effect on the development of international investment legal principles.<sup>186</sup> In 1962, the United Nations General Assembly (GA) adopted Resolution 1803 (XVII) labelled Permanent Sovereignty over Natural Resources, recognising the right of states to expropriate investments in their natural resources, provided “appropriate compensation” was paid to the foreign investors whose property was nationalised.<sup>187</sup> Shortly thereafter the provision was repeated in subsequent GA Resolutions though slightly amended, particularly the payment of compensation requirement.<sup>188</sup> There is a general consensus that paragraph 4 of Resolution 1803 (XVII) constitutes customary international law.<sup>189</sup>

Moreover, in 1965, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) was adopted and came into effect in 1966.<sup>190</sup> Article 1 (1) of the Washington Convention created the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution which facilitates resolution of investment disputes between international investors and host countries themselves.<sup>191</sup> In 1967, the OECD had approved the Draft Convention on the Protection of Foreign Property. Articles 1 (a) and 3 of the Draft Convention reflected minimum

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<sup>184</sup> For a literature review of the attempts to codify rules on international responsibility, see Rosenne “Introduction” in International Law Commission (ed) *The International Law Commission's Draft Articles on State Responsibility* (1991). See also First Report on State Responsibility by R Ago, Special Rapporteur, *Review of Previous Work on Codification of the Topic of the International Responsibility of States* (May 1969) A/CN.4/217 and Corr.1 and Add.1 Chapter 1 and International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries (2002).

<sup>185</sup> See Harvard Law School “Draft Convention on the International Responsibility of States for Injuries to Aliens” 1961 55 *American Journal of International Law* 548-584.

<sup>186</sup> Bishop *et al* 5.

<sup>187</sup> Paragraph 4 of the GA Res. 1803 (XVII) 1-5, UN Documents A/RES/1803), (December 14, 1962).

<sup>188</sup> GA Res 3171, UN GAOR, 28<sup>th</sup> Sess. Supp. No. 30, UN. Doc. A/9559 (1974), (1974) 13 ILM 328; GA Res. 3201, UN GAOR, 29<sup>th</sup> Sess. Supp. No. 1, UN Doc. A/9550 (1974), (1974) 13 ILM 715 (Declaration on the Establishment of a New International Economic Order); GA Res. 3281, UN GAOR, 29<sup>th</sup> Sess. Supp. No.1 UN. Doc. A/9631 (1974), (1975) 14 ILM 251 (Charter of the Economic Rights and Duties of States).

<sup>189</sup> See Weston ““Constructive Takings under International Law: A Modest Foray into the Problem of ‘Creeping Expropriation’” 1975 16 *Virginia Journal of International Law* 103; Dolzer “Expropriation” in Bernhardt (ed) *Encyclopaedia of Public International Law* (1985) 214; Dolzer “Indirect Expropriation of Alien Property” 1986 1 *ICSID Review* 41; Asante “International Law and Foreign Investment: A Reappraisal” 1988 37 *International and Comparative Law Quarterly* 588; Sornarajah (1994); and Higgins *The Taking of Property by the State: Recent Developments in International Law* (1982). Customary international law as represented by paragraph 4 of Resolution 1803 (XVII) is discussed in Chapter 3.

<sup>190</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 U.N.T.S 159 / (1991) ATS 23 / 4 ILM 532 (1965) / UKTS 25 (1967) (hereafter the “Washington Convention”) was adopted by the World Bank on March 18, 1965 and came into effect on October 14, 1966.

<sup>191</sup> Article 1 (2) of the Washington Convention.



standards of investor treatment.<sup>192</sup> However, this OECD Draft Convention did not receive sufficient support from the OECD countries.<sup>193</sup> Additionally, in 1974 the United Nations Economic and Social Council adopted the Transnational Corporations Code of Conduct targeted towards addressing Transnational Corporations' activities. Similar to the OECD Draft Convention it suffered strong criticism from developed countries.<sup>194</sup>

Post WW II, Bilateral Investment Treaties (BITs) became the most significant source of investment protection laws.<sup>195</sup> BITs were typically between developed and developing countries which established the rights and protection for investors as well as a system to enforce those rights.<sup>196</sup> In addition, these treaties reinforced international principles and practices regarding FDI.<sup>197</sup> These investment treaties offered foreign investors higher standards of legal protection and guarantees for foreign investments than those available under national and international investment laws.<sup>198</sup> A range of BITs under the auspices of the IMF and the World Bank were enacted in order to provide protection for foreign investors.<sup>199</sup> BITs later spread to Eastern and Central Europe, Asia, Africa and South America as countries in these regions were in pursuit of foreign capital.

### 2 2 3 Investment protection under the WTO

Prior to the Uruguay Round investment-related issues received minimal attention.<sup>200</sup> Thus GATT 1947 did not clearly address investment issues. However, despite the marginalisation of investment issues in the GATT, the case of *USA v. Canada Foreign International Review*

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<sup>192</sup> See also Lowenfeld *International Economic Law* 2 ed (2008) 475-481.

<sup>193</sup> UNCTC "Bilateral Investment Treaties" 1988 United Nations (Doc. No. ST/CTC/65) New York 7.

<sup>194</sup> See generally Norbert (ed) *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980).

<sup>195</sup> Leal-Arcas 187. See also Buthe and Milner *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis* (2009) and Buthe and Milner "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis" in Sauvant and Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 171.

<sup>196</sup> See also Buthe and Milner "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?" 2008 52 *American Journal of Political Science* 741-762 and Buthe and Milner "Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis" in Sauvant and Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 172. Buthe and Milner maintain that, after WW II investment protection rules were developed to protect investors from expropriation of property by host states.

<sup>197</sup> Schultz, in a transmission letter to the President, argued that BITs were designed "to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct investment." Schultz "Transmission Letter to the President Recommending Transmission of the US-Turkey BIT, 1985 <http://ankara.uembassy.gov/IRC/treaty/1985BIT.HTM> (accessed 09-06-2014).

<sup>198</sup> Leal-Arcas 187.

<sup>199</sup> Haslam 2010 *Third World Quarterly* 1187.

<sup>200</sup> Rugman "New Rules of International Investment: The Case of a Multilateral Agreement on Investment (MAI) at the WTO" in Milner and Read (eds) *Trade Liberalisation, Competition and the WTO* (2002) 176.

*Act (FIRA)* arose.<sup>201</sup> In this case, the US argued, among other issues, that Canada's requirements under the FIRA which obliges foreign investors subject to the Act to purchase goods of Canadian origin in preference to imported goods or in specified amounts or proportions, or to purchase goods from Canadian sources and to manufacture in Canada goods which could be imported were inconsistent with Articles III (4), III (5), XI and XVII (1) (c) of the GATT.<sup>202</sup> The GATT Panel found that Canada's practice of local content requirements was inconsistent with GATT Article III: 4 on National Treatment (NT).<sup>203</sup> The *FIRA* case confirmed that the existing obligations under the GATT were applicable to requirements imposed by governments in an investment context in so far as such requirements discriminated between imported and domestic goods.<sup>204</sup>

During the Uruguay Round negotiations (1986-1994), the US proposed the application of NT and Most Favoured Nation (MFN) principles to foreign investment.<sup>205</sup> The proposal received strong support from developed countries, but robust opposition from developing countries.<sup>206</sup> Despite these conflicts, it is worth mentioning that the Uruguay Round gave birth to the Agreement on Trade-Related Investment Measures (TRIMs)<sup>207</sup> and the General Agreement on Trade in Service (GATS)<sup>208</sup> in the WTO context. It is important to note that the WTO does not directly deal with investment. Rather, foreign investment is negotiated to a certain extent in the WTO Agreements in the context of the GATT,<sup>209</sup> TRIMs Agreement,<sup>210</sup> GATS Agreement<sup>211</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).<sup>212</sup> The GATS is not an investment agreement *per se*, but covers investment in the

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<sup>201</sup> *Canada - Administration of the Foreign Investment Review Act (FIRA)*, Report of the Panel adopted on 7 February 1984 (L/5504 - 30S/140).

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid* paras 5.4 - 5.12.

<sup>204</sup> WTO "Trade and Investment: Agreement on Trade Related Investment Measures".

<sup>205</sup> Amarasinha and Kokott "Multilateral Investment Rules" in Muchlinski, Ortino and Schreuer (eds) *The Oxford Handbook of International Investment Law* (2008) 125.

<sup>206</sup> *Ibid.*

<sup>207</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S 186 (hereafter "TRIMs Agreement").

<sup>208</sup> General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S 183, 33 ILM 1167 (1994) (hereafter "GATS").

<sup>209</sup> Article I and III of the GATT, read together with *Canada - Administration of the Foreign Investment Review Act (FIRA)*, Report of the Panel adopted on 7 February 1984 (L/5504 - 30S/140).

<sup>210</sup> TRIMs are a subset of the incentives and regulations designed to influence FDI, see the Illustrative List in the Annex of TRIMs. See also *Canada - FIRA* case; Appellate Body Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, DSR 2002:V, 1821

<sup>211</sup> Article II and XVII of the GATS Agreement.

<sup>212</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1 C, Legal Instruments - Results Of The Uruguay Round Vol. 31, 33 ILM 1197 (1994) (hereafter "TRIPs Agreement"). TRIPs Agreement encourages investors to undertake

services trade context. Notably, Article 1 (2) of GATS differentiates trade in services into four modes: Mode 1 deals with cross-border supply of a service; Mode 2 provision implies the movement of the consumer to the location of the supplier; Mode 3 concerns services sold in the territory of a member by entities that have established a presence there but originate in the territory of another member; and Mode 4 deals with provision of services requiring the temporary movement of natural persons. Article 1 of the TRIMs Agreement explicitly states that the Agreement “applies only to investment measures related to trade in goods.” In 1995, the US pushed for the adoption of a Multilateral Agreement on Investment (MAI) Draft within the OECD framework.<sup>213</sup> The MAI was intended to ensure a comprehensive, uniform and systematic protection and regulation of investment at the international level.<sup>214</sup> Following the international Non-Governmental Organisations (NGOs) campaign against the MAI, it did not come into existence.<sup>215</sup> The TRIMs reaffirmed some of the *FIRA* case arguments and the GATS reiterated a number of issues on the agenda of the MAI.<sup>216</sup> Current foreign investment protection rules and norms are to be found in customary international law, soft law, and bilateral, regional and international investment agreements. The contemporary international investment protection regime will be discussed in Chapter 3 of this study.

## 2.3 FDI AS A NECESSITY

Research on the effects of FDI has produced contradictory results.<sup>217</sup> Some scholars have shown that FDI spurs economic growth in the host countries while others show no such

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projects focusing on technology distribution rather than local production, see Smarzynska “Composition of Foreign Direct Investment and Protection of Intellectual Property Rights: Evidence from Transition Economies” (2002) World Bank Policy Research Working Paper 2786.

<sup>213</sup> Salacuse “Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain” in Horn (ed) *Arbitrating Foreign Investment Disputes* (2004) 51.

<sup>214</sup> Ibid.

<sup>215</sup> The campaign was undertaken by a large coalition of international NGOs and developing countries’ governments protesting against the negotiations of the MAI. These international NGOs and governments feared that the MAI would give the foreign investors power to directly challenge government policies. See Khor “NGOs in OECD Countries Protest against MAI” <http://www.twinside.org.sg/title/oecd-cn.htm> (accessed 19-05-2014). For more information on the reasons why the MAI failed see Muchlinski “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?” 2000 *International Law* 1033.

<sup>216</sup> See generally Wallach *Public Citizen Pocket Trade Lawyer: The Alphabet Soup of Globalisation* (2005).

<sup>217</sup> For surveys of the literature on FDI spillovers, see generally Farole and Winkler *Making Foreign Direct Investment Work for Sub-Saharan Africa: Local Spillovers and Competitiveness in Global Value Chains* (2014); Colen, Maertens and Swinnen “Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence” in De Schutter, Swinnen and Wouters (eds) *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (2013); Moran, Graham and Blomstrom (eds) *Does Foreign Direct Investment Promote Development?* (2005); and Blomstrom and Kotto “Multinational Corporations and Spillovers” 1998 12 *Journal of Economic Surveys* 247-277.

effect.<sup>218</sup> On the one hand, the substantial foreign ownership gives rise to concerns about the loss of sovereignty and compromise over national security.<sup>219</sup> The controversies over FDI revolve around its substantial environmental damage and negative impact on working conditions.<sup>220</sup> For example, in Namibia, Ramatex investment had adverse effects on working conditions.<sup>221</sup> On the other hand, FDI has developmental impact on the host economy such as employment creation,<sup>222</sup> economic growth and development,<sup>223</sup> advanced technology transfer,<sup>224</sup> managerial skills<sup>225</sup> and national competitiveness.<sup>226</sup> It is these and other reasons that FDI is much needed in emerging economies such as South Africa and Zimbabwe.<sup>227</sup>

It is submitted that the shortcomings of FDI are exceeded by its developmental effects. The approach followed in this study is to describe the developmental impacts of FDI. To that effect, an account of developmental and growth impacts of FDI is provided. It is noteworthy that the objectives of the SADC Model BIT, SADC Finance and Investment Protocol (FIP) and other SADC instruments aim to ensure that FDI contributes to the “sustainable development” of the SADC region. The opportunity to stimulate growth and development through FDI in Sub-Saharan Africa (SSA) has been limited, perhaps due to various determinants of FDI

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<sup>218</sup> See Lipsey and Sjöholm “The Impact of Inward FDI on Host Countries: Why Such Different Answers?” in Moran, Graham and Blostrom (eds) *Does Foreign Direct Investment Promote Development?* (2005) 23-44 and Buthe and Milner “Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis” in Sauvant and Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 171.

<sup>219</sup> Buthe and Milner “Bilateral Treaties and Foreign Direct Investment: A Political Analysis” in Sauvant and Sachs (eds) *The Effect of Treaties on Foreign Direct Investment: Bilateral Treaties, Double Taxation Treaties, and Investment Flows* (2009). See also Leal-Arcas 178; Moosa *Foreign Direct Investment: Theory, Evidence and Practice* (2002) 3.

<sup>220</sup> Herman, Chisholm and Leavell “FDI and the Effects on Society” *Proceedings of the Academy for Studies in International Business* (2004) 4.

<sup>221</sup> Such adverse effects include, among others, forced pregnancy test for women applicants, non-payment for workers on sick leave; very low wages and no benefits; insufficient health and safety measures; no compensation in accidents; abuse by supervisors; open hostility towards trade unions, see Gaucho “Globalisation and its Victims: The Case of the Malaysian Textile Company Ramatex in Namibia” 2010 <http://vivaworkers.org/wp-content/uploads/2013/02/Ramatex-article-2010.pdf> (accessed 22-07-2014).

<sup>222</sup> On the correlation between employment and FDI, see Leibrecht “How Important is Employment Protection Legislation for Foreign Direct Investment Flows in Central and Eastern European Countries?” 2009 17 *Economics of Transition* 275-295.

<sup>223</sup> See Farole and Winkler 1; Mann “Reconceptualising International Investment Law: Its Role in Sustainable Development” 2013 17 *Lewis and Clark Law Review* 521; and Ho and Rashid “Macroeconomic and Country Specific Determinants of FDI” 2011 *The Business Review* 219.

<sup>224</sup> For a detailed analysis of the impact of FDI on technology advancement, see Borensztein, De Gregorio and Lee “How Does Foreign Direct Investment Affect Economic Growth” 1998 *Journal of International Economics* 115. See also Blomstrom *Foreign Investment and Spillovers: A Study of Technology Transfer to Mexico* (1989).

<sup>225</sup> See Fu “Foreign Direct Investment and Managerial Knowledge Spillovers through the Diffusion of Management Practices” 2012 49 *Journal of Management Studies* 970-999.

<sup>226</sup> See generally Porter *The Competitive Advantages of Nations* (1998).

<sup>227</sup> For more information on why FDI is needed in developing countries, see Farole and Winkler 7-10.

spillovers.<sup>228</sup> Nonetheless, benefits of FDI do not accrue automatically to the host economy because not all foreign investments deliver spillovers.<sup>229</sup> It is important to note that the FDI growth-enhancing effect depends on the degree of complementarity between FDI and domestic industry.<sup>230</sup>

The increasing investment gap and recession in foreign aid has made developing countries to turn to FDI as a mechanism to circumvent development financing constraints.<sup>231</sup> There is empirical evidence that countries are engaging in a race to the bottom or “beggar-thy-neighbour” investment incentive competition in an effort to lure investors.<sup>232</sup> This is a strategy to increase FDI inflows by removing all investment and trade restrictions thereby attracting investors out of neighbouring countries.<sup>233</sup> It is widely accepted for governments to provide incentives to entice foreign investment into their countries. It is submitted that FDI is necessary in developing economies to accelerate growth and development because these countries cannot achieve these goals from domestic investment.<sup>234</sup> As a result of the FDI developmental impacts, most developing countries have facilitated FDI inflows into their domestic industry in order to benefit the local economy.<sup>235</sup> This study makes a case that South Africa and Zimbabwe need FDI as a means to facilitate economic growth and development, create employment, improve infrastructure as well as to promote the transfer of managerial skills and advanced technology.

### **2 3 1 Economic growth and development**

FDI is widely viewed as one of the major contributors to economic growth.<sup>236</sup> However, the economic growth impact of FDI is underexplored by legal and policy-oriented studies. Gross

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<sup>228</sup> The determinants include spillover potential foreign investors, the absorptive capacity of local agents (workers and firms) and how these two factors interact within specific host country institutional environment as well as the transmission channels, among others; see Farole and Winkler 31. See also Cleeve “How Effective are Fiscal Incentives to Attract FDI to Sub-Saharan Africa” 2008 42 *The Journal of Developing Areas* 135-153.

<sup>229</sup> Correa and Kumar 16.

<sup>230</sup> Ibid.

<sup>231</sup> Musila and Sique ‘“Accelerating Foreign Direct Investment Flow to Africa: From Policy Statements to Successful Strategies” 2006 32 *Managerial Finance* 577. See also Mallampally and Sauvart “Foreign Direct Investment in Developing Countries” 1999 *Finance and Development* 36.

<sup>232</sup> It is generally assumed that foreign investors invest in countries with lower regulatory standards and that countries competitively undercut each other’s standards in order to attract foreign investment. See Olney “A Race to the Bottom? Employment Protection and Foreign Direct Investment” 2013 91 *Journal of International Economics* 191. For instance, the Namibian government undercut the South African standards in order to attract Ramatex.

<sup>233</sup> Ibid.

<sup>234</sup> See also “Africa Needs Investment Not Aid” 2014 <http://www.capitalfm.co.ke/business/2014/04/africa-needs-investment-not-aid-says-equity-boss/> (accessed 02-05-2014).

<sup>235</sup> UNCTAD *World Investment Report* 2006.

<sup>236</sup> Leal-Arcas 170. See also Trakman “Foreign Direct Investment: Hazard or Opportunity?” 2009 *George Washington International Law Review* 12; Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* 3 ed (2009) 14; and Correa and Kumar xi.

Domestic Product (GDP) is the most commonly used tool to measure a country's economic growth.<sup>237</sup> GDP is the total value of goods and services produced in an economy within a certain period of time and can be measured by adding up all of the economy's income, investment, government purchases and net exports.<sup>238</sup> The IMF has revised down South Africa's economic growth outlook for 2014 to 2.3 percent from the earlier forecasts of 2.8 percent due to the multiple strikes, policy uncertainty and investment constraints prevalent in South Africa during the year.<sup>239</sup> Zimbabwe's economy remains unstable with an unsustainably high external debt, massive deindustrialisation and lack of investment.<sup>240</sup> To make matters worse, Zimbabwe's real GDP decelerated to 3.7 percent from an estimated 4.4 percent in 2012.<sup>241</sup> The New Partnership for African Development (NEPAD) seeks to achieve and sustain an average GDP growth rate of at least 7 percent per annum in order to reduce the share of Africans living in extreme poverty by half and attain other United Nations (UN) Millennium Development Goals (MDGs) by the year 2015.<sup>242</sup> In order to achieve this goal, Africa would need huge investment injections in various sectors of Africa's economies including agriculture, industry, education, and health. Notwithstanding the substantive initiatives, African governments lack adequate financing capacity to meet this goal and protect the gains recorded in the past years in terms of growth and poverty reduction.<sup>243</sup>

Given that, FDI is much needed and recently it has become one of the major sources of finance for developing countries.<sup>244</sup> At the international level, foreign investment is regarded as one of the main drivers of economic growth and development and complements scarce financial resources.<sup>245</sup> FDI is regarded as a means to acquire additional funding and achieve economic growth as well as alleviate poverty.<sup>246</sup> FDI presence in the host economy typically increases

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<sup>237</sup> Musila and Sigwe 2006 *Managerial Finance* 28.

<sup>238</sup> See Statistics South Africa (Stats SA) "Measuring South Africa's Economic Growth" <http://www.statssa.gov.za/articles/15%20measuring%20gdp.pdf> (accessed 02-06-2014).

<sup>239</sup> IMF *World Economic Outlook* (2014) 68.

<sup>240</sup> Company closures have soared in recent years in the wake of growing economic problems. See generally African Economic Outlook Report 2014.

<sup>241</sup> Ibid.

<sup>242</sup> The eight UN MDGs are as follows: halve extreme poverty rates, achieve full and productive employment for all, halt the spread of HIV/AIDS or reduce child mortality, promote gender equality and empower women, achieve universal primary education, ensure environmental sustainability, develop a global partnership for development and improve maternal health, also available at <http://mdgs.un.org>.

<sup>243</sup> UN *The Millennium Development Goals Report* (2013) 7.

<sup>244</sup> Trakman 12.

<sup>245</sup> Ibid.

<sup>246</sup> It is argued that FDI significantly contributes to poverty alleviation when it is targeted at labour intensive industries and when interactions with local firms can create spillovers. Colen and Guariso "What Type of Foreign Direct Investment is Attracted by Bilateral Investment Treaties?" in Moran, Graham and Blomstrom (eds) *Does Foreign Direct Investment Promote Development?* (2005) 139.

national production.<sup>247</sup> For example, through FDI, China has experienced rapid economic growth and has emerged as an important trading nation in the world.<sup>248</sup> Most importantly, China has recently become the leading destination for FDI flows.<sup>249</sup> At the same time, China has developed as a leading investor in Africa.<sup>250</sup> Conversely, in respect of economic growth, it is not the volume of FDI flows that matters, but the kind of FDI.<sup>251</sup> The connection between FDI and economic growth is determined by the sectors which it enters and what potential benefits the FDI is likely to bring to the domestic economy.<sup>252</sup>

Be that as it may, the relationship between FDI, economic growth and poverty reduction is not automatic. Therefore, host governments must develop attractive investment climates, address economic leakages and anti-competitive practices in the investment industry, among others.<sup>253</sup> Otherwise host countries may not achieve sustainable economic growth and development if they cannot ensure the participation of this significant part of the foreign investors in economic growth processes. Additionally, the effect of foreign investment on the growth rate of the economy is positively associated with the level of human capital.<sup>254</sup> Hence, the higher the level of human capital in the host country, the higher the effect of FDI on the growth rate of the economy.<sup>255</sup> In line with this observation, it is reasonable for developing and emerging economies to improve investment policies affecting FDI.<sup>256</sup>

### **2 3 2 Technology transfer and development**

Recent growth studies have shown that FDI is a significant vehicle for the transfer of technology, contributing relatively to growth, modernisation and development.<sup>257</sup> Thus, one of the fundamental contributions that FDI can make to growth and development emanates from the diffusion of knowledge and technology.<sup>258</sup> The bulk of FDI originates from developed

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<sup>247</sup> Leal-Arcas 175.

<sup>248</sup> Borensztein, De Gregorio and Lee “How Does Foreign Direct Investment Affect Economic Growth” 1998 *Journal of International Economics* 115.

<sup>249</sup> UNCTAD World Investment Report 2011.

<sup>250</sup> Ibid.

<sup>251</sup> Colen, Maertens and Swinnen “Determinants of Foreign Direct Investment Flows to Developing Countries: The Role of International Investment Agreements” in Moran, Graham and Blomstrom (eds) *Does Foreign Direct Investment Promote Development?* (2005) 116.

<sup>252</sup> Ibid.

<sup>253</sup> UNCTAD Investment Policy Monitor 2013.

<sup>254</sup> Borensztein *et al* 1998 *Journal of International Economics* 115.

<sup>255</sup> Ibid.

<sup>256</sup> Gwenamo “Foreign Direct Investment in Zimbabwe: The Role of Institutional and Macroeconomic Factors” 2011 *South African Journal of Economics* 211.

<sup>257</sup> Hofmann *The Impact of International Trade and FDI on Economic Growth and Technological Change* (2013) 154. See also Neuhaus *The Impact of FDI on Economic Growth: An Analysis for the Transition Countries of Central and Eastern Europe* (2006) 46.

<sup>258</sup> Borensztein *et al* 1998 *Journal of International Economics* 115.

countries which are industrially and technologically advanced.<sup>259</sup> Developing countries' access to foreign technology is an important issue that has not been adequately addressed in the WTO agreements, despite attempts by UNCTAD to adopt the International Code of Conduct on Transfer of Technology in the 1908s.<sup>260</sup> Technology diffusion happens in various ways including the transmission of ideas and new technologies, importing high-technology products, adoption of foreign technology and conducts for the international diffusion of technology.<sup>261</sup> FDI is considered to be a major mechanism through which advanced technology is transferred to developing countries.<sup>262</sup>

In a typical model of technology diffusion, economic growth of developing countries depends on the extent of adoption and implementation of new technologies that are already in use in developed or technologically advanced countries.<sup>263</sup> It is submitted that the positive impacts of technology depends as well on the particular sector and context. A country's economic growth and development therefore depends on its absorption capacity for superior technology.<sup>264</sup> Accordingly, an introduction of technology raises the host country's (firms') efficiency and facilitates development of new activities. The host country must be capable of absorbing the technology imported by foreign firms. The assimilation of superior technology however requires advanced human capital.<sup>265</sup> Be that as it may, the relationship between technology, FDI growth and human capital suggests that growth is enhanced by a host country's human capital interaction with the new technology.<sup>266</sup> FDI brings human capital enhancement through managerial skills, training of firms and workers, knowledge and skills.<sup>267</sup> A host country therefore benefits from the transfer and use of technology, to increase the quality of production.<sup>268</sup> Thus the introduction of advanced technology comes with new processes and products for the domestic industry which implies that goods would be produced or processed

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> It should be noted that the host state's transmission channels also include labour market regulations, intellectual property rights, access to finance, trade and investment industrial policy and governance. See Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> The absorption capacity is determined by the relatively limited technology gap, human capital, firm location, competition and type of ownership among other aspects. See Agosin and Mayer "Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment?" *UNCTAD Discussion Papers* (2000) 146.

<sup>265</sup> Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>266</sup> Kokko, Zejan and Tansini "Trade Regimes and Spillover Effects of FDI: Evidence from Uruguay" 2001 *Welwirtschaftliches Archiv* 124.

<sup>267</sup> Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>268</sup> Correa and Kumar 18.



locally.<sup>269</sup> Hence, the contribution of FDI to economic growth occurs when there is sufficient absorptive capability for the advanced technology in the host economy. It is also important to note that FDI's contribution of technology is sometimes considered to be a requirement for investment admission.<sup>270</sup>

### 2 3 3 Employment creation

Foreign investment is regarded as a significant element for employment generation.<sup>271</sup> For instance, notwithstanding the negative effects thereof, the Ramatex investment in Namibia led to the establishment of a new manufacturing export base in textiles and garments, creation of about 7 000 jobs, labour force training and the development of transport networks.<sup>272</sup> It is worth noting that achievement of full and productive employment and decent work is among the UN MDGs.<sup>273</sup> In 2012, the global economic crisis substantially destabilised the employment capacity of national economies.<sup>274</sup> In the first quarter of 2014, 65 percent of young people in South Africa were estimated to be unemployed.<sup>275</sup> In 2012, the Zimbabwe National Statistics (ZIMSTAT) re-defined the term "unemployment" to constitute a lack of any means of contributing to the country's income or GDP.<sup>276</sup> As a result of this, at least 3.7 million people in Zimbabwe were estimated to be informally employed.<sup>277</sup> It is difficult to secure formal employment in a rapidly de-industrialising economy.<sup>278</sup> Recently, the African Development Bank stated that at "least two thirds of Zimbabwe are engaged in informal trade due to a debilitating economic meltdown".<sup>279</sup> In Zimbabwe, vending in the central business district or towns has become the only source of income for many because unemployment, company

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<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Jenkins "Globalization, FDI and employment in Viet Nam." 2006 15 *Transnational Corporations* 115. On the correlation between FDI and employment creation, see Sprenger "Economic Globalisation, FDI, Environment and Employment" in Welfens (ed) *Internationalisation of the Economy and Environmental Policy Options* (2001) 90-98 and Leibrecht "How Important is Employment Protection Legislation for Foreign Direct Investment Flows in Central and Eastern European Countries?" 2009 17 *Economics of Transition* 275-295.

<sup>272</sup> Jauch "Globalisation and its Victims: The Case of the Malaysian Textile Company Ramatex in Namibia" 2010 <http://vivaworkers.org/wp-content/uploads/2013/02/Ramatex-article-2010.pdf> (accessed 22-07-2014).

<sup>273</sup> UN *The Millennium Development Goals Report* (2013) 8.

<sup>274</sup> Ibid.

<sup>275</sup> African Economic Outlook: South Africa 2014 also available at <http://africaneconomicoutlook.org>.

<sup>276</sup> See ZIMSTAT Poverty Income Consumption and Expenditure Survey 2011/12 Report (April 2013) 95-100 also available at <http://www.zimstat.co.zw>.

<sup>277</sup> Ibid.

<sup>278</sup> See Mutsaka "Showdown: Zimbabwe Threatens to Drive out Sidewalk Vendors" *Associated Press* 05 June 2015 <http://abcnews.go.com/International/wireStory/showdown-zimbabwe-threatens-drive-sidewalk-vendors-31550743> (accessed 16-06-2015).

<sup>279</sup> Ibid.

closures and retrenchment have been the order of the day.<sup>280</sup> FDI not only raises the level of investment or capital stock but also increases employment by creating new production capacity and jobs.<sup>281</sup> Until 2000, Mexico experienced a period of relatively positive employment creation due to a constant FDI inflow.<sup>282</sup> Greenfield and brownfield investments tend to offer high levels of employment opportunities if implemented appropriately.<sup>283</sup> This is because they lead to the creation and expansion of business activities, respectively.<sup>284</sup> In the same way, this would be the case with cross-border M&As and joint ventures if they result in the expansion of the existing enterprises.<sup>285</sup>

As discussed earlier, potential spillover FDI inevitably requires skilled human capital. In this instance domestic labour laws regulating aspects such as the ability to hire and fire locals and the ability to import foreign labour would also need to address this issue in the public interest. Moreover, another strategy would be to train local labour and this is cheaper than to import skilled labour from abroad.<sup>286</sup> In *Tiger Brands Ltd v Ashton Canning Company (Pty) Ltd*, the South African Competition Tribunal approved the merger subject to the condition that the merging parties would not retrench more than 45 employees from the aggregate number of employees employed by both firms immediately prior to the merger and that the merging parties make available an amount of R2 million for the purpose of training all affected persons.<sup>287</sup> There is also evidence that FDI has possible risks for local employment.<sup>288</sup>

## 2 3 4 National competitiveness

FDI plays a significant role in promoting the competitiveness emerging economies.<sup>289</sup> There is recent empirical and theoretical literature on the effects of FDI on national competitiveness.<sup>290</sup>

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<sup>280</sup> On 1<sup>st</sup> of June 2015, the Minister of Local Government Public Works, Rural and Urban Development gave a seven day ultimatum to all vendors to refrain from street vending in the central business district and other towns. However, the ultimatum was eventually extended to 26<sup>th</sup> of June 2015. See Murwira "7-Day Ultimatum for City Vendors" *The Herald* (Zimbabwe) 2 June 2015 <http://www.herald.co.zw/7-day-ultimatum-for-city-vendors/> (accessed 07-06-2015).

<sup>281</sup> Ho and Rashid 2011 *The Business Review* 219.

<sup>282</sup> Ernst "The FDI–Employment Link in a Globalizing World: The Case of Argentina, Brazil and Mexico." International Labour Office, Employment Strategy Paper 17 (2005) 10.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid.

<sup>286</sup> Luiz and Charalambous "Factors Influencing Foreign Direct Investment of South African Financial Services Firms in Sub-Saharan Africa" 2009 *International Business Review* 315.

<sup>287</sup> *Tiger Brands Ltd v Ashton Canning Company (Pty) Ltd* Case 46/LM/May05.

<sup>288</sup> See Jerkins 2006 15 *Transnational Corporations* 134-137, where FDI tends to be associated with lower rates of employment creation than local firms in Viet Nam.

<sup>289</sup> See generally Clipa "Competitiveness through Foreign Direct Investment" 2011 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1861947](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861947) (accessed 07-05-2015).

<sup>290</sup> Ibid.

Gugler and Brunner, in their article, provides a comprehensive conceptual framework for assessing the effects of FDI on competitiveness.<sup>291</sup> For example, foreign investment has been at the core of China's involvement in the international production process of globalisation.<sup>292</sup> Globalisation is increasingly demanding the ability of regional economies to adapt in order to maintain their competitive edge.<sup>293</sup> Foreign investment enhances domestic firms' global production and ability to compete on international markets.<sup>294</sup> Typically, the more FDI inflows a country has, the more production it does.<sup>295</sup> This means that the country will export more of its production thereby playing an active role on the international market.<sup>296</sup> FDI can increase the capacity of local firms to export, to meet international competition.<sup>297</sup>

### **2 3 5 Infrastructure improvement**

Infrastructure broadly entails the basic physical, organisational or technical structures or services required for the operation of a society or enterprise and functioning of the economy.<sup>298</sup> Nevertheless, the focus of this study is limited to economic infrastructure which refers to transportation services, electricity, water and sanitation, telecommunication services and an economy's capital stock that produces services to facilitate economic production. Apart from policy, strategy and programs to promote sustainable infrastructure, FDI also plays a significant role in improving infrastructure.<sup>299</sup> Several developing countries around the world have pursued clear policies or guidelines to encourage/attract FDI in infrastructure in a bid to develop their national infrastructure.<sup>300</sup> Philippines and Argentina are among the most aggressive countries in trying to attract foreign investment into their infrastructure sectors.<sup>301</sup> More precisely, developing economies have limited national budgets to meet the huge capital

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<sup>291</sup> Gugler and Brunner "FDI Effects on National Competitiveness: A Cluster Approach" 2007 13 *International Advances in Economic Research* 268-284.

<sup>292</sup> OECD "Main Determinants and Impacts of Foreign Direct Investment on China's Economy" (2000) Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers on International Investment 4.

<sup>293</sup> Ibid.

<sup>294</sup> *Nampak Ltd v Malbak Ltd Case 29/LM/May02*.

<sup>295</sup> Leal-Arcas 175.

<sup>296</sup> Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>297</sup> Clipa "Competitiveness through Foreign Direct Investment" 2011 10.

<sup>298</sup> The term typically refers to the technical structures that support a society such as roads, water supply, sewers, power grids, and telecommunications. Aschauer "Genuine Economic Returns to Infrastructure Investment" 1993 *Policy Studies Journal* 380.

<sup>299</sup> Leal-Arcas 179.

<sup>300</sup> Donaldson, Sader and Wagle *Foreign Direct Investment in Infrastructure: The Challenge of Southern and Eastern Africa* (1997) 15. See also Kirkpatrick, Parker and Zhang "Foreign Direct Investment in Infrastructure in Developing Countries: Does Regulation Make a Difference?" 2006 15 *Transnational Corporations* 143.

<sup>301</sup> For instance, in the early 1990s, the Philippines initiated a massive programme to attract investment in new projects to increase capacity and the rehabilitation of existing utilities. See Donaldson *et al* 7.

requirements for the maintenance and development infrastructure sector.<sup>302</sup> Africa, among other developing regions already faces a fundamental infrastructure gap at both national and regional levels.<sup>303</sup> Without filling that gap and promoting economic integration, Africa will struggle to benefit from the eventual global recovery.<sup>304</sup> To achieve this goal, African governments must implement adequate policies that enable space for infrastructure investment.<sup>305</sup> The World Bank estimates that, on average, developing countries invest annually 3 to 4 percent of their GDP in infrastructure.<sup>306</sup> Yet they are supposed to invest an estimated 7 to 9 percent to achieve broader economic growth and poverty reduction goals.<sup>307</sup>

## 2.4 RISKS FACED BY FDI

Some scholars argue that FDI has substantial adverse effects on employment,<sup>308</sup> income distribution<sup>309</sup> as well as national sovereignty and autonomy.<sup>310</sup> The fear of such adverse effects has often led to nationalisation or expropriation of foreign commercial property<sup>311</sup> and imposition of restrictive fiscal and legal policies aimed at lessening the interference of foreign investors in domestic matters.<sup>312</sup> In other words, foreign investors are obliged to rely on the host country's laws and related policies which exposes them to a number of risks. These risks include breach of investment contracts, arbitrary expropriation, unfair taxation, political and economic corruption and revocation of licences, inequitable dispute settlement mechanisms, and performance requirements, among others.<sup>313</sup> For example, Zimbabwe's hyperinflationary

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<sup>302</sup> Ibid 10. See also Kirkpatrick *et al* 2006 15 *Transnational Corporations* 143.

<sup>303</sup> Donaldson *et al* 8.

<sup>304</sup> AfDB "Invests USD 18 Million to Help Fill Infrastructure Finance Gap in Africa" <http://www.afdb.org/news-and-events/article/afdb-invests-usd-18-million-to-help-fill-infrastructure-finance-gap-in-africa-9394/> (accessed 27-05-2014). See also Ho and Rashid 2011 *The Business Review* 219.

<sup>305</sup> AfDB "Impact of the Crisis on African Economies – Sustaining Growth and Poverty Reduction: African Perspectives and Recommendations to the G20" 2009 AfDB 9 <http://www.afdb.org/fileadmin/uploads/afdb/documents/genericdocuments/impact%20of%20the%20crisis%20and%20recommendations%20to%20the%20g20%20-%20march%2021.pdf> (accessed 27-05-2014).

<sup>306</sup> UNCTAD World Investment Report: Transnational Corporations and the Infrastructure Challenge: Overview 2008.

<sup>307</sup> Ibid.

<sup>308</sup> See Jenkins 2006 15 *Transnational Corporations* 115-142.

<sup>309</sup> FDI is argued to contribute to income inequality. For an exhaustive discussion on the correlation between FDI and income inequality, see Pan-Long "Foreign Direct Investment and Income Inequality: Further Evidence" 1995 23 *World Development* 469-483; Choi "Does Foreign Direct Investment Affect Domestic Income Inequality?" 2006 13 *Applied Economics Letters* 811-814; and Lipsey and Sjöholm in Moran *et al* (eds) *Does Foreign Direct Investment Promote Development?* (2005) 23-44.

<sup>310</sup> Sornarajah *The International Law on Foreign Investment* 2 ed (2004) 97. See also Dolzer and Schreuer *Principles of International Investment Law* (2008) 89 and Subedi *International Investment Law – Reconciling Policy and Principle* (2008) 121.

<sup>311</sup> Lowenfeld 484.

<sup>312</sup> Leal-Arcas 178.

<sup>313</sup> See Zhan "The FDI Impact of IIAs - Can Econometric Studies help understand the Relationship?" *Investment Policy Hub* 10 September 2014 <http://investmentpolicyhub.unctad.org/Blog/Index/32> (accessed 10-09-2014).

rates, general strikes, continuing high budgets, land tenure uncertainty and economic instability, among other issues, have been challenging the continuation of a significant number of foreign investments in the country. Investment instruments do not only protect and promote foreign investment, rather they also have an objective of minimising risk and loss in the event of expropriation and submission of investment disputes.<sup>314</sup> Most investment instruments commonly address the following issues: conditions for foreign investors in the host state; standards of treatment of foreign investments; expropriation and methods for resolving investment disputes; currency transfers; performance requirements and others.<sup>315</sup>

## 2 4 1 Political risks

Political risks comprise of political actions which interrupt sales or cause harm to foreign commercial property or personnel which risks include riots, operational restrictions impeding the ability to conduct business and governmental takeover of property.<sup>316</sup>

### 2 4 1 1 *Expropriation of investments without compensation*

Expropriation leads to transfer of property rights.<sup>317</sup> It may either be direct/*de facto* or indirect/*de jure*. *De facto* expropriation occurs when a state procures property owned by an investor located in the host country and the deprivation of property is attributable to the host state.<sup>318</sup> *De jure* expropriation is the more common form of expropriation and occurs when the state interferes in the use of the investor's property or the benefits, even where the property is not seized and the title to the property is not affected.<sup>319</sup> For instance, when governmental measures force an investor to flee the country, denying him or her access to his funds or profits, or compelling him to sell or transfer it at an unfairly low price.<sup>320</sup> States enjoy the right to expropriate investors and regain ownership of industries as part of their territorial and economic

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<sup>314</sup> Bersman "Bilateral Investment Protection Treaties: An Examination of the Revolution of Significance of US Prototype Treaty" 1983 *Journal of International Law and Politics* 6.

<sup>315</sup> Sornarajah 217.

<sup>316</sup> Pajunen "Institutions and Inflows of Foreign Investments: A Fuzzy-set Analysis" 2008 39 *Journal of International Business Studies* 654. See also Buthe and Milner "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?" 2008 52 *American Journal of Political Science* 743. Buthe and Milner aver that political violence and instability in the host country is one of the greatest threats to investors.

<sup>317</sup> Reinisch "Expropriation" in Muchlinski, Ortino and Schreuer (eds) *The Oxford Handbook of International Investment Law* (2008) 407.

<sup>318</sup> See *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID, Case No. ARB/98/4 (December 2000).

<sup>319</sup> OECD "Indirect Expropriation and the Right to Regulate" 2004 *International Investment Law* 3-4. See also *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 (30 August, 2000).

<sup>320</sup> OECD 2004 *International Investment Law* 3-4.

sovereignty.<sup>321</sup> It is one of the main political risks faced by FDI.<sup>322</sup> Governments are permitted to expropriate whenever a national imperative arises but they must act in accordance with right procedures and rules as well as subject to adequate and effective compensation.<sup>323</sup> In 2000, amendments to sections 16 and 17 of the Zimbabwean Constitution<sup>324</sup> and subsequent amendments to the Land Acquisition Act (LAA) authorised the expropriation of foreign owned land.<sup>325</sup> These amendments imposed no obligation on the government to pay compensation to foreign land owners except for land improvements. In addition, these amendments made it difficult for the foreign land owners to appeal on the ground that the compensation was unjust. In similar vein, the Economic Freedom Fighters (EFF), a new political party, is advocating for the expropriation of land without compensation for equitable redistribution among both white and black South Africans.<sup>326</sup>

Regulatory expropriation is a notion of international investment law which makes the potential for conflict between investors' rights and regulatory autonomy clear.<sup>327</sup> The Hull standard on expropriation requires "prompt, adequate and effective compensation".<sup>328</sup> At the same time, other standards provide for a "just, full, reasonable or fair and equitable compensation".<sup>329</sup> In the *ConocoPhillips Petrozuata case*,<sup>330</sup> the ICSID Tribunal declared that the host country is bound to pay compensation to the foreign investors who lose their property to expropriation. According to the UNCTAD Investment Policy Monitor 2014, a number of developing countries

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<sup>321</sup> Sornarajah 97. See also Dolzer and Schreuer 89; Subedi 121; *De Sanchez v. Banco Central de Nicaragua* 770 F.2d 1385, 1397; *AMCO v. Indonesia (Merits)* 89 ILR, paras 405 and 466.

<sup>322</sup> Investment Climate Advisory Services of the World Bank Group *Investment Law Reform: A Handbook for Development Practitioners* (2010) 46.

<sup>323</sup> Ibid 46.

<sup>324</sup> Constitution of Zimbabwe Amendment (No. 16) Act 2000.

<sup>325</sup> Land Acquisition Act 3 of 1992 (Chapter 20:10) (as amended).

<sup>326</sup> See EFF "Expropriation of Land without Compensation for Equitable Redistribution" <http://efffighters.org.za/policy/on-land> (accessed 02-06-2014); Simon "Land Expropriation is the Only Solution – EFF" *SA Breaking News* 1 July 2015 <http://www.sabreakingnews.co.za/2014/07/01/land-expropriation-is-the-only-solution-eff/> (accessed 01-07-2014); Barron "So Many Questions: Julius Malema on Land Occupation" *Times Live* 21 December 2014 <http://www.timeslive.co.za/politics/2014/12/21/so-many-questions-julius-malema-on-land-occupation> (accessed 23-12-2014).

<sup>327</sup> Regulatory expropriation entails the regulatory measures aim at public interests but which deprive the investors of the commercial value of the investment. Tienhaara *The Expropriation of Environmental Governance – Protecting Foreign Investors at the Expense of Public Policy* (2009) 25.

<sup>328</sup> Prompt means without due or undue delay; adequate entails that the compensation must be equivalent to the fair market value immediately before the expropriation commenced, without any deduction due to the pending expropriation became public and effective means that compensation shall be fully realised and freely transferred. See the OECD Negotiations as discussed in Karl *Investor Protection in Multilateral Agreement on Investment State of Play as of February* (1997) 14.

<sup>329</sup> American Law Institute *Restatement of the Law, Third: Foreign Relations Law of the United States* (1987) 712.

<sup>330</sup> *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (3 September 2013) para 401.

have opened up their economies and dismantled regulatory barriers to foreign investment and adopted policies to protect against expropriation of investment.<sup>331</sup>

#### 2 4 1 2 *Political instability and corruption*

Political corruption, instability and violence are among the attributes that shape political risks faced by foreign investors in the host country.<sup>332</sup> Modern political risk is “highly complex and multi-dimensional.”<sup>333</sup> It includes among other things international wars, economic sanctions, terrorism, government instability, state failure, creeping expropriation and breach of investment contracts, repatriation restrictions or discrimination.<sup>334</sup> Nevertheless, the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) provides for political risk insurance of inward FDI. The MIGA political risk insurance protects foreign investments against the risks of transfer restrictions, expropriation, and breach of investment contracts, war, terrorism and civil disturbance, and disrespecting financial obligations.<sup>335</sup>

#### 2 4 2 **Fiscal risks**

Fiscal risks encompass economic and financial challenges which are faced by foreign investors such as economic corruption and instability, unfair taxation, foreign exchange rates fluctuations, and repatriation of profits, among others.<sup>336</sup> In the 1980s the South African Financial Rand system provided for two exchange rates for the rand, one for current account transactions and one for capital account transactions for non-residents.<sup>337</sup> Foreign investments in South Africa could only be sold for financial rand and limitations were placed on the convertibility of financial rand into foreign currencies.<sup>338</sup> In terms of this policy, foreign investors could repatriate the majority of their South African investments through the commercial rand.<sup>339</sup> Similarly, from 2000 to 2008 Zimbabwe's exchange rate policies made it difficult for foreign investors operating in Zimbabwe to obtain foreign currency.<sup>340</sup> Despite

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<sup>331</sup> UNCTAD Investment Policy Monitor 2014 available at <http://unctad.org/en/pages/publications/Investment-Policy-Monitor.aspx> (accessed 29-11-2014).

<sup>332</sup> Pajunen 2008 *Journal of International Business Studies* 654.

<sup>333</sup> Jakobsen “Old Problems Remain, New Ones Crop Up: Political Risk in the 21<sup>st</sup> Century” 2010 *Business Horizons* 482.

<sup>334</sup> Moreira “Learning from Failure: China’s Overseas Oil Investments” 2013 *Journal of Current Chinese Affairs* 133.

<sup>335</sup> UNCTAD Investment Policy Monitor 2014.

<sup>336</sup> Asiedu “On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?” 2002 *World Development* 112.

<sup>337</sup> Jonsson “Inflation, Money Demand, and Purchasing Power Parity in South Africa” *IMF Staff Papers* (2001) 244.

<sup>338</sup> Roux *Everyone's Guide to the South African Economy* 8 ed (2005) 124.

<sup>339</sup> *Ibid.*

<sup>340</sup> Bureau of Economic and Business Affairs “2012 Investment Climate Statement - Zimbabwe” <http://www.state.gov/e/eb/rls/othr/ics/2012/191267.htm> (accessed 10-04-2014).

remonetising the economy and other benefits, the multi-currency system in Zimbabwe still poses a number of challenges to foreign investments in Zimbabwe.<sup>341</sup> To make matters worse, prices and wages are agreed to in US dollars whilst South Africa is the country of origin of most capital inflows into Zimbabwe.<sup>342</sup>

Economic corruption is another important fiscal challenge faced by foreign investments.<sup>343</sup> For example, in an unreported case, a Zimbabwean national who had formed a joint venture with a Singaporean investor, defrauded his foreign partners of mining equipment worth US\$2.5 million.<sup>344</sup> Moreover, foreign investors may be compelled to pay higher tax than domestic investors.<sup>345</sup>

### 2 4 3 Legal risks

Legal risks faced by foreign investors consist of among other challenges, discrimination, and breach of investment contracts, changes to domestic investment regulatory frameworks, inequitable dispute settlement mechanisms and bureaucratic approval procedures. The first step in the foreign investment process is entry and establishment of the investment. Notwithstanding any overriding treaty obligations, the host country has the discretion to enforce the rules regarding entry and establishment of foreign investment.<sup>346</sup> This is consistent with the assertion that host states are free to allow or prohibit the entry and establishment of aliens including traders and foreign investors in their territory in general.<sup>347</sup> Approval or admission procedures relate to the granting of licenses and the entry and establishment of foreign investors.<sup>348</sup> Foreign investors however are likely to experience complex bureaucratic and approval procedures prior to granting of licenses and establishment.<sup>349</sup> In most countries, investment institutions facilitate investment licensing and approval procedures. In Zimbabwe, section 6 and 7 of the ZIA Act

<sup>341</sup> IMF “Zimbabwe: Challenges and Policy Options after Hyperinflation” 2010 *African Development* <http://www.imf.org/external/pubs/ft/2010/afr1003.pdf> (accessed 02-06-2014).

<sup>342</sup> Ibid. See also *Murehwa v Nyambuya* HC 3232/09.

<sup>343</sup> See “Corruption scares Investors” [http://www.zbc.co.zw/index.php?option=com\\_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86](http://www.zbc.co.zw/index.php?option=com_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86) (accessed 18-03-2015).

<sup>344</sup> Muzulu “Foreigner Swindled in \$2.5 million Mining Joint Venture” *News Day*, 5 May 2014 <https://www.newsday.co.zw/2014/05/05/foreigner-swindled-25-million-mining-joint-venture/> (accessed 16-05-2014).

<sup>345</sup> See Wahid, Sawkut and Seetanah “Determinants of Foreign Direct Investments (FDI): Lessons from the African Economics” 2009 9 *Journal of Applied Business and Economics* 8.

<sup>346</sup> UNCTAD “Investor-State Dispute Settlement and Impact on Investment Rulemaking” 2007 [http://www.unctad.org/org/en/docs/iteiia20073\\_en.pdf](http://www.unctad.org/org/en/docs/iteiia20073_en.pdf) (accessed 10-06-2014). See also Dolzer and Schreuer at 79–80. The international norms on admission of FDI are discussed in Chapter 3.

<sup>347</sup> Fatouros “Towards an International Agreement on Foreign Direct Investment?” 1995 *ICSID Review – Foreign Investment Law Journal* 181-193.

<sup>348</sup> UNCTAD Investment Policy Monitor 2014.

<sup>349</sup> Ibid.



gives the ZIA Board, the responsibility to approve investment proposals by potential domestic and foreign investors in Zimbabwe. In South Africa there is no uniform framework under which inward FDI is assessed but investment approval is given by the Minister of Finance.<sup>350</sup> It is a common cause that complex admission procedures deter foreign investors.<sup>351</sup> In 2013, Mongolia adopted a law on investment that reduces approval requirements and applies to both domestic and foreign investors.<sup>352</sup> Burundi also adopted a mining law in 2013 which simplified entry procedures and strengthened FDI protection.<sup>353</sup>

#### 2 4 3 1 *Investor-state dispute settlement mechanisms*

Usually investor-state disputes involve breach of investment contracts, *de facto* expropriation, revocation of licenses or permits, wrongful criminal prosecution, land zoning decisions, invalidation of patents, among others.<sup>354</sup> In *Ambiente Ufficio S.P.A. v. Argentine Republic (formerly Giordano Alpi)*<sup>355</sup> it was observed that an array of investment agreements require investor-state disputes to be litigated before the domestic courts before being pursued through international arbitration. Generally, the investment dispute settlement mechanism is complex, has limited remedies and the interests and needs of all parties are unlikely to be addressed. Foreign investors often tend to be concerned that they will not receive equal treatment before the domestic courts of a foreign country, particularly where they are in a dispute with the host government.<sup>356</sup> In *Mike Campbell (Pvt) Ltd v. The Republic of Zimbabwe*,<sup>357</sup> the foreign land owners in Zimbabwe challenged the lawfulness of the expropriation without compensation authorised by the Zimbabwean Constitution. The SADC Tribunal ruled in favour of the foreign land owners but Zimbabwe, despite being a signatory to the SADC Treaty creating the Tribunal, refused to abide by the judgment.<sup>358</sup> Similarly, in *Funnekotter v. The Republic of Zimbabwe*,<sup>359</sup> the ICSID Tribunal ruled in favour of Dutch investors and granted them

<sup>350</sup> Department of National Treasury “A Review Framework for Cross-border Direct Investment in South Africa”  
*Discussion Document* 2011  
<http://www.treasury.gov.za/documents/national%20budget/2011/Cover%20note%20-%20A%20review%20framework%20for%20cross-border%20direct%20investment%20in%20SA.pdf> (accessed 10-06-2014).

<sup>351</sup> UNCTAD Investment Policy Monitor 2014.

<sup>352</sup> See generally Investment Mongolia Agency *Mongolian Law on Investment* (2013).

<sup>353</sup> See Economist Intelligence Unit *Burundi Mining Law* also available at <http://viewswire.eiu.com>.

<sup>354</sup> See UNCTAD “Recent Developments in Investor-State Dispute Settlement (ISDS)” *International Investment Agreements Issues Note* 1 (2014).

<sup>355</sup> *Ambiente Ufficio S.P.A. v. Argentine Republic (formerly Giordano Alpi)*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para 312.

<sup>356</sup> UNCTAD “Series on International Investment Policies for Development, Investor-State Disputes: Prevention and Alternatives to Arbitration” 2010, United Nations Sales No. E.IO.II.D.II xvi.

<sup>357</sup> *Mike Campbell (Pvt) Ltd v. The Republic of Zimbabwe*, SA (T) Case No. 2/2007.

<sup>358</sup> *Ibid.*

<sup>359</sup> *Bernardus Henrius Funnekotter v. The Republic of Zimbabwe* ICSID Case No. ARB/05/06.

compensation. These foreign investors had challenged the land reform policy of Zimbabwe and alleged that it violated provisions of the Netherlands-Zimbabwe BIT.<sup>360</sup>

In *Ömer Dede and Serdar Elhüseyni v. Romania*,<sup>361</sup> it was opined that foreign investors enjoy the right to submit relevant disputes to international arbitration. However, this right is in many cases denied by host states. For instance, under section 11 of South Africa's proposed Investment Bill, foreign investors will only have recourse to South African courts, domestic arbitration or the mediation services of the DTI, once the bill becomes law.<sup>362</sup> Foreign investors from countries not covered by BITs such as the US and Japan will only have recourse through South African courts.<sup>363</sup> Another challenge that investors face in the arbitration of investment disputes is the host country's refusal of the arbitral tribunals' jurisdiction.<sup>364</sup> In *Mike Campbell*, Zimbabwe rejected the judgment because it claimed that it had withdrawn from the SADC Tribunal's jurisdiction.

#### 2 4 3 2 Breach of investment contracts

Investment contracts comprise all kinds of contracts for making a foreign investment such as M&As, joint ventures, Greenfield and Brownfield investment contracts.<sup>365</sup> In 2013 at least ten cases were brought before the ICSID by investors challenging the unilateral cancellation or breach of investment contracts by host states.<sup>366</sup> Notably, Zimbabwe's land reform violated the provisions of the Netherlands-Zimbabwe BIT. Similarly, the amendments to the Mineral and Petroleum Resources Development Act (MPRDA) violated South Africa-Italy BIT's right to fair and equitable treatment and the right to protection against expropriation.<sup>367</sup> The consequences of this breach would involve the operation of a customary international law (CIL) principle that agreements are to be honoured (*pacta sunt servanda*) which would constrain a

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<sup>360</sup> Articles 1 (a) and (b), 3, 6, 7 and 9 of the Agreement on Encouragement and Reciprocal Protection of Investment between the Republic of Zimbabwe and the Kingdom of Netherlands, 1996.

<sup>361</sup> *Ömer Dede and Serdar Elhüseyni v. Romania* ICSID Case No. ARB/10/22, Award (5 September 2013) para 219. The exhaustion of local remedies rule requires that local remedies must be exhausted before international proceedings may be instituted. See *ICJ: Interhandel (Switzerland v. United States)*, Judgment (21 March 1959), para 25. In the dispute between Netherlands and Zimbabwe, the host country (Zimbabwe) submitted that it will submit the matter for settlement according to the rules and procedures promulgated by the UNCITRAL once the investors have exhausted the internal administrative and judicial remedies.

<sup>362</sup> Section 11 of the Investment Bill, 2013.

<sup>363</sup> *Ibid.*

<sup>364</sup> UNCTAD "Recent Developments in Investor-State Dispute Settlement (ISDS)" *International Investment Agreements Issues Note* 1 (2014) 9.

<sup>365</sup> They also include Private-Public Partnership, Built-Operate-Transfer, economic development contracts, concession agreements and licensing, contract for the exploration of natural resources and joint venture contracts.

<sup>366</sup> UNCTAD "Recent Developments in Investor-State Dispute Settlement (ISDS)" *International Investment Agreements Issues Note* 1 (2014).

<sup>367</sup> Yazbek "Bilateral Investment Treaties: The Foreclosure of Domestic Policy Space" 2010 *South African Journal on International Affairs* 103.

state party from altering unilaterally the terms of a relevant agreement.<sup>368</sup> This CIL principle demonstrates that contracts or treaties are laws with a binding force between parties and requires that every contracting party keep his promise and fulfil his or her obligation.<sup>369</sup> Section 326 (1) of the Constitution of Zimbabwe<sup>370</sup> and section 231 of the Constitution of South Africa<sup>371</sup> treat CIL as part of domestic law to the extent of its consistency with these Constitutions and Acts of Parliament. The *pacta sunt servanda* principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties (VCLT).<sup>372</sup>

#### 2.4.3.3 Performance requirements

Performance requirements refer to measures which are adopted by the host state requiring foreign investors to fulfil certain requirements as a condition of either investment approval, or as a condition for the enjoyment of certain advantages.<sup>373</sup> These requirements include, among others, local content requirements, foreign exchange neutrality, export control, requirement to transfer technology, employment performance and requirement to establish a joint venture with domestic participation.<sup>374</sup> Despite the fact that these requirements are aimed at ensuring the development of the host nation, they are somewhat restrictive on foreign investors.<sup>375</sup> In the *FIRA case*, section 2 of Canada's Foreign Investment Review Act (FIRA) required the Canadian government to review foreign direct investment proposals under a set of factors and permit entry only if the reviewing body determined that the investment proposal was of significant benefit to Canada. The FIRA imposed a local content requirement on foreign investments requiring them to purchase Canadian goods instead of importing goods of their choice.<sup>376</sup> Since some of such requirements have the effect of distorting international trade and/or investment, efforts have been made to regulate such measures through the TRIMs, GATS and TRIPs, among others.

<sup>368</sup> Shaw *International Law* 6ed (2008) 829. See also *Texaco v. Libya* 1977 53 ILR para 389.

<sup>369</sup> Wehberg "Pacta Sunt Servanda" 1959 53 *The American Journal of International Law* 783.

<sup>370</sup> Constitution of the Republic of Zimbabwe, 2013. See also *Barker v Government* 1983 (1) ZLR para 137.

<sup>371</sup> Constitution of the Republic of South Africa, 1996. See also *S v Makwanyane* 1995 (6) BCLR 665 CC para 35.

<sup>372</sup> Article 27 of the VCLT, 1969 states that, "every treaty in force is binding upon the third parties to it and must be performed by them in good faith."

<sup>373</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 [http://unctad.org/en/Docs/iteiia20037\\_en.pdf](http://unctad.org/en/Docs/iteiia20037_en.pdf) (accessed 09-09-2014) iii.

<sup>374</sup> Ibid.

<sup>375</sup> Correa and Kumar 24.

<sup>376</sup> *FIRA case* para 143.

Foreign investors also face discrimination. The *Pope & Talbot v. Canada*<sup>377</sup> tribunal stated that in investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors. Foreign investors can be discriminated against investors of the host state or investors of other states. In other words, foreign investors are treated less favourable than nationals of the host state or investors of other states in like circumstances/situations.<sup>378</sup> A discriminatory measure is illegal if it singles out a specific person or group without a reasonable basis.<sup>379</sup> Be that as it may, a discriminatory measure rationally connected to a legitimate goal of policy is permissible.<sup>380</sup> In *Cross-Border Trucking Services (Mexico v. US)*,<sup>381</sup> the panel mentioned that differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety and that such different treatment be equivalent to the treatment accorded to domestic investors.

In investment practice, discrimination is mostly based on race,<sup>382</sup> ethnicity<sup>383</sup> and nationality.<sup>384</sup> For instance, in *Mike Campbell v. Zimbabwe*, the applicants alleged that the expropriation of land authorised by the Constitution of Zimbabwe Amendment No. 17 was discriminatory on the basis of race in that it was only directed towards white farm owners. The applicants argued that the action of Zimbabwe “in expropriating land for resettlement purpose has been solely or primarily on consideration of race and ethnic origin ... In reality it was aimed at persons who owned land because there were white. It matter not whether they acquired the land during the colonial period or after independence.”<sup>385</sup> Foreign investors may experience discrimination during the pre or post establishment phase. Most host countries impose a number of specific economic, social fiscal or environmental conditions on foreign investors that exists at the time of entry and/or throughout the subsequent life of the investment.

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<sup>377</sup> *Pope & Talbot's v. Canada*, UNCITRAL (NAFTA), Award on Merits of Phase 2 (April 10, 2001) para 170.

<sup>378</sup> Dozer and Schreuer *Principles of International Investment Law* (2008) 178.

<sup>379</sup> Rubins and Kinsella *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (2005) 177.

<sup>380</sup> *GAMI Investments, Inc. v. Mexico*, NAFTA/UNCITRAL Tribunal (November 15, 2004) para 14.

<sup>381</sup> *Cross-Border Trucking Services (Mexico v. US)*, NAFTA Arbitral Panel (February 6, 2001) para 258.

<sup>382</sup> See *Campbell v. Zimbabwe* case.

<sup>383</sup> For example, in 1972, Idi Amin's confiscation of Asian property in Uganda was considered illegal based on ethnicity grounds. See Schefer 180 and Wooldridge and Shanna “The Expulsion of the Ugandan Asians and Some Legal Questions Arising Therefrom” 1974 *Comparative and International Law Journal of Southern Africa* 52.

<sup>384</sup> See *Ronald S. Launder v. The Czech Republic*, UNCITRAL Arbitration, Final Award (September 3, 2001); *Total SA v. The Argentina Republic*, ICSID Case No. ARB/04/1, Award, 344 (December 27, 2010); *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL Arbitration, Arbitral Award (January 26, 2006); *Kuwait v. American Independent Oil Company (Aminoil)*, Award (24 March 1982); and *Amoco v. Iran*, Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Award (July 14, 1987) paras 140-141.

<sup>385</sup> Para 175.

With regard to discrimination based on nationality, the *ADC v. Hungary*<sup>386</sup> tribunal considered that Hungary's action of nationalising foreign company only and not competing national company was discriminatory. Another notable example of discrimination based on nationality is the differential treatment of Jewish-owned property in Germany by the Nazi regime.<sup>387</sup> In the 1930s, the Nazi regime implemented discriminatory measures against the Jewish investors in Germany.<sup>388</sup> The discriminatory measures were designated to eliminate foreign nationals in the local economic activities of Germany.<sup>389</sup> These measures included, *inter alia*, the prohibition of Jewish property owners from taking advantage of property deductions, negotiating loans, contracts and mortgages.<sup>390</sup> The Nazi regime also implemented tax measures on Jewish-owned property which amounted to at least 20 percent of their respective assets.<sup>391</sup> Finally, in 1941, the Nazi regime authorised mass expropriation of Jewish property in Germany.<sup>392</sup>

International law prohibits such discrimination.<sup>393</sup> General standards of treatment (NT and MFN) are commonly found in BITs and IIAs and they require investments to be accorded fair and equitable treatment. For example, Article 3 (2) of the BIPPA provides that state parties shall accord to investments and returns of investors from the other party treatment not less favourable than that which they accord to investments and returns of their domestic investors or third state. In addition, Article 3 (3) of the BIPPA provides that state parties shall accord to investors of another state party, treatment not less favourable than that accorded to their domestic investors or any third state.

## 2 5 CONCLUSION

From the above analysis, it may be argued that the historical evolution of FDI is to be ascribed to transfers of capital, the free movement of capital flows across borders and MNCs' cross-border activities, the search for new markets, cheap labour and lower costs of production

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<sup>386</sup> *ADC & ADMC Management v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006) paras 441-443.

<sup>387</sup> Schefer 180.

<sup>388</sup> Aalders "Organised Looting: The Nazi Seizure of Jewish Property in the Netherlands 1940-1944" in Feldman and Seibel (eds) *Networks of Nazi Persecutions: Bureaucracy, Business and the Organisation of the Holocaust* (2005) 176.

<sup>389</sup> Ibid.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

<sup>392</sup> Ibid.

<sup>393</sup> Aalders in Feldman and Seibel (eds) *Networks of Nazi Persecutions: Bureaucracy, Business and the Organisation of the Holocaust* (2005) 176.

among others.<sup>394</sup> The history of FDI protection moreover shows that in the early stages of the development of the FDI phenomenon there were low levels of protection afforded to investors.<sup>395</sup> As foreign investment began to expand and the tension between investors and host countries intensified, FDI protection began to shift from national to international law.<sup>396</sup>

FDI has been identified as a vehicle for economic growth in developing countries because it is the major source of funding. It spurs economic growth and development, stimulates domestic production, competition and international competitiveness through the transfer of technology.<sup>397</sup> Additionally, it has been shown to facilitate the transfer of knowledge as well as spurring economic growth and creating new employment opportunities.<sup>398</sup> Simultaneously, it seems logical that FDI contributes to the integration of developing countries into the global economy through the transfer of advanced technology that enhances domestic production, international competitiveness.<sup>399</sup> The appreciation of the benefits of FDI inflows and the widespread adoption of development strategies based on increased integration in the world economy has resulted in the proliferation of a significant drive by host countries to actively seek out FDI through the liberalisation of their investment policies and offering favourable conditions for foreign investment.<sup>400</sup>

The above analysis indicates that increased FDI does not necessarily imply higher economic growth. Seeing that not all FDI contributes to employment creation or growth and development among other things, the host countries should encourage FDI in those sectors that are promising for sustainable economic and employment growth and discourage strong fluctuations of short-term non-productive investment.<sup>401</sup> The international and regional legal issues revolving around foreign direct investments reflect the different interests of the host state and the foreign investor in this context. International investment law aims at striking a balance between legitimate regulatory concerns and the exercise of territorial sovereignty through the state on the one hand and the interests of the investor regarding legal stability and profit-maximisation on the other hand.<sup>402</sup> In the past, conflicts often arose due to expropriation and nationalisation of the investors' property or as a result of generally unstable legal conditions. Traditionally,

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<sup>394</sup> See Adewale (Master of Commerce-thesis, University of South Africa, 2008) 24.

<sup>395</sup> Haslam 2010 *Third World Quarterly* 1187.

<sup>396</sup> Goldberg and Kindleberger 1970 *Law and Policy in International Business* 295.

<sup>397</sup> See Hofmann 154; Neuhaus 46; and Borensztein *et al* 1998 *Journal of International Economics* 115.

<sup>398</sup> Leibrecht 2009 17 *Economics of Transition* 275-295.

<sup>399</sup> Gugler and Brunner 2007 13 *International Advances in Economic Research* 268-284.

<sup>400</sup> See also Mallampally and Sauvart 1999 *Finance and Development* 36.

<sup>401</sup> UNCTAD World Investment Report 2006.

<sup>402</sup> Bersman 1983 *Journal of International Law and Politics* 6.

international investment law is aimed at the protection and promotion of foreign investment. To date various standards for investment protection have developed across the world. It is to those investment protection standards that this study now turns.

## CHAPTER 3

### International standards on foreign investment protection

#### 3.1 INTRODUCTION

International investment law has become one of the most rapidly developing areas of international law.<sup>403</sup> The rapid expansion of global investment law is aided by the proliferation of international investment agreements (IIAs), bilateral investment treaties (BITs)<sup>404</sup> and regional agreements<sup>405</sup> or free trade agreements (FTAs) containing investment provisions.<sup>406</sup> Today, the international investment framework consists of more than 3 400 investment treaties including BITs and regional agreements or FTAs.<sup>407</sup> History has already shown that one of the fundamental drivers of investment protection treaties has been the desire of developed, capital-exporting states to ensure the legal protection of their nationals who were investing in developing, capital-importing states.<sup>408</sup> However, there is no single instrument on the international plane that broadly captures substantive rules on investment protection.<sup>409</sup> This suggests that there is no comprehensive and authoritative treaty of universal application that subjects all states to the same standards of investment protection. Rather, international rules and norms on investment protection are multi-faceted and multi-layered. Suffice to say that the existing international investment legal framework comprises of various rules and norms that probably differ in scope, purpose and interpretation.<sup>410</sup>

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<sup>403</sup> Schefer *International Investment Law: Text, Cases and Materials* (2013) x. See also Paparinskis *Basic Documents on International Investment Protection* (2012) 3.

<sup>404</sup> The first BIT was negotiated in 1959 between Pakistan and the Federal Republic of Germany. BITs are generally designed for the protection and promotion of investment and remain the main international means for FDI protection and regulation. See Mann “Reconceptualising International Investment Law: Its Role in Sustainable Development” 2013 *Lewis & Clark Law Review* 17. See also Leal-Arcas *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (2010) 206; and Zampetti and Sauve “International Investment” in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 215.

<sup>405</sup> See, for example, Chapter 11 of the North America Free Trade Agreement, 1994 (hereafter “NAFTA”); European Energy Charter; Protocols and the Treaty Establishing the Common Market for Eastern and Southern Africa 33 ILM 1067, 1993 (hereafter “COMESA Treaty”); and Southern African Development Community Protocol on Finance and Investment, 2006 (hereafter “SADC FIP”).

<sup>406</sup> See United Nations Conference on Trade and Development (UNCTAD) “International Investment Agreements: Key Issues” 2004 UNCTAD/ITE/IIT/2004/10; UNCTAD *International Investment Instruments: A Compendium* also available in the UNCTAD Investment Instruments On-line Database at <http://www.unctad.org>.

<sup>407</sup> International Institute for Sustainable Development (IISD) “Investment Treaties” <http://www.iisd.org/investment/law/treaties.aspx> (accessed 25-08-2014).

<sup>408</sup> Ibid.

<sup>409</sup> See Lowenfeld *International Economic Law* (2002) Part VI.

<sup>410</sup> International investment protection law is characterised by the co-existence of voluntary, non-binding and binding rules imposing obligations on the host state and involve the responsibility of that state. See Leal-Arcas 180.



The aspiration for universal application of investment standards is somewhat contentious in international law. This is because investment treaties, as highlighted in Chapter 2, are sometimes considered by developing economies as instruments of hegemonic domination of developing countries by developed countries.<sup>411</sup> In addition to the foregoing, majority of international investment treaties make no reference to developmental provisions which presents a challenge to adopting a multilateral approach to standards. However, this approach if taken in light of the balanced approach adopted by the International Trade Organisation (ITO) could be feasible as a developmental clause would allow for a special but differential application of minimum standards.<sup>412</sup> Moreover, it is submitted that international economic law is dominated by neoliberal ideology<sup>413</sup> which means that the developmental objective is a secondary issue.<sup>414</sup> As a result of the above, developing states appear to consider BITs and investment related regional instruments as more important because they seem to strike an appropriate balance between investment protection and developmental objectives.<sup>415</sup>

Against this background, providing a comprehensive summative account of the international legal framework for the protection of FDI is a strenuous undertaking. The approach adopted in this Chapter is to identify and discuss selected voluntary, binding and non-binding rules that constitute the basic international legal framework governing the field of FDI protection. In essence, the discussion in the present Chapter intends to establish the minimum international standards on specific issues of foreign investment protection in the new millennium. In particular, it focuses on international rules and norms relating to the admission, nationalisation/expropriation and treatment of foreign investments, performance requirements and investment dispute resolution. Modern international investment law has developed through a long way to achieve its primary goal which is to provide the protection of FDI under minimum standards.<sup>416</sup> On this basis, there are specialised treaties and case law on foreign investment that provide important guidance as to the correct interpretation of such particular standards of FDI protection. In that sense, it is appropriate to carefully examine the provisions of such treaties or case law. As a result, in appropriate cases, this Chapter explores the development of the said minimum international standards on investment protection.

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<sup>411</sup> Schill *The Multilateralisation of International Investment Law* (2009) 199.

<sup>412</sup> Ibid.

<sup>413</sup> Carmody "A Theory of WTO Law" 2008 11 *Journal of International Economic Law* 527.

<sup>414</sup> Warikandwa *Enlarging the Place of Human Rights and Development in International Trade Regulation: An Evaluation of the Problems and Prospects of Incorporating a Social Clause in the Legal Framework of the World Trade Organisation* (LLD-thesis, University of Fort Hare, 2012) 178.

<sup>415</sup> Leal-Arcas 187.

<sup>416</sup> Schefer 3.

Similar to other areas of international law, international investment law derives from treaties, customary rules, general principles of law and dispute settlement rules.<sup>417</sup> There is no doubt, therefore, that the sources of public international law embedded in Article 38 (1) of the Statute of the International Court of Justice (ICJ) are significant rules that shape the subject of international investment law. In addition, the modern development of international law has seen the emergence of other important sources of international law such as, *inter alia*, soft law,<sup>418</sup> peremptory norms (*jus cogens/obligation erga omnes*)<sup>419</sup> and a system of higher norms.<sup>420</sup> It is worth mentioning that international human rights law as well as principles of equity, fairness, justice and non-discrimination of public international law are also foundations of international investment protection law.<sup>421</sup> Ratner and Slaughter opine that international law is no more or less than the rules to which states have agreed through treaties, customs and perhaps other forms of consent.<sup>422</sup> As a result, this Chapter presents minimum global standards, norms and/or best practices on investment protection in the form of international agreements or conventions, customary international law (CIL), general principles of law, judicial decisions or soft law.

It should be noted that this study seeks to provide an argument as to why uniform or minimum international rules governing the protection of foreign investment are necessary. The argument lies in economic advantages for developing and developed states that stem from uniform structures protecting FDI. The other basic motive of the argument is the establishment of legal certainty in the legal protection of FDI. It is submitted that minimum international rules can lock states into a governance system that prevents them from taking measures that negatively affect not only national economy but the economies of other countries or even destabilise the global economic system. Thus investment treaties are not about domination of developing

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<sup>417</sup> Paparinskis 3.

<sup>418</sup> Traditionally, soft law is not formally binding on states or individuals. Nevertheless, it is important to note that soft law such as United Nations General Assembly (GA) Resolutions as well as binding and non-binding legal documents, Organisation for Economic Co-operation and Development (OECD) guidelines, World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 (hereafter “WB Guidelines”), among others, may possess considerable legal authority and may also have varying normative intensity and general applicability. See Dugard *International Law: A South African Perspective* 4 ed (2011) 33. See also Shaw *International Law* 6 ed (2008) 117.

<sup>419</sup> Article 53 of the Vienna Convention on the Law of Treaties (VCLT) of 1969 provides that “a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

<sup>420</sup> See Cassese *International Law* 2 ed (2005) Chapters 10 and 11.

<sup>421</sup> See WTO *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) 10; and Harrison *The Human Rights Impact of the World Trade Organisation* (2007) 37.

<sup>422</sup> Ratner and Slaughter “Appraising the Methods of International Law: A Prospectus for Readers” 1999 93 *American Journal of International Law* 291.

countries by developed countries, but establishing a regime that is conducive to creating economic growth as well as generating welfare in and among capital-exporting and capital-importing states.<sup>423</sup>

The principal objective of this Chapter is to discuss minimum international investment rules as standards for interpreting domestic investment law and related policies of South Africa and Zimbabwe. In addition, global investment regimes are examined as a foundation for norms, standards and/or best practices upholding key foreign investment safeguards in South Africa and Zimbabwe. Accordingly, this Chapter provides a background within which Chapters 4 and 5 will be evaluated and understood. The questions to be addressed in this Chapter include: firstly, what are the existing international regulatory regimes of foreign investment protection and how adequate are they for foreign investment protection? Secondly, what norms, minimum standards and/or best practices do these international investment legal mechanisms create in foreign relation to investment protection and regulation? Lastly, what are the international and regional obligations on South Africa and Zimbabwe regarding the protection of FDI?

The Constitutions of South Africa<sup>424</sup> and Zimbabwe<sup>425</sup> confirm the application of international rules in their municipal laws. It is for this particular reason that international rules and norms of foreign investment protection will be used to evaluate the investment and related policies of South Africa and Zimbabwe. By making reference to foreign, voluntary and non-binding norms on FDI protection, it is sought to determine whether there may be any lessons which may be learnt from the application of those standards and/or best practices. Non-binding and voluntary investment rules may have an influence on foreign investment protection and regulation.<sup>426</sup> Whether it would be appropriate to consider or apply such international standards of investment protection in South Africa and Zimbabwe is a question that this study seeks to address.

### **3 2 INTERNATIONAL PRACTICES ON ADMISSION OF FOREIGN INVESTMENTS**

Admission of investment is generally the pre-establishment phase when an investor seeks entry or access into the territory of the host state.<sup>427</sup> Historically, rules on the entry of foreign

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<sup>423</sup> Ibid.

<sup>424</sup> See sections 39 (1) (b), 231, 232 and 233 of the Constitution of the Republic of South Africa, 1996.

<sup>425</sup> See sections 34, 46 (1) (c), 326 and 327 of the Constitution of the Republic of Zimbabwe, 2013.

<sup>426</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 211.

<sup>427</sup> Hamida "Sovereign FDI and International Investment Agreements: Question Relating to the Qualification of Sovereign Entities and the Admission of their Investments under International Agreements" 2010 9 *The Law and Practice of International Courts and Tribunals* 30. See also Gomez-Palacio and Muchlinski "Admission and

investors were achieved through national immigration laws because there were no specific rules on foreign investment.<sup>428</sup> Currently, the measures on the admission of FDI are commonly found in IIAs and BITs. This may mean that state rights and obligations to admit FDI within its territory are the result of the treaties and other international law instruments to which a particular state is part.<sup>429</sup> This does not mean to say CIL is irrelevant in respect of admission of investment. Rather CIL accords to the state an absolute and sovereign right to control the entry of foreign investors.<sup>430</sup> Thus host states retain a CIL sovereign right to determine the admission of foreign investment into their respective territories. In most cases host states admit, exclude or admit FDI into their territories subject to conditions.

In recent BITs or IIAs practice, states, especially developing countries, exercise the right to admit FDI with a motive to promote national economic or other public policies.<sup>431</sup> This possibly means that FDI can be admitted subject to specific conditions such as, *inter alia*, joint ventures with domestic investors, technology transfer, employment of local personnel, research and development, local equity participation,<sup>432</sup> utilisation of local resources and other performance requirements. In principle, this is contrary to the general international rule of investment liberalisation that requires a host country to refrain from applying restrictive measures to the entry of foreign investment irrespective of whether or not they are discriminatory.<sup>433</sup> For instance, Article II of the WB Guidelines provide that member states will advance the admission and establishment of investments by foreign investors and avoid making complicated procedural regulations for or imposing unnecessary conditions on the admission of such investments.<sup>434</sup>

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Establishment” in Muchlinski, Ortino and Schreuer (eds) *The Oxford Handbook of International Investment Law* (2008) 227-258.

<sup>428</sup> Sornarajah (2010) 98.

<sup>429</sup> Hamida 2010 *The Law and Practice of International Courts and Tribunals* 30.

<sup>430</sup> See *Barcelona Traction Case, Light and Power Company Ltd (Belgium v. Spain)* Second Phase, (1970) ICJ Reports para 33; *Mihaly International Corporation v. Sri Lanka* (Award, 15 March 2002) para 60; Jennings & Watts (eds) *Oppenheim’s International Law* 9 ed (1992) 896-900; Seidl-Hohenveldten *International Economic Law* 3ed (1999) 99-126; Muchlinski (2007) 177-214; Sornarajah (2004) 98-108; Sihata “Recent Trends Relating to Entry of Investment” 1994 *ICSID Review* 9 47; Dolzer and Stevens (1995) 50; Sacerdoti “The Admission and Treatment of Foreign Investment under Recent Bilateral and Regional Treaties” 2000 1 *Journal of Women Imaging* 105; and UNCTAD “Admission and Establishment” *UNCTAD Series on Issues in International Investment Agreements* (1995) 7.

<sup>431</sup> Baltag “Admission of Investments and the ICSID Convention” 2009 6 *Transnational Dispute Management* 1. See also Pollan *Legal Framework for the Admission of FDI* (2006) 76.

<sup>432</sup> For example, the Black Economic Empowerment (BEE) policy of South Africa and the Indigenisation policy of Zimbabwe. These policies are discussed in Chapters 4 and 5, respectively.

<sup>433</sup> See UNCTAD Investment Policy Monitor 2014.

<sup>434</sup> See Article II of the WB Guidelines.

Most investment treaties declare the need to admit investment “in accordance with laws and regulations of the host country.”<sup>435</sup> This provision is recognised in Article 2 (1) of Annex 1 of the SADC FIP which provides that states shall admit investment in accordance with their laws and regulations. This approach is likely to put restrictions on the establishment and structure of ownership as well as future operations and management of foreign firms.<sup>436</sup> In present times, developing countries complement such a flexible principle because it allows them to admit FDI along with their respective national development goals and broad notion of national security especially in areas of critical interest to states.<sup>437</sup> The notion of regulating and admitting foreign investment “in accordance with the laws of host states” give admitting states autonomy over FDI. It should be noted that states are however required to apply such domestic rules of law in good faith and not arbitrarily.<sup>438</sup> The WB Guidelines urge member states to apply, *bona fide*, guidelines in the admission of foreign investment without prejudice to the binding rules of international law.<sup>439</sup>

The sovereign right of states to determine, regulate or control the admission of investment has been limited in present investment practice.<sup>440</sup> In fact, such a sovereign right is affected by variables such as, *inter alia*, general principles of national treatment (NT) and most favoured nation (MFN) or investment liberalisation provisions, transparency of regulatory controls as well as exceptions and derogations to treaty-based rights of entry and establishment.<sup>441</sup> Conventionally, principles of NT and MFN in investment law are applied post-establishment of FDI. Under general international law, host states are required not to discriminate against investors from other state parties when admitting investment.<sup>442</sup> But this position seems to have

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<sup>435</sup> Gomez-Palacio and Muchlinski in Muchlinski *et al* (eds) *The Oxford Handbook of International Investment Law* (2008) 227. See, for instance, Article 2 of the Croatian Model BIT, 1998; Article 2 of the Netherlands Model BIT, 1997; Article 2 (1) of the Swiss Model BIT, 1986/1995; Article 24 (1) of the British Model BIT, 2005; and Article 2 of the 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. For more examples on investment treaties providing for the host state’s discretion to admit foreign investment according to its rules and regulation, see Pollan 142-143.

<sup>436</sup> See UNCTAD Investment Policy Monitor 2014. See, for example, the indigenisation policy of Zimbabwe and BEE policy of South Africa.

<sup>437</sup> *Ibid.*

<sup>438</sup> See, for instance, Article 3 of the Southern African Development Community Model BIT, 2012 (hereafter SADC Model BIT).

<sup>439</sup> See the preamble of the WB Guidelines which requires the member countries to follow the WB Guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development.

<sup>440</sup> See UNCTAD “Investor-State Dispute Settlement and Impact on Investment Rulemaking” (2007) UNCTAD/ITE/IIA/2007/3.

<sup>441</sup> UNCTAD “International Investment Agreements: Key Issues” (2004) UNCTAD/ITE/IIT/2004/10 143.

<sup>442</sup> International Institute for Economic Development (IIED) “Investment Treaties and Sustainable Development: Investment Liberalisation” 2014 <http://pubs.iied.org/17239iied> (accessed 09-09-2014).

shifted in the new millennium as some BITs and IIAs, particularly those signed by US, Canada and Japan among other states, have extended such standards to the pre-establishment phase. This could be a result of the growing pressure to incorporate investment liberalisation guarantees into investment treaties.<sup>443</sup> Such treaties do not contain a requirement for admission of investment in accordance with host state law. NT and MFN principles require states to grant prospective foreign investors a treatment not less favourable than that accorded to domestic nationals or nationals of the most-favoured nation in like circumstances, respectively.<sup>444</sup> For example, the OECD's Multilateral Agreement on Investment (MAI) Draft<sup>445</sup> incorporated NT and MFN principles in both pre- and post-establishment phases. Another notable example is Article II of the General Agreement on Trade and Services (GATS)<sup>446</sup> which applies an MFN standard to both pre- and post-establishment in all services sectors unless an exception is contained in the country's MFN exemptions. As one would expect, the application of NT and MFN standards in pre-establishment stage has implications of limiting host countries' right to admit or not admit FDI on the basis of their own national policies.

### **3 2 1 International treaty models on admission of investment**

UNCTAD has identified five practices or models that have mutually evolved in the present international investment treaties resulting from increasing pressure to liberalise investment.<sup>447</sup> The five models include: investment control; selective liberalisation; regional industrialisation programme; mutual NT and combined NT and MFN. The said models present a point from complete state control over entry and establishment on the one hand, to entry and establishment rights subject to limited exceptions, on the other hand.<sup>448</sup> It should be noted that these models are merely international legal and policy options surrounding the admission and establishment of FDI in host countries. Perhaps more importantly is that these models may play an

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<sup>443</sup> See UNCTAD Investment Policy 2014.

<sup>444</sup> Correa and Kumar 111.

<sup>445</sup> The Multilateral Agreement on Investment Draft (MAI Draft) was negotiated by governments at the Annual Meeting of the OECD Council in May 1995. It sought but failed to provide a comprehensive multilateral treaty for international investment constituting high standards of investment liberalisation, investment protection and effective dispute settlement procedures.

<sup>446</sup> General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 UNTS 183, 33 ILM 1167 (1994) (hereafter "GATS").

<sup>447</sup> See UNCTAD "Admission and Establishment" *UNCTAD Series on Issues in International Investment Agreements* (1995) 7; and UNCTAD "International Investment Agreements: Key Issues" (2004) UNCTAD/ITE/IIT/2004/10.

<sup>448</sup> UNCTAD "International Investment Agreements: Key Issues" (2004) UNCTAD/ITE/IIT/2004/10 143. See also UNCTAD "Admission and Establishment" *UNCTAD Series on Issues in International Investment Agreements* (2002) 16.

educational role suggesting to governments various possible approaches that are generally acceptable.

### 3.2.1.1 *Investment control*

The investment control model concedes restrictions and control on the admission of foreign investment in accordance with the host country's laws and regulations.<sup>449</sup> Article 2 (1) of the SADC FIP reflects the investment control model. In this model, the host country has the discretion in deciding whether and on what conditions FDI may be admitted into its territory. Investment control model retains the host state's sovereign right, under CIL, to control the entry and admission of foreign investment within its territory.<sup>450</sup> Investment control provisions are common to most BITs and IIAs.<sup>451</sup> The WB Guidelines affirm state investment control and assert that each state retains the right to make regulations to govern the admission of foreign investments.<sup>452</sup> The restrictions imposed by a host country in exercising the right of control to admit FDI may comprise of absolute restriction or limits on foreign presence or may involve discretionary authorisation, registration and reporting requirements.<sup>453</sup>

### 3.2.1.2 *Selective liberalisation*

The selective liberalisation model is suitable "where states do not wish to liberalise across the board but wish to follow controlled and industry-specific liberalisation in exchange for equivalent action by other states, where, after negotiation, it appears useful to do so."<sup>454</sup> The selective liberalisation approach is well explained in Article XVI of the GATS. The Article articulates that a right of establishment exists where a member state makes specific commitments on market access. Thus, a member state is proscribed from imposing specific listed restrictions on the supply of services except where it explicitly specifies that it reserves such limitations. As a result, in the absence of an express reservation or limitation, the member state cannot impose certain restrictions.<sup>455</sup> Article XVI of the GATS clarifies that the recipient state has considerable discretion in controlling the breadth of its market access commitments,

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<sup>449</sup> UNCTAD "Admission and Establishment" *UNCTAD Series on Issues in International Investment Agreements* (2002) 16.

<sup>450</sup> Ibid.

<sup>451</sup> See, for example, Article 3 of the SADC Model BIT; Article 3 of the Agreement on Investment and Free Movement of Arab Capital among Arab Countries, 1970; Articles 2 and 5 of the Unified Agreement for the Investment of Arab Capital in the Arab States, 1980; and Article 2 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, 1981.

<sup>452</sup> UNCTAD "Admission and Establishment" *UNCTAD Series on Issues in International Investment Agreements* (1996) 247.

<sup>453</sup> Ibid 174-177.

<sup>454</sup> UNCTAD "International Investment Agreements: Key Issues" (2004) UNCTAD/ITE/IIT/2004/10 150.

<sup>455</sup> For examples of restrictions not to be imposed by a host country, see Article XVI (2) (e)-(f) of the GATS.

and that it may expressly reserve powers to limit the mode of supply; there is no general obligation to remove all barriers concerning the entry and establishment of service providing firms.<sup>456</sup> GATS members are obliged to do no more than set out the specific market access commitments that they are prepared to undertake in a schedule drawn up in accordance with Article XX of the GATS.<sup>457</sup>

### 3 2 1 3 *Regional industrialisation programme*

The regional industrialisation programme model entails the establishment of industrial integration programmes or organisations aimed at the participation of foreign investors of member countries.<sup>458</sup> These regional organisations are achieved, *inter alia*, through industrial programmes and other means of industrial integration, which include industrial integration programmes aiming at the participation of at least four member countries, and which may involve the location of plants in countries of the sub-region.<sup>459</sup> These are corporations established in a member country by investors from two or more member countries, which are accorded rights of entry on the basis of national treatment in all member countries.<sup>460</sup> Within such integrated organisations, restrictions on freedom of establishment of investment are removed for investors of member states. Such favourable treatment is not normally available to investors of third parties.<sup>461</sup> This model has been adopted by many international agreements.<sup>462</sup> Article 101 (1) of the COMESA Treaty states that “the member states shall promote and encourage the establishment of multinational industrial enterprises in accordance with the laws in force in the member states in which such enterprises shall be established, having regard to the economic conditions and priorities of the particular member states concerned.”

### 3 2 1 4 *Mutual NT*

Similar to the regional industrialisation programmes model, the mutual NT model is based on preferential rights of entry and establishment for investors from other member states.<sup>463</sup> The latter model differs however from the former model in that it offers general rights of entry to

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<sup>456</sup> UNCTAD “International Investment Agreements: Key Issues” (2004) UNCTAD/ITE/IIT/2004/10 150.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> Ibid.

<sup>461</sup> Ibid 151.

<sup>462</sup> For example, Article 4 of the Protocol on Co-operation in the field of Industrial Development and Article 101 of the COMESA Treaty.

<sup>463</sup> Muchlinski (1999) 245-247.



all investors from other states.<sup>464</sup> Rights of entry are thus accorded on the basis of NT in all member countries. This may mean that restrictions on the entry and establishment of nationals from member states are prohibited.<sup>465</sup> This model has been embraced by many states, particularly member states of the European Community (EC) Treaty,<sup>466</sup> and the two OECD Liberalisation Codes.<sup>467</sup> It is worth mentioning that a member state is not prevented from imposing restrictions on grounds of public policy, national security or public health.<sup>468</sup> This may mean that a host state can impose restrictions on the entry and establishment of foreign investment on selected industries or sectors based on public policy, national security or public health grounds. The mutual NT model has also been adopted by regional organisations such as the Treaty Establishing the Caribbean Community (CARICOM),<sup>469</sup> Treaty Establishing the Economic Community of Central African States (ECCAS),<sup>470</sup> Community Investment Code of the Economic Community of the Great Lakes Countries,<sup>471</sup> Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area<sup>472</sup> and the ECOWAS Revised Treaty,<sup>473</sup> among others.

### 3.2.1.5 *Combined NT and MFN treatment*

The combined NT and MFN treatment model is common in US BITs practice. This model was included in the MAI Draft. The present model imposes substantial obligations to admit foreign investment on the host government.<sup>474</sup> NT and MFN standards, in relation to admission of FDI, require states to give foreign investors treatment no less favourable than that accorded to domestic investors or those from the most-favoured nation, in like circumstances. For instance, Article II (I) of the US Model BIT states:

With respect to the establishment ... each Party shall accord treatment no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter ‘national treatment’), or to investments in its territory of nationals or companies of a third country

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<sup>464</sup> Ibid.

<sup>465</sup> Ibid.

<sup>466</sup> See Article 52-66 of the Treaty Establishing the EC, 1957.

<sup>467</sup> The Code Liberalisation of Capital Movements of 2013 and the Code of Liberalisation of Current Invisible Operations of 2013 were adopted by the OECD Council and constitute legally binding rules, stipulating progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions. More information on these Codes is available at <http://www.oecd.org/daf/inv/investment-policy/codes.htm>.

<sup>468</sup> See Article 56 of the EC Treaty.

<sup>469</sup> Article 35 of the CARICOM Treaty, 1973.

<sup>470</sup> Article 40 of the ECCAS Treaty, 1992.

<sup>471</sup> Article 6 of the Community Investment Code of the Economic Community of the Great Lakes Countries, 1987.

<sup>472</sup> Article 4 (6) of the Framework Agreement on the ASEAN Investment Area, 1998.

<sup>473</sup> Article 3 of the ECOWAS Revised Treaty, 1993.

<sup>474</sup> IIED “Investment Treaties and Sustainable Development: Investment Liberalisation” 2014.

(hereinafter ‘most favoured nation treatment’), whichever is most favourable (hereinafter ‘national and most favoured nation treatment’).

The imposition of NT and MFN principles on the entry and establishment of foreign investment can significantly erode the ability of the host government to control the admission of investment within its jurisdiction.<sup>475</sup> This model has been embedded in the NAFTA,<sup>476</sup> the FTA between Colombia, Mexico and Venezuela<sup>477</sup> and the Framework Agreement on the ASEAN Investment Area.<sup>478</sup> In terms of this model, investors and investments from non-member states cannot benefit from measures aimed at investors and investments from member states. The IIAs or BITs concluded by the EC tend not to include the NT and MFN provisions on the admission and establishment of foreign investment.<sup>479</sup> It is noteworthy that NT and MFN do not constitute full liberalisation of investment, but host government authorisations may still be a prerequisite for investment if they are applied to both nationals and foreigners in a non-discriminatory manner.<sup>480</sup> Regardless of the foreign, exceptions from NT and MFN are permissible in international law, provided they are rational.<sup>481</sup>

From the above analysis, host states traditionally retain a sovereign right, under CIL, to determine the entry of foreign investors within their territories. However, as highlighted above, the notion of investment liberalisation seems to have received much attention in contemporary investment practice. In essence, the host states’ sovereign right to control the entry and establishment of foreign investment is significantly limited by the ideology of investment liberalisation which lies at the heart of international economic law. This may be based on a variety of concepts and standards, including adapted and evolved versions of non-discrimination standards commonly seen in international trade treaties, notably NT and MFN. Five options have emerged as central in contemporary investment law with regard to admission of investment. Notably, the five models recognise that the entry of foreign investment should be in accordance with the internal rules and regulations of the host state. In addition, the WB Guidelines also provide standards that could be used by member countries on the admission of foreign investment. Though the WB Guidelines are non-binding, it is submitted that they may

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<sup>475</sup> Ibid.

<sup>476</sup> See Articles 1102, 1103, 1104, 1106 and 1108 of the NAFTA.

<sup>477</sup> Article 17 of the Free Trade Agreement between Colombia, Mexico and Venezuela, 1994.

<sup>478</sup> Articles 4 (b) and 7 of the Framework Agreement on the ASEAN Investment Area.

<sup>479</sup> IIED “Investment Treaties and Sustainable Development: Investment Liberalisation” 2014.

<sup>480</sup> Ibid.

<sup>481</sup> Sornarajah (2010) 106.

be an important step in the emergence of generally acceptable international standards on admission of FDI.

### 3 3 INTERNATIONAL LAW RULES ON EXPROPRIATION

Under international investment law and also echoed in *Grand River Enterprises v. US*,<sup>482</sup> the term “expropriation” refers to the nationalisation of foreign investors’ property or interests by the host state.<sup>483</sup> Expropriation is one of the greatest risks faced by foreign investors in host states and occupies the most prominent position in the history of investment law.<sup>484</sup> Within international law, nationalisation of foreign investors’ property raises major questions. The rules governing expropriation of such property concern the balance between investor protection and state sovereignty.<sup>485</sup> The *ADC v. Hungary*<sup>486</sup> tribunal stated that in CIL states enjoy the right to expropriate foreign-owned property. The states’ right to expropriate foreign investment is reiterated in a number of international instruments,<sup>487</sup> including almost all IIAs. It is suggested that the states’ power to expropriate foreign-owned property emanated from the customary rule of permanent sovereignty over natural resources.<sup>488</sup> However, the states’ right to expropriate foreign investment is not unlimited,<sup>489</sup> but such right is subject to several

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<sup>482</sup> *Grand River Enterprises Six Nations v. United States of America*, NAFTA; UNCITRAL Arbitration Awards, 146-155 (January 12, 2011).

<sup>483</sup> See also Sabahi and Birch “Comparative Compensation for Expropriation” in Schill (ed) *International Investment Law and Comparative Public Law* (2010) 778; Reinisch “Expropriation” in Muchlinski, Ortino and Schreuer (eds) *The Oxford Handbook of International Investment Law* (2008) 407; OECD “Indirect Expropriation and the Right to Regulate” 2004 *International Investment Law* 3-4; *Metalclad Corp. v. United Mexican States*, ICSID, Case No. ARB (AF)/97/1 (August 30, 2000); *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, Award of 27 June 1990, 4 ICSID Rep. 246 (1977) paras 66-85; Newcombe “The Boundaries of Regulatory Expropriation in International Law” 20 2005 *ICSID Review – Foreign Investment Law Journal* 1; and Brownlie *Principles of Public International Law* 6 ed (2003) 508.

<sup>484</sup> Investment Climate Advisory Services of the World Bank Group *Investment Law Reform: A Handbook for Development Practitioners* (2010) 146.

<sup>485</sup> Todd *International Investment Law and Arbitration* (2005) 599.

<sup>486</sup> *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006) para 423. See also Reinisch in Muchlinski *et al* (eds) *The Oxford Handbook of International Investment Law* (2008) 407-458; *Banco Nacional de Cuba v. Sabbatino* 376 US 398 (1964) para 428; *De Sanchez v. Banco Central de Nicaragua* 770 F.2d 1385, 1397; and *AMCO v. Indonesia (Merits)* 89 ILR paras 405 and 466.

<sup>487</sup> See, for example, the Charter of Economic Rights and Duties of States; GA Resolution 1803 (XVII) 1-5, UN Documents A/RES/1803), (December 14, 1962) or (Permanent Sovereignty over Natural Resources, 1962); GA Resolution 3171 (XXVIII) 1 and 3, UN Documents A/RES/3171 (XXVII) (December 17, 1973); GA Resolution 3281 (XXIX) Article 2 (2) (c), UN Documents A/RES/29/3281 (December 12, 1974); Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1952; and Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. For an account of the GA Resolution on Permanent Sovereignty of the State, see De Arechaga “State Responsibility for the Nationalisation of Foreign Owned Property” 1979 11 *New York University Journal of International Law and Politics* 179.

<sup>488</sup> See Schwebel “The Story of the UN’s Declaration on Permanent Sovereignty over Natural Resources” 1963 49 *ABA Journal* 463; Gess “Permanent Sovereignty over Natural Resources” 1964 13 *International & Comparative Law Quarterly* 389; Lillich *International Law of State Responsibility for Injuries to Aliens* (1983); and Lowenfeld *International Economic Law* 2 ed (2008) 486.

<sup>489</sup> *ADC v. Hungary* para 423.

conditions.<sup>490</sup> Conditions such as, *inter alia*, public purpose,<sup>491</sup> due process,<sup>492</sup> non-discrimination<sup>493</sup> and payment of compensation<sup>494</sup> have stood out as commonly cited standards for the expropriation of foreign investment.<sup>495</sup> This is a general international law principle, where no rule would bar expropriation of foreign owned property provided that such action is undertaken for public purpose, in a non-discriminatory manner, in accordance with due process of law and upon payment of compensation.<sup>496</sup> It is no surprise that some, if not all, of the said standards have been embodied in the Constitutions of South Africa<sup>497</sup> and Zimbabwe<sup>498</sup> as well as in Article 5 of the SADC Model BIT and a number of Model BITs<sup>499</sup> as traditional norms for expropriation of property. Before discussing the standards or rules on the expropriation of foreign investors' property, it is appropriate to examine the development of such standards.

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<sup>490</sup> Jennifer "Separate and Unequal: Bilateral Investment Treaties and Property Rights in Developing Countries" (2007) Paper presented at the Annual Meeting of the Midwest Political Science Association [http://www.allacademic.com/meta/p197323\\_index.html](http://www.allacademic.com/meta/p197323_index.html) (accessed 28-08-2014).

<sup>491</sup> See Munchlinski *Multinational Enterprises & the Law* 2 ed (2007) 599; *ADC v. Hungary* para 429; *Goetz v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability (September 12, 1998); and Article 1110 of the NAFTA.

<sup>492</sup> Due process condition comprises of procedural and substantive law content, see Clayton & Tomlinson (eds) *The Law of Human Rights* 2 ed (2009) 708. See also Sandefur "In Defense of Substantive Due Process, or the Promise of Lawful Rule" 2012 35 *Harvard Journal of Law & Public Policy* 286-293; *ADC v. Hungary* para 435. Due process is also disputed as a standard element of expropriation. See Dolzer and Schreuer *Principles of International Investment Law* 2 ed (2012) 100. See also *Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, ICSID Case No. ARB/05/18, Award (March 3, 2010); and Reinisch "Legality of Expropriations" in Reinisch (ed) *Standards of Investment Protection* (2008) 193.

<sup>493</sup> See, for example, *ADC v. Hungary* para 441; *Mike Campbell (Pvt) Ltd v. the Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (November 28, 2008); and *Amoco International Finance Corporation v. Iran* 15 Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Award (July 14, 1987).

<sup>494</sup> The payment of compensation is the most critical standard element of expropriation. Walde and Sabahi "Compensation, Damages and Valuation" in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 1052 and Reinisch in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 48-89.

<sup>495</sup> See Edwick *Bilateral Investment Treaties Encouraging Foreign Direct Investment: Zimbabwe – South Africa BIPPA as a Case Study* (LLM-thesis, UP, 2009) 47; American Law Institute *Restatement of the Law, Third: Foreign Relations Law of the United States* (1987) 712; UNCTAD Series on International Investment Agreements II (2012) 27; Reinisch in Reinisch (ed) *Standards of Investment Protection* (2008) 173; Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 108; Sheppard "The Distinction between Lawful and Unlawful Expropriation" in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 169; McLachlan, Shore and Weinger *International Investment Arbitration: Substantive Principles* (2005) 265; UNCTAD "Taking of Property" *UNCTAD Series on Issues in International Investment Agreements* (2000) 12.

<sup>496</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 225. See also, for instance, Article 5 of the South Africa-Zimbabwe BIT; Article 6 (1) of the US-Rwanda BIT, 2008; Article 7 (1) of the Agreement between the government of United Mexican States and the government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, 2009; and Article 13 (1) of the Canadian Model BIT, 2004;

<sup>497</sup> See section 25 (2) of the Constitution of South Africa.

<sup>498</sup> See section 71 (3) of the Constitution of Zimbabwe.

<sup>499</sup> See, *inter alia*, Article 6 (1) of the US Model, 2004; Article 13 (1) of the Canadian Model BIT, 2004; Article 1110 (1) of NAFTA; Article 13 (1) of the European Energy Charter Treaty; Article 20 (1) of the COMESA Investment Agreement; and Article 4 (2) of the Germany Model BIT, 2008.

The next part will therefore explore the historical development of the international norms on expropriation.

### 3 3 1 Origins of international standards of expropriation

Expropriation of foreign-owned property began in early twentieth century with the nationalisations in South America in the 1900s, in the Soviet Union in the 1920s<sup>500</sup> and in Mexico in the 1930s.<sup>501</sup> Massive expropriation of foreign investors' property began to gain momentum in the 1940s in Eastern Europe, Latin America and the US, among others.<sup>502</sup> The proliferation of disputes<sup>503</sup> over expropriation of foreign property prompted the establishment of legal rules and practices on expropriation as developed, capital-exporting states sought to legally protect the property of their nationals from being nationalised by developing, capital-importing states.<sup>504</sup> Following the expropriation of American-held oil interests by Mexico in the 1930s, United States (US) insisted on the recognition of the Hull Formula<sup>505</sup> as an international law rule on expropriation.<sup>506</sup> Critics of the Hull Formula countered its recognition and proposed the international recognition of the Calvo doctrine.<sup>507</sup> Due to this divergence, there was no consensus in the international investment community as to the obligations of the host states on expropriation of foreign investors' property.<sup>508</sup>

In 1962, the GA passed Resolution 1803, also referred to as the Resolution on Permanent Sovereignty over Natural Resources<sup>509</sup> which declares, in paragraph 4:

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<sup>500</sup> During this period, in the Soviet Union, there was expropriation of both foreign and domestic owned mines, factories and oil industry without compensation by the state, see Friedman *Expropriation in International Law* (1953) 176-223.

<sup>501</sup> In 1930s, there were massive nationalisation of land and petroleum holdings of US nationals by Mexico based on the state's right to control its natural resources. Lowenfeld (ed) *Expropriation in the Americas: A Comparative Law Study* (1971) 120.

<sup>502</sup> Rubins *Investor-State Arbitration* 3 ed (2013).

<sup>503</sup> See, for instance, the nationalisation of Anglo-Iranian Oil Company's property in Iran (1951), Egypt's nationalisation of Suez Canal Company (1956), the nationalisation of Dutch property in Indonesia (1958), *inter alia*. For a detailed exploration of the expropriations of US properties, see Committee Print of House Commission on Foreign Affairs "Expropriations of American-Owned Property by Foreign Governments in the Twentieth Century" 1963 *International Legal Materials* 1066.

<sup>504</sup> Sornarajah (1994) 8.

<sup>505</sup> The Hull Formula was developed by Cordell Hull in 1938, and states that property may be expropriated on a non-discriminatory basis, for public purpose, in accordance with a due process and against payment of prompt, adequate and effective compensation. See Lowenfeld (2008) 475-481.

<sup>506</sup> Leal-Arcas 186.

<sup>507</sup> The Calvo doctrine was developed by Carlos Calvo in the nineteenth century and postulated that under international, law foreign investment had no rights greater than domestic investors of the host country. See Shea *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955) 17-19.

<sup>508</sup> Schwebel "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources" 1963 49 *American Bar Association Journal* 463.

<sup>509</sup> The Resolution on Permanent Sovereignty over Natural Resources was adopted in 1962 by UN Commission on Permanent Sovereignty over Natural Resources and provides that states as well as international organisations

Nationalisation, expropriation or requisition shall be passed on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in the force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.

Though Resolution 1803 did not constitute an accord between developed and developing countries,<sup>510</sup> it reflected substantial consensus around the question of expropriation.<sup>511</sup> The subsequent GA Resolutions<sup>512</sup> slightly amended provisions on expropriation standards, particularly the payment of compensation. During the GA Resolutions era, foreign investment protection was left to the municipal law of host states.<sup>513</sup> Regardless of the said UN efforts, the case of *Texaco Overseas Petroleum Company (TOPCO) v. Libya*<sup>514</sup> and various international law authorities<sup>515</sup> agree that paragraph 4 of Resolution 1803 represents CIL but the later resolutions do not reflect CIL. As a customary rule it is plausible to propose that it applies to all states except where explicitly rejected. In addition, in 1967 the OECD attempted to introduce the Draft Convention on the Protection of Foreign Property<sup>516</sup> which contained the Hull Formula in Article 3 on rules of compensation. Though this Draft Convention did not gain support, its substantive provisions on expropriation served as a model for most BITs.<sup>517</sup>

Immediately after World War II, developing countries including Libya and some western countries such as France, the United Kingdom (UK)<sup>518</sup> and Canada<sup>519</sup> enacted legislation to authorise nationalisation of oil industries. In the period 1971-1974, the Libyan government under the leadership of Colonel Muammar Qaddafi expropriated all the foreign-owned oil

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shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the UN Charter and the principles contained in the Resolution.

<sup>510</sup> Schrijver *Sovereign Over Natural Resources* (1997) 37.

<sup>511</sup> Lowenfeld (2008) 494.

<sup>512</sup> GA Res 3171, UN GAOR, 28<sup>th</sup> Sess. Supp. No. 30, UN Doc. A/9559 (1974), (1974) 13 ILM 328; GA Res. 3201, UN GAOR, 29<sup>th</sup> Sess. Supp. No. 1, UN Doc. A/9550 (1974), (1974) 13 ILM 715 (Declaration on the Establishment of a New International Economic Order); GA Res. 3281, UN GAOR, 29<sup>th</sup> Sess. Supp. No.1 UN Doc. A/9631 (1974), (1975) 14 ILM 251 (Charter of the Economic Rights and Duties of States).

<sup>513</sup> Fatouros "Towards an International Agreement on Foreign Direct Investment" in OECD *Towards Multilateral Investment Rules* (1996) 48.

<sup>514</sup> *Texaco Overseas Petroleum Company/California Asiatic Oil Company (TOPCO) v. Libyan Arab Republic*, (1978) ILM 1.

<sup>515</sup> See Weston "Constructive Takings under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'" 1975 16 *Virginia Journal of International Law* 103; Dolzer "Expropriation" in Bernhardt (ed) *Encyclopaedia of Public International Law* (1985) 214; Dolzer "Indirect Expropriation of Alien Property" 1986 1 *ICSID Review* 41; and Asante "International Law and Foreign Investment: A Reappraisal" 1988 37 *International and Comparative Law Quarterly* 588.

<sup>516</sup> The Draft Convention on the Protection of Foreign Property was prepared by the OECD Committee in 1960.

<sup>517</sup> Dolzer and Stevens *Bilateral Investment Treaties* (1995) 2.

<sup>518</sup> See Higgins (1982) 349-354.

<sup>519</sup> See Mendes "The Canadian National Energy Programme: An Example of Assertion of Economic Sovereignty or Creeping Expropriation in International Law" 1981 14 *Vanderbilt Journal of Transnational Law* 475.

companies<sup>520</sup> in and around Libya without payment of compensation.<sup>521</sup> Within this period, a wide range of expropriation claims were brought before international tribunals.<sup>522</sup> The following part discusses the minimum standards of expropriation of foreign commercial property.

### 3 3 2 International minimum standards of expropriation

As seen from the preceding discussion, there is no authoritative codification of international expropriation law. But perhaps the most troublesome question in the field of expropriation pertains to the legal implications of generally applicable global minimum standards thereof. Nonetheless, there are commonly cited standards on international expropriation law including public purpose, due process, non-discrimination and compensation. It is worth noting that not all IIAs or BITs refer to all the said standards in list form but most commonly address each of the rules in their expropriation clauses with varying interpretations.<sup>523</sup> As shall be seen below, some of the prevailing standards have become CIL or general principles of law in international investment law. This part's purpose is to determine the accepted minimum standards for expropriation of foreign investment on the international plane.

#### 3 3 2 1 Public purpose

In recent practice, public purpose standard for expropriation is based on grounds of public utility or public interest.<sup>524</sup> The *Amoco v. Iran* tribunal noted that:

a precise definition of the 'public purpose' view for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalise, this term is broadly interpreted, and states, in practice, are granted extensive discretion.<sup>525</sup>

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<sup>520</sup> These companies include, *inter alia*, British Petroleum (BP Libya), Texaco and Standard Oil of California (TOPCO/CALASIATIC) and Atlantic Ridgefield (Libyan American Oil Company or LIAMCO).

<sup>521</sup> For a thorough discussion on this aspect, see Von Mehren and Kourides "International Arbitrations between States and Foreign Private Parties: The Libyan Nationalisation Cases" 1981 75 *American Journal of International Law* 476. See also the BP Award, 1974 in *International Law Reports* (1979) 53 297; TOPCO/CALASIATIC Award, 1977 in *Journal of du Droit International* (1977) 104 350; *Libya American Oil Company (LIAMCO) V. Government of the Libyan Arab Republic*, Award (April 12, 1977), 20 ILM 1(1981); *British Petroleum v. Libya*, Award 10 October 1973.

<sup>522</sup> See, for example, *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award 20 November 1984; *Benvenuti & Bonfant v. People's Republic of Congo*, Award 15 August 1980; *Adriano Gardella v. Ivory Coast*, Award 29 August 1977; *Kaiser Bauxite v. Jamaica*, Award 6 July 1975; *AGIP v. Congo*, Award 30 November 1979; *Klockner v. Cameroon*, Award 21 October 1983; *SOABI v Senegal*, Award 25 February 1988; *LETCO v. Liberia*, Award 16 February on Liability, Interpretation and Allied Issues, 4 May 1989.

<sup>523</sup> Schefer 169.

<sup>524</sup> Ibid 170.

<sup>525</sup> Para 145.

In similar vein, the European Court of Human Rights (ECtHR) in *James v United Kingdom*,<sup>526</sup> considering expropriation in violation of property rights held that the court “will respect a national legislature’s judgment as to what is in the public interest ... unless that judgment is manifestly without reasonable foundation.” It is suggested that an individual’s right to property can only be infringed by an overriding public interest element in expropriation.<sup>527</sup> The public purpose element is usually considered part of CIL.<sup>528</sup> This notion can be disputed. In addition, this standard has been reaffirmed in almost all IIAs or BITs.<sup>529</sup> The jurisprudence of the public purpose requirement varies case-by-case depending on applicable law and tribunals’ interpretation. For example, the *BP v. Libya ad hoc* tribunal explicitly assessed the public purpose requirement and found that the expropriation was unlawful because the alleged public interest ground was politically motivated as retribution to the British foreign policy.<sup>530</sup> It is submitted that the public purpose element will undoubtedly strengthen the views of those host states who expropriate foreign-owned property with the objective of redistributing such property or resources to the public.

### 3.3.2.2 Due process

The notion of due process was developed in Anglo-American law and it consists of both substantive and procedural law content.<sup>531</sup> In international investment law, due process as a rule of expropriation law requires procedural fairness. The procedural content includes, *inter alia*, the notifying of foreign investors, transparency and administrative proceedings before and during the expropriation and perhaps giving the affected investors an opportunity to be heard or request a review of the decision.<sup>532</sup> The *ADC v. Hungary* tribunal agreed that, in general terms, “the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claim heard.”<sup>533</sup> This tribunal further mentioned that a legitimate procedure requires reasonable advance notice, a fair hearing

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<sup>526</sup> Para 23.

<sup>527</sup> *Kardassopolous v Georgia* para 391. See also *ADC v. Hungary* para 432; *Siemens A. G v. Argentina*, ICSID Case No. ARB/02/08, Award (February 6, 2007); *Marvin Feldman v. Mexico* (2002) 7 ICSID Reports 318; (2003) 42 ILM 625, para 136; and para 4 of Resolution 1803.

<sup>528</sup> See para 4 of Resolution 1803; Malanczuk *Akehurst’s Modern Introduction to International Law* 7ed (1997) 235; Hober *Investment Arbitration in Eastern Europe: In Search of a Definition of Expropriation* (2007) 38; Mariles “Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law” 2007 16 *Journal of Transnational Law & Policy* 276-336; and Article 10 (10) of the Peru-Singapore FTA 2008.

<sup>529</sup> UNCTAD *Taking Bilateral Investment Treaties 1999 – 2000: Treaties in Investment Rule – Making* (2007) 44.

<sup>530</sup> Para 71.

<sup>531</sup> *ADC v. Hungary* paras 435-446.

<sup>532</sup> Newcombe and Paradell (2009) 376.

<sup>533</sup> Para 435.



and unbiased and impartial adjudication to assess the actions in dispute.<sup>534</sup> The standard of due process is not mentioned as a CIL<sup>535</sup> but it is generally established in IIAs though in different forms. Additionally, it seems that due process is required to be in accordance with the law of the host state<sup>536</sup> and international minimum standards of due process which include notice, fair hearing and non-arbitrariness. In *Elettronica Sicula S.p.A (ELSI) (US v. Italy)*,<sup>537</sup> the ICJ defined arbitrariness to include disregard of due process of law. However, the requirement of due process remains uncertain as to its interpretation.<sup>538</sup>

### 3 3 2 3 *Non-discrimination*

As a general rule, non-discrimination element of expropriation entails that host state may expropriate foreign nationals' property without any regard to their race, nationality and other personal characteristics.<sup>539</sup> A discriminatory expropriation singles out a specific person or group without a reasonable basis<sup>540</sup> and would violate international law.<sup>541</sup> In expropriation law, the non-discrimination standard is generally proscribed in CIL and several treaty provisions addressing the legality of expropriation.<sup>542</sup> The *Amoco v. Iran* tribunal stated that discrimination in the arena of expropriation is extensively prohibited by CIL.<sup>543</sup> In addition, almost all IIAs and BITs have made non-discrimination a requirement for lawful expropriation. However, Article 6 (1) of the SADC Model BIT recognises all the said obligations of lawful expropriation except non-discrimination. Considerable international case law<sup>544</sup> has acknowledged the existence of non-discrimination for expropriation in general. In *Mike*

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<sup>534</sup> Ibid.

<sup>535</sup> Van Duzer, Simons and Mayeda *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiations* (2013) 157.

<sup>536</sup> Ibid 156.

<sup>537</sup> *Elettronica Sicula S.p.A (ELSI)*, Judgement ICJ Reports 1989.

<sup>538</sup> Ibid.

<sup>539</sup> See, for example, *Banco Nacional de Cuba v. Sabbatino* which involved the expropriation of ethnic Indians' owned property by the Idi Amin Uganda, the Aryanisation policy of Nazi-Germany which led to the expropriation of Jewish property, Cuban Revolution which resulted in the expropriation of US nationals' property, *Oppenheimer v. Inland Revenue Commissioner* (1975) 1 All ER 538; .

<sup>540</sup> Rubins and Kinsella *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (2005) 177.

<sup>541</sup> See, for example, Article 1 (3) of the UN Charter, 1945; Article 2 of the Universal Declaration of Human Rights (UDHR), 1948 ; Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR), 1966; Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; Article 2 of the African Charter on Human and Peoples' Rights (ACHPR), 1981; Article 14 of the European Convention on Human Rights (ECHR), 1950; Article 6 (2) of the SADC Treaty; and para 7 of the UN Human Rights Committee General Comment No. 18, 1989.

<sup>542</sup> Maniruzzaman "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview" 1998 8 *Journal of Transnational Law and Policy* 57.

<sup>543</sup> Para 140.

<sup>544</sup> See *BP v. Libya*, *LIAMCO v. Libya*, *ADC v. Hungary*, *Eureko B. V v. The Republic of Poland*, and *Liberian Eastern Timber Corporation (LETCO) v. The Republic of Liberia*, ICSID Case. ARB/83/2 Award, 31 March 1986, 2 ICSID Reports 343, 366.

*Campbell v. Zimbabwe*, the government of Zimbabwe expropriated white owned agricultural land for the purpose of resettlement in terms of section 16B of the Constitution of Zimbabwe Amendment No. 17.<sup>545</sup> The applicants contended that the action by Zimbabwean government in expropriating the land was racially motivated because it only aimed at white farm owners.<sup>546</sup> The applicants based their claim on Article 6 (2) of the SADC Treaty which states that SADC and member states shall not discriminate against any person on grounds of, among others, race, and ethnic origin. In this regard, the SADC Tribunal observed that “if expropriation of the land was not arbitrary but reasonable and objective, fair compensation was paid and the purpose of the expropriation was legitimate, the differential treatment afforded to foreign land owners would not constitute discrimination.”<sup>547</sup> It is worth mentioning that the mere fact that the property of foreigners of different race, national or ethnic origin or other personal characteristics is expropriated does not *per se* imply a discriminatory expropriation. In order to establish that expropriation was not discriminatory, there should be adequate reasons for such a distinction. The *Kuwait v. American Independent Oil Company (Aminoil)*<sup>548</sup> tribunal found that the expropriation of the US oil only and not Arabian oil was not discriminatory because there were adequate reasons for not nationalising the Arabian oil.

In addition to the above, a discriminatory expropriation rationally connected to a country’s security or economic policies would be considered reasonable.<sup>549</sup> The application of such an exception is strictly regulated to ensure that the truly disadvantaged receive the property to which they are entitled.<sup>550</sup> It is significant to note that such discriminatory expropriation should be in good faith, reasonable and does not impair legal rights and interests of foreign investors.<sup>551</sup> Though in most cases the discrimination is among foreign investors, there is also discrimination between foreign investors and nationals of the expropriating state. In *ADC v. Hungary*, the tribunal concluded that Hungary’s expropriation of foreign companies only and not domestic competing firms was discriminatory.<sup>552</sup>

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<sup>545</sup> Constitution of Zimbabwe Amendment (No. 17) of 2005.

<sup>546</sup> *Campbell v. Zimbabwe* para 175.

<sup>547</sup> Para 186.

<sup>548</sup> *Kuwait v. American Independent Oil Company (Aminoil)*, Award 24 March 1982 para 87.

<sup>549</sup> See generally Peterson and Garland *Bilateral Investment Treaties and Land Reform in Southern Africa* (2010).

<sup>550</sup> *Ibid.*

<sup>551</sup> *Amco v. Iran* para 140.

<sup>552</sup> *ADC v. Hungary* paras 441-443.

Compensation refers to any payment to the foreign investor for expropriation.<sup>553</sup> It is traditional that an expropriating state has an obligation to pay compensation to an investor in the event of exercising its sovereign right to expropriate. The *Benvenuti & Bonfant v. Congo, Santa Elena v. Costa Rica*<sup>554</sup> and *Amco v. Indonesia* tribunals confirmed that compensation for expropriation must be in accordance with the general principles of international law. In exceptional circumstances, some states have recently signed IIAs but made reservations to the expropriation clauses to preserve their regulatory rights and consequently limit the scope of the expropriation provisions.<sup>555</sup> This is often driven by the fear of host states to pay compensation to foreign investors for loss of investments arising from the violation of an expropriation clause.<sup>556</sup>

Among all the requirements for a legal expropriation, compensation has and is extensively litigated perhaps because of the conflicting views over the measure and/or appropriate rules of compensation. For instance, in *American International Group Inc. v Iran*, the US called for the application of the Hull Formula conditions on compensation while Iran contended for an “appropriate compensation” standard of Resolution 3281. The measure of compensation would be a long and detailed study because of the different notions attached to the subject. Since the ultimate goal of this study is to discern the present international minimum standards on expropriation compensation, a succinct overview of the divergent on compensation for expropriation will be provided.

The rules to be applied in determining compensation depends either on customary law of expropriation, applicable treaty or both especially when a treaty is uncertain in this regard. In essence, current international investment law is dominated by treaty law. As resonated in *Amoco v. Iran*,<sup>557</sup> in most instances a treaty trumps CIL in matters concerning the payment of expropriation compensation. It should be noted that this does not mean that CIL would be irrelevant; rather CIL would be used to fill in the possible *lacunas* in the treaty.<sup>558</sup> It is no surprise that the recent tribunals dealing with the issue of compensation decide such on the

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<sup>553</sup> Walde and Sabahi in Muchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 1052.

<sup>554</sup> *Compania del Desarrollo de Santa Elena, SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 para 71.

<sup>555</sup> See *Tecmed v. Mexico* 29/05/2003 para 119; and Dolzer and Schreuer (2008) 109.

<sup>556</sup> *Ibid.*

<sup>557</sup> *Amoco v. Iran* para 222.

<sup>558</sup> *Ibid.*

basis of a specific BIT or IIA.<sup>559</sup> This is possibly because most treaties generally contain rather exhaustive rules on the suitable measure of compensation.<sup>560</sup>

The Hull Formula developed by the US pronounces that in expropriation, “prompt, adequate and effective compensation” is paid. The provisions of the Hull Formula resonate in Article 5 of the SADC FIP. Prompt entails that an investor should not need to wait years for payment for expropriation of its investment.<sup>561</sup> Adequate is a quantum element which means that an investor should be paid the proper value of its loss and reflects the value of assets put in and the expected profits that would have resulted from the investment had it not been taken.<sup>562</sup> The effective element states that the investor should receive compensation in a form that benefits the former owner.<sup>563</sup> Thus compensation needs to be paid in a readily convertible currency or freely transferable currency.<sup>564</sup> Though the Hull Formula was widely accepted by states<sup>565</sup> and is contemplated in a number of IIAs as well as BITs<sup>566</sup> it is not accepted as CIL.<sup>567</sup> Be that as it may, wide acceptance of these conditions may be an indication of the broad recognition of an international minimum standard of expropriation compensation.

During the New International Economic Order (NIEO)<sup>568</sup> movement, newly independent states argued that compensation should be “appropriate” as opposed to the “adequate” standard required by the Hull formula. Essentially, paragraph 4 of the Resolution 1803 required appropriate compensation and this provision was later reinforced in Article 2 (c) of the Charter of Economic Rights and Duties of States also referred to as Resolution 3281 (XXIX).<sup>569</sup>

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<sup>559</sup> Ibid.

<sup>560</sup> Ibid.

<sup>561</sup> See the OECD Negotiations as discussed in Karl *Investor Protection in Multilateral Agreement on Investment State of Play as of February* (1997) 14.

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.

<sup>564</sup> For further information, see Sabahi *Compensation and Restitution in Investor-State Arbitration* (2011) 153-156.

<sup>565</sup> See Rubins (2013).

<sup>566</sup> For example, Article 13 (1) (c) of the ECT, Article 6 (1) (c) of the US Model BIT and Article 13 (1) of the Canadian Model BIT.

<sup>567</sup> Reinisch in Reinisch (ed) *Standards of Investment Protection* (2008) 194.

<sup>568</sup> NIEO was adopted by the GA in 1975 at the 6<sup>th</sup> Special Session of the GA and whose objectives included, *inter alia*, to development of the global economy as a whole, with the setup of interrelated policies and performance targets of the international community at large. More information on the NIEO is available at <http://www.un-documents.net/s6r3201.htm>.

<sup>569</sup> Charter of Economic Rights and Duties of States was adopted by the GA at the 29<sup>th</sup> Session of the GA in 1974.

In present IIAs and BITs' compensation provisions, terms such as full,<sup>570</sup> just,<sup>571</sup> adequate,<sup>572</sup> appropriate,<sup>573</sup> fair and equitable<sup>574</sup> or merely compensation<sup>575</sup> are used as basis for determination of the payment of expropriation compensation. In other words, whatever terms a treaty specifies in their expropriation provisions, they should be assessed in relation to the fair market value. In most cases the said terms are defined to mean fair market value of investment.<sup>576</sup> For example, the WB Guidelines states that "compensation will be deemed to be adequate if it is based on fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to taking the asset became publicly known." Noteworthy is that the WB Guidelines are not decisive but may be applied by members of the WB Group to foreign investments in their territories as a complement to applicable investment treaties and binding international instruments to the extent that such guidelines do not conflict with such treaties and international instruments.<sup>577</sup> The *American International Group Inc. v. Iran* case emphasised that the words full and adequate can be used as identical compensation standard.<sup>578</sup>

In spite of being questioned as CIL rules, the above traditional standards on expropriation are often found in almost all IIAs or BITs. Under international law or the *pacta sunt servanda*, states have an obligation to respect or fulfil the provisions of the treaty they are part to in good faith. In addition, international investment tribunals regularly scrutinise the legality of an expropriation in light of almost, if not all, these standards of general international law.<sup>579</sup> It is worth noting that IIAs or BITs, in their expropriation provisions, refer to each of these practices though, sometimes, with different interpretations.<sup>580</sup> The varying interpretations are conceivably because of the lack of a single and authoritative instrument on investment

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<sup>570</sup> See *Seedco Inc. v. National Iranian Oil Company*, Award No. ITL 59/129/3 para 11-13; Shaw *International Law* 4 ed (1997) 574.

<sup>571</sup> For instance, Article 13 (1) of the European Energy Charter Treaty.

<sup>572</sup> For example, Article 4 of Angola-UK BIT, 2000.

<sup>573</sup> For example, Article 20 (2) of the COMESA Investment Agreement and Article 5 (1) of the France-Hong Kong BIT, 1995.

<sup>574</sup> For example Article 5 of the India-UK BIT, 1994.

<sup>575</sup> For example, Article 4 (2) of the German Model BIT.

<sup>576</sup> See Congyan "Change of Structure of International Investment and the Development of Developing Countries' BIT Practice: Towards a Third Way of BIT Practice" 2007 8 *Journal of World Investment & Trade* 829; *American International Group Inc. v. Iran* para 380. See, for example, Article 6 (2) of the US Model BIT, 2004; Article 4 (2) of the Germany Model BIT, 2008; and Article 5 (1) of the India Model BIT, 2003.

<sup>577</sup> See Article I (1) of the WB Guidelines.

<sup>578</sup> Para 105.

<sup>579</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 225.

<sup>580</sup> Ibid.

protection. Conversely, any expropriation which lacks a public purpose, non-discrimination, due process and compensation is illegal under general international law.<sup>581</sup>

### 3.4 INTERNATIONAL RULES ON PERFORMANCE REQUIREMENTS

There is emerging consensus that most host economies broadly view inward FDI as a significant means of integrating their economies with global markets<sup>582</sup> and expect it to contribute to their economic growth and development,<sup>583</sup> technology advancement<sup>584</sup> and employment creation,<sup>585</sup> among other important benefits. However, investment liberalisation or developing attractive investment climate alone is not always sufficient for the expected benefits to materialise.<sup>586</sup> Be that as it may, host economies typically employ a number of policy measures to maximise the development benefits of inward FDI. Performance requirements are among the policy instruments<sup>587</sup> used by host economies in this instance. Performance requirements are basically stipulations, measures or conditions imposed on foreign investors by host states post-establishment, requiring investors to fulfil certain specified goals or requirements with respect to their operations in the host country.<sup>588</sup> Another rationale for employing performance requirements is to maintain the political independence of the host state.<sup>589</sup> In international investment law, there are divergent views as to the use of performance requirements.<sup>590</sup> On the one hand, FDI-importing countries seek to preserve their right to utilise performance requirements to enhance various development benefits of inward FDI.<sup>591</sup> On the other hand, FDI-exporting countries tend to associate performance requirements with protectionism, among other issues.<sup>592</sup>

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<sup>581</sup> See Sheppard in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 169.

<sup>582</sup> African Development Bank (AfDB) "Regional Integration Brief" 2013 [http://www.afdb.org/admin/uploads/afdb/documents/publication/regional\\_intergation\\_brief\\_intrad-sadc\\_cross-borader\\_investments.pdf](http://www.afdb.org/admin/uploads/afdb/documents/publication/regional_intergation_brief_intrad-sadc_cross-borader_investments.pdf) (accessed 25-05-2014). See also Ethier "The New Regionalism" 1998 108 *Economic Journal* 1149; and Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>583</sup> Leal-Arcas 170. See also Trakman "Foreign Direct Investment: Hazard or Opportunity?" 2009 *George Washington International Law Review* 12; Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* 3 ed (2009) 14; Rao and Guru *Joint Ventures in International Business* (2009) 81; and Correa and Kumar xi.

<sup>584</sup> Borensztein *et al* 1998 *Journal of International Economics* 116.

<sup>585</sup> Leibrecht "How Important is Employment Protection Legislation for Foreign Direct Investment Flows in Central and Eastern Europe Countries?" 2009 17 *Economics of Transition* 275-295.

<sup>586</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 [http://unctad.org/en/Docs/iteiia20037\\_en.pdf](http://unctad.org/en/Docs/iteiia20037_en.pdf) (accessed 09-09-2014).

<sup>587</sup> Other policy instruments used to enhance various development benefits include, *inter alia*, trade policy, screening mechanisms and investment incentives. *Ibid*.

<sup>588</sup> *Ibid*.

<sup>589</sup> *Ibid*.

<sup>590</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 2.

<sup>591</sup> *Ibid*.

<sup>592</sup> *Ibid*.

In principle, performance requirements can be divided into three categories. The first category includes those requirements that are expressly prohibited by the WTO Agreement on Trade-Related Investment Measures (TRIMs Agreement).<sup>593</sup> Article 2 (1) of the TRIMs Agreement prohibits member states from applying any trade-related investment measures (TRIMs) that are inconsistent with the provisions of Article III or Article XI of the General Agreement on Tariffs and Trade (GATT).<sup>594</sup> In fact, the TRIMs Agreement prohibits performance requirements such as local content,<sup>595</sup> trade balancing, foreign-exchange restrictions related to the foreign-exchange inflows attributable to an enterprise and export controls.<sup>596</sup> The second category involves the performance requirements explicitly prohibited or conditioned by IIAs or BITs.<sup>597</sup> These requirements include, *inter alia*: requirement to establish joint venture with domestic participation; requirements for a minimum level of domestic equity participation; requirements to locate headquarters for a specific region; employment and training requirements; export requirements; restrictions on sales of goods or services in the territory where they are produced or provided; requirements to supply goods produced or services provided to a specific region exclusively from a given territory; requirements to act as the sole supplier of goods produced or services provided; requirements to transfer technology; production processes or other proprietary knowledge; and research and development requirements.<sup>598</sup> The third category includes all other performance requirements that are not subject to control through any IIA or BIT.<sup>599</sup>

As highlighted in the introduction, this Chapter is the background through which Chapters 4 and 5 will be examined. Therefore the focus of this part is on international norms of selected performance requirements relevant to South African and Zimbabwean investment laws and related policies. Such performance requirements include requirements linked to joint ventures or domestic equity participation as well as employment and training of locals. As mentioned

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<sup>593</sup> Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S 186 (hereafter “TRIMs Agreement”).

<sup>594</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S 187, 33 ILM 1153 (1994) (hereafter “GATT”). See also Articles 1 and 2 of the Annex of the TRIMs Agreement.

<sup>595</sup> In *Foreign International Review Act (FIRA) (US v. Canada)* of 1984, the panel found that the local content requirements imposed by the FIRA are inconsistent with Article III of the GATT on NT.

<sup>596</sup> See Article 2 (1) of the TRIMs Agreement.

<sup>597</sup> See US BITs and NAFTA.

<sup>598</sup> See UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 2.

<sup>599</sup> *Ibid.*

above, the said performance requirements are not covered by multilateral agreements<sup>600</sup> but may be explicitly restricted in BITs or IIAs.<sup>601</sup>

### 3 4 1 Joint venture and local equity requirements

The requirement that FDI entry be made in collaboration with local business has meant that the preferred form of entry is through a joint venture.<sup>602</sup> This requirement is common in many developing states.<sup>603</sup> A notable example of the joint venture requirement is in Myanmar where foreign nationals, in a joint venture, are allowed to acquire 80 percent or less equity while the Myanmar nationals need to hold a minimum of 20 percent of investment therein.<sup>604</sup> Domestic equity requirements provide that foreign investors may not undertake a direct investment project within the host state without the participation of local partners.<sup>605</sup> Joint venture or domestic participation requirements can be used as a condition for the admission of foreign investment or during its operation.<sup>606</sup> In recent years, there has been a tendency towards limitation of foreign ownership in strategic, productive or key industries by many countries.<sup>607</sup> For instance, the indigenisation policies adopted in India,<sup>608</sup> China,<sup>609</sup> Brazil and many African countries including, among others, Nigeria,<sup>610</sup> South Africa<sup>611</sup> and Zimbabwe<sup>612</sup> aim to ensure the increase of domestic equity in foreign-owned companies.<sup>613</sup> Joint venture or domestic equity participation requirements have been used for a number of reasons. Some of the main reasons for imposing such requirements are: to avoid economic sectors or enterprises from being controlled by foreigners; facilitate transfer of technology and management skills to

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<sup>600</sup> Moran *Foreign Direct Investment and Development* (2002) 17.

<sup>601</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007).

<sup>602</sup> Sornarajah (2010) 114.

<sup>603</sup> Ibid 342.

<sup>604</sup> “New Regulations under the Foreign Investment Law Released 2013” <http://www.kpmg.com/mm/en/issuesandinsights/articlespublications/articles/pages/articles-06022013.aspx> (accessed 10-09-2014).

<sup>605</sup> Salacuse *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (2013) 97.

<sup>606</sup> Zampetti and Sauve in Guzman and Sykes *Research Handbook in International Economic Law* (2007) 223.

<sup>607</sup> Salacuse (2013) 97.

<sup>608</sup> Miller, Glen, Jaspersen and Karmokolias “International Joint Ventures in Developing Countries” 1997 34 *Finance and Development* 26-29.

<sup>609</sup> For more information on China’s limitation of foreign ownership, see WTO, GATS “The People’s Republic of China: Specific Commitments” (2002) GATS/SC/35 49.

<sup>610</sup> For more information on the Nigerian Indigenisation policy, see Beveridge “Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria” 1991 *International and Comparative Law Quarterly* 40302; Tobi “Legal Aspects of Foreign Investment and Financing Energy Products in Nigeria” 1991 14 *Dalhousie Law Journal* 5; Osunbor “Nigeria’s Investment Laws and the State’s Control of Multinationals” 1988 3 *ICSID Review* 38.

<sup>611</sup> See section 2 of the South African BEE Act. See also *Peel v Harmon J & C Engineering* 2013 (2) SA 331 GJ.

<sup>612</sup> Section 3 (1) of the Zimbabwean Indigenisation and Economic Empowerment Act, 2007.

<sup>613</sup> Salacuse (2013) 97.



domestic enterprises; and develop domestic human capital.<sup>614</sup> In addition, natural-resource-rich countries commonly employ such requirements to secure economic rents from the exploitation of various resources.<sup>615</sup>

### 3.4.1.1 *International standards and norms*

Under international law, performance requirements relating to domestic equity and local collaboration raise different kinds of concerns.<sup>616</sup> This may be a result of the absence of an authoritative multilateral treaty that comprehensively deals with this issue. In general international law, countries are prohibited from unduly restricting foreign nationals to affiliate with local partners.<sup>617</sup> For example, Article XVI (2) of the GATS prohibits, in service sector, measures such as joint venture requirements and limitations on participation of foreign or limiting foreign firms to minority shareholding.<sup>618</sup> In particular, Article XVI (2) (e) of the GATS states:

in sectors where market-access commitments are undertaken, ... a member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, ... measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

In addition to the above, Article XVI (2) (f) states:

in sectors where market-access commitments are undertaken, ... a member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, ... limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

In *China – Publications and Audio-visual Products*,<sup>619</sup> the panel ruled that a measure that provides that the Chinese joint venture partner should hold no less than 51 percent of any equity or investment constituted a limitation on market access as envisaged in Article XVI (2) (f) of the GATS. The MAI Draft intended to go far beyond the TRIMs in performance requirements provision. Thus, it sought to expand the list of prohibited performance requirements that had

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<sup>614</sup> Ibid. See also Bloomstrom, Kokko and Zejan *Foreign Direct Investment: Firm and Host Country Strategies* (2000) 30.

<sup>615</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003.

<sup>616</sup> Sornarajah (2010) 139.

<sup>617</sup> Salacuse (2013) 97.

<sup>618</sup> Hilary “Foreign Investment in Services: The Threat of GATS 2000 Negotiations” WTO Symposium Paper (2002). See also De Meester and Coppens “Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?” in Drabek and Mavroidis (eds) *Regulation of Foreign Investment: Challenges to International Harmonisation* (2013) 105.

<sup>619</sup> *China – Publications and Audio-visual Products* paras 7.1376 and 7.1388.

no direct effect on trade to include, among others, establishment of a joint venture with domestic participation and achievement of a minimum level of equity participation.<sup>620</sup> It should be noted that, of course, exceptions or reservations to these rules are permissible in the GATT,<sup>621</sup> TRIMs Agreement<sup>622</sup> and GATS<sup>623</sup> context. From a legal perspective, it is common that host countries employ joint venture and equity requirements in exercising their international law and CIL right to control the admission of investments and exploitation of natural resources.<sup>624</sup> For instance, the resolution on Permanent Sovereignty over Natural Resources recognised the right of all countries to secure greater share in the administration of enterprises wholly or partly owned by foreign nationals.<sup>625</sup>

Generally, international investors are unhappy to be exposed to joint venture and equity requirements.<sup>626</sup> The most possible explanation for this is the desire to liberalise investment or market access by international investors. Developed countries including the US, Canada and EU have established, in their BITs or IIAs, market access for their investors as a core issue, including the prohibition of joint venture and other local-ownership requirements. For example, Article X (4) of the proposed Canada-EU Trade Agreement Draft<sup>627</sup> intends to prohibit the establishment of monopolies, joint venture requirements, and maximum shareholding levels for foreign investors as well as quantitative limits on the value of foreign shareholdings.

### **3 4 2 Employment and training requirements**

Host countries may impose measures that require foreign investors to offer employment and training to host countries' citizens. Some of the main purposes of employment and training requirements include to, *inter alia*, address imbalances in the labour market, to induce firms to engage more actively in training and human resource development activities and encourage the expansion of creation of certain skills.<sup>628</sup> For example, employment and training requirements

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<sup>620</sup> See Article III of the MAI Draft.

<sup>621</sup> Articles III, XI, XVIII, XXIV, XIX and XXI.

<sup>622</sup> Articles 3 and 4.

<sup>623</sup> Articles II and XVII.

<sup>624</sup> Ibid

<sup>625</sup> Resolution 2158 para 5.

<sup>626</sup> Salacuse (2013) 208.

<sup>627</sup> Canada-EU Trade Agreement Draft, 2013.

<sup>628</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 30.

were introduced in a mandatory character in South Africa<sup>629</sup> and Malaysia<sup>630</sup> to address racial imbalances.<sup>631</sup>

### 3 4 2 1 *International law on employment and training requirements*

There is no existing binding multilateral treaty making express provisions on employment and training requirements. Despite that, the International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy sets out principles in the fields of, *inter alia*, employment<sup>632</sup> and training<sup>633</sup> which Multinational Enterprises (MNEs) or FDI are recommended to observe on a voluntary basis.<sup>634</sup> The ILO Declaration urges MNEs, when investing in developing countries to take into account established general policy objectives of the host country in which they operate and their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate.<sup>635</sup> MNEs are encouraged to increase employment opportunities and standards in the host countries.<sup>636</sup> Additionally, paragraph 30 of the ILO Declaration provides that MNEs should ensure that relevant training is provided for all levels of their employees in the host country and such training should develop generally useful skills and promote career opportunities.<sup>637</sup>

In BITs and IIAs there is a variation in the treatment of employment and training requirements. As one would expect, it is submitted that developed countries may resent the imposition of employment and training requirements because of the assumed restrictions such requirements put on investment. For example, the Rwanda-US and Tanzania-Canada BITs prohibit the use of employment and training measures on foreign investment. The Rwanda-US treaty includes an additional footnote of direct importance here and articulates:

For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an

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<sup>629</sup> See the definition of “broad-based black economic empowerment” in section 1 of the Broad-Based BEE Act 53 of 2003. See also the Employment Equity Act of 1998 and Skills Development Act of 1998 for more information on the employment and training requirements in South Africa.

<sup>630</sup> See the New Economic Policy of Malaysia <http://www.epu.gov.my/en/dasar-ekonomi-baru> (accessed 09-09-2014).

<sup>631</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 3.

<sup>632</sup> Paras 13-23 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2006.

<sup>633</sup> Ibid paras 29-32.

<sup>634</sup> See the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2006.

<sup>635</sup> Ibid para 1.

<sup>636</sup> Ibid para 14.

<sup>637</sup> Ibid paras 29-32.

investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to train workers in its territory, provided that such training does not require the transfer of a particular technology, a production process or other proprietary knowledge to a person in its territory.

Similar to the field of joint venture and domestic equity requirements, developing host-countries would favour the imposition of employment and training requirements because of their relevance to human capital development.<sup>638</sup>

### 3 5 INTERNATIONAL TREATMENT STANDARDS

The word “treatment” is not defined in any treaty text. But the *Suez v. Argentina*<sup>639</sup> tribunal stated that the ordinary meaning of the term “treatment” in the context of investment includes the rights and privileges granted as well as the obligations and burdens imposed by a contracting state on investments or investors covered by the treaty.<sup>640</sup> The treatment standards of investment became a controversial issue in the 1920s when the Mexican revolutionary government declared its intention to adhere to the Calvo doctrine standard of treatment<sup>641</sup> and the US government opposed such standard of treatment.<sup>642</sup> On the one hand, Mexico and other countries who favoured the Calvo doctrine renounced all forms of protection of foreign investors provided by their home countries and maintained that foreign nationals were entitled only to the same level of protection that nationals obtained from their respective legal system.<sup>643</sup> On the other hand, the US proposed the recognition of an international standard of treatment for foreign investors that would guarantee a minimum standard of protection independent of the protection offered to the host state’s nationals.<sup>644</sup>

After the Mexican revolution, Mexico entered into separate agreements with some European states and US whose investors had suffered physical injuries during the revolution. The US-Mexico Commission (General Claims Commission)<sup>645</sup> was granted jurisdiction on the basis of

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<sup>638</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 30.

<sup>639</sup> *Suez, Sociedad General de Aguas de Barcelona SA and Vinendi Universal SA v. The Argentine Republic*, ICSID Case No. ARB/03/19.

<sup>640</sup> Para 55.

<sup>641</sup> The Calvo doctrine alleged that foreign nationals were entitled only to the same level of protection that nationals obtained from their respective legal system. See Shea *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955) 17-19.

<sup>642</sup> Schefer 272.

<sup>643</sup> Ibid.

<sup>644</sup> Ibid.

<sup>645</sup> General Claims Commission was set up in 1924 by treaty that adjudicated claims by citizens of the United States and Mexico for losses suffered due to the acts of one government against nationals of the other.

international law and decided the *Neer Claims*<sup>646</sup> and *Roberts Claims*.<sup>647</sup> The General Claims Commission's decisions have been regarded as authoritative formulations of the minimum international law standards for the treatment of foreign investors.<sup>648</sup> Customary minimum standards on treatment of foreign nationals existed to assure foreign persons certain protection and a claim for minimum standards of treatment of foreign-owned property was a different matter.<sup>649</sup> Thus CIL on international minimum standards concerned physical injury to the person of the individual foreign nationals and not damage to his property.<sup>650</sup> The US pressed for the development of the CIL to extend minimum standards to all areas of the host states' treatment of investment.<sup>651</sup> The international minimum standards emerged as a counter to the standard of NT articulated in the Calvo doctrine.<sup>652</sup> Until today the existence of CIL on minimum standards of treatment is still questionable.

This divided opinion on standards of treatment was still evident in 1930 at the Hague Conference, on the codification of CIL rules on the Responsibility of States for Damage Caused in their Territories to the Persons and Properties of Foreigners.<sup>653</sup> At the Hague Conference, capital-importing states maintained the position that foreign nationals were only entitled to equality of treatment with nationals, whilst capital-exporting states advocated the existence of a minimum standard of treatment.<sup>654</sup> The final version of the Draft Codification failed. In early 1930s, particularly at the International Conference on the Treatment of Foreigners, states attempted to conclude a Convention on the Treatment of Foreigners under the auspices of the League of Nations.<sup>655</sup> Article 16 (8) of the Draft Convention accorded foreign nationals equal

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<sup>646</sup> In *US (LF Neer) v. United Mexican States*, (1926), RIAA 60 (hereinafter "*Neer Claims*"), the Claims Commission expressed the minimum standards in that "the governmental acts should be put to test of international standards and ... the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency" para 61.

<sup>647</sup> In *Robert Claims* (1926) 4 UNRIAA 77, the Claims Commission declared that equality is not the ultimate test of the propriety of the acts of authorities in the light international law. Rather, the test is whether with ordinary standards of civilisation.

<sup>648</sup> Sornarajah (2010) 130.

<sup>649</sup> Ibid.

<sup>650</sup> See *Neer Claims* (1926) 4 UNRIAA 60, *Janes Claims* (1926) 4 UNRIAA 82 and *Robert Claims* (1926) 4 UNRIAA 77.

<sup>651</sup> See Hackworth 3 *Digest of International Law* (1942) 659.

<sup>652</sup> Sornarajah (2010) 129.

<sup>653</sup> See Hackworth "Responsibility of States for Damage Caused in Their Territories to the Persons and Properties of Foreigners" 1930 24 *American Journal of International Law* 500; and Borchard "Responsibility of States at the Hague Codification Conference" 1930 24 *American Journal of International Law* 517.

<sup>654</sup> Hackworth 1930 24 *American Journal of International Law* 514.

<sup>655</sup> Draft Convention of 1929. The text of the Draft Convention, 1929 is reproduced in International Conference on the Treatment of Foreigners, Preparatory Documents, LN Doc. C.36.M. 21.1929.II. See also Kuhn "The International Conference on the Treatment of Foreigners" 1930 24 *American Journal of International Law* 570.

treatment with nationals with a number of exceptions.<sup>656</sup> The adoption of the Draft Convention failed because of, among other factors, the pressure from capital-exporting states that were unable to agree on such treatment standard.<sup>657</sup> In 1933, at the Seventh International Conference of American States, the Convention on the Rights and Duties of States (Montevideo Convention)<sup>658</sup> was adopted. Article 9 of the Montevideo Convention states, in part, that “nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights more extensive than those of the nationals.”<sup>659</sup>

In current practice, it submitted that there is a series of treatment standards found so widely in BITs, IIAs as well as other areas of international law that one can consider the least a state must offer in the treatment of foreign investment within its territory. As shall be discussed below, some international investment treaties require the host countries to afford investments covered by the treaty treatment no less favourable than that required by CIL minimum standard. Whilst other international agreements require the host states to afford foreign investors treatment no less favourable than that accorded to national investors or investors of other third parties. The treatment standards commonly provided under international law include full protection and security,<sup>660</sup> fair and equitable treatment (FET) as well as non-discrimination treatment (NT and MFN).<sup>661</sup>

The content of these standards is not generally defined; their meaning may therefore need to be determined in the light of specific circumstances of application. More recently these treatment standards have been interpreted in different ways by arbitration tribunals.<sup>662</sup> This

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<sup>656</sup> For example, the exclusion of certain professions (lawyers and stockbrokers), government contracts, exploitation of minerals and hydraulic power and limitation on ownership of land and business for national security purposes. See Article 16 (8) of the Draft Convention.

<sup>657</sup> See Devèze “Work of the International Conference on the Treatment of Foreigners” (1930) LN Doc. C.10.1930.II.

<sup>658</sup> The Montevideo Convention on the Rights and Duties of States was signed at the International Conference of American States in Montevideo, Uruguay on December 26, 1933 and entered into force on December 26, 1934.

<sup>659</sup> See Article 9 of the Montevideo Convention.

<sup>660</sup> Traditionally, courts and tribunals have interpreted the content of this standard of treatment as imposing a positive obligation upon host state to exercise due diligence to protect the investor and his property from physical threats and injuries, not imposing an obligation to protect covered investments and investors from all injuries from whatever sources. See *Suez v. Argentina*; *Saluka Investment BV (Netherlands) v. The Czech Republic*, Partial Award; *BG Group v. Argentina*; *PSEG v. Turkey*; *Rumeli v. Kazakstan*; *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, Award (June 27, 1990), 4 ICSID Rep. 246 (1997); and *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/01, Award (February 21, 1997).

<sup>661</sup> Shan “The Protection of Foreign Investment” in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 476. See also Juillard “Variation in the Substantive Provisions and Interpretation of International Investment Agreements” in Sauvant (ed) *Appeals Mechanisms in International Investment Disputes* (2008) 91; and Salacuse 206.

<sup>662</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 476.

study will only examine the non-discrimination treatment as well as the FET standards because they seem to be relevant to the contemporary South African and Zimbabwean investment regimes.

### 3 5 1 Non-discrimination principle

The non-discrimination principle is argued to have originated in international trade under the framework of the 1947 GATT and was eventually adopted in the field of investment.<sup>663</sup> In regard to the treatment of FDI, non-discrimination principle<sup>664</sup> prohibits a host state from offering foreign investors treatment less favourable than it accords to domestic investors or other states' investors based on nationality under similar situations/like circumstances/like situations/same circumstances.<sup>665</sup> The *Pope & Talbot v. Canada*<sup>666</sup> tribunal stated that in the investment context, the concept of discrimination has been defined to imply unreasonable distinctions between foreign and domestic investors. NT and MFN are two main manifestations underpinning the non-discrimination standard of treatment.<sup>667</sup> MFN and NT standards have become common elements of BITs<sup>668</sup> and other multilateral instruments<sup>669</sup> relating to FDI.<sup>670</sup> In principle, MFN and NT standards oblige the host country to provide foreign investors with the same or a not less favourable treatment than that accorded to nationals or to investors of any other state, respectively.<sup>671</sup> For instance, Article 4 (1) of the India-Switzerland BIT provides that "each contracting party shall in its territory accord to investments of investors of the other contracting party treatment not less favourable than that which it accords to investment of its own investors or to investments of investors of any third state, whichever is more favourable."

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<sup>663</sup> Martins "The Principle of Non-Discrimination in the Bilateral Investment Treaties: Lessons for Brazil" *Institute of Brazilian Issues* (2011) 7.

<sup>664</sup> For a thorough discussion on the non-discrimination standard in investment law, see Diebold "Standards of Non-Discrimination in International Economic Law" 2011 60 *International and Comparative Law Quarterly* 831-865 and Schreuer "Protection against Arbitrary or Discriminatory Measures" in Rogers and Alford (eds) *The Future of Investment Arbitration* (2009) 183-198.

<sup>665</sup> Dozer and Schreuer (2008) 178. For a question on nationality-based differentiation, see *Ronald S. Launder v. The Czech Republic*, UNCITRAL Arbitration, Final Award (September 3, 2001). See also *Total SA v. The Argentina Republic*, ICSID Case No. ARB/04/1, Award, 344 (December 27, 2010); *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL Arbitration, Arbitral Award (January 26, 2006).

<sup>666</sup> *Pope & Talbot's v. Canada*, UNCITRAL (NAFTA), Award on Merits of Phase 2 (April 10, 2001) para 170.

<sup>667</sup> Gallagher and Shan *Chinese Investment Treaties: Policy and Practice* (2009) 139.

<sup>668</sup> For instance, Article II (1) of the US-Ecuador BIT, Article 3 (1) of the Russia-Mongolia BIT of 2005 and Article II (2) of the Pakistan-Turkey BIT of 1995.

<sup>669</sup> For example, Article 1104 of the NAFTA.

<sup>670</sup> Gallagher and Shan 139.

<sup>671</sup> Manning-Cabrol "The Imminent Death of Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors" 1995 *Law and Policy in International Business* 26.

However, the non-discrimination provision does not mean that any measure that subjects foreign investors to treatment less favourable than accorded to domestic investors or investors of any other state is prohibited on the basis of discrimination. Rather, differential treatment can be shown to have a reasonable basis or treatment that is not the same can be acceptable.<sup>672</sup> As a matter of fact, many investment treaties have specific exception to the non-discrimination obligations in the text of the agreements and the tribunals are bound to apply such exceptions.<sup>673</sup> For instance, Article 7 of the SADC FIP provides that, notwithstanding the obligation not to give differential treatment, states may in accordance with their respective domestic legislation grant preferential treatment to covered investments and investors in order to achieve national development objectives. Under CIL, also echoed in *Methanax v. US*,<sup>674</sup> the concept of non-discrimination requires the claimant to prove the host state's intent to discriminate to sustain the claim.<sup>675</sup> Present case law on investment proves that intent to discriminate is necessary<sup>676</sup> but insufficient to succeed in proving discriminatory treatment.<sup>677</sup>

### 3.5.1.1 NT standard

The NT obligation extends back at least to the Greek city-states and today is found in treaties throughout the international economic legal system including investment law.<sup>678</sup> The UNCTAD defines NT standard as a principle whereby a host country extends to foreign investors the treatment that is at least as favourable as the treatment it accords to domestic investors in like circumstances.<sup>679</sup> The scope of NT principle in investment field goes well beyond its use in trade agreements.<sup>680</sup> The *Total v. Argentina* tribunal stated that the purpose of the NT provision “is to ascertain whether the protected investments have been treated worse

<sup>672</sup> See *S D Myers Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award, (November 13, 2000) para 254; *Pope & Talbot v. Government of Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, (April 10, 2001) para 102.

<sup>673</sup> See, for example, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (March 28, 2011) paras 44-47.

<sup>674</sup> *Methanax Corporation v. US*, UNCITRAL (NAFTA), Final Award (August 3, 2005) para 6.

<sup>675</sup> Choudhury “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democracy Deficit?” 2008 *Vanderbilt Journal of Transnational Law* 775-828.

<sup>676</sup> See *LG & E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006) para 146; and *Alex Genin, Eastern Credit Ltd Inc. and AS Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) para 369.

<sup>677</sup> See *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007) para 368; *Siemens AG v. The Argentine Republic*, ICSID Case ARB/02/8, Award (February 6, 2007) para 321; and *S D Meyers v. Canada* para 254.

<sup>678</sup> Schefer 305.

<sup>679</sup> UNCTAD “National Treatment” *UNCTAD Series on Issues in International Investment Agreements* (1999) 1. See also Newcombe and Paradell (2004) Chapter 4; Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 223; and Article 1102 of the NAFTA.

<sup>680</sup> UNCTAD “National Treatment” *UNCTAD Series on Issues in International Investment Agreements* (1999) 9.



without any justification, specifically because of their nationality.”<sup>681</sup> Except investment treaties signed by the US, Canada and Japan most current BITs still limit the NT obligations to existing FDI or post-establishment phase.<sup>682</sup> It is submitted that strict application of the NT principle would generally restrict the implementation of host government’s laws or policies aimed at providing specific advantages or benefits to nationals not readily available to foreign investors.<sup>683</sup>

Linked to the above, NT provision is frequently accompanied by a number of general exceptions, either in the treaty itself or related instruments, relating to, *inter alia*, public order, public health and national security.<sup>684</sup> Paragraph 22 of the Doha Declaration<sup>685</sup> provides that any framework should take account of the development policies and objectives of host governments as well as their right to regulate in the public interest. Hence NT obligation is not unconditionally and automatically applicable, but it is subject to public order and public interest requirements of the host countries. Though national governments have the right to fulfil their public policies, they cannot achieve those goals by discriminating between foreign and domestic investors unless there is a reasonable exception.<sup>686</sup> The *GAMI Investments v. Mexico*<sup>687</sup> tribunal held that the measure was plausibly connected with a legitimate goal of policy applied neither in discriminatory manner nor as a disguised barrier to equal opportunity. Further, in *Cross-Border Trucking Services (Mexico v. US)*,<sup>688</sup> the panel mentioned that differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety and that such differential treatment be equivalent to the treatment accorded to domestic investors.

### 3.5.1.2 MFN standard

The UNCTAD states that in the international law context MFN treatment means that “a host country treats investors from one foreign country no less favourably than investors from any other foreign country.”<sup>689</sup> MFN standard obliges the state granting MFN treatment to the

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<sup>681</sup> Para 344.

<sup>682</sup> UNCTAD “National Treatment” *UNCTAD Series on Issues in International Investment Agreements* (1999) 2.

<sup>683</sup> *Ibid.*

<sup>684</sup> United Nations Centre on Transnational Corporations “Bilateral Investment Treaties 1959-1991” 1992 <http://unctc.unctad.org/data/e92iialba.pdf> (accessed 18-09-2014) 9.

<sup>685</sup> Doha WTO Ministerial 4<sup>th</sup> Ministerial Declaration WT/MIN (01)/DEC/1 adopted on 14 November 2001.

<sup>686</sup> See Newcombe and Paradell (2004) 178.

<sup>687</sup> *GAMI Investments, Inc. v Mexico*, NAFTA/UNCITRAL Tribunal (November 15, 2004) para 14.

<sup>688</sup> *Cross-Border Trucking Services (Mexico v. US)*, NAFTA Arbitral Panel (February 6, 2001) para 258.

<sup>689</sup> UNCTAD “Most-Favoured-Nation Treatment” *UNCTAD Series on Issues in International Investment Agreements* 1999 1. See also Newcombe and Paradell (2004) Chapter 5; Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 222; and Article 1103 of the NAFTA.

beneficiary state the treatment accorded to third states in case this treatment is more favourable than the treatment under the treaty between the granting and beneficiary states.<sup>690</sup> In other words, the host state shall offer other states' investors the same treatment as the one offered to third states. For instance, Article 10 (3) of the US-Chile FTA provides that "each party shall accord to investors of the other party treatment no less favourable than it accords, in like circumstances, to investors of any non-party..." With exceptions of investment treaties signed by the US,<sup>691</sup> Canada and Japan,<sup>692</sup> most investment treaties offer the MFN provision in the post-establishment phase only. MFN clauses in investment treaties are generally reciprocal, unconditional and indeterminate in nature.<sup>693</sup> One of the main purposes of this standard is to create a level playing field among different foreign states by prohibiting discrimination on the basis of different foreign nationalities.<sup>694</sup> Exceptions for a differential treatment for foreign investors are permissible in the MFN context.<sup>695</sup> MFN exceptions are often found as a result of regional integration such as the establishment of customs unions (CUs), FTAs and BITs.<sup>696</sup>

### 3 5 2 FET standard<sup>697</sup>

Historically, FET seemed to be the most favoured standard for the treatment of foreign nationals. Article II (2) of the Havana Charter<sup>698</sup> contemplated that foreign investment should be assured fair and equitable treatment. It is suggested that though the Havana Charter did not enter into force, it served as a precedent for subsequent efforts to reach an agreement on treatment standards for foreign investment in international law. For instance, the International Chamber of Commerce (ICC) International Code of Fair Treatment for Foreign Investment,<sup>699</sup> Abs-Shawcross Draft Convention on Investments Abroad,<sup>700</sup> the OECD Draft Convention on

<sup>690</sup> Ustor "Most-Favoured-Nation Clause" in Bernhardt and Macalister-Smith (eds) *Encyclopedia of Public International Law* (1997) 468.

<sup>691</sup> For example, Article 4 of the US Model BIT.

<sup>692</sup> For example, Article 2 (2) of the Japan-Republic of Korea BIT.

<sup>693</sup> Acconi "The Most Favoured Nation Treatment and the International Law on Foreign Investment" 2005 2 *Transnational Dispute Management* 5.

<sup>694</sup> Gallagher and Shan 140.

<sup>695</sup> See *Parkerings-Compagniet AS v. Lithuania* para 396.

<sup>696</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 478.

<sup>697</sup> For more information on FET standard, see Klager *Fair and Equitable Treatment in International Investment Law* (2011).

<sup>698</sup> The Havana Charter, formerly the Final Act of the United Nations Conference on Trade and Employment was signed on March 24, 1948. See Havana Charter for an International Trade Organisation, 24 March 1948, UN Conference on Trade and Employment, UN.DOC.E/CONF.2/78 Sale No. 1948.II.D.4.

<sup>699</sup> International Code of Fair Treatment for Foreign Investment (ICC Brochure No. 129 1949), reprinted in *UNCTAD International Investment Agreements: A Compendium* III 273. This compendium is available at [www.unctad.org](http://www.unctad.org).

<sup>700</sup> Draft Convention on Investments Abroad (Abs-Shawcross Draft) 1960, reprinted in the "Proposed Convention to Protect Private Foreign Investment: A Round Table" 1960 9 *Journal of Public Law* 116.

the Protection of Foreign Property<sup>701</sup> and the MAI Draft embodied the FET standard. Apart from the above international agreements, the FET norm was also incorporated into a number of regional agreements<sup>702</sup> and Friendship, Commerce and Navigation (FCN) treaties.<sup>703</sup>

Currently, at the multilateral level, there is no comprehensive treaty on foreign investment incorporating the FET principle. The FET standard is currently found in Article 6 of the SADC FIP as well as a number of BITs<sup>704</sup> and international treaties that deal with the issue of investment protection.<sup>705</sup> In addition, the WB Guidelines seek to provide guidance on ways in which the FET standard may be given specific application with respect to investment issues.<sup>706</sup>

It is no surprise that the FET standard is not defined in any investment treaty and is one of the most litigated issues in international arbitration.<sup>707</sup> This may imply that there is difficulty in identifying the meaning or content<sup>708</sup> and/or perhaps the accepted common standard of the FET provision. However, there is substantial body of jurisprudence that has addressed the interpretation and application of the FET standard. At a minimum, FET means no discrimination by nationality or origin, in respect of such matters as access to local courts, administrative bodies, applicable taxes and administration of governmental regulation.<sup>709</sup> Of significance is the idea that there are at least two approaches through which FET provisions are commonly advanced in investment law. These two approaches include the plain meaning and equating or linking FET with the CIL minimum standard.<sup>710</sup>

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<sup>701</sup> OECD Draft Convention on the Protection of Foreign Property, 2 ILM (1963) 241.

<sup>702</sup> See, for instance, the NAFTA, European Energy Charter Treaty, Economic Agreement of Bogota of 1948, the Fourth Convention of the African, Caribbean and Pacific group of States (ACP) and the European Economic Community also known as Lome IV.

<sup>703</sup> More specifically, the United States FCN treaties with Belgium and Luxembourg, France, Greece, Ireland, Israel, Nicaragua and Pakistan, among other states.

<sup>704</sup> Paparinskis *The International Minimum Standard and Fair and Equitable Treatment* (2013) 3. See, for example, Article 2 (2) of the German Model BIT and Article IV (1) of the Argentina-Spain BIT.

<sup>705</sup> See Kläger *Fair and Equitable Treatment in International Investment Law* (2011) 9-22 and Tudor *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008) chapter 1. See, for instance, NAFTA; ECT; Article III (2) of the WB Guidelines; Article of the MIGA Convention; African Partnership Agreement, Caribbean and Pacific Group of the one part and the EC and its Members of the other Part, 2000; Article 15 of Annex of the Cotonou Agreement; and Article 7 of the IISD Model IIA.

<sup>706</sup> The WB Guidelines give guidance to the application of FET standard in investment issues such as security of person and property rights, the granting of permits and licenses and the repatriation of capital.

<sup>707</sup> Dolzer and Schreuer 119.

<sup>708</sup> See Schefer 327 and Mann *Further Studies in International Law* (1990) 234-251.

<sup>709</sup> Lowenfeld (2008) 556.

<sup>710</sup> Another approach used in the international investment law to advance the FET standard is to accompany the FET with other standards of treatment such as NT and MFN standards. For instance see the Peruvian BITs.

### 3 5 2 1 *Plain meaning approach*

In the first conception, FET standard is expressed without qualification or condition.<sup>711</sup> For example, BITs signed by Germany and China merely prescribe FET without any further explanation. In such instances, it is up to the concerned tribunal to interpret the terms of the FET provisions. Such BITs treat FET as a *sui generis* or independent treatment standard and is not necessarily equivalent or linked to CIL minimum standard.<sup>712</sup> The plain meaning approach is consistent with the accepted rules of interpretation in international law. Usually the process of interpreting the FET clause in most arbitral awards primarily begins with reference to Article 31 (1) of the VCLT which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Against this background, the FET standard should be interpreted in its ordinary meaning,<sup>713</sup> in the context the term FET is used and with regard to the object and purpose of the concerned investment treaty.<sup>714</sup> The tribunals in *Biwater v. Tanzania*<sup>715</sup> and *National Gird PLC v. Argentina*<sup>716</sup> stated that FET is an autonomous treatment which is different from CIL.

The plain meaning of FET does not automatically connote a clear set of legal prescriptions in some situations. Essentially, in any of its textual form, FET is a principle whose content is wide open to interpretation.<sup>717</sup> The *Lemire v. Ukraine*<sup>718</sup> tribunal maintained that FET is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness.<sup>719</sup> This does not suggest that the plain meaning approach is devoid of content. Rather, if a dispute arises, a FET is likely to be applied objectively by the arbitration tribunals.<sup>720</sup> In this position, the legal meaning of FET standard is a matter for the

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<sup>711</sup> See Schefer 327.

<sup>712</sup> Ibid 339.

<sup>713</sup> In *MTD v. Republic of Chile*, Award, 25 May 2004, in which the tribunal stated that the terms fair and equitable in their ordinary meaning mean “just, even-handed, unbiased and legitimate.”

<sup>714</sup> See *Saluka Investment BV (Netherlands) v. The Czech Republic*, Partial Award para 300.

<sup>715</sup> *Biwater Gauff Ltd (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008).

<sup>716</sup> Ibid.

<sup>717</sup> Schefer 328.

<sup>718</sup> *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010).

<sup>719</sup> Para 258.

<sup>720</sup> Ibid.

tribunal's appreciation in the light of all relevant circumstances.<sup>721</sup> Other scholars<sup>722</sup> view this first conception as imposing a higher standard of treatment on host states than CIL does.

### 3 5 2 2 *International minimum standard approach*

The second approach holds the view that FET standard is another denomination of minimum standard of CIL. This notion is incorporated in Article 5 of the SADC Model BIT. International minimum standard is a norm of CIL which governs the treatment of foreign investors by providing for a minimum set of principles which states, regardless of their domestic laws and practices,<sup>723</sup> must respect when dealing with foreign investors and their investments.<sup>724</sup> The *S D Myers v. Canada*<sup>725</sup> tribunal stated that a violation of the international minimum standard occurs when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. The tribunal added that minimum standard of treatment provides a floor below which treatment of foreign investors must not fall, even if a government is not acting in a discriminatory way.<sup>726</sup> It is important to note that FET, in the minimum international standard context, is absolute<sup>727</sup> in that it is maintained even when the domestic investment is not given any treatment.<sup>728</sup>

In the present practice, FET standard is adopted in many international investment treaties.<sup>729</sup> The most significant and explicit adoption of the concept of FET as a minimum international standard is found in Article 1105 (1) of the NAFTA which reads “each party shall accord to investments of investors of any other party treatment in accordance with international law, including fair and equitable treatment ...” In addition, Article 3 (1) of the UK-Mexico BIT provides that “investments of investors of each party shall at all times be accorded treatment in accordance with customary international law, including fair and equitable treatment ...” In 2001, the Free Trade Commission (FTC) of NAFTA issued a Note on the Interpretation of Article 1105 of the NAFTA and clarified that, Article 1105 (1) of the NAFTA prescribes the CIL minimum standard of treatment of foreign investors. The FTC Note affirms that the

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<sup>721</sup> Ibid.

<sup>722</sup> See Mann “British Treaties for the Promotion and Protection of Investments” 1981 52 *British Yearbook of International Law* 244.

<sup>723</sup> Roth *The Minimum Standard of International Law Applied to Aliens* (1949) 127.

<sup>724</sup> Tudor *Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008) 4.

<sup>725</sup> *S D Myers v. Canada*, Award para 263.

<sup>726</sup> Para 259.

<sup>727</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 479.

<sup>728</sup> See Lowenfeld (2008) 556.

<sup>729</sup> See, for example, Article 1105 of the NAFTA; Article 5 of the UK-Mexico BIT; Article II (3) (a) of the US-Ukraine BIT; French Model BIT; Canada Model BIT; and Article 5 (1) of the US Model BIT.

concepts of FET as well as full protection and security do not require treatment in addition to or beyond CIL.<sup>730</sup> The FTC Note also stipulates breach of any provision or separate international agreement do not establish that there has been a breach of Article 1105 (1).<sup>731</sup> The *ADF v. US*<sup>732</sup> tribunal noted that FTC interpretation was necessary for consistency and continuity of interpretation of the minimum standard of treatment. More recently, the FTC Note is unquestionably accepted by NAFTA tribunals despite some early decisions to the contrary.<sup>733</sup> The *Methanex v. US*<sup>734</sup> tribunal pointed out that the binding force of the FTC Note is not only a matter of NAFTA but also follows from the general law of treaties.<sup>735</sup>

There is a considerable amount of international case law<sup>736</sup> that has sought to unveil the content or elements of CIL minimum standard. The standard developed by the General Claims Commission in *Neer v. Mexico*<sup>737</sup> seems to be invoked in almost all FET claims. In *Neer v. Mexico*, the General Claims Commission recognised that treatment was below the minimum international standard if the treatment to foreigners amounted to an outrage, bad faith, to wilful neglect of duty or any insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.<sup>738</sup> It is submitted that Article 5 (2) of the SADC Model BIT contains the language of the *Neer Claims*. Though the traditional standard of *Neer v. Mexico* is commonly invoked in FET claims, the cases of *Mondev v. US*<sup>739</sup> and *ADF v. US*, among others, rejected its application in CIL. *Mondev v. US*, a case concerning denial of justice, considered the ICJ Chamber's focus on judicial propriety in the *ELSI* case as a useful criterion in the context of denial of justice. Thus, the *Mondev v. US* tribunal stated:

whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all of the available facts that the impugned decision was

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<sup>730</sup> See para B (2) of the FTC Note on the Interpretation of Article 1105 of the NAFTA.

<sup>731</sup> Ibid.

<sup>732</sup> *ADF Group Inc. v. US*, 6 ICSID Reports, Award (January 9, 2003) para 177.

<sup>733</sup> See *S D Myers v. Canada*; *Pope & Talbot*; and Schreuer "Fair and Equitable Treatment in Arbitral Practice" 2005 6 *Journal of World Investment* 360.

<sup>734</sup> *Methanex Corp. v. US*, Final Award, (August 3, 2005) paras 20-22.

<sup>735</sup> See also Dumberry "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law – Case of the NAFTA Chapter 11 Pope & Talbot Awards" 2004 3 *Journal of World Investment* 4658-4691; *Mondev v. US*, *United Parcel Service (UPS) v. Canada*, Award on the Merits (June 24, 2007) UNCITRAL (NAFTA); *ADF v. US*, Award (January 9, 2003); and *Loewen Group Inc. and Raymond L Loewen v. US*, Award (June 26, 2003).

<sup>736</sup> See, for example, *Alex Genin, Eastern Credit Ltd, Inc. and AS Baltoil (US) v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) para 367; and *Occidental v. Ecuador* paras 188 and 190.

<sup>737</sup> *L F H Neer and Pauline Neer (USA) v. United Mexican States*, 4 RIAA 60 (October 15, 1926).

<sup>738</sup> Para 61.

<sup>739</sup> *Mondev International Ltd v. US*, ICSID Case No. ARB/99/2, NAFTA, Award (October 11, 2002).

clearly improper and discreditable, with the result that the investment has been subject to unfair and inequitable treatment.<sup>740</sup>

The *ADF v. US* case concerned minimum standard of treatment in the application of a regulatory framework. The tribunal contended that "there appears no logical necessity and no concordant State practice to support the view that the *Neer Claims* formulation is automatically extendible to the contemporary context of treatment of foreign investors" by a host State.<sup>741</sup>

### 3 5 2 3      *Content of FET*

In principle, the content of FET comprises a number of sub-elements protecting different aspects of the interests of foreign investors.<sup>742</sup> Despite uncertainty in the content of the FET standard, significant aspects have been frequently elaborated by arbitration tribunals in determining possible violations. These aspects include, *inter alia*, arbitrariness,<sup>743</sup> denial of justice,<sup>744</sup> the violation of legitimate expectations,<sup>745</sup> a failure to observe due process, a lack of transparency<sup>746</sup> and bad faith.<sup>747</sup> The *Glamis v. US* tribunal held that FET breach is committed when there is a sufficiently egregious or shocking act such as gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or manifest lack of reasons.<sup>748</sup> In addition, the *Tecmed v. Mexico*<sup>749</sup> and *Maffezini v. Spain*<sup>750</sup> tribunals mentioned that a violation of the FET obligation took place if in the light of good faith under international law the host state acted against the legitimate and basic expectations of the investor. The recent case law appears to indicate that the content of FET in terms of the second approach revolves around these elements.<sup>751</sup> This does not suggest that mere violation

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<sup>740</sup> Para 127.

<sup>741</sup> Para 181.

<sup>742</sup> Klager "Fair and Equitable Treatment and Sustainable Development" in Segger, Gehring and Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 242.

<sup>743</sup> See *Genin v. Estonia* para 371 and *LG & E Energy v. Argentina*. In *ELSI*, the ICJ though not specifically interpreting FET provision, it stated that arbitrariness "is not so much something opposed to a rule of law ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety..." paras 73-77.

<sup>744</sup> See *Metaclad v. Mexico*; *Parkerings-Compagniet v. Lithuania*; and *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (April 12, 2002).

<sup>745</sup> See *International Thunderbird Gaming Group v. Mexico*, Award (January 26, 2006) para 147, *CME v. Czech*, Partial Award (September 13, 2001), *Tecmed v. Mexico*, *GAMI v. Mexico*, Award (November 15, 2005), *Euero BV v. Poland*, Partial Award (August 19, 2005). See also Von Walter "The Investor's Expectations in International Investment Law" in Reinisch and Knahr (eds) *International Investment Law in Context* (2008) 175.

<sup>746</sup> See *Metaclad v. Mexico* para 99.

<sup>747</sup> However, there is a considerable authority indicating that bad faith is not an essential element of a violation of FET. See *Mondev v. US* para 116.

<sup>748</sup> Para 627.

<sup>749</sup> *Tecmed SA v. Mexico*, 43 ILM 133 (ICSID 2003).

<sup>750</sup> *Emilio Augustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (November 13, 2000).

<sup>751</sup> Schefer 328.

of these significant elements lead automatically to finding an FET violation, but the FET standard is adapted to the circumstances of each case.

### 3 6 INTERNATIONAL RULES OF INVESTMENT DISPUTES SETTLEMENT

Dispute settlement rules are probably the most important rules and are of interest to foreign investors because they ensure the legal protection of the rights of FDI. Historically, local courts applying domestic laws and rules have always been the primary forum for investment dispute resolution,<sup>752</sup> unless there is any overriding international law arrangement.<sup>753</sup> It is submitted that both the Calvo doctrine and the NIEO sought to establish the standard that investment disputes be submitted exclusively to the courts or administrative tribunals of the host state. However, fears that domestic courts were not impartial and independent led to the search for an international mechanism for resolving investment disputes.<sup>754</sup> The current investment agreements provide for recourse to agreed third party dispute settlement mechanisms such as consultation, negotiation<sup>755</sup> and arbitration when the consultation and negotiation process fail.<sup>756</sup> Article V (1) of the WB Guidelines asserts that investment disputes are normally resolved through negotiations and local courts or other agreed mechanisms including conciliation and independent arbitration.<sup>757</sup> It is submitted that arbitration has been considered the most favourable dispute resolution technique in investment protection instruments. Arbitration allows foreign investors to avoid submitting the disputes to domestic courts of the host state or to ask for diplomatic protection of their home state.<sup>758</sup> The advantage of arbitration is that the dispute is handed to an independent and impartial international legal forum generally removed from political interference as well as protect investors from any unfair activities which would be carried out by the host state to the investors' disadvantage.<sup>759</sup>

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<sup>752</sup> See the preamble of the ICSID Convention (Washington Convention).

<sup>753</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 497.

<sup>754</sup> Ibid.

<sup>755</sup> Some international investment treaties impose on investors a requirement to consult/negotiate with host state before bringing the claim to arbitration. For consultation and negotiation provisions, see, for instance, Article 1118 of the NAFTA; Agreement between Singapore and Japan for a New-Age Economic Partnership of 2002; Mexico-Japan Economic Partnership Agreement of 2004; Mexico, El Salvador, Guatemala and Honduras FTA of 2000; Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR of 1994; and the EU-Mexico Partnership Agreement.

<sup>756</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 227.

<sup>757</sup> Article V (1) of the WB Guidelines affirms that independent arbitration includes an *ad hoc* or institutional arbitration agreed upon in writing by the parties to the dispute.

<sup>758</sup> Bernasconi-Osterwalder and Rosert "Investment Treaty Arbitration: Opportunities to Reform Arbitral Rules and Processes" 2014 *The International Institute for Sustainable Development* 11.

<sup>759</sup> Di Pietro "Applicable Law under Article 42 of the ICSID" in Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Investment Treaties and Customary International*



Notwithstanding such advantages, parties to a dispute usually encounter difficulties in the practice of arbitration.<sup>760</sup> Normally these difficulties vary across the nature of, *inter alia*, the personnel involved in administering the applicable laws, local legislations, the problems of sovereign immunity of state parties, the basis for recognition and enforcement of foreign arbitral awards, and the roles of domestic courts in support of international arbitration process.<sup>761</sup> The difficulties enumerated above are some of the pertinent questions this part seeks to address. Perhaps the main question to be addressed is what are the existing minimum international norms, standards and/or best practices pertinent to the field of investment dispute resolution. These minimum global standards will be used later in the study as a basis for examining the investment dispute settlement rules in South Africa and Zimbabwe.

### **3 6 1 International law practices on investment dispute resolution**

#### *3 6 1 1 Institutional fora*

The aforesaid fragmentation character of international investment law is also noticeable from the institutional fora of settlement of dispute procedures applicable in the field. Contrary to other branches of international law where permanent courts such as, *inter alia*, European Court of Justice, Inter-American Court of Human Rights and International Criminal Court (ICC) exist, there is no compulsory or permanent investment dispute forum within the international legal arena.<sup>762</sup> Be that as it may, there are a number of international institutional fora open to investors for arbitration proceedings against a host state.<sup>763</sup> Given that it is likely that there is prevalence of conflicting arbitral awards and forum shopping, the institutional fora that have been usually chosen for the settlement of investment disputes include, *inter alia*, International Centre for the Settlement of Investment Disputes (ICSID),<sup>764</sup> United Nations Commission on

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*Law* (2005) 239. See also Franck “Foreign Direct Investment, Investment Treaty Arbitration and the Rules of Law” 2007 *Global Business & Development Law Journal* 347.

<sup>760</sup> See Schill “Illegal Investments in Investment Treaty Arbitration” 2012 11 *The Law and Practice of International Courts and Tribunals* 281-323.

<sup>761</sup> *Ibid.*

<sup>762</sup> Schreuer “Diversity and Harmonisation of Treaty Interpretation in Investment Arbitration” in Fitzmaurice, Elias and Merkouis (eds) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (2010) 1.

<sup>763</sup> Teitel and Howse “Cross-Judging: Tribunalisation in a Fragmented but Interconnected Global Order” 2009 *NYU Journal of International Law and Politics* 41.

<sup>764</sup> The ICSID is an autonomous international forum for conflict resolution established in 1966 by the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (Washington Convention) of 1965. The ICSID is an impartial institution and does not conciliate or arbitrate the investment disputes. The arbitration and conciliation under the Washington Convention are exclusively voluntary and require consent of both the investor and host state concerned. See Shihata “Towards a Greater Depoliticisation of Investment of Investment Disputes: The Roles of ICSID and MIGA” 1986 1 *ICSID Review – Foreign Investment Law Journal* 1.

International Trade Law (UNCITRAL),<sup>765</sup> ICC,<sup>766</sup> Permanent Court of Arbitration (PCA),<sup>767</sup> International Court of Justice (ICJ),<sup>768</sup> Stockholm Chamber of Commerce's (SCC) Institute of Arbitration<sup>769</sup> and London Court for International Arbitration (LCIA).<sup>770</sup> In fact, present practice gives investors a choice of arbitral mechanisms through institutions such as the ICSID and its Additional Facility for host countries which are not party to the Washington Convention, the ICC or several regional arbitration centres or UNCITRAL.<sup>771</sup>

It is noteworthy that the ICSID is commonly considered as the primary forum for investment dispute settlement.<sup>772</sup> According to Article 1 (2) of the Washington Convention, the purpose of the ICSID is, in part, to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the Washington Convention. The ICSID arbitration rules apply only to that subset of investment cases that are decided by ICSID tribunals. The decisions of tribunals convened under UNCITRAL, ICC, PCA or SCC rely on their own rules or on the rules the parties have

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<sup>765</sup> The UNCITRAL is the core legal body of the UN in the field of international trade law, whose mandate is to further the progressive harmonisation and unification of the law of international trade. UNCITRAL also assist states in reforming and modernising their laws on arbitration so as to take into account the particular features and needs of international commercial arbitration. The UNCITRAL provides for arbitration and conciliation rules. More information on the UNCITRAL is available at <http://www.newyorkconvention.org/uncitral>.

<sup>766</sup> The ICC was established in 1923, handles both public investment arbitrations and international commercial arbitration. The ICC arbitration is a flexible and efficient dispute resolution procedure leading to binding and final decisions subject to enforcement worldwide. This mechanism constitutes one of the essential features of ICC arbitration procedure and is appreciated by most ICC arbitration users, including arbitrators. More information on the ICC arbitration is available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/>.

<sup>767</sup> The PCA was established under Articles 20 to 29 of the Hague Convention, 1899. The PCA is another administrator/facilitator of arbitration rather than a court. See Schefer 381. The PCA provides for Optional Rules for Arbitration Disputes between two parties of which only one is a state, 1993. See the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment, 2001.

<sup>768</sup> The ICJ was established by the UN Charter as the principal judicial organ of the United Nations. The role of the ICJ in the field of investment disputes has been limited so far and there have been three cases involving claims of expropriation of foreign investment before the ICJ. See also *Anglo-Iranian Case Oil Co. (United Kingdom v. Iran)* (1952) ICJ Rep. 93; *Case concerning Barcelona Traction, Light and Power Company Limited* (New Application: 1962) (*Belgium v. Spain*) Second Phase, (1970) ICJ Rep. 3; and *Case concerning Elettronica Sicula S.P.A. (ELSI) (United States v. Italy)* (1989) ICJ Rep. 15. In all the three cases, the claim was dismissed, but the ICJ avoided a pronouncement on the underlying question of the responsibility of the host state to foreign investors.

<sup>769</sup> The SCC Institute of Arbitration is also another forum available to investors and was established in 1917.

<sup>770</sup> The LCIA is one of the world's leading international institutions for commercial dispute resolution. The LCIA provides efficient, flexible and impartial administration of arbitration and other Arbitration Dispute Resolution proceedings, regardless of location, and under any system of law. More information on LCIA is available at <http://www.lcia.org/>.

<sup>771</sup> See Stevens "Experience in Arbitrations under ICSID Rules Pursuant to Bilateral Investment Treaties" *International Business Lawyer* 29 (2001) 377-280; Von Mehren, Salomon and Paroutsas "Navigating through Investor-State Arbitrations – An Overview of Bilateral Investment Treaty Claims" 2004 *Dispute Resolution Journal* 69-77.

<sup>772</sup> See Chao and Schurz "International Arbitration: Selecting the Proper Forum" *Mealey's International Arbitration Report* 17 (2002) 41.

agreed upon.<sup>773</sup> Of significance is that BITs and IIAs may either specify what fora are to be used,<sup>774</sup> give a choice to the parties or the parties may choose to resolve their differences through *ad hoc* arbitration.<sup>775</sup> It is worth noting that the choice of law is not limited to either domestic laws or legal systems of the host state or home state but parties are permitted to agree to have their process governed by general principles of law as well as rules of international conventions.<sup>776</sup> The inclusion of such various institutional fora options to conduct arbitration is generally regarded as an expression of consent to arbitration.<sup>777</sup> Normally, tribunals decide on the basis of the provisions of the applicable treaty, legal principles agreed upon by the parties<sup>778</sup> and the general principles of international law.<sup>779</sup> In other words, parties may select one of a variety of legal rules to govern their dispute. If there is no consensus as to the applicable rules between the parties, Article 42 of the Washington Convention provides that the dispute is to be subject to the law of the state party together with international law rules.

Notwithstanding the decentralisation of international investment law, tribunals contribute to the harmonisation of international investment law, in particular through the existence of *de facto* practice of precedents concerning most investment issues.<sup>780</sup> This does not suggest that there is a doctrine of judicial precedent/*stare decisis* in international investment law.<sup>781</sup> The existence of *stare decisis* is an intricate question in international investment law.<sup>782</sup> Under

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<sup>773</sup> See Chao and Schurz “International Arbitration: Selecting the Proper Forum” *Mealey’s International Arbitration Report* 17 (2002) 41

<sup>774</sup> See *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (October 31, 2011) Award para 129. In essence, most BITs or IIAs give set out options to consider rules of the above said institutions, see, for instance Article 29 (6) of the SADC Model BIT.

<sup>775</sup> Schefer 380.

<sup>776</sup> See *Mobil v. New Zealand* case.

<sup>777</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 227.

<sup>778</sup> See Article 42 (1) of the Washington Convention; Article 33 (1) of the PCA Optional Rules for Arbitrating Disputes between Two Parties of which One is only a State, 1993; Article 17 (I) of the ICC Rules, 1998; and Article 3 of the Inter-American Convention on International Commercial Arbitration, 1976.

<sup>779</sup> See *Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (November 27, 1985) para 70. See also Article 42 (1) of the Washington Convention; Report of the Executive Directors of the International Bank for the Reconstruction and Development on the Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965 *International Legal Material* 524 para 10; Schreuer, Malintopi and Reinisch *ICSID Convention: A Commentary* 2ed (2009) 605; Salacuse and Baker “The Treatification of international Investment Law” 2006 3 *Transnational Dispute Management* 3; and *MTD Equity and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/7 (May 25, 2004) para 23.

<sup>780</sup> Hirsch in Drabek and Mavroidis (eds) *Regulation of Foreign Investment: Challenges to International Harmonisation* (2013) 343.

<sup>781</sup> Schreuer and Weiniger “A Doctrine of Precedent” in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 1191.

<sup>782</sup> *Ibid.*

general international law, there is no rule of judicial precedent.<sup>783</sup> The doctrine of judicial precedent in international law is expressly rejected by Article 59 of the ICJ Statute,<sup>784</sup> Article 1136 (1) of the NAFTA<sup>785</sup> and less clearly by Article 53 (1) of the Washington Convention.<sup>786</sup> This means that investment tribunals are not bound by previous awards rendered by other tribunals. Nonetheless, some empirical studies reveal that a *de facto* practice of precedent certainly exists in investment law and tribunals, though not bound, have a duty to adopt solutions established in a series of consistent case law.<sup>787</sup> The empirical studies argue that the influential role of judicial decisions is particularly prominent with regard to the awards of the ICSID tribunals, but decisions of non-ICSID tribunals are also repeatedly cited by ICSID and other tribunals.<sup>788</sup> In addition, investment tribunals' jurisprudence displays an increasing reference and citation of both ICSID tribunals' decisions as well as other investment treaty awards.<sup>789</sup> Similarly, considerable case law reveals scenarios where investment tribunals relied on awards of other investment tribunals.<sup>790</sup>

There are two models that exist in international agreements on the settlement of investment disputes namely investor-state and state-to-state dispute resolution.<sup>791</sup> Under traditional international law, states may only be sued by other states. Individuals did not have legal

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<sup>783</sup> See *AES v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/02/17 (April 26, 2005) para 23; *Suez v. Argentina* para 90. For a detailed discussion on the existence of *stare decisis* rule in international law see Schreuer and Weiniger "A Doctrine of Precedent" in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 1191-1195.

<sup>784</sup> Article 59 of the ICJ Statute articulates that "the decision of the court has no binding force except between the parties and in respect of that particular case."

<sup>785</sup> Article 1136 (1) of the NAFTA states that "an award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case."

<sup>786</sup> Article 53 (1) of the Washington Convention postulates that "the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

<sup>787</sup> See, for instance, Schreuer and Weiniger in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 1191-1195; Schreuer *et al* (2009) 610; Fauchald "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis" 2008 19 *European Journal of International Law* 277-299; and Commission "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" 2007 6 *Journal of World Investment and Trade* 297-332.

<sup>788</sup> See Commission 2007 6 *Journal of World Investment and Trade* 149.

<sup>789</sup> *Ibid.*

<sup>790</sup> See, for example, *Bernardus Henricus Funnekotter v Republic of Zimbabwe*, ICSID Case No. ARB/05/06 (Award of April 22, 2009) para 124; *Pantechniki v. Albania*, Award (July 30, 2009) ICSID Case No. ARB/07/21 para 78; *Europe Cement v. Turkey*, Award (August 13, 2009) ICSID Case No. ARB (AF)/07/2 (ECT) para 171; *Phoenix v. Czech Republic*, Award (15, 2009) ICSID Case No. ARB/06/5 para 108; *Cementownia v. Turkey Award* (September 17, 2009) ICSID Case No. ARB/06/2 paras 153-155; and *Amco v. Indonesia; LETCO v Liberia*, Award, (March 31, 1986) ICSID Reports 352.

<sup>791</sup> Chao and Schurz "International Arbitration: Selecting the Proper Forum" *Mealey's International Arbitration Report* 17 (2002) 4.

standing in international law.<sup>792</sup> In essence, home states in exercising diplomatic protection could establish *ad hoc* commissions and arbitral tribunals to adjudicate claims involving treatment of foreign nationals and their property by the host state.<sup>793</sup> Hence, the home state litigates on behalf of the investor and it was uncertain therein if the investor would receive compensation.<sup>794</sup> The most frequent method of settling investment disputes is investor-state dispute settlement.<sup>795</sup> In modern investment law, state-to-state resolution has occurred, but rarely.<sup>796</sup> Some of the BITs require the investor to exhaust local remedies before resorting to arbitration.<sup>797</sup>

The MAI Draft intended to establish a specific dispute settlement mechanism that would deal with both state-to-state and investor-to-state disputes. In investor-state dispute, the investor would choose whether to submit the dispute for resolution to any competent court or administrative tribunal of the contracting party to the dispute; to resolve the dispute in accordance with any dispute settlement procedure agreed upon before the dispute arose or to follow the procedure provided for by the MAI Draft itself.<sup>798</sup> In addition, contracting parties would give unconditional consent to submission of a covered dispute to arbitration under either: the rules arbitration of the ICSID or under the rules of the ICSID Additional Facility; the UNCITRAL rules; or the Court of Arbitration of the ICC.<sup>799</sup>

### 3 6 1 2      *Consent requirement*

The requirement of consent is of critical importance in international dispute settlement. In fact, consent is the cornerstone of jurisdiction of tribunals in international dispute resolution.<sup>800</sup> In

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<sup>792</sup> Beckman and Butte “Introduction to International Law” <http://www.ilsa.org/jessup/intlawintro.pdf> (accessed 02-10-2014).

<sup>793</sup> Newcombe and Paradell (2009).

<sup>794</sup> Franck 2007 *Global Business & Developmental Law Journal* 343.

<sup>795</sup> See UNCTAD “Recent Developments in Investor-State Dispute Settlement” *International Investment Agreement Issues Note* (2014).

<sup>796</sup> *Ibid.*

<sup>797</sup> The local remedies rule is such a fundamental principle of international law that it cannot be excluded except by express words having that effect and this rule is regarded by some IIAs or BITs as a precondition for international arbitration, see Sornarajah (2010) 220. See also Crawford “Treaty and Contract in Investment Arbitration” 2008 24 *Arbitration International* 351; Dolzer and Schreuer 264-267; Salacuse 386; Schwebel and Wetter “Arbitration and Exhaustion of Local Remedies” 1966 60 *American Journal of International Law* 484; *Interhandel Case (Switzerland v. US)*, Judgment, ICJ 6 (March 21, 1959) para 27; *ELSI Case (US v. Italy)*; and Article 26 of the Washington Convention. For more information on the principle of exhaustion of local remedies, see Amerasinghe *Local Remedies in International Law* (1990).

<sup>798</sup> See Article V (D) (2) of the MAI Agreement.

<sup>799</sup> See Chao and Schurz “International Arbitration: Selecting the Proper Forum” *Mealey’s International Arbitration Report* 17 (2002).

<sup>800</sup> Report of the Executive Directors of the International Bank for the Reconstruction and Development on the Convention on Settlement of Investment Disputes between States and Nationals of Other States, 1965 International Legal Materials 524 para 23.

the international law arena, it is a cardinal principle that an international tribunal adjudicating upon an international commercial dispute owes its jurisdiction to the consent of the parties.<sup>801</sup> Thus international arbitration is based on consent of both parties to resolve their dispute before a third party, arbitrator or tribunal.<sup>802</sup> Consent must be given in written form.<sup>803</sup> It may be provided in a consent provision in an investment contract which functions as an agreement to submit any future disputes to arbitration<sup>804</sup> or national legislation specifying that claims against a host state may be brought to a particular institution or to *ad hoc* arbitration.<sup>805</sup> Consent is required for consultation, negotiation<sup>806</sup> or arbitration.<sup>807</sup> In addition, it is common cause that where the host state has consented to dispute settlement, no party can withdraw consent unilaterally nor can it require that there be an exhaustion of local remedies unless this is expressly provided in an agreement.<sup>808</sup> For instance, Article 25 (1) of the Washington Convention requires consent by the parties to arbitration under a particular agreement or in respect to a particular dispute, but provides that the consent of the parties may not be withdrawn. In addition to the foregoing, Article 7 of the UN Convention on Jurisdictional Immunities of States and their Property<sup>809</sup> affirms that a state cannot allege immunity from jurisdiction in a proceeding before a court of another state if it explicitly consented to the exercise of such jurisdiction by international agreement, in a written consent or by a declaration before the court or written communication in a specific proceeding.<sup>810</sup>

### 3 6 1 3 *Independence and impartiality*

In practice, it is common cause that a tribunal adjudicating upon a dispute must be impartial and independent.<sup>811</sup> Impartiality and independence of tribunals is also fundamental in investment dispute settlement.<sup>812</sup> Traditionally, arbitration before a neutral or independent

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<sup>801</sup> Ibid.

<sup>802</sup> Schefer 399.

<sup>803</sup> See Article 5 of the ICC Rules of Arbitration, 1998.

<sup>804</sup> See World Bank “Basic Submission Clause” <http://icsid.worldbank.org/icsid/staticfiles/model-clauses-en/7.htm> (accessed 29-09-2014).

<sup>805</sup> See *Tidewater v. Venezuela* case.

<sup>806</sup> See Article 28 of the Washington Convention; Rule 2 of the ICSID Rules of Procedures for the Institution of Conciliation and Arbitration Proceedings, 2006; and Article 2 of the Additional Facility Rules for the ICSID, 2007.

<sup>807</sup> See Article 36 of the Washington Convention; Rule 2 of the ICSID Rules of Procedures for the Institution of Conciliation and Arbitration Proceedings; Article 2 of the Additional Facility Rules for the ICSID; and Article 1122 of the NAFTA.

<sup>808</sup> Leal-Arcas 211.

<sup>809</sup> UN Convention on Jurisdictional Immunities of the States and their Property, 2004.

<sup>810</sup> Ibid Article 7.

<sup>811</sup> Peters “Dispute Settlement Arrangements in Investment Treaties” 1991 22 *Netherlands Yearbook of International Law* 91.

<sup>812</sup> Ibid.

tribunal has been seen as the best method of securing impartial justice in dispute resolution.<sup>813</sup> Part 1 of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration<sup>814</sup> sets out the general principle of arbitrator independence and impartiality and provides that “every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so throughout the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.”

Most international rules and investment treaties provide for the settlement of investment disputes by specifying arbitration in a neutral, independent or impartial forum of resolution of disputes.<sup>815</sup> The ICSID Arbitration Rules require arbitrators to be able to exercise independent judgment.<sup>816</sup> In addition, the ICC Rule 11<sup>817</sup> stipulates that “every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.”<sup>818</sup> Likewise, Article 14 (1) of the Arbitration Rules of the Arbitration Institute of the SCC requires every arbitrator to be impartial and independent and Article 14 (2) adds that an arbitrator must disclose any circumstances which may give rise to justifiable doubts as to his or her impartiality and independence.<sup>819</sup> PCA Rule 10<sup>820</sup> confirms that “any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Article 1139 of the NAFTA establishes a mechanism for settlement of investment disputes that assures both equal treatment with the principle of international reciprocity and due process before an impartial tribunal.<sup>821</sup>

The *ConocoPhillips v. Venezuela*<sup>822</sup> tribunal indicated that the purpose of the independence and impartiality requirements would be to protect parties against arbitrators being influenced by factors other than those related to the merits of the case. The *Suez v. Argentina* tribunal

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<sup>813</sup> Sornarajah (2010) 217.

<sup>814</sup> The IBA Guidelines on Conflicts of Interest in International Arbitration were approved by the Council of the IBA in 2004 and are intended for use around the world. These guidelines set out a series of seven general standards of independence and disclosure to govern the selection, appointment, and continuing role of an arbitrator. See IBA Guides, Rules and Other Free Materials [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 02-10-2014).

<sup>815</sup> Peters 1991 *Netherlands Yearbook of International Law* 91.

<sup>816</sup> The ICSID Additional Facility Rules of 1978 provides for ICSID arbitration in instances where the Washington Convention has no jurisdiction, see Article 2 of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID.

<sup>817</sup> ICC Rules of Arbitration, 2012.

<sup>818</sup> See also Article 7 (II) of the ICC Rules, 1998.

<sup>819</sup> See Article 14 (2) of the Arbitration Rules of the Arbitration Institute of the SCC.

<sup>820</sup> PCA Rules of Procedure were adopted by the Administrative Council of the PCA in 2011.

<sup>821</sup> See Article 1139 of the NAFTA.

<sup>822</sup> *ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 Decision on the Proposal to Disqualify L. Yves Fortier, QC, Arbitrator (February 27, 2012) para 55.

opined that independence and impartiality are states of mind.<sup>823</sup> The tribunal added that the fact that gathering conclusive evidence on a state of mind is impossible means that challenges to an arbitrator's independence and impartiality must be imputed from the arbitrator's actions or from others' actions in connection with the arbitrator.<sup>824</sup> Additionally, the *Urbaser SA v. Argentina*<sup>825</sup> tribunal mentioned that both concepts of independence and impartiality are deemed to be of equivalent content and pertinence in the framework of Articles 14 (1)<sup>826</sup> and 57<sup>827</sup> of the Washington Convention.

Impartiality goes to the arbitrator's subjective relationship to the issue or parties, to the state of mind he or she may have.<sup>828</sup> According to paragraph 3 (1) of the IBA Rules of Ethics partiality arises when an arbitrator favours one of the parties or where he is prejudiced in relation to the subject matter of the dispute.<sup>829</sup>

Independence has been said to concern the arbitrator's objective relationship to the issue or parties.<sup>830</sup> Impartiality is the lack of relations with a party that might influence the arbitrator.<sup>831</sup> The *Suez v. Argentina* tribunal said that in determining a lack of manifest independent judgment the respondent must, *inter alia*, prove such facts that would lead an informed reasonable person to conclude that the respondent clearly and obviously lacks the quality of being able to exercise independent judgment and impartiality.<sup>832</sup> The tribunal emphasised that the language of Article 57 of the Washington Convention places a heavy burden of proof on the respondent to establish facts that make it obvious and highly probable, not just possible, that the respondent is a person who may not be relied upon to exercise independent and impartial judgment.<sup>833</sup>

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<sup>823</sup> Para 30.

<sup>824</sup> Ibid.

<sup>825</sup> *Urbaser SA v. The Argentine Republic*, ICSID Case No. ARB/07/26 (August 12, 2010), Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan Arbitrator para 34.

<sup>826</sup> Article 14 (1) of the Washington Convention articulates that "persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the panel of arbitrators."

<sup>827</sup> Article 57 of the Washington Convention stipulates that "a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."

<sup>828</sup> Schefer 477.

<sup>829</sup> See paragraph 3 (1) of the IBA Rules of Ethics.

<sup>830</sup> Ibid 476.

<sup>831</sup> *ConocoPhillips Company v. Argentina* para 54. See also *Tidewater Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 (December 23, 2010), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal.

<sup>832</sup> Para 29.

<sup>833</sup> Ibid.



One of the most important issues for foreign investors is the enforcement of resulting judgments whether there are litigating at national or internal level.<sup>834</sup> It is submitted that arbitral awards are ineffective if they are not enforced. Quite often host states refuse to enforce arbitral awards in their nations, in most cases, on grounds of the lack of jurisdiction of the tribunal.<sup>835</sup> Most international instruments governing international adjudication do not cover enforcement but leave the issue to domestic laws or applicable treaties.<sup>836</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>837</sup> governs the recognition and enforcement of awards in international dispute settlement. The enforcement of an ICSID award is provided for in the Washington Convention. According to Article 54 (1) of the Convention “each contracting state shall recognise an award rendered pursuant to this Convention as binding and shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that state...” Under the current system, for ICSID awards there is a treaty obligation to recognise and an obligation to enforce the award in accordance with the laws of the country where the enforcement is sought, which extends only to the pecuniary obligations imposed by the award.<sup>838</sup> The preamble of the Washington Convention recognises that mutual consent by parties to submit to conciliation or to arbitration constitutes a binding agreement which requires in particular that any award be complied with.<sup>839</sup>

Non-ICSID awards are enforceable under the normal rules governing the recognition and enforcement of arbitral awards established by national law, the New York Convention - which deals with enforcement of awards in international commercial arbitration and other relevant treaties, which give the principal role to domestic courts.<sup>840</sup> Article III of the New York Convention requires contracting states to “recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”. Article V lists a number of grounds on which recognition and enforcement of the award may

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<sup>834</sup> Oppong “Enforcing Judgments of the SADC Tribunal on the Domestic Courts of Member States” in Bosl, Du Pisan, Erasmus, Hartzenburg and Sandrey (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 117.

<sup>835</sup> Aduaka “Contemporary Problems in International Commercial Arbitration Practice in Nigeria” 2013 3 *African Journal of Law and Criminology* 111.

<sup>836</sup> For instance Article 1136 (3) (b) of the NAFTA expressly provides for the possibility of actions in national courts to “revise, set aside or annul” awards, requiring the winning party to refrain from enforcement until the losing side has had the opportunity to pursue such relief.

<sup>837</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959.

<sup>838</sup> See Article 54 (3) of the Washington Convention.

<sup>839</sup> See the preamble of the Washington Convention.

<sup>840</sup> See Article III of the New York Convention.

be refused. If an obligation to abide by the arbitral award is created by the investment treaty, any reference to the New York Convention must be regarded as surplusage.

Article 35 of the UNCITRAL Model Law on International Commercial Arbitration<sup>841</sup> provides that an arbitral award, irrespective of the state in which it was made, shall be recognised as binding and shall be enforced subject to the grounds of refusal embodied in Article 36. Article 32 (2) of the PCA Optional Rules for Arbitrating Disputes between Two Parties of which One is a State declares that an award is binding and final on both parties. A similar provision is found in Article 26 (7) of the LCIA Arbitration Rules and Article 28 of the ICC Arbitration Rules. Article 40 of the Arbitration Rules of the Arbitration Institute of the SCC states that an award is binding and final and shall be enforced without delay.<sup>842</sup> Arbitral awards are regarded as decisions of national courts and must be enforced in accordance with the laws of the state where enforcement is sought.<sup>843</sup> Article 4 of the Inter-American Convention on International Commercial Arbitration asserts that arbitral awards may be executed or recognised in “the same manner as that of the decisions handed down by national or foreign courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.” Also Article 5 of this Convention provides a list of grounds for refusal.

Enforcement of arbitral awards is subject to the international law doctrine of state immunity.<sup>844</sup> Thus an award against a host state need not be enforced if this would be in violation of the rules on state immunity as applied in the enforcing state.<sup>845</sup> In the common law tradition, the doctrine had its origins in the acknowledgment of the need for international comity and the evolution of the concept of national sovereignty.<sup>846</sup> However, it is suggested that even if state immunity is available to frustrate enforcement, this does not affect the obligation to comply with the award.<sup>847</sup> In light of the foregoing principle, the *MINE v. Guinea*<sup>848</sup> *ad hoc* committee opined

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<sup>841</sup> UNCITRAL Model Law on International Commercial Arbitration, 2006.

<sup>842</sup> Read together with Article 47 of the Arbitration Rules of the Arbitration Institute of the SCC.

<sup>843</sup> De Wet “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern African” 2013 *ICSID Review* 1-19. See also Bartels “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal” Final Report presented to the SADC Tribunal Member State Ministers of Justice and Attorney-General Meeting, 2011.

<sup>844</sup> See Paulson and Blackaby *Guide to ICSID Arbitration* (2004) 3.

<sup>845</sup> UNCTAD “Dispute Settlement: International Centre for Settlement of Investment Dispute. 2.9 Binding Force and Enforcement” (2003) UNCTAD/EDM/Misc.232/Add 8. See also Osode “State Contracts State Interest and International Commercial Arbitration: A Third World Perspective” 1997 XXX *Comparative and International Law Journal of Southern Africa* 41 and Sornarajah *International Commercial Arbitration* (1990) 200.

<sup>846</sup> Osode 1997 XXX *Comparative and International Law Journal of Southern Africa* 40.

<sup>847</sup> Blane “Sovereign Immunity as a Bar to the Execution of International Arbitral Awards” 2009 *Journal of International Law and Policy* 453.

<sup>848</sup> *MINE v. Guinea*, Interim Order No.1 on Guinea’s Application for Stay of Enforcement of the Award (August 12, 1988) 4 ICSID Reports 115/6.

that “state immunity may well afford a legal defence to forcible execution, but it provides neither argument nor excuse for failing to comply with an award ... non-compliance by a state constitutes a violation by that state of its international obligations and will attract its own sanctions.” Where a host state invokes immunity rules, the only path of relief of the investors is the invocation of the diplomatic protection of its home state.<sup>849</sup> State immunity is forfeited through express waiver.<sup>850</sup> For example, section 14 (3) of the South African Foreign States Immunities Act<sup>851</sup> exempts property of a foreign state that is used for a commercial purpose from immunity for the purposes of execution.<sup>852</sup>

### 3.7 CONCLUSION

The absence of a binding and comprehensive multilateral agreement within the international investment arena presents a degree of complexity of the system in ascertaining the generally agreed standards on foreign investment protection. In contrast to other areas of international law where substantive rules are contained in comprehensive multilateral instruments, international rules or standards of investment law are constituted in a number of investment treaties particularly BITs, IIAs as well as regional and multilateral treaties containing provisions on investment.<sup>853</sup> This fragmented regime may encourage legal conflict and uncertainty as well as an incentive for treaty shopping by those foreign investors seeking protection in situations where their home country has not concluded or ratified investment agreements that offer the same protection as those achieved in other jurisdictions. *Prima facie* the international investment legal framework presents insurmountable obstacles the development of a coherent and harmonised body of law in this field.<sup>854</sup> Be that as it may, as shown above, recent international investment practice has seen an emergence of minimum global standards and norms on investment protection in the form of international agreements or conventions, CIL, general principles of law, judicial decisions or soft law.<sup>855</sup>

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<sup>849</sup> Schefer 449.

<sup>850</sup> See *The Government of the Republic of Zimbabwe v. Louis Karel Fick* 2013 ZACC 22.

<sup>851</sup> South African Foreign States Immunities Act 87 of 1981.

<sup>852</sup> Ibid section 14 (3).

<sup>853</sup> UNCTAD “Development Implications of International Investment Agreements” International Investment Agreement Monitor 2 (2007). See also Zhan, Weber and Karl “International Investment Rulemaking at the beginning of the Twenty-First Century” in Alvarez and Sauvart (eds) *Evolving International Investment Regime* (2011).

<sup>854</sup> Hirsch in Drabek and Mavroidis (eds) *Regulation of Foreign Investment: Challenges to International Harmonisation* (2013) 341.

<sup>855</sup> See Leal-Arcas 180 and Schefer 3.

In this Chapter, it was established that host states enjoy a sovereign right to control the admission of foreign investors.<sup>856</sup> Save for an overriding treaty, the host state has the discretion in deciding whether and on what conditions a foreign investment project may be accepted into its territory.<sup>857</sup> However, the current treaty practice provides for admission of FDI subject to specific conditions such as, among others, joint ventures with local investors, employment and training of local personnel and local participation. In this context, most international investment treaties and other relevant instruments require host states to apply such conditions *bona fide* and in accordance with the objective to preserve national economic or other public policies without prejudice to foreign investors.<sup>858</sup> In other words, since there is no minimum international standards as to the admission of FDI, host states have the discretion whether and on what conditions may foreign investment be admitted into their territories.<sup>859</sup> It is however noteworthy that such a discretion is not to be exercised arbitrarily or without good reason.<sup>860</sup> As seen in this Chapter, the UNCTAD has complemented certain policy options that have evolved in contemporary international investment practice on the admission and establishment of FDI. These policy options include investment control, selective liberalisation and regional programmes, mutual NT as well as combined NT and MFN. It should be noted that these options seem to balance state control over admission of FDI, on the one hand, and right to regulate admission of foreign investors, on the other hand.

With regard to expropriation, there are commonly cited standards on international expropriation law including public purpose, due process, non-discrimination and compensation. Thus, within the international investment arena, expropriation is permissible if it is for a public purpose, done in accordance with due process, in non-discriminatory manner and upon payment of compensation.<sup>861</sup> These standards have become somewhat CIL<sup>862</sup> or general principles of international law in the field of expropriation. Though the international norms of expropriation are standardised under investment treaties, varied terms are used to interpret and implement such rules. It has been demonstrated that in present IIAs and BITs' compensation provisions, terms such as full, just, adequate, appropriate, fair and equitable

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<sup>856</sup> Salacuse (2013) 208.

<sup>857</sup> Dolzer and Schreuer 79–80.

<sup>858</sup> See Baltag 2009 6 *Transnational Dispute Management* 1; and Pollan (2006) 76.

<sup>859</sup> Dolzer and Schreuer 79–80.

<sup>860</sup> See Article 3 of the SADC Model BIT and the preamble of the WB Guidelines.

<sup>861</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 494.

<sup>862</sup> The CIL status of these standards is still questionable.

or merely compensation are used as basis for determination of the payment of expropriation compensation.

As evident in this Chapter, the use of performance requirements is a debatable issue in international investment law. On the one hand, host states seek to preserve their right to maintain performance requirements arguing that such requirements are an important policy tool to enhance the benefits of and address concerns related to inward FDI. International investors, on the other hand, tend to consider performance requirements as restrictive to investment liberalisation. However, this Chapter discussed only selected performance requirements that are predominant in South African and Zimbabwean investment regulation, such as joint venture with local investors, domestic equity participation as well as employment and training of locals. There are no multilateral agreements addressing such performance requirements but they are regulated by a number of BITs and IIAs. As demonstrated above, the said performance requirements raise different kinds of issues in international investment community possibly because of diversity of approach to their regulation by investment treaties. That said, international rules thereof depend on the BITs or IIAs applicable to a certain jurisdiction. Equally important is that the use of the said performance requirements must not prejudice international investors.

In addition, as noted above, in the new millennium a series of treatment standards have evolved as evident in BITs, IIAs as well as other areas of public international law that one can consider the least that a state should offer in the treatment of foreign investors within its territory. The treatment standards commonly provided under international law include full protection and security, FET as well as non-discrimination. This study only examined the non-discrimination treatment and FET standards because they seem to be relevant to the South African and Zimbabwean investment regimes. The content of these standards is not generally defined; their meaning may therefore need to be determined in the light of specific circumstances of application. More recently these treatment standards have been interpreted in different ways by arbitration tribunals.<sup>863</sup> From the above discourse, it is common in the international investment law that host states are prohibited from offering foreign investors treatment less favourable than it accords to domestic investors or other states' investors based on nationality or origin under similar situations.<sup>864</sup> It is also significant to note that a differential treatment is

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<sup>863</sup> Shan in Brown and Snyder (eds) *General Reports of the XVIII Congress of International Academy of Comparative Law* (2000) 476.

<sup>864</sup> Dolzer and Schreuer (2008) 178.

not *per se* prohibited but it may be permissible if it based on reasonable or legitimate grounds.<sup>865</sup> On the contrary, treatment is unfair, inequitable or discriminatory if it is, *inter alia*, arbitrary, *malafide* and not transparent.<sup>866</sup>

Finally, there is no permanent or compulsory dispute resolution forum in the international investment arena. Rather there is a plethora of institutional fora open to investment dispute settlement. It is significant to mention that though it is likely that there would be conflicting awards and forum shopping, the said forums' rules are quite similar. From the above discussion, it is evident that consultation/negotiation is the first phase of dispute resettlement and arbitration is invoked if consultation/negotiation fails. In arbitration, a dispute is brought before an independent and impartial arbitrator or tribunal. It is noteworthy that consent of the parties is a precondition to arbitration and the cornerstone to the jurisdiction of such tribunals. Consent is given in a written form and once it is given it cannot be withdrawn easily. Most importantly, international arbitral awards are final and binding on both parties. Therefore, the arbitral awards must be, as a general principle of international law, enforced without delay, subject to the international principle of state immunity, in the same manner as a domestic court's judgment<sup>867</sup> and in accordance with laws and procedures of the state where enforcement is sought.

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<sup>865</sup> See Article 7 of the SADC FIP; *Lemire v. Ukraine* para 44-47; *Myers Inc. v. Canada* para 254; and *Pope & Talbot v. Canada* para 102.

<sup>866</sup> See Von Walter in Reinisch and Knahr (eds) *International Investment Law in Context* (2008) 175.

<sup>867</sup> De Wet 2013 *ICSID Review* 1-19.

## CHAPTER 4

### The legal protection of foreign investment in South Africa

#### 4 1 INTRODUCTION

The protection and regulation of Foreign Direct Investment (FDI) has a long history in South Africa. Foreign companies from the United Kingdom (UK), the United States (US) and Europe at large<sup>868</sup> have been present in South Africa since Britain established a colony in the early nineteenth century.<sup>869</sup> The South African apartheid system<sup>870</sup> politically and economically isolated the country from the international community.<sup>871</sup> In the 1940s, the apartheid government became increasingly insensitive and institutionalised racial discrimination through an expanding legislative framework.<sup>872</sup> During this period, South Africa was more inward looking, enforcing a policy of import substitution<sup>873</sup> and capital control.<sup>874</sup> In the 1950s, black resistance to the apartheid regime, and international campaign against apartheid intensified.<sup>875</sup> Consequently, in the 1960s, there were unending calls for disinvestment from South Africa in the international community resulting in the imposition of trade and economic sanctions on South Africa by countries such as the UK, Australia, Hong Kong, France, Brazil, Norway, Sweden, Finland, Denmark, Iceland, Netherlands, Japan and others.<sup>876</sup> Foreign investors were therefore discouraged to invest due to the apartheid policies and effects of the sanctions that undermined the economy of South Africa.<sup>877</sup> In the 1980s, South African investment environment was characterised by, *inter alia*, restrictions on foreign ownership of domestic enterprises, political instability, imposition of trade and financial sanctions as well as strict

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<sup>868</sup> See Sandrey “Foreign Direct Investment in South Africa: the BRIC Perspective” in Sandrey, Fundira, Vink, Jensen, Viljoen and Nyhondo (eds) *BRICS: South Africa’s Way Ahead?* (2013) 92.

<sup>869</sup> Gelb *Foreign Companies in South Africa: Entry, Performance and Impact* (2002) 1.

<sup>870</sup> Apartheid was a system of racial segregation in South Africa enforced through legislation by the National Party governments, the ruling party from 1948 to 1994, under which the rights, associations and movements of the majority black inhabitants were curtailed and Afrikaner minority rule was maintained. See Maylan *A History of the African People of South Africa: From the Early Iron Age to the 1970s* (1986) 184.

<sup>871</sup> Trade Law Centre (TRALAC) “Investment Project: South African Case Study” International Institute for Sustainable Development Report, May 2004 3.

<sup>872</sup> Organisation for Economic Co-operation and Development (OECD) “Self-Assessment of South Africa’s Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment” *OECD-South Africa Investment Policy Dialogue* (2014) 11.

<sup>873</sup> Import substitution policy was a trade and economic strategy for economic development based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialised products. It encourages industrial growth within a nation in order to reduce imports of manufactures, save foreign exchange, provide jobs and reduce dependency. Ibid.

<sup>874</sup> During the apartheid era, South Africa did not attract much foreign investment and most investment came from local companies. Langalanga “Imagining South Africa’s Foreign Investment Regulatory Regime in a Global Context” *SAIIA Occasional Papers* (2015) 5.

<sup>875</sup> Maylan 184.

<sup>876</sup> See generally Levy “Sanctions on South Africa: What Did They Do?” (1999) Yale University, Economic Growth Centre, Discussion Paper 796.

<sup>877</sup> Ibid.

capital controls and tax laws.<sup>878</sup> Hence South Africa was then characterised by low levels of economic growth and investment.<sup>879</sup>

Immediately after 1994, the policy regime of South Africa became more liberal with the explicit aim of attracting much needed foreign investment.<sup>880</sup> Increasing FDI has been integral to post-apartheid economic policy, particularly with the low domestic savings rate.<sup>881</sup> The South African government recognised the need to rebuild the country's relationship with international investors after the isolation of the apartheid era.<sup>882</sup> The transition to democracy, together with the lifting of economic sanctions against South Africa in the early 1990s, brought about a gradual return of FDI into South Africa.<sup>883</sup> During this period, the South African government entered into a number of BITs with developed countries, chiefly European countries who were equally keen to support its transition back into the community of nations, with a view to encouraging foreign investment in democratic South Africa.<sup>884</sup> Its BITs sought to give foreign investors assured protection in order to promote FDI in the economy including assurances as to expropriation, security, repatriation of capital and income from investments, equality of treatment with domestic investors as well as international arbitration of disputes.<sup>885</sup> Beyond this core FDI regulation, there were a number of incentive schemes to lure FDI

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<sup>878</sup> See Tsai "Determinants of Foreign Direct Investment and Its Impact on Economic Growth" 1994 19 *Journal of Economic Development* 137-149.

<sup>879</sup> Duffett, Van der Heever and Bell "Black Economic Empowerment Progress in the Advertising Industry in Cape Town: Challenges and Benefits" 2003 3 *Southern African Business Review* 91.

<sup>880</sup> Sharp "Policy Framework for Foreign Direct Investment Promotion in South Africa: Operations, Effectiveness and Sustainability" *SAIIA Occasional Papers* (2015) 6. The Growth, Employment and Redistribution (GEAR) policy was adopted in 1996 and whose objectives were to, among others, increase employment, increase private investment and achieve economic growth as well as to increase investor confidence and macroeconomic stability. It was initially a five-year plan aimed at broadening employment and socio-economic opportunities especially for the poor, and redistribution of income. For detailed information on GEAR, see Department of Finance "Growth, Employment and Redistribution a Macroeconomic Strategy" <https://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/dat/GEAR.pdf> (accessed 13-11-2014). In addition, Trade and Investment South Africa, a national investment promotion agency was established with the mandate of providing one-stop-shop services to potential investors. See generally Department of Trade and Industry (DTI) "Trade and Investment South Africa (TISA)" [https://www.thedti.gov.za/about\\_dti/tisa.jsp](https://www.thedti.gov.za/about_dti/tisa.jsp) (accessed 13-11-2014).

<sup>881</sup> SAIIA "FDI in South Africa: Promotion and Protection of Investors... and the Public Interest" 2014 <http://www.saiia.org.za/opinion-analysis/fdi-in-south-africa-promotion-and-protection-of-investors-and-the-public-interest> (accessed 05-05-2015).

<sup>882</sup> Ibid. See also Bowman Gilfillan Africa Group "Bilateral Investment Treaties: A Shield or Sword?" <http://www.bowman.co.za/filebrowser/articledocuments/south-african-government-canceling--bilateral-investment-treaties.pdf> (accessed 07-11-2014).

<sup>883</sup> TRALAC International Institute for Sustainable Development Report, May 2004 16.

<sup>884</sup> Empirical studies suggest that during the first four years of post-apartheid, South Africa entered into 15 BITs, mostly with European countries and to date, in total it has entered into 47 BITs, although not all of them are still in effect. See Bowman Gilfillan Africa Group "Bilateral Investment Treaties: A Shield or Sword?"

<sup>885</sup> Ibid.



including Enterprise Investment Program (EIP),<sup>886</sup> Industrial Development Zones (IDZs)<sup>887</sup> and Special Economic Zones (SEZs).<sup>888</sup>

Since 1994, South Africa is undergoing significant transformation in its approach to inward FDI.<sup>889</sup> The transition is informed by the country's desire to fight, among others, unemployment, redress the imbalances of the past, create inclusive growth and accelerate progress.<sup>890</sup> In effect, South Africa is in the process of cancelling various BITs signed pre-1994. These BITs are set to be replaced by a single domestic regime that will afford protection to investors and create an opportunity to implement policies to redress economic inequality and meet domestic policy objectives.<sup>891</sup>

Today South Africa is among the three largest recipients of FDI in Africa together with Angola and Nigeria.<sup>892</sup> The 2010 and 2013 indicators of restrictiveness on FDI compiled by the OECD suggests that South Africa is 21<sup>st</sup> out of 48 countries across the world.<sup>893</sup> Essentially, in South Africa all sectors are open to investors; no government approvals are required but there are few restrictions on the form or extent of foreign investment; foreign investors are allowed 100 percent ownership or shareholding; there are no performance requirements on foreign

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<sup>886</sup> The EIP provides a cash grant of up to 30 percent for qualifying assets, but beyond this there are few options for large tax-holidays or lower tax rates. For more information on the EIP, see DTI "Enterprise Investment Programme (EIP)" [https://www.thedti.gov.za/financial\\_assistance/docs/eip\\_claim\\_procedure.pdf](https://www.thedti.gov.za/financial_assistance/docs/eip_claim_procedure.pdf) (accessed 27-04-2015).

<sup>887</sup> IDZs are equivalent of export processing zones known to allow duty-free imports and provide good infrastructure and world-class management, but do not provide tax breaks. IDZs have been created in relatively underdeveloped regions to try to spread the positive effects of investment geographically. See, for more information, Tang "Zoning in on South Africa's Industrial Development Zones" [http://www.tips.org.za/files/Tang\\_Final\\_Zoning\\_in\\_on\\_SAfrica\\_IDZs\\_24\\_Oct\\_2008.pdf](http://www.tips.org.za/files/Tang_Final_Zoning_in_on_SAfrica_IDZs_24_Oct_2008.pdf) (accessed 27-04-2015).

<sup>888</sup> SEZs promise a significant corporate tax reduction and duty exclusions for those firms aimed at producing in these zones. For a detailed explanation on the SEZs, see generally DTI "Industrial Development Financial Assistance (Incentives): Special Economic Zone (SEZ)" [https://www.thedti.gov.za/financial\\_assistance/financial\\_incentive.jsp?id=59&subthemeid=25](https://www.thedti.gov.za/financial_assistance/financial_incentive.jsp?id=59&subthemeid=25) (accessed 27-04-2015).

<sup>889</sup> Sharp *SAIIA Occasional Papers* (2015) 9. See also Asafao-Adjei *Foreign Direct Investment and Its Importance to the Economy of South Africa* (Masters in Commerce-thesis, UNISA, 2007) 91.

<sup>890</sup> TRALAC International Institute for Sustainable Development Report, May 2004 8.

<sup>891</sup> Woolfrey "South Africa's Promotion and Protection of Investment Bill" 2013 <http://www.tralac.org/2013/11/20/southafricaspromotionandprotectionofinvestmentbill/#.uzrkceztxyv.email> (accessed 23-10-2014).

<sup>892</sup> Asiedu "Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability" (2005) Research Paper UNU-WIDER United Nations University 2005/24 1.

<sup>893</sup> The Regulatory Restrictiveness Index measures statutory restrictions on FDI in 58 countries, including all OECD and G20 countries and covers 22 sectors. It gauges the restrictiveness of a country's FDI rules by looking at four types of restrictions: foreign equity limitations; screening or approval mechanisms; restrictions on the employment of foreigners as key personnel; and operational restrictions – restrictions on branching and on capital repatriation or on land ownership. See the OECD FDI Regulatory Restrictiveness Index, 2010 (Annex) and OECD FDI Regulatory Restrictiveness Index 2013 (Annex) also available at <http://www.oecd.org/investment/fdiindex.htm>.

companies as a condition for establishing or expanding investments.<sup>894</sup> However, 2015 FDI Confidence Index reflects that South Africa has fallen out of investment confidence.<sup>895</sup> AT Kearney Johannesburg stated that the main reason for this is that the country lacks investment regulatory clarity.<sup>896</sup>

South Africa does not have a general law concerning foreign investment but FDI related policies are pursued in particular sectors and specific regulatory measures are in place directed towards protecting foreign investors.<sup>897</sup> The primary goal of these policies is to create a friendly and predictable environment where foreign investors are confident in the legal and financial framework.<sup>898</sup> Thus the said policies provide the basis of the legal framework within which investments operate. It is however said that South Africa's policy framework faces significant challenges as it attempts to marry an environment conducive to investment with the need to achieve important development objectives.<sup>899</sup> Whether the investment regime of South Africa provides protection to FDI is the question this Chapter intends to address.

This Chapter is not intended to be an exhaustive study of the entire investment regime of South Africa, but merely a limited examination of some investment laws and related policies with a view to assessing their conformity with the minimum international norms on FDI protection. In particular, focus is placed on the purported national investment legislation, the Black Economic Empowerment (BEE) laws, the land reform and ownership laws as well as the enforcement of foreign investment arbitral awards. It is critical to mention that these investment laws and related policies will be measured against the minimum international rules, standards and/or best practices elucidated in the previous Chapter. Hence the Chapter aspires to assess the investment regime's compliance with the minimum international norms on FDI protection. To achieve this end, it is appropriate to understand the background and policy objectives of South Africa's investment laws and related policies.

South Africa shows commitment to provide protection to investors, both foreign and domestic, which is in line with international standards by subscribing to several international investment

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<sup>894</sup> Ibid.

<sup>895</sup> News24 Wire "SA Falls out of Investment Confidence Index" *Polity* 29, April 2015 [http://www.polity.org.za/article/sa-falls-out-of-investment-confidence-index-2015-04-29?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.polity.org.za/article/sa-falls-out-of-investment-confidence-index-2015-04-29?utm_source=twitterfeed&utm_medium=twitter) (accessed 29-04-2015).

<sup>896</sup> Ibid.

<sup>897</sup> OECD *OECD-South Africa Investment Policy Dialogue* (2014) 11.

<sup>898</sup> Ibid.

<sup>899</sup> TRALAC International Institute for Sustainable Development Report, May 2004 29.

protection instruments. Hence it is party to an array of multilateral investment agreements,<sup>900</sup> regional instruments containing investment protection<sup>901</sup> and BITs.<sup>902</sup> Such international agreements are binding among the contracting parties under which each party undertakes certain obligations with respect to investments made by nationals of other countries within its territory.<sup>903</sup> The foregoing notion is reinforced by Article 26 of the Vienna Convention on the Law of Treaties (VCLT)<sup>904</sup> which pronounces that every treaty is binding upon parties to it and obligations created by it must be performed by the parties in good faith. In accordance with Article 18 of the VCLT, the South African government also undertakes an obligation not to undermine the object and purpose of treaties to which it is a signatory. This means that South Africa must respect, protect and fulfil in good faith the obligations assumed under the various international, regional and bilateral investment agreements. Moreover, the signing of the investment treaties acts a signal that the country is serious about protecting foreign investment.<sup>905</sup>

The Constitution<sup>906</sup> encourages the application of international law in domestic matters.<sup>907</sup> Section 39 (1) (a) of the Constitution states that a court may consider international law when

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<sup>900</sup> South Africa is a signatory to several multilateral investment agreements including the Multilateral Investment Guarantee Agency of the World Bank (hereafter “MIGA”). South Africa signed the Convention establishing the MIGA on 16 December 1992, and ratified it on 2 March 1994. South Africa is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter New York Convention). South Africa is also a member of the World Trade Organisation (WTO) and party to the WTO Agreements containing investment-related provisions such as the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S 187, 33 ILM 1153 (1994) (hereafter “GATT”); the Agreement on Trade-Related Investment Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S 186 (hereafter TRIMS Agreement); and the General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S 183, 33 ILM 1167 (1994) (hereafter “GATS”).

<sup>901</sup> South Africa is a signatory to the Southern African Development Community Protocol on Finance and Investment of 2006 (hereafter “SADC FIP”), SADC Treaty Establishing the Southern African Development Community of 1992 (hereafter “SADC Treaty”) and The Southern African Development Community Model Bilateral Investment Treaty of 2012 (hereafter “SADC Model BIT”).

<sup>902</sup> South Africa signed BITs with Austria, Belgium / Luxembourg, Czech Republic, Finland, France, China, Iran, Korea, Turkey, Argentina, Chile, Cuba, Greece, Italy, Netherlands, Russian Federation, Spain, Sweden, Switzerland, United Kingdom, Sweden, Denmark, Netherlands, Algeria, Egypt, Ghana, Libya, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, Tunisia, Cuba, Italy, Egypt, Mozambique, Switzerland, Senegal, Spain, Korea, Chile, China, Germany, Zimbabwe and France, among others.

<sup>903</sup> See Schefer *International Investment Law: Text, Cases and Materials* (2013) 33.

<sup>904</sup> Vienna Convention on the Law of Treaties of 1969 entered into force on 27 January 1980.

<sup>905</sup> See Kerner “Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties” 2009 53 *International Studies Quarterly* 73.

<sup>906</sup> Constitution of the Republic of South Africa, 1996.

<sup>907</sup> For an extensive discussion on the application of international in South Africa, see Dugard “South Africa: International Law provisions of the 1996 Constitution” 1997 36 *International Legal Materials* 744-758 and Keightley “Public International Law and the Final Constitution” 1996 12 *SAJHR* 405-418.

interpreting the Bill of Rights. Section 233 of the Constitution provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Customary international law (CIL), in terms of section 232 of the Constitution, is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. By virtue of this constitutional provision, it is plausible to argue that the CIL standards on the protection of FDI discussed in the preceding Chapter form part of South African investment law unless inconsistent with the Constitution or an Act of Parliament. It is against this background that the said South African investment laws and related policies will be assessed against the international standards discussed in the preceding Chapter. The assessment is done by setting out the South African policies and legal framework in existence as well as the specific regulations applicable in various sectors; highlighting and explaining at the end of each section the extent to which the South African investment regime is compliant with the minimum international norms on investment protection.

## 4.2 NATIONAL INVESTMENT LEGISLATION

South Africa does not have a single national legislation at the moment that governs FDI protection. The existing regime regulating investment protection is characterised by rather divergent and competing legal frameworks.<sup>908</sup> The protection of investment is thus addressed by a number of legislations, policies and BITs. More recently South Africa has undertaken a review of its investment protection regime.<sup>909</sup> This was prompted by increasing discontent among domestic investors that the BITs signed by South Africa provide, among other issues, greater rights and protection to foreign investors than domestic investors as well as the provisions for investor-state arbitration in BITs allow foreign investors to challenge domestic public interest laws and measures in front of *ad-hoc* international arbitral tribunals.<sup>910</sup> As a response to this, in 2011, the government mandated the DTI to review BITs entered into by South Africa referred to as old-generation BITs accrued after the end of apartheid in the exuberant liberal phase.<sup>911</sup> South Africa saw the need to develop a new investment legislation

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<sup>908</sup> Baloro and Nulliah “Regime on Foreign Direct Investment with the South African Development (SADC): A Comparative Study of Foreign Direct Investment (FDI) Laws of Select Southern African Countries” 2003 28 *Journal for Juridical Sciences* 74.

<sup>909</sup> See generally DTI “Update on the Review of Bilateral Investment Treaties in South Africa” (2013) Paper prepared for the Parliamentary Portfolio Committee on Trade and Industry [http://www.safpi.org/sites/default/files/publications/dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf) (accessed 12-12-2014).

<sup>910</sup> Ibid.

<sup>911</sup> Ibid. See also Langalanga “Imagining South Africa’s Foreign Investment Regulatory Regime in a Global Context” *SAIIA Occasional Papers* (2015) 7.

to codify and clarify typical BIT provisions into domestic law and strengthen investor protection.<sup>912</sup> According to SAIIA, “these BITS are set to be replaced by a single domestic investment regime that will offer various protections for investors, while allowing the country room to institute policies to redress economic inequality and meet domestic policy objectives” which is in line with in a global move towards third generation BITs.<sup>913</sup> South Africa is not the first and only country to take a mandate to review BITs.<sup>914</sup> Globally, both developing and developed countries are increasingly seeking to adopt approaches to investment promotion and protection which better balance the requirements of investors and the right of governments to regulate in the public interest on matters relating to environmental protection, public health and social equality.<sup>915</sup> Critiques of the termination of the country’s BITs have suggested that these actions create increased uncertainty for foreign investors and are likely to deter foreign investment in the country.<sup>916</sup> Consequently, the Promotion and Protection of Investment Bill (Investment Bill)<sup>917</sup> was introduced in 2013 as part of an overhaul of the regulatory framework for FDI in South Africa.

#### **4 2 1 Background of the Investment Bill**

The Investment Bill is intended to replace the existing BITs with a domestic legislation. From 2011-2013, South Africa terminated its BITs with Spain, Germany, Belgium and Luxemburg.<sup>918</sup> Apart from replacing the existing BITs, the Investment Bill anticipates to

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<sup>912</sup> DTI “Update on the Review of Bilateral Investment Treaties in South Africa” (2013) Paper prepared for the Parliamentary Portfolio Committee on Trade and Industry.

<sup>913</sup> South African Institute of International Affairs “FDI in South Africa: Promotion and Protection of Investors... and the Public Interest” 2014.

<sup>914</sup> Countries such as Canada, Australia, Sweden, Brazil, the US and a number of Latin American countries have conducted reviews of their BIT policies. See Langalanga “Is South Africa Alone in the FDI Regulation Revisionism?” *SAIIA Opinion & Analysis*, 2015 <http://www.saiia.org.za/opinion-analysis/is-south-africa-alone-in-the-fdi-regulation-revisionism> (accessed 09-10-2015).

<sup>915</sup> Erasmus “Investment Protection Agreements: The Implications of South African Policy and Legislative Changes” TRALAC Working Paper, 2015 [http://www.tralac.org/discussions/article/8282-investment-protection-agreements-the-implications-of-south-african-policy-and-legislative-changes.html?utm\\_source=Weekly+tralac+Newsletter&utm\\_campaign=77fd96ee75-](http://www.tralac.org/discussions/article/8282-investment-protection-agreements-the-implications-of-south-african-policy-and-legislative-changes.html?utm_source=Weekly+tralac+Newsletter&utm_campaign=77fd96ee75-NL20151015&utm_medium=email&utm_term=0_a95cb1d7ad-77fd96ee75-311090785)

NL20151015&utm\_medium=email&utm\_term=0\_a95cb1d7ad-77fd96ee75-311090785 (accessed 16-10-2015). Erasmus asserts that the enactment of the Investment Bill does not mean that the government of South Africa disregards the need for legal certainty for investors, but the government needs to regain policy space which is necessary in order regulate investments in the public interest.

<sup>916</sup> Woolfrey “Another BIT Bites the Dust” 2013 <http://www.tralac.org/2013/10/30/another-bit-bites-the-dust/#.uzrnyf0npz8.email> (accessed 23-10-2014).

<sup>917</sup> Promotion and Protection of Investment Bill, 2013.

<sup>918</sup> The review of the BITs drew two essential conclusions. The first was that South Africa does not receive significant inflows of FDI from many partners with whom it has BITs, and South Africa continue to receive significant investment from jurisdictions with which it has no BITs. Secondly, the Review highlighted the range ambiguities that are evident in many standard provisions of the BITs to which is a party. These ambiguities give rise to varying interpretations of meaning, usually expansive, that create great uncertainty for both investors and governments. More recently, South Africa has become increasingly aware of that deficiencies in the treaties are accompanied by shortcomings in the functioning of the international investment arbitration system itself. See

“provide for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to investors.”<sup>919</sup> It purports to ensure equal treatment between domestic and foreign investors<sup>920</sup> and it covers both domestic and foreign investments made for commercial purposes.<sup>921</sup> This means that foreign investors are entitled to the same level of protection offered to domestic investors.

However, the Investment Bill has been criticised by international investors who perceive some of its provisions to be uncertain with regard to the protection of FDI.<sup>922</sup> Much of the criticism has revolved around issues including: the belief that the protection offered to foreign investors under the Investment Bill is of a lower standard than that provided for under BITs and IIAs; this Bill provides a very narrow conceptualisation of expropriation; and it does not provide investors with recourse to international arbitration.<sup>923</sup> From foreign investors’ view point, the mere adoption of domestic legislation to replace BITs in itself diminishes the degree of protection afforded by it.<sup>924</sup>

## **4 2 2 Nature of the challenging provisions of the Investment Bill**

This part of the Chapter discusses the nature of the provocative provisions of the Investment Bill with the aim to assess their consistency with minimum international norms on FDI protection. As highlighted above, these provisions relate to the conceptualisation of expropriation and access to international arbitration.

### **4 2 2 1 Expropriation**

Section 8 (1) of the Investment Bill states that investments “may not be expropriated except in accordance with the Constitution and in terms of a law of general application for public purposes or in the public interest”. In terms of section 25 of the Constitution, “property may be expropriated only in terms of a law of general application...for a public purpose or in the public interest”. Section 8 (2) of the Investment Bill explicitly highlights a number of measures which

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generally Remarks by Rob Davies at the Centre for Conflict Studies Public Dialogue on “South Africa, Africa and International Investment Agreements,” 2014 <http://paulroos.co.za/wp-content/blogs.dir/12/files/2014/02/Speech-by-Min-Davies-on-IIAS-CCR-17-Feb-2014.pdf> (accessed 15-12-2014).

<sup>919</sup> See the introduction of the Investment Bill. See also Adeleke “Benchmarking South Africa’s Foreign Direct Investment Policy” *SAIIA Policy Insights* 13 (2015) 2.

<sup>920</sup> Section 3 (b) of the Investment Bill. See also Adeleke *SAIIA Policy Insights* 13 (2015) 2.

<sup>921</sup> Section 4 (1) of the Investment Bill.

<sup>922</sup> Sibanda “The Promotion and Protection of Foreign Investments Bill: Denunciation of BITs, and the De-Internationalisation of Investor-State Arbitration in South Africa” 2014 4 *The Business and Management Review* 159.

<sup>923</sup> Erasmus “Investment Protection Agreements: The Implications of South African Policy and Legislative Changes” TRALAC Working Paper, 2015.

<sup>924</sup> Sibanda 2014 4 *The Business and Management Review* 159.

“do not amount to acts of expropriation” under the Bill, including measures which have an “incidental or indirect adverse impact on the economic value of an investment” and measures which aim to protect or enhance legitimate public welfare objectives”. By failing to expressly state that expropriation has to be carried out in a ‘non-discriminatory’ manner and merely stating that certain types of measures cannot be considered to be expropriation, the Investment Bill espouses a very narrow philosophy of expropriation and increases the freedom for the government to enact measures which many investors might consider as involving some form of ‘effective’ or ‘indirect’ expropriation.<sup>925</sup> It seems likely that the government’s purpose of reformulating the expropriation concept is to protect itself against claims by foreign investors that regulation of rights of persons over their property may amount to indirect expropriation.<sup>926</sup>

In addition, the Investment Bill allows the government to provide less than full market value compensation in cases of expropriation. Section 8 (3) of the Investment Bill states:

compensation ... must reflect an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances including the current use of the investment, the history of the acquisition and use of the investment, the market value of the investment and the purpose of the expropriation.

In line with the Constitution, the Investment Bill specifies that compensation for expropriation must be “just and equitable” and that market value is just one of a number of factors to be considered when determining how this standard is to be applied. From foreign investors’ perspective, a guarantee of full market value compensation is certainly more reassuring than a guarantee of “just and equitable” compensation, the exact determination of which is likely to be less predictable and more open to political influence.<sup>927</sup>

#### 4 2 2 2      *Access to international arbitration*

Another area of uncertainty is that the Investment Bill does not provide foreign investors with recourse to international arbitration. Section 11 (1) of the Investment Bill provides:

a foreign investor that has a dispute in respect of action taken by the government of the Republic or any organ of state, which action affected an investment of such foreign investor, may request the department or any other competent authority to facilitate the resolution of such dispute by appointing a mediator or other competent body.

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<sup>925</sup> Woolfrey “South Africa’s Promotion and Protection of Investment Bill” 2013.

<sup>926</sup> Bowman Gilfillan Africa Group “Bilateral Investment Treaties: A Shield or Sword?” 3.

<sup>927</sup> Woolfrey “South Africa’s Promotion and Protection of Investment Bill” 2013.

The above provision means that investment disputes can only be settled through local courts, domestic arbitration or mediation services of the DTI which would prevent foreign investors from settling disputes in international courts. In doing so, it reduces the likelihood of South African government being the respondent in any future international investor-state arbitration. Section 11 (2) of the Investment Bill further provides that the Minister shall promulgate regulation governing the mediation process. Section 11 (5) adds that an investor may refer a dispute to arbitration under the Arbitration Act. In this regard, the South African government's action is motivated by a legitimate and widely shared concern that BITs and the international system of investor-state arbitration inhibit the ability of governments to enact legislation and regulatory measures aimed at promoting public policy objectives in areas such as public health, environmental protection and social equality.<sup>928</sup>

#### **4 2 3 Compliance of the Investment Bill with minimum international norms**

Section 5 (3) of the Investment Bill acknowledges that the protection of investment under the Bill must be consistent with applicable international agreements. Section 2 (b), (c) and (d) of the Investment Bill provides that the Bill must be interpreted with due regard to international law and CIL compliant with the Constitution as well as any relevant convention or international agreement to which South Africa is or becomes a party. It is against this background that the provisions of the Investment Bill are evaluated in light of minimum international rules.

Under CIL, states enjoy the right to expropriate investments and regain ownership of industries as part of their territorial and economic sovereignty.<sup>929</sup> However, this CIL is not absolute. Thus expropriation of foreign investments and any measures having an equivalent effect are prohibited, except where this is undertaken in a non-discriminatory manner, for a public purpose, in line with applicable law and upon payment of compensation.<sup>930</sup> This means that any expropriation lacking a public purpose, unaccompanied by payment of compensation, and that it is not done in accordance with due process or non-discrimination principle is *prima facie* illegal. These standards have emerged in international investment law as minimum standards required for a legitimate expropriation. In contrast to this, the Investment Bill's expropriation clause is silent on the non-discrimination standard. The *Amoco v. Iran* tribunal stated that the

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<sup>928</sup> Ibid.

<sup>929</sup> See *De Sanchez v. Banco Central de Nicaragua* 770 F.2d 1385, 1397 and *AMCO v. Indonesia* (Merits) 89 ILR, paras 405 and 466.

<sup>930</sup> Zampetti and Sauve "International Investment" in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 225.



non-discrimination principle in the expropriation arena is a CIL rule.<sup>931</sup> As a CIL rule, in accordance with section 232 of the Constitution, it is binding on South Africa unless it is inconsistent with the Constitution or an Act of Parliament. In addition, the Investment Bill's expropriation clause explicitly highlights a number of measures which do not amount to acts of expropriation including measures which have an incidental or indirect adverse impact on the economic value of an investment and measures which aim to protect or enhance legitimate public welfare objectives.<sup>932</sup> Such a provision may increase the flexibility for the government to enact any measures involving some form of effective or indirect expropriation.

As highlighted above, the payment of compensation upon expropriation is one of the minimum norms of international investment law. The *Benvenuti & Bonfant v. Congo*,<sup>933</sup> *Santa Elena v. Costa Rica*<sup>934</sup> and *Amco v. Indonesia*<sup>935</sup> tribunals confirmed that compensation for expropriation must be in accordance with the general principles of international law. In international investment law, compensation must be assessed in relation to the fair market value of an investment.<sup>936</sup> Nonetheless, in line with the South African Constitution, the Investment Bill specifies that compensation for expropriation must be just and equitable,<sup>937</sup> and that market value is just one of a number of factors to be considered when determining how this standard is to be applied.<sup>938</sup> While this does not necessarily mean that compensation for expropriation under the Investment Bill will always be less than market value, it creates additional uncertainty for foreign investors who had previously been assured of fair market value compensation if their investments were ever expropriated.<sup>939</sup>

It should be noted that there are no mandatory rules governing international commercial arbitrations in South Africa. The Arbitration Act<sup>940</sup> despite applying to both domestic and international arbitration, is considered to be inadequate for the purpose of international

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<sup>931</sup> *Amoco International Finance Corporation v. Iran* 15 Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Award (July 14, 1987) para 140.

<sup>932</sup> Section 8 (2) of the Investment Bill.

<sup>933</sup> *Benvenuti & Bonfant v. People's Republic of Congo*, Award (August 15, 1980).

<sup>934</sup> *Compania Del Desarrollo de Santa Elena, SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, (February 17, 2000) para 71.

<sup>935</sup> *Amco v. Indonesia*, ICSID Case No. ARB/81/1, Award (November 21, 1984), 24 ILM 1022 (1985).

<sup>936</sup> See Congyan "Change of Structure of International Investment and the Development of Developing Countries' BIT Practice: Towards a Third Way of BIT Practice" 2007 8 *Journal of World Investment & Trade* 829; *American International Group Inc. v. Iran* para 380. See, for example, Article 6 (2) of the US Model BIT, 2004; Article 4 (2) of the Germany Model BIT, 2008; and Article 5 (1) of the India Model BIT, 2003.

<sup>937</sup> Section 8 (1) of the Investment Bill.

<sup>938</sup> *Ibid* section 8 (3) (c).

<sup>939</sup> Woolfrey "South Africa's Promotion and Protection of Investment Bill" 2013.

<sup>940</sup> Arbitration Act 42 of 1965.

arbitration.<sup>941</sup> Moreover, the Recognition and Enforcement of Foreign Arbitral Awards Act (REFAAA)<sup>942</sup> does little more than provide for the enforcement of foreign awards. This is one of the issues the South African Law Commission (SALC) sought to address when it proposed for an international arbitration legislation to be enacted in South Africa.<sup>943</sup> Thus the SALC proposed an international arbitration Act which makes international arbitration readily available to foreign contracting parties and thus create a legal framework to encourage investment in South Africa.<sup>944</sup>

As shown in the preceding Chapter, access to international arbitration is a hallowed principle of international investment law under which foreign investors are essentially allowed to approach relevant international arbitration fora for the settlement of investment disputes.<sup>945</sup> South Africa is a party to many BITs and IIAs which accord foreign investors the right to submit investment disputes to binding international arbitration. In fact, most BITs and IIAs signed by South Africa provide for arbitration to be at the International Centre for Settlement of Investment Disputes (ICSID)<sup>946</sup> pursuant to the ICSID Additional Facility Rules<sup>947</sup> and *ad hoc* arbitration pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the London Court of International Arbitration (LCIA) or ICC.<sup>948</sup> Some investment agreements require investor-state disputes to be litigated before the domestic courts before being pursued through international arbitration.<sup>949</sup> South Africa is not a

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<sup>941</sup> Christie “South Africa as a Venue for Commercial Arbitration” 1993 9 *Arbitration International* 165.

<sup>942</sup> Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

<sup>943</sup> See SALC Project 94 *Arbitration: An International Arbitration Act for South Africa* (July 1998). The aim of this report was to point out some of the gaps in the South African international arbitration law and also to identify potential interventions that could mitigate these specific defects.

<sup>944</sup> *Ibid.*

<sup>945</sup> See Bowman Gilfillan Africa Group “Bilateral Investment Treaties: A Shield or Sword?” 4.

<sup>946</sup> The ICSID is an autonomous international forum for conflict resolution established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter “ICSID or Washington Convention”) of 1965. The arbitration and conciliation under the Washington Convention are exclusively voluntary and require consent of both the investor and host state concerned. See Shihata “Towards a Greater Depoliticisation of Investment Disputes: The Roles of ICSID and MIGA” 1986 *ICSID Review – Foreign Investment Law Journal* 1.

<sup>947</sup> The ICSID Additional Facility was established in 1978 to permit investors from or in non-ICSID states to access the dispute settlement under the ICSID. The Additional Facility’s procedural rules for arbitration are similar to those of the ICSID. See ICSID Additional Facility Rules ICSID/11 April 2006 also available at [https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf).

<sup>948</sup> See Osode “State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective” 1997 *Comparative and International Law Journal of Southern Africa* 59.

<sup>949</sup> See *Ambiente Ufficio S.P.A. v. Argentine Republic (formerly Giordano Alpi)*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, (February 8, 2013) para 312.

signatory to the Washington Convention.<sup>950</sup> The SALC has recommended the government of South Africa to sign the Washington Convention but nothing was done.<sup>951</sup>

The UNCITRAL Model Law on Commercial Arbitration<sup>952</sup> aims to diminish, from the context of international commercial arbitration, the interference of domestic courts and restrict the unnecessary invoking of party autonomy by granting parties the freedom to choose how their disputes should be settled. In *Telecordia Technologies Inc v Telkom SA*,<sup>953</sup> the Supreme Court of Appeal (SCA) confirmed that the role of courts should be minimised in international arbitration. Nevertheless, the Investment Bill intends to take a distinct approach as it purports to completely eliminate the interference of international arbitration forums in investment disputes within South Africa.<sup>954</sup> In so doing, the Investment Bill provides for the settlement of investment disputes only through domestic courts, arbitration or mediation of the DTI.<sup>955</sup> The SADC FIP, to which South Africa is party, allows foreign investors who have invested in the SADC region to take investment-related disputes against a party to the agreement to international arbitration. It is submitted that the removal of international arbitration can negatively affect the prospects for foreign investors. This is because access to international arbitration is professed to provide investors with certainty and contributes to investor confidence.<sup>956</sup> Furthermore, in international arbitration the dispute is handed to an independent and impartial international legal forum generally removed from political interference as well as protect investors from any unfair activities which could be carried out by the host state to the investors' disadvantage.<sup>957</sup> In other words, recourse to international arbitration is much appreciated by investors, as they are not restricted to pursuing a dispute against a particular country through its own legal system which may lack transparency, efficiency and independence or may simply be biased towards its own government's interests.<sup>958</sup> In addition, submitting investment disputes to international arbitration enhances the prospects of equalising the disputing parties in proceedings before the international forum.<sup>959</sup> This study does not seek

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<sup>950</sup> For the instance, the Washington Convention provides facilities and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with its provisions.

<sup>951</sup> SALC Project 94 *Arbitration: An International Arbitration Act for South Africa* (July 1998) 144.

<sup>952</sup> The UNCITRAL Model Law on Commercial Arbitration was adopted on 2 June 1985 by the UNCITRAL (hereafter "UNCITRAL Model Law").

<sup>953</sup> *Telecordia Technologies Inc. v Telkom SA* 2007 (3) 266 (SCA).

<sup>954</sup> Section 11 (1) of the Investment Bill. See also Sibanda 2014 4 *The Business and Management Review* 160.

<sup>955</sup> Section 11 (1) of the Investment Bill.

<sup>956</sup> Franck "Foreign Direct Investment, Investment Treaty Arbitration and the Rules of Law" 2007 *Global Business & Developmental Law Journal* 337.

<sup>957</sup> See Osode 1997 *Comparative and International Law Journal of Southern Africa* 44.

<sup>958</sup> Ibid.

<sup>959</sup> Ibid.

to undermine the role of local courts in investment disputes, but rather propose that South Africa should adopt a regime that is harmonious with international arbitration rules.

### **4 3 ECONOMIC EMPOWERMENT POLICIES**

The long history of states' right to own and control national resources dates back to 1966 when the United Nations General Assembly (GA) adopted the Permanent Sovereignty over Natural Resources Resolution (PSNRR).<sup>960</sup> The PSNRR recognised the right of all countries to secure greater share in the administration of enterprises wholly or partly owned by foreign nationals. It is submitted that economic empowerment policies are aimed at giving practical meaning to the equality principle embodied in a plethora of international, regional and national legal instruments.

#### **4 3 1 BEE laws of South Africa**

Colonial rule resulted in the deliberate exclusion and marginalisation of the black South Africans in land and business ownership as well as business and employment opportunities, among other things.<sup>961</sup> The apartheid government employed tailored legislation and governance systems to achieve these imbalances.<sup>962</sup> Thus the government enacted several pieces of legislation designed to exclude the black community from mainstream economic activities.<sup>963</sup> However, the constitutional dispensation has been accompanied with robust discussions aimed at pursuing the BEE policy as perhaps the most appropriate mechanism to address the said systemic economic marginalisation.<sup>964</sup> The BEE policy is a pragmatic strategy that seeks to promote the country's economic transformation and facilitate participation of black people in the economy.<sup>965</sup> The term "black people" is a generic term referring to Africans, Indians and Coloureds who were previously disadvantaged.<sup>966</sup> Thus BEE seeks to moderate economic

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<sup>960</sup> Permanent Sovereignty over Natural Resources 2158 (XXI).

<sup>961</sup> Osode "Advancing the Cause of Black Economic Empowerment through the Use of Legal Instruments" in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 261.

<sup>962</sup> Ibid.

<sup>963</sup> These legislations included, *inter alia*, the Bantu Building Workers Act 27 of 1951 which restricted blacks to performing skilled work in areas designated for blacks only and not in those areas reserved for whites; the Industrial Conciliation Act 28 of 1956 through which job reservations were made to the effect that specified work was reserved for whites; and the Mines and Works Act 27 of 1956 in which blacks working in the mining industry were prevented from competing for certain categories of jobs monopolised by whites.

<sup>964</sup> Southall "Ten Propositions about Black Economic Empowerment in South Africa" 2007 *Review of African Political Economy* 83. See also Tangri and Southall "The Politics of the Black Economic Empowerment in South Africa" 2008 34 *Journal of Southern Africa Studies* 700.

<sup>965</sup> See also Rungan, Cawood and Minnitt "Incorporating BEE into the New Mineral Law Framework for the South African Mining Industry" 2005 105 *The Journal of The South African Institute of Mining and Metallurgy* 736 and *Peel v Harmon J & C Engineering* 2013 (2) SA 331 GSJ.

<sup>966</sup> The term "black people" must be read with the definition of B-BBEE which states that the economic empowerment of all black people includes women, workers, youth, disabled and people living in rural areas. See section 1 of the BEE Act.

inequalities among and within races at the same time increasing black management and control of businesses in the economy.<sup>967</sup> BEE gives practical meaning to the equality provision embedded in the Constitution.<sup>968</sup> The government pursued enthusiastically the BEE project through state-sanctioned legislative initiatives such as the Reconstruction Development Programme (RDP),<sup>969</sup> Preferential Procurement Policy Framework Act (PPPFA),<sup>970</sup> National Empowerment Fund Act (NEFA)<sup>971</sup> and Employment Equity Act (EEA),<sup>972</sup> Skills Development Act (SDA)<sup>973</sup> and others.<sup>974</sup>

In 2003, the BEE Act<sup>975</sup> was enacted as a vehicle to drive the BEE policy. The Act is aimed at providing, *inter alia*, the definition of BEE; setting uniform guidelines against which the public and private sectors could measure their compliance with the BEE goals; and setting procurement targets for the public and private sectors.<sup>976</sup> Nonetheless, the initial BEE approach did not successfully result in the intended wealth distribution to the marginalised groups but to a few black elites with political connections.<sup>977</sup> In the first four years into democracy, only 10

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<sup>967</sup> DTI “Rationale for BEE” 2008 <http://www.thedti.gov.za> (accessed 06-06-2014).

<sup>968</sup> Mangcu “Introduction” 2007 *Visions of Black Economic Empowerment* 3. See also Sachs ‘The Constitutional Principles Underpinning Black Economic Empowerment’ 2007 *Visions of Black Economic Empowerment* 10.

<sup>969</sup> RDP is the precursor of the BEE and it was adopted as “an integrated, coherent socio-economic framework which seeks to mobilise all the people and the resources of South Africa towards the final eradication of the result of apartheid, the building of a pluralistic future”. White Paper on Reconstruction and Development, September 1994 1.1.1 and 1.3.6.

<sup>970</sup> The Preferential Procurement Policy Framework Act 5 of 2000, in brief, elaborates the framework within which organs of state must determine their procurement policy.

<sup>971</sup> The objectives of National Empowerment Fund Act 105 of 1998 are to establish a trust for promoting and facilitating the ownership of income-generating assets by historically disadvantaged individuals (HDIs), encourage and promote savings, investments and meaningful economic participation by the HDIs as well as promote the universal understanding of equity ownership among the HDIs. See section 3 of the NEFA.

<sup>972</sup> The Employment Equity Act 55 of 1998 governs the implementation of affirmative action measures in the workplace in order to eradicate discrimination against those who were previously disadvantaged, prohibits unfair discrimination in any employment policy or practice, provides the method for resolving disputes arising out of unfair discrimination, and requires employers to formulate employment equity plans and report on implementation of such plans.

<sup>973</sup> Skills Development Act 97 of 1998 provides a framework to promote the development of strategies to improve the skills of HDIs.

<sup>974</sup> Some of these initiatives include: the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 55 of 2003, Restitution of Land Rights Act 22 of 1994, Competition Act 89 of 1998, Minerals and Petroleum Development Act (MPRDA) 28 of 2002, among others. See DTI “South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment” 2003 12.

<sup>975</sup> Black Economic Empowerment Act of 2003.

<sup>976</sup> Osode in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 274.

<sup>977</sup> There was a general consensus that foreign-owned companies were partnering only with prominent politicians and government officials. See Osode in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 261; Turok “BEE Transactions and their Unintended Consequences” 2006 22 *South African Journal of Social and Economic Policy* 59-64; and Seekings and Natrass “State-Business Relations and Pro-Poor in South Africa” 2011 23 *Journal of International Development* 339.

percent of the shares on the Johannesburg Stock Exchange were owned by black entities.<sup>978</sup> For this reason, the Broad-Based Black Economic Empowerment (B-BBEE) Act<sup>979</sup> was enacted in 2003. The B-BBEE project includes measures such as employment equity, skills development, ownership, management, socio-economic development, enterprise development and preferential procurement. B-BBEE has three components namely direct empowerment,<sup>980</sup> promotion of human resource development and indirect empowerment.<sup>981</sup> Additionally, the BEE policy is facilitated by threefold means notably the BEE Codes of Good Practice (the BEE Codes),<sup>982</sup> strategy for implementation of B-BBEE by the Minister of Trade and Industry as well as sector transformation charters.<sup>983</sup>

In 2013, the BEE Codes<sup>984</sup> and the BEE Act<sup>985</sup> were amended. The BEE Amendment Act attempts to close various loopholes created by different interpretations of the BEE Act, BEE Codes and other related legislation. The Amendment Act has brought about four significant changes to the BEE Act. Firstly, the Act seeks to align the BEE Act with the amended B-BBEE Codes and sector codes.<sup>986</sup> Secondly, section 13B of the Amendment Act establishes the B-BBEE Commission (the Commission) to deal with compliance with B-BBEE. The Commission receives and investigates complaints; maintains a registry of major transactions; and receives reports from organs of state, public entities and the private sector among other functions.<sup>987</sup> Thirdly, section 1 (e) of the Amendment Act inserts a definition of fronting

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<sup>978</sup> Verhoef “Economic Empowerment and Performance: Strategies towards Indigenisation/Black Economic Empowerment and the Performance of such Enterprises in Nigeria and South Africa, Since the Early 1970s to 2002” 2004 *Journal for Contemporary History* 106.

<sup>979</sup> Broad-Based Black Economic Empowerment Act 53 of 2003.

<sup>980</sup> This component entails the promotion of ownership and control by black persons over the South African economy. See Osode in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 262.

<sup>981</sup> This element evaluates a range of criteria relating to a business such as the level of procurement sourced from black-empowered or black-owned businesses as well as enterprise development through investment in, and joint ventures with, black-empowered or black-owned business, see Cliffe Dekker Hofmeyr “The Way to BEE” <http://www.cliffedekker-hofmeyr.com/literature/bee/index.htm> (accessed 09-07-2014).

<sup>982</sup> The BEE Codes provide a comprehensive outline of seven score elements of BEE in terms of the generic scorecard, namely ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic? See Codes of Good Practice on Black Economic Empowerment, GG 29617 of 9 February of 2007.

<sup>983</sup> See section 12 of the B-BBEE Act. Sector charters are available at <http://www.dti.gov.za/bee/beecharter.htm>.

<sup>984</sup> See B-BBEE Act (53/2003): Codes of Good Practice on Black Economic Empowerment No. 29617 issued in General Notice 1019 of 2013 (hereafter the “B-BBEE Codes”).

<sup>985</sup> See BEE Amendment Act 46 of 2013.

<sup>986</sup> The B-BBEE Codes require that all entities operating in the South African economy make a contribution towards the objectives of B-BBEE. The Codes however recognise that there may be multinationals that have global practices preventing them from complying with the ownership element of B-BBEE through the traditional sale of shares. The Codes thus allow foreign multinational companies that do business in South Africa some flexibility in how they structure their empowerment deals.

<sup>987</sup> See section 13F of the BEE Amendment Act for more information on the functions of the BEE Commission.

practice which now “means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative.”<sup>988</sup> In addition to this, section 30O of the Amendment Act introduces criminal offences for misrepresentation or providing false information regarding a firm’s B-BBEE status or engaging in fronting practices. Last, but not least, section 13G of the Amendment Act now forces organs of state and public entities; Sectoral Education and Training Authorities and listed companies to report BEE compliance as their core obligation. Thus section 13G promotes compliance by organs of state and public entities as well as strengthens the evaluation and monitoring of compliance. To achieve their objectives, the BEE policies have imposed certain conditions on foreign investors intending to comply with them. Be that as it may, it is said that foreign investors are offended by some of the BEE elements which were in conflict with South Africa’s investment treaty obligations.<sup>989</sup> The focal aim of this part of the Chapter is to examine selected regulations or requirements of the BEE and assess their consistency with relevant minimum international best practices discussed in Chapter 3.

#### **4 3 2 Elements of BEE policies frustrating FDI**

It is said that the BEE policies are not helping to attract FDI into South Africa<sup>990</sup> and are resented by foreign investors.<sup>991</sup> There is a perception among foreign investors that the cost of doing business in South Africa escalated in terms of the real costs of BEE compliance, in particular relating to implementation and investment risk.<sup>992</sup> There is no doubt that high cost of doing business may discourage foreign investors from investing in South Africa because of the decreased return on investment. In *Foresti v. South Africa*, a group of Italian investors challenged a set of BEE policies because they were in violation of the investment protection treaties concluded by South Africa with Italy and Luxembourg.<sup>993</sup> The Italian investors challenged in particular the MPRDA alleging that it places more onerous requirements to

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<sup>988</sup> See also *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 72.

<sup>989</sup> See, for instance, *Pierro Foresti, Laura de Carli v The Republic of South Africa*, ICSID Case No. ARB (AF)/07/01 (04 August, 2010). See also *Agri South Africa v Minister of Mining and Energy* 2013 (4) 1 (CC).

<sup>990</sup> Mebratie and Bedi “Foreign Direct Investment, Black Economic Empowerment and Labour Productivity in South Africa” <http://nbn-resolving.de/urn:nbn:de:101:1-201111029344> (accessed 09-11-2014).

<sup>991</sup> See generally Peterson “South Africa’s Bilateral Investment Treaties: Implications for Development and Human Rights” (2006) *Dialogue on Globalisation, Occasional Papers*.

<sup>992</sup> See Jack “Unpacking the Different Waves of BEE” 2006 22 *South African Journal of Social and Economic Policy* 19–23 and Turok 2006 22 *South African Journal of Social and Economic Policy* 59–64.

<sup>993</sup> See Langalanga “Imagining South Africa’s Foreign Investment Regulatory Regime in a Global Context” *SAIIA Occasional Papers* (2015) 25.

employ black managers and transfer ownership of mining rights to HDIs. The MPRDA requires foreign-owned companies to achieve 26 percent black ownership of mining rights and its employment equity measures required 40 percent black participation in management.<sup>994</sup> Conversely, the South African BITs provide protection of foreign investors from, *inter alia*, expropriation and measures limiting investors' rights of ownership, possession, control or employment of investments. In *Foresti v. South Africa*, the tribunal did not however decide on the merits of the dispute as the case was discontinued upon the application of the claimants. Nonetheless, the OECD observes:

the main obstacle to international investment is the widespread misperception among investors about B-BBEE ... the correct understanding of B-BBEE and its implementation is necessary and that it is of great importance that B-BBEE is driven from within the business. With the international community understanding why and how B-BBEE works ... B-BBEE can be seen to contribute to FDI since it promotes skills development and economic participation. These factors contribute to a positive economic environment in which FDI can flourish ... measures that are directed at historically disadvantaged groups ... are not reflected in member countries' reservations under the OECD Codes of Liberalisation, nor are they listed as exceptions under the National Treatment instrument, as they do not introduce discriminatory treatment on the basis of the nationality or residency of investors. This is the same criteria that has been applied in the case of similar measures maintained by countries that are not adherents to the OECD Declaration on International Investment and Multinational Enterprises, such as South Africa.<sup>995</sup>

For the purpose of this study, provisions relating to domestic equity participation, employment and training requirements as substantial elements of the BEE policy are discussed with the intention to assess their consistency with the pertinent international norms.

#### 4.3.2.1 Domestic equity participation

In South Africa, domestic equity requirements are mandatory in character.<sup>996</sup> As indicated above, the BEE policy ushered in a dynamic shift in the ownership, management and control of businesses and productive assets. For instance, section 2 (a) and (b) of the B-BBEE Act states:

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<sup>994</sup> Vickers "Investment Policy, Performance and Perceptions in South Africa: Final Report of the Investment for Development Project in South Africa" *Institute for Global Dialogue* (2003) 21. For a detailed discussion on the MPRDA and the BEE, see Cawood "The Mineral and Petroleum Resources Development Act of 2002: A Paradigm Shift in Mineral Policy in South Africa" 2004 *The Journal of the South African Institute of Mining and Metallurgy* 53-64 and Rungan *et al* 2005 105 *The Journal of The South African Institute of Mining and Metallurgy* 735-744.

<sup>995</sup> OECD *OECD-South Africa Investment Policy Dialogue* (2014) 39.

<sup>996</sup> *Ibid* 17.



the objectives of this Act are to facilitate broad-based black economic empowerment by promoting economic transformation in order to enable meaningful participation of black people in the economy; achieving a substantial change in the racial composition of ownership and management structures ... of existing and new enterprises.

In similar vein, section 2 of the BEE Act requires substantive control and participation by HDIs in the management of any enterprise.<sup>997</sup> In fact, the essence of empowerment entailed the advancement of a black minority through equity acquisitions. There is empirical evidence showing that BEE ownership or local equity requirements are problematic to international investors.<sup>998</sup>

#### 4 3 2 2      *Employment and training requirements*

Employment and training requirements have a mandatory character in South Africa.<sup>999</sup> The B-BBEE framework brought forth an element of human resource development such as employment equity, management and skills development. In essence, the BEE policy requires companies to increase the number of HDIs in their employ.<sup>1000</sup> For instance, the B-BBEE employment generic scorecard proposes that companies should achieve 25,1 percent BEE equity levels, 60 percent of black people in senior positions, 50 percent procurement from black-owned firms and 50 percent equity in employment.<sup>1001</sup> The EEA, as the enabling legislation, imposes obligations on employers to employ HDIs in order to promote equity in workplaces. The EEA is intended to secure the implementation of human resource management policies in terms of which HDIs will be placed first for appointments, promotions and training opportunities regardless that they may be less qualified or have less experience than non-HDIs.<sup>1002</sup> Some of the main purposes of employment and training requirements include to, *inter alia*, address imbalances in the labour market, to induce firms to engage more actively in training and human resource development activities and encourage the expansion of creation

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<sup>997</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) para 21. See also *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).

<sup>998</sup> Duffett *et al* 2009 3 *Southern African Business Review* 92.

<sup>999</sup> OECD *OECD-South Africa Investment Policy Dialogue* (2014) 17.

<sup>1000</sup> See Duffett *et al* 2009 3 *Southern African Business Review* 87.

<sup>1001</sup> DTI "South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment" 2003 12.

<sup>1002</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* (2002) 365. See, for instance, *The Department of Correctional Services v Van Vuuren* 1999 ILJ 2297 where a highly qualified white female candidate who was in fact at the top of the said list of four and whose appointment was highly recommended by the Panel was not appointed but a less qualified black male candidate was appointed based on the affirmative action policy of the EEA.

of certain skills.<sup>1003</sup> In regard to training, the SDA requires employers to pay a skills development levy to finance skills development.

#### **4 3 3 Conformity of the BEE laws with minimum international standards**

From a legal perspective, it is common that host countries employ domestic equity requirements in exercising their international law and CIL right to control the admission of investments and exploitation of natural resources.<sup>1004</sup> Within the World Trade Organisation (WTO) framework, there is scope to pursue the objectives of redressing negative economic effects of the past by promoting empowerment among historically disadvantaged groups.<sup>1005</sup> In essence, Articles III, XI, XVIII, XXIV, XIX and XXI of the GATT; Articles 3 and 4 of the TRIMS Agreement; and Articles II and XVII of the GATS provide for instances in which developing states may be exempted from the WTO rules. In terms of both Articles XX of GATT and XIV of GATS, such measures should be applied “in a manner which would not constitute a means of arbitrary or unjustifiable discrimination...” It is unlikely that claims of exceptions to the WTO rules based on arbitrary and discriminatory behaviour will succeed because such claims have been strictly interpreted in the WTO jurisprudence and past dispute settlement cases.<sup>1006</sup> Host countries are however prohibited from unduly or arbitrarily compelling foreign nationals to affiliate with local partners.<sup>1007</sup> The Multilateral Agreement on Investment (MAI) Draft<sup>1008</sup> sought to expand the list of prohibited performance requirements that had no direct effect on trade to include, among others, establishment of a joint venture with domestic participation and achievement of a minimum level of equity participation.<sup>1009</sup> Article 7 (2) of the SADC Model BIT maintains that states “may require that a majority of the board of directors ... of an investment be of a particular nationality ... in the territory of the state party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.” In addition, Article 7 (4) of the SADC Model BIT provides that host states may require foreign investors to ensure progressive increases in the number of senior management positions occupied by nationals of the host state.

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<sup>1003</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 30.

<sup>1004</sup> Ibid

<sup>1005</sup> Kruger “The Impact of WTO Law on Foreign Investment: The Walmart/Massmart Merger” 2012 <http://www.tralac.org/files/2012/02/s12wp032012-kruger-impact-wto-law-foreign-investmentwalmartmassmart-merger.fin.pdf> (accessed 24-10-2014).

<sup>1006</sup> Ibid.

<sup>1007</sup> Ibid.

<sup>1008</sup> Multilateral Agreement on Investment Draft, 1995.

<sup>1009</sup> See Article III of the MAI Draft.

With regard to employment and training requirements, there is variation in the treatment of employment and training requirements in the international investment law arena. The International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy sets out principles in the fields of, *inter alia*, employment<sup>1010</sup> and training<sup>1011</sup> which Multinational Enterprises (MNEs) or foreign investors are recommended to observe on a voluntary basis. FDI is thus encouraged to increase employment opportunities and standards in the host countries.<sup>1012</sup> The MAI Draft intended to evolve a multilateral system which prohibits the imposition of employment and training requirements levels. This undertaking is unlikely to be supported by developing host-countries who would favour the imposition of employment and training requirements because of their relevance to human capital development. As a result, policy of foreign investment is designed to allow for a transfer of technical and managerial expertise from skilled foreign investors or through skills development in the parent company, to equip local workers with global best practices.<sup>1013</sup> According to Article 7 (4) of the SADC Model BIT, host states may require foreign investors to institute training programs or establish mentoring programs for the purposes of increasing the number of senior management positions occupied by its nationals. This obligation is non-mandatory on both foreign investors and host states, but such requirements can be imposed in a transparent and legal manner.<sup>1014</sup>

#### **4 4 LAND REFORM AND OWNERSHIP LAWS IN SOUTH AFRICA**

South Africa has a history of racially-skewed exclusion of the majority of citizens from land ownership, development and use under the colonial regime.<sup>1015</sup> After colonial rule, South Africa saw the need to modernise traditional tenure patterns as well as the political and ideological need to redistribute land more equitably among all citizens.<sup>1016</sup> Since 1994, South Africa has embarked on a multi-faceted programme of land reform designed to redress the racial imbalance in land holding and secure the land rights of HDIs.<sup>1017</sup> The land reform program aims to achieve objectives of equity in terms of land access and ownership as well as improved land

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<sup>1010</sup> Paras 13-23 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2006.

<sup>1011</sup> *Ibid* paras 29-32.

<sup>1012</sup> *Ibid* para 14.

<sup>1013</sup>

<sup>1014</sup> See Comment on Article 7 of the SADC Model BIT with Commentary, 2012.

<sup>1015</sup> Cloete "Comparative Lessons for Land Reform in South Africa" 1992 22 *Africa Insight* 249.

<sup>1016</sup> *Ibid* 252.

<sup>1017</sup> *Ibid* 249.

use and contribution to the rural and ultimately the national economy.<sup>1018</sup> In April 1997, the Department of Land Affairs (DLA) released the White Paper on South African Land Policy setting out the framework for land reform policy in South Africa.<sup>1019</sup> The White Paper was divided into three main initiatives namely land restitution,<sup>1020</sup> land redistribution,<sup>1021</sup> and land tenure reform.<sup>1022</sup> The land reform policy is mandated by section 25 (5) to (7) of the Constitution which stipulates certain requirements of government to “foster conditions which enable citizens to gain access to land,” and to provide legally secure tenure or compensation, and restitution or compensation, for those dispossessed of property by colonial rule. It is significant to note that the measures to gain access to land on an equitable basis are subject to reasonable legislative and other measures as well as available resources of the state.<sup>1023</sup>

The land redistribution policy has undergone a series of shifts since 1994. Though a number of methods such as expropriation and other non-market mechanisms are available to the state in the land redistribution programme, the willing-buyer willing-seller approach<sup>1024</sup> has been extensively used.<sup>1025</sup> The willing-buyer willing-seller model has been used by South Africa to

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<sup>1018</sup> Lahiff “Land Redistribution in South Africa: Progress to Date” [http://www.sarpn.org/documents/d0002695/Land\\_Redistribution\\_South\\_Africa.pdf](http://www.sarpn.org/documents/d0002695/Land_Redistribution_South_Africa.pdf) (accessed 25-10-2014) 3.

<sup>1019</sup> White Paper on South African Land Policy, April 1997 explains the purpose of land redistribution programme as being to provide the poor with land for residential and productive purposes in order to improve their livelihoods.

<sup>1020</sup> Land restitution is governed by the Restitution of Land Rights Act 22 of 1994 which seeks to provide for the restitution of land rights to individuals or communities displaced under racially-based laws or practices after 1913. The Restitution of Land Rights Act was amended in 2003. The Restitution of Land Rights Amendment Act allows the Minister of Land Affairs to expropriate land by ministerial order, potentially greatly increasing the rate of acquisition of private land under claim. The Parliament has recently passed the Restitution of Land Rights Act Amendment Bill, on 25 February 2014. See also Mostert “Land Restitution, Social Justice and Development in South Africa” 2002 2 *SALJ* 400-428.

<sup>1021</sup> Land redistribution is a discretionary programme that seeks to redress the racial imbalance in landholding on a more substantial scale and assists certain categories of people to acquire land through the market. The legal basis for redistribution is the Provision of Certain Land for Settlement Act 126 of 1993, which was amended in 1998 and is now titled the Provision of Land and Assistance Act, but this is no more than an enabling Act that empowers the Minister of Land Affairs to provide funds for land purchase. See Lahiff “Land Redistribution in South Africa: Progress to Date” 6.

<sup>1022</sup> Land tenure reform was addressed through a review of the land policy, administration and legislation to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure. See the White Paper on South African Land Policy, April 1997. The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) is a short term measure to protect people with insecure tenure from losing their rights to land. With the declaration of constitutional invalidity of the Communal Land Rights Act, the IPILRA remains as the main legislative instrument to deal with development decisions in the communal areas.

<sup>1023</sup> Section 25 (5) of the Constitution.

<sup>1024</sup> The willing-buyer willing-seller model was based on the World Bank’s recommendations for a market-led reform, emphasising the voluntary nature of the process, payment of full market-related prices, up-front and in cash, a reduced role for the state and the removal of various ‘distortions’ within the existing land market. This approach also fitted well with the general spirit of reconciliation and compromise that characterized the negotiated transition to democracy, although it goes considerably further than the requirements of the 1996 Constitution. See Lahiff “Land Redistribution in South Africa: Progress to Date” 10.

<sup>1025</sup> See generally World Bank *South African Agriculture: Structure, Performance and Options for the Future* (1994).

date and is expressed in the compensation scheme provided for under Section 12 of the Expropriation Act of 1975. Despite the government's concerted effort to address the land question through restitution, tenure security, and facilitating access to land through redistribution as mandated by section 25 of the Constitution, there remains a strong and growing public opinion and impression that more needs to be done and be so done at a faster pace.<sup>1026</sup> Empirical evidence suggests that land reform in South Africa has consistently fallen far behind the targets set by the state and behind popular expectations.<sup>1027</sup> After 1994, the African National Congress (ANC) government set a target for the entire land reform programme of redistributing 30 percent of white-owned agricultural land within a five-year period<sup>1028</sup> but this target date was subsequently extended to twenty years ending in 2014. As a result of this failure, various changes to land reform policy have been proposed relating to, *inter alia*, expropriation or nationalisation of land, scrapping of the willing-buyer willing-seller approach, Agricultural Broad-Based Black Economic Empowerment (AgriB-BBEE).<sup>1029</sup> In regard to expropriation, the Expropriation Bill<sup>1030</sup> was proposed in 2013 and also the land redistribution policy that proposes that farm labourers assume ownership of half the land on which they are employed. This part of the Chapter aims to analyse these two proposed mechanisms in light of the minimum international standards on expropriation.

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<sup>1026</sup> It is plausible to propose that this is because of the fact that post 1994 policies provided a set of market driven land reform proposals with the following gaps: no proposals on foreign land ownership, land ceilings and land/rural tax; no proposals on proactive, supply-driven approach to land reform; provides very little direction in terms of institutional reforms to support land reform; and commitment to freehold title or unitary land registration system. The Economic Freedom Fighters (EFF), a new political party in South Africa, has specified land expropriation without compensation as one of its key policies. EFF "Expropriation of Land without Compensation for Equitable Redistribution" <http://efffighters.org.za/policy/on-land> (accessed 02-06-2014). See also Barron "So Many Questions: Julius Malema on Land Occupation" *Times Live*, 21 December 2014 <http://www.timeslive.co.za/politics/2014/12/21/so-many-questions-julius-malema-on-land-occupation> (accessed 23-12-2014).

<sup>1027</sup> Ibid.

<sup>1028</sup> See generally ANC *The Reconstruction and Development Programme: A Policy Framework* (1994).

<sup>1029</sup><sup>1029</sup> In July 2004, a draft of the AgriBEE Charter was released after two years of consultations between AgriSA, the main organisation representing white landowners, the National African Farmers' Union and the National Department of Agriculture, which have been unfolding since they adopted the Agricultural Sector Plan in 2002 in the Presidential Working Group on Agriculture. The Draft Charter reiterates the existing target of redistributing 30 percent of agricultural land to black South Africans by 2014, but also sets ambitious targets for the deracialisation of ownership, management and procurement in the agricultural sector, including 35% black ownership of existing and new enterprises by 2008. See Department of Agriculture "Broad-Based Black Economic Empowerment in Agriculture" AgriBEE Reference Document (2004). Speaking at the ANC Celebrations, President Jacob Zuma presented a speech on the land issue. The speech addressed concerns around the slow pace at which the land is being redistributed as a result of the willing-buyer willing-seller and more importantly insisted that expropriation within the confines of the Constitution would be done this year, 2015. See South African Press Association "Zuma on Expropriation: Land will be returned to our people" *Sunday World*, 11 January 2015 <http://www.sundayworld.co.za/news/2015/01/11/zuma-on-expropriation-land-will-be-returned-to-our-people> (accessed 29-04-2015).

<sup>1030</sup> Expropriation Bill, 2013.

#### 4 4 1 Redistribution of farm land

South Africa's proposed farm land redistribution policy intends to introduce a new system of land reform which departs from the contemporary willing-buyer willing-seller system. This new land reform system proposes that, if enacted, a maximum share of 50 percent of farm land be allocated to farm labourers.<sup>1031</sup> This would be proportional to the improvement of the land and based on the number of years they worked on the land.<sup>1032</sup> It is said that this proposal is supported by sections 25, 26, 27 and 36 of the Constitution of South Africa, provisions of the Freedom Charter (FC),<sup>1033</sup> chapter 6 of the National Development Plan (NDP),<sup>1034</sup> Agenda 21 of the United Nations,<sup>1035</sup> Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights<sup>1036</sup> and General Comment No.7 of the Committee on Economic, Social and Cultural Rights.<sup>1037</sup> Under this purported land reform policy the government will pay for the 50 percent to be shared by farm labourers.<sup>1038</sup> This money will not to be paid to the farm owner but to into an investment and development fund – to be jointly owned by the parties constituting the new ownership.<sup>1039</sup> This aspect raises concerns on the issue of compensation as embodied in section 25 of the Constitution of South Africa. It is submitted that the government's proposal, if enacted, requires some major changes to existing laws including, *inter alia*, the Subdivision of Agricultural Land Act,<sup>1040</sup> Extension of Security of Tenure Act,<sup>1041</sup> and the Labour Tenants Act.<sup>1042</sup>

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<sup>1031</sup> Department of Rural Development and Land Reform "Final Policy Proposals on Strengthening the Relative Rights Of People Working the Land" 2014.

<sup>1032</sup> Ibid.

<sup>1033</sup> The FC declares that "South Africa belongs to all who live in it, black and white," in particular Clause 3 states that the people of South Africa shall share in the country's wealth and Clause 4 maintains that the land shall be shared among those who work on it.

<sup>1034</sup> Chapter 6 of the NDP contains the essence of an integrated and inclusive economy.

<sup>1035</sup> Agenda 21 states that "people shall be protected by law against unfair eviction from their homes and land."

<sup>1036</sup> International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>1037</sup> General Comment No.7 of the Committee on Economic, Social and Cultural Rights, 1997.

<sup>1038</sup> Department of Rural Development and Land Reform "Final Policy Proposals on Strengthening the Relative Rights of People Working the Land" 2014.

<sup>1039</sup> Ibid.

<sup>1040</sup> Subdivision of Agricultural Land Act 70 of 1970.

<sup>1041</sup> Extension of Security of Tenure Act 62 of 1997.

<sup>1042</sup> Labour Tenants Act 3 of 1996.

#### 4 4 2 Expropriation Bill

The purported Expropriation Bill is intended to, *inter alia*, substitute the Expropriation Act<sup>1043</sup> and the Expropriation Bill of 2008 after its constitutionality was questioned,<sup>1044</sup> speed up the implementation of land reform policy,<sup>1045</sup> correct historical injustice in property ownership<sup>1046</sup> and replace the willing-buyer willing-seller model.<sup>1047</sup> Section 1 of the Expropriation Bill, in line with section 25 (4) (b) of the Constitution, states that the term “property” is not limited to land and includes a right in or to such property. It purports to give practical effect to section 25 of the Constitution which deals with the protection of property. The preamble of the current Expropriation Bill states that the Bill seeks to ensure that:

there is a framework for expropriation of property; expropriation of property for a public purpose or in the public interest subject to compensation which is just and equitable and reflects an equitable balance between the public interest and the interests of those affected; and respect of the rights of everyone including the rights to equality and to administrative action that is lawful, reasonable and procedurally fair.

The above provision states that just and equitable compensation is due for expropriated property reflecting an equitable balance between the public interest and the interests of the expropriated owner, having regard to a number of considerations.<sup>1048</sup> The requirement that an equitable balance between the interests of the public and affected persons must be sought is

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<sup>1043</sup> This is because the Expropriation Act 63 of 1975 is inconsistent with the spirit and provisions of the Constitution, in particular to the equality clause (section 9); the property clause (section 25); just administrative action (section 33); and extension of the purpose for expropriation to include public interest. See Department of Public Works “Explanatory Memorandum on the Draft Expropriation Bill, 2013” 1

<sup>1044</sup> The Expropriation Bill of 2008 was withdrawn after clauses that removed the rights of land owners to approach the courts were criticised by various stakeholders for being unconstitutional.

<sup>1045</sup> Department of Public Works “Explanatory Memorandum on the Draft Expropriation Bill, 2013” 1.

<sup>1046</sup> Ibid.

<sup>1047</sup> The Expropriation Bill aims to change the willing-buyer, willing-seller model as it applies to land restitution on the ground that: the Expropriation Act precedes the Constitution and does not promote its democratic spirit and transformative intent, as it was structured to formalise existing property relations; and the compensation scheme provided in the Expropriation Act is not line with Section 25 (3) of the Constitution on property expropriation and compensation, as it restricts opportunity for balancing the equitable interest between public purpose and the interests of those affected. See Bowman Gilfillan Africa Group “Legal Talk: SA Land Expropriation Draft Bill Bound to Spark Lively Debate” <http://www.portfolio-property.com/article/view/id/145> (accessed 26-10-2014).

<sup>1048</sup> See section 13 (1) of the Expropriation Bill which states:

The amount of compensation to be paid to an expropriated owner or expropriated holder must be just and equitable reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder, having regard to all relevant circumstances, including:

- (a) the current use of the property
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

embedded in section 25 (3) (a) to (e) of the Constitution. The SCA in *Abrahams v Allie*<sup>1049</sup> endorsed the approach that the equitable balance be achieved by first determining the market value that would be added to or subtracted from consideration of the other relevant factors before determining the compensation amount. The Expropriation Bill of 2013, contrary to its 2008 predecessor, allows the courts, rather than the state, to decide the compensation payable for expropriated property.<sup>1050</sup> In effect, it explicitly provides that the amount of compensation must either be agreed by the parties or, failing that, determined by a court.<sup>1051</sup>

Be that as it may, there are several concerns about this Bill. One of the concerns about the Expropriation Bill is that it proposes to extend the power to expropriate assets from the minister of public works to all organs of state.<sup>1052</sup> Briefly, the Expropriation Bill:

extends the power to expropriate from the minister of public works to all organs of state at all three tiers of government ...; allows an ‘expropriating authority’ to take ownership and possession of property simply by notice and before the erstwhile owner has received any compensation; states that compensation becomes payable only when its amount has been agreed by the state or decided by the courts; and puts great pressure on the expropriated owner to agree to the amount of compensation offered by the state, rather than remain without the benefit of either the property or its value in money.<sup>1053</sup>

The Expropriation Bill also contradicts section 25 the Constitution, for it still allows expropriation to take place simply by notice and before the state has shown that all constitutional requirements for a valid expropriation have been complied with.<sup>1054</sup> In addition, the Expropriation Bill undermines the constitutional right of access to court,<sup>1055</sup> for it allows the state to resort to self-help long before relevant legal questions have been “resolved by the application of law...in a fair public hearing before a court”.<sup>1056</sup>

#### **4 4 3 Conformity of the proposed farm land redistribution policy and Expropriation Bill with minimum international norms.**

The right of states to expropriate foreign-owned property is reiterated in a number of international instruments.<sup>1057</sup> In general international law there is no rule that would bar

<sup>1049</sup> *Abrahams v Allie* 2004 (4) SA 535 (SCA).

<sup>1050</sup> Section 22 (1) of the Expropriation Bill.

<sup>1051</sup> *Ibid* preamble, sections 13 and 22.

<sup>1052</sup> Jeffery “No need for new Expropriation Bill” 2013 <http://news.acts.co.za/blog/2013/05/no-need-for-new-expropriation-bill> (accessed 26-10-2010).

<sup>1053</sup> *Ibid*.

<sup>1054</sup> Marais “When does State interfere with Property (now) amount to Expropriation? An Analysis of the Agri SA court’s State acquisition requirement (part 1)” 2015 *Potchefstroom Electronic Journal* 2983.

<sup>1055</sup> Section 34 of the Constitution.

<sup>1056</sup> Jeffery “No need for new Expropriation Bill” 2013.

<sup>1057</sup> See, for example, the Charter of Economic Rights and Duties of States; Resolution 1803 (XVII) 1-5, UN Documents A/RES/1803), (December 14, 1962) or (Permanent Sovereignty over Natural Resources, 1962); GA



expropriation of foreign owned property<sup>1058</sup> provided that it is non-discriminatory, not arbitrary, in the public interest and that fair/just/adequate/equitable/full compensation is paid.<sup>1059</sup> The previous Chapter showed that there is general consensus that norms such as public interest/public purpose, due process, non-discrimination and compensation have emerged in international law as common requirements for a legal expropriation.<sup>1060</sup> Most BITs or IIAs refer to each of these standards but mostly with different interpretations. However, the Expropriation Bill encompasses only the public interest, compensation and indirectly due process.<sup>1061</sup> The Bill follows the expropriation provision of the SADC Model BIT<sup>1062</sup> as well as the Canadian and US Model BITs which remove the non-discrimination standard. This could be to allow the government to correct the country's inequitable property ownership status quo. BITs are binding international treaties between two states under which each country undertakes certain reciprocal obligations in respect of any investments made within its territory by nationals of the other state. As highlighted above compensation must be paid to the land owner; accordingly the land policy seems to have departed from this norm. Since the compensation is not paid to the land owner but to the state.<sup>1063</sup>

#### 4 5 ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN SOUTH AFRICA

In South Africa, apart from the common law,<sup>1064</sup> there are two statutory enactments which regulate the recognition and enforcement of foreign arbitral awards namely the Arbitration Act

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Resolution 3171 (XXVIII) 1 and 3, UN Documents A/RES/3171 (XXVII) (December 17, 1973); Resolution 3281 (XXIX) Article 2 (2) (c), UN Documents A/RES/29/3281 (December 12, 1974); Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1952; and Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001. For an account of the Resolution on permanent sovereignty of the state, see De Arechaga "State Responsibility for the Nationalisation of Foreign Owned Property" 1979 11 *New York University Journal of International Law and Politics* 179.

<sup>1058</sup> *De Sanchez v. Banco Central de Nicaragua* 770 F.2d 1385, 1397.

<sup>1059</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 225. See also, for instance, Article 5 of the South Africa-Zimbabwe Bilateral Investment Promotion and Protection Agreement (BIPPA), 2009; Article 6 (1) of the US-Rwanda BIT, 2008; Article 7 (1) of the Agreement between the government of United Mexican States and the government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments, 2009; and Article 13 (1) of the Canadian Model BIT, 2004.

<sup>1060</sup> See Edwick *Bilateral Investment Treaties Encouraging Foreign Direct Investment: Zimbabwe – South Africa BIPPA as a Case Study* (LLM-thesis, UP, 2009) 47; Reinisch in Reinisch (ed) *Standards of Investment Protection* (2008) 173; Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 108; Sheppard "The Distinction between Lawful and Unlawful Expropriation" in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 169; UNCTAD *International Investment Agreement: Key Issues* (2004) 235; McLachlan, Shore and Weinger *International Investment Arbitration: Substantive Principles* (2005) 265.

<sup>1061</sup> See chapter 5 of the Expropriation Bill.

<sup>1062</sup> Article 6 of the SADC Model BIT.

<sup>1063</sup> See Department of Rural Development and Land Reform "Final Policy Proposals on Strengthening the Relative Rights of People Working the Land" 2014.

<sup>1064</sup> In *Government of the Republic of Zimbabwe v Louis Karel Fick* Case CCT 101/12 ZACC 22 (27 June, 2013) (hereafter "*Fick* Constitutional Court case"), the Constitutional Court relied on the common law to enforce a binding international (SADC Tribunal) judgment within the Republic. See paras 35-37.

and the REFAAA. In terms of section 1 of the REFAAA, a foreign arbitral award is an award made outside South Africa, or an award the enforcement of which is not permissible in terms of the Arbitration Act but which is not in conflict with the provisions of the REFAAA. Section 1 of the REFAAA also provides that either a provincial or local division of the High Court is competent to make a foreign arbitral award an order of court. In terms of Section 31 (1) of the Arbitration Act “an arbitration award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.” Section 31 (3) of the Arbitration Act further states that “an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.” In similar vein, section 2 (1) of the REFAAA stipulates that “any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.” Section 2 (3) of the REFAAA further provides that a foreign arbitral award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect. It is worth noting that a foreign arbitral award is not automatically recognised and enforced in South Africa. Rather, for a foreign arbitral award to be recognised and enforced in South Africa the requirements of the REFAAA must be met. Section 3 of the REFAAA explicitly states that any application for the recognition and enforcement of a foreign arbitral award shall be accompanied by the original foreign arbitral award and the original arbitration agreement duly authenticated.

Nonetheless, recognition and enforcement of a foreign arbitral award may be refused. Section 4 of the REFAAA deals with circumstances under which the recognition and enforcement of a foreign arbitral award may be declined. In terms of section 4 (1) of the REFAAA a foreign arbitral award may not be recognised and enforced if the court finds that:

- (a) (i) a reference to arbitration is not permissible in the Republic in respect of the subject-matter of the dispute concerned; or
- (ii) enforcement of the award concerned would be contrary to public policy in the Republic; or
- (b) the party against whom the enforcement of the award concerned is sought, proves to the satisfaction of the court that-
  - (i) the parties to the arbitration agreement concerned had, under the law applicable to them, no capacity to contract, or that the said agreement is invalid under the law to which the parties have subjected it or of the country in which the award was made; or
  - (ii) he did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present his case; or
  - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the

reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be made an order of court under section 2 (1); or

(iv) the constitution of the arbitration tribunal concerned was or the arbitration proceedings concerned were not in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place; or

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

The circumstances outlined above are the defences which may be raised by the party against whom the enforcement of the award is sought. In *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd*<sup>1065</sup> the High Court held that a foreign arbitral award cannot be enforced if the agreement on the basis of which the award was made is invalid<sup>1066</sup> or if the recognition and enforcement of such award will be contrary to public policy in South Africa.

In *Fick* Constitutional Court case, the court was faced with an issue of the enforcement of foreign judgments in South Africa. Initially, the now suspended SADC Tribunal rendered a judgment against Zimbabwe<sup>1067</sup> which was also enforceable in South Africa in terms of Article 3 (3) of the Protocol of the SADC Tribunal.<sup>1068</sup> Article 32 (3) of the SADC Tribunal Protocol stipulates that SADC Tribunal decisions are binding upon the parties to the dispute in respect of that particular case and enforceable "within the territories of the states concerned". De Wet argues that this provision implies that though the decision was against Zimbabwe only, other SADC member states are responsible for its enforcement.<sup>1069</sup> It was on this basis and on the REFAAA that when Zimbabwe refused to enforce and register this SADC Tribunal decision, it was successfully registered with the South African High Court in 2009.<sup>1070</sup>

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<sup>1065</sup> In *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd* AC70/2011, the Phoenix Shipping Corporation obtained a foreign arbitration award pursuant to proceedings in the LCIA against DHL Global Forwarding SA (Pty) Ltd and Bateman Project Ltd.

<sup>1066</sup> Though neither the New York Convention nor the REFAAA defines the term "invalid", in this case, the High Court of South Africa held that invalidity could mean a contract between parties in circumstances where there is lack of consensus. See para 62.

<sup>1067</sup> In *Mike Campbell (Pvt) Ltd v. Republic of Zimbabwe* (2008) SADC T 2 (28 November 2008), the SADC Tribunal ruled in favour of Zimbabwean foreign farmers whose farms were expropriated by the Zimbabwean government in terms of the agrarian land reform policy authorised by the Constitution Amendment No. 16 Act 2000, which denied them compensation for their expropriated land and access to court. The SADC Tribunal concluded that the expropriation under the circumstances amounted to discrimination on the basis of race and that Zimbabwe had to pay fair compensation to the applicants. See also De Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 2013 *ICSID Review* 1-19.

<sup>1068</sup> Protocol on the SADC Tribunal adopted on 14 August 2001.

<sup>1069</sup> See De Wet 2013 *ICSID Review* 1-19.

<sup>1070</sup> See *Louis Karel Fick v. Government of the Republic of Zimbabwe* unreported case 3106/07 (13 January, 2010).

Zimbabwe asserted state immunity in terms of section 2 of the South African Foreign States Immunities Act (FSIA)<sup>1071</sup> which provides that “a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.”<sup>1072</sup> However section 3 (1) of the FSIA, provides that immunity shall be forfeited in proceedings in respect of which the State expressly waived its immunity. Despite the foregoing assertion by Zimbabwe, the High Court of South Africa attached Zimbabwean government property in South Africa in accordance with section 14 (3) of the FSIA.<sup>1073</sup> The decision of the High Court was confirmed on appeal by the SCA in 2012<sup>1074</sup> and finally by the Constitutional Court in 2013.<sup>1075</sup> The SCA further observed that Zimbabwe had forfeited any immunity which it may have enjoyed from the jurisdiction of South African courts by committing itself to the SADC Treaty<sup>1076</sup> and the SADC Tribunal Protocol. The Constitutional Court disputed the notion of using the Enforcement of Foreign Civil Judgments Act<sup>1077</sup> as the appropriate vehicle for enforcing international judgments, as it applied to magistrates’ courts only. Hence the common law was used as the suitable vehicle through which the SADC Tribunal decision could be enforced in South Africa.<sup>1078</sup> According to South African common law, the requirements for a “foreign judgment” to be enforced included that: *inter alia*, the court which rendered the judgment had jurisdiction over the case; the judgment was final and conclusive; enforcement is not contrary to public policy; the judgment is not obtained by fraudulent means; and the judgment does not involve the enforcement of a penal or revenue law of the foreign state.<sup>1079</sup> The Constitutional Court stated that the reason for developing the common law to facilitate the enforcement of foreign judgments was that it was necessary to ensure that lawful judgments were not evaded with impunity by any state or person.<sup>1080</sup>

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<sup>1071</sup> Foreign States Immunities Act 87 of 1981.

<sup>1072</sup> Osode 1997 *Comparative and International Law Journal of Southern Africa* 44.

<sup>1073</sup> Section 14 (3) of the FSIA exempts property of a foreign state that is used for commercial purposes from immunity for the purposes of execution. See also *Republic of Zimbabwe v Sheriff Wynberg North* 2010 ZAGPJHC 118.

<sup>1074</sup> See *Government of the Republic of Zimbabwe v Fick* (2012) ZASCA 122 (SCA Judgment) (hereafter “*Fick* SCA case”).

<sup>1075</sup> See *Fick* Constitutional Court case.

<sup>1076</sup> Zimbabwe ratified the SADC Treaty on 17 November 1992 and South Africa acceded to it on 29 August 1994.

<sup>1077</sup> Enforcement of Foreign Civil Judgments Act 32 of 1988.

<sup>1078</sup> *Fick* SCA case paras 35-37.

<sup>1079</sup> *Ibid* paras 47-50.

<sup>1080</sup> De Wet 2013 *ICSID Review* 1-19.

## **4 5 2 International law practice on the recognition and enforcement of foreign arbitral awards**

In the international arena, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention. South Africa ratified the New York Convention on May 3, 1976 without reservations and the REFAAA was enacted to give effect to the New York Convention. Article I (1) of the New York Convention states:

Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The New York Convention requires foreign arbitral awards to be enforced in terms of the rules of procedure applicable in the territory where the recognition and enforcement is sought.<sup>1081</sup> Article IV (1) of the New York Convention, in the same terms as section 3 of the REFAAA, provides the requirements for applying for the recognition and enforcement of a foreign arbitral award. Likewise, Article V of the New York Convention provides, in the same wording as section 4 (1) of the REFAAA, the grounds upon which the recognition and enforcement of a foreign arbitral award may be refused.

## **4 6 CONCLUSION**

This Chapter has attempted to critically examine selected South African investment laws and related policies with the principal objective of assessing their compliance with the minimum international norms, standards and/or best practices on the protection of FDI. The international norms, standards and/or best practices discussed in the preceding Chapter inform the interpretation of investment laws and related policies in particular areas of the South African investment regime. The overall understanding derived in this Chapter is that South Africa is yet to align some of its investment laws and related policies with the pertinent international norms.

The proposed Investment Bill seeks to, *inter alia*, provide a coherent and harmonise the legislative and regulatory framework for investment in South Africa, create an equilibrium between the rights and obligations of both foreign and domestic investors as well as replace

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<sup>1081</sup> Article III of the New York Convention states:

each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

existing BITs to which South Africa is a signatory.<sup>1082</sup> However, this Bill has been criticised by foreign investors as it offers a lower standard of protection to FDI than BITs. In particular, it contains a narrow concept of expropriation and lacks recourse to international arbitration for the resolution of investment disputes. As has been observed from the discussion of international norms, expropriation of foreign investment is subject to requirements of non-discrimination, public purpose/interest, due process and payment of compensation.<sup>1083</sup> Nevertheless, similar to the SADC Model BIT,<sup>1084</sup> the Investment Bill omits/excludes the non-discrimination of principle.<sup>1085</sup> In addition to the concept of expropriation, it provides for less than full market value compensation for expropriation as opposed to BITs and most IIAs.<sup>1086</sup> Moreover, the Investment Bill restricts the settlement of investment dispute to local courts, arbitration or mediation of the DTI.<sup>1087</sup> This provision undermines the purpose of BITs or IIAs which allow foreign investors to approach international arbitration fora such as LCIA, ICC, UNCITRAL and ICSID Additional Facility for the resolution of investment disputes.

BEE laws have been and are being implemented to redress the injustice and imbalances of the past<sup>1088</sup> thereby increasing black management and control of business in South Africa.<sup>1089</sup> South Africa has enacted a number of legislative initiatives including the RDP, PPPFA, NEFA, BEE Act and B-BBEE Act, among others, to drive the BEE policy. Nevertheless, some of these legislative initiatives emasculate investment protection. For instance, some of the policies impose domestic equity participation<sup>1090</sup> as well as employment and training requirements on foreign investors.<sup>1091</sup> It is worth mentioning that there is literature contrary to the foregoing argument.<sup>1092</sup> International law is less prescriptive on the issue of domestic equity requirements. CIL and general international law grant host states the right to regulate natural resources and control the admission of investment in their respective territories.<sup>1093</sup> The right to control and regulate admission of investment include also the imposition of the conditions upon which

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<sup>1082</sup> See the preamble and section 3 (b) of the Investment Bill.

<sup>1083</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 225.

<sup>1084</sup> See Article 6 (1) of the SADC Model BIT.

<sup>1085</sup> See section 8 (1) of the Investment Bill.

<sup>1086</sup> Woolfrey "South Africa's Promotion and Protection of Investment Bill" 2013.

<sup>1087</sup> See section 11 (1) of the Investment Bill.

<sup>1088</sup> Osode in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 261.

<sup>1089</sup> See DTI "Rationale for BEE" 2008.

<sup>1090</sup> See sections 1, 2 (a) and (b) of the B-BBEE Act.

<sup>1091</sup> See the EEA.

<sup>1092</sup> See OECD *OECD-South Africa Investment Policy Dialogue* (2014) 39.

<sup>1093</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 30.

investment may be admitted into the territory of the host state.<sup>1094</sup> Be that as it may, it is submitted that domestic equity requirements are not prohibited but must not be unduly or arbitrarily imposed on foreign investors.<sup>1095</sup> With regard to employment and training requirements, FDI is encouraged to increase employment and offer training for locals<sup>1096</sup> provided this does not unduly impair the foreign investors' ability to exercise control over their investment.<sup>1097</sup>

Since 1994, South Africa has been in the process of redistributing land in order to enable access to land on an equitable basis.<sup>1098</sup> To drive this land redistribution policy, a number of legislative policies were introduced, among them includes the Redistribution of Land Rights Act, Provision of Land and Assistance Act, the IPILPA and the Expropriation Act. Recently, the South African government has proposed the Expropriation Bill and the redistribution of farm land in order to fulfil some of the objectives of its land redistribution policy. As highlighted above these two purported laws seem to depart from international norms on the protection of foreign investors. For instance, the redistribution of farm land policy provides that compensation for expropriated 50 percent of farm lands will be paid to the state not to the farm owner.<sup>1099</sup> On the contrary, international law norms provide that compensation for investment should be paid to the property owner.

Arbitral awards made outside South Africa are enforced in terms of common law, the Arbitration Act or REFAAA by a competent provincial or local division High Court.<sup>1100</sup> Foreign arbitral awards are enforced in the same manner as any judgment or order of the same effect.<sup>1101</sup> This is in accord with the international law which requires foreign arbitral awards to be enforced with the rules of procedure in the territory against which enforcement is sought.<sup>1102</sup> Nonetheless, foreign arbitral awards are not automatically enforced and recognised in South Africa but certain conditions stipulated in the REFAAA must be met. The REFAAA provides that a foreign arbitral award may not be enforced if it is, *inter alia*, invalid, against public policy

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<sup>1094</sup> Ibid.

<sup>1095</sup> Ibid.

<sup>1096</sup> See paras 13-32 of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2006.

<sup>1097</sup> Article 7 (2) and (4) SADC Model BIT.

<sup>1098</sup> Lahiff "Land Redistribution in South Africa: Progress to Date" 3.

<sup>1099</sup> Department of Rural Development and Land Reform "Final Policy Proposals on Strengthening the Relative Rights of People Working the Land" 2014.

<sup>1100</sup> Section 1 of the REFAAA.

<sup>1101</sup> See sections 2 (1) and (3) of the REFAAA as well as section 31 (3) of the Arbitration Act.

<sup>1102</sup> Article III of the New York Convention.

or not yet binding upon the parties.<sup>1103</sup> These provisions are reiterated in Article V of the New York Convention. In addition, a state may assert state immunity to avoid the recognition and enforcement of arbitral awards in its territory.<sup>1104</sup>

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<sup>1103</sup> See section 4 (1) of the REFAAA.

<sup>1104</sup> See section 14 (3) of the FSIA.



## CHAPTER 5

### The legal protection of foreign investment in Zimbabwe

#### 5.1 INTRODUCTION

The legal protection of Foreign Direct Investment (FDI) in Zimbabwe has its roots in the colonial era.<sup>1105</sup> During the British colonial rule, the majority of FDI into Zimbabwe, the then Southern Rhodesia, originated in the United Kingdom (UK), the European Union (EU), South Africa, Germany and Japan among other countries.<sup>1106</sup> Foreign investments were mainly in the mining, manufacturing and agricultural sectors.<sup>1107</sup> In the 1940s, under the British colonial government led by Cecil John Rhodes, Zimbabwe pursued an open investment regime to attract investment and build trading links with other countries.<sup>1108</sup> In the 1950s, Zimbabwe was recorded to have had the highest rate of FDI inflows in Sub-Saharan Africa.<sup>1109</sup> This was also attributed to the federation between the three British territories (Southern Rhodesia, Northern Rhodesia and Nyasaland) in 1953 which was aimed at enhancing the scale of economic integration and attracting FDI.<sup>1110</sup>

In November 1965, a predominantly white government headed by Prime Minister Ian Douglas Smith proclaimed the Unilateral Declaration of Independence (UDI)<sup>1111</sup> which enabled the Smith regime to announce independence from the British government.<sup>1112</sup> However, the UDI was condemned by Britain and international organisations such as the former Organisation of African Unity, the United Nations and the Commonwealth. For that reason, economic and political sanctions were imposed on Zimbabwe to compel the Smith government to reverse the UDI and pave way for black majority rule.<sup>1113</sup> These sanctions made economic growth in Zimbabwe strenuous as the country was segregated from the international economic arena.<sup>1114</sup>

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<sup>1105</sup> Clarke *Foreign Companies and International Investment in Zimbabwe* (1980) 15.

<sup>1106</sup> See Twomey *A Century of Foreign Investment in the Third World* (2000) 105; and Saungweme "Trade Dynamics in Zimbabwe: 1980-2012" 2013 4 *International Journal of Economic Research* 29-38.

<sup>1107</sup> Clarke 15.

<sup>1108</sup> Bond and Manyanya *Zimbabwe's Plunge: Exhausted Nationalism, Neoliberalism and the Struggle for Social Justice* 2 ed (2002) 5.

<sup>1109</sup> Twomey 105.

<sup>1110</sup> Wild "An Outline of African Business History in Colonial Zimbabwe" 1992 XIX *Zambezia* 27.

<sup>1111</sup> The UDI was a statement adopted by the cabinet of Rhodesia under the governance of Ian Smith on November 11, 1965 proclaiming the independence of the Rhodesia from the British government. See Watts *Rhodesia's Unilateral Declaration of Independence: An International History* (2012) 2.

<sup>1112</sup> The Smith government declared its independence from Britain because the British colonial power wanted a gradual process of power transfer to the black majority in conformity with global realities and demands after the Second World War. See *ibid.*

<sup>1113</sup> See generally Kurebwa *The Politics of Economic Sanctions on Rhodesia (Zimbabwe) 1965 to 1979* (2012).

<sup>1114</sup> See generally Kapungu *The United Nations and Economic Sanctions Against Rhodesia* (1973); Handford *Portrait of an Economy: Rhodesia under Sanctions* (1976); and Jardim *Sanctions Double - Cross: Oil to Rhodesia* (1978).

The Smith regime was financially supported by Multinational Corporations such as the London-Rhodesia Company, Anglo-American Corporation and the British American Tobacco Company which had massive investments in the mining, agriculture and manufacturing sectors.<sup>1115</sup> This regime correspondingly began to craft and implant policies to counter economic sanctions and achieve self-sufficiency.<sup>1116</sup> It is however noteworthy that these policies were somewhat hostile towards foreign investment.<sup>1117</sup> Thus the policies discouraged exports by raising the costs of exports; foreign companies were not allowed to remit dividends; and new investment permits and licenses were costly.<sup>1118</sup> This inevitably led to critical shortage of foreign exchange and low FDI inflows into Zimbabwe.<sup>1119</sup>

The ushering in of a new political dispensation in 1980 generated a lot of expectations especially among the black people who were looking forward to the reversal of inequalities inherited from the colonial rule and the stakeholders who wished for increased flows of foreign investment into Zimbabwe.<sup>1120</sup> The Zimbabwean government was inevitably forced to introduce a number of policies to address FDI-related issues. It is however argued that during the first decade of independence, FDI flows into Zimbabwe were very low because of the policy environment which was unfavourable to foreign investors.<sup>1121</sup> For instance, approvals of foreign investment involved an excessively long process and policies on repatriation of profits remained restrictive.<sup>1122</sup> In 1991, the Economic Structural Adjustment Programme (ESAP) was introduced on the advice of the World Bank and the International Monetary Fund (IMF). The objectives of the ESAP were to, *inter alia*, promote the role of the private sector as an engine for economic growth; trade and exchange market liberalisation and encouragement of both domestic and foreign investment with the view to generate sustained growth and employment creation.<sup>1123</sup> The ESAP was also aimed at achieving domestic deregulation and investment promotion which sought to liberalise investment and equally important to abolish or modify

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<sup>1115</sup> Kapungu 5.

<sup>1116</sup> The Smith government countered the economic sanctions by adaptation, reduction of external dependence and the development of fresh links with non-sanctioning states. Ibid.

<sup>1117</sup> Ibid.

<sup>1118</sup> Saungweme 2013 *International Journal of Economic Research* 29-38.

<sup>1119</sup> Ibid.

<sup>1120</sup> Clarke 15.

<sup>1121</sup> Gwenhamo "Foreign Direct Investment in Zimbabwe: The Role of Institutional Factors" (2009) Economics Research Southern Africa Working Paper 144 3.

<sup>1122</sup> Ibid.

<sup>1123</sup> The ESAP was spelt out in the January 1991 document, *Zimbabwe A Framework for the Economic Reform (1991-95)* (1991).

bye-laws and regulations that hamper investment.<sup>1124</sup> Nonetheless, the performance of the ESAP was largely unimpressive which eventually frustrated many stakeholders.<sup>1125</sup> In 1992, the Zimbabwe Investment Centre (ZIC) Act<sup>1126</sup> was promulgated with the intention to establish the Zimbabwe Investment Centre (the Centre) and provide for the promotion and co-ordination of investment.<sup>1127</sup> The Centre was an autonomous institution intended to act as a single clearance agency for investment.<sup>1128</sup> It co-ordinated and facilitated the approval and registration of investment project proposals, advised on investment policy and promoted both domestic and foreign investment.<sup>1129</sup> During this period, enterprises could be one 100 percent foreign owned, but there was in effect strong preference for joint ventures with local partners.<sup>1130</sup> Ownership restrictions in some sectors required at least 30 percent of local participation in an enterprise.<sup>1131</sup> With the Statutory Instrument of 1994,<sup>1132</sup> the government established a list of sectors that were reserved for domestic investors and attempted to encourage joint ventures between foreign and local investors. In 1996, the Zimbabwe Programme for Economic and Social Transformation (ZIMPREST), the successor to ESAP, was established and among its objectives was to facilitate investment.<sup>1133</sup> Similar to its predecessor, ZIMPREST's performance was not impressive.<sup>1134</sup> In 1996, the government promulgated the Export Processing Zones (EPZs) Act<sup>1135</sup> to provide for foreign investment incentives.<sup>1136</sup>

Since the year 2000, there have been a series of government initiatives and policies which magnified risks for foreign investors and prompted the majority of foreign investors to emigrate

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<sup>1124</sup> See generally Saunders "Economic Structural Adjustment Programme (ESAP)'s Fables II" Southern Africa Report 4 (July 1996) <http://www.africafiles.org/article.asp?ID=3876> (accessed 02-05-2015).

<sup>1125</sup> Ibid.

<sup>1126</sup> Zimbabwe Investment Centre Act 16 of 1992 (Chapter 24:16) (as amended).

<sup>1127</sup> Ibid the preamble.

<sup>1128</sup> Ibid section 3.

<sup>1129</sup> The functions of the Centre were provided for in section 19 of the ZIC Act.

<sup>1130</sup> Gwenhamo (2009) Economics Research Southern Africa Working Paper 144.

<sup>1131</sup> Ibid.

<sup>1132</sup> The Statutory Instrument 108 of 1994, an initiative to promote indigenisation of the economy, gazetted a list of sectors reserved for local investors. In terms of the Statutory Instrument, foreign investors were allowed to take up only to 20 percent of equity in companies undertaking projects in the reserved sector list.

<sup>1133</sup> The ZIMPREST was an economic blueprint documented in Zimbabwe Program for Economic and Social Transformation 1996-2000. It was sponsored by the International Financial Institution and was designed to restructure public enterprises, reform the financial sector and with a proposed market-oriented land reform (forcing land taxes and subdivision). See *Zimbabwe Program for Economic and Social Transformation 1996-2000* (1998).

<sup>1134</sup> See Moyo "Land Policy, Poverty Reduction and Public Action in Zimbabwe" (2005) Institute of Social Studies/United Nations Development Programme Land, Poverty and Public Action Policy Paper 11 6.

<sup>1135</sup> Export Processing Zones Act Acts 22 of 2001 (Chapter 14:07) (as amended).

<sup>1136</sup> The benefits of the EPZs included a five-year tax holiday, duty-free importation of raw materials and capital equipment for use in the EPZs, and no tax liability from capital gains arising from the sale of property forming part of the investment in EPZs. See EPZs Act.

from the country.<sup>1137</sup> For instance, in 2000, the Zimbabwean government sanctioned the compulsory seizure of privately-owned agricultural land<sup>1138</sup> which undermined the security of property rights and eventually strained Zimbabwe's relations with the United States (US) and the EU since most of the farms appropriated belonged to their nationals.<sup>1139</sup> As a result, economic sanctions were imposed by the US, the EU and Australia against Zimbabwe.<sup>1140</sup> These sanctions led to a critical shortages of foreign currency, decline of FDI inflows<sup>1141</sup> and Zimbabwe was unable to obtain financial and credit loans from multilateral financial institutions such as the World Bank, the IMF and the African Development Bank.<sup>1142</sup> When Zimbabwe's relations with the US and the EU deteriorated, the government of Zimbabwe began to establish economic ties with the Asian countries, particularly China under the 'Look East Policy'.<sup>1143</sup>

In 2005, FDI into Zimbabwe further decreased. According to the 2006 World Investment Report compiled by the United Nations Conference on Trade and Development (UNCTAD), FDI inflows dropped from US\$103 million in 2005 to US\$40 million in 2006 as a result of Zimbabwe's severe economic crisis.<sup>1144</sup> In 2007, the government enacted the Indigenisation and Economic Empowerment Act (Indigenisation Act)<sup>1145</sup> which mandates all foreign-owned companies with a share capital above US\$500 000 operating in Zimbabwe to cede 51 percent of their shares or interests therein to indigenous Zimbabweans.<sup>1146</sup> In 2008, the government amended the Mines and Minerals Act<sup>1147</sup> to incorporate indigenisation requirements in the

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<sup>1137</sup> US Department of State Diplomacy in Action "2012 Investment Climate Statement – Zimbabwe" Bureau of Economic and Business Affairs Report (June 2012) <http://www.state.gov/e/eb/rls/othr/ics/2012/191267.htm> (accessed 02-05-2015).

<sup>1138</sup> The fast track land reform programme was documented in Government of Zimbabwe *Fast Track Land Reform Programme* (2001).

<sup>1139</sup> See US Department of State Diplomacy in Action "2012 Investment Climate Statement – Zimbabwe" Bureau of Economic and Business Affairs Report (June 2012).

<sup>1140</sup> Ibid.

<sup>1141</sup> The Report on attracting FDI by the Foreign Affairs Parliamentary Portfolio Committee has cited sanctions by the EU and the US, corruption and inadequate funding of the ZIA as some of the major challenges impeding foreign investors into Zimbabwe. See "Corruption scares Investors" [http://www.zbc.co.zw/index.php?option=com\\_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86](http://www.zbc.co.zw/index.php?option=com_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86) (accessed 18-03-2015).

<sup>1142</sup> US Department of State Diplomacy in Action "2012 Investment Climate Statement – Zimbabwe" Bureau of Economic and Business Affairs Report (June 2012).

<sup>1143</sup> The Look East Policy, launched in 2004, has been pursued as a method of circumventing western sanctions and by engaging with China, as an instrument to force the west back into investing in Zimbabwe on conditions consistent with its indigenisation policy. See Chun "China-Zimbabwe Relations: A Model of China-Africa Relations?" *SAIIA Occasional Papers* (2014) 205.

<sup>1144</sup> UNCTAD World Investment Report 2006.

<sup>1145</sup> Indigenisation and Economic Empowerment Act 14 of 2007.

<sup>1146</sup> Ibid section 3 (1).

<sup>1147</sup> Mines and Minerals Act Acts 38 of 1961 (Chapter 21:05) (as amended).

mining sector. The amendment would require mining firms to transfer 51 percent ownership shares to the state and 25 percent of the shares would be without compensation.<sup>1148</sup> Until the end of 2008, high levels of hyperinflation, valueless currency as well as complicated exchange-rate policies made it difficult for investors to obtain foreign currency amid continued shortages of fuel, electricity and other important goods.<sup>1149</sup> In the World Bank's 2012 Doing Business Report, Zimbabwe was ranked 122 out of 183 countries with respect to the country's ability to protect investment.<sup>1150</sup> The US Department of State Diplomacy in Action Report observed that in the absence of comprehensive reforms Zimbabwe's investment climate will remain unattractive and the economy will remain in stagnation.<sup>1151</sup> It is a fact that Zimbabwe urgently needs FDI that injects much-needed capital into the economy, creates jobs, develops infrastructure and which spawns spillover effects through general improvements in productivity, efficiency, skills development and technology transfer cross relevant sectors.<sup>1152</sup> In 2011, FDI in Zimbabwe was worth US\$380 million and its major sources were China, Mauritius and South Africa.<sup>1153</sup> During this period, Zimbabwe signed Bilateral Investment Treaties (BITs) with these countries to protect the investors originating from these countries. For instance, in November 2009, the governments of South Africa and Zimbabwe signed the Reciprocal Protection of Investments Agreement<sup>1154</sup> to assist South African investors in the protection of their investments and apply, *mutatis mutandis*, to Zimbabwean investors and their investments in South Africa. The EU has cited political uncertainty, controversial agrarian reforms, and expropriation of private property, economic mismanagement, corruption and hostile policies as some of the determinants that have caused increased FDI outflows from Zimbabwe.<sup>1155</sup>

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<sup>1148</sup> US Department of State Diplomacy in Action "2012 Investment Climate Statement – Zimbabwe" Bureau of Economic and Business Affairs Report (June 2012).

<sup>1149</sup> Ibid

<sup>1150</sup> See World Bank Doing Business Report 2012.

<sup>1151</sup> US Department of State Diplomacy in Action "2012 Investment Climate Statement – Zimbabwe" Bureau of Economic and Business Affairs Report (June 2012).

<sup>1152</sup> Kahiya "Musings on Attracting and Vetting Foreign Direct Investment" *Zimbabwe Independent*, 5 January 2015 <http://www.theindependent.co.zw/2015/01/02/musings-attracting-vetting-foreign-direct-investment/> (accessed 29-04-2015).

<sup>1153</sup> Zimbabwe Investment Authority "FDI in Zimbabwe" [http://www.investzim.com/index.php?option=com\\_content&view=article&id=272&Itemid=685](http://www.investzim.com/index.php?option=com_content&view=article&id=272&Itemid=685) (accessed 04-04-2015).

<sup>1154</sup> 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 on November 27, 2009.

<sup>1155</sup> Tshuma "Zimbabwe: Indigenisation Still a Barrier" *Financial Gazette*, 1 May 2014 <http://allafrica.com/stories/201405010619.html> (accessed 30-04-2015).

This Chapter aims to critically assess the legal protection of FDI in Zimbabwe. However, it is important to note that the assessment will not cover the entire investment regime of Zimbabwe but rather focus will be on selected investment laws and related policies. In particular, the ZIA Act, indigenisation laws, the land reform laws as well as the municipal legal framework for enforcement of foreign arbitral awards will be interrogated. An assessment of the investment laws and related policies, in this Chapter, will establish whether or not these laws and policies are consistent with the international norms on FDI protection. In consequence, the said investment laws and related policies of Zimbabwe will be assessed against the minimum international norms, standards and/or best practices on the protection of foreign investment outlined in Chapter 3 of this study.

Zimbabwe provides legal protection for all investors in the country through its Constitution which guarantees the right to property ownership and prohibits expropriation of property without adequate compensation.<sup>1156</sup> In addition, Zimbabwe is a signatory to a number of international investment and related treaties including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention),<sup>1157</sup> the Convention establishing the Multilateral Investment Guarantee Agency (MIGA Convention),<sup>1158</sup> the Agreement on Trade-Related Investment Measures (TRIMs Agreement),<sup>1159</sup> and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>1160</sup> The government of Zimbabwe has also signed several BITs guaranteeing the protection of investment with many countries.<sup>1161</sup> However, it is submitted that in spite of the said constitutional guarantees and being a signatory to

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<sup>1156</sup> See section 71 of the Constitution of the Republic of Zimbabwe, 2013.

<sup>1157</sup> Zimbabwe signed the Washington Convention on 25 March 1991, ratified it on 20 May 1994 and the Convention entered into force in Zimbabwe on 19 July 1994. The Washington Convention also known as the Convention establishing the International Centre for Settlement of Investment Disputes established in 1965 and entered into force in 1966, is a procedural multilateral agreement formulated within the World Bank framework which furnishes a comprehensive regime for the settlement of disputes between foreign investors and host states.

<sup>1158</sup> Zimbabwe is a signatory to the MIGA Convention established in 1988. The MIGA Convention guarantees investment made by foreign investors against political and non-commercial risks in developing countries.

<sup>1159</sup> Zimbabwe is a member of the Agreement on Trade-Related Investment Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex IA, Legal Instruments-Results of the Uruguay Round (1994) (hereafter “TRIMs Agreement”). The TRIMs Agreement is an instrument of the World Trade Organisation (WTO) which sets rules relating directly to foreign investment and it is however not a comprehensive investment instrument but only deals with certain performance requirements.

<sup>1160</sup> Zimbabwe acceded to the New York Convention, established in 1958, on July 19, 1994. The New York Convention is a multilateral agreement which governs the recognition and enforcement of foreign arbitral awards.

<sup>1161</sup> The Zimbabwean government has signed a number of BITs with 17 countries including, among others, UK, China, South Africa, Denmark, Germany, Mozambique, Malaysia, Netherlands, Portugal, Switzerland, Egypt, Yugoslavia, Iran, India, Indonesia and Jamaica. However, only six of these BITs (with South Africa, Netherlands, Denmark, South Korea, Switzerland and Germany) have been ratified.

international investment treaties, Zimbabwe has been in the international spotlight for not protecting, in practice, foreign investors within its territory.<sup>1162</sup>

It is submitted that the mere fact that Zimbabwe has subscribed to a plethora of international investment treaties is an indication of its intention to assure investment protection which conform to global standards on the protection of foreign investment.<sup>1163</sup> In principle, international agreements are binding among the contracting parties under which each party undertakes certain obligations with respect to investments made by nationals of other countries within its territory.<sup>1164</sup> Article 26 of the Vienna Convention on the Law of Treaties (VCLT)<sup>1165</sup> declares that every treaty is binding upon parties to it and obligations created by it must be performed by the parties in good faith. In accordance with Article 18 of the VCLT, Zimbabwe further undertakes an obligation not to undermine the object and purpose of treaties to which it is a signatory. That said, it is imperative for Zimbabwe to respect, protect and fulfil in good faith the obligations it has assumed under the various international, regional and bilateral investment agreements.<sup>1166</sup>

In addition to the foregoing, the Constitution of Zimbabwe endorses the application of international rules within in its municipal law. The Constitution reveals a clear determination to ensure that Zimbabwean laws and the Constitution itself are interpreted to comply with international law. Specifically section 46 (1) (c) of the Constitution requires courts to have due regard to principles of public international law and all treaties and conventions to which Zimbabwe is a part when interpreting the constitutionally protected rights. This further resonates with section 327 (6) of the Constitution which provides that when interpreting any legislation, every court and tribunal must adopt a reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe. In addition, section 12 (1) (b) of the Constitution stipulates that international law must form the basic principles of Zimbabwean foreign policy. Within the ambit of this study, this means that any legislation and/or policy that affects investors' rights should be interpreted, as far as reasonably possible, in conformity with applicable international law. Section 2 (1) of

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<sup>1162</sup> See Chokuda "International Investment Dispute Resolution: A Review of the Resolution Investment Disputes Arising out of the Land Reform Programme in Zimbabwe" 2009 21 *South African Mercantile Law Journal* 753.

<sup>1163</sup> See Kerner "Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties" 2009 53 *International Studies Quarterly* 73.

<sup>1164</sup> See Schefer *International Investment Law: Text, Cases and Materials* (2013) 33.

<sup>1165</sup> The Vienna Convention on the Law of Treaties of 1969 entered into force on 27 January 1980.

<sup>1166</sup> See Ebobrah and Nkhata "Is the SADC Tribunal under Judicial Siege in Zimbabwe? Reflections on *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*" 2010 XLII *Comparative International Law of Southern Africa* 85-86.

the Constitution provides that the “Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the inconsistency.”

In addition to the above, section 326 (1) of the Constitution treats customary international law (CIL) as part of the domestic law of Zimbabwe to the extent that such CIL is not inconsistent with the Constitution and any Act of Parliament.<sup>1167</sup> Section 34 of the Constitution states that “the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a part are incorporated into domestic law.” Simultaneously, section 327 (2) of the Constitution provides that “an international treaty which has been concluded or executed by the President or under the President’s authority does not bind Zimbabwe until it has been approved by Parliament; and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.”<sup>1168</sup> It is against this background, that the selected Zimbabwean investment laws and related policies will be assessed against the minimum international standards, norms and/or best practices discussed in Chapter 3 of this study.

## 5.2 THE ZIA ACT

Until 2006, investment in Zimbabwe was statutorily governed by the ZIC Act and the EPZs Act. In 2006, the ZIA Act was enacted and it repealed the ZIC Act and the EPZs Act. The ZIA Act is now the principal legislation that governs the approval, registration and facilitation of investment in Zimbabwe. The Act establishes the Zimbabwe Investment Authority (the Authority). The Authority is a statutory body established by section 3 of the ZIA Act with the mandate to, *inter alia*, promote, facilitate, register and co-ordinate both domestic and foreign investment in the country.<sup>1169</sup> It is a merger of the former EPZs Authority and the Centre.<sup>1170</sup> It is submitted that the intention is to provide a one-stop-shop for investors providing them with all the relevant investment information and facilitation to obtain licences and authorisations required to establish a business in Zimbabwe. The ZIA Act guarantees all investors legal protection of their investments. Section 32 of the Act pronounces that “the property or interest

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<sup>1167</sup> For such international law to be binding on Zimbabwe, two elements must be satisfied and these include, state practice (*usus*) and states’ acceptance of an obligation to be bound (*opinio-juris*). See *Libya/Malta* ICJ Reports 1985 paras 13, 29. See also Roberts “Traditional and Modern Approaches to Customary International Law: A Reconciliation” 2001 95 *American Journal of International Law* 757.

<sup>1168</sup> In Zimbabwe, a rule of international law emanating from a treaty which has been ratified by Zimbabwe does not create any legal rights for citizens under national law unless it has been incorporated in an Act of Parliament. See Madhuku *An Introduction to Zimbabwean Law* (2010) 40.

<sup>1169</sup> See section 7 of the ZIA Act.

<sup>1170</sup> *Ibid* sections 35 and 36.



or right therein of every investor to whom an investment licence has been issued ... shall be accorded every protection afforded by the law of Zimbabwe.”

### **5 2 1 Investment establishment, registration and licensing processes**

Section 13 (1) of the ZIA Act provides that any investor who wishes to establish a new investment in Zimbabwe should first apply at the Authority for approval of the investment project accompanied by a prescribed fee. But an investment into an existing company requires the approval of the Exchange Control Authority of the Reserve Bank of Zimbabwe.<sup>1171</sup> The Investment Committee (the Committee)<sup>1172</sup> will then decide whether the proposed project is in accordance with all the rules and regulations that govern investment in Zimbabwe. The Committee is responsible for making recommendations to the ZIA Board (the Board)<sup>1173</sup> to approve or refuse any investment applications submitted to the Authority by any prospective domestic or foreign investors. In accordance with section 13 (4) of the ZIA Act, within 21 days after receiving the recommendations of the Committee, the Board will either approve or reject the recommendations; or return the application for further consideration by the Committee. When approving the applications for any investment licences, the Board shall have regard to a number of considerations including: among others, the extent of skills and technology transfer; extent of employment creation and human resources development; the impact of the proposed investment on local industries; and its impact on the environment.<sup>1174</sup> Section 25 (2) of the ZIA Act authorises the Minister of Industry and International Trade to specify the sectors of the economy available for investment by domestic and foreign investors as well as the sectors reserved for domestic investors for the purpose of promoting equitable participation in the economy by domestic investors.<sup>1175</sup> It is submitted that this provision goes along with the contemporary development goals of Zimbabwe aimed at empowering the indigenous citizens in the economic activities of the country.<sup>1176</sup> Once the investment is approved by the ZIA, an investment license is issued to the investor in terms of section 15 of the ZIA Act. Section 37 of the ZIA Act states that every holder of an EPZ license issued under the EPZs Act shall apply at ZIA for an investment license under the ZIA Act. The investment license specifies the

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<sup>1171</sup> The Authority “Establishing a Business in Zimbabwe” [http://www.investzim.com/index.php?option=com\\_content&view=article&id=252&Itemid=673](http://www.investzim.com/index.php?option=com_content&view=article&id=252&Itemid=673) (accessed 05-04-2015).

<sup>1172</sup> For the constitution of the Committee, see section 6 (2) of the ZIA Act.

<sup>1173</sup> The Board controls and manages the operations of the Authority. For the constitution of the Board, see section 5 of the ZIA Act.

<sup>1174</sup> See section 14 of the ZIA Act.

<sup>1175</sup> Ibid section 25 (2) (a) and (b).

<sup>1176</sup> See section 14 of the Constitution.

description, nature, approved activities and conditions of the investment, the nature and value of foreign assets to be invested, the period within which it shall be invested, date of issue and expiry of the license, and any other matters considered necessary.<sup>1177</sup> Section 16 of the ZIA Act stipulates that the investment license is valid for a definite period prescribed by the Board from the date of issue and may be renewed before the date of its expiry in terms of section 17 of the ZIA Act. Immediately after obtaining the investment licence, the investor must register with the Zimbabwe Revenue Authority (ZIMRA)<sup>1178</sup> for tax purposes.

## **5 2 2 Monitoring compliance with the ZIA Act**

The Authority is established as a corporate body capable of suing and being sued in its own name as well as performing all acts that corporate bodies may by law perform.<sup>1179</sup> The functions of the Authority also include supervise, monitor and evaluate compliance with the ZIA Act.<sup>1180</sup> The Authority is also authorised to “visit any premises and inspect any financial statements, books and other documents in order to ensure compliance with any conditions subject to which any investment licence was issued.”<sup>1181</sup> It also keeps a register of all investment licences, including the conditions to which each licence is issued, as well as all amendments, suspensions and cancellations of investment licences.<sup>1182</sup> This register is open to members of the public on payment of a prescribed fee.<sup>1183</sup>

## **5 2 3 Offences and penalties**

The ZIA Act arms the Authority with the power to cancel or suspend any investment licence in cases where the investor: obtained an investment licence through fraud, material misrepresentation or any false or misleading statement; fails without reasonable explanation to implement the approved activity; or fails to comply with any conditions imposed on the issue of the licence.<sup>1184</sup> The Act creates an offence for intentional misrepresentation of information for the purposes of obtaining an investment licence. In particular, section 30 of the Act postulates that “any person who, when submitting an application for an investment licence, makes any statement knowing it to be false in a material particular or not reasonably believing

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<sup>1177</sup> See section 15 (3) of the ZIA Act.

<sup>1178</sup> The ZIMRA is the agent of the state that is in charge of assessing, collecting and reinforcing the payment of all revenues in terms of the Revenue Authority Act 17 of 1999 (Chapter 23:11) (as amended).

<sup>1179</sup> See section 3 of the ZIA Act.

<sup>1180</sup> Ibid section 7 (f).

<sup>1181</sup> Ibid section 21.

<sup>1182</sup> Ibid section 18.

<sup>1183</sup> Ibid.

<sup>1184</sup> Ibid section 22.

it to be true, shall be guilty of an offence and liable to a fine not exceeding level six<sup>1185</sup> or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

#### **5 2 4 Compliance of the ZIA Act with international norms on investment protection**

As emerged in Chapter 3 of this study, host states have the discretion to determine the admission or approval of FDI into their territories.<sup>1186</sup> Thus a host state may specify conditions upon which foreign investment may be admitted or approved into its territory.<sup>1187</sup> For example, Article 2 (1) of Annex 1 of the Southern African Development Community Protocol on Finance and Investment (SADC FIP)<sup>1188</sup> provides that states shall admit investment in accordance with their laws and regulations. As noted above, in considering the admission of foreign investment, the Board shall have regard to, *inter alia*: the extent to which skills and technology will be transferred for the benefit of Zimbabwe and its people; the extent to which the proposed investment will lead to employment creation and development of human resources;<sup>1189</sup> the extent to which local raw materials will be utilised and beneficiated; the value of convertible foreign currency transferred into Zimbabwe by the proposed investment; the impact of the proposed investment on the environment and the economy; and the possibility of technology transfer.<sup>1190</sup>

Nevertheless, host states are prohibited from imposing conditions upon the admission of foreign investment which arbitrarily prejudice foreign investors as well as the binding rules of international law.<sup>1191</sup> Article II of the WB Guidelines requires states to advance the admission and establishment of investments by foreign investors and avoid making complicated procedural regulations or imposing unnecessary conditions on the admission of such investments. As already noted, the foregoing is tantamount to the international norm of

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<sup>1185</sup> Level six provides for offences for which a sentence of periodical imprisonment may be imposed. See Sixth Schedule and section 345 of the Criminal Procedure Act and Evidence Act 3 of 2009 (Chapter 9:07) (as amended).

<sup>1186</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 30. See also UNCTAD “Admission and Establishment” *UNCTAD Series on Issues in International Investment Agreements* (1996) 247.

<sup>1187</sup> Ibid.

<sup>1188</sup> SADC Protocol on Finance and Investment, 2006.

<sup>1189</sup> Unlike the Black Economic Empowerment (BEE) policy of South Africa, the employment creation and human resources of the ZIA Act are non-mandatory in character. See Organisation for Economic Co-operation and Development (OECD) “Self-Assessment of South Africa’s Investment Regime in Relation to the OECD Codes of Liberalisation and the Principle of National Treatment” *OECD-South Africa Investment Policy Dialogue* (2014) 17. According to Article 7 (4) of the Southern African Development Community Model Bilateral Investment Treaty (hereafter “SADC Model BIT”), host states may require foreign investors to institute training programs or establish mentoring programs for the purposes of increasing the number of senior management positions occupied by its nationals.

<sup>1190</sup> Section 14 of the ZIA Act.

<sup>1191</sup> See the preamble of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992 (hereafter “WB Guidelines”).

liberalisation of FDI law and policies which commands the removal of restrictive measures against the admission of foreign investors.<sup>1192</sup> It is submitted that the requirements of foreign investment admission under the ZIA Act are flexible. More important is that the considerations for approving investments equally apply to both domestic and foreign investors. Thus foreign investors in Zimbabwe possess the same rights as domestic investors under the ZIA Act.

### 5.3 THE LAND REFORM POLICY<sup>1193</sup>

In order to understand the current state of affairs in the context of the Zimbabwean land reform policy, a holistic approach is a prerequisite.<sup>1194</sup> It is essential for anyone desiring to critically assess Zimbabwe's land reform policy and its ramifications to first take into account important historical events that shaped the policy with its present problematic dimensions.<sup>1195</sup> Therefore, this part of the Chapter discusses the historical background of land ownership in Zimbabwe before and after independence from colonial rule. The legal framework under which this policy is proceeding is also scrutinised. The implications of this land reform policy for investment protection in Zimbabwe is what this Chapter seeks to address. Finally, the land reform laws are evaluated against minimum international norms on the protection of foreign investment.

Historically, the colonial government of Zimbabwe denied black citizens access to land and other property rights among other things through discriminatory policies and legislation.<sup>1196</sup> In *In Re Southern Rhodesia*,<sup>1197</sup> the Privy Council confirmed that all unalienated land belonged to the British Crown and that land being expropriated from Africans was *terra nullius*; that is,

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<sup>1192</sup> See UNCTAD *Investment Policy Monitor* (2014).

<sup>1193</sup> The land reform of Zimbabwe, similar to the one adopted by several countries, was a central demand of the nationalist movement and the armed liberation struggle which sought popular sovereignty and majority rule including control over land, natural resources and economy. See Moyo and Chambati "Introduction: Roots of the Fast Track Land Reform in Zimbabwe" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 2.

<sup>1194</sup> Ndlovu "Following the NAFTA Star: SADC Land Reform and Investment Protection after the Campbell Litigation" 2011 15 *Law, Democracy and Development* 60.

<sup>1195</sup> *Ibid.*

<sup>1196</sup> According to the International Commission of Jurists (ICJ) Report of 1976 11-12, the objective of the legislation was to strengthen white dominion over the most fertile and economically important land while maintaining the African population as the labouring class. See also Magure "Foreign Investment, Black Economic Empowerment and Militarised Patronage Politics in Zimbabwe" 2012 *Journal of Contemporary African Studies* 67-82. During the colonial era, land ownership in Zimbabwe was largely based on unequal and repressive agrarian relations as the colonial government enforced legislation which resulted in mass expropriation of prime agricultural land by the colonial settlers and the subsequent marginalisation of black people into reserves now known as communal areas. These pieces of legislation included the Land Apportionment Act of 1930, which divided land into white and black areas; the Native Land Husbandry Act of 1951 which conferred individual rights a households and established strict farming methods as an attempt at environment conservation; and the Communal Lands Act 20 of 1982 (Chapter 20:04) (as amended) which provided for the classification of communal lands and emasculated the powers of traditional leaders.

<sup>1197</sup> *In Re Southern Rhodesia* (1919) AC 210. See also Ndlovu 2011 15 *Law, Democracy and Development* 61. Ndlovu argues that during the colonial period, law was used as a tool to legitimise expropriation of land.

not owned by any person because the local tribes were not sufficiently civilised to have developed any recognisable property rights over the land. Therefore, at independence Zimbabwe inherited a highly unequal pattern of land distribution.<sup>1198</sup> Immediately after attaining independence, the government intended to acquire millions of hectares of land to resettle landless families.<sup>1199</sup> Zimbabwe's land reform practice since 1980 has entailed three distinct approaches or phases of land redistribution and/or acquisition which differed markedly in the nature, approach and objective.<sup>1200</sup>

In 1979, the now defunct Lancaster House Constitution (LHC)<sup>1201</sup> was signed which incorporated provisions on the acquisition of land by the state for resettlement purposes. The LHC provided for land reform only on a willing buyer-willing seller basis as well as upon prompt payment of adequate compensation to land owners in foreign currency.<sup>1202</sup> It is suggested that the LHC slowed down land redistribution because it protected settler political power and proscribed land expropriation leading to limited land redistribution using a market based land acquisition mechanism.<sup>1203</sup> In particular, section 16 of the LHC clearly cemented the historical inequitable land tenure relations as it guaranteed protection for the property rights of the white commercial farmers for the first decade of independence. This constitutional provision led to the enactment of the Communal Land Act<sup>1204</sup> and Land Acquisition Act.<sup>1205</sup>

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<sup>1198</sup> Chitsike "A Critical Analysis of the Land Reform Programme in Zimbabwe" (2003) Paper presented at the 2nd FIG Regional Conference, Marrakech, Morocco [https://www.fig.net/pub/morocco/proceedings/TS4/TS4\\_4\\_chitsike.pdf](https://www.fig.net/pub/morocco/proceedings/TS4/TS4_4_chitsike.pdf) (accessed 02-04-2015).

<sup>1199</sup> Chinamasa *The Human Right to Land in Zimbabwe: The Legal and Extra-legal Resettlement Processes* (LLM-thesis, University of Makerere, 2001) 2.

<sup>1200</sup> The first phase (1980-1989) land reform was based on state-led purchases of land on the market and its allocation to selected beneficiaries, in the context of heterodox economic policies, which enabled increased public spending on social services and peasant agriculture. The second phase (1990-1997), neoliberal policies restricted state interventions in markets, in general and restricted social welfare subsidies. In the third phase (post 1997), an escalating social crisis, which culminated in extreme political polarisation by 1997, saw the land redistribution programme shift towards land expropriation, leading to extensive land redistribution and increased state interventions in the economy, alongside bitterly contested elections. See Moyo "Three decades of agrarian reform in Zimbabwe" 2011 38 *Journal of Peasant Studies* 493-53; Moyo "Land Reform and Redistribution in Zimbabwe since 1980" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 30; and Moyo "Land Concentration and Accumulation after Redistributive Reform in Post-Settler Zimbabwe" 2011 38 *Review of African Political Economy* 257-276.

<sup>1201</sup> Lancaster House Constitution, 1979. See also Annex C of the Lancaster House Agreement, 1979.

<sup>1202</sup> Section 16 of the LHC.

<sup>1203</sup> Through entrenched constitutional provisions that protected whites only, the government was prevented from undertaking the necessary land reform over the first 10 years of independence. See Moyo and Chambati "Introduction: Roots of the Fast Track Land Reform in Zimbabwe" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 3. See also Von Horn "Redefining 'Property': The Constitutional Battle over Land Redistribution in Zimbabwe" 1994 38 *Journal of African Law* 144-172.

<sup>1204</sup> Communal Land Act 20 of 1982 (Chapter 20:04) (as amended).

<sup>1205</sup> Land Acquisition Act 3 of 1992 (Chapter 20:10) (as amended).

These legislations were aimed at facilitating the land redistribution process sanctioned by the LHC.

In 1990, the said LHC restrictions on land expropriation were partially removed and the Land Acquisition Act<sup>1206</sup> was enacted shortly thereafter to enable the state to expropriate land for redistribution.<sup>1207</sup> In effect, after 1990, there was a series of amendments to the LHC aimed at limiting the degree of protection afforded by the LHC on land redistribution.<sup>1208</sup> These amendments sought to terminate the willing seller-willing buyer principle as well as to authorise the government to compulsorily acquire land upon payment of compensation determined by the Minister of Lands.<sup>1209</sup> In 1992, the Land Acquisition Act was enacted to give effect to these constitutional amendments thereby improving the amount of land to be acquired for resettlement.<sup>1210</sup> In 1997, the government published a list of 1 471 farms it intended to compulsorily acquire for redistribution and the land owners were given 30 days to submit written objections.<sup>1211</sup>

In 1998, land occupations were targeted at farms designated by the government, but this was made impossible due to the litigation commenced by white commercial farmers.<sup>1212</sup> In July 2000, the government launched a more radical approach<sup>1213</sup> to the land reform policy which became known as the fast track land reform programme.<sup>1214</sup> The programme, mobilised and led

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<sup>1206</sup> The Land Acquisition Act empowered the government to acquire land it deems necessary by expropriation; determine and pay a fair compensation within a reasonable time for land expropriated; pay compensation in local currency; and restrict ownership of land to one farm only unless exemption is justified.

<sup>1207</sup> Moyo "Land Reform and Redistribution in Zimbabwe since 1980" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 33.

<sup>1208</sup> See, for example: Constitution of Zimbabwe Amendment (No.10) Act, 1990; Constitution of Zimbabwe Amendment (No.11) Act, 1990; Constitution of Zimbabwe Amendment (No. 12) Act, 1993; Constitution of Zimbabwe Amendment (No.13) Act 1993; Constitution of Zimbabwe Amendment (No.14) Act, 1996; Constitution of Zimbabwe Amendment (No.15) Act, 1998; Constitution of Zimbabwe Amendment (No.16) Act, 2000; Constitution of Zimbabwe Amendment (No.17) Act, 2005; Constitution of Zimbabwe Amendment (No.18), 2007; Constitution of Zimbabwe Amendment (No.19) Act, 2008; and Constitution of Zimbabwe Amendment (No.20) Act, 2013.

<sup>1209</sup> Ibid.

<sup>1210</sup> Following the enactment of this Land Acquisition Act, the government of Zimbabwe embarked on a land reform programme on which it compulsorily acquired commercial farm land mainly from white commercial farmers. Chitsike (2003) Paper presented at the 2nd FIG Regional Conference, Marrakech, Morocco 9.

<sup>1211</sup> Chinamasa (LLM-thesis, University of Makerere, 2001) 3.

<sup>1212</sup> Ibid.

<sup>1213</sup> The land reform programme which started in 2000 saw an estimated 4 000 white commercial farmers being thrown off their land without compensation. See Moyo and Chambati "Introduction: Roots of the Fast Track Land Reform in Zimbabwe" in Moyo and Chambati (eds) *Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 1.

<sup>1214</sup> For a more information on the fast track land reform programme, see Government of Zimbabwe *Fast Track Land Reform Programme* (2001). See also Sadomba *War veterans in Zimbabwe: Complexities of a Liberation Movement in an African Post-Colonial Settler Society* (PhD-thesis, Wageningen University, 2008) Chapters 3 and 4; Sadomba "A Decade of Zimbabwe's Land Revolution: The Politics of the War Veteran Vanguard" in Moyo

by liberation war veterans, stimulated massive illegal land occupations and entailed state land expropriation.<sup>1215</sup> The bureaucracy formalised two fast track land reform allocation schemes known as the A1<sup>1216</sup> and A2.<sup>1217</sup> Immediately, the government pushed through Parliament a constitutional amendment which gave the government no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.<sup>1218</sup> The amendment significantly extended the grounds upon which land could be compulsorily acquired and absolved the government from paying compensation thereof except for land improvements.<sup>1219</sup>

In 2005, in order to avoid legal challenges to the land reform policy, the government of Zimbabwe enacted the Constitution Amendment 17 to authorise the expropriation of foreign owned land without compensation. Section 16B (2) (b) of this Constitution confirmed the acquisition of agricultural land for resettlement by the state pursuant to the land reform programme without compensation except for improvements effected prior to acquisition.<sup>1220</sup> In addition, section 16B (3) (a) and (b) of this Constitution ousted the jurisdiction of the courts to entertain any challenge concerning acquisitions guaranteed by section 18 (1) and (9) of this Constitution.<sup>1221</sup> Section 72 of the current Constitution retains the state's right to expropriate all agricultural land without compensation except for improvements made on the land prior to expropriation. In addition, section 72 (3) (b) of the Constitution provides that "no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application." Recently the government has introduced a new policy on land

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and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013); and Moyo *The Land Question in Zimbabwe* (1995) Chapter 2.

<sup>1215</sup> Ibid.

<sup>1216</sup> A1 (peasant or small scale farmers) targeted landless and poor families, providing land use permits on small plots for residence, cropping and common grazing. A1 permit provides similar forms of land rights to those provided under the customary tenure system in Zimbabwe's communal areas but their legal status differs as the state directly owns such land and controls the land allocation process using criteria which transcend those defined by membership to given communities. See Moyo "Land Reform and Redistribution in Zimbabwe since 1980" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 39.

<sup>1217</sup> A2 (new back commercial farmers) targeted new 'commercial' farmers, providing larger individual plots on long lease to beneficiaries with skills and/or resources. Ibid.

<sup>1218</sup> See section 16B of the Constitution Amendment 17.

<sup>1219</sup> Chinamasa (LLM-thesis, University of Makerere, 2001) 3.

<sup>1220</sup> See also *Mike Campbell (Pvt) Ltd v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (Judgment of November 28, 2008).

<sup>1221</sup> Ibid.

which allows farming joint ventures or partnership between new back farmers and former white commercial farmers.<sup>1222</sup>

### 5 3 1 Effect of Zimbabwe's land reform on foreign investment protection

As already noted above, the land reform programme was intended to redress historical settler-colonial dispossession and related racial and foreign domination as well as the class-based agrarian inequalities which the colonial rule promoted thereby broadening access to land and promoting peasant productivity.<sup>1223</sup> Instead, the implementation procedures of this programme were deemed to be unlawful<sup>1224</sup> and violent<sup>1225</sup> as well as racially motivated<sup>1226</sup> as it encroached upon the legitimate property rights of foreign land owners<sup>1227</sup> and also led to expropriation of private investments.<sup>1228</sup> The legality of the land reform policy was actively litigated in Zimbabwean courts,<sup>1229</sup> the SADC tribunal<sup>1230</sup> and the ICSID<sup>1231</sup> for the reason that it led to the expropriation of foreign-owned farms covered by Bilateral Investment Protection and Promotion Agreements.<sup>1232</sup> In spite of the foregoing, it is important to note that the land reform policy has led to a net transfer of wealth and power from a racial minority of landed persons to

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<sup>1222</sup> Jena "Zimbabwe in Land Policy U-turn" *News Day*, 5 January 2015 <https://www.newsday.co.zw/2015/01/05/zimbabwe-land-policy-u-turn/> (accessed 29-04-2015).

<sup>1223</sup> Moyo "Land Reform and Redistribution in Zimbabwe since 1980" in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 29.

<sup>1224</sup> The implementation of the land reform programme resulted in unlawful and the breakdown of the rule of law in that the perpetrators were not prosecuted and the victims were denied protection of the law as required by section 18 of the Constitution thereof, see *Commercial Farmers' Union (CFU) v Minister of Lands* 2000 (2) ZLR 469 (SC) para 483F-H. See also *George Quinnell v The Ministry of Agriculture* (SC47/04) and *CFU v The Minister of Agriculture Land and Resettlement* (HC 3985/2000).

<sup>1225</sup> See Willems "Peaceful Demonstrators, Violent Invaders: Representations of the Land Question in the Zimbabwean Press" 2005 32 *World Development* 1767-1783 and Raftopoulos "The State in Crisis: Authoritarian Nationalism, Selective Citizenship and Distortions of Democracy in Zimbabwe" in Hammar, Raftopoulos and Jensen (eds) *Zimbabwe's Unfinished Business: Rethinking Land, State and Nation in the Context of Crisis* (2003).

<sup>1226</sup> See *Campbell v. Zimbabwe* para 175; and *Mike Campbell (Pvt) Ltd v The Zimbabwe Republic Police* (SC49/07); *CFU v Minister of Lands* 2001 (2) SA 925 (ZSC) para 9.

<sup>1227</sup> See generally Willems 2005 32 *World Development* 1767-1783 and Ndlovu 2011 15 *Law, Democracy and Development* 60-85.

<sup>1228</sup> Chokuda 2009 21 *South African Mercantile Law Journal* 753. See also Von Horn 1994 38 *Journal of African Law* 144-172.

<sup>1229</sup> For instance, *CFU v Minister of Lands*; *CFU v The Minister of Agriculture Land and Resettlement*; *Mike Campbell (Pvt) Ltd v Minister of National Security Responsible for Lands, Land Reform and Resettlement* (124/06) 2008 (1) (ZWSC); and *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement* (HC3295/08) (Unreported case).

<sup>1230</sup> See *Campbell v. Zimbabwe* para 175. The SADC tribunal, established by Article 9 of the SADC Treaty, is the highest legal and institutional body seized with responsibility for adjudicating regional disputes directly or indirectly impacting on the realisation of the objectives of the Declaration and Treaty of the SADC, 1992.

<sup>1231</sup> See *Bernardus Henricus Funnekotter v Republic of Zimbabwe*, ICSID Case No. ARB/05/06 (Award of April 22, 2009); *Bernhard von Pezold v Republic of Zimbabwe* (ICSID Case No. ARB/01/15); and *Border Timbers Ltd v Republic of Zimbabwe* (ICSID Case No. ARB/20/25).

<sup>1232</sup> The majority of land owners were from European nations (such as Britain, German, Switzerland, Netherlands and Italy), the US, South Africa and Mauritius. Some of these countries had signed BITs with Zimbabwe.



various classes of black people including mostly women, landless poor classes as well as a substantial number of low-income wage earning and unemployed individuals.<sup>1233</sup>

5 3 1 1 *Funnekotter v. Zimbabwe*

In *Funnekotter v. Zimbabwe*, a group of Dutch farmers sued the government for breach of the Netherlands-Zimbabwe BIT<sup>1234</sup> before the ICSID tribunal.<sup>1235</sup> The claimants alleged that Zimbabwe had unlawfully expropriated their farms without compensation and had failed to provide full protection and security or fair and equitable treatment as mandated by the Zimbabwe-Netherlands BIT.<sup>1236</sup> In particular the claimants submitted that Zimbabwe violated, amongst others, Article 6 of the BIT which states:

neither contracting party shall subject nationals of the other contracting party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the former contracting party may have given;
- (c) the measures are accompanied by provision for the payment of just compensation.

The claimants further argued that the Zimbabwean government authorised land invasions by war veterans and eventually enacted legislation condoning such actions.<sup>1237</sup> The ICSID tribunal ruled in favour of the applicants and held that the state respondent had failed to pay just compensation as required by Article 6 (c) of the Zimbabwe-Netherlands BIT.<sup>1238</sup> Nevertheless, Zimbabwe refused to comply with the award<sup>1239</sup> and argued that it should be permitted a discounted rate or amount of compensation in view of the social purposes embedded in its land reform objectives.<sup>1240</sup> But this argument was rejected by the arbitrators pointing to the fact that

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<sup>1233</sup> See Moyo “Land Reform and Redistribution in Zimbabwe since 1980” in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 58.

<sup>1234</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands, 1996.

<sup>1235</sup> See *Bernardus Henricus Funnekotter v. Republic of Zimbabwe* (ICSID Case No. ARB/05/6), Decision of 2 April 2009. See also Schefer 199-200.

<sup>1236</sup> Schefer 199-200.

<sup>1237</sup> The government of Zimbabwe condoned these illegal land invasions by enacting legislation to justify the actions of the government and by its failure to uphold the rights of the affected farmers to end violence and bring the perpetrators to justice. See Zimbabwe Human Rights NGO Forum “Land Reform and Property Rights in Zimbabwe” 2010

[http://reliefweb.int/sites/reliefweb.int/files/resources/F83EDE2320A923844925779F001CDC97-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/F83EDE2320A923844925779F001CDC97-Full_Report.pdf) (accessed 02-04-2015).

<sup>1238</sup> Para 148.

<sup>1239</sup> See Schlemmer “Protection of Investors and Investments” 2009 *SA Merc LJ* 746.

<sup>1240</sup> Article 6 (c) of the Zimbabwe-Netherlands BIT further states that “... such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants. The

the Zimbabwe-Netherlands BIT demands payment of “just compensation”.<sup>1241</sup> Recently, a court upheld US\$25 million compensation award to Dutch farmers whose farms were seized under the land reform programme in Zimbabwe.<sup>1242</sup>

### 5 3 1 2 *Campbell v. Zimbabwe*

Ndlovu opines that though *Campbell v. Zimbabwe* was predominantly about land reform laws and policies that were contended to “discriminatory, racist and making no provision for compensation in an expropriation context, the findings do have serious implications for trade and investment protection”.<sup>1243</sup> In *Campbell v. Zimbabwe*, a group of white commercial farmers challenged the compulsory acquisition of their agricultural land by the government of Zimbabwe through the land reform programme.<sup>1244</sup> Following the unreasonable delay by the Supreme Court of Zimbabwe, Campbell supported by 78 other white commercial farmers launched proceedings before the now suspended SADC tribunal in October 2007. The applicants submitted that: the land reform programme breached Zimbabwe’s obligations under Article 4 (c)<sup>1245</sup> and 6 (2)<sup>1246</sup> of the SADC Treaty;<sup>1247</sup> that they had been denied access to the courts to challenge the legality of the compulsory acquisition of their lands;<sup>1248</sup> that they had been racially discriminated against since the land reform programme targeted only white commercial farmers;<sup>1249</sup> and that they were denied compensation in respect of their expropriated lands.<sup>1250</sup> At the time, the Constitution provided for, *inter alia*, the right not to have private property compulsorily acquired without the authority of law,<sup>1251</sup> the right to

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genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an independent firm of auditors.”

<sup>1241</sup> Ibid.

<sup>1242</sup> See “Zimbabwe: US Court Upholds US\$25 Million Compensation Award to Dutch Farmers against Zimbabwean Banks, Firms Over Seized Land” <http://allafrica.com/stories/201506060156.html> (accessed 07-06-2015).

<sup>1243</sup> Ndlovu 2011 15 *Law, Democracy and Development* 60. See also Ndlovu, “Land Reform and Investor Protection in the SADC Region” 2012 15 *International Journal of Private Law* 79-100 and Ndlovu, “Land Reform and Investment Protection after the Campbell Litigation: Can SADC Learn from NAFTA?” in Kierkegaard and Kierkegaard (eds) (2010) *Private Law: Rights, Duties and Conflicts* 856-877.

<sup>1244</sup> Ndlovu 2011 15 *Law, Democracy and Development* 65.

<sup>1245</sup> Article 4 (c) of the SADC Treaty binds the SADC member states to act in accordance with certain principles that include the principles of human rights, democracy and rule of law.

<sup>1246</sup> Article 6 of the SADC Treaty prohibits discrimination.

<sup>1247</sup> *Campbell v. Zimbabwe* 26 and 54.

<sup>1248</sup> Ibid 41. See also Ndlovu 2011 15 *Law, Democracy and Development* 67.

<sup>1249</sup> The applicants submitted that “the actions of the government of Zimbabwe in expropriating land for resettlement purpose has been based solely or primarily on consideration of race and ethnic origin ... It is being directed at white farmers ... In reality it was aimed at persons who owned land because they were white. It mattered not whether they acquired land during the colonial period or after independence”. See para 175. See also Ndlovu 2011 15 *Law, Democracy and Development* 67.

<sup>1250</sup> *Campbell v. Zimbabwe* 56-57.

<sup>1251</sup> See section 16 (1).

protection of the law,<sup>1252</sup> the right to a fair hearing and a determination of civil rights or obligations by a court of law<sup>1253</sup> and the right not to be treated in a discriminatory manner on the grounds of race and colour.<sup>1254</sup>

In response to the applicants' allegations, the respondent argued that: the SADC tribunal had no jurisdiction to entertain the application under the SADC Treaty; the government of Zimbabwe acquired land from mainly white and black farmers who owned large portions of land suitable for agricultural resettlement and this policy cannot be attributed to racism but the correction of circumstances brought about by colonial history; the applicants would receive compensation under the Constitution Amendment No. 17; the compulsory acquisition of lands belonging to applicants by the respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities; and the applicants have not been denied access to the courts but could seek judicial review.<sup>1255</sup> The SADC tribunal unanimously held that: the tribunal had jurisdiction over this matter; the land reform programme breached Articles 4 (c) and 6 (2) of the SADC Treaty; the applicants have been discriminated against on the grounds of race;<sup>1256</sup> the applicants had been denied access to courts in Zimbabwe; and that fair compensation was payable for the applicants' lands compulsorily acquired by the respondent.<sup>1257</sup>

### **5 3 2 Conformity of the land reform policy with international norms on FDI protection**

Under CIL, host states have the right to expropriate foreign-owned property within their territories.<sup>1258</sup> The right of host states to expropriate foreign-owned property is widely recognised in a number of international instruments.<sup>1259</sup> Noteworthy is the fact that this right is

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<sup>1252</sup> See section 18 (1).

<sup>1253</sup> See section 18 (9).

<sup>1254</sup> See section 23 (1).

<sup>1255</sup> *Campbell v. Zimbabwe* 16-17. See also Ndlovu 2011 15 *Law, Democracy and Development* 68.

<sup>1256</sup> With regards to racial discrimination, the SADC tribunal argued that while there was no explicit mention of race, ethnicity or people of a particular origin in Constitution Amendment 17, its implementation affected white farmers only and consequently constituted indirect or *de facto* or substantial inequality. This tribunal further held that the differentiation of the treatment of the applicants was discriminatory because the criteria for such differentiation were not reasonable and objective but arbitrary and based primarily on considerations of race. *Campbell v. Zimbabwe* 52-54. See also Ndlovu 2011 15 *Law, Democracy and Development* 68.

<sup>1257</sup> *Campbell v. Zimbabwe* 55.

<sup>1258</sup> *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006) para 423. See also *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) para 428; *De Sanchez v. Banco Central de Nicaragua* 770 F.2d 1385, 1397; and *AMCO v. Indonesia (Merits)* 89 ILR paras 405 and 466.

<sup>1259</sup> See, for example, the Charter of Economic Rights and Duties of States; GA Resolution 1803 (XVII) 1-5, UN Documents A/RES/1803), (December 14, 1962) or (Permanent Sovereignty over Natural Resources, 1962); GA Resolution 3171 (XXVIII) 1 and 3, UN Documents A/RES/3171 (XXVIII) (December 17, 1973); GA Resolution 3281 (XXIX) Article 2 (2) (c), UN Documents A/RES/29/3281 (December 12, 1974); Protocol 1 of the European

not absolute<sup>1260</sup> but is subject to a number of conditions.<sup>1261</sup> As observed in Chapter 3 of this study, there are four conditions upon which foreign-owned property can be expropriated including public purpose or interests,<sup>1262</sup> due process,<sup>1263</sup> non-discrimination<sup>1264</sup> and payment of compensation.<sup>1265</sup> In other words, expropriation of foreign-owned property is permissible if it is undertaken for public purpose or interest, in a non-discriminatory manner, in accordance with due process of law and upon payment of fair/just/adequate/appropriate/full compensation. These four conditions have emerged as international minimum standards for legitimate expropriation of foreign-owned property.<sup>1266</sup>

Nevertheless, the Zimbabwean land reform programme was found in many respects to be lacking some, if not all of the said conditions for expropriation.<sup>1267</sup> For instance, the land reform programme was said to be discriminatory as it has been based solely on considerations of race and ethnic origin.<sup>1268</sup> Hence it was aimed at white foreign nationals who owned land in Zimbabwe. The *Amoco v. Iran* tribunal stated that discrimination, in the arena of expropriation, is extensively prohibited by CIL.<sup>1269</sup> In addition, it is worth mentioning that the mere fact that the property of foreigners of different race, national or ethnic origin or other personal

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Convention for the Protection of Human Rights and Fundamental Freedoms, 1952; and Article 36 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

<sup>1260</sup> *ADC v. Hungary* para 423.

<sup>1261</sup> Jennifer “Separate and Unequal: Bilateral Investment Treaties and Property Rights in Developing Countries” (2007) Paper presented at the Annual Meeting of the Midwest Political Science Association [http://www.allacademic.com/meta/p197323\\_index.html](http://www.allacademic.com/meta/p197323_index.html) (accessed 28-08-2014).

<sup>1262</sup> See Munchlinski *Multinational Enterprises & the Law* 2 ed (2007) 599; *ADC v. Hungary* para 429; *Goetz v. Republic of Burundi*, ICSID Case No. ARB/95/3, Decision on Liability (September 12, 1998).

<sup>1263</sup> See Sandefur “In Defense of Substantive Due Process, or the Promise of Lawful Rule” 2012 35 *Harvard Journal of Law & Public Policy* 286-293; *ADC v. Hungary* para 435; Dolzer and Schreuer *Principles of International Investment Law* 2 ed (2012) 100; *Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, ICSID Case No. ARB/05/18, Award (March 3, 2010); and Reinisch “Legality of Expropriations” in Reinisch (ed) *Standards of Investment Protection* (2008) 193.

<sup>1264</sup> See *ADC v. Hungary* para 441 and *Amoco International Finance Corporation v. Iran* 15 Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Award (July 14, 1987).

<sup>1265</sup> See Walde and Sabahi “Compensation, Damages and Valuation” in Munchlinski Ortino and Schreuer (eds) *Oxford Handbook of International Investment Law* (2008) 1052; and Reinisch in Munchlinski *et al* (eds) *Oxford Handbook of International Investment Law* (2008) 48-89.

<sup>1266</sup> See Edwick *Bilateral Investment Treaties Encouraging Foreign Direct Investment: Zimbabwe – South Africa BIPPA as a Case Study* (LLM-thesis, UP, 2009) 47; Reinisch in Reinisch (ed) *Standards of Investment Protection* (2008) 173; Schreuer “The Concept of Expropriation under the ECT and other Investment Protection Treaties” in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 108; Sheppard “The Distinction between Lawful and Unlawful Expropriation” in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 169; and McLachlan, Shore and Weinger *International Investment Arbitration: Substantive Principles* (2005) 265.

<sup>1267</sup> Chokuda 2009 21 *South African Mercantile Law Journal* 753. See also Von Horn 1994 38 *Journal of African Law* 144-172.

<sup>1268</sup> See *Campbell v. Zimbabwe* para 175; *Mike Campbell (Pvt) Ltd v. The Zimbabwe Republic Police* (SC49/07); and *CFU v Minister of Lands* 2001 (2) SA 925 (ZSC) para 9.

<sup>1269</sup> Para 140.

characteristics is expropriated yet of another foreigner is not does not *per se* imply a discriminatory expropriation.<sup>1270</sup> With particular reference to compensation, the land reform policy authorised expropriation without payment of compensation except for improvements.<sup>1271</sup> Section 72 of the Constitution provides for the right of the state to expropriate agricultural land without compensation except for improvements.<sup>1272</sup> In regard to due process, although there was a proper implementation plan authorised by the law, the land reform policy, specifically the fast track land reform programme was without due process of law regardless of the immediate government's legislative enactments condoning such actions.<sup>1273</sup> Thus due process was not followed in the seizing of the foreign-owned farms by the war veterans as required by the implementation plan. With regard to the public purpose condition, the land reform programme was a means to acquire land for resettlement and redistribution purposes.<sup>1274</sup> In principle the government intended to acquire land from white commercial farmers in order to resettle landless families and redistribute it to previously marginalised black people.<sup>1275</sup> This notion can be attributed to public utility, purpose or interest. Immediately following the land reform, the government of Zimbabwe enacted and implemented the indigenisation and economic policy reminiscent of the land reform programme. It is to this indigenisation policy that this Chapter now turns.

#### 5 4 THE INDIGENISATION POLICY

The Zimbabwean colonial government utilised deliberate and systemic disempowerment mechanisms which led to the exclusion of indigenous Zimbabweans from the economic mainstream.<sup>1276</sup> During the pre-1980 era, there were a plethora of laws in Zimbabwe restricting black populations' access to economic activities as well as business control or ownership.<sup>1277</sup>

<sup>1270</sup> See *Kuwait v. American Independent Oil Company (Aminoil)*, Award 24 March 1982 para 87.

<sup>1271</sup> See *Funnekotter v. Zimbabwe* para 148.

<sup>1272</sup> Recently, the current Minister of Finance, Patrick Chinamasa told the IMF that the Zimbabwean government has committed to compensate and/or allow back on the farms the white farmers who lost their farms in the unlawful and violent farm seizures of the last 15 years as a way of injecting confidence in the economy and attracting FDI. See "IMF concludes first SMP Review: Chinamasa says government to compensate White Farmers" *Financial Gazette*, 10 March 2015 <http://www.financialgazette.co.zw/imf-concludes-first-smp-review-chinamasa-says-gvt-to-compensate-white-farmers/> (accessed 18-03-2015).

<sup>1273</sup> See Willems 2005 32 *World Development* 1767-1783. See also *CFU v Minister of Lands* 2000 (2) ZLR 469 (SC) paras 483F-H and *George Quinnell v The Ministry of Agriculture* (SC47/04) and *CFU v The Minister of Agriculture Land and Resettlement* (HC 3985/2000).

<sup>1274</sup> See Moyo 2011 38 *Journal of Peasant Studies* 493-53 and Moyo 2011 38 *Review of African Political Economy* 257-276.

<sup>1275</sup> *Ibid.*

<sup>1276</sup> Settler power restricted the emergence of an indigenous capitalist class across almost all sectors of the Zimbabwean economy. Chuwa and Mukuvare "An Analysis of Zimbabwe's Indigenisation and Economic Empowerment Programme (IEEP) as an Economic Development Approach" 2013 2 *Researchjournali's Journal of Economics* 2.

<sup>1277</sup> *Ibid.*

As a result, the government of Zimbabwe has, over the past two decades, sought to redress this systemic disempowerment of the past by fundamentally transforming the country's political, social and economic landscape. The indigenisation discussion started to gather momentum in 1990 as a major theme of political discourse in Zimbabwe. In that year, the Indigenous Business Development Centre (IBDC)<sup>1278</sup> was established to broaden indigenous participation in business activities. The original indigenisation and empowerment vision "espoused by the IBDC was not premised on the racially motivated asset stripping currently defining Zimbabwe's indigenisation culture."<sup>1279</sup> The IBDC sought to fight unemployment by increasing the size of the country's economy through the creation of new black businesses as opposed to "taking over existing companies owned by whites."<sup>1280</sup> An indigenised company was defined as one with 35 percent of its shares belonging to indigenous citizens.

In 1997, the Technical Support for the Indigenisation Policy Programme (TSIPP)<sup>1281</sup> was signed between the United Nations Development Program and the government of Zimbabwe. The immediate objectives of the TSIPP were to support government in articulating a comprehensive indigenisation project with operational guidelines and strategies to assist the government in developing a detailed intervention program for the privatisation component of the indigenisation policy.<sup>1282</sup> However, the TSIPP was without a clear policy framework and operational guidelines. Hence, the absence of a clear policy framework resulted in different interpretations of the TSIPP's aims and objectives.<sup>1283</sup> It is submitted that all these measures were intended to increase the participation of Zimbabwean indigenous citizens in business. In

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<sup>1278</sup> The IBDC was established in December 1990 due to the need to broaden indigenous participation in the business economic life of the country. Its aims and objectives were to foster, encourage, promote, protect and advance the establishment, maintenance, development and increase of indigenous owned enterprises in Zimbabwe and in so doing act as a focal point in the development of strategies. More information on the IBDC is available at <http://www.ibdczw.org/>.

<sup>1279</sup> See Moore, Kriger and Raftopoulos *Progress in Zimbabwe? The Past and Present of a Concept and a Country* (2013) 15.

<sup>1280</sup> Raftopoulos and Compagnon 22.

<sup>1281</sup> Technical Support for the Indigenisation Policy Programme Zim/97/005/01/97 was a technical assistance project agreement between the United Nations Development Programme and the government of Zimbabwe whose overall objective was to come up with a policy framework on indigenisation that sought to empower indigenous groups in order to eradicate poverty through various instruments of empowerment. It was signed in March 1997 and began to be operative in June 1997. See "Terminal Evaluation for the Project Technical Support to Indigenisation"

<http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0cbwqfjaa&url=http%3a%2f%2ferc.undp.org%2fevaluationadmin%2fdownloadaddocument.html%3fdocid%3d258&ei=jxakvy6rcixxuqkugogd&usg=afqjcnh8r5-snh-mocrnmjmh0ormlxonua&bvm=bv.88528373,d.d24> (accessed 19-03-2015).

<sup>1282</sup> Ibid.

<sup>1283</sup> Ibid.

2007, the government of Zimbabwe enacted the Indigenisation Act<sup>1284</sup> to spearhead the indigenisation policy.

#### **5 4 1 The nature of the Indigenisation Act**

The Indigenisation Act, among other issues seeks to increase the “involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation’s resources.”<sup>1285</sup> According to section 1 of the Indigenisation Act an indigenous Zimbabwean means “any person who, before the 18th of April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.” The Act’s policy objectives are to: firstly, economically empower indigenous Zimbabweans by increasing their participation through economic expansion and their productive investment in the economy so as to create more wealth for poverty eradication.<sup>1286</sup> Secondly, to create conditions that will allow the disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity.<sup>1287</sup> Thirdly, to develop a broad-based domestic private sector that is the engine of economic growth and development in a growing market economy.<sup>1288</sup> Lastly, to democratise ownership relations in the economy and eliminate racial differences arising from economic disparities.<sup>1289</sup> This Act mandates all foreign-owned companies with a share capital above US\$500 000 operating in Zimbabwe to cede 51 percent of their shares or interest therein to indigenous Zimbabweans.<sup>1290</sup> The Act has reserved a number of economic sectors for indigenous Zimbabweans.<sup>1291</sup> Section 3 (1) (f) of this Act provides for preferential procurement

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<sup>1284</sup> The Indigenisation Act was gazetted on March 7, 2008 and was signed into law on April 17, 2008. On January 29, 2010, the government of Zimbabwe published regulations with respect to the enabling Act, thereby rendering the law effective. The regulations included a requirement for companies operating in Zimbabwe to provide specified information to the Minister of Youth and Development, Indigenisation and Empowerment, including and indigenisation implementation plan by April 15, 2010.

<sup>1285</sup> Section 2 of the Indigenisation Act. See also Magure 2012 *Journal of Contemporary African Studies* 67-82.

<sup>1286</sup> Section 3 of the Indigenisation Act.

<sup>1287</sup> Ibid.

<sup>1288</sup> Ibid.

<sup>1289</sup> Ibid.

<sup>1290</sup> Ibid section 3 (1).

<sup>1291</sup> These reserved economic sectors include the following: agricultural production of food and cash crops; transport (buses, taxis and car hire services); retail and wholesale trade; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts; marketing and distribution. See <http://www.nieeb.co.zw/index.php/sectors/reserved-sectors> (accessed 02-05-2015).

from domestic companies.<sup>1292</sup> Noteworthy is that the objectives of the Act were eventually placed in the current Constitution.<sup>1293</sup>

In 2013, the Zimbabwean government crafted an economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset) to achieve sustainable economic growth and development as well as social equity, *inter alia*, anchored on indigenisation, empowerment and employment creation.<sup>1294</sup> Chapter 3 of the Zim Asset states that the blueprint is also expected to consolidate the gains and opportunities brought by the indigenisation policy and increase FDI, among other things. The objectives of the Zim Asset explicitly seek to further the indigenisation programme. Critics have said that the Zim Asset is not implementable within a short period of time due to the financial challenges facing the country.<sup>1295</sup> However, it is argued that the current investment levels are not sufficient to sustain the aspirations of the Zim Asset.<sup>1296</sup>

#### 5 4 1 1      *Ownership threshold*

The Indigenisation Act focuses more on ownership and control.<sup>1297</sup> Section 3 of the Act seeks to bestow majority ownership and control of the country's resources to the indigenous Zimbabweans. Foreign investors will only be able to own 49 percent of their entities. The 51-49 percent threshold is not negotiable.<sup>1298</sup> The Indigenisation Act uses a one-size-fits-all approach to indigenisation without exceptions.<sup>1299</sup> The Act prescribes that 51 percent of the issued shares of every "public company and any other business" shall be owned by indigenous

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<sup>1292</sup> The procurement clause states that "all government departments and local authorities and all companies shall procure at least 51 percent of their goods and services that require procurement in terms of the Procurement Act (Chapter 22: 14) from businesses in which a controlling interest is held by indigenous Zimbabwean," see section 3 (1) (f) of the Indigenisation Act. Section 3 (1) (f) of the Indigenisation Act is similar to section 10 (a) to (d) of the BEE Act of 2003 of South Africa.

<sup>1293</sup> See section 14 (1) of the Constitution.

<sup>1294</sup> See the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset), October 2013 – December 2018.

<sup>1295</sup> See "Corruption scares Investors" [http://www.zbc.co.zw/index.php?option=com\\_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86](http://www.zbc.co.zw/index.php?option=com_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86) (accessed 18-03-2015).

<sup>1296</sup> Ibid.

<sup>1297</sup> This is contrary to the BEE Act which requires substantive control and participation in the management of any enterprise. See section 2 of the BEE Act; the Broad-Based Black Economic Empowerment (B-BBEE) generic scorecard; *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC) para 21; and *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1(CC).

<sup>1298</sup> In South Africa, the B-BBEE employment generic scorecard proposes that companies will achieve 25, 1 percent BEE equity levels, 60 percent of black people in senior positions, 50 percent procurement from black-owned firms and 50 percent equality in employment. See also DTI "South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment" 2003 12.

<sup>1299</sup> Section 3 of the Indigenisation Act.



Zimbabweans.<sup>1300</sup> There are ongoing attempts by the government to review the Act to make it flexible. The two empowerment models, Production Sharing Model (PSM) and Joint Empowerment Investment Model (JEIM), are considered as the best possibilities of meeting the Act's ideological, legal and policy necessities.<sup>1301</sup>

There is however a general consensus that the implementation of the indigenisation policy has created uncertainty further harming Zimbabwe's investment climate.<sup>1302</sup> According to the observation by the UNCTAD, the indigenisation policy had a fundamental impact on FDI flows in and out of the country.<sup>1303</sup> In 2011, Zimbabwe was ranked 171 out of 183 countries in terms of the World Bank Ease of Doing Business Indices.<sup>1304</sup> During the period between 2010 and 2012, it was observed that there was significant increase of FDI outflows from Zimbabwe because the indigenisation policy lacked clarity on the protection of property rights.<sup>1305</sup> The former governor of the Reserve Bank of Zimbabwe (RBZ), Gideon Gono, warned the political leaders to guard against implementing the Indigenisation Act in a manner that would frustrate and threaten foreign investors.<sup>1306</sup> Similar to South Africa's BEE, the indigenisation policy is

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<sup>1300</sup> Ibid.

<sup>1301</sup> PSM is a broad cover for an assortment of production sharing agreements signed between governments and extraction companies concerning how much of a resource extracted from the country each will receive. Investors will be allowed to recover their initial capital investment or appropriate return on investment and operational costs before the sharing of production outputs or profits. JEIM, with the exclusion of mining, agriculture and particular tourism investments, locals will be encouraged to enter joint ventures as a way of generating capital build wholly Zimbabwean –owned enterprise. See "Indigenisation Act to be Amended" *Harare24*, 24 May 2014 <http://harare24.com/index-id-news-zk-20562.html> (accessed 12-02-2014). Nevertheless, the BEE sets uniform guidelines and indicators against which public and private sectors could measure their performance in pursuit of the BEE objectives. It encourages enterprise development through investment in and joint ventures with black-owned business. See section 1 of the BEE Act.

<sup>1302</sup> See Chiwunze "Economic Empowerment and Foreign Direct Investment: The Cases of Botswana, South Africa and Zimbabwe" 2014 [http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=1646:economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe&catid=87:african-finance-a-economy&Itemid=294](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1646:economic-empowerment-and-foreign-direct-investment-the-cases-of-botswana-south-africa-and-zimbabwe&catid=87:african-finance-a-economy&Itemid=294) (accessed 08-11-2014).

<sup>1303</sup> See Magure 2012 14 *Journal of Contemporary African Studies* 67.

<sup>1304</sup> The World Bank Ease of Doing Business Indices is an index created by the World Bank indicating the regulations for business and protection of property rights. More information on the Ease of Doing Business Indices is available at <http://data.worldbank.org/indicator/IC.BUS.EASE.XQ/countries/1W?display=map>.

<sup>1305</sup> In 2014, the Germany ambassador to Zimbabwe, Ulrich Klockner stated that the lack of clarity and transparency regarding the application of Zimbabwe's indigenisation policy has deterred Germany investors from investing in Zimbabwe. See "German Investors Wary of Indigenisation, says Ambassador" *The Zimbabwean*, 12 February 2014 <http://www.thezimbabwean.co/news/zimbabwe/70490/german-investors-wary-of-indigenisation.html> (accessed 14-02-2015). Similarly, the Canadian ambassador to Zimbabwe, Lisa Stadelbauer, said that Canadian investors are hesitant to invest in Zimbabwe because of the unequal and inconsistency application of the indigenisation law in the country. See "Zimbabwe's indigenisation policy scares away Canadian investors" *News Day*, 14 March 2014 <https://www.newsday.co.zw/2014/03/14/zimbabwes-indigenisation-policy-scares-away-canadian-investors/> (accessed 14-02-2015).

<sup>1306</sup> RBZ *Monetary Policy Statement* (2009).

being derailed by a few politically connected officials who want to amass wealth to themselves in an irresponsible manner whilst the intended majority remain with nothing.<sup>1307</sup>

#### **5 4 2 Compliance of the indigenisation policy with minimum international norms**

Under international law, it is common for host states to employ domestic equity requirements as part of exercising their control over natural resources and the right to admit foreign investment.<sup>1308</sup> Normally, host countries apply local participation requirements upon FDI admission with the objective to preserve national economic interest or other promote public policies.<sup>1309</sup> Some of the main reasons for imposing such requirements are: to avoid large or strategic economic sectors or enterprises from being controlled by foreigners; facilitate transfer of technology and management skills to domestic enterprises; and develop domestic human capital.<sup>1310</sup> As observed in Chapter 3 of this study, there are no minimum international standards as to the admission of FDI and the imposition of local equity on foreign investors. Hence host states have the discretion whether and on what conditions FDI may be admitted into their territories. That said, the indigenisation policy of Zimbabwe is not *per se* unlawful since it is aimed at increasing the “involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, so as to ensure the equitable ownership of the nation’s resources.”<sup>1311</sup> In other words, the indigenisation policy is in accordance with the national development goals of Zimbabwe.<sup>1312</sup> It is important to note that states are however required to apply local equity requirements in good faith and not arbitrarily.<sup>1313</sup> Thus the imposition of local equity requirements must not prejudice foreign investors.

### **5 5 ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ZIMBABWE**

The recognition and enforcement of foreign arbitral awards in Zimbabwe is governed by common law and statutorily by the Arbitration Act,<sup>1314</sup> the Arbitration (International Investment

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<sup>1307</sup> RBZ *Monetary Policy Statement* (2007); RBZ *Supplement to the Monetary Policy Statement* (2011); and Munyedza “The Impact of the Indigenisation and Economic Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities” 2011 37 *Business and Economic Journal* 9. As noted above, the stated idea behind this law is to indigenise the Zimbabwe economy by promoting the participation of indigenous Zimbabweans in business and the exploitation of economic resources. See section 3 of the Indigenisation Act.

<sup>1308</sup> UNCTAD “Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries” 2003 30.

<sup>1309</sup> See also Bloomstrom, Kokko and Zejan *Foreign Direct Investment: Firm and Host Country Strategies* (2000) 30.

<sup>1310</sup> *Ibid.*

<sup>1311</sup> Section 2 of the Indigenisation Act. See also Magure 2012 *Journal of Contemporary African Studies* 67-82.

<sup>1312</sup> See section 13 of the Constitution.

<sup>1313</sup> See Article 3 of the SADC Model BIT.

<sup>1314</sup> Arbitration Act 6 of 1996 (Chapter 7:15) (as amended).

Disputes) Act<sup>1315</sup> as well as the Civil Matters (Mutual Assistance) Act.<sup>1316</sup> Accordingly, arbitral awards made in other jurisdictions including regional and international tribunals are enforceable in Zimbabwe. Noteworthy is the fact that foreign arbitral awards are not automatically enforceable in Zimbabwe rather they must be registered for enforcement.<sup>1317</sup> Foreign arbitral awards are registered in the same way as domestic judgments.<sup>1318</sup> Generally, foreign arbitral awards are enforced by domestic courts pursuant to the rules of civil procedure in force in the territory in which it is carried out.<sup>1319</sup> Section 3 of the Civil Matters (Mutual Assistance) Act extends the application of the Act to the judgments of those international tribunals specifically designated for the purposes of recognition and enforcement. The effect of registration is to give the award, from the date of registration, the same force and effect as a final judgment of a court and to make pecuniary obligations imposed thereunder enforceable.<sup>1320</sup> This means that a registered foreign arbitral award has the same effect as a final judgment of the High Court as constituting *res judicata*.<sup>1321</sup>

Nevertheless, Article 36 (1) of the Model Law of the UNCITRAL as contained in the Arbitration Act provides that recognition or enforcement of an arbitral award may only be refused at the request of the party against whom it is invoked who shows the court that:

- (a) (i)... the agreement was invalid under the law to which the parties subjected it or under the law of the country where the award is made; or
- (ii) ...
- (iii) ...
- (iv) the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of law of the country in which, or under which the law of which, that award was made; or
- (b) if the court finds that –

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<sup>1315</sup> Arbitration (International Investment Disputes) Act 16 1995 (Chapter 7:03).

<sup>1316</sup> Civil Matters (Mutual Assistance) Act 14 1995 (Chapter 8:02) (as amended) mainly deals with the recognition and enforcement of civil foreign judgments so it is of less relevance to commercial disputes.

<sup>1317</sup> See *Greenland v Zimbabwe Community Health Intervention Research Project* HH93/13 para 3 and *Joseph Tapera v Field Spark Investments (Pvt) Ltd* HC 3813/12.

<sup>1318</sup> De Wet “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern African” 2013 *ICSID Review* 1-19. See also Bartels “Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal” Final Report presented to the meeting of SADC Tribunal Member State, Ministers of Justice and Attorneys-General (July 2011).

<sup>1319</sup> Ibid.

<sup>1320</sup> Section 5 (2) of the Arbitration (International Investment Disputes) Act.

<sup>1321</sup> Ibid. See also Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (2001) 376.

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe;  
or

(ii) the recognition or enforcement will be contrary to the public policy of Zimbabwe.<sup>1322</sup>

Under common law, there are a number of requirements to be satisfied for foreign arbitral awards to be recognised or enforced.<sup>1323</sup> These requirements were expanded by Justice Patel in *Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Company Ltd*<sup>1324</sup> when he pointed out that:

under common law, the general requirements for the recognition and enforcement of foreign judgments may be summarised as follows: (i) the foreign court in question had the requisite international jurisdiction or competence according to our law; (ii) the judgment concerned was final and has the effect of *res judicata* according to the law of the forum in which it was pronounced; (iii) the judgment must not have been obtained by fraudulent means; (iv) the judgment must not entail the enforcement of a penal or revenue law of the foreign state; (v) it must not be contrary to public policy in this country; and (vi) the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.<sup>1325</sup>

## **5 5 1 Refusal of recognition and enforcement of foreign arbitral awards in Zimbabwe**

Zimbabwe has refused to register and enforce several arbitral awards by international tribunals citing, *inter alia*, public policy,<sup>1326</sup> jurisdictional challenges<sup>1327</sup> as well as state immunity.<sup>1328</sup>

### **5 5 1 1 Public policy**

Under both common law and statutory law, the local courts will not enforce or register an award if it is contrary to public policy.<sup>1329</sup> Accordingly, for a foreign arbitral award to be recognised and enforced in Zimbabwe, it must be consistent and in accord with the public order or morals in Zimbabwe. It is said that the public policy doctrine serves as a safety mechanism for a country to enable its court to deny foreign laws and judgments which for one reason or another

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<sup>1322</sup> See Article 36 of the Model Law of the UNCITRAL contained in the Arbitration Act.

<sup>1323</sup> See Borm-Reid "Recognition and Enforcement of Foreign Judgments" 1954 3 *International and Comparative Law Quarterly* 50 and Oppong "Enforcing Judgments of the SADC Tribunal on the Domestic Courts of Member States" in Bosl, Du Pisan, Erasmus, Hartzenburg and Sandrey (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 115.

<sup>1324</sup> *Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Company Ltd* HH 95/10.

<sup>1325</sup> The common law on the recognition and enforcement of foreign arbitral awards of Zimbabwe is, in its basic principles, much the same as that of South Africa. See *Jones v Krok* 1995 (1) SA 677 (A) para 685B-E; *Purser v Sales* 2001 (3) SA 445 (SCA) para 450D-G; and *Government of the Republic of Zimbabwe v. Louis Karel Fick* Case CCT 101/12 ZACC 22 (27 June, 2013) paras 47-50.

<sup>1326</sup> See, for example, *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* (HC33/09) (2010) ZWHHC 1 and *Zimbabwe Electricity Supply Authority v Genius Joel Maposa* 1999 (2) ZLR 452.

<sup>1327</sup> See, for example, *Campbell v. Zimbabwe* 23-25.

<sup>1328</sup> See, for instance, *Government of the Republic of Zimbabwe v Fick* (2012) ZASCA 122.

<sup>1329</sup> *Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Company Ltd* and section 4 (2) (a) as well as Article 36 of the Model Law contained in the Arbitration Act, respectively.

should not be enforced.<sup>1330</sup> In other words, recognition and enforcement of foreign arbitral awards can be denied where it would result in a violation of public policy.<sup>1331</sup> In *Gramara v. Zimbabwe*,<sup>1332</sup> the High Court refused to register the award on the basis that it would violate public policy.

Linked to the above, the public policy defence is well established in the conflicts of law context, particularly where the enforcement of national jurisdiction is at stake.<sup>1333</sup> Thus domestic courts will be reluctant to enforce a judgment which contradicts their own municipal law.<sup>1334</sup> For instance, in *Campbell v. Zimbabwe*, the applicant requested the High Court of Zimbabwe to register the SADC tribunal's decision against the government of Zimbabwe. The High Court declined to register and enforce the judgment. Patel J that it is generally not contrary to Zimbabwe's public policy to enforce the SADC tribunal's judgments because Zimbabwe is under an international obligation to do so.<sup>1335</sup> However, the court reasoned that the land reform programme was enshrined in the Constitution and that its constitutionality had been upheld by the Supreme Court of Zimbabwe.<sup>1336</sup> Therefore, complying with this judgment would compel Zimbabwe's government to act contrary to section 16B of the Constitution Amendment 17 which is part of the supreme law of Zimbabwe.<sup>1337</sup> It is however important to note that Article 27 of the VCLT prohibits a state from invoking provisions of its internal law as justification for its failure to perform a treaty obligation.

## 5.5.1.2 Jurisdiction

It is a requirement under both common law and statutory law that the foreign court or tribunal has the requisite international jurisdiction in order for its award to be registered or enforced locally.<sup>1338</sup> In *Campbell v. Zimbabwe*, one of the main issues was to decide whether the SADC tribunal had jurisdiction to hear the case.<sup>1339</sup> In a letter written by the then Minister of Justice, Patrick Chinamasa, to the Registrar of the SADC tribunal, Zimbabwe argued that the tribunal

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<sup>1330</sup> Seng Wei "Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement under the New York Convention" 2009 *Singapore Journal of Legal Studies* 594.

<sup>1331</sup> De Wet "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 17 *Potchefstroom Electronic Law Journal* 560.

<sup>1332</sup> *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* 5483/09 2010 (unreported case).

<sup>1333</sup> De Wet 2014 17 *Potchefstroom Electronic Law Journal* 560.

<sup>1334</sup> Oppong in Bosl *et al* (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 129.

<sup>1335</sup> *Campbell v. Zimbabwe* 23-25.

<sup>1336</sup> *Ibid.*

<sup>1337</sup> *Ibid.*

<sup>1338</sup> See *Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Company Ltd* and section 4 (2) (a) as well as Article 36 of the Model Law as contained in the Arbitration Act, respectively.

<sup>1339</sup> See *Campbell v. Zimbabwe* 23-25.

had no jurisdiction to hear the case because the Protocol of the SADC tribunal was not binding upon Zimbabwe in that it has not yet been ratified by the requisite two thirds of the membership of SADC as required by Article 38 of the Protocol of the SADC tribunal and further that the amendment of the SADC Treaty has not yet entered into force because it has not been ratified by two thirds of the total membership of SADC as required under international law.<sup>1340</sup> The letter further stated that Zimbabwe is not bound by any of the tribunal's past or future decisions.<sup>1341</sup> The SADC tribunal unanimously held that it had jurisdiction to hear the case because section 16B (3) (a) of the Constitution Amendment No. 17 had eliminated the applicants' access to domestic courts and the applicants were therefore entitled to seek remedy before the tribunal based on Articles 14 (a) and 15 of the SADC tribunal. Regardless of this ruling, the High Court of Zimbabwe refused to register and enforce the tribunal's judgment.

### 5 5 1 3      *State immunity*

A state can refuse to register a foreign arbitral award based on the doctrine of state immunity.<sup>1342</sup> In accordance with this doctrine, states enjoy exemption from execution against their assets in their own territory or elsewhere.<sup>1343</sup> This possibly means an award against a host state need not be enforced if this would be in violation of the rules on state immunity as applied in the enforcing state.<sup>1344</sup> It is submitted however that a successful claim of state immunity in investment disputes will deprive affected foreign investors of the benefits of an international judgment. In *Zimbabwe v Fick*,<sup>1345</sup> the government of Zimbabwe alleged that it was a sovereign state and "it was judicious that it does not subject itself to the courts of another sovereign state," in this case the Republic of South Africa.<sup>1346</sup> For this contention, Zimbabwe relied upon the provisions of the Foreign States Immunities Act.<sup>1347</sup> The Act provides in section 2 that "a foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in the Act" and that "a court shall give effect to the immunity conferred by this section

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<sup>1340</sup> Ibid.

<sup>1341</sup> Ibid. See also Moyo "Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and Beyond" 2009 9 *African Human Rights Law Journal* 595.

<sup>1342</sup> See Ostrander "The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments" 2004 22 *Berkeley Journal of International Law* 540; Osode "State Contracts State Interest and International Commercial Arbitration: A Third World Perspective" 1997 XXX *Contemporary International Law Journal of Southern Africa* 41; and Sornarajah *International Commercial Arbitration* (1990) 200.

<sup>1343</sup> Oppong in Bosl *et al* (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 126.

<sup>1344</sup> UNCTAD "Dispute Settlement: International Centre for Settlement of Investment Dispute. 2.9 Binding Force and Enforcement" UNCTAD/EDM/Misc.232/Add (2003) 8. See also Osode 1997 XXX *Comparative and International Law Journal of Southern Africa* 4.

<sup>1345</sup> *Government of the Republic of Zimbabwe v Louis Karel Fick* (2012) ZASCA 122.

<sup>1346</sup> Ibid para 13.

<sup>1347</sup> Foreign States Immunities Act 87 of 1981.

even though the foreign state does not appear in the proceedings in question.” But under section 3 of this Act, a foreign state forfeits that immunity in proceedings in respect of which the foreign state has expressly waived its immunity. The Supreme Court of Appeal of South Africa ruled that Zimbabwe had forfeited any immunity which it may have enjoyed from the jurisdiction of South African courts by committing itself to the SADC Treaty<sup>1348</sup> and the Protocol of the SADC tribunal.<sup>1349</sup> The court further held that by merely adopting Article 32 (2) of the Protocol of SADC tribunal, Zimbabwe expressly waived any immunity it was entitled to claim from the jurisdiction of the SADC member states and agreed that the orders of the tribunal would be enforceable in their courts.<sup>1350</sup>

### **5 5 2 Conformity of Zimbabwe’s regime on the enforcement of arbitral awards with international norms**

Zimbabwe has acceded to both the Washington Convention and the New York Convention. Both of these conventions have been domesticated in Zimbabwean municipal law. In particular, the Washington Convention has been domesticated in the Schedule (section 2) of the Arbitration (International Investment Disputes) Act. The preamble of this Act provides for the implementation of the Washington Convention. The New York Convention is incorporated in the Arbitration Act.<sup>1351</sup> In addition, Zimbabwe is among the African countries which use the rules and procedures of the UNCITRAL Model Law on International Commercial Arbitration<sup>1352</sup> though with varying degree of modifications. The UNCITRAL Model Law is incorporated into Schedule (section 2) of the Arbitration Act. The preamble of the Arbitration Act stipulates that the Act is to apply *mutatis mutandis* to the UNCITRAL Model Law, thereby giving effect to the New York Convention. This means that foreign investors may bring their claims against Zimbabwe before international arbitration tribunals in accordance with the rules and procedures of the Washington Convention, New York Convention or UNCITRAL Model Law. It is arguable that Zimbabwe has created statutory regimes for enforcing international judgments which are consistent with international norms thereof. This is consistent with the principle that treaties and international law must either be enacted or transformed into national law before it forms part of Zimbabwean law.<sup>1353</sup> Section 34 of the Constitution of Zimbabwe

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<sup>1348</sup> Zimbabwe ratified the SADC Treaty on 17 November 1992 and South Africa acceded to the SADC Treaty on 29 August 1994.

<sup>1349</sup> *Zimbabwe v. Fick* para 20.

<sup>1350</sup> *Ibid* para 44.

<sup>1351</sup> See the preamble of the Arbitration Act.

<sup>1352</sup> The Model Law on International Commercial Arbitration was adopted by the UNCITRAL on June 21, 1985.

<sup>1353</sup> Madhuku 40.

states that “the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.” In Zimbabwe, a rule of international law emanating from a treaty which has been ratified by Zimbabwe does not create any legal rights for citizens under national law unless it has been incorporated in an Act of Parliament.<sup>1354</sup> Simultaneously, section 327 (2) of the Constitution provides that “an international treaty which has been concluded or executed by the President or under the President’s authority does not bind Zimbabwe until it has been approved by Parliament; and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.”

Moreover, most of the BITs signed by Zimbabwe contain dispute resolution clauses that allow investors to submit disputes with the host state to international arbitration, in particular to the ICSID or by way of *ad hoc* arbitration under the Arbitration Rules of the UNCITRAL.<sup>1355</sup> Article 26 of the VCLT declares that every treaty is binding upon parties to it and obligations created by it must be performed by the parties in good faith. Additionally, in accordance with Article 18 of the VCLT, Zimbabwe undertakes an obligation not to undermine the object and purpose of treaties to which it is a signatory. That said, it is imperative for Zimbabwe to respect, protect and fulfil in good faith the obligations assumed under the various international, regional and bilateral investment agreements.<sup>1356</sup> It is submitted therefore that Zimbabwe’s refusal to register and enforce the above-mentioned foreign arbitral awards creates the impression that it is not committed to honour or uphold its obligations under international law.<sup>1357</sup>

## 5 6 CONCLUSION

The legal protection of foreign investment in Zimbabwe dates back to the colonial era.<sup>1358</sup> Following the attainment of independence, the government launched several affirmative action laws and policies aimed at addressing inequalities inherited from the colonial government. The government laws, policies, policy papers and official statements recognise and encourage the need to protect and promote FDI but this sentiment has not been implemented in practice.<sup>1359</sup>

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<sup>1354</sup> Ibid.

<sup>1355</sup> For instance, Zimbabwe signed BITs that provide for ICSID arbitration only with: China (Article 9); the Germany (Article 11), Netherlands (Article 9) and Switzerland (Article 10); and BITs provide for either ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules with: Czech Republic (Article 8) and Denmark (Article 9).

<sup>1356</sup> See Ebobrah and Nkhata 2010 XLII *Comparative and International Law Journal of Southern Africa* 85-86.

<sup>1357</sup> Scholtz “Review of the Role, Functions and Terms of Reference of the SADC Tribunal” 2011 1 *Southern African Development Community Law Journal* 200.

<sup>1358</sup> Clarke 15.

<sup>1359</sup> US Department of State Diplomacy in Action “2012 Investment Climate Statement – Zimbabwe” Bureau of Economic and Business Affairs Report (June 2012).



Noteworthy is the fact that the implementation of some of the affirmative action laws and policies tend to counteract the protection and promotion of foreign investment.<sup>1360</sup> This Chapter has critically assessed some of the investment laws and related policies of Zimbabwe with the aim of assessing their compliance with the international minimum norms, standards and/or best practices on the protection of FDI. The main inference from in this discussion is that Zimbabwe is yet to bring some of its investment laws and related policies into conformity with international minimum standards.

The ZIA Act is the main legislation that governs the admission, promotion and co-ordination of investment in Zimbabwe. The Authority, established by section 3 of the ZIA Act, is responsible for the facilitation, promotion, registration and co-ordination of both foreign and domestic investment.<sup>1361</sup> The Act provides that foreign investment is admitted in accordance with the rules and regulations that govern investment in Zimbabwe. It also provides that investment is approved based on a number of considerations including: *inter alia*, the extent of skills and technology transfer; extent of employment creation and human resources development; and the impact of the investment on local industries.<sup>1362</sup> In other words, foreign investment is admitted with due regard to the national development goals which are mainly aimed at empowering the locals and fostering economic growth. In light of the international minimum standards on the admission of FDI, as noted in Chapter 3 of this study, host states have the discretion to determine the terms of admission of foreign investment into their territories.<sup>1363</sup> Hence, in most instances, FDI is admitted in accordance with the laws of the host state.<sup>1364</sup>

The land reform policy was aimed at redressing the historical deliberate and systemic inequitable distribution of land in Zimbabwe.<sup>1365</sup> Thus it aimed at acquiring land for redistribution and resettlement purposes.<sup>1366</sup> This policy has been implemented in three distinct phases of land redistribution and/or acquisition which were different in nature, approach and

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<sup>1360</sup> Ibid.

<sup>1361</sup> See section 7 of the ZIA Act.

<sup>1362</sup> Ibid section 14.

<sup>1363</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 30. See also UNCTAD Admission and Establishment: UNCTAD Series on Issues in International Investment Agreements 1996 247.

<sup>1364</sup> See Article 2 (1) of the Annex 1 of the SADC FIP.

<sup>1365</sup> Chitsike "A Critical Analysis of the Land Reform Programme in Zimbabwe" (2003) Paper presented at the 2<sup>nd</sup> FIG Regional Conference, Marrakech, Morocco, 2.

<sup>1366</sup> Ibid.

objective.<sup>1367</sup> The first phase was authorised by the LHC and provided for a state acquisition only on a willing buyer-willing seller basis as well as compensation paid in foreign currency.<sup>1368</sup> It is argued that this phase did not do much to address the historical inequitable land distribution.<sup>1369</sup> The second phase, aided by the subsequent amendments to the LHC as well as the enactment of the Land Acquisition Act of 1992, enabled the state to expropriate land for redistribution.<sup>1370</sup> The willing buyer-willing seller model was terminated and compensation was to be determined by the Minister of Lands. The third phase, known as the fast track land reform programme, was more radical and driven by war veterans it involved massive illegal land acquisitions as well as state land expropriation.<sup>1371</sup> The government amended the Constitution to condone such acts by the war veterans. This Constitution Amendment 17 imposed no obligation on the government to pay compensation for agricultural land compulsorily acquired for resettlement purposes and affected foreign land owners who were not allowed to challenge such in the courts.<sup>1372</sup> This controversial provision has been retained in the current Constitution.<sup>1373</sup> In several arbitrations, the implementation of the land reform programme was found to be unlawful<sup>1374</sup> and racially motivated.<sup>1375</sup> Within international minimum standards on the expropriation of foreign-owned property, expropriation of such is permissible if it is done: for public purpose or interest; in accordance with a due process of law; in a non-discriminatory manner; and upon payment of compensation as determined by the applicable law.<sup>1376</sup> As noted above, the land reform policy was non-compliant with all of the said standards except for that pertaining to public purpose or interest.

The indigenisation policy is aimed at increasing the participation and involvement of indigenous people of Zimbabwe in economic activities.<sup>1377</sup> As such, all foreign companies with

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<sup>1367</sup> See Moyo 2011 38 *Journal of Peasant Studies* 493-53; Moyo in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 30; and Moyo 2011 38 *Review of African Political Economy* 257-276.

<sup>1368</sup> Section 16 of the LHC.

<sup>1369</sup> Von Horn 1994 38 *Journal of African Law* 144-172.

<sup>1370</sup> Moyo in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013) 33.

<sup>1371</sup> See Sadomba in Moyo and Chambati (eds) *In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism* (2013).

<sup>1372</sup> Section 16B of the Constitution Amendment 17.

<sup>1373</sup> Section 72 of the Constitution.

<sup>1374</sup> See *CFU v Minister of Lands* paras 483F-H.

<sup>1375</sup> See *Campbell v. Zimbabwe* para 175; *Campbell (Pvt) Ltd v The Zimbabwe Republic Police* (SC49/07); and *CFU v Minister of Lands* para 9.

<sup>1376</sup> See Reinisch in Reinisch (ed) *Standards of Investment Protection* (2008) 173; Schreuer in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 108; Sheppard in Ribeiro (ed) *Investment Arbitration and the Energy Charter Treaty* (2006) 169; and McLachlan *et al* 265.

<sup>1377</sup> Section 2 and 3 of the Indigenisation Act.

a share capital above US\$500 000 operating in Zimbabwe are required to cede 51 percent of their shares or interest therein to indigenous Zimbabweans.<sup>1378</sup> The Indigenisation Act provides for a number of economic sectors that are reserved for indigenous Zimbabweans. In 2013, the objectives of the indigenisation policy were eventually incorporated into the Constitution<sup>1379</sup> as well as into the economic blue-print, Zim Asset. As observed in the Chapter, the implementation of this policy has been considered threatening by foreign investors.<sup>1380</sup> But as noted above, it is not the policy that has derailed FDI protection and promotion but its inconsistent and uncertain implementation.<sup>1381</sup> Under international law, host states are allowed to employ domestic or local equity requirements<sup>1382</sup> with the objective of pursuing national economic or other public policies.<sup>1383</sup> Other reasons for doing so, include to prevent strategic economic sectors or enterprises from being controlled by foreigners, facilitate technology and management skills transfer as well as develop human capital.<sup>1384</sup> There is no doubt that the indigenisation policy is in accordance with the national development goals of Zimbabwe.<sup>1385</sup> Be that as it may, local equity requirements are supposed to be applied in good faith and not arbitrarily.<sup>1386</sup>

Arbitral awards made outside the Republic of Zimbabwe are enforceable in terms of the common law, Arbitration Act, Arbitration (International Investment Disputes) Act or Civil Matters (Mutual Assistance) Act. These foreign arbitral awards are enforced in the same manner as any judgment or order of the same effect and in accordance with the rules and procedures of Zimbabwe.<sup>1387</sup> However, foreign arbitral awards are not automatically enforced in Zimbabwe but must firstly be registered for enforcement.<sup>1388</sup> A registered foreign arbitral award has the same effect as a final judgment of the High Court constituting *res judicata*. Zimbabwe has implanted statutory regimes for the recognition and enforcement of foreign arbitral awards that are consistent with international standards. Thus it has domesticated the Washington Convention in the Arbitration (International Investment Disputes) Act,<sup>1389</sup> the New

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<sup>1378</sup> Ibid section 3.

<sup>1379</sup> Section 14 (1) of the Constitution.

<sup>1380</sup> See Magure 2012 14 *Journal of Contemporary African Studies* 67.

<sup>1381</sup> Ibid.

<sup>1382</sup> UNCTAD "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries" 2003 30.

<sup>1383</sup> Bloomstrom *et al* (2000) 30.

<sup>1384</sup> Ibid.

<sup>1385</sup> See section 13 of the Constitution.

<sup>1386</sup> See Article 3 of the SADC Model BIT.

<sup>1387</sup> De Wet 2013 *ICSID Review* 1-19.

<sup>1388</sup> See *Greenland v Zimbabwe Community Health Intervention Research Project* para 3.

<sup>1389</sup> See Schedule (section 2) of the Arbitration (International Investment Disputes) Act.

York Convention and *mutatis mutandis* the UNCITRAL Model Law in the Arbitration Act.<sup>1390</sup> In addition, Zimbabwe has signed several BITs which allow investors to submit investment disputes for settlement by way of *ad hoc* arbitration under the rules and regulations of the UNCITRAL and ICSID. As noted above, Zimbabwe's past failure or refusal to enforce and register international arbitration awards can possibly be attributed to its failure to honour its obligations under international law<sup>1391</sup> and not its regime for the recognition and enforcement of foreign arbitral awards.

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<sup>1390</sup> See Schedule (section 2) of the Arbitration Act.

<sup>1391</sup> Scholtz 2011 1 *Southern African Development Community Law Journal* 200.

## CHAPTER 6

### Conclusions and Recommendations

#### 6.1 INTRODUCTION

The protection of Foreign Direct Investment (FDI) has proven to be a contentious issue in the international economic arena.<sup>1392</sup> This is a result of several factors including the political-ideological controversies between developed and developing countries.<sup>1393</sup> Developing countries, as host states, maintain that unregulated FDI poses a threat to national sovereignty and autonomy, among other challenges.<sup>1394</sup> For this and other important reasons, their legislative and regulatory investment regimes are aimed at strictly limiting the rights of foreign investors.<sup>1395</sup> Several investment-related regulations designed at national level are aimed at protecting national investors, industries or sovereignty, even in cases where nothing justifies such protectionist attitude.<sup>1396</sup> Developed countries, as home states, tend to pursue an international investment framework that will promote and legally protect their investors, among other things.<sup>1397</sup> It is however uncontested that foreign investors and their investments enjoy a right to protection and security by the host states.<sup>1398</sup> In fact, host states owe a duty to diligently protect foreign investors and their investments.<sup>1399</sup> In the case of *American Manufacturing & Trading v. Zaire*<sup>1400</sup> the tribunal ruled that the host state must take all necessary measures to ensure the protection and security of foreign investment and should not be permitted to invoke its own legislation to detract from any such obligation.<sup>1401</sup>

This study has critically examined the protection of foreign investment in South Africa and Zimbabwe against pertinent international norms, minimum standards and/or best practices. More pointedly, it identified the potential existence of gaps or shortcomings in selected national investment laws and related policies. This Chapter concludes the study and sets out

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<sup>1392</sup> Singh and Sharma “Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap” 2013 29 *Merkouris Utrecht Journal of International and European Law* 89.

<sup>1393</sup> Schill *The Multilateralisation of International Investment Law* (2009) 52-58.

<sup>1394</sup> Kumar *Globalisation and Quality of Foreign Direct Investment* (2002) 14.

<sup>1395</sup> *Ibid.*

<sup>1396</sup> Leal-Arcas *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (2010) 263.

<sup>1397</sup> Correa and Kumar *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (2003) xi.

<sup>1398</sup> Schefer *International Investment Law: Text, Cases and Materials* (2013) 312.

<sup>1399</sup> *Ibid* 317.

<sup>1400</sup> *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSCID Case No. ARB/93/1, Award (February 21, 1997).

<sup>1401</sup> *Ibid* paras 6.05-6.06.

recommendations taking into account all the issues that have been discussed in the preceding chapters.

Chapter 1 of the study is the introductory chapter and has set out the goals and objectives envisaged by this study. It also set out a detailed account of what constitutes FDI as illustrated by several international organisations, investment treaties and the jurisprudence pertinent to the interpretation of foreign investment. In that Chapter, it was noted that the definitions of FDI by international organisations, investment treaties and scholarship of FDI are often similar, and that FDI covers all assets of the foreign investors including, *inter alia*, movable and immovable property, shares or equity, copyright, industrial property rights and licences granted by the host state.<sup>1402</sup>

The enquiry undertaken in Chapter 2 began by setting out the historical origin of FDI protection. In that Chapter, the evolution of foreign investment protection was traced, revealing the circumstances in which it has developed into what it is presently. It was established that the protection of foreign investment has always been of concern to regulators as early as the pre-Havana Charter era fuelled by the growing need to protect foreign commercial property.<sup>1403</sup> It was also learnt from the Chapter that foreign investment plays a major role in, *inter alia*: the economic development and growth; the technological advancement; the human resources development; the employment creation, the improvement of infrastructure; and national competitiveness of the host states.<sup>1404</sup> Chapter 2 concluded by discussing potential risks faced by foreign investors in host states including political, fiscal and legal risks.<sup>1405</sup>

Chapter 3 focused on the international standards, norms and/or best practices on FDI protection. It revealed that, unlike most branches of international law anchored in a certain set of multilateral instruments, there is no comprehensive and authoritative treaty of universal application that subjects all states to the same standards of foreign investment protection. *Prima facie*, this setting presents insurmountable obstacles to the development of a coherent and harmonised body of law in this sphere.<sup>1406</sup> The Chapter therefore identified and discussed selected voluntary, binding and non-binding rules that constitute the common and basic international legal framework governing foreign investment protection. The ultimate purpose of this Chapter has been to assess the international minimum standards on specific aspects of

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<sup>1402</sup> See Part 1 2.

<sup>1403</sup> Leal-Arcas 180-182. See also Schefer 5.

<sup>1404</sup> See Part 2 3.

<sup>1405</sup> See Part 2 4.

<sup>1406</sup> Leal-Arcas 190.

FDI protection in the new millennium. In particular, it focused on international norms on the admission, expropriation and treatment of foreign investment as well as the use of certain performance requirements and investment dispute settlement. The Chapter also explored how these minimum standards have emerged in the international law arena. The discussion in Chapter 3 contributed immensely to the clarification of the obligations that international investment law imposes on host states in the protection of FDI.

Chapter 3 demonstrated that there are no minimum international standards on the admission of foreign investment, rather host states have the discretion to determine the terms of admission of FDI into their territories which discretion ought to be exercised *bona fide*.<sup>1407</sup> It was also exposed that international minimum standards on the expropriation of foreign investment provide that foreign commercial property may be expropriated: in the public interest or for a public purpose; in accordance with due process of law; in a non-discriminatory manner and upon payment of compensation determined by the applicable law.<sup>1408</sup> In regard to domestic equity participation as well as employment and training requirements, it was shown that there are no international minimum standards. Hence the Chapter revealed that the imposition of such requirements depends upon the applicable law in a particular jurisdiction and of utmost importance is that the use of such performance requirements must not prejudice international investors.<sup>1409</sup> Chapter 3 also showed that the international standards on the treatment of investment include full protection and security, fair and equitable treatment (FET) or non-discrimination. However, this study has discussed only the non-discrimination and FET standards because they are seemingly relevant to the South African and Zimbabwean jurisdictions – the main focus of this study. The Chapter concluded by discussing the international standards on investment dispute settlement. In this regard, it was shown that there is no compulsory or permanent dispute forum in the international investment arena. Rather, there is a plethora of investment fora open to investment disputes whose rules are quite similar and their jurisdiction is commonly based on the consent of the parties.<sup>1410</sup> As a general principle of international law, arbitral awards must be recognised and enforced without delay, subject to the international principle of state immunity, in the same manner as a domestic court's judgment.<sup>1411</sup>

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<sup>1407</sup> See Part 3 1.

<sup>1408</sup> See Part 3 2 2.

<sup>1409</sup> See Part 3 3 1 1.

<sup>1410</sup> See Schefer Chapter 6.

<sup>1411</sup> De Wet "The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa" 2013 *ICSID Review* 1.

Chapter 4 focused on selected investment laws and related policies in South Africa. In particular, it examined the proposed Promotion and Protection of Investment Bill<sup>1412</sup> (Investment Bill), the Black Economic Empowerment (BEE) policy, land ownership and reform laws as well as the enforcement of foreign arbitral awards regime. These laws and related policies were critically examined with a view to assessing their compliance with pertinent international minimum standards. Chapter 5 dealt with selected investment laws and related policies of Zimbabwe including the Zimbabwe Investment Authority (ZIA) Act,<sup>1413</sup> indigenisation policy, land reform policy and the enforcement of foreign arbitral awards framework. Similarly, these laws and related policies were examined with a view to measuring the extent of their compliance with relevant international norms, standards and/or best practices.

## 6 2 CONCLUSIONS

It is widely argued that FDI enhances the host states' economic development and growth,<sup>1414</sup> employment creation;<sup>1415</sup> technological advancement;<sup>1416</sup> infrastructure improvement;<sup>1417</sup> and national competitiveness.<sup>1418</sup> Host states need to adopt regulatory regimes or establish investment climates which uphold FDI protection and security in order for them to exploit and harness the said benefits of foreign investment.<sup>1419</sup> In addition, the investment regulatory regimes must be crafted in a manner which takes into account the interests or rights of foreign investors and be interpreted in accordance with appropriate international minimum standards.<sup>1420</sup> The submission of this study is that in areas where international standards do not

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<sup>1412</sup> Promotion and Protection of Investment Bill, 2013.

<sup>1413</sup> Zimbabwe Investment Authority Act 4 of 2006 (Chapter 14:20).

<sup>1414</sup> Ho and Rashid "Macroeconomic and Country Specific Determinants of FDI" 2011 *The Business Review* 219. See also Trakman "Foreign Direct Investment: Hazard or Opportunity?" 2009 *George Washington International Law Review* 12; Hoekman and Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* 3 ed (2009) 14.

<sup>1415</sup> Ajayi "Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential" (2006) African Economic Research Consortium 15.

<sup>1416</sup> Borensztein, De Gregorio and Lee "How Does Foreign Direct Investment Affect Economic Growth" 1998 *Journal of International Economics* 115.

<sup>1417</sup> Fedderke and Bogeti "Infrastructure and Growth in South Africa: Direct and Indirect Productivity Impacts of Infrastructure Measures" (2006) World Bank Policy Research Working Paper 3989. See also Fedderke and Garlick "Infrastructure Development and Economic Growth in South Africa: A Review of the Accumulated Evidence" (2008) School of Economics Policy Paper 12; Herranz-Loncán "Infrastructure Investment and Spanish Economic Growth, 1850–1935" 2007 *Explorations in Economic History* 452.

<sup>1418</sup> African Development Bank "Regional Integration Brief" 2013 Regional Integration and Trade Department [http://www.afdb.org/admin/uploads/afdb/documents/publication/regional\\_intergation\\_brief\\_intrad-sadc\\_cross-border\\_investments.pdf](http://www.afdb.org/admin/uploads/afdb/documents/publication/regional_intergation_brief_intrad-sadc_cross-border_investments.pdf) (accessed 25-05-2014). For a detailed discussion on FDI benefits, see Part 2 3.

<sup>1419</sup> Zampetti and Sauve "International Investment" in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 217.

<sup>1420</sup> Ibid.



exist, a host state can adopt a measure of protection it deems fit as long as it is based on good faith and does not prejudice foreign investors.

## 6 2 South Africa

### 6 2 1 Investment Bill

South Africa is currently in the process of cancelling or allowing the expiration of Bilateral Investment Treaties (BITs) inherited from the apartheid era. Its decision is informed by an extensive review, with a proposal that the void left by the revoked expiring BITs be filled by a comprehensive piece of legislation, the Investment Bill which sets up a regulatory framework for all investment.<sup>1421</sup> As noted above, South Africa's decision to terminate its BITs has elicited strong and mixed reactions from around the world.<sup>1422</sup> Chapter 4 demonstrated that the Investment Bill contains ambiguities in the provisions relating to expropriation<sup>1423</sup> and investment dispute settlement.<sup>1424</sup> The Bill, if enacted, would provide a lower standard of foreign investment protection than that accorded by BITs signed by South Africa because it would, *inter alia*, adopt a narrow conceptualisation of expropriation of investment<sup>1425</sup> and does not provide foreign investors with recourse to international arbitration.<sup>1426</sup> Such a narrow concept of expropriation would possibly increase the leeway for the government to adopt initiatives or measures which foreign investors might consider to involve some form of effective or indirect expropriation.<sup>1427</sup> In addition, the removal of the right to access international arbitration for the settlement of investment disputes is inconsistent with international best practice<sup>1428</sup> and would provide investors with greater uncertainty.<sup>1429</sup> Nonetheless, section 2 (b), (c) and (d) of the Investment Bill sets out a tone for the Bill to be

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<sup>1421</sup> DTI "Update on the Review of Bilateral Investment Treaties in South Africa" (2013) Paper Prepared for the Parliamentary Portfolio Committee on Trade and Industry [http://www.safpi.org/sites/default/files/publications/dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf) (accessed 12-12-2014).

<sup>1422</sup> See Part 4 2 2.

<sup>1423</sup> See section 8 of the Investment Bill.

<sup>1424</sup> Ibid section 11.

<sup>1425</sup> Ibid section 8.

<sup>1426</sup> Ibid section 11.

<sup>1427</sup> Woolfrey "South Africa's Promotion and Protection of Investment Bill" 2013 <http://www.tralac.org/2013/11/20/southafricaspromotionandprotectionofinvestmentbill/#.uzrkceztxyv.email> (accessed 23-10-2014).

<sup>1428</sup> International best practice allows investors to have access to international arbitration that is likely to be independent and impartial. See Franck "Foreign Direct Investment, Investment Treaty Arbitration and the Rules of Law" 2007 *Global Business & Developmental Law Journal* 347. The importance of international arbitration is also discussed in Chapter 3.

<sup>1429</sup> Ensor "Bill to Limit Arbitration for Foreign Investors" *Business Day* 31 October <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=ae441db6-cda6-466b-9e52-a9c788dc0241&key=iT6nFn%2fFOJUx9PeNE4Rw1w%3d%3d&issue=11062013103100000000001001> (accessed 28-04-2015).

interpreted with due regard to international and customary international law compliant with the Constitution as well as any relevant convention or international treaty to which South Africa is or becomes a party. The government of South Africa contends that its BITs are outdated and they offer greater rights and protection to foreign investors than to local investors and also that their dispute settlement provisions allow foreign investors to challenge domestic public interest laws and measures through *ad hoc* international arbitral awards.<sup>1430</sup> It is also interesting to note that foreign investors' calculus is that international arbitration is a better forum to protect their property rights than the domestic courts.<sup>1431</sup>

## 6 2 2 BEE laws

BEE is aimed at correcting the economic imbalances and injustices of the past thereby increasing, promoting and/or facilitating the participation of historically disadvantaged individuals in the economic mainstream.<sup>1432</sup> Some critics of BEE argue that some of its requirements deter foreign investment.<sup>1433</sup> Chapter 4 revealed that BEE legislative provisions mandatorily impose domestic equity participation as well as employment and training requirements upon foreign owned companies.<sup>1434</sup> In Chapter 3, it was observed that host countries are permitted to impose such requirements in a transparent and legal manner that do not prejudice foreign investment.<sup>1435</sup> It is submitted, for this reason, that the domestic participation, employment and training sanctioned by the BEE laws are not *per se* illegal. However, this study has shown that there is empirical evidence indicating that the BEE ownership and local equity requirements are seemingly a source of difficulty for international investors.<sup>1436</sup>

## 6 2 3 Land ownership and reform laws

Land ownership and reform is one of the most contentious issues in the contemporary political affairs of South Africa. The issue of land redistribution and ownership has been a prickly issue

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<sup>1430</sup> Department of Trade and Industry (DTI) "Update on the Review of Bilateral Investment Treaties in South Africa" (2013) Paper Prepared for the Parliamentary Portfolio Committee on Trade and Industry [http://www.safpi.org/sites/default/files/publications/dti\\_review\\_of\\_bits\\_ppc\\_20130215.pdf](http://www.safpi.org/sites/default/files/publications/dti_review_of_bits_ppc_20130215.pdf) (accessed 28-04-2015).

<sup>1431</sup> See Franck "Foreign Direct Investment, Investment Treaty Arbitration and the Rules of Law" 2007 *Global Business & Developmental Law Journal* 337.

<sup>1432</sup> See Osode "Advancing the Cause of Black Economic Empowerment through the Use of Legal Instruments" in Osode and Glover (eds) *Law and Transformative Justice in Post-Apartheid South Africa* (2010) 261.

<sup>1433</sup> See, for instance, Verhoef "Economic Empowerment and Performance: Strategies towards Indigenisation/Black Economic Empowerment and the Performance of such Enterprises in Nigeria and South Africa, since the early 1970s to 2002" 2004 *Journal for Contemporary History* 114.

<sup>1434</sup> See Part 4 3 2.

<sup>1435</sup> See Part 3 3 2 1.

<sup>1436</sup> Duffett, Van der Heever and Bell "Black Economic Empowerment Progress in the Advertising Industry in Cape Town: Challenges and Benefits" 2009 *Southern African Business Review* 92.

for the past twenty years.<sup>1437</sup> Having inherited a highly unequal land ownership and distribution pattern from the colonial regime, the government of South Africa accordingly promulgated laws and policies aimed at achieving equity in terms of land access, ownership and use.<sup>1438</sup> Despite the government's concerted efforts to address this problem, there remains a strong and growing public opinion and impression that more needs to be done and be so done at a faster pace.<sup>1439</sup> In effect, there is general consensus that land redistribution in post-apartheid South Africa has consistently fallen far behind the target set by the state and behind popular expectations.<sup>1440</sup> Since 1994, the government of South Africa promised to redistribute 30 percent of the land that was historically in the possession of white commercial farmers by 2014, but far less than 10 percent of the land earmarked for redistribution has been redistributed or transferred to date.<sup>1441</sup> The discussion in Chapter 4 showed that the purported land redistribution laws, if approved, would threaten foreign investors and would also require major changes to existing laws including the Constitution.<sup>1442</sup> Especially problematic is the anticipated land reform programme which is supposed to sanction the state's taking of private land without compensation.<sup>1443</sup> On the contrary, section 25 of the Constitution prohibits the expropriation of property, both domestic and foreign-owned, without the payment of compensation.

#### 6 2 4 *Recognition and enforcement of foreign arbitral awards*

South Africa has adopted a regime for the recognition and enforcement of foreign arbitral awards that is informed by the principles and provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>1444</sup> South Africa has not only ratified the New York Convention without any reservations but has also domesticated it through the Recognition and Enforcement of Foreign Arbitral Awards Act (REFAAA).<sup>1445</sup> An award that is made outside South Africa, will be recognised and enforced in terms of common law, the Arbitration Act<sup>1446</sup> or REFAAA. The recognition and enforcement

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<sup>1437</sup> Cloete "Comparative Lessons for Land Reform in South Africa" 1992 22 *Africa Insight* 249.

<sup>1438</sup> Lahiff "Land Redistribution in South Africa: Progress to Date" [http://www.sarpn.org/documents/d0002695/Land\\_Redistribution\\_South\\_Africa.pdf](http://www.sarpn.org/documents/d0002695/Land_Redistribution_South_Africa.pdf) (accessed 25-10-2014) 3.

<sup>1439</sup> Economic Freedom Fighters (EFF) "Expropriation of Land without Compensation for Equitable Redistribution" <http://efffighters.org.za/policy/on-land> (accessed 02-06-2014).

<sup>1440</sup> Ibid.

<sup>1441</sup> See Wilkinson, Brodie, Chiumia and Rademeyer "President Jacob Zuma's Sixth State of the Nation Address Fact-Checked" 2014 <http://africacheck.org/reports/a-first-look-at-president-jacob-zumas-2014-state-of-the-nation-address/> (accessed 08-04-2015).

<sup>1442</sup> In particular to section 25 of the Constitution of the Republic of South Africa, 1996.

<sup>1443</sup> Ibid.

<sup>1444</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>1445</sup> Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

<sup>1446</sup> Arbitration Act 42 of 1965.

of foreign arbitral awards provides foreign investors with a certain degree of assurance that the decisions of international tribunals will be executed by the host states.<sup>1447</sup> Nonetheless, South Africa has not signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States Establishing the International Centre for the Settlement of Investment Disputes (Washington Convention)<sup>1448</sup> and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.<sup>1449</sup> It follows that in accordance with section 4 (1)(a)(i) of the REFAAA, the awards by these two tribunals will not be recognised and enforced in South Africa.<sup>1450</sup> This is likely to be problematic to foreign investors in South Africa considering that the International Centre for Settlement of Investment Disputes (ICSID)<sup>1451</sup> and UNCITRAL arbitration are highly popular fora in the international investment dispute settlement arena.

## 6.3 Zimbabwe

### 6.3.1 ZIA Act

As discussed earlier, all new investments into Zimbabwe require an investment licence issued by the Zimbabwe Investment Authority (the Authority) and investment into existing companies require approval of the Exchange Control Authority of the Reserve Bank of Zimbabwe. When approving the application for any investment licences, the ZIA Board shall have due regard to a number of considerations including, among others: the extent of skills and technology transfer; extent of employment creation and human resources development; and the impact of the proposed investment on local industries and the environment.<sup>1452</sup> This is consistent with the international best practice as discussed in Chapter 3. That discussion indicated that host states have the autonomous right to determine the terms of admission or approval of foreign investment into their territories.<sup>1453</sup> This means that host states may specify the terms upon

<sup>1447</sup> Oppong “Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States” in Bosl, Du Pisan, Erasmus, Hartzenburg and Sandrey (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 117.

<sup>1448</sup> The ZIA Act is the principal legislation that governs both domestic and foreign investment in Zimbabwe.

<sup>1449</sup> The UNCITRAL Model Law is designed to assist States in reforming and modernising their laws on arbitral procedures so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States from all regions and the different legal or economic systems of the world. See UNCITRAL Model Law on International Commercial Arbitration, 2006.

<sup>1450</sup> On the contrary, some of the BITs negotiated by South Africa provides for the option to approach such tribunals.

<sup>1451</sup> The ICSID is an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors and host states.

<sup>1452</sup> Section 14 of the ZIA Act.

<sup>1453</sup> See Part 3.1.1.4.

which foreign investment may be admitted into their territories. In addition to the foregoing, it was also said that host states should impose such conditions or determinants *bona fide* and not *mala fide* or in a manner that would prejudice foreign investors and/or violate binding rules of international law.<sup>1454</sup> FDI admission under the ZIA Act is formulated in line with the contemporary public policy goals of the country aimed at fostering economic development and growth of the country as well as at empowering and increasing the participation of national citizens in the economic mainstream of the country.<sup>1455</sup> It was also noted that unless domestic laws specify otherwise, foreign investors have access, with the same rights and obligations, to the same sectors of investment opportunities as local investors. However, Chapter 5 has generally shown that Zimbabwe is among countries with a poor record of protecting foreign investment.

### 6.3.2 Land reform policy

The procedures used in the implementation of the land reform policy of Zimbabwe have been extensively criticised as they were deemed to be unlawful,<sup>1456</sup> violent<sup>1457</sup> and discriminatory.<sup>1458</sup> They encroached upon the legitimate property rights of foreign investors who owned land in Zimbabwe.<sup>1459</sup> The land reform implementation was jointly condemned by national courts,<sup>1460</sup> the now suspended Southern African Development Community (SADC) tribunal<sup>1461</sup> and the ICSID tribunal.<sup>1462</sup> It is important to recall that this study hailed the policy objectives

<sup>1454</sup> See the preamble and Article II of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1992.

<sup>1455</sup> See section 25 (2) (a) and (b) of the ZIA Act and section 14 of the Constitution of the Republic of Zimbabwe, 2013.

<sup>1456</sup> See *Commercial Farmers' Union (CFU) v Minister of Lands* 2000 (2) ZLR 469 (SC) para 483F-H. See also *George Quinnell v The Ministry of Agriculture* (SC47/04) and *CFU v The Minister of Agriculture Land and Resettlement* (HC 3985/2000).

<sup>1457</sup> See Willems "Peaceful Demonstrators, Violent Invaders: Representations of the Land Question in the Zimbabwean Press" 2005 32 *World Development* 1767-1783.

<sup>1458</sup> See *Campbell v. Zimbabwe* para 175; *Mike Campbell (Pvt) Ltd v The Zimbabwe Republic Police* (SC49/07); *CFU v Minister of Lands* 2001 (2) SA 925 (ZSC) para 9.

<sup>1459</sup> See Willems 2005 32 *World Development* 1767-1783; Peterson and Garland "Bilateral Investment Treaties and Land Reform in Southern Africa" *Rights and Democracy* <http://www.peacepalacelibrary.nl/ebooks/files/334103282.pdf> (accessed 08-08-2015)

<sup>1460</sup> For instance, *CFU v Minister of Lands*; *CFU v The Minister of Agriculture Land and Resettlement*; *Mike Campbell (Pvt) Ltd v Minister of National Security Responsible for Lands, Land Reform and Resettlement* (124/06) 2008 (1) (ZWSC); and *Etheredge v The Minister of State for National Security Responsible for Lands, Land Reform and Resettlement* (HC3295/08) (Unreported case).

<sup>1461</sup> See *Campbell v. Zimbabwe* para 175. At the 2014 Summit of SADC Heads of State and Government, the SADC leaders adopted the New Protocol on the SADC Tribunal which intends to reinstate the SADC Tribunal. See Veritas "The New Protocol on the SADC Tribunal" 2014 <http://www.mikecampbellfoundation.com/page/new-protocol-on-sadc-tribunal> (accessed 10-08-2015).

<sup>1462</sup> See *Bernardus Henricus Funnekotter v. Republic of Zimbabwe*, ICSID Case No. ARB/05/06 (Award of April 22, 2009); *Bernhard von Pezold v. Republic of Zimbabwe* (ICSID Case No. ARB/01/15); and *Border Timbers Ltd v Republic of Zimbabwe* (ICSID Case No. ARB/20/25).

underpinning the land reform policy bearing in mind the history of land ownership in Zimbabwe which was highly unbalanced and deliberately promoted the interests of the colonial rulers. This study agrees with the argument that the land reform policy was aimed at correcting the injustices and imbalances of the past thereby broadening access to land and promoting productivity by the peasantry. It is however the approach to implementation of this policy that the study found problematic. The discussion on the land reform policy's compliance with international norms on expropriation revealed that the policy's implementation was inconsistent with some of the standards identified in Chapter 3, specifically, non-discrimination, due process of law and the payment of compensation.<sup>1463</sup>

### 6 3 3 *Indigenisation policy*

This study has shown that the government of Zimbabwe is committed to increasing the participation or involvement of locals in the economic mainstream through legislative and policy instruments. The Indigenisation and Economic Empowerment Act (Indigenisation Act)<sup>1464</sup> demonstrates the government's genuine interest and commitment to ensuring that indigenous Zimbabweans participate or get involved in economic activities. Accordingly, the target beneficiaries are individuals who, before 18 April 1980, were disadvantaged by unfair discrimination on the grounds of their race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.<sup>1465</sup> In addition, the present economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset) is aimed at achieving sustainable economic growth and development as well as social equity, *inter alia*, anchored on indigenisation, empowerment and employment creation.<sup>1466</sup> The objectives of Zim Asset explicitly seek to further the indigenisation programme.<sup>1467</sup> However, it is argued that the current investment levels are not sufficient to sustain the aspirations of Zim Asset.<sup>1468</sup>

There is a lot of criticism that has been and is still being levelled against the indigenisation policy. While the success of the indigenisation policy is critically important to the direct

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<sup>1463</sup> See Part 5 3 2.

<sup>1464</sup> Indigenisation and Economic Empowerment Act 14 of 2007.

<sup>1465</sup> Ibid section 2.

<sup>1466</sup> See the Zimbabwe Agenda for Sustainable Socio-Economic Transformation, October 2013 – December 2018.

<sup>1467</sup> Chapter 3 of the Zim Asset.

<sup>1468</sup> See "Corruption scares Investors" [http://www.zbc.co.zw/index.php?option=com\\_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86](http://www.zbc.co.zw/index.php?option=com_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemid=86) (accessed 18-03-2015).

beneficiaries whose economic and future prosperity depends on it, the flawed implementation or approach that the government has adopted scares away foreign investors<sup>1469</sup> and directly benefits both established businessmen as well as rich and politically affiliated individuals in Zimbabwe.<sup>1470</sup> Perhaps more pointedly, Chapter 5 showed that the uncertain and inconsistent implementation of the policy has led to increasing FDI outflow from Zimbabwe. Despite a felt need for Zimbabwe to redress colonially induced injustices in the economic domain, an uncertain and inconsistent approach to indigenisation of the economy is fundamentally problematic as it deters foreign investors, among other things.<sup>1471</sup> This fact has been underscored by many foreign investors. For instance, Klockner<sup>1472</sup> and Stadelbauer<sup>1473</sup> stated that the lack of clarity, transparency and consistency in the application of the indigenisation law has deterred German and Canadian investors from investing in Zimbabwe, respectively. The operationalisation of such a policy by political leaders driven by self-interests to amass wealth to themselves has inevitably spawned results different from those intended by the government.<sup>1474</sup>

#### 6 3 4 *Recognition and enforcement of foreign arbitral awards*

In Zimbabwe, the common law and several legislative instruments clearly and appropriately provide a regulatory regime for the recognition and enforcement of foreign arbitral awards. Embedded in the inner parts of these legislative and the common law initiatives is not only the meticulous recognition and enforcement of foreign awards but it is also the quest to provide for a regime of enforcement of awards that is in line with the international best practices. The first and perhaps the most crucial aspect of this practice is that the foreign arbitral award, subject to certain exceptions, must be enforced without delay, in the same manner as the decision or judgment of the national courts.<sup>1475</sup> More specifically, Zimbabwe has domesticated

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<sup>1469</sup> “Zimbabwe’s Indigenisation Policy Scares Away Canadian Investors” *News Day*, 14 March 2014 <https://www.newsday.co.zw/2014/03/14/zimbabwes-indigenisation-policy-scares-away-canadian-investors/> (accessed 14-02-2015). See also “German Investors Wary of Indigenisation, says Ambassador” *The Zimbabwean*, 12 February 2014 <http://www.thezimbabwean.co/news/zimbabwe/70490/german-investors-wary-of-indigenisation.html> (accessed 14-02-2015).

<sup>1470</sup> Munyedza “The Impact of the Indigenisation and Economic Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities” 2011 37 *Business and Economic Journal* 9.

<sup>1471</sup> See “Zimbabwe’s Indigenisation Policy Scares Away Canadian Investors” *News Day*, 14 March 2014 <https://www.newsday.co.zw/2014/03/14/zimbabwes-indigenisation-policy-scares-away-canadian-investors/> (accessed 14-02-2015) and South African Press Association “Zimbabwe Needs Clarity of Investment” *The Citizen*, 27 December 2015 <http://citizen.co.za/282747/zimbabwe-needs-clarity-investment/> (accessed 27-11-2014).

<sup>1472</sup> “German Investors Wary of Indigenisation, says Ambassador” *The Zimbabwean*, 12 February 2014.

<sup>1473</sup> “Zimbabwe’s Indigenisation Policy Scares Away Canadian Investors” *News Day*, 14 March 2014.

<sup>1474</sup> Munyedza 2011 37 *Business and Economic Journal* 9.

<sup>1475</sup> See Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (2001) 376. See also De Wet 2013 *ICSID Review* 1-19.

the New York Convention, Washington Convention and, *mutatis mutandis*, the UNCITRAL Model Law.<sup>1476</sup> It has also signed BITs that contain dispute resolution clauses that allow investors to submit disputes with the host state to international arbitration, in particular to the ICSID or by way of *ad hoc* arbitration under the Arbitration Rules of the UNCITRAL.<sup>1477</sup> However, in Zimbabwe, the recognition and enforcement of foreign arbitral awards has proved to be challenging in practice. Chapter 5 pointed out that the national courts have been hesitant and timid to enforce foreign awards.<sup>1478</sup> The government of Zimbabwe has refused to register and enforce several arbitral awards by international tribunals citing, *inter alia*, public policy,<sup>1479</sup> jurisdictional challenges<sup>1480</sup> as well as state immunity.<sup>1481</sup>

### 6 3 RECOMMENDATIONS

As noted from the above analysis, FDI is an indispensable ingredient of economic development, regional or international economic integration, technological advancement, infrastructure improvement as well as employment creation and human resource development for South Africa and Zimbabwe.<sup>1482</sup> In order to exploit such benefits there is a need to create and implement an enabling favourable investment climate or investment regulatory regime.<sup>1483</sup> Such an investment climate and/or regulatory framework can only be achieved if adequate and sound investment laws and related policies are in place.<sup>1484</sup> This part of the Chapter makes a modest contribution towards meeting the needs implicit in above discussed challenges.

#### 6 3 1 National investment legislations

It is worth noting that there is nothing wrong in the South African government reviewing its current BITs practice as part of an exercise to overhaul its investment regime. Rather the introduction of the Investment Bill is a commendable attempt to bring all investors under the same legal umbrella and to clarify provisions that are too broadly or vaguely defined under

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<sup>1476</sup> See Part 5 5 2.

<sup>1477</sup> For instance, Zimbabwe signed BITs that provide for ICSID arbitration only with: China (Article 9); Germany (Article 11), Netherlands (Article 9) and Switzerland (Article 10); and BITs provide for either ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules with: Czech Republic (Article 8) and Denmark (Article 9).

<sup>1478</sup> See Part 5 5 1.

<sup>1479</sup> See, for example, *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* (HC33/09) (2010) ZWHHC 1 and *Zimbabwe Electricity Supply Authority v Genius Joel Maposa* 1999 (2) ZLR 452.

<sup>1480</sup> See, for example, *Campbell v. Zimbabwe* 23-25.

<sup>1481</sup> See, for instance, *Government of the Republic of Zimbabwe v Fick* 2012 (11) SA 657 (SCA) and *Government of the Republic of Zimbabwe v Fick* (2012) ZASCA 122.

<sup>1482</sup> See Part 2 3.

<sup>1483</sup> Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 217.

<sup>1484</sup> *Ibid.*



BITs.<sup>1485</sup> It is submitted however that South Africa should review its BITs practice with a view to developing a robust investment regulatory regime which is in line with international minimum standards balancing its developmental needs with those of foreign investment protection. This is important to create a balance between foreign investors' interests and the advancement of national development objectives. It is also necessary for the effective protection and promotion of foreign investment. For instance, China has become the biggest developing FDI host country in the world because it has shaped a transparent and consistent regulatory regime governing foreign investment.<sup>1486</sup> In addition, the Johannesburg-based firm of AT Kearney has recommended that South Africa can restore investor confidence by providing a clear set of guidelines for what is required from investors in given sectors, combined with consistent implementation.<sup>1487</sup>

With respect to Zimbabwe, the analysis of the ZIA Act has led to the conclusion that the investment climate under the Act is substantially liberal towards foreign investors and grants foreign investors same rights as domestic investors and there are no mandatory requirements on the admission or approval of investment. Nonetheless, there have been statements lately that the government is considering the enactment of a revision of existing laws and regulations to further protect investors and to provide a comprehensive investment policy.<sup>1488</sup> The objective is to rationalise and align the ZIA Act with the indigenisation laws in order to address investors' concerns and hence attract meaningful investment into the country without undermining the empowerment initiatives.<sup>1489</sup> The European Union has also warned that Zimbabwe will

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<sup>1485</sup> Le Roux "South Africa's Revocation of its Bilateral Investment Treaties: Beware of Strangers Bringing Money, Especially if you need it" 2015 *South African Institute of International Affairs* <http://www.saiia.org.za/opinion-analysis/south-africas-revocation-of-its-bilateral-investment-treaties-beware-of-strangers-bringing-money-especially-if-you-need-it> (accessed 05-05-2015). See also South African Institute of International Affairs "FDI in South Africa: Promotion and Protection of Investors... and the Public Interest" 2014 <http://www.saiia.org.za/opinion-analysis/fdi-in-south-africa-promotion-and-protection-of-investors-and-the-public-interest> (accessed 05-05-2015).

<sup>1486</sup> See Long "China's Policies on FDI: Review and Evaluation" in Moran, Graham and Blomstrom (eds) *Does Foreign Direct Investment Promote Development?* (2005) 315-336.

<sup>1487</sup> News24 Wire "SA Falls out of Investment Confidence Index" *Polity*, 29 April 2015 [http://www.polity.org.za/article/sa-falls-out-of-investment-confidence-index-2015-04-29?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.polity.org.za/article/sa-falls-out-of-investment-confidence-index-2015-04-29?utm_source=twitterfeed&utm_medium=twitter) (accessed 29-04-2015).

<sup>1488</sup> Deloitte "Doing Business in Zimbabwe: The jewel of Africa" 2013 <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-doing-business-zimbabwe-13.pdf> (accessed 25-04-2015). The government of Zimbabwe is currently set to amend more than 450 laws with the Constitution and international practice. See "President lays out Legislative Agenda" *The Herald* (Zimbabwe), 29 October 2014 <http://www.herald.co.zw/president-lays-out-legislative-agenda/> (29-10-2014) and Makonese "Zimbabwe: Alignment of the Country's Laws with the new Constitution" *De Rebus*, August 2014 17.

<sup>1489</sup> "Laws Impeding Foreign Investment: EU" <http://www.newzimbabwe.com/news/news.aspx?newsID=8640> (accessed 28-04-2015).

continue to lag behind most of its SADC neighbours in attracting FDI unless measures are taken to address the currently prohibitive legal framework.<sup>1490</sup>

### 6 3 2 Economic empowerment laws

Considering that inequality was the status quo during colonial rule, it is recommended that every sphere of the country from business to government needs to transform so that it is generally representative of the demographics of the country. An assessment of the indigenisation and BEE policies has led to the recommendation that this goal could be successfully achieved by making distributive justice<sup>1491</sup> a point of reference. Economic empowerment of the poor and distributive justice are concepts which might be complimentary.<sup>1492</sup> It is plausible to argue that for economic empowerment to be attained in any society, distributive justice should be the underlying principle or value.<sup>1493</sup> In effect, distributive justice is professed in the implicit egalitarian norms aimed at benefitting the previously disadvantaged individuals that underpin the two economic empowerment policies.<sup>1494</sup> It is important to note that this study does not condemn the economic empowerment policies *per se*. Rather it concurs with the modern day advances in the pursuit of equity and income redistribution. The BEE and indigenisation policies must therefore be commended as a sound legal instrument for advancing the inclusive participation of the black majority in the mainstream of the nation's economy.<sup>1495</sup>

As noted above, critics including foreign investors have been particularly concerned about the inconsistency and uncertainty in the government's approach to implementation of the policy.<sup>1496</sup> Given the climate of legal uncertainty and policy inconsistency, it is probable that foreign investors are discouraged from investing.<sup>1497</sup> It is therefore recommended, that the indigenisation policy be implemented within a framework where there is consistency as well as appropriate flexibility to respond to different economic conditions.<sup>1498</sup> This study submits

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<sup>1490</sup> Ibid.

<sup>1491</sup> See Warikandwa and Osode "Legal Theoretical Perspective and their Potential Ramifications for Proposals to Incorporate a Trade-Labour Linkage into the Legal Framework of the World Trade Organisation" 2014 *Speculum Juris* 44 and many other authorities cited there.

<sup>1492</sup> See generally Rawls *A Theory of Justice* (1971) as cited in Thabe *BEE and Rawlsian Justice* (MA-thesis, University of the Witwatersrand, 2010).

<sup>1493</sup> Ibid.

<sup>1494</sup> Ibid. See also Warikandwa and Osode 2014 *Speculum Juris* 44.

<sup>1495</sup> Warikandwa and Osode "Renewing the Fight against 'Fronting' and Related Challenges: An Appraisal of the Broad-Based Black Economic Empowerment Amendment Act of 2013" (forthcoming) 18.

<sup>1496</sup> See Part 5 4 2.

<sup>1497</sup> Ibid.

<sup>1498</sup> Magure "Foreign Investment, Black Economic Empowerment and Militarised Patronage Politics in Zimbabwe" 2012 *Journal of Contemporary African Studies* 73.

that there is an urgent need to reconcile the indigenisation policy goals with the FDI imperative. The two proposed empowerment models namely the production sharing model and joint empowerment investment model<sup>1499</sup> could well be relevant in shaping how Zimbabwe approaches indigenisation without threatening foreign investors. It is also suggested that, similar to the BEE policy (scorecards), Zimbabwe requires a transparent and clear investment framework in which ownership requirements associated with indigenisation are just one of the elements of the applicable criteria. South Africa and Zimbabwe might learn from Myanmar which has eased some of its restrictions on economic activities by foreign businesses.<sup>1500</sup>

### **6 3 3 Land reform and ownership laws**

It is suggested that land reform is necessary not only as an appropriate means of compensating previously disadvantaged individuals for the harm they suffered under apartheid and expanding black economic self-sufficiency and political empowerment,<sup>1501</sup> but also as a major means of attaining the goals of social justice and economic progress in South Africa.<sup>1502</sup> As shown in this study, South Africa's proposed land reform laws depart from the Constitution<sup>1503</sup> and relevant international practice. This has stirred up fears among investors that South Africa will run into farm invasion problems along the lines of what transpired in Zimbabwe.<sup>1504</sup> Due to the apparent shortcomings of the land ownership and reform system in South Africa,<sup>1505</sup> it can be argued that there is no way massive redistribution of land could take place without the possibility of expropriation of privately owned land.<sup>1506</sup> In addition, due to the challenges of the willing-buyer willing-seller approach, it is desirable that a more interventionist and robust approach to land reform in which state expropriation forms an integral part as endorsed by section 25 of the Constitution be adopted. Expropriation will influence the pace and direction of land reform and further send the message out that the state is serious about expediting the land reform programme.<sup>1507</sup> Additionally, a more carefully designed policy on expropriation would avert

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<sup>1499</sup> See Part 5 4 1 1.

<sup>1500</sup> Myat "Gov't Eases Restriction on Foreign Economic Activities" *Myanmar Business Today*, 7 September 2014 <http://www.mmbiztoday.com/articles/gov-t-eases-restriction-foreign-economic-activities> (accessed 29-04-2015).

<sup>1501</sup> For discussion on this issue, see Robinson "Rationales for Rural Land Redistribution in South Africa" 1997 23 *Brooklyn Journal of International Law* 484-485.

<sup>1502</sup> Zirker "This is my Land: The Evolution of Property Rights and Land Reform in South Africa" 2003 18 *Connecticut Journal of International Law* 634.

<sup>1503</sup> Section 25 (5)-(7) of the Constitution.

<sup>1504</sup> Dlamini *Taking Land Reform Seriously: From Willing Seller – Willing Buyer to Expropriation* (LLM-thesis, University of Cape Town, 2014) 65.

<sup>1505</sup> In South Africa, an estimated 84 percent of the land is still owned by the white minority. Ibid 9.

<sup>1506</sup> Zimmerman "Property on the line: Is an Expropriation-Centred Land Reform Constitutionally Permissible?" 2005 *South African Law Journal* 378.

<sup>1507</sup> Dlamini (LLM-thesis, University of Cape Town, 2014) 69.

the problem of a chaotic land reform process, as experienced in Zimbabwe. To this end, it is therefore recommended that South Africa provide legislative framework for the transformation and restructuring of land ownership and reform in line with constitutional imperative and pertinent international minimum standards so as to facilitate and enhance the process as well as reflect the diversity and demographics of the Republic.<sup>1508</sup>

Notwithstanding the state of affairs or the question of legality, it is unreasonable to draw a conclusion that the Zimbabwe land reform programme has not transferred majority of the land to the poor, vulnerable and previously disadvantaged individuals.<sup>1509</sup> A growing consensus has attributed the chaotic and violent land invasions in Zimbabwe to a combination of, *inter alia*, lack of rule of law, poor programme design and absence of capacity at all levels of government.<sup>1510</sup> As a result, this has led to calls for a shift in government policy, namely towards the use of constitutionally endorsed expropriation in the area of land reform.<sup>1511</sup> However, under the present land reform regime of Zimbabwe, farm or land owners do not have real property rights.<sup>1512</sup> It is submitted that property rights are central in the protection of foreign investment. In principle, secure property rights tend to increase FDI.<sup>1513</sup> That said, it is recommended that the land reform programme be reviewed to explicitly grant protection to property rights. Additionally, like South Africa,<sup>1514</sup> Zimbabwe needs transparent legal, impartial and/or independent institutional initiatives to drive and monitor the land reform process. More importantly, this goes without saying that the government needs to restore the rule of law to enable it come up with a credible land reform programme. The government should recognise that agriculture plays an important role in the country's economic development since Zimbabwe has a predominantly agrarian economy.<sup>1515</sup> Therefore, government assistance in the form of loans and farming skills development, capital investment

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<sup>1508</sup> Ibid Chapter VI, where Dlamini comprehensively discusses how South Africa could appropriately use the constitutional and/or related international law provisions dealing with the state's powers of expropriation within a land reform context.

<sup>1509</sup> See Savius "An Assessment of Livelihood Realities in the Lowveld of Zimbabwe and South Africa after the Land Reform: What are the Policy Implications?" 2011 44 *Africa Institute of South Africa Policy Brief* 4.

<sup>1510</sup> Lahiff and Cousins "The Land Crisis in Zimbabwe viewed from South Limpopo" 2001 *Journal of Agrarian Change* 663. See also Njaya and Mazuru "Land-Reform Process and Property Rights in Zimbabwe: Constraints and Future Prospects" 2010 12 *Journal of Sustainable Development in Africa* 164-185.

<sup>1511</sup> The legal framework for land reform in Zimbabwe is now defined by section 72 of the Constitution.

<sup>1512</sup> Magure 2012 *Journal of Contemporary African Studies* 73.

<sup>1513</sup> See generally Gwenhamo "Foreign Direct Investment in Zimbabwe: The Role of Institutional and Macroeconomic Factors" 2011 79 *South African Journal of Economics* 211-223. See also Gwenhamo, Fedderke and De Kadt "Measuring Institutions: Indicators of Political Rights, Property Rights and Political Instability in Zimbabwe" 2012 *Journal of Peace Research* 599.

<sup>1514</sup> See Lahiff and Cousins 2001 *Journal of Agrarian Change* 660.

<sup>1515</sup> Chamabati and Moyo "Land Reform and the Political Economy of Agricultural Labour in Zimbabwe" 2007 4 *Occasional Research Paper Series* 4-7. See also Gwenhamo *et al* 2012 49 *Journal of Peace Research* 597.

and provision of inputs should be prioritised in order to ensure that the distributed land is utilised productively. In addition, the government should devise a proper selection and follow up of beneficiaries. One should also add the need for a solid framework for property rights protection, a sound policy environment and political stability.

### **6 3 4 Enforcement of foreign arbitral awards**

This study showed that it is fundamental that South Africa's and Zimbabwe's arbitration laws be in line with international practice since they are parties to international commercial transactions. Perhaps more specifically, it has indicated that nothing undermines foreign investment more than to have foreign arbitral awards not recognised or enforced by the domestic courts, in the protection of FDI.<sup>1516</sup> The study concludes that South Africa's existing legislative and regulatory framework for the recognition and enforcement of foreign arbitral awards is inadequate since it lacks the adoption of the ICSID and UNCITRAL Model law arbitration rules. This may be because South Africa has neither adopted the UNCITRAL Model Law nor acceded to the Washington Convention. It is for this and other reasons, that the South African Law Commission (SALC) recommended that South African government adopt *mutatis mutandis* the UNCITRAL Model Law<sup>1517</sup> and accede to the Washington Convention.<sup>1518</sup> By ratifying the Washington Convention<sup>1519</sup> and adopting the UNCITRAL Model Law, South Africa would create the necessary legal framework that is user-friendly and attractive to foreign investment.<sup>1520</sup> It is also argued that a foreign arbitral award is usually easier to enforce in a jurisdiction which is a party to the Washington Convention.<sup>1521</sup> South Africa might learn from other African countries including Zimbabwe and Kenya which have adopted the UNCITRAL Model Law and also signed up to the Washington Convention. In addition, the SALC recommended that the REFAAA should be repealed by legislation which deals expressly with both the recognition and enforcement of foreign arbitral awards and rectifies certain other defects in the wording of the legislation as well as the grounds upon which recognition and enforcement may be refused.<sup>1522</sup> Moreover, the UNCITRAL Model Law

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<sup>1516</sup> See Part 3 5 1 4. See also Oppong in Bosl *et al* (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 117.

<sup>1517</sup> For a detailed account on this, see SALC, Project 94, *Arbitration: An International Arbitration Act for South Africa* (July 1998) 13-98.

<sup>1518</sup> *Ibid* 22.

<sup>1519</sup> For a discussion of the benefits for South Africa of ratifying the Washington Convention, *ibid* 144.

<sup>1520</sup> *Ibid* 23.

<sup>1521</sup> *Ibid* 106.

<sup>1522</sup> For the recommendations on the REFAAA, *ibid* 130-132.

and ICSID Arbitral Rules can be usefully consolidated within the legislation replacing the REFAAA.<sup>1523</sup>

Chapter 5 showed that Zimbabwean legislation has provided the much-needed intervention in the area of recognition and enforcement of foreign arbitral awards. Nonetheless, a close examination on the recognition and enforcement of foreign arbitral awards in Zimbabwe has led to the recommendation that domestic courts should be impartial and independent in recognising and enforcing foreign awards. This will ensure that investors regain confidence in the judicial system.<sup>1524</sup> It is also suggested that, in addition to judicial impartiality and independence, political will and commitment is required to strengthen the protection of foreign investment through enforcing foreign arbitral awards in Zimbabwe.<sup>1525</sup> Failure to recognise or enforce arbitral awards may send a negative signal about the host state's commitment to respect investors' property rights which may in turn have adverse effects on FDI inflows.<sup>1526</sup>

#### **6 4 CONCLUDING REMARKS**

As part of its contribution to the literature, this study demonstrated that inconsistent and uncertain investment laws and related policies raise a number of concerns in the area of foreign investment protection and most of all deter FDI promotion. This study advanced the argument that investment regulatory regimes must be in accord with pertinent international norms, minimum standards and/or best practices elucidated in Chapter 3. Thus both South Africa and Zimbabwe must adopt investment regulatory frameworks that are informed by apposite international minimum standards.

In addition, it is beyond the scope of this study to contest the appropriateness or soundness of taking measures aimed at redressing colonially induced injustice and racial imbalances in the ownership of national resources and participation in economic activities. Rather the study submits that the approaches to implementation of these policies appear not to be contributing to the attainment of these aspirations. In other words, the problem is seemingly not the legal content but the implementation process or approach. It is submitted that their implementation should be based on good governance including transparency, inclusiveness participation and social acceptance by affected communities.<sup>1527</sup> It is also worth noting that the aim of this study

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<sup>1523</sup> Ibid 22.

<sup>1524</sup> Asiedu "Policy Reform and Foreign Direct Investment in Africa: Absolute Progress but Relative Decline" 2004 22 *Development Policy Review* 46.

<sup>1525</sup> See Oppong in Bosl *et al* (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2010) 117.

<sup>1526</sup> See generally Hatchondo and Martinez "Legal Protection of Foreign Investors" 2011 97 *Federal Reserve Bank of Richmond Economic Quarterly* 176.

<sup>1527</sup> See, for instance, Magure 2012 *Journal of Contemporary African Studies* 73.

is not to argue that foreign investors be given greater rights than domestic investors or host countries, but rather to reveal that foreign investors have the right to conduct business on an equal basis without suffering discrimination due to their foreign origin. This study also suggests that legislative and regulatory investment initiatives should be designed to stimulate or promote inclusive and sustainable economic growth and development while at the same time protecting and promoting foreign investment. For instance, BEE has a wide range of developmental plans to realise economic growth and welfare which offer potentially lucrative value and opportunities for foreign investors willing to become partners in a country that is uniquely the gateway into Africa.<sup>1528</sup> This study also advances the argument that foreign investment should be regulated in a manner that helps to fulfil the host country's development aspirations.<sup>1529</sup> Foreign investment can be harnessed towards the realisation of specific development objectives that each individual country has set for itself.<sup>1530</sup> Thus, it should be regulated in a manner which complies with national, regional and international laws on development in general.

This study leaves scope for further in-depth research on the legal protection of FDI in South Africa and Zimbabwe. The study confined itself to an assessment of selected investment laws and related policies namely national investment legislations, economic empowerment policies, land ownership and reform laws as well as the laws on recognition and enforcement of foreign arbitral awards within both jurisdictions. It therefore did not focus on other laws and policies pertinent to the protection of foreign investment including, *inter alia*, repatriation of profits; tax policies; conversion and transfer policies; fiscal policies; and trade policies. Accordingly there is scope for further research in this regard. The study would have succeeded if it contributed towards ensuring that transparent, consistent, liberal or flexible investment laws and related policies become an avenue through which foreign investment is effectively regulated and simultaneously protected.

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<sup>1528</sup> Verhoef 2004 29 *Journal for Contemporary History* 114.

<sup>1529</sup> See, for instance, Zampetti and Sauve in Guzman and Sykes (eds) *Research Handbook in International Economic Law* (2007) 217.

<sup>1530</sup> *Ibid.*

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