



**BILATERAL INVESTMENT TREATIES ENCOURAGING FOREIGN DIRECT INVESTMENT:  
ZIMBABWE –SOUTH AFRICA BIPPA AS A CASE STUDY.**

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**BILATERAL INVESTMENT TREATIES ENCOURAGING FOREIGN DIRECT  
INVESTMENT: ZIMBABWE –SOUTH AFRICA BIPPA AS A CASE STUDY.**

**BY BANDERA EDWICK 29722919**

**Supervisor: Professor Danny Bradlow**

**SUBMITTED IN PARTIAL FULFILLMENT OF THE DEGREE LLM IN INTERNATIONAL TRADE AND  
INVESTMENT LAW IN AFRICA**

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### Undertaking

“I undertake that all material presented for examination is my own work and has not been written for me, in whole or in part, by any other person(s).I also undertake that any quotation or paraphrase from published or unpublished work of another person has been dully acknowledged in the work which I present for examination”.

**EDWICK BANDERA**



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**Acknowledgements**

I thank the Almighty GOD for taking me this far

In Memory of my late mother and father

My special thanks to all friends and relatives for the support and encouragement during this period of my studies. To the following I express my sincere gratitude for the different special roles they have played in my studies; Edna, Cathrine, River, Osbourne Majuru and Ronnie.

I wish to thank Professor Bradlow, Rafia Da Gama and Emily Laubscher for all the guidance and encouragement throughout the period of my studies at the University of Pretoria.

To all the LMM students (2009) of International Trade and Investment, and Viola thanks for giving me the last push.

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**LIST OF ABBREVIATIONS**

Broad based Black Economic Empowerment (BEE)

Bilateral Investment Promotion and Protection Agreement (BIPPA )

Bilateral Investment Treaties (BIT)

Friendship commerce and Navigation treaties (FCN)

Foreign Direct Investment (FDI)

Gross domestic product (GDP)

International Monetary Fund (IMF)

Land Acquisition (LAA)

Southern African Development Community (SADC)

Most Favoured Nation (MFN)

North American Free Trade Agreement (NAFTA)

Organization of Economic Cooperation and Development (OECD)

United Nations Conference on Trade and Development (UNCTAD)

International Centre for The settlement of Investment of Investment Disputes (ICSID)

United Nations Commission on International Trade Law (UNCITRAL).

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**Abstract**

*The main ambit of this research is to seek to find a link between bilateral investment treaties and foreign direct investment. This offers a contribution on the ongoing debate on the effect of bilateral investment treaties on foreign direct investment. In order to analyze this debatable role of bilateral investment treaties on foreign direct investment a case study of the recently signed Bilateral Investment and Promotion and Protection Act between Zimbabwe and South Africa (BIPPA) is carried out with a special focus on Zimbabwe. The argument is BIPPA contains many rights which investors can use against the host. These clear outlined rules increase investor confident which will result in flows of investments to the host nation. The rules have a disciplinary effect upon the host. This is further qualified by the notion that BIPPA will have more effect on the Zimbabwean side were the government have to convince investors that their property will be protected. Domestic policies will be highlighted as being in conflict with investors rights. BIPPA can thus be used as shield to these domestic policies thereby encouraging foreign direct investment. These treaties however have their own cost effects which will be categorized as reputational, sovereignty and arbitration. Other issues such as the effect of bilateral investment treaties on development will also be deliberated on.*

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### 1.1 The history behind signing of BIPPA

Zimbabwe was once the “jewel” of Africa because of its vibrant agriculture system, where farmers would produce enough for the country and surplus for export.<sup>1</sup> Agriculture was an important contributor to the economy of the country, making Zimbabwe one of the strongest economies in the region over the years. The prominence of the agriculture sector was largely attributed to foreign investors who had remained and come in the country after the attainment of the independence by Zimbabwe.<sup>2</sup> It was also soon after independence when the government of Zimbabwe spear headed the land resettlement program to relocate landless families.<sup>3</sup> The land reform was not carried out appropriately which resulted in many investors leaving the country further causing an economic upheaval detriment to the populace.<sup>4</sup>

A look at some of the policies that were implemented during the land reform offers an understanding of how domestic policies can affect the operations of foreign investment in a country. After the constraints of the Lancaster House Agreement in 1990 the government of Zimbabwe amended the provisions of the constitution concerning property rights. The 1992 Land Acquisition Act gave the government power to acquire land for resettlement. The government was empowered to identify specific pieces of land in which it had an interest and then followed by actual acquisition.<sup>5</sup> The Act sought to redress the imbalances and injustices perpetrated on the majority black people of Zimbabwe for over a century. Though the act was valid and appropriate in addressing the disproportionate allocation of land, it had its own internal weaknesses. One of the problematic provisions of the Act was section 13 and 14 which ceded power to the Minister of Land to acquire the land. The Minister as result had wide discretionary

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<sup>1</sup> Craig J. Richardson , “How the Loss of Property Rights Caused Zimbabwe’s Collapse” No. 4 • November 14, 2005, Cato Institute, Economic Development Bulletin, Project global Economic Liberty

<sup>2</sup> SA, Zimbabwe sign investment protection deal, Newzimbabwe.com, 27/11/2009 [accessed 21-03-2010]

<sup>3</sup> Ruswa Goodhope, 2004, A study on the impact of governance on land reform in Zimbabwe, A mini-thesis submitted in partial fulfillment of the requirements for the degree of Master of Economics in the Institute for Social development. [http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd\\_gen8Srv25Nme4\\_5741\\_1183989258.pdf](http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_gen8Srv25Nme4_5741_1183989258.pdf) [accessed 20-03-2010]

<sup>4</sup> It is estimated that, in 2005, the unemployment rate in Zimbabwe was in excess of 80%, and in 2008 the gross domestic product (GDP) growth rate in Zimbabwe was –12.6%; Central Intelligence Agency. 2009. The World Factbook 2009: Zimbabwe; available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ZI.html>; [accessed 21-04-2010] Zimbabwe beating world economic records (highest inflation rate, smallest domestic market size, and lowest foreign direct investment). 16 World Economic Forum, International Bank for Reconstruction and Development/World Bank & African Development Bank. 2009. The Africa Competitiveness Report 2009. Geneva: World Economic Forum, p 23

<sup>5</sup> Land Acquisition Amendment Act 1992



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powers in a manner that transformed the executive arm of the government into the maker, interpreter and enforcer of the law. This resulted in the suppression of the powers of the judiciary in contradiction with the internationally recognized doctrine of the separation of powers.

The fast track resettlements program was formally announced by the government in July 2000 which marked a major turning in history of property rights protection in Zimbabwe. The Zimbabwean Parliament passed two amendments to the Constitution of Zimbabwe: one on 19 April 2000 (Amendment 16),<sup>6</sup> and one on 14 September 2005 (Amendment 17).<sup>7</sup> President Mugabe issued a decree amendment to the LAA in 2001 authorizing the forceful removal of white farmers from their farms, with the government having no obligation to pay for that land except for compensation on land improvement. It was further stipulated in the amendment, that the government could resettle people on the farms before waiting for appeals and it was not possible to appeal on the ground that the compensation was not fair.<sup>8</sup>

The amendment of Section 16 and 17 of the Zimbabwean Constitution and the subsequent Land Acquisition Act of 1992 paved the way for the expropriation of white owned rural land thereby legalizing the expropriation without due process. The government of Zimbabwe failed to take responsibility of the chaotic land reform as they justified the land reform to the rest of the world as a mechanism to solve the historical injustices and racial imbalances in the ownership of land.<sup>9</sup> There was however no justification because the land reform failed to take cognizance of the real situation in respect to farm ownership. It completely disregarded the issue of fair and reasonable compensation for assets taken by the government.<sup>10</sup>

The correct legal position was that commercial farmers held freehold title and over eighty percent of farmers were in possession of the certificate of no interest which they had derived from the Zimbabwean government.<sup>11</sup> The certificate of no interest was issued as an indication of

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<sup>6</sup> Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000

<sup>7</sup> Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005

<sup>8</sup> Land Acquisition (Amendment) Act 2002

<sup>9</sup> Eddie Cross.Cato Institute • The Cost of Zimbabwe's Continuing Farm Invasions. 1000 Massachusetts Ave., N.W., Washington, D.C. 2001 • (202) 842-0200 fax: (202) 842-3490 • [www.cato.org](http://www.cato.org), No. 12 • May 18, 2009. [Accessed 10-02-2010]

<sup>10</sup> *ibid*

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government declining to purchase the farm after being offered to it at a market price.<sup>12</sup> As result farmers who held both the title and the certificates possessed an apparently indisputable legal right to the land and all the improvements they had made on that land.<sup>13</sup> They thus had the right to be fully compensated when their assets were taken over by the state.

A number of laws were passed to rationalize, authorize and shield the haphazard land reform process.<sup>14</sup> The rule of law was largely undermined during the land reform process as the legal framework guiding land reform was not reliable, credible and predictable.<sup>15</sup> The independence and partiality of the judiciary and court system was affected by constant political interference. There was constant manipulation of the courts and judiciary to shield the wrongs of the land reform.<sup>16</sup>

Most farmers reduced or gave up production because of this legal uncertainty. This is because there was lack of assurance that their farming activities were not going to be interfered with. The process interfered with certain property rights of land owners which play an important role in agriculture production investment and title deeds which serve as a source of investment capital by providing a mechanism to access the funds held in the private sector financial institutions.<sup>17</sup> This investment is the practical basis for all on-farm capital developments, and the support base for all the production programs applied on commercial farms.<sup>18</sup> The uncertain tenure for new farmers had a negative effect on production, the lease agreements discouraged new farmers from substantially investing in agriculture.<sup>19</sup>

Having found no remedy in the local remedies, a group of Zimbabwean farmers took the matter to the SADC tribunal in Windhoek, Namibia.<sup>20</sup> The proceedings were challenging the

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<sup>12</sup> Eddie, 2001, *supra* note 9

<sup>13</sup> Eddie, 2001, *supra* note 9

<sup>14</sup> Eddie, 2001, *supra* note 9

<sup>15</sup> Eddie, 2001, *supra* note 9

<sup>16</sup> When Zimbabwe's Supreme Court ordered the squatters evicted, Mugabe forced the chief justice to resign and physically threatened the remaining justices, who relented. Owners abandoned their property, severely disrupting agricultural production. [www.newZimbabwe.com](http://www.newZimbabwe.com) [accessed 05-05-2010]

<sup>17</sup> Eddie, 2001, *supra* note 9

<sup>18</sup> Eddie, 2001, *supra* note 9

<sup>19</sup> Foreign direct investment fell to zero by 2001, and the World Bank's risk premium on investment in Zimbabwe shot up from 4 percent to 20 percent that year. *Supra* note 16

<sup>20</sup> Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe, SADC (T) Case No. 2/2007

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expropriation or potential expropriation without compensation authorized by the property clause in the Bill of Rights found in Zimbabwe's Constitution. In 2008, the Tribunal upheld the farmers' case. A decision was issued instructing the government of Zimbabwe to protect the farmers' legal rights. The government, in spite of being a signatory to the treaty creating the SADC Legal Tribunal, ignored the ruling.<sup>21</sup>

In *Funnekotter v Zimbabwe*, the Hague Tribunal ruled in favor of Dutch investors and was granted nearly \$22million in compensation.<sup>22</sup> In this case a group of Dutch origin farmers had invested in Zimbabwe after 1980 and were protected by the Netherlands –Zimbabwe BIPA<sup>23</sup> took their case to the International Court of Justice in Hague.<sup>24</sup> Their farms were expropriated with no compensation. There was direct expropriation of farms by the Zimbabwean regime violating a number of domestic, regional and international laws. These outright expropriations resulted not only in violation of domestic and regional but also international law right to property which provides that:

*"Everyone has the right to own property alone as well as in association with others," and that "no one shall be arbitrarily deprived of his property."<sup>25</sup> Article 14 of the African Charter on Human and Peoples' Rights, however, provides that: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in*

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<sup>21</sup> In November 2008 this tribunal ruled in favour of Mr Michael Campbell and 78 other Zimbabwean farmers that the land reform programme was racist and unlawful. In his reaction to this, Pres Robert Mugabe described the ruling as "nonsense and of no consequence" to Zimbabwe. The tribunal followed up its ruling with a contempt ruling and costs order in June 2009. On 26 February 2010, the North Gauteng High Court in Pretoria registered these rulings. They are now rulings of a South African court and as such the cost order is an executable judgment. Four Cape Town properties in Zonnebloem, Kenilworth and Wynberg were identified. The Sheriff of Cape Town visited these properties on 11 March 2010 to attach movables. We have received his confirmation about the current state of the properties: three of the properties are vacant and one is being leased to third party tenants. Since the properties are therefore of a non-diplomatic nature, they can be attached. A writ of execution of immovable property will therefore be issued in the North Gauteng High Court today and served early next week. The attachment of immovable properties in Cape Town will be the first step in what AfriForum describes as its "Civil Sanction Campaign". This campaign is our gesture of hope and support to the millions of Zimbabweans waiting in despair for a better life. <http://www.southafrica.co.za/2010/03/26/zim-civil-sanction-campaign> *Zim – civil sanction campaign*, Alana Bailey March 26, 2010

<sup>22</sup> *Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe* (ICSID Case No ARB/05/6)

<sup>23</sup> Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11 December 1996

<sup>24</sup> Sokwanele, Legal Opinion: Proposed Bilateral Investment Promotion and Protection Agreement between Zimbabwe and South Africa, 26 November 2009, <http://www.sokwanele.com/thisiszimbabwe/archives/5253> [accessed 20-03-2011]

<sup>25</sup> The Universal Declaration of Human Rights, 1948 (article 17)

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*the general interest of the community and in accordance with the provisions of appropriate laws."*

It is against this background that the Zimbabwe-South Africa Bilateral Investment Promotion Agreement(BIPPA) was signed. Given this background there has criticism on the effectiveness of the current BIPPA in protecting investors in Zimbabwe.<sup>26</sup> In actual sense BIPPA was signed in a contentious environment.<sup>27</sup>

Negotiations relating to the content of a bilateral agreement between Zimbabwe and South Africa have been ongoing since 2002. Although theoretically a reciprocal agreement, the BIPPA was signed largely to make provision for the South African business community's interest in investment opportunities in Zimbabwe, particularly in the agro-processing sector, telecommunications, mining and infrastructure.<sup>28</sup>

South African investors, who remain Zimbabwe's largest African trading partner, have in the past been anxious about investing in Zimbabwe because of the high levels of uncertainty about the protection of their investments, particularly the protection of property rights. The BIPPA aims to allay this uncertainty.<sup>29</sup>

Political risk has been high in Zimbabwe although there are other means of ensuring against this risk. This research therefore seeks to find out how BIPPA can be used as a weapon to reduce this risk thereby encouraging investment in Zimbabwe. The risks that the investor can face when investing in a hostile environment are so many but the following are the one that has been associated with Zimbabwe. Political risk is the risk that the laws of a country will unexpectedly change to the investor's detriment after the investor has invested capital in the country, thereby reducing the value of the individual's investment. Sonarajah<sup>30</sup> has associated the risks in Zimbabwe with instability in law and order in the state posing a threat to foreign investment. He interlinked this risk with nationalistic sentiments.<sup>31</sup> The government of Zimbabwe was unable to contain the

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<sup>26</sup> Sokwanele *supra* note 24

<sup>27</sup> <http://www.theindependent.co.zw/comment/24471-bippa-a-test-of-govts-sincerity.html> [accessed 05-02-2010]

<sup>28</sup> <http://www.mondaq.com/article.asp?articleid=94688> [accessed 05-02-2010]

<sup>29</sup> Sokwanele *supra* note 26

<sup>30</sup> Sornarajah M. 2004. *The International Law on Foreign Investment* (2nd Ed.) Cambridge: Cambridge University Press , 78

<sup>31</sup> *ibid*

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public after triggering an uprising against foreigners. The government, facing opposition, diverted attention into the scheme for seizing property of white farmers and handing the property over to the indigenous people. Such situations are usually provided for the terms of international law through rules that engage the responsibility of the state where it fails to give protection to the interest of the foreigner from anticipated attacks on property; Nationalistic sentiments pose threat to foreign investments.<sup>32</sup> Nationalistic sentiments were appeased in Zimbabwe by the existing politician by carrying out an attack on the white farmers who owned a great share of economy so as to retain power.<sup>33</sup> Of the late the proposed indigenous law has raised eyebrows of potential investors who were contemplating investing in Zimbabwe.

The investor can however take some comfort, in the recently signed bilateral investment treaties between Zimbabwe and South Africa. The agreement contains promises by these countries guaranteeing certain standards of treatment of investors and investments. Political risk may be substantially reduced because the agreement seek to protect private investment is in place between the foreign state, the investor's home state and third parties. The agreement is aimed specifically at protecting private foreign direct investment in the host state. BIPPA set forth standards for treatment of foreign investors in areas such as expropriation of property, repatriation of funds, and settlement of disputes. When a host state violates the rights guaranteed to the investor by the treaty, an investor has recourse on an international arbitration.

### **The problem statement**

During Zimbabwe's controversial land reform program there was wide spread violation of property rights and the country willfully violated other bilateral investment protection deals signed with other countries. This resulted in investor confidence being lost and a number of investors left the country. The Zimbabwean economy suffered immensely. In the hope to revive its economy Zimbabwe signed a bilateral investment treaty with South Africa with a significant and projected aims of attracting Foreign Direct Investment (FDI) not only from South Africa but the rest of the world. Critics have however raised doubts over Zimbabwe's commitment to a

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<sup>32</sup> *ibid*

<sup>33</sup> *ibid*

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Bilateral Investment Promotion and Protection Agreement (BIPPA) signed with South Africa.<sup>34</sup> Although the agreement is bilateral in nature, the spotlight remained on Zimbabwe. Zimbabwe still cannot be trusted to abide by the agreement due to its history. The problem of commitment on the side of Zimbabwe which encourages FDI still remains debatable. The SADC judgment<sup>35</sup> against Zimbabwe in which Zimbabwe refused to abide by it still discourages investors and the question remains on the effectiveness of BIPPA offering legal protection in Zimbabwe and of which the proposed Indigenous law has been deemed expropriatory in nature.

### 1.2 Hypothesis and Research Questions

The hypothesis of this research focus on the study of Bilateral Investment Treaties (BITs) encouraging FDI flows to the host the host nation although they are many arguments against this notion on the available literature. My arguments will be that BITs are investment treaties with clear and enforceable rules which reduce the risks the investor might face and that such reduction in risk,<sup>36</sup> all things being equal encourages investment. It will also further validate that the role of encouraging FDI has its own negative implications upon the host which can be justified as disciplinary on the host. This will be achieved through a detailed and comprehensive analysis of the possible impact of BIPPA on Zimbabwe. This in turn raises four critical questions that will be used as principal guide to this study:

- 1- How do Bilateral Investment Treaties (BIT) encourage Foreign Direct Investment(FDI)
- 2- In what ways can the Zimbabwe- South Africa BIPPA encourage foreign Direct Investment to Zimbabwe
- 3- What are the implications of BIPPA encouraging FDI on Zimbabwe
- 4- What conclusions can be drawn on the role of BIPPA encouraging foreign Direct Investment to Zimbabwe

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<sup>34</sup> SA-Zimbabwe bilateral treaty 'best yet' but no reason to invest Thursday, February 11, 2010 By Michael Trapido ; [http://www.theichmarksentinel.com/rs\\_headlines.asp?recid=3887](http://www.theichmarksentinel.com/rs_headlines.asp?recid=3887) [Accessed 08-03-2010]

<sup>35</sup> Sokwanele *supra* note 24

<sup>36</sup> Tobin, Jennifer and Susan Rose-Ackerman, 2003, Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties, 6

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### 1.3 Significance of the study

This study is relevant to the government of Zimbabwe in respect of what changes the government needs to effect so that the bilateral investment agreement with South Africa can achieve the desired goal of encouraging foreign direct investment. To the government of South Africa it helps them to be aware of what possible protection might be expected to their investors who intent to invest in Zimbabwe. The study will help investors around the world to make an informed decision if they decide to invest in Zimbabwe and it is great significance to those developing countries keen to attract foreign direct investment from developed countries using bilateral investment treaties.

For academics, the study contributes to the ongoing debate on the role of bilateral investment treaties in encouraging foreign direct investment thereby adding on the existing literature on the topic. It will also help policy makers on how they can improve on bilateral investment treaties so that they can encourage foreign direct investment.

### 1.4 Definition of Concepts

**Bilateral Investment Treaties** (BITs) – are agreements signed between two countries concerning the reciprocal promotion and protection and protection of investments.<sup>37</sup> The promotion and protection is reciprocal hence there no indication on the source of investment or the recipient. The terms often used the host (Zimbabwe) and the home (South Africa). BITs are agreements that establish the terms and conditions for investment by nationals and companies of one country in the jurisdiction of another. These treaties provide institutional safeguards for foreign investment.

**Foreign direct investment** (FDI)- is a measure of foreign ownership of productive assets, such as factories, mines and land. Increasing foreign investment can be used as one measure of growing economic globalization. Foreign Direct Investment is viewed as a major stimulus to economic growth in developing countries.<sup>38</sup> It has a perceived ability to deal with major

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<sup>37</sup> Geguerios Jose, Luis, *Bilateral Investment Treaties on the Reciprocal Protection of Foreign Investment*, California Western International Law Journal, spring 1994, p257

<sup>38</sup> [http://www.sarpn.org.za/documents/d0000883/P994-African\\_Social\\_Observatory\\_PilotProject\\_FDI.pdf](http://www.sarpn.org.za/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pdf) (accessed 15-02-2010)



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obstacles such as shortages of financial resources, technology, and skills.<sup>39</sup> The IMF defines foreign direct investment as “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 effective control in the management of the enterprise.”

Bilateral Investment Promotion and Protection Agreement (BIPPA ) -Zimbabwe- South Africa bilateral investment agreement signed by trade ministers from both countries on 27 November 2009 that would protect investments made by nationals of both countries in each other's territory.

### **1.5 Research Methodology**

The main ambit of my paper takes the form of a literature review and analysis; the research methodology will be qualitative and analytical in nature. Analytical because there are many scholars who have written on the subject hence it will require an analysis of the available literature to come up with my own conclusion. Both primary and secondary sources will be explored and as to the current debate on the topic of BIPPA reference will be made on available internet sources and newspapers. Bilateral treaties (with special focus on the BIPPA) and official documents as well as relevant official documents will be explored as primary sources. Relevant books, scholarly articles and working papers are also examined as secondary sources with the view to assess the role of Bilateral Investment treaties in encouraging foreign direct investment. Hence intensive library research and desk-top literature review will be employed.

### **1.6 Delineations and Limitations of the study**

A detailed assessment of the role of bilateral investment treaties in encouraging foreign direct investment will hardly be achieved in this thesis owing to the time and space limitations. This study will pay a special focus on Zimbabwe although bilateral investment treaties are reciprocal as per say, it has been largely acknowledged that their role is mostly to promote foreign direct investment to the host state. The research will also be limited on the major critical political issues of the country as it will focus more on issues affecting investment. The work will be limited on the

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<sup>39</sup> *ibid*



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situation on the ground since it will be written away from the country. Hence there will be no interviews thus limiting me to primary, secondary and internet information.

### 1.7 Literature Review

There has been heated debate among scholars on the effect of bilateral investment treaties on foreign direct investment. Most of the early studies on the topic have generated inconsistent results arguing against BIT as a device of investment facilitation, but the most recent refined research supports the link between signing a BIT and FDI promotion. Pertaining to the recently signed Zimbabwe- South Africa BIPPA there has also been arguments for and against the effectiveness of the agreement protecting investments in Zimbabwe, an element which will lure investors to invest in Zimbabwe.

*"We want this BIPPA between our two countries to work. BIPPA is a document signaling to the world that Zimbabwe is ready for investments and should not be judged by its past performance and that the country BIPPA signifies a new era," Elton Mangoma, Zimbabwe's Trade minister, said after the signing ceremony. Mangoma said Zimbabwe was working hard to improve its investment climate and assured South Africans and other countries that their businesses will not be affected by the state's controversial empowerment law, which requires that locals own a 51 percent stake in all foreign firms<sup>40</sup>*

The argument on BIPPA encouraging FDI is based on the underlying statement by the minister. Despite the land reform issue the indigenous law poses a question on the security of investments in Zimbabwe. BIPPA is said to stand against the proposed empowerment law.

The first refined study on the proponents of BITs encouraging FDI is by Neumayer and Spess.<sup>41</sup> The study disqualifies all the previous studies that argue against BITs as having an impact on FDI. They focused more on the signaling effect<sup>42</sup> of BITs and found a positive effect of BITs on

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<sup>40</sup> The words of the Minister raise the main question in my research in which views of different scholars will be employed for clarity. These words can be found in different newspaper article but for reference see; SA -Zim sign a New Investment Protection Deal- 27/11/2009, newzimbabwe.com [Accessed 02-02-2010]

<sup>41</sup> Neumayer, E. and Spess, L.: 2005, Do bilateral investment treaties increase foreign direct investment to developing countries?, *World Development* 33(10), 1567–1585

<sup>42</sup> Aisbett supports Neumayer and Spess as his study found a positive and strong statistical correlation between BIT ratification and FDI inflows. His study focuses on FDI flows from 29 OECD countries to 28 developing countries during 1980-1999. Her finding however does not give a conclusive answer on the effectiveness of BITs as a device for FDI promotion. Aisbett, E 2007. *Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation*: CADARE, Working Paper, 1032. Berkeley, University of California, <http://repositories.cdlib.org/are.ucb/1032>. [accessed 20-03-2010]

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FDI inflows across various model specifications. On the role of BITs operating as substitutes to institutional quality they found limited evidence. They argue that by concluding BITs with developed countries, particularly those that are major FDI exporters, developing countries give up some of their domestic policy autonomy by binding themselves to foreign investment protection, but could expect to receive more FDI in exchange. Their conclusion was that the effect is possibly more evident in countries with weak domestic institutions, especially in countries for which the confidence and credibility-inspiring signal to foreign investors following the signing of BITs was most important.<sup>43</sup>

Using bilateral outward FDI stock data from 19 OECD and 57 host countries home countries Egger and Pfaffermayr<sup>44</sup> analysis demonstrated that BITs wield positive and significant effect on the outward FDI of home countries in BIT partner host countries if the treaties are actually implemented. Buthe and Milner<sup>45</sup> examine the proposition on 122 developing countries with a population of one million people from 1970 to-2000. In their research they use a range of control variables relating to market size, economic development, trade openness, domestic and political constraints and political instability. They put forward the argument that the greater number of BITs a developing country concludes the more appealing it will be to foreign investors which in turn increases inward FDI. They however caution that developed countries have to weigh the benefits of increased FDI and the costs.

Salacuse and Sullivan<sup>46</sup> find that BITS with the strongest investor protection attracts FDI as compared to an agreement with weaker standards. In line of this argument their results showed that United States BIT is more likely to induce FDI inflows than those by OECD countries. They also argue that ratified BITs are more effective in investment promotion compared to those that are not.<sup>47</sup>

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<sup>43</sup> Neumayer and Spess *supra* note 42

<sup>44</sup> Egger P and Pfaffermayr, M. 2004. The Impact of Bilateral Treaties on Foreign Direct Investment, *Journal of Comparative Economics*, Elsevier Vol 32(4) 788-804

<sup>45</sup> Buthe, Tim & Helen V. Milner. 2005. "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through Policy Commitment via Trade Agreements and Investment Treaties?" Working Paper.

<sup>46</sup> Salacuse, J. and Sullivan, N.: 2004, Do BITs really work? An Evaluation of bilateral investment treaties and their grand bargain, *Harvard International Law Journal* 46(1)

<sup>47</sup> Gallagher and Birch examines the impact of the total number of BITs and BITs with the United States on the total and bilateral inflows of FDI into 2003. They concluded that the total number of signed BITs has an independent and

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Grosse and Trevino<sup>48</sup> in their study on the effect of BITs on FDI in 13 countries of Central and Eastern Europe covering the period from 1990 to 1999- argue that BITs help to curb the uncertainty and costs associated with long-term capital investment, thereby resulting in inward FDI. They propound that BIT reduces the cost of doing business as investors get the assurance that foreign and domestic investors will be treated on the same footing. Egger and Merlos<sup>49</sup> they find that Bits had a better impact on long-term basis than in the short term. The 2008 authors Busse,<sup>50</sup> et al whose study focus on the 1978 to-2004 assert that:

*“BITs promote FDI inflows to developing countries. This result is fairly robust across various models. Moreover, the significantly positive effect of BITs on bilateral FDI Flows holds for FDI flows from developed source countries to various sub-samples of developing host countries. BIT may even substitute for weak local institutions, though not unilateral FDI-related liberalization measures. All this suggest that policy makers in developing countries have resorted to an effective means to promote FDI by concluding BITs”*

In contrast to Neumayer and Spess,<sup>51</sup> and proponents of the theory that BITs encourages FDI to developed Yackee<sup>52</sup> in his paper concludes that the institutional quality test shows an opposite conditional relationship than that found by Neumayer and Spess. He argues that against the strong relationship between BITs and FDI on the pretext that: potential investors are not aware of the existence of BITs and that BITs do not solve the problems of credible commitment.

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positive effect on total FDI inflow into a host country. They however not associate this effect on the United States BITs. Gallagher, KP and Birch, MB (2006), DO Investment Agreements Attract Investments? Evidence from Latin America, *The Journal for World of Investment Trade*, Vol; 7 No 6, 961-974.

<sup>48</sup> Grosse R and Trevino, T L J.2005,. New Institutional Economies and FDI Location in Central and Eastern Europe, *Manage International Review* Volume 45 No 2: 123-145.

<sup>49</sup> Egger, P. Merlo (2007),. The Impact of Bilateral Investment Treaties on FDI dynamic; *The world Economy* 2007. Vol 30: 1536-1549.

<sup>50</sup> Busse,M. Koeniger, J and Nunnenkemp, P 2008, FDI Promotion through Bilateral Investment Treaties: More than an BIT ? Kiel Working Paper NO.1403 February keil: Keil Institute for the World Economy.

<sup>51</sup> Neumayer and Spess *supra* note 42

<sup>52</sup> Yackee, J. W 2007. 2007. *Do BITs Really Work?* Revisiting the Emperical link between investment treaties and FDI, Legal Research Paper Series, Paper No. 1054 Wirsconsin: University of Wisconsin Law School

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Hallward-Driemeier<sup>53</sup>, as one of the exponents argues that BITs are complements to good institutional quality and therefore do not perform their original function, namely to provide guarantees to foreign investors in the absence of good domestic institutional quality. Looking at the bilateral flow of FDI from 20 OECD countries to 31 developing countries over the period 1980–2000 he concludes that BIT between two countries does not increase the flow of FDI from the developed to the developing signatory country. Study by Tobin and Rose-Ackerman<sup>54</sup> finds a negative effect at high levels of risk and a positive effect only at low levels of risk, with the majority of developing countries falling into the high risk category. Sornarajah<sup>55</sup>, for example, suggests that “in reality attracting foreign investment depends more on the political and economic climate for its existence rather than on the creation of a legal structure for its protection. The Zimbabwe –South Africa Bilateral investment agreement will be tested in line of the above argument to see in which scholarly view holds water.

### **1.8 Preliminary Chapter overview**

Chapter one is the introduction. It outlines the background of the research problem, definitions of concepts, research questions, hypotheses, the significance and the research methodology.

The Second chapter constitutes the general background on BIPPA by highlighting the role of bilateral investment treaties in encouraging foreign direct investment. It will highlight the history of bilateral investment treaties in line with role encouragement of foreign direct investment. It will also be shown how the basic structure and the ultimate goal of the treaties in support investment protection which investors seek. The history, the aim and structure of BITs shows how the main aim has been to ensure security of investments in the host nation.

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<sup>53</sup> Hallward-Driemeier, M (2003). Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite. World Bank Policy Research Paper WPS 3121, World Bank: Washington DC

<sup>54</sup>Tobin, J. and Rose-Ackerman, S.: 2004, Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. Yale Law School Center for Law, Economics and Public Policy Research Paper No. 293

<sup>55</sup> Sornarajah. M. (1986), State Responsibility and Bilateral Investment Treaties’ *Journal of World Trade Law*, 20, 79-98

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The third chapter will carry out an analysis of the BIPPA provisions and how it aims to achieve its ultimate goal. It depicts how clear outlined rules are aimed at protecting investments in a risk country like Zimbabwe. Like all the other BITs BIPPA have substantive and procedural rules at the disposal of the investor for investment protection. The fourth chapter then dwells on the negative and implications of the provisions of BIPPA upon the host. Last chapter 5 will then draw conclusions from the arguments raised in chapter 2, 3, and 4 in favor and against BIPPA encouraging foreign direct investment. Recommendations will also be given in this chapter.

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### CHAPTER TWO

#### Introduction

In order to have a clear understanding of the perceived role of Bilateral Investment Treaties one needs to have an understanding of the background behind the treaties. Hence this chapter explores the origins, the contents and the objectives of BITs. The chapter will then proceed by examining the relationship between BITs and FDI from a theoretical perspective and elaborates on the causal mechanisms that may link these two phenomena. This chapter offers a background to the role of investment treaties and how they come about. It offers a background to the understanding why BIPPA was signed with the aim of encouraging FDI. The history, the aims and the structure of BIT shows how Zimbabwe signing BIPPA at point when there is no certainty on the investment area is in line with the ultimate goal of these investment treaties.

The point that needs to be noted that as this chapter folds is that from history these treaties have always been signed to ensure security of investors in a foreign nation especially where the risk of expropriation was high. The nationalization of the British oil assets by the Iran in 1951, the expropriation of Liamco's concessions in Libya in the 1955 and the nationalization of the Suez by Egypt a year later show how investment can be prone to sovereign risk in the host country.<sup>56</sup> South Africa also soon after apartheid signed a number of investment treaties to ensure and encourage investors by signaling to the world that an investor friendly environment was emanating.<sup>57</sup> After the colonial era developed countries with fear of the emerging governments the only way to encourage national to foreign investment was to ensure that there is an international instrument to protect these investors. The Legal system is said to have been developed out of necessity to cope with the emergency situations. The only way to restore a climate of favorable international which had been endangered by extensive expropriation policies was the developed and international instruments which states had to commit to. Bilateral investment treaties became the main source of international investment law.<sup>58</sup> George Schultz points out that bilateral investment treaties were not only aimed at protecting investments but to reinforce

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<sup>56</sup> Jesawald W. Salacuse *supra*

<sup>57</sup> Luke Peterson

<sup>58</sup> United Nations Conference on Trade and Development (UNCTAD) *Bilateral investment treaties, trends in Investment Rule Making*, United Nations, New York Geneva 2007, p.1

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traditional international principles and practices regarding foreign direct private investment.<sup>59</sup> The need to attract FDI for the development of the state has been apparent in many capital importing states by not wanting to perceive internationally posing a frequent arbitrary threat of expropriation both in BIT generation as in the FCN generation.

### **THE HISTORY BEHIND BILATERAL INVESTMENT TREATIES**

During the colonial era military power was sufficient to safeguard investments and trade being gun-boat diplomacy. In some parts investors had to rely upon their governments taking up the claim on their behalf through diplomatic measures.<sup>60</sup> The right of diplomatic protection was and still is inadequate to promote foreign investment; the Latin American countries relied upon the Calvo Doctrine, which denied the possibility of interference under diplomatic protection principle.<sup>61</sup> The hurdle for investors to convince their government to claim diplomatic protection for its nationals was very high and unpredictable. There was basically no international law to meet the needs of foreign investment and this was also noticed in the International Court of Justice in the Barcelona Traction case.<sup>62</sup>

The only protection for foreign investors was the customary international legal rule of minimum standard of treatment and the so-called Hull rule. The Hull Rule came into being as result of US-Mexico dispute in which the New Mexican government after the revolution expropriated different American holdings in Mexico.<sup>63</sup> According to this rule countries that expropriated property were required to provide prompt, adequate and effective payment. The Hull Rule dealt exclusively with cases of expropriation and therefore provided no general protection against

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<sup>59</sup> George P. Schultz, Transmission letter to the President recommending transmission of the US-Turkey BIT, 1985 . <http://ankra.euembassy.gov/IRC/treaty/1985.htm> [accessed 17-03-2010]

<sup>60</sup> Tobin, Jennifer. "Separate and Unequal: Bilateral Investment Treaties and Property Rights in Developing Countries" Paper presented at the annual meeting of the Midwest Political Science Association, Palmer House Hotel, Chicago, IL, Apr 12, 2007 . 2010-01-24, [http://www.allacademic.com/meta/p197323\\_index.html](http://www.allacademic.com/meta/p197323_index.html),. Republic of South Africa,. *Bilateral Investment Treaty Policy Framework Review: Government Position Paper*, 7. <http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf>.

<sup>61</sup> John Dugard, *International Law, A South African Perspective*, 3rd Ed., 2005, p 295;

<sup>62</sup> Sonarajah M; *The International Law on Foreign Investment*, second Edition, Cambridge University Press, 2004, p 213.

<sup>63</sup> In one of a series of diplomatic notes to the Mexican Minister of Foreign Affairs, the US Secretary of State Cordell Hull stated that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefore." Guzman, Andrew. 1998. Explaining the Popularity of Bilateral Investment Treaties: Why Ldcs Sign Treaties That Hurt Them. *Virginia Journal of International Law* 38: 639.641



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discriminatory treatment. This requirement was more inclined to the needs of developed countries that exported capital. The Hull Rule however ceased to be the rule of customary international law in the mid-1970s because developing countries challenged its validity as part of their demands for the New International Economic Order with some success.

BITs can however be deemed as the successor to the friendship commerce and Navigation treaties (FCN).<sup>64</sup> The USA negotiated and signed FCNs with many European States including France, Italy and Latin American States so as to improve and to protect many foreign trade relationships with each other.<sup>65</sup> These treaties provided international legal standard for the protection of natural and legal persons.<sup>66</sup> Nevertheless FCN clause failed to cater for the problem of creeping expropriation and also suffered from poorly drafted arbitration clauses. Historically the FCNs have covered a broad range of topics, on the contrary to the European Union BITs which was limited towards promotion and protection of investors.<sup>67</sup> Though the FCN was intended to facilitate trade and shipping they usually contained provisions affecting the ability of one's country nationals to own property or to do business in the territory of the other. The continued uncertainties arising from the FCN regarding the safety of foreign investors coupled with other potentially positive benefits prompted the ushering in of the BIT.

A new era in the historical development of the recent international legal framework emerged in the late 1950s, as individual European countries negotiated bilateral treaties. This was because in the late 1950s fears heightened of the security of foreign investments when concerns about decolonization in the developing world and the spread of communism emanated.<sup>68</sup> Germany, which had lost all of its foreign investments as result of its defeat in World War II, took the lead in this new phase of bilateral making.<sup>69</sup> The first agreement thus was between Germany and

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<sup>64</sup> Sonarajah M *supra* note at 30, 217.

<sup>65</sup> Vandeveldt J Kenneth, The BIT Program: A Fifteen-Year Appraisal, The Development and Expansion of Bilateral Investment Treaties, American Society of International Law Proceedings, 1992, 533.

<sup>66</sup> Sonarajah, *supra* note 30, 209

<sup>67</sup> Mark S Bergman, Bilateral Investment Protection Treaties; An Examination of the Evolution and Significance of US Prototype Treaty, *Journal of International Law and Politics*, Vol 16, 1983, 6.

<sup>68</sup> Treaty for the promotion and Protection of Investments, Pakistan-F.R.G, 457 UNTS. 23, Lauterpacht ELIHU, international Law and Private Foreign Investment, Indiana Journal Global Legal Studies, Spring 1997, p 266

<sup>69</sup> Salacuse, J. and Sullivan, N.: 2004, Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain, *Harvard International Law Journal* 46(1) :68.



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Pakistan in 1959.<sup>70</sup> A number of bilateral investment protection agreements (BIPAs)<sup>71</sup> when then concluded as compared to the United States.<sup>72</sup> A total of Eighty-three BITs were concluded by 1970, just eleven years after Germany and Pakistan conclude the First BIT. In 1980, BITs spread to the Eastern and Central Europe, Asia, Africa and South America as they opened their markets in pursuit of foreign capital.

One of the reasons that might have resulted in the progress of European programs compared to the United States was that they were less strict in their demands as regards to guarantees pertaining matters such as free conversion of local currency, abolition of performance requirements and protection against expropriation.<sup>73</sup> On the side of developing countries one of the factors that prompted the increase BITs was led by the economies of oil-exporting developing countries. Since 1979, they had undergone balance of payments deficits on current accounts due to rising import prices and a falling demand in the prices of their exports.<sup>74</sup> As a result they had to come terms with liberalization of their foreign investment codes and the conclusion of BITs a measure to attract FDI.

In model BITs various economic, political and historical factors shaped and continue to shape the development of international law on foreign investments.<sup>75</sup> The modern BITs retain but expand upon the FCN treaty establishment concepts and terminology in areas of entry and general treatment standards, property protection and financial transfers.<sup>76</sup> In limiting the scope to exclusively investment related issues the European model was incorporated. In the absence of a clear multilateral regime, bilateral investment treaties remain the main international means for foreign investment regulation.<sup>77</sup>

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<sup>70</sup> Jeswald W. Salacuse, *supra* note 69, 102

<sup>71</sup> BIPA referred to non-United States investment protection agreements where as BIT refers only to the United States bilateral investment treaty. *ibid*

<sup>72</sup> Switzerland, France, the United Kingdom, the Netherlands and Belgium followed relatively after Germany in their order, by 1977; European countries had concluded approximately 130 BITs with developing countries. above

<sup>73</sup> Do Bit Really Work? An Evaluation of Bit Treaties and their Grand Bargain, Volume 46

<sup>74</sup> UNCTAD 1988 PG 1

<sup>75</sup> Tobin, Jennifer and Rose Ackerman *supra* note 69

<sup>76</sup> *ibid*

<sup>77</sup> *ibid*

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### THE AIMS OF BILATERAL INVESTMENT TREATIES

The agreements have three primary objectives, the promotion and protection of investments, the minimization of risk and loss in the event of an expropriation and the submission of investment disputes.<sup>78</sup> A BIT between a developed and a developing country is found on the grand bargain: a promise of the protection of capital in return for the prospect of more capital in return for the prospect of more capital in the future.<sup>79</sup> Author Kenneth Vandeveld propounds that the primary objective of the BITs is to promote the application of the rule of law to foreign investment, while a secondary purpose is to create a liberal investment regime.<sup>80</sup> The aim of a Foreign Direct Investment, according to the definition of International Monetary Fund (IMF), is to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise.<sup>81</sup>

The main goal behind the signing of BITs rests on the need of developed countries wanting their nationals to invest safely and securely in developing countries and as well as the ensuing need to create a stable international legal framework to facilitate and protect investments.<sup>82</sup> In the absence of the BITs foreign investors are obliged to rely on the host law alone which made investors open to a number of risks. Bilateral investment treaties are thus the dominant means through which investment in low-income and middle income countries is regulated under international law by ensuring investment neutrality to foreign investment<sup>83</sup>. The provisions of BITs are meant to secure the legal environment for foreign investors, establish mechanisms for dispute resolution and facilitate the entry and exist of funds.

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<sup>78</sup> Mark S, Bersman, Bilateral Investment Protection Treaties: An Examination of the Evolution of Significance of the US Prototype Treaty. *Journal of International Law and Politics*, Vol 16

<sup>79</sup> Salacuse and Sullivan, 2005, *supra* note 46, 77

<sup>80</sup> Vandeveld, 2004, *supra*, 98.

<sup>81</sup> OECD BENCHMARK DEFINATION ON FOREGN DIRECT INVESTMENT, Third Edition <http://www.oecd.org/dataoecd/10/16/2090148.pdf>, 7

<sup>82</sup> Reisman .Michael W: Indirect Expropriation and its Evaluation in the BIT generation, *The British International Law* 2003, Vol. 74 (2003) p115-150 and see also Geguerios Jose, Luis, Bilateral Investment Treaties on the Reciprocal Protection of Foreign Investment, *California Western International Law Journal*, spring 1994, p257.

<sup>83</sup> Vandeveld J. Kenneth , Investment Liberalisation and Economic Development: The role of Bilateral investment Treaties. *Columbia Journal of Transnational Law* , 1998, p.507-514

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Bilateral investment treaties are viewed by host governments and by investors as devices that raise the expected return on investments.<sup>84</sup> They are more inclined to assist FDI inflows of the host country as a part of broad FDI policy.<sup>85</sup> Besides assisting developing countries to attract scarce capital to finance liquidity constraints, the treaties also help giving signals to the multinational companies that the government are now committed in providing investments protection and guarantees.<sup>86</sup> BITs thus have positive spill-over effects as the encouragement of FDI flows need not be limited to the parties to the treaty but to the rest of the world.<sup>87</sup>

The role for BITs in creating new flows in contributing to the new stream of investment is indirect since treaties do not create economic conditions for investments but rather they are intended to remove legal obstacles to free flow of investment.<sup>88</sup> BITs thus provide investment security and neutrality.<sup>89</sup> BITs aim to obtain legal protection for investment as a means of fostering economic growth and development.<sup>90</sup>

### **FEATURES OF BILATERAL INVESTMENT TREATIES**

Although many countries rely on their model agreements when negotiating individual BITs, BITs are remarkably similar in their organization and content.<sup>91</sup> BITs addresses four substantive

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<sup>84</sup> Guzman, Andrew. 1998. Explaining the Popularity of Bilateral Investment Treaties: Why Ldcs Sign Treaties That Hurt Them. *Virginia Journal of International Law* 38: 639.

<sup>85</sup> Secretary of state George Schultz argued the BITS were designed ,“ to protect investment not only by the treaty but by also reinforcing traditional international principles and practices regarding foreign private investment, George P. Schultz, Transmission Letter to the President recommending transmission of US-Turkey BIT, 1985. <http://ankra.uembassy.gov/IRC/treaty/1985.htm> [accessed 22-03-2010]

<sup>86</sup> <http://www.unctad.org/TEMPLATES/webflyer.asp?docid=2995&intItemID=2023&lang=1> (accessed 07-02-2010)

<sup>87</sup> Neumayer, Eric and Laura and Laura Spess, 2004, Do Bilateral Investment Treaties Increase Foreign Direct Investment? *Investment Treaties*. Briefing 2 August 2007 , International Institute for Environment and Development

<sup>88</sup> Lorenzo Cotulo, *Investment Treaties*. Briefing 2 August 2007 , International Institute for Environment and Development

<sup>89</sup> Vandevelde J. Kenneth, *Investment Liberalisation and Economic Development: The role of Bilateral Investment Treaties*, *Colombia Journal of Transnational Law*, 1998, p .507-514

<sup>90</sup> Dolzer Rudolf and Stevens Margrete, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995,12.

<sup>91</sup> Several factors account for the uniformity among BITs; most BITS between developed and developing states have been negotiated on the basis of models drafted by developed states. The models themselves are similar because the drafters often drew upon certain common sources such as the Organization of Economic Cooperation and Development (OECD) Draft Convention on the Protection of Foreign Property. See Kenneth J.Vandevelde, *United States Investment Treaties; Policy and Practice* 29, 1992 While BITs are modified according to the signatories' preferences, in most cases, they cover substantially similar issues and have changed little with time , see Hallward-Driemeier, 2003; Tobin & Rose-Ackerman, 2005; UNCTAD, 2000.

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issues: conditions for the admission of foreign investors to the host state, standards of treatment of foreign investors, expropriation and methods of for resolving investment disputes.<sup>92</sup>

Most BITs have similar provisions and the following issues can be found in most BITs: Preamble, investment and investor definitions, treatment of investment, expropriation, currency transfer, subrogation and dispute settlement provisions.<sup>93</sup> A number of BITs also include provisions allowing for transfer of monies and for some protection from war and civil disturbance.<sup>94</sup> Nonetheless a limited number contain provisions on the movement of key employees, and prohibiting certain forms of performance requirements.<sup>95</sup> Generally, treaty provisions will only apply to investments once they have been established in the host state. However, some treaties particularly those concluded by the U.S., Canada and Japan may widen protections to the pre-establishment phase meaning prior to the establishment of the investment in the host state's territory.<sup>96</sup> In terms of the sectors of the economy that are covered by the substantive disciplines, it is common for treaties to cover all sectors, with the exception of those which are expressly excluded of the treaty, or free from the application of certain of its provisions.<sup>97</sup>

The promotion and protection of investment is reciprocal hence most BITs do not explain which party is the source of investment or which is the recipient.<sup>98</sup> They are however of made between unbalanced partners.<sup>99</sup> They are usually concluded between a capital exporting developed state and a developing state keen to attract capital from that state. Hence in practical sense taking into consideration the differences in wealth and technology, it is usually one flow of investment that

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<sup>92</sup> Goerge M. von Mehren., Navigation Through Investor-State Abitrations: An overview of Bilateral investment Treaties Claims DISP. RESOL.J., 2004, 69-70.

<sup>93</sup> Sonararaj M. *supra* note 30, 2004, 217.

<sup>94</sup> UNCTAD., Bilateral Investment Treaties in the Mid-1990s, United Nations, New York and Geneva 1998, 73-80.

<sup>95</sup> UNCTAD, BITs in the Mid-1990s, pp. 81–3; Provisions covering performance requirements are found in some U.S., Canadian and Japanese treaties.

<sup>96</sup> UNCTAD, Admission and Establishment, 1999, 26–8;

<sup>97</sup> Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making*, International Institute for Sustainable Development November 2004 © 2004 International Institute for Sustainable Development and the Swiss Agency for Development and Cooperation, <http://www.investmenttreatynews.org/content/archives.aspx>

<sup>98</sup> Siquerios Jose Luis, Bilateral Treaties on the Reciprocal Protection of Foreign Investment, *California Western International Law Journal*, Spring 1994, 257.

<sup>99</sup> Sonarajah., 2004, *supra* note 30, 207.

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is reflected.<sup>100</sup> Bilateral investment treaties are voluntary there is no element of oppression involved in their conclusion as the signing is reached through negotiations.

### **THE INTERLINK BETWEEN BITS AND FDI**

There are four areas of BITS and FDI intersection that have been determined and this has been collaborated by econometric literature. It has been submitted by a number of scholars that BITS has the following impact on FDI:

- Commitment effect:<sup>101</sup> research testing this hypothesis take bilateral FDI flows between pairs of developing host countries and developed home countries as a dependent variable, and examine whether and when the conclusion of BITs (mostly its signing) contributed to increased FDI flows from home BIT partner countries to the host partner countries. The argument is based on the pretext that binding international commitment to satisfactory protection and treatment of foreign investors will reduce risks and increase FDI from home partner countries.

Developing countries in their bid to attract FDI often suffer from “holdup” or “dynamic inconsistency” problem in which cure is found in the basic provisions of BITs.<sup>102</sup> The dynamic inconsistency problem emanates from the fact that the host countries often find it difficult to protect investments once the investment is established and investors have dejected significant costs.<sup>103</sup> Besides promise of fair and equitable treatment previously the host will exploit or expropriate the assets of the investors hence BITs acts as a shield against expropriation or an arbitrary treatment of investments.<sup>104</sup> National legislation is often not sufficient to provide adequate security to foreign investors and with no international enforcement the cost of doing business will be high that most investors decide not to invest. Bits are designed to erase these barriers and guarantee legal rights to investors.

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<sup>100</sup> Sonarajah, *supra* note 30,2004, 207.

<sup>101</sup> UNCTAD Series on International Investment Policies for Development,.The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, 2009, 29-30.

<sup>102</sup> Andrew T Guzman,. Why LCD Sign Treaties that hurt them, *Virginia Journal of International Law* Vol 38 639. 658

<sup>103</sup> *ibid*

<sup>104</sup> *ibid*

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Bilateral Investment Treaties offer a binding international commitment by guaranteeing a fair protection and treatment of foreign investors, reducing risk which in turn increases FDI.<sup>105</sup> They impose the requirements for fair compensation to be paid and they specify an independent international forum in which compensation is to be determined. Transparency, predictability and legal security needed by foreign investors is provided by BITs.<sup>106</sup> They also protect foreign investors against political and other risks highly prevalent in many developing countries.<sup>107</sup> Far from being neutral, foreign investors are often granted higher security and better treatment than domestic investors. By giving private parties a right to pursue and receive a legal remedy, BITs boost the credibility of the host government's commitment. As a result, we would expect some violations to be deterred by a BITs commitment and expected returns to investments to increase accordingly.

Government non-compliance has costs to the government.<sup>108</sup> BITs do this by clarifying commitment, explicitly involving the home country's government, enhancing enforcement.<sup>109</sup> BITs are much more precise than customary law thereby reducing the ambiguity of the host government obligations. They provide broader legal framework in which to interpret specific contractual obligations. Precision removes potential avenues for government deniability, making it clearer to the broader range of audiences domestic and foreign that an obligation has been disregarded.

BITs in force provide a useful commitment mechanism because states that renege on a BIT or any other international obligation for that matter violate the general principle of international law that agreements should be respected (*pacta sunt servanda*)<sup>110</sup>. Thus home country has obligation of good faith treaty observance. States that violate a BIT offend not only private investors but also their government. Such violation is likely to have negative reputational repercussions which can in turn damage foreign policy interests that go above and beyond the specific investment

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<sup>105</sup> Guzman, 1998 *supra* note 102, 28

<sup>106</sup> *ibid*

<sup>107</sup> *ibid*

<sup>108</sup> Several recent examples illustrate the potential price tags involved in investment arbitration. In three complaints against Argentina, ICSID awarded the American companies, LG&E, Enron, and Sempra, 60 , 100 , and 130 million dollars, respectively.

<sup>109</sup> Guzman, 1998 *supra* note 84

<sup>110</sup> John Dougard, 406, this principle is reaffirmed by art 26 of the Vienna Convention on the Law of Treaties.

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decision.<sup>111</sup> State to state legal arrangements implicate the interests of home governments much more directly than simple contracts between private parties.

They may impose discipline on governments that would otherwise favor narrow interests or demand corrupt payoffs. They bind a country to uphold contracts with international direct investor. Thus, BITs may bring greater FDI flows, especially to riskier countries. On other hand developing countries may be faced with standard form treaties drafted by wealthy countries that limit a nation's domestic policy flexibility and lead it to favor outside investors or narrow local interests over the general population.

- BITs with stringent provisions in favor of foreign investors have a greater chance to stimulate FDI.<sup>112</sup> The research center of attention has based on the comparison of inflows from home countries having concluded inflexible BITs with inflows from countries with relaxed BITs. Even if some countries failed to realize the full implications of the agreements they signed, the treaties serve to increase investment protection, and as such should increase foreign direct investment. There have however been different results on this matter even though there has been some finding in favor of this hypothesis. The arguments in favor are usually attributed to BITs signaling properties rather than to direct legal protections they afford to investors.

BITs allow governments to credibility commit themselves to protect investor's property. Investors are allured by the existence of a strong, well enforced property rights environment.<sup>113</sup> "Economic historians from Adam Smith to Douglass North have theorized that market economies depend on property rights help to ensure the efficient exchange of goods between actors." Well enforced property rights systems ensure investors that they will directly realize any benefits from the use of their property, making investors more likely to

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<sup>111</sup> Abbott and Snidal 2000: 426; Elkins, Guzman, and Simmons 2006: 823; Guzman 2005; Lipson 1991; Simmons 2000; Vandevelde 2000: 488.

<sup>112</sup> UNCTAD (UN Conference on Trade and Development), Recent Developments in International Investment Agreements (2008\_June 2009), report. New York & Geneva, 29-30

<sup>113</sup> Hallward-Driemeier, M.: 2003, Do bilateral investment treaties attract FDI? Only a bit and they could bite. World Bank Policy Research Paper WPS 3121



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invest, but to invest wisely and efficiently.<sup>114</sup> Thus government can claim a portion of foreign direct investment by ensuring strong system of well enforced property rights by the conclusion of bilateral investment treaties.

- Shortcut to improved institutional quality:<sup>115</sup> This theory is approved by using both aggregate and bilateral flows of FDI. The quality of institutions and policies that are required by investors usually takes time to be achieved. BITs may be viewed by foreign investors as a substitute to improved institutional quality and thereby encourage FDI inflows these investors.

Unlike developed countries with well established institutions, many of developing countries are characterized by uncertain political environments. Under such conditions, multinational corporations (MNCs) and home governments of capital exporting countries, typically developed countries, have sought protection for their investments. One mechanism to obtain this protection is by the signing of Bilateral Investment Treaties (BITs). BITs are agreements that establish the terms and conditions for investment by nationals and companies of one country in the jurisdiction of another. These treaties provide institutional safeguards for foreign investments. Developing countries can also expect some benefits from signing BITs.

A country with higher number of bilateral investment treaties suggests that investors are not confident about the host destination.<sup>116</sup> The argument is BIT operates as an alternative to a host country that has weak domestic rules.<sup>117</sup> They give host government competitive edge in attracting capital if there are otherwise doubts about their willingness fairly to enforce contracts.<sup>118</sup>

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<sup>114</sup> Abbot, *supra* ,2000, 26.

<sup>115</sup>UNCTAD, *supra* note 112,2009, 29-30.

<sup>116</sup> Elkins, Zachary, Guzman, Andrew T, & Simmons, Beth (2006), *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*. UC Berkeley: Berkeley Program in Law and Economics, Retrieved from: <http://escholarship.org/uc/item/0bp87871>

<sup>117</sup> *Ibid*

<sup>118</sup> Neumayer and Spess *supra* note, 42, 29



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- Signaling effect:<sup>119</sup> This proposition is usually valued using total FDI inflows into host developing countries and the number of concluded BITs. This has been done in most cases with OECD countries, and at times also with developing countries, as a key explanatory variable. Host countries hope that the treaties signal to foreign investors either a strong protective investment environment or a commitment that foreign investments will be protected through international enforcement of the treaty. Thus BIT is expected to kindle FDI from all countries, not only from the BIT contracting parties.

One significant impediment to FDI inflows to the developing world involves the high level of risk associated with such investment and poor property rights laws. Historically, many developing countries had expropriated foreign assets without adequately compensating the owners of the assets. Therefore, developing countries that desire to attract more capital need to convince foreign investors that they can be trusted. By signing BITs developed countries send out a signal that they are now in favor of FDI thereby separating themselves to those that are not.

Signing a BIT may involve substantial negotiation efforts. The negotiation phase may involve several negotiation rounds, side payments, and diplomatic skills.<sup>120</sup> In addition, signing a BIT may demonstrate the seriousness of the host government to improve their treatment of foreign investors.<sup>121</sup> This is especially true if the government faces domestic opposition to the treaty.<sup>122</sup> By agreeing to sign a treaty which requires domestic support for its ratification rather than an executive agreement, governments indicate that they intend to live up to the terms of the agreement.<sup>123</sup>

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<sup>119</sup> UNCTAD, 2009 *supra* note 112, 29-30.

<sup>120</sup> UNCTAD. (1998). *Bilateral Investment treaties in the mid 1990s*. New York and Geneva: United Nations

<sup>121</sup> Ginsburg Tom, *International Substitutes for Domestic Institutions: Bilateral Investment Treaty and Governance*, *International Review of Law and Economics*, 25:117.

<sup>122</sup> Kerner, A. (2007). *Why should I believe you?: the sources of credibility in bilateral investment treaties and their effects*. . 48th international studies association annual conference. Chicago: 48th international studies association annual conference, 37

<sup>123</sup> Martin, I. (2005). *The president and international commitments: treaties as signaling devices*. *Presidential Studies Quarterly* 35 , 440-465.

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Finally, signing a BIT may be an indication of more comprehensive economic liberalization efforts on the part of the host country. As such, it can serve as a signal of a more welcoming and profitable economic climate to foreign investors.<sup>124</sup> While the implementation and enforcement of a BIT involves *ex-ante* costs as well revision of domestic laws, for example most of these costs are higher in the signing and ratification stage. As an UNCTAD study argues, “Once a BIT signed, or expected to be signed, the market has absorbed or begins to absorb it.”<sup>125</sup>

A signed BIT that is not in force generates only limited obligations to the host government, however. Under the Vienna Convention on the Law of Treaties, states are obliged not to defeat the object and purpose of the treaty even if it is not in force. Nonetheless, states are not bound by the treaty provisions until it takes effect.<sup>126</sup> In sum, to the extent that signing a BIT sends a costly signal of a pro-investment climate, signing a BIT will result in an increase of FDI inflows into developing countries. This proposition, while logically consistent, is grounded in the premise that the costs involved in signing a BIT are indeed high.<sup>127</sup>

There however arguments against these proposition that there is a link between BIT and FDI. The role of BIT being a commitment device is said not be consistent because hosts often make all the promises necessary to bring investors but once the investors have come , the host tend relax and give minimum commitment so that the investors do not leave. The host can weigh as to whether expropriation of an investors property can outweigh the compensation that can be brought against the investor and divert from its commitment. The increase in the number of cases being brought against the states also shows how the states can go against this commitment.

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<sup>124</sup> Salacuse and Sullivan, 2005, *supra* note 46, 76.

<sup>125</sup> UNCTAD, 1998 *supra* note 106.

<sup>126</sup> For example, in 2004 the U.S. signed a BIT with Uruguay’s conservative government. Shortly thereafter this government was replaced by a left-of-center party that insisted on the renegotiation of the treaty. The treaty was indeed revised in favor of Uruguay, resigned, and only then ratified). In addition, to the extent that the BIT is not mutually ratified, investors cannot invoke the dispute settlement procedure agreed upon in the treaty (UNCTAD 2005: 8). Thus, signing a BIT may send a costly signal of pro-investment legal and political environment but is unlikely to credibly commit the government to honor in the future deals they made with foreign investors in the present. Salacuse, 2007, 37.

<sup>127</sup> Guzman (1998) *supra* note 84, 645

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Contrary to the argument above the treaties has be found some authors not be substitutes to domestic institutions rather complacent.<sup>128</sup> This is because the treaties making it impossible for the host to alter any domestic policy as investors have more rights the domestic investors. The importance of property rights is watered down by the fact that there has been clear evidence of where investments have been received where no BIT was not in place. The Japan has been the one the strongest source of FDI but has not concluded many BITS .Also Brazil one of the top receivers of FDI has not ratified a single BIT. In 1978 whilst BIT negotiations between China and the US an approximately \$3,5 was invested in China by 350 US companies. The other argument is if BIT signals a safe investment then it should be signed by more reliable countries than less. Less reliable should also sign only one treaty to put across the message unlike multiple treaties which has been characterized by most developing countries. The cost, risk and time spent on investment arbitration that comes with BIT can be factor to deter small companies to make their investment decision based on the existence of the treaty.<sup>129</sup>

In acknowledging the arguments above it however remains pertinent that BIT in some areas has played a major role in the promotion on FDI. This dissertation subscribe to the notion the binding obligation of these International rules BIT helps to discipline a country associated with investment risk. By signing the agreement the host country signals its preparedness to welcome investors and to treat them fairly. A major factor taken into consideration by many investors is how profitable the investment will be in the host state. Political risk however affects the profitability investment especially where there is no recourse in event the investment is affected by this risk. Bilateral investment treaties offer rights to investors which the host has no power to interfere with because the treaties limit the ability of states to control the operations of foreign investments and investors. BIT has been used as tool but governments in persuading its nationals to at least consider investments in a country which it has a BIT with. BITs are used as confident building measures that can be used to improve the investment climate signaling a welcome to investments.

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<sup>129</sup> UNCTAD, 2009,*supra* note 112

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Zimbabwe need foreign direct invest as measure to rebuild the economy hence commitment to BIPPA is of utmost importance as not abiding by it will result another economic upheaval. Macroeconomic and political stability has been noted as one of the factors that affect an investment decision. Indirectly a connection can however be determined between BIT and FDI as BIT seek to strengthen the regulatory institutional environment.<sup>130</sup> The growing number of international disputes is evidence that foreign investors know about the existence of these treaties and large amounts that have been awarded to foreign can be factor that can lead investors to invest where there is a BIT in place.<sup>131</sup> BIT thus has a great impact on investor confidence thereby increasing FDI to the host.<sup>132</sup> An investor protected by BIT is a stronger position to seek redress than where there is no BIT in place. BIT, mandatory dispute settlement provisions and ultimate prospect of compulsory arbitration will cause host country official to think twice before taking an action towards a foreign investor. Investors have greater sense of security because of BIT dispute settlement and its outlined rules.

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<sup>130</sup> *ibid*

<sup>131</sup> Vandeveld, K (2000). The Economics of Bilateral Investment Treaties. *Harvard International Law Journal*, 41 (2), 469-502, 186

<sup>132</sup> *ibid*

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### CHAPTER THREE

#### Introduction

The high risk associated with poor property rights laws can be a major hindrance to FDI inflows to the host.<sup>133</sup> In considering where to invest one of the factor investors taken into consideration are political issues that might affect the value of their investments',<sup>134</sup> National policies has implications on the amount of FDI a country can receive. Liberal economic policies and limited government intervention is one of the considerations.<sup>135</sup> The government has to assure foreign investors security of investments by their commitment to liberal economic policies which can be achieved by commitments to international institutions.<sup>136</sup> The government should be committed to encourage FDI because domestic policies that can change easily change discourage investors. BITs are international agreements that establish terms and conditions for investment by nationals and companies of one country of another. These treaties thus provide institutional safeguards for FDI.<sup>137</sup>

The argument is by signing BITs countries make policies more credible and reassure investors that their investments are secure.<sup>138</sup> Studies on the political economy of BIT have indicated that their substantive and procedural provisions concede sovereignty over investment activity in exchange for participation in investment liberal regime that will help encourage FDI.<sup>139</sup> BITs aim to make the regulatory framework for FDI more transparent, stable, predictable and secure and thus more attractive for foreign investors. Liberalization of FDI entry and operations reduces obstacles to FDI.<sup>140</sup> According to Vandevælde, "BITs potentially promote foreign investments

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<sup>133</sup> Dolzer Rudolf and Stevens Margete, *Bilateral Investment Treaties*, Martinus Nijhoff Publishers, 1995, 12.

<sup>134</sup> Buthe and Milner <sup>6</sup> *The Economists* "Fools Rush In," August 7, 2004:50.

<sup>135</sup> *ibid*

<sup>136</sup> Buthe, Tim. and Milner, Helen. "The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through Policy Commitment via Trade Agreements and Investment Treaties" *Paper presented at the annual meeting of the American Political Science Association, Hilton Chicago and the Palmer House Hilton, Chicago, IL, Aug 20, 2004* <Not Available>. 2009-05-26 [http://www.allacademic.com/meta/p59852\\_index.html](http://www.allacademic.com/meta/p59852_index.html) [accessed 24-05-2010] 7

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> *ibid*

<sup>140</sup> UNCTAD. (2000) *Bilateral Investment Treaties: 1959-1999*. United Nations Conference on Trade and Development (New York and Geneva)

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flows by reducing political risk and protecting foreign investment against uncompensated expropriation, harmful exchange controls, and discriminatory treatment by the host state and even some form of damage to private property”

This chapter depicts how BIPPA provisions can be used by investors as a device to reduce the risk associated with Zimbabwe by its clear outlined rules. The decision to invest in a country is determined by a number of factors of which BIT might is one of them. By signing BIPPA Zimbabwe commits itself to warranty protection of investments under international law thereby binding itself to this obligation. According to Bergman a BIT can play an important role where reduced risk is an important factor. Given the controversial land reform in Zimbabwe which resulted in the violation of many property rights this research perceives how BIPPA can be used to the advantage of investors thereby encouraging them to invest in Zimbabwe given the unstable political environment.

BIPPA contains clearly defined and enforced property rights which can be used as a disciplinary measure in investment area in the case of Zimbabwe. Well-enforced property rights boosts investor confidence as investors are assured that their property cannot be arbitrary expropriated without compensation. Hence by granting a wide range of investment rights to investors and providing an easily accessible resolution of investment disputes BIPPA will help encourage investors. In context BIPPA will overcome poor property protection associated with the host country. According to Richards,<sup>141</sup> effective structuring of investment treaties has the following effects: increasing the appeal of investments in markets that are profitable; discourage government interference with assets and facilitate the assertion and enforcement of claims against a government which interferes with the assets of the protected investor. Thus one of the ways to minimize risk arising from the government interference is the effective use of investment protection treaties.<sup>142</sup>

The South African trade and investment minister Davies had this to say about the BIPPA, “Everybody now seems to appreciate that this is a positive agreement which provides investor confidence that did not exist before. There will be recourse to a whole range of mechanisms in

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<sup>141</sup> Richards J. Hay, Using Investment Treaties to Mitigate political risk,  
<http://www.stikeman.com/en/pdf/MinNov07.pdf> ,[12-03-2010]

<sup>142</sup> *ibid*

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the event of a dispute.”<sup>143</sup> In support of this Werksmans Attorney Director commented that the treaty was going to offer the best protection to South Africans with investments in Zimbabwe. On the Zimbabwean side Arthur Mutambara, Zimbabwe’s Deputy Prime Minister assured potential investors on the significance of the agreement. He said, ‘the agreement had worldwide significance and application and represented a bill of investment guarantees to any willing investor. Further “Zimbabwe has signed the BIPPA, not with South Africa, but with the world. The BIPPA lays out the fundamental conditions that we are going to offer the rest of the world.”

BIPPA seek to create a stable orderly framework as the preamble states the main objective being to create an appropriate environment for investments to increase prosperity in both states.<sup>144</sup> Although the preamble does not create any legally binding rights and duties it still remains vital for guiding the interpretation of the treaty as to the intention of the parties.<sup>145</sup> BIPPA it was concluded mainly to create an conducive environment for investors to invest in Zimbabwe by according national treatment, relaxed foreign equity restrictions, upholding free movement of capital and providing political risk cover for the cross-border investments.<sup>146</sup>

### **Scope of the Application of BIPPA**

The scope of the treaty plays a significant role in determining the investors and the investments that are protected by its provisions. Like all the other bilateral investment treaties the scope of BIPPA is found definitions article one. BIPPA contains a broad concept of investment with five categories of assets being; movable and immovable property, interests in companies (including both portfolio and direct investment), contractual rights, intellectual property and business concessions.<sup>147</sup> This definition ensures that investments are largely protected because it offers protection for upright expropriation, breach and the withdrawal of licenses amongst other rights. It clears the air that used to exist that intangible property cannot be protected by international

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<sup>143</sup>[http://monstersandcritics.com/news/business/news/article\\_1515799.php/South-Africa-Zimbabwe-sign-bilateral-investment-protection-bill](http://monstersandcritics.com/news/business/news/article_1515799.php/South-Africa-Zimbabwe-sign-bilateral-investment-protection-bill) [accessed 17-02-2010]

<sup>144</sup> “Desiring to create favorable conditions for greater investment by investors of either Party in the territory of the other party: and Recognizing that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both parties.” Zimbabwe- South Africa Bilateral Investment Protection Agreement preamble.

<sup>145</sup> Jose Luis, 1994, Bilateral Treaties on the Reciprocal Protection of Foreign Investment, California Western International Law Journal, Volume 24, 258

<sup>146</sup> <http://english.peopledaily.com.cn/90001/90778/90858/90866/6704241.html> [accessed 09-o4-2010]

<sup>147</sup> Article 1 BIPPA

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law.<sup>148</sup> A number of cases litigated on the protection of these rights. In these two cases the question of trademarks being protected under BITs was raised in *Le Courturiev v Rey and Carl Zeiss*.<sup>149</sup> In recent years as also found in BIPPA it now clear that intangible assets are part of the definition of property. The aim of definition is to include all the legitimate interests in the territory of either party whether directly or indirectly controlled by nationals of the other party, having economic value or associated with the investment.

In order for an investor to have a claim under the treaty the investor should be a sufficiently connected with the countries that are parties to the BITs in operation. BIPPA thus contains both the definition of natural and juristic persons.<sup>150</sup> The definition of natural person has not been a problem because it has always been guided by the party's domestic law as in article 1(a). The problem has been on the inclusion of juristic persons because it gives a leverage to third parties whose countries are not part of the contract. The criteria that has been used to determine the nationality of legal entity has been the country of the company's incorporation, country of company's seat, ownership and control over the company making the investment. Sonarajah propounds that in protection of juristic person the treaty should ensure protection for wholly owned subsidiaries of multilateral corporations which are incorporated in a host state party and which could easily be identified as a foreign controlled corporation.<sup>151</sup> Shareholders position on whether they can bring a claim under BIT was deliberated in ICSID case of *CMS Gas Transmission Company v The Republic of Argentina* (Case No ARB/01/8. It was held that there was still no division between claims by shareholders from those of corporations concerned. Minority shareholder in joint venture can also be protected if appropriately worded in the treaty as held in the ICISID tribunal *AAPL v Sri Lanka*.<sup>152</sup> This inclusion of juristic persons gives a worldwide perspective of BIPPA meaning it's not only investors from South Africa who can be protected by BIPPA provisions as South Africa can be used as a conduit to invest in

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<sup>148</sup> Sonarajah *supra* note 30 226

<sup>149</sup> *ibid*

<sup>150</sup> Article 1 (a) and (b)

<sup>151</sup> Sonarajah *supra* note 231

<sup>152</sup> *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No., ARB/87/3, Award, 27 June 1990.



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Zimbabwe.<sup>153</sup> This substantiates the argument that BITs has spillover effects by encouraging investors not only from the parties but those who can be able to establish their link to the agreement.

Closely linked to the BITs definition is the time dimensions of the treaty.<sup>154</sup> This determines if the treaty will cover investments made before and after the conclusion of the treaty. Most BITs cover both existing and future investments. Article 11 of BIPPA incorporates this provision. The provision protects tenure for all existing and future investments but specifically excluded those who had been affected by the land reform who had claims against the government. This article was not welcomed by South Africans.<sup>155</sup> They wanted the agreement to be retrospective because during the land reform a number of farms were expropriated without compensation including that of South Africans.<sup>156</sup> In contention of the exclusion clause Afriforum, a South African civil society organization wanted to stop the signing of the agreement.<sup>157</sup>

On an application brought on behalf of Louis Fick, a South African whose farm had been confiscated they argued that the provision was discriminatory making it unlawful.<sup>158</sup> In their view this provision had the implication of exonerating Zimbabwe from its pending claim on the SADC claim by Campbell and others.<sup>159</sup> The matter was however settled out of court as it was made clear that the agreement was not going to be used by Zimbabwe as a scapegoat from the SADC Tribunal ruling and the South African Trade Minister and Industry emphasized that BIPPA was not going to affect existing rights and remedies in terms of other sources of international law specifically that of the SADC Tribunal.<sup>160</sup>

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<sup>153</sup> for example, Canada or Chinese investors might “route” their SA-bound investments, via a South African subsidiary, so as to avail themselves of the treaty protections extended to South African companies . in the Netherlands-SA investment treaty.

<sup>154</sup> Salacuse and Sullivan, 2005, *supra* note 46, 664.

<sup>155</sup> John Brand and Mieke Krynauw, Implications and ramifications of Zimbabwe/SA agreement on investment protection, 05 February 2010, <http://www.legalbrief.co.za/article.php?story=20100205110339837>, [accessed 05-04-2010]

<sup>156</sup> *ibid*

<sup>157</sup> *ibid*

<sup>158</sup> *ibid*

<sup>159</sup> *ibid*

<sup>160</sup> *ibid*

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In the argument of BITs encouraging FDI the way the host treat existing investors should be approached with caution as it can have implications on the confidence investors will have upon the host. Existing investors are potential source of new investments. <sup>161</sup>BITs thus do not only cater for future investments but can also have the effect of encouraging foreign investment by catering for the needs of existing investments.<sup>162</sup> However given the fact that BIPPA was not only going to encourage FDI by certainty for investors in Zimbabwe but also help in the economic recovery of and stabilization it was only sensible that BIPPA be concluded with no retrospective property clause. The inclusion of prior investment can have the effect expanding the investment rights and treatment placing unexpected burden on the host. BIPPA aimed to start a new Chapter in the investment area between the two countries making it difficult to include historical claims arising from the land reform.<sup>163</sup> Besides an out of court agreement made it clear that BIPPA was not going ‘immunize’ Zimbabwe from its International claims. To justify this position to on the exclusion of the claims in BIPPA provisions one needs to note of the following argument;

*According to the Vienna Convention, there is usually a presumption against retrospective application of a treaty. This is also true for BITs. The prevailing trend is to provide protection for both future investments already established at the date of entry into force of the agreement. Furthermore, it is stated that the agreement shall not apply to any investment-related dispute or claim that arose or was settled before the entry into force of the BIT.* <sup>164</sup>

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<sup>161</sup>Salacuse and Sullivan,2005, *supra* note,46. 665

<sup>162</sup> *ibid*

<sup>163</sup> Salacuse and Sullivan,2005, *supra* note 46, 668

<sup>164</sup>Republic of South Africa,,Bilateral Investment Treaty Policy Framework Review: Government Position Paper <http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf> pg 33

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### **Admission and Establishment**

Traditionally states had the right to control and limit admission but recent trend trends has seen the power of the states being minimized.<sup>165</sup> There are two approaches in international investments agreements.<sup>166</sup> There is the admission model where entry is in accordance with the laws and regulations of the host country. This model does not precisely stipulate key obligations applying to established investments.<sup>167</sup> Then there is the pre-establishment model designed for both protection and liberalization.<sup>168</sup> Provisions of national treatment are extended to the establishment period removing any barriers to access. This category of BITs imposes a higher degree of discipline on the contracting parties.

Article 2 stipulates the requirements that the states need to be adhere in order to create conducive environment for the encouragement of investments. According to BIPPA admittance of foreign investment by the host will have to confirm to the domestic laws and this has always been the case for most developing countries that the treaty applies only to investments that is in accordance with the with the host legislation. This leaves room for Zimbabwe to apply a mechanism for screening the investment it might want to have in place for the development of the state. To make it easy for the investors to establish their investments in the host the necessary permits, licensing agreements and contracts for technical, commercial or administrative assistance has to be issued in accordance with the domestic law. For transparency in the financial position and results of activates related to investments BIPPA set out the requirement the investments will be subject to bookkeeping and auditing according to national or international standards and ensuring results are made accessible to the investor. This part of BIPPA plays an important role in the promotion of investments as they will as there will be certainty and transparency in the admission and establishment of FDI. This model of in not pre-establishment because this type of model has implications of stifling local investment as they find it difficult to compete with large corporation that might invest in the host<sup>169</sup>

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<sup>165</sup> UNCTAD 2007 ,INVESTOR–STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING, [http://www.unctad.org/en/docs/iteija20073\\_en.pdf](http://www.unctad.org/en/docs/iteija20073_en.pdf) [ accessed 30-05-2010]

<sup>166</sup> BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING , 141

<sup>167</sup> *ibid*

<sup>168</sup> *ibid*

<sup>169</sup> Salacuse and Sullivan,2005, *supra* note 46667

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### Treatment of Investments

#### Fair and Equitable treatment

The requirement provides that both contracting party shall guarantee fair and equitable treatment to investments belonging to nationals of either party. BIPPA stipulates that no interference will occur with the investments through arbitrary or discriminatory measures in the operation, maintenance, utilization, enjoyment or disposal.<sup>170</sup> Investments thus have to be accorded full protection and security not less that required by international law. This requirement brings transparency required by most investors and help to stabilize conditions to develop investor's expectations. There is no clear interpretation of this provision hence in *TECMED v MEXICO*<sup>171</sup> case and the *Maffezini v, Spain*<sup>172</sup> case the ICSID tribunals held that a violation of this 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.

Failure to ensure transparency in the function of public authorities can make the state to held accountable. Further in *AAPL v Sri Lanka*<sup>173</sup> it was held that the government is in breach if does not take any measures that fall within the normal exercise of government to impose law and order that could help protect the investors property. The protection warranted with this provision is not as straight forward as it sounds but given the jurisprudence an investor can the provision warrants greater leverage for the investor to utilize this provision for ensuring protection of property.

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<sup>170</sup> Article 3 (1)

<sup>171</sup> In *TECMED v. Mexico*, the conduct of various Mexican public officials was held to be inconsistent and insufficiently transparent and thus contrary to the principle of fair and equitable treatment of foreign investors. In this case, the renewal of the license for the operation of a hazardous waste landfill by a Spanish investor in Mexico was refused on different grounds, following a period of strong local protests and political changes on the municipal level. Considering the behavior of the Mexican authorities in the light of the standard of fair and equitable treatment embodied in the Spanish-Mexican bilateral investment treaty, the tribunal found (Técnicas Medioambientales *TECMED S.A. v. Mexico*, 43 I.L.M. 133, ¶ 122 (ICSID (W. Bank) 2003)

<sup>172</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No, ARB/97/7, Decision on Jurisdiction, 25 January 2000; Award, 13 November 2000; Rectification of Award, 31 January 2001.

<sup>173</sup> *AAPL v Sri Lanka supra* note 152

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### **National treatment and Most Favored Treatment**

A foreign investor has confidence in the host where he knows that investments will not be subjected to any form of discriminations. National treatment grants foreign investors in like circumstances treatment no less favorable than the treatment of nationals. Most favored Nation treatment treaty all foreign investors alike irrespective of their nationality.<sup>174</sup> The fact that two helps to create investment neutrality makes it appealing to investors. MFN in the territory of the other party oblige observance contractual obligation with investors.<sup>175</sup> This provision is of relevance in case of Zimbabwe were the land reform expropriations were carried out in a discriminatory manner. Article 3(2) and (3) of BIPPA reads:

*(2) Each Party shall in its territory accord to investments and returns of investors of the other party treatment not less favorable than which it accords investments and returns of its own investors or to investments and returns of investors of third state.*

*(3) Each Party shall in its territory accord to investors of the other Party treatment not less favorable than that which it accords to its own or investors of any third state.*

It remains not in international investment law clear if the MFN clause can be used by investors to establish jurisdiction over investment disputes with the host state. It was concluded that if the MFN is to apply to dispute settlement it should be clear that the parties intended it to be. There have been three major cases dealing with this matter. In *Maffezini*<sup>176</sup> the inclusion of “all matters are subject to this agreement” meant that the parties intended the MFN to be extended to the dispute settlement provision of the BIT between Chile and Spain. This was however not the case in *Salini*<sup>177</sup> and *Plama*<sup>178</sup> cases where it was unclear. It was held that the MFN clauses in the case of RSA-Korea BIT was only limited to the substantive provision in relation to the investment treaty.

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<sup>174</sup> Vandevelde J Kenneth, Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties, Columbia Journal of transnational Law, 1998, 507-514.

<sup>175</sup> *ibid*

<sup>176</sup> ICISID Case No. ARB/97/7, Decision of January 25 2005

<sup>177</sup> ICISID Case No. ARB/02/13, Decision of November 15, 2004.

<sup>178</sup> ICISID Case No. ARB/03/24, Decision of February 8, 2005.

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In case of BIPPA it is clear that the MFN clause is not extended to dispute settlement. The application of minimum standard of treatment allows international inspection of the treatment of by the host. When an entry has been made national treatment can also be used as weapon by the investor against performance requirements such as export quotas or local purchase requirement as they are not required for local entrepreneurs. In NAFTA case of *ADF v United States*<sup>179</sup> performance requirements were held to be in violation of the national treatment provision. BIPPA however excludes the application of national treatment and MFN to regional economic cooperation, any agreement in relation to taxation and domestic law designed to protect those disadvantaged by unfair discrimination in the territory.<sup>180</sup> Also exempted in Article 3(5) are development finance institutions. Although national treatment to the advantage of foreign investors in administrative control over them it can also work in reverse because a measure taken against the national can also affect a foreign investor. The MFN does not apply to the pre-establishment phase and this is done to protect local investors.

### **Compensation of losses**

In case of Zimbabwe where the political situation is not yet stable although the unity government had tried to stabilize the situation the provision for compensation for any losses for destruction during wars and national emergencies gives the investors security. BIPPA thus contains the following provision,

*“Investors of one party whose investments in the territory of the other party suffer losses owing to war or other armed conflict, revolution, national emergency, revolt, insurrection or riot in the territory of the of the latter Party shall be accorded by the latter party treatment, as regards to restitution, indemnification, compensation or other settlement, not less favorable than which the latter party accords to its own investors or to investors of any third state.”*

The *Asian Agricultural Products (AAPL) v Sri Lanka* was the first case to deal with this provision on an international tribunal.<sup>181</sup> It was ruled that in times of civil conflicts, the host state has an obligation to confer adequate protection to foreign investments and failure to do resulted in liability of the state. As result of this ruling compensation was awarded to the foreign investor.

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<sup>179</sup> *ADF Group Inc. v. United States of America* (ICSID Case No., ARB(AF)/00/1), <http://www.state.gov/documents/organization/5963.pdf> [accessed 04-5-2010]

<sup>180</sup> Article 4 (a) and (b)

<sup>181</sup> *(AAPL) v Sri Lanka*, *Supra* note 152

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### **Expropriation**

BIPPA like most BITs has always guarded against this possibility, and continue to express investors' fears of being expropriated unlawfully. States are not prohibited from expropriation but the right of host countries to expropriate or nationalize foreign property, subject to certain requirements,<sup>182</sup> which has been recognized in BIPPA. The prerequisite conditions for lawful expropriation of foreign investors by host countries have been considered to be the following: it had to be taken for a public purpose, on a non-discriminatory basis, under due process of law and based upon the payment of prompt, adequate and effective compensation.

In Zimbabwean case the expropriation provision plays an important role. Foreign investors were affected by the policies that were implemented permitting the Zimbabwean government to take property without restrictions, resulting in the expropriation of white-owned land for distribution to black farmers without compensation. Amendment 17<sup>183</sup> was questioned in *Campbell*<sup>184</sup> and *Funnekotter*.<sup>185</sup> In the *Campbell* case who was of British origins it was found ruled by the SADC tribunal that Zimbabwe's expropriation process had discriminated against the applicants on the grounds of race and that fair compensation was to paid to applicants for the properties which had been compulsorily acquired. Protected by the Netherland and Zimbabwe BIT *Funnekotter* brought the dispute under the international Center for Investment Disputes. In this ruling the Zimbabwean government was found to have unlawfully expropriated the land by not compensating the applicants thereby violating the bilateral investment treaty.

Expropriations are the most fatal interference with property even though they are prima facie lawful.<sup>186</sup> Political risk in investment is also associated with the risk faced by an investor that the host will confiscate the investor's property rights situated in the host country.<sup>187</sup> Therefore, one of the most important guarantees an investor can have is a guarantee of compensation if an

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<sup>182</sup> Tobin, Jennifer, 2007, *supra* note 60

<sup>183</sup> Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005

<sup>184</sup> *Campbell and Another v Republic of Zimbabwe* (SADC (T) 03/2009) [2009] SADCT 1 (5 June 2009), <http://www.saflii.org/sa/cases/SADCT/2009/1.html> (accessed 17-05-2010)

<sup>185</sup> *Bernardus Henricus Funnekotter & Others v Republic of Zimbabwe* *supra* note 22

<sup>186</sup> Tobin, Jennifer, 2007, *supra* note 60

<sup>187</sup> N. Stephan Kinsella, Paul E. Comeaux, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, Copy right © 1994 by the New York Law School *Journal of International and Comparative Law*, 1



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expropriation occurs. BIPPA article 5 includes a provision on expropriation and compensation in order to protect investors against the risk of unlawful expropriation.

*Investments of investors of either Party shall not be nationalized , expropriated or subjected to measures having effects equivalent to nationalization or expropriation(hereinafter referred to as expropriation) in the territory of the other party except for public purposes, under the due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall at least equal to market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay and shall be effectively releasable.*

The provision contains strong disciplinary measures against Zimbabwe. It offers protection against direct and indirect expropriation or nationalization or any other comparable measures affecting investments made in either territory of the parties. Investor needs to be assured that even if they lose their property they will be a remedy. In terms of compensation BIPPA<sup>188</sup> guarantees that there will, “prompt, adequate and effective compensation equivalent to the market value, including interest at commercial rate. Such a requirement is likely to be one of the most effective in terms of protecting the value of the investment because other nations are more willing to enforce a damages award based on this obligation and because Zimbabwe would be less willing to expropriate in the first place if it would have to pay for the property it confiscates.

The issue of what determine the appropriate compensation has been raised and that it should actually be left to arbitrators to assess this matter. This compensation standard is the “Hull Formula,” which is promoted by the United States but is not universally accepted as customary international law.<sup>189</sup> This standard better protects the investor by insisting that the host nation pay the true economic value of the investment which is taken, rather than “appropriate”

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<sup>188</sup> Article 4

<sup>189</sup> Guzman 1998, *supra* note 84



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compensation an in adequate standard which is often favored by less developed countries.<sup>190</sup> It has propounded that standard of valuation as that indicated in BIPPA requires the host to pay full compensation. Further it gives any investor affected by expropriation the right to state their case in court of law or other independent forum. In addition to compensation being paid without delay, the provision include, interest from the date of the expropriation, be fully realizable, and be freely transfer able at a market rate of exchange.

Although most BITs use the terms expropriation and nationalization, most do not attempt to define either of the terms or try to clarify what the difference between said terms would be.<sup>191</sup> The wording used in various BITs also incorporate additional language that extend protection to actions of a host country that may be ‘tantamount’ or ‘equivalent’ to expropriation or that may have an ‘effect that is equivalent’ to expropriation. The term ‘indirect expropriation’ is also encountered. What constitutes expropriation remains a deeply contentious issue.<sup>192</sup> The concern is n heightened by an early NAFTA Chapter 11 investment arbitration, *Metalclad v. Mexico*,<sup>193</sup> where an arbitral tribunal ruled that expropriation could be defined broadly, so as to include not only literal seizure or destruction of property, but also “covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property...”In the ruling, the tribunal gave short shrift to the purpose underlying the government interference, instead setting forth a test which focused upon the degree of interference suffered by the investor. A deprivation “in whole or significant part”, would constitute an expropriation contrary to the treaty, no matter the purpose underlying that deprivation.<sup>194</sup>

In *Compania del Desarrollode Santa Elena SA v Costa Rica* the ICISID panel emphasized the ample authority for the proposition that property has been expropriated when the effect of the

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<sup>190</sup> RUDOLF DOLZER, THE IMPACT OF INTERNATIONAL INVESTMENT TREATIES ON DOMESTIC ADMINISTRATIVE LAW, *INTERNATIONAL LAW AND POLITICS*, [Vol. 37:953, 958-959

<sup>191</sup> M, Michael Reisman nad Robert D. Sloane, indirect Expropriation in BIT Generation, *The British Law Journal*, 2003.134

<sup>192</sup> *ibid*

<sup>193</sup> *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of the Tribunal, Aug.30, 2000, at para 103

<sup>194</sup> *ibid*

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measures taken by the state has been to deprive the owner of the little possession and access to the benefit and economic use of his property.<sup>195</sup> There is not much difference between indirect and creeping expropriations which has been defined to mean lack of vividness and transparency not only of formal regulatory or otherwise indirect expropriations, which may be identified more closely with few violate events.

### **Transfers of Investments and Returns**

This Article<sup>196</sup> assures investors of their ability to move their funds from the place of the investment to the home state. In the light of the importance of transfer obligations to foreign investors, a country wishing to attract investment stands therefore to benefit from the inclusion of a comprehensive and sufficiently detailed transfer provision. But a host country may also seek qualifications, the most important of which relates perhaps to the ability of the country to impose restrictions on transfers in response to balance-of payments crises.

The ability of an investor to transfer income and capital is important consideration for many investors. The exchange risk is one of greatest risk associated with international investment flows hence a reduction in the risk of currency exchange controls can be a major significance to an investor.<sup>197</sup> This provision gives investors security against certain measures in the economy of Zimbabwe that may have temporary or permanent implications on the exchange control and affect the free transfer abroad of liquid assets. Most BITs like BIPPA incorporates the requirement of free transfer of liquid assets in freely convertible currency without delay at the market rate of exchange applicable. BIPPA stipulates that the transfer has to be done with accordance with domestic laws in force but not hinder the free and undelayed transfer of funds. Any restriction to the repatriation is prohibited; they should be free transfer of assets to and from the host. This provision is very important in the encouragement of FDI but can also work to the detriment of the host. The more freedom investors have on the transfer of income can have a huge impact on balance of payments and foreign exchange used to pay for essential goods and services for the good of the country.<sup>198</sup> This can be of major implications on Zimbabwe's plans

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<sup>195</sup> Columbia Del Desarrollo de Santa Elena SA v Costa Rica, ICISID, Case NO ARB/96/1 Award of February 2000, 439 ilm 1317, 13330 para 77.

<sup>196</sup> Article 6

<sup>197</sup> Rudol Dolzer, *Supra* note 190,

<sup>198</sup> Jesawald and salacuse *supra* note 46,668-670

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to rebuild the economy. That is why in most cases transfer of funds is one of the sticky areas in negotiations of BITs. While the host seeks to limit this provision the home of investors seek a broad unrestricted guarantee on money transfers.<sup>199</sup> BIPPA provision on transfer of funds is unlimited which of major concern for Zimbabwe

This provision covers a broad spectrum of issues being the general nature of investors' rights to make transfers, the payments that are covered by the right to make transfers, the nature of the currency with which the payment maybe made, the applicable exchange rate and the time within the host must allow the investor to make such transfers.<sup>200</sup> This provision offers guarantee to investors especially in the case of Zimbabwe were the issue of currency can be a major obstacle. The argument against is by legalizing the use of different foreign currency it makes it easier for investors because no license will be required to trade in foreign currency.<sup>201</sup> It will be easier for foreign investors to repatriate their funds in whatever currency but it can also impact most because Zimbabwe is great need for the same currency to stabilize the economy. Although highly burdensome exchange control regulations may constitute an expropriation, exchange control regulations which do not rise to this level can still be very costly to investors hence provision of this clause is made.<sup>202</sup>

### **Dispute Settlement Provision**

The dispute settlement provision of BITs is the most important provision to most foreign investors.<sup>203</sup> By signing BITs a state commits to some legal rules, guarantees of high standard of treatment. These legal rights guaranteed under international law of investment can only have value if they can be implemented. The ability to access international arbitration encourage investors because they is usually the assumption by investors that local courts in developing countries will lack technical competence or neutrality to adequately resolve investment disputes. The provision for dispute settlement help states to overcome commitment problems as independent judicial system will ensure that such rules are enforced without bias. Dispute settlement provisions help to guarantee fair and impartial resolution of disputes and to avoid

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<sup>199</sup> *Ibid* 666

<sup>200</sup> *Ibid* 667

<sup>201</sup> E. Magoma, Investment opportunities in Zimbabwe, paper presented , 30 March 2009,

<http://www.sadc.int/fan/agricresearch/icart/meetings/ProceedingsICARTGranteesReviewWorkshop.pdf>

<sup>202</sup> Sonarajah *supra* note 30 at 238

<sup>203</sup> *ibid*

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disruption of investment flows.<sup>204</sup> There are two broad models of dispute settlement that exist in international agreements and these are also finding in BIPPA. There is the State-to- State dispute resolution which is available only among states party to an agreement. It usually involves the interpretation of treaty in question.<sup>205</sup> Then is there is the Investor-State mechanism which is the most popular which allows private investors to submit claims against the host country to international arbitration.<sup>206</sup>

Article 7 of BITs provides for the investor state arbitration were an investor can directly initiate arbitration with the host state. This provision is the most attractive to investors because it allows power to private persons to submit a claim against the host to an international arbitration. BIPPA provides that if a dispute arises between the investor and a party it shall be settled by friendly negotiations between the two parties. However if the dispute has not been settled within six months it may brought to the competent court of the host for arbitration. The issue of a competent court in this case works on the South African side because it can be difficult to find one in Zimbabwe. Hence the end result is international arbitration because exhaustion of local remedies is not a prerequisite. The following article 8 provides disputes between parties. Negotiation is provided as the starting point but if the parties cannot reach an agreement the next and final stop will arbitral tribunal. The applicable law being the law of the host sate, investment contract and the rules of international law.

### **Applicable laws to BIPPA**

On the applicable laws to investment disputes there are three sources of substantive legal rules that must be taken into consideration in the resolution of any dispute.<sup>207</sup> These are municipal laws of the host including relevant international treaties that are binding upon the state, the investment treaty itself and the general principles of international law.<sup>208</sup> An investment is an

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<sup>204</sup> Kenneth J vandevelde. The Political economy of Bilateral Investment Treaty(1998) 92

<sup>205</sup> Article 7

<sup>206</sup> Article 8

<sup>207</sup> Andrew Newcombe, Lluís Paradell – 2009, Law and practice of investment treaties standards of treatment Political Science,

[http://books.google.co.za/books?id=4fuB9D9kC&pg=PA79&lpg=PA79&dq=choice+of+law+clause+in+investment+treaties&source=bl&ots=prxbSIWJ7O&sig=2F9\\_E1RDLT8h7RzVylA69CKGOdc&hl=en&ei=3k0FTOM4vu4gb6yDLdg&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CBcQ6AEwAA#v=onepage&q=choice%20of%20law%20clause%20in%20investment%20treaties&f=false](http://books.google.co.za/books?id=4fuB9D9kC&pg=PA79&lpg=PA79&dq=choice+of+law+clause+in+investment+treaties&source=bl&ots=prxbSIWJ7O&sig=2F9_E1RDLT8h7RzVylA69CKGOdc&hl=en&ei=3k0FTOM4vu4gb6yDLdg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBcQ6AEwAA#v=onepage&q=choice%20of%20law%20clause%20in%20investment%20treaties&f=false) , 4

<sup>208</sup> Zacky Douglas, The Hybrid and Invement Treaty Arbitration, The British Year Book of Internal Law 2003, 195-234

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embodiment of property rights, whereas the minimum standards of investment protection treaties are derived from international law. An investment relationship has been concluded to involve domestic law as well as international law. The host state law regulates a multitude of technical questions such as admission, licensing, labor relations tax, foreign exchange and real estate. Whereas International Law is relevant for such questions such as international minimum standard of treatment of aliens, the protection of foreign owned property, especially against illegal expropriation, interpretation of treaties.

BIPPA like most BITs refer to contractual rights among recognized categories of investments covered by the minimum standard of investment treatment. In order for BIT to have an effect on FDI contractual right should be interpreted narrowly. The inclusion of shares ensures the protection of an investment is reliant upon securing upon securing those shares in accordance with the relevant municipal law where the company is incorporated. Although this rule is subject to exception, legal ownership of shares arises upon entry onto the share register of the host.<sup>209</sup> Once the right has been recognized by municipal law of the host state, the treaty regime takes over. The subsequent changes in municipal law or other acts attributable to the host state that affect the right of investors must be assessed against the minimum standards of protection in the invest treaty.<sup>210</sup>

The host cannot therefore escape liability to an investor under the investment treaty regime by passing a law to the effect that the title of shares obtained by acceptance of shares certificate shall no longer be recognized of the investor acquired them lawfully.<sup>211</sup> Also if the investor's shares remain stringent because of the municipal law of host have an effect of rendering those shares worthless, it will be open to the treaty tribunal to find prohibition against indirect expropriation or other minimum standard of treatment has been violated by the host state.<sup>212</sup>

The court found that the tribunal complied with the choice of law clause in Netherlands-Czech Republic by applying relevant sources of law, being primarily international law.<sup>213</sup> An issue

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<sup>209</sup> Growers Principles of Modern Company Law, 1997 6<sup>th</sup> edition 328.

<sup>210</sup> *ibid*

<sup>211</sup> *ibid*

<sup>212</sup> D.O Conell, International law Vol 2 1970 2<sup>nd</sup> ed

<sup>213</sup> Cze republic v CME Czech Republic BV( Svea Court of Appeals 15 May 2003) reproduced and translated in 2003, 42 ILM, 919,965.

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pertaining the rights underlying a covered investment is relevant in case of establishing the tribunal jurisdiction and the liability. The decision of the tribunal in *TECMED SA v United Mexican States*<sup>214</sup> illustrates an approach to preliminary issues concerning rights that comprise investment. The claimant principal claim was that the failure to renew Cytrars operating of its investment license under Spain –Mexico amounted to expropriations. The tribunal ruled that Mexico had used its regulatory power to revoke Cytra’s License in a manner inconsistent with its obligations under the investment treaty.

BIPPAs choice of arbitration was the International Centre for The settlement of Investment of Investment Disputes (ICSID) and the applicable rules of the United Nations Commission on International Trade Law (UNCITRAL).

The option of the dispute to be submitted ICSID helps to promote investment because under the Convention the host states and the investor have confidence that their case will be resolved effectively according to the legal and economic merits of the case.<sup>215</sup> One of the fundamental protection of ICISID system is that consent to arbitrate is not unilaterally irrevocable. In *Alcoa Minerals of Jamaica Inc. v. Government of Jamaica*,<sup>216</sup> an ICSID panel unanimously assumed jurisdiction over an investment dispute and confirmed that a valid consent given by the host is irrevocable. Hence investors are assured to rely on ICISID arbitration without fear that any other party tries to solve dispute within other international options Arbitration under the ICISID is wholly exempted from the supervision of local courts.<sup>217</sup> ICISID convention makes it mandatory that all the members recognize and enforce ICISID awards.<sup>218</sup> A member of the ICISID thus has to enforce ICSID awards immediately under their domestic laws. When they is clear reference of the ICISID like in BIPPA award are binding and final. There is no appeal and the awards have the benefit of being supported by the World Bank, which can bring commercial pressure to bear, so that awards are complied with. Recognition thus cannot be denied by the domestic courts. The inclusion of ICISID in BIPPA helps to precipitate the goal of investment promotion. The

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<sup>214</sup> Award 29 May 2003, Case NO ARB(AF) /oo/2/2004 43 ILM133

<sup>215</sup> UNCTAD 2003 *supra*

<sup>216</sup> Zacky Douglas *supra* note 208

<sup>217</sup> *ibid*

<sup>218</sup> *ibid*

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preamble of ICISID recognizes the role of private international investment for economic development.

Article 42 of ICISID provides that in the absent of the agreement between the parties, the tribunal shall apply the law of the host state and applicable rules of international law. In the tribunal reaching a decision by majority vote s, the decision will be final and binding upon parties. ICISID members like Zimbabwe have to recognize and enforce the awards in their territory as if they were final judgment of the state court. UNCITRAL article 1(2) of the Rules provides that these rules shall govern the arbitration except that were any of the Rules is in conflict with provision of the applicable to the provision shall prevail. Hence UNICITRAL Rules contemplates the application of national law. The economic rational of these protections afforded to individual or legal entity is to promote and encourage direct foreign investment on the economies of contracting states.

Subrogation of claims contained in article 9 is a provision incorporated mostly by the home to encourage investments in the host. The home of investors provides insurance for corporations that make investments in the other party state.<sup>219</sup> The provisions then help the home state to be able recoup claims against the host after paying out the claims through the insurance schemes for foreign investments run by the investors.<sup>220</sup> Although this provision helps to promote investment flows it also serves the foreign policy goals of the home state especially where foreign investment is in resource field.<sup>221</sup> In this case Zimbabwe has been one of the major trading partners of South. Zimbabwe is also a country that is endowed with resources hence in as much as this provision is to encourage investments to Zimbabwe it also going to be to the benefit of South Africa. The provision secures investors because if they suffer damage and has been paid off by the insurance agency the home country will pursue the claim on their behalf. To eradicate questions about the transfer of rights subrogation of rights applies as well, to rights of free

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<sup>219</sup> Sonarajah, 2004, *supra* note 30 at 256

<sup>220</sup> *ibid*

<sup>221</sup> *ibid*

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transfer and arbitration covered by BIT. The insurer can also utilize the contractual obligations on the treaty on compensation.<sup>222</sup>

It is clear from the above that like most BITs BIPPA is one-sided mostly catering for the rights of investors. The host is left with little if no space to regulate investments once they enter the country. This being the reason these BIPPA should play an important role to warrant protection to foreign investors especially in Zimbabwe were the situation is changing but not yet stable. A BIT in case of Zimbabwe aims to signal that past policies relating to foreign investments have undergone dramatic change.

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<sup>222</sup> Ruldolf and Dolzer *supra* at 263



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### Chapter 4

#### Introduction

In the previous chapter it was highlighted that BIPPA has the effect of increasing FDI by credibly committing Zimbabwe to protect the property of investors. The clear outlined rules lowers risk and increases expected returns on investment. Committing to BIT has implications in on the host. In signing BITs a country trade off its sovereignty in relation to the benefits of increased FDI.<sup>223</sup> The impact on regulatory ability introduces an additional dimension of cost-benefit analysis to the initial sovereignty trade of indicated. This will entail an examination of the positive and negative impact of these treaties. By binding themselves to international law protection countries surrender some of their domestic policy independence.<sup>224</sup> BIT allows governments to commit themselves a country more attractive place to invest. Committing to BITs involves costs for the host.<sup>225</sup> The signing of BITs involves an assessment whether it is beneficial for the host that's why this chapter seeks to highlight the negatives and the benefits of signing BIT. Bilateral investment treaties are double edged as the attract investors they also constrain government policy making.<sup>226</sup>

#### Sovereignty Limitations

Bilateral investment treaties like many other treaties limit sovereignty. These treaties have the impact of limiting the sovereign control of investments that takes place within the territory of the host state.<sup>227</sup> In particular, an investment treaty will limit the sovereign right of a state to subject foreign investors to its domestic administrative legal system.<sup>228</sup> All the main clauses typically included in an investment treaty operate in various ways to define and narrow the types of domestic administrative regulation to which foreign investors must subject themselves.<sup>229</sup> This is a response to investors' concern for the predictability and stability of the legal framework

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<sup>223</sup> Sonarajah *supra* note 30 at 365

<sup>224</sup> *ibid*

<sup>225</sup> Elkins, Zachary, Guzman, Andrew T, & Simmons, Beth. (2006). *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*. UC Berkeley: Berkeley Program in Law and Economics. Retrieved from: <http://escholarship.org/uc/item/0b87871> [accessed 04-05-2010]

<sup>226</sup> Luke Eric Peterson, Research Note: *Emerging Bilateral Investment Treaty Arbitration and Sustainable Development*, August, 2003, available at: <http://www.iisd.org/publications/publication.asp?pno=562> [accessed 04-05-2010]

<sup>227</sup> Sonarajah 2004, *supra* note 30 at 366

<sup>228</sup> Luke Eric Peterson *supra* note 225

<sup>229</sup> *ibid*

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governing their investments. Foreign investors' expectations of administrative stability and the host state's expectations of the sovereignty to control its administrative law are brought into a balance by an investment treaty that essentially favors the interests of foreign investors when compared to the general rules of international law applicable in the absence of a treaty. Countries has actually enacted or amended their domestic policy laws in order to suit with the BIT that will be place. Zambian government abolished the 1991 code and enacted a new code that permits payments in order to make similar with those that was given in Zambia-Germany BIT.<sup>230</sup>

### **Zimbabwe Indigenization and Economic Empowerment Regulation**

When a country signs a bilateral investment treaty any passing of rule that affects investors is subject to review by the foreign tribunal.<sup>231</sup> The question arises whether BIPPA has this right to limit domestic policy in Zimbabwe. By signing BIPPA Zimbabwe cedes its sovereignty for FDI. This brings to question the proposed Indigenous law in Zimbabwe and the impact of BIPPA on the law. The following discussion shows how BIPPA can protect potential investors in Zimbabwe upon domestic law with a look at the proposed empowerment act of Zimbabwe.<sup>232</sup> The law was seen as an extension of the government's policy of seizing white-owned farms and giving them to locals, which started more than 10 years ago.<sup>233</sup> The land reform has been seen by as failure as many of the farms that were taken remain unutilized and impoverished many Zimbabweans. The law is said to have a pose a threat to foreign direct investment, so vital to the economic growth of the country.<sup>234</sup>

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<sup>230</sup> Muthaika A Peter, Creating an attractive Investment Climate in the Common Market for Eastern and Southern Africa( Comesa) Region, foreign Investment Law journal, ICISID Review, 1997, pg 272.

<sup>231</sup> Luke Eric Peterson *supra* note 225

<sup>232</sup> Indigenisation Economic Empowerment( General ) Regulations 2010.

<sup>233</sup> Annie Lowrey ,Monday, March 1, 2010Zimbabwe's terrible new business law, [http://blog.foreignpolicy.com/posts/2010/03/01/zimbabwes\\_terrible\\_new\\_business\\_law](http://blog.foreignpolicy.com/posts/2010/03/01/zimbabwes_terrible_new_business_law) [ accessed 23-05-2010]

<sup>234</sup> Germany investors have already warned that they will stop investing in Zimbabwe under the law. Business And Civic Society Dismisses Indigenous Act, 15/03/2010, <http://news.radiovop.com/index.php/business/zimbabwe-business/3411.html>, John Robertson, a Harare- based economic commentator, told the DPA news agency that the move would put a stop to any possibility of new investment. He further commented that after a decade of strife Zimbabwe has in 2009 shown a growth of 4.7. Multinational Companies were indicated as the most affected by the law an example being South Africa's Impala Platinum and Rio Tinto. <http://english.aljazeera.net/news/africa/2010/02/201021053053124242.html>

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According to Indigenization law, companies owned by non-indigenous people were given five years to sell a 51% stake to indigenous people. An "indigenous Zimbabwean" had been defined as "any person who before the 18 April 1980" -the official founding date of Zimbabwe -"was disadvantaged by unfair discrimination on the grounds of his or her race".<sup>235</sup> The objective of the law is to achieve a socially or economic theory by the involvement of indigenous Zimbabweans in the economic activities of the country, who were denied access, so as to ensure the equitable ownership of the nation's resources. Under the indigenization law, all business with assets of more than \$500, 00 would have to submit a form detailing the racial composition of their shareholding to the government.<sup>236</sup> A plan of five years on the implementation has to accompany the document. The Act applies to any company, association, syndicate or partnership of persons and it doesn't matter whether the business is registered or not. The government would then have to access how much of the company's shareholding has to be ceded to Indigenous Zimbabweans.<sup>237</sup> The Indigenization Minister will then keep a list of suitable candidates to whom shares can be ceded. The Indigenization and Economic Empowerment regulations set out a maximum jail sentence of five years for officials from companies that fail to cede majority control to black Zimbabweans.<sup>238</sup>

Before going the provisions that the law seek to violate let start at domestic qualification of the law. The Act is unconstitutional because according to Section 25 of the Constitution of the Interparty Political Agreement, all the policies have to have sought approval of the cabinet and parliament. Minister Morgan Tsvangirai is said to have not seen the law before its gazette.<sup>239</sup> It has also been apparent that he is not in support of the law. Furthermore the Bill of Rights prevents compulsory acquisition of property except in special circumstances were it has to be accompanied by compensation.<sup>240</sup> The Indigenization Act and Regulation give no mention of compensation and the word cede is used which can be interpreted to mean handover freely. The law also infringes upon the freedom of association in the constitution.

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<sup>235</sup> Zimbabwean President Robert Mugabe has denied that a controversial Zimbabwean law is to be shelved, [http://news.bbc.co.uk/2/hi/business/8619492.stm?utm\\_source=twitterfeed&utm\\_medium=twitter](http://news.bbc.co.uk/2/hi/business/8619492.stm?utm_source=twitterfeed&utm_medium=twitter)

<sup>236</sup> *ibid*

<sup>237</sup> *ibid*

<sup>238</sup> *ibid*

<sup>239</sup> Investor Arlet, [www.newZimbabwe.com](http://www.newZimbabwe.com) [accessed 09-03-2010]

<sup>240</sup> *ibid*

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Although many BIPPAs has been violated in the past as result of the Land reform policies one should also take into consideration that the Global Agreement and the establishment of the Government of National Unity have altered the political landscape of the country and this should be able to ensure the rule of law. Bilateral investments treaties can be utilized by investors to impose discipline on the host using tools like the national treatment provision. BIPPA can be used to avoid expropriations that might arise from the indigenous law of Zimbabwe. The proposed Indigenization and Economic Empowerment Act provides that foreign-owned companies must transfer a majority shareholding in those companies to Zimbabwean nationals. As a consequence, this Act poses a serious risk to foreign companies investing in Zimbabwe by requiring that their local subsidiaries have at least 51 percent of their shares owned by indigenous Zimbabweans, irrespective of when incorporated diluting existing shareholders' interests to 49 percent. If the appropriation of land, owned by foreigners, is any guide, any payment for the transfer of shares is likely to be delayed, probably indefinitely. Local law is unlikely to provide relief for foreign investors. However, given the provisions of the signed BIPPA investors from South Africa and third parties will be able to seek redress by use of international law, directly against the Zimbabwe Government. The rights given by BIPPA are enforceable by arbitration at the International Centre for Settlement of Investment Disputes (ICSID). This means that investors do not have to be subjected to Zimbabwean law. The provision of BIPPA overrides the application of domestic measures upon investors.

*SA-Zimbabwe BIPPA Articles 3 (2), (3), and (4) “Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favorable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.” “Each Party shall in its territory accord to investors of the other Party treatment not less favorable than that which it accords to its own investors or to investors of any third State.” “The provisions to sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from ... “any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory*

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The afro-mentioned provision standard guarantee that foreign investors are not to be subjected to any discrimination hence foreign investors can argue that the provisions of the proposed Indigenous law discriminate against foreigners and local business. Zimbabwe can however try to justify that the act falls under the exception of the above clause article 3(4). The sub-article was put in to cater for the South African BBE because it is clear that it aims to correct the injustices of the past. The preamble to the Broad-Based Black Empowerment Act (2003) stipulates that one of the two objectives of the Act is to “promote the achievement of the constitutional right to equality. Most of the recent provision South Africa has signed has included the provision.<sup>241</sup>

Even the Southern African BBE which can be justified on reasonable grounds has been on the spot light of BIT violation in relation to their initial BITs signed after apartheid had put South on the spot light.<sup>242</sup> A claim has already be been brought by the Italian investors in Marlin Holdings Ltd, Marlin Corporation Ltd and Red Graniti SA (Pty) Ltd.<sup>243</sup> The company controls around 80% of South Africa’s natural stone exports. The claim has been brought under the South Africa-Italy BIT which was signed on 9 June 1997 and came into force on 16 March 1999. Their request for compulsory arbitration has been granted by the World Bank’s ICSID in Washington, DC on request. They alleged that the MPRDA<sup>244</sup> legislation, which came into force in 2004, violated the right to fair and equitable treatment of Italian investors in South Africa. They also raised there was violation on the right of protection against expropriation by effectively expropriating their current mineral rights through the process of forcing them to convert their current rights to new-order rights.<sup>245</sup> This conversion process is at the discretion of the Department of Mines and Minerals, which must take into account whether the applicant has met its BEE targets as set out by the Mining Sector BEE Charter.<sup>246</sup> These requirements include appointing black managers, as well as selling a 26% equity holding to BEE partners. The 26% ownership requirement by

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<sup>241</sup> DTI (Department of Trade and Industry) ‘Guidelines: Equity Equivalent Programme for multinationals’, <http://www.empowerdex.com/Portals/5/docs/dti%20BEE%20STRATEGY.pdf>. [accessed 04-05-2010]

<sup>242</sup> Yazbek, Nicole(2010) 'Bilateral investment treaties: the foreclosure of domestic policy space', South African Journal of International Affairs, 17: 1, 103 -120, <http://dx.doi.org/10.1080/10220461003763874>, [accessed 09-05-2010]

<sup>243</sup> *Ibid* at 111

<sup>244</sup> Minerals and Petroleum Resources Development Act of 2002.

<sup>245</sup> *Ibid*.

<sup>246</sup> *Ibid*.

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historically disadvantaged South Africans is alleged to constitute a violation of investors' rights to receive fair and equitable treatment, because the Mining Charter discriminates against foreign investors in favor of previously disadvantaged people and, as such, violates the 'equitable treatment requirements'.<sup>247</sup>

This however cannot be purely justified in the Zimbabwean situation which has a history of using domestic policy to justify expropriation and the law is being introduced after three decades of independence. If the law surpasses, it will be difficult for Zimbabwe to escape arbitration under the provision of indirect expropriation. Locally the law had received much support as they are divergence of views on the proposed law. The law which supposed to result in an urgent transfer of shares is said to be aimed at enriching a few elite group in Zimbabwe.

*"We fear that this could lead to a creation of new minority blacks who will just replace the minority whites," Lovemore Matombo, the head of Zimbabwe's Congress of Trade Unions, told AFP. And how does Mugabe's government determine who qualifies as an "indigenous Zimbabwean" anyway? What about people of mixed race, naturalized citizens, or citizens by marriage? The law says the category includes "any person who before the 18th April 1980" -- when Zimbabwe was officially founded -- "was disadvantaged by unfair discrimination on the grounds of his or her race." That means the new law inverts the guidelines of the racist Rhodesian government, which as a foundational principle discriminated against black and mixed-race people.*<sup>248</sup>

The establishment of international investment regimes is designed to provide the most stringent and certain protection of foreign investment abroad by limiting governments into a predictable regulatory framework far into the future.<sup>249</sup> This has been described as the imposition of 'the discipline of the "rule of law"' on state regulation.<sup>250</sup> The argument that BIT has the effect of limiting the policy space of the host is valid and states should always negotiate for treaties that

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<sup>247</sup> *Ibid.*

<sup>248</sup> Anne Lowrey, Zimbabwe terrible business law, March, 2010,  
[http://blog.foreignpolicy.com/posts/2010/03/01/zimbabwes\\_terrible\\_new\\_business\\_law](http://blog.foreignpolicy.com/posts/2010/03/01/zimbabwes_terrible_new_business_law)

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

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leave that room.<sup>251</sup> However in the case of Zimbabwe the limiting of sovereignty will help to discipline the country investment policies. Zimbabwe needs foreign investment as a key component to promote growth and reduce poverty caused by some of its domestic policies.

Bilateral investment treaties by reducing the space for unprincipled and arbitrary actions of the host contribute to good governance which a necessary condition for the achievement of the economic progress of the host.<sup>252</sup> The treaties can work as tool to external checks and disciplines to the domestic legal system. By subjecting to mechanisms of international dispute settlement like ICSID states agree to the notion that domestic framework is being regulated by the decisions of international authorities.<sup>253</sup> The impact on domestic law that follows from the acceptance is today perceived as a necessary consequence of an investor friendly climate as emphasized in the preamble.<sup>254</sup>

Although no single set of guidelines exists to direct each state as it seeks to strike a balance in these matters, the international trend is certainly to place higher emphasis on an investment-friendly climate leading to economic growth rather than on legal and political concepts of national sovereignty.<sup>255</sup> The common and most logical explanation given in the body of literature dedicated to this topic is that investment treaties have been viewed and marketed as a developmental tool because it is believed that they attract large inflows of foreign investment due to the protection these agreements afford to foreigners.<sup>256</sup> In other words, BITs act as a signaling device for foreign investors.<sup>20</sup> Such agreements facilitate potential investment, which host governments view as vital for sustainable growth of their domestic economies. The classical economic theory on foreign investment takes the form that foreign investment is wholly beneficial to the host economy.<sup>257</sup> The fact that foreign capital is brought into the host state ensure that domestic capital is available of public benefit. The foreign investors usually bring with him technology and employment. Foreign direct investment (FDI) is one of the most

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<sup>251</sup> *Ibid.*

<sup>252</sup> Ruldolf Dolzer *supra* note 63.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> Sonarajah *supra* note 30.



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important sources of investment funds and is seen as a primary means for increasing economic growth, making them powerful players within the domestic political sector. Foreign investors are, understandably, more willing to invest in countries with more stable property rights regimes. The uncertainty inherent in high-risk economies increases makes to BITs remain substantively and statistically significant regardless of which policy measures are implemented by the host nation.<sup>258</sup>

There are more than 2,500 BITs<sup>259</sup> which have been ratified worldwide and over 130 states have ratified with ICSID Convention. Six BITs exist between Zimbabwe and third countries that have come into force: China, Denmark, Germany, the Netherlands, Serbia and Montenegro, and Switzerland. Most of these BITs including BIPPA contain a provision that protects a conduct that is tantamount to expropriation. Investors from these countries can use them to pursue claims by way of international arbitration. Third country investors can also utilize these treaties as discussed. In being found in violation of the BIT provisions can result in arbitration costs which supposed to deter the host from breaching any BIT. This leads to next possible impact of BIT that is arbitration costs.

### **Arbitration repercussions**

In the event of a dispute the cost of defending such claims can be substantial hence having knowledge of the arbitration cost implications can have the effect of discipline upon the host. The cost of defending for the state against on the investment laws has become expensive.<sup>260</sup> On average the cost of hiring three arbitrators has been estimated to amount to US\$500.00<sup>261</sup> and fees for legal has also been very high.<sup>262</sup> The Meticaland cooperation has been reported to have

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<sup>258</sup> *Ibid.*

<sup>259</sup> United Nations Conference on Trade and development (UNCTAD), *Bilateral Investment Treaties 1995-2006. Trends in Investment Rule Making*, United nations, New York and Geneva. P.1

<sup>260</sup> Luke Peterson, *Bilateral Investment Treaties and Development Policy-Making*, [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf) [accessed 15-03-2010]

<sup>261</sup> Gustavo Carvajal, presentation to workshop on investment, Americas Trade and Sustainable Development Forum, November 18, 2003, Miami; Shihata and Parra 1999, put the average figure at US\$220,000 in 1999 (excluding lawyer's fees). In 2002, CSID's daily fee payable to ICSID arbitrators was increased from \$1,100 to \$2,000. On this schedule, the average cost would appear to rise to some \$400,000. <http://www.worldbank.org/icsid/schedule/schedule.htm> [accessed 09/03/2010]

<sup>262</sup> *ibid*



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spend some US 4million on lawyers and arbitrators fee in NAFTA<sup>263</sup>. Another example is the Czech Republic that is reported to have spent US 10million to defend against two major arbitrations in relation to a large broadcasting enterprise.<sup>264</sup> Adding to the money damages awarded against Czech Republic who lost the matter amounted to more than a third of billion dollars US which doubled the amount of the public sector deficit and necessitated an increase in taxes and cost to the public spending.<sup>265</sup> Both parties according UNCTAD 2005 had an average costs plus arbitration of around \$1.5 to \$2.5 million. The financial implications to agreeing to arbitration should be overlooked especially by a country like Zimbabwe struggling with its economy.<sup>266</sup>

### **Reputational concerns**

In not abiding by the treaty the host has the disadvantage of tarnishing its image on the invest arena. Clear violation of the treaties results in much reputational cost on host.<sup>267</sup> Zimbabwe has already suffered reputational costs will resulted in its economy crumbling down because investors fled out of the country. The land reform resulted in many violations of property and of bilateral investment treaties. BIPPA is however the first treaty Zimbabwe has signed in after the subduing of the threats of land reform expropriating land under the unity government. This reputation can however be nullified if Zimbabwe abide by BIPPA which it has recently ratified to show its commitment.

By signing a BIT Zimbabwe can regain a good reputation as good investment destination. BIT gives a reputational advantage over others who will also be competing for inflow of capital. Lack of credibility on the host is also diffused by signing of the agreement. It is argued that BIT where the host is unreliable as signals the willingness to abide by international obligation. The aim will be to compete among potential hosts, to reduce risk and to enhance profitability of investments. In countries were the institutions are inherently credible BITs adds no value as investors are do

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<sup>263</sup> *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000; Review by the British Columbia Supreme Court (2001 BCSC 664), 2 May 2001; Supplementary Reasons for BCSC Decision, 31 October 2001.

<sup>264</sup> *ibid*

<sup>265</sup> *ibid*

<sup>266</sup> *ibid*

<sup>267</sup> Elkins, Zachary, Guzman, Andrew T, & Simmons, Beth. (2006). *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*. UC Berkeley: Berkeley Program in Law and Economics. Retrieved from: <http://escholarship.org/uc/item/0bp87871> see generally.

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not need a treaty to be convinced to invest. It has been found that BIT is of much value to state with the reputation of being corrupt and lacking law and order. Although they can be arguments against this it has been indicated that on the findings of Late 1980s that BIT has had obvious payoffs to the host nations. There was an indication of BIT in force being associated with an extra 0, 5 percent GDP percent in investment.

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### CHAPTER FIVE

#### Conclusions

Zimbabwe is a country that is endowed with many natural resources. An estimated 35 minerals are produced in Zimbabwe, the main ones being coal, chromium ore, asbestos, gold, nickel, copper, iron ore, vanadium, lithium, tin and platinum group metals. The country also boasts of the largest reserves of coal bed methane gas in the sub-Saharan Africa. At the current extraction rate, Zimbabwe's coal will last for 5500 years with the country also having the second largest platinum discoveries in the world. In coal bed methane, the country has potential to generate electricity from its gas fields.<sup>268</sup> Natural resources of the country can allure investors to the host despite the political risk that might be associated with the host, this has been seen in most oil exporting countries. On the other hand an investor who invest in a country where there is a BIT in place is in much better position than the one where there is no investment treaty to ensure protection of investments.<sup>269</sup>

Political risk can be a major hindrance on investors reaping their benefits especially where there is no recourse available. Investors need to be assured that their property is protected in a foreign land before they can decide to invest. Political risk can make investors flee away from a country resulting in serious economic implication upon the host. Zimbabwe's domestic laws have resulted in many investors leaving the country and the bilateral investment and protection agreement was signed as assurance that investors can invest in Zimbabwe and not be limited by national law rather their needs will be addressed at an international level. The clear outlined substantive and procedural rules have the effect of encouraging investors to the host. Although there are many methods that can be used to reduce risk BIT has been seen as another tool.<sup>270</sup> BIT seeks to improve the domestic institutions because of its signaling characteristic. The commitment effect is also fulfilled as through a binding arbitration states known to violate investors rights. These rules seek to discipline the host policies infringement upon the investor's rights.

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<sup>268</sup> Ministry of industry and international trade, Investing in Zimbabwe 2007 brochure, [www.miiit.gov.zw/brochure/2007\\_brochure.pdf](http://www.miiit.gov.zw/brochure/2007_brochure.pdf) [accessed 09-04-2010]

<sup>269</sup> Paul E. Comeaux, N. Stephan Kinsella, Copy right © 1994 by the New York Law School Journal of International and Comparative Law.

<sup>270</sup> *ibid*

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It has been shown that investors can invest in Zimbabwe under the shield of the recently signed bilateral investment promotion and protection agreement. This has been the first under the Unity government which more weight than the previous ones which were violated during the Land reform. The fact that the new government seek to rebuild the economy can make the government abide by BIPPA. To show that they are now not only ready to welcome investors but to commit to international norms Zimbabwe has already ratified the agreement. A ratified treaty binds the government to abide by what they would have signed to.

On the other hand these agreements come with their own cost effects upon the host nation. These have been summed up as sovereignty, arbitration and reputational costs. States trade sovereignty for FDI. The domestic policies have to be in line with the agreement because evidence to the contrary can be detrimental to the host. Arbitration costs has recently have raised eyes of many host nations because of the huge amounts are now being awarded to investors hence states have to think twice before they violate the rights of investors. Reputational costs has been said to emanate from the state's failure to abide by the treaty. This can result in investors leaving the host and deterring new investors. These three features sound all negative but it has been argued that they have a disciplinary effect upon Zimbabwe resulting in an increase in FDI.

### **Recommendations**

- Zimbabwe needs to abide by BIPPA, signing the agreement has shown that Zimbabwe is willing to abide it. The South African government needs to ratify the agreement in order to ensure more protection upon its nations. This is because a ratified treaty is binding upon the states. There is however need for Zimbabwe to review some of its policies especially the Indigenization law. This is because failure to do so might result in investors leaving.
- There is need to create more policy space in these agreements.<sup>271</sup> Even though there an argument above, of the provisions of BIPPA being disciplinary upon the host it should be

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<sup>271</sup> Yazbek, Nicole(2010) 'Bilateral investment treaties: the foreclosure of domestic policy space', South African Journal of International Affairs, 17: 1, 103 — 120, <http://dx.doi.org/10.1080/10220461003763874> [accessed 09-05-2010]

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approached with cautions as the very same agreements will cause problems for the government. These treaties are seen to reach beyond domestic borders into sensitive regulatory areas and economic sectors; there is a growing need for host governments who sign them to ensure that they provide ‘adequate safeguards for the exercise of legitimate government activity.’<sup>272</sup>

- Developmental concerns<sup>273</sup> - the fact that bilateral investment treaties seek to encourage foreign direct investment does not necessarily mean that it will result in development in the current, the need to ensure development should be apparent in the treaties. BIPPA provisions give unlimited power of the repatriation of funds. There is need to create some exceptions to BIPPAs hence they should have been an expectation to balance of payments. The developmental goal should be made apparent in investment treaties. An example being preferential treatment used as a weapon to encourage development.
- Performance requirements<sup>274</sup> are obligations imposed upon an investor by host state’s public authorities. They are typically part of the pre-establishment negotiations conducted between a prospective investor and the relevant home state authorities. A wide range of performance requirements have been identified and fall into six broad categories: export performance; joint venture and equity ownership; research and development; technology transfer; employment and training; and other requirements such as local content requirements or the provision of surety in the form of bonds or otherwise. Performance requirements require an investor to give undertakings to meet certain criteria. Consequently performance requirements are widely seen as imposing an economic burden or otherwise decreasing the economic efficiency of an investment.

There is also the need to look at the new generation investment agreements, an example being the new model BITs of the United States and Canada. According to UNCTAD (2007)<sup>275</sup> there are five main features which include;

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<sup>272</sup> Peterson LE, South Africa’s Bilateral Investment Treaties: Implications for Development and Human Rights, Dialogue on Globalisation conference report. Berlin: Friedrich-Ebert-Stiftung, 26, 2006, p. 3.

<sup>273</sup> Peterson LE, ‘Bilateral investment treaties and development policy making’, International Institute for Sustainable development, 2004, p. 4, [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf) [accessed 20-05-2010]

<sup>274</sup> DTI, Government Policy Paper *supra*

<sup>275</sup> See as stipulated and further explanation.

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- First, some recent IIAs have deviated from the traditional open-ended, asset-based definition of investment. Instead, they have attempted to strike a balance between maintaining a comprehensive definition of investment and yet not covering assets that are not intended by the parties to be covered investments.
- Second, the wording of various substantive treaty obligations has been revised. Learning from the technical intricacies faced in the implementation of NAFTA's Chapter 11 and other agreements, new IIAs clarify the meaning of provisions dealing with absolute standards of protection, in particular the international minimum standard of treatment in accordance with international law, and indirect expropriation.
- Third, these IIAs address a broader range of issues – not only specific economic aspects like investment in financial services, but also other kinds of issues where more room for host country regulation is sought. The protection of health, safety, the environment and the promotion of internationally recognized labor rights are areas where new IIAs include specific language aimed at making it clear that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of these other key public policy goals.
- Fourth, recent IIAs include transparency provisions that represent an important qualitative innovation compared with previous IIAs. Moving from a trend towards conceiving transparency as an obligation to exchange information between countries, these IIAs tend to establish transparency also as an obligation with respect to the investor. Furthermore, transparency obligations are no longer exclusively geared towards fostering exchange of information, but also pertain to transparency in the domestic process of rule-making, aiming to enable interested investors to participate in it.
- Fifth, new IIAs contain significant innovations regarding ISDS procedures. Greater transparency in arbitral proceedings, including open hearings, publication of related legal documents and the possibility for representatives of civil society to submit *amicus curiae* briefs to arbitral tribunals, is foreseen. In addition, other very detailed provisions on ISDS are included

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in order to provide for more legally oriented, predictable and orderly conduct at the different stages of the ISDS process.

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