ARE INDIGENISATION MEASURES COMPENSABLE? A CASE STUDY OF MEASURES TAKEN UNDER THE INDIGENISATION AND ECONOMIC EMPOWERMENT LAWS OF ZIMBABWE

Submitted to the Faculty of Law, Centre for Human Rights, University of Pretoria, in Partial Fulfilment for the Requirements of the Masters of Law Degree in International Trade and Investment Law in Africa

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Declaration

I, EMMA CHITSOVE, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

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This dissertation has been submitted for examination with my approval as University supervisor.

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

EMMA CHITSOVE

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List of Acronyms

AAG	Affirmative Action Group
ACHPR	African Charter on Human and Peoples' Rights
BIT	Bilateral Investment Agreement
BSAC	British South Africa Company
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa
FTA	Free Trade Area
GATT	General Agreement on Tariff and Trade
GATS	General Agreement on Trade and Services
IBDC	Indigenous Business Development Centre
ICSID	International Centre for the Settlement of Investment Disputes
IEEB	Indigenisation and Economic Empowerment Board
IIA	International Investment Agreement
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Area
OECD	Organisation for Economic Cooperation and Development
SADC	Southern African Development Committee
UN	United Nations
UNCTAD	United Nations Conference on Trade And Development
US	United States
ZIA	Zimbabwe Investment Authority

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Chapter 1

1.1. Introduction

Respect for private persons' property is a recognised principle of international law and it is more elaborated in investment law. However, the level of protection and the general notion of property rights differ. The United States of America[1] views property rights as absolute rights[2] whereas most Commonwealth Constitutions subject property rights to public interest and identify the circumstances under which property becomes defeasible in the public interest.[3] The African Charter and Human and Peoples' Rights (ACHPR) illustrates a relative protection of property rights by African States.[4] In Zimbabwe, this right is enshrined in the Constitution and it is afforded relative respect and protection.[5] Its enjoyment can be interfered directly and/or indirectly by the State with and sometimes without payment of compensation.[6]

This act of interference with private property is generally termed as expropriation. International law allows expropriation where certain legal requirements are met, in particular; expropriation must be for a 'public purpose; non-discriminatory; in accordance with the due process of the law and must be accompanied by compensation.'[7] International jurisprudence recognises two forms of expropriation, namely: direct and indirect expropriation. Direct expropriation relates to outright seizure of property and transfer of title from the private person to the State or to a third party through the State.[8] Indirect expropriation is disguised

[1] The Constitution of the United States of America, Fifth Amendment states: '[N]or shall private property be taken for public use, without just compensation.'
[2] M Sornarajah *The International Law on Foreign Investment* (2010) 370 argues that this statement is contentious as US jurisprudence is inconsistence in this respect.
[3] Sornarajah (n2 above) 369-371.
[4] African Charter on Human and Peoples' Rights, Art 14 which reads that: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'
[5] Section 71 and 72 of the Constitution of Zimbabwe.
[6] Section 72(7) of the Zimbabwe's Constitution where the government excludes itself from paying compensation on agricultural land compulsorily acquired by it. This right is placed on the former colonial power and such payments have to be done through a Fund established for this by the former colonial power, Britain.
[7] D Zongwe 'The Contribution of Campbell v. Zimbabwe in the Foreign Investment Law on Expropriations.' (2010) 2:1 *Namibia Law Journal* 7. R Dolzer & C Schreuer *Principles of International Investment Law* (2008) 91. United Nations Conference on Trade And Development *UNCTAD Series on Issues in International Investment Agreements II – Expropriation* (2012) 28.
[8] A Newcombe 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20:1 ICSID Review – Foreign Investment Law Journal 7. United Nations Conference On Trade And Development *UNCTAD Series on Issues in International Investment Agreements II – Expropriation* (2012) 6 – 7.

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taking of property and there is no change of title or physical seizure of the property.[9] Where the measures by the state, administrative or legislative, would affect the investment, its value or enjoyment, it also amounts to indirect expropriation.[10]

However, there are uncertainties on what governmental measures amount to compensable expropriation and what amounts to non-compensable expropriation. Arbitral Tribunals are divided on this aspect, with some deciding that expropriation would be non-compensable where the state is exercising its 'police powers'.[11] Controversies surrounding government measures are whether the State has the right to regulate for public interest while interfering with foreign investments without being required to pay compensation. This controversy is far from being solved as investment tribunals are grappling with the issue on what measures amount to or are tantamount to non- compensable expropriation. For instance, some tribunals have decided that environmental measures are expropriatory and are compensable.[12] On the other hand, some tribunals have held that such measures fall within the regulatory powers or 'police powers' of states and are a lawful regulation and are not compensable.[13]

This issue comes to the core in the case of Zimbabwe where the government has enacted the Indigenisation and Economic Empowerment Act[14]mandating all foreign owned businesses with varying net asset value from one United States Dollar (US$1) to ten million United States Dollars (US$10 000 000) to dispose of their shares to indigenous Zimbabweans from the 18th of April 2008. The compliance period varies from four years to five years depending with the sector. Failure to comply with these measures attracts criminal penalties and withdrawal of investment licences.

[9] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-U.S. C.T.R. 122 para 154 and *S.D. Myers Inc. v. Canada* (1st Partial Award, 13 November 2000), 40 I.L.M. 1408 para 283.
[10] OECD Directorate For Financial And Enterprise Affairs *'Indirect Expropriation' And The 'Right To Regulate' In International Investment Law* – Working Papers On International Investment Number 2004/4.
[11] MC Porterfield 'State Practice and the (Purported) Obligation Under Customary International Law to Provide Compensation for Regulatory Expropriations, (2011) 37 *North Carolina Journal of International Law and Commercial Regulation* 164 – 165. See the cases of *Methanex Corp. v. United States*, Final Award, Part IV, Ch. D,7 (NAFTA Arbitration Trib. 2005), and *Lauder (U.S.) v. Czech Republic* (Final Award) (September 3, 2002).
[12]*Compañia del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica (*ARB/96/1), Award of 17 February 2000, ICSID Rev.-FILJ, Vol 15, 2000 para. 72; *Tecmed v. Mexico* (ARB (AF)/00/2), Award of 29 May 2003, 43 ILM, 2004, para. 122.
[13] *Methanex Corp. v. United States*, 44 I.L.M. 1345, 1455-58 (NAFTA Ch. 11 Arb. Trib. 2005); Section 712, Comment g *Restatement of the Law Third, the Foreign Relations of the United States*, Volume 1, 1987.
[14] Chapter 14:33.

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1.2. Problem statement

The dawn of 2008 saw the government of Zimbabwe enacting the Indigenisation and Economic Empowerment Act. This Act and its Regulations directed all foreign owned companies with a varying net asset value from one United States Dollar (US$1) to ten million United States Dollars (US$10 000 000) to dispose of their shares to indigenous Zimbabweans from the 18th of April 2008. The Minister of Youth Development, Indigenisation and Economic Empowerment is empowered to implement the Act and to pass any subsidiary legislation to enforce the Act. These laws are part of the government's plans to correct historical imbalances which were brought about by the colonial government through systematic disempowerment laws and practices.[15] Many indigenous Zimbabweans were denied access to resources and means of production. In pursuance to the Act, all foreign-owned companies in Zimbabwe are required to dispose 51% of their shares through the modes outlined in the Act. These measures raise crucial issues such as how far the state can go in exercising its regulatory powers which interferes with investors' property rights and under what circumstances are these measures non-compensable.

Whereas it is settled that direct takings are compensable, international tribunals are still grappling with non-compensable expropriation and this is worsened by the forms of indirect expropriation which are constantly evolving.[16] In the case of indigenisation laws, this problem is exacerbated by the fact that there is no direct or indirect enrichment of the government and in most cases, there may be no changes in management control effected by the measure.[17] Furthermore, the problem with indigenisation is that transfer of shares is not voluntary and the timing of effecting transfer is not left to foreign investor and to some extent, this resembles some form of forced sales.[18] It is because of these features that there is a challenge in determining whether such a measure is compensable or not. In addition, the need to examine these measures arose as a result of lack of precedent at international level pertaining empowerment measures. The sole opportunity to have these measures subjected to arbitral scrutiny was in the South African case of *Foresti and Others versus South Africa*,[19] which was discontinued at the instance of the claimants. Since, these measures have not been judicially scrutinised at international plane, it is imperative to examine these laws with a view

[15] F Maphosa 'Towards the sociology of Zimbabwean indigenous entrepreneurship.' (1998) XXV (ii) *Zambezi* 173 – 190.
[16] M Sornarajah *The International Law on Foreign Investment* (2010) 363.
[17] Sornarajah (n16 above) 380 – 383.
[18] n16 above.
[19] *Piero Foresti and Others v The Republic Of South Africa* ICSID Case No ARB(AF)/07/1.

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to determine first, whether they are expropriatory and secondly, whether they are compensable.

1.3. Research questions

The overarching goals of this study are to examine whether the indigenisation measures are expropriatory and if so, whether they are compensable. In addressing these issues, this study seeks to answer the following related questions:

- What is indirect expropriation and what are the criteria for determining indirect expropriation?
- How non – compensable expropriation is distinguished from compensable expropriation under international investment law?
- What are the main features of the Zimbabwe indigenisation and economic empowerment laws?
- Are the measures provided for under the indigenisation and economic empowerment laws expropriatory and if so are they are compensable?
- Are there are any reforms to be undertaken on the Zimbabwean laws relating to indigenisation and economic empowerment in order to align it to international norms and standards?

1.4. Thesis statement

This study argues that indigenisation and economic empowerment laws and policies introduced in Zimbabwe which are meant to correct historical imbalances through racial realignment of the economic ownership may amount to indirect expropriation which is non-compensable under international law unless compensation for such is expressly provided for in specific BITs or other International Investment Agreements (IIAs).

1.5. Justification of study

The Zimbabwean government has of late been criticized for embarking on an indigenisation programme whilst the wounds of land reforms are still fresh.[20] Furthermore, there has been

[20] MD Mawere *Indigenization: a case of hypocritical manipulation?* Published 11 December 2009 http://www.newzimbabwe.com/pages/mawere91.16861.html (accessed 10 September 2013); S Kohler *The*

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uncertainty on whether these measures are expropriatory or not. There is a dearth of scholarship on this issue; rather, some commentators focus on the constitutionality of these laws.[21] This research thus seeks to analyse the indigenization laws in light of international investment law so as to ascertain whether or not they are expropriatory and/or non – compensable. Besides, the Zimbabwean President is regarded by some quarters in Africa as a great champion against neo – imperialism and resultantly, Zimbabwe has huge influence in Africa and is regarded as a trendsetter on controversial issues.[22] Other countries which intend to adopt such measures would be interested in knowing the relationship of these laws with their international obligations. They may also take a leaf on how not to do things. Thus, in a wider and broad sense, the findings of this research are also important for African countries and other third world countries on how they should balance investment protection and the promotion of the State's social, economic and development interests exercised through laws and regulations.

1.6. Literature Review

Researchers on indigenization laws in Zimbabwe have concentrated on the legality of the Indigenisation and Economic Empowerment Act and its Regulations and have brushed over the interface between indigenization laws and international investment laws.[23] A handful has

Indigenisation of Zimbabwean Business: A Threat to Economic Recovery? Published 2 July 2010. http://consultancyafrica.com.www122.nur4.host-h.net/index.php?option=com_content&view=article&id=468:the-indigenisation-of-zimbabwean-business-a-threat-to-economic-recovery&catid=82:african-industry-a-business&Itemid=266 (accessed 10 September 2013); D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenization And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask* (2011); SW Radio Africa Transcript Broadcast 12 February 2010. *Hot Seat: Indigenization debate with Supa Mandiwanzira the President of the Affirmative Action Group, businessman Mutumwa Mawere, economist Daniel Ndlela and journalist Peta Thornycroft.* http://www.swradioafrica.com/pages/hotseat160210.htm (accessed 10 September 2013). The fast track land reform was embarked from 2000 by the government and it saw white farmers' land being compulsorily acquired without compensation.

[21] D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenisation And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask* (2011); A Magaisa *The illegality of Zimbabwe's new indigenisation regulations in the banking and education sectors*. Published July 5, 2012 http://newzimbabweconstitution.wordpress.com/2012/07/05/the-illegality-of-the-new-indigenisation-notice-in-the-banking-and-education-sectors/ (accessed 10 September 2013).

[22] The Zimbabwean President has for a long time been the African voice on controversial issues in the UN General Assembly, see Mugabe's 68th United Nations General Assembly's speech, New York, 26 September 2013 where he lamented that the UN Security Council's formal decisions "*...have provided camouflage to neo-imperialist forces of aggression seeking to military intervene in smaller countries in order to effect regime change and acquire complete control of their wealth."*

[23] n 20 above.

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discussed the opportunities these laws present to rural development[24] and its contribution to sustainable development.[25]

The general principles of investment law are *inter alia* rooted in international law especially, Bilateral Investment Treaties [BITs].[26] One of the crucial aspect is that of expropriation whose tenets according to Sornarajah, once clear, have been 'befuddled with difficulty as a result of the progressive expansion of the concept of taking',[27] in particular, the formulations of three types of takings under investment treaties, namely: 'direct, indirect and anything 'tantamount to a taking' or anything 'equivalent to a taking'.'[28]This study is centred on indirect takings, whose relevance is in assessing whether the indigenisation laws constitute indirect taking or expropriation.

Newcombe[29] and Nikièma[30] argue that whereas direct expropriation poses little challenges to its constitution, indirect expropriation is a challenge to define, especially in the light of the fact that BITs have not provided an explicit definition of the concept. Due to this shortcoming investment tribunals have devised their own criteria and approaches which are categorised by Newcombe as follows: the "orthodox approach" and "appropriation approach."[31] These approaches are of importance in the current study as they will form basis of defining whether the indigenisation measures amounts to indirect expropriation and whether they are compensable.

Newcombe does shy away from providing a comprehensive answer to the question of when a regulatory state measure is non – compensable. However, he suggests two approaches to determine and justify non-compensable expropriation, namely: subjecting the regulatory measure to proportionality and necessity tests and assessing the procedural aspect of reaching the regulatory measure instead of the substantive impact of the regulation. This study will

[24] J Matutu 'The Indigenisation and Economic Empowerment Policy in Zimbabwe: Opportunities and Challenges for Rural Development' (2012) 1:2 *Southern Peace Review Journal* 5.
[25] T Murombo 'Law and the indigenisation of mineral resources in Zimbabwe: Any equity for local communities?' (2010) 25 *SAPL* 568.
[26] M Sornarajah *The International Law on Foreign Investment* (2010) 81.
[27] Sornarajah (n26 above) 363.
[28] n 27 above.
[29] A Newcombe 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20:1 *ICSID Review-Foreign Investment Law Journal* 1.
[30]SH Nikièma 'Best Practices Indirect Expropriation' (2012) *International Institute for Sustainable Development.*
[31] Newcombe (n29 above) 8.

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utilise Newcombe's first suggestion to determine whether the indigenisation laws are one of the circumstances which justify non-compensation.

Sornarajah argues that a State has the right to control property and economic resources and based on this premise, the taking of property by the State is *prima facie* lawful. He avers that as far as indigenisation measures are concerned, though these measures resemble forced sales, they are not compensable and such policies must be considered a part of ordinary business risk.[32] The scholar therefore raises an issue which is pertinent to this study. However, his capitulation only lays a general background which is not specific to any country and Zimbabwe in particular. Also, his capitulations are premised on activities of newly independent States, to which Zimbabwe cannot be termed as such.

According to Matyszak,[33] the indigenization laws are unconstitutional as they potentially violate key rights such as: right to property (section 16, now section 71); freedom from discrimination (section 23, now section 56); right to freedom of association (section 21, now section 58). The same views are shared by Magaisa[34] and both find it difficult to see how these would square with Bilateral Investment Treaties [BITs], which invariably protect property from compulsory acquisition.[35] However, the later submissions by the said authors are not substantiated by law and facts to reach this conclusion. Hence, this study will hence, explore whether the indigenisation laws are expropriatory and if so, whether they amount to a non-compensable expropriation.

1.7. Methodology

The approach of this study will be descriptive and analytical. The descriptive approach will be utilized to lay a general overview of the laws that governs indigenization in Zimbabwe. The analytical approach will be employed to evaluate if the indigenization laws are

[32] M Sornarajah *The International Law on Foreign Investment* (2010) 381.
[33] D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenisation And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask*. (2011) http://www.kubatana.net/docs/econ/rau_indeg_econ_analysis_2_110616.pdf >(accessed 2 September 2013).
[34] A Magaisa *The illegality of Zimbabwe's new indigenisation regulations in the banking and education sectors*. Published July 5, 2012 http://newzimbabweconstitution.wordpress.com/2012/07/05/the-illegality-of-the-new-indigenisation-notice-in-the-banking-and-education-sectors/ (accessed 10 September 2013).
[35] n33 above.

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expropriatory and compensable. The analytical approach will entail desk and library based research and the use of primary documentary sources including the Constitution of Zimbabwe and the Indigenisation and Economic Empowerment Act. The study will also utilize secondary sources of information like journal articles and newspapers capturing the relevant issues under analysis.

1.8. Scope and Limitations of the Study

This study is limited to the relationship between the indigenization and economic empowerment laws with international investment laws, in particular whether the measures are expropriatory and compensable in light of international investment principles. Hence, the constitutionality of these measures falls outside the ambit of this study. Further, this study is limited to indigenisation and economic empowerment measures employed in all the sectors in Zimbabwe except the mining sector. The mining sector has been excluded because it has its own unique intricate regulations which govern them whereas on other sectors the rules are almost uniform.

1.9. Chapter Outline

This study consists of five chapters outlined as follows:

Chapter 1: Introduction

This Chapter introduces the study, outlines the background to the study, the research problem, research questions, thesis statement, justification of the study, literature review; the methodology and the scope and limitations of this study.

Chapter 2: Indirect expropriation

This Chapter defines indirect expropriation from a general perspective and as provided for in various International Investment Agreements. It further discusses the elements of establishing indirect expropriation extracted from the body of arbitral awards.

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Chapter 3: Distinguishing non-compensable expropriation from compensable expropriation

This Chapter will explore the distinction between non-compensable expropriations from indirect expropriation which is compensable. This discussion will explore the distinction, first the position under customary international law; secondly as provided in Bilateral Investment Treaties and lastly, as decided by arbitral tribunals.

Chapter 4: Indigenisation and economic empowerment Laws in Zimbabwe

This Chapter analyses the legal framework of Zimbabwe indigenization laws form the colonial period (1890 – 1980) to post independence era (1980 – present). It will then evaluate these indigenisation and economic empowerment laws with the view of determining, whether these measures are, first, expropriatory and secondly, if expropriatory, whether they are compensable.

Chapter 5: Conclusions and recommendations

This Chapter starts with a summary of findings, makes some concluding remarks and proffers recommendations based on the findings of the study.

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Chapter 2

Indirect expropriation

2.1. Introduction

The need to create a balance between the State's interests to exercise its sovereign powers to regulate in general and specifically, to control its natural resources on one hand and the interests of the investor, on the other hand, has kindled the debate on indirect expropriation under international law. The investor-state arbitrations especially under the North America Free Trade Area (NAFTA) arbitration mechanism, wherein the investors allege that certain regulatory measures are expropriatory, have popularised this debate.[36] It is against this backdrop that the precise meaning of what constitutes indirect expropriation has haunted Tribunals and States alike.

International investment law recognises expropriation in traditional categories of direct and indirect.[37]Whereas the concept of direct expropriation[38] has been settled and such expropriation is now a rare phenomenon indirect expropriation has gained significant importance in international investment law.[39] Indeed, international debate has shifted from direct expropriation and standard of compensation to the definition of indirect expropriation.[40] This chapter addresses the meaning of indirect expropriation and discusses the criteria for establishing indirect expropriation.

2.2. Definition of indirect expropriation

Indirect expropriation is mostly defined from an effect-based approach.[41] This approach is reflected in the works of many scholars,[42] International Investment Agreements (IIAs)[43] and

[36] M Brunetti 'Indirect Expropriation in International Law' (2003) 5 *International Law FORUM du droit international* 150; C Barklem & EA Prieto-Ríos 'The Concept of "Indirect Expropriation", its appearance in the international system and its effects in the regulatory activity of governments' (2011)11 *Civilizar (21)* 77.
[37] A Newcombe & L Paradell *Law and Practice of Investment Treaties* (2009) 323.
[38] A Newcombe A 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 *ICSID Review-Foreign Investment Law Journal* 7.
[39]Dolzer R & C Schreuer *Principles of International Investment Law* (2008) 92.
[40] Dolzer R, "Indirect Expropriations: New Developments?" (2002) 11 *N.Y.U. Envt'l.J* 64 – 65.
[41] A Newcombe and L Paradell *Law and Practice of Investment Treaties* (2009) 326.
[42] M Sornarajah *The International Law on Foreign Investment* (2010) 367-368; M Brunetti 'Indirect Expropriation in International Law' (2003) 5 *International Law FORUM du droit international* 150; A Newcombe and L Paradell *Law and Practice of Investment Treaties* (2009) 326; R Dolzer and F Bloch, "Indirect Expropriation: Conceptual Realignment?" 5 *International Law FORUM du droit international* 155.
[43] Art 10C CAFTA – DR (2006); Art 10 of the 1961 Draft Convention on State Responsibility and Art 3 of the OECD Draft Convention on the Protection of Foreign Investment (1968).

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arbitral awards.[44] In general terms, indirect expropriation occurs where a State takes measures which substantially interfere with property rights of an investor without necessarily affecting the legal title of the said property.

The above definition shows that a range of measures by the State can give rise to indirect expropriation and these include: expulsion of persons key to the investment;[45] increase in taxation to the extent of rendering the investment economically unviable;[46] replacement of management;[47] denial of a construction permit contrary to prior assurances[48] and revocation of an operating license.[49]

Of essence is that diverse terminologies are used to describe indirect expropriation. Different texts make reference to 'creeping; constructive; disguised; consequential; regulatory and /or virtual expropriation.'[50] All these references are equivalence or sub-categories of indirect expropriation.[51] "Disguised" expropriation indicates that the expropriation is not visibly recognisable as such[52] whereas 'creeping expropriation'[53] denotes the incremental encroachment into the foreign investor's business and mostly done through a series of activities so as to kill the investor's interests over a period of time.[54] 'Regulatory takings' denotes a situation whereby the host State invokes its regulatory powers to enact measures that adversely affects the investor's rights without necessarily affecting ownership of the

[44] *Middle East Cement Shipping and Handling Co. v. Egypt* ICSID Case No. ARB/ 99/6 (2002), para. 107; *Lauder v Czech Republic*, UNCITRAL Arbitration Proceedings (Final Award, 3 September 2001) and *Metalclad Corp. v United Mexican States*, Award (ICSID (Additional Facility) Case NO. ARB (AF) /97/1), 30 Aug. 2000) para 107.
[45] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL *ad hoc* Tribunal, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 183 (1989).
[46] *Revere Copper and Brass Inc v Overseas Private Investment Corporation*, Award, 24 August 1978, 56 ILR 258.
[47] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-U.S. C.T.R. 122.
[48] *Metalclad Corp. V United Mexican States*, Award (ICSID (Additional Facility) Case No. ARB (AF) /97/1), 30 Aug. 2000.
[49] *Tecmed, S.A. v. United Mexican States* (2006) 10 ICSID Reports 134.
[50] UNCTAD Series On International Investment Agreements II *Expropriation: A Sequel* (2012) 11
[51] UNCTAD (n50 above).
[52] *Case concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* [1971] ICJ Reports 3.
[53] R. Dolzer, 'Indirect Expropriation of Alien Property' (1986) 1 *ICSID Rev 41*; B. Weston, 'Constructive Takings under International Law' (1975) 16 *Virginia JIL* 103.
[54] *Generation Ukraine, Inc v Ukraine* ICSID Case No ARB/00/9, Award of 16 September 2003, 44 ILM 404 (2005); *Phillips Petroleum Co v Iran* 21 Iran-US CTR 79 (1989); *Waste Management, Inc v United Mexican States*, ICSID Case No ARB (AF)/98/2, Award of 2 June 2000, 40 ILM 56 and *Liberian Eastern Timber Corporation v Republic of Liberia* ICSID Case No ARB/83/2, Award of March 1986 , 2 ICSID Reports 343 (1994).

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investor over the property.[55] These different terminologies do not expand the discipline of expropriation, rather they are a restatement of customary international law position that expropriation can occur directly or indirectly and in assorted forms.[56]

2.3. Definition of indirect expropriation in international investment agreements

Most IIAs refer to indirect expropriation in one way or the other.[57] In most cases, the term is not defined. However, there has been a trend to attempt to define indirect expropriation. The earliest attempts to define indirect expropriation are found in the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (Harvard Draft) and the 1967 OECD Draft Convention on the Protection of Foreign Property (OECD Draft). Art 10(3) of the Harvard Draft defined a taking of property to include unreasonable interferences with the use of, enjoyment, or disposal of property. The OECD Draft describes indirect expropriation as any measure applied in such a way so as to ultimately deprive the investor of the enjoyment or value of his property.[58] The 1985 Convention Establishing Multilateral Insurance Guarantee Agency (MIGA) contains some defining elements of indirect expropriation as 'any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of the guarantee of his ownership or control of, or a substantial benefit from, his investment.'[59]

More specific definitions and explicit criteria for determining whether a particular measure amounts to indirect expropriation are found in recent Bilateral Investment Models which include Canadian Model BIT[60]; US Model BIT[61] and the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) (2006). Annex 10-C of CAFTA-DR distinguishes indirect expropriation as follows: '[...] where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or

[55] *Suez et al. v. Argentina*, Decision on Liability, 30 July 2010, para. 121.
[56] A Newcombe and L Paradell *Law and Practice of Investment Treaties* (2009) 339
[57] However, the Lebanon-Malaysia BIT and the Austria-Croatia BIT do not include reference to indirect expropriation.
[58] Notes and comments to Art 3 of OECD Draft Convention on the Protection of Foreign Property, 12 October 1967, 7ILM 117 (1968) 126
[59] Art 11 of 1985 Convention Establishing Multilateral Insurance Guarantee Agency.
[60] 2004 Canadian Model BIT, Art 13 (1) Annex B. Available on http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (accessed online; 4 February 2014).
[61] 2012 USA Model BIT Article 4 Annex B. http://www.state.gov/documents/organization/188371.pdf (accessed 4 February 2014).

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outright seizure.' Furthermore, the Annex contains factors that the Tribunals should take into account when determining whether the government's action constitutes indirect expropriation, namely: (i) the economic impact of the measure, though as a stand-alone, it cannot establish indirect expropriation;[62] (ii) the impact of government's interference on reasonable and investment backed expectation and (iii) the character of the government's action, that is whether the measure are *bona fide* and are genuinely pursued to fulfil a legitimate public policy objective.[63] Similar approaches have been taken in other investment agreements.[64]

The ASEAN Comprehensive Investment Agreement 2009 and the New-Zealand- Malaysia Free Trade Agreement provide diverse factors in considering indirect expropriation. The ASEAN Agreement is unique in that it brings in a new element of proportionality in identifying indirect expropriation. [65] This element has to be included in the indirect expropriation inquiry together with the economic impact and government's prior written commitments. Also, the New-Zealand-Malaysia BIT introduces two requirements for indirect expropriation, namely: the deprivation must be severe or for an indefinite period and must not be disproportionate to the public purpose sought.[66] Where there is discrimination and a breach of a prior written commitment, the deprivation will likely constitute an indirect expropriation.

In a nut shell, these investment agreements define indirect expropriation as having the same effect with nationalisation or direct expropriation. In other words, there must be substantial interference with the use, management and enjoyment of the investment. Besides examining the effects, the agreements have included factors that the Tribunal has to consider on a case-by-case basis in determining indirect expropriation. The common factors are: (i) the economic impact of a governmental measure; (ii) the character of a governmental measures;

[62]This provision was influenced by the following case: *El Paso Energy International Corporation v The Argentine Republic*, ICSID Case No ARB/03/15, Award 31 October 2011.
[63] Annex 10-C (4) (a) of the DR-CAFTA.
[64]Australia-Chile Free Trade Agreement (FTA) (2006),http://www.dfat.gov.au/fta/aclfta/Australia-Chile-Free-Trade-Agreement.pdf (accessed 13 February 2014) and Japan- Philippines FTA (2008) http://www.bilaterals.org/IMG/pdf/JPEPA_2006_.pdf (accessed 13 February 2014).
[65] Art 3, Annex 2 of the ASEAN Comprehensive Investment Agreement 2009. Available online: http://aseansummit.mfa.go.th/14/pdf/Outcome_Document/ASEAN%20Compre%20Invest%20Agreement.pdf (accessed 13 February 2014).
[66] Art 3, Annex to the New Zealand – Malaysia Free Trade Agreement. http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b8f6ae-c0a8156f-2af82af8-4fed08f4 (accessed 13 February 2014).

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(iii) the interference of the measure with reasonable and investment-backed expectations; (iv) the discriminatory nature of the measure and (v) the proportionality of the measure with the public purpose sought to be achieved. Two points are worth noting from these provisions: first, the provisions provide a method of analysis which is case based and secondly, the factors are not cumulative. The language of these investment agreements is self-evident. It is meant to clarify the provisions of these agreement but most importantly, to limit the tribunal's broad discretion in interpreting indirect expropriation.

Furthermore, by outlining the criteria for consideration when inquiring on indirect expropriation, the investment agreements are inadvertently codifying the elements of indirect expropriation and remedying judicial and arbitral findings.[67]It is believed that these limitations will not stifle judicial innovation especially in the light of how the concept of indirect expropriation is evolving. The aspect of "creeping expropriations" is a testimony to these assertions that States constantly evolve and so do their ways of interfering with the investors' properties.

2.4. The Determination of indirect expropriation

Whilst scholars lament the lack of clarity on the concept of indirect expropriation, the body of arbitral awards case-law and investment agreements have provided some insights into the crucial elements of establishing indirect expropriation, namely: (i) the degree of interference with property; (ii) effect on investor; (iii) protection of investor's legitimate expectation; (vi) the character of government measure and (v) proportionality. These elements are mutually exclusive from one another and are extracted from the body of arbitral awards. What follows hereto is the discussion of these elements as reflected in various cases.

2.4.1. Intensity of interference with property

The degree of interference with the investment is one of the crucial elements of indirect expropriation and there is a general consensus in this respect. The classical formulation of the aspect of interference is found in the case of *Tippetts* wherein the Tribunal indicated that: 'A

[67] A Reinisch 'Expropriation' in P Muchlinski, F Ortino and C Schreuer (eds) *Handbook of International Investment Law* (2008) 424.

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deprivation or taking of property may occur under international law through interference by a state in the use of that property or the enjoyment of its benefits, even where legal title to that property is not affected.'[68] What is apparent from the statement is that for a deprivation to occur there must be interference by the State on the rights and benefits of the investor. This deprivation of rights and benefits is independent from ownership. Logically, it follows that not all interferences can cause deprivation on the investor; rather, the interference should be of a certain threshold.[69] The difficulty is in identifying the exact level of interference and the acceptable threshold.[70]

In the *Starrett Housing* case, the Tribunal concluded that the appointment of Iranian manager to an American housing project was an act of interference by the State in the investment to an extent of rendering the investor's rights useless.[71] Holtzmann, in a concurring judgement, noted that the Claimant's property was expropriated by a number of governmental measures prior to the appointment of the temporary manager. The measures which deprived the investor of control and management of the property included the blocking of bank accounts and a coerced agreement to reduce the contract price for apartments.[72]

In the *Pope & Talbot* case[73] which involves the imposition of export limits of softwood lumber by the Canadian government following a U.S. – Canada Softwood Lumber Agreement, the NAFTA Tribunal required that for a measure to be expropriatory, the interference should be '*...sufficiently restrictive to support a conclusion that the property has been "taken" from its owner.*'[74] However, the Tribunal dismissed the claim as it noted that the investor continued to export substantial quantities of lumber despite the measure complained of and was earning substantial profit, hence, the degree of interference did not rise up to expropriation.

In the *Metalclad case,* which involved the denial of construction permits contrary to previous assurances, the ICSID Tribunal stated that for the interference to amount to indirect

[68] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran,* Award No 141-7-2, reprinted in 6 Iran-United States Cl Trib 219 (1984) p 225.
[69] L Yves Fortier, and Stephen L Drymer 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005) 13 *Asia Pac. L. Rev*. 86.
[70] Reinisch in P Muchlinski, F Ortino and C Schreuer (n67 above) 439.
[71] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-U.S. C.T.R. 122 154.
[72] n71 above, para 240-241.
[73] *Pope& Talbot, Inc v Government of Canada*, Interim Award of 26 June 2000.
[74] n73 above, para 102 (emphasis added).

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expropriation, the measure must have significantly deprived the owner in whole or in part of his investment.[75] The level of interference is described stringently in the *Tecmed* case which involved the revocation of an operating licence. The Tribunal stated that the investor must have been 'radically deprived of the economic use and enjoyment of the investment.'[76]

On the same wavelength, Tribunals have also paid attention to the duration of the interference. In *Tippetts* case, the Tribunal noted that the deprivation should not be 'merely ephemeral.'[77]The New-Zealand-Malaysia BIT states the same language in that it provides that if a deprivation is for an indefinite period, this amounts to indirect expropriation.[78] However, the NAFTA Tribunal in *S.D. Myers* case[79] accepted that 'in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation even if it were partial and temporary.'[80] In this case, interference for eighteen months was found not to be expropriatory. To the contrary, interference of four months[81] and also of about one year[82] was found not to be merely ephemeral but constituting an expropriation.

In a nut shell, for a measure to be considered expropriatory, the required level of interference has been varyingly described from case to another. What is apparent from these various descriptions is that the components of these crucial elements are far from being settled. Furthermore, the durational aspect remains unclear. The construction is thus largely depended on the situations in which the question arises and most importantly the interpretation is on a case bases.[83]

[75] *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/ 1, Award (30 August 2000) para 103.
[76] *Tecmed S.A, v. The United Mexican States* ICSID Award Case No. ARB (AF)/00/2 para 115.
[77] *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, Award No 141-7-2, reprinted in 6 Iran-United States Cl Trib 219 (1984) 225.
[78] Art 3, Annex to the New Zealand – Malaysia Free Trade Agreement. http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b8f6ae-c0a8156f-2af82af8-4fed08f4 (accessed 13 February 2014).
[79] *S.D. Myers Inc v Canada*, Partial Award, 121 I.L.R 72.
[80] n 79 above, para 283 .
[81] *Middle East Cement Shipping and Handling Co. S.A v Arab Republic of Egypt*, Award, 12 April 2002 para 107.
[82] *Wena Hotels Ltd v Arab Republic of Egypt*, Award, 8 December 2000, para 9.
[83] L Y Fortier and S L Drymer 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005) 13 *Asia Pac. L. Rev*. 79 at 91.

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2.4.2. The effect on the investor

This criterion emphasises on the effect of the measure and not its intentions. The effect criterion has been predominant even during the evolution of the concept of indirect expropriation. In the cases of *Norwegian Ship-owners*[84] and *Chorzow Factory*, [85] the Tribunals used this criterion to determine expropriation. However, this criterion came to the fore in the Iran-US Claims Tribunal awards wherein the Tribunal was given a wide discretion to deal with direct takings and "all measures affecting property rights."[86]

Tribunals have used the effect criterion as the exclusive factor in the *Tippets* case which involves the appointment of a manager by the Iranian government to a U.S business. The Tribunal, in its award accepting the Claimant's argument that the measure was expropriatory, stated that the effects of the measure on the investor are more important than the intents of the government.[87]A similar approach was taken in the *Biloune* case wherein the Ghanaian government deported Mr Biloune, the main shareholder, without the possibility of re-entering Ghana.[88]

Of importance to note is that it is debatable whether the 'effect' test is the dominant or sole factor in determining indirect expropriation[89] or merely one of the factors. Undoubtedly there are arbitral awards and scholarly work supporting both views.[90] It is submitted that the effect test is a 'selfish' test which does not take into cognisance of the dynamics of the investment playfield. The dynamics are to the effect that there are competing interests that have to be balanced; the investor's interests and the State's interests. These dynamics are not taken into account by the effect test. To this end, it is submitted that the 'effect' test should not be

[84] *Norwegian Shipowners' Claims (Norway v United States of America)* Award of the Tribunal, The Hague, 13 October 1922. http://legal.un.org/riaa/cases/vol_I/307-346.pdf (accessed 10 February 2014).
[85] *Germany v. Poland) (1927) P.C.I.J., Ser. A, No. 9*. http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm (accessed 10 February 2014).
[86] Reinisch 'Expropriation' in P Muchlinski, F Ortino and C Schreuer (n67 above) 444 – 445. M Sornarajah *The International Law on Foreign Investment* (2010) 368-9 argues that one has to be cautious in making a generalisations on the dicta of Iran-USA Claims Tribunal of awards. Albeit they contributed to investment law but the mandate was too wide and unacceptable under international law.
[87] *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran* IRAN-US CLAIMS C.T.R 219, 225
[88] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* Award on Jurisdiction and Liability, 27 January 1987, 95 ILR(1989)183, 209
[89]B Mostafa 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Austl. Int'l L.J*. 267
[90] M Gutbrod etal 'Protection Against Indirect Expropriation under National and International Legal Systems' (2009) 1:2 *Gottingen Journal of International Law* 301

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regarded as the sole factor in determining indirect expropriation, rather it should considered as one of the factors.

2.4.3. Protection of investor's legitimate expectations

This is another factor which has been considered by Tribunals in the context of an inquiry into claims of indirect expropriation. This criterion is rooted in the principle of stability, that is, 'the reliance that the investment environment will not change during the course of investment with the ultimate effect of jeopardising the reasonable expectations of the investor.'[91] In claims based on this criterion, the investor has to demonstrate that the investment was based on the state of affairs when the investment was made and this exclude the challenged regime.[92] In the *Metalclad* case, where reliance was placed on government's assurance that the investor's landfill project satisfied all relevant local laws and regulations, the Tribunal found a case of indirect expropriation when the municipality denied construction of the disposal facilities.[93]

The expectations must be *bona fide* and reasonable. The NAFTA Tribunal in the *Methanex* case, rejected that a California ban on certain gasoline additives produced and marketed by the investor constituted *inter alia*, indirect expropriation.[94] The Tribunal emphasised that the investor was well aware of the constantly changing environmental and health protection measures hence no expectations were created.[95] The threshold of legitimate expectations varies as it is dependent on the nature of the alleged violations.[96]

2.4.4. Character of government measure (purpose test)

This criterion is central in determining whether a regulatory measure is non-compensable or amounts to a compensable indirect expropriation. The "purpose test" can be viewed from several angles, in particular; (i) enrichment of the State;[97] (ii) deliberate targeting of

[91] AK Hoffmann 'Indirect Expropriation', in Reinisch (ed) *Standards of Investment Protection* (2008) 162; L Y Fortier & S L Drymer 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005)13 *Asia Pac. L. Rev.*91.
[92] OECD *'Indirect Expropriation' And The 'Right To Regulate' In International Investment Law: Working Papers On International Investment Number 2004/4* 19.
[93] *Metalclad v Mexico* 119 I.L.R 615.
[94] *Methanex Corporation v United States of America*, Award, 3 August 2006, 44 ILM 1345 (2005) para 10.
[95] n 94 above.
[96] *International Thunderbird Gaming Corporation v Mexico*, Award, 26 January 2006, para 147.
[97] In *Amoco Asia Corporation v Republic of Indonesia*, ICSIS Award, 20 November 1984, 1 ICSID Reports 413, 455 (1993) and *Tecmed SA v The United Mexican States* ICSID Case No ARB(AF)/00/2, Award (29 May 2003), the Tribunal expressed that expropriation even exists when the expropriating state transfers ownership to

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investors[98] and (iii) the promotion of general welfare angle.[99] However, the first two elements are generally excluded among the criteria for a finding of expropriation and emphasis is mainly on the general welfare objective criterion.[100]

The character of government measures have been a source of inquiry in most of arbitral cases. For instance, in the *SD Myers* case, the investor challenged the export ban on hazardous waste - PCB (polychlorinated biphenyl). In rejecting the expropriation claim, the Tribunal stated that 'regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint.'[101] However, it acknowledged the possibility, in legal theory, to enquire the purpose and intent of the government measure.[102]

2.5. Conclusion

The foregoing discussion reflects that the parameters of indirect expropriation are not precisely drawn. This is despite the fact that there is an extensive reference to the term in literature and arbitral awards and most importantly, in IIAs. However, four constitutive elements to indirect expropriation can be drawn: an act by the State; intrusion with property rights; loss of value and/or control over the property or rights and lastly, the owner retains the legal title over the property. In other words, there is no physical seizure of the property but there is a degree of interference whose effect or result is that the owner of the property either loses control of the property or its value is diminished.

Four points are worth drawing from the discussion. First, the general definition is too broad that it leaves room for possibilities of various circumstances that have negative impacts on the investor to be referred to as indirect expropriation. Secondly, the current definitions of indirect expropriation are investor-centred, that is, they emphasise on the effects of the State's measure on the investment. Thirdly, the attempts to define with precision the measures which constitute indirect expropriation serve to clarify the investment agreements

another legal or natural person. Per contra see *Ronald S. Lauder v The Czech Republic* Final Award in the Matter of an UNICTRAL Arbitration: 3 September 2001, para 203 (accessed 20 February 2014).

[98] *Sea-Land Service Inc v Iran*, Award No 135-33-1 (20 June 1984) 166.

[99] L Y Fortier & S L Drymer 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2005) 13 *Asia Pac. L. Rev.* 98.

[100] Fortier & Drymer (n99 above) 100.

[101] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, Nov. 13, 2000,para 81-82.

[102] n 101 above, para 281 and 285

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thereby limiting the Tribunals' interpretation discretions. Fourthly, the elements used to establish indirect expropriation are inconsistently interpreted thereby creating legal uncertainty. Having defined indirect expropriation, the next Chapter discusses how compensable indirect expropriation is distinguished from non – compensable expropriation.

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Chapter 3

Distinguishing non-compensable expropriation from compensable indirect expropriation in International Law

3.1. Introduction

One of the persisting debates in international expropriation law is centred on what kinds of government measures are compensable. Capital importing and exporting states have significantly disagreed on this.[103] The rationale of such a distinction lays in State's quest to determine its regulatory boundaries and discern when compensation is due to the investor. To the investor, the demarcation makes a difference in establishing whether to operate or abandon the project and its right to receive compensation. [104] These rationales are rooted in two recognised judicial and arbitral assertions: first, legitimate regulatory measures are outside the scope of indirect expropriation and second, substantial deprivation regardless of its purposes are considered expropriatory which warrants compensation.[105]

This Chapter addresses how international investment law has sought to distinguish non-compensable expropriations from indirect expropriation. It will first explore non-compensable expropriation as settled under customary international law; secondly, as provided for in Bilateral Investment Treaties and lastly, as decided by Arbitral Tribunals. Underscoring these discussions is the state's right to regulate which is discussed in the next sub-heading.

3.2. The State's right to regulate

The State's right to regulate as entrenched in International Law is based upon the principle of territorial sovereignty.[106] Territorial sovereignty signifies ownership and possession of a territory which entitles a State to exercise its authority and jurisdiction over the territory.[107] It

[103] A Newcombe & L Paradell *Law and Practice of Investment Treaties Standards of Treatment* (2009) 321. The divide is reflected in UN Resolution on Permanent Sovereignty over Natural Resources GA Res 1803, 14 December 1962 and the 1974 Charter of Economic Rights and Duties of States.
[104] Dolzer & Stevens, "Bilateral Investment Treaties", (1995) ICSID 99.
[105] A Reinisch 'Expropriation' in P Muchlinski, F Ortino and C Schreuer (eds) *The Oxford Handbook of Investment Law* (2008) 432.
[106] S Olynyk 'A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus. L. Rev* 266.
[107] I Brownlie *Principles of Public International Law* (2008) 203 – 204.

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entails the right to exercise the State functions to the exclusion of other States. One of the State functions is to regulate. In the investment realm, this entails the right to regulate foreign investment to promote domestic development priorities and linkages and the right to regulate to protect the public welfare from possible negative impacts.[108] To this end, it is a general principle of International Law that general regulations do not amount to indirect expropriation.[109]

This right to regulate commercial and business activities within a State's territory is recognised under customary international law.[110] Its scope in investment law is articulated in the *ADC* case wherein the Tribunal stated that:

> The Tribunal cannot accept the Respondent's position that the actions taken by it against the Claimants were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs. It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses an inherent right to regulate its domestic affairs, the exercise is not unlimited and must have its boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[111]

It is worthy-noting that this *dictum* reflects that the State's right to regulate is not absolute. It can be limited by bilateral investment agreements whose obligations have to be honoured. Once signed, the right to regulate is not a defence. This kind of reasoning has caused anxiety in the investment regime as it purports to curtail States' right to regulate.

The anxiety has been exacerbated by the expansionary trends of the doctrine of expropriation. It has evolved from permanent physical dispossessions and deprivations of property to takings that fall short of physical seizures but affecting the property.[112] As indicated in the previous chapter, the contours of latter developments of expropriation, that is, indirect expropriation are not precisely drawn. This lack of precision and clarity has been taken advantage of by the investor to threaten arbitration action as a response to proposed new rules

[108] H Mann *The Right of States to Regulate and International Investment Law* 5 http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 04 March 2014).
[109] *Lauder v Czech Republic* Award 3 September 2001 200 – 201; *El Paso Energy Inter. Co v Argentina* ICSID Case No. ARB/03/15 Award 31 October 2011 234 and *Marvin Roy Feldman Karpa v United States of America* ICSID Award Case No. ARB (AF)/99/1 105.
[110] Olynyk (n106 above) 265; Art 20 of SADC Model BIT (2012).
[111] *ADC Affiliate Ltd and ADC & ADMC Management Ltd v Hungary* (Award) (ICSID Arbitral Tribunal Case No ARB/03/16, 2 October 2006) 423.
[112] Olynyk (n106above) 267

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and laws by the State.[113] The consequence is a 'phenomenon of regulatory chill, the inability or fear of governments to take measures due to the unknown but potentially very expensive consequences of vague IIA rules.'[114] The on-going 'plain packaging case' illustrates the tension between the State's right to regulate and the concept of indirect expropriation.[115] This tension is more apparent in arbitral awards wherein the Tribunals attempt to distinguish non – compensable expropriation from indirect expropriation.

3.3. Non-compensable expropriation under Customary International Law

Customary international law (CIL) is one of the sources of international law. CIL is described as 'a general practice accepted as law.'[116] Two elements are required to establish CIL, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed as a matter of law (*opinio juris sive necessitatis*).[117] In expropriation realm, CIL has long been providing protection for aliens including protecting their investments in the territory of other States.[118]

CIL categorises government measures that are non-compensable as follows: measures meant for protection of public health, safety, morals or welfare and maintenance of public order;[119] measures of penal nature such as confiscations of property and imposition of fines;[120] non – discriminatory taxation measures[121] and other measures within police powers of States.[122]

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[113] Mann (n108 above) 8.
[114] n 113 above .
[115] *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging Dispute DS434* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (accessed 04 March 2014).
[116] Art 38 (1) (b) of the International Court of Justice Statutes.
[117] JL Goldsmith & EA Posner 'A Theory Of Customary International Law' *Chicago John M. Olin Law & Economics Working Paper No. 63 (2D SERIES)* http://www.law.uchicago.edu/files/files/63.Goldsmith-Posner.pdf (accessed 04 March 2014).
[118] RD Bishop; J Crawford & WM Reisman *Foreign Investment Dispute Cases, Materials and Commentary* (2005) 837.
[119] GC Christie 'What Constitutes a Taking of Property under International Law' (1962) 33 *B.Y.I.L* 338.
[120] A Newcombe 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20:1 *ICSID Review – FILJ* 24.
[121] GH Aldrich 'What constitute a Compensable Taking of Property? The Decision of the Iran – United States Claims Tribunal' (1994) 88 *A.J.I.L*. 585 609.
[122] *Methanex Corp. v. USA*, Final Award, 3 August 2005, 44 ILM 1343, para. 410 (2005); *Lauder (USA) v. Czech Republic*, Final Award, 3 September 2002, para. 198; *Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, para. 119.

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In the case of *Too,*[123] the Claimant, an Iranian national owned a motel and restaurant in California. At some point, the motel-restaurant was destroyed by fire. The police investigated the incident without reaching any final conclusion. The insurance denied payment and the motel-restaurant was subjected to a forced sale. The liquor permit held by Too was sold on public action by the Internal Revenue Service of the USA (IRS). The proceeds from the sale were used to pay part of the Claimant's overdue employment taxes. The claimant was also the owner of a cold-storage trailer found in the state of Arizona. The authorities informed Too about the trailer and the impeding action for abandoned property. Too did not make efforts to recover the trailer and it was sold at an auction. To all these sales, Too contended that they were wrongfully expropriated by the United States.

The Tribunal dismissed the Claimant's claim of expropriation on the basis that 'a State is not responsible for loss of property or for other economic disadvantage resulting from a *bona fide* general taxation or any other action that is commonly accepted as within the police power of States.'[124] The sale was occasioned by Mr Too's failure to pay taxes to the government, a lawful duty imposed on him by the State's law. These laws were not discriminatory and were not designed to cause the investor to abandon the property to the State or to sell it at a lower price.[125]

The rationale for non-compensation for these expropriatory measures is that the takings are regarded as essential for the state to function efficiently. Where however, the measure is taken in a discriminatory and arbitrary manner, such can be challenged as it fall short of the minimum standards of treating an investor. This minimum standard of treatment is infringed when the investor is subjected to grossly unfair discrimination and prejudice. [126]

CIL hence distinguishes non-compensable expropriation from indirect expropriation using the 'arbitrariness and non-discrimination test.' This test is rooted in the acceptance that States

[123] *Too v. Greater Modesto Insurance Associates and the United States of America*, Award of December 29, 1989, Iran-US CTR, vol. 23, 1989-II.
[124] n123 above, 387.
[125] n123 above, 389.
[126] *Waste Management, Inc. v. United Mexican States* ICSID Case No. ARB (AF)/ 00/3 para 98.

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have wide power to appropriate the property of foreigners on various grounds; the least that can be required of it is to exercise these powers for clearly justified public interests and on good faith and non-discriminatory basis.[127]

3.4. Non-compensable expropriation under Bilateral Investment Treaties

IIAs including BITs have for long been attempting to distinguish non-compensable expropriation from compensable expropriations. The earliest distinction is given in the 1961 Harvard Draft. In particular Article 10(5) excludes measures taken by State in the preservation of public order, health and morality. These are out-rightly regarded not wrongful hence non-compensable.

This Draft never saw the light of the day. However, it has significant effects on the rules of international law; in particular, it can be regarded as a cogent source of law. The importance of such a treaty was spelt out by Oppenheim by giving example of the International Law Commission's work. He stated:

> Given the authoritative status of the members of the Commission as individual jurist, the fact that collectively they represent many nationalities, and the close connection of their work with the international political realities of the day, the work of the Commission, even where it does not result in a treaty but particularly so if is it itself an authoritative influence on the development of the law and a cogent material source of law.[128]

In light of these averments, it is argued that the Harvard Draft is a source of international law, specifically as a secondary international law source under the 'writings of publicists' stipulated in Art 38 of the ICJ Statute. It is thus a principal source of evidence of international consent.

Modern BITs distinguishes non-compensable expropriation from compensable indirect expropriation using two approaches or a combination. The identified approaches are: explanatory approach and general exceptions approach.[129] The explanatory approach reads to the effect that:

[127] FV Gracia – Amador *Fourth Report on State Responsibility, International Law Commission* (1959) para 841 http://www.un.org/law/ilc/index.htm (accesses 19 March 2014).
[128] Oppenheim, *International Law* (1992) 50.
[129] UNCTAD *Expropriation: A Sequel* (2012) 86.

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> Except in rare circumstance, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, does not constitute indirect expropriations.[130]

Similar wordings are found in the Canadian Model BIT;[131] USA Model BIT[132] and Turkey Model BIT;[133] Canadian BITs with Peru;[134] Slovakia Republic[135] and Jordan;[136] in the FTAs between the United States and Chile[137]and Morocco.[138]

It is worth noting that the non-compensable provisions are mainly found in the 'new generation' of BITs.[139] This generation of BITs give specific textual language in contrast to the 1960s through to 1990s BITs which did not include such provisions. The specific language is meant to curb the investor from arguing otherwise. To the Tribunal, it serves as guidance for measures that are non-compensable and the test for subjecting such measure. These provisions have become common to the extent that excluding them, one risks the Tribunal interpreting that such measures were meant to be included within the scope of the expropriation article.[140]

These provisions carry two cumulative conditions that have to be fulfilled for a measure to be regarded as non-compensable, namely: non-discriminatory and public welfare conditions. Thus, for a measure to be non-compensable, it has to be non-discriminatory and meant to fulfil a public purpose objective such as health, safety and environment. Where one of the conditions is not met, the measure automatically becomes expropriatory.

Additionally, some BITs set out conditions that would render an otherwise non-compensable measure to be considered compensable. The Protocol to the India-Latvia BIT, for instance, provides that a measure clouded with the sole intention to adversely affect the economic

[130] Art 4 (b) of Annex B US Model Treaty (2012).
[131] Art 13 (c) of Annex B Canada Model Treaty (2005).
[132] Art 4 (b) of Annex B US Model Treaty (2012).
[133] Article 5 of the Turkey Model BIT (2009).
[134]Annex B.13 of the Canada-Peru BIT (2006.)
[135] Annex A of the Canada-Slovak Republic BIT (2010).
[136] Annex B.13 of the Canada-Jordan BIT (2009).
[137] Annex 10-D of the Chile-United States FTA (2003).
[138] Annex 10-B of the Morocco-United States FTA (2004).
[139]UNCTAD *Investment Policy Framework for Sustainable Development* (2012) http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (accessed 18 March 2014).
[140] SADC Model BIT with Commentary 26 http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (accessed 14 March 2014).

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value of the investment, will be considered expropriatory.[141] Also, the Colombia – United Kingdom BIT subjects the measure to a couple of requirements, namely: a fulfilment of public purpose or social interest; non-arbitrariness; good faith and proportionality.[142]

In summary, the nature and characteristics of a government, measures meant to protect environment, public health and morality are regarded as non-compensable. States can provide for other measures which they deem to be non-compensable.[143] However, it is not cast in mould that if there is a public welfare purpose to fulfil, the measure is automatically non-compensable. The measures have to be non-discriminatory and exercised in good faith.

In some cases, it has to be proportional to the objective sought to be achieved. The proportionality principle is balance-oriented, in that, it seeks to balance conflicting interests.[144] In the indirect expropriation, its application is meant to balance the investors' interests and the public interests. The application of this principle in investment law is plausible as it serves to sieve politically motivated regulations from public or social interest regulations. In the absence of such, States can misuse regulations to score political mileage under the disguise of public welfare purpose whilst the investors pay the price for those measures. Tribunals have applied this principle in various cases in determining non-compensable expropriation from indirect expropriation.[145]

The second treaty approach is called the general exceptions approach. This approach eliminates certain government measures from the scope of the treaty as a whole.[146] Generally, the general exceptions are crafted along the Art XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade and Services (GATS) and have a chapeau which reads as follows:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between States where like conditions prevail, or a disguised restriction on investors and investments,

[141] UNCTAD *Expropriation: A Sequel* (2012) 87.
[142] Art 6.2(c) Colombia - United Kingdom BIT (2010).
[143] Art 20 United States – Uruguay BIT (2005) provides for prudential measures exceptions for financial services; Art 2. 3 of France – Mexico BIT (1998) provides for cultural exceptions.
[144] J Delbruck, 'Proportionality' in: Rudolf Bernhardt (ed.), (1983) 3 *EPIL* 396.
[145] *Siemens A – G v The Argentine Republic* ICSID Case No ARB/02/8 Award of 6 February 2007 and *Tecmed S.A. v. United Mexican States*, ICSID No. ARB (AF)/00/2, Award, 29 May 2003.
[146] UNCTAD (n141 above) 89.

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> nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures:…[147]

This approach allows the State to adopt measures which are on their face expropriatory provided that they fulfil the two tier test. First, the measure has to fall under at least one of the exceptions such as 'protection of human, animal or plant life or health.'[148] Any measure which does not fall under the recognised exceptions is expropriatory. Secondly, the measure should be applied in a manner which meets standard of non-discrimination and non-arbitrariness. Most importantly, the States must have like conditions prevailing, such as both are developing countries. Where these conditions are met, the measure is non-compensable. For instance in *Continental Casualty* case,[149] Argentina in its defence against expropriatory claim, relied successfully on Art XI of US – Argentina BIT (2009), an exception clause which allowed parties to adopt measures necessary for the protection of State's essential security interests.[150]

While the term 'arbitrary' is not defined, it can be argued that it connotes a wilful disregard of due process, an act that shocks or surprises a sense of judicial propriety.[151] It is a measure which depends on individual discretion, or an action founded on prejudice or preference rather than reason or fact.[152] Discrimination, on the other hand denotes an unequal treatment of the investor in comparable circumstances. The treatment can be *de facto* or *de jure* and based on certain grounds like nationality or religion. Tribunals concur that intent is not decisive in finding discrimination; rather, it is the impact on the investment which is determent to ascertain whether it had resulted in non-discriminatory treatment.[153]

3.5. Non-compensable expropriation in Arbitral practice

The importance of arbitral practice lays in their interpretive role of BITs and customary international law. BITs are abstractly drafted hence their precise intentions are deciphered through interpretations by the Tribunals which breath life and meaning to them. This part

[147] Article 10.18 of India-Republic of Korea CEPA.
[148] Article 10.18 of India-Republic of Korea CEPA.
[149] *Continental Casualty v Argentina* ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).
[150] Art. XI of the US-Argentina BIT provides as follows: 'This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'
[151] *Elettronica Sicula S.p.A. (ELSI) (Unites States v Italy)* 20 July 1989, ICJ Reports 15.
[152] Black's Law Dictionary 7th (ed) 1991; C Schreuer 'Protection Against Arbitrary or Discriminatory Measures' http://www.univie.ac.at/intlaw/wordpress/pdf/93.pdf (accessed on 12 March 2014).
[153] *Siemens v Argentina*, Award, 6 February 2007 321.

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addresses how the Tribunals have distinguished non-compensable expropriation from compensable indirect expropriation.

The body of arbitral awards reflects an emergence of three approaches that are used to distinguish non-compensable expropriation from indirect expropriation and these are: the 'sole effects'; the 'police powers' and the 'balanced' approach. The sole effects approach emphasises on the impact of the government measure on the investor. It is the effect of the measure that is determinant of whether the measure is expropriatory or not. On the other hand, the police powers approach argues that the character of the government's action is necessary in determining whether the measure amounts to an indirect expropriation.[154] The balanced approach endeavours to weigh the effects with the purpose of government measure, through subjecting the complained measure to proportionality test.

3.5.1. Sole effect doctrine in practice

This doctrine emphasises on the effect of the regulatory measure on the investor. As indicated in Chapter 2, the effect should be of a certain threshold which threshold is not yet settled but case-based. It can be where a measure 'removes all benefits of ownership', 'renders property 'virtually valueless', or becomes 'equivalent to the [direct] expropriation of a property right'.[155] According to this doctrine, if the interference exceeds certain intensity, there will be an expropriation regardless of the measure's purpose.[156] The following cases illustrate the use of this doctrine to distinguish non-compensable expropriation from compensable indirect expropriation.[157]

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[154]B Mostafa 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Austl. Int'l L.J.* 267; S Olynyk 'A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus. L. Rev.* 270; V Heiskanen 'The Contribution of the Iran-United States Claims Tribunals to the Development of the Doctrine of Indirect Expropriation' (2003) 5 *International Law FORUM du droit international* 176.

[155] S Olynyk 'A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration (2012) 15 *Int'l Trade & Bus. L. Rev*. 271; B Mostafa 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Austl. Int'l L.J.* 280.

[156] U Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *J. World Investment & Trade* 724; V Heiskanen 'The Contribution of the Iran-United States Claims Tribunals to the Development of the Doctrine of Indirect Expropriation' (2003) 5 *International Law FORUM du droit international* 176.

[157] *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* Award on Jurisdiction and Liability, 27 January, 95 ILR(1989)183, 209; *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No ARB/99/7 (Annulment Proceedings) (1 November 2006); *Santa Elena v Costa Rica* (2000) 5 ICSID Rep 153; *Siemens v Argentina* (ICSID Arbitral Tribunal Case No ARB/02/8, 6 February 2007), *Starrett v Iran* (1983) 4 Iran-US CTR 122,155. *Parkerings – Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007; *Southern Pacific Properties (Middle East) Limited (Si) v. Arab*

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3.5.1.1 Metalclad case[158]

In this case, the Claimant was a US corporation. It purchased a Mexican corporation which had federal and state permits to build a landfill. When the company began to work on the landfill, the construction was halted because of lack of municipal permit. The company applied for the permit and resumed constructions. The permit application was denied after constructions had been completed. Operations of the landfill were made impossible due to preliminary injunction against operating it. Nineteen months later from the construction, an Ecological Decree was issued by the Governor declaring an area including the landfill site to be a Natural Area for the preservation of a rare cactus and permanently precluded its use as a landfill.

Metalclad filed a claim against the Mexican government alleging that the government's interference with operation of the landfill constituted a 'measure tantamount to expropriation' in violation of Art 1101 of NAFTA. The Tribunal found that the measures coupled with the government's representations on which the investor relied, and the lack of substantial basis for the denial of the permit, amounted to indirect expropriation.[159] Having established expropriation, the Tribunal did not examine the intentions of the Ecological decree. However, it noted that its implementation would in and of itself constitutes an act tantamount to expropriation since it had the effect of barring the operation of the landfill.[160] The findings of the Tribunals hence depended on the reliance of the investor on government's representations; the nature of government's measure and its economically harmful effects.

3.5.1.2. Biwater case[161]

In *Biwater* case, the Claimant successfully bid for the right to develop Tanzania's water and sewer infrastructure and services project. A company, City Water, was formed to manage the project. However, as a result of the Claimant's mismanagement of the project, City Water failed to generate expected income and consequently encountered extreme financial and

Republic of Egypt, (National Law), Award, 20 May 1992, 3 ICSID Reports 189; *Phelps Dodge Corp., et alt v. The Islamic Republic of Iran*, Award No. 217-99-2, 19 March 1986.

[158] *Metalclad Corp v Mexico*, ICSID Case No. ARB (AF)/97/1 Award of 30 August 2000.

[159] *Metalclad Corp v Mexico*, ICSID Case No. ARB (AF)/97/1 Award of 30 August 2000, para 107.

[160] n159 above, para 109, 111.

[161] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

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practical difficulties that prevented it from meeting its contractual obligations. Renegotiations of the deal with the government were done at the request of the Claimant. The renegotiation process failed and the government (through Water Authority) issued a notice to terminate the deal. Following such, government officials deported City Water's senior management, appointed new management, entered City Water's offices, took control of the company's assets and informed City Water staff of the changes. In pursuance of these acts, the Claimant instituted proceedings in the ICSID against Tanzania alleging a violation of Art 5 (1) of the United Kingdom – Tanzania BIT which prohibits unlawful expropriation of investor's investments.

The Tanzanian government argued that these actions did not constitute a breach of its international law obligations as the underlying project agreements allowed the state to 'take any measures necessary to ensure continuity of water supply and sewerage services'. More specifically, Tanzania argued that the investor's lack of funds prevented it from performing properly and created 'a real threat to public health and welfare'. In light of that threat, the government saw it fit to take necessary steps to regain possession and control of the investor's assets and operations.

The Tribunal considered the State's conduct 'in terms of the effect of individual, isolated acts complained of as well as in terms of the cumulative effects of individual and connected acts.'[162] The complained interferences individually and cumulatively were found to be expropriatory, in particular: the occupation of facilities; the usurpation of management; and the deportation of staff, whereas the Minister's Press Conference and withdrawal of VAT Exemptions on purchase were found to be have contributed to the expropriation element. The Tribunal reached a conclusion that cumulative effects of the complained measures were essentially to nullify Claimant's rights in the project thereby amounts to expropriation of Claimant's rights.[163]

The above two cases illustrate the application of 'effect doctrine' in distinguishing a non-compensable expropriation from indirect expropriation. The difficulty with this doctrine is that in assessing the legality of the measure, a blind eye is cast on the nature of the act. It thus

[162] n161 above, para 455.
[163] n161 above, para 519.

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creates a blur line between the effects manifesting from political risk and the failure of the government to respect due process.[164] This is particularly true when the 'effect test' is considered as the sole test to determine indirect expropriation. In the *Biwater* case the Tribunal was pressed to find a violation even in the face of Tanzania's necessity defence. Consequently, the award gave more weight to adherence to contractual obligations than Respondent's obligations to the public.

3.5.2. Police powers doctrine in practice

This doctrine argues that the character of the government's action, that is, its purpose, context and nature, are necessary in determining whether the measure amounts to an indirect expropriation.[165] The police powers doctrine shifts the focus to the needs of the host State.[166] This doctrine takes the measure's 'public purpose' as the decisive criterion. To this end, where the interference serves a legitimate purpose there will be no finding of expropriation and therefore, no compensation is due even if the severity of the interference is comparable with a direct expropriation.[167]

The term police powers can be defined from a broad perspective to a narrow perceptive. In broad terms, police powers entail 'all forms of domestic regulation under a state's sovereign powers.'[168] Essentially, any regulation which is *bona fide*, non-discriminatory and in the interests of public health, safety, morals or welfare is regarded to be within the ambit of police power.[169] The narrow definition refers to 'measures that justify state action which would otherwise amount to compensable deprivation or appropriation of property.'[170] This narrow view postulates that only measures for tax, crime and 'the maintenance of public order' fall within the police power.[171] These two formulations reflect a lack of consensus on this concept, as to whether it should be defined in broad terms or in narrow terms.

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[164] V Heiskanen 'The Contribution of the Iran-United States Claims Tribunals to the Development of the Doctrine of Indirect Expropriation' (2003) 5 *International Law FORUM du droit international* 177.
[165] n169 above.
[166] Kriebaum (n156 above) 726.
[167] Kriebaum (n156 above) 726.
[168] A Newcombe 'The boundaries of Regulatory Expropriation in International Law' (2005) 20: 1 *ICSID Review-FILJ* 20.
[169] B Mostafa 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 *Austl. Int'l L.J.* 273.
[170] Newcombe (n168 above) 20.
[171] Mostafa (n169 above) 273.

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However, despite this divergence, the importance of this concept lays in that police powers allow the state to protect, promote and maintain essential public interests. [172] The following cases reflect how the Tribunals have applied this concept in distinguishing non-compensable expropriation from compensable indirect expropriation.

3.5.2.1. S.D Myers case[173]

The Claimant was registered as a U.S company specialising in disposal of highly toxic substance (polychlorinated biphenyl (PCB)). In November 1995, Canada imposed a ban on the export of PCBs from its territory. This shattered the possibility for Claimant to export PCB and to dispose of it in its U.S plants. Canada's export ban followed from its signature in 1989 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. This Convention prohibited the export and import of hazardous wastes to and from states that were not a party to the Convention. The U.S. was not a party to the Convention at the time of Canada's ban. The Claimant claimed *inter alia* that the Canadian measures were "tantamount to an expropriation" and had violated Article 1110 of NAFTA.

In its submissions before the NAFTA Arbitration Tribunal, Canada argued that the measure was justified and made in good faith as the government believed that PCBs imposed significant danger to health and the environment especially when exported without proper assurances of safe transportation and destruction.[174]Furthermore, Canada claimed that, even if the measure were to have violated Article 1106, the Article's exception applies because it is a measure 'necessary to protect human, animal or plant life or health or was necessary for the conservation of living or non-living exhaustible natural resource.'[175]

In analysing the facts, the Tribunal considered the real intentions of Canada, that is, the purpose of the government measure. To this end, it concluded that there was no legitimate reason to introduce the ban; rather the motive was protectionist, that is, to keep the Canadian industry strong in order to assure a continued disposal capability. It however dismissed the claim of expropriation on the basis that the government measure was temporary and Canada

[172] Newcombe (n168 above) 20.
[173] *S. D. Myers Inc. v. Canada*, Partial Award, 121 I.L.R. 72 (NAFTA Ch. 11 Arb. Trib. 2000).
[174] n173 above, para 152.
[175] n173 above, para 155.

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did not realize any benefit from the measure. It was thus a delayed opportunity not an 'expropriation' case.[176]

3.5.2.1. Saluka case[177]

Investicnía Poštovní Banka (IPB) was one of the four major banks in Czech Republic. Nomura Group acquired shares in IPB as portfolio investor. A special purpose vehicle called Saluka was established for the purpose of holding share in IPR. By mid-1998, the Czech banking sector was in serious difficulties due to various reasons. IPB and three other major banks also faced these financial difficulties. The Czech Government embarked on a privatisation process and offered financial help to other major banks to overcome their difficulties. This help was not extended to the Claimant bank. Following government inspections and audit, IPB went under forced administration.

On the basis of government's actions Saluka filed a claim under the UNICITRAL Rules alleging, *inter alia*, a violation of Art 5 of the Netherlands- Czech and Slovak Federal Republic BIT (1991). Specifically, the Claimant alleged that it was deprived of its shares in IPB by the government's intervention which culminated in a forced administration of IPB. It contended that these measures were not taken for public benefit; were discriminatory and not accompanied by just compensation.

The government justified its action on the basis that the stability of the banking sector was being endangered by the deficiency of the bank. In addition, it posed a threat to other banks where it was a major shareholder with decisive controlling influence. Given this critical financial condition and the bank's inability to remedy the crisis, it was necessary to introduce forced administration.

The Tribunal lamented the lack of precision in international law in identifying with precision regulations which are considered to be within the 'police powers' ambit and thus non-compensable.[178] Faced with this difficulty, it analysed the context which an impugned

[176] n173 above, para 287 – 288.
[177] *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006, Permanent Court of Arbitration [PCA].
[178] n177 above, paras 263 264.

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measure was adopted. It found that the 'forced administration' measure was valid and permissible regardless of the effects to Claimant's investment.[179]

The above case reflects regulatory measures that are taken for a legitimate public purpose and are not discriminatory are not compensable. The police power doctrine is an objective and transparent standard which explores the nature and context of a government measure. Such an analysis is essential in unveiling disguised purposes as was done in the *S.D Myers* case where the Tribunal indicated that the measure was motivated by protectionism intents rather than environment concerns.

3.5.3. Balanced approach

This approach seeks a reconciliation of investor's interests and that of the State's. It particularly subjects the complained measure to proportionality inquiry, specifically that where the effect is not proportionate to the objective sought, measure is expropriatory and compensation is payable.[180] This approach thus establishes a relationship between effect and purpose. This approach has been heavily borrowed from jurisprudence of European Court of Human Rights.[181] However, the balanced approach has gained populace amongst scholars, who have initiated various models to this approach.[182]

3.5.3.1. Tecmed case[183]

Tecmed was a Spanish company, which in 1996 acquired a hazardous waste landfill in Mexico through Mexican Cytrar, its subsidiary. It was to be granted a ten year authorisation for that purpose by the Mexican authorities. However, a local division in charge of Mexico's national policy on ecology and environmental protection issued a one-year permit to Cytrar, which could be extended every year at the applicant's request 30 days prior to its expiration. The local division however refused to extend the permit in 1998.

[179] n177 above, para 276.
[180] *LG&E v Argentina* (ICSID Arbitral Tribunal Case No ARB/02/1, 3 October 2006); *Feldman v Mexico* (2003) 7 ICSID Rep 341; *Tecmed S.A. v. United Mexican States*, ICSID No. ARB(AF)/00/2, Award, 29 May 2003.
[181] *Matos e Silva, Lda v. Portugal* App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573, (1996); *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9 (1986).
[182] U Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *J. World Investment & Trade* 726; S Olynyk 'A Balanced Approach To Distinguishing Between Legitimate Regulation And Indirect Expropriation In Investor-State Arbitration' (2012) 15 *Int'l Trade & Bus. L. Rev*. 270
[183] *Tecmed SA v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award (29 May 2003).

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On this basis Tecmed argued that the refusal of Mexican authority constituted indirect expropriation of its assets and a breach of Spain-Mexico BIT. The Tribunal in order to determine whether the regulatory measure complained off amounted to expropriation, it examined whether the measure was proportional to objective sought. It found that the situation prevailing in the region did not justify an intervention by the government as it posed no 'serious emergency, social crisis or public unrest.'[184] Weighing this with the deprivation of the economic value of the investment, the Tribunal concluded that the interference amounted to indirect expropriation as the measure taken was not proportional to the objective sought.

The *Tecmed* case utilised the proportionality test, as a methodological approach in determining whether an expropriation has occurred. In essence it utilises proportionality as a tool to distinguish between compensable indirect expropriation and a non-compensable regulation. Where the objectives are disproportionate to purpose sought to be achieved, the measure is expropriatory thereby compensable.

3.6. Evaluation of the sole effect doctrine versus the police powers doctrine in arbitral practice

The above discussions have highlighted that the 'sole effect' and 'police powers' approaches are competing approaches whereas the balanced approach seeks to link the two. The 'sole effect' emphasises on protecting the investor whereas the 'police powers' doctrine considers the needs of the State. These needs are tested and tried through subjecting them to non – discrimination and arbitrariness tests. Consequently, this doctrine is objective and transparent. However, on its own, the doctrine is insufficient to establish non-compensable expropriation; rather it has to be complemented by other criteria such as proportionality and non-discrimination.[185] The balanced approach is an improvement compared to the extreme approaches of sole effect and purpose approaches. For the purposes of this present study, the balanced approach will be used to determine if the indigenisation measure in Zimbabwe are first expropriatory and secondly compensable. This doctrine is preferred in light of global trends towards sustainable investment policies where investment policies strive to create

[184] n183 above, para 133.
[185] *Azurix Corp v Argentina Republic*, ICSID ARB/01/12, Award, 14 July 2006 310.

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synergies with States' wider economic development goals or industrial policies.[186] A balanced approach as compared to sole effect and purpose approach is accommodative of such global trends.

3.7. Conclusion

This chapter has discussed how non – compensable expropriation is distinguished from compensable indirect expropriation in international law. It revealed that expropriation law is still grappling with the issue of how to distinguish non-compensable expropriation from indirect expropriation. Customary international law asserts that certain measures that are adopted within police powers of States even when they deprive the investor are non – compensable. However, there is discord on defining the 'police power' concept. IIAs have attempted to solve this discord by incorporating CIL provisos and subject these measures to tests of non – discrimination; arbitrariness and proportionality in some cases. Arbitral practice sheds less light on the distinction; rather the distinction is depended on the adopted approach, either 'effect' based or 'police powers' or balanced approach. To this end, it can be concluded with certainty that international law is yet to identify with precision the measures that are expropriatory but are non – compensable. In light of the above discussions, Chapter 4 will discuss the indigenisation and empowerment laws in Zimbabwe.

[186] UNCTAD *Investment Policy Framework for Sustainable Development* (2012) 5 – 6.

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Chapter 4

Indigenisation and economic empowerment laws in Zimbabwe

4.1. Introduction

Zimbabwe's legal system is shaped by the legacy of colonialism. This underlying history has influenced the country's social; political and economic policies. Indigenisation is one of those policies which were influenced by colonialism, in this context, as a tool to realign historical imbalances brought by colonialism. To create an understanding of the state of play on indigenisation measures in Zimbabwe, this Chapter explores two main components of the study, namely: a discussion of the indigenisation and economic empowerment laws in Zimbabwe and the evaluation of these laws.

4.2. Legal framework of Indigenisation and economic empowerment measures in Zimbabwe

This part of the discussion commences with Zimbabwe's international obligations under the BITs and IIAs it is a party to. It then proceeds to briefly explore the constitutional provisions relating to indigenisation and economic empowerment measures. Lastly, it discusses the indigenisation and economic empowerment laws during the colonial period (1890 – 1980) and post-independence era (1980 – present).

4.2.1. Zimbabwe's international obligations

At the time of writing, Zimbabwe is a party to thirty BITs and of which six with the following countries are in force: China, Czech Republic, Denmark, Germany, the Netherlands and Switzerland.[187] These six BITs provides for both direct and indirect expropriation.[188] These treaties are broadly crafted. They do not define expropriation, its characteristics, measures and behaviours that amount to expropriation. However, it has been recognised that the expropriation clauses 'imports into a treaty the customary international

[187] http://unctad.org/Sections/dite_pcbb/docs/bits_zimbabwe.pdf (accessed 01 April 2014).
[188] Art 5 of Zimbabwe – Czech Republic (1999); Art 6 of Zimbabwe – Netherlands (1998); Art 4 (2) of Zimbabwe – Germany (2000); Art 5 of Zimbabwe – Denmark (1999); Art 4 (1) of Zimbabwe – China (1998) and Art 6 of Zimbabwe – Switzerland (2001).

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law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.'[189]

BITs are international agreements which establishes terms and conditions on which investors of one State can establish businesses and investment in the territory of another State. They are aimed at establishing a stable international legal framework to facilitate and protect investment. In more explicit terms, their purpose is two-fold, that is, to provide insurance for investment exporting countries against expropriation or other arbitrary treatment of investments, and to allow developing nations to send a signal to the global community that they not only welcome foreign investment but will also facilitate and protect certain foreign ventures.[190] A distinctive feature of many BITs is that they permit an investor whose rights under the BIT have been violated to sue in international tribunals such as International Centre for the Settlement of Investment Disputes (ICSID), rather than suing the host State in its own courts.

The obligations imposed by the BITs are on the Contracting Parties, that is, the Host States. An infringement of any obligation gives rise to a legal claim by the investor against the host state. The traditional BITs do not impose obligations on the investor[191] and in the case of Zimbabwe, the BITs to which it is a part to are not an exception. Therefore, in the context of this study, Zimbabwe has international obligations to respect the provisions of the BITs it signed and ratified which include an obligation to pay compensation for all expropriations.

4.2.2. Constitutional provisions governing indigenisation and economic empowerment measures

Indigenisation measures which the current study is exploring were enacted in 2008. At that time Zimbabwe was governed by the Lancaster House Independence Constitution of 1980 (as amended). It contained a Bill of Rights which however, did not specifically provide for indigenisation and economic empowerment measures.

[189] *Saluka v Czech Republic* (UNCITRAL Arbitral Tribunal, 17 March 2006) para 253; See also Art 31 (3) (c) of the Vienna Convention on the Law of Treaties which allows tribunals to refer to state practices and rules of international law in interpreting treaties.
[190] WM Reisman & RD Sloane 'Indirect Expropriation and its Valuation in the BIT Generation' *The British Year Book of International Law (*2003) 116.
[191] Art 13 – 15 of SADC Model BIT (2012) which provides for obligations to the investor such as protection and respect of human rights, environment and labour.

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The new Constitution of 2013, however, recognises the adoption of measures by government to facilitate empowerment of its citizen. This in terms of s14 (1) of the Constitution is a national objective which the government endeavours to fulfil. Further, s56 (6) recognises that the government can take legislative and other measures with the view of promoting equality to the groups or classes of persons who previously suffered unfair discrimination. Therefore, empowerment of Zimbabwean citizens is now a constitutional mandate. However, for the purposes of this study, the constitutionality of the indigenisation laws and regulations is not addressed.

4.2.3. Economic disempowerment laws during the colonial era (1890 – 1980)

The 13th of September 1890[192] marked the effective colonial occupation of Zimbabwe through the British South Africa Company (BSAC). The BSAC was a mercantile company incorporated on 29 October 1889 by a Royal Charter given by Lord Salisbury, the British Prime Minister, to Cecil John Rhodes. The Charter empowered the BSAC to, *inter alia*, make laws, subject to the approval of Britain, and to maintain a police force in the newly acquired territory.[193]

The administration of BSAC over Rhodesia came to an end with the granting of Responsible Government to the territory by the British Government on 13 September 1923. This saw the government enacting various pieces of legislation which were racially biased and which excluded the blacks from meaningfully participating in the economic activities of the country. It reduced the blacks to mere labourers in the mining; agriculture and manufacturing sectors. Race, thus, became a determinant factor in socio-economic and political participation. The following are some of the pieces of legislation that perpetrated and furthered racial divide; inequalities and suppressed emergence and growth of indigenous businesses during the colonial era in Zimbabwe: Pass Laws of 1902; Land Apportionment Act of 1930; Factory Act No.20 of 1948 (Chapter 218) Companies Act No. 47 of 1951 (Chapter 190); Native Land Husbandry Act of 1951; Urban Registration and Accommodation Act of 1954; Control of Goods Act No. 12 of 1954; Second Hands Goods Act; Land Tenure Act of 1965; Grain Marketing Act 20 of 1966; Income Tax Act No. 5 of 1967 (Chapter 181); Liquor Act No. 9

[192] This is the day the British Union Flag (Union Jack) was flown at Fort Salisbury present Harare.
[193] Article 10 of the Charter read: '…the company shall to the best of its ability preserve peace and order in such manners as it shall consider necessary and may with that object make ordinances to be approved by [the British] Secretary of State, must establish and maintain a force of Police.'

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of 1974 and the Regional, Town and Country Planning Act No. 22 of 1976 (Chapter 241). Some of these statutes will be discussed below.

The Land Apportionment Act of 1930 and the Land Tenure Act of 1965 were enacted pursuant to the 1925 Morris Carter Lands Commission which recommended a separation of blacks and white until such a point when the blacks have become civilised.[194] These pieces of legislation ushered measures which saw the whites taking about 18 million hectares of prime and fertile land and dispossessing the blacks in the process. The low-laying regions of land were given to the blacks and in most cases; it was arid, tsetse-fly infected and unsuitable for meaning agricultural activities. At that time, the blacks constituted up to 95.6 % of the population and were allocated 6 hectares per household of six people.[195] Blacks who could afford to purchase land were allowed to purchase up to 125 hectares of land in African Purchase Areas, mainly in regions adjacent to Communal Areas whereas a large-scale white commercial farmer had an average of 2 500 hectares of land.[196]

The Native Land Husbandry Act of 1951allowed white farmers to breed boundless stock of cattle whereas the black communal farmers were limited to breed only six head of cattle per family. The Companies Act No. 47 of 1951 (Chapter 190) had complex requirement procedures for registration of a company which proved to be an inhibiting factor. In particular, it prohibited one person from opening a company and did not allow a director to borrow money to pay for the allotted shares. The Liquor Act of 1974, prohibited businesses operating bottle stores from allowing patrons to consume beer at the premises. A business would lose a license for such. The Control of Goods Act of 1954 imposed quantitative restrictions on imports to Zimbabwe whereas the Second Hand Goods Act prohibited the imports of second hands clothes and other materials. The Grain Marketing Act of 1966 divided the country into agricultural zones and prohibited the movement of grain from one part of the country to another. Most importantly, farmers and producers were required to sell the maize and wheat only to the Grain Marketing Board or to large commercial millers or their agents.

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[194] L Mazingi and R Kamidza *Tearing Us Apart: Inequalities in Southern Africa* 324 http://www.osisa.org/sites/default/files/sup_files/chapter_5_-_zimbabwe.pdf (accessed 20 March 2014).
[195] Mazingi & Kamidza (n194 above) 324.
[196] Mazingi & Kamidza (n194 above) 325; A Cheater 'The Ideology Of 'Communal' Land Tenure in Zimbabwe: Mythogenesis Enacted?' (1990) 60 :2 *Journal of the International African Institute* 188.

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Furthermore, the Regional, Town and Country Planning Act No. 22 of 1976 (Chapter 241) empowered local authority to make regulations which regulated the activities of both the formal and informal businesses. They also gave local authorities control over land use. These were often used to restrict the activities of small businesses. This Act also provided for the delimitation and allocation of residential areas in accordance with race, for instance, Northern suburbs were for whites whereas the southern where industries were located were for blacks. Moreover, the zoning regulations restricted businesses to operate in certain areas. Some areas were designed as residential only, implying that it was illegal to operate businesses in such areas. The business designated areas were expensive for blacks and not strategically positioned in relation to their clientele.[197] The Income Tax Act No. 5 of 1967 introduced taxes such as the as the hut, cattle and dip-tank taxes. Failure to pay the taxes attracted an imprisonment penalty. These tax obligations were burdensome on the blacks and the sanction for non – compliance was heavy. Because of heavy penalties, blacks without money to fulfil their tax obligations were left without an option except to provide their services as cheap labourers in the mines and the farms.

The net effect of these laws and the general legal framework made it impossible for the blacks to be involved meaningfully in the economy of the country. Their participation was inadvertently limited to provision of labour, mainly to fulfil the tax obligations. It is thus on this background that the Government endeavoured after independence in 1980, to amend or repeal these laws so as to promote the development of small scale indigenous businesses.

4.2.4. Indigenisation and economic empowerment laws in the post-independence era (1980 – present)

During the first decade of independence, the new government was reluctant towards indigenisation. Its reluctance was mainly attributed to the policy of reconciliation adopted by the government;[198] the socialist political ideologies[199] and the Constitutional restraints.[200]

[197] K Kapoor, D Mugwara and I Chidavaenzi 'Empowering Small Enterprises in Zimbabwe' (1997) *World Bank Discussion Paper No. 379* 26 <http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-4074-3> (accessed 07 April 2014); F Maphosa 'Towards the Sociology Of Zimbabwean Indigenous Entrepreneurship.' (1998) XXV (ii)*Zambezi* 184-185 .

[198] B Raftopoulos 'Fighting For Control: The Indigenization Debate In Zimbabwe' (1996) 11: 4 *Southern Africa Report.*

[199] AT Mangwende (1994) 'The Legislature and the Indigenisation of the Zimbabwean Economy: Problems and Prospects; Experiences of the Parliamentary Select Committee on the Indigenisation of National Economy' Paper presented on National Workshop on *The Indigenisation of Zimbabwean Economy: Problems and*

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However, from the 1990s, indigenisation issues were dealt at lobbyist level with groups such as the Indigenous Business Development Centre (IBDC) and the Affirmative Action Group (AAG). These groups demanded a greater participation of the blacks in ownership of the economy, though, *inter-alia*, the deregulation of laws and procedures hindering black enterprises; redistribution of land and white-owned wealth.[201] Such demands were made at the backdrop of continual racial inequalities. For instance in 1991, 50% of the population received less than 15% of total annual incomes whereas the richest 3% of the population received 30% of total incomes.[202]

In response to the indigenisation calls, a Parliamentary Select Committee was set up in 1991 to examine the adequacy of necessary and supportive legislation to indigenize the economy; examine ownership and review of equity structure in all sectors of the economy; examine all matters pertinent to the successful implementation of an indigenisation policy and to report its findings to Parliament. In 1993, the Committee identified various pieces of legislation whose repeal and / or amendment would facilitate black participation in the economy.

However, policy deficiency resulted in indigenisation being perceived in a narrow sense with limited focus on the disposal of state owned enterprises, buying of shares and takeover of existing companies.[203] To address this anomaly the United Nations Development Programme and the Government of Zimbabwe entered into a technical assistance project agreement on 'Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97.' This project assisted the government in drafting policy framework for indigenization, which was finally adopted in 1998. In 1999, a Trust Deed was prepared and lodged for the National Investment Trust (NIT) which had been set up to warehouse shares for indigenous Zimbabweans.

The recommendations of the Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97 formed a useful base for the drafting of the Indigenisation and Economic Empowerment Act (IEEA) to anchor the Indigenisation Policy. The contents and parameters of the Indigenisation Policy are discussed below.

Prospects jointly organized by Institute of Development Studies (IDS) University of Zimbabwe and Organisation for Social Science Research in Eastern and Southern Africa (OSSREA), 18-19 August 1994.

[200] Section 38 (1) of the Lancaster Constitution provided for twenty members who were elected by white voters registered on the White Roll for twenty white constituencies. These were whites, mainly from the Rhodesia Front Party and they ensured that the laws protected their property rights.

[201] B Raftopoulos 'Fighting For Control: The Indigenization Debate In Zimbabwe' (1996) 11: 4 *Southern Africa Report* 3.

[202] n201 above.

[203] *Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97* Commissioned by UNDP 8.

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4.2.5. Indigenisation Policy

The Indigenisation Policy was adopted in 1998 and revised in 2004. It broadly aimed to bringing about economic justice between races in Zimbabwe and to democratise the economy. These objectives, amongst others, were to be achieved through strategies such as: creating an enabling macro-economic environment; industrialisation of the economy; land redistribution; review of the laws that constraints indigenisation and increasing indigenous private investment in the economy. The increase of indigenous private investment in the economy was to be achieved through the establishment of new indigenous enterprises and new joint ventures, buying of shares in the existing non-indigenous companies privatisation of state enterprises, takeovers, employee stock ownership schemes, subcontracting and outsourcing. The Department of State Enterprises and Indigenisation was charged with co-ordinating, monitoring and evaluating the implementation of this Indigenisation Policy.

This policy had its shortcomings. It lacked the implementation mechanisms and most importantly it did not create legal obligations to the parties involved. As a result, laws were needed to anchor it. These shortcomings coupled with the recommendations of the Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97 necessitated the enactment of the Indigenisation and Economic Empowerment Act. For all intents and purposes, the Act operationalize this Policy.

4.2.6. Indigenisation and Economic Empowerment Act [Chapter 14:33]

This Act came into force in April 2008. It is aimed at providing support measures for the further indigenisation of the economy and economic empowerment of indigenous Zimbabweans. The main objective of the Act is to endeavour that at least 51% of the shares of every public company and any other business is owned by indigenous Zimbabweans. This fifty-one percentile rule also applies to specific commercial undertakings; namely: mergers; restructurings; acquisition of a controlling share in a company; de-merger or unbundling of a business; relinquishment of a controlling share in a business; and any proposed foreign investment requiring a license under the Zimbabwe Investment Authority Act, Chapter 14:30.[204] Procurement by government has to adhere to the 51% rule, in that the government must procure at least 51% of its goods and services from businesses in which indigenous Zimbabweans have a controlling interest.

[204] Section 3 of the Indigenisation and Economic Empowerment Act.

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The beneficiaries of the Act are both natural and legal persons who prior to 18th of April 1980 were disadvantaged by unfair discrimination on the grounds of race and / or descent.[205] The benefactors are all public companies; private companies; associations; syndicates or partnerships registered in terms of the Companies Act [Chapter 24:03] or otherwise.[206]

It also provides for the establishment of the Indigenisation and Economic Empowerment Board (IEEB). IEEB is established for the purpose of advising the Minister and administering the Fund.[207] This Fund is established in terms of the same Act to finance indigenisation and empowerment transactions and provide assistance to indigenous Zimbabweans in, *inter alia*, financing of share acquisitions; warehousing of shares and capacity-building.[208]

4.2.7. Indigenisation Regulations

In pursuance of s3 (1) of the Act, various regulations were passed to primarily empower the Minister of Indigenisation in implementing the provisions of the Act. At the time of writing the following Regulations were in force: (i) Indigenisation and Economic Empowerment Act (General) Regulations 2010 Statutory Instrument 21/2010 amended by Statutory Instrument (SI) 116/2010; 34/2011; 84/2011and 66/2013; (ii) Indigenisation and Economic Empowerment Act (General) Regulations 459 of 2011 and (iii) Indigenisation and Economic Empowerment Act (General) Regulations General Notice 280 of 2012. These Regulations are discussed below.

4.2.7.1. Indigenisation and Economic Empowerment (General) Regulations, 2010

These regulations provide for the value threshold of business that has to comply with indigenisation quota. It categorically states in s4 (1) that every business with a net asset value of five hundred thousand United States Dollars (US$ 500 000) and is non-indigenous compliance, must submit an indigenisation plan to the Minister stating how it intend to comply with the 51% requirement. The same threshold value is applicable to the various commercial undertakings aforementioned.[209] The period of achieving indigenisation is five years from the date of operation of these regulations,[210] or within five years from the

[205] Section 2 of the Act on the definition of 'indigenous Zimbabwean.'
[206] Section 2 of the Act on the definition of a 'business.'
[207] Section 8 of the Act.
[208] Section 12 (2) of the Act.
[209] Section 6 to section 9 of the Regulations (2010).
[210] These regulations came into force on the 1st March, 2010.

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commencement of the business concerned. Longer periods of complying are permissible where there is a social or economic objective to be achieved.[211]

The Regulations also provide ways in which a company can comply with the 51% quota. These include transfer of shares;[212] employee share ownership scheme;[213] Management Buy Outs[214] and community share ownership scheme or trust.[215] Under the employee share ownership scheme and Management Buy Outs the company may dispose up to 28% of the company shares to its employees and a maximum of 5% to managerial staff. The Community Share Ownership Schemes can only be utilised by qualifying businesses, that is, companies engaged in exploiting the natural resources of any community. The minimum shares to be donated to the community share scheme are ten percent of the net asset value of the business in question.[216]

The Regulations, further, provide for sectors that are reserved for indigenous Zimbabweans. These include: passenger buses, taxes and car hire services; milk processing; retail and wholesale trade; barber shops, hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; tobacco grading and packaging; tobacco processing; bakeries; primary production of cash crops and advertising agencies.[217] Existing foreign investors in these sectors are expected to apply for an indigenisation compliance certificates. Failure to comply with the provisions of the Regulations attracts penalties such revocation or suspension of an operating license;[218] a fine not exceeding level twelve (US$2 000) or imprisonment for a period not exceeding five years or both.[219]

[211] Section 3 (a) of the Regulations (2010).
[212] Section 3 of the Regulation (2010).
[213] Section 14 of the Regulation (2010).
[214] Section 14A of the Regulation (2010).
[215] Section 14B of the Regulation (2010).
[216] Section 14B (5) of the Regulations (2010).
[217] Third Schedule of the Regulations (2010).
[218] Section 9A (4) of the Regulations (2010).
[219] See s 4(4) for failure to return a duly completed form; s4 (7) for making false statements; s5 (3) for failure to furnish any additional information that the Minister requires and s9 (4) for failure to obtain approval from the Minister to invest in a reversed sector.

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4.2.7.2. Indigenisation and Economic Empowerment Act (General) Regulations General Notice 459 of 2011

This Notice applies to the manufacturing sector. The minimum asset value is of or above one hundred thousand dollars (US$100 000). Period of compliance is four years, in which the indigenisation quota of 51% is achieved as follows: twenty-six *per centum* (26%) for year one; thirty-six *per centum* (36%) by year 2; forty-six *per centum* (46%) by year 3 and fifty-one *per centum* (51%) by year 4. This is the only sector in which the indigenisation quota can be staggered, albeit because of its sensitive nature.

4.2.7.3. Indigenisation and Economic Empowerment Act (General) Regulations General Notice 280 of 2012

This Notice provides for the net asset value and maximum period for business to indigenise in the Finance; Tourism; Education and Sport; Arts, Entertainment and Culture; Engineering and Construction; Energy Services; Telecommunications; Transport and Motor Industry Sectors.

For the financial sector, the net asset value for businesses in this sector is as prescribed by the Reserve Bank. Shares to be disposed to indigenous Zimbabweans are 51% and compliance period is one year. Sectors such as education; telecommunications; electricity; engineering and construction and education and sports, the minimum asset value are one dollar (US$1) and the compliance period is one year. In the tourism sector, the net asset value for a five star hotel is ten million dollars and the period of compliance is one year.

4.3. Current state of play in Zimbabwe

Since the promulgation of the first Indigenisation Regulations in 2010, intense debate has been generated especially among writers questioning their constitutionality under the old Constitution.[220] Ink has been lost in attempts to decipher the real intentions of the Legislature;[221] discuss the impacts[222] and the possible benefits.[223] On the other hand, non-

[220] D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenisation And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask* (2011); A Magaisa *The illegality of Zimbabwe's new indigenisation regulations in the banking and education sectors*. Published July 6, 2012 http://newzimbabweconstitution.wordpress.com (accessed 17 March 2014).

[221] N Willsmer 'Commentary on Empowerment Legislation to Chamber of Mines Zimbabwe' *Executive Committee Circular* No. 21/2011 of 5 April 2011; D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenisation And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask* (2011) 1; T Chowa & M Mukuvare 'An Analysis Of Zimbabwe's Indigenisation And

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indigenous business ran to comply with the laws[224] and most notably established Community Share Ownership Schemes[225] and Employees Ownership Schemes.[226] However, at the time of writing, no one has challenged these regulations on any judicial forum and most importantly these laws have not been scrutinised in light of Zimbabwe's international obligations especially in the investment realm. Of great concern is in relation to existing foreign investors, who suddenly find themselves obliged to dispose 51% of their shares to indigenous Zimbabweans within a stipulated period or risk losing their operating licences.

4.4. Evaluation of Zimbabwe's indigenisation and economic empowerment measures

This part evaluates the indigenisation and economic empowerment measures outlined above, with a view of determining whether the measures are expropriatory and if so, whether they are compensable. This evaluation will be explored through a cumulative three-tier approach which entails first, a determination of the effects of the indigenisation measure on the investor; secondly, exploration of the purpose of these measure and lastly adjudication of whether the effects are proportional to the purpose pursued.

4.4.1. The method of evaluation on whether the measures are expropriatory and compensable

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Economic Empowerment Programme As An Economic Development Approach' (2013) 1 : 2 *Researchjournali's Journal of Economics* 1.

[222]P Munyedza 'The Impact of the Indigenous Economic Empowerment Act of Zimbabwe on the Financial Performance of Listed Securities' (2011) 37 *Business and Economics Journal 1*; B Magure 'Foreign investment, black economic empowerment and militarised patronage politics in Zimbabwe', (2012) 30:1 *Journal of Contemporary African Studies* 67.

[223]J Matunhu 'The Indigenisation and Economic Empowerment Policy in Zimbabwe: Opportunities and Challenges for Rural Development' (2012) 1:2 *Southern Peace Review Journal* 1; T Chowa & M Mukuvare 'An Analysis Of Zimbabwe's Indigenisation And Economic Empowerment Programme As An Economic Development Approach' (2013) 1: 2 *Researchjournali's Journal of Economics* 1*;* T Murombo 'Law and the indigenisation of mineral resources in Zimbabwe: Any equity for local communities?' (2010) 25 *SAPL* 568.

[224] As of end December 2013 a total of 1 471 indigenisation plans were processed by the National Indigenisation and Economic Empowerment Board (NIEEB). From December 2013 to February 2014 date, NIEEB had processed 1 311 applications from investors in the reserved sectors and had issued 578 compliance certificates. W Gwatiringa *Address to Parliament Thematic Committee on Indigenisation* of 6 February 2014 http://www.nieeb.co.zw/index.php/media-center/news/154-news (accessed 19 March 2014).

[225] As at February 2014, 61 trusts were registered and 16 were funded and operational across the country. A total of US$116.4 million was pledged to the trusts by several companies across the country and of that amount; about US$30 million was paid to the trusts. W Gwatiringa *Address to Parliament Thematic Committee on Indigenisation* of 6 February 2014 http://www.nieeb.co.zw/index.php/media-center/news/154-news (accessed 19 March 2014).

[226] Companies such as BAT Zimbabwe, Schweppes Zimbabwe, Blanket Mine, Portland Holdings, Freda Rebecca Gold Mine and Meikles Limited have operational employee share ownership schemes.

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In the light of the findings in Chapters 2 and 3 to the effect that there are competing and equally aggressive approaches to indirect expropriation and non-compensable expropriation, respectively, this study adopts a contextual and balanced approach in evaluating the indigenisation and economic empowerment measures in Zimbabwe. Specifically, this approach entails an examination of the following: first, the effects of the measure on the investor, secondly, the purpose of the measure and lastly, the proportionality of the measure. The first requirement of effect is meant to determine whether the indigenisation measures are expropriatory, whereas the second and third requirements are meant to determine whether the measure is compensable. When the first requirement is met and expropriation is established, the second leg of the approach is to determine the purpose of the indigenisation measures and its proportionality to the effects of the measure on the investor and the aim sought to be achieved by expropriatory measures. Where the purpose is proportional to the effects on the investor, the expropriation is deemed to be non-compensable and the converse is true.

This method is adopted as it endeavours to fill the gaps identified in Chapter 2 which are created by absolute use of one approach and the difficulties highlighted in Chapter 3 of distinguishing non-compensable expropriation from indirect expropriation. For instance, where the effect approach is applied; a disposal of 51% of shares is undoubtedly expropriatory and the converse is true when the purpose approach is applied. Since both approaches are selfish in their own respects, a balance can be reached by incorporating the approaches thereby examining the measures from a contextual and balanced approach. Various arbitral awards,[227] treaties[228] and scholars[229] support this balanced approach, with the exception that the 'balance' is differently put.

In the present study, the adopted approach is exceptional to the various proposed balanced approaches in that the purpose of the measure is applied to determine whether a measure is

[227] n180 above.
[228] Annex 10-D (4) of the *United States-Chile Free Trade Agreement*, and Annex 10-B (4) of the *United States-Morocco Free Trade Agreement.* Annex B 13(1)(b) Canadian Model BIT (2004).
[229] U Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 J. World Investment & Trade 717; S Olynyk '*A Balanced Approach to Distinguishing Between Legitimate Regulation and Indirect Expropriation in Investor-State Arbitration'* (2012) 15 *Int'l Trade & Bus. L. Rev*. 254; B Kingsbury & SW Schill 'Public Concepts To Balance Investors' Rights With State Regulatory Actions In The Public Interest – The Concept of Proportionality' in S W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 75.

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compensable or not whereas for instance in Kriebaum's[230] approach, the aspect of proportionality is brought in to determine the appropriate compensation. For the avoidance of doubt, the adopted approach is used to determine whether an expropriation has occurred and whether it is compensable, in contrast to the laid down requirements of the mentioned BITs which are used to determine whether the expropriation is lawful.

4.4.2. Whether the indigenisation measures are expropriatory: the effects of the measure to the investor

The standard of determining existence of expropriation is 'substantial deprivation.'[231] This entails interference with the use, management and enjoyment of an investment.[232] In other words, the measures complained of should be of a certain effect on the use, management, control or enjoyment of the investment by the investor. The element of control in determining expropriation was discussed in the *Saint Elena* case wherein the Tribunal opined that one of the key steps in determining whether expropriation has taken place is identifying 'the extent to which the measures taken have deprived the owner of the normal control of his property.'[233] In *Azurix*,[234] a case of expropriation was dismissed because the measure complained of did not affect the complainant's ownership of the shares in the company. Similar findings were made in *CMS Gas Transmission*[235] and *Feldman* case.[236] Loss of control in regulatory expropriation must approach a level of a direct physical taking.[237] For instance, interference with the daily operations of an investment is a quasi-physical taking, in that without the ability to direct the daily operations or select the personnel who operate the investment, one can hardly be said to hold even physical possession of the investment in question.

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[230] U Kriebaum 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 J. World Investment & Trade 717.
[231] *Metalclad Corporation v United Mexican States*, ICSID Case No ARB (AF)/97/1, Award 30 August 2000 103; *Pope and Talbot v Canada*, Interim Award, 26 June 2000 69.
[232] *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States* ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, pp. 39-67 at 59; *Starrett Housing Corp. v. Iran*, 4 Iran-United States Cl. Trib. Rep. 122, 154 (1983).
[233] *Campania del Desarrollo de Santa Elena, S.A. v. Costa Rica* ICSID Case No. ARBI96/1, Final Award, para. 76.
[234] *Azurix v Argentina* ICSID Case No ARB/0I /12, 14 July 2006).
[235] *CMS Gas Transmission Company v Argentina* ICSID Case No. ARB/01/ 8, para 263 – 264.
[236] *Feldman v. United Mexican States* ICSID Case No. ARB(AF) /99/1.
[237] *Pope and Talbot v Canada, Interim Award, 26 June 2000.*

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In *casu*, the indigenisation measures seek a relinquishment of 51% of shares from the investor in favour of indigenous Zimbabweans. This loss of shares can be viewed from two angles, namely: aggregate loss and cumulative loss. An aggregate loss arises where an indigenous Zimbabwean buys an aggregate 51% shares from the foreign company with the effect of dispossessing the foreigner as the majority shareholder. In cumulative loss, numerous Zimbabweans in form of individuals and share schemes and in varying proportions acquire the 51% shares in the company. In the first scenario, the loss is outright and physically evident, whereas in the second scenario, *prima facie*, an individual investor may not necessarily lose control over the company; rather, the numbers of shares are diminished.

It is submitted that in the second scenario, though at face value, control or ownership of shares is retained, the cumulative effect is that the investors are substantially deprived of their shares. The different form of disposing the shares, that is, Employee Share Ownership Schemes; Community Share Ownership Schemes and selling, taken together has the effect of depriving the investor ownership and control of the investment. The second scenario gives rise to a case of creeping expropriation,[238] as a singular action such as Community Share Ownership Scheme, which requires a donation of 10% of shares to the same, viewed alone is insufficient to give rise to expropriation. This is so because arbitral awards require a substantial deprivation of the investment, wherein a disposal of 10% does not give rise to such. Therefore, the various forms of disposing the shares as provided in the Regulations cumulatively have the effect of disposing the investor ownership and control of the investment.[239]

The economic effects of the measures are also relevant, however, not as the sole determinant factor but rather as a contributory factor.[240] The Regulations define the term *"dispose"* as meaning to sell, donate or otherwise dispose. The 51% of the shares can be disposed of through transfer upon purchase or donation either in an employee share scheme or community share scheme. On the face of it, the investor will not be economically harmed because the beneficiaries will be buying those shares at the price prevailing at the market. However, even where the investor is selling them at market price, he will suffer economic

[238] n 54 above.
[239] Section 3 (transfer of shares); s14 and s 14A (Employee share ownership scheme and Management Buy Outs) and s14B (Community Share Ownership Scheme) of the Indigenisation and Economic Empowerment (General) Regulations, 2010 Statutory Instrument 21 of 2010 (as amended).
[240] *Telenor Mobile Communications A.S. v Republic of Hungary* ICSID Case No. ARB/04/15 para 64 – 65.

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harm because the market price will not compensate for anticipated profits arising from the shares. The investor's loss is to the extent of the 51% of shares disposed. A casual link exists between the loss of profit and the measure since without the shares, the investor will not receive dividends anticipated from the shares before they were disposed.[241] To this end, it is argued that there is economic harm perpetrated by the indigenisation measures regardless of the shares being disposed at market value. The severity of the economic impact is, however, determined on a case by case basis, depending on the facts and evidence presented to the Tribunal. Furthermore, the issue of loss of profits is addressed fully when determining the appropriate compensation.[242]

In the circumstances where the value of shares were to plunge at the market due to various reasons connected to the regulatory measure, such as lack of confidence by market traders, resulting at the investor suffering loss, it is argued that a claim of indirect expropriation will not suffice. These are effects which are incidental and co-incidental to the measure, not based on intentions of the State.[243] For expropriation to be established, the primary purpose of the State's conduct is to affect the investor, in this case, to depreciate the value of the shares to facilitate indigenisation or to force the investor to abandon their shares. These intentions are not evident from the case at hand; rather, the intention is to redress historical imbalances to achieve economic justice.

In a nutshell, the indigenisation measures substantially deprive the investor of the use, management and ownership of 51% of its shares. These measures substantial interfere with the investor's ownership of shares. They have the effect of displacing the foreign investor as the controller of the investment. The degree of interference is not temporary and the loss of control is irretrievable, therefore, the indigenisation and empowerment measures in Zimbabwe are expropriatory.

4.4.3. Are the indigenisation measures compensable?

[241] *Pope and Talbot Inc. v Canada* Interim Award, 26 June 2000.
[242] *Article 36 (2) of the International Law Commission's Guideline on the Responsibility of States for Internationally Wrongful Acts.*
[243]Legal Opinion of M. Sornarajah in the case of *El Paso Energy International Company v The Republic of Argentina* Case No. ARB/03/15 para 47 – 48.

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The above discussion has concluded that the indigenisation measures are expropriatory. The following discussion zeros on whether these expropriatory measures are compensable. This requires the examination of the purpose of the indigenisation measures and determination of whether they are proportional to the effects on the investor and the aim sought to be realised by the expropriatory measure.

4.4.3.1. The purpose of the measures

The purpose of the indigenisation laws is to endeavour that at least 51% of the shares in foreign owned companies are disposed to indigenous Zimbabwean within a period of five years. In simpler words, the underlying intention is to correct historical imbalances through indigenisation. Indigenisation is defined to mean deliberate actions of involving indigenous Zimbabweans in the economic activities of the country. The preparatory history of this law supports the above assertions; in particular, that the purpose of the law is to redress historical imbalances.[244]

The beneficiaries are indigenous Zimbabweans who have to prove that they suffered racial discrimination prior to the independence of Zimbabwe. The benefactors are foreign owned companies whose shareholding structure is being realigned. The law is about foreigners versus non-foreigners and not about blacks versus whites as it was in the land cases.[245] A company has no race. Rather, it is composed of shareholders who may be of different races.[246]

Some scholars[247] view the law from black and white perspective, understandably so because, the laws that perpetrated the inequalities sought to be remedied were racially discriminatory. Also, it is obvious that white persons are the ones who benefitted from these racial laws and for that reason, they feel targeted by the law. However, a closer look at the preparatory history of the Act reflects the Minister of Indigenisation's assertions and insistence that the

[244]Parliament Of Zimbabwe Hansard Vol. 34 No.15 Wednesday 26th September 2007 http://www.parlzim.gov.zw/attachments/article/119/26_September_2007_34-15.pdf (accessed 07 April 2014) pgs 57; 92; 116.
[245]Section 16 and s16A of the Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005; *Mike Campbell (Pvt) Ltd. and Others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007; *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe* ICSID Case No. ARB/05/6.
[246] *Dadoo Ltd and others* v *Krugersdorp Municipal Council* 1920 AD 530.
[247] D Matyszak *Everything You Ever Wanted To Know (And Then Some) About Zimbabwe's Indigenisation And Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid To Ask* (2011) 1.

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law is non-racial.[248] The definition of indigenous Zimbabwe carries the non-racial tone as it is broad to accommodate any person who is a Zimbabwean who was discriminated on racial grounds to be a beneficiary of the indigenisation programme. A Chinese Zimbabwean can, for example, benefit if he/she can satisfy the 'indigenous' requirement.

International law recognises the state's right to regulate for public purposes, whose parameters are only defined by the State concerned. The purposes may not be all similar in States as conditions and needs differ from one State to the other. Indeed, similar policies have been witnessed in other countries such as South Africa, Malaysia, Namibia and Nigeria. What might differ are the constructions of the laws governing these policies, the implementation periods and timing.

In investment realm, Tribunals have recognised that States have a right to regulate for public purposes meant to achieve certain goals, such as protection of environment.[249] Likewise, it is argued that Zimbabwe has the right to adopt measures for a public purpose such as empowerment measures. States enjoys a margin of appreciation over regulatory measures enacted for public purposes.[250]

4.4.3.2. Whether the measure is proportional to the objective sought to be achieved?

In assessing the proportionality of a measure, one has to consider the impacts versus the objectives. As highlighted, the impact is substantially on control of the company, that is, there is disposition of the foreign investor as the majority shareholder. The aspect of proportionality was enunciated in the Tecmed case[251] wherein the Tribunal in considering whether the acts undertaken by Mexico were to be characterized as expropriatory, examined whether such measure was proportional to the public interest and whether there was a

[248]Parliament Of Zimbabwe Hansard Vol. 34 No.15 Wednesday 26th September 2007 http://www.parlzim.gov.zw/attachments/article/119/26_September_2007_34-15.pdf (accessed 07 April 2014) pgs 57; 92; 116.
[249] *S .D. Myers, Inc. v. Government of Canada*, Partial Award, Nov. 13, 2000; *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006, Permanent Court of Arbitration [PCA].
[250] *Continental Casualty Co. v Republic of Argentina* ICSID Case No. ARB/03/9 para 181.
[251] *Tecmed S.A, v. The United Mexican States* ICSID Award Case No. ARB (AF)/00/2.

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reasonable relationship of proportionality between the charge of weight imposed on the foreign investor and the aim sought to be realised by an expropriatory measure. [252]

Proportionality is a structural concept which requires an analysis of the suitability and necessity of the measures taken and demands a balance of the means and the pursued end.[253] It further entails that where a less restrictive measure capable of achieving the same results is available, then such should be adopted. Proportionality is henceforth a 'set material limits to the interference of public authority into the private sphere of citizen'[254] and 'provides a tool to define and restrain the regulatory freedom of government.'[255]Henceforth, as a structural concept, a three-tier test is applied to determine the proportionality of the namely: (i) suitability; (ii) necessity and (iii) proportionality *stricto sensu.*

(i) Is the indigenisation measure suitable for a legitimate government purpose?

Here the question is 'whether the measure adopted by the state serves a legitimate governmental purpose and is generally suitable to achieve the purpose.'[256] The purpose of the law, as discussed earlier, is to provide for economic empowerment measures in favour of indigenous Zimbabwean. This empowerment purpose is achieved through a process of indigenisation. To achieve such purpose foreign owned companies are obliged to dispose 51% of the shares to indigenous Zimbabwean through the highlighted methods. Underscoring these laws is the need to address skewed ownership of resources in Zimbabwe.

The legitimacy of such a purpose is undeniable just as the historical imbalances in the distribution of productive resources in Zimbabwe are. The imbalances are well documented.[257] For instance, the manufacturing sector is 65% foreign owned, mining sector

[252] n251 above, para 122.
[253] S W Schill 'Public Concepts To Balance Investors' Rights With State Regulatory Actions In The Public Interest – The Concept of Proportionality' in S W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 75; X Han 'The Application of the Principle of Proportionality in Tecmed v. Mexico' *Chinese JIL* (2007) Vol. 6, No. 3, 638 – 639.
[254] J Schwarze, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law' (2003) *Rivista Trimestrale di Diritoo Pubblico* 53..
[255] M Andenas & S Zlepthig 'Proportionality: WTO Law in Comparative Perspective' (2007) 42 *Tex ILJ* 371 383.
[256] S W Schill 'Public Concepts To Balance Investors' Rights With State Regulatory Actions In The Public Interest – The Concept of Proportionality' in S W Schill (ed) *International Investment Law and Comparative Public Law* (2010) 86.
[257] L Masuko & A Sibanda *Implementing Indigenisation In Zimbabwe: Policy Choices*. Study Commissioned by UNDP and the Ministry of Economic Planning and Investment Promotion; Maphosa F (1996) Towards the

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90% foreign owned and construction sector 75% foreign owned,[258] The bulk of the indigenous population is disadvantaged in terms of ownership and control of resources. This has resulted in high poverty levels, despite a strong base of manpower development.[259] These concerns about imbalances have been raised in one way or another and measures have been adopted to redress imbalances particularly at senior levels of management in both public and private sectors. Other measures adopted by the government included, deregulation of laws[260] and promotion of small-medium enterprises through enactment of laws meant to promote such.[261] However, disequilibrium in ownership relations remains.[262] The above evidence reflects the genuine need for reforms so as to address the skewed ownership of resources in Zimbabwe.

Having established the legitimacy of the purpose, it is imperative to explore whether the measure furthers the stated purpose. The purpose of economic empowerment so as to address historical imbalances is rightfully furthered by indigenisation measures. The meaning of indigenisation is a testimony to this assertion.[263] Indigenous Zimbabweans can be deliberately involved or participate in the economy of the country if the foreign-investor divestment to the extent of 51% of its shares in the company.

(ii) Was the measure necessary?

This covers two aspects: first, whether there is a less restrictive measure and secondly, whether such alternative measure is equally effective. In essence, where a less restrictive measure exists and equally effective to achieve the same goal, there is no justification for the

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Sociology Of Zimbabwean Indigenous Entrepreneurship. (1998) XXV(ii) *Zambezi* 173; *Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97* Commissioned by UNDP; L Mazingi & R Kamidza *Tearing Us Apart: Inequalities in Southern Africa* 324 http://www.osisa.org/sites/default/files/sup_files/chapter_5_-_zimbabwe.pdf (accessed 20 March 2014).

[258] L Masuko & A Sibanda *Implementing Indigenisation In Zimbabwe: Policy Choices*. Study Commissioned by UNDP and the Ministry of Economic Planning and Investment Promotion 17 – 18.

[259] According to World Bank data, as at 2011, the poverty headcount ratio was 72.3%. http://data.worldbank.org/country/zimbabwe (accessed 08 April 2014).

[260] F Maphosa 'Towards the Sociology of Zimbabwean Indigenous Entrepreneurship' (1998) XXV(ii) *Zambezi* 173.

[261] K Kapoor, D Mugwara and I Chidavaenzi 'Empowering Small Enterprises in Zimbabwe' (1997) *World Bank Discussion Paper No. 379* http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-4074-3 (accessed 07 April 2014) ; *Zimbabwe Parliamentary Debates*, Vol 7: 5 July 1983, p. 155.

[262] K Kapoor, D Mugwara and I Chidavaenzi 'Empowering Small Enterprises in Zimbabwe' (1997) *World Bank Discussion Paper No. 379* 26 <http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-4074-3> (accessed 07 April 2014); L Masuko & A Sibanda *Implementing Indigenisation In Zimbabwe: Policy Choices.* Study Commissioned by UNDP and the Ministry of Economic Planning and Investment Promotion.

[263] Section 2 of the Indigenisation Act for meaning of 'indigenisation.'

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State to adopt a more restrictive measure.[264] In *casu*, there were no available alternative measures to achieve the economic empowerment purpose. The measures could be seen as the zenith of state transformation of a once colonised state. Since independence, various strategies have been implemented to remove traces of colonial legacy and address historical imbalances, such as africanisation; localization; land redistribution and affirmative action.[265] Of all these measures, none addressed skewed ownership of the economy. In this context, it is submitted that there are no existing less restrictive measures to pursue the objective of economic empowerment.

(iii)Proportionality *stricto sensu*

The above discussion reflected that the measure is suitable and necessary. However, to fulfil the proportionality test, it is imperative to determine that the measure is not excessive with regard to the objective pursued. This requires a balance between the effects of the state measures on the investor's ownership rights and the importance of the government purpose.[266] Where the investor bears excessive burden, the measure is not proportional to the objective sought.[267]

In *casu*, the measure is not excessive to the objective as the shares are disposed off at market value. Irreparable economic harm would have occurred if the shares were to be sold at a price lower than the market value as was done in Malaysia.[268] To this end, the investor does not bear any excessive burden. Furthermore, the transactions of shares are done through private commercial dealings, in which the investor determines the price of his shares. Such transactions can take into account the anticipated profits.

To this end, it is argued the regulatory measure of indigenisation is proportional to the objective sought. The effects of such measure are minimal, and where they are witnessed,

[264] S W Schill 'Public Concepts To Balance Investors' Rights With State Regulatory Actions In The Public Interest – The Concept of Proportionality' in S W Schill (ed) International Investment Law and Comparative Public Law (2010) 87.
[265] Masuko & Sibanda (n 258 above) 9 – 11.
[266] n264 above.
[267] *Tecmed S.A, v. The United Mexican States* ICSID Award Case No. ARB (AF)/00/2 121 – 122.
[268] ET Gomez & J Saravanamuttu (eds) *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Justice* (2012).

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such harm is incidental to the process. To hold otherwise, one risks unduly burdening and preventing the government from achieving reasonable regulations.

Based on the totality of the findings from the study, it is concluded that the indigenisation measures are non – compensable as the measures are proportional to the objective of redressing historical imbalances. This is regardless of the fact that the measures substantially deprive the investor control and ownership of the investment. The investor's economic losses are mitigated by the fact that the shares are sold at market value. The investor is hence still capable of pursuing other business ventures in Zimbabwe which are in compliance with the indigenisation measures, such as joint ventures.

4.5. Conclusion

This chapter discussed the indigenisation and economic empowerment framework in Zimbabwe. Such discussion highlighted the disempowerment of Zimbabweans during the colonial period and the government's efforts to reverse the effects of colonisation through passing of legislation, in particular the Indigenisation and Economic Empowerment Act and its Regulations. It further evaluated these laws with the view to determining both whether the measures are expropriatory and whether such measures, if found to be expropriatory, are compensable. The evaluations highlighted that these measures are expropriatory since they substantially deprive the investor of control its investment. However, it was established that these regulatory measures are non – compensable as they are proportional to the objective sought of redressing historical ownership imbalances.

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Chapter 5

Conclusion and Recommendations

5.1. Introduction

This study sought to examine whether the indigenisation measures are expropriatory and if so, whether they are compensable. It explored the concept of indirect expropriation; examined how non – compensable expropriations are distinguished from compensable expropriations; discussed the features of Zimbabwe indigenisation and economic empowerment laws and evaluated these laws against international standards of investment law. This Chapter presents a summary of findings, conclusions and recommendations.

6.1. Summary of Findings

In Chapter 2, the research addressed the meaning of indirect expropriation and discussed the criteria for establishing indirect expropriation. It argued that the parameters of indirect expropriation are yet to be precisely drawn, in that, the elements to determine this concept are inconsistently interpreted thereby creating legal uncertainties. Furthermore, the current definition of indirect expropriation is too broad that it leaves room for possibilities of various circumstances that have negative impacts on the investor to be referred to as indirect expropriation. However, there is consensus that for indirect expropriation to occur there must be an interference with the investor's property by the State which results in loss of value or control over the property or rights and most importantly the owner retains the legal title over the property.

Further, Chapter 3 examined how international investment law distinguishes non-compensable expropriations from compensable expropriation. It highlighted the fact that international investment law is yet to identify with precision the measures that are expropriatory but are non- compensable. The distinction is depended on the adopted approach, either 'effect' based or 'police powers' approach with the balanced approach being the middle ground. It was found that it is advisable to adopt the balanced approach since it caters for the excessive ends found in both the 'effect; approach and the 'police powers' approach.

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In Chapter 4, the study discussed and evaluated the indigenisation and economic empowerment laws in Zimbabwe. The discussion of the laws spanned from the colonial era to post independence era. It revealed that during the colonial period, Zimbabweans were economically disempowered through legislation by the colonial regime. After an evaluation of these laws using the balanced approach, the study found that these indigenisation measures are expropriatory. However, they are non-compensable as they are proportional to the objective sought of redressing historical ownership imbalances.

6.2. Conclusions

The study has shown that the lack of precision in the meaning of indirect expropriation and the distinction between measures that are compensable from non – compensable measures means that the outcome of an expropriatory claim arising from the indigenization measures is depended on the adopted approach by the concerned Tribunal. The BITs, to which Zimbabwe is part to, are of less assistance too as they do not provide for an approach to adopt and neither do they provide for criteria to distinguish compensable expropriation from non – compensable expropriation. Therefore, a balanced approach was adopted to determine whether the measures are expropriatory and compensable. Such an approach sought to balance Zimbabwe's quest to correct historical imbalances through indigenisation and the rights of the investor in his investment. Based on this approach, the study concludes that the measures in question are expropriatory. However these regulatory measures are non-compensable as they are suitable for a legitimate governmental purpose; necessary and proportional to the objective of redressing historical ownership imbalances.

6.3. Recommendations

This study recommends the following:

6.3.1. Review of BIT policies

The government of Zimbabwe reviews its BITs policies as a whole, with the view of aligning it with its Constitutional mandate of promoting empowerment of Zimbabwe citizens. This is being done by South Africa, a country in similar circumstances and has Black Economic

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Empowerment Laws since 2006. The review will have to include issues such as the meaning and elements of indirect expropriation and factors to distinguish non – compensable expropriation from compensable expropriation. Equally important is to incorporate exceptions to expropriation claims as it did in its BIT with South Africa. The exception may include regulatory measures taken by government to promote empowerment of nationalities of the parties to the treaties. The Zimbabwean government may take a leaf from the ASEAN Comprehensive Agreement (2009) which provides that: 'non – discriminatory measures of a Member State that are designed to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation.'[269]

6.3.2. Adopt exceptions to national treatment

Furthermore, it is recommended that there should be an explicit exception to the national treatment. The indigenisation measures by nature seek to favour national of the Host State, that is, Zimbabwe, which is discriminatory and a violation of the National Treatment clause found in most BITs Zimbabwe signed. The Japan – Philippines Agreement allows parties to disregard the national treatment provision in government procurement and further allows Parties to maintain, amend or adopt non –conforming measures to national treatment through a schedule of commitment.[270] Exception clauses are important to the government as it is through such that policy space to meet social welfare needs of the State is maintained. To the investor, they clarify the limits of investor's rights and the extent of government policy space.

6.3.3. Termination and / or renegotiations of BITs

For the BITs that are in force, it is recommended that Zimbabwe consider terminating and/ or renegotiating them when they expire. Termination will not prejudice existing investors due to the survival clause which provides that the BIT will continue to be in force for a certain period of time. Renegotiations, however, do not have effect of triggering the survival clause, rather the rights of the investors are changed when the amendments comes to effect. Therefore, it is recommended that Zimbabwe first endeavour to renegotiate the BITs before considering termination. This recommendation is not far – fetched as countries like South Africa have done the same to accommodate its constitutional mandate.

[269] Annex 2, Art 4 of ASEAN Comprehensive Investment Agreement; Art 20 (8) of COMESA Investment Agreement.
[270] Art 94 of Japan – Philippines Economic Partnership Agreement.

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6.3.4. Enactment of domestic laws to govern foreign investment

Lastly, it is recommended that Zimbabwe enact an Act of Parliament to govern foreign investments. This Act is meant to compliment and clarify Zimbabwe's investment policies. Currently, there is no such Act, rather there is the Zimbabwe Investment Authority (ZIA) Act which provides for ZIA meant to promote and coordinate investments through issuing of investment licences. This Act will endeavour to define, *inter alia,* investment; investor; expropriation and compensation and exception. The importance of the Act lays in circumstances where the concerned investor is not protected by any BITs; rather his fate is left at the mercy of unsettled customary international law.

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