UNIVERSITY OF PRETORIA

Is Zimbabwe open for business? The protection of property rights within the legal framework of foreign direct investments

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IN

INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA

By

TINASHE MUGAURI

(u19386568)

Supervisor: Dr Femi

SEPTEMBER 2

DECLARATION

I declare that, except for reference as well as any other assistance duly indicated and acknowledged, this dissertation, "Is Zimbabwe open for business? The protection of property rights within the legal framework of foreign direct investments" is my own work that has never been previously submitted in part or in its entirety at any institution for degree purposes or otherwise.

Signed at Pretoria on

…………………………

Tinashe Mugauri

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I would like to thank me, for all the hard work I put into ensuring that I submit this dissertation. I would also like to thank my family for all the support you gave me since day one and your prayers and encouragement each day keep me going thus I will forever be greatly. My supervisor Dr Femi I would like to express my appreciation for your kind assistance in ensuring that I manage to produce this work.

Thank you God Always.

DEDICATION

I dedicate this work to my young brothers I hope it act as an inspiration for you to go beyond anything I have achieved.

ABBREVIATIONS

BIT	Bilateral Investment Treaty
CIL	Customary International Law
FDI	Foreign Direct Investment
FNC	Friendship, Commerce and Navigation
OECD	Organisation for Economic Cooperation and Development
SADC	Southern Africa Development Community
UNCTAD	United Nations Conference on Trade and Development
WW II	Second World War
ZIA ACT	Zimbabwe Investment Authority Act

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ABSTRACT

The institution of protection of property rights has been at its lowest ebb in Zimbabwe. With the coming into power of Emmerson Mnangagwa as the new president of Zimbabwe he declared from assumption of power that Zimbabwe was open for business. Thus, this study seeks to examine the regulatory space and the legal protection of property rights which is one of the requisites for attracting foreign direct investment. The International Property Rights Index ranks Zimbabwe as one of the countries with the least protection of property rights seating at 117 out of 125 countries according to the 2018 report. The problem that this study seeks to interrogate is whether Zimbabwe is open for business when its regulatory space in relation to protection of property rights is ranked one of the lowest and examine Zimbabwe domestic framework on the protection of property rights. The existing literature has left a gap open on the importance of protection of property rights in luring foreign direct investment and ultimately how property rights can ultimately result in economic growth due to the investor confidence that adequate protection of property rights ushers in. Consequently, it is the aims of this study to conclude by making recommendations to policy makers in Zimbabwe about how they can transform the regulatory space with regards to protection of property rights in Zimbabwe drawing lesson from jurisdictions other jurisdictions

CHAPTER 1

INTRODUCTION AND OVERVIEW OF THE STUDY

1 1 INTRODUCTION

Foreign direct investment (FDI) refers to cross-border investments which are made by an investor who is resident in one country, but has control or a great amount of influence over the management of an enterprise in another country.[1] The host country plays an essential role in the domestic protection and regulation of foreign direct investment. In this context, the host country's legal regime is not the only crucial component in protecting and regulating FDI. Hence, there are other fundamental components in the domestic framework for protecting of property rights and these include quality of political, economic and financial policies and regulatory processes as well as physical and institutional infrastructure.[2] There must be certainty in the domestic framework of a country to enable foreign investors to make sound investment decision. Government policies and bureaucratic procedures governing and regulating protection of property rights are still a major problem in Zimbabwe.

Additionally, the legislation regulating investments, property rights are archaic and not suitable for modern business.[3] Zimbabwe FDI inflows have seen a dramatic decrease in the past two decade and this is largely attributable to a number of factors chief among them being the land reform policy, indigenisation policy as well as inconsistency and uncertainty in government investment policy.[4] It is against this backdrop that this proposition critically assesses the legal, institutional and policy frameworks regulating property rights protection in Zimbabwe, and attempts to reform these frameworks by conducting a comparative analysis with what other countries have done successfully in legislating for property rights protection towards creating a better investment climate.

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[1] Legal Information Institute 'Foreign Direct Institute' available at https://www.law.cornell.edu/wex/foreign_direct_investment (accessed 18 May 2016).
[2] Investment Climate Advisory Services of the World Bank Group Investment Law Reform: A Handbook for Development Practitioners (2010) 1.
[3] World Economic Forum (WEF) Africa Competitive Report 2013 101.
[4]Invictus Securities Zimbabwe "March 2014 Equities Market Review and Strategy Outlook" as cited in Mangudhla "Bad Policies Hindering Investment" Zimbabwe Independent, 15 March 2014 http://www.theindependent.co.zw/2014/03/15/bad-policies-hindering-investment/ accessed on 23 Sept 2019.

1 2 DEFINITION OF FOREIGN DIRECT INVESTMENT (FDI)

A large figure of studies have been conducted to detect the elements of FDI but no consensus view has developed, in the sense that there is no widely accepted set of explanatory variables that can be regarded as the accurate determinants of FDI.[5] The nonappearance of a generally accepted legal definition of FDI shows that conceivably FDI is one of the most critical and controversial issue.[6]

The OECD benchmark definition of FDI describes it as:

> A category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a strategic long-term relationship between the direct investment and the enterprise which allows a significant degree of influence by the direct investor in the management of the direct investment enterprise. The lasting interest is evidenced where the direct investor owns at least 10 per cent of the voting power of the direct investment enterprise.[7]

In addition, the UNCTAD defines FDI as:

> an investment made by a resident of one economy in another economy… is of a long-term nature … the investor has a 'significant degree of influence' on the management of the enterprise…10 per cent of the voting shares or voting power is the level of ownership necessary for a direct investment interest to exist".[8] FDI is also defined under the North American Free Trade Agreement (NAFTA) to include direct investment, "portfolio investment, equity securities, partnership and other interests and tangible and intangible property acquired in the expectation … of economic benefit.[9]

[5]Balinda; (2016) *Factors Attracting Foreign Direct Investments (FDIs) in Rwanda: The Case of Selected Companies*, at page 60.
[6] Correa and Kumar *Protecting Foreign Investment: Implications of a WTO Regime and Policy Options* (2003) 146.
[7] OECD Benchmark Definition of Foreign Investment (Draft) 4 ed (2008) 17.
[8] UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs (2009) 35.
[9] North American Free Trade Agreement, 1994; 32 ILM 289, 605 (1993)

Furthermore, Bilateral Investment Treaties (BIT) also offers us with a definition of investment and one clear example of such is a 2009 BIT between Canada and Jordan which defined investment as-

> an enterprise, shares, stocks, and other forms of equity participation in an enterprise, bonds, debentures and other debt instruments of an enterprise, a loan to an enterprise . . . an interest in an enterprise that entitles the owner to a share in the assets of that enterprise on dissolution, interest arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory such as under (a) contracts involving the presence of an investor's property in the territory of the party, including turnkey or construction contracts or concessions, or (b) contracts where remuneration depends substantially on the production, revenues or profit of an enterprise, intellectual property rights and any other tangible or intangible, movable or immovable, property and related property rights acquired in the expectation or used for the purpose of economic benefit or other business purposes.[10]

The International Centre for Settlement for Investment Disputes (ICSID) tribunal in the case of *Salini v Morocco* stated that for a transaction to amount to investment it must comply with the following test. The *Salini* test provides that to be an investment the activity in question must:

> (1) involve the transfer of funds or the contribution of money or assets; (2) be of a certain duration; (3) have the participation of the individuals transferring the funds in the management and risks associated with the project; and finally (4) bring economic contribution to the host state.[11]

It should be realised that not every form of commercial endeavour will amount to an investment to attract the protection of international investment law including most importantly the protection enshrined in treaties.[12] Therefore, it is important for one to understand what amounts

[10] Article 1 (Dec 2014) Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments available at https://treaty-accord.gc.ca/text-texte.aspx?id=105176&lang=eng accessed on 24 July 2019.
[11] *Salini Costruttori spa v. Morocco* ICSID Case No. ARB/00/4.
[12] Collins; 2017, *An introduction to international investment law*; Cambridge University Press at page

to FDI for it to be granted protection under international investment law, bilateral investment treaties and under municipal legal regimes.

1 2 1 Forms of FDI

Portfolio investment involves the purchase of a stake in a business by a foreign equity investor, or the purchase of financial securities that normally have a brief time prospect. Muradzikwa defines foreign direct investment as;

> involves more than just the purchase of shares and securities. It involves an investment made for acquiring an ongoing interest in an enterprise (or setting up a new enterprise) in a country other than the investor's home country. It is important to split Foreign Direct Investment into two that is; Mergers and Acquisitions and Greenfields investments. Greenfields investment means creating an entirely new project or company from nothing such as an oil field, a mine or factory. Host states often have preference for Greenfield investment because it represents an entirely new source of capital rather than the reorganisation of an existing one. Mergers and acquisitions are often associated with loss of employment as old companies are restructured by foreign managers to becomes more competitive, sometimes referred to euphemistically as synergies in management speak.[13]

Today FDI is one of the centrepieces of economic globalisation, accountable for the rise of numerous of the emerging markets.[14]

1 2 2 Importance of FDI

FDI has been a locomotive of economic growth in a more and more globalized world economy and has been one of the most important subjects in the study of international business.[15] FDI is regarded as the visa into the international division of production, which can improve the economic growth and competitiveness of the host country and indigenous firms.[16] While

[13] Muradzikwa (2002) 5 "Foreign Investment in SADC. Development Policy Research Unit (DPRU) Working Paper 02/67 also available at http://www.uct.ac.za/depts/dpru accessed on 30 July 2019.
[14] Id at page 31.
[15] Sauvant KP, Maschek & McAllister G; 2008 'Foreign Investment by Emerging Market Multinational Enterprises, the Impact of the Financial Crisis and Recession and Challenges Ahead' Palgrave Macmillan, New York, OECD Global Forum on Investment, 7-8.
[16] Ibid.

international loans and bonds as a form of finance brings host countries only money, foreign direct investment harvests them a package of vibrant elements for the conception of productive enterprise, including advanced technology, superior management skills and systems and links to international market. Furthermore, Salacuse opines that;

> FDI enables the host to use its own capital for other needed purposes, thus expands the total amount of capital available for national economic development. National laws and regulations as well as governmental policies exerts a strong influence in shaping the investment climate in any country on the protection of property rights. Within individual countries numerous laws and regulations may have an impact on the feasibility of undertaking an investment transaction by a given foreign investor. Equally relevant to investors are constitutional provisions on private property rights, the ability of foreign to secure legal rights in land, the political stability, honesty and effectiveness of its government, the competence and independence of its judiciary, its relevant national policies both written and unwritten and the attitude of government officials towards private investment in general and the specific investment transaction in question.[17]

Countries have reduced their sector ban through careful revaluations by asking the following questions: precisely what national interest are being advanced by prohibiting or restricting foreign investment in a specified sector? What has been the record of national public and private in developing those sectors? What positive contribution would foreign investment make to such sectors in the current circumstances?[18]

1 2 4 Importance of protection of property rights

It is uncontested that states owe investors a duty of diligently attempting to protect both the physical and the intellectual property assets of an investment and the personal safety of the individual investor.[19] Property rights refer to the private right of possessing something. The right to private property is an important part of any Bill of Rights in a Constitution. Normal

[17] Salacuse 2013 *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* Oxford University Press: Oxford 89-90.
[18] Ibid at page 95.
[19] Krista Nadakavukaren, Schefer, (2013) *International Investment Law: Text, Cases and Materials* Edward Elgar Publishing Ltd: UK.

measurements of a country's conduciveness as an investment destination invariably refer to the extent to which a country protects property rights.[20] Property rights serve an important role in the market, assisting in facilitating the provision of credit facilities. The general belief is that countries that protect property rights incline to do well economically than countries that have frail property rights systems.[21]

The institution of property rights has not been without controversy in Zimbabwe. The right to private property applies to all persons, citizens and non-citizens alike. This means a foreign investor in Zimbabwe would be entitled to as much protection as a Zimbabwean citizen regarding property rights. Foreign investors and indeed any investor, look to the protection of their investments and economic interests and strong property rights are a useful indicator of a country's safety as an investment destination.[22] The International Property Rights Index in 2018 ranked Zimbabwe number 117 out of 125 of countries protection of property rights. The lesson learned here is that well-protected private property rights are crucial for economic growth and serve as the market economy's fulcrum.[23]

The disfigurement done to property rights by the land reforms program caused a sequence of ripple effects throughout Zimbabwe's other economic sectors. Craig Richardson believes that -

> unfortunately, the rebuilding of an economy after property rights have been revoked is likely to be contentious and slow, akin to rebuilding trust in a relationship after a serious betrayal. Property rights are analogous to the concrete foundation of a building: critical for supporting the frame and the roof, yet virtually invisible to its inhabitants. In fact, there are three distinct economic pillars that rest on the foundation of secure property rights, creating a largely hidden substructure f or the entire marketplace. They are: trust on the part of foreign and domestic investors that their investments are safe from potential expropriation; Land equity, which allows wealth in

[20] Alex T Magaisa; Property Rights in Zimbabwe's Draft Constitution, 08 - 15August 2012 available at http://archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefing_issue_86_120808.pdf accessed on 29 July 2019.

[21] Ibid

[22] Ibid.

[23] Craig J. Richardson; 2005, How the Loss of Property Rights Caused Zimbabwe's Collapse; https://www.cato.org/publications/economic-development-bulletin/how-loss-property-rights-caused-zimbabwes-collapse accessed on 11 May 2019.

property to be transformed into other assets; and • Incentives, which vastly improve economic productivity, both in the short and long term, by allowing individuals to fully capture the fruit of their labours.[24]

1 3 PROBLEM STATEMENT

Protection of property rights influences FDI inflows by influencing investors' perceptions about the safety of their investments from unexpected confiscation. It is important to realise that Zimbabwe is ranked one of the lowest recipients of foreign direct investment in the sub-Saharan region. This is largely attributable to the lack of protection of property rights as there is a lot of uncertainty amongst investors about the safety of their investments in Zimbabwe. In a country where there is a total lack of property rights protection, very few companies would want to invest in that country even if it may relish large market size, low labour cost and good geography**.** Furthermore, the Business Monitor International (BMI) KPMG research ranked Zimbabwe 43rd (forty-third) out of 48 (forty-eight) states in Sub-Saharan and 191(one hundred and ninety-one) out of 201 (two hundred and one) countries worldwide for trade and investment attractiveness.[25]

Accordingly, this study seeks to critically interrogate whether if Zimbabwe is open for business when its legal framework on protection of property rights is still shrouded in obscurity. For that purpose, the research problem to be addressed is whether a country can be open for business yet its legal framework on protection on property rights is still uncertain and unpredictable. One can safely argue that indeed the Zimbabwean government is contradicting itself in chanting that Zimbabwe is open for business but the permissible apparatus that are necessary to attract capital investment are still not in place. More so, there is need for policy shift to attract capital, promulgate pragmatic policies and shift away from the policies of the old order besides that the Zimbabwe is open for business vision is a mere platitude.

1 4 OBJECTIVES OF THE STUDY

The principal objective of this study is to examine and assess whether Zimbabwe is open for business through examining its internal legal policies and law relating to property rights protection. Furthermore, it is the aim of this study to argue that the necessary legal investment

[24] Richardson; (2006) Learning from Failure: Property Rights, Land Reforms, and the Hidden Architecture of Capitalism, American Enterprise Institute for Public Policy Research (2).
[25] https://home.kpmg/content/claim/kpmg/za/pdf/2017/12/zimbabwe-2017 h2 pdf, accessed on 25 March 2019.

climate that allows FDI to thrive has not yet materialised despite the Government of Zimbabwe gospel of being open for business. It is the goal of this study to explore what are the necessary legal mechanism for the protection of property rights that should be put in place to complement the statement that Zimbabwe is open for business. In the process, the study will use a comparative study with some jurisdiction on how the Zimbabwe can draw some ideas on property rights protection to be regarded as being open for business. Lastly, it is also the objective of this study to make recommendations to the policy-makers and the Government of Zimbabwe on legal mechanism that should be prevailing first for Zimbabwe to be open for business.

1 5 RESEARCH QUESTIONS

The lack of property rights protection of foreign investors within the Zimbabwe legal and institutional framework has led to deep concern about the deficiencies FDI flowing into the country. In that context, there is an inadequate illumination by research on questions that will be addressed in this study which include:

1. What are the weaknesses that exist within the Zimbabwe legal and institutional framework on property rights protection negatively affecting FDI number flowing into the country?
2. What influence does the protection of property rights have on attracting foreign direct investment? And is Zimbabwe open for business when its law surrounding the protection of property rights in foreign direct investment is still uncertain and unpredictable?
3. Which mechanisms in the South African legal and institutional framework that have facilitated property rights protection of foreign investors?

1 6 THESIS STATEMENT

This study aims to investigate the weaknesses that exist within the Zimbabwe legal and institutional framework on property rights protection that undermines the averment Zimbabwe is open for business. Moreover, this study objective is to reason that without clear and certain regulatory framework on the protection of property rights in relation to FDI this will put to bed the dictum that Zimbabwe is open for business. In addition to that this learning seeks to argue that there is an unswerving relationship between the protection of property rights and economic

growth of a country. Lastly this study will be of the understanding that Zimbabwe cannot be open for business when there is uncertainty in its laws and its political environment on the protection of property rights.

1 7 SIGNIFICANCE OF THE STUDY

The significance of this study lies in its attempt to examine whether without any legal reforms aimed at providing protection of property rights for foreign investors, Zimbabwe can be open for business. Furthermore, this study is crucial because, it aim to highlight that the mere publication and adoption of investment policy and investment guidelines is not enough to contribute to the restoration of investor confidence and create predictability within the investment community but however, the implementation of pragmatic investment law on protection of property rights is key to unlocking Zimbabwe potential in attracting FDIs. In as much the President Mnangagwa lead "new dispensation" government has been preaching the gospel of democracy, economic recovery and Zimbabwe being open for business, so that Zimbabwe can be readmitted into the international community there are still crucial issues of fundamental importance that needs to be addressed before Zimbabwe can boost its image of attractiveness to FDIs. Therefore, this study is significant in providing the policy makers with reality check on the need to ensure that protection of investor property rights laws is certain considering the recent eyesore history that Zimbabwe has had in light of confiscation, expropriation of foreign investor property.

1 8 RESEARCH METHODOLOGY

The methodology to obtain reliable findings will be fundamental in prescribing ways in which these challenges may be remedied. There are basically two types of research approaches that may be employed in research. These include the quantitative approach and the qualitative approach. This study will rely exclusively on the qualitative approach. The quantitative research entails the gathering and analysis of statistical or numerical data, leading to conclusive findings. Its outcome is usually used to recommend a final course of action. In view of the nature of the research problem and the objectives of the study, the qualitative approach is the most fitting and suitable methodology. The historical studies method will be employed in chapter two of the dissertation. It will serve to provide the historical and factual background on property rights protection. Pertinent literature will be used to critically recount and interpret

chronological development of the subject matter within the context of this study. Secondary data analysis is of significant importance as it is aimed at providing a more balanced and critical analysis of the research problem. Primary materials will be in the form of international instruments, national legislations and decided international and national case law on foreign investment. Secondary sources will include textbooks, journal articles, reports, newspaper articles, critical reviews and internet sources pertinent to the subject of foreign investment regulation.

1 9 LITERATURE REVIEW

Section 32 of the Zimbabwe Investment Authority Act provides that the property, interest or right therein of every licensed investor to whom an investment license has been issued in terms of this Act shall be accorded every protection afforded by the law of Zimbabwe.[26] More so, the Zimbabwe Investment guidelines of 2018 provides that Zimbabwe economy will be founded on sound market principles and principles of legal protection that encourages and protect private enterprises and the fruits thereof. Furthermore, the investment guidelines provide that the government commit to the protection of all investment from expropriation, or from measures taken that will have a similar effect except for a public purpose and on a non-discriminatory basis, in accordance with national laws and principles of international law and subject to the prompt payment of adequate and effective compensation.[27]

For purposes of this study, Maja aver that for Zimbabwe to attract foreign direct investment; "it is essential to assess whether adequate regulatory protection is afforded foreign investor. To invest foreign investor, need assurance that there will be protection of property rights and fair and non-discriminatory framework in terms of their investment in Zimbabwe. Protection of property rights would spur FDI inflows by influencing investors' perceptions about the safety of their investments from unexpected confiscation."[28] Therefore, this study by Maja provides us with an overview of the problem that exists in the regulatory framework on property rights protection in Zimbabwe and the role of property rights protection plays in economic growth.

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[26] Zimbabwe Investment Authority Act (Chapt 14:30) Act 4 of 2006

[27] Zimbabwe Investment Guidelines and Opportunities of 2018

[28]Maja, Nhara (2017) (5); Foreign Investor Protection in Zimbabwe The "Principle of Non-Discrimination" and Foreign Investor Protection: A Zimbabwean Perspective available at https://zimlii.org/zw/journals/Foreign%20Investor%20Protection%20in%20Zimbabwe.pdf accessed on 29 July 2019.

Scully indicates that countries with well-developed property rights and market structures experienced, on average, 2.6 percent GDP growth, compared with 1.1 percent in countries where property rights were limited and there was a great deal of state intervention.[29] Goldsmith also found that less-developed countries enjoyed faster growth when they had more secure property rights, as measured by a Heritage Foundation index.[30] The two aforementioned studies by Scully and Goldsmith ably show the vital role that property rights protection in international investment law plays on economic growth. The protection against expropriation guarantees respect for property rights as an aspect of the rule of law and an essential prerequisite for market transactions; capital transfer guarantees ensure the free flow of capital in and out of the host state and contribute to the efficient allocation of resources in a global market; and umbrella clauses back up private ordering between foreign investors and the host state by ensuring that contractual and other similar promises vis-à-vis foreign investors benefit from a layer of international law protection in addition to the protections that exist under domestic law.[31]

Subedi, states that in the absence of an international treaty on the regulation or protection of foreign investment many states have concluded BITs or other IIAs such as FTAs with a view of attracting foreign investment by according these investors an additional layer of protection. Furthermore Subedi is of the view that the primary purpose of BIT is to protect the property rights of foreign investors, whether natural or juridical.[32] Additionally, Subedi propagates that, unlike local law on foreign investment, which can also offer adequate protection to property rights and grant incentives to foreign investors however, they are liable to change with a change of government, no state can unilaterally change international law or provisions of BITs thus leaving foreign investor seeking recourse from established customary international law minimum standards.[33]

Moreover, Subedi is of the fulcrum that, the objective of BITs is not only to outline a set of standards of protection of property rights available to foreign investors but also to provide for international investor-state arbitration as a substantive incentive and protection for foreign

[29] Scully, (1988) The Institutional Framework and Economic Development." Journal of Political Economy (96): 652–62.
[30] Goldsmith, A. (1995) "Democracy, Property Rights, and Economic Growth." Journal of Development Studies 32: 157–75.
[31] Schill, International Investment Law and the Rule of Law (2014) at page 8; Amsterdam Law School Legal Studies Research Paper No. 2017-18.
[32] Subedi, *International Investment Law Reconciling Policy and Principle*, 3ed 2016
[33] Id.

investors.[34] David Collins suggest that it is unsurprisingly anticipated that BIT signage ought increase FDI inflows into the territory of the signatory state, the conclusion of the BITs sends a message to potential investors that the country is reasonably safe place in which to do business.

According to the UNCTAD it positions that another reason for concluding BITs is that home countries may have doubts about the institutional quality in the host country; that is, the quality of domestic institutions protecting property rights and resolving disputes. BITs by placing dispute resolution outside the domestic system of host countries, may thus substitute for poor institutional quality.[35] BITs thus may contribute to the coherence, transparency, predictability and stability of the investment frameworks of host countries. Hallward-Driemeier found that BITs do not serve to fascinate supplementary FDI but may act more as a complement to, rather than a substitute for, good institutional quality and local property rights.[36] More so, likewise, Tobin and Rose Ackerman are of the view that the number of BITs seems to have little impact on a country's ability to attract FDI, though it may positively impact investment in already-attractive countries.[37]

According to Schreuer expropriation is not illegal *per se* under international law. It has always been beyond doubt that a state has the power and the right to expropriate the property of nationals and of foreigners, in principle. But a legal expropriation of foreign owned property is subject to certain conditions these conditions are commonly referred to as a public interest, absence of discrimination, due process of law and compensation that is prompt, adequate and effective".[38] He further states that an expropriation may take place under perfectly legitimate circumstances. Arbitrariness, bad faith, lack of proportionality and other improprieties are not constitutive elements of expropriation. Their absence does not mean that an expropriation could not have taken place.

[34] Ibid
[35]Ginsburg, T., 2005. International substitutes for domestic institutions: Bilateral investment treaties and governance. International Review of Law and Economics, 25(1), pp.107-123.
[36] Lehavi, A. and Licht, A.N., 2011. BITS and Pieces of Property. Yale J. Int'l L., 36, p.115; Available at: http://digitalcommons.law.yale.edu/yjil/vol36/iss1/4 accessed on 29 July 2019.
[37]. Rose-Ackerman, S. and Tobin, J., 2005. Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. Yale Law & Economics Research Paper, (293).
[38]Schreuer, C., 2005. The concept of expropriation under the ETC and other investment protection treaties. Transnational Dispute Management, 2(3). avilable at https://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf accessed on 20 September 2019.

Anne Hoffmann indicates that for an expropriation to be legal it must not be discriminatory against the investors, it must be for a public purpose, in accordance with due process of law and it must be accompanied by full compensation which is prompt, adequate and effective.[39] According to the UNCTAD publication on international investment agreements it provides that under customary international law and typical international investment agreements, three principal requirements need to be satisfied before taking can be lawful; it should be for a public purpose; it should not be discriminatory, and compensation should be paid.[40] Chidede believes that "It is worth mentioning that the mere fact that the property of foreigners of different race, national or ethnic origin or other personal characteristics is expropriated does not *per se* imply a discriminatory expropriation. To establish that expropriation was not discriminatory, there should be adequate reasons for such a distinction".[41]

Addison and Heshmati are of the view that traditional FDI determinants, such as natural resources and low labour costs, are relatively becoming less important, while less traditional factors, such as governance and economic freedom, are becoming more popular concluded that property rights were more important determinants of FDI; specifically, that other institutional factors affect FDI. indirectly through property rights.[42] Foreman believe that greater assurances to comply with contracts, respect for property rights, and economic freedom are important determinants to attract more foreign investment.[43] Salacuse believes that the effectiveness and security of property rights under national law depend on much more than constitutional provisions. Above all, it requires the resources and commitment of the political authorities and the court to enforce and implement them.[44]

Henisz, W submits that some scholars argue that in countries where property rights are poorly protected, multinationals' investments face expropriation risks.[45] Dambisa Moyo opines that that FDI is a much more effective means of achieving economic development than more

[39] A Reinisch, 2008 *Standards of Investment Protection*, Oxford University Press ed.
[40] UNCTAD, International investment Agreement: UNITED NATIONS New York and Geneva, Key Issues Vol 1, (2004) 235
[41]Chidede, The Legal Protection of Foreign Direct Investment in the New Millennium: A Critical Assessment with a focus on South Africa and Zimbabwe (LL M thesis UFH, 2015) 66.
[42] Addison, T. and Heshmati, A., 2003. The new global determinants of FDI flows to developing countries: The importance of ICT and democratization (No. 2003/45). WIDER Discussion Papers//World Institute for Development Economics (UNU-WIDER).
[43] Kapuria-Foreman, V., 2007. Economic freedom and foreign direct investment in developing countries. The Journal of Developing Areas, pp.143-154.
[44] Salacuse, The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital, Oxford University Press; 1 edition 2013.
[45] Henisz, (2000) The institutional environment for multinational investment; The Journal of Law, Economics, and Organization, Volume 16, Issue 2.

generally used methods, such as foreign aid and International Monetary Fund loans.[46] Subedi opines that the protection of foreign investment under customary international law are the traditional notion of diplomatic protection and the treatment of aliens. He further positions that it is the notion of diplomatic protection of citizens and their property abroad by the home country that gave rise to the modern rules of foreign investment law. The tribunal decision in *Waste Management v Mexico* stated-that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency or candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representation made by the host state which were reasonably relied on by the claimant.[47]

Salacuse trusts that: for foreign investors the importance of effective property rights lies in the extent to which they effectively inhibit the host government, local cartels, business competitors and criminal gangs among others, from seizing or otherwise interfering with the investor use and benefit of the physical and intangible things incorporated in its investment. Insecure or poorly enforced property rights are inhibiting economic growth in at least four ways; firstly, insecure or poorly enforced property rights increases the risk of expropriation by government or seizure by nongovernmental group of an investor assets and thereby reduce the incentive to invest and produce economically. Secondly, insecure property rights increase the cost of protecting the physical and intangible things in the investor possession. Thirdly, insecure property rights prevent or inhibit the most efficient use or deployment of economic resources. For example, an investor may be unwilling to deploy its most advanced technology in a country with inadequate legal protection of intellectual property but willing to risk a less advanced and less efficient technology. Lastly, insecure property prevents or make costlier other useful economic transaction, such as securing through the provision of collateral.

In *Saluka Investments B.V. vs The Czech Republic* the tribunal held that the full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by

[46] Moyo, (2009) *Dead aid: Why aid is not working and how there is a better way for Africa*.
[47] *Waste Management Inc v Mexico*, A/F/00/3, paras 98-9 (ICSID) 2004.

use of force.[48] Salacuse is of the opinion that, national laws and regulations as well as governmental policies exerts a strong influence in shaping the investment climate in any country on the protection of property rights.[49]

1 10 CHAPTER OUTLINE

THIS STUDY IS DIVIDED INTO FIVE CHAPTERS

Chapter 1 propositions a succinct synopsis on the protection of property rights in the context of foreign direct investment as well as related issues. It discusses the definition of the concept of FDI from various IIAs, international organisations and jurisprudence in the interpretation of foreign investment given that it is not defined in any international instrument. It also provides a concise summary on the importance of protection of property rights and the importance of FDIs in a domestic economy. This Chapter also discusses the common types of FDI. It will also outline the research problem, significance of the study, objectives of the study, research methodology and literature review.

Chapter 2 will deliberate on the historical background of protection of property rights. It will also discuss how the protection of property rights and foreign direct investments is an inevitability a need for developing host countries. Furthermore, this chapter will discuss the theoretical framework on property rights, highlighting why the presence of robust protection of property rights is key for economic growth. This Chapter will conclude by evaluating the subject of protection of property rights regulation from economic, legal, development and political perspectives in order to ground an engagement as to why there is a need for property rights protection in Zimbabwe

Chapter 3 will explore the existing international investment legal framework with a focus on identifying the international norms and minimum standards on protection of property rights. These international minimum standards will be discussed as standards for evaluating domestic investment laws compliance with international canons on protection of property rights. These standards will be analysed versus Zimbabwe compliance with these international minimum standards in order to assess whether the government of Zimbabwe conducts follow these standards.

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[48] *Saluka Investment BV (the Netherlands) v the Czech Republic*, partial award, IIC 210 (2006) 17 March 2006, Permanent Court of Arbitration (PCA).
[49] See footnote 12 above.

Chapter 4 will judgmentally scrutinize selected investment laws on protection of property rights and related policies of South Africa and Zimbabwe. These laws and policies include the Protection of Investment Act and recognition and enforcement of foreign arbitral awards. Chapter 4 will critically inspect investment laws and related policies of Zimbabwe regarding the protection of property rights. These laws and policies include the Constitution of Zimbabwe, Zimbabwe Investment Authority Act, Indigenisation and Economic Empowerment Act, land reform and ownership policies as well as recognition and enforcement of foreign arbitral awards.

Lastly, Chapter 5 will sum up the key issues and findings of the study in relation to the objectives of the study. It will make recommendations to the policy-makers in Zimbabwe for policy refinements and modernisation of their protection of property rights policy framework in line with international norms and standards.

CHAPTER 2

EVOLUTION AND THEORETICAL FRAMEWORK OF PROPERTY RIGHTS PROTECTION

2.1 INTRODUCTION

This chapter is divided into two parts. The first part briefly explores the historical evolution of protection of property rights in international investment law. The second portion makes a case that protection of property rights, is a necessity for developing countries permitting sustainable economic growth and development, employment creation, technology advancement and infrastructure improvement. To that end, the second part explores major socio-economic benefits of protection of property rights. Lastly, the second part will also evaluate the subject of protection of property rights regulation from economic, legal, development and political perspectives in order to ground an engagement as to why there is a need for property rights protection in Zimbabwe. Significantly, this chapter adopts a multidisciplinary approach to the analysis of law, political economy, social science, international relations, therefore, it slightly departs from a textual-formalistic reading and interpretation of law.

2 2 HISTORICAL ORIGIN OF PROTECTION OF PROPERTY RIGHTS

As is rightly said, "a lawyer without history or literature is like a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect".[50] The history of the treatment of the property of aliens is not robust in size but can be traced over centuries.[51] It is evident that historically, early political and economic systems where highly sensitive towards the participation of aliens in their communities.[52] Consequently, often, aliens were deprived of their legal capacities and rights. In the middle age, and even after the development of the modern state in the late seventeenth century, an alien and his property were subject to abusive and discriminatory conduct, either at the hands, or with the implicit permission of the local governing authority.[53] The remedy for mistreatment of an alien, that

[50] See footnote 17 at page 16.
[51] Newcombe AP & Paradell L (2009), Law and Practice of Investment Treaties: Standards of Treatment (3) AH Alpena an den Rijn: Kluwer Law International.
[52] Ibid.
[53] The legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of early Rome and the Germanic tribes, to that of practical assimilation with nationals at the present time. Edwin Borchard, Diplomatic protection of citizens abroad (New York: Banks Law Publishing Co., 1915), at p. 33.

existed, was retaliation from the alien's home territory.[54] The contemporary international law involving the treatment of alien property has its heritages in the State practice of the late eighteenth and nineteenth centuries. It was during this historical time of immense industrialization principally in Great Britain, and increasingly in other Western European countries and the United States that they began to create the large capital excesses that would fuel foreign investment on a gauge not formerly witnessed in world history. The United States, for example, as early as the Eighteenth Century started to conclude bilateral treaties of "Friendship, Commerce and Navigation" (FCN), the purpose of which was to establish trade relations with its treaty partners.[55] These treaties comprised of provisions guaranteeing "special protection"[56] or "full and perfect protection"[57] to the property of nationals of a contracting state in the territory of another party. They also required payment of compensation for expropriation and guaranteed to nationals of one contracting state most favoured nation (MFN) and national treatment with respect to the right to engage in certain business activities in the territory of the other party.[58]

Diplomacy was effective mechanism on occasion in the protection of aliens' properties. As an alternative to diplomacy, nations sometimes utilized military force to protect foreign investments.[59] Prior to the introduction of diplomatic protection, in the nineteenth century, influential individuals and corporations would persuade their government to send a small contingent of warships in what was called gunboat diplomacy.[60] Diplomatic protection is a principle of customary international law, first defined by Emmerich de Vattel in 1758 when he stated that whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.[61] The concept underlying the principle of diplomatic protection was that an injury to a state's national was an injury to the state itself, for which it may claim reparation from any responsible state.[62] The notion of diplomatic protection put forward by the Western powers

[54] Evelyn Colbert, Retaliation in international law (New York: King's Crown Press, 1948), Ch. 1.
[55]Vandevelde, A Brief History of International Investment Agreements, U.C. Davis Journal of International Law & Policy 12, no. 1 (Fall 2005): 158.
[56] Ibid
[5757] Ibid
[58] Ibid.
[59] Edwin M. Borchard, Limitations on Coercive Protection, 21 AM. J. INT'L L. 303 (1927).
[60] See footnote 33 at page 27.
[61] Emmerich De Vatrel, The law of nations or The Principles of natural law applied to the conduct and to the affairs of nations and sovereigns, Vol III, at 136 (James Brown Scott ed, Charles Fenwick trans, Carnegie Institution of Washington 1916).
[62] Art. 1 of the International Law Commission's (ILC's) Articles on Diplomatic Protection adopted by the ILC's at its fifty-eighth session, in 2006, provides that 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury

treated a grievance to a foreign national caused by an act or omission of the host State as an international wrong against that national's home State, for which the home State was permitted but not bound to pursue reparation in its own name.[63]

Before the Second World War, the protection of foreign direct investment was not often a concern in international agreements. Most international economic agreements concerned themselves with setting up trade relations, though these agreements sometimes contains some provisions on the protection of property of nationals of one state in the territory of another state.[64] The foundational source of norms for the protection of international investment frameworks in the colonial era was customary international law, which mandates host states to treat investment in line with an international minimum standard.[65] The Western vantage point was illustrated in two related ideas; Firstly, these western countries determined that their nationals should not be exposed by host states to a standard of treatment that fell under a certain international minimum standard, even if that minimum standard meant treatment better than that guaranteed by the host state to their own nationals.[66] Secondly, the western states maintained that they had the right to afford protection to their nationals when these minimum standards were undermined.[67]

CIL, nonetheless, gave an insufficient for the protection of foreign investment. Customary international law was deemed at this stage to protect the physical property of the foreign investor and other assets directly invested through notion of diplomatic protection and State responsibility.[68] Knotted to the international law principle of State responsibility for injuries to aliens was the standard of international minimum standard, below which States could not sink in the treatment of aliens.[69] The international minimum standard had by this era already developed to be a norm of customary international law.[70] Some countries disputed that

caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.

[63] As later explained by the Permanent Court of International Justice: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels." Mavrommatis Palestine Concessions Case (Jurisdiction) (*Greece v. UK*) 1924 P.C.I.J., Series A, No. 2, p. 12.

[64] See footnote 59 above at page 3.

[65] Ian Brownlie, (1998) *Principles of Public International Law* 527-28 5th ed.

[66]Edwin Borchard; Protection of Citizens Abroad and Change of Original Nationality; (1934). Faculty Scholarship Series

[67] Ibid

[68] M. Sornarajah, (2010) *The International Law on Foreign Investmen*t (Cambridge University Press) at page 345.

[69] Shihata *IF Legal Treatment of Foreign Investment: "The World Bank Guidelines"* (1993) 79

[70] Tudor; (2008) *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* ed Oxford University Press 61.

customary international law imposed an international minimum standard on the treatment of foreign investment.[71] Most notably, the Latin American countries adhered to the Calvo doctrine, under which foreign investors were entitled only to the treatment that the host country afforded to its own investors.[72] The only mechanism offered by customary law for enforcement of customary norms was espousal. Espousal was a mechanism whereby an injured national's state assumes the national's claim as its own and presents the claim against the state that has injured the national.[73] Espousal was often an unsatisfactory remedy for several reasons. First, the national's state is under no obligation to espouse a claim[74] and, in fact, a home state is often reluctant to espouse because espousal can disrupt the home state's relations with the host state.[75] Furthermore, a home state may espouse a claim only after the national has exhausted his or her remedies under the law of the host state, a procedure that may need a substantial expenditure of time and money without satisfactory resolution. Finally, once local remedies have been exhausted and the home state has been persuaded to espouse the claim, the investor loses control over the claim. The home state is entitled to settle the claim on any terms it wishes.[76]

Some of the specific protections of customary international law that played a key role in this era included:[77] the notion that foreign owned property must not be exposed to discriminatory legislation and consequently had to be treated identically to locally owned property; the public purpose principle that verbalized that the property of aliens could only be assimilated for the purpose of public utility so as to protect foreign property from arbitrary seizures; the principle of full compensation that require alien property to be fairly compensated for when it was acquired; the principle of *pacta sunt servanda* that spoke to the notion that a State was bound by its treaty commitments on the protection of foreign property; the notion that a State could only claim for injury to the property of its national after the national had exhausted all avenues or alternative under domestic law; and that it was generally acceptable for reparations to be made in a monetary form. These protections offered by customary international law to alien property were, however, not adequate.[78] The aim of protection of property rights under the

[71] Ibid at page 526-7.
[72] Donald R. Shea, (1955); The Calvo Clause: A Problem of Interamerican and International Law and Diplomacy 17-20.
[73] Whiteman, (1967) Digest of International Law; Publisher: U.S. Government Printing Office, 1216- 19.
[74] Ibid.
[75] Vandevelde, (1992) *United States Investment Treaties: Policy and Practice*; Deventer: Kluwer Law and Taxation Publishers 10.
[76] See footnote 9 at page 160.
[77] See footnote 17 above at 49.
[78] Ibid.

customary international law principles is to ensure the protection of aliens against non-commercial risks, such as discrimination and expropriation.[79]

2 2 1 Pacta sunt servanda principle

One of the rules of customary international law, which was designed to safeguard alien property interests from arbitrary commandeering by states was the *pacta sunt servanda*. This principle specified that a State is bound, in good faith, to carry out its treaty responsibilities. Since the *pacta sunt servanda* principle was universally indorsed, no one challenges the proposition that a State must observe its treaty obligations concerning the property interests of foreigners.[80] The Permanent Court of International Justice, in the *Chorzow Factory* case, held that the taking of alien property in violation of a treaty was "unlawful" and "illegal". The *pacta sunt servanda* principle, nonetheless, protects alien property interests, and the infringement of that rule, pertaining alien property, provides the platform for an international claim. In the *Chorzow Factory* case, it was ruled that the violation of a treaty protecting alien property entails the duty to make reparation for the damage which has been incurred.[81] The protection afforded by the precolonial investment agreement was weak, particularly insofar as the treaties provided no means for enforcement. Thus, the non-legal mechanisms of military force and diplomacy were left to provide the principal means for protecting foreign investment.

2 2 2 Calvo doctrine

In the 1860s, the Argentine foreign minister and jurist, Carlos Calvo, framed the 'Calvo doctrine' to challenge the foremost opinion that customary international law placed an international minimum standard of the treatment of foreign investment.[82] The Calvo doctrine allowed foreign investors only to the similar standard of treatment as was given by the host country to domestic investors.[83] The Calvo doctrine opinioned that: 'It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended'.[84] The consequences of this provision was that if, for example, the domestic country did not give its citizens compensation on

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[79] FJ Nicholson 1965 'The Protection of Foreign Property under Customary International Law'3 American Journal of International Law 33-34.
[80] Ibid at page 5.
[81] Ibid.
[82] See footnote 59 above at 159
[83] See footnote 18 above at page 50.
[84] Cited in United Nations Yearbook on the International Law Commission 2002 vol 2 part 1 (2010) 76.

expropriation of their property, it was, therefore, under no obligation to compensate foreigners in a similar situation.[85] By 1903, the tensions between these two diverging camps that is the countries that favoured the international minimum standard and those which favoured the Calvo doctrine had deepened significantly, with the situation gradually becoming unsustainable following the annexation of property belonging to foreign nationals by the Venezuelan government without compensation.[86] The proponents of the Calvo doctrine argued that by entering the domestic market, the foreign investor willingly assumed risks to his investment, and should on the basis of this decision be entitled to the same standard of treatment as that accorded to citizens.[87]

2 2 3 The hull formula

The view under customary international law was that: 'For expropriation to be lawful, the taking must be made in the public interest, on a non-discriminatory foundation, under due process of law, and provision must be made for prompt, effective and adequate compensation.[88] In 1938 when Mexico relied on the "Calvo doctrine" to defend its expropriation of property owned by citizens of the USA, in response to the actions by the Mexican government, the then US Secretary of State, Cordell Hull, sent a note detailing the response of the USA.[89] Hull wrote in his note: "Under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof".[90] The Court in *Banco Nacional de Cuba v Chase Manhattan Bank*[91] stated that the Hull doctrine can be reflected as follows; The right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective, and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of these requirement". Pursuant to this doctrine, the award of full compensation was granted at market value and the foreign investor was also entitled to approach an overseas tribunal for relief if the remedies offered by the host country proved to be inadequate.[92]

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[85] See footnote 18 at page 51.
[86] Filho MTF (2010) 280. The tensions between these the Latin American countries and the developed countries was also exacerbated by grudges that arose from the past period of colonialization.
[87] See footnote 72 above at 37.
[88] Brown, C. ed., 2013. Commentaries on selected model investment treaties; Oxford University Press at 677.
[89] See footnote 18 at page 56.
[90]Hackworth G (1943) Digest of International Law; publisher: Government Printing Office 657.
[91] *Banco Nacional de Cuba v Chase Manhattan Bank*, 514 F. Supp. 5 (S.D.N.Y. 1980), 888 – 893.
[9292] See footnote 18 at page 57.

2 3 PROPERTY RIGHT PROTECTION AFTER SECOND WORLD WAR.

It is noteworthy that after WW II, property rights were enshrined in the Universal Declaration of Human Rights.[93] The first post-war years were marked by comprehensive nationalizations of key industries, upsetting foreign as well as domestic firms, not only in the countries that became part of the socialist bloc, but also in Western Europe. As colonial territories began to acquire their independence furthermore, takings of foreign-owned property increased. For numerous of the countries emerging into political independence, but also for some of the economically weaker States that had been independent for some time, a principal political and economic goal was to regain national control over their natural wealth and their economy.

Their Governments feared that foreign control over natural resources and key industries, would deprive the countries concerned of economic benefits and compromise their newly found political independence. The early 1960s also saw the beginning of the process of negotiating bilateral investment promotion and protection agreements.[94] According to the UNCTAD Series states that another reason for concluding BITs was that home countries may have doubts about the institutional quality in the host country; that is, the quality of domestic institutions protecting property rights and resolving disputes. BITs, by placing dispute resolution outside the domestic system of host countries, may thus substitute for poor institutional quality.[95] BITs were originally intended to support certain paradigmatic economic forms of foreign investment and to protect investors rights from potential infringements by host countries.[96]

2 3 1 Havana charter

Under Article 12 of the Havana Charter, investment regulation is articulated although not exhaustively.[97] The Havana Charter did not include provisions like minimum standards, compensation for expropriations which were at the core of customary international law on treatment of aliens.[98] Multilaterally, the abortive Havana Charter of 1948 intended to establish the International Trade Organization ITO also contained an obligation to grant "adequate

[93] Articles 2 and 17 of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (hereafter UDHR).
[94] United Nations Conference on Trade and Development; International Investment Agreements: Key Issues Volume I, United Nations New York and Geneva, 2004.
[95] U.N. Conference on Trade & Dev., The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries, 16-17.
[96] Ibid
[97] See footnote 13 above at page 96.
[98] See footnote 33 above at 20-21.

security for existing and future investments.[99] Article 11 (1) (b) of the Charter provided that "no member shall take unreasonable or unjustifiable action within its territory injurious to the rights or interests of nationals of other members in the enterprise, skills, capital, arts or technology which they have supplied.[100] Article 12 of the Charter stated that members undertake to give due regard to the desirability of avoiding discrimination as between foreign investments.[101] Despite the success of the Havana Charter in encouraging foreign investment, providing for rights of host Member States to determine terms for inward bound foreign investment, and calling for non-discrimination of investments, 'the Havana Charter contained no specific obligations or duties granting access to foreign investment'.[102] The Havana Charter died at birth, never entering into force despite numerous attempts to try to resuscitate it. In part, the reason why the Havana Charter failed was because the USA, the country leading the negotiations, refused to submit the Havana Charter for ratification to its Senate.[103]

2 3 2 Abs-Shawcross draft convention on foreign investment 1959

The 1959 Draft Convention on Investment Abroad (Abs-Shawcross Draft Convention) was the third non-governmental initiative to try to establish an international legal framework for investment.[104] The Draft Convention provided for 'fair and equitable treatment' of aliens and their property.[105] The authors of the Abs-Shawcross Draft Convention were of the view that the Draft Convention reiterated the traditional rules of international law relating to the treatment of property rights and the interests of aliens.[106] The majority of the provisions of the Abs-Shawcross Draft Convention would find their way into the 1967 Draft Convention on the Protection of Foreign Property proposed by the OECD, which would, however, suffer the same fate as the AbsShawcross Draft Convention.[107]

2 4 THEORETICAL FRAMEWORK ON PROPERTY RIGHTS PROTECTION

[99] Havana Charter art. 12 ¶ 2(a)(i), U.N. Doc. E/Conf.2/78 (Mar. 24, 1948).
[100] See footnote 42 above at page 23.
[101] Ibid.
[102] Echandi, R. and Sauvé, P. eds., 2013. Prospects in international investment law and policy: world trade forum. Cambridge University Press at page 108.
[103] Douglas, Z., Pauwelyn, J. and Viñuales, J.E. eds., 2014. The foundations of international investment law: bringing theory into practice. OUP Oxford.
[104] See footnote 52 above at page 21.
[105] Abs-Shawcross Draft Convention, Art I. The 'fair and equitable treatment'/ 'fair treatment' of aliens and their property was first evidenced in the FCN treaties.
[106] See footnote 18 at page 70.
[107] See footnote 33 above.

Van den Brink puts forward that: “If a property right is insecure, investment will fall. Therefore, there is consensus that property rights need to be secure”.[108] Secure property rights emerges with multiplicity of merits without which the economy simply collapses and there will be pandemonium over the land.[109] The fundamental role that property rights played in underpinning the Zimbabwe economy was invisible to most people. According to Richardson he is of the view that Zimbabwe thus provides a compelling case study of the perils of ignoring the rule of law and property rights when they conducted the fast track land reforms initiative.[110] The lesson learned here is that well-protected private property rights are crucial for economic growth and serve as the market economy’s linchpin.[111] Once those rights are damaged or removed, economies may be prone to collapse with surprising and devastating speed. That is because of the subsequent loss of investor trust, the vanishing of land equity, and the disappearance of entrepreneurial knowledge and incentives-all of which are essential ingredients for economic growth.[112] It is argued that institutional factors such as property rights and rule of law directly influence transaction and information costs thereby affecting economic performance in the long run. One core result of protection of property rights is that they influence the volume of foreign direct investment into a country.

A weak legal system including property rights violations is an infringement to foreign investment and dispel entry of foreign direct investment into a country. Beside the political dismay, foreign investors are concerned about the quality of institutions regarding protection of their property rights and the bureaucratic red tape of undertaking investment. Blomstrom and Kokko 2003 note that potential investors consider the rule of law, strong and clearly defined property rights, extent of corruption, the regulatory framework and local bureaucracy in making their investment decisions.[113] A well-functioning legal system also provides protection of intellectual property rights, which is a source of competitive edge for most foreign investors. Good administration of justice, respect for property rights, freedom from political

[108] Van den Brink R Land Policy and Land Reform in Sub-Saharan Africa: Consensus, Confusion and Controversy.
[109] Joseph Otoo; Zimbabwe at the cross-roads: The rule of law and investment protection, 2018, available at https://www.africanlawbusiness.com/news/8022-zimbabwe-at-the-cross-roads-the-rule-of-law-and-investment-protection accessed on 28 August 2019.
[110] Craig J. Richardson, How the Loss of Property Rights Caused Zimbabwe’s Collapse 2005 available at https://www.cato.org/publications/economic-development-bulletin/how-loss-property-rights-caused-zimbabwes-collapse accessed on 28 August 2019.
[111] Ibid
[112] Ibid.
[113] Ajayi, S.I., 2008. Foreign direct investment in sub-Saharan Africa: origins, targets, impact and potential at page 129.

intrusion in private business, low corruption, transparency and minimal red tape will promote FDI.[114]

The protection of property rights and the ultimate enforcement of these rights is key to luring investment, promoting economic growth and development, as well as improving the living standards of people. The upholding of property rights results in increased investment by the private sector both domestic and foreign.[115] The private sector is the engine of economic growth in various countries as it results in the development of the economy. In order to attract investment Zimbabwe needs to uphold the sanctity of property rights as one of the main drivers of the economic growth is a sound and policy on property rights. Respect of property rights attracts and promotes private sector investment which is the engine for economic growth.[116] According to Stern, Porter, and Furman, they are of the view that, in developing countries, the lower degree of investment in intangible assets may relate to the weaker protection of property right, and suggests that investment in particular types of assets will be higher the more protected the property rights of the assets.[117]

Protection of property rights demands the finding an equilibrium between; an active government that enforces property rights, facilitates private contracting, and applies the law fairly to all; and a government sufficiently constrained that it cannot engage in coercion and expropriation.[118] Property rights resembles the political power structure of the state. They reflect an ill-defined set of legal, social and political dimensions of different possible aspects of ownership over tangible or intangible assets.[119] Keefer and Knack argue that property rights insecurity is a result of a general level of insecurity in a country that makes it expensive for governments to protect property rights, or as the product of the particularly short horizons of government leaders that make it more likely for them to prefer expropriation over growth.[120] Property rights therefore cannot be distinguished from the governance context: many research findings have found that that better governance contexts enjoy better property rights are simply tautological: both ideas, of governance and property rights, are synonymous with underpinning

[114] Ibid.
[115] G Gono; The role of property rights in investment promotion, 2009 at para 52- 6.
[116] Ibid.
[117] Claessens, S. and Laeven, L., 2003; Financial development, property rights, and growth. The Journal of Finance, 58(6), pp.2401-2436 at page 6.
[118] Levine, R., 2005. Law, endowments and property rights. Journal of Economic Perspectives, 19(3), pp.61-88.
[119] Everest-Phillips, M., 2008. The Myth of 'Secure Property Rights': Good Economics as Bad History and its Impact on International Development. London: Overseas Development Institute Working Paper at page 24.
[120] Ibid.

structures of state power and its legal and other manifestations.[121] Property rights demands the formal and informal components of state-society relations. Economic growth comes from political trustworthiness or reliable commitment to overcome risk and uncertainty, through a shared vision and national purpose.

It requires an effective and legitimate coercive power to enforce property rights, and the most important but least addressed challenge in international development: the political incentive to use that authority to support economic growth for the long-term benefit of the whole population. In reality property rights are a mixture of private as well as public goods and depend not just on governance structures but on the societal trust underpinning property rights as much before 1688 as afterwards.[122] Khan points out that good governance including secure property rights, has not been translated into higher economic growth in developing countries.[123] Few doubts that property rights, not as absolutely secure but adequately stable, are essential for economic productivity.[124]

Unstable property rights exist in developing countries where limited public resources are available to adequately define and protect property rights. A property regime cannot exist in a vacuum at the state level, but rather it demands the existence of an array of complementary institutions, including an effective police force, an efficient judiciary, and other similar institutions. Knack and Keefer claim that few would dispute that the security of property and contractual rights and the efficiency with which governments manage the provision of public goods and the creation of government policies are significant determinants of the speed with which countries grow.[125] Claessens and Laeven put forward that that firms operating in areas of frail property rights protection are inclined to have fewer intangible assets relative to tangible assets, as the latter are easier to protect from appropriation by other firms.[126] Riker opinions that a right in itself had no value unless government officials perceive some benefit in enforcing that right.[127]

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[121] See footnote 19 at page 20.
[122] Haber, S. et al. 2003. The Politics of Property Rights. Cambridge University Press.
[123] Khan, M. 2004. „Power, Property Rights and the Issue of Land Reform: A General Case Illustrated with Reference to Bangladesh‟. Journal of Agrarian Change 4 (1 and 2.
[124] Bruce, J. W. and S. Migot-Adholla (eds). 1994. Searching for land tenure security in Africa. Washington DC: The World Bank.
[125] Knack, S. and Keefer, P., 1995. Institutions and economic performance: cross-country tests using alternative institutional measures. Economics & Politics, 7(3), pp.207-227.
[126] See footnote 121 above.
[127] Riker, W. and I. Sened. 1991; A Political Theory of the Origin of Property Rights: Airport Slots‟. American Journal of Political Science 35, 4. pp. 951–69.

A property rights regime cannot simply be created by decree; rather, it requires the state to create and maintain a various of institutions which will act to provide checks and balances for the protection of property rights. While a successful formal property rights regime requires the creation of several specialized property rights protection laws it also requires the existence of several related state institutions that are necessary for the maintenance of the rule of law. Without the existence of these institutions, which allow foreign investors to enforce their rights, those rights are meaningless, and the formal regime will not bring the benefits which it is supposed to provide.[128] The existence of a competent and uncorrupted judiciary is an important institution for the effective functioning of a formal property regime. Without a judiciary that is perceived as competent, individuals will be unlikely to turn to courts to settle their disputes, leading to informal dispute resolution mechanisms, which may not provide individuals with complete legal protection of their property rights. Similarly, where a corrupt and bribe taking judiciary is the norm, the costs of accessing the justice system are significantly raised for individuals.[129]

A widely-accepted explanation is that well-enforced property rights provide incentives for individuals to participate in economic activities, such as investment, innovation and trade, which lead to a more efficient market.[130] The lack of protection for property rights provided little incentive for foreign investors to invest in land, physical or human capital, or technology. Property rights are important for economic growth because they allow individuals to appropriate the returns of their efforts, encourage investments in capital, accumulation of knowledge and efficient organization of economic resources. Johnson use a survey conducted among entrepreneurs of former communist countries in order to study the effect of weaker property rights on reinvestment of profits. They find that firms are more likely to reinvest their profit if they perceive their property rights as more secure, with secure property rights being more important for investments than availability of credit.[131]

Property rights must precede economic growth, since private property rights provide the incentive required for production and exchange. Democratic regimes tend to protect property rights more than dictatorships and nations that protect property rights grow faster than those

[128] Trebilcock, M. and Veel, P.E., 2008. Property rights and development: The contingent case for formalization. U. Pa. Journal of International Law., 30, p.397.
[129] Ibid.
[130]Acemoglu, Daron; Johnson, Simon; Robinson, James (2005). "Institutions as a fundamental cause of long-run growth". Handbook of Economic Growth. **1**: 397.
[131] Johnson, S., McMillan, J. and Woodruff, C. (2002) Property rights and finance. American Economic Review 92(5): 1335–1356.

that do not.[132] Property rights provides individuals with stable expectations about the future behaviour of others, including the government. If a high degree of uncertainty prevails, property rights do not exist or are not well defined-then the incentive for immediate consumption. According to Adam Smith, security of property rights against expropriation by fellow citizens or the state is an important condition for encouraging individuals to invest and accumulate capital, which, in turn, would boost economic growth. According to the Coasean analysis, property rights are crucial to economic performance; "in all societies, primitive and modern, property rights are an important part of social technology that helps to determine economic efficiency.[133]

Smith has long held secure private property rights to be a fundamental prerequisite for trade, labour specialization, efficient investments, credit access, liberty, government accountability, growth-promoting economic policies, functioning markets, and myriad other engines of economic development.[134]

At a micro level, secure property rights are thought to generate economic growth for three reasons. First, secure property rights internalize externalities, thereby incentivizing efficient levels of investment and ensuring that resources is neither over nor under-utilized. Second, clear allocation and enforcement of resource entitlements can generate efficiency gains by reducing transaction costs in exchanges between parties and allowing reallocation to more efficient users. Third, secure private property rights may facilitate access to credit and the conversion of dead assets into investment capital because the underlying asset can serve as collateral, making repayment commitments more enforceable. Markets, credit access, and efficient resource use drive economic growth by enabling specialization and gains from trade, providing capital for reinvestment, and increasing productivity.[135] Strong protection of property rights plays a critical role in luring foreign direct investment, this is because efficient and effective regulations on protection of property rights set up a formidable foundation in attracting investment. FDI has been identified as a vehicle for economic growth in developing countries because it is the major source of funding. It spurs economic growth and development,

[132] Leblang, D.A., 1996. Property rights, democracy and economic growth. Political Research Quarterly, 49(1), pp.5-26 at page 16.
[133] Bailey, M.J., 1998. Property Rights in Aboriginal Societies. The New Palgrave Dictionary of Economics and the Law, pp.155-57.
[134] Terra Lawson-Remer, (2012) Property Insecurity, Brooklyn Journal of International Law at page 3.
[135] Ibid.

stimulates domestic production, competition and international competitiveness through the transfer of technology.

2 5 CONCLUSION

The history of FDI protection moreover highlights that in the early stages of the development of the FDI phenomenon there were low levels of protection afforded to investors property rights.[136] Furthermore, there was a gradual development in the protection of property rights since the eighteenth century to the current dispensation. Despite significant threat that was posed by the Calvo doctrine the customary rule of international minimum standard played a fundamental role in the protection of property rights even though there were loopholes with the standard. In addition to that, this chapter also highlighted the importance of the protection of property rights as they set the necessary foundation in attracting FDI. Property rights are especially important in the field of FDI as they characterize the legal protection necessary to support entry into a foreign market for investment, and to maintain a competitive position of the market.[137] FDI flows into host countries are determined by a variety of factors, including the economic attractiveness of host countries, profitability of a possible investment, as well as a variety of policy and institutional determinants and business facilitation measures, including rules on protection of property rights. Chapter 3 objective is to discuss the international minimum standards on property rights protection in order to assess Zimbabwe compliance with these international minimum standards. Furthermore, some of the topic that chapter 3 aim to interrogate includes international minimum standard, the fair and equitable treatment, international law on expropriation and so on.

[136] Haslam 2010 Third World Quarterly 1187.

[137] Vanhonnaeker, L, 2015. *Intellectual property rights as foreign direct investments: from collision to collaboration*. Edward Elgar Publishing at page 50.

CHAPTER 3

INTERNATIONAL MINIMUM STANDARDS ON PROPERTY RIGHTS PROTECTION

3 1 INTRODUCTION

The Constitution of the Republic of Zimbabwe entrenches the position of customary international law in the republic. Section 326(1) of the Constitution provides that 'customary international law is the part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.[138] The court in the case of *Minister of Foreign Affairs v Jenrich & Others* also affirmed this position. More so, the court pronounced that on a pure reading of section 326 of the Constitution together with the *obiter dicta* of the court in the case of *Barker McCormac* would uphold that customary international law is part of the law in Zimbabwe.[139] It therefore becomes crucial to explore if Zimbabwe's legal framework on protection of property rights is in conformity with customary international law.[140] The State is mandated under customary international law to offer these minimum protections to the property owned by aliens.[141]

The Indigenisation and Economic Empowerment Act, read together with the Indigenisation Regulations, discriminates against foreign investors to the benefit of indigenous Zimbabwean which infringes upon the customary international rules observed by States. International rules and norms on investment protection are multi-faceted and multidimensional. Suffice to put forward that the contemporary international investment legal framework includes an array of rules and norms that are probably unique in scope, purpose and interpretation.[142] The discussion in the current Chapter intends to establish the minimum international standards on specific issues of protection of property rights in Zimbabwe, thus this Chapter explores the development of the said minimum international standards on investment protection. It should be noted that this study seeks to provide an argument as to why uniform or minimum international rules regulating the protection of foreign investor property rights are essential. It

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[138] Section 326(1) of the Constitution of Republic of Zimbabwe of 2013.
[139] Minister of Foreign Affairs v Jenrich & Others (HC 232/15) [2015] ZWHHC 232 (10 March 2015);
[140] The following rules of customary international law outlined in chapter 2 will now be used as tools for analysis: (1) the international minimum standard on the treatment of foreign investment; (2) fair and equitable treatment; (3) MFN treatment; (4) national treatment; (5) protection against expropriation; and (6) and standards of compensation. However, it is not worth noting that not all these rules are applicable.
[141]. Sprankling, J.G., 2014. The international law of property. OUP Oxford ch 10.
[142] International investment protection law is characterized by the co-existence of voluntary, non-binding and binding rules imposing obligations on the host state and involve the responsibility of that state.

is submitted that minimum international rules can lock states into a governance system that prevents them from taking measures that negatively affect not only national economy but the economies of other countries or even destabilize the global economic system.[143] The principal objective of this Chapter is to discuss minimum international investment rules as standards for interpreting domestic investment law and related policies of Zimbabwe in order to determine their conformity with the international legal standards and norms.

3 2 INTERNATIONAL MINIMUM STANDARDS

The classic definition of the International law minimum standard given by A.H Roth states that 'the international standard is nothing else but a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of an alien is regulated by the law of nations'.[144] The OECD Convention defines the international minimum standard as rules of customary international law which governs the treatment of aliens, by pro viding for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.[145] In the case of *Saluka Investment BV v the Czech Republic* the tribunal pronounced that, it should be keep in mind that the customary minimum standard is in any case binding upon a state and provides a minimum guarantee to foreign investors even where the state follows a policy that is in principle opposed to foreign investment; in that context the minimum standard of fair and equitable treatment may in fact provide no more than minimal protection.[146] Consequently, in order to violate that standard, states conduct may have to display a relatively higher degree of inappropriateness.[147]

The minimum standard guarantees that foreign investors properties are granted a fair and equitable treatment, full protection and security in harmony with the principles of customary international law. The minimum standard provides a base to safeguard that the handling of foreign investor cannot fall underneath the treatment regarded as appropriate under commonly accepted standards of customary international law.[148] The international minimum standard of

[143] See foonote 42 above at page 50.
[144] Roth, A.H., 1949. The minimum standard of international law applied to aliens (No. BOOK). [sn] at page 127.
[145]OECD, The International Minimum Standard in Customary International Law, Annex to Fair and Equitable Treatment Standard in International Investment Law, OECD, 2004, p. 26.
[146]*S*ee footnote 49 above para 292.
[147] Ibid.
[148] OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. http://dx.doi.org/10.1787/675702255435 at page 13.

treatment of foreign property assumes that the entry of foreign property into a country also involves the acknowledgement of particular property rights. The minimum standard of treatment is an effort to protect aliens' enjoyment of life, liberty, and property against arbitrary conducts by states.[149] Therefore, the standard also covers the personal securities of aliens and the avenues to remedy the infringement of rights connected with aliens and their property. The Organisation for Economic Co-operation and Development (OECD), highlighted that in its working paper the "international minimum standard of treatment is a norm of customary international law which regulates the treatment of aliens by providing for a minimum set of principles which states, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.[150] States have a legal obligation not to subject foreign investors and their property to a standard below the minimum standard of treatment required by customary international law.

Accordingly, the international minimum standard originally dealt with the personal security of aliens along with the protection of their property. The standard rested on the opinion that civilized nations recognized a unanimous standard for the treatment of aliens. An issue which has been timeously debated is the relationship between Fair Equitable Treatment, and the International Minimum Standard of treatment of aliens under customary international law. This debate centres on the question whether the Fair Equitable Treatment standard is an element of the customary international law minimum standard, or an autonomous standard which requires an additional standard above the minimum standard of customary international law.[151]

The basis for safeguarding of foreign investors property rights under customary international law is the traditional idea of diplomatic protection and the treatment of aliens. In the case of *Neer v Mexico*, the tribunal was of the view that "the treatment of an alien, in order to constitute an international delinquency, it should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that

[149]Borchard, E.M., 1934. The Protection of Citizens Abroad and Change of Original Nationality. The Yale Law Journal, 43(3), pp.359-392.
[150] Organisation for Economic Co-operation and Development (OECD) 'Fair and Equitable Treatment Standard in International Investment Law' (2004) Directorate for Financial and Enterprise Affairs, Working Papers http://dx.doi.org/10.1787/675702255435 (accessed 4 September 2019).
[151]Lad-Ojomo, O., 2009. What is the Distinction Between the Fair and Equitable Treatment Standard and the Minimum Standard of Treatment Under Customary International Law? University of Dundee, diakses, 2.

every reasonable and impartial man would readily recognize its insufficiency".[152] While the principle of national treatment forecast that aliens can only expect equality of treatment with local nationals, the international minimum standard sets a number of basic rights established by international law that countries must give to aliens autonomous of the treatment granted to their own citizens.[153]

3 2 1 Fair equitable treatment

The fair and equitable treatment standard is a complete standard of protection. It applies to investments in a given condition short of reference to how supplementary investments or entities are treated by the host State. Thus, host governments are unable to deny a claim under this standard by justifying that the treatment is not unique from that experienced by the local nationals or other foreign investors operating in their economy.[154] The Fair Equitable Treatment standard can be traced as far back as the Havana Charter of 1948 in which its article 11(2) prescribed that foreign investments should be assured 'just and equitable treatment.[155] According to Reinisch he is of the view that the fair and equitable standard is a flexible, elastic standard, whose normative content is being constantly expanded to include new elements.[156] Fair and equitable treatment clauses gained prominence as a result of the failure of classical treatment standards such as the National Treatment clause to give adequate protection to investors as they were contingent on the host-state granting its citizens or other foreign investor's better investment protection.[157]

The Fair Equitable Treatment concept has been described as 'an embodiment of a rule of law standard which the legal systems of host States have to accept in their dealings with foreign investors.[158] The protection of legitimate interests of the investor is said to be the dominant element of the Fair Equitable Treatment standard.[159] In *National Grid v. Argentina*, the Tribunal ruled that the FET standards protect the investor's expectations, which were

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[152] See *Neer v. Mexico*, [US-Mexico Claims Commission] (Oct. 15, 1926), reprinted in 21 AM. J. INT'L L. 555 (1927). 556. The United States brought a claim of responsibility against Mexico before the US-Mexico Claims Commission for the loss of life of one of its nationals

[153] See footnote 71 above.

[154] United Nations Conference On Trade And Development; Fair And Equitable Treatment 2012 available at https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf, accessed on 29 July 2019.

[155] OECD Working Papers on International Investment: Fair and Equitable Treatment Standard in International Investment Law at http://www.oecd.org/dataoecd/22/53/33776498.pdf (last visited on 20/01/19)

[156] Reinisch, *Standards of investment protection* ed 2008, page 111.

[157] Bronfman MK 'Fair and Equitable Treatment: An Evolving Standard' 2006 Estudios Internacionales 611

[158]Schill, S.W., 2006. Fair and equitable treatment under investment treaties as an embodiment of the rule of law. Transnational Dispute Management (TDM), 3(5).

[159]See footnote 49 above.

"reasonable and legitimate in the context in which the investment was made.[160] In 1967 the OECD Council adopted the Draft Convention on the Protection of Foreign Property. Although it was never opened for signature, it required each Party to always ensure fair and equitable treatment to the property of the nationals of the other Parties. The words 'Fair and Equitable Treatment' describe the standard of treatment which is expected under international investment law, to be accorded to foreign investors by host governments. Provisions requiring host governments to treat investments fairly and equitably are found in most bilateral investment treaties, and in those containing investment provision.[161] The FET standard is usually included in investment treaties to cover governmental actions which do not fall within the scope of other provisions. The provision is there to ensure that a minimum standard of investment protection exists even in situations not contemplated by the specific treaty provisions.

According to the UNCTAD Secretariat study it concluded that the fair and equitable treatment is not synonymous with the international minimum standard. Both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment does not automatically incorporate the international minimum standard for foreign investors. Where the fair and equitable standard is invoked the central issue remains simply whether the actions in question are in all circumstances fair and equitable or unfair and inequitable.[162] The fair and equitable standard does not add anything more to the international minimum standard but merely affirms it.[163] Furthermore, the fair and equitable standard expands the scope of the international minimum standard by allowing future tribunal to create new standard when the situation demands so that justice may be done for the foreign investor who suffer unfair treatment at the hand of the host state.[164]

3 2 2 Difference Between Fair Equitable Treatment and Minimum Standard Treatment

Recently the vagueness of the minimum standard of treatment and its fair and equitable treatment component has become a source of fundamental debate due to its emergence as the most frequently invoked standard of protection in investor-state arbitral disputes.[165] *Azure*

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[160] *National Grid P.L.C. v. Argentine Republic,* Award, 175 (UNCITRAL Arb. Trib. Nov. 3, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0555.pdf [hereinafter National Grid Award]
[161] See footnote 4 at page 6.
[162] United Nations Conference for Trade and Development (UNCTAD), Fair and equitable treatment (1999) 40.
[163] Vasciannie, S., 2000. The fair and equitable treatment standard in international investment law and practice. The British Year Book of International Law, 70(1), p.99.
[164] Sornarajah, M., 2004. *The international law on foreign investment*. Cambridge University Press at page 333.
[165]Dolzer, R., 2005. Fair and equitable treatment: a key standard in investment treaties. Int'l Law., 39, page 87.

tribunal pronounced that, "the question whether or not fair and equitable treatment is or is not additional to the minimum treatment standard requirement under international law is a question about substantive content of fair and equitable treatment and whichever side of the argument one takes, the answer to the question may in substance be the same".[166] One of the main theories that exists to define the Fair and Equitable Treatment standard is the one that considers the standard to be a part of the international minimum standard required by international law, which, for many States, is a part of customary international law.

The relationship between the fair and equitable treatment standard and the international minimum standard of customary international law has been regarded by some investment agreements as tantamount i.e. equivalent terminology. For others the standard is part of the international minimum standards of customary international law. Moreover, bearing in mind that the international minimum standard has itself been an issue of hullabaloo between developed and developing States for a considerable period, it is unlikely that a majority of States would have accepted the idea that this standard is fully reflected in the fair and equitable standard without clear discussion . . . both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors.[167]

Professor Muchlinski states that: The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors.[168] It must be concluded that the fair and equitable treatment standard still remains a vague and undetermined concept that needs further developing by arbitral tribunal.

3 2 3 Calvo doctrine

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[166]*Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 361.

[167]Vasciannie, Stephen, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, The British Yearbook of International Law, 1999, Oxford, Volume 70 1999 (2000), p. 144.

[168] Muchlinski Peter. Multinational Enterprises and the Law. 1995, p. 625. In Fair and Equitable Treatment Standard in International Investment Law. OECD, September 2004, p. 24.

Those countries who were opposed to accepting the law of investor countries, in the name of the international minimum standards, were of the view that no state should be required to offer more protection to foreign investors than that accorded to its own nationals. [169] The central element of the Calvo Doctrine was to require aliens to submit disputes arising in a country to that country courts, it is about requiring foreign companies or other foreign investors to exhaust local remedies prior to resorting to international arbitration or adjudication. According to Jean Ho he is of the view that the Calvo standard could not become the minimum standard for protection partly because it did not set out what exactly aliens protection entailed. The Calvo standard offered no objective benchmark against which the adequacy of a national standard could be assessed.[170]

3 2 4 National Treatment

Foreign investors and their property must be given treatment that is fair and equitable, however in Zimbabwe, this has not been the case. Thus, when foreigners establish their businesses in Zimbabwe in certain sectors of the economy, they are obligated to dispose of 51 per cent of the ownership or control of their businesses to indigenous citizens under the guise of indigenisation and economic empowerment. The treatment of foreign investment in Zimbabwe as a result of the indigenisation laws also conflicts the principle of national treatment in customary international law.[171] Foreign investors are placed on an uneven footing when compared to domestic investors in a 'like circumstances' as a result of the indigenisation laws.[172] Therefore, to a greater extent the indigenisation laws violate the principle of national treatment which is central to eliminating protectionism and facilitating investment liberalisation.[173] Consequently, by not providing national treatment and fair and equitable treatment to foreign investors, Zimbabwe's indigenisation laws violate the international minimum standards of treatment that must be afforded to foreign investors.[174]

A national treatment is a relative, or dependent obligation. It demands that a host states treat foreign investment or investors as well as similarly situated national investor. The principle of national treatment under foreign investment law has a somewhat different meaning from the

[169] See footnote 33 above at 14.
[170] Ho, J, 2018. *State Responsibility for Breaches of Investment Contracts* (Vol. 136). Cambridge University Press at page 90.
[171] See footnote 5 at page 165.
[172] See footnote 8 at page 105.
[173] Ibid.
[174] VanDuzer, J.A., Simons, P. and Mayeda, G., 2013. Integrating sustainable development into international investment agreements: a guide for developing country negotiators. Commonwealth Secretariat at page 111.

meaning accorded to this principle in international trade law. According to UNCTAD national treatment is a relative standard whose content depends on the underlying state of treatment for domestic and foreign investor alike.[175] The principle of national treatment has two facets to it. One of them has its origins in the Calvo doctrine under which aliens and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws. The other has its basis in the doctrine of state responsibility for injuries to aliens and their property under which customary international law is regarded as having established a minimum international standard of treatment to which aliens are entitled.[176] One of the fundamental question that has been asked is whether national treatment applies before or after investment has been admitted into the country.

The national treatment obligation defends against discrimination, whether *de jure or de facto* based on nationality. Succeeding on a national treatment case does not entail indicating discriminatory intent, such a obstacle would be too excessive for most claimants to overcome. Rather in the absence of a legitimate rationale for the discrimination between investor in like circumstances, the tribunal will deduce or at least conclude that the differential treatment was a result of the claimant's nationality.[177] The treatment of foreign investment in Zimbabwe as a result of the indigenization laws also conflicts the principle of national treatment in customary international law.

National treatment, a host country cannot afford a foreign investor and his property treatment that is less favourable than that which it provides to its own investors and investments in like circumstances. Foreign investors are placed on an uneven footing when compared to domestic investors in a 'like circumstances' as a result of the indigenization laws.[178] Therefore, to a greater extent the indigenisation laws violate the principle of national treatment which is central to eliminating protectionism and facilitating investment liberalisation. Consequently, by not providing national treatment and fair and equitable treatment to foreign investors, Zimbabwe's indigenisation laws violate the international minimum standards of treatment that must be afforded to foreign investor.[179] If an investor alleges that the national treatment standard has

[175] UNCTAD, National Treatment, UNCTAD series on issues in International Investment agreements (New York and Geneva, United Nations, 1999) 3.
[176] See footnote 24 at page 97.
[177] Newcombe, Paradell and Krishan, *National Treatment, The Law and Practice of Investment Treaties* (2008) 36.
[178] See footnote 174 above at 105.
[179] See generally Van Duzer JA, Simons & Mayeda; Integrating Sustainable Development into International Investment Agreements: A Guide to a Developing Country (2013) 111.

been violated, the discrimination would consequently be assessed against domestic investors in a 'like situation' or 'like circumstances.[180]

National treatment obligations are generally applicable to the post-entry treatment of foreign investor. According to Polan, the national treatment standard is the main instrument for investment liberalisation, and is, therefore, a key tool for economic development. According to the *Pope & Talbot* tribunal: once the foreign investor has discerned a difference in treatment between it and a domestic investor, the question becomes whether they are in like circumstances. It is in answering that question that the issue of 'discrimination' may arise.[181]

3 3 INTERNATIONAL LAW ON EXPROPRIATION

Expropriation is not prohibited *per se* under international law. It has always been beyond doubt that a state has right to expropriate property of nationals and foreigners in principle. But a legal expropriation of foreign property is subject to certain conditions.[182] Expropriation may take place under perfectly authentic settings. The absence of uncertainty, bad faith, lack of proportionality does not mean that expropriation might not have ensued. Sornarajah, a leading foreign investment scholar, distinguishes between three types of takings which are often used interchangeably, namely confiscation, expropriation, and nationalization.[183] A distinction must be made between confiscation, expropriation and nationalization of property. Expropriations are the most severe form of interference with property rights.[184] Confiscation is the capricious taking of the property by the ruler or the ruling coterie of the state for personal gain. Nationalization referred to a situation in which a state embarks on a wholesale taking of property of foreigners to end their economic domination of the economy or sector of the economy.[185] The notion of creeping expropriation is based on the unbundling of property rights. As a rule of thumb foreign owned property may not be expropriated or subjected to a measure tantamount to expropriation unless four conditions are met; an expropriation must be for a public purpose, it should be non-discriminatory, it is taken in accordance with applicable

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[180] Park P & Park DM Energy Law and the Sustainable Company: Innovation and Corporate Social Responsibility (2016) ch 4.
[181] *Pope & Talbot Incorporated v Canada*, Interim award, IIC 192 (2000), 26th June 2000, Ad Hoc Tribunal (UNCITRAL)
[182] Schreuer, C., 2005. The concept of expropriation under the ETC and other investment protection treaties. Transnational Dispute Management, 2(3).
[183] See footnote 168 at page 345.
[184] Rudolf Dolzer & Christoph Schreuer, (2008); *Principles of International Investment Law*, (Oxford University Press at 89.
[185] See footnote 19 at page 346.

laws and due process and full compensation is paid.[186] Apart from scaring away foreign investment, a policy that would permit states to take property without restrictions would increase the costs of doing business in those states, like it did in Zimbabwe.[187]

Hull articulated that under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof.[188] The court in *Banco Nacional de Cuba v Chase Manhattan Bank* stated that the Hull doctrine can be reflected as follows: "The right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective, and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of this requirement".[189] The Hull doctrine also clashed with the Calvo doctrine which required that a foreign investor be afforded no more favourable treatment that that which is accorded to citizens in the domestic country.

Where property is expropriated for a drive which is not public, such an expropriation will be illegal. The 2006 SADC Finance and Investment Protocol guarantees investors a Hull-based protection against expropriation. It was noted in Article 5 of Annex 1 of the 2006 SADC FIP that: 'Investments shall not be nationalized or expropriated in the territory of any State party except for a public purpose, under due process of the law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation'.[190] According to the SADC Bilateral Investment Treaty model, under Article 6(1) notes that investments cannot be expropriated or nationalized unless if: it is in the public interest, it is in accordance with due process of the law and fair and adequate compensation is paid within a reasonable time. Expropriation of property can only take place in exceptional instances where the expropriation is for a public purpose, non-discriminatory and in accordance with due process of the law.[191]

3 3 1 Direct expropriation

Direct expropriation means a mandatory legal transfer of the title to the property or its outright physical seizure. Normally, the expropriation benefits the State itself or a State-mandated third

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[186] Ibid at page 98.
[187] World Economic Forum Et Al., The Africa Competitiveness Report 2009 237 (World Economic Forum 2009) suggests that Zimbabwe is one of Africa's least competitive country.
[188] Hackworth G (ed) Digest of International Law (1943) 657.
[189] *Banco Nacional de Cuba v Chase Manhattan Bank*, 514 F. Supp. 5 (S.D.N.Y. 1980), 888 – 893. The USA thus sought to enforce diplomatic protection and also rejected the notion that it could not come to the aid of its citizens who stayed abroad. See Dugan C et al Investor-State Arbitration (2011) 432.
[190] 2006 SADC FIP, Article 5 of Annex 1.
[191] See International Business Publications Turkey Company Laws and Regulations Handbook vol 1 (2009) 22.

party.[192] In cases of direct expropriation, there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure.[193]

3 3 2 Indirect expropriation

Indirect expropriation involves total or near-total deprivation of an investment but without a formal transfer of title or outright seizure.[194] The UNCTAD study on Taking of Property pronounce that, it is not the physical invasion of property that characterize nationalization or expropriation that has assumed importance but the erosion of rights associated with ownership by state interference.[195] The decisive element in an indirect expropriation is the substantial loss of control or economic value of foreign investment without physical taking.[196] A classical definition can be found in the *Starrett Housing* case; it is recognized under international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.[197] Creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment.[198]

In *Suez v. Argentina* the tribunal stated that in case of an indirect expropriation, sometimes referred to as a 'regulatory taking,' host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them.[199] In the *Tippetts* case the tribunal was of the view that a deprivation or taking of property take place under international law through interference by the state in the use of

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[192]United Nations Conference on Trade and Development; Expropriation Unctad Series on Issues in International Investment Agreements II, UNITED NATIONS New York and Geneva, 2012 at page 21.
[193] Ibid.
[194] Ibid at page 22.
[195] UNCTAD series on international investment agreement; Taking Property (20) 2000.
[196] I Brownlie, *Principle of Public International law*, 534 (5th ed 1998).
[197] *Starrett Housing v. Iran*, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-United States Claims Tribunal Reports 122, p. 15
[198] See footnote 47 at page 26.
[199] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17.

property or with the enjoyment of its benefits, even where the legal title is not affected.[200] In *Goetz v Burundi* the host state had revoked the investor's free zone status without any formal taking of property. The tribunal stated that the government actions fell under the concept of measures having an effect like expropriation.[201]

3 4 REQUIREMENTS OF LAWFUL EXPROPRIATION

Before analysing the conditions that determine the lawfulness of an expropriation, a tribunal should answer the question whether the expropriation has occurred. Only after a tribunal concludes that the taking has indeed taken place, it should proceed to examine whether the four conditions have been met.

3 4 1 Public purpose

The host country has a prerogative to determine what is in the public purpose. As noted by the United Nations Conference on Trade and Development (UNCTAD), usually a host country's determination of what is in its public interest is accepted.[202] Once the determination has been made that there is substantial deprivation of property, then the focus shifts to ascertain whether the measure was for public purpose.[203] Another rule of international law, which is aimed at protecting alien property from arbitrary seizure, is the principle that the taking of alien property must be for a public purpose. The taking of property must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private gain or an illicit end.[204] The *Amoco v. Iran* tribunal noted that: a precise definition of the 'public purpose' view for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and states, in practice, are granted extensive discretion.[205] It is suggested that an individual's right to property can only be infringed by an overriding public interest element in expropriation.[206]

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[200] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers* of Iran 22 June 1984, 6 Iran-US CTR 219 at page 225.
[201] *Goetz and others v Republic of Burundi*, Award, 2 September 1998, 6 ICSID Report 5.
[202] United Nations Conference on Trade and Development (UNCTAD) 'Taking of Property' UNCTAD series on issues in International Investment Agreements (2000) 435-436.
[203] Qumba; Balancing the Protection of foreign direct investment and the right to regulate for the public benefit in South Africa (LL M Thesis, University of Pretoria 2015) at page 27.
[204] See footnote 47 above at page 29.
[205] *Amoco v. Iran*, Iran-US Claims Tribunal, 15 Iran-US CTR 189, Partial Award (July 14, 1987 at para 145.
[206] *Kardassopolous v Georgia* para 391. See also *ADC v. Hungary* para 432; *Siemens A. G v. Argentina*, ICSID Case No. ARB/02/08, Award (February 6, 2007); *Marvin Feldman v. Mexico* (2002) 7 ICSID Reports 318; (2003) 42 ILM 625, para 136; and para 4 of Resolution 180

According to Schefer he is of the view that the public policy requirement for a legal expropriation is a difficult one to adjudicate effectively, for generally the state is better placed to determine what is in the public purpose than is an international tribunal.[207] In the case of *Campbell v Government of Zimbabwe* the Justice Mondlane stated that although public purpose is a definitional element and requirement of lawful expropriation, it does not belong to international courts like the SADC Tribunal to pronounce themselves on the legitimacy of a sovereign state's legislative purposes. The Permanent Court of International Justice observed, in the German interests in *Polish Upper Silesia* case, that generally accepted international law permits the expropriation of property belonging to foreigners for reasons of public utility.[208]

3 4 2 Due process

The due process requirement is often referred to as the benchmark to test the legality of expropriation.[209] The due-process principle requires (a) that the expropriation comply with procedures established in domestic legislation and fundamental internationally recognized rules in this regard and (b) that the affected investor have an opportunity to have the case reviewed before an independent and impartial body (right to an independent review).[210] In international investment law, due process as a rule of expropriation law requires procedural fairness. The procedural content includes, inter alia, the notifying of foreign investors, transparency and administrative proceedings before and during the expropriation and perhaps giving the affected investors an opportunity to be heard or request a review of the decision.[211] The *ADC v. Hungary* tribunal agreed that, in general terms, "the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claim heard.[212]

In addition, the expropriation process must be free from arbitrariness. The International Court of Justice (ICJ) defined arbitrariness as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[213] Examples of disregard of due process would be when an expropriation absences legal source (no law or procedure properly established beforehand to order the expropriation), when the investor has no remedy to

[207] See footnote 23 above at page 170.
[208] *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).
[209] See footnote 64 above at page 31.
[210] See footnote 47 at page 36.
[211] Ibid at page 177.
[212] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006).
[213] See footnote 47 at page 36.

domestic courts or administrative tribunals in order to challenge the measure or when the State engages in abusive conduct.

3 4 3 Non-Discrimination

As a general rule, non-discrimination element of expropriation entails that host state may expropriate foreign nationals' property without any regard to their race, nationality and other personal characteristics.[214] It should be realized that an expropriation that target certain foreign investor is not discriminatory per se the expropriation must be based on, linked to or taken for reason of the investor nationality. In *ADC v. Hungary* the tribunal agreed that "in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties".[215] Zimbabwe is signatory to an array of international instrument that speaks to non-discrimination rules in international investment law. Article 6(2) of the SADC Treaty ordains that: SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit.[216] Therefore, there is no rule under customary international law which prohibits discrimination between foreign investors and local investors. Differentiation is not prohibited by the non-discrimination principle, but differentiation must be based on reasonable grounds.[217]

3 4 4 Compensation

The lawfulness of expropriation does not pardon a state from disbursing compensation. Payment of compensation is not dependent on whether the expropriation was lawful or unlawful but rather on whether the expropriation occurred.[218] Customary international law states that the taking of alien property must be fairly compensated for. The more exact interpretation of this rule is that the taking of alien property must be accompanied by "adequate,

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[214] See, for example, *Banco Nacional de Cuba v. Sabbatino* which involved the expropriation of ethnic Indians' owned property by the Idi Amin Uganda, the Aryanisation policy of Nazi-Germany which led to the expropriation of Jewish property, Cuban Revolution which resulted in the expropriation of US nationals' property, *Oppenheimer v. Inland Revenue Commissioner* (1975) 1 All ER 53

[215] See footnote 75 above.

[216] Southern African Development Community, Treaty of the Southern African Development Community, Aug. 17 1992, 32 I.L.M. 11.

[217] Kläger, R., 2011. 'Fair and Equitable Treatment' in International Investment Law (Vol. 83). Cambridge university press.

[218] Organisation for Economic Co-operation and Development (OECD) '"Indirect Expropriation" and the "Right to Regulate'' in International Investment Law' OECD Working Papers on International Investment (2004).

effective, and prompt payment".[219] For an expropriation to be lawful is that it must be accompanied by compensation. Compensation is prompt if paid without delay; adequate, if it has a reasonable relationship with the market value of the investment concerned; and effective, if paid in convertible or freely useable currency.[220]

This rule is the one most frequently involved in testing the legality of an expropriation; and where its requirements are not complied' with, the taking of alien property is judged to be confiscatory.[221] The question is not whether compensation should be paid by the state that has violated the legal norm: rather, the proper focus of legal analysis is about the timing, the amount and the form of payment in cases of expropriation by the state.[222] 6 Hull describes the taking of property without compensation as confiscation. It is a confiscation of property even when compensation will be paid in the future. Hull contends that if host states could take the property of foreign investors and pay when they consider appropriate and according to their economic circumstances, then the protection provided by the well-established principles of international law would be misleading. Host state governments would be at freedom to take property outside their affordability and the foreign investors would be left without legal remedy.[223] The empirical evidence clearly demonstrates that expropriation without compensation discourages investment mainly because entrepreneurs cannot reap the fruits of their investment.[224]

3 5 CONCLUSION

The absence of a binding and comprehensive multilateral agreement within the international investment arena presents a degree of complexity of the system in ascertaining the generally agreed standards on foreign investor protection of their property rights. This chapter has discussed the fundamental importance of customary international law which is deeply entrenched in the Constitution of Zimbabwe and forming part of the Zimbabwe law to the extend it is in conformity with the Constitution. As afore mentioned, the international minimum standard is a vital aspect in the protection of property rights as they provide a blanket approach which provide the minimum treatment standard of foreign investor property upon

[219] From the note of Secretary of State Hull to the Mexican Government, Aug. 22, 1938, in the controversy over the Mexican expropriation of American agrarian and oil properties, quoted in 3 Hackworth, Digest of International Law 658 (1942).
[220] See footnote 47 at page 40.
[221]Nicholson, F.J., 1964. The protection of foreign property under customary international law. BC Indus. & Com. L. Rev., 6, p.391 at page 11.
[222] See footnote 221 above at page 31
[223] See footnote 36 above at page 16.
[224] Stijn Claessens & Luc Laeven, Financial Development, Property Rights, and Growth, 58.

their admission into a country. Like International Investment Agreements, the international minimum standard in general may also contribute to more transparency, predictability and stability of the investment framework of host countries and may to some extent serve as a substitute for weak institutional quality in the host country concerning the protection of property rights.

In a report concluded by the US government on the investment climate in Zimbabwe it was observed that corruption has remains widespread and there is minute protection of property rights, particularly with respect to agricultural land. Historically, the government has resorted at times to expropriating land without compensation, although it has indicated a new commitment to protecting property rights.[225] International minimum standard thus provides a safety net to protect foreign investor property rights since customary international is part of Zimbabwean law. This chapter also discussed the fair and equitable treatment and its importance on the protection of property rights. It was also observed that property rights are especially important in the field of FDI as they represent the 'legal protection necessary to support entry into a foreign market for investment (or trade), and to maintain a competitive position of the market.[226]

In addition to that this episode also highlighted the fundamental importance of the international rules of non-discrimination such as the national treatment and the most favoured nation principle, and it has been stated that some of the domestic law of Zimbabwe such as the Indigenisation Policy are not in conformity with the rules of national treatment as investors from foreign country property is not accorded same treatment as domestic investors. Lastly the foregoing chapter has also discussed the international rules on expropriation and outline the requirements that must be adhered to for expropriation to be legal. Moreover, this chapter also deliberated on the different forms of expropriation which host government can resort to, to expropriate foreign investor property. The land reform program had numerous implications for FDI in Zimbabwe. The first notable implication is the reduction of FDI due to the infringement of property rights as a result of expropriation which never complied with requirements of expropriation under international investment law. Chapter 4 aim to engage in a comparative analysis between Zimbabwe and South Africa legal and institutional protection on property rights.

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[225] https://www.state.gov/reports/2019-investment-climate-statements/zimbabwe accessed on 23 Aug 2019.

[226] See footnote 130 above at 50.

CHAPTER 4

COMPARATIVE ANALYSIS OF ZIMBABWE AND SOUTH AFRICA POLICY AND LEGAL FRAMEWORK

4 1 INTRODUCTION

This chapter compares the investment framework in Zimbabwe against those of other developing countries, specifically South Africa. Foreign investors will be looking for a sound legal framework for investment, which is in turn underpinned by consistent and clear rules and regulations relating to investment protection. This will help to foster legal certainty, particularly in sectors such as energy, natural resources and infrastructure where significant capital is invested over the long term. To assure investors and to improve investment conditions across the economy, the legal framework must contain sound and detailed provisions that lay down the legitimate protection of investors' properties. Zimbabwe needs to engage in an informed revision of the broader legal regime governing business activities, to improve transparency, predictability, efficiency and openness. To attract investment and ensure the rule of law and the sanctity of contracts, the local courts will need to be seen and demonstrate that they are independent from external forces. This will require a strong judiciary which is not the subject of patronage and a government willing to abide by the determinations of the courts. According to its 2013 Constitution, Zimbabwe has an independent judicial system whose decisions are binding on other branches of government. However, the government has in the past been well known for interfering in cases that have political overtones through influencing decisions of the local courts. This has resulted in a lack of trust in the courts and the judicial process thus leaving foreign investors uncertain about the local courts ability to enforce the law in protection of their property right. Therefore, this chapter seeks to make a comparative analysis between the legal framework that is available for protection of property rights in Zimbabwe with that of South Africa in order to draw lesson on how the Zimbabwean government need to improve. The utmost important of this chapter is that it provides the government of Zimbabwe with a reality check of how South Africa is able to attract massive capital investment because of the legal framework that is predictable, transparent and openness unlike Zimbabwe.

4 2 LAND REFORM POLICY

It is essential for anyone desiring to critically assess Zimbabwe's land reform policy and its ramifications on property rights to first consider important historical events that shaped the

policy with its present problematic dimensions.[227] The implications of the land reform policy for investment protection in protection of property rights in Zimbabwe is what this Chapter seeks to address. Finally, the land reform laws will be evaluated against minimum international norms on the protection of foreign investment and determine its conformity with the established legal standard and norms. Historically, the colonial government of Rhodesia (presently Zimbabwe) denied black citizens access to land and other property rights through the use of their discriminatory policies and legislation.[228] In July 2000, the government of Zimbabwe conducted a more radical approach[229] to the land reform policy which became known as the fast track land reform program.[230] The programme, was mobilized and led by liberation war veterans, who stimulated enormous illegal land acquisition which entailed state land expropriation.[231]

Consequently, the government pushed through the Parliament a constitutional amendment which gave the government no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.[232] The amendment significantly widened the basis upon which land could be compulsorily taken and absolved the government from paying compensation thereof except for land improvement.[233] In 2005, in order to avoid legal proceedings to the land reform policy, the government of Zimbabwe enacted the Amendment 17 to the Constitution which authorized the expropriation of foreign owned land without compensation.[234] Section 16B (2) (b) of this Constitution confirmed the acquisition of agricultural land for resettlement by the state pursuant to the land reform programme without compensation except for improvements effected prior to acquisition.[235] In addition, section

[227] Ndlovu, L, 2011. Following the NAFTA Star: SADC land reform and investment protection after the Campbell litigation. Law, Democracy & Development, 15(1) at page 60.
[228] According to the International Commission of Jurists (ICJ) Report of 1976 11-12, the objective of the legislation was to strengthen white dominion over the most fertile and economically important land while maintaining the African population as the labouring class. See also Magure "Foreign Investment, Black Economic Empowerment and Militarised Patronage Politics in Zimbabwe" 2012 Journal of Contemporary African Studies 67-82.
[229] The land reform programme which started in 2000 saw an estimated 4 000 white commercial farmers being thrown off their land without compensation. See Moyo, S. and Chambati, W., 2013. Introduction: Roots of the fast track land reform in Zimbabwe. Land and Agrarian Reform in Zimbabwe: Beyond White-settler Capitalism, pp.1-28.
[230]For a more information on the fast track land reform programme, see Government of Zimbabwe Fast Track Land Reform Programme (2001). See also Sadomba, W., 2008. War veterans in Zimbabwe's land occupations: complexities of a liberation movement in an African post-colonial settler society.
[231] Ibid.
[232] See section 16B of the Constitution Amendment 17 of 2005.
[233]Chinamasa (LLM-thesis, The human right to land in Zimbabwe the legal and extra-legal resettlement processes) University of Makerere, 2001.
[234] See footnote 42 above at 151.
[235]*Mike Campbell (Pvt) Ltd v. The Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (Judgment of November 28, 2008)

16B (3) (a) and (b) of this Constitution removed the jurisdiction of the Courts to adjudicate any challenge regarding acquisitions guaranteed by section 18 (1) and (9) of this Constitution.[236] Section 72 of the interim Constitution maintains the state's right to confiscate all agricultural land without compensation except for enhancements made on the land before to expropriation.[237] In addition, section 72 (3) (b) of the Constitution provides that "no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application."

4 2 1 Effect of the land reform on foreign investment protection

The land reform programme was intended to redress historical land imbalance between the black and white people and related racial and foreign domination as well as the class-based agrarian inequalities which the colonial rule promoted..[238] Instead, the implementation procedures of this programme were deemed to be unlawful1ness[239] and violent[240] as well as racially motivated[241] as it encroached upon the legitimate property rights of foreign land owners[242] and also led to expropriation of private investments.[243] This exercise raised fundamental questions about the respect for property rights and the rule of law in Zimbabwe.[244] The government attempted to sugarcoat the issue by promulgating the Land Acquisition Amendment Act as a way of putting a legal expression to a military process. Through this Act and as a means of formalisation, the government would adopt two models for the resettlement process.[245] Section 72 of the current Constitution provides for the right to agricultural land, and expropriation without compensation for redistribution is permissible. This seems to be in

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[236] Ibid.
[237] See footnote 8 at page 151.
[238] Jena "Zimbabwe in Land Policy U-turn" News Day, 5 January 2015 https://www.newsday.co.zw/2015/01/05/zimbabwe-land-policy-u-turn/ (accessed 05-08-2019). 1223 Moyo "Land Reform and Redistribution in Zimbabwe since 1980" in Moyo and Chambati (eds) In Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism (2013) 2.
[239] *Commercial Farmers' Union (CFU) v Minister of Lands* 2000 (2) ZLR 469 (SC) para 483F-H. See also *George Quinnell v The Ministry of Agriculture* (SC47/04) and *CFU v The Minister of Agriculture Land and Resettlement* (HC 3985/2000).
[240] See Willems "Peaceful Demonstrators, Violent Invaders: Representations of the Land Question in the Zimbabwean Press" 2005 32 World Development 1767-1783 and Raftopoulos "The State in Crisis: Authoritarian Nationalism, Selective Citizenship and Distortions of Democracy in Zimbabwe" in Hammar, Raftopoulos and Jensen (eds) Zimbabwe's Unfinished Business: Rethinking Land, State and Nation in the Context of Crisis (2003).
[241] *See Campbell v. Zimbabwe* para 175; and *Mike Campbell (Pvt) Ltd v The Zimbabwe Republic Police* (SC49/07); *CFU v Minister of Lands* 2001 (2) SA 925 (ZSC) para 9.
[242] See generally Willems 2005 32 World Development 1767-1783 5
[243] Chokuda 2009 21 South African Mercantile Law Journal 753.
[244] International Business Publications Zimbabwe Investment and Business Guide Volume 1 Strategic and Practical Information (2015) 110.
[245] See footnote 17 above at 95.

contradiction to the fact that the new Constitution also provides for an express guarantee of property rights in s 71. Furthermore, s 295(2) of the 2013 Constitution provides: “Any person whose agricultural land was acquired by the State before the effective date and whose property rights at that time were guaranteed or protected by an agreement concluded by the Government of Zimbabwe with the government of another country, is entitled to compensation from the State for the land and any improvements in accordance with that agreement.”[246] Section 295(2) therefore gives protection to foreign investors and their property, whose countries had signed a BIT with Zimbabwe. Section 295(3) clarifies the issue of compensation by pronouncing that where the land of a person other than those referred to s 295(1) and s 295(2) was expropriated, only compensation for improvements made at the time the land was taken would be provided.[247]

The land reform initiative had various ramifications on FDI flows into Zimbabwe. The first visible implication was the lowering of FDI due to the flagrant violation of property rights.[248] Property rights are especially important in the field of FDI as they represent the legal protection necessary to support entry into a foreign market for investment (or trade), and to maintain a competitive position of the market.[249] Empirical research has also proven that the composition of FDI is highly related to property rights.[250] The property need not even be physical property all the time, even intellectual property rights are a vital consideration for investors when making a decision on FDI.[251] It is from this perspective that one can conclude that the land reform policy had a tremendous impact on the investment positions in Zimbabwe. The implementation of the land policy was done in a haphazard manner. For instance, constitutional amendments would follow expropriations rather than the former succeeding the latter. The land policy in Zimbabwe was a clear infringement to the Bilateral Investment Treaties, thus severing the ‘special relationship’. Land policy should principally not violate vital provisions in these agreements, such as; national treatment, the payment of fair and adequate compensation, and non-discrimination.[252]

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[246] Section 295(2) of the 2013 Constitution of Zimbabwe Amendment (No.20) Act 1 of 2013.
[247] See footnote 19 at page 97.
[248] Mafa, O. and Gudhlanga, E.S., 2015. Gender, Politics and Land Use in Zimbabwe 1980ñ2012. Codesria at 7.
[249]See footnote 141 above at 50.
[250] Ghauri, P.N. and Oxelheim, L. eds., 2003. European Union and the race for foreign direct investment in Europe. Emerald Group Publishing at page 363.
[251]Francioni, F. ed., 2001. Environment, human rights and international trade. Bloomsbury Publishing at page 273.
[252] See footnote 17 at page 108.

Non-adherence by the Zimbabwean government with the orders of ICSID continue even though Zimbabwe is a signatory to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. This is a grave concern to potential foreign investors and a reflection of the demise of the rule of law and the possibly for them to lose their investments.[253]

4 3 THE INDIGENISATION POLICY

The Zimbabwean colonial government utilized deliberate and systemic disenfranchisement mechanisms which led to the exclusion of indigenous Zimbabweans from the economic mainstream.[254] As a result, the Government of Zimbabwe tried to resolve this imbalance by implementing initiatives, such as, the land reform program and the indigenisation program, aimed at empowering indigenous Zimbabweans.[255] The indigenisation program is grounded on the notion that the economy and the productive factors should be in the control of the indigenous people.[256] The general conception of the government at this juncture were the following;[257] (1) to economically empower indigenous Zimbabweans by increasing their participation through economic expansion and their productive investment in the economy so as to create more wealth for poverty eradication; (2) to create conditions that will allow disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity; (3) to develop a broad-based domestic private sector which is the engine of economic growth and development in a growing market economy; (4) to democratize ownership relations of the economy; and (5) to eliminate racial differences arising from economic disparities.

By 2007, the government had a complete policy which was introduced through an Act, the Indigenisation and Economic Empowerment Act. This Act aimed to attain the following;

> "[T]o provide for support measures for the further indigenisation of the economy; to provide for support measures for the economic empowerment of indigenous Zimbabweans; to provide for the establishment of the National

[253] International Business Publications (2015) 111.
[254] See footnote 8 at page 157.
[255] See footnote 17 at page 109.
[256] Both the indigenisation policy and the land reform policy were therefore founded on the ideas of social justice and fairness. See Magaisa AT 'The Trouble with Zimbabwe's Indigenisation Policy' Nehanda Radio 21 October 2016.
[257] See footnote 17 at page 111.

Indigenisation and Economic Empowerment Board and its functions and management; to provide for the establishment of the National Indigenisation and Economic Empowerment Fund; to provide for the National Indigenisation and Empowerment Charter; and to provide for matters connected with or incidental to the foregoing."

4 3 1 Effects of indigenisation policy on FDI

THE International Monetary Fund (IMF) has urged the Government of Zimbabwe to revise its indigenisation laws, attract foreign direct investment and generate money to pay off its debt.[258] The ultimate negative ramifications of the policy are its filibuster ring of the Investment drive. The policy obviously makes the country an eyesore investment destination. Arguably, the indigenisation laws in Zimbabwe have had an effect on investment. The IMF notes that "the indigenisation policy and investment are intrinsically linked, and it would be desirable that authorities come up with one single harmonized law on investment".[259] While this is yet to materialize, indigenisation laws continue to adversely affect investment. For example, if one compares investment levels in Zimbabwe with those of its neighbouring countries since the implementation of the indigenisation laws, one can clearly see that FDI levels in Zimbabwe have been significantly reduced. The legal provisions requiring foreign companies to cede 51 per cent of their ownership have resultantly contributed tremendously to Zimbabwe's failure to move with its regional counterparts in terms of FDI inflows.

Similarly, Shangahaidonhi and Gundani expressed the following opinion: The obvious negative effect results of the indigenisation law is its stalling of the investment drive. The policy obviously makes the country an undesirable investment destination. The condition of surrendering 51 per cent to locals is too much a price to pay. This makes the entire exercise a disenfranchisement initiative to investors. In contrast, the Namibian Black Economic Empowerment (BEE) has been met with greater acceptance from foreign investors than the Zimbabwe Indigenisation policy, all owing to these adverse conditions.[260] The effect on FDI

[258] https://www.zimbabweonlinenews.com/%EF%BB%BFchange-indigenisation-law-imf-tells-zim/.

[259] International Monetary Fund Zimbabwe: Start Report for the 2016 Article IV Consultation and the Third Review of the Staff Monitored Program –Press Release; Staff Report; and Statement by the Executive Director of Zimbabwe (2016) 43.

[260] Shangahaidonhi, T. and Gundani, B., 2014. The feasibility of value addition in the mining sector in the wake of the indigenization policy in Zimbabwe. Journal of Emerging Trends in Economics and Management Sciences, 5(2), pp.128-129.

is further compounded by the failure to respect property rights, particularly in land. Now that it has been established that indigenisation laws have a negative outcome on investment, the next part assesses the consistency of Zimbabwe's domestic framework on investment with international norms and standards on investment.[261]

4 4 ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ZIMBABWE

The recognition and enforcement of foreign arbitral awards in Zimbabwe is regulated by common law and statutorily by the Arbitration Act,[262] the Arbitration (International Investment Disputes) Act[263] as well as the Civil Matters (Mutual Assistance) Act.[264] Accordingly, arbitral awards made in foreign jurisdictions including regional and international tribunals are enforceable in Zimbabwe. Noteworthy is the fact that foreign arbitral awards are not automatically executed in Zimbabwe rather they must be registered for enforcement.[265] Enforcement of foreign arbitral awards is fundamental for the protection of property rights because it provides a recourse upon which the foreign investors can be provided protection of their property if they receive awards in their favour.

4 5 REFUSAL OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ZIMBABWE

Zimbabwe signed and acceded to the Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) to enable foreign investors to have access to international arbitration over and above domestic law courts. This gives the investor recourse to international arbitration should they be unhappy with Zimbabwean judicial system, and international arbitration is one of the fundamental avenues available for foreign investor to protect their property rights. None the less Zimbabwean government has in the past resisted registration and enforcement of arbitral awards granted by these tribunals.

4 5 1 Public Policy

For a foreign arbitral award to be recognized and executed in Zimbabwe, it must be in line and in accord with the public order or morals in Zimbabwe. It is said that the public policy doctrine

[261] See footnote 19 at page 144.
[262] Arbitration Act 6 of 1996 (Chapter 7:15) (as amended)
[263] Arbitration (International Investment Disputes) Act 16 1995 (Chapter 7:03).
[264] Civil Matters (Mutual Assistance) Act 14 1995 (Chapter 8:02) (as amended) mainly deals with the recognition and enforcement of civil foreign judgments so it is of less relevance to commercial disputes
[265] See Greenland v Zimbabwe Community Health Intervention Research Project HH93/13 para 3 and *Joseph Tapera v Field Spark Investments* (Pvt) Ltd HC 3813/12.

acts as a protective mechanism for a country to enable its court to reject foreign laws and judgments which for one reason or another should not be enforced.[266] In *Gramara v. Zimbabwe*,[267] the High Court declined to register the award on the grounds that it would infringe public policy. Furthermore, in *Campbell v. Zimbabwe*, the applicant requested the High Court of Zimbabwe to register the SADC tribunal's ruling against the government of Zimbabwe. The High Court refused to register and enforce the judgment. Patel J pronounced that it is generally not contrary to Zimbabwe's public policy to enforce the SADC tribunal's judgments because Zimbabwe is under an international obligation to do so.[268]

4 5 2 Jurisdiction

It is prescribed under both common law and statutory law that a foreign court or tribunal must have the requisite international jurisdiction in order for its award to be registered or enforced locally.[269] In *Campbell v. Zimbabwe*, one of the contentious issues was to determine whether the SADC tribunal had jurisdiction to entertain the case.[270] In a letter penned by the then Minister of Justice, Patrick Chinamasa, to the Registrar of the SADC tribunal, the Government of Zimbabwe argued that the tribunal had no jurisdiction to adjudicate over the matter because the Protocol of the SADC tribunal was not binding on Zimbabwe because it had not yet been endorsed by the required two thirds of the contracting states of SADC as mandated by Article 38 of the Protocol of the SADC tribunal and further that the amendment of the SADC Treaty has not yet entered into power because it has not been ratified by two thirds of the total membership of SADC as required under international law.[271] The letter further pronounced that Zimbabwe will not be bound by any of the tribunal's past or future decisions.

4 5 3 State immunity

A state can object to register a foreign arbitral award on the grounds of the doctrine of state immunity.[272] It is submitted however that a successful claim of state immunity in investment

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[266] Wei, T.S., 2009. Why Egregious Errors of Law May Yet Justify a Refusal of Enforcement Under the New York Convention. Sing. J. Legal Stud., p.594.
[267] *Gramara (Pvt) Ltd v. Government of the Republic of Zimbabwe* 5483/09 2010 (unreported case).
[268] Campbell v. Zimbabwe 23-25
[269] See *Tiiso Holdings (Private) Limited v Zimbabwe Iron and Steel Company Limited* (HC 4972/09) [2010] ZWHHC 95 (05 July 2010); and section 4 (2) (a) as well as Article 36 of the Model Law as contained in the Arbitration Act, respectively.
[270] *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* SADC (T) Case No 2/2007 (Judgment of November 28, 2008).
[271] Ibid.
[272] See Ostrander "The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments" 2004 22 Berkeley Journal of International Law 540.

disputes will deprive affected foreign investors of the benefits of an international judgment. In *Zimbabwe v Fick*,[273] the government of Zimbabwe alleged that it was a sovereign state and "it was judicious that it does not subject itself to the courts of another sovereign state," in this case the Republic of South Africa.[274]

4 6 LEGAL FRAMEWORK FOR PROTECTION OF PROPERTY RIGHTS IN ZIMBABWE

4 6 1 Constitution of Republic of Zimbabwe

According to section 71 of the Constitution of Zimbabwe it states that subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others. Furthermore, subsection 3 of section 71 elucidates that subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied; (a). the deprivation is in terms of a law of general application; (b). the deprivation is necessary for any of the following reasons- (i). in the interests of defence, public safety, public order, public morality, public health or town and country planning; or (ii). in order to develop or use that or any other property for a purpose beneficial to the community; (c). the law requires the acquiring authority- (i). to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition; (ii). to pay fair and adequate compensation for the acquisition before acquiring the property or within a reasonable time after the acquisition; and (iii). if the acquisition is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the acquisition, for an order confirming the acquisition.

It is fundamental to note that the property rights that are enshrined in article 71 of the Constitution of Zimbabwe are not absolute they are subject to 72 thus section 71 cannot be interpreted in isolation to 72. According to section 72 of the Constitution it states that where agricultural land, or any right or interest in such land, is required for a public purpose, including (a) settlement for agricultural or other purposes; (b). land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or the relocation of persons dispossessed as a result of the utilization of land for a purpose referred to

[273] *Government of the Republic of Zimbabwe v Louis Karel Fick* (2012) ZASCA 122.
[274] Ibid at para 13.

in paragraph (a) or (b) and the land, right or interest may be compulsorily acquired by the State by notice published in the Gazette identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication of the notice. In addition to that subsection 3 of section 72 provides that where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2); (a). no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition; (b). no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application; and the acquisition may not be challenged on the ground that it was discriminatory in contravention of section 56.[275]

There are fundamental difference that exist between the clauses on protection of property rights within Constitution of South Africa and the one of Zimbabwe. The Constitution of South Africa provides that property that has been expropriated must be subject to compensation of the true market value of the property. Nonetheless the Zimbabwean Constitution takes a different route in this regard as it provides that properly that has been compulsorily acquired is subject to compensation but the compensation to be made is for the improvements that have been made on the land. Therefore, the implication of this provision in the Zimbabwean Constitution is that since foreign investor will not be compensated the market value of the property, they will be inclined not to make significant modification to the land, not transfer any technology to the land that may improve the property because the government will not compensate them the market value of the property but only the improvement made only. The government of Zimbabwe program to seize commercial farms without compensating the titleholders, who have no recourse to the courts, has raised serious questions about respect for property rights and the rule of law in Zimbabwe.

According to the Constitution of Zimbabwe it provides that the no person may apply to a competent court to adjudicate on any question relating to compensation except for compensation for improvement made and court cannot entertain a matter outside the above-mentioned exception. Nonetheless according to South African Constitution, provides that the amount of compensation to be paid must be agreed upon by the affected parties or it may be determined by a competent court after taking all the facts into consideration. Thus, allowing

[275] Section 72 of the Constitution of Republic of Zimbabwe

the courts to be an independent umpire to determine the amount of compensation to be paid provides certainty and transparency in ensuring that the investor is compensated the true market value of the property.

4 6 2 The Zimbabwe Investment Authority Act

According to section 32 of the Zimbabwe Investment Act it provides that the property or interest or right therein of every investor to whom an investment license has been issued in terms of this Act shall be accorded every protection afforded by the laws of Zimbabwe.[276] Despite this provision speaking to the protection of investor property and interests it does not provide the content of such protection thus one is now forced to sort recourse from the Constitution of Zimbabwe under sections 71 and 72 for protection. However, despite the protection provided under the constitution of Zimbabwe making a comparative analysis with the protection made under Constitution of South Africa the protection provides under section 71 and 72 are of slightest quality that foreign investors will not be inclined to invest. If one can make a comparative analysis between the protection offered under the ZIA Act and the protection offered under the Protection of Investment Act one notices that the latter provides protection that is certain, predictable, transparent and open because the contents of the protection offered are well articulated in the Act, whereas under the former, the content of protection offered are still shrouded in obscurity thus leaving investors with uncertainty about the notion that Zimbabwe is open for business.

4 7 SOUTH AFRICAN PERPESECTIVE ON PROPERTY RIGHTS PROTECTION

In October 2013, the government of South Africa cancelled several BITs with major European countries. The government argued that it is ensuring that the investor's rights are protected but that those rights are also balanced against the sovereign rights of the Republic of South Africa to regulate in the public interest. The South African government further put forward that the current first-generation BITs were drafted in favour of the foreign investors at the expense of the citizenry, and are unconstitutional.[277] Today South Africa is among the three largest recipients of FDI in Africa together with Angola and Nigeria.[278] The primary goal of this

[276] Section 32 of the Zimbabwe Investment Act, Act 4/2006, 6/2015
[277] NGWENYA, (LLD Thesis, Promotion and Protection of Foreign Investment in South Africa: A Critical) UNISA 2015 at page 79.
[278] See the OECD FDI Regulatory Restrictiveness Index, 2010 (Annex) and OECD FDI Regulatory Restrictiveness Index 2013 (Annex) also available at http://www.oecd.org/investment/fdiindex.htm.

policy is to create a friendly and predictable environment where foreign investors are confident in the legal and financial framework.[279]

The Promotion and Protection of Investment Act was introduced in 2013 as part of an overhaul of the regulatory framework for FDI in South Africa and provided the much-needed certainty in protection of investor property rights. Apart from replacing the existing BITs, the Investment Act anticipated to provide for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to investors".[280] It purports to ensure equal treatment between domestic and foreign investors, and it covers both domestic and foreign investments made for commercial purposes. This means that foreign investors are entitled to the same level of protection offered to domestic investors.[281]

Much of the criticism has revolved around issues including: the belief that the protection offered to foreign investors under the Investment Bill is of a lower standard. It is important to realize that the Promotion of Investment Act provides the much need certainty on the protection that foreign investors will be ushered with upon the entry of their investment in South Africa, it is therefore that predictability, transparent and openness within the South African legal framework that makes South Africa a much safer investment destination than Zimbabwe.

4 7 1 National Treatment

National treatment has been defined as a principle whereby a host country extends to foreign investors treatment no less favourable than that accorded to national investors in like circumstances. The rationale behind national treatment is that foreign investors should not be treated in a discriminatory manner and unfairly based on the grounds of their nationality. Section 8(1) of the Protection of Investment Act states that foreign investors and their investments must not be treated less favourably than South African investors in like circumstances.

Furthermore, the Act provides that purposes of this section, 'like circumstances' means the requirement for an overall examination of the merits of the case by taking into account all the terms of a foreign investment, including the effect of the foreign investment on the Republic, and the cumulative effects of all investments; sector that the foreign investments are in; aim of

[279] OECD OECD-South Africa Investment Policy Dialogue (2014) 11.
[280] Adeleke, F., 2015. Benchmarking South Africa's Foreign Direct Investment Policy. at page 13.
[281] See footnote 8 at page 126.

any measure relating to foreign investments; factors relating to the foreign investor or the foreign investment in relation to the measure concerned; effect on third persons and the local community; effect on employment; and direct and indirect effect on the environment.[282] This means that the level of treatment accorded to foreign investors shall be equal to the treatment of nationals in similar situations. This also means that, after establishment in a country, no quotas or local purchase requirements may be imposed on foreign investors. Foreign investors must enjoy the same benefits as the nationals of the host state. The national treatment acts as a 'watch-dog' by preventing discrimination based on nationality.

4 7 2 Protection Under Constitution

In terms of the Act, reference is made to the Constitution of the Republic of South Africa, as follows: "Investors have the right to property in terms of section 25 of the constitution." Section 25 states that "no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. It has been argued that the deprivation of property in terms of the constitution depends on the extent of interference with the enjoyment, use or exploitation and that substantial interference beyond the normal restriction on property use or enjoyment found in an open and democratic society would constitute deprivation.[283] According to section 25 (2) of the Constitution provides that property can only be expropriated in terms of law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.[284] According to Section 25 of the Constitution, there are two grounds for the deprivation of poverty. The first is that deprivation of property may only occur pursuant to a law of general application. Arbitrary deprivations are prohibited. Secondly, expropriation of property may only occur by law of general application, for public purpose and in the public interest and subject to the payment of compensation to the affected owner.[285]

In the *FNB* case it was stated that "even more so than in relation to the right to privacy, denying companies entitlement to property rights would lead to grave disruptions and would undermine the very fabric of our democratic State. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies.

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[282]Section 8 (2) (a-g) of the Protection of Investment Act of Act No. 22 of 2015.
[283]*MKontwana v Nelson Mandela Metropolitan Municipality, Bisset V Buffalo City Municipality; Transfer Rights Action Campaign v Mec, local Government and Housing, Gauteng*, 2005(1) SA 530 (CC).
[284] Section 25 (2) of the Constitution of Republic of South Africa of 1996.
[285] Ibid

The property rights of natural persons can only be fully and properly realized if such rights are afforded to companies as well as to natural persons".[286] In line with the Constitution, the Investment Act specifies that compensation for expropriation must be "just and equitable" and that market value is just one of a number of factors to be considered when determining how this standard is to be applied. From foreign investors' perspective, a guarantee of full market value compensation is certainly more reassuring than a guarantee of "just and equitable" compensation, the exact determination of which is likely to be less predictable and more open to political influence.[287]

The Constitution requires that expropriation be authorized by a law of general application. Furthermore, the Constitution provides that compensation must be "just and equitable", reflecting an equitable balance between the public interest and the interest of those affected having regard to all relevant circumstances, including the current use of the property, the history of the acquisition and use of the property, the market value of the property, and the purpose of the expropriation.[288] The Constitution provides for significant and robust protection for investors and for property both domestic and foreign. The Promotion of Investment Act therefore sets out a transparent and open investment environment for our investors while modernizing the investment regime. Furthermore, the Constitution elucidate that for the purposes of section 25 the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land. It is important to note that the Constitution of South Africa provides a clear and certain procedure through which foreign investor property rights may be limited. With such a clear and certain practice, it leaves the investor well informed about the avenues available to enforcing their rights.

4 7 3 Physical Security of Property

The Act says that "the Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity.[289] The provision of protection to investors against physical harm has been viewed as

[286] *First National Bank of Sa Limited T/A Wesbank v The Commissioner for The South African Revenue Services* and others 2002 (4) SA 768 (CC) at para 45.
[287]. S Woolfrey' South Africa's Promotion and Protection of Investment Bill' available at http://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investmentbill.html; accessed on 26 September 2019.
[288] Section 25 (3) of the Constitution.
[289] Section 9 of Act 22 of 2015.

an embodiment of customary international law standards relating to the protection of aliens.[290] Minimum standards of treatment outline the benefits or protections that a state must extend to all non-domestic investors. The minimum standard of treatment requires due diligence on behalf of States to exercise reasonable care within its means to protect investments, but tribunals have rejected a strict liability standard in this regard.[291] It is important to note that in section 9 the level of physical protection and security of investors is dependent on the availability of resources and capacity. This means that the protection of investors is always not guaranteed but depends on the availability of resources and capacity. The position taken by South Africa in this regard is highly defensive especially in cases where the property of a foreign investor would be violated and be subjected to threats. The South African government would raise a defence that, at the time of the violence or attack of the investor's property, it did not have the necessary resources and capacity to provide protection.

4 7 4 Dispute resolution

According to section 13 of the Act it provides that an investor who would have become aware of any conduct by the government which would have affected his investment may request the Department for the dispute to be resolved through appointing a mediator.[292] Furthermore, the Act also provides that an investor upon becoming aware of a dispute he/she is not precluded from approaching any competent court, independent tribunal, for the resolution of the dispute/[293] in addition to that, the Act also provides that the government may consent to an international arbitration with the investor after the investor has exhausted all his local remedies and such arbitration will be conducted between the Republic of South Africa and the home state of the investor.[294] It is vital to note that a certain and predictable dispute resolution provides the investor with a clear picture of avenues available to him to dispute resolution. It is fundamental to note that the Promotion of Investment Act provides the investor with an array of dispute resolution mechanism, such as mediation, approaching the courts, independent tribunal and to an extent international arbitration. Thus, there is need for the for the Zimbabwean government to draw lesson from the Protection of investment dispute resolution and promulgate a legislation that offers such a wide spectrum in terms of dispute resolution.

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[290] See footnote 168 above at 237

[291] R. Doak Bishop; (2nd ed., 2014); *Violation of Investor Rights under Investment Treaties, in Foreign Investment Disputes: Cases, Materials and Commentary* 752, 753

[292] See section 13 of the Protection of Investment Act.

[293] Section 13 (4) of Act 22 of 2015

[294] Section 13 (5). Of Act 22 of 2015.

IS ZIMBABWE OPEN FOR BUSINESS?

The Canadian ambassador to Zimbabwe Lisa Stadelbauer once stated that Canadian investors are hesitant to invest in Zimbabwe because of uncertainties informing the application of the indigenisation law in the country.[295] It is a generally accepted view that the best way to lock a nation into a sustainable economic development mode is to advance policies that are favourable and guarantee foreign investment protection.[296] In terms of national treatment, a host country cannot afford a foreign investor and his property treatment that is less favourable than that which it provides to its own investors and the investment in like circumstances. Therefore, the indigenisation laws violate the principles of national treatment which is central to eliminating protectionism and facilitating investment liberalisation.[297]

According to section 326 of the Constitution of Zimbabwe provides that customary international law is part of Zimbabwe law unless it is inconsistent with the Constitution or an Act of Parliament.[298] In this way therefore, the treatment of foreign investment in Zimbabwe because of the indigenisation laws conflicts the principle of national treatment in customary international law. Foreign investors and their property must be given treatment that is fair and equitable, in Zimbabwe that has not been the case because non-nationals, they are obligated to dispose of 51 percent of their ownership in certain sectors of the economy or control of their business to indigenous citizens under the guise of economic empowerment. Thus, foreign investors have been denied their customary international law right to a fair equitable treatment.[299] It is from this way that one can conclude that how can Zimbabwe be open for business when it doesn't adhere to the customary international laws that fascinates foreign

4 8 CONCLUSION

According to Salacause he is of the opinion that "national laws and regulations as well as governmental policies exerts a strong influence in shaping the investment climate in any country on the protection of property rights. Within individual countries numerous laws and

[295] News Day "Zimbabwe's Indigenisation policy scarce away Canadian investors. News Day 14 March 2014 available at https://www.newsday.co.zw/2014/03/zimbabwes-indigenisation-policy-scares-away-canadian-investors accessed on 23 April 2019.
[296] T Chidede, Warikandwa, (2017) 12 *Foreign Direct Investment and Zimbabwe's Indigenisation and Economic Empowerment Act. Friends or Foes*. Midlands State University Law Review.
[297] Kondo, Investment Law in A Globalised Environment: A proposal for a new foreign direct investment regime in Zimbabwe (LLD Thesis University of Western Cape 2017) 147.
[298] Constitution of the Republic of Zimbabwe, 2013
[299] See footnote 12 above at page 146-7.

regulations may have an impact on the feasibility of undertaking an investment transaction by a given foreign investor. Equally relevant to investors are constitutional provisions on private property rights, the ability of foreign to secure legal rights in land, the political stability, honesty and effectiveness of its government, the competence and independence of its judiciary, its relevant national policies both written and unwritten and the attitude of government officials towards private investment in general and the specific investment transaction in question".[300] This chapter has critically made a comparative analysis between South Africa legal framework on property rights protection and Zimbabwe, and outlined the major loophole that exist within the Zimbabwe legal framework that demands to be ironed out. Furthermore, this chapter discussed the significant impact that the land reform policy and the indigenisation and economic empowerment policy had upon FDI entering the country as the two aforementioned government policy resulted in lowering of investor confidence due to the lack of transparency, openness in which the policies were undertaken. Additionally, this chapter also scrutinized the enforcement of foreign arbitral awards in Zimbabwe as they play a fundamental role in property rights protection. Nonetheless, the Zimbabwean government has on previous occasions denied the enforcement of these awards on the following jurisdiction, state immunity and public policy. Lastly this chapter made a comparative analysis between the Zimbabwe Constitution, Zimbabwe Investment Authority Act and the South African Constitution and the Protection of Investment Act to bring out some of the lesson that Zimbabwe government can draw from their neighbouring counterparts in order to increase FDI pouring into the country. The next chapter 5 will conclude the study by making recommendations to the policy makers in Zimbabwe of the fundamental role that strong policies and law of protection of property rights plays in luring FDI into the country.

[300] See footnote 13 above.

CHAPTER 5

SUMMARY OF FINDINGS AND RECOMMENDATIONS

5 1 INTRODUCTION

Laws evolve as do societies. To be relevant and effective, laws have to keep pace with global changes within the particular societies to which they apply. Investment laws are no exception.[301] This study has critically interrogated the protection of property rights in Zimbabwe against applicable international norms, minimum standards and/or best practices. Additionally, this Chapter concludes this study and sets out the appropriate recommendations considering all the issues that have been discussed in the preceding chapters. The aim of this thesis was to determine how Zimbabwe can mold its legislative, institutional and policy frameworks on property rights protection in a fashion that creates a positive and certain investment climate. A property rights protection law, a new institutional arrangement to govern and oversea the protection of investment is a necessity and a policy on protection of property rights are some of the suggested remedy that can provide certainty, predictable and transparent.

Chapter 1 of the study is the introductory chapter and has set out the goals and objectives envisaged by this study. It also set out a detailed account of what constitutes FDI as illustrated by several international organizations, investment treaties and the jurisprudence pertinent to the interpretation of foreign investment, and further outline the fundamental importance of protection of property rights in relation to foreign direct investment and economic growth. Additionally, this chapter also outlined different literatures surrounding the property of property rights and FDI, and also tried to answer the complex question on whether Zimbabwe is indeed open for business looking at its regulatory framework and compliance with international minimum standards.

The enquiry undertaken in Chapter 2 began by setting out the historical origin of protection of property rights. In that Chapter, the evolution of property of protection was traced, revealing the circumstances in which it has developed from diplomatic protection to protection under the international minimum standards and under bilateral investment treaties to present day protection. It was also observed from the Chapter that foreign investment plays a major role in, the economic development and growth; the technological advancement; the human resources development; the employment creation, the improvement of infrastructure; and

[301] See footnote 20 above at 322.

national competitiveness of the host states. Furthermore, this chapter also engaged in a multidisciplinary discourse of the importance of protection of property rights to an economy and outline the close relationship that exist between property rights protection and economic growth. Chapter concludes by discussing the theoretical framework on protection of property rights.

Chapter 3 focused on the international standards, norms and/or best practices on FDI protection. This chapter begins by highlighting how customary international law form part and parcel of Zimbabwean as deeply entrenched in its constitution. The Chapter therefore identified and discussed selected voluntary, binding and non-binding rules that constitute the common and basic international legal framework governing property rights protection. The ultimate purpose of this Chapter has been to assess the international minimum standards and assess Zimbabwe's compliance with these minimum standards. This chapter investigated on the difference between the international minimum standard and the fair equitable treatment, and how the international minimum standard emerged as a more favoured treatment standard of protection despite being significantly threatened by the Calvo doctrine. The discussion in Chapter 3 contributed immensely to the clarification of the obligations that international investment law imposes on host states in the protection of property rights. It was also highlighted that international minimum standards on the expropriation of foreign investor property demands that foreign commercial property may be compulsorily acquired: in the public interest or for a public purpose; in accordance with due process of law; in a non-discriminatory manner and upon payment of compensation determined by the applicable law.

Chapter 4 focused on making a comparative analysis between the legal framework on protection of property rights in Zimbabwe and South Africa. This chapter was at pain to show that Zimbabwe needs to engage in an informed revision of the broader legal regime governing business activities, to improve transparency, predictability, efficiency and openness. Furthermore, this section also discussed the impact of the land reform policy on property rights in Zimbabwe as it resulted in lowering FDI numbers into the country. This chapter also discussed and indicated the significant impact that the indigenisation policy had on FDI as it was shown that obvious negative effect results of the indigenisation law is its stalling of the investment drive. Moreover, this chapter also discussed the enforcement of foreign arbitral awards in Zimbabwe and how the Zimbabwe government has in the past refused to enforce foreign arbitral awards on the grounds of public policy, state immunity and jurisdiction. Furthermore, this chapter also discussed the legal framework available for protection of

property rights in Zimbabwe and highlighted some of the deficiencies that exist in this framework. A comparative analysis was made between with the Constitution of Republic of South Africa and the Promotion of Investment Act in order to allow the Zimbabwean government to draw some notes from the South African legal framework.

5 2 RECOMMENDATIONS

Some of the proposed recommendation to policy makers in Zimbabwe includes there is need to; (1) comply with divergent regional obligations on protection for property rights, (2) harmonise Zimbabwe's fragmented laws and patch some of the loopholes that exist in law dealing with foreign investment protection, (3) create a better functioning institutional framework for protection of property rights, (4) comply with international minimum standards on protection of property rights, (5) create more policy space for the state to regulate property rights protection, (6) adequately address the issue of indigenisation and economic empowerment, (7) have a firm policy on foreign investment guiding state practice to provide more transparency and certainty. In order to increase the FDI numbers pouring into Zimbabwe there is need to build a friendly and open investment environment or regulatory framework, and that can only be achieved if adequate and sound investment regulation and related policies are in promulgated. Zimbabwe needs transparent legal, impartial and/or independent institutional ingenuities to drive and monitor the protection of property rights.

It is widely argued that FDI enhances the host states' economic development and growth.[302] Host countries like Zimbabwe need to implement regulatory framework or create investment climates which uphold property rights protection and security in order for them to exploit and harness the said benefits of foreign investment.[303] In addition, the investment legal framework must be fashioned in a manner which takes into account the interests or rights of foreign investors and be interpreted in accordance with appropriate international minimum standards.[304] The suggestion of this learning is that in areas were international standards do not exist, a host state can adopt a measure of protection it reckons fit as long as it is based on good faith and does not prejudice foreign investors. One of the main drivers of investment is a comprehensive and perfect policy on property rights. Respect of property rights fascinates and promotes private sector investment which is the engine for economic growth. There is

[302] Ho, C.S. and Rashid, H.A., 2011. Macroeconomic and country specific determinants of FDI. The Business Review, 18(1), pp 219.
[303] Zampetti, A.M. and Sauve, P., 2007. International Investment, [w:] Research Handbook in International Economic Law, ed. AT Guzman, AO Sykes. 217.
[304] Ibid.

need for the Zimbabwean government to promulgate certain, predictable, transparent law which can lure foreign investor into the country. An existing legal framework of a country is a reflection upon which investor conclude whether they will invest or not, in making investment decisions, investors seek confirmation that they would be rewarded for investing in a particular asset, and also want guarantee of security over their investment.

In as much the Governments of Zimbabwe tries to make constitutional provisions that seek to enhance investor confidence, however there are significant loophole that exist within such regulatory regimes that needs to be ironed out in order to acquire investor confidence. Government should not inappropriately nationalize or expropriate investments. Nationalization should only be done for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.[305] In order to ensure that the country remains competitive for foreign direct investment, there is need to have clear and unambiguous legislation which gives investors a basis to plan and make concrete decisions and commitments on their future investments in Zimbabwe. While it is a gallant idea to ensure that the indigenous people benefit from the exploitation of all-natural resources in Zimbabwe this should be done in a manner which should not retard growth of the economy and negatively impact of the FDI number entering the country.[306] Given the centrality on protection of investment capital in economic growth, the Government should champion the respect for property rights in order to promote further investment.

Zimbabwe entrenches customary international law in its Constitution which the country should adhere to in order to promote investment. This benefits to describe the country as a benign and attractive investment destination. Drawing further lesson from China[307] not only the public properties are under the protection by law, but also private properties have been gradually recognized and protected by law due to the swift growth of private properties during the development of the socialist market economy. Thus, Zimbabwe should take lesson from communist states such as China which protects of property rights of private investors as such rights are of key importance in the economic development of any country. The protection of private properties in China has been a significant contributor and indicator to the country's decade of accelerated and sustained economic growth. The safeguarding of property rights leads to increased investments by the private sector both domestic and foreign. The private

[305] The Role Of Property Rights In Investment Promotion; The January 2009 Monetary Policy Statement at page 2, available at https://www.rbz.co.zw/documents/mps/role_property_rights.pdf accessed on 18 September 2019.
[306] Ibid.
[307] See footnote 4 above at page 8.

sector is the locomotive of economic growth in numerous countries as it results in the expansion of the economy.

5 3 CONCLUSION

To ensure that the proper functioning of law, a sound investment policy as well as a functional and effective institutional framework for managing foreign investments is proposed. In this way therefore, one can conclude that the dictum Zimbabwe is open for business is a façade that has not yet materialised because the necessary regulatory framework that can complement this statement does not even exist. There is a need for a complete overhaul of the legal regime in Zimbabwe in order to provide more transparency, openness, predictable and certainty in property rights protection. As one financial analysist once said money flows into countries where it is protected most, if FDI numbers are to increase into Zimbabwe there is need to provide robust, effective and efficient laws on property rights protection.

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