SOFT EXPROPRIATION IN THE MINERAL SECTOR OF THE KINGDOM OF SWAZILAND IN THE LIGHT OF HER OBLIGATIONS UNDER BILATERAL INVESTMENT TREATIES (BITs)

By

Sibusiso Gama

Student No: 17399123

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Prepared under the supervision of

Dr. Femi Oluyeju

International Development Law Unit

Centre of Human Rights

Faculty of Law

University of Pretoria

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Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LLM) International Trade and Investment Law in Africa at International Development Unit, Centre of Human Rights, Faculty of Law, University of Pretoria is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

SIBUSISO GAMA

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Dedication

To my parents Ms Delisile Vilakati and my deceased father Elphas Gama.

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First, I would like to thank the Almighty God for being part of LLM International Trade and Investment class of 2017. It has been such a good and informative year being exposed to study law at this level and being lectured by numerous professionals who are in the field and were always endeavouring to give us the best knowledge and understanding we needed. I had the opportunity of meeting the best lecturers and professionals in this field.

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List of Acronyms

GDP	Gross Development Product
BIT's	Bilateral Investment Treaties
CBS	Central Bank of Swaziland
MEPD	Ministry of Economic Planning and Development
Ingwenyama	The official title of the Swazi King, meaning "the Lion"
Indlovukazi	This is the official name of the Queen of Swaziland, the mother of the King, meaning "the Elephant" and usually enjoys the same privileges and immunity as the King.
Tinkhundla	This is the Swazi system of government which refers to the divided Swazi areas to various chiefdoms forming the pillars of political organization and economic development of the country.
USD	United States of America Dollars (currency)
UNCITRAL	United Nations Commission on International Trade Law
Emalangeni (E')	The official currency of the Kingdom of Swaziland
FDI	Foreign Direct Investment
OSISA	Open Society Initiative for Southern Africa
CANGO	Co-ordinating Assembly of Non-Government Organizations
SADC	Southern African Development Community
ICSID	International Centre for the Settlement of Investment Disputes
ECHR	European Court of Human Rights
EU	European Union
PCIJ	Permanent Court of International Justice
ICJ	International Court of Justice
NAFTA	North American Free Trade Area

SIPA	Swaziland Investment Promotion Authority
UNCTAD	United Nations Conference on Trade and Development
OECD	Organization for Economic Co-operation and Development
COMESA	Common Market for East and Southern Africa
COTONOU Agreement	A treaty agreement between the European Union and the African, Pacific and Caribbean and Pacific Group of States
ICC	International Chamber of Commerce
BEE	Black Economic Empowerment
MPRDA	Minerals and Petroleum Resources Development Act
HDSA	Historically Disadvantaged South Africans
IEEA	Indigenization and Economic Empowerment Act of Zimbabwe
ICCPR	International Convention on Civil and Political Rights
ACHR	African Commission on Human Rights
FPS	Full Protection and Security
FET	Fair and Equitable treatment
PSNR	Permanent Sovereignty over Natural Resources

Table of Cases

Mike Campbell and others v The Republic of Zimbabwe SADC (T) Case No.2 of 2007 (Judgement) 28 November 2008.

National Grid plc v The Argentine Republic UNCITRAL Case No.1:09-cv-00248-RBW, Award, 3 November 2008.

Piero Foresti and others v The Republic of South Africa ICSID Case No.ARB(AF)/07/1 (Award) 4 August 2010.

Pope and Tabolt Inc v The Government of Canada (Interim Award) 26 June 2000.

Ronald S Lauder v The Czech Republic UNCITRAL (Final Award) (3 September 2001).

Saluka Investments v The Czech Republic UNCITRAL Partial Award 17 March 2006.

Texaco v Libya (1977) 52 ILR 389.

Texas Overseas Petroleum Company and California Asiatic Company (TOPCO) v The Government of the Libyan Arabic Republic (Award on the Merits) (1977) 17 ILM 1 (1978); 53 ILR 389 (1977).

Tecnicas Medioambientales Tecmed SA v The United Mexican States ICSID Case No. ARB/(AF)/00/2 (Award) 29 May 2003.

The Loewen Group Inc., Raymond L. Loewen v The United States of America ICSID Case ARB(AF)/98/3 Award (26 June 2003).

Waste Management Inc v The United Mexican States ICSID Case No.AF/00/3 Award (30 April 2004).

List of Treaties and Instruments

SADC Mining Protocol

2006 SADC Protocol on Finance and Investment

1995 UK BIT Model

2012 US BIT Model

1995 United Kingdom-Swaziland BIT

The SADC BIT Model 2012

OECD Convention 1967

General Assembly Resolution 1803 of 1962 Permanent Sovereignty over Natural Resources (PSNR)

General Assembly Resolution 3201 New International Economic Order (NIEO)

General Assembly Resolution 3281 Charter of Economic Right and Duties (CERDS)

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CHAPTER 1
GENERAL BACKGROUND

1.1 Introduction

The Kingdom of Swaziland is a landlocked, open economy in Southern Africa bordering South Africa and Mozambique. It has a population of approximately 1.2 million with a GDP per capita of about US$3000. Swaziland is classified as a lower middle-income country. The primary challenge for the Kingdom to address is the high rate of poverty and inequality in the country. An estimated 63% of the population lives below poverty line and about 29% below extreme poverty.[1]

Over the last two decades there has been an extraordinary proliferation of bilateral investment treaties (BITs). In the decade of the 1990's alone these are said to have increased in number from 470 to close to 2000. Developing-country governments are signing BITs as a device to attract foreign investment, by signalling a credible commitment to investor protection guarantees.[2] Swaziland is no exception to the above as it is also a party to such BITs.

The BIT generation has come with perks which have constrained developing states in managing their domestic affairs and have rendered their powers redundant. There are concerns about the motive of developing countries entering such agreements when constraining their sovereignty by entering such treaties limiting their own policy space and ability to adopt the necessary legal and economic policies suitable for their national interests.[3]

The greatest fear of foreign investors when establishing their investments in a foreign country is that the host country government will seize their assets or interfere with the investment. The assets in the jurisdiction of the host state become vulnerable to the host country's legislative and administrative acts, including expropriation, nationalization, dispossession an alteration of property rights necessitating a call by capital exporting countries for stricter protection of their properties and investments.[4]

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[1] World Bank Report in Swaziland 2016/17 Last Updated 1 April 2017 available online at http://www.worldbank.org/en/country/swaziland/overview#2(accessed on the 26 September 2017).
[2] MJ Trebilcock and R Howse *The Regulation of International Trade* (2007) page 469.
[3] S Montt *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009) page 85.
[4] JW Salacuse *The Law of Investment Treaties* (2010) page 313.

Studies tend to show that expropriation of property is the most severe form of interference with property rights as it destroys the investor's legitimate expectations relating to its investments.[5] International investment law decisions show tend to point out that the state's intention when effecting changes to its regulatory regime is of little importance, an important consideration is the effects of such measures on the investor.[6]

Indigenization policies, discrimination, arbitrary measures by governments when enacting their legal framework, can be fertile ground for the establishment of expropriation claims in the current BITs era under international investment law. The investment tribunals themselves have failed to come up with a conclusive list of measures which are tantamount to expropriation and adopt a case by case approach which can also be problematic.

Minerals in the Kingdom of Swaziland vest in the *Ingwenyama.*[7] In 2011, a new Mines and Minerals Act was passed to regulate the management and control of minerals and mineral oils including the granting of mineral rights. Under the Act, the King has the right to acquire 25% shareholding without any monetary contribution in trust for the Swazi nation and the Government has the obligation to acquire an additional 25% share (a 15% which is maintained in a Fund and a 10% acquired by any indigenous Swazi.[8]

The Mineral Management Board advises the King on mineral matters and the Commissioner of Mines which is mandated to grant prospecting rights are both appointed by the King who is also a major role player and a shareholder in the mineral sector. The holder of a mineral right shall also pay royalties to the *Ingwenyama* holding the minerals in trust for the entire nation a royalty based on the gross value of any mineral or minerals obtained in operations under the mineral right and sold by the holder in the manner prescribed.[9]

The term 'expropriation' can be defined as the taking property by the state –something of value. As modern international investment law protects both an investor's rights to use and profit from its investment, government actions that take away any of these may constitute an expropriation.[10]Recent developments in international investment show a rise in another form

[5] P Leon (2009) *Creeping Expropriation of Mining Investments: An African Perspective*, Journal of Energy and Natural Resources Law available online at http://dx.doi.org/10.1080/02646811.2009.11435231(accessed on the 2nd March 2017) page 598.
[6] Leon (n5 above) page 629.
[7] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 213.
[8] Mines and Minerals Act 4 2011 sec 133(1), (2), (3).
[9] Mines and Minerals Act 4 2011 sec 132.
[10] KN Schefer *International Investment Law: Text, Cases and Materials* (2013) p168.

of expropriation often called "indirect expropriation" which has seen legitimate regulation and economic policies of states being challenged in arbitral tribunals.

The study therefore seeks to look at the numerous decisions by investment tribunals in the modern form of expropriation (i.e. indirect expropriation) which manifest in state actions when exercising the sovereign immunity right to make regulations. The study seeks a closer analysis of the thin line between powers states enjoy under international law of regulating their economies and expropriation on the other hand, in so far as how investment tribunals and principles of investment law on protection of investment have pronounced on the subject with a view to application of such principles to the mineral regime in Swaziland whether they 'cross the line.'

1. 2 Research problem

A company which had prospecting rights in the country to mine diamond was placed under judicial management by an order of the High Court of Swaziland dated the 10th October 2014 and a further provisional liquidation or winding up of the company SG Iron Pty Ltd was further ordered by the High Court on the 16th December 2014 on request by the judicial manager following disputes between the investor and Kingdom of Swaziland.[11]

The mining business closed within its three years of operation and the investor complained of having lost tens of millions of USD in investment and lost earnings. This resulted in 700 jobs being lost in the country where the unemployment rate is alarming rates. The country also suffered loss of foreign capital injection necessary for its economic growth.

The investor further lodged disputes and attached a jet belonging to the King alleging the King was indebted to him against a company which is wholly governed by the King of Swaziland in the Ontario Superior Court[12] and the Court of Appeal for Ontario[13]. The matter came immediately after the closure of the mine in Swaziland and has triggered a declined investor confidence in the Kingdom and more specifically in the mineral sector, a fact which has motivated this research.

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[11] Swazi Observer 14 October 2014 available online at https://www.swaziobserver.co.sz(accessed on the 14 March 2017).

[12] *S.G. Air leasing Ltd v Inchatsavane Company (Proprietary) and Others* 2015 ONSC 1483, Court file No: CV-14-519022 Date 20150327 available online at http://2015 ONSC 1483 (CanLii).

[13] *S.G. Air leasing Ltd v Inchatsavane Company (Proprietary) and Others* 2015 ONCA 440, Date 20150617 available online at http:// http:www.canlii.org/en/on/onsc/doc/2015/2015onsc1483.html?resultIndex=1(accessed on the 16 March 2017).

The mining industry is one of the heavily regulated industries in the country with the King having 25% shareholding, another 25% for the government of Swaziland for any mineral project in the country according to the Mines and Minerals Act. The active participation of the monarch also poses problems for investment as the country's Constitution states that the King is immune from all legal proceedings in the country affecting any remedy an investor may seek in the local courts in the mining sector. The mineral sector is therefore considered a high risk. Reports tend to suggest that disputes in the country mainly involve a pattern of companies that are partly owned by the King and the Government of Swaziland investing in natural resources.[14]

Therefore, based on the above, one can conclude that all is not well with the mineral industry in the Kingdom of Swaziland. The country may have enacted a legitimate mineral regime in line with its economic policy, however, the very provisions governing the sector may consist of measures tantamount to nationalization or expropriation. Thus, the study seeks to investigate the mineral regime of Swaziland and seeks to establish whether it is tantamount to nationalization or expropriation.

1.3 Research questions

The main question of this research is whether extractive industry specific laws and policies cumulatively amount to measures tantamount to nationalization or indirect expropriation? To answer this question, the following sub-questions will be addressed:

(i) Whether the sovereign right of states to regulate their economy is absolute and not subject to challenge under investment in the BIT system?

(ii) What is the requirement for a finding of indirect expropriation and whether an indigenization economic policy regime may amount to indirect expropriation or rather measures equivalent to expropriation?

(iii) What are the provisions of the Minerals and Mines Act and the mineral policy of the Kingdom of Swaziland?

(iv) Whether the extractive industry specific laws and policies of the Kingdom of Swaziland cumulatively amount to nationalization or indirect expropriation?

[14] U.S. Department of State, Bureau of Economic and Business Affairs; Investment Climate Statements for 2016 Swaziland. Available at http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dlid=254241(accessed 24 March 2017).

1.4 Thesis statement

The study seeks to answer the question whether the extractive industry specific laws and policies of the Kingdom of Swaziland cumulatively amount to measures tantamount to nationalization and/or expropriation. The study argues that the laws and policies of the mineral regime of the country cumulatively are tantamount to nationalization or expropriation.

1.5 Significance of the study

The study is fundamental mainly because the principle of expropriation under international investment law is still developing. During such developments investment tribunals are still making efforts to make a clear and concise description of the principle. The study seeks to make an application of the law to the specific industry regulation in Swaziland and determine if it violates the current standards as they stand. The study is also helpful for the country to re-evaluate its laws and policies of the extractive industries mainly in so far as it relates to expropriation. The study is also aimed at contributing and make addition to the available literature on expropriation.

1.6 Literature overview

Many writers have written about expropriation under international investment law and seemingly the subject is still on going and there has not been consensus on indirect expropriation and/or 'measures tantamount to or equivalent to expropriation'.

Soranajah states that there are diverse ways of affecting property interests such that the definition of indirect takings becomes difficult. These types of taking have been defined as 'disguised expropriation', to indicate that they are not visibly recognizable as expropriations or as 'creeping expropriations', to indicate that they bring about the slow and insidious strangulation of the interests of the foreign investor.[15]

Indirect expropriation refers to situations in which host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investment but without changing or cancelling investors' legal title to their assets or diminishing their control over them.[16]

The learned author referring to the case of *Pope & Tabolt*[17] which interpreted 'a measure tantamount to nationalization or expropriation' as referring simply to indirect expropriation. In

[15]M Soranajah *The International Law on Foreign Investment* (2010) page 368.
[16] Salacuse (n4 above) page 325.
[17] *Pope and Tabolt Inc v The Government of Canada* UNCTRAL (Interim Award) (26 June 2000) p96, 104.

the tribunal's opinion, the expression 'a measure tantamount to nationalization or expropriation' means nothing more than 'a measure tantamount to nationalization or expropriation' rejecting the argument that such measures can encompass less severe acts than expropriation itself. Thus, measures are covered only if they achieve the same result as expropriation. The more important and challenging distinction for arbitral tribunals is the distinction between legitimate regulatory acts and regulatory actions that amount to indirect expropriation or that have measures equivalent to or tantamount to expropriation.[18]

A creeping expropriation may be defined as a slow and incremental encroachment on one or more of the ownership rights of the foreign investor that diminishes the value of its investment. The legal title of the property remains vested in the private investor but the investor's rights of the use of the property are diminished because of the interference by the state.[19]

The impact of government interference is the core of all types of expropriation. The measures can be expropriatory if they neutralize the benefit of the foreign owner. However, the controversy here lies in where to draw the line between non-compensable regulatory takings and other governmental activity and measures amounting to indirect, compensable expropriation. This has resulted in tribunals adopting different approaches to the subject.[20]

1.7 Research methodology

The study will be based on desktop and library study. The primary and secondary sources of information will be books, articles by leading experts and organizations in the field, treaties, conventions, protocols, legislation, case law, arbitration awards mainly ICSID awards and information available from electronic resources and databases.

A narrative, descriptive and comparative study will also be looked to some of the provisions of the laws and policies of some African countries for purposes of identifying good practices to incorporate as well as those that have attracted reproach with a view to find lessons.

1.8 Limitations of the study

The study is aimed at looking at principles of indirect and creeping expropriation in a view to establish whether legislation as it governs a sector of production and its economic policy can

[18] Salacuse (n4 above) page 328.
[19] Leon (n5 above) page 598.
[20] *Expropriation Regime under the Energy Charter Treaty*; Energy Charter Secretariat 2012 B-1200 Brussels, Belgium p11-12 available online at www.energycharter.org/fileadmin/DocumentsMedia/.../Expropriation_2012_en.pdf(accessed on the 2nd March 2017).

cross the line to expropriation. The process will be guided by the principles which have been applied by arbitration and investment tribunals on the subject with a view to establish a deviation from the mineral regime as it stands in the Kingdom of Swaziland.

1.9 Chapter overview

The topic under discussion will be discussed in five chapters which shall include the following.

Chapter 1

This chapter introduces the research, discusses the problem of the study and lays out the research questions. It shall further set out the context of the research in terms of identifying the problem and outlining the methodology to be adopted in conducting the research.

Chapter 2

This chapter will look at the history and justification of states on the sovereign right to legislate with a view to establish whether it is binding under international law. The chapter will also look as to whether the right to regulate of states under the BIT system is absolute.

Chapter 3

This chapter will discuss the principle of expropriation in detail and the provisions of investment agreements on expropriation and how investment tribunals, regional tribunals and other international tribunals have decided on the principle of indirect expropriation for purposes of determining the true test on the subject and relevance to the research. The chapter will also determine if indigenization measures can be tantamount to expropriation.

Chapter 4

This chapter shall set the history of the mineral regime of the Kingdom of Swaziland, the country's system of government, its mineral policy and economic policy of the mineral sector with a view to mirror the said laws with the principles of indirect expropriation to establish whether they cumulatively amount to measures equivalent to expropriation.

Chapter 5

This chapter concludes the research and proposes recommendations for the reform of the mineral sector in the Kingdom of Swaziland.

CHAPTER 2
THE EXTINCTION OF THE RIGHT OF STATES TO REGULATE IN THE BIT SYSTEM

2.1 Introduction

A controversial subject under international investment law has been the right enjoyed by states of regulating their economy and natural resources found within their territories. There has been an exchange of blows by developing and developed states regarding the treatment of aliens in the foreign state with the latter calling for much protection of the investor, while the former calling for equality or rather that such protection be vested in the adequate control of the domestic host state jurisdiction. This chapter seeks to look in detail the justification of states to regulate their mineral resources and to establish whether there is any change or development to the right of states to regulate their economies.

2.2 Theory of foreign direct investment

This study will therefore be premised on the middle-path theory of international investment law. This theory entails the awareness by developing states that foreign direct investment is slowly taking away their sovereignty and the fact that their role can be both positive (economic growth, foreign capital, technology transfer) and negative (environment, human rights violations, transfer-pricing) to the economy.[21]

The theory states that investment might be beneficial to the host-state, but warns this may be the case only if foreign direct investment abides by the domestic regulation put in place by the host state.[22] This theory is based on the idea that there is an obligation by the foreign corporation to abide by the laws and regulations of the host state which are meant to capture the maximum benefits the foreign investment can bring to the economic development of the host government. The notion of instant industrialization which is at the heart of all developing nations requires capital which only the foreign investment can bring. Such can be achieved through policies meant to attract and accommodate foreign investment.[23]

2.3 Permanent Sovereignty of states over their natural resources (PSNR)

The right of states has a long history but this study will start the genesis with the resolution of 1962.[24] The resolution states among other things, that the right of states to dispose of their

[21] M Soranajah (n15 above) page 56.
[22] M Soranajah (n15 above) page 59.
[23] M Soranajah (n15 above) page 58.
[24] General Assembly resolution 1803 (XVII) of 14 December 1962 "Permanent sovereignty of natural resources".

mineral resources and wealth should be respected, any agreement made to economic and investment between developed and developing countries should not conflict with the interests of the host states, the right of developing states to govern their natural resources is inalienable and symbolizes their economic independence.[25]

The right to peoples and states to permanent sovereignty of natural resources must be exercised for purposes of national development and welfare of the people of the state concerned.[26] The manner of extraction, exploitation and disposing of the natural resources should be in accordance with the rules set forth by the host state.[27]

The resolution provides that nationalization, expropriation and requisitioning shall be for public purposes and in the national interest which are recognized and overriding purely personal and individual rights. In such cases the owner shall be paid appropriate compensation according to the rules of the state acquiring the property and international law. Where the issue of compensation is disputed, national domestic law shall govern and international adjudication or arbitration only upon exhaustion of local remedies.[28]

The resolution further provides that violation of states of their natural right to sovereignty of natural resources and wealth is contrary to the objectives of the Charter of the United Nations in the maintenance of international development and world peace.[29] It provides further that foreign investments agreements should be entered in good faith and states shall always recognize the fundamental right of states over their wealth and natural resources.[30]

2.4 The 1974 Charter of Economic Rights and Duties of States (CERDS)

On 1 May 1974 the General Assembly adopted resolution 3201 establishing the New International Economic Order.[31] The resolution was a joint effort by members of the United Nations seeking to balance the social and economic imbalances between developing and developed states based on equality, sovereignty for future economic, social development and justices among others.[32]

[25] The preamble of resolution 1803 (XVII).
[26] Resolution 1803 (n24 above) art 1.
[27] Resolution 1803 (n24 above) art 2.
[28] Resolution 1803 (n24 above) art 4.
[29] Resolution 1803 (n24 above) art 7.
[30] Resolution 1803 (n24 above) art 8.
[31] United States General Assembly Resolution 3201 (1 May 1974) (S-VI): Declaration on the Establishment of the New International Economic Order (NIEO) Sixth Special Session Agenda Item 7 A/RES/S-6/3201.
[32] Preamble of resolution 3201.

The resolution postulates the rise of technological advances and development in the international community, however such is not true with the developing countries who were still tied in colonial domination, racial discrimination, foreign occupation and neo-colonialism and such has resulted or robbed them of their progress to full economic emancipation.[33]

The new international economic order was founded therefore based, among others, on the following principles; Sovereign equality of states and self-determination of all peoples, banishing inequality among states, every state is endowed with the right to implement their own economic and social systems it deems appropriate for their economic development, States are hereby granted full permanent sovereignty to their natural resources and economic activities. To safeguard its resources, each state is entitled to exercise effective control over them and their exploitation suitable to its own situation. *States shall also have the right to nationalization or transfer of ownership to its own nationals* and such shall be a resemblance of the full permanent sovereignty of states. No state shall be coerced or subjected to any economic or political pressure to prevent the free and full exercise of this inalienable right.[34]

2.5 Resolution 3281 Charter of Economic Rights and Duties of States

It was followed on the 12 December 1974 by resolution 3281[35] establishing the charter of economic rights and duties of states is the introduction of an international economic order based on sovereign equality of states despite their economic status and overcoming any economic obstacles of developing countries to achieve their full economic independence.[36]

Resolution 3281 was adopted by a vote of 120 to 6, with 10 abstentions and states voting against the resolution included Belgium, Denmark, German Federal Republic, Luxembourg, the United Kingdom and the United States. The main argument of these developed countries was that the resolution is inconsistent with international law principles on the treatment of foreign investment and the respect of international obligations.[37]

The resolution grants states full sovereignty over its natural resources and economic resources.[38] Each state has the right to regulate and exercise authority over all foreign

[33] Resolution 3201 (n31 above) art 1.
[34] Resolution 3201 (n31 above) art 4 (a)-(t).
[35] Resolution adopted by the General Assembly 3281 (XXIX). Charter of the Economic Rights and Duties of States, Twenty-Ninth session Agenda Item 48 12 December 1974 A/RES/29/3281.
[36] Preamble of Resolution 3281.
[37] JW Salacuse *The Three Laws of International Investment; National, Contractual and International Frameworks for Foreign Capital* 2013 page 326-327.
[38] Resolution 3281 (n35 above) art 2(1).

investment within their national jurisdiction according to its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment.

Every state shall have the power to regulate and exercise authority over the activities of transnational corporations doing business within its territory and shall adopt measures to ensure that such activities comply with the law and regulations of the national host state and they also conform to the socio-economic policies of the national state. The transnational corporation shall not interfere with the internal affairs of the host state.

In situations where foreign property is nationalized, expropriated or transfer of property to the national state, *compensation shall be paid by the state adopting such measures in accordance with the national laws and regulations of the host state*. In a case where the issue of compensation is not settled it shall be determined according to the domestic law of the national host state and by its tribunals and the states may other peaceful means to resolve the matter based on sovereign equality.[39]

It is the right and duty of all states, individually and collectively to eliminate all forms of oppression in the form of colonialism, apartheid, neo-colonialism, all forms of aggression, occupation and domination with the consequences thereof. States which practice such coercive policies remain liable to the countries, territories and peoples affected for the restitution and compensation for the damage caused to the natural resources of those countries, territories and peoples and it is the duty of that state to grant assistance to them.[40]

2.6 The status of resolutions under international law

The question as to whether resolutions of the political organs of the United Nations may result in the establishment of customary international law has not been very clear. The position has always been that a resolution of either the General Assembly or the Security Council categorized as a recommendation is not binding upon states and may only be 'soft law' making standard guidelines on certain principles.[41]

The United States Court of Appeals in *Filartiga v PenaIrala*[42] the court validating resolutions creating customary international law against torture by stating that the General Assembly has

[39] Resolution 3281 (n35 above) art 2 (2) (a)-(c).
[40] Resolution 3281 (n35 above) art16.
[41] Dugard J *International Law: A South African Perspective* (1994) page 34.
[42] *Filartiga v Pena-Irala* 630 F 2d 876 (1980) at 882-4.

declared that the Charter precepts embodied in the Universal Declaration 'constitute principles of international law'.

The International Court of Justice in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*[43] where the court noted that though resolutions may provide the existence of a rule or the emergence of an *opinio juris*. Though the General Assembly resolutions may point to a violation of the UN Charter and signalling a deep concern regarding the problem of nuclear weapons, several of the resolutions in the present case have been adopted through negative votes and abstentions, they do not meet the requirement of *opinio juris* on the use of such weapons.

In the *TOPCO* arbitration[44] the question of the legality of the New International Economic Order (NIEO) as to whether custom has been developed through it. The tribunal concluded that only Resolution 1803(XVII) of 1962 was adopted in unanimously, can be recognized as customary international law. The sole Arbitrator Dupuy further stated that article 2 of the Charter must be analysed as a political rather than as a legal declaration concerned with the ideological strategy of development and supported by developing nations.[45] The subsequent NIEO and Charter are to be considered as *contra legem* as between the states that adopted them.[46]

In the *AMINOIL*[47] tribunal which was the result of a nationalization of petroleum concessions by Kuwait in the 1970's, the main issue for determination by the tribunal being the standard of compensation. The tribunal, among other things stated that the 'appropriate compensation' standard of Resolution 1803 is customary international law, and rejected the subsequent resolutions because of a lack of consensus.

Tribunals have since adopted the position that United General Assembly resolutions on permanent sovereignty attains the status of customary international law. The International Court of Justice in the case of *Congo v Uganda*[48] the court acknowledged that 'permanent

[43] *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 226.
[44] *Texas Overseas Petroleum Company and California Asiatic Company (TOPCO) v The Government of the Libyan Arabic Republic* (Award on the Merits) (1977) 17 ILM 1 (1978); 53 ILR 389 (1977).
[45] TOPCO arbitration (n44 above) para 87. See also PM Norton *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation* (1991) The American Journal of International Law, Vol.85 No.3 Cambridge University Press pp474-505 at page 481.
[46] PM Norton (n45 above) page 481.
[47] *Kuwait and American Independent Oil Co.,* 66 ILR 519, 21 ILM 976 (1982) (Reuter, Sultan and Fitzmaurice, arbs., 1982) (hereinafter AMINOIL) para 601.
[48] *Case concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 168 paragraph 244, *East Timor (Portugal v Australia)* [1995] ICJ Reports 90, *Libyan American*

sovereignty of states' as provided in resolution 1803 and resolution 3281(NIEO) is a principle of customary international law, though the court stated it does not apply to looting, pillage and exploitation of natural resources by members of an armed conflict.

2.7 The World Bank Initiatives

Developed countries on the other hand are not pleased with the said resolutions advocated by the developing and there had been abstentions during the adoption of the resolutions and we have seen numerous initiatives meant to counter the said resolutions and some include, among other;

2.7.1 ICSID

The establishment of ICSID by the World Bank is one international investment arbitration which has brought a new dimension under international investment law where the investor can now bring the host state before the centre, a right which a natural or legal person never enjoyed under international law which was for the exclusive preserve of states.[49]The centre though it has been criticised for its lack of appeal procedures and limited annulment proceedings which critiques argue is 'pro-investor' and inconsistency of the awards.[50]

The introduction of ICSID and the increase of the BITs in the modern era of international investment has been termed as a 'silent revolution' where foreign investors have since found a forum of challenging measures by the host state they feel arbitrary and invoking the high standards of some of the BITs.[51] The basis of the ICSID jurisdiction is based on consent,[52] which is usually the main clause of all the BITs currently in force among states.

Many authors have written on the legitimacy and otherwise of the ICSID tribunal and opinion is divided. Some argue it is one it is an independent forum which has been a revelation in investor-state disputes while others are challenging its legitimacy. The anti-ICSID ideologies argue that the ICSID Convention which was the product of the World Bank is one effort by the

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Oil (LIAMCO) v Libya (1977) 62 ILR 139, *Texaco v Libya* (1977) 52 ILR 389 paragraph 87 the arbitrator held that resolution 1803 reflects the status of customary international law existing in this field. See M. Soranajah (15 above) page 446. See S P Subedi *International Investment Law Reconciling Policy and Principle* (3rd Edition) Hart Publishing United States of America 2016 page 40. See also S P Ng'ambi *Resource Nationalism in International Investment Law* Routledge, Taylor and Francis Group, London and New York 2016 pages 49-51.

[49] ICSID Convention was submitted by the Executive Directors on 18 March 1965 to the member governments of the World Bank for their consideration for purposes of signature and ratification. The Convention entered into force 14 October 1966. See also sec 25 of the ICSID Convention.

[50] Subedi (n48 above) page 49.

[51] Subedi (n48 above) 50-51.

[52] ICSID Convention art 25.

bank to destabilize the UN General Assembly resolutions on permanent sovereignty.[53] The Convention has been present since 1965 and quietly without much activity only to resurface during the late 1980s after the increase of BITs when it started to bite.[54]

Modern international investment law has slowly eroded the sovereignty of state principle through limiting its legislative powers through the internationalization of investment contracts and by ousting the jurisdiction of local judicial bodies and opt for international arbitration as the only mechanism for investment disputes.[55]

The Convention has resulted in the extinction of the sovereignty of natural resources which states have long enjoyed under international law. This unfortunate scenario is perpetuated by the signing of the BITs which in most instances developing countries sign with the 'big brothers' and render their bargaining power vulnerable, and the ICSID clause is the bread and butter of most if not all the BITs.

2.7.2 MIGA

MIGA is a member of the World Bank and is housed at the World Bank Headquarters though a full independent international organization. MIGA offers protection against investment for non-commercial risks which includes; currency inconvertibility, expropriation and similar measures having the effect of depriving the investor control or substantial benefit from his investment, repudiation or breach of contract by host state, military action or civil strife.[56]

MIGA is often guided by its Operational Regulations, uses standardized contracts which are in line with the object of the Treaty and the regulations thereof. Upon the issuance of MIGA guarantee, the holder must take due diligence to avoid and minimize covered loss and to cooperate with MIGA in the event of a claim or in efforts of processing the claim. The holder must notify MIGA promptly of any event that might give rise to a loss and should also exhaust any available local remedies.[57]

[53] MG Desta *The elusive search for equilibrium* (ch 8) SW Schill, CJ Tams, R Hofmann *International Investment Law: Bridging the gap* (2015) Edward Elgar Publishing page 239.
[54] MG Desta (n53 above) page 249.
[55] MG Desta (n53 above) page 243.
[56] MIGA Convention art 11(a).
[57] JW Salacuse (n37 above) page 272.

The rights which states have long enjoyed under the resolutions on permanent sovereignty and charter of economic rights and duties (CERDS) is slowly coming to extinction with developing states signing the BITs which have seen their regulating powers challenged in the tribunals.[58]

2.8 Conclusion

The resolutions as propagated by developing countries on the permanent sovereignty of natural resources and the subsequent resolutions on the treatment of investors in the territory of the host state provides an unequivocal justification of states to govern and regulate their natural resources and that investors be given the same treatment as the domestic enterprise and such resolutions of the UN General Assembly have since attained the status of customary international.

The developed countries on the other hand have not supported the resolutions since their adoption at the General Assembly and efforts have been made to render such resolutions redundant. The result of such has been the promulgation of BITs which are slowly taking away the right to regulate which states enjoy under customary international law. The main culprit of such is the treaty clauses where states are opting for international arbitration which in most cases under ICSID. We have seen that under the said tribunal, the legitimate regulations of states when regulating foreign have been subject to challenge when they interfere with the use and enjoyment of their investment making the right not absolute or sacrosanct. The tribunals are concerned with the effect of the measures and the intention of the state in implementing same is irrelevant.

The next chapter shall be looking at the test invoked by the investment tribunals when determining indirect expropriation. The chapter will look as to what is the main criterion the tribunals use in determining such kind of expropriation. The chapter will also deal with the question whether indigenization policy measures by states can be measures tantamount to expropriation.

[58] S Montt (n3 above) page 85.

CHAPTER 3

THE CONCEPT OF EXPROPRIATION

3.1 Introduction

It may be noted in the previous chapter that the sovereignty principle which states have long enjoyed under customary international as supported by resolution 1803 (PSNR) gave states the right to make regulation and economic policies governing their respective economies. It was noted further that such right is falling by the signing of BIT which have crippled such state sovereignty. The powers which states enjoyed have since been ceded to the international tribunals who have since challenged the legitimate state policies and regulation.

The contention on the attack of the sovereignty of states has made the law of international investment law controversial. This chapter will be looking at the principle of indirect expropriation, how the tribunals are formulating the test of determining this kind of expropriation and whether the tribunals indeed scrutinize domestic regulation of states when exercising permanent sovereignty over their natural resources. Furthermore, the chapter will seek to determine whether indigenization policies can be measures tantamount to expropriation.

3.2 Definition of expropriation

The terms nationalization and expropriation are used interchangeably. Nationalization refers to a situation in which the state engages in an exercise of the taking of the property of foreigners to end their economic domination of the whole economy or of sectors of the economy. This has been prevalent mainly in Africa and Asia during decolonization when states sought to take control of all assets of companies owned by former colonial masters.[59]

The classic or traditional meaning of expropriation is that of 'direct' expropriation which refers to the overt taking of property, and the title of the investment is transferred to the expropriating national host government.[60] We have seen a paradigm shift in the 21st century as cases of direct expropriations are no more prevalent among states, but instead we now witnessing the progression of indirect expropriations which have been a controversial and developing subject as they are being interpreted by international investment tribunals and international investment conventions. Expropriation has been categorized as lawful and unlawful.

[59] M Soranajah (n15 above) page364-365.
[60] A Reinisch *Standards of Investment Protection* (2008) page 151.

3.3 Justifiable expropriation

An action which may seem to be expropriatory by the government of the host state may still be regarded as lawful expropriation only if it meets the customary law conditions which makes such an expropriation legal; if the expropriatory measure is (1) for a public purpose (2) not arbitrary or discriminatory (3) according to due process of the law (4) accompanied by reasonable compensation (most treaties having adopted the Hull formula of prompt, adequate and sufficient compensation).[61]

3.3.1 Expropriation must be in the public interest

The principle of public interest was elaborated by the European Court of Human Rights in the *James v United Kingdom*[62]. In that case the applicants who were trustees acting under the Second Duke of Westminster were deprived of ownership of many properties through the exercise by the occupants of rights of acquisition conferred by the Leasehold Reform Act of 1967, as amended. In answering one of the question whether the impugned legislation complied with the 'public interest' test the commission stated that the legislature should always be given a wide discretion to implementing economic and social purposes for the public benefit and courts should always respect the legislature's judgement as to what it considers to be in the 'public interest' unless such judgement is without any reasonable basis. The commission noted that the decision to enact laws expropriating property will commonly involve consideration of political, social and economic on which opinions in democratic states may differ.[63]

3.3.2 Expropriation must not be discriminatory

Expropriation or nationalization must not be taken in a discriminatory manner but the property must be taken in a non-discriminatory manner. States are always prohibited from discriminating against foreign investors because of their foreign nationality. Tribunals will always uphold a violation of this requirement when the measures of the host are likely to affect only the foreign investor. Expropriation will not be discriminatory if directed to a foreign investor but such will be the case where is solely because of the investor's nationality.[64]

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[61] Salacuse (n4 above) page 349.
[62] *James and others v The United Kingdom* ECHR Application No.8793/79 Judgement 21 February 1986 Strasbourg.
[63] *James and others v The United Kingdom* (n62 above) page 19 para 46.
[64] *James and others v The United Kingdom* (n62 above) page 34.

International jurisprudence in non-treaty cases also affirms that non-discrimination constitutes a basic element of the international law governing expropriation and is a requisite for lawful nationalization.[65]

3.3.3 It must be done in accordance with due process of the law

Some BITs do makes explicit provision of this requirement in that the expropriation must be by an order of the authority of the government and the people affected by the decision of the government in expropriating property should have a right of recourse or prompt review in the administrative and judicial processes of the host state.[66]

Examples of disregard of due process of the law will be when an expropriation lacks a legal basis in that there were no lawful procedures were done beforehand when effecting the expropriation, when the investor is left without any remedy either to the domestic courts or administrative tribunals in challenging the measures sought to be implemented by the host government of seeking to expropriate the investor's property.[67]

3.3.4 The expropriation must be accompanied by compensation

Compensation is a suitable remedy for the investor following the taking of its property by the host state and such is meant as a reparation to mitigate the loss suffered by the investor over its expropriated investment. Some writers argue that the need for payment of compensation serves an important goal of maintaining respect for investment treaty rules and ultimately preserving the investment regime and its effectiveness.[68]

The point of difference of investment treaty as opposed to other treaty violations is that it makes provision for the payment of compensation as a prerequisite for expropriation. The right to property is a universally recognized right and is enshrined in every state's domestic law and a violation thereof is frowned upon by both domestic law and international law hence the need to emphasise on compensation.

[65] Salacuse (n4 above) page 350.
[66] United Kingdom-Swaziland BIT art 5(1).
[67] UNCTAD *Expropriation; Series on Issues of International Investment Agreements II* United Nations 2012 New York and Geneva page 37.
[68] Salacuse (n4 above) page 352.

3.4 Compensation for legal and illegal expropriation

The *Chorzow Factory*[69] case drew a distinction between lawful and unlawful expropriation. In that case the Permanent Court of International Justice held that in the case of unlawful expropriation the damage suffered must be repaired through the "payment of fair compensation" or "the just price of what was expropriated" at the time of the expropriation.[70] By contrast, it stated that in the case of unlawful expropriation, international law provides for *restitutio in integrum,* or if impossible, its monetary equivalent at the time of judgement.

In the case of *Bernadus Henricus Funnekoter and others v The Republic of Zimbabwe*[71] the tribunal noted that there has been some debate on that distinction. The case further cited with approval the *Amoco* case when the Iran-US Claims Tribunal noted in 1987 that the fact that the *Chorzow factory* "is nearly sixty years old, this judgement is widely regarded as the most authoritative expose of the principles applicable in this field and is still valid today".[72]

3.5 The valuation methods

The finding of the appropriate standard for expropriation by the investment tribunal does not put the matter to rest as it still bears the task of making a proper valuation of the compensation to award the claimant investor whose investment has been expropriated by the host government. As the treaties refers to "fair market value" "just economic value" "adequate compensation" such standards are not helpful when it is to be applied in each set of circumstances to determine the appropriate compensation due to the investor.[73]

In the absence of clear guidelines by the treaty provisions, parties have invoked the help of experts from the field of finance and economics to help them calculate the appropriate compensation in the circumstances.

3.6 Unlawful expropriation

We have seen earlier on that expropriation can be lawful and unlawful with the former having been discussed above which is basically allowed and justified though it must meet the specified conditions as already discussed above. Unlawful expropriation is totally prohibited as it involves the outright interference or rather taking of the property of the investor. Under the

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[69] *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Germany v Poland),* 1928 P.C.I.J. (ser.A) No.17 (13 September 1928) [hereinafter Chorzow Factory].
[70] *The Chorzow Factory* case (n69 above) para 47.
[71] *Bernadus Henricus Funnekoter and others v The Republic of Zimbabwe* ICSID Case No.ARB/05/6 Award (22 April 2009).
[72] (n71 above) para 108-110.
[73] Salacuse (n4 above) page 356.

species of unlawful expropriation, we have direct and indirect expropriation. Direct expropriation has already been described as the physical outright of taking of property of the investor by the state.

This chapter will be looking in detail indirect expropriation which has been a controversial subject under international investment law mainly because of a lack of clear and precise meaning as to what amounts to indirect expropriation and the test as adopted by the various investment tribunals for purposes of seeking an answer to this research.

3.7 Indirect expropriation

The modern era has seen the emergence of another 'disguised' form of expropriation where the host government does not literally take the assets of the foreign investment but introduces measures likely to interfere with the economic capacity of the investment. This is one area under investment law which there is no unanimity of what are the kinds of government regulations or rather measures that amount to indirect expropriation hence they are often called disguised because they are not visibly recognized as expropriations.[74]

Schefer said the following on indirect expropriation "Courts have long realized that governments can effectively damage an investor's profit expectations through measures that have no direct impact on the ownership of the property. The label for actions that restrict use, management, or the profitability of the company is *indirect expropriation*. This term includes: *material expropriation, creeping expropriations, measures similar/tantamount/having equivalent effect to expropriation*."[75]

It was in that regard that the tribunal in the case of *Pope & Tabolt*[76] interpreted 'a measure tantamount to nationalization or expropriation' as referring simply to indirect expropriation. It stated that the expression 'measures tantamount to nationalization or expropriation' means nothing more than 'a measure equivalent to nationalization or expropriation'. The tribunal was of the view that the expression does not imply something lesser of the acts than expropriation, but it meant the equivalent or rather it had the same force and result as expropriation.

In the *Waste Management*[77] the tribunal stated that an indirect expropriation was still a taking of property, but a measure tantamount to an expropriation might involve no actual transfer,

[74] Soranajah (n15 above) pages 367-368.
[75] Schefer (n10 above) p 204.
[76] *Pope & Tabolt* (n17 above) paras 96, 104.
[77] *Waste Management, Inc v United Mexican States* (No.2) ICSID Case No.ARB(AF)/00/3 (Final Award) (30 April 2004).

taking, or loss of property by any person or entity. The tribunal further stated that the phrase 'a measure tantamount to nationalization or expropriation in Article 1110 of NAFTA was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation and so to broaden it.[78]

The cases above sought to define the measures tantamount to expropriation and indirect expropriation but in practice same has not been relevant as mostly a finding of one will automatically result in the finding of the other. The daunting task by arbitral tribunals has always been making a distinction between legitimate regulatory measures of states and regulatory measures that amount to or are equal or tantamount to an expropriation.

3.7.1 Creeping Expropriation

A creeping expropriation may be defined as the 'slow and incremental encroachment on one or more of the of the ownership rights of the foreign investor that diminishes the value of its investment'. The legal title remains vested with the investor but the rights of use of the property are diminished because of the state's interference on the investor's property. It may also amount to a series of steps and government actions which slowly diminishes the control and value of the investment[79]

3.7.2 The criteria for determining indirect expropriation

The provisions of the various investment treaties do not make a lucid guideline for singling out indirect expropriation from legitimate regulatory measures of host governments. However, the tribunals have tried to establish some criteria for drawing a line to be able to bisect the line of how a legitimate government law or economic policy may cross the line to indirect expropriation. These include; (1) the degree of intensity of interference with investor property (2) the frustration of investor's legitimate expectations (3) nature, purpose and characteristic of the measure (4) the 'sole effects' rule. They are discussed in detail hereinbelow;

Degree of interference with investor property

This criterion has been divided into two parts; namely the severity of its economic impact and effect on the investor's control over the investments and the duration of the regulatory measure. There is also ample authority which suggests that the interference must be 'substantial' to constitute an expropriation, i.e. when it deprives the foreign investor of fundamental rights of ownership or when it interferes with the investment for a significant period. The measures must

[78] (n77 above) paras 143-144.
[79] Leon (n5 above) page 598. See also KN Schefer (n10 above) page 225.

be such that it substantially impairs the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless.[80]

In *Marvin Roy Feldman Karpa (CEMSA)*[81]. CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico was allegedly denied the benefits of the law that allowed certain tax refunds to exporters and claimed expropriation under the NAFTA treaty Article 1110 thereof. The tribunal stated that the regulatory action neither deprived the claimant control over his company, nor interfered with directly with the internal operations of the company or displaced the claimant as the controlling shareholder. The claimant is free to pursue other continuing lines of business activity…he was precluded from exporting cigarettes; however, this did not amount to deprivation of control of his company.[82]

The duration of the measure is also another issue to be considered in determining a measure tantamount to expropriation. In *SD Myers*[83] the NAFTA Tribunal made a more clearer definition of the distinction between indirect expropriation and regulation by stating that an expropriation usually amounts to a lasting removal of the ability of the owner to make use of its economic rights, though the tribunal noted that it acknowledged the fact that at times, partial or temporary deprivation may amount to expropriation.[84] However, in that case the tribunal did not find that the temporal export ban on certain hazardous waste amounted to expropriation because it only lasted for a short time.

The severity of the economic impact of the measure is one key factor in which the tribunals will place much reliance when it has the effect of depriving the investor of its right to the use and enjoyment of the investment to make a finding of an indirect expropriation and a minimal impact will not suffice.[85]

Frustration of the investor's legitimate expectations

[80] OECD (2004) ""*Indirect Expropriation" and "Right to regulate" in International Investment Law*", OECD Working Papers on International Investment, 2004/04, OECD Publishing http://dx.doi.org/10.1787/780155872321(accessed on the 14 September 2017) page11.
[81] *Marvin Roy Feldmann (A United States citizen acting on behalf of CEMSA) v The United Mexican States* ICSID Case No. ARB (AF)/99/1, Award 16 December 2002.
[82] *Marvin Feldmann* (n81 above) pages 39-64 and 59.
[83] *SD Meyers, Inc v Canada*, UNCTRAL (First Partial Award) (13 November 2000).
[84] (n83 above) para 283.
[85] Salacuse (n4 above) page 339.

The host state and the investor when entering into an investment agreement, the host state when it makes legitimate expectations with the investor, it makes an undertaking that it will be able to honour the investor's legitimate expectations and that the host state will not make any measure likely to interfere with that expectation This requirement incorporates some of the elements which are also needed and a characteristic of the fair and equitable standard of treatment and will also result in a finding of indirect expropriation.

In *Metaclad v Mexico*[86] a case in which Metaclad, alleged that its subsidiary COTERIN's attempt to operate a hazardous waste landfill that it constructed in the Municipality of Guadalcazar had been affected by the measures contributable by Mexico. Metaclad then instituted an action under the NAFTA claiming that an ecological decree promulgated after the claim was made, violated Article 1110 and therefore required compensation for expropriation. The tribunal found that Metaclad was led to believe and did in fact believe that federal and state permits allowed for the construction and operation of the landfill and as a result it was led to rely on 'the reasonably to be expected economic benefit'. Therefore, the tribunal held that the company's inability to carry out the project frustrated those expectations and as such constituted a factor, among others, to the finding that the government measures were tantamount to expropriation.

Some states in response to the growing challenges by tribunals in making a finding of indirect expropriation on legitimate expectations have captured the legitimate expectations requirement in their BITs. For example, the 2012 US Model BIT provides that; "…the determination of whether and action or series of actions in a specific situation constitutes an indirect expropriation requires a case by case, fact based enquiry that requires among other factors, the extent to the government action interferes with distinct, reasonable investment-backed expectations…"[87]

The learned author Salacuse states that government statements, whether expressed in advertisements, during promotional 'road shows', or during direct negotiations with specific foreign investors, may also create legitimate expectations upon which investors rely when making investment decisions.[88]

[86] *Metaclad Corp. v The United Mexican States* ICSID Case No. ARB(AF)/97/1 Award (30 August 2000).
[87] 2012 US BIT Model Clause 4(a)(ii) of Annex B of Article 6 [Expropriation and Compensation].
[88] Salacuse (n4 above) page 339.

The character, essence and intention of the measure

Tribunals will always be called upon to look at the characteristics of the measure with a view to establish whether it is a bona fide measure meant solely for the genuine interests of effecting a regulation and pure economic policy of the state. The character of the measure should be clothed with the characteristics of proportionality, non-discriminatory and done in due process.

In the *SD Myers* case, the tribunal in addition to pointing that 'measures tantamount to expropriation' should be understood to mean they are equivalent to expropriation stated the following when analysing a measure;

> "…both words require a tribunal to look at the substance of what has occurred and not only at the form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure".[89]

Moreover, in the case of *Tecmed v The United Mexican States*[90] in which the investor, Tecnicas Medioambientales Techmed S.A. lodged a claim with the ICSID tribunal after the Mexican government failed to re-licence its hazardous waste site and alleged a contravention of various rights and protections in the Spain-Mexico BIT and made an expropriation claim. The tribunal in considering whether the acts undertaken by Mexico were to be characterized as expropriatory, cited the ECHR practice considered 'whether the actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, considering the significance of such impact plays a key role in deciding the proportionality. The tribunal went on to state that there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realized by the alleged expropriatory measure. The tribunal concluded that the measures undertaken by the Mexican government were inconsistent with the purpose sought by the host government and so were equivalent to an expropriation.

The 'sole effects' criteria

The sole effects principle has been controversial with some tribunals endorsing it that the state measure must have economic effects on the investments while other tribunals looking at the

[89] *SD Myers* (n83 above).
[90] *Tecnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No. ARB (AF)00/2 (Award) (29 May 2003) para122.

nature and purpose of the measure. The 'sole effects' determination has not been the only criteria, tribunals mixing it with other criteria for purposes of determining if a measure is expropriatory.

This approach was also followed by the *AES v Hungary*[91] case when the claimant was alleging indirect expropriation based on Hungary's adjustment of its electricity pricing regulations and the tribunal noted that though in many cases the focus will be on how the measure or a modification of the existing law impacts on the investment. The tribunal stated that for an expropriation to take place the measure must deprive the investor of his benefit, in whole or a significant part of its value to make a valid claim of indirect expropriation. In that case the tribunal held that the effects of the re-introduction of the Price Decrees do not amount to an expropriation of the investment.

The tribunal will however need to weigh the effects against the intention and interest of the state when implementing the measure. If the measure will then show adequate proof of sufficient policy considerations for its implementation, tribunals will likely hold a valid regulation as opposed to indirect expropriation.[92]

3.8 Different types of government measures that may constitute expropriation

The previous paragraphs were an elaboration of the numerous criteria that have been used by investment tribunals to establish indirect expropriation from a supposed legitimate regulation by the host state with its impact on the investment. Although there are numerous actions usually done by the host states in interfering with the property rights of the investment, the following acts have been regarded as ones that usually breed expropriation claims; (1) disproportionate tax increases (2) interference with contractual rights of the investment (3) interference with the management of the investment (4) revocation, denial or failure to renew permits or licences and these measures are briefly discussed hereinbelow;

3.8.1 Disproportionate tax increases

A tribunal will be called upon to determine whether the taxation measure by the state resulted in the substantial deprivation of the economic rights of the investor. In the case *Link-Trading*

[91] *AES Summit Generation Limited and AES-Tizza Eromu Kft v The Republic of Hungary*, ICSID Case No. ARB/05/7 Award, ECT Arbitration Award (23 September 2010) para14.3.1-14.3.4 available at http://italaw.com/documents/AESvHungary.pdf(accessed on the 4 October 2017).
[92] KN Schefer (n10 above) page 210.

Joint Stock v Department of Customs Control of the Republic of Moldova[93] in a case in which the claimant a US-Moldovan joint venture company registered in Moldova whose business consisted the import of consumer products in a Free Economic Zone of Chisinau. It was totally exempt from import duties and value added taxes upon import of its goods to the FEZ and a partial exemption granted to its customers in the customs territory of Moldova of such goods by a Budget Law of 1996 and Law No.625 and the state had made an undertaking of a 10-year tax holiday to the claimants.

The tribunal in ascertaining whether the measure was expropriatory held that customs policy is a matter that falls within the customary regulatory powers of the state and the burden is on the claimant to establish that those powers were used abusively by the state and produced measures tantamount to expropriation.[94] In dismissing the claim, the tribunal found that there was no evidence to show that claimant was treated less favourably than any other retailer in the FEZ and thus the tribunal stated that the claimant has failed to prove that the direct consequences of the measure deprived its investment hence failed to establish that link.

In the *EnCana Corp*[95] case, the claimants alleged that Ecuador's action including the issuance of SRI Resolutions 233, 669,670, 736 and 3191, the continuing denial of VAT refunds and credits to the companies and further amendments to that effect violated their rights to entitlements of such amounts under Ecuadorian law and therefore constituted measures tantamount to expropriation. The tribunal held that in the absence of a commitment by the host state, the foreign investor does not have any right or legitimate expectation that the government will not take measures to amend its fiscal policies, which can be detrimental to the investor during the time of the investment. By its very nature tax will likely to interfere with the economic benefit of an investment, they will only in rare cases be rendered as equivalent to expropriation.[96]

It is clear from the above cases that tribunals have been very slow to make an expropriation finding on taxation matters mainly because custom policies have been the exclusive of the host state which always remains at liberty to impose tax and such discretion will be interfered with only in rare and irrational and excessive taxation measures necessitating a deviation.

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[93] *Link-Trading Joint Stock Co v Department of Customs Control of the Republic of Moldova* UNCITRAL (Final Award) (18 April 2002).
[94] (n93 above) para 68.
[95] *EnCana Corporation v Republic of Ecuador* LCIA Case No. UN3481 (Award) (3 February 2006).
[96] (n95 above) para173.

3.8.2 Interference with contractual rights

Some governmental measures may affect the contractual rights of the foreign investment and investors will challenge such measures in the investment tribunals alleging indirect expropriation. In the *Siemens v Argentine* case, the tribunal stated that for a state to incur liability to the investor it must act as such through its very legitimate and authoritative power.[97]

In the *Lauder* case,[98] the tribunal held that it cannot be stated that the Czech Republic interfered with Lauder's property to deprive him of its enjoyment and hence it does not amount to indirect expropriation. The tribunal held that it is not all forms of breach of contract by the state which will amount to expropriation even if the violation amounted to a loss of contractual rights. The most important factor is whether the state was acting in its full government authority when implementing the impugned measure.[99]

3.8.3 Interference with the management of the investment

A finding of indirect expropriation may also arise in situations where the host interferes with the management of the investment enterprise by effecting measures which will result in the change of management by the investors themselves and substituted by a management imposed by the host state government on the foreign investment.

A similar finding was also entered by the ICSID Tribunal in the case of *Benvenuti & Bonfant*[100] the tribunal also determined the governmental measures which included the interference with the marketing of the investor's products by fixing prices, dissolving a market company, instituting criminal proceedings against the investor who then left the country, and finally the physical takeover of the investor's premises. The tribunal found that the cumulative effects of the governmental measures amounted to a *de facto* expropriation.

3.8.4 Failure to issue or renew permits and licences

In some cases, a failure by the government authorities to issue and/or renew licenses and permits of the investment business, such conduct may amount to indirect expropriation. A leading case on this subject is *Metaclad Corporation v The United Mexican States* in the denial of permit case by the municipality of Guadalcazar.

[97] *Siemens AG v Argentina* ICSID Case No.ARB/02/8 Award (6 February 2007) para 253.
[98] *Ronald S Lauder v The Czech Republic* UNCITRAL (Final Award) (3 September 2001).
[99] *Lauder* case (n98 above) para 202.
[100] *Benvenuti & Bonfant v Congo* ICSID Case No. ARB/77/2 (Award) (8 August 1980).

The tribunal in determining the matter stated that by permiting or tolerating the conduct of Guadalcazar in relation to Metaclad has already been found to amount to an unfair and inequitable treatment breaching Article 1105 of NAFTA and thus by participating in the denial to Metaclad of the right to operate the landfill, notwithstanding that the project was fully approved by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of Article 1110(1) of NAFTA.[101]

3.9 Police powers

The doctrine of police powers is centred around the notion that states are always authorised to make regulations for their own public policy space and tribunals will always respect and uphold any non-discriminatory measures that are designed and applied to protect the legitimate public welfare objectives of the state.[102]

In the *Feldman v Texaco* case, the NAFTA tribunal stated the following instructive words on the doctrine;

> "…governments must be free to act in the broader public interest through the protection the environment, new or modified tax regimes the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."[103]

In the Methanex case, the tribunal held the following;

> "…as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been made by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[104]

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[101] *Metaclad* (n86 above) para 128.
[102] Hindelang, Krajewski *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016) Oxford University Press, United Kingdom page 88.
[103] *Marvin Feldmann* case (n81 above) para 103.
[104] *Methanex Corporation v The United States of America* NAFTA Arbitral Tribunal Final Award on Jurisdiction and Merits (3 August 2005) para 7.

In the El Paso matter,[105] the ICSID tribunal stretched the argument a bit further by making the following observations; "The general rule is that general regulations do not amount to indirect expropriation, the exception being that unreasonable general regulations can amount to indirect expropriation. Furthermore, a necessary condition for expropriation is that it must neutralize the use of the investment meaning a substantive component of the property rights must be diminished. Therefore, a mere loss of the investment even an important one will not amount to indirect expropriation".[106]

3.10 The protection of Property in Swaziland

3.10.1 The Constitution of Swaziland

The Kingdom of Swaziland do have provisions meant for the protection of property and will be examined below with a view to determine the standards of protection as provided for by the relevant laws protecting property in the country. The constitution[107] of the country provides that a person shall not be compulsory deprived of property or any interest in, or right over property of any description except where the following conditions are met;

(1) The taking or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health

(2) The compulsory taking of possession or acquisition of property is made under a law which makes provision for; -prompt payment of adequate and fair compensation

-a right of access to a court of law by any person who has an interest over the property

(3) the taking or possession is made under a court of law.[108]

The constitution further provides that foreign direct investment shall be governed according to any law regulating investment.[109] This is a clear indication that the government of Swaziland is not willing to take responsibility on the governing law of foreign investment in the country but is merely swinging the pendulum to 'any law' and the country is selling its soul by so doing when it have the opportunity of stating either national law and/or customary international law.

[105] *El Paso Energy International Company v The Argentine Republic* ICSID Case No.ARB/03/15, Award (27 October 2011).
[106] *El Paso* (n105 above) para 233.
[107] The Constitution of the Kingdom of Swaziland Act 1 2005.
[108] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 19.
[109] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 69(4).

3.10.2 The Swaziland Investment Promotion Authority

In addition to the constitution of the country, there is also established a Swaziland Investment Promotion Authority (SIPA) which is a body corporate and creature of statute whose objectives includes, among others, (a) to attract, encourage, facilitate and promote local and foreign investment in Swaziland, (b) to initiate, coordinate and facilitate the implementation of government policies and strategies of investment (c) to provide a one-stop information and support facility for local and foreign investment (d) to advise the Minister on investment policies, strategies and suitable initiatives.[110]

The Act further provides that no property or any interest or any right over property of any description which forms part of an investment shall be compulsory acquired or '*subjected to measures which have similar effect'*, unless such is done;

(a) In accordance with applicable legal procedures
(b) In pursuance of a public purpose
(c) Without any form of discrimination on the basis on nationality
(d) Upon prompt payment of adequate and fair compensation

Where the conditions laid down above are met, the compensation shall be determined based on current market value and shall be fully transferable at the prevailing current exchange rate in the currency in which the investment was originally made, without deduction of taxes, levies or other duties except where such has previously accrued.[111]

The Act further provides that in the event of a dispute between the investor and the government, the investor may elect to submit the dispute either to;

(a) The jurisdiction of the High Court of Swaziland
(b) To a process of arbitration under the Arbitration Act 1904
(c) Arbitration under the arbitral rules of the United Nations Commission of International Trade Law (UNICTRAL), or
(d) *In the case of a foreign investor* (my own emphasis), to arbitration under the International Centre for the Settlement of Investment Disputes (ICSID)[112]

[110] Swaziland Investment Promotion Authority Act 1 1998 sec 4.
[111] Swaziland Investment Promotion Authority Act 1 1998 secs 20(1) and (2).
[112] Swaziland Investment Promotion Authority Act 1 1998 sec 21.

3.11 The rise of BITs in Africa

The first BIT was signed in 25 November 1959 between Germany and Pakistan and more than 3000 of these treaties have been adopted. The main reason for African countries signing BITs was to attract foreign direct investment (FDI) while for developed countries on the other hand it was an opportunity for cheap labour and raw materials.[113]

This therefore necessitated the question whether BITs have brought investment inflows in the developing countries. Empirical research shows that there has never been a positive answer to the affirmative that countries by signing BITs they receive much FDIs in return. Even if BITs contribute to the FDI and development of any given country, it is not established that such benefits outweigh the costs of eradication of policy space and risks associated with prosecuting of investor-state disputes which may invoke international standards which can be to the prejudice of the host state.[114]

Because of the lack of unanimous standard of protection for foreign investment, BITs have been a necessary tool by which developed countries have incorporated greater or higher standards of protection to the investor than that provided in international law, and states with weak bargaining power will tend to deviate from international practice and grant more favourable treatment to their powerful contracting partners.[115]

The 21st century have witnessed a rise of bilateral investment treaties (BITs) mainly between developed and developing states and developing states have been doing so in the notion of increasing foreign direct investment in their territories. There is currently 2954 BITs being signed worldwide, but a total of 2364 BITs are in force.[116]

3.11.1 The status of bilateral investment treaties (BITs) in Swaziland

Swaziland is not an exception to the BIT era as it is a signatory to six (6) BITs which include the following; Egypt which BIT was signed on the 18 July 2000 though it is not in force, Germany whose BIT was signed on the 5 April 1990 but entered into force on the 5 August 1995, Kuwait which was signed on the 23 July 2009 but it is not in force, Mauritius whose BIT was signed 15 May 2000 though it is also not in force, Taiwan Province of China whose BIT

[113] United Nations Economic Commission for Africa *Investment Policies and Bilateral Investment Treaties in Africa; Implications for Regional Integration* 2016 Addis Ababa, Ethiopia page10.
[114] UNECA (n113 above) page 11-12.
[115] SP Subedi *International Investment Law: Reconciling Policy and Principle* (2008) page 90.
[116] UNCTAD Investment Treaty Database available online at https://investmentpolicyhub.unctad.org/IIA(accessed on the 7th September 2017).

was signed 3 March 1998 though it is also not in force, the United Kingdom whose BIT was signed on the 5 May 1995 and entered into force the same day.[117]

3.11.2 Provisions of UK-Swaziland BIT on expropriation

The study will concentrate on a few provisions of the United Kingdom and Swaziland BIT[118]. It provides that investment of nationals and companies of one contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party and neither party shall adopt any unreasonable and discriminatory measures which is in any way prejudicial or detrimental to the management of the entire investment.[119] The bilateral investment treaty also makes provision for the national and most favourable nation treatment provisions.[120]

The treaty also has a clause on expropriation which provides that investment of nationals or companies of one contracting party shall not be nationalized, expropriated or *subjected to measures having the effect equivalent to nationalization or expropriation* (my own emphasis), unless such expropriation is for a public purpose for the internal needs of that party and upon payment of prompt, adequate and effective compensation and that the national or company likely to be aggrieved by the expropriation shall be entitled to adequate review or redress, to appear before a competent authority for a valuation of his investment according to the principles set in the treaty.[121] The treaty neither provide a specific definition of measures equivalent to nationalization or expropriation nor any measures of the state that does not amount to expropriation.

The treaty also provides for the settlement of disputes in that disputes must be settled amicably failing which a notification of a claim be submitted to international arbitration whereupon the parties may agree to either refer the dispute to; ICSID, the court of arbitration ICC, tribunal established according to the UNCITRAL Rules.[122]

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[117] UNCTAD Treaty Database (n116 above).
[118] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Swaziland for the Promotion and Protection of Investment [The agreement entered into force on the 5th May 1995] (to be hereinafter referred to as the UK-Swaziland BIT).
[119] UK-Swaziland BIT (n118 above) art 2(2).
[120] UK-Swaziland BIT (n118 above) art 3.
[121] UK-Swaziland BIT (n118 above) art 5.
[122] UK-Swaziland BIT (n118 above) art 8.

3.11.3 The SADC BIT Model

The Southern African Development Community (SADC)[123] has also made considerable in the provision of guidance towards the issue of foreign direct investment which includes among other its Protocol on Finance and Investment[124] which is aimed at the harmonization of the laws and policies on investment for its member states.

The SADC BIT Model[125] is one template which has been made by the regional body with the aim of providing guidelines to the governments of member states when negotiating their future investment treaties. The Model prohibits expropriation except on due process, public process and on payment of compensation.[126] The Model also provides in addition and helpful to southern African countries that a [non-discriminatory] measure of a state party meant to protect legitimate public welfare objectives such as public health, safety and the environment does not constitute indirect expropriation under this agreement.[127]

The Model also provides that the host state has the right to take regulatory and other measures to ensure development within its territory and with other legitimate social and economic objectives in accordance with customary international law and general principles of international law.[128] The Model further provides that the state party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under domestic law to achieve national or sub-national regional development goals. The state party may also facilitate the development of local entrepreneurs, enhance productivity, increase employment, increase human resource capacity and training, research and development.[129] Furthermore, a state party may take measures necessary to address historically based economic

[123]The Southern African Development Community is a Regional Economic Community comprising 15-member states; Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Established in 1992, SADC is committed to regional integration and poverty eradication within southern Africa through economic development and ensuring peace and security. Available online at http://www.sadc.int/about-sadc/(accessed on 21 September 2017).

[124] SADC Protocol on Finance and Investment signed on 18 August 2006 and entered into force on 16 April 2010. It outlines SADC policy on investment calling upon member states to attract investors and facilitate entrepreneurship among their population. Available online at http://www.sadc.int/opportunities/investment/(accessed on the 21 September 2017).

[125] SADC *SADC Model Bilateral Investment Treaty Template with Commentary*: 2012 Gaborone, Southern African Development Community page 4. The preparation of the SADC Model BIT Template has been done through an interactive process by a drafting committee consisting of representatives from Malawi, Mauritius, Namibia, South Africa and Zimbabwe, with technical support provided by Mr Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (IISD). Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee of the May 2012.

[126] SADC BIT Model 2012 (n125 above) art 6.1 page 24.

[127] SADC BIT Model 2012 (n125 above) art 6.7 page 25.

[128] SADC BIT Model 2012 (n125 above) art 20.1 page 39.

[129] SADC BIT Model 2012 (n125 above) arts 21.1-21.2 page 40.

inequalities suffered by ethnic or cultural groups due to discriminatory or oppressive measures prior into entering into this agreement.[130]

The Model BIT further provides that nothing in this agreement shall oblige a state party to pay compensation for adopting or enforcing measures designed to protect public morals and safety, human, animal and plant life, conservation of living and non-living exhaustible natural resources and the environment.[131] State parties shall also not be obliged to pay compensation if it adopts reasonable measures for prudential reasons, such as, protection of investors, depositors, financial-market participants, policy-holders, maintenance of safety in the financial sector.[132] The Model further makes an exclusion of taxation measures for purposes of expropriation under this agreement.[133]

The SADC BIT Model is one template which the SADC member states are rethinking their investment treaty obligations because of what developing states have witnessed in the arbitral tribunals where their legitimate economic policies have been subjected to challenges under the 'investor-state' disputes in international arbitration forums like ICSID. The Model seeks therefore a paradigm shift by recommending a new approach to investment governance that deviates from the current prevailing status quo of BITs as they apply to southern African countries.[134]

Another notable feature of the BIT Model is the exclusion of the investor-state dispute settlement noting that several states are opting out of investor-state mechanisms.[135]

3.12 Indigenization policies and expropriation; case studies

Indigenization involves a progressive transfer of foreign interests into the hands of local shareholders. This has been the trend in African countries after colonization where they sought to claim ownership and control of interests in foreign business to vest in local entrepreneurs. Natural resources and land reforms are the main sectors where this practice has been prevalent. Indigenization differs from nationalization or expropriation in that property does not vest in the state or state organ but equity vests in the hands of local people. The policy behind indigenization measures is that it is aimed at economic self-determination and such falls within

[130] SADC BIT Model 2012 (n125 above) art 21.3 page 40.
[131] SADC BIT Model 2012 (n125 above) art 25.1 page 46.
[132] SADC BIT Model 2012 (n125 above) art 25.2 page 46.
[133] SADC BIT Model 2012 (n125 above) art 25.5 page 46.
[134]S Woolfrey *The SADC Model Bilateral Investment Treaty Template: Towards a new standard of protection in southern Africa* (2014) Stellenbosch, Tralac page 2.
[135] SADC BIT Model 2012 (n125 above) art 29 page 55.

the regulatory powers of the state in its sovereign powers to make economic policies and distinct from takings requiring compensation.[136] We shall look some of the cases where some indigenization policies have been subjected to challenge at the investment tribunals;

3.12.1 The BEE National Policy of South Africa

The introduction of the new Minerals Act of South Africa[137] and the Broad Based Socio-Economic legislation[138] gave birth to the black economic empowerment policies. The Republic of South Africa in a bid to empower formerly disadvantaged blacks formulated the Black Economic Empowerment (BEE) policy meant to address the economic inequalities because of its colonial era. The policy in practice sought to empower black people to have a share of equity in all economic activities in the country. In the mining industry of the country, such a black participation was a result of the Mining Charter[139] which was promulgated pursuant to the broad based socio-economic empowerment provisions of the MPRDA,[140] because of negotiations by key stakeholders in the South African mineral sector but it only became operational upon enactment of the MPRDA in May 2004.

The Charter therefore if mining companies must transfer 15 per cent of their assets or equity to BEE groups or individuals by May 2009[141] and 26 per cent by May 2014.[142] The Mining Charter also provides that companies shall publish employment equity plans directed towards achieving a baseline 40 per cent HDSA participation in management and ten per cent participation of women in the mineral sector by May 2009.[143] Besides all these measures, the government made sure of implementation of the said equity transfer and divestures through various stakeholder meetings and a private independent service provider was engaged to monitor the compliance with the Mining Charter. However, there was an increasing concern for those in the mineral sector that though the government might be implementing its black

[136]Soranajah (n15 above) page 380-381.
[137]The Minerals and Petroleum Resources Development Act of 2002 came into force 1 May 2004. Section 110 of the Act also changed the old minerals order which vested to the owner of the mineral surface to the custodianship of the state for 'the benefit of all'.
[138]Broad Based Black Economic Empowerment Act 53 2003.
[139] Mining Charter which came into effect on the 11th October 2002.
[140] Section 100(2) of the MPRDA Act of 2004 which provided that the Minister must within six months from the date in which the Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry and allow such South Africans to benefit from the exploitation of mining and mineral resources.
[141]Scorecard Item 9.
[142] Mining Charter of 2002 para 4.7.
[143] Mineral Charter of 2002 para 4.2.

economic empowerment and making such changes may result in the growing perception that the mineral sector of South Africa is not investor friendly.[144]

Piero Foresti and others v The Republic of South Africa

The 'legitimate BEE economic policy' was put to test in the case of *Piero Foresti and others v The Republic of South Africa*[145] in which the claimants lodged investor-state dispute with the ICSID based on their respective BITs with South Africa, namely the Italy BIT[146] and Luxembourg BIT[147] consisting Italian nationals having companies in the Republic and a company incorporated in Luxembourg (Finstone). The claimants alleged that the respondent was in breach of the BITs provisions on expropriation (Article 5 of both BITs) in two aspects;

(a) By the coming into effect of the MPRDA Act which put to an end certain mineral rights which the claimants had under the old Minerals Act of the country
(b) When the MPRDA Act came into operation simultaneously with the Mining Charter which introduced compulsory equity divesture of the claimant's shares in the investment companies of the claimants
(c) Alternatively, they made a claim that the country failed to adhere to due process requirements because of the divesture requirements of the Act and Charter and therefore in breach of the BIT.[148]

They also alleged that their BITs had extensive provisions covering direct, indirect expropriation, measures having the equivalent of expropriation and *measures limiting, whether temporarily or permanent, investor's rights of ownership, possession, enjoyment and control of the investments*.[149] The claimants alleged therefore that the introduction of the MPRDA Act the respondent expropriated all its mineral rights because of the conversion of the old order mineral rights to the new rights which must be acquired in pursuance of an application to the Minister, and the compulsory transfer of shares to the historically disadvantaged South Africans in the manner described above and stated that amounted to expropriation.[150]

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[144] Leon (n5 above) page 616.
[145] *Piero Foresti and others v The Republic of South Africa* ICSID Case No. ARB(AF)/07/1(Award) (4 August 2010).
[146] Agreement between the Republic of South Africa and the Italian Republic for the Promotion and Protection of Investments signed in Rome on the 9th June 1997.
[147] Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments signed in Pretoria in 14 August 1998.
[148] *Piero Foresti and others* (n145 above) para 54.
[149] *Piero Foresti and others* (n145 above) para 57.
[150] *Piero Foresti and others* (n145 above) para 60-65.

During the change of pleadings, the claimants sought to discontinue which robbed us jurisprudence on the pronouncement by the tribunal whether the BEE policy and the divesture requirements constituted measures equivalent to expropriation and the case was discontinued and claims dismissed for future reference in similar cases as the present study. Therefore, the question remains unanswered positively.

Agri SA v Minister of Natural Resources

The case above was not a bar to local mineral rights holders in South Africa under the old regime as the MPRDA Act was also a subject of determination in the domestic case of *Agri-SA*[151]. The applicant in these proceedings substituted the said Sebenza (Pty) (Ltd) bought coal rights from the liquidators of Kwa-Zulu Collieries and registered them in its name but was not the owner of the land in which it was located. Despite conversion it was the rightful holder to make an application in terms of the new order.[152] Unused rights were in force for a period of one year and failure to make a fresh application they are forfeited.[153]

Sebenza then encountered internal problems failing to apply for permit to mine or authorization to prospect in the former Minerals Act and the problem continued even during the promulgation of the MPRDA. Liquidation was the best option and sold the rights to Metsu Trading (Pty) (Ltd) but the sale was cancelled after the parties were advised that the rights had ceased to exist under the MPRDA. Sebenza lodge a compensation a claim for expropriation in terms of Schedule II of the MPRDA, this decision coincided with Agri SA's decision to seek clarity from a court of law on its view that the commencement of the MPRDA had the effect of expropriating mineral rights conferred by the former Minerals Act. It then identified Sebenza's claim as the ideal test for the prosecuting of the rights of its members and then procured Sebenza's compensation claim of R250 000.00 which was dismissed by the state hence proved an opportune time to lodge the present proceedings before court.[154]

The main question before the court was whether Sebenza's mineral rights which they enjoyed during the subsistence of the former Minerals Act, were expropriated when the MPRDA came into effect.[155]

[151]*Agri South Africa v Minister of Minerals and others* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013).
[152](n151 above) para 13.
[153]Item 8(1) of Schedule II of the MPRDA Act.
[154](n151 above) paras 15-16.
[155](n151 above) para 24.

His Lordship Mogoeng CJ in a majority judgement held that there can be no expropriation when the property alleged to be taken is not acquired by the state.[156] He went on to state that the constitution of the country includes the nation's commitment to land reform and reforms to bring about equitable access to its natural resources. He further went on to state that the MPRDA was a break to the barrier of exclusivity to equal opportunity and the commanding weights of wealth-generation and economic development. It seeks to address the injustices of the past in the economy by treating property rights with sensitivity and the fairness it deserves.[157]

The case then sought to uphold the BEE policy introduced by the state to balance economic problems faced the country during the colonial era and therefore upheld the age old permanent sovereignty of states over their natural resources and right of states to make regulations and economic policies for the economic development of the nation.

3.12.2 Indigenization policy of Zimbabwe

The introduction of Zimbabwe Indigenization Economic Policy which was also strengthened by an Act of Parliament[158] which resulted in an economic meltdown and sanctions of the country by the western world and it brought much criticisms internally and internationally. Some of the issues of concern to the country was a decline in foreign direct investment.[159]

The Act defines "indigenization" as a deliberate involvement of indigenous Zimbabweans in the economic activities of the country, to which hitherto they had no access, to ensure the equitable ownership of the nation's resources.[160]

The objectives of the Act provide that the Government of Zimbabwe shall by this Act or regulations ensure that indigenous Zimbabweans shall own 51% shares of every public company or business and no merger or restructuring of any company shall be approved by the Competition Commission unless 51% shares in the merger or restructuring is held by indigenous Zimbabweans.[161]

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[156](n151 above) para 59.
[157](n151 above) para 73.
[158]Indigenization and Economic Empowerment Act [Chapter 14:33] 2008 [Date of commencement 7th April 2008]
[159]Chidede T., Warikandwa T.V. *Foreign Direct Investment and Zimbabwe's Indigenization and Economic Empowerment Act: Friends or Foes?* (2017) 3 Midlands State University Law Review (2017) 3 MSULR A publication of the Faculty of Law, Midlands University Gweru Zimbabwe page 25 available online at https://www.zimlii.org.../journals/MSULR%20VOL%20Article%202-Foreign(accessed on the 12th Septemeber 2017).
[160] Definitional section of the Indigenization and Economic Empowerment Act 2008.
[161] Indigenous and Economic Empowerment Act of 2008 sec 3(1).

A further instrument was enacted by the Minister in pursuance to the IEE Act meant for the indigenous quota on the mineral sector which provides that the minimum indigenization and empowerment quota means a controlling interest of 51% shares of the shares or interest which in terms of the Act is required to be held by indigenous Zimbabweans in the non-indigenous mining businesses concerned and every mining business which was not in compliance with the notice was called to put its house in order according to the prescribed period.[162]

The Republic of Zimbabwe was in pursuit of its sovereignty right to make the indigenization policy hence His Excellency R.G. Mugabe reinforce his government's position on indigenization during his inauguration on the 22nd August 2013 when he stated;

> *"…we dare not let our people down. We are aware that people of ill will have cast aspersions on our hallowed policy of indigenization and economic empowerment. Well, it is set policy, our chosen path to full sovereignty…our minerals are a depletable resource. We cannot grow them again once they have been exploited. Consequently, we cannot be bystanders in their exploitation. We need a share, a controlling share in all ventures that exploit our non-renewable natural resources…we seek partners in a 51/49 per cent shareholding principle. Genuine partners should find this acceptable".[163]*

The present IEE policy has not yet been a subject if investment tribunals but some scholars have noted its advantages and disadvantages,[164] save for the previous land reform policies which will be discussed below.

Mike Campbell and others v The Republic of Zimbabwe

The first case was that of *Mike Campbell and others* [165] wherein the applicants were challenging the acquisition of agricultural land for resettlement and other purposes which full title shall

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[162] The Indigenous and Economic Empowerment General Notice 114 of 2011. Notice was published in the Government Gazette Extraordinary of 25th March 2011 simultaneously with the Indigenous Economic Empowerment (Amendment) Regulations, 2011 (No.3) published in Statutory Instrument 34 2011.

[163]His Excellency Robert Mugabe's inauguration speech on the 22nd August 2013 transcript available online at https://zimbabwesituation.com/news/transcript/-mugabe's-inauguration-speech-22-August-2013(accessed on the 14th September 2017).

[164]Chidede and Warikandwa (n159 above) where the authors state that the 51 per cent equity by policy makers have the potential to scare away investors as investing under such circumstances could be tantamount to undertaking a high-risk business venture. See also T Murombo *Law and Indigenization of Mineral Resources in Zimbabwe* page 571 where the author states that whether mining activities can sustain local livelihoods and economic growth will depend on many other factors like appropriate legal and policy framework, adequate political stability and transparent property rights.

[165]*Mike Campbell (Pvt) Ltd., William Michael Campbell and others v The Republic of Zimbabwe*, in the Southern African Development Community Tribunal, Windhoek, Namibia, SADC (T) Case No.2/2007, Judgement

vest on the state. The acquisition was done on the strength of Section 16B Amendment 17 of the Zimbabwe Constitution. The constitution further provided that no compensation shall be payable except on improvements, and further had ouster clauses in that the local courts had no jurisdiction to challenge the acquisition. It must be noted on the respondent's arguments that the policy was not based on discrimination, but an agricultural resettlement brought about by colonial history.[166]

The question for determination by the tribunal included, among others, whether the applicants were denied justice in the local courts, whether applicants were discriminated because of race and whether compensation was payable because of the compulsory acquisition of the property by the respondent.[167]

The tribunal held that the applicants were deprived of their lands without having access to the courts in violation of Article 4 of the SADC Treaty which obliges member states to respect principles of human rights, democracy and the rule of law and the rule of law cannot be regarded without access to courts.[168] The tribunal further held that the applicants were discriminately deprived of their properties much against numerous conventions referred by the tribunal like the SADC Treaty, ICCPR, ACHR and it went on to hold that the respondent must pay compensation for their lands compulsory acquired by the respondent.

Bernadus Funnekoter and others v The Republic of Zimbabwe

The same land reform policies above also went to ICSID on applications brought by *Bernadus Henricus Funnekoter and others*[169]. The case also involved the land evasions by the respondent, as above the matter, save that the present matter was viewed according to the present international investment law based on Netherlands-Zimbabwe BIT violation. The claimants alleging that they were deprived of their investments by the respondent's actions which were 'tantamount to expropriation' contrary to Article 6 of the BIT[170] and a violation of the fair and equitable treatment standard contrary to Article 3 of the BIT, a denial of fair and equitable

(November 28, 2008) available online at https://www.saflii.org>Databases(accesssed on the 14th September 2017).

[166](n165 above) page 15.

[167](n165 above) pages 16-17.

[168](n165 above) pages 26-41.

[169]*Bernadus Henricus Funnekotter* (n71 above).

[170](n71 above) para 39-40. Article 6 of the Netherlands-Zimbabwe BIT provided that neither contracting party shall subject the nationals of the other contracting party to any measures depriving them, directly or indirectly, of their investments unless the measures are taken for a public interest, not discriminatory and they are accompanied by payment of just compensation.

treatment standard as required by the treaty.[171] The tribunal held and Zimbabwe conceded that the compulsory acquisition done through the Land Acquisition Act and Zimbabwean Constitution is 'tantamount to expropriation'.[172] The tribunal further ordered that Zimbabwe pays compensation to the claimants.

3.13 De Sanchez v Banco Central de Nicaragua

The *De Sanchez*[173] is one case in which the US Supreme Court of Appeal had to determine the true effect of legitimate governments economic policies under customary international law. In this case the Nicaragua government was suffering critical shortage of foreign exchange which led the government around the September 1978 to adopt exchange control regulations limiting sales of foreign exchange for other purposes be authorized by the Banco Central's Board of Directors. Further tighter restrictions were imposed because of a standby agreement between Nicaragua and the IMF.[174]

In June 1979 when Nicaragua was on the verge of collapse Mrs Josefina Sanchez Navarro de Sanchez left Nicaragua for Miami and she had a $150 000 check issued to her by the Nicaraguan Central Bank (Banco de Central de Nicaragua). She encountered problems in cashing the check because of the decree stated above by the Nicaraguan government. She then filed a suit against the bank starting from the district courts which dismissed his application hence she then lodged the present appeal.

The court, among others, held that the Nicaragua government had the general supervision and control of currency and foreign exchange in the country, the authority to manage international monetary reserves of the country and it had discretionary power under Nicaraguan law to control Nicaragua's foreign exchange reserves by stopping payment of checks drawn on its USD accounts.

The court further noted that the purpose of this discretionary power "is to allow governments executives to make policy decisions free from future litigation", hence Nicaragua's order decision to stop payment of the check was a pure policy decision. The court citing authority from other cases stated that to deny immunity of a foreign state for the implementation of its domestic economic policies would be to completely abrogate the doctrine of sovereign

[171](n71 above) para 46.
[172](n71 above) para 97.
[173] *De Sanchez v Banco Central de Nicaragua* 770F. 2d 1385 US Court of Appeals 5th Cir. September 19 1985
[174] *De Sanchez* case (n173 above) para 7.

immunity.[175] The case seeks to strengthen the position proving authority and/or justification of states in implementing indigenous policy measures when regulating their economies.

3.14 Latin American countries position of protection under BITs

The Latin American have been great dissidents of the favourable treatment granted to investors in the protection of investment under bilateral investment treaties. The said countries have been great followers of the Calvo doctrine which was formulated by the Argentine jurist Carlos Calvo (1824-1906) whose essence being that foreign investors investing in the host state should be bound by the domestic law of the host state, and his/her remedies are only available in the domestic courts for any injury suffered. Many Latin American countries including, among others, Peru, Bolivia, Ecuador have enacted the 'Calvo-doctrine' in their constitutions as well as their investment treaty agreements.[176]

Brazil is not a signatory to any BIT with the western countries and in the event of any dispute or disagreement foreign investors do not invoke the ICSID or tribunals constituted under the UNCITRAL Rules and any measure 'allegedly' interfering with the property rights of the investment shall be decided according to the national Brazilian law before its domestic courts.[177] However, Brazilian law recognizes indirect expropriation and the term refers to an act of expropriation by the state without due process of the law, whether the taking is total or partial. According to the Brazilian law, the right of state to regulate is only limited by the proportionality principle; the state cannot eliminate the rights of investors, it can only restrain them for the preservation of public interest.[178]

3.15 Other standards of treatment in BITs

3.15.1 Fair and equitable treatment standard (FET)

Another important clause found in numerous BITs is the international minimum standard of 'fair and equitable treatment' and 'full protection and security' which investors have often used simultaneously with the expropriation claim. Some authors say it has superseded the expropriation clause which has traditionally been the most important clause. It has also been referred to as the 'alpha and omega' of the BIT generation.[179]

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[175] *De Sanchez* case (n173 above) para19 of a concurring judgement.
[176] Subedi page 14.
[177] Montserrat C *Indirect Expropriation and Resource Nationalism in Brazil's Mining Industry;* The University of Miami Inter-American Law Review, Vol 46, No.1 (Fall 2014), page 61-88 at page 63.
[178] (n177 above) page 77.
[179] S Montt (n3 above) pages 293-294.

The fair and equitable treatment conforms to the "minimum standard" which is part of customary international law.[180] The FET constitutes obligations recognized under customary international law and they are not free-standing obligations.[181] It should be noted that there has not been a clear-cut definition of the standard and such has led tribunals to adopt different interpretations.

The denial of justice requirement as it applies to the FET standard is extensive and includes among others, including frustration of the investor in obtaining a suitable remedy within the domestic courts mainly fuelled by the fact that he is foreign origin and discrimination against a foreign litigant.[182]

In some instances, the courts will more likely when not having made an indirect expropriation finding but will still hold the FET violation. In the case of *National Grid plc v Argentina*[183] in which the claimants had invested in the former state-owned electricity transmission company during a period when the country was still facing the 1989 Argentine financial crisis. The investor brought a claim against the country alleging a violation of Article 5(1) of the UK-Argentina BIT that Argentina's regulatory measures constituted an indirect expropriation. The tribunal held that there was no indirect expropriation of National Grid's investment, it went on to hold though that Argentina had breached its obligations to provide fair and equitable treatment and full protection and security of the investment and awarded a USD 53.5 million damage to the claimant.[184]

Even if there are efforts to curb the meaning and content of the standard, it remains open-ended and there has not been a flexible and specific approach adopted when interpreted by tribunals which may result in some genuine state measures caught in the trap of the standard.[185]

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[180] OECD Draft Convention on the Protection of Foreign Property (known as the Draft OECD Convention) 1967 p120. See also UNCTAD *Fair and Equitable Treatment Series on Issues in International Investment Agreements II* United Nations, 2012 New York and Geneva page 5.

[181] *The Loewen Group, Inc. and Raymond L. Loewen v The United States of America* ICSID Case No.ARB(AF)/98/3 (Award) (26 June 2003) para 128.

[182] *Loewen* (n181 above). The tribunal noting that the trial was a disgrace the trial court having allowed the respondents to use racist slurs against the claimants and using all strategy possible to make the court uphold justice for the 'Mississippi people' and uphold local favouritism against foreign litigants (para.119, 136). The tribunal held that the whole trial and its resultant verdict was improper and cannot be equated to the minimum standards of international law and fair and equitable treatment (para 136).

[183] *National Grid plc v Argentine Republic* UNCITRAL Case No.1:09-cv-00248-RBW, Award 3 November 2008.

[184] *National Grid* (n183 above) para 154.

[185] UNCTAD (n180 above) page 105.

3.15.2. Protection and Security of the entire investment (FPS)

This is also a customary international law standard which imposes an obligation to protect foreigners and threats to foreigners. The standard applies to the physical security of the investment the state is obliged to protect the person and property of the investors orchestrated by the state or organs of the state.[186]

The standard is also not confined to the physical security of the investment but will also go beyond to include economic regulatory powers whereby the state is also obliged to protect the normal ability of the business to function on a level playing ground and not disturbed or harassed by the political and economic powers of the host state.[187]

The host state is obligated to give due diligence in protecting the investor from any possible harm likely to eventuate to his investment. The failure by the host state therefore to take reasonable measures to protect the investment against threats such as brigands or violence by the police or some security agencies of the state renders the government to compensate the investor from any likelihood of harm.[188]In the *Wena Hotels*[189] case, the tribunal held that Egypt was responsible for the protection of the hotel and its failure to take any action to prevent any seizures and control over the hotel to Wena, the country breached its obligations and its actions fell short of the fair and equitable treatment and full protection and security standards.

Lastly, it worthy to note that Swaziland being a party to some BITs as discussed above, the said BIT does have the clause which provides that investments of nationals or companies of one contracting party shall always be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other contracting party.[190] The country is therefore mandated to ensure that it honours its obligations relating to the said standards to avoid being hauled before the investment tribunals on violations of same.

3.16 Conclusion

We have seen in the previous chapters how the issue of indirect expropriation poses a challenge for investment tribunals in trying to decide whether measures by a state amount to or are

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[186] C Schreuer *Full Protection and Security* Journal of International Dispute Settlement, (2010) pages 1-17, page 2. Available online at https://www.univie.or/en/Docs/unctaddiaeia2011d5_en.pdf(accessed on the 21 September 2017).
[187] Schreuer (n186 above) page 7.
[188] JW Salacuse *The Three Laws of International Investment* (n37 above) page 388.
[189] *Wena Hotels Limited v Arab Republic of Egypt* ICSID Case No. ARB/98/4 (Award on the Merits) (8 December 2000).
[190] UK-Swaziland BIT (n118 above) art 2(2).

equivalent to expropriation. There is no uniform test as for tribunals to make a finding of indirect expropriation and mostly the tribunals are guided by the case to case approach and try to look at the nature of the measure and its impact on the investment.

The protection of investment under the bilateral investment treaties (BITs) has seen those powers which states legitimate policy and regulatory measures since time immemorial be scrutinized with an endeavour to break any barriers or looking at any effect they may have in the economic viability and interference on the operations of the management.

The constitution of Swaziland and other investment provisions only covers situations of lawful expropriations but fails to address to define indirect expropriation. The BITs to which Swaziland is party to are broad structured and say nothing on indirect expropriation or rather what measures amount to expropriation. A worse scenario is the provision on the Swaziland Investment Promotion Act which provides that disputes of foreign investment goes to ICSID. The tribunal will then be empowered to scrutinize the measures or the law and give an interpretation thereof if it amounts to expropriation using the test above.

Indigenization policies are neither unlawful nor unjustified but customary international law has long recognised the principle that states should always be given discretionary powers to formulate their own economic policies and an infringement of that is an abrogation to the long-standing principle of sovereign immunity under international law. There is no clear case under the investment tribunals which have made a clear pronouncement as to whether indigenization measures can be tantamount to expropriation as the *Piero Foresti* case was discontinued, except for the Zimbabwe awards in which the tribunals held that the policies were expropriatory. The major consideration has been whether the measures interfere with the use and enjoyment of the investment and the intention of the state is irrelevant.

The next chapter shall be looking at the extractive industries laws and policies of the Kingdom of Swaziland to apply the above expropriation principles and tests for determining indirect expropriation with a view to stablish whether the legal framework of the extractive industries in the country cumulatively amount to measures equivalent to expropriation.

CHAPTER 4
THE LAWS AND POLICIES OF THE EXTRACTIVE INDUSTRIES OF SWAZILAND

4.1 Introduction

We have seen in the previous chapters the task usually faced by tribunals when determining whether measures are tantamount to expropriation. The major problem of such being that no BIT makes a clear definition of indirect expropriation save for the standard clauses of '…measures tantamount to expropriation'. We have seen that the tribunals are indeed scrutinizing the regulations and economic of states in trying to ascertain the character and purpose of the as to whether it interferes with the investor's investment. The tribunals also state that the intention of the state is irrelevant, what matters are the effects on the use and enjoyment of the investment. Indigenization can amount to expropriation but only if they interfere with the economic benefit of the investment. It has been noted in the previous chapters that indigenization policies been challenged and in some cases, can amount to measures tantamount to expropriation.

This chapter seeks to navigate the mineral regime of the Kingdom of Swaziland, its mineral policy as well as the economic policies of the mineral industry in the country. This is aimed at laying the foundation and introduction to the said mineral regulation to see any discernible trends which have seen most country crossing the line to indirect or rather 'creeping expropriation' on the basis of bilateral investment treaties to which the country is a party to.

4.2 Brief facts about the Kingdom of Swaziland

Swaziland has been a monarchy since the early 15th to 16th century, though the country and the people derived their name from a later king Mswati I who ruled in the mid-19th century. The Swazi King or *Ngwenyama* (lion) reign in conjunction with the Queen Mother or *Ndlovukazi* (she-elephant) which is either the King's biological mother, which is the case presently or, on her death, a senior wife.[191] Succession is usually done according to Swazi law and custom.

The present monarch King Mswati III ascended the throne in 1986 succeeding his father the late King Sobhuza II who reigned from 1921-1982. The King is usually regarded as the mouth-piece of the people and is usually described as *umlomo longacali manga* (the mouth that tells

[191] Christina Forsyth Thompson *Swaziland Business Yearbook; A Commercial Guide* 2017 26th Edition Paarlmedia Printing South Africa page 7.

no lies).[192] The King and *Ingwenyama* is the hereditary head of state and a symbol of unity and eternity for the Swazi nation.[193] The King and *Ingwenyama* is immune from any legal proceedings, taxation of any income and property accruing to him in any private capacity.[194]

The King is in most instances the substantive head of all the arms of government, executive authority in the country vests in the King,[195] legislative authority of the country vests in the King,[196] though judicial powers vests in the judiciary,[197] the King is responsible for the appointment of the judicial service commission (JSC) in the country as well as judges in consultation with the JSC.[198] The names of the King and *Ingwenyama* shall be used interchangeably and the latter is the traditional names for the King and clarity is made simply because some statutes in Swaziland and mostly the statutes which are subject to this research often refer to the King as *Ingwenyama*.

4.3 Minerals in Swaziland

4.3.1 Iron ore

The iron ore mine which ceased operations in the 1970s in western Ngwenya and was developed as a tourist attraction lies next to the old excavation site in the area dating back to iron age. The mine was re-opened in October 2011 in which medium grade iron ore was mined though there were environmental concerns in the area. The project had a short spell as it ceased operations in October 2014 apparently following a decline in the international price of iron ore and shareholder disputes in the company which was granted licence to operate the mine. This has resulted in the loss of approximately 700 jobs and about E400 Million potential revenue was lost by the country during the year 2016. According to the geological survey, there is over 600 million tonnes of iron ore in the country.[199] This mine is currently not operational.

4.3.2 Coal (Anthracite)

Despite being enhanced by the infrastructure development of a new seam at Maloma, production slowed down by 20.3% to 141,733 tonnes in 2015 due to geological issues that resulted in reduced yields in sealable production. Revenue was down by 15% to E177.6 Million

[192] (n191 above) page 7.
[193] The Constitution of the Kingdom of Swaziland Act 1 2005 secs 4(1) and (2).
[194] The Constitution of the Kingdom of Swaziland Act 1 2005 secs 10 and 11.
[195] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 65.
[196] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 106.
[197] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 140(1).
[198] The Constitution of the Kingdom of Swaziland Act 1 2005 secs 153(1), 159(2).
[199] (n191 above) page 90.

because of reduced output and depressed prices. Maloma is the only operational coal mine in the country and reserves are estimated at 150 million tonnes. [200]

4.3.3 Quarried stone

Production in the quarry stone increased mainly to high demand of construction activities and the increase is expected to continue following the increase of construction by both the private and public sector. It is operational at Sikhuphe, Nkwalini, Mbabane and AT&T.

4.3.4 Diamonds and Gold

In February 2016, the King announced the opening of a new gold mine in the northern region of the country that is estimated to have gold ore reserves of 1.65 million tonnes and is expected to boost value addition for the mineral sector.[201] Gold has not been mined in the country since 1954. It is established by Swaziland Mining Ventures.

4.3.5 Sand and Soapstone

Excavation of these minerals is strictly controlled to prevent environmental damage and stiff penalties apply upon violation of the legislation.[202]

4.3.6 Other minerals

Deposits of kaolin, talc, silica have been identified in Swaziland but there are currently feasibility studies taking place to determine the viability of proceeding to explore those minerals. According to a survey by the Department of Geological Survey and Mines, Swaziland has over 763 million tonnes of unexplored minerals in various parts of the country.[203]

4.4 Historical background of the mineral regime in Swaziland

The Europeans settlers came to Swaziland around the year 1840 and some began to obtain mineral concessions by the then kings of Swaziland. In 1881 the Convention of Pretoria, the British and Transvaal Republic ratified some of the borders of Swaziland and incorporated to the Transvaal Republic and since border issues has remained in dispute between South Africa and Swaziland.[204] In 1902 following the Anglo-Boer war the British administration

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[200] (n191 above) page 90-91.
[201]Central Bank of Swaziland Annual Report 2015-2016 p28. Available online at http://www.centralbank.org.sz/about/annual/2015-16.pdf(accessed on the 17 March 2017).
[202] (n191 above) page 91.
[203] (n191 above) page 90.
[204] P Jordan *The Mineral Industry of Swaziland* Report No.104 March 1990 Institute of Mining Research in Zimbabwe.

commenced up until 1968 when Swaziland got her independence from Great Britain leaving behind a Westminster Constitution.[205]

One of the earliest statute was the Concessions Act[206] which provided that no concession or grant made by or on behalf of the King or Paramount Chief of Swaziland shall be recognized by any court of law, save as confirmed by the Chief Court and which have not become void on the October 1904 through forfeiture or otherwise.[207] The Act further established a commission of three or more persons, one of whom shall be president thereof to deal with concessions confirmed by the Chief Court.[208]

After the death of the Paramount Chief King Mbandzeni in 1889, practically the whole of Swaziland was apportioned by concessions. These concessions were mixed as they not only included mining and land rights but also covering every conceivable and inconceivable field of activity. The South African Government and the British Government entered an "Organic Proclamation" of September 1890 which established a "Chief Court" of three members mandated to examine the existing concessions.[209]

The concessions which were confirmed by the Chief Court, leases, cessions, hypothecations and all encumbrances thereon were registered by the Registrar of Deeds in his special registers for Swaziland,[210] and concession rentals were payable by the concessionaires to the Swaziland Government annually.[211]

Minerals in the country dates as far as 1870 during the discovery of gold in the Forbes Reef area in the northern region of the country. Asbestos also began in the Havelock Mine in 1939, diamonds around 1984 and as of 1988 minerals in the country were asbestos, diamonds, coal and stone. The country had its mineral statute enacted during the colonial era. The Act still reserved all ownership of minerals in the country to the King holding it in trust for the Swazi nation.

[205] Swaziland Independence Constitution Act 1968.
[206] Concessions Act 1904; Date of commencement 1st October 1904- Parts I and II, 19th October 1908- Part III, 5th November 1912-Part IV, 17th April 1909- Part V.
[207] Concessions Act 1904 sec 2.
[208] Concessions Act 1904 sec 3.
[209] Explanatory Note of the Concessions Act 1904.
[210] Concessions Act sec 8.
[211] Concessions Act of 1904 secs 13 and 14.

4.5 The current mineral regime of Swaziland

The Mining department in the Ministry of Natural Resources of the government of the Kingdom of Swaziland is responsible for the administration of the minerals industry in the country. Such responsibilities involve the enforcement of the constitution and the mineral legislation. The objectives of the mining department at the said ministry includes, among others, to implement and continuously review the national mineral policy to achieve the national development strategy (NDS), sectoral development (SDPs) and poverty reduction action plan (PRAP) goals, establish and maintain a modern, effective and visionary regulatory framework to govern the mineral industry in the country.[212]

The Constitution of Swaziland[213] provides that all minerals and mineral oils in Swaziland vests in the *Ingwenyama* in trust for the Swazi nation.[214] The Constitution further establishes a Minerals Management Board whose function is to advise the *Ingwenyama* on the overall management of minerals and responsible for issuing grants, licenses and other dispositions conferring mineral rights in Swaziland.[215] The members of the Minerals Management Board are appointed by the *Ingwenyama* in consultation with the Minister responsible for minerals.[216]

There is established the office of the Commissioner of Mines consisting of inspectorate, mine engineers, geo-scientists, geologists, mineral evaluators and a minerals marketing body.[217] *Ingwenyama* appoints a suitable person with considerable expertise and experience in the mineral industry as a Commissioner of Mines.[218] The functions of the Commissioner of Mines shall include, among others, receive applications for consideration and advice of the Board, issue mineral licenses grants by the *Ingwenyama,* maintain a register for mineral rights.[219]

The *Ingwenyama* in trust of the Swazi nation shall be always entitled 25% shareholding of any large mineral project in which a mining license has been issued. In addition to the above, the Government of Swaziland shall also acquire 25% shareholding made up of 15 per cent for the government and 10 per cent for any person who must be a citizen of Swaziland.[220] No effect

[212]Swaziland Government Ministry of Natural Resources available online at http://www.gov.sz/index.php?option=com_content&view=article&catid=84:natural-resources-a-energy&id=405:mining-department(accesssed on the 15th August 2017).
[213] The Constitution of the Kingdom of Swaziland Act 1 2005.
[214] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 213.
[215] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 214 (5).
[216] The Constitution of the Kingdom of Swaziland Act 1 2005 sec 214 (1).
[217] Mines and Minerals Act 4 2011 sec 16.
[218] Mines and Minerals Act 4 2011 sec 17.
[219] Mines and Minerals Act 4 2011 sec 18.
[220] Mines and Minerals Act 4 2011 secs 133 (1) -(2).

shall be given to any mineral project until the share requirements stated above has been put to place and may also be cancelled if the holder of a license enters into an agreement or arrangement which aims to defeat such an arrangement.[221]

4.5.1 Procedure of applications for licences and approval of applications

An application for a mining licence shall be done in the prescribed form and directed to the *Ingwenyama* and such application shall set, among others, the following requirements for consideration; a proposal for the mining operations, a statement of financial and technical resources of the applicant, undertaking by applicant to employment and capacitating Swazi citizens, community development and procurement of local goods and services.[222]

The Act further provides that the Board *shall not* consider the application unless it is satisfied of the above requirements and further that the proposal is also aimed at local beneficiation and value addition of minerals is accepted.[223]

4.5.2 Financial obligations of mineral rights holders

The holder of a mineral right shall pay to the *Ingwenyama* in trust for the Swazi nation a royalty fee based on the gross value of any mineral or minerals obtained and sold by the holder of the mineral rights. Payment shall be made in the prescribed form that include gross production details, gross sales figures, the price sold and to whom the minerals were sold. The Commissioner shall always consider if such minerals were disposed of in a manner not in accordance with the arm's length and shall so determine the actual price for purposes of royalty fee due.[224]

The holder of a prospecting or mining license shall pay rent to the *Ingwenyama* in respect of the area specified in the license and such rental due shall become due upon the grant and each anniversary of the grant of the licence.[225]

4.5.3 Settlement of disputes

The Act provides that all disputes between a mineral rights holder and any person, not the government or its agencies, that concerns exercise of that tight shall be submitted to the Commissioner of Mines who shall determine same according to rules of natural justice. The

[221] Mines and Minerals Act 4 2011 secs 133(5) (a) and (b).
[222] Mines and Minerals Act 4 2011 secs 54(1) and (2).
[223] Mines and Minerals Act 4 2011 sec 56.
[224] Mines and Minerals Act 4 2011 secs 132 (1), (2) and (4).
[225] Mines and Minerals Act 4 2011 sec 134.

Commissioner shall then make an order in writing after determining the issues. Such order can be appealed to a competent court of jurisdiction according to the laws of Swaziland.[226]

4.5.4 Respect for the environmental

All mineral rights holders must follow the environmental laws and regulations of the country.[227]A large scale mining project under the Act shall not commence unless and until the Swaziland Environmental Authority has issued an Environmental Compliance Certificate (ECC) and such ECC must be endorsed by the Commissioner of Mines.[228] A mineral rights holder shall also comply to any laws governing the use of water or natural resources.[229]

4.5.5 Foreign direct investment in the mineral sector

The stock of FDI directed towards the mineral sector plummeted in 2015 registering E110.3 million down from E457.2 million from the previous year marking a decline. This was mainly due to the closure of iron ore in 2014 which resulted in a decline of reinvested earnings in this sector. The mineral sector has not been a major contributor towards the country's revenues and its impact has been considerably low with coal being the key mineral in the sector in 2015.[230]

4.5.6 Economic contribution of the sector to the economy

The mineral sector has not been a great contributor to the country's GDP and since the termination of the extraction of iron ore in September 2014, the sector has witnessed a further downward spiral. It is estimated that the closure of the mine has resulted in an average loss of E400 million worth of revenue for the year 2016.[231] Coal production declined by 20.3 per cent to 141,733 metric tonnes in 2015 from 177,930 metric tonnes produced in 2014 resulting in a decline of sales by 15 per cent to E177.6 million in 2015 due to low output and depressed sales. Revenue from mining and quarrying sub-sector fell by 65 per cent to 216 million in 2015 mainly due to the closure of iron ore and poor performance in coal production.[232]

The mining sector is slowly showing signs of growth and this follows the opening of a gold mining project at Lufafa Gold Mines though at a small scale. The gold production is

[226] Mines and Minerals Act 4 2011 sec 121(1) -(11).
[227] Mines and Minerals Act 4 2011 sec 122.
[228] Mines and Minerals Act 4 2011 sec 125.
[229] Mines and Minerals Act 4 2011 sec 128.
[230] Central Bank of Swaziland Report (n201 above) page 41.
[231] (n201 above) page 27.
[232] Central Bank of Swaziland Report (n201 above) page 27.

intensifying too as the Mining Department has issued more licences in areas between Bulembu and Piggs Peak where there are prospects of further mineral extraction.[233]

4.6 Closure of iron ore mine at Ngwenya

The mineral sector suffered a blow around the year 2014 when a company, Salgaocar Limited, was put under liquidation by an order of the High Court of Swaziland[234] only upon three years of its seven-year mineral licence lease duration. The investor complained of having lost tens of millions of USD when the mine was closed and there was a loss of around 700 jobs in a small population where the rate of unemployment is high. The body of papers placed before the courts in Swaziland during the liquidation of the company stated that the applicant's shareholders are Salgaocar Resources Africa Limited (SRAL) investing shareholder, a company incorporated in the Republic of Seychelles, the Government of Swaziland and the *Ingwenyama* in trust for the Swazi nation in compliance with section 133 of the Mines and Minerals Act of 2011.

The two main reasons stated for the placing of the company under judicial management were that the price of iron ore had gone down drastically in the international market and the applicants themselves engaged the minerals board to suspend operations, and there was a serious shareholder dispute that arose between the shareholders of the investor SRAL which had resulted in legal proceedings among them in Singapore.[235]

There was so much controversy surrounding the closure of this mine with the investor alleging the government of Swaziland has expropriated its investment, though up until today no case has ever been reported at investment tribunals. Many news of a notice of arbitration were circulating in the internet of the investor making an expropriation claim against Swaziland,[236] but confirmation with the ICSID secretariat proved that no matter reported or pending against Swaziland at ICSID.[237]

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[233] Central Bank of Swaziland 2016/17 Report available online at http://centralbank.org.sz/about/annual/2016-17.pdf(accessed on the 4 October 2017) page 36.
[234] *Salgaocar Swaziland (Pty) Limited v Salgaocar Swaziland (Pty) Limited* Swaziland High Court Case No: 1444/14 (Unreported).
[235](n234 above).
[236]http://www.ghananews24.com/news/afica-southern-african-resources-ltd-submits-notice-of-arbitration-against-swaziland-for-expropriation-of-mine(accessed on the 5 March 2017). See also http://www.allafrica.com/stories/201502032040.html(accessed on the 7 March 2017).
[237] Email from ICSID Secretariat<icsidsecretariat@worldbank.org> (accessed on the 17 March 2017).

4.6.1 Investor's case against the government of Swaziland in the Canadian courts

The liquidation of the said company at the domestic courts of Swaziland did not put the matter to rest as immediately thereafter the investor who had mineral rights to extract iron ore at the closed mine lodged civil claims against the King of Swaziland by seeking attachment of the King's aircraft at the Canadian courts.[238]

The brief facts of the matter were as follows; S. G. Air a British Virgin Islands incorporated company owned and operated by Mr Shanmuga Rethetham (known as Mr Shan and it shall be stated at this juncture that he is also the same owner who was behind the company that was operating the mine that was closed in Swaziland above). Mr Shan is a citizen of Singapore and had business dealings with His Majesty King Mswati III prior to the sale of the aircraft to Inchatsavane company limited. Inchatsavane is a company incorporated in the Kingdom of Swaziland and wholly governed by His Majesty King Mswati III (to be hereinafter referred to as HMK in this matter) in the amount of $11 450 000.[239]

After that sale, the aircraft was subject to an agreement to be refurbished in an amount of $6 050 00 USD payments schedule due on the 7th June and 8th November 2010. Problems however ensued after the initial payments as Inchatsavane decided to sell the aircraft to Wells Frego though the aircraft was to be held in trust by Miller Capital as per the agreement between Inchatsavane and Wells Frego. The amount of $7 500 USD was paid by Miller Capital with funds advanced to pay Goderich Aircraft and other $4,500 paid to Inchatsavane. Repairs continued as a result resulting in an escalation of the refurbishment costs of the aircraft. Goderich had financial challenges and sought the assistance of S.G. Air who made an advance payment of $3,300 USD. S.G. Air further alleges having provided HMK with replacement aircraft on through leases which Mr Shan alleges he paid personally.[240]

The aircraft was further resold to Inchatsavane by Wells Frego and some further modifications necessitated that it also premised at Goderich and S.G. became aware of its latter location and moved an application before court and obtained an *exparte* order. The applicant therefore claimed to have a possessory lien over the aircraft for payment of the sum of $3, 500 USD by the applicant to Goderich Aircraft for the refurbishment of the aircraft. The court in dismissing the application stated that though the matter points to a debt owed to S.G Air apparently by

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[238] *S.G. Air leasing Ltd v Inchatsavane Company (Proprietary) and Others* 2015 ONSC 1483, Court file No: CV-14-519022 Date 20150327 available online at http:www.canlii.org/en/on/onsc/doc/2015/2015onsc1483.html?resultIndex=1(accessed on the 16 March 2017).
[239] *SG Air leasing* case (n238 above) page 2.
[240] *SG Air Leasing* case (n238 above) page 2 para [8] – [9].

Inchatsavane, the applicant has failed to establish that it would suffer irreparable harm and failed to meet the litmus test of greater harm test which calls for the applicant to establish more than entitlement to payment.[241]

The applicant upon dismissal of its application lodged an appeal at the Ontario court of appeal[242] which was also dismissed by the appeal court which held that the appelllant advanced money to Goderich Aircraft and not Inchatsavane and S.G. Air is not one that made the repairs or refurbishments and hence not entitled to injunction relief and/or possessory lien.[243]

It is also prudent to state at this very moment for purposes of relevance to this study in that matter the court made an observation of some other issues that mushroomed in the case, wherein the papers before indicated that there is a company SG Iron Ore Mining (SG Iron) which is owned 50 percent by SARL(Southern Africa Resources Limited), 25 percent by the nation of Swaziland and 25 percent by the King of Swaziland.[244] This is a reflection of shareholder arrangement of the provisions of the Mines and Minerals Act of Swaziland which was also highlighted by the court in that matter.[245] Though the rest of that point to the fact that SARL encountered financial distress in 2013 but this research is only concerned with the regulatory framework of the mineral sector.

The case came immediately after the closure of the mine and after that there was so much speculation surrounding the circumstances leading to the closure of the mine. Though the matter was never lodged before any investment tribunal, some publications were pointing to the regulatory framework of the mineral sector of Swaziland and due for analysis on this research mainly on expropriation.

A report by OSISA suggests that there is a general perception that the state involvement stake in mining operations in the country is high. In addition to the 50% shareholding that accrues for local shareholding, mining companies are expected to pay royalties at a rate of 3% per annum, 27.5% of income tax, hence the net profit after all deductions for the proponent remains low. The taxes impose a significant hurdle for mining ventures in Swaziland and might deter potential investors. The study revealed conversations with community people and former

[241] *S.G. Air Leasing* case (n238 above) page 6 para [28] – [30].
[242] *S.G. Air leasing Ltd v Inchatsavane Company (Proprietary) and Others* 2015 ONCA 440 Date 20150617 available online at http://www.canlii.org/en/on/onca/doc/2015/2015onca440/2015onca440.html?resultIndex=1(accessed on the 17 March 2017).
[243] *S.G. Air Leasing* (n242 above) page 4-5 para [8] – [12].
[244] *S.G. Air Leasing* (n242 above) page 3 para [12].
[245] Mines and Minerals Act 4 2011 sec 133.

employees working at Salgaocar revealed that, the company would make it an excuse when employees complained of low salaries and say 'your Government takes the biggest stake in the operations'.[246]

Furthermore, the Investment Climate for Swaziland by the United States of America points to the fact that the mineral sector in the Kingdom of Swaziland is of high risk. It states that a few disputes that has happened in the country involved companies partly owned by the King and the government of Swaziland while investing in natural resources. Another risk in Swaziland is the fact that the King is immune from any legal proceedings in the country and any operations where the King might be involved it might not have access to the local courts.[247]

4.7 The National Mineral Policy of Swaziland

During the year of 1999, the government of Swaziland set out its vision for the development of the country to 2020 according to its National Development Strategy (NDS). In a bid to diversify its economy, the Kingdom of Swaziland seeks to thrive a vibrant mineral industry which will be beneficial to the economic fortunes of the country. In achieving the goal to fulfil the positive contribution of the industry to the economy, the government will diversify its export base, generating skilled employment, creating demand for local goods and services, infrastructure development and act as an agent for a wider investment in the economy.[248]

The mining policy of Swaziland is centred around the following main pillars; principles for sustainable mining development, stewardship or ownership of minerals in the country, aspirations on participation in the mineral sector, mining regulation, fiscal mechanism over the mineral sector and a respect for the environmental laws of the country, promotion of small-scale mining operations, policies to secure maximum benefits of mining.

While seeking to enlarge investment in the mining industry the government seeks to ensure that all mineral operations are conducted responsibly with respect to the environment any likelihood of harm to the local communities. Having set the background, the Government policies of the mining industry shall include, among others, the following;

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[246] CANGO Swaziland *Scoping Mission to generate knowledge on the status of the extractive industry in the Kingdom of Swaziland* available online at http://www.cangoswaziland.files.wordpress.com/2016/07/state-of-extractive-industry-in-Swaziland-report.pdf(accessed on the 15 August 2017) page 26.

[247] U.S. Department of State, Bureau of Economic and Business Affairs; Investment Climate Statements for 2016 Swaziland. Available at http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2016&dlid=254241(accessed on the 23 March 2017).

[248] National Mining Policy of the Kingdom of Swaziland 2003.

- To ensure that Swaziland's mineral endowment is managed on a sustainable economic, social and environmental basis and that there is an equitable sharing of the financial and developmental benefits of the mineral industry by all stakeholders
- To encourage local and foreign participation in the commercial exploration of minerals in the country and ensure government's commitment to free-market economy.[249]
- To foster economies of scale for the mineral sector
- A vibrant legal mining framework in which investors are treated in an equal and transparent manner
- Access by investors to and to security of tenure over areas on minerals potential
- A competitive, stable and fair fiscal regime[250]

To apply principles of accountability and transparency in the administration of the mining regulation and facilitate community participation in the country. Government further recognizes the need for disclosure of information on the mineral industry for informed participation.[251]

To act in harmony with regional and international partners, and endorse the principles enshrined in the SADC Mining Protocol and other regional and international agreements relevant to mining to which Swaziland is a signatory.[252]

Further, the fiscal regime regulating the mineral sector needs to be established by legislation and will be standardized, open and predictable to the investors and such regime shall be administered efficiently and transparently.[253]

There shall be a mandatory participation of the Swazi nation in large mining projects in a minority free share basis with an upper hand share percentage stipulated in the mining legislation and such arrangement to be additional to the option of the state to negotiate additional shares on a commercial basis[254]

[249] National Mining Policy of Swaziland 2003 (n248 above) clause 2.
[250] (n248 above).
[251] (n248 above) clause 9.
[252] (n248 above) clause 11.
[253] (n248 above) clauses 1-4 of the Fiscal Mining Policy.
[254] (n248 above).

4.8 Conclusion

The Mineral Act of Swaziland is one of a heavy regulated statute governing the extractive industry and has been considered a high-risk sector. It provides for the shareholding of any mineral project in the country which is 25% for the King who acquires same without any monetary contribution, 25% for the government of Swaziland and the investor left with 50% shareholding. The investor still has the obligation to pay for the financial obligations as provided for by the Act which include mineral tax, royalties and rent all which is due to the *Ingwenyama* who apparently according to the Act holds in trust for the Swazi nation.

The King have many roles in the mineral sector of Swaziland. He is a shareholder in the mineral sector of Swaziland and regulator in the sense that the appointments of the critical positions in the sector, the Mineral Management Board and Commissioner of Mines are all appointed by the King when he himself is involved in the game. This borders on the question of transparency of the mineral industry to which the national mining policy predicates as the said institutions independence in regulating the sector will be compromised.

The King is also immune from any legal proceeding in the country according to the constitution of Swaziland and in any situation like the mineral industry if there can be a dispute, the investor cannot have access to justice in the local courts as the King is immune necessitating the need for international arbitration which is not always desirable as it may take time and costly.

Thus, the test of expropriation as discussed above stated that the major criteria is the effects of the measures on the investment and the intention of the state is irrelevant. The shareholding in the country of 50 per cent is quite high and in addition the investor needs to pay taxes, royalties and rentals all which have an impact on the use and enjoyment of the investment. Worse still with the new standards set by international tribunals under the BIT era the extractive industry laws and policies of Swaziland can amount to measures tantamount to expropriation.

CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The study is aimed at answering the question whether the extractive industries specific laws and regulations for the Kingdom of Swaziland cumulatively amount to measures tantamount to expropriation. This was done by looking at the criteria used by the tribunals in the investment disputes, as well as to consider if indigenization measures are tantamount to expropriation. Another consideration was an analysis of the right to regulate and its effectiveness under the BIT system.

5.2 Summary of Findings

First, it was held in chapter 2 that the resolutions as propagated by developing countries on the permanent sovereignty of natural resources and the subsequent resolutions on the treatment of investors in the territory of the host state provides an unequivocal justification of states to govern and regulate their natural resources and that investors be given the same treatment as the domestic enterprise and such resolutions of the UN General Assembly have since attained the status of customary international.

The developed countries on the other hand are pushing for the nullification of the General Assembly resolutions. The result of such has been the promulgation of BITs which are slowly taking away the right to regulate which states enjoy under customary international law. The main culprit of such is the treaty clauses where states are opting for international arbitration which in most cases under ICSID. We have seen that under the said tribunal, the legitimate regulations of states when regulating foreign have been subject to challenge when they interfere with the use and enjoyment of their investment making the right not absolute or sacrosanct. The tribunals are concerned with the effect of the measures and the intention of the state in implementing same is irrelevant.

Secondly, it held in chapter 3 that the fundamental criterion used by the investment tribunals when determining an expropriation claim is to look at the effects of the measures on the economic benefit of the investment and the intention of the state when enacting the measure is irrelevant. Such also goes to the fact that the tribunals are willing to go on and determine such measure even if the state is making a defence of sovereignty as discussed in chapter 2 which in most cases have failed to hold water if the measure concerned impacts on the investment.

Thirdly, it was held in chapter 4 of this study that the mineral laws and policies of the Kingdom of Swaziland is based on an indigenization policy seeking to empower the Swazi nation. The King and the government of the country are the fore-runners in the mineral laws of the country being entitled to 50 per cent shareholding without any monetary contribution. The sector is considered a high risk too with the King being a shareholder and responsible for the appointment of people responsible for the management of the sector which all boarders around lack of transparency in the sector.

5.3 Conclusion

The mineral regime of the Kingdom of Swaziland is one heavily regulated and indigenized piece of legislation with the King and the government being major beneficiaries and a small portion of 10 per cent left to the indigenous Swazi nation and is considered a high-risk business (US Investment Climate). The country while in a development agenda may find itself slowly creeping or encroaching to the use and enjoyment of the foreign investor's economic benefit of the industry which are some of the considerations in indirect expropriation claims.

We have already noted above that legitimate indigenization economic policy of states are being challenged at the investment tribunals, even if the state always retains its powers to regulate and govern its natural resources under customary international law, and state are justified under international law to pursue indigenization policies. It was noted in this study that in the BIT system the tribunals are not deterred by the sovereignty principle and are willing to assess the impact of such measures or laws on the overall investment.

In the cases and authorities above, support the view that indirect expropriation refers to the economic interference, depriving the investment its economic benefit partial or substantive which case can be the case in the extractive industry specific laws and policies of Swaziland. Therefore, from an economic point of view the laws and policies of the specific extractive industries of the Kingdom of Swaziland cumulatively amount to measures tantamount to expropriation. Another problem is the lack of definition of indirect expropriation in the BITs, like the UK-Swaziland referred to in the study earlier. Some countries are moving forward to improve or address the situation in their BITs by providing a definition of the principle.

Furthermore, the fair and equitable treatment clause also poses another challenge to states as the tribunals will always when considering an indirect expropriation claim will also assess the measure through the said standard. Even if the measure passes the indirect expropriation claim,

it can fail to meet the fair and equitable standard treatment as there is still controversy as to what amounts to the standard and is also accompanied by compensation.

5.3 Recommendations

- The country needs to terminate its BITs when they come to an end, or rather re-negotiate or when it is to enter new BITs the country should insist on making explicit clause on what would not amount to expropriation, as the silence and open-endedness of the current provisions may result in arbitral tribunals in investor-state disputes to make a finding of indirect expropriation even on genuine regulation and economic policies of the country.
- In line with the SADC Model, the country when negotiating BITs clauses should make explicit provisions of measures which should not amount to expropriation like taxation matters, and other genuine and public interests of the state like the environment.
- There ought to be an express provision that the country retains the right to regulate and make reasonable measures for the social, infrastructure and economic development of the country.
- The country needs to re-invent the Minerals Act as it stands for purposes of making the sector more transparent as stated by the Mineral policy. The King and the government needs to establish an independent body which will monitor their interests in the sector and avoid an active role in the sector. Such body be independent from the government which shall then partner with foreign investors in the operations of the mineral sector. This be done to mitigate the perception of risk and bias currently as the King is a shareholder in the sector and appoints the Minerals Management Board and Commissioner of Mines which are very crucial positions in the running of the sector and such raises serious questions of the independency of such bodies.
- Improve the domestic jurisprudence in investment arbitrations through the training of arbitrators in the country so that some of the disputes be settled according to the domestic courts and arbitrations. Some African countries already have their own domestic arbitration centres and Swaziland needs to follow suite. By so doing in the future, insist on clauses for domestic settlement of disputes and reject the compulsory arbitration out of the country.
- Amend the SIPA Act to make clear obligations of both the investor and the country's obligations towards any investment in the country. The more the country leaves or

omits making clear guidelines of both parties, the more it is likely to be the investor's ammunition in the investment tribunals.

- The SIPA Act also needs to have clear guidelines on the requirements for the admission of foreign investment in the country, clear provisions of compliance on environmental laws, human rights, labour laws, corruption and corporate governance.

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