Indigenisation Laws and Bilateral Investment Treaties in Zimbabwe

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ABSTRACT

This article discusses indigenisation and economic empowerment laws in Zimbabwe. During the colonial period, the laws in place were deliberately crafted to dis-empower Zimbabweans. It is against this background that after independence, the new government took strides to redress these imbalances through the Indigenisation and Economic Empowerment Act and Regulations. However, these laws create legal challenges in that they potentially violate obligations in bilateral investment treaties (BITs) that Zimbabwe has entered into. They potentially violate national treatment and expropriation obligations in the BITs. After exploring the law on these elements of the BITs, the paper recommends a review of Zimbabwe's BIT policy as a whole, with the view to aligning it with its constitutional mandate of promoting empowerment of indigenous Zimbabwean citizens.

1. INTRODUCTION

In 1998, Zimbabwe adopted an Indigenisation Policy broadly aimed at bringing about economic justice between races in Zimbabwe and creating favourable economic conditions for promotion of basic human rights, such as the right to employment.[1] A decade later, the Indigenisation and Economic Empowerment Act and Regulations were passed to support this policy and provide measures of achieving economic empowerment through indigenisation of the economy. These laws however, impose legal challenges on Zimbabwe's obligations under the various BITs to which it is a party. Hence, this paper seeks to examine indigenisation and economic empowerment laws in Zimbabwe in light of the commitments in its BITs, and to proffer suggestions and recommendations on what should be done going forward.

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1 Zimbabwe Government, "Zimbabwe government policy framework for indigenisation of the economy," Department of State Enterprises and Indigenisation , Harare, (1998), p. 1.

2. LEGISLATIVE FRAMEWORK FOR INDIGENISATION IN ZIMBABWE

2.1 Background to Indigenisation in Zimbabwe

Between the periods 1890 – 1980, the colonial government adopted laws that were racially biased and restricted black Zimbabweans from participating meaningfully in economic activities.[2] The net effect of these laws was that black Zimbabweans were reduced to being mere labourers in mining, agriculture and manufacturing sectors of the economy. It is against this background that the government endeavoured after independence in 1980 to amend or repeal these laws so as to promote the development of small scale indigenous businesses.

During the first decade of independence, however, the new government appeared to be hesitant about indigenisation. It adopted and pursued a policy of reconciliation[3] and socialist political ideologies,[4] and was restrained by some elements of the Independence Constitution.[5] From the 1990s, Government began to pay more attention to demands of lobbying groups such as the Indigenous Business Development Centre (IBDC) and the Affirmative Action Group (AAG). These groups were among those clamouring for greater participation of blacks in ownership of the economy through, *inter – alia,* deregulation of laws and procedures hindering black enterprises, redistribution of land and white-owned wealth.[6]

2 The following are some of the pieces of legislation that perpetrated and furthered racial division and inequalities, and suppressed emergence and growth of indigenous businesses during the colonial era in Zimbabwe: Land Apportionment Act of 1930; Factory Act, No.20 of 1948 (Chapter 218); Companies Act, No. 47 of 1951 (Chapter 190); Native Land Husbandry Act of 1951; Urban Registration and Accommodation Act of 1954; Control of Goods Act, No. 12 of 1954; Second Hands Goods Act [No. or year?]; Land Tenure Act of 1965; Grain Marketing Act, No. 20 of 1966; Income Tax Act, No. 5 of 1967 (Chapter 181); Liquor Act, No. 9 of 1974; and the Regional, Town and Country Planning Act, No. 22 of 1976 (Chapter 241).

3 B. Raftopoulos, "Fighting for control: the indigenization debate in Zimbabwe," 11(4) *Southern Africa Report* (1996), p. 3.

4 A. T. Mangwende, "The Legislature and the indigenisation of the Zimbabwean economy: problems and prospects; experiences of the Parliamentary Select Committee on the indigenisation of national economy," Paper presented on National Workshop on The Indigenisation of Zimbabwean Economy: Problems and Prospects, jointly organized by Institute of Development Studies (IDS), University of Zimbabwe and Organisation for Social Science Research in Eastern and Southern Africa (OSSREA), 18 - 19 August, 1994.

5 Section 38 (1) of the Lancaster House Constitution provided that 20 out of 100 members of the House of Assembly were to be elected by voters registered on the White Voters Roll. These were whites, mainly from the Rhodesia Front Party and they ensured that the laws protected their property rights.

6 B. Raftopoulos, "Fighting for control: the indigenization debate in Zimbabwe," 11(4) *Southern Africa Report* (1996), p. 3.

In 1991, a Parliamentary Select Committee was set up to examine the adequacy of necessary and supportive legislation to indigenize the economy; examine ownership and review equity structure in all sectors of the economy; examine all matters pertinent to the successful implementation of an indigenisation policy and to report its findings to Parliament. In 1993, the Committee identified various pieces of legislation whose repeal and/ or amendment would facilitate black participation in the economy. However, policy deficiency resulted in indigenisation being perceived in a narrow sense, with limited focus on the disposal of state owned enterprises and buying of shares and takeover of existing companies. To address this anomaly the United Nations Development Programme and the Government of Zimbabwe signed the Technical Support for Indigenisation Policy Programme.[7] This project assisted the government in drafting the policy framework for indigenisation, which was finally adopted in 1998. In 1999, a deed was prepared and registered for the National Investment Trust (NIT), an organization established to warehouse shares for indigenous Zimbabweans. The recommendations of the Technical Support for Indigenisation Policy Programme formed a useful base for the drafting of the Indigenisation and Economic Empowerment Act (IEEA) to anchor the Indigenisation Policy. The contents and parameters of the Policy, the Act and its Regulations are discussed below.

2.2 The Indigenization Policy

The Indigenisation Policy was adopted in 1998 and revised in 2004. It broadly aims to bring about economic justice between races in Zimbabwe; to "democratise the economy" and to create favourable economic conditions for the promotion of basic human rights, such as the right to development, the right to employment, the right to own property and the right to an adequate standard of living.[8]

These objectives were to be achieved through strategies such as industrialisation of the economy; land redistribution; review of the laws that constraint indigenisation and increasing indigenous private investment in the economy. The increase of indigenous private investment in the economy

7 Technical Support for Indigenisation Policy Programme, Zim/97/005/01/97 https://erc.undp.org/evaluation/documents/download/258 (accessed 8 February, 2017)

8 Zimbabwe, Department of State Enterprises and Indigenisation "Zimbabwe government policy framework for indigenisation of the economy" (1998), p. 1.

was to be achieved through the establishment of new indigenous enterprises and new joint ventures; buying of shares in the existing non-indigenous companies; privatisation of state enterprises; takeovers; employee stock ownership schemes; subcontracting and outsourcing.[9] The Department of State Enterprises and Indigenisation in the Office of the President was charged with co-ordinating, monitoring and evaluating implementation of the Indigenisation Policy.

The Policy had its shortcomings. It lacked implementation mechanisms and, most importantly, it did not create legal obligations for the parties involved. As a result, laws were needed to anchor it. These shortcomings coupled with the recommendations of the Technical Support for Indigenisation Policy Programme necessitated the enactment of the Indigenisation and Economic Empowerment Act.[10]

2.3 Indigenization and Economic Empowerment Act, 2007

This Act came into force in April 2008. It is aimed at providing support measures for the further indigenisation of the economy and economic empowerment of indigenous Zimbabweans. The main objective of the Act is to endeavour that at least 51% of the shares of every public company and any other business are owned by indigenous Zimbabweans. This fifty – one percentile rule also applies to specific commercial undertakings; namely: mergers; restructurings; acquisition of a controlling share in a company; de-merger or unbundling of a business; relinquishment of a controlling share in a business; and any proposed foreign investment requiring a license under the Zimbabwe Investment Authority Act [Chapter 14:30].[11] Procurement by Government has to adhere to the 51% rule, in that the government must procure at least 51% of its goods and services from businesses in which indigenous Zimbabweans have a controlling interest.

The beneficiaries of the Act are both natural and legal persons who prior to 18th of April 1980 were disadvantaged by unfair discrimination on the grounds of race and/ or descent.[12] The benefactors are all foreign-owned public companies, private companies, associations, syndicates or

9 *Ibid.*
10 Chapter 14:33.
11 Section 3 of the Indigenisation and Economic Empowerment Act, (hereinafter referred as "the Act"), (Chapter 14:33).
12 Section 2 of the Act, on the definition of "indigenous Zimbabwean".

partnerships registered in terms of the Companies Act, (Chapter 24:03).[13]

The Act also provides for the establishment of the Indigenisation and Economic Empowerment Board (IEEB). The purpose of the IEEB is to advise the Minister and to administer the Fund.[14] This Fund is established in terms of the Act to finance indigenisation and empowerment transactions, and to provide assistance to indigenous Zimbabweans in, *inter alia*, financing of share acquisitions; warehousing of shares and capacity – building.[15]

2.4 Indigenisation Regulations

In pursuance of section 3 (1) of the Act, various Regulations were passed primarily to empower the Minister of Indigenisation in implementing the provisions of the Act. Currently, the following Regulations are in force: (i) Indigenisation and Economic Empowerment Act (General) Regulations, Statutory Instrument (SI) 21/2010, as amended by SI 116/2010, SI 34/2011, SI 84/2011and SI 66/2013; (ii) Indigenisation and Economic Empowerment Act (General) Regulations – General Notice (GN) 114 of 2011; (iii) Indigenisation and Economic Empowerment Act (General) Regulations, GN 459/2011; and (iv) Indigenisation and Economic Empowerment Act (General) Regulations, GN 280/2012. Some of the these Regulations are discussed below.

2.4.1 Indigenisation and Economic Empowerment (General) Regulations, 2010

These regulations provide for the value threshold of a business that has to comply with the indigenisation percentile requirement. Regulation 4 (1) stipulates that every business with a net asset value of five hundred thousand United States Dollars (US$ 500 000) and is non – indigenous compliant, must submit an indigenisation plan to the Minister stating how it intends to comply with the 51% requirement. The same threshold value is applicable to the following commercial undertakings: mergers; restructurings; acquisition of a controlling share in a company; de-merger or unbundling of a business; relinquishment of a controlling share in a business; and any proposed foreign

13 Section 2 of the Act, on the definition of a "business".
14 Section 8 of the Act.
15 Section 12 (2) of the Act.

investment requiring an investment license.[16] The period for achieving indigenisation is five years from the date of operation of these regulations,[17] or within five years from the commencement of the business concerned. Longer periods of compliance are permissible where there is a social or an economic objective to be achieved.[18]

The Regulations also provide ways in which a company can comply with the 51% quota. These include transfer of shares;[19] Employee Share Ownership Scheme (ESOS);[20] Management Buy Outs[21] and Community Share Ownership Scheme (CSOS).[22] Under the ESOS and Management Buy Outs, the company may dispose up to 28% of the company shares to its employees and a maximum of 5% to managerial staff. The CSOS can only be utilised by qualifying businesses, that is, companies engaged in exploiting the natural resources of any community. The minimum number of shares to be donated for CSOS should be 10% of the net asset value of the business in question.[23]

The Regulations further provide for sectors that are reserved for indigenous Zimbabweans. These are primary production of food and cash crops; passenger buses, taxis and car hire services; retail and wholesale trade; barber shops, hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts and craft and marketing and distribution.[24] Existing foreign investors in these sectors are expected to apply for indigenisation compliance certificates. Failure to do so attracts penalties, such as revocation or suspension of an operating license;[25] a fine not exceeding US$2 000 or imprisonment for a period not exceeding five years, or both.[26]

16 Regulations 6 to 9 of the Indigenisation and Economic Empowerment (General) Regulations, 2010 (hereinafter referred as "2010 Regulations").
17 These Regulations came into force on the 1st March, 2010.
18 Regulation 3 (a) of the 2010 Regulations.
19 Regulation 3.
20 Regulation 14.
21 Regulation 14A.
22 Regulation 14B.
23 Regulation 14B (5).
24 Third Schedule of the 2010 Regulations.
25 Regulation 9A (4) of the 2010 Regulations.
26 See Regulation 4(4) for failure to return a duly completed form; Regulation 4 (7) for making false statements; Regulation 5 (3) for failure to furnish any additional information that the Minister requires; and Regulation 9 (4) for failure to obtain approval from the Minister to invest in a reversed sector.

2.4.2 Indigenisation and Economic Empowerment Act (General) Regulations, General Notice 114 of 2011

These Regulations apply to the Mining sector. Every mining business with a net asset value of or above one United States dollar (US$1) and whose 51% or controlling interest is not held by indigenous Zimbabweans is required to submit its indigenisation implementation plan to the Minister for approval.[27] After approval of the plan, the company must dispose its shares or interests to the designated entities not later than six months, from the day of publication of these Regulations.[28] For the purposes of indigenisation, "designated entity" is defined in Regulation 1 to mean: (i) the National Indigenisation and Economic Empowerment Fund; or (ii) the Zimbabwe Mining Development Corporation established in terms of the Zimbabwe Mining Development Corporation Act [*Chapter 21:*08]; or (iii) any company or other entity incorporated by the Zimbabwe Mining Development Corporation or the Fund for the purposes of this notice; or (iv) a statutory sovereign wealth fund that may be created by law; or (v) an employee share ownership scheme or trust, management share ownership scheme or trust or community share ownership scheme or trust.

The value of the shares or other interests required to be disposed of to a designated entity is calculated on a basis of valuation agreed to between the Minister and the non-indigenous mining business concerned. However, the value and calculations should take into account the State's sovereign ownership of the minerals exploited or proposed to be exploited by the concerned non-indigenous mining business.[29]

2.4.3 Indigenisation and Economic Empowerment Act (General) Regulations, General Notice 459 of 2011

These Regulations apply to the manufacturing sector. The minimum asset value for affected businesses should be or above one hundred thousand dollars (US$100 000). The Regulations set a four-year compliance period, within which the indigenisation quota of 51% may be achieved as follows: twenty-six *per centum* in year one; thirty-six *per centum* (36%) by year two; forty-six *per centum* (46%) by year three and fifty-one *per centum* (51%) by

27 Regulation 2 of the General Notice 114 of 2011.
28 The Regulations were published in the Government Gazette Extraordinary of 25 March, 2011.
29 Regulation 3 (2) of Regulations in General Notice 114 of 2011.

year four. This is the only sector in which the indigenisation quota can be staggered. This is because of its sensitive nature.

2.4.4 Indigenisation and Economic Empowerment Act (General) Regulations, General Notice 280 of 2012

These Regulations provide for the net asset value and maximum period for businesses to indigenise in the following sectors: Finance; Tourism; Education and Sport; Arts, Entertainment and Culture; Engineering and Construction; Energy Services; Telecommunications; and Transport and Motor Industry. For the financial sector, the net asset value for businesses in this sector is as prescribed by the Reserve Bank. Shares to be disposed to indigenous Zimbabweans are 51%, and the compliance period is one year. Sectors such as education; telecommunications; electricity; engineering and construction; and education and sports, the minimum asset value is one dollar (US$1) and the compliance period is one year. In the tourism sector, the net asset value for a five star hotel is ten million dollars and the period of compliance is one year.

2.4.5 Frameworks, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act, General Notice 9 of 2016[30]

The Notice embodies the procedures and guidelines for implementing the Indigenisation Act. It clarifies that indigenisation in the resource sector is non-negotiable, whereas for the non-resource sectors, lesser shares may be transferred to indigenous persons over a stipulated period of time until the 51% minimum shareholding is achieved.

The framework sets the required weightings for "socially and economically desirable objectives."[31] The four specific objectives are: the undertaking of specified development work in the community in which the

30 General Notice 9 of 2016 replaced and substituted in its entirety General Notice 394A of 2015, Frameworks, Procedures and Guidelines for Implementing the Indigenisation and Economic Empowerment Act. General Notice 394A of 2015 was issued by the Minister of Finance despite the fact that the Indigenisation and Economic Empowerment Act under which the General Notice was published is administered by Minister of Indigenisation. This reflects discord in Government over indigenisation.

31 Regulation 5 (4) of the Indigenisation and Economic Empowerment (General) Regulations, 2010, SI 21 of 2010.

business in question carries on its business; the beneficiation to a specified extent of raw materials that are extracted in Zimbabwe by the business in question before it exports them; the transfer to a specified extent of new technology to Zimbabwe by the business in question; and the employment to a specified extent of local skills or the imparting of new skills to Zimbabweans to a specified extent. For instance, in the Energy Sector, to achieve the 51% rule, direct equity to the indigenous Zimbabwean should be 20% and the rest of the 31% percentage will be achieved thorough fulfilling the indicators which include vocational training (5%); skills development (3%); carbon neutral environment and empowerment (5%).[32]

It further introduced an indigenisation levy to be charged against all business, indigenous or not, to facilitate indigenisation and empowerment generally.[33] The levy will be calculated based on the prescribed rate that is linked to the annual gross turnover of the business entities also taking into cognisance the extent to which the individual entity is supporting socially and economically desirable objectives and other government economic programmes such as Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET). If non-indigenous business "simply decides" to flout indigenisation laws, the levy can be increased.[34]

2.5 Assessment of the Legal Framework

Since the promulgation of the first Indigenisation Regulations in 2010, at least three disconcerting elements have been identified in the legal framework for indigenisation in Zimbabwe. Some questioned the constitutionality of the legal framework under the old Constitution.[35] Other commentators noted the confusion as to which Ministry was to be responsible for the process.[36]

The constitutionality of the indigenisation laws and regulations is

32 Table 2: Empowerment Quotas or Credits (%) of General Notice 9 of 2016.

33 Paragraphs 35 to 43 of General Notice 9 of 2016, as read with Section 17 of Indigenisation and Economic Empowerment Act.

34 Paragraph 38 of the General Notice 9 of 2016.

35 D. Matyszak, "Everything you ever wanted to know (and then some) about Zimbabwe's Indigenisation and Economic Empowerment Legislation, But (quite rightly) were too afraid to ask," *Research & Advocacy Unit* (April 2010); D. Matyszak, "Some Comments on the New Indigenisation Regulations," *Research & Advocacy Unit* (July 2010); D. Matyszak, "Everything you ever wanted to know (and then some) about Zimbabwe's Indigenisation and Economic Empowerment Legislation, But (quite rightly) were too afraid to ask," 2nd ed. *Research & Advocacy Unit* (May 2011); A. Magaisa, "The illegality of Zimbabwe's new indigenisation regulations in the banking and education sectors," (July, 2012), http://newzimbabweconstitution.wordpress.com (accessed 9 February 2017).

36 D. Matyszak, "Chaos clarified – Zimbabwe's 'New' indigenisation framework," *Research and Advocacy Unit*, (February 2016).

not addressed in this paper. It will suffice to note that the new Constitution authorises adoption of measures by Government to facilitate empowerment of its citizen.[37] It further recognises that government can take legislative and other measures with the view of promoting equality of groups or classes of persons who previously suffered unfair discrimination.[38]

Ministerial responsibility over implementation of indigenisation is still a concern after adoption of the new Constitution. For instance, the Minister responsible for Indigenisation in 2015, Patrick Zhuwao, emphasised that indigenisation laws were not negotiable and were to be applied strictly.[39] In sharp contrast, the Minister of Finance at the time, Patrick Chinamasa, who perceived that the country was in dire need of foreign direct investment, was of the view that international investors could "sit down and talk" if there were any challenges in implementing the indigenisation laws.[40] Even Zhuwao's predecessor, Minister Francis Nhema's perceptions were that the requirement to cede 51% was negotiable and it was erroneous to believe that there was a "one-size-fits-all approach."[41]

As noted above, the introduction of the Indigenisation Framework did not clarify the confusion over Ministerial responsibilities.[42] It in fact introduced other legal concerns. First, it is not entirely clear whether the original intention was to set out mere proposals or substantive rules and regulations in GN9/ 2016. The Notice appears to have been crafted in response to the President's political pronouncements at different occasions.[43] The Notice was ultimately used to amend rules and regulations and to alter substantive laws on indigenisation as regards the empowerment levy and the manner in which businesses are required to indigenise.[44] It is legally disconcerting to alter substantive laws through subsidiary legislation.

This notwithstanding, the legal framework for indigenisation in Zimbabwe, at the time of writing, had not been challenged in the Courts.

37 Section 14 (1) of the Constitution of Zimbabwe, 2013.
38 Section 56 (6) of the Constitution of Zimbabwe, 2013.
39 "Indigenisation can co-exist with FDI," *The Herald*, 19 September, 2015, http://www.herald.co.zw/indigenisation-can-co-exist-with-fdi/ (accessed 9 February, 2017)
40 "Investment: Zim is the palace to be", *The Herald*, Editorial Comment 3 April, 2014, http://www.herald.co.zw/editorial-comment-investment-zim-is-the-place-to-be/ (accessed 9 February, 2017).
41 Nhema, "Indigenisation law not cast in stone", *Daily News*, 29 August, 2014 https://www.newsday.co.zw/2014/08/29/indigenisation-law-cast-stone-nhema/ (accessed 9 February, 2017).
42 See note 30 above.
43 Paragraph 9, 10, 11 and 12 of General Notice 9 of 2016 as read with Section 17 of Indigenisation and Economic Empowerment Act.
44 D. Matyszak, "Chaos clarified – Zimbabwe's 'New' indigenisation framework," *Research and Advocacy Unit* (February 2016), p. 16.

The discussion of the interface between indigenisation laws and Zimbabwe's BITs is therefore attempted below without any judicial insights on the legal framework.

3. INDIGENISATION LAWS AND ZIMBABWE'S BILATERAL INVESTMENT TREATIES

Bilateral Investment Treaties are international agreements which establish the terms and conditions on which nationals of either party can invest in the territory of the other. They are aimed at establishing a stable international legal framework to facilitate and protect the investment. They provide insurance for investment exporting countries against expropriation or other arbitrary treatment of investments, and developing nations also use them to signal their predisposition to inflows of foreign investment.[45] A distinctive feature of many BITs is that they permit an investor whose rights under the BIT have been violated to sue in international tribunals such as International Centre for the Settlement of Investment Disputes (ICSID), rather than suing the host State in its own courts.

BITs impose legal obligations on Contracting Parties and a breach of any of these obligations may give rise to a legal claim by the investor against the host state. Traditional BITs, including many to which Zimbabwe is a party, do not impose obligations on the investor.[46] Currently, Zimbabwe is a party to thirty – two BITs, eight of which are in force, namely those with China, Serbia, Denmark, Russia, Islamic Republic of Iran, Germany, the Netherlands and Switzerland.[47] These eight BITs provide for *inter alia* protection against discrimination[48] and expropriation.[49] These are the provisions likely to conflict with indigenisation laws.

45 W. M. Reisman & R. D. Sloane, "Indirect expropriation and its valuation in the BIT generation", (2003) *The British Year Book of International Law*, p.116.

46 *Per contra*, the new generation of BITs do impose obligations on the investor. See, for example, Articles 13 to 15 of SADC Model BIT (2012), imposing obligations on an investor relating to protection and respect of human rights, environment and labour.

47 http://investmentpolicyhub.unctad.org/IIA/CountryBits/233 (accessed 10 February 2017).

48 Article 3 (1) of Zimbabwe – Czech Republic BIT (1999); Article 3 (1) of Zimbabwe – Germany BIT (2000); Article 3(2) of Zimbabwe – Netherlands BIT (1998); Article 3 of Zimbabwe – Denmark BIT (1999) and Article 4 of Zimbabwe – Switzerland BIT (2001).

49 Article 6 of Zimbabwe – Netherlands (1998); Article 4 (2) of Zimbabwe – Germany (2000); Article 5 of Zimbabwe – Denmark (1999); Article 4 (1) of Zimbabwe – China (1998) and Article 6 of Zimbabwe – Switzerland (2001).

3.1 The indigenisation laws and national treatment provisions

The national treatment standard[50] is one of the oldest obligations imposed on States whose relevance spans from trade in goods and services to investment issues and even human rights.[51] It essentially entails that foreign investors and their investment must be accorded treatment no less favourable than that which the host state accords to its own investors in the same circumstances. The purpose of the national treatment provision is succinctly explained as "to oblige host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals."[52]

A determination of breach of this obligation requires an inquiry into the following: first, whether the foreign investor and the domestic investor are in "like circumstances", such as same business[53] or same 'sector';[54]secondly, whether the treatment accorded to the foreign investor is less favourable in comparison to the treatment accorded to the domestic investor;[55] and, thirdly, whether there existed a justification for the differentiation.[56] The intent of the government is not essential for a determination or finding of discrimination; rather it is the impact of the act that is decisive.[57]

Zimbabwe's indigenisation laws inherently favour domestic investors over foreign investors. In some cases, a foreign investor is totally barred from investing in certain sectors, which are reserved for indigenous Zimbabweans.[58] The crux of the matter is whether there is justification for the different treatment. Government has persistently attempted to justify its actions on the basis of the need to redress historical imbalances.[59] In the case

50 See Article 3(1) of Germany – Zimbabwe BIT which reads: "Neither Contracting Party shall in its territory subject investments owned or controlled by nationals or companies of other Contracting Party to treatment less favourable than that which it accords to investments of its own national or companies or to investments of nationals ..."

51 A. K. Bjorklund, "National treatment" in A. Reinisch (ed), *Standards of investment protection*, Oxford University Press, New York, (2009), p.29.

52 R. Dolzer and C. Schreuer, *Principles of international investment law*, Oxford University Press, New York, (2008), p. 178.

53 *Feldman v Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) 488 para 171.

54 *S.D. Myers Inc. v. Canada*, First Partial Award of November 13 2000 (2001) 40 ILM 1408, para. 250.

55 *International Thunderbird Gaming Corporation v Mexico* (NAFTA), Award, 26 January 2006 para 175-177.

56 R. Dolzer & C. Schreuer, Principles of international investment law, Oxford University Press, New York, (2008), p. 181.

57 *Siemens v Argentina*, Award, 6 February 2007.

58 See for instance Third Schedule of the 2010 Regulations.

59 Parliament of Zimbabwe *Hansard* Vol. 34 pp. 57; 92; 116.

of *SD Myers v Canada*, the NAFTA Tribunal stated that circumstances meant to promote the public interest may warrant differential treatment between a foreign and a domestic investor.[60] In this regard the Tribunal recognised subsidies as a measure that can be taken by Government to promote national policies.[61] Likewise, it can be argued that indigenisation measures meant to redress historical disparities warrant for differentiation between foreign and domestic investors.

The South Africa – Zimbabwe BIT explicitly recognises unequal treatment between foreign investors and domestic investors in cases meant to promote the advancement of previously disadvantaged persons.[62] Thus, this BIT protects pieces of legislation such as Zimbabwe's Indigenisation Act and the South African Black Economic Empowerment Act 53 of 2003 from inquiry. In order to accommodate its indigenisation drive, it is recommended that Zimbabwe should follow the precedent set in the South Afica – Zimbabwe BIT. Indigenisation must be incorporated as an exception to national treatment in all its BITs.

3.2 Indigenisation laws and protection against expropriation

Protection from expropriation of an investment is common in most international investment agreements.[63] Generally, expropriation refers to "property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators."[64] The takings may take the form of outright seizure of the property or measures which substantially interfere with property rights of an investor without necessarily affecting legal title to the property. The first instance is termed direct expropriation and the latter is indirect expropriation. Both

60 *S.D. Myers Inc. supra* para 250.

61 *S.D. Myers Inc. supra para*. 255.

62 Article 3 (c) of South Africa - Zimbabwe BIT (2009) states that: '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....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.'

63 See, for instance, Article 6 (1) of the Switzerland – Zimbabwe BIT (2001), which provides: "Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation."

64 United Nations Conference on Trade and Development (UNCTAD), *Expropriation. UNCTAD Series on International Investment Agreements II*, United Nations, New York and Geneva, (2012) pp. 5 – 6.

categories are recognized under international investment law. However, direct expropriations are now a rare phenomenon, but indirect expropriations are more common and closely interrogated under the law relating to protection of foreign investments.[65]

Tribunal awards have been instrumental in identifying a range of measures that can give rise to expropriation claims. These include outright seizures;[66] expulsion of persons key to the investment;[67] increase in taxation to the extent of rendering the investment economically unviable;[68] replacement of management;[69] denial of a construction permit contrary to prior assurances;[70]revocation of an operating license;[71] and varied forms of regulation, ranging from decrees protecting endangered cacti and antiquities[72] to bans on gasoline additives.[73]

Zimbabwe's indigenisation laws indirectly interfere with an investment in that they mandate a transfer of 51% of shares in all foreign owned companies to indigenous Zimbabweans. However, whether expropriation is thereby effected might depend on the approach to be adopted by a Tribunal considering the matter. There are three possible approaches, being: the "effect approach"; "police powers approach"; and "balanced approach".

The "effect approach" focuses on the effect of the complained measure on the investor.[74] Under the "police powers approach", the purpose, context and nature of the government measure, are all important factors in

65 R. Dolzer and C. Schreuer, *Principles of international investment law*, Oxford University Press, New York, (2008), p. 92.

66 *Compañia del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ARB/96/1.

67 *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL *ad hoc* Tribunal, Award on Jurisdiction and Liability, 95 ILR 183.

68 *Revere Copper and Brass Inc v Overseas Private Investment Corporation*, 56 ILR 258.

69 *Starrett Housing Corporation v Islamic Republic of Iran*, 4 Iran-U.S. C.T.R. 122.

70 *Metalclad Corp. v United Mexican States Award,* (ICSID (Additional Facility), Case No. ARB (AF) /97/1).

71 *Tecmed, S.A. v. United Mexican States*, (2006) 10 ICSID Reports 134.

72 *Metalclad Corp. v United Mexican States*, *supra.*

73 *Methanex Corp. v United States of America*, 44 I.L.M. 1345, 1455-58 (NAFTA Ch. 11 Arb. Trib. 2005.

74 U. Kriebaum, "Regulatory takings: balancing the interests of the investor and the state," *Journal of World Investment & Trade*, (2007), p. 724; V. Heiskanen, "The contribution of the Iran-United States Claims Tribunals to the development of the doctrine of indirect expropriation," *International Law FORUM du droit international* (2003), p. 176. See also the cases of *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 95 ILR (1989) 183, 209; *Patrick Mitchell v The Democratic Republic of Congo*, ICSID Case No ARB/99/7, (Annulment Proceedings); *Santa Elena v Costa Rica*, (2000) 5 ICSID Rep 153; *Siemens v Argentina*, ICSID Arbitral Tribunal Case No ARB/02/8; *Starrett v Iran* (1983) 4 Iran-US CTR 122, 155; *Parkerings – Compagniet AS v Lithuania*, ICSID Case No ARB/05/8; *Southern Pacific Properties (Middle East) Limited (Si) v Arab Republic of Egypt (National Law)*, 3 ICSID Reports 189; *Phelps Dodge Corp., et. al. v. The Islamic Republic of Iran,* Award No. 217-99-2.

determining whether the measure amounts to an indirect expropriation.[75] This approach takes the measure's "public purpose" as the decisive criterion. To this end, where the interference serves a legitimate purpose there will be no finding of expropriation and therefore, no compensation is due even if the severity of the interference is comparable with a direct expropriation.[76]

The "balanced approach" seeks a reconciliation of investor interests with those of the State. The measures complained against are subjected to the proportionality test. Where the effect is disproportionate to the objective sought, the measure is regarded as expropriatory, and compensation is payable.[77] This approach thus establishes a relationship between effect and purpose. This approach borrows from jurisprudence of the European Court of Human Rights.[78] It is being popularised by some scholars.[79]

In Zimbabwe's situation, the first two approaches may arguably be overly protective of foreign investment. The requirement for disposal of 51% of the shares in foreign owned companies to indigenous persons would undoubtedly be expropriatory in nature. The BITs to which Zimbabwe is a party, regrettably, do not offer any guidance or suggestions as to which approach is to apply in expropriation claims. Neither do they define expropriation, its characteristics, measures and behaviours that amount to expropriation, and measures that do not. In the absence of any guidance from the BITs signed by Zimbabwe, it can only be hoped the "balance approach" would apply in expropriation claims, and that due consideration would be given to, *inter alia*, the effect of the measure and the government's intention.[80]

3.2.1 The effect of indigenisation measures on investments

In the consideration of the effect of a regulatory measure on the investment,

75 V. Heiskanen, "The contribution of the Iran-United States Claims Tribunals to the development of the doctrine of indirect expropriation," *International Law FORUM du droit international* (2003), p. 177. See also the cases of *S. D. Myers Inc. v Canada*, Partial Award, 121 I.L.R. 72; *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ, 368.

76 U. Kriebaum, "Regulatory takings: balancing the interests of the investor and the state", *Journal . World Investment & Trade,* (2007), p. 726.

77 *LG & E v Argentina*, ICSID Arbitral Tribunal Case No ARB/02/1; *Feldman v Mexico*, (2003) 7 ICSID Rep 341; *Tecmed S.A. v United Mexican States*, ICSID No. ARB (AF)/00/2.

78 *Matos e Silva, Lda v Portugal*, App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573; *James v United Kingdom*, (1986) 98 Eur. Ct. H.R. (ser. A) 9.

79 U. Kriebaum, "Regulatory takings: balancing the interests of the investor and the state," *Journal of World Investment & Trade* (2007), p. 726; S. Olynyk "A balanced approach to distinguishing between legitimate regulation and indirect expropriation in Investor-State Arbitration" *Int'l Trade & Bus. L. Rev* (2012), p.270.

80 S. Olynyk "A balanced approach to distinguishing between legitimate regulation and indirect expropriation in Investor-State Arbitration" *Int'l Trade & Bus. L. Rev* (2012), p. 279.

"substantial deprivation" is the standard for determining indirect expropriation[81] This means that the measures complained of should have a significant effect on the use, management, control or enjoyment of the investment by the investor.[82] The element of control in determining expropriation was discussed in the *Saint Elena* case, in which the Tribunal opined that one of the key steps in determining whether expropriation has taken place is identifying "the extent to which the measures taken have deprived the owner of the normal control of his property."[83] Loss of control in regulatory expropriation must approach a level of a direct physical taking.[84] Interference with the daily operations of an investment, for example, is almost a physical taking, in that without the ability to direct the daily operations or select the personnel who operate the investment, one can hardly be said to hold even physical possession of the investment in question.

The transfer of 51% of shares from an investor to indigenous Zimbabweans may involve an aggregate loss or a cumulative loss. An aggregate loss arises where an indigenous Zimbabwean purchases an aggregate 51% of shares from the foreign company with the effect of displacing a foreign investor as the majority shareholder. In cumulative loss, numerous Zimbabweans in form of individuals and share schemes, and in varying proportions, acquire 51% of shares in the investment. In the first scenario, the loss is outright and physically evident whereas in the second scenario, *prima facie* an individual investor may not necessarily lose control over the company, rather the numbers of shares are diminished.

In the second scenario, although at face value control or ownership of shares is retained, the cumulative effect is that investors are substantially deprived of their shares. The differing methods of disposal, such as Employee Share Ownership Schemes, Community Share Ownership Schemes, and sales, taken together, still have the effect of depriving the investor of ownership and control of the investment. The second scenario gives rise to a case of creeping expropriation.[85] Singular actions, such as a donation

81 *Metalclad Corporation v United Mexican States*, ICSID Case No ARB (AF)/97/1, Award 30 August 2000 103; *Pope and Talbot v Canada*, Interim Award, 26 June 2000 69.

82 *Marvin Roy Feldman Karpa (CEMSA) v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, pp. 39-67 at 59; *Starrett Housing Corp. v. Iran, 4 Iran-United States* Cl. Trib. Rep. 122, 154 (1983).

83 *Campania del Desarrollo de Santa Elena, S.A. v Costa Rica*, ICSID Case No. ARBI96/1, Final Award, para. 76.

84 *Feldman v United Mexican States*, ICSID Case No. ARB(AF) /99/1 para. 152; *Pope and Talbot v Canada, Interim Award, 26 June 2000.*

85 "Creeping expropriation" denotes the incremental encroachment into the foreign investor's business, mostly done through a series of actions and omissions so as to destroy the investor's interests over

of 10% of shares to a Community Share Ownership Scheme viewed alone is insufficient to give rise to expropriation. The standard of substantial deprivation would not be met. The various methods of relinquishing shares provided for in the Regulations would therefore be critical in this debate.[86]

The economic effects of measures are also a relevant consideration.[87] The Regulations define the term *"dispose"* as meaning to sell, donate or otherwise dispose. The 51% of the shares can be disposed of through transfer upon purchase or donation either in an employee share scheme or community share scheme. On the face of it, an investor is not economically harmed if shares are purchased at the prevailing market value. There may, however, be economic harm where the market price for the shares will not compensate for anticipated profits.[88] It is therefore arguable that indigenisation measures result in economic harm regardless of the shares being disposed at market value. The severity of the economic impact, however, would have to be determined on a case by case basis, depending on the facts and evidence presented to a Tribunal. Further, the issue of loss of profits should be part of the assessment of appropriate compensation.[89]

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

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a period of time. For detailed discussion, see R. Dolzer, "Indirect Expropriation of Alien Property", (1986) 1 *ICSID Rev 41*; B. Weston, "Constructive Takings under International Law", (1975) 16 *Virginia JIL* 103; W. R. Riesman and R. D. Sloane, "Indirect Expropriation and its Valuation in the BIT Generation" 74 *BYIL* 115 (2003) 123. Creeping expropriation is also examined in these cases: *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL *ad hoc* Tribunal on Jurisdiction and Liability of 27 October 1989, 95 ILR I83; *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award of 16 September 2003, 44 ILM 404 (2005); *Phillips Petroleum Co v Iran* 21 Iran-US CTR 79 (1989); *Waste Management, Inc v United Mexican States*, ICSID Case No ARB (AF)/98/2, Award of 2 June 2000, 40 ILM 56 and *Liberian Eastern Timber Corporation v Republic of Liberia* ICSID Case No ARB/83/2, Award of March 1986 , 2 ICSID Reports 343 (1994).

86 Section 3 (transfer of shares); Section 14 and Section 14A (Employee share ownership scheme and Management Buy Outs) and Section 14B (Community Share Ownership Scheme) of the Indigenisation and Economic Empowerment (General) Regulations, 2010 Statutory Instrument 21 of 2010 (as amended).

87 *Telenor Mobile Communications A.S. v Republic of Hungary*, ICSID Case No. ARB/04/15, para 64 – 65; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, para 467.

88 *Pope and Talbot Inc. v Canada* Interim Award, 26 June 2000.

89 Article 36 (2) of the International Law Commission's Guideline on the Responsibility of States for Internationally Wrongful Acts.

3.2.2 The purpose of indigenisation measures.

In line with the balanced approach, it is necessary to examine the Government's intentions in introducing the regulatory measures under scrutiny. The purpose of the indigenisation laws is to redress historical imbalances.[90] This is done thorough mandating foreign-owned companies to dispose at least 51% of the shares to indigenous Zimbabweans.

The beneficiaries are indigenous Zimbabweans who have to prove that they suffered racial discrimination prior to the independence of Zimbabwe. The benefactors are foreign owned companies whose shareholding structure is being realigned. The law is about foreigners versus non-foreigners, and not about blacks versus whites, as was the case with the land cases.[91] A company has no race but shareholders, who may be of different races.[92]

International law recognises the right of the State to regulate for public purposes, whose parameters are only defined by the State concerned.[93] What may be public purposes may differ from one State to another, but policies similar to Zimbabwe's economic indigenisation have been pursued in other countries such as South Africa, Malaysia, Namibia and Nigeria. What might differ are the laws governing such policies and their implementation.

In the realm of the law relating to protection of international investments, Tribunals recognise that States have a right to regulate for public purposes meant to achieve certain goals, such as protection of the environment.[94] It is likewise contended that regulating foreign investments in Zimbabwe for purposes of indigenisation of the economy is a legitimate public purpose. States enjoy a margin of appreciation over regulatory measures enacted for public purposes.[95]

3.2.3 Are the measures proportional to the objective sought?

90 Parliament Of Zimbabwe, *Hansard*, Vol. 34 No.15, Wednesday 26th September 2007, pp. 57, 92 and 116, at http://www.parlzim.gov.zw/attachments/article/119/26_September_2007_34-15.pdf, (accessed 07 April 2017) .

91 Section 16 and section 16A of the Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005; *Mike Campbell (Pvt) Ltd. and Others v The Republic of Zimbabwe* SADC (T) Case No. 2/2007; *Bernardus Henricus Funnekotter and Others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6.

92 *Dadoo Ltd and others v Krugersdorp Municipal Council*, 1920 AD 530.

93 *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), para. 255.

94 *S .D. Myers, Inc. v Government of Canada*, Partial Award, Nov. 13, 2000; *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), 17th March 2006, Permanent Court of Arbitration [PCA].

95 *Continental Casualty Co. v Republic of Argentina*, ICSID Case No. ARB/03/9, para 181.

Proportionality is a structural concept which requires an analysis of the suitability and necessity of the measures taken and demands a balance of the means and the end pursued.[96] It further entails that where a less restrictive measure capable of achieving the same results is available, then such should be adopted. Proportionality thus sets "material limits to the interference of public authority into the private sphere of citizen",[97] and "provides a tool to define and restrain the regulatory freedom of government."[98] This aspect of proportionality was explored in the *Tecmed* case.[99] In considering whether acts taken by Mexico were to be characterized as expropriatory, the Tribunal examined whether the measure was proportional to the public interest, and whether there was a reasonable relationship of proportionality between the burden imposed on the foreign investor and the aim sought to be realised by the expropriatory measure.[100]

This requires a balance between the effects of the measures on the investor's ownership rights and the importance of the government purpose. Where the investor bears excessive burden, the measure is not proportional to the objective sought.[101] In the Zimbabwe situation, it could be contended that measures are not excessive to the objective, as the shares are disposed of at market value. Irreparable economic harm would have occurred if the shares were to be sold at a price lower than the market value, as was done in Malaysia.[102] To this end, the investor does not bear any excessive burden. Further, share transactions are effected through private commercial dealings, in which the investor determines the price for the shares. The price may take into consideration loss of anticipated profits.

Indigenisation measures are also necessary. Necessity is explored by examining two aspects. The first is whether there is a less restrictive measure, and the second is whether such an alternative measure is equally effective.[103]

96 S. W. Schill, "Public Concepts To Balance Investors' Rights With State Regulatory Actions In The Public Interest – The Concept of Proportionality," in S. W. Schill, (ed) *International Investment Law and Comparative Public Law,* (2010), p. 75; X. Han, "The Application of the Principle of Proportionality in *Tecmed v. Mexico," Vol. 6, No. 3 Chinese JIL* (2007), pp.638 - 639.

97 J. Schwarze, "The Principle of Proportionality and the Principle of Impartiality in European Administrative Law", *Rivista Trimestrale di Diritoo Pubblico,* (2003), p. 53.

98 M. Andenas and S. Zlepthig, "Proportionality: WTO Law in Comparative Perspective," *42 Tex ILJ* (2007), pp. 371 - 383.

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

100 *Ibid* para. 122.

101 *Ibid* para 121 – 122.

102 E. T. Gomez and J. Saravanamuttu (eds) *The New Economic Policy in Malaysia: Affirmative Action, Ethnic Inequalities and Social Justice*, NUS Press, (2012).

103 B. Kingsbury and S. W. Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality," *Oxford University Press* (2010) pp. 86 - 87.

In essence, where a less restrictive measure exists and is equally effective to achieve the same goal, there is no justification for the State to adopt a more restrictive measure. In Zimbabwe's case, it could be argued that there were no available alternative measures for the desired economic transformation. After independence, Government had unsuccessfully attempted to address the problem through policies such as africanisation, localization; land redistribution and affirmative action.[104]

To sum up, the answer to the question posed at the commencement of this section is positive. Indigenisation measures satisfy the proportionality test and are inconsequence valid or not expropriatory in nature, notwithstanding that they have the effect of eviscerating a foreign investment. They are legitimate regulatory measures meant to address Zimbabwe's peculiar economic problems.

4. CONCLUSION

This review and discussion of indigenisation and economic empowerment laws in Zimbabwe suggests they are largely aimed at redressing historical imbalances created by the colonial regime. The core element of indigenisation, requiring transfer of 51 per cent of shares in foreign enterprises to indigenous Zimbabweans, creates challenges for Zimbabwe under BITs it has signed and ratified. It potentially violates the national treatment obligation embodied in the BITs, and could be regarded as effecting expropriation foreign investments. It has been contended that whether Zimbabwe's indigenisation laws are expropriatory in nature may depend on the approach adopted by a Tribunal to which a dispute is referred. If the so called balanced approach is adopted, the core indigenisation requirement may be regarded as effecting indirect expropriation, which amounts to legitimate exercise of Government's regulatory powers to redress Zimbabwe's peculiar economic problems. Regulatory measures that are suitable for a legitimate governmental purpose, and necessary and proportional to the objective to be achieved, are non compensable under international investment law.

It is recommended nevertheless that Zimbabwe reviews its BITs as a whole, with a view of aligning them with its constitutional mandate of promoting empowerment of indigenous Zimbabweans. This has been done

104 L. Masuko and A. Sibanda *Implementing Indigenisation in Zimbabwe: Policy Choices*. Study Commissioned by UNDP and the Ministry of Economic Planning and Investment Promotion , (YEAR?) pp. 9 - 11.

in South Africa where since 2003 Government has been pursuing a similar or comparable Black Economic Empowerment policy. Zimbabwe's review will have to include issues such as the meaning and elements of indirect expropriation and factors to distinguish non – compensable expropriation from compensable expropriation. Equally important is to incorporate exceptions to expropriation claims and violations of national treatment as it did in its BIT with South Africa. The exception may include regulatory measures taken by government to promote empowerment of nationalities of the parties to the treaties. The Zimbabwean Government may also draw from the ASEAN Comprehensive Agreement of 2009, which provides that: "non – discriminatory measures of a Member State that are designed to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation."[105]

It is additionally recommended that going forward all BITs should incorporate an explicit exception to national treatment. Indigenisation measures by nature seek to favour nationals of the host State, that is, Zimbabwe, which is discriminatory and a violation of the national treatment clause found in most of Zimbabwe's BITs. The Japan – Philippines Agreement, for example, allows parties to disregard national treatment in government procurement and further allows Parties to maintain, amend or adopt measures not complying with national treatment in a schedule of commitments.[106] Exceptions to national treatment or other rules may give Government the policy space it requires to pursue its other social, economic and development agendas. They also serve to clarify limits of the rights of investors.

It is lastly recommended that Zimbabwe should enact an Act of Parliament to govern foreign investments, to compliment or replace the Zimbabwe Investment Authority (ZIA) Act.[107] This Act provides for and empowers the ZIA to promote and coordinate investments through issuing of investment licences. A new Act will further clarify Zimbabwe's investment policies and deal with issues such as definitions of an investor or investment, national treatment, expropriation, compensation for expropriation and resolution of investment disputes. The Act will also provide the applicable legal framework for situations and investments not covered by a BIT.

105 Article 4 of Annex 2, ASEAN Comprehensive Investment Agreement; Article 20 (8) of COMESA Investment Agreement.
106 Article 94 of Japan – Philippines Economic Partnership Agreement.
107 Act No. 4 of 2006, (Chapter 14: 30).