



UNIVERSITY *of the*
WESTERN CAPE

Faculty of Law

Revisiting Zimbabwe's First Generation BITs: A Case for Balancing Rights and Obligations

Mini thesis submitted in fulfilment of the requirements of the LLM degree

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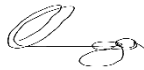
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Declaration

I declare that 'Revisiting Zimbabwe's First Generation BITs: A case for Balancing Rights and Obligations' is my own work, which has not been submitted before any degree or examination in any other university. All the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

This mini thesis is dedicated to my loving parents.



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KEY WORDS

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International investment regulation

Investment law

Investor interests

Policy space

SADC Finance and Investment Protocol



ACRONYMS AND ABBREVIATIONS

BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
CETA	EU-Canada Comprehensive Economic and Trade Agreement
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FCN	Friendship, Commerce and Navigation Treaties
FPS	Full Protection and Security
Havana Charter	United Nations Charter
ICSID	International Centre for Settlement of Investment Disputes
IEEA	Indigenisation and Economic Empowerment Act
IAs	International Investment Agreements
IMF	International Monetary Fund
ISDS	Investor-state Dispute Settlement
MAI	Multilateral Agreement on Investment
MFN treatment	Most-Favoured Nation Treatment
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organisations
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
PI Act	Protection of Investment Act 22 of 2015

SADC FIP	Southern African Development Community Finance and Investment Protocol
SADC	Southern African Development Community
TNCs	Transnational Companies
US	United States of America
UNCTAD	United Nations Conference on Trade and Development
ZIA	Zimbabwe Investment Authority
ZIA Act	Zimbabwe Investment Authority Act
ZimAsset	Zimbabwe Agenda for Socio-Economic Transformation



Table of Contents

CHAPTER 1	1
1.1 INTRODUCTION	1
1.2 BACKGROUND TO THE PROBLEM	2
1.3 RESEARCH QUESTION	6
1.4 RESEARCH OBJECTIVES	6
1.5 SIGNIFICANCE OF THE PROBLEM	7
1.6 METHODOLOGY	7
1.7 LIMITATIONS OF THE STUDY	9
1.8 OVERVIEW OF CHAPTERS.....	10
CHAPTER 2	12
2.1 INTRODUCTION	12
2.2 INVESTMENT PROTECTION PRIOR TO BILATERAL INVESTMENT TREATIES.....	14
2.3 EMERGENCE OF BILATERAL INVESTMENT TREATIES AND THEIR PURPOSE.....	21
2.3.1 Reconciling the ‘seemingly irreconcilable’ differences between developed and developing countries	22
2.3.2 Catalysing investment by reducing political risk.....	23
2.3.3 Restating principles of international law	24
2.4 PROBLEMS WITH BILATERAL INVESTMENT TREATIES	25
2.5 PROPOSITION TO BALANCE INTERESTS OF INVESTORS AND HOST STATE PARTIES IN BILATERAL INVESTMENT TREATIES	30
2.6 CONCLUSION	33
CHAPTER 3	34
3.1 INTRODUCTION	34
3.2 BACKGROUND	34
3.3 STRUCTURAL PROBLEMS OF BILATERAL INVESTMENT TREATIES.....	35
3.4 PROBLEMATIC TREATY PROVISIONS IN ZIMBABWE’S BITS.....	39
3.4.1 National Treatment Clause.....	39
3.4.2 Most Favoured Nation Treatment.....	43
3.4.3 Fair and Equitable Treatment.....	47
3.4.4 Full Protection and Security.....	50
3.4.5 Expropriation: Indirect Expropriation	52
3.5 CONCLUSION	54
CHAPTER 4	55
4.1 INTRODUCTION	55
4.2 BACKGROUND	56

4.3 NEW APPROACH TO PROBLEMATIC PROVISIONS.....	58
4.3.1 National Treatment	58
4.3.2 Most-favoured Nation Treatment	59
4.3.3 Fair and Equitable Treatment.....	61
4.3.4 Full Protection and Security.....	63
4.3.5 Expropriation: Indirect Expropriation	64
4.4 OTHER ATTEMPTS TO BALANCE BILATERAL INVESTMENT TREATIES	67
4.4.1 Right to regulate.....	67
4.4.2 Disclosure	68
4.4.3 Transparency.....	70
4.4.4 Investor responsibility	70
4.5 CONCLUSION	71
CHAPTER 5	73
5.1 INTRODUCTION	73
5.2 CONCLUSION	73
5.3 A PROPOSAL FOR REFORMING ZIMBABWE'S BILATERAL INVESTMENT TREATIES	75
5.3.1 National Treatment Clause.....	76
5.3.2 Most-favoured Nation Treatment	77
5.3.3 Fair and Equitable Treatment.....	77
5.3.4 Full Protection and Security.....	78
5.3.5 Expropriation: Indirect Expropriation	78
5.3.6 Right to regulate.....	79
5.3.7 Disclosure	80
5.3.8 Transparency.....	81
5.4 CLOSING REMARKS.....	82
ANNEXURE	83
BIBLIOGRAPHY.....	96

CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

Foreign investments have many benefits; most of which are dependent on the kind of investment.¹ For host countries, the expected benefits which would arise from their perspectives include, but are not limited to; technology, knowledge and skills transfer.² Apart from these non-monetary benefits; more directly, a country benefits from increase in job opportunities,³ increased competition,⁴ and in some cases, increased economic stimulus.⁵ Where greenfield investments are set up, the host country also stands to benefit in terms of infrastructural development. Also, foreign direct investment (FDI) has been said to be resilient in times of financial crises.⁶ For example, in East Asia, between 1997-98, FDI remained stable as opposed to the down-ward spiralling of portfolio investments.⁷

¹ There are two types of investments, namely foreign direct investment (FDI) and portfolio investments. Foreign direct investment involves cross-border movements of capital into another country, establishing a lasting interest in an enterprise that is resident in another economy. See Organisation for Economic Co-operation and Development *OECD Benchmark Definition of Foreign Direct Investment* (2008) 17. Portfolio investments covers equity and debt securities, and does not involve any control or management of the business. See Maffry A 'Direct versus Portfolio Investment in Balance of Payments' (1954) 44 *The American Economic Review* 614.

² Committee for Economic Development *Transitional Corporations and Developing Countries: New Policies for a Changing World* (1981) as noted and cited by Salacuse JW *The Laws of International Investment Law* (2013) 18.

³ Feldstein M 'Aspects of Global Economic Integration: Outlook for the Future' 2000 *Cambridge Massachusetts National Bureau of Economic Research Working Paper* as noted by Loungani P and Razin A 'How Beneficial is FDI for Developing Countries' (2001) 38 *International Monetary Fund (IMF) Finance and Development Quarterly Magazine*.

⁴ Feldstein as noted by Loungani & Razin (2001).

⁵ According to Feldstein, capital inputs which would otherwise not be attained through financial investments of trade in goods and services there by contributing to the economy. See Feldstein M 'Aspects of Global Economic Integration: Outlook for the Future' 2000 *Cambridge Massachusetts National Bureau of Economic Research Working Paper*.

⁶ Other findings however have pointed how FDI components have been negatively affected since 2007 when there was a global financial crisis, see Petersen Institute for International Economics Working Paper (2011) 2-3.

⁷ Loungani P and Razin A 'How Beneficial is FDI for Developing Countries' (2000) 38 *International Monetary Fund (IMF) Finance and Development Quarterly Magazine* available at <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm> (accessed on 25 March 2017).

To mitigate the current downward economic spiral,⁸ Zimbabwe needs to do more to attract foreign investments. Capital inflows from FDI⁹ are paramount because of the ability to reposition functioning sectors of the economy such as mining, manufacturing, agriculture and diversify the economy into newer opportunities.¹⁰ This would entail revisiting how investors are protected. The law makers would have to consider investor shunning behaviour such as the land reform programme, disregard of investors' property rights¹¹ and Zimbabwe's indigenisation policy as codified through the Indigenisation and Economic Empowerment Act.¹² There is therefore a need for a sound regulatory approach to the treatment and protection of foreign investors in Zimbabwe through the use of bilateral investment treaties (BITs). This aids in creation of legal certainty which is an important ingredient for the inflow of investment.¹³ However, BITs have challenges particularly with

⁸ Zimbabwe on downward spiral, see Mail & Guardian Africa 'Zimbabwe economy still on downward spiral, as Mugabe signs law to stop mass lay-offs' 28 August 2015 available at <http://mqafrica.com/article/2015-08-28-zimbabwe-still-on-downward-spiral-as-mugabe-signs-law-to-stop-mass-lay-offs> (accessed 25 March 2017).

⁹ Foreign capital inflows to finance investments in Zimbabwe was aided by reform. The Reserve Bank of Zimbabwe (RBZ) moved to allow investors to finance their projects using debt as compared to previously when the debt to be injected for greenfield investments had to be equal to equity. See Business Reporter 'RBZ increases greenfield projects debt threshold' The Herald Zimbabwe available at <http://www.herald.co.zw/rbz-increases-greenfield-projects-debt-threshold/> (accessed 25 March 2017)

¹⁰ See generally Treasury of Zimbabwe 'Pre-Budget Strategy Paper for 2017' available at <http://www.zimtreasury.gov.zw/index.php/investment-promotion-files> (accessed 25 March 2017). Zimbabwe needs foreign investment to aid in creating employment, which has remained elusive to date. See generally Zimbabwe National Statistics Agency (Zimstat), stating unemployment to be at 11.3%, available at <http://www.zimstat.co.zw/> (accessed 25 March 2017), although other reports claim unemployment to be higher. For example, in the ruling party's political manifesto of 2013 states unemployment to be at 60%, while Zimstat has no 2013 data to confirm to the same. See also Chiumia S 'Is Zimbabwe's unemployment rate 4%, 60% or 95%? Why the data is unreliable' available at <https://africacheck.org/reports/is-zimbabwes-unemployment-rate-4-60-or-95-why-the-data-is-unreliable/> (accessed 13 March 2017).

¹¹ *Campbell and Another v Republic of Zimbabwe* 2009 (SADC (T) 03/2009) SADCT 1.

¹² Under section 3 of this Act, investors are obliged to cede 51% of equity ownership to indigenous Zimbabweans.

¹³ It is however important to note that there are other empirical studies that show that there is no correlation between Investment Agreements and the inflow of investments. See for example; Hallward-Driemeier M 'Do bilateral investment treaties attract FDI? Only a bit and they could bite' 2003 *World Bank Policy Research Paper WPS 3121* and Tobin J and Rose-Ackerman S 'Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties' 2004 *Yale Law School Centre for Law, Economics and Public Policy Research Paper No. 293*. However, there is another school of thought whose authors point to a correlation between FDI and investment regulation. See for example; Neumayer E and Spess L 'Do bilateral investment treaties increase foreign direct investment to developing countries?' 2005 *World Development* and Salacuse JW and Sullivan NP 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' in Sauvant KP and Sachs LE *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2004). See generally Zenda C 'Zimbabwe needs to do more to attract investment' available at

regard to striking the much needed balance between interests of the host state and investor.¹⁴

1.2 BACKGROUND TO THE PROBLEM

Investment in Zimbabwe is regulated by domestic law,¹⁵ treaty law,¹⁶ customary international law¹⁷ and international instruments Zimbabwe has ratified.¹⁸ Domestically, the Zimbabwe Investment Authority Act¹⁹ (ZIA Act), establishing the investment authority, is primarily responsible for ensuring that inward bound investments are licensed and are treated in co-ordinated fashion.²⁰ Equally important is the Indigenisation and Economic Empowerment Act (IEEA) and its Regulations, which provide that all companies must cede 51 per cent of their ownership to indigenous Zimbabweans, thereby creating multiple issues regarding ownership.²¹ The afore-mentioned documents are also supported by other instruments such as the; Exchange Control Act,²² Immigration Act,²³ Indigenisation Act,²⁴ Joint Venture Act,²⁵ Special Economic Zones Act,²⁶ amongst others. As can be noted, at a domestic level, the laws governing investment are quite fragmented and unfocused.

<http://www.financialgazette.co.zw/zimbabwe-needs-to-do-more-to-attract-investmentbmi/> (accessed 7 March 2017).

¹⁴ There will be discussion of this position in Chapter 2 of this thesis.

¹⁵ Zimbabwe Investment Authority Act [CHAPTER 14:30] Act no. 4 of 2006.

¹⁶ Sibanda G 'Zimbabwe: Govt signs 54 Trade pacts' available at <http://www.bilaterals.org/?zimbabwe-govt-signs-54-trade-pacts> (accessed 25 March 2017). See also Investment Policy Hub, Zimbabwe Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233> (accessed on 25 March 2017).

¹⁷ As per constitution of Zimbabwe, Article 326 of Constitution of Zimbabwe Amendment (No. 20) Act 2013.

¹⁸ For example, Zimbabwe acceded to the Multilateral Investment Guarantee Agency in 1989, see generally 'Business Law Handbook: Strategic Information and Basic Laws on Zimbabwe' 2012 *International Business Publications, USA*.

¹⁹ [Chapter 14:30] Act no. 4 of 2006.

²⁰ Section 7 of Zimbabwe Investment Authority Act.

²¹ Section 3 of the Indigenisation and Economic Empowerment Act.

²² [Chapter 22:05] Act no. 6 of 2006 which governs issues to do with exchange of transactions, regulations of imports and exports, foreign currency, transfer of property, securities and transactions relating thereto. Such provisions are applicable to investments.

²³ [Chapter 4:02] Act no. 22 Of 2001 supported by Statutory Instrument 78 of 1987 which regulates entry of persons, otherwise being investors

²⁴ [Chapter 14:33] Act 14 of 2007 which articulates share ownership of a foreign company and sets a limit of such ownership to 49%.

²⁵ [Chapter 22:22] Act no. 6 of 2015 providing for implementation of partnerships with government enterprises.

Customary international law also influences investment law in Zimbabwe to the extent in which it is consistent with the Constitution itself.²⁷ It reads;

“(1) Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament.

(2) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe in preference to an alternative interpretation inconsistent with that law.”²⁸

In terms of treaty law, Zimbabwe is a party to 54 bilateral investment treaties (BITs),²⁹ 10 of which are in force.³⁰ The problem with these treaties is that they are first generation BITs.³¹ These have been highly debated owing to their lopsided nature, to which there has been suggestion of balancing rights and obligations of investors and host states.³² The debates and discussions have seen the International Investment Agreement (IIA) regime, undergo reform with an expansion of obligations of investors,³³ and more elaborate texts that are evasive due to loose language.³⁴ In this respect, Zimbabwe has not fared particularly well. All of its investment treaties are first generation BITs which provide more rights than obligations and grappled with unexplained clauses, similar in structure and language.³⁵

²⁶ [Chapter 14:34] Act no. 7 of 2016 creating special economic zones as well as considerations for investment licences for the investors intending to invest in the zone.

²⁷ Section 326 of Constitution of Zimbabwe Amendment (No. 20) Act 2013.

²⁸ Section 326 of Constitution of Zimbabwe.

²⁹ Sibanda G ‘Zimbabwe: Govt signs 54 trade pacts’ available at <http://www.bilaterals.org/?zimbabwe-govt-signs-54-trade-pacts> (accessed on 25 March 2017).

³⁰ Investment Policy Hub, Zimbabwe Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233> (accessed on 25 March 2017).

³¹ These are BITs that are traditional in the approach of investment regulation, focusing mainly on protection of investors, awarding rights to investors and obligations to the host state. See generally Schill SW *The Multilateralization of International Investment Law* (2009) 90-91.

³² There have been different literature that speaks to the need of balancing rights and obligations of state parties and investors. See part 2.5 of this thesis for a more detailed literature in that regard. Apart from a preposition to balance interests, states like Canada and India have model treaties that derogate from the traditional structure of BITs. See Chapter 4 of this thesis.

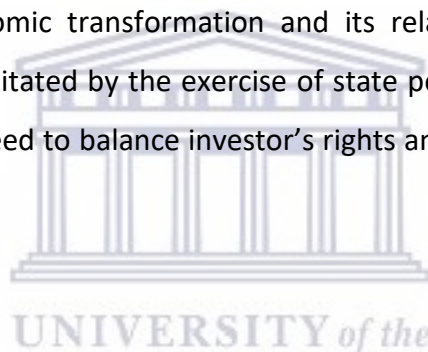
³³ Bottini ‘Strengthening the Global Trade and Investment System for Sustainable Development’ 2015 *International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum Think Piece 2-3*, available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Bottini-FINAL.pdf> (accessed on 25 March 2017).

³⁴ Organisation for Economic Co-operation and Development (OECD) ‘Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World’ OECD Working Papers on International Investment February 2015 available at <http://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> (accessed 25 March 2017) 37-40.

³⁵ See Chapter 3 of this thesis, where a detailed analysis is undertaken.

In the view of this thesis, substantive clauses that are problematic include³⁶ the national treatment clause, the most-favoured nation treatment, fair and equitable treatment, full protection and security and indirect expropriation.³⁷ In Zimbabwe's in-force BITs, these clauses are shy of clear, precise meaning, leaving room for wide interpretation which may be to the detriment of Zimbabwe as a host state.³⁸ For example, the fair and equitable treatment clause in the Switzerland – Zimbabwe BIT is neither linked to customary international law³⁹ nor given meaning as in the EU-Canada Comprehensive Economic Agreement (CETA).⁴⁰

Apart from substantive provisions, another important issue that arises in the Zimbabwean context, as well as generally, is that of limited host state policy space.⁴¹ This distinctive issue finds itself absent in Zimbabwe's BITs. Policy space is not expressly provided for in these texts. This has severe implications for the government especially with regard to enforcement of social economic transformation and its related policy. The increase of investor-state disputes precipitated by the exercise of state police powers when regulating domestic affairs, raises the need to balance investor's rights and host country's policy space and regulatory flexibility.⁴²



³⁶ However, there are other clauses which are problematic including the dispute settlement clause and repatriation of funds clause. See Valenti M 'The Scope of an Investment Treaty Dispute Resolution Clause: It is Not Just a Question of Interpretation' (2013) 29 *Arbitration International* and Reinisch A 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties' (2011) 2 *Journal of International Dispute Settlement*, Lang J & Gilfillan B 'Bilateral Investment Treaties – Shield or Sword?' available at http://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf (accessed 17 August 2017) 3.

³⁷ See United Nations Conference on Trade and Development (UNCTAD) 'Investor State Dispute Settlement Arising from Investment Treaties: A Review' available at http://unctad.org/en/docs/iteiit20054_en.pdf (accessed 25 March 2017) 32-41. These clause will be discussed in Chapter 2 and 3 of this thesis.

³⁸ See Chapter 3 of this thesis.

³⁹ As done in the Agreement between Japan and the Republic of the Philippines for an Economic Partnership (2006), under article 91.

⁴⁰ Article 8.10 (2) of Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union signed 30 October 2016 available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 3 May 2017).

⁴¹ The BITs that Zimbabwe is party to, are silent to guarantees or considerations of policy space. Surprisingly, Zimbabwe – South Africa BIT for example, has no reference to policy space particularly towards economic empowerment laws to which both countries have fervent policies and laws for; namely Indigenisation and Economic Empowerment Act for Zimbabwe and Black Economic and Empowerment. See also 'regulatory chill' echoed by Spears SA 'The Quest For Policy Space In A New Generation Of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1040. See generally Miles K *The Origins of International Investment Law: Empire Environment and the Safeguarding of Capital* (2013)

⁴² Yu & Marshall (2008) 2-3

Notably, host countries' interests underlying in sustainable development and responsible business conduct have been recognised in recent IIAs.⁴³ Yu and Marshall opine that there is now a trend which developing countries have especially adopted to ensure FDI policies are geared and otherwise consistent with their national development goals.⁴⁴ This would be a trend Zimbabwe would find beneficial to catch onto, as the government is enjoined to provide for by the new transformative constitution.⁴⁵

An important characteristic of BITs is the guarantee of protection of investors and their investments through clauses such as fair and equitable treatment as well as compensation where expropriation has taken place.⁴⁶ However, these clauses have contributed immensely to the position that the IIA regulatory regime is unbalanced.⁴⁷ To this, renegotiation of current BITs as well as new direction on future BITs would, arguably, balance the much needed promotion and protection of investments against the needs of the host state. Such a balance would depend on how each country is poised with foreign investments. For Zimbabwe, the tarnished image of investor treatment⁴⁸ among other factors should be of

⁴³ Gordon K 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' 2014 *OECD Working Papers on International Investment* 8-9

⁴⁴ Yu V & Marshall F 'Investor Obligations and Host State Policy Space' 2008 *2nd Annual Forum of Developing Country Investment Negotiators IISD working paper Marrakesh* 1-2. Ecuador is a practical example of states moving away from BITs, noting issues of development agendas being undermined in these texts. See Uribe D 'Ecuador withdraws from its remaining investment treaties' SOUTHNEWS 23 May 2017 available at <http://mailchi.mp/southcentre/southnews-basic-statement-on-climate-change-222505?e=e185515255> (accessed 14 June 2017).

⁴⁵ National objective of empowerment articulated under article 14 of Constitution of Zimbabwe. Interestingly, Carim X 'International Investment Agreements and Africa's Structural Transformation: A perspective from South Africa' *Investment Policy Brief* (2015), points to the fact that such transformative measures are further supported by structural measures. These in essence form part of development measures, which have seen countries such as South Africa terminate BITs and opting to govern foreign investments with a standalone investment act (the Protection of Investment Act).

⁴⁶ Sauvart K P & Sachs L E 'The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows' 2009 *Oxford Scholarship Online* as cited by Wagner M 'Regulatory Space in International Trade Law and International Investment Law' (2015) 36 *University of Pennsylvania Journal of International Law* 12-13

⁴⁷ Salacuse J W 'Towards a Global Treaty for Investment Protection? Lessons from the Failure of OECD's MAI' (2004) 75 noting 'power asymmetries' that exist between capital exporting and capital importing countries in negotiating BITs, see also Morin and Gagne 'What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?' (2007) 36 *International Journal of Political Economy* 54-55

⁴⁸ Thornycroft P and Laing A 'Land grabs' *The Telegraph* 28 February 2015 available at <http://www.telegraph.co.uk/active/11442408/Zimbabwes-white-farmers-targeted-for-new-Mugabe-land-grabs.html> (accessed 26 March 2017.) Further to this, 'non-compliance with SADC Tribunal award in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008) which led to the review of SADC tribunal and subsequently changing its mandate to deal with state-state disputes available at <http://www.saflii.org/za/journals/DEREBUS/2013/13.html> (accessed 26 March 2017)

consideration in suggesting the appropriate provision to employ in critical areas such as standard of treatment, indirect expropriation and compensation.

Zimbabwe should revisit its BITs and renegotiate to highlight the changing times by balancing the rights and obligations of investors and state parties. Particularly for Zimbabwe, its fervent policy on indigenisation has to be articulated in its BITs under the national treatment clause, so that a tribunal presiding over an investment dispute would take note of such policy considerations in adjudicating an investment dispute. Apart from the national treatment clause, traditional clauses that award protection to the investor have been revisited by countries like Canada and India.⁴⁹ Clauses such as the fair and equitable treatment, most-favoured nation treatment, full security and protection, and indirect expropriation have undergone changes in structure, with countries opting for more elaborate provisions.

1.3 RESEARCH QUESTION

This thesis examines the question: whether or not it is necessary to revisit Zimbabwe's BITs with the intention of balancing rights and obligations of investors and state parties.

1.4 RESEARCH OBJECTIVES

- (i) To examine the history of BITs and typical BIT clauses;
- (ii) To examine and analyse old or first generation BITs Zimbabwe is a party to especially in light of the problems of some of the clauses;
- (iii) To assess the practicality of articulating and enhancing policy space in BITs;

⁴⁹ This has been seen by more elaborate Model BITs and treaty practice of the two countries. See Chapter 4 for a more detailed discussion.

- (iv) To determine if Zimbabwe can draw lessons from other countries in terms of drafting BITs;
- (v) To propose recommendations towards balancing the interests of the investor and Zimbabwe as the host state.

1.5 SIGNIFICANCE OF THE PROBLEM

The central problem that this thesis grapples with is that of the inherent challenges that Zimbabwe's first generation BITs are fraught with. To begin, these treaties are characterised by loose language which creates the leeway for potential misinterpretation. Furthermore, existent in the treaties are controversial provisions such as the fair and equitable treatment (FET) standard and the most-favoured nation (MFN) clause which have been at the centre of numerous arbitral cases. In these cases, developing countries were exposed to huge awards which they can little afford. Finally, Zimbabwe's BITs do not cater for empowerment agendas, akin to the exercise of the right to regulate, which are an important mantle in Zimbabwe's new Constitution. It is against this background that it becomes important to resolve the challenges in Zimbabwe's BITs because: (1) it accords with the transformative agenda of Zimbabwe's Constitution, (2) it moves in line with the new mantra in international investment law of balancing the rights and obligations of investors and host-states, (3) it eliminates potential exposure to insensitive arbitral claims, and (4) it clarifies poor drafting in existing treaties.

1.6 METHODOLOGY

This research is a desktop study which is based on various primary and secondary sources. In terms of primary sources, the research will examine and interrogate various Acts, regulations and policies. As regards secondary sources, a review of journal articles, internet

sources, position papers and other scholarly material will be conducted. In doing so, this thesis will use a combination of research methodologies. More specifically, the thesis will adopt a legal historical method. This method traces the history of law and its development.⁵⁰ Further to this, it includes an analysis of the rules of law in light of the external legal history, namely economic and political developments among other things.⁵¹ The purpose of legal historical research is to establish the developments of legal rules and propose amendments to existing law based on historical facts.⁵² This study therefore follows a similar pattern by analysing investment regulation during colonial times and particularly post-colonial period for Latin America and other parts of the world. The history is critical in understanding how the law of bilateral investment treaties came about.

While a comparative approach will not be utilised, the thesis does, however, draw lessons from other jurisdictions. Two countries in particular are selected for this purpose. These are, namely; Canada and India. Canada is a useful country to draw lessons from because, in terms of investments, Canada has set itself as a friendly investment destination. This is particularly espoused in its forward thinking BIT templates which seek to rethink the structure of current BITs. India, makes a good jurisdiction to draw lessons from, as in the past, just like Zimbabwe, it grappled with the issue of empowerment. This led to decreased investment levels and investor apathy. Interestingly, however, India has managed to turn around its investment climate and, similar to Canada, it has also constructed some progressive Model BITs to take its investment into the future. The thesis will also draw lessons from the SADC FIP and Model BIT as these are influential texts on Zimbabwe since it is a member state of SADC. Finally, the thesis will also draw lessons from EU-Canada Comprehensive Economic and Trade Agreement (CETA) which makes up part of international best practices because it is one of the newer agreements on international investment.

⁵⁰ Du Plessis W 'A Self Help Guide Research Methodology and Dissertation Writing' 2007 available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/reqte/pdf/Du_Plessis_Research_Methodology_FI_NAL.pdf (accessed 17 August 2017) 30.

⁵¹ Du Plessis W 'A Self Help Guide Research Methodology and Dissertation Writing' 2007 available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/reqte/pdf/Du_Plessis_Research_Methodology_FI_NAL.pdf (accessed 17 August 2017) 30.

⁵² Du Plessis W 'A Self Help Guide Research Methodology and Dissertation Writing' 2007 available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/reqte/pdf/Du_Plessis_Research_Methodology_FI_NAL.pdf (accessed 17 August 2017) 31.

1.7 LIMITATIONS OF THE STUDY

This study is limited to only BITs and will not assess national legislation that regulates foreign investments in Zimbabwe. However, the Indigenisation Act and Procurement Act will be discussed to the extent that they influence BITs. In the Zimbabwean BITs to be discussed in this study, focus will be on five substantive provisions, namely national treatment, most-favoured nation treatment, fair and equitable treatment, full protection and security, and indirect expropriation. While other provisions like dispute settlement are problematic,⁵³ the writer opines that such problems are secondary. Essentially, the primary problems of BITs lie in the substantive provisions and subsequently create problems for dispute settlement and practice. As such, matters of dispute settlement will not be addressed in this thesis. The repatriation of funds clause is, to an extent, problematic considering issues like balance of payment of a country in which investments are undertaken.⁵⁴ This clause will not make up part of this study as it is neither widely debated nor highly contested compared to the substantive provisions in BITs noted above. Notwithstanding the above, the mini thesis word limit was also an inhibiting factor for a further discussion on aforementioned issues. Although these clauses will not be discussed in detail, they will make up part of the proposed full model BIT for Zimbabwe as presented in an annexure at the end of this thesis.

⁵³ See Valenti M 'The Scope of an Investment Treaty Dispute Resolution Clause: It is Not Just a Question of Interpretation' (2013) 29 *Arbitration International* and Reinisch A 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties' (2011) 2 *Journal of International Dispute Settlement*, Lang J & Gilfillan B 'Bilateral Investment Treaties – Shield or Sword?' available at http://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf (accessed 17 August 2017) 3.

⁵⁴ United Nations Conference on Trade and Development (UNCTAD) 'Transfer of Funds' UNCTAD Series on Issues in International Investment Agreements 200 available at <http://unctad.org/en/Docs/psiteiitd20.en.pdf> (accessed 21 August 2017) 43-48.

1.8 OVERVIEW OF CHAPTERS

Chapter 1

Chapter one is the introduction to the mini thesis. It consists of the background to the research, research questions, research objectives, significance of the study, methodology adopted by the research and an outline of chapters.

Chapter 2

The second chapter will examine the history of BITs, their problems and the emergence of the balancing theory.

Chapter 3

This chapter analyses Zimbabwe's BITs, particularly the nine BITs currently in force. Under this chapter, the study will identify the problems with the structure of these BITs. Moreover, the chapter will identify policies that are of interest to Zimbabwe as a host state and possible problematic clauses in current BITs in pursuing state interests.

Chapter 4

In chapter four, the research will examine how Canada, India, SADC FIP and Model BIT, and CETA have addressed problems of BITs. Furthermore, an analysis of these modern templates is undertaken and there will be an assessment on the viability of enhancing policy space in BITs.

Chapter 5

Conclusion and recommendations; proposals for balancing the interests will be presented in this chapter

Annexure

Under this section, there is a proposed model BIT for Zimbabwe.



CHAPTER 2

HISTORY OF BILATERAL INVESTMENT TREATIES AND THE EMERGENCE OF THE BALANCING THEORY

2.1 INTRODUCTION

The protection of investors is, amongst other measures, guaranteed by BITs.⁵⁵ BITs make up part of the IIA regime and have a history dating back to the late 1950s, when Germany and Pakistan were the first two countries to conclude such an agreement.⁵⁶ Since then, BITs have continued to grow and are the largest contributors to IIAs. For instance, in 2015, 31 new IIAs were concluded taking the total number of IIAs to 3,304.⁵⁷ Of these, 20 were BITs, bringing their total number to 2,946.⁵⁸ This is reflective of the centrality of BITs in investment regulation.

Of particular importance is the lopsided nature of BIT protection. For instance, in 2015, 85% of the protections in IIAs were tipped in favour of investors.⁵⁹ This has resulted in the termination of numerous existing BITs. As an example, Indonesia terminated 8 of its BITs in 2015,⁶⁰ also sending notices for the termination of a further 10 in 2016.⁶¹ Similarly, Poland

⁵⁵ Most investments are protected under BITs although there are trade agreements that encompass investment, for example, the newly signed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. Chapter 8 in the CETA, is an investment chapter that seeks to protect investments.

⁵⁶ Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962).

⁵⁷ UNCTAD 'World Investment Report 2016 Investor Nationality: Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 25 April 2017) 101.

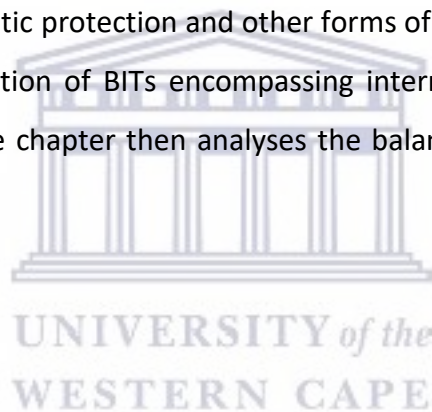
⁵⁸ UNCTAD 'World Investment Report 2016 Investor Nationality: Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 25 April 2017) 101

⁵⁹ UNCTAD 'World Investment Report 2016 Investor Nationality: Policy Challenges' available at http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf (accessed 25 April 2017) xi.

⁶⁰ Peterson LE 'Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new \$600 mil claim from Indian mining investor' *Bilaterals* 20 November 2015 available at <http://bilaterals.org/?indonesia-ramps-up-termination-of> (accessed 25 April 2017).

has announced its intention to cancel 23 of its BITs.⁶² South Africa terminated its BITs and opted to regulate foreign investments with an act of parliament, namely the Protection of Investment Act.⁶³ Similarly, Ecuador terminated its BITs citing several challenges with the texts, including contradicting and undermining development objectives laid down in the Constitution of Ecuador.⁶⁴ This shows the current dire state as regards the status of BITs in investment law, largely due to their unbalanced nature.

Tipped to change the scales has been the discourse on the balancing of investors' and host states' rights and obligations.⁶⁵ This discussion is central to investment law as it encompasses much needed tools such as the right to regulate and policy space. Accordingly, it is not unusual that this chapter centres on the history of BITs and the emergence of the balancing proposition. Structurally, the chapter will first investigate movements of capital, treatment and protection of investors prior to BITs. Thereafter, the chapter explores inherent problems of diplomatic protection and other forms of investment protection which subsequently led to the creation of BITs encompassing international law. To give further context to this argument, the chapter then analyses the balancing discourse in relation to BITs.



⁶¹Widyatmoko W 'Indonesia: The end of Bilateral Investment Treaties?' Global Arbitration News 29 May 2015 available at <https://globalarbitrationnews.com/indonesia-the-end-of-bilateral-investment-treaties-the-end-of-bilateral-investment-treaties-20150202/> (accessed 25 April 2017).

⁶² Waldoch M & Onoszko M 'Poland plans to cancel Bilateral Investment Treaties with EU' Bloomberg 26 February 2016 available at <https://www.bloomberg.com/news/articles/2016-02-25/poland-seeks-to-end-bilateral-investment-deals-with-eu-members> (accessed 25 April 2017).

⁶³ Protection of Investment Act 22 of 2015.

⁶⁴ Uribe D 'Ecuador withdraws from its remaining investment treaties' SOUTHNEWS 23 May 2017 available at <http://mailchi.mp/southcentre/southnews-basic-statement-on-climate-change-222505?e=e185515255> (accessed 14 June 2017).

⁶⁵ Kingsbury B & Schill SW 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality' in Schill SW *International Investment Law and Comparative Public Law* (2010) 78.

2.2 INVESTMENT PROTECTION PRIOR TO BILATERAL INVESTMENT TREATIES

The historical origins of BITs can best be traced to the post-colonial times of developing countries. Before this, there was no need for an outright legal system governing investments.⁶⁶ The rationale behind this is that, in this time, investments were protected by colonial laws which afforded protection to all economic activities in the colony.⁶⁷ Most agreements, before then, focused on establishing trade relations, whilst in rare instances, these agreements would touch on investment related issues such as property rights.⁶⁸

Of such agreements, Friendship, Commerce and Navigation (FCN) bilateral treaties were the forerunner to BITs.⁶⁹ The substantive rights covered by FCN treaties included; navigation rights, trading rights, entry and establishment, and human rights overall.⁷⁰ Whilst these rights were largely of an economic nature, they also covered issues such as the protection of aliens and their property.⁷¹ These treaties were aimed at securing interests of state parties' nationals abroad⁷² and became an important practice in diplomacy.⁷³ It was of interest to conclude such treaties, particularly for the US, to protect and promote investments from within its borders.⁷⁴

The presence of FCN treaties did contribute towards international law on investments with the inclusion of principles of national treatment (NT) and most favoured nation treatment (MFN), although not widely used at the time.⁷⁵ The legal structure of treatment and

⁶⁶ Sornarajah M *The International Law on Foreign Investment* (2010) 19.

⁶⁷ Sornarajah M (2010) 20.

⁶⁸ Vandevelde KJ 'A Brief History of International Investment Agreements' in Sachs L & Sauvant KP (eds.) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (2009) 158.

⁶⁹ Dolzer R & Stevens M *Bilateral Investment Treaties* (1995) 10.

⁷⁰ Dunning JH & Ludan SM *Multinational Enterprises and the Global Economy* (2008) 311.

⁷¹ Dunning JH & Ludan SM (2008) 311.

⁷² Coyle JF 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 *Columbia Journal of Transnational Law* 305.

⁷³ Walker H 'Modern Treaties of Friendship, Commerce and Navigation' as cited by Coyle JF 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 *Columbia Journal of Transnational Law* 303.

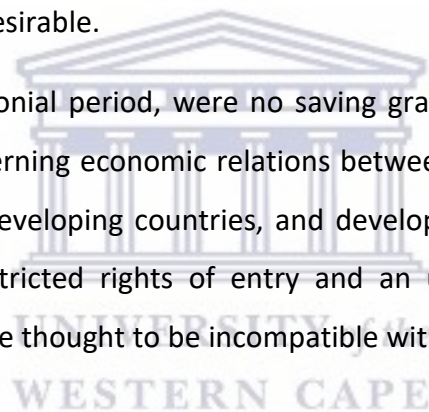
⁷⁴ Coyle JF & Yackee JW 'Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts' (2016) 49 *Arizona State Law Journal* 2.

⁷⁵ Dunning JH & Ludan SM (2008) 311. See generally Titi C *The Right to Regulate in International Investment Law* (2014) 53-56.

protection of foreign investments in the 19th and early to mid-20th century⁷⁶ was, however, deficient regardless of the presence of FCNs.⁷⁷ This is because international law at the time, had not established exhaustive standards of investment protection and was silent on issues such as repatriation.⁷⁸ Such a position can be largely attributed to the fact that investments were made through colonial expansion during colonial rule.⁷⁹ Therefore, there was no pressing need to have international law on foreign investment as the colonial legal systems were integrated with those of their colonial masters.⁸⁰

Essentially, investors at the time were content with an imperial parliament ensuring their investment and an imperial court adjudicating investment disputes in cases where there would be one arising.⁸¹ As such, customary international law was not fully developed in the area of investment protection and as a result it remained vague and not widely applicable.⁸² This would in time create problems for capital-exporting states when newly independent states found its contents undesirable.

The FCN treaties, in post-colonial period, were no saving grace as they were found to be undesirable instruments governing economic relations between newly independent states, which were predominantly developing countries, and developed states.⁸³ This was largely because FCNs offered unrestricted rights of entry and an unqualified right of national treatment, and were therefore thought to be incompatible with the new political realities of



⁷⁶ These timelines were selected because of their centrality in developments of BITs, as it was post-colonial period for the bulk of Latin American countries. Moreover, it was the period in which Germany lost the First World War and had to cede to the victorious powers and thus gave up its colonies and investments in them. See Salacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 342, Twomey M *A Century of Foreign Investment in the Third World* (2002) 217. Investment tensions continued, especially between Latin America and the US. In 1938, the Hull Rule was asserted by the US as the standard in expropriation. See Wang G *International Investment Law: A Chinese Perspective* (2014) 389.

⁷⁷ Salacuse JW & Sullivan NP 'Do BITs really Work: An Evaluation of BITs and their Grand Bargain' (2005) 46 *Harvard International Law Journal* 68.

⁷⁸ Salacuse JW & Sullivan NP (2005) 68-69.

⁷⁹ Sornarajah M (2010) 19. See also Sornarajah M *Resistance and Change in the International Law on Foreign Investment* (2015) 32.

⁸⁰ Dunning JH & Ludan SM (2008) 307.

⁸¹ Dunning JH & Ludan SM (2008) 307.

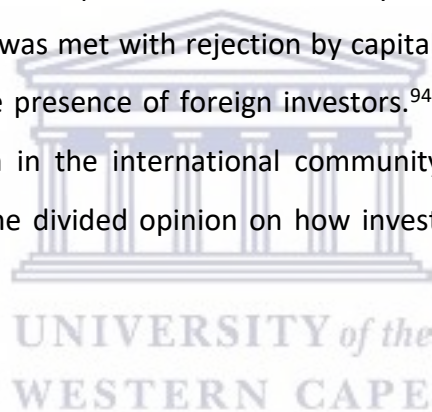
⁸² See discussion by Salacuse JW & Sullivan NP (2005) 68-70.

⁸³ Dolzer R & Stevens M (1995) 11.

developing states.⁸⁴ For example, in the Nicaragua – US FCN treaty, nationals and companies of contracting states were given a right to engage in all sectors of the economy.⁸⁵

Eventually, the unrestricted rights of entry previously guaranteed by FCN treaties were denied,⁸⁶ especially because of the distrust of aliens and their intentions,⁸⁷ particularly former colonial masters of newly independent states. Distrust of aliens could be seen by the hostile outlook on foreign investments by third world countries, particularly Latin America.⁸⁸ In the 1900s, for example, there were expropriations and nationalisations of foreign owned property.⁸⁹ There were conscious efforts by host states to protect culture, custom, religion and political institutions which stirred negative attitude towards aliens.⁹⁰ Therefore, treatment of aliens was often unfriendly and emulated that which was given to enemies or outcasts.⁹¹

In the perspective of newly independent states,⁹² they had sovereignty over natural resources.⁹³ This perspective was met with rejection by capital exporting-states and said to have been an obstacle to the presence of foreign investors.⁹⁴ Treatment of investors was, therefore, a central problem in the international community, particularly for developed capital-exporting states.⁹⁵ The divided opinion on how investors were to be treated, had



⁸⁴ Dolzer R & Stevens M (1995) 11.

⁸⁵ See for example Article VIII of United States of America and Nicaragua Treaty of Friendship, Commerce and Navigation 1956 available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20367/v367.pdf> (accessed 21 August 2017).

⁸⁶ Dunning JH & Ludan SM (2008) 161

⁸⁷ Wojnowska-Radzińska J *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law* (2015) 23.

⁸⁸ Twomey MJ 'A Century of Foreign Investment in Mexico' UM-Dearborn Economics Working Paper 2009 available at <http://www-personal.umd.umich.edu/~mtwomey/econhelp/MexInv.pdf> (accessed 25 April 2017) 4.

⁸⁹ Rubin SJ & Alexander DC (eds.) *NAFTA and Investments* (1995) 162. See also Bulmer-Thomas V *The Economic History of Latin America since Independence* (2014) 100-102, 243-237.

⁹⁰ See discussion by Wojnowska-Radzińska J (2015) 23-24

⁹¹ Newcombe PA & Paradell L *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 3.

⁹² Latin America was the first group of states to gain independence from their colonial masters, thus their centrality in the discussion of principles of developments of international investment law. See Subedi SP *International Investment Law: Reconciling Policy and Principle* (2008) 8-11.

⁹³ Subedi SP *International Investment Law: Reconciling Policy and Principle* (2008) 21.

⁹⁴ Qureshi AH & Ziegler AR *International Economic Law* (2007) 401.

⁹⁵ Qureshi AH & Ziegler AR (2007) 402.

some if its roots in the difference of opinion on private property rights⁹⁶ between the traditional capital-exporting and capital-importing countries.

The US for example, insisted on international minimum standards and thus built standards that were favourable to foreign investors.⁹⁷ Latin American states on the other hand opined that foreign investors entered the host state and reasonably assumed the risks of investment there.⁹⁸ Therefore, the treatment to be awarded to investors was that which nationals of the host state received.⁹⁹

The contentious relationship between Latin American countries and the US over investment protection was the genesis of state responsibility for the treatment of aliens.¹⁰⁰ Such responsibility established international minimum standards of treatments of investors and their investments, and protection overall.¹⁰¹ State responsibility essentially gave effect to diplomatic protection as legitimate action to counter the 'unfair acts' of host states against aliens.¹⁰² Thus, investors in host states could invoke diplomatic protection and a state could be held accountable for breach of state responsibility.¹⁰³

Diplomatic protection is defined as a means by which a state takes action on behalf of its nationals, who have been unjustly denied their rights and interests due to an internationally wrongful act.¹⁰⁴ An injurious act towards an alien was therefore actionable by the home state in defence of its national.¹⁰⁵ A state thus espouses a claim for its national.¹⁰⁶ There is a school of thought that puts forward that diplomatic protection was a means of securing interests of capital-exporting countries.¹⁰⁷

⁹⁶ Newly independent states were developing and some were communist states who opined that they had sovereignty over natural resources. Furthermore, they took the position that international law was furthering the interests of capitalist countries. See Shaw MN *International Law* (2008) 823.

⁹⁷ Sornarajah M (2010) 36.

⁹⁸ Sornarajah M (2010) 37. See also Miles K *The Origins of International Investment Law: Empire Environment and Safeguarding of Capital* (2013) 50.

⁹⁹ Sornarajah M (2010) 37.

¹⁰⁰ Sornarajah M (2010) 36. See also Subedi SP (2008) 11-13, 56.

¹⁰¹ Miles K (2013) 47.

¹⁰² See Borchard E 'The Minimum Standard of Treatment of Aliens' (1940) 38 *Michigan Law Review* 446-448

¹⁰³ Miles K (2013) 47-48.

¹⁰⁴ British Institute of International Comparative Law *Investment Treaty Law: Current Issues. Remedies In International Investment Law Emerging Jurisprudence Of International Investment Law III* (2009) 4.

¹⁰⁵ Asante SKB 'International Law and Foreign Investment: A Reappraisal' (1988) 37 *International and Comparative Quarterly* 590. See also Miles K (2013) 47.

¹⁰⁶ Newcombe & Paradell (2009) 5.

¹⁰⁷ Miles K (2013) 37.

Diplomatic protection varied from diplomatic protest to military intervention.¹⁰⁸ An example of diplomatic protection is gunboat diplomacy used during colonial times as a means to protect commercial interests in Latin America.¹⁰⁹ This was a means in which a state would mount pressure on another state for the purposes of ensuring certain demands were met.¹¹⁰ The practice took centre stage in the post-colonial times, in 1902, when it was used to settle an investment dispute in Venezuela.¹¹¹

It is important to restate that these states felt they were under no obligation to conform to standards of investment protection in customary international law,¹¹² nor did they feel a need to persist with old standing arrangements that were existent during colonial times to protect property.¹¹³ Furthermore, minimum standards of treatment were largely based on US domestic law standards;¹¹⁴ therefore, it was argued that former colonies had been used as a platform to expand economic interests.¹¹⁵ To this, newly formed states sought to dismantle those economic interests.¹¹⁶

The resultant effect of Pan-American¹¹⁷ movement on treatment of investors led to a rift in opinion as to the status of generally accepted western protection standards. The divide between these two schools of thought would soon be exacerbated by the creation of the Calvo Doctrine. This doctrine sought to reinforce the ideas of investor treatment by Latin American countries. The Calvo doctrine was formulated by an Argentine jurist Carlos Calvo, and was premised on national treatment.¹¹⁸ One of the fundamentals of the Calvo doctrine

¹⁰⁸ Miles K (2013) 47. See also Cable J *Gunboat Diplomacy 1919–1991: Political Applications of Limited Naval Force* (2016) 1.

¹⁰⁹ See generally Graham-Yooll A *Imperial Skirmishes: War and Gunboat Diplomacy in Latin America* (2002) 91-98.

¹¹⁰ Cable J (2016) 1-2.

¹¹¹ Miles K (2013) 67. Civil unrest in Venezuela between 1898-1900 saw British, German and Italian nationals sustain property damage. To this, Venezuela was unable to meet payment demands and this resulted in the blockade, with seizure of the Venezuelan fleet, sinking of gunboats and bombarding Puerto Cabello. See Becker Lorca A *Mestizo International Law* (2014) 145-147.

¹¹² Sornarajah M (2015) 34-35. See also López Escarcena S *Indirect Expropriation in International Law* (2014) 27.

¹¹³ See generally Vandavelde KJ 'A Brief History of International Investment Agreements' (2005) 12 *University of California Davis Journal of International Law* 166-167.

¹¹⁴ Sornarajah M (2010) 36

¹¹⁵ See discussion by Miles K (2013) 2, 36.

¹¹⁶ Shaw (2008) 823. See also Lipson C *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) 76-77.

¹¹⁷ This term is used by Lipson, describing Latin American states and their treatment of aliens. See Lipson C *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (1985) 76-80.

¹¹⁸ Miles K (2013) 50.

maintains that no state has the right to intervene in another state by diplomatic pressure or military force for the purposes of private claims or debt owed to its nationals.¹¹⁹ This was especially due to unsettling diplomatic protection by capital exporting countries, which saw intervention in the host state.¹²⁰

Furthermore, the Calvo doctrine held the position that investment disputes were subject to host state courts' jurisdiction.¹²¹ Essentially, an investor was to rely on national standards of treatment, local courts for investment related disputes as opposed to home state courts and cede the right to diplomatic protection. This doctrine was, to a large extent, motivated by the need to stop diplomatic protection and its intrusive tendencies in the internal affairs of host states.¹²² Latin American states were displeased with the practice of European States engaging in aggression against militarily and economically weaker Latin American States as a means of collecting debts owed to their citizens.¹²³

This position was however rejected by capital-exporting states.¹²⁴ The US put forward a remedy against expropriation by asserting the Hull Rule. It came from the US Secretary of State Cordell Hull who wrote a letter to the Mexican government following expropriations of property owned by US nationals.¹²⁵ The Hull Rule established fair, prompt and adequate compensation¹²⁶ and was the expected position of Mexican expropriations of 1927.¹²⁷ The rationale behind the Hull Rule was the practice among the global north, of prompt and adequate compensation when a state took an alien's property.¹²⁸

After the failure of the Calvo Doctrine,¹²⁹ Latin American efforts to develop standards of treatment continued. This can be evidenced in later doctrines such as the Drago Doctrine,

¹¹⁹ Atkins GP *Encyclopaedia of the Inter-American System* (1997) 47-48.

¹²⁰ See Miles K (2013) 50.

¹²¹ Subedi SP (2008) 14.

¹²² Miles K (2013) 50.

¹²³ Gathii JT 'War 's Legacy in International Investment Law' (2009) 11 *International Community Law Review* 355.

¹²⁴ See Tabari NM *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (2016).

¹²⁵ Montt S *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (2009) 56-57.

¹²⁶ Dolzer R 'New Foundations of the Law of Expropriation of Alien Property' (1981) 75 *The American Journal of International Law* 558-559. See also Subedi SP (2008) 18.

¹²⁷ See Subedi SP (2008) 16-18.

¹²⁸ Lowenfeld AF *International Economic Law* (2008) 467.

¹²⁹ Failure with regards to being accepted by capital-exporting countries. The Calvo doctrine was otherwise accepted by the bulk of Latin American countries and to-date there are some treaties that do recognise the doctrine under Calvo Clause. See Miles K (2013) 50-52, Subedi SP (2008) 14-16.

which was similar to the Calvo doctrine. The Drago doctrine was devised by Luis Maria Drago as an immediate response to Britain, Germany and Italy blocking the port of Puerto Cabello for the collection of debts owed to their nationals in 1902.¹³⁰ Much like the Calvo doctrine, the Drago doctrine was 'non-interventionist'¹³¹ particularly by European powers in the Americas.¹³²

From the discussion above, it is clear that international investment regulation was fragmented. Following this, there were attempts to regulate foreign investments on a multilateral level. Most notably, the Havana Charter of 1948¹³³ was one such attempt. The Havana Charter was intended to create the International Trade Organisation (ITO), which would make up part of the international economic triad consisting of the World Bank and the IMF.¹³⁴ With the inclusion of several other things, the Havana Charter provided for employment and economic activity, economic development and reconstruction and set up the ITO.¹³⁵ Under Article 12 of the Havana Charter, investment regulation is articulated although not exhaustively.¹³⁶ It did not include provisions like minimum standards, compensation for expropriations which were at the core of customary international law on treatment of aliens.¹³⁷ Thus, the Havana Charter failed for several other reasons including its failure to appeal to capital-exporting states by not addressing the relevant questions in international investment law.¹³⁸ For example, with regard to protection of foreign investment, the Havana Charter merely set out unenforceable undertakings.¹³⁹

¹³⁰ Scafi JP *The Hidden History of International Law in the Americas: Empire and Legal Networks* (2017) 70.

¹³¹ Scafi JP (2017) 70.

¹³² See generally Fawcett L 'Between West and Non-West: Latin American Contributions to International Thought' (2014) 34 *The International History Review* as cited by Scafi JP (2017) 70.

¹³³ Havana Charter for the International Trade Organization 1948 available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed 25 April 2017).

¹³⁴ Appleton AE & Plummer MG (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (2007) 53.

¹³⁵ Chapter II articles 2-7, Chapter III articles 8-15 of the Havana Charter for an International Trade Organisation 1948.

¹³⁶ See Salacuse JW *The Law of Investment Treaties* (2015) 96.

¹³⁷ Lowenfeld AF (2008)482-483. See also Schill S *Multilateralization of International* 33-34, Subedi (2008) SP 20-21.

¹³⁸ Weiler T *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (2013) 213-215, Caliskan Y *The Development of International Investment Law: Lessons from the OEDC MAI and Their Application to a Possible Multilateral Agreement on Investment* (2008) 205.

¹³⁹ Schill S *The Multilateralization of International Investment Law* (2009) 34.

Apart from the Havana Charter, another multilateral attempt to regulate investment was seen by the Multilateral Agreement on Investment (MAI) by the Organisation for Economic Co-operation and Development (OECD). The MAI negotiations began in May of 1995,¹⁴⁰ primarily under the need to have transparent and fair rules on investments and investors.¹⁴¹ The strategy was to conclude a multilateral agreement with high level of protection amongst OECD members and other willing states.¹⁴² Although there was consensus a general consensus on the benefits of FDI,¹⁴³ there were significant differences in negotiation positions of the parties.¹⁴⁴ This among other reasons saw the MAI fail and abandoned in 1998.¹⁴⁵

2.3 EMERGENCE OF BILATERAL INVESTMENT TREATIES AND THEIR PURPOSE

From the historical perspective above, it is clear that there was dire need for an international investment protection legal framework. Perhaps at a multilateral level, it was impossible owing to clashes of ideologies such as those between capitalism and communism.¹⁴⁶ With the multilateral regulation process having been fraught by numerous challenges, a regulation at a lower level was developed in the form of BITs. Bilateral agreements were a more manageable platform to negotiate for protection of investments. It is important to reflect on the purpose of the creation of BITs. This leads into an interesting and insightful discussion filled with many perspectives and parallels. The discussion will be structured as follows. First, a discussion is led on reconciling differences between

¹⁴⁰ Caliskan Y *The Development of International Investment Law: Lessons from the OECD MAI Negotiations and Their Application to a Possible Multilateral Agreement on Investment* (2008) 110.

¹⁴¹ Caliskan Y (2008) 110.

¹⁴² Newcomb AP & Paradell L *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 55.

¹⁴³ Tielaman K 'The Failure of Multilateral Agreement on Investment and the Absence of a Global Public Policy Network' UN Vision Project on Global Public Policy Networks available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf> (accessed 28 August 2017) 9.

¹⁴⁴ Tielaman K 'The Failure of Multilateral Agreement on Investment and the Absence of a Global Public Policy Network' UN Vision Project on Global Public Policy Networks available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf> (accessed 28 August 2017) 9.

¹⁴⁵ Caliskan Y (2008) 111.

¹⁴⁶ There are fundamental differences in the two ideologies with regard to property ownership and rights. Thus, it was inevitable that states had different views on protection standards.

developed and developing countries. Thereafter, the need to reduce political risk is considered as well as the purpose of BITs to restate principles of international law.

2.3.1 Reconciling the 'seemingly irreconcilable' differences between developed and developing countries

Having unpacked the history of international investment regulation, it is evident that one of the problems in international investment law was reaching consensus on standards of treatment. The developed countries had certain standards of treatment that they asserted to be the correct standing at international law,¹⁴⁷ while developing countries insisted they were sovereign states who could do as they please with investments in their territory.¹⁴⁸

However, the interdependence of states for globalisation¹⁴⁹ saw countries move towards reconciling their differences in opinion over treatment of investors. Dolzer and Stevens assert that economic cooperation is one of the rationales behind having BITs.¹⁵⁰ Developing countries saw the need to have investments within their territories as a means to stimulate their economies.¹⁵¹ To this, some discussion and position had to be taken by capital-

¹⁴⁷ International minimum standards that were asserted since the 19th century when investment protection was a contentious issue. These include compensation for expropriation as per Hull Rule, and international minimum standard of treatment as opposed to national treatment asserted by the Latin American group through the Calvo Doctrine. Lipson C (1985) 75.

¹⁴⁸ Subedi SP (2008) 18, Sornarajah (2010) 124-128.

¹⁴⁹ Economic interdependence of states through trade and investment, among other things, has been attributed by the need of factors of production that may be attained after crossing borders and moving production plants. See the discussion by Paehlke R 'Globalisation, Interdependence and Sustainability' in Bell DVJ & Cheung YA (eds) *Introduction to Sustainable Development* (2004). The discussion of economic interdependence is an ongoing one. The International Monetary Fund (IMF), for example, speaks to flexibility of economies, identifying much needed reforms and 'ease bottlenecks' to ensure economic growth and benefit from globalisation. See speech by Anne O. Krueger, Former First Deputy Managing Director, IMF 13 June 2006 available at <http://www.imf.org/external/np/speeches/2006/061306a.htm> (accessed 25 April 2017). Further to this, there has been a school of thought that globalisation cannot be resisted, neither can national boarder stop the flow of information. Thus, globalisation creates interdependence of economies and therefore important to have consensus over issues like investment regulation. See Göksel NK 'Globalisation and the State' 2004 available at <http://sam.gov.tr/wp-content/uploads/2012/02/1.-NiluferKaracasuluGoksel.pdf> (accessed 25 April 2017).

¹⁵⁰ Dolzer R & Stevens M (1995) 12.

¹⁵¹ This was further supported by the World Bank and International Monetary Fund's Washington consensus which encouraged entering into BITs with capital-exporting countries for the purposes of fully realising the benefits of foreign investment. See Langalanga A 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' 2015 South African Institute of International Affairs Occasional Paper 214 available

importing governments on treatment of investors. Essentially, to incentivise FDI, capital-importing countries had to realise not only their need for investments, but also the importance of guaranteeing protection thereafter. Arguably, reconciling the two positions on treatment of foreign investors was in part aided by the abandonment of communism by most developing states.¹⁵² Such abandonment saw the move towards capitalist economy, and subsequently, the notion of respect for private property rights. This meant that potential host states could see through the prism of capital-exporting states on the rationale of protecting private property rights.

2.3.2 Catalysing investment by reducing political risk

For capital movements to be encouraged there was a need to reduce political risk against that capital, especially against the history of the 19th century and 20th century capital interferences. Efforts to reduce political risks can be seen by the nature of BITs, which compel states to trade part of their sovereignty for credibility over hosting foreign capital.¹⁵³ BITs create internationally binding obligations on treatment of investors by setting out rules on how investors from state parties are to be treated.¹⁵⁴ Such binding obligations are important to guard against 'dynamic inconsistency'.¹⁵⁵ Thus, one of the purposes of BITs is to reduce political risks that would otherwise work to the detriment of investors.¹⁵⁶

Granting protection, stabilising and otherwise limiting a host state government's regulatory freedom is a focal point of BITs.¹⁵⁷ This is an important trait as it reduces government

at <https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file> (accessed 25 April 2017) 8.

¹⁵² Langalanga A (2015) 8. However, abandonment of communism did not necessarily aid in increasing FDI even after reform of regulation in Eastern Europe in the 1990s. This was in part due to political, economic and social problems. See Chan S *Foreign Direct Investment in the Changing Global Political Economy* (2016) 146.

¹⁵³ Aaken V 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 *Journal of International Economic Law* 507.

¹⁵⁴ Sornarajah (2010) 175.

¹⁵⁵ Schill SW, Tams CJ & Hoffman R *International Investment Law and Development: Bridging the Gap* (2015) 157.

¹⁵⁶ Ginsburg T 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 *International Review of Law and Economics* 117.

¹⁵⁷ Martinez-Fraga P J & Reetz C R *Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era* (2015) 42.

intervention which may tend to be arbitrary and intrusive to private property rights.¹⁵⁸ To further the above, other schools of thought view BITs as a confidence booster for investors.¹⁵⁹ Moreover, non-commercial safeguards and guarantees provided by BITs incentivise investments.¹⁶⁰

Finally, the aim of BITs is to establish enforceable rules for the protection of foreign investment from unfair treatment especially expropriation in each contracting country.¹⁶¹ For an example, BITs identify the circumstances when expropriation of foreign investment can take place and compensation to be paid.¹⁶² Moreover, BITs establish an investment dispute settlement mechanism to enable an investor to claim against breach of treaty obligations.¹⁶³ Therefore, at their core, BITs seek to protect property rights.¹⁶⁴

2.3.3 Restating principles of international law

The characteristics of BITs in general are that they lay down international law on treatment and protection of investors.¹⁶⁵ The bulk of these standards have been positions initially taken by capital-exporting states in the 19th and 20th centuries thus, BITs were proposed as a means of strengthening principles of customary international law and practice by United States and other capital-exporting countries.¹⁶⁶

¹⁵⁸ See Perera AR 'The Role and Implications of Bilateral Investment Treaties' available at <http://www.tandfonline.com/doi/abs/10.1080/03050718.2000.9986567> (accessed 25 April 2017)

¹⁵⁹ Sauvart KP & Sachs LE 'BITs, DTTs, and FDI flows: An Overview' in Sauvart KP & Sachs LE *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (2009) 9.

¹⁶⁰ Subedi SP (2008) 8.

¹⁶¹ Mina W 'Do Bilateral Investment Treaties Encourage FDI in the GCC Countries?' (2010) 2 *African Review of Economics and Finance* 1. See also Shreuer C 'Investments, International Protection' available at http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf (accessed 25 April 2017) 2.

¹⁶² Mina W (2015) 1

¹⁶³ Organisation for Economic Co-operation and Development (OECD) Investment Division 'Dispute settlement provisions in international investment agreements: A large sample survey' 2012 available at <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf> (accessed 25 April 2017) 8.

¹⁶⁴ Sprenger H & Boersma B 'The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets' *American Bar Business Law Today* March 2014 available at http://www.americanbar.org/publications/blt/2014/03/01_sprenger.html (accessed 23 April 2017).

¹⁶⁵ See Muchilinski PT (2007) 674-698.

¹⁶⁶ Gudgeon SK 'United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards' (1986) 4 *International Tax and Business Lawyer* 111.

While restating principles of international law, BITs presented an opportunity to increase protection for foreign investors. Guzman asserts that while investors enjoyed protection standards prior to BITs, the rush to get foreign investments by capital-importing countries meant they competed against each other and subsequently did not foresee that the BITs they were signing offered much higher protection overall.¹⁶⁷ This was especially surprising considering the collective rejection of the Hull Rule in favour of a more lenient standard, yet BITs offer investors a much higher standard than that which was offered under customary international law.¹⁶⁸

2.4 PROBLEMS WITH BILATERAL INVESTMENT TREATIES

Bilateral Investment Treaties reinforce standards of treatment through a dispute resolution mechanism. In this regard, BITs have been a success in safeguarding the rights and interests of investors.¹⁶⁹ As a result, BITs have become the most widely used IIA to-date.¹⁷⁰ These standards in BITs were, however, never intended to be a charter of the economic rights and duties of the firms.¹⁷¹ As such, several problems are inherent in BITs, which have been discussed by different scholars, and will be briefly unpacked in this section. A more detailed discussion of the problems will be given in Chapter 3. Within this generality, focus will be placed on discussions led with regard to the rights and obligations of investors and state parties which are eye-wateringly unbalanced.

First generation BITs are hamstrung by the problem that they are constructed with loose language, poor drafting and inherently short texts.¹⁷² One may examine first generation BITs, whose content is usually confined between eight and twelve pages. As such, countries like Canada, India and US for example, have revisited policies on investment treaties in an

¹⁶⁷ Guzman AT 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment treaties' (1998) 38 *Virginia Journal of International Law* 643.

¹⁶⁸ Guzman AT (1998) 643. See also Salacuse JW & Sullivan NP 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard International Law Journal* 68.

¹⁶⁹ Gazzini T 'Bilateral Investment Treaties' in Gazzini & De Brabandere E (eds.) *International Investment Law: The Sources of Rights and Obligations* (2012) 33.

¹⁷⁰ UNCTAD World Investment Report 2016 101.

¹⁷¹ <http://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf> 6. full ref

¹⁷² See Van Harten G 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 *Trade Law and Development* 22.

effort to clarify loose language on concepts such as expropriation and fair and equitable treatment.¹⁷³ When arbitral tribunals are faced with investor claims, they refer to these short and unclear BIT texts. Arbitrators themselves have to find meaning of most of the language in the texts to which some have been expansionists¹⁷⁴ in interpretation and, awarding damages host state governments can little afford.¹⁷⁵

Apart from loose language and short texts, BITs have the effect of restricting host governments from taking legislative or regulatory measures which would benefit domestic firms or give preferential treatment to disadvantaged persons.¹⁷⁶ South Africa for example, has been sued for pursuing its Constitutional imperatives of economic empowerment.¹⁷⁷ In exercise of its regulatory powers and under the direction of the Constitution, the government of South Africa codified economic empowerment in the Mineral and Petroleum Resources Development Act (MPRD).¹⁷⁸ Such preferential treatment could run counter to national treatment provision in BITs.¹⁷⁹ The consequence of this is investors trigger the ISDS

¹⁷³ Van Harten (2010) 22. Furthermore, one can note how the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union for example, has qualified the fair and equitable treatment in its investment chapter. Arguably, this is to guard against uncertainties of loose language in international investment agreements. See Article 8.10 of CETA available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 25 April 2017).

¹⁷⁴ UNCTAD 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' 2012 available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 14 May 2017) 11. See also Sornarajah M (2010) 352-354.

¹⁷⁵ Gaukrodger D & Gordon K 'Investor-State Dispute Settlement: A Scoping Paper for The Investment Policy Community' OECD Working Papers on International Investment March 2012 available at http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (accessed 25 April 2017) 7. Insensitive because some of the claims will attract awards that may affect a county's fiscal position as noted by. See also Rosert D 'The Stakes Are High: A Review of Financial Costs of Investment Treaty Arbitration' International Institute for Sustainable Development July 2014 available at <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf> (accessed 25 April 2017) 15.

¹⁷⁶ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3.

¹⁷⁷ *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01. Although the claimants later withdrew their case and parties settled, the fact remains governments can be sued for legislative or regulatory measures that can diminish or affect an investment. In *Metalclad Corporation v. The United Mexican States* ICSID Case No. ARB (AF)/97/1, the investors successfully challenged government's right to regulate when they were refused to expand a waste site to an ecological protected zone.

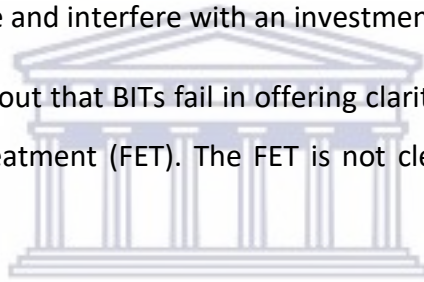
¹⁷⁸ MPRD Act No. 49 of 2009, amendment under section 70.

¹⁷⁹ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3. Notably, South Africa's new Protection of Investment Act No. 22 of 2015 expressly gives preferential

clause, and lead matters of important public policy to be solved before an insensitive international arbitral tribunal who are geared to determine breach of investment treaty measures.¹⁸⁰ Thus, the host state is in a position where it has to have high regard of BIT provisions while, in some instances, running counter to its Constitution and other domestic laws.¹⁸¹

Another central challenge to BITs is that claims have been brought forward for indirect expropriations using BIT provisions.¹⁸² Indirect expropriation has been defined as measures by government that gradually encroach upon foreign investment so as to confiscate or destroy.¹⁸³ Although some BITs have a provision for indirect expropriation,¹⁸⁴ the texts are short and offer no detailed explanation.¹⁸⁵ The provisions do not address the distinction between compensable and non-compensable regulatory actions.¹⁸⁶ Thus, a host government can regulate only to the extent that it does not interfere with investments. In the event that it does regulate and interfere with an investment, it has to compensate.

It is also noteworthy to point out that BITs fail in offering clarity for standards of treatment, namely fair and equitable treatment (FET). The FET is not clear as to what it means, and



treatment to domestic investors under section 8 (4). This qualifies the national treatment provision, a trait short in BITs.

¹⁸⁰ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3.

¹⁸¹ For an example, South Africa has questioned BITs against its Constitution, and saw disconnect between the country's domestic imperatives and the commitment in its BITs. See Langalanga A (2015) 8-9. See also South African Institute of International Affairs 'Promotion and Protection of Investment Bill 2013' Submission to the Department of Trade and Industry 1 November 2017 available at <https://www.saiia.org.za/general-publications/799-saiia-submission-investment-protection-and-promotion-bill/file> (accessed 25 April 2017).

¹⁸² For example, *CMS Gas Transmission Company v. The Republic of Argentina* ICSID Case No. ARB/01/8.

¹⁸³ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3. See also Isakoff PD 'Defining the Scope of Indirect Expropriation for International Investments' (2013) 3 *Global Business Law Review* 192-194.

¹⁸⁴ Germany–Poland BIT, 1989, Article 4.2; Australia–Vietnam BIT, 1991, Article 7.1; Guinea–Egypt BIT, 1998, Article 5.1; Cameroon–Mali BIT, 2001, Article 6.1; Israel–Estonia BIT, 1994, Article 5.1

¹⁸⁵ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3.

¹⁸⁶ OECD "'Indirect Expropriation" and the "Right to Regulate" In International Investment Law' September 2004 available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (accessed 25 April 2017) 6.

inconsistent arbitral awards add more confusion and uncertainty.¹⁸⁷ The standard has been termed by some scholars as vague.¹⁸⁸ As such, case law points to different interpretations. For example, *Pope & Talbot, Inc. v. Canada*¹⁸⁹ states that an investor is entitled to international law minimum standard of treatment, plus fairness elements;¹⁹⁰ while in the *TecMed* case,¹⁹¹ the tribunal held that FET requires the state parties to provide treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.¹⁹² In *TecMed*, the Tribunal further held that consistency in the acts of the host state is an expectation by the investor.¹⁹³ These decisions are different and inconsistent, and may delegitimise the investor – state dispute settlement mechanism.¹⁹⁴

The full protection and security (FSP) clause is not clear whether it refers to physical protection or could extend to other kinds of protection. Scholars like Schreuer assert that it is beyond doubt that the FSP standard relates to physical protection of the investor and their assets.¹⁹⁵ Tribunals in *Rumeli*¹⁹⁶ and *Saluka*¹⁹⁷ have also reinforced the notion that FSP is limited to physical protection. In *Saluka*, the Tribunal said the FSP standard applies when the foreign investment has been affected by civil strife and physical violence, and is not meant to cover any other impairment of an investor's investment.¹⁹⁸ In contrast, the Tribunal in *Azurix v Argentina* held that breach of the FSP standard can still be established even in instances where there is no physical violence.¹⁹⁹ Such inconsistencies are problematic in investment treaty practice.

¹⁸⁷ Lad-Ojomo O 'What is the Distinction Between the Fair and Equitable Treatment Standard and the Minimum Standard of Treatment Under Customary International Law' available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.473.6169&rep=rep1&type=pdf> (accessed 25 April 2017) 20-21.

¹⁸⁸ See Bronfman MK 'Fair and Equitable Treatment: An Evolving Standard' in Bogdandy A & Wolfrum R (eds.) *Max Planck Yearbook of United Nations Law* (2006) 625-626, 631-632, 676.

¹⁸⁹ *Pope & Talbot Inc. v Government of Canada* UNCITRAL final merits award 10 April 2001.

¹⁹⁰ *Pope & Talbot Inc. v Canada* para 110.

¹⁹¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.

¹⁹² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* para 154.

¹⁹³ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* para 154.

¹⁹⁴ Jaime M 'Relying Upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements' (2014) 46 *Georgetown Journal of International Law* 264.

¹⁹⁵ Schreuer C 'Full Protection and Security' 2010 *Journal of International Dispute Settlement* 2.

¹⁹⁶ *Rumeli v Kazakhstan* Award 29 July 2008 para 668.

¹⁹⁷ *Saluka Investments BV (The Netherlands) v The Czech Republic*, partial award 17 March 2006 para 483-484.

¹⁹⁸ *Saluka Investments BV (The Netherlands) v The Czech Republic*, para 483-484.

¹⁹⁹ *Azurix Corp v The Argentine Republic* Award 14 July 2006 para 406.

Another clause that is problematic in investment treaty practice is the most-favoured nation (MFN). In theory, it is intended to guard against discrimination;²⁰⁰ however, practice has seen it giving room for countries to sue under a BIT they are not necessarily a party to.²⁰¹ In the *White Industries Case*²⁰² a provision of assisting an investor with effective means for enforcement of rights was absent in the India-Australia BIT but however present in the Kuwait-India BIT. To this, the tribunal found no difficulty to use the MFN provision to find in India in breach of its obligation to provide an effective means to enforce rights.²⁰³ This therefore, shows how treaty provisions can be abused.²⁰⁴ Investors have the opportunity to rely on provisions negotiated in the past or future treaties.²⁰⁵

Finally, the national treatment clause in BITs is problematic regardless of its popularity. Many BITs focus on providing a general provision on national treatment, which only speaks to equal treatment of domestic and foreign investors.²⁰⁶ The challenge with this provision is that it does not account for domestic needs of host states.²⁰⁷ For instance, such a provision does not allow a host state to afford its nationals preferential treatment in line with its national objectives and development agenda.²⁰⁸

In light of the above, it is imperative to realise the need to revisit BITs that they reflect on what state parties actually intend to do. For example, if states commit themselves to not treat investments inequitably, it should not be interpreted to mean what the parties

²⁰⁰ Collins D *An Introduction to International Investment Law* (2016) 110.

²⁰¹ As in the case of *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award (30 November 2011) where the tribunal considered the Kuwait-India BIT.

²⁰² *White Industries Australia Limited v. India*, UNCITRAL (India-Australia BIT), Award, Nov. 30, 2011

²⁰³ See Slattery G 'White Industries Australia Limited v The Republic of India - India breaches Australian/Indian BIT' Squire Patton Boggs June 2012 available at <http://www.lexology.com/library/detail.aspx?q=5cd06b89-a957-43a6-9269-98f1adb1c6c4> (accessed 25 April 2017).

²⁰⁴ Although the rationale behind the tribunal's award was to ensure that there were no undue delays in registering awards, the means at arriving to that is however not justifiable.

²⁰⁵ Sornarajah M (2010) 204.

²⁰⁶ See Dolzer R National 'Treatment: New Developments' available at <https://www.oecd.org/investment/internationalinvestmentagreements/36055356.pdf> (accessed 25 April 2015).

²⁰⁷ Langalanga A 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' South Africa Institute of International Affairs May 2015 available at <https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file> (accessed 25 April 2017) 11.

²⁰⁸ Peterson LE 'Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation' 2007 Friedrich Ebert Stiftung Conference Report available at http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf (accessed 25 April 2017) 3.

intended as opposed to expansive interpretation. Furthermore, the BIT texts themselves should expressly provide direction on interpretation by expanding the language and provisions that are short and open to interpretation. National treatment provisions should be qualified, giving exceptions to the rule. Apart from addressing problems with the current content of BITs, the texts should be conscious of host state needs by allowing for regulatory space and distinguishing between compensable and no compensable regulatory measures.

2.5 PROPOSITION TO BALANCE INTERESTS OF INVESTORS AND HOST STATE PARTIES IN BILATERAL INVESTMENT TREATIES

In view of the above, there have been proposal to balance the interests of parties to a BIT, especially with the view that first generation BITs are unbalanced. There are different scholars asserting a balance in the structure of BITs. Notwithstanding that scholarly debate, state practice has reflected a backlash against the structure of BITs²⁰⁹ by revisiting the texts and putting forward model treaties or terminating BITs altogether.

Continuance of traditional treaty practice is subjecting developing countries to the risk of being sued,²¹⁰ attracting penalties which are exorbitant. Moreover, these traditional or first generation BITs typically remain in force for more than ten years and additional years owing to sunset clauses that most carry.²¹¹ Negotiation of new, more balanced IIAs is an important and necessary step.²¹² Although it is an important step to negotiate, Berger opines it is not sufficient as developing countries need to find ways to reduce liability resulting from old, less balanced BITs that remain in force especially under the sunset clauses.²¹³ There have been suggestions to issue interpretive notes in IIAs, to hedge against unfavourable terms in the first generation BITs.²¹⁴ Berger opines that policy makers in developing countries should

²⁰⁹Ma D ' A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America ' 2012 *Journal of Dispute Resolution* 571, 589.

²¹⁰ Berger A 'Developing Countries and Future of International Investment Regime' 2015 *Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ)* 19.

²¹¹ Berger (2015) 19.

²¹² Berger (2015) 24.

²¹³ Berger (2015) 24.

²¹⁴ Johnson L & Razbaeva M 'State Control over Interpretation of Investment Treaties' 2014 *Vale Columbia Centre on Sustainable International Investment* as cited by Berger (2015) 24.

get the content of IIAs right by drafting treaty templates taking into account international experiences with investor-state dispute settlement (ISDS) clauses.²¹⁵ Once there is an appropriate treaty template, there is need to decide on the context in which to renegotiate.²¹⁶

The United Nations Conference of Trade and Development (UNCTAD) heralds new generation investment policy, with an aim to broaden the regulatory space of host states.²¹⁷ This is because BITs limit regulatory space for host states by constraining measures pertaining to host state's regulatory prerogative which may take the form of protectionism.²¹⁸ Therefore, tension between interests and expectations of capital exporting states and capital importing states has been a recurring point of departure; as such, a key investment policy challenge is identifying the need to adjust the balance between rights and obligations of host states and investors.²¹⁹

A view has also been echoed that BITs should give effect to development objectives in pursuit of a balanced structure.²²⁰ The Energy Charter and North American Free Trade Agreement (NAFTA) for example, commit themselves to sustainable development, labour and environmental concerns, by citing them as objectives in the preamble.²²¹ Derogating from or relaxing of domestic measures for health, safety and environment would be inappropriate.²²² Furthermore, the fact that a controversial issue like labour protection can be dealt with amongst three countries at different levels of development and diverse labour legislation,²²³ can serve as an example of how a balance in treaty law substance can be achieved through negotiation and compromise.

Schill and Jacob assert the view that investment treaty-making could be refined, striking a clearer and more appropriate balance between investor protection and non-investment

²¹⁵ Berger (2015) 25.

²¹⁶ Berger (2015) 25.

²¹⁷ UNCTAD Investment Policy Framework for Sustainable Development available at http://investmentpolicyhub.unctad.org/Upload/Documents/INVESTMENT%20POLICY%20FRAMEWORK%202015%20WEB_VERSION.pdf (accessed 13 May 2017) 5, 75.

²¹⁸ Martinez-Fraga & Reetz (2015) 41.

²¹⁹ Martinez-Fraga & Reetz (2015) 41.

²²⁰ Filbri M & Praagman I A' International Investment and How they Reflect the Rights and Responsibilities of Different Stakeholders' 1999 *SOMO Amsterdam* 30.

²²¹ Filbri & Praagman (1999) 34.

²²² Filbri & Praagman (1999) 34.

²²³ Filbri & Praagman (1999) 37.

related public policy.²²⁴ Such an example would be the India Model BIT, which is part of the third generation BITs. There has been refinement by USA, Norway and South Africa of model BITs as well as renegotiation of existing treaties.²²⁵ This reaction shows discontentment with existing IIAs and the lack of balance they strike between the host country's right to regulate and the expectations of investors regarding transparent, predictable and consistent investment framework.²²⁶ The dissatisfaction with IIAs was also attributed to interpretation by arbitral tribunals, triggering refinement and a call for balancing the rights, obligations and public interest.²²⁷ The need for balance in IIAs is seeking modification from older, dubbed first generation BITs, to more modern approaches to investment treaty making.²²⁸ Schill and Jacob, however, challenge an assumption that there is a uniform and general development in investment treaty practice from traditional short and unrefined BITs to more elaborate well-intended models.²²⁹

It is noteworthy that both developed and developing countries are revisiting their BITs and seeking a better balance between rights and obligations of investors and state parties.²³⁰ In the 1990s for an example, Canada, Mexico and the US were in pursuit of reform in the international investment regime and policy after an awakening of the powers allocated to investors.²³¹ Moreover, states have revisited their BITs for the purpose of clarity on language to ensure uniformity and coherence in treaty interpretation.²³²

²²⁴ Schill W & Jacob M 'Trends in International Investment Agreements 2010/2011: The Increasing Complexity of International Investment Law' in Sauvant K P (ed.) *Yearbook on International Investment Law and Policy 2011-2012* (2013) 142.

²²⁵ Kehoe EG & Maslo PB 'Trends in international investment agreements, 2009/2010: Recent steps in the evolution of bilateral investment treaties and the UNCITRAL arbitration rules,' in Sauvant KP *Yearbook on International Investment Law and Policy 2010/2011* (2011) 37 as cited by Schill & Jacob (2013)142.

²²⁶ Schill & Jacobs (2013) 142 -143.

²²⁷ Muchlinski P 'Trends in International Investment Agreements' as cited by Schill & Jacobs (2013) 143.

²²⁸ Schill & Jacobs (2013) 143.

²²⁹ Schill & Jacobs (2013) 143

²³⁰ Singh K & Ilge B (eds.) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 4.

²³¹ Singh K & Ilge B (2016) 4.

²³² Johnson L & Sachs L 'International Investment Agreements, 2011–2012: A Review Of Trends And New Approaches' available at http://ccsi.columbia.edu/files/2014/03/Johnson_Sachs_YIILP2012-2013-Final.pdf (accessed 25 April 2017).

2.6 CONCLUSION

The chapter has seen that BITs come as a saving grace after there were failures to regulate international investment multilaterally or by traditional FCN treaties. BITs reconciled divides in opinion and reinforced standards of international law. The contents of BITs reflect on their purpose, which is to guarantee protection of investors and investments and in that regard, they have been successful. However, the contents regard the interests of the investor at the expense of the host country. The chapter highlighted challenges with BITs. Some of the most notable and notorious provisions include FET, NT, FPS, MFN and other types of expropriation such as indirect expropriation.

Furthermore, BITs have become outmoded being overtaken by events in developing host states that are now undergoing reforms in their economies in pursuit of different development agendas. This presents an opportunity to revisit BITs and modify them in line with new trends and thoughts. Resolving the shortcomings of BITs essentially entails balancing rights and obligations of state parties and investors. Countries like the US, Canada and India have revisited their Model BITs, for more consolidated models. The problematic provisions identified above will further be discussed in the following chapter in an analysis of Zimbabwe's BITs. Against this background, the next chapter critically analyses Zimbabwe's BITs with a view of unearthing the inherent challenges in these documents.

CHAPTER 3

AN ANALYSIS OF ZIMBABWE'S BILATERAL INVESTMENT TREATIES

3.1 INTRODUCTION

This chapter analyses Zimbabwe's BITs which are currently in force. The central discussion in this chapter will be on the problematic structure of Zimbabwe BITs and treaty provisions in these texts. Arguments are made to the effect that most of these provisions are drafted loosely and open the floodgates of interpretation. The structure of this chapter is as follows. First, a brief background to Zimbabwe's BITs is provided. Secondly, an analysis of BIT structure overall and then analysis of selected provisions is undertaken.²³³

3.2 BACKGROUND

Zimbabwe is a party to 54 BITs, 9 of which are in force.²³⁴ This chapter will however examine 5 BITs currently in force, whose text is available to the public.²³⁵ When analysing Zimbabwe's BITs, it is important to note that these texts were signed and entered into force at different times. The China- Zimbabwe BIT was signed in May 1996 and entered into force 1 March 1998.²³⁶ Two months later, the Netherlands- Zimbabwe BIT entered into force.²³⁷ In

²³³ In this Chapter, not all problematic provisions will be discussed. See part 1.7 of this thesis.

²³⁴ Sibanda G 'Zimbabwe: Government signs 54 trade pacts' The Herald 22 June 2015 available at <http://www.bilaterals.org/?zimbabwe-govt-signs-54-trade-pacts> (accessed 26 April 2017). Other sources however, point to 35 signed BITs and 10 in force, see UNCTAD Investment Policy Hub: Zimbabwe's Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iialInnerMenu> (accessed 26 April 2017).

²³⁵ Although it is reported to be 10 BITs in force, 5 will be used in this chapter because the other 5 are unavailable. Two BITs, namely Russia – Zimbabwe BIT and Denmark- Zimbabwe BIT, are in Russian and Danish respectively. There are no English texts available. Furthermore, while Kuwait – Zimbabwe BIT, Serbia- Zimbabwe BIT and Iran – Zimbabwe BIT are in force, there are no texts accessible online. Thus, this chapter will examine at Zimbabwe's BITs with China, Germany, Netherlands, South Africa and Switzerland.

²³⁶ UNCTAD Investment Policy Hub: Zimbabwe's Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iialInnerMenu> (accessed 26 April 2017).

the second quarter of 2000, the Germany- Zimbabwe BIT entered into force, although it was signed in 1995.²³⁸ A year later from the entry into force of the Germany – Zimbabwe BIT, the Switzerland-Zimbabwe BIT, negotiated in 1996, entered into force.²³⁹ Finally, the South Africa – Zimbabwe BIT entered into force on 15 September 2010, a year after its signing. To sum up the timeline, of the 5 available in-force BITs, 4 were negotiated and signed in the 1990s, while one was negotiated in 2009.

Although these BITs were negotiated and signed in different millenniums, they are inherently the same in structure and content, with minor differences. This shows an interesting pattern in the investment treaty signing of Zimbabwe. Arguably, there is an indifferent attitude to the effects of these texts and their implications especially against the discussion of balancing interests of investors and state parties. This argument uncloaks some of the challenges abound in these BITs. It is against this background the next section discusses the structure of Zimbabwe’s BITs and some of the problems inherent in them.

3.3 STRUCTURAL PROBLEMS OF BILATERAL INVESTMENT TREATIES

Since the inception of BITs, they have undergone minor developments. It is therefore not shocking that these BITs would have significant challenges. One of these challenges pertains to the structure of BITs. To begin, BITs expressly provides for standards of treatment, however, these are often articulated in one paragraph without explanation. For instance, the Switzerland – Zimbabwe BIT reads:

‘Investment and returns of investors shall at all times be accorded with **fair and equitable treatment** and shall enjoy **full protection and security** in the territory of the other Contracting Party. Neither Contracting Party shall in any way **impair by unreasonable** or

²³⁷ UNCTAD Investment Policy Hub: Zimbabwe’s Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iialInnerMenu> (accessed 26 April 2017).

²³⁸ UNCTAD Investment Policy Hub: Zimbabwe’s Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iialInnerMenu> (accessed 26 April 2017).

²³⁹ UNCTAD Investment Policy Hub: Zimbabwe’s Bilateral Investment Treaties available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/233#iialInnerMenu> (accessed 26 April 2017).

discriminatory measures to the management, maintenance, use enjoyment, extension or disposal of investments in its territory of investors of the other contracting party.²⁴⁰

Another example noteworthy is that found in the Netherlands – Zimbabwe BIT, which reads:

‘(1) Each contracting party shall ensure **fair and equitable treatment** of the investments of nationals of the other Contracting Party and shall **not impair, by unreasonable or discriminatory measures, the operation management, maintenance, use, enjoyment or disposal** thereof by those nationals. Each Contracting Party shall accord to such investments **full physical security and protection.**’²⁴¹

There are two distinct standards of treatment provided for in the two provisions highlighted above, namely fair and equitable treatment and full security and protection standard. Failure to provide for these standards has the ability to impair investments, however they remain distinct standards which must still be explained and qualified separately.

Apart from the FET and FPS standard, the BIT texts of Zimbabwe seemingly provide for another standard that obliges state parties not to impair investments by unreasonable or discriminatory measures to either the maintenance, use, enjoyment or disposal of the investment. The text is not clear whether or not this obligation gives meaning to the FET and FPS or is a standalone standard. Arguably, had the standard intended to give meaning to the often vague and notorious FET, the text could have expressly said so.

In addition to the above, the structure of BITs is focused on protecting investors and thus give rights generously and on a wider array as compared to customary international law.²⁴² Investor rights are given through different standards of treatment and are inviolable, justiciable and inalienable.²⁴³ While there are reasons of doing so, it has then created a system that is investor interest oriented.²⁴⁴ Such a system has thus, ignored host state legitimate interests. Notably, the state has no rights in first generation BITs. The host state

²⁴⁰ Article 4 para 1 of Switzerland – Zimbabwe BIT. The text has been bolded as part of my own emphasis.

²⁴¹ Article 3 (1) of Netherlands – Zimbabwe BIT. The text has been bolded as part of my own emphasis.

²⁴² Elkins Z, Guzman AT & Simmons BA ‘Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960 – 2000’ (2006) 60 *International Organisation* 814.

²⁴³ Franck SD ‘The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future’ (2005) 12 *University of California International Law and Policy* 52-55.

²⁴⁴ Davarnejad L ‘Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises’ OECD Global Forum on International Investment March 2008 available at <http://www.oecd.org/investment/globalforum/40352144.pdf> (accessed 7 May 2017) 2, 5-6.

would be ordinarily interested in the right to regulate,²⁴⁵ a critical feature of sovereignty.²⁴⁶ Such a right, in the perspective of the state, would usher in practical socio-economic and environment issues that investments have an impact on. Thus, the BIT regime would be more balanced.

Bilateral investment treaties are shy of human rights obligations. Investment treaties must include explicit human rights provisions in order to protect the ability of the state to take appropriate measures under international or domestic human rights obligations.²⁴⁷ The absence of human rights clauses within BITs results in interpretation that permits actions that violate human rights.²⁴⁸ When BITs incorporate human rights obligations, it aids in the interpretation of the treaty by arbitral tribunals, fully realising a state's obligations of those rights to its people.²⁴⁹

An analysis of the *Foresti Case* for example, indicates that human rights organisations were granted permission to assist the Tribunal in interpreting the South African Mineral and Petroleum Resources Development Act 28 of 2002 in light of the country's constitutional and human rights obligations.²⁵⁰ Human rights activists were concerned that the claimant's interpretation of South Africa's BITs could severely impinge on government's policymaking space and impede its ability to pursue key policies such as economic empowerment.²⁵¹ Thus, a strict interpretation of treaty provisions may give an inappropriate outcome that trumps on human rights. It is therefore essential that human rights provisions are articulated in BITs as these clauses lead to the necessity of addressing issues of importance to host states.²⁵²

²⁴⁵ See generally Mann H 'The Right of States to Regulate and International Investment Law' November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 6 May 2017).

²⁴⁶ Mouyal LW *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016) 31.

²⁴⁷ Ayala Y S 'Restoring the Balance in Bilateral Investment Treaties: Incorporating Human Rights Clauses' (2009) 32 *Artículo De Investigación/ Research Articles Revista de Derecho, Universidad del Norte* 141.

²⁴⁸ Ayala (2009) 158.

²⁴⁹ Ayala (2009) 158.

²⁵⁰ Joint press release by the Legal Resources Centre, the Centre for Applied Legal Studies, the Centre for Environmental Law and the International Centre for the Legal Protection of Human Rights 19 October 2009 available at http://www.ciel.org/wp-content/uploads/2015/04/SouthAfrica_Media_19Oct09.pdf (accessed 18 May 2017).

²⁵¹ Joint press release by the Legal Resources Centre, the Centre for Applied Legal Studies, the Centre for Environmental Law and the International Centre for the Legal Protection of Human Rights 19 October 2009 available at http://www.ciel.org/wp-content/uploads/2015/04/SouthAfrica_Media_19Oct09.pdf (accessed 18 May 2017).

²⁵² Ayala (2009) 158.

There are other examples where issues of importance to host states are accentuated by legislative and administrative measures, but however challenged by foreign investors under the protection of BITs and these cases have grown in number.²⁵³ In November 2011, Philip Morris filed an investment treaty claim against Australia and its passing of the Tobacco Plain Packaging Act.²⁵⁴ Philip Morris sought suspension of the legislation's enforcement or compensatory damages.²⁵⁵ Australia's regulatory measure forbade the use of graphics, symbols or images in their packaging and marketing with the aim of reducing the appeal of tobacco products especially because of growing concern of public health.²⁵⁶ Similarly, Germany was dragged to arbitration by a Swedish Energy Company, Vattenfall,²⁵⁷ after it had initiated a phase-out of nuclear power.²⁵⁸ Vattenfall argued that the impact of new German environmental regulations are in violation of Germany's commitments as a signatory to the energy charter treaty.²⁵⁹ The dispute was later settled, with Germany agreeing to a watered down environmental permit in favour of the corporation.²⁶⁰

In addition to the above, the structure of first generation BITs is not reflective of some constitutional requirements and directions. Zimbabwe's neighbour and fellow SADC member state South Africa, has reviewed and terminated its BITs. This is, in part, owed to the inhibiting stance these texts pose against the country's transformative constitution.²⁶¹ The economic empowerment laws of South Africa, are aimed at redressing past injustices and empower previously marginalised groups within the Republic.²⁶² As a constitutional

²⁵³ Spears S 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 16 *Journal of International Economic Law* 1038.

²⁵⁴ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012 – 12 Award 17 December 2015.

²⁵⁵ *Philip Morris Asia Limited v. The Commonwealth of Australia* para 8.

²⁵⁶ Australian Government Department of Health 'Tobacco control: Policy and programs to improve the health of all Australians by eliminating or reducing their exposure to tobacco in all its forms' available at <http://www.health.gov.au/tobacco> (accessed 20 May 2017).

²⁵⁷ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6.

²⁵⁸ World Nuclear Association 'Nuclear Power in Germany' available at <http://www.world-nuclear.org/information-library/country-profiles/countries-q-n/germany.aspx> (accessed 20 May 2017).

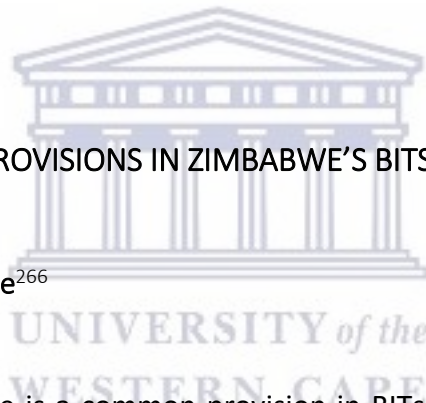
²⁵⁹ See para 50 – 53 of the Request for Arbitration submitted by Vattenfall available at <https://www.italaw.com/sites/default/files/case-documents/ita0889.pdf> (accessed 20 May 2017).

²⁶⁰ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* Award 11 March 2011, page 33.

²⁶¹ Gallagher K 'Renegotiating bilateral treaties should not scare off investors' The Business Report 4 November 2013 available at <http://www.iol.co.za/business-report/opinion/renegotiating-bilateral-treaties-should-not-scare-off-investors-1601411> (accessed 5 May 2017).

²⁶² See Department of Trade and Industry of South Africa giving a general overview of economic empowerment, available at http://www.dti.gov.za/economic_empowerment/bee.jsp (accessed 5 May 2017).

imperative, government has thus explored and implored ways of achieving that. However, this has been problematic to investors and they have challenged economic empowerment laws.²⁶³ As such, it is noteworthy that BITs give ample room for commercial interests of investors to be fulfilled, while issues of public interest are side-lined.²⁶⁴ To this, one then contemplates the bulk of Zimbabwe's BITs that do not to give light to new government policy and particularly Constitutional directives. The new transformative Constitution of Zimbabwe speaks to economic empowerment.²⁶⁵ Government is encouraged to aspire to economic empowerment and have done so in numerous ways. One of such ways is by preferential treatment provided for nationals under the Procurement Act of Zimbabwe. This is not given as an exception to the national treatment standard in most of Zimbabwe's BITs. The potential effect of this is that in cases where such preferential treatment is given to domestic firms, Zimbabwe as a host state runs risk of violating its national treatment obligation under BITs.



3.4 PROBLEMATIC TREATY PROVISIONS IN ZIMBABWE'S BITS

3.4.1 National Treatment Clause²⁶⁶

The national treatment clause is a common provision in BITs which appears in most texts Zimbabwe is a party to. The provision places an obligation on the host state to treat foreign

See also The Department of Trade 'South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment' June 2003 available at https://www.thedti.gov.za/economic_empowerment/bee-strategy.pdf (accessed 5 May 2017) 8.

²⁶³ An example is the case *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* 2009 ICSID Case No. ARB(AF)/07/01, where the Italian nationals challenged Mineral and Petroleum Resources Development Act No. 28 of 2002 which was part and parcel of economic empowerment policy and law in South Africa.

²⁶⁴ Hindelang S & Krajewski M (eds.) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016). See also Executive Summary of Government Position Paper 'Bilateral Investment Treaty Policy Framework Review' The Department of Trade & Industry 2009 available at http://www.gov.za/sites/www.gov.za/files/32386_961.pdf (accessed 5 May 2017) 11.

²⁶⁵ Section 14 of the Constitution of Zimbabwe. Further to this, the Procurement Act of Zimbabwe speaks to affirmative action through preferential treatment given to companies that have indigenous Zimbabweans as majority shareholders.

²⁶⁶ Article 3.2 Netherlands – Zimbabwe BIT, article 3.2 and 3.3 South Africa – Zimbabwe BIT, and article 4.2 and 4.3 Switzerland – Zimbabwe BIT.

and domestic investors and their investments equally.²⁶⁷ Ordinarily, the national treatment standard involves an analysis of two issues.²⁶⁸ First, the definition of the standard itself, and secondly, the factual situation in which the standard applies.²⁶⁹ A factual situation is one that requires identical circumstances, thus offering narrow scope of application of national treatment.²⁷⁰ An example would be the national treatment clause of United Kingdom- Belize BIT,²⁷¹ which is further qualified by requiring the investor to show he/she was treated unfairly in the same circumstances. The provision reads:

‘(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords in the same circumstances to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State’²⁷²

Notwithstanding the popularity of the national treatment provision, some BITs do not expressly provide for it with the purpose of avoiding giving preferential treatment that is otherwise meant to benefit domestic entities.²⁷³ For example, China has in the past excluded the national treatment clause.²⁷⁴ However, in recent agreements, it has opted to include this provision, but however in a qualified manner. Typically, this qualification would state that national treatment will be accorded subject to national laws.²⁷⁵

A qualified national treatment clause limits the liability of the host state to lawsuits that may arise after it has given preferential treatment to domestic firms. It indicates to the investor that while they expect to be treated equally as with domestic entities, there are limitations to that right. The factual situation test is a trait short in Zimbabwe’s BIT. As a

²⁶⁷ Sauvant KP (ed.) ‘International Investment Agreements: Key Issues’ UNCTAD October 2010 available at http://unctad.org/en/Docs/iteiit200410_en.pdf (accessed 27 April 2017) 86-87.

²⁶⁸ UNCTAD ‘National Treatment’ IIAs Issues Paper Series May 1999 available <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf> (accessed 27 April 2017) 28.

²⁶⁹ UNCTAD ‘National Treatment’ IIAs Issues Paper Series May 1999 available <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf> (accessed 27 April 2017) 28.

²⁷⁰ UNCTAD ‘National Treatment’ IIAs Issues Paper Series May 1999 available <http://unctad.org/en/Docs/psiteiitd11v4.en.pdf> (accessed 27 April 2017) 28

²⁷¹ United Kingdom – Belize Bilateral Investment Treaty 30 April 1982 (entered into force 30 April 1982) available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/436> (accessed 27 April 2017).

²⁷² Article 3 (1) United Kingdom – Belize BIT.

²⁷³ Muchilinski PT (2008) 684.

²⁷⁴ Sauvant KP (ed.) ‘International Investment Agreements: Key Issues’ UNCTAD October 2010 available at http://unctad.org/en/Docs/iteiit200410_en.pdf (accessed 27 April 2017) 187-188. China – Zimbabwe BIT does not provide for national treatment.

²⁷⁵ Muchilinski PT (2008) 648. Sauvant KP (ed.) ‘International Investment Agreements: Key Issues’ UNCTAD October 2010 available at http://unctad.org/en/Docs/iteiit200410_en.pdf (accessed 27 April 2017) 187-188.

consequence, it exposes the state to lawsuits which may arise in circumstances that are incomparable.

Commendably, the South Africa – Zimbabwe BIT qualifies the national treatment provision and further envisages economic empowerment.²⁷⁶ It reads:

‘(4) The provisions of sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from:

(c) any domestic law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.’²⁷⁷

The structure of the national treatment standard in the South Africa- Zimbabwe BIT is largely due to the fact that the BIT itself was signed after the both countries had a clear standing on their economic empowerment policies and laws.²⁷⁸ Therefore, the BIT reflects positions influenced by their respective constitutional imperatives as well as legislative reforms. However, other Zimbabwean BITs do not enjoy the same luxuries as they were signed in the 1990s, when economic empowerment was not law but merely government policy.²⁷⁹ For example, Netherlands – Zimbabwe BIT does not expand the national treatment provision by providing for exceptions. It merely reads:

‘(2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals...’²⁸⁰

It is not unusual for a developing country like Zimbabwe to encourage indigenous businesses by offering preferential treatment. In fact, such a position has been noted to be a legitimate one for purposes of protecting the development of indigenous industrial production and service provision in the face of potentially negative competitive pressure

²⁷⁶ Policies that both countries follow.

²⁷⁷ Article 3.4 South – Africa Zimbabwe BIT.

²⁷⁸ These are Black Economic Empowerment laws in South Africa and Indigenisation laws in Zimbabwe.

²⁷⁹ See Mumbengegwi C *Macroeconomic Structural Adjustment Policies in Zimbabwe* (2001) 102.

²⁸⁰ Article 3.2 Netherlands – Zimbabwe BIT)

from powerful foreign investors.²⁸¹ In the Zimbabwean context, preferential treatment for indigenous businesses is provided through government procurement. The majority of government tenders can only be accessed by companies that have a 51% indigenous shareholding. This is envisaged under the Indigenisation and Economic Empowerment Act section 3(1)(f). The provision provides that government departments, statutory bodies and local authorities shall procure at least 51% of their goods and services from businesses in which a controlling interest is held by indigenous Zimbabweans. This means that the government will consider companies that do not have a 51% ownership quota, however, such companies are limited to only 49% of the government tenders.

While wholly foreign owned entities are limited to 49% of government tenders as provided by law, section 3 (1) (g) of Indigenisation and Economic Empowerment Act creates an obligation for those wholly foreign owned companies to favour suppliers whose businesses have indigenous Zimbabweans holding the controlling interest; that is in the event they are to offer goods and services to the government under the Procurement Act.²⁸² The preference is therefore in ownership threshold.

Notwithstanding the above, investors are required to cede 51% of ownership to indigenous Zimbabweans pursuant to the Indigenisation and Economic Empowerment Act.²⁸³ This entails that every business should qualify for government procurement as they would have ceded 51% ownership to indigenous Zimbabweans. There is however, some companies that

²⁸¹ Muchilinski PT, Ortino F & Shreuer C (eds.) *The Oxford Handbook of International Investment Law* (2008) 96.

²⁸² Section 3(1)(g) of Indigenisation and Economic Empowerment Act reads:

‘(g) where goods and services are procured in terms of the Procurement Act [Chapter 22:14] from businesses in which a controlling interest is not held by indigenous Zimbabweans, any subcontracting required to be done by the supplier shall be done to the prescribed extent in favour of businesses in which a controlling interest is held by indigenous Zimbabweans’

²⁸³ As provided for by section 3 of the Indigenisation and Economic Empowerment Act.

are yet to comply with the Act.²⁸⁴ Non-compliance is attributed, in part, to the confusion between the Act, regulations and ideas of the President.²⁸⁵

Arguably, indigenisation on ownership of foreign owned companies should be done away with. This is because in the SADC region, Zimbabwe is the only country to implement indigenisation thresholds where controlling interests are given up.²⁸⁶ Given the similarity of the investment sectors in SADC economies, investors would use other countries as safe havens for their investments.²⁸⁷ Thus, it would then become necessary to qualify the national treatment clause in Zimbabwe's so as to close potential avenues for non-compliance with the national treatment clause.

3.4.2 Most Favoured Nation Treatment²⁸⁸

Another common provision in BITs is the most-favoured nation treatment (MFN) standard. It provides that investors from state parties shall not receive treatment less favourable than that awarded to investors from third states.²⁸⁹ The provision is a non-discriminatory measure that seeks to guard against economic distortions that could occur through country



²⁸⁴ See Kuwaza K 'Indigenisation process gets murkier' The Independent 24 March 2016 available at <https://www.theindependent.co.zw/2016/03/24/indigenisation-process-gets-murkier/> (accessed 22 May 2017). This year Edgar's, a clothing company, has complied with the indigenisation laws. It is apparent that there is a snail pace these companies have on complying with indigenisation laws in Zimbabwe. See Kazunga O 'Edgars cedes \$25m to workers' scheme' The Chronicle 16 May 2017 available at <http://www.chronicle.co.zw/edgars-cedes-25m-to-workers-scheme/> (accessed 22 May 2017).

²⁸⁵ See generally Matyszak D 'Chaos Clarified – Zimbabwe's "New" Indigenisation Framework' Research and Advocacy Unit 2016 available at <http://researchandadvocacyunit.org/system/files/Chaos%20Clarified.pdf> (accessed 20 May 2017).

²⁸⁶ Namibia is still debating a 25% ownership threshold in its parliament, see section 23 of the National Equitable Economic Empowerment Bill 2015. South Africa's BEE focuses on affirmative action in the employment sector.

²⁸⁷ Kondo T 'Investment Law in a Globalised Environment: A Proposal for a New Investment Regime in Zimbabwe' (Unpublished LLD Thesis, University of the Western Cape, 2017) 323.

²⁸⁸ Article 3.2 China – Zimbabwe BIT, article 3.1 & 3.2 Germany – Zimbabwe BIT, article 3.2 Netherlands – Zimbabwe BIT, article 3.2 South Africa - Zimbabwe BIT and article 4.2 and 4.3 Switzerland – Zimbabwe BIT.

²⁸⁹ OEDC 'Most-favoured Nation Treatment in International Investment Law' Working Papers on International Investment February 2004 available at http://www.oecd.org/daf/inv/investment-policy/wp-2004_2.pdf (accessed 28 April 2017) 2.

by country liberalisation.²⁹⁰ Therefore, the MFN clause has become a significant instrument of economic liberalisation.²⁹¹

Initially, the MFN clause was aimed at ensuring traders were not discriminated against in particular markets.²⁹² Today however, the standard has been problematic as investors have used the clause to 'import' a more favourable clause in other BITs the host state is a party to.²⁹³ There is a school of thought that asserts that it is inaccurate to describe MFN clauses of this time as reflecting an attempt by states to eliminate market discrimination.²⁹⁴ Rather, Cole gives a brief synopsis of the history of the MFN clause in trade law²⁹⁵ and concludes that:

'MFN clauses have simply never been the generalized non-discrimination provisions that some contemporary commentators have portrayed them as being. They were originally developed as a means of gaining specific advantages already offered to specific third states, and, even when the generalized form of MFN treatment became dominant, the clause was used tactically as a means of ensuring market benefits rather than as a principled means of promoting multilateral non-discrimination.'²⁹⁶

Moreover, investors can latch on to more favourable treatment provided in past or present treaties.²⁹⁷ It is therefore, against this background that one will see the problems with the MFN treatment today. In BITs, clause importing has been enabled by the MFN standard. This

²⁹⁰ Salomon C & Friedrich S 'How Most Favoured Nation Clauses in Bilateral Investment Treaties Affect Arbitration' Practical Law Arbitration 2013 available at <https://m.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration> (accessed 28 April 2017) 1.

²⁹¹ Salomon C & Friedrich S 'How Most Favoured Nation Clauses in Bilateral Investment Treaties Affect Arbitration' Practical Law Arbitration 2013 available at <https://m.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration> (accessed 28 April 2017) 1. OECD 'Most-favoured Nation Treatment in International Investment Law' Working Papers on International Investment February 2004 available at http://www.oecd.org/daf/inv/investment-policy/wp-2004_2.pdf (accessed 28 April 2017) 2.

²⁹² Cole T 'Boundaries of Most Favoured National Treatment in International Investment Law' (2012) 33 *Michigan Journal of International Law* 546.

²⁹³ Salomon C & Friedrich S 'How Most Favoured Nation Clauses in Bilateral Investment Treaties Affect Arbitration' Practical Law Arbitration 2013 available at <https://m.lw.com/thoughtLeadership/favoured-nation-clauses-arbitration> (accessed 28 April 2017) 2-3.

²⁹⁴ Cole T (2012) 547-552.

²⁹⁵ Cole T (2012) 553.

²⁹⁶ Cole T (2012) 553.

²⁹⁷ Sornarajah M (2010) 204.

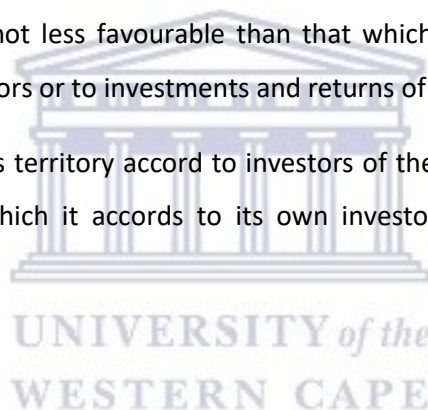
has been with the assistance of arbitral tribunals, who have created a norm for investors to benefit from treaty provisions they are not even a party to.²⁹⁸

Zimbabwe's BITs do contain the provision of MFN treatment and could experience the same problems the standard brings about. The standard is fairly the same in all of Zimbabwe's BITs with minor differences. For example, the standard in South Africa – Zimbabwe BIT reads:

'(1) Investments and returns that are reinvested of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Party.

(2) Each Party shall in its territory accord to investments and returns of investors of the other Party treatment not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

(3) Each Party shall in its territory accord to investors of the other Party treatment not less favourable than that which it accords to its own investors or to investors of any third State.'²⁹⁹



Notwithstanding this, the article further gives exceptions to the general rule and application of the MFN standard. It reads:

'(4) The provisions of sub-Articles (2) and (3) shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from –

- (a) any existing or future customs union, free trade area, common market, any similar international agreement or any interim arrangement leading up to such

²⁹⁸ This is evident in the number of cases decided on by ISDS arbitration tribunals, such as those in *CME Czech Republic BV v Czech Republic (UNCITRAL, Award, 14 March 2003)*, *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan (ICSID Case No ARB/05/16, Award, 29 July 2008)* and *MTD v Chile (ICSID Case No ARB/01/7, Award, 25 May 2004)*. See also Cole T (2012) 560.

²⁹⁹ Article 3 of South Africa – Zimbabwe BIT.

customs union, free trade area, or common market to which either Party is or may become a party; or

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or

(c) ...

(5) If a Party accords special advantages to development finance institutions with foreign participation and established for the exclusive purpose of development assistance through mainly non-profit activities, that Party shall not be obliged to accord such advantages to development finance institutions or other investors of the other Party.³⁰⁰

This approach is similar in all of Zimbabwe's BITs. However, the problem lies in the limitation of the scope of application of the MFN clause. It remains questionable as to how far the clause extends and/or how far it ought to extend to for it to take a balanced position in the regulation of an investment.

One may analyse the case of *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*³⁰¹ where the claimants used the MFN clause in the Turkey-Kazakhstan BIT to import a variety of substantive protections from other Kazakh BITs, including the obligation to ensure the fair and equitable treatment of the investments of investors of the other Contracting Party; the duty not to deny justice; the obligation to accord full protection and security to such investments; and the obligation not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments.³⁰² Essentially, investors are enabled to bypass provisions of the applicable BIT.³⁰³ By allowing this, state parties are bound to extend

³⁰⁰ Article 3.4 (a) – (b) and 3.5 of South Africa – Zimbabwe BIT.

³⁰¹ *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* (ICSID Case No ARB/05/16, Award, 29 July 2008).

³⁰² *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan* (ICSID Case No ARB/05/16, Award, 29 July 2008) para 575.

³⁰³ Bernasconi-Osterwalder N & Johnson L 'Commentary to the Australian Model Investment Treaty' November 2011 available at https://media.arbeiterkammer.at/wien/PDF/studien/Studie_Investitionsschutzabkommen_en.pdf (accessed 7 May 2017) 17.

treatment which they had not intended to when entering a bilateral investment protection agreement.

The MFN clause is problematic, however notwithstanding this, it remains a cornerstone in the protection against discrimination of investors. Sometimes, allocation of rights or preferential treatment may be due to a 'facilitation fee' or 'greasing of the wheel',³⁰⁴ as such create an unfair playing field for investors, especially those from countries that are unable to do so. Therefore, the MFN treatment serves as a disincentive against such practices. The inclusion of an MFN clause in investment treaties remains an interesting unit of further research. CETA signatories have limited the scope of application of the MFN clause, providing for instances where the MFN clause can and cannot find application.³⁰⁵

3.4.3 Fair and Equitable Treatment³⁰⁶

The most important provision from the perspective of the investor is the fair and equitable treatment clause (FET).³⁰⁷ It is a rule of international law and not determined by laws of the host state.³⁰⁸ Although this provision is a common clause in BITs, there is no standalone definition of the FET standard in BITs.³⁰⁹ In fact, some scholars like Sornarajah³¹⁰ are of the view that FET is an international minimum standard the US has sought to assert for over a century and remains uncertain as to what it encompasses as its content.³¹¹

³⁰⁴ See for example OECD efforts to guard against these practices through its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997 available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 1 May 2017). Further to this, there have been further efforts to enjoin non-members of OECD to cooperate in combating corruption, particularly major exporters and investors. See 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' November 2009 available at <https://www.oecd.org/daf/anti-bribery/44176910.pdf> (accessed 1 May 2017).

³⁰⁵ Article 8.7 para 1, 3 and 4 of CETA.

³⁰⁶ Article 3.1 of China – Zimbabwe BIT, article 3.1 Netherlands – Zimbabwe BIT, article 3.1 South Africa – Zimbabwe BIT and 4 para 1 of Switzerland – Zimbabwe BIT.

³⁰⁷ Muchilinski PT *et al* (eds.) (2008) 97.

³⁰⁸ Schreuer C 'Investments, International Protection' January 2011 available at http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf (accessed 29 April 2017) 9.

³⁰⁹ Muchilinski PT 'The Framework of Investment Protection: The Content of BITs' in Sauvant KP & Sachs LE (eds.) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009) 46.

³¹⁰ Sornarajah M *Resistance and Change in the International Law on Foreign Investment* (2015).

³¹¹ Sornarajah M (2015) 246.

The law on fair and equitable treatment is primarily for the purposes of promoting investment protection and not to bring about a law that balances investor interests and host state interests.³¹² This is attributed to the expansionist approach taken by arbitral tribunals when interpreting the FET standard.³¹³ It is necessary however to consider the needs of the host state to regulate the behaviour of aliens in its territory for public interest.³¹⁴ Therefore, leaving the FET standard without an attempt to describe what it is, leaves the host state vulnerable. Drafters of CETA for example, have tried to give meaning to FET by explicitly stating that a measure or series of measures that subsequently constitute denial of justice, fundamental breach of due process and abusive treatment of investors, among other things, could constitute unfair and inequitable treatment.³¹⁵

In Zimbabwe's BITs, the FET clause is articulated without clarity. For example, Switzerland – Zimbabwe BIT which reads:

'Investments and returns of each contracting party shall at all times be accorded **fair and equitable treatment** and shall enjoy full protection and security in the territory of another Contracting Party. Neither Contracting Party shall in any way impair unreasonable or discriminatory measures in the management, maintenance, use, enjoyment, extension or disposal of investments in its territory of investors of the other Contracting Party.'³¹⁶

When examining the FET provision provided in the Switzerland – Zimbabwe BIT, it is unclear whether the preceding sentence is meant to give interpretation the FET clause. The language lacks specific meaning and is particularly prone to expansive interpretation simply because an arbitral tribunal does not have sufficient interpretative guidance from the text.³¹⁷

³¹² Sornarajah M (2015) 247.

³¹³ UNCTAD 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' 2012 available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 14 May 2017) 11.

³¹⁴ Muchilinski PT *Multinational Enterprises and the Law* (2007) 636.

³¹⁵ Article 8.10 (2) of Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union signed 30 October 2016 available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (accessed 3 May 2017).

³¹⁶ Article 4 para 1 of Switzerland – Zimbabwe BIT. Bolded for own emphasis.

³¹⁷ UNCTAD 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' 2012 available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 14 May 2017) 11.

Lacking sufficient guidance to interpret the FET clause has resulted in inconsistent interpretations. Zimbabwe's BITs do not expand what the FET standard means and could face the same challenge of different and inconsistent decisions. *Talbot*³¹⁸ and *TecMed*³¹⁹ are examples of cases that have diverging interpretations of what the FET standard is. In *TecMed* for example, the Tribunal held that FET requires the state parties to provide treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.³²⁰ In addition to that, the Tribunal held that consistency in the acts of the host state is an expectation by the investor.³²¹

By relying on the legitimate expectations of the investor as affirmed in *TecMed*, the result may be an unbalanced approach, which unduly favours investor interests and overrides legitimate regulation in the public interest.³²² Tribunals are encouraged to consider treatment of an investor in isolation, without a consideration of overarching determinations whether the treatment was justified.³²³ Legitimate expectation encourages tribunals to focus on the extent to which a measure interferes with the interests of the investor rather than the extent to which the benefits of a measure exceeds its costs overall.³²⁴

There is a school of thought that attributes diverging interpretations of the FET clause to the drafting itself.³²⁵ There are different approaches in drafting the FET clause. One has been to link FET to international law.³²⁶ Another drafting style is to link the standard to minimum standard under customary international law.³²⁷ Determining what FET stands for has been

³¹⁸ *Pope & Talbot Inc. v Government of Canada* UNCITRAL final merits award 10 April 2001.

³¹⁹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.

³²⁰ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* para 154.

³²¹ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* para 154.

³²² UNCTAD 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' 2012 available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 14 May 2017) 11.

³²³ Sauvant KP (ed.) *Yearbook on International Investment Law & Policy 2011-2012* (2013) 705.

³²⁴ Sauvant KP (ed.) (2013) 705.

³²⁵ UNCTAD 'Fair And Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements' 2012 available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (accessed 15 May 2017).

³²⁶ As that done in the Croatia – Oman BIT under article 3 (2) which reads: 'Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment **in accordance with international law** and provisions of this Agreement.' [Own emphasis added]

³²⁷ This approach has been adopted in the Agreement between Japan and the Republic of the Philippines for an Economic Partnership (2006), under article 91 which reads 'Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment..' and The concepts of "fair and equitable treatment" do not require treatment in addition to or beyond that which is **required by the customary international law minimum standard of treatment** of aliens'. [Own emphasis added].

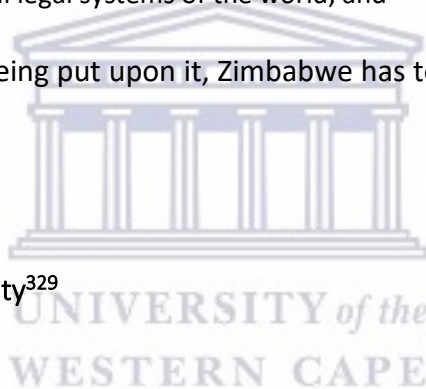
problematic and controversial such that newer agreements on investment have expressly provided what the standard entails. For example, Rwanda – US BIT reads:

‘1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and³²⁸

To avoid onerous standards being put upon it, Zimbabwe has to revisit its BITs to give clarity to the FET clause.



3.4.4 Full Protection and Security³²⁹

Another important provision in the perspective of the investor is the full protection and security (FPS) clause. This is largely due to the fact that it is a provision that an investor depends on for physical safety especially in instances where there may be armed conflict or any other civil unrest which could affect the investment.³³⁰ A foreign investor expects to have security and protection in a secure and safe environment,³³¹ especially after investing large sums of capital in the host state. Moreover, investors contribute immensely to the

³²⁸ Article 5 of the Treaty Between the Government of the United States of America and the Government of The Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment signed 19 February 2008.

³²⁹ Article 3.1 China – Zimbabwe BIT, article 4.1 Germany – Zimbabwe BIT, article 3.1 Netherlands – Zimbabwe BIT, article 3.1 South Africa - Zimbabwe BIT and article 4 para 1 of Switzerland – Zimbabwe BIT.

³³⁰ Schreuer C 'Full Protection and Security' (2010) *Journal of International Dispute Settlement* 2.

³³¹ Saclacuse JW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 355.

economy of a country³³² and thus governments should be incentivised to provide security and protection. However, the extent of this protection is questionable, whether it extends beyond physical protection or not.³³³

In its nature, the FPS clause is not half as notorious and controversial as its sibling FET.³³⁴ Although tribunals have refused to hold governments to an absolute standard of strict liability,³³⁵ the degree of diligence expected of states is high, and it is not necessarily proportionate to the resources available,³³⁶ particularly to developing countries like Zimbabwe. When considering the BITs of Zimbabwe, they vary in how the standard is written. The Switzerland – Zimbabwe BIT and South Africa - Zimbabwe BIT are similar. They both refer to ‘full protection and security’. It brings to question how the tribunal could interpret this provision whether it applies to only physical protection or could extend beyond that as in the *Occidental Case*.³³⁷

The Netherlands – Zimbabwe BIT inserts ‘physical’ to the FPS standard, so it is clear what that entails. Allowing for the FPS to extend to instances where there is no physical damage then creates a broad spectrum on which investors can sue. In *Occidental Exploration Ltd v Republic of Ecuador*³³⁸ the Tribunal read the FPS standard so broadly that it found Ecuador in breach of the standard because it had changed its interpretation of tax law and began denying value added tax reimbursements.³³⁹ Moreover, it may not reflect on the parties’ intention to interpret FPS that broadly.

³³² See generally Alfaro L, Chanda A, Kalemli-Ozcan S & Sayek S ‘How Does Foreign Direct Investment Promote Economic Growth? Exploring the Effects of Financial Markets on Linkages’ Harvard Business School Working Paper Summaries September 2006 available at <http://www.hbs.edu/faculty/Publication%20Files/07-013.pdf> (accessed 16 May 2017), Khaliq A & Noy I ‘Foreign Direct Investment and Economic Growth: Imperial Evidence from Sectoral Data in Indonesia’ March 2007 available at http://www.economics.hawaii.edu/research/workingpapers/WP_07-26.pdf (accessed 16 May 2017).

³³³ The question arises after there were two diverging judgments in *Saluka* and *Azurix*.

³³⁴ Malik M ‘The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?’ The International Institute for Sustainable Development 2011 available at http://www.iisd.org/pdf/2011/full_protection.pdf(accessed 8 May 2017) 1.

³³⁵ Malik M ‘The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?’ The International Institute for Sustainable Development 2011 available at http://www.iisd.org/pdf/2011/full_protection.pdf(accessed 8 May 2017) 5.

³³⁶ Malik M ‘The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?’ The International Institute for Sustainable Development 2011 available at http://www.iisd.org/pdf/2011/full_protection.pdf(accessed 8 May 2017) 5.

³³⁷ *Occidental Exploration & Prod. Co. Ltd v Republic of Ecuador* LCIA Case No. UN3467.

³³⁸ *Occidental Exploration & Prod. Co. Ltd v Republic of Ecuador* LCIA Case No. UN3467

³³⁹ *Occidental Exploration & Prod. Co. Ltd v Republic of Ecuador* para 183-187.

South Africa's approach³⁴⁰ to the FPS requirement in international investment law is a good example of how to be risk averse with the provision. In the PI Act, protection provided for is subject to the resources available.³⁴¹ Essentially, host states must be prepared to give security and protection, and at the same time ensure they are not committing to protections that will deplete tax payer's money and burden national reserves. For Zimbabwe, BITs refer to FPS without subjecting such to available resources. This creates problems for a developing poor country like Zimbabwe that is already swimming in international debt, to open itself to an onerous standard of protection it can little afford. Therefore, it is imperative to revisit its BITs and balance these provisions.

3.4.5 Expropriation: Indirect Expropriation³⁴²

The BITs Zimbabwe is a party to expressly provide for direct expropriation and indirect expropriation. For example, the Germany – Zimbabwe BIT reads:

'(2) Investments by nationals or companies of either contracting parties shall not be expropriated, nationalised or subjected to any other measure the effect of which would be tantamount to expropriation or nationalisation in the territory of another Contracting Party.'³⁴³

However, the BITs are silent to whether or not state police powers³⁴⁴ exercised through regulation could amount to expropriation. Although in theory, a state has a right to regulate, in practice it is not necessarily so with the presence of BITs. As seen in cases adjudicated by international tribunals, investors can challenge regulatory measures that may diminish the investment in any way.³⁴⁵ In *Ethyl Corporation v Canada*,³⁴⁶ Canada was sued by the investor

³⁴⁰ As provided for in the Protection of Investment Act

³⁴¹ Section 9 of the Protection of Investment Act No. 22 of 2015.

³⁴² Article 4 China – Zimbabwe BIT, article 4.2 Germany – Zimbabwe BIT, article 6 Netherlands – Zimbabwe BIT, article 5 South Africa – Zimbabwe BIT and article 6 Switzerland – Zimbabwe BIT.

³⁴³ Article 4(2) of the Germany – Zimbabwe BIT.

³⁴⁴ This is a doctrine that recognises host state's right to regulate or take measures that may significantly affect investor's property interests without compensation in some instances. See Henckels C 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-state Arbitration' (2012) 15 *Journal of International Economic Law* 225.

³⁴⁵ Pelc KJ 'Does the International Investment Regime Induce Frivolous Litigation?' May 2016 available at <http://politics.as.nyu.edu/docs/IO/42486/frivolity.pdf> (accessed 21 May 2017) 1.

³⁴⁶ *Ethyl Corporation v. The Government of Canada*, UNCITRAL 1997.

for banning the import and transportation of MMT. The banned product was the investor's product, and was considered by the government of Canada to be a dangerous toxin.³⁴⁷ According to the Canadian government, the product could harm health, and cause air pollution including the release of greenhouse gases.³⁴⁸ The investors successfully settled with the Canadian government including reversal of the ban and legal fees were covered.³⁴⁹

Under international law, not all state measures interfering with property constitute expropriation.³⁵⁰ In fact, state measures, may affect foreign interests considerably without amounting to expropriation.³⁵¹ Government may subject foreign assets to taxation, trade restrictions involving licenses and quotas³⁵² in its exercise of police powers.³⁵³ Furthermore, there are other regulatory measures that must be regarded as essential in the proper functioning of the state, such as consumer protection, securities, environmental protection and land planning.³⁵⁴

Moreover, states have different economies and aspirations. As such, regulations and the extent of regulations differ. It would be to the detriment of host state parties to be negated from regulating towards national interest, unless such regulation is accompanied by necessary funds to compensate any investor that would be affected. It is safe to say, the poorer the host state, the more its regulatory power is depleted. It is therefore necessary to ensure there is an acceptable line drawn between compensable and non-compensable forms of regulation.

Zimbabwe's BITs are hamstrung by the problem that the expropriation clause could be interpreted to negate government from exercising its right to regulate. It is not in dispute that once government expropriates, it has to compensate. However, there must be a distinction between compensable and non-compensable regulatory measures. To this, Zimbabwe must be held to compensate legitimate costs an investor has incurred as a result

³⁴⁷ Sforza M & Vallianatos M 'Chemical Firm Uses Trade Pact to Contest Environmental Law' (1997) available at <https://www.globalpolicy.org/component/content/article/212/45381.html> (accessed 21 May 2017).

³⁴⁸ Buckman G *Global Trade: Past Mistakes, Future Choices* (2013) 174.

³⁴⁹ Buckman G (2013) 175.

³⁵⁰ OECD "'Indirect Expropriation" and the "Right to Regulate" In International Investment Law' September 2004 available at https://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf (accessed 8 May 2017) 4.

³⁵¹ Brownlie I *Public International Law* (2008) 509.

³⁵² As in the case of Zimbabwe currently under Statutory Instrument 62 of 2016, where certain goods were banned for balance of payments issues.

³⁵³ Brownlie I (2008) 509.

³⁵⁴ Sornarajah M (2010) 368.

of the exercise of the right to regulate; provided that such compensation is awarded fairly especially after being measured against the public good. This guards against unfettered use of the right to regulate. Essentially, there needs to be a balance.

3.5 CONCLUSION

The chapter has highlighted problems in the structure of Zimbabwe's BITs and the consequences thereafter. These texts are drafted with loose and vague language which can be open to interpretation. Moreover, the BITs do not contain considerations of human rights and other national policy objectives that could be of interest to host states. Rather, the texts emphasise on investor's rights and host state obligations. Further to this, some standards of treatment provided for in the texts are not accompanied by explanation as to what they entail or mean. This creates room for tribunals to interpret widely and arguably run counter to state parties' intention.

Having an account of the problems Zimbabwe could face with its first generation BITs, it is imperative to realise the importance of revisiting the texts. The texts must provide a balance by being responsive to practical issues the host government is facing, and not merely focus on protecting the interests of the investor. Zimbabwe must therefore take it upon itself to be a proponent of a more balanced investment treaty text by renegotiating and amending its BITs. There are countries like Canada and India, who have taken different approaches in structure and content of their BITs by having treaty models. The following chapter will therefore explore different approaches Canada and India have employed in their BIT models on pertinent issues surrounding BITs. Apart from these countries, Zimbabwe can also draw lessons from SADC FIP, SADC BIT Model treaty and CETA as international best practices.

CHAPTER 4

THE POSSIBILITY OF A MORE BALANCED BILATERAL INVESTMENT TREATY SYSTEM IN ZIMBABWE: LESSONS FROM CANADA, INDIA, SADC AND CETA

4.1 INTRODUCTION

Older BITs have been described as imbalanced instruments which are overly protective of investor interests at the expense of host states' regulatory prerogative and pursuit of public welfare objectives.³⁵⁵ This gives rise to a pertinent need to reform BITs. However, BIT reforms require a reconciliation of competing interests, which is generally difficult to attain.³⁵⁶ It is against this background, deliberations on new model treaties and IIA negotiations, are working to change prevailing trends.³⁵⁷

With Zimbabwe having first generation BITs which are faced with challenges, as demonstrated in the foregoing chapter, there is therefore much Zimbabwe can learn from the above mentioned reform processes. This chapter therefore, discusses how other jurisdictions have dealt with problematic treaty provisions and structure of BITs as discussed in chapter 3. More specifically, this chapter focuses on Canada and India as jurisdictions to learn from. For perspective, the chapter turns to the SADC FIP, SADC Model BIT and international best practices as established in one of the most recent comprehensive agreements, CETA.

³⁵⁵ Titi C Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law' (2016) 33 *Journal of International Arbitration* 426.

³⁵⁶ Titi C (2016) 426.

³⁵⁷ Titi C (2016) 426.

4.2 BACKGROUND

The powers allocated to foreign investors and to arbitrators under Chapter 11 of the North American Free Trade Agreement (NAFTA), were an awakening for Canada to review investment regulation by investment treaties.³⁵⁸ As a result, Canada revisited its investment treaties, with a view to clarify loose language created by poor drafters.³⁵⁹ Currently, Canada's new treaty practice is espoused in its forward thinking BIT template which moves away from the problematic first generation BIT structure. Apart from the BIT template, Canada's treaty practice with some African countries³⁶⁰ has shown its commitment to move towards more balanced approaches to BITs. These relatively new investment treaties by Canada and some African states are based on the model BIT template.³⁶¹

Similarly, India has expressed disenchantment with the current international investment regulatory system after being subjected to lawsuits from foreign investors.³⁶² An important case in this regard was *White Industries v India*³⁶³ where the arbitral tribunal found India in breach of its obligations under the Australia – India BIT. The principle which the Tribunal found to have been violated was imported through an MFN provision from an India–Kuwait BIT.³⁶⁴ The tribunal held that India was in violation of its treaty obligation to enable an effective means of asserting claims and enforcing rights.³⁶⁵ This judicial creativity,³⁶⁶ among

³⁵⁸ Van Harten G 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 *Trade Law and Development* 21.

³⁵⁹ Van Harten G (2010) 22.

³⁶⁰ Nigeria (May 2014) Cameroon (March 2014), Nigeria (May 2014), Senegal (November 2014), Mali (November 2014), Cote d'Ivoire (November 2014), Burkina Faso (April 2015) and most recently Guinea (May 2015).

³⁶¹ Willard R & Morreau S 'The Canadian Model BIT – A Step in the Right Direction for Canadian Investment in Africa?' Kluwer Arbitration Blog 18 July 2015 available at <http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/> (accessed 8 June 2017).

³⁶² See generally Nedumpara J, 'Imagining Policy Space in India's Trade and Investment Agreements' FGV Direito SP Research Paper Series 2014 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532582 (accessed 8 June 2017).

³⁶³ *White Industries Australia Limited v. India*, UNCITRAL (India-Australia BIT), Award, Nov. 30, 2011.

³⁶⁴ Langalanga A 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' South African Institute of International Affairs May 2015 available at <https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file> (accessed 8 June 2017) 25.

³⁶⁵ *White Industries Australia Limited v. India*, UNCITRAL (India-Australia BIT), Award, Nov. 30, 2011 para 16.1.1.

³⁶⁶ Langalanga A 'Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context' South African Institute of International Affairs May 2015 available at <https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file>

other things, unsettled the Indian government, which then in turn reviewed its BIT programme.³⁶⁷

Apart from these two jurisdictions, other noteworthy templates that will be considered in this chapter are the SADC Model treaty and the SADC Finance and Investment Protocol (SADC FIP). Firstly, the SADC FIP has been regarded as a progressive instrument for the regional block in terms of investment regulation, showing potential in South to South cooperation and mutual learning.³⁶⁸ Initially, the SADC FIP was signed in 2006 and came into force in 2010.³⁶⁹ However, Annex 1 of the 2006 SADC FIP (Investment Charter) has been repealed by the 2016 Agreement Amending Annex 1 - Cooperation on Investment (2016 SADC FIP).³⁷⁰ What is of interest is some provisions have been excluded from the 2016 SADC FIP text. To this, Zimbabwe must consider this amendment as a learning curve. In its preamble, the 2016 SADC FIP draws attention to the problem of unintended consequences of some clauses in the 2006 SADC FIP. For instance, the fair and equitable clause is absent in the 2016 SADC FIP as a means of limiting these unintended consequences.

The SADC Model BIT is an important text to refer to as it captures a more balanced and risk averse model treaty for investment regulation. Arguably, the 2016 SADC FIP in some instances follows the recommendation of the Drafting Committee in relation to some clauses such as the NT, FET and MFN clauses.³⁷¹ Notwithstanding these regional influences, international best practices as envisaged in different investment treaties and chapters alike make a good point of call in rethinking how to best address problematic treaty provisions. Zimbabwe can draw lessons from the CETA's investment chapter which makes up part of international best practices as it is one of the newer investment regulation treaties signed.

papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file (accessed 8 June 2017) 25.

³⁶⁷ Law Commission of India 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty' Report 260 August 2015 available at <http://lawcommissionofindia.nic.in/reports/Report260.pdf> (accessed 8 June 2017) 3.

³⁶⁸ Berger A 'Developing Countries and Future of International Investment Regime' 2015 *Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ)* 25.

³⁶⁹ The new SADC FIP was signed on 31st August 2016 and made available to the public on 16th May 2017. See SADC Documents and Publication available at [http://www.sadc.int/documents-publications/show/Protocol%20on%20Finance%20and%20Investment%20\(2006\)](http://www.sadc.int/documents-publications/show/Protocol%20on%20Finance%20and%20Investment%20(2006)) (accessed 1 June 2017).

³⁷⁰ See SADC Documents and Publication available at <http://www.sadc.int/documents-publications/show/4999> (accessed 8 June 2017).

³⁷¹ For instance, in the SADC Model BIT, the Drafting Committee strongly recommended against the inclusion of the FET clause. See commentary to Article 5 SADC Model BIT 2012.

4.3 NEW APPROACH TO PROBLEMATIC PROVISIONS

4.3.1 National Treatment

In the India Model BIT, the Host State has an obligation to treat domestic and foreign investors equally. However, the provision is qualified by requiring the circumstances to be 'like' for an investor to prove that there has been a breach of the NT provision.³⁷² Similarly, Canada's Model BIT on the protection of investments requires like circumstances to be a determining factor whether there has been a breach of national treatment or not.³⁷³ While both model treaties (Canada and India) include the NT clause, India has express exceptions to the application of the clause. Notably, India excludes the application of the clause to laws or measures of a regional or local government.³⁷⁴ In contrast, Canada includes the coverage of the NT to treatment provided by sub-national government.³⁷⁵

Canada's Model BIT does not provide for exceptions to the application of the national treatment clause. In fact, what is notable in the NT clause under Canada's Model BIT is simply the requirement of like circumstances in order to breach the NT clause. The application of national treatment is limited to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.³⁷⁶ Under article 4 (5) of the India Model BIT, there is express exclusion of liability of breach of the NT clause in instances where the state offers financial assistance or puts in place measures that favour its own investors in pursuit of legitimate public purpose. To this, Zimbabwe can attempt such drafting and include its economic empowerment advancements as mandated by the Procurement Act and encouraged by the Constitution.

In the 2016 SADC FIP, the NT provision is provided for under article 6. It requires like circumstances to be a determining factor to show breach of the NT clause.³⁷⁷ However, in paragraph two of the article, there's a non-exhaustive list providing guidance on situations

³⁷² Article 4.1 India Model BIT.

³⁷³ Article 3.1 and 3.2 of Canada Model BIT. See also article 4.1 and 4.2 of Canada – Nigeria BIT signed 6 May 2014.

³⁷⁴ Article 4.3 India Model BIT.

³⁷⁵ Article 3.3 Canada Model BIT.

³⁷⁶ Article 3.1 and 3.2 Canada Model BIT.

³⁷⁷ Article 6 para 1 and 2 of SADC Agreement Amending Annex 1 - Cooperation on investment - on the Protocol on Finance & Investment 2016 (2016 SADC FIP).

deemed to be like circumstances.³⁷⁸ Furthermore, the 2016 SADC FIP recognises that states may have preferential treatment accorded to domestic investors in pursuit of development objectives.³⁷⁹ The NT clause in CETA requires ‘like situations’ for an investor to prove that there has been breach of the provision.³⁸⁰ Similar to Canada, the NT provision applies to establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of investments.³⁸¹

Zimbabwe may be better suited to employ the 2016 SADC FIP approach to the NT clause in its BITs. Firstly, this is because it includes the ‘like circumstances’ requirement, a trait absent in most of the NT clauses. Second, it furnishes a non-exhaustive list of what could be deemed as ‘like circumstances’. Lastly, it provides policy space for Zimbabwe to pursue economic empowerment by offering preferential treatment to domestic investors, as envisaged by its Procurement Laws.

4.3.2 Most-favoured Nation Treatment

The challenge with the MFN clause is its ability to allow investors to create their own treaties with the goal of advancing their own interests.³⁸² Currently, Zimbabwe’s BITs expose the country to such practices and it calls for Zimbabwe to rethink how it articulates the MFN clause. There have been different approaches countries have taken on the MFN clause. Some have excluded the clause while others have limited the scope of application of the clause.

India has chosen to remove the clause altogether from its Model BIT. Its rationale is to ensure that foreign investors are not able to borrow more beneficial provisions from other Indian BITs (treaty shopping).³⁸³ Similarly, the SADC Model BIT excludes the MFN clause. It

³⁷⁸ Article 6 para 2 (a) – (f) of the 2016 SADC FIP.

³⁷⁹ Article 6 para 3 of the 2016 SADC FIP.

³⁸⁰ Article 8.6 para 1 of CETA.

³⁸¹ Article 8.6 para 1 of CETA.

³⁸² See UNCTAD ‘Most-favoured Nation Treatment’ UNCTAD Series on Issues in International Investment Agreements II 2015 available at http://unctad.org/en/Docs/diaeia20101_en.pdf (accessed 24 May 2017) 58-62.

³⁸³ Law Commission of India ‘Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty’ Report 260 August 2015 available at <http://lawcommissionofindia.nic.in/reports/Report260.pdf> (accessed 24 May 2017) 24.

asserts that BITs must be bilateral and including the MFN clause enables these treaties to establish an unintended multilateralisation.³⁸⁴ On the other hand, the Canadian Model BIT has not excluded the MFN clause. It provides for it subject to like circumstances and with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.³⁸⁵ It excludes all other kinds of treatments from being magnetic to the MFN clause, for example dispute resolution. While CETA also provides for an MFN clause, it lists the instances when the MFN clause cannot find application.³⁸⁶ For example, accreditation of testing and analysis services among other things, makes up an old standing arrangement and agreement amongst European countries therefore a Canadian entity cannot claim for breach of the MFN treatment.³⁸⁷

While both the 2006 and 2016 SADC FIP do not include the MFN clause, the SADC Model Treaty recommends that should states include the provision, they ought to include conditions and limitations by requiring like circumstances and applying only to the management, operation and disposition of investments.³⁸⁸ Zimbabwe must consider how the MFN clause is ultimately intended to guard against discrimination. To avoid multilateralisation of treaty provision, Zimbabwe can emulate what Canada did in its model BIT, which is to define the scope of application of the MFN clause. Moreover, Zimbabwe may also expressly provide that MFN will not apply to dispute resolution mechanisms as provided for under CETA.

³⁸⁴ SADC Model Bilateral Investment Treaty with Commentary available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (accessed 24 May 2017) 22.

³⁸⁵ Article 4 Canada Model BIT.

³⁸⁶ Article 8.7 para 3 and 4.

³⁸⁷ Article 8.7 para 3 of CETA, which reads:

(3) Paragraph 1 does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results of or work done by those accredited services and service suppliers.'

³⁸⁸ SADC Model Bilateral Investment Treaty with Commentary available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (accessed 24 May 2017) 22.

4.3.3 Fair and Equitable Treatment

Another provision found to be problematic in the analysis of Zimbabwe's BITs is the FET clause. This because of expansive interpretation by some tribunals,³⁸⁹ and as such, it has been open to varying interpretations.³⁹⁰ There are several options which Zimbabwe could consider to employ for a more clear, certain and balanced approach to the FET clause in its BITs.

Canada provides for the FET standard in its Model BIT and links it to the customary international law minimum standard of treatment of aliens.³⁹¹ The linking of the FET standard to another customary international law standard, to a certain degree clarifies the meaning of the standards and provides guidance to arbitral tribunals (to a greater extent) on how to determine breach of the FET clause.

In contrast, India avoids using the term FET. Rather, India's Model BIT describes what is usually deemed as constituting fair and equitable treatment. Here, it provides for obligations on the host state not to subject investments to measures that constitute a denial of justice under customary international law, un-remedied and egregious violations of due process or abusive treatment involving continuous, unjustified and outrageous coercion or harassment.³⁹²

In the 2006 SADC FIP, the FET standard is provided for without explaining what it means or linking it to either customary international law or international minimum standard.³⁹³ In contrast, the 2016 SADC FIP does not include the FET clause. This is because the FET clause is viewed as a problematic clause. As noted by the drafters of the 2016 SADC FIP, some of the provisions in the 2006 SADC FIP such as the FET clause, have unintended consequences for host states. The exclusion of the FET standard does not come with anything in its place.

The Drafting Committee of SADC Model BIT also shared a similar view to that of the drafters of the 2016 SADC FIP. They recommended against the inclusion of the FET standard owing

³⁸⁹ See Sornarajah M (2010) 17, 204.

³⁹⁰ Salacuse SW *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 384.

³⁹¹ Article 5.1 and 5.2 Canada Model BIT.

³⁹² Article 3.1 India Model BIT.

³⁹³ Article 6.1 of the SADC FIP 2006.

to its expansive and controversial interpretation.³⁹⁴ The Drafting Committee however, gave options on how to articulate the FET clause should a state insist on its inclusion. First, the SADC Model BIT recommends linking FET to customary international law on the treatment of aliens, in a similar manner to the Canadian approach.³⁹⁵ Further to this, the drafting committee noted that the investor should be required to show that the 'act or actions by the government are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency'.³⁹⁶

The second option advanced by the SADC Model BIT recommends articulating the FET to entail that the state shall not deny administrative and procedural justice to investors.³⁹⁷ Moreover the administrative, legislative and judicial process should not be arbitrary.³⁹⁸ Further to this, the second option of FET under the SADC Model BIT, mandates the host state to notify investors of administrative or judicial proceedings directly affecting their investment.³⁹⁹

Under CETA, the FET clause is said to have been breached if there has been denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment among other things.⁴⁰⁰ CETA's provision on FET further informs the tribunal of the option to⁴⁰¹ take into account whether a host state had made a specific representation to an investor that created a legitimate expectation. Moreover, that specific representation is what the investor relied on, in deciding to make or maintain the covered investment.⁴⁰²

³⁹⁴ SADC Model BIT Commentary available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (accessed 24 May 2017) 22.

³⁹⁵ Article 5.1 SADC Model BIT, Option 1.

³⁹⁶ Article 5.2 SADC Model BIT, Option 1.

³⁹⁷ Article 5.1 SADC Model BIT, Option 2.

³⁹⁸ Article 5.1 SADC Model BIT, Option 2.

³⁹⁹ Article 5.2 SADC Model BIT, Option 2.

⁴⁰⁰ Article 8.10 para 2(a)-(f) of CETA.

⁴⁰¹ Option because the wording says 'may' as opposed to 'shall'.

⁴⁰² Article 8.10 para 4 of CETA.

A preferred option for Zimbabwe would be to adopt the second approach advanced by the SADC Model BIT which obliges the host state to refrain from arbitrary processes whether administrative, legislative or judicial. However, it remains to be seen whether or not by employing this provision, Zimbabwe would have lowered the standard of treatment. If the right to due process is already constitutionally enshrined,⁴⁰³ then limiting the FET to the approach advanced by the SADC Model BIT would be tantamount to repetition. Thus, even if the FET clause as defined by the SADC Model BIT, is excluded, investors would still have recourse to the Constitution.

4.3.4 Full Protection and Security

The full protection and security standard (FPS) has been said to be less notorious in investor state dispute settlement in comparison to the FET clause.⁴⁰⁴ However, it could be an equally problematic provision if left without legal certainty. The main question around this clause is whether or not this protection extends beyond physical protection. Two distinct judgements in *Saluka*⁴⁰⁵ and *Azurix*⁴⁰⁶ are examples of legal uncertainty of the FPS clause owing to different interpretations. The Tribunal in *Saluka* held that the FPS is meant to hold states liable if foreign investments have been affected by civil strife and physical violence, and is not meant to cover any other impairment of an investor's investment.⁴⁰⁷ In contrast, in *Azurix* the Tribunal held that a breach of the FPS can be found to exist even where there is no physical violence.⁴⁰⁸

It is against this background that drafters of Model BITs and investment chapters have addressed the FPS to give clarity and certainty. The Canadian Model BIT, links the FPS to

⁴⁰³ Section 68 and 69 of the Constitution of Zimbabwe

⁴⁰⁴ Malik M 'The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?' The International Institute for Sustainable Development 2011 available at http://www.iisd.org/pdf/2011/full_protection.pdf(accessed 8 May 2017) 1.

⁴⁰⁵ *Saluka Investments BV (The Netherlands) v The Czech Republic*, partial award 17 March 2006. *Occidental Exploration & Prod. Co. Ltd v Republic of Ecuador* LCIA Case No. UN3467

⁴⁰⁶ *Azurix Corp v The Argentine Republic* Award 14 July 2006.

⁴⁰⁷ *Saluka Investments BV (The Netherlands) v The Czech Republic*, para 483-484

⁴⁰⁸ *Azurix Corp v The Argentine Republic* Award 14 July 2006 para 406.

customary international law minimum standard of treatment of aliens.⁴⁰⁹ In the Indian Model BIT, the FPS clause is excluded altogether.

The SADC Model BIT provides for FPS,⁴¹⁰ unlike both the SADC FIPs which are silent on this type of protection. The SADC Model BIT limits the application of the FPS to physical protection by noting war or other armed conflict, revolution, revolt, insurrection or riot as circumstances linked to the FPS.⁴¹¹ Furthermore, the host state is obliged to compensate for losses that have incurred and such compensation must be non-discriminatory on an MFN basis.⁴¹² Examining the CETA text with regard to the FPS clause, it provides that the FPS means physical protection.⁴¹³

As highlighted in the previous chapter, the majority of Zimbabwe's BITs simply refer to the FPS without limiting it to physical protection and security. Accordingly, several lessons can be drawn from the brief analysis and description above. The CETA blanket approach to speak to physical protection is an option Zimbabwe could consider.

4.3.5 Expropriation: Indirect Expropriation

The challenge with indirect expropriation in Zimbabwe's BITs is that it does not distinguish between compensable and non-compensable forms of expropriation. This distinction is important to make as it reduces the risk of Zimbabwe being sued for expropriation in instances where it has exercised its legitimate regulatory power.⁴¹⁴ As noted in the previous chapter, Zimbabwe's BIT opens up Zimbabwe to risk of such lawsuits owing to its unelaborated stance on indirect expropriation.⁴¹⁵

In its Model BIT, Canada speaks to expropriation under article 13. Typically, the provision provides that a host state shall not nationalise or expropriate directly or indirectly except for a public purpose, in accordance with due process of law, in a non-discriminatory manner

⁴⁰⁹ Article 5.2 of the Canada Model BIT.

⁴¹⁰ Article 9.1 of the SADC Model BIT.

⁴¹¹ Article 9.2 of the SADC Model BIT.

⁴¹² Article 9.2 of the SADC Model BIT.

⁴¹³ Article 8.10 para 7 of the CETA.

⁴¹⁴ See Dolzer R & Stevens M *Bilateral Investment Treaties* (1999) 99.

⁴¹⁵ See part 3.4.5 of this thesis.

and on prompt, adequate and effective compensation.⁴¹⁶ In Annex B.13(1), the text addresses a pertinent issue of what amounts to indirect expropriation. Firstly, the provision defines indirect expropriation as resulting from a measure or series of measures by the host state, that have an effect equivalent to direct expropriation, although without formal transfer of title.⁴¹⁷ Further to this, there is a non-exhaustive list on what to consider when determining whether or not measures constitute indirect expropriation.⁴¹⁸ Similarly, India has a non-exhaustive list on what could amount to indirect expropriation.⁴¹⁹

The Canada Model BIT states three pertinent factors of consideration in alleged indirect expropriation circumstances. These are, namely: the economic impact of the measure on the investment, the extent to which the measure interfere with reasonable expectations of the investor; and the character of the measure.⁴²⁰ Although a measure may create adverse economic impact on an investment, it does not establish that an indirect expropriation has occurred.⁴²¹ India's Model BIT states that a permanent and complete or near complete deprivation of the value of investment may be considered in determining whether or not there has been indirect expropriation.⁴²² Further to this, a tribunal would also consider whether there has been permanent and complete or near complete deprivation of the investor's right of management and control over the investment.⁴²³ This is a non-exhaustive list similar to the approach of Canada, although different in content.

Both the Canadian and Indian Model BITs provide that the exercise of the right to regulate in the interest of the public or public welfare objectives such as public health and safety or environment, shall not constitute expropriation.⁴²⁴ This is also the same stance the 2016 SADC FIP takes.⁴²⁵ On the same matter, the 2006 SADC FIP simply reinforces the right to regulate without necessarily referring to or directly linking such to indirect expropriation instances,⁴²⁶ thus implying that an undertaking of a measure would not constitute indirect

⁴¹⁶ Article 13.1 Canada Model BIT.

⁴¹⁷ Annex B.13 (1) (a) of the Canada Model BIT.

⁴¹⁸ Annex B.13 (1) (b) of the Canada Model BIT.

⁴¹⁹ Article 5.2 India Model BIT.

⁴²⁰ Annex B.13 (1) (b) of the Canada Model BIT.

⁴²¹ Annex B.13 (1) (b) (i) of the Canada Model BIT.

⁴²² Article 5.2 (i) of India Model BIT.

⁴²³ Article 5.2 (i) of India Model BIT.

⁴²⁴ Article 5.4 of India Model BIT. Annex B.13 (1) (c).

⁴²⁵ Article 5.7 of the 2016 SADC FIP.

⁴²⁶ Article 14 of the SADC FIP 2006.

expropriation. In CETA, the signatories also reaffirm the right to regulate pursuant to protection of public health, safety, the environment among other things.⁴²⁷ Of all the discussed texts, the Indian model BIT negates a tribunal from reviewing the host state's exercise of regulatory power to determine whether the measure in question was taken for a public purpose or in compliance with its law.⁴²⁸

The approach of India to limit a tribunal's power to scrutinise a measure, can be examined from two prisms. On the face of it, it may affect the ability of the tribunal to fully exercise its powers and determine a case on all its merits. It would be in the interest of justice to examine the measure and determine whether or not it was a legitimate measure or simply unfettered use of right to regulate. However, the Indian approach could be argued as wise. There have been questions raised on whether individuals appointed on an *ad hoc* basis possess the sufficient legitimacy to assess state acts, especially those relating to sensitive public policy issues.⁴²⁹ One of the central challenges of arbitrators in ISDS lies in the fact that they are also lawyers and lecturers among other things, and therefore exposed to conflict of interest.⁴³⁰ To add on, the ISDS arbitration system lacks binding jurisprudence,⁴³¹ which is one of the major elements that gives domestic courts legitimacy and consistency. Thus, arbitrators can award damages without having to apply limitations on state liability or referring to jurisprudence as would be the norm in domestic courts.⁴³²

From the discussion above, it is apparent that Zimbabwe has quite the large pool of choices to choose from. The best approach that Zimbabwe could employ in its own BITs to address indirect expropriation and the right to regulate would be that of India.

⁴²⁷ Article 8.9 para 1 of CETA.

⁴²⁸ Article 5.5 India Model BIT.

⁴²⁹ Carim X 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' South Centre Investment Policy Brief August 2015 available at https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (accessed 5 June 2017) 2.

⁴³⁰ Arbitrators and 'dual hats' is an issue discussed on several forums. See Gaukrodger D & Gordon K 'Investor-state Dispute Settlement: A Scoping Paper for the Investment Policy Community' OECD Working Papers on International Investment March 2012 available at http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf (accessed 8 June 2017) 95-97.

⁴³¹ Gazzini T & De Brabandere E *International Investment Law. The Sources of Rights and Obligations* (2012) 254.

⁴³² Carim X 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' South Centre Investment Policy Brief August 2015 available at https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (accessed 5 June 2017) 2.

4.4 OTHER ATTEMPTS TO BALANCE BILATERAL INVESTMENT TREATIES

In addition to addressing traditional treaty clauses in BITs, other jurisdictions have added more provisions in pursuit of more elaborate texts. By doing so, it may be regarded as pursuing a more balanced BIT system. For example, the right to regulate as a standalone clause has been put forward in both the SADC FIPs. Arguably, this is to counter any interpretation or practice that may be to the severe detriment of the host state. However, to revisit BITs and merely reduce protections traditionally offered by first generation BITs would be flipping the same side of a coin. Rather, both the state and investor must have rights and obligations provided in BITs.

4.4.1 Right to regulate

One of the most debated areas in international investment law is the right to regulate. Host state parties have time and again been faced with lawsuits emanating from instances where they have exercised their right to regulate.⁴³³ Some states have expressed their discontentment with this and opted to do away with BITs because of a regulatory chill effect they submerge governments under.⁴³⁴ A question then arises, on whether or not the right to regulate should be expressly provided for in BITs.

Notably, in the 2016 and 2006 SADC FIP, the right to regulate is guaranteed.⁴³⁵ Similarly, the SADC Model BIT, provides that a state should have the right to regulate.⁴³⁶ This is to ensure that its territory is consistent with the goals and principles of sustainable development, and other legitimate social and economic policy objectives.⁴³⁷ Neither one of these provisions are provided for in Zimbabwe's BITs.

Apart from regional influences Zimbabwe can consider for inspiration, Zimbabwe can also examine what has been done in other jurisdictions. For example, India reaffirms the right to

⁴³³ Rovine AW *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (2016) 233.

⁴³⁴ Brown J 'International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?' (2013) 3 *Western Journal of Legal Studies* 8 – 9, 21.

⁴³⁵ Article 12 of the 2016 SADC FIP. Article 14 of the SADC FIP 2006.

⁴³⁶ Article 20.1 SADC Model BIT.

⁴³⁷ Article 20.1 SADC Model BIT.

regulate and the need to utilise policy space.⁴³⁸ Its Model BIT notes that the right to regulate also includes change of laws and policy that may change the conditions applicable to investments.⁴³⁹ Canada does not expressly provide for the right to regulate, but provides that state parties can regulate to protect legitimate public welfare objectives, such as health, safety and the environment.⁴⁴⁰

In the CETA text, parties recognise that the provisions in the text preserves the right to regulate and flexibility of states to achieve legitimate policy objectives such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.⁴⁴¹ Although investors are to expect protection of their investments as guaranteed by the CETA agreement, the right to regulate would not be undermined.⁴⁴² Although the right to regulate under Article 23.2 of CETA is not under the text's Investment Chapter, it is nonetheless important as it would have a nexus on the investments undertaken through CETA. Under this provision, labour laws, policies and standards shall be continually encouraged through modification of the law.⁴⁴³ Furthermore, environmental protection is another area CETA signatories affirm the right to regulate.⁴⁴⁴

4.4.2 Disclosure

Newer treaties require investors to disclose information about their entities. In the Indian Model BIT, investors are required to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.⁴⁴⁵ Disclosure of source of funds is also something India has obliged investors to do under its model BIT. This requires investors to show appropriate documentary evidence establishing the legitimacy of their funds.⁴⁴⁶ For the

⁴³⁸ India Model BIT, preamble.

⁴³⁹ India Model BIT, preamble. From this, one can note that there is a nexus between the right to regulate and indirect expropriation. This was clear in the *Foresti* case, where the South African government exercised its right to regulate through the Black Economic Empowerment law and policy thus impaired the investment.

⁴⁴⁰ Annex B.13 (1) (c) Canada Model BIT.

⁴⁴¹ CETA, preamble. Article 8.9 para 1 of CETA.

⁴⁴² CETA, preamble.

⁴⁴³ Article 23.2 of CETA.

⁴⁴⁴ Article 24.3 of CETA.

⁴⁴⁵ Article 10.1 India Model BIT.

⁴⁴⁶ Article 10.2 India Model BIT.

purposes of proving an alleged breach of treaty provisions, investors are mandated to maintain true and complete copies of the records, books of account and current financial statements.⁴⁴⁷ Furthermore, investors are expected to maintain accounting records and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.⁴⁴⁸

Similarly, the SADC Model BIT recognises the need to have investment disclosure for the purposes of carrying forward anti-corruption, fraud and misrepresentation in making investments.⁴⁴⁹ Accordingly, the investor shall provide information as the state may require with regard to corporate history and practices of the investor.⁴⁵⁰ While disclosure may be made public,⁴⁵¹ the host state is required to protect confidential business information that would prejudice the competitive position of the investor.⁴⁵² The CETA text provides that investors are under an obligation to disclose information to the host state, and the host state to protect such information where its public disclosure would prejudice the competitive position of the investor.⁴⁵³ While it is an obligation to disclose business information, the state is required to make such requests reasonably and refrain from unduly burdensome demands.⁴⁵⁴

This clause would come as a huge benefit for Zimbabwe if it is made part of its BITs. This is especially in light of USD\$15 billion unaccounted for by government from diamond mines.⁴⁵⁵ The precious stone can assist in the revitalising of the economy if exploited well. However, investors privileged enough to mine for the stone have proven that disclosure of operations needs to be done. Disclosure also assists members of parliament to act on complete and correct information in exercising parliamentary oversight. The benefit of this provision to

⁴⁴⁷ Article 10.3 India Model BIT.

⁴⁴⁸ Article 10.4 India Model BIT.

⁴⁴⁹ Commentary on Article 10 SADC Model BIT.

⁴⁵⁰ Article 12.1 SADC Model BIT.

⁴⁵¹ Article 12.4 SADC Model BIT.

⁴⁵² Article 12.4 SADC Model BIT.

⁴⁵³ Article 8.17 of CETA.

⁴⁵⁴ Article 8.17 of CETA.

⁴⁵⁵ The President of the Republic of Zimbabwe made these allegations at his 92nd birthday celebrations in 2016. He further blamed Chinese investors of looting, thus the country missing US\$15 billion in revenue. See ANA 'Zimbabwean president Mugabe announces \$15 billion in diamonds looted' Sowetan Live 4 March 2016 available at <http://www.sowetanlive.co.za/news/2016/03/04/zimbabwean-president-mugabe-announces-15-billion-in-diamonds-looted> (accessed 5 June 2017).

Zimbabwe is that it assists in the guard against fraudulent activities investors may be engaged in.

4.4.3 Transparency

To complement the right to regulate, transparency of the host state is required by some of these new BITs. The tenants of this clause speaks to transparency by the host state with regard to laws and regulations having a direct effect on investments. This clause is a trait short in Zimbabwe's BITs and arguably, makes a wise clause for Zimbabwe to show good faith of its dealings with investments given its tarnished image of investment protection.

In Canada's Model BIT, state parties are required to publish laws and regulations that apply to investments.⁴⁵⁶ The publication of these new rules and regulations is also necessary for full transparency, especially for interested persons.⁴⁵⁷ Under the CETA text, transparency is regarded as a tenant under the FET clause.⁴⁵⁸

Transparency is also articulated under Article 7 of the 2016 SADC FIP. It is mandated for states to establish confidence, stability, predictability, trust and integrity by adhering to transparent practices and procedures relating to investments.⁴⁵⁹ This is also the same stance the 2006 SADC FIP adopted.⁴⁶⁰ Further to this, under the 2016 SADC FIP, member states are required to notify the SADC Secretariat of new regulations that affect provisions in the Investment Annex, within a period of three months of introducing the regulations.⁴⁶¹

4.4.4 Investor responsibility

There is now a new thrust to put responsibility on investors. In doing so, investment regulatory instruments such as the SADC FIP have included an investor responsibility clause. In the 2006 SADC FIP, such responsibility is couched as 'corporate responsibility', mandating

⁴⁵⁶ Article 19.1 Canada Model BIT.

⁴⁵⁷ Article 19.1 Canada Model BIT.

⁴⁵⁸ Article 8.10 (2) of CETA.

⁴⁵⁹ Article 7.1 of the 2016 SADC FIP.

⁴⁶⁰ Article 8 SADC FIP 2006.

⁴⁶¹ Article 7.2 2016 SADC FIP.

investors to abide by the laws, regulations, administrative guidelines and policies of the host state.⁴⁶² This is similar to the 2016 SADC FIP drafting.⁴⁶³ By having such a provision, it sees the attempt to balance rights and obligations, by holding investors accountable to laws of the host state. These laws would include labour, environment, corporate governance and many others which may have direct effect on an investment.

4.5 CONCLUSION

This chapter examined the approaches employed in other jurisdictions as well as in other selected texts in jurisdictions to addressing the problems in BITs. A number of expositions were made in these discussions. For example, it was highlighted that in some documents key provisions such as the MFN have been done away with. This is because of the MFN clause has the unintended consequence of multilateralisation of BITs. While India has done away with the clause, Canada in its model BIT limits the instances where the MFN clause can apply. Similarly, CETA provides the same by limiting the MFN clause to apply to establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. The NT in most texts examined in this chapter are qualified, requiring like circumstances to be a factor and other factors such as the sector the investment is in and aim of the measure that is discriminating against investors.

With regard to the FET clause, most of the texts have removed the clause and have either replaced it or done away with it completely. For instance, the 2006 SADC FIP had the FET clause, but the 2016 SADC FIP amending the 2006 text has completely done away with the clause. Other approaches to the FET clause have been to elaborate what it means as undertaken by CETA. The FPS clause has been quite consistent in all texts, and has been explicit to refer only to physical protection. Finally, indirect expropriation has been given a more elaborate definition, with a distinction between compensable and non-compensable regulatory measures. Further to this, most texts have reaffirmed the state's right to regulate.

⁴⁶² Article 10 SADC FIP 2006.

⁴⁶³ Article 8 2016 SADC FIP.

There have been other clauses that seek to balance out rights and obligations of state parties and investors. Some texts have expressly provided for the right to regulate in the body of the treaty, while other have reaffirmed the right in preambles. To balance this right to regulate, transparency is required on part of the host government. This is to say regulations or laws that may affect investments would need to be published and in some instances allow for comments from stakeholders. Disclosure on part of investors is seen as a way to ensure against corrupt or fraudulent activities in the host state. In summation, the chapter has seen different approaches employed with the intention to create more balanced BITs. In the following chapter, the thesis will recommend which provisions Zimbabwe should employ and why.

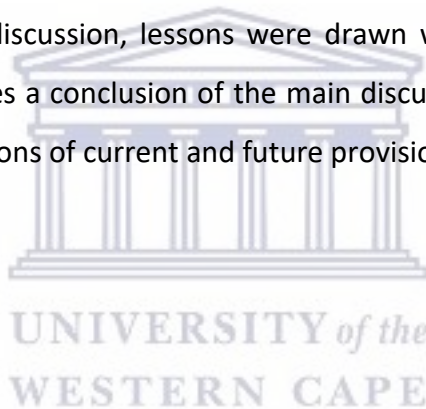


CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The aim of this thesis was to examine Zimbabwe's BITs, identify the problems associated with them and propose reform towards more balanced BITs. In order to address this aim, the thesis examined Zimbabwe's 'in-force' BITs, which are first generation BITs. To provide perspective to the discussion, the thesis examined the practices from selected jurisdictions and instruments. From this discussion, lessons were drawn which are instructive for this chapter. This chapter furnishes a conclusion of the main discussions in the thesis and lastly recommends alternative versions of current and future provisions.



5.2 CONCLUSION

The thesis first discussed in chapter 2, a historical development of international investment regulation till the time of BITs taking centre stage. Initially, investments were regulated by colonial rule and FCN treaties. However, the independence of states saw change in government did not secure, to a large extent, investments of traditional capital exporting states. Post-colonial period was characterised with divide in opinion over investment regulation. Newly independent states were adamant to preserve their sovereignty and have control over natural resources and the entities that exploited those resources. This is seen by the position asserted by the Calvo and Drago doctrine. These doctrines were specifically in response to the interventionist stance traditional capital exporting states took when claiming for debts owed to their nationals. The tenants of both the Calvo and Drago

doctrines were on non-interventionist and national treatment.⁴⁶⁴ These positions were rejected by capital exporting states, who opined that the long standing standards of treatment of aliens practiced by the global north should stand as the acceptable standards governing investments in post-colonial times.

The chaotic environment of investment regulation was later met with attempts to regulate investments under a multilateral agreement. This attempt was seen in the Havana Charter of 1948. Although the Charter was mainly on trade, it also touched on investment regulation. Provisions at the core of treatment of aliens like minimum standard of treatment and rules on expropriation were not addressed. The Havana Charter failed owing to several other reasons, including failure to address pertinent issues on standards of treatment. Another multilateral attempt to regulate investments was through the MAI, which failed. These failures at a multilateral level presented an opportunity to negotiate investment protection at a bilateral level. Thus, there was an emergence of BITs and their popularity to-date. The purpose of BITs was to reconcile differences between developed and developing countries with regard to standards of treatment and investment regulation overall.⁴⁶⁵ Another purpose of BITs is to restate the principles of international law as well as generally catalyse investment by reducing political risk. Notwithstanding their popularity as an instrument that governs investments, BITs present several problems.

In Chapter 3, the thesis zoomed in on Zimbabwe's BITs that are in force. First, there was an examination of the structure of BITs. Noted by this examination, was how Zimbabwe's BITs are generally short texts, characterised by loose imprecise language. Secondly, there was an analysis of individual provisions, namely the national treatment clause (NT), the most-favoured nation treatment clause (MFN), the fair and equitable treatment clause (FET), full protection and security clause (FPS) and expropriation clause. The discussion in Chapter 3 concluded that to a large extent, Zimbabwe's BITs are problematic and unbalanced. This is mainly because the clauses have neither explanation nor qualification. Moreover, because the majority of the BITs were negotiated and signed before there were some critical changes in Zimbabwe's laws, the texts are not reflective of the laws of Zimbabwe that may affect investments.

⁴⁶⁴ See part 2.2 of this thesis.

⁴⁶⁵ See part 2.3 of this thesis.

Having discussed problems with Zimbabwe's BITs, Chapter 4 discussed possible solutions from other jurisdictions. This was done by critically analysing typical BIT clauses in model treaties of Canada and India, and investment chapters in the SADC FIP and CETA. The Chapter analysed each clause individually, comparing each to the four texts that were selected. The main findings of this Chapter was that there have been reform to foreign investment regulation. These clauses were expanded, explained and qualified. Furthermore, the right to regulate was reinforced with the aim to address the issue of indirect expropriation. Apart from addressing common BIT clauses, the Chapter highlighted that in pursuit of more balanced texts, BITs have taken form to include other provisions that place an obligation upon the investor. For example, an obligation to disclose company books for the purposes of host governments to have oversight on investments. The Chapter briefly suggested possible solutions to the problems of Zimbabwe's BITs, however recommendations below will exhaustively lay out how best Zimbabwe can address its problems.



5.3 A PROPOSAL FOR REFORMING ZIMBABWE'S BILATERAL INVESTMENT TREATIES

Zimbabwe could either repeal or amend its BITs. If Zimbabwe repeals its BITs, the sunset clause found in most of these texts would still allow for the protection under first generation BITs to be operational.⁴⁶⁶ On the other hand, if Zimbabwe opts for amendment, it must be aware that it is not a unilateral act, both parties must agree to those amendments. Either one of the options is something Zimbabwe must consider nonetheless. Apart from amending and repealing, it is also recommended that Zimbabwe has a model treaty as done by Canada and India, which sets out investment treaty practice to follow for consistency. This section will recommend how best to approach each provision for amendment, and new treaty clauses are proposed.

⁴⁶⁶ Article 12.2 China – Zimbabwe BIT, Article 12.2 Germany- Zimbabwe BIT, Article 14.1 Netherlands – Zimbabwe BIT, Article 12.2 South Africa Zimbabwe BIT and Article 12.1 Switzerland Zimbabwe BIT.

5.3.1 National Treatment Clause

As discussed in Chapter 3, the NT clause in Zimbabwe's BITs is problematic because it is unqualified and could attract lawsuits because of preferential treatment currently given to Zimbabwean businesses.⁴⁶⁷ To this, it is recommended that Zimbabwe must firstly, do away with indigenising foreign owned businesses. That way, it can compete with other SADC countries in terms of attracting investment. Given the similar economies of the SADC regional block, it is highly detrimental for Zimbabwe to continue mandating foreign owned businesses to an ownership threshold.⁴⁶⁸ When indigenisation law is repealed, it then becomes necessary to qualify the NT clause.

By qualifying the NT clause, Zimbabwe can still keep its preferential treatment without attracting lawsuits that may be expensive to go through and settle. It is thus, recommended that Zimbabwe employ the approach advanced by the 2016 SADC FIP. This approach has three characteristics that best suit Zimbabwe to employ. First, the application of the NT clause is limited to the operation, management and disposition of the investment.⁴⁶⁹ Secondly, there is a requirement that circumstances must be like.⁴⁷⁰ Furthermore, it is recommended that Zimbabwe's new NT provision give direction on how like circumstances can be examined. This a wise formulation advanced by the 2016 SADC FIP, which requires a case-by-case analysis of circumstances and a non-exhaustive list that includes the sector the investment is in, and the measure of the aim concerned.⁴⁷¹ Finally, the 2016 SADC FIP recognises that a host state may want to pursue national development objectives, therefore allows for preferential treatment in that regard.⁴⁷²

⁴⁶⁷ See part 3.4.1 of this thesis.

⁴⁶⁸ There are 'safe havens' for investments within SADC, which are basically countries that do not require an ownership limit and thus investors would simply choose not to invest in Zimbabwe. See Kondo T 'Investment Law in a Globalised Environment: A Proposal for a New Investment Regime in Zimbabwe' (Unpublished LLD Thesis, University of the Western Cape, 2017) 323.

⁴⁶⁹ Article 6.1 of the 2016 SADC FIP.

⁴⁷⁰ Article 6.1 of the 2016 SADC FIP.

⁴⁷¹ Article 6.2 of the 2016 SADC FIP.

⁴⁷² Article 6.3 of the 2016 SADC FIP.

5.3.2 Most-favoured Nation Treatment

Although some jurisdictions like India have done away with the MFN clause, other treaty practices like that of Canada and the CETA retained the MFN clause. As highlighted in Chapter 4, an option available to address the unintended multilateralisation of BITs by this clause is to limit its application.⁴⁷³ It is therefore recommended that Zimbabwe keeps the MFN clause, however limit its scope of application to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments as advanced by the Canada Model BIT.⁴⁷⁴ Further to this, it is recommended that Zimbabwe subjects the MFN treatment to operate only in like circumstances as provided for by the Canada Model BIT.⁴⁷⁵

5.3.3 Fair and Equitable Treatment

Among problematic provisions in BITs, the FET clause has been one of the most notorious given its unknown contents overall.⁴⁷⁶ Leaving the common clause open to interpretation exposes Zimbabwe to numerous lawsuits. It is against this background that a recommendation to furnish the FET as advanced by the SADC Model BIT is put forward. This means that in its BITs, Zimbabwe will keep the traditional clause, and define it as creating an obligation for the host state to refrain from arbitrary processes against the investor. In essence, the host state shall not deny administrative and procedural justice to investors.⁴⁷⁷ Finally, the host state should notify investors of administrative or judicial proceedings directly affecting their investment.⁴⁷⁸

⁴⁷³ See part 4.3.2 of this thesis.

⁴⁷⁴ Article 4 Canada Model BIT.

⁴⁷⁵ Article 4 Canada Model BIT.

⁴⁷⁶ See part 3.4.3 of this thesis.

⁴⁷⁷ Article 5.1 SADC Model BIT, Option 2.

⁴⁷⁸ Article 5.2 SADC Model BIT, Option 2.

5.3.4 Full Protection and Security

The problem with the FPS clause has been that in some instances, it has been interpreted widely to include protection beyond physical protection.⁴⁷⁹ To this, some jurisdictions and drafters have expressly provided what is meant by the FPS, limiting it to physical protection for the most part.⁴⁸⁰ It is therefore recommended Zimbabwe employs the straightforward approach advanced by CETA, of defining the FPS as physical protection. However, for avoidance of an onerous standard, Zimbabwe must further qualify this to provide that such protection would be subject to available resources.⁴⁸¹ By doing this, Zimbabwe commits to protection it can actually provide as opposed to that which may burden its national reserves.

5.3.5 Expropriation: Indirect Expropriation

The thesis has discussed that there are regulations that may have effect on an investment. When this happens, indirect expropriation is said to have taken place.⁴⁸² However, it is essential for states to regulate activities within their borders for several reasons. To this, it becomes a problem if every regulatory measure can be compensable. It is essential for Zimbabwe to revisit the clause for the purposes of distinguishing between compensable regulatory measures and non-compensable regulatory measures. This has been one of numerous problems of Zimbabwe's BITs. It is therefore recommended that Zimbabwe distinguishes between compensable and non-compensable regulatory measures by emulating what India has done.

Firstly, it is important to have a non-exhaustive list of what could amount to indirect expropriation. A permanent and complete or near complete deprivation of the value of investment may be considered in determining whether or not there has been indirect

⁴⁷⁹ See part 3.4.4 of this thesis.

⁴⁸⁰ See part 4.3.4 of this thesis.

⁴⁸¹ This is what South Africa provided for in its Protection of Investment Act under section 9.

⁴⁸² See part 3.4.5 of this thesis.

expropriation.⁴⁸³ Further to this, has there been permanent and complete or near complete deprivation of the investor's right of management and control over the investment.⁴⁸⁴ There must be evidence to show that there was an appropriation by the host state, which results in transfer of the value of the investment to the host state or a third party.⁴⁸⁵

Second, it is recommended that Zimbabwe provides that the exercise of the right to regulate in the interest of the public or public welfare objectives such as public health and safety or environment, shall not constitute expropriation.⁴⁸⁶ Although India has excluded a tribunal from critically analysing new laws and regulations for the purposes of finding legitimacy of the same,⁴⁸⁷ it is an approach that the writer recommends against in the case of Zimbabwe. This is mainly because it is in the interest of justice that a tribunal scrutinise, to a certain degree, the measures undertaken by government in its exercise of the right to regulate in an effort to determine whether or not the measure is legitimate and in the interest of the state at large.



5.3.6 Right to regulate

As a compliment to an elaborate indirect expropriation clause, it is imperative that Zimbabwe further reinforce its right to regulate, pursuant to public interest. Some model BITs have reinforced this right, and treaty practice as seen by the SADC FIP and CETA.⁴⁸⁸ It is recommended that Zimbabwe expressly provides for the right to regulate and for the purposes of the flexibility to achieve legitimate policy objectives such as public health and safety, and environment as done by CETA signatories.⁴⁸⁹ Further to this, Zimbabwe must realise that issues like environment, labour and health are generally acceptable and relatable throughout the world. However, issues of economic empowerment of indigenous or previously marginalised persons may only be peculiar to Zimbabwe and developing countries at large. Thus, it is recommended that in reforming BITs, Zimbabwe should

⁴⁸³ Article 5.2 (i) of India Model BIT.

⁴⁸⁴ Article 5.2 (ii) of India Model BIT.

⁴⁸⁵ Article 5.2 (iii) of India Model BIT.

⁴⁸⁶ Article 5.4 of India Model BIT. Annex B.13 (1) (c) Canada Model BIT.

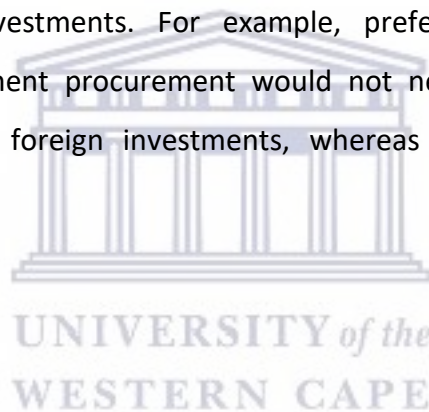
⁴⁸⁷ Article 5.5 India Model BIT. See also part 4.3.5 of this thesis.

⁴⁸⁸ See part 4.4.1 of this thesis.

⁴⁸⁹ CETA, preamble.

emulate what the SADC Model Treaty advances with regard to development objectives. This states that governments should ensure that their territories are consistent with goals and principles of sustainable development, and other legitimate social and economic policy objectives.⁴⁹⁰

In summation, the BITs of Zimbabwe should reinforce the right to regulate pursuant to public interest in health and safety, environment and labour. Furthermore, expressly provide that in the exercise of the right to regulate, states will be on a quest to ensure that their territories are mindful of legitimate social and economic policy objectives through economic empowerment laws among other things mandated or encouraged by the Constitution and laws. While it is recommended that Zimbabwe expressly provides for this, it is imperative that such laws be reasonable and refrain from interfering unjustifiably with foreign investments. Zimbabwe can empower its domestic investors without unduly interfering with foreign investments. For example, preferential treatment currently provided for under government procurement would not necessarily interfere with the operation or enjoyment of foreign investments, whereas indigenising foreign owned businesses would.⁴⁹¹



5.3.7 Disclosure

Pursuant to the exercise of parliamentary oversight on investments, the disclosure clause is a key element in ensuring against fraudulent activities. This is an important clause to employ for Zimbabwe, in light of the diamond revenue scandal and allegations put forward against foreign investors.⁴⁹² It is therefore recommended that Zimbabwe employs the disclosure clause. This clause would require investors to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with

⁴⁹⁰ Article 20.1 SADC Model BIT.

⁴⁹¹ See part 3.4.1 of this thesis.

⁴⁹² The President of the Republic of Zimbabwe made allegations, at his 92nd birthday celebrations in 2016, that there was revenue missing from diamond mining. He further blamed Chinese investors of looting, thus the country missing US\$15 billion in revenue. See ANA 'Zimbabwean president Mugabe announces \$15 billion in diamonds looted' Sowetan Live 4 March 2016 available at <http://www.sowetanlive.co.za/news/2016/03/04/zimbabwean-president-mugabe-announces-15-billion-in-diamonds-looted>

affiliates, ownership, governance, or other matters.⁴⁹³ Further to this, Zimbabwe should demand any other corporate history and practices of the investor.⁴⁹⁴ Moreover, investors should be expected to maintain accounting records and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.⁴⁹⁵

Although disclosure is important, there is a need to strike a balance between such disclosure being made public, and protection of confidential information of the investor. Thus, it is recommended that there be an obligation on the Host State to protect confidential business information that would prejudice the competitive position of the investor.⁴⁹⁶ Moreover, it is recommended that this clause place an obligation on Zimbabwe as a host state to act reasonably, by making requests of disclosure reasonable and refrain from unduly burdensome demands.⁴⁹⁷

5.3.8 Transparency

To balance the right to regulate by the host state, it is imperative to place an obligation on the host state to be transparent in its implementation of its laws, particularly those having a direct effect on foreign investments. It is recommended that the transparency clause be employed in Zimbabwe's BITs, obligating state parties to publish laws and regulations that apply to investments,⁴⁹⁸ with the purpose of establishing confidence, stability, predictability, trust and integrity by adhering to transparent practices and procedures relating to investments.⁴⁹⁹

⁴⁹³ Article 10.1 India Model BIT.

⁴⁹⁴ Article 12.1 SADC Model BIT.

⁴⁹⁵ Article 10.4 India Model BIT.

⁴⁹⁶ Article 12.4 SADC Model BIT.

⁴⁹⁷ Article 8.17 of CETA.

⁴⁹⁸ Article 19.1 Canada Model BIT.

⁴⁹⁹ Article 7.1 of the 2016 SADC FIP.

5.4 CLOSING REMARKS

The thesis has therefore established the problems with Zimbabwe's BITs and the need to revisit them for reform. Such reform is conscious of the discussions and practices around international investment law. Following is an annexure detailing a proposed model BIT. Whilst the model BIT provides more provisions than that discussed as problems in the thesis,⁵⁰⁰ it was worthwhile to include all provisions for a full model BIT text. The proposed model BIT is derived from the South – Africa Zimbabwe BIT, which is a more recent agreement signed by Zimbabwe. The focus is on the five provisions discussed throughout this thesis and new clauses identified and discussed in this thesis as options to consider for more balanced texts.

(30 141 words)



⁵⁰⁰ See part 1.7 of this study, where a discussion of the limitation of study is undertaken.

ANNEXURE

Proposed Model Text for Zimbabwe's Bilateral Investment Treaties

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF ZIMBABWE

AND

.....
**FOR THE PROMOTION AND RECIPROCAL
PROTECTION
OF INVESTMENTS**

UNIVERSITY *of the*
WESTERN CAPE

PREAMBLE

The Government of the Republic of Zimbabwe and the Government of ... (hereinafter jointly referred to as the "Parties", and separately as a "Party");

DESIRING to create favourable conditions for greater investment by investors of either Party in the territory of the other Party; and

RECOGNISING that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in the territories of both Parties;

HEREBY AGREE as follows:



ARTICLE 1

Definitions

In this Agreement, unless the context indicates otherwise -

"investment" means every kind of asset and in particular, though not exclusively, includes -

- a) movable and immovable property as well as other rights such as mortgages, liens or pledges;
- b) shares, stock and debentures of a company and any other form of participation in a company;
- c) claims to money, or to any performance under contract having an economic value;
- d) intellectual property rights, in particular copyrights, patents, utility model patents, registered designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and goodwill; and
- e) rights or permits conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

and any change in the legal form in which assets are invested or reinvested shall not affect their character as investments under this Agreement.

"investor" means in respect to either Party:

- a) the nationals of a Party, being those natural persons deriving their status as nationals of a Party from the domestic law in force in the territory of that Party; and
- b) the "companies" of a Party, being any legal person, corporation, firm or association incorporated or constituted in accordance with the domestic law in force in the territory of that Party;

"returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profits, interest, capital gains, dividends, royalties and fees;

"territory" means -

- a) for the Republic of Zimbabwe, the land and territory of the Republic of Zimbabwe and the airspace above it;
- b) for the Republic of ...



- (1) Each Party shall, subject to its general policy in the field of foreign investment, encourage investments in its territory by investors of the other Party and, subject to its right to exercise powers conferred by the domestic law of its country, shall admit such investments.
- (2) Each Party shall grant, in accordance with the domestic law of its country, the necessary permits in connection with such investments and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance.
- (3) In order to create favourable conditions for assessing the financial position and results of activities related to investments in the territory of a Party, that Party shall - notwithstanding its own requirements for bookkeeping and auditing - permit the investment to be subject also to bookkeeping and auditing according to standards which the investor is subjected to by his or its national requirements or according to

internationally accepted standards (such as International Accountancy Standards (IAS) drawn up by the International Accountancy Standards Committee (IASA)). The results of such accountancy and audit shall be freely transferable to the investor.

ARTICLE 3

Treatment of Investments

- 1) Investments and returns that are reinvested of investors of either Party shall at all times be accorded fair and equitable treatment.
 - (a) For certainty, fair and equitable treatment does not require treatment in addition to or beyond an obligation for the Host State to refrain from arbitrary processes against the investor.
 - (b) The host state shall not deny administrative and procedural justice to investors.
- 2) Investments and returns that are reinvested of investors of either Party shall at all times enjoy full physical security and protection, subject to available resources. Such treatment will be awarded on a national treatment basis.

UNIVERSITY of the
WESTERN CAPE

ARTICLE 4

Non-discrimination

- 1) A State Party shall accord to investors and their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of investments in its territory.
- 2) For greater certainty, references to 'like circumstances' in paragraph 1 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, inter alia:
 - a) its effects on third persons and local community;

- b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - c) the sector the investor is in;
 - d) the aim of the measure concerned;
 - e) the regulatory process generally applied in relation to the measure concerned;
and
 - f) other factors directly relating to the investment or investor in relation to the measure concerned.
- 3) Notwithstanding the provisions of paragraph 1, State Parties may, in accordance with their respective domestic legislation, grant preferential treatment to domestic investments and investors in order to achieve national development objectives.
- 4) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
- 5) The provisions of paragraph 4 shall not be construed so as to oblige one Party to extend to the investors of the other Party the benefit of any treatment, preference or privilege resulting from
- a) any existing or future customs union, free trade area, common market, any similar international agreement or any interim agreement leading up to such customs union, free trade area, or common market to which either Party is or may become a party; or
 - b) any international agreement or arrangement relating wholly or mainly to taxation of any domestic legislation relating wholly or mainly to taxation.

ARTICLE 5

Compensation for Expropriation

- 1) Investments of investors of either Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be at least equal to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, and shall be effectively realisable.
- 2) The investor affected by the expropriation shall have a right, under the domestic law of the country of the Party making the expropriation, to prompt review, by a court of law or other independent and impartial forum of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles referred to in paragraph 1.
- 3) The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:
 - a) permanent and complete or near complete deprivation of the value of Investment; and
 - b) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment
 - c) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party;

- 4) For the avoidance of doubt, the parties also agree that, 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 shall not constitute expropriation.

ARTICLE 6

The Right to Regulate

- 1) In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
- 2) The provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity

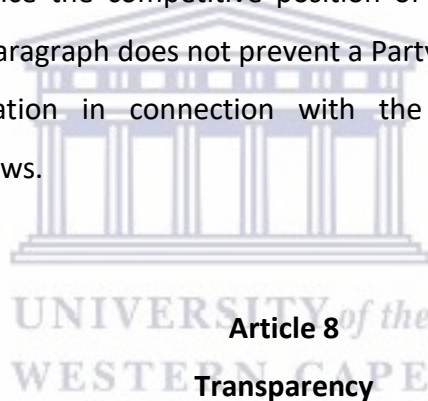
Article 7

Disclosure

- 1) Investors and Investments must timely comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.
- 2) An Investor shall provide such information to an actual or potential Host State as that State Party may require concerning the Investment in question and the

corporate history and practices of the Investor, for purposes of decision making in relation to that Investment or solely for statistical purposes.

- 3) Accounting records shall be maintained and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.
- 4) A Party may require an investor of the other Party, or its covered investment, to provide routine information concerning that investment solely for informational or statistical purposes, provided that those requests are reasonable and not unduly burdensome.
- 5) The Party shall protect confidential or protected information from any disclosure that would prejudice the competitive position of the investor or the covered investment. This paragraph does not prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.



Article 8

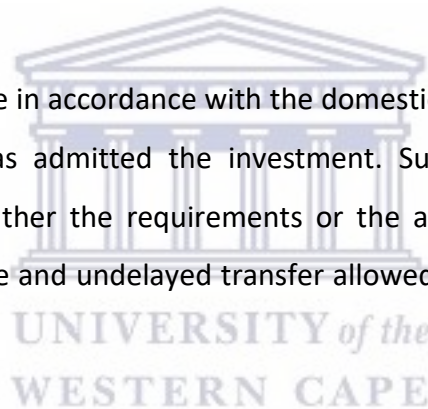
Transparency

- 1) Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
- 2) Each Party shall promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures as they relate to investment.

ARTICLE 9

Transfers of Investments and Returns

- 1) Each Party shall allow investors of the other Party the free transfer of payments relating to their investments and returns, including compensation paid pursuant to Articles 5.
- 2) All transfers shall be effected without delay in any convertible currency at the market rate of exchange applicable on the date of transfer. In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is the more favourable to the investor.
- 3) Transfers shall be done in accordance with the domestic laws in force in the territory of the Party, who has admitted the investment. Such domestic laws shall not, however, regarding either the requirements or the application thereof, impair or derogate from the free and undelayed transfer allowed in terms of paragraph 1 and 2.



ARTICLE 10

Investor-state dispute settlement

- 1) Any legal dispute between an investor of one Party and the other Party relating to an investment of the former shall be settled amicably between the two parties concerned.
- 2) If the dispute has not been settled within six (6) months from the date at which it was raised in writing, the dispute may at the choice of the investor, after notifying the Party concerned of its intention to do so in writing, be submitted –
 - a) to the competent courts of the Party in whose territory the investment is made;

- b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and nationals of other States, opened for signature at Washington DC on 18 March 1965; or
 - c) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
- 3) If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in paragraph 2, the choice shall be final.
 - 4) The decision in resolution of the dispute shall be derived by application of the domestic law, including the rules relating to conflicts of law, of the country of the Party involved in the dispute in whose territory the investment has been made, the provisions of this Agreement, the terms of the specific agreement which may have been entered into regarding the investment as well as the principles of international law.
 - 5) The award made shall be final and binding on the parties to the dispute and shall be executed according to the applicable domestic law.

ARTICLE 11

Dispute between the State Parties

- 1) Any dispute between the Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiations between the Parties.
- 2) If the dispute cannot thus be settled within a period of six months, following the date on which such negotiations were requested by either Party, it shall upon the request of either Party be submitted to an arbitral tribunal.

- 3) Such an arbitral tribunal shall be constituted for each individual case in the following way:
 - a) within three months of the receipt of the request for arbitration, each Party shall appoint one member of the tribunal
 - b) those two members shall then select a national of a third State who on approval by the two Parties shall be appointed Chairman of the tribunal.
 - c) the Chairman shall be appointed within three months from the date of appointment of the other two members.
- 4) If within the periods specified in sub-Article (3) the necessary appointments have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is also prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.
- 5) The arbitral tribunal shall decide the dispute according to this Agreement and the principles of international law. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties. Each Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining cost shall be borne in equal parts by the Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Parties. The tribunal shall determine its own procedures, unless the Parties agree otherwise.

ARTICLE 12

Subrogation

If a Party or its designated Agency makes a payment to its own investor under a guarantee it has given in respect of an investment in the territory of the other Party, the latter Party shall recognise the assignment, whether by law or by legal transaction, to the former Party of all the rights and claims of the indemnified investor, and shall recognise that the former Party or its designated agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original investor.

ARTICLE 13

Application of other Rules

- 1) If the provisions of the domestic law of the country of either Party or obligations under international law existing at present or established hereafter between the Parties in addition to this Agreement contain rules, whether general or specific, entitling investments and returns of investors of the other Party to treatment more favourable than is provided for by this Agreement, such rules shall, to the extent that they are more favourable, prevail over this Agreement.
- 2) Each Party shall observe any other obligation it may have entered into with regard to investments of investors of the other Party.

ARTICLE 14

Scope of the Agreement

This Agreement shall apply to all investments, whether made before or after the date of entry into force of this Agreement, but shall not apply to any property right or interest compulsorily acquired by either Party in its own territory before the entry into force of this Agreement.

ARTICLE 14

Entry into Force, Duration, Termination and Amendment

- 1) The Parties shall notify each other when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty (30) days after receipt of the last notification.
- 2) This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Party shall have given written notice, through the diplomatic channel, of termination to the other.
- 3) In respect of investments made prior to the date when the notice of termination becomes effective, the provisions of Articles 1 to 11 remain in force with respect to such investments for a further period of twenty years from that date.
- 4) The terms of this Agreement may be amended by negotiated agreement between the Parties. The Parties shall notify each other through an Exchange of Notes through the diplomatic channel when their respective constitutional requirements for entry into force of such amendment have been fulfilled. Such amendment shall enter into force on the date of receipt of the last notification.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed and sealed this Agreement in two originals in the English language, **both** texts being equally authentic.

DONE at on this day of 2017

**FOR THE GOVERNMENT OF THE
REPUBLIC OF ZIMBABWE**

FOR THE GOVERNMENT OF THE

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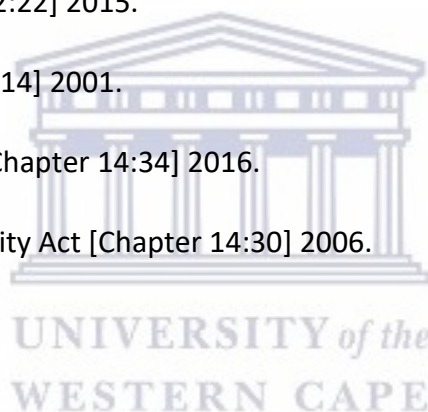
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