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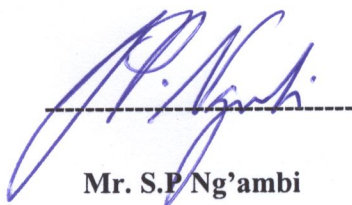
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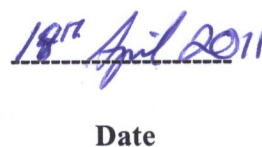
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**THE ISSUE OF DISCRIMINATION IN INTERNATIONAL INVESTMENT LAW –
THE CASE OF MIKE CAMPBELL AND OTHERS v THE REPUBLIC OF
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Mr. S.P Ng'ambi



Date

DEDICATION

To my parents George and Priscilla, for your sacrifices, belief and all the support you have given making it possible for me to pursue my LLB. To my brothers Chense and Chipu, thank you for everything.

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The conclusion of this work is the pinnacle of what has been an exigent and somewhat satisfying expedition, as it were, in the school of law. Thank you to Sangwani Patrick Ng'ambi for his guidance during the preparation of this paper. A special thanks to my contemporaries, the "Knights of the Round Table": Chisuwo Hamwela, Christopher Mundia, Tundo Chibeleka, Nchimunya Ng'andu and Mulopa Ndalameta. What I have learnt from their friendship through the good and the bad is invaluable. Gentlemen, together we can move mountains.

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It is humanly impossible to acknowledge by name everyone who has assisted me through my university education in general and in the preparation of this paper in particular. Therefore, to all those not mentioned by name, but who supported me in one way or the other, I extend my heartfelt gratitude.

ABSTRACT

Foreign Direct Investment (FDI) is an essential factor contributing to the economic and developmental well being of any country. In order to attract and sustain its flow, host States have to create an attractive investment climate. In addition to this, a host State must also afford protection to the foreign investor. Notwithstanding this however, a host State has the right, as a matter of sovereignty, to regulate investments within its jurisdiction. One way this is done is through expropriations and/or nationalisations.

International Investment Law accords protection to foreign investors against the foregoing measures. As a general proposition, international investment law prohibits or outlaws discriminatory expropriations and nationalisations. As a matter of fact, it is a main aim of international investment law to protect foreign investors against discrimination in general.

This paper evaluates the various forms of foreign investment protection in specific relation to expropriation. This paper assesses the requirements for lawful expropriations, highlighting the lucidity of these principles and their effectiveness in protecting foreign investment without abrogating the needs and interests of the host state arising out of the right to regulate.

This paper also appreciates the complex issue of discrimination in international investment law, bringing to light the standard of fair and equitable treatment under which the principle of non-discrimination is prevalent. This paper further appreciates the interpretation and application of the principles in relation to the protection against discrimination, establishing whether or not these principles are applied consistently and establishing whether or not these principles are absolute.

This work further recognises and evaluates the contribution that the case of *Mike Campbell v The Republic of Zimbabwe* brings to the law on FDI, particularly the standard that imposes that expropriations must not be discriminatory. The noteworthy exception to this standard is that of post-colonial expropriations carried out to end the economic domination of the nationals of the former colonial power. The SADC Tribunal in the Campbell case seems to have developed an exception to this exception. This paper appreciates the extent to which a country can fall within the general exception to the principle of discrimination.

After considering the foregoing, this paper draws findings and makes conclusions and recommendations in relation to the adequacy or inadequacy as the case may be of the following: foreign investment protection measures generally, the requirements for lawful expropriations and nationalisations, the protection against discrimination in international investment law as part of the standard of fair and equitable treatment and the contribution that the Campbell case has made to the foreign investment law on expropriations.

TABLE OF INTERNATIONAL INSTRUMENTS

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

The Economic Agreement of Bogota, 1948

The General Agreement on Tariffs and Trade (GATT), 1994

The General Agreement on Trade in Services (GATS), 1995

The Havana Charter, 1948

International Convention on the Settlement of Disputes between States and Nationals of other States (ICSID), 1965

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Protocol on Tribunal in the Southern African Development Community

Statute of the International Court of Justice (26 June 1945) 33 UNTS 993

Treaty of the Southern African Development Community, Aug. 17 1992, 32 I.L.M. 116

TABLE OF LEGISLATION

The Constitution of Zimbabwe (Amendment No. 17 of 2005)

TABLE OF CASES

ADC v Hungary, ICSID Case No. ARB/03/16, 2 October 2006

AMINOIL v Kuwait, Award of 24 March 1982

Bernardus Henricus Funnekotter and Others v The Republic of Zimbabwe, (ICSID) Case No. ARB/05/6

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Noble Ventures v Romania, ICSID Case No ARB/01/11 of 12 October 2005, 111

United States v Italy, ICJ Reports, 1989

Walter Fletcher Smith Claim (US v Cuba), Award, 2 May 1929, 2 RIAA 913

GLOSSARY OF ACRONYMS

| | |
|--------|--|
| ASEAN | Association of Southeast Asian Nations |
| BIT | Bilateral Investment Treaty |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CEDRS | Charter of Economic Rights and Duties of States |
| COMESA | Common Market for Eastern and Southern Africa |
| FCN | Friendship, Commerce and Navigation |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| IIA | International Investment Agreement |
| ICSID | International Convention on the Settlement of Investment Disputes between States and Nationals of other States |
| IMF | International Monetary Fund |
| ICJ | International Court of Justice |
| ITO | International Trade Organisation |
| MAI | Multilateral Agreement on Investment |
| MFN | Most Favoured Nation Treatment |
| MIGA | Multilateral Investment Guarantee Agency |
| NAFTA | North American Free Trade Agreement |
| OECD | Organisation for Economic Co-operation and Development |

| | |
|-------|---|
| SADC | Southern African Development Community |
| TNC | Transnational Corporation |
| TRIMS | Agreement on Trade-Related Investment Measures |
| UN | United Nations |
| UNCTC | United Nations Centre on Transnational Corporations |
| WTO | World Trade Organisation |

TABLE OF CONTENTS

| | |
|---|------|
| Title..... | i |
| Declaration..... | ii |
| Supervisor’s Recommendation..... | iii |
| Dedication..... | iv |
| Acknowledgements..... | v |
| Abstract..... | vi |
| Table of International Instruments..... | viii |
| Table of Legislation..... | ix |
| Table of Cases..... | x |
| Glossary of Acronyms..... | xi |
| Table of Contents..... | xii |

Chapter 1

Nationalisation, Expropriation and Foreign Direct Investment

| | |
|---------------------------------|---|
| 1.0 Introduction | 1 |
| 1.1 Statement of Problem | 2 |
| 1.2 Objectives of the Study | 4 |
| 1.2.1 Specific Objectives | 4 |
| 1.3 Rationale and Justification | 5 |
| 1.4 Research Questions | 5 |
| 1.5 Methodology | 6 |
| 1.6 Foreign Direct Investment | 6 |

| | |
|---------------------------------------|---|
| 1.7 Nationalisation and Expropriation | 7 |
| 1.8 State Sovereignty | 8 |
| 1.9 Conclusion | 9 |

Chapter 2

Foreign Investment Protection

| | |
|---|----|
| 2.0 Introduction | 10 |
| 2.1 Factors Contributing To a Good Investment Climate | 10 |
| 2.2 International Efforts to Regulate Foreign Investment | 10 |
| 2.2.1 The Havana Charter of 1948 | 11 |
| 2.2.2 The UN Declaration on Permanent Sovereignty over Natural Resources | 11 |
| 2.2.3 The 1974 Charter of Economic Rights and Duties of States (CERDS) | 12 |
| 2.2.4 The UN Draft Code of Conduct for Transnational Corporations | 12 |
| 2.2.5 The International Convention on the Settlement of Investment Disputes Between States and Nationals of other States (ICSID) | 12 |
| 2.2.6 The World Trade Organisation Agreements and Foreign Investment | 13 |
| 2.2.7 The OECD Guidelines and the Multilateral Agreement on Investment | 13 |
| 2.2.8 Review of International Efforts to Regulate Foreign Investment | 13 |
| 2.3 Foreign Investment Protection in Customary International Law | 14 |
| 2.3.1 Overview | 14 |
| 2.3.2 Most-Favoured-Nation Treatment (MFN) | 14 |
| 2.3.3 National Treatment | 15 |
| 2.3.4 Legality of Expropriations | 15 |

| | |
|--|----|
| 2.3.4.1 Measure is not for a Public Purpose | 16 |
| 2.3.4.2 Measure is Discriminatory | 16 |
| 2.3.4.3 Measure does not follow the Due Process of Law | 16 |
| 2.3.4.4 Measure is not followed by Compensation | 17 |
| 2.3.4.5 Measure is in Breach of a Treaty | 17 |
| 2.3.4.6 Measure is in Breach of an Explicit Agreement between the Host State and the Foreign Investor | 17 |
| 2.3.5 Standards of Compensation in Customary International Law | 18 |
| 2.3.5.1 The Calvo Doctrine | 18 |
| 2.3.5.2 The Hull Formula | 19 |
| 2.3.6 Access to International Arbitration | 19 |
| 2.3.7 Protection through Bilateral Investment Treaties (BITs) | 20 |
| 2.3.8 Stabilisation Clauses | 20 |
| 2.3.9 Summary | 20 |
| 2.4 Conclusion | 21 |

Chapter 3

Discrimination and the Standard of Fair and Equitable Treatment

| | |
|--|----|
| 3.0 Introduction | 22 |
| 3.1 The Standard of Fair and Equitable Treatment | 22 |
| 3.1.1 Origins of the Standard | 22 |
| 3.1.2 Current use of the Standard in International Agreements and State Practice | 23 |
| 3.1.3 Interpretation of the Standard | 24 |

| | |
|---|----|
| 3.1.4 Lucidity of the Standard in relation to Discrimination | 25 |
| 3.2 Discrimination | 26 |
| 3.2.1 Overview | 26 |
| 3.2.2 The Paradox of (Non) Discrimination | 26 |
| 3.2.3 Discrimination and the Right to Regulate | 27 |
| 3.2.4 The Concept of Legal Discrimination | 28 |
| 3.3 Effect of Arbitral Tribunals on the issue of Discrimination | 31 |
| 3.4 Conclusion | 32 |

Chapter 4

Mike Campbell and Others v The Republic of Zimbabwe

| | |
|--|----|
| 4.0 Introduction | 33 |
| 4.1 Relevance to the Study | 33 |
| 4.2 Background and Facts | 33 |
| 4.3 Parties Submissions | 35 |
| 4.3.1 Applicants Submissions | 35 |
| 4.3.2 Respondents Submissions | 35 |
| 4.4 The Tribunal's Findings | 36 |
| 4.5 Review of the Case | 37 |
| 4.5.1 Racial Discrimination | 37 |
| 4.5.2 Public Purpose | 38 |
| 4.5.3 Compensation | 39 |
| 4.6 Contribution of the Campbell Case to the Law on Expropriations | 40 |

| | |
|----------------|----|
| 4.7 Conclusion | 41 |
|----------------|----|

Chapter 5

Conclusions and Recommendations

| | |
|---|-----------|
| 5.0 Introduction | 42 |
| 5.1 Conclusions Drawn | 42 |
| 5.2 Recommendations | 44 |
| 5.2.1 Global Treaty on Investment | 44 |
| 5.2.2 Reshaping the Right to Regulate | 45 |
| 5.2.3 Imposing Obligations on Foreign Investors under BITs and IIAs | 46 |
| 5.2.4 Arbitral Precedent | 47 |
| 5.2.5 International Investment Court | 48 |
| 5.3 Conclusion | 48 |
| Bibliography | 50 |

CHAPTER ONE

NATIONALISATION, EXPROPRIATION AND FOREIGN DIRECT INVESTMENT

1.0 Introduction

The world market, in the main, is a global village which demands investment both local and foreign for its sustenance. Foreign Direct Investment (FDI) in particular provides a major source of capital which brings with it up-to-date technology. Further, FDI benefits any country's economy as a whole by creating an environment for the transfer of general knowledge and of specific technologies in production and distribution, industrial upgrading, employment as well as work experience for the labour force. FDI also ensures the productivity of goods and services.¹

As a result of the role that FDI plays in accelerating economic growth, many countries, developing and developed alike; seek such investment in order to boost their development efforts. However, as a general proposition of international law, each country as a matter of sovereignty has the right to nationalise and expropriate, as the case may be, foreign investments within its jurisdiction.

Nevertheless, for such nationalisations or expropriations to be efficacious and valid they must be legal on a number of stages. Firstly, the expropriation must be legal under the law of the host State, that is to say, it must be made pursuant to statutory prescription. Secondly, it must be legal under international law.² This refers to the fact that the expropriation or nationalisation must meet the requirements suggested by customary international law and practice. That is, the measure for which the land is taken must serve a public purpose, the measure must neither be arbitrary nor discriminatory, the measure must be accompanied by compensation and the measure must follow principles of due process, as well as requirements of fair and equitable treatment.³

However, what is unclear is whether the basis of the legality of expropriations and nationalisations in international law show a balanced understanding of the special legal

¹ R.G. Lipsey & K.A. Chrystal, *Economics 11e: Students Resources*, Oxford University Press, 2007. Available at <http://www.oup.com/uk/orc/bin/9780199286416> (Accessed on 30th August 2010)

² O. Dike, 'Nationalisation of Foreign Asset by Host State: A Failure of Stabilization Clause?' University of Dundee. Available at <http://www.dundee.ac.uk/./files.php> (Accessed on 31st August 2010)

³ R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008. p. 91

relationship between the host State and the foreign investor as well as their respective needs and interests.⁴

1.1 Statement of Problem

As aforementioned, FDI is essential to the development of any given economy. In order to attract foreign investment it is vital to provide incentives by protecting investors from political risk (expropriations and nationalisations), transfer risk (currency controls and inconvertibility of funds) and calamity risk (insurrection, revolution, war, e.t.c.).⁵

Especially of relevance to this paper is the protection of investors from political risk, namely; expropriations and nationalisations as the case may be. In this regard, on the one hand, every individual State has the right to regulate their economies through various measures. In fact, direct land acquisition is often the only mode available for governments to employ some of the duties they are seized with such as the provision of an infrastructure network and public services as well as to some extent the redistribution of wealth to less affluent income groups. This process of expropriation or nationalisation includes the taking of foreign investment.

On the other hand, to promote investment as well as adhere to the rule of law as suggested by the principles of international investment law, every State is obligated to provide protection of one form or the other to the foreign investor. Protection of foreign investment in international law is generally provided through principles of national treatment, Most-Favoured-Nation (MFN) treatment, fair and equitable treatment standards, Bilateral Investment Treaties (BITs) as well as the general rules in relation to the legality of nationalisations and expropriations.⁶ These are namely, requirements that the nationalisation or expropriation is for a public purpose, not discriminatory and is accompanied by compensation.

The question to be addressed in this regard is whether or not such measures to protect foreign investment are in themselves adequate and whether or not they serve the interests of both the host State in question and the foreign investor. For instance, on the standard of compensation

⁴ S. Ripinsky & K. Williams, 'Damages in International Investment Law', Amsterdam Law Forum, Vol. 1:3 - British Institute of International Comparative Law, London (2008), p. 83

⁵ E. Snyder, 'Foreign Investment Protection: A Reasoned Approach' Michigan Law Review, Vol. 61, No. 6 (April 1963), p. 1087

⁶ A. Reinisch, Standards of Investment Protection, Oxford University Press, 2008. p. 29 - 131

payable; the question to be considered is whether it is to be adequate compensation or full compensation.

Central to the principles governing international investment law is the standard of fair and equitable treatment. In this regard, the United Nations Centre on Transnational Corporations (UNCTC) issued a study which stated that fair and equitable treatment is a classical international law standard. This study further noted that this classical international law doctrine considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the international minimum standard and the duty of protection of foreign property by the host State.⁷

A document prepared by the World Trade Organisation (WTO) Secretariat for the Working Group on the relationship between trade and investment states that the principle of fair and equitable treatment has its roots in customary international law and it is generally considered to cover the principle of non – discrimination, along with other legal principles related to the treatment of foreign investors, but in more abstract sense than the standards of MFN and national treatment.⁸

In relation to discrimination specifically, it is relatively an effortless process for a host State, inadvertently or otherwise, to discriminate against foreign investors on various grounds in a bid to empower its economy through nationalisation and expropriation. The concern is where the line ought to be drawn, as it were, in order to ensure that there is a balanced understanding of the special legal relationship between the host State and the foreign investor as well as their respective needs and interests.

As referred to above, a key principle in relation to the legality of nationalisations and expropriations at international investment law is that they ought not to be discriminatory. Investment law generally prohibits discriminatory expropriations or nationalisations on the basis of race, with the notable exception of post-colonial expropriations carried out to end the economic domination of the nationals of the former colonial power.⁹ In this regard, the Southern African Development Community (SADC) Tribunal in the case of *Mike Campbell*

⁷ United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties* (1988), p. 42

⁸ WTO, Working Group on the Relationship between Trade and Investment, Non-Discrimination, Most-Favoured-Nation Treatment and National Treatment, Note by the Secretariat, WT/WGTI/W/118, 4 June 2002

⁹ D. Zongwe, 'The Contribution of *Campbell v Zimbabwe* to the Foreign Investment Law on Expropriations' CLPE Research Paper 50/2009, Vol. 5 No. 9 (2009), p. 1

*(Pvt) Ltd and Others v The Republic of Zimbabwe*¹⁰ (hereinafter referred to as the *Campbell* case) appears to have contributed to the foreign investment law on expropriations, in reference to the extent to which a country can expropriate property as part of a general government program to correct economic inequalities brought about by a colonial past.¹¹ It has been suggested however, that the ruling in this particular case was inadequate.

There is therefore a need to revisit this case to establish the input it has made to the foreign investment law on expropriations as well to explore the case for its strengths and weaknesses in relation to whether or not it was decided rightly and suggest possible modifications to the reasoning of the SADC Tribunal if need be.

In summation, it is against this backdrop that this paper seeks to address the concerns in relation to the efficacy of the measures taken to protect foreign investment with particular reference to the efficiency of the law in relation to the legality of expropriations and nationalisations in international investment law in general with special reference to the subject of discrimination.

1.2 Objectives of the Study

The general objective of this study is to highlight and consider the efficacy of the basis of the legality of expropriations and nationalisations in international investment law in general with special reference being made to the subject of discrimination. This study further aims to revisit the *Campbell* case to underline the contribution it has made to the foreign investment law on expropriations and explore the case for its strengths and weaknesses and suggest possible modification.

1.2.1 Specific Objectives

- a) To consider the various forms of foreign investment protection and evaluate their adequacy in relation to expropriations and nationalisations.
- b) To consider the factors contributing to a good investment climate in relation to the promotion and protection of foreign investment.

¹⁰ *Mike Campbell (Pvt) Ltd. and Others v The Republic of Zimbabwe*, SADC (T) Case No. 2/2007.

¹¹ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 1

- c) To bring to light the accepted foundations for the legality of nationalisations and expropriations at international investment law and evaluate their lucidity, adequacy as well as suitability as forms of foreign investment protection.
- d) To specifically highlight the issue of discrimination in international investment law in relation to nationalisations and expropriations, with reference being made to the standard of fair and equitable treatment.
- e) To understand as a case study, the contribution that the *Campbell* case brings to the law on FDI, especially the principle that expropriations must not be discriminatory and highlight the value of the SADC Tribunal's ruling.
- f) To draw conclusions from the efficiency of various forms of foreign investment protection, the adequacy of the law governing nationalisations and expropriations and the contribution of the *Campbell* case and recommend accordingly.

1.3 Rationale and Justification

This study is justified on the basis that it is cardinal to evaluate foreign investment protection in international investment law. This need is exemplified from the fact that many countries, especially developing and under-developed have and are using the processes of nationalisation and expropriation as means to empower their nationals, their economies and to break the shackles of economic domination by the nationals of former colonial powers.

In this regard, this study will evaluate the efficacy of the law protecting foreign investments in relation to expropriations and nationalisations in the main, to establish whether such measures show a balanced understanding of the special legal relationship between the host State and the foreign investor as well as their respective needs and interests.

1.4 Research Questions

- a) Are the various forms of foreign investment protection generally clear and adequate in addressing the protection of foreign investments in relation to nationalisation and expropriation?

- b) What are the complexities surrounding the issue of discrimination in international investment law?
- c) Is the standard of fair and equitable treatment comprehensible in relation to the issue of discrimination in international investment law?
- d) Is the concept of legal discrimination reconcilable with the principle of anti-discrimination?
- e) Is the SADC Tribunal's decision in the *Campbell* case adequate in addressing the issues that were before it? If not, how was the Tribunal to rule? How has this decision contributed to the foreign investment law on expropriations?

1.5 Methodology

This research intends to achieve its objectives by referring to a number of authorities on this matter. It will draw information from authors of books, journals and scholarly articles who have systematically analysed the issues relating to discrimination in international investment law in relation to expropriations and nationalisations. This study, in addition will refer to a number of decided cases on the matter as well as relevant treaties, draft treaties and UN resolutions to elucidate the fact. It will also attend to the internet with a view to disseminating current information.

1.6 Foreign Direct Investment

The paradigm of Foreign Direct Investment (FDI) escapes a single definition. However, various definitions drawn from a range of sources suggest key and common characteristics. For instance, the Organisation for Economic Co-operation and Development (OECD) points out that FDI reflects the objective of obtaining a lasting interest by a resident entity in one economy ("direct investor") in an entity resident in an economy other than that of the investor ("direct investment enterprise"). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. The definition further advances that the direct investment involves both the initial transaction between the two entities and all subsequent

capital transactions between them and among affiliated enterprises, both incorporated and unincorporated.¹²

Further, Under International Monetary guidelines, FDI is defined when an investor based in one country acquires an asset in another country with the intent to manage that asset. This means that FDI inflows into a country by a foreign investor imply an objective of long-term commitment.¹³

The various definitions of FDI can be summed up in the WTO classification. The WTO defines FDI as what occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset.¹⁴ In summation therefore, in light of the foregoing, this paper will adopt the WTO definition on FDI and advance on this premise.

1.7 Nationalisation and Expropriation

It is important to note that the two types of takings under consideration, namely, nationalisation and expropriation are often used interchangeably. However, they are distinct. Firstly, nationalisation can be referred to as the across-the-board takings of property designed to end or diminish foreign investment in the economy or in sectors of the economy of a host State.¹⁵

Secondly, expropriation, which is also commonly referred to as compulsory acquisition is defined as the taking of property by a host State specifically for an economic or public purpose.¹⁶ Expropriation may either be direct or indirect. Direct expropriation, on the one hand, refers to an official act by a host State that takes the title of the foreign investor's property. Indirect expropriation, on the other hand, refers to a situation where the foreign investor's title is left untouched but the host country deprives him of the possibility to utilize the investment in a meaningful way. An emblematic trait of an indirect expropriation is that

¹² OECD Benchmark Definition of Foreign Direct Investment (Third Edition). p. 7-8. Available at <http://www.oecd.org/.../2090148.pdf> (Accessed on 15th December 2010)

¹³ N. Bajpai & N. Gasgupta, 'What Constitutes Foreign Direct Investment? Comparison of India and China', CGSD Working Paper No. 1 (January 2004), p. 6

¹⁴ Available at http://www.wto.org/english/tratop_e/invest_e/invest_e.htm (Accessed on 28th December 2010)

¹⁵ M. Somarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2004. p. 346

¹⁶ M. Somarajah, *The International Law on Foreign Investment*, p. 346

the host State will deny the existence of an expropriation and thus deny the payment of compensation.¹⁷

The current trend has departed from the traditional distinct definitions of nationalisation and expropriation. For the purposes of this obligatory essay therefore, the concepts of nationalisation and expropriation shall be used synonymously.

1.8 State Sovereignty

In the main, customary international law does not preclude host States from expropriating or nationalising foreign investments provided certain conditions are met. These conditions are generally that the taking of the investment be for a public purpose, as provided by law, in a non-discriminatory manner and with compensation.

Host States inherently have this right to regulate investments through the principle of State sovereignty. This position is exemplified through the application of international customary law. The Charter of Economic Rights and Duties of States (CERDS) in Article II provides that every State has the right of possession, use and disposal over its wealth, natural resources and economic activities, the right to regulate and exercise authority over foreign investment within its national jurisdiction as well as regulate and supervise the activities of transnational corporations within its national jurisdiction.¹⁸

In addition, The General Assembly Resolution on Permanent Sovereignty over Natural Resources provides that States have sovereignty over natural resources and as a result can nationalise property in this regard within their jurisdiction.¹⁹ This principle of permanent sovereignty is in fact generally considered as a recognised principle of modern international law.²⁰

With particular reference to developing countries, the principle of permanent sovereignty or jurisdiction over natural wealth and resources may be deemed an expression of, *inter alia*,

¹⁷ R. Dolzer & C. Schreuer, Principles of International Investment Law, p. 92

¹⁸ The Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), UN GAOR, 29th Sess., Supp. No. 31 (1974)

¹⁹ Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII) of 14th December 1962

²⁰ K. Hossain & S.R. Chowdhury, Permanent Sovereignty over Natural Resources in International Law, London, England: Frances Printers Limited, 1984

economic self-determination.²¹ As a matter of fact, this idea has been integrated in both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Article 1 of these Covenants provide in relevant part as follows:

“All peoples have the right of self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development...All people may, for their own needs, freely dispose of their natural resources...”²²

In fact, before these covenants were opened for signature in 1966, the United Nations General Assembly recommended

“...that the sovereign right of every State to dispose of its wealth and its natural resources should be respected.”²³

Further, as established above, there is a close connection between the principle of State sovereignty and the measure of what may be referred to as de-colonisation. That is to say, post-colonial expropriations and nationalisations carried out to end the economic domination of the nationals of a former colonial power.

1.9 Conclusion

This chapter has explored the definitions of the terms FDI, nationalisation and expropriation. FDI as highlighted plays a cardinal role in the development process of any given country. Both the foreign investor and the host State in this regard do have rights and obligations owed to each other. This paper will essentially explore the efficacy of the law protecting foreign investments in relation to expropriations and nationalisations to establish whether such measures show a balanced understanding of the special legal relationship between the host State and the foreign investor as well as their respective needs and interests. Further, this paper will refer specifically to the issue of discrimination and re-visit the *Campbell* case to address the contribution it has made to the foreign investment law on expropriations.

²¹ F. V. Garcia-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation', *Lawyer of the Americas*, Vol. 12 No. 1 (Winter, 1980), p. 21

²² International Covenant on Economic, Social and Cultural Rights, 1966 and International Covenant on Civil and Political Rights, 1966.

²³ General Assembly Resolution 1515, 15 UN GAOR, Supp. (No. 16) 134, UN Doc. A/4648 of 1960

CHAPTER TWO

FOREIGN INVESTMENT PROTECTION

2.0 Introduction

This chapter shall firstly consider the factors that contribute to the creation of a good investment climate. Secondly, this chapter shall illustrate the various efforts to protect foreign investment with reference being made to the protection against discrimination. In so doing, a review of the requirements for lawful expropriations will also be made in light of the need to protect foreign investment on the one hand without abrogating the needs and interests of the host State on the other.

2.1 Factors Contributing To a Good Investment Climate

Investment generally, whether it be by foreigners or the local private sector, is unlikely to proceed if a country's economic fundamentals are lacking.²⁴ The factors contributing to a good investment climate are not exhaustive but can be summarised under four major heads. First are stability and security, secondly are regulation and taxation, finance and infrastructure are third; and workers and the labour market are the final factor to improve the investment climate.²⁵

The availability or lack of the foregoing factors affects a potential investor's expected revenue, costs, after tax profits as well as expected risks. To protect foreign investment, international efforts have been made to regulate it. In addition to that, minimum standards of treatment of foreign investors have been set as required by international customary law. The foregoing aspects are discussed below.

2.2 International Efforts to Regulate Foreign Investment

The United Nations (UN), the World Bank, the International Monetary Fund (IMF) and other economic organisations such as the OECD have over the years made ardent efforts to regulate investment. A Convention on the Treatment of Foreign Investors was proposed in 1929 under

²⁴ K. Bird, 'Philippines: Strengthening Investment Climate and Competitiveness', ADB Technical Assistance Consultant's Report, For National Economic and Development Authority, Project No. 40538 (March 2010), p. 4

²⁵ D. Kusumaningrum, 'A Better Investment Climate for Everyone', World Development Report 2005, A Co-publication of The World Bank and Oxford University Press, 2004, CGPRT Flash, Vol. 4, No. 1 (January 2006), p.4

the League of Nations. This however never materialized due to a number of countries objecting to some of its provisions. As a result, most attempts at international regulation of *foreign investment have been made since the inception of the UN.*²⁶

2.2.1 The Havana Charter of 1948

The Draft Havana Charter, the product of a UN Conference on Trade and Employment held between 21st November 1947 and 24th November 1948 contained a number of provisions making reference to foreign investment.²⁷ For instance, Article 12 (2) provided that members were to undertake to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments as well as to give due regard to the desirability of avoiding discrimination as between foreign investments.²⁸

Further, the States participating in the conference decided to establish the International Trade Organisation (ITO) whose functions could have included assuring just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one member country to another.²⁹ The ITO like the Charter never came into existence. However, these efforts clearly illustrate an attempt to regulate foreign investment to ensure amongst other things that investors are not discriminated against.

2.2.2 The UN Declaration on Permanent Sovereignty over Natural Resources

This declaration adopted by a General Assembly resolution generally seeks to strike a balance between the interests of both the host and the home countries, supporting the notion that sovereign States have the right to expropriate the assets of foreign companies under certain conditions, which include appropriate compensation.³⁰ The resolution has been accepted by the international community without much resistance. It can be argued to be one of the most widely accepted international instruments on international investment law.

²⁶ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, Hart Publishing, Oxford and Portland, Oregon, 2008. p. 19

²⁷ AF. Lowenfeld. *International Economic Law*, Oxford University Press, 2002. p. 404

²⁸ The Havana Charter, 1948

²⁹ Article 11 (2)(a) of the Havana Charter, 1948

³⁰ Permanent Sovereignty over Natural Resources, General Assembly Resolution 1803 (XVII) of 14th December 1962

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

CERDS also made provision for the regulation of foreign investment. Article 2 provides that every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its wealth, natural resources and economic activities.³¹ Emphasis under CERDS is placed on the application of national law rather than international law. For instance, CERDS does require the payment of appropriate compensation as established by the national law prevalent in a given host State.³²

Due to its emphasis on the application of national law as opposed to international law, most developed countries did not support CERDS as their nationals interests invested in developing countries could not fully be protected and realised by the application of the national law of a given host State.

2.2.4 The UN Draft Code of Conduct for Transnational Corporations (TNCs)

The UN Draft code of conduct made provision for expropriation in light of treatment of Transnational Corporations (TNCs). Paragraph 55 of the Code provides that States have the right to nationalise or expropriate the assets of a TNC operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles.³³ Further, the draft code also provides that TNCs 'shall receive fair and equitable treatment in the countries in which they operate'.³⁴

2.2.5 The International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID)

The International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) is a vehicle to build foreign investor confidence and to make provision for a credible and effective dispute settlement mechanism for such investors. Notably, States are free to agree to submit investment disputes to international arbitration generally but by becoming a party to ICSID, States would, at least theoretically, stand a better

³¹ The Charter of Economic Rights and Duties of States, GA Res. 3281 (XXIX), UN GAOR, 29th Sess., Supp. No. 31 (1974)

³² S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 26

³³ UN Draft Code of Conduct for Transnational Corporations – UN Doc E/1990/94 of 12 June 1990

³⁴ UN Draft Code of Conduct for Transnational Corporations, para 48

chance of attracting foreign investment from those investors cautious of losing their investment through expropriation, nationalisation or other government actions.³⁵

2.2.6 The World Trade Organisation (WTO) Agreements and Foreign Investment

Foreign investment protection as part of international trade was introduced during the WTO's Uruguay round of multilateral trade negotiations at whose end the Agreement on Trade-Related Investment Measures (TRIMS) was concluded. The TRIMS Agreement generally forbids States from taking measures that seek to evade the principle of national treatment or the ban on quantitative measures.³⁶ In addition, there are other WTO agreements such as the General Agreement on Trade in Services (GATS) which include the MFN principle requiring WTO members to treat services and service providers from one member country in the same way as services and service providers from any other member country.³⁷

2.2.7 The OECD Guidelines and the Multilateral Agreement on Investment (MAI)

The Multilateral Agreement on Investment (MAI) operating within the OECD initially provided measures for increased protection for investment, including national treatment, non-discrimination, and reduced barriers to investment.³⁸ In specific relation to expropriation, draft Article IV provides that a Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory except where such is for a purpose in the public interest, on a non-discriminatory basis, in accordance with due process of law, and accompanied by payment of prompt, adequate and effective compensation.³⁹

2.2.8 Review of International Efforts to Regulate Foreign Investment

The above consideration of international efforts made to regulate foreign investment is not an exhaustive one. Other efforts have been made to regulate and ensure protection of foreign investors including anti-corruption conventions, the 1992 Guidelines on the Treatment of Foreign Direct Investment and the Multilateral Investment Guarantee Agency (MIGA), amongst others.

³⁵ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 31

³⁶ World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press, 1999. p. 146

³⁷ Article II of General Agreement on Trade in Services (GATS), 1995

³⁸ K. Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law', *Duke Law Journal*, (November 2009), p. 7

³⁹ DAFEE/MAI (98)7/REV 1 of the OECD of 22 April 1998, 13

It is safe to conclude from the foregoing that concerted efforts have been made on an international platform, as it were, to ensure that foreign investors are not discriminated against. What is clear to note however, despite the various efforts made, is that the conclusion of a global treaty on foreign investment at the material time has not been made. Notwithstanding that, these efforts have contributed to the development of the main principles of law governing the treatment of foreign investment under international law. However, the uniformity and certainty in the interpretation and application of these main principles is unclear due to the fact that not all countries are State party to each of the foregoing instruments at a go. Further, some of the efforts did not proceed beyond the draft point and as a result are only of illustrative measure thus contributing to the lack of uniformity and predictability when it comes to foreign investment protection generally and the protection against discrimination in particular.

2.3 Foreign Investment Protection in Customary International Law

2.3.1 Overview

In relation to the protection of foreign investment, certain minimum standards of treatment are prescribed by customary international law. The foundation of such protection is based on the long-established idea of diplomatic protection and the treatment of aliens. This essentially means that a host State is obligated to ensure that it extends the international minimum standard of protection that ought to be extended to both aliens and their property under international law.⁴⁰

2.3.2 Most-Favoured-Nation Treatment (MFN)

MFN treatment in the context of foreign investment has been classified as follows:

“MFN means that a host country treats investors from one foreign country no less favourably than investors from any other foreign country...The MFN standard gives investors a guarantee against certain forms of discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different foreign countries”.⁴¹

The MFN clause has also been considered as an attempt to form an agency of equality. It seeks to prevent discrimination and establish equality of opportunity on the highest possible

⁴⁰ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 31

⁴¹ UNCTAD, ‘Most-Favoured-Nation Treatment’, UNCTAD Series on Issues in International Investment Agreements (New York and Geneva, United Nations, 1999),p. 1

plane, the minimum of discrimination and the maximum of favours conceded to any third State.⁴²

It is clear that MFN clauses do not have a universal meaning. Their very formulation and application vary widely among investment treaties depending on either the entire content of the treaty or selected matters addressed by the treaty. The proper application and interpretation of the MFN clause is dependent on its text. Notwithstanding that, the MFN clause is a clear attempt to ensure that foreign investors are protected against discriminatory treatment.

2.3.3 National Treatment

National treatment can be described as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances. In this way the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.⁴³

The principle of national treatment is deeply rooted in the notion of non-discrimination. In order to establish what amounts to discrimination, it is necessary to evaluate the treatment of the foreign investor to the treatment extended to a domestic investor in similar circumstances. However, the national treatment principle is not always of simple and straightforward application. This is owing to the fact that inequalities in economic power, technical capabilities and financial strength between national and non-national firms may deem it necessary and even expedient to accord different treatment in order to bring about a degree of operative equality.⁴⁴

2.3.4 Legality of Expropriations

A host State has a sovereign right to nationalise or expropriate investment within the confines of its area or jurisdiction. As a general rule, nationalisation or expropriation would be deemed illegal if firstly, the measure is not for a public purpose. Secondly, if the measure is arbitrary and discriminatory within the generally accepted meaning of the terms. Thirdly, if the

⁴² G. Schwarzenberger, 'The Most Favoured Nation Standard in British State Practice', 22 BYIL 96 (1945), p. 99-100

⁴³ UNCTAD, 'National Treatment', UNCTAD Series on Issues in International Investment Agreements (New York and Geneva, United Nations, 1999), p. 1

⁴⁴ S. Subedi, International Investment Law – Reconciling Policy and Principle, p. 72

measure is not taken in accordance with applicable laws and due process and finally, if the measure is not accompanied by prompt, adequate, and effective compensation.⁴⁵ The following is a consideration of the foregoing factors with the aid of judicial and arbitral practice as illustrative cases.

2.3.4.1 Measure is not for a Public Purpose

It is important to note that there is no universal definition for 'public purpose' and what constitutes a 'public purpose' is determined on a case by case basis. One such case for an illustrative measure is that of the *Walter Fletcher Smith Claim (US v Cuba)*⁴⁶ where the arbitral tribunal was of the view that

“...properties seized were turned over immediately to the Defendant company, ostensibly for public purposes, but, in fact, to be used by the Defendant for purposes of amusement and private profit, without any reference to public utility.”

In this case the requirement of public purpose was not met.

2.3.4.2 Measure is Discriminatory

Expropriation or nationalisation would be illegal if such is done arbitrary or discriminatory. The term 'arbitrary' was defined by the International Court of Justice (ICJ) in *United States v Italy*⁴⁷ as 'a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety'. Discrimination was considered by ICSID in *Noble Ventures v Romania*⁴⁸ in which the tribunal stated that in order to claim protection under the phrase 'full protection and security' it was necessary to demonstrate that a certain measure was directed specifically against a certain investor by reason of his nationality.

2.3.4.3 Measure does not follow the Due Process of Law

An expropriation or nationalisation may well be illegal if it does not follow what is referred to as the due process of the law. What constitutes due process was established in the case of *ADC v Hungary*⁴⁹ where the arbitral tribunal was of the following view:

⁴⁵ R. Dolzer & C. Schreuer, Principles of International Investment Law, p. 91

⁴⁶ *Walter Fletcher Smith Claim (US v Cuba)*, Award, 2 May 1929, 2 RIAA 913

⁴⁷ *Case Concerning Electronica Sicula SpA (ELSI) (United States v Italy)*, ICJ Reports, 1989, para 128

⁴⁸ *Noble Ventures v Romania*, ICSID Case No ARB/01/11 of 12 October 2005, 111

⁴⁹ *ADC v Hungary*, ICSID Case No. ARB/03/16, 2 October 2006, para. 435

“Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that ‘the actions are taken under due process of law’ rings hollow.”

2.3.4.4 Measure is not followed by Compensation

As a rule of thumb, an expropriatory measure that is not followed by the payment of compensation is illegal. What is of a contentious nature is the standard of such compensation which is dealt with under 2.3.5 below.

2.3.4.5 Measure is in Breach of a Treaty

In addition to the foregoing conditions as determinants of the legality of nationalisations and expropriations, where the measure undertaken is in breach of a treaty to which the foreign investor and the host State are party to, the purported nationalisation or expropriation is illegal. This is aptly illustrated in the seventh judgment of the Permanent Court of International Justice in the *case concerning certain German Interests in Polish Upper Silesia (Charzow Factory case)*⁵⁰ where the Court was dealing with *inter alia* an application that certain parts of the Polish expropriation law of July 14, 1920, constituted a measure of liquidation and as such violated certain articles of the Geneva Convention of May 15, 1922. The Court held that the expropriation made pursuant to the Polish expropriation law was illegal as it was in breach of a treaty.

2.3.4.6 Measure is in Breach of an Explicit Agreement between the Host State and the Foreign Investor

There are situations where there is an express agreement between the host country and the foreign investor that for a stipulated period of time the former shall not expropriate or nationalise the property or investment as the case may be of the latter. This particular condition was illustrated in the case of *AMINOIL v Kuwait*.⁵¹ The crucial issue in the arbitration was whether or not Decree Law No. 124 of 1977 was a valid act of nationalisation. The question of validity turned on the ‘stabilisation clause’ of the Concession Agreement

⁵⁰ *Charzow Factory Case*, PCIJ Series A, Nos. 7, 9, 17, 19 (1926-1928)

⁵¹ *AMINOIL v Kuwait*, Award of 24 March 1982, 21 ILM 976, 998 (1982)

which prevented the Sheikh from unilaterally modifying or annulling the concession, apart from certain grounds laid down in the agreement.

The majority of the Tribunal refused to read the 'stabilisation clause' as an outright prohibition of nationalisation that would cover the whole period of concession. Rather, the clause impliedly prohibited nationalisations of a 'confiscatory character', that is, without 'proper indemnification', but did not rule out nationalisation *per se*. Therefore, the majority of the Tribunal held that the nationalisation was lawful provided it did not possess any confiscatory character.

2.3.5 Standards of Compensation in Customary International Law

International law requires a host government to pay compensation for expropriation but doesn't specifically prescribe the actual standard of compensation. Most International Investment Agreements (IIAs) usually demand 'prompt, adequate and effective compensation' or 'full compensation' or 'appropriate compensation' or 'fair compensation'.

The France/Hong Kong BIT provided the following in relation to compensation:

"Compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation 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, be effectively realisable and be freely convertible."⁵²

In relation to the standard of compensation, two main principles have been advanced at international law discussed below.

2.3.5.1 The Calvo Doctrine

The essential factor of the Calvo doctrine was to require aliens to submit disputes occurring in a country to that country's courts. The gist of this doctrine is the exhaustion of local remedies by foreign companies before turning to international arbitration. From this premise, the matter of compensation can similarly be drawn to dictate that setting the standard of compensation payable upon expropriation or nationalisation is a preserve of the local law in question as a matter of territorial sovereignty of the State.⁵³

⁵² Article 5(1) of the France - Hong Kong BIT 1995

⁵³ WD. Verwey & NJ Schrijver, 'The taking of Foreign Property under International Law: A New Legal Perspective?' XV Netherlands Yearbook of International Law (1984), p. 23

It is important to note that one disadvantage of this approach is that it ignores the weakness of certain legal systems especially in developing countries. Therefore, a situation may arise where the multinational corporation may take advantage of the host State and dictate the provisions of the investment contract due to the weakness of the given legal system.

2.3.5.2 The Hull Formula

The Hull formula as a standard of compensation under international law was developed as a result of diplomatic exchanges between the Mexican Minister of Foreign Affairs and the United States Secretary of State Cordell Hull in relation to Mexico's expropriation of various US assets between 1915 and 1930.

In the exchanges, the US recognised the right of Mexico to expropriate foreign assets for public purposes, but only if such expropriation had to be 'coupled with and conditioned on the obligation to make adequate, effective and prompt compensation'. In turn, Mexico maintained the position that expropriation and the setting of the standard of compensation was a matter of national law and the principles of justice and equity rather than international law standards as claimed by the US.⁵⁴

What is clear to conclude from the foregoing is that expropriation without compensation is illegal. However, the standard of compensation payable is far from uniform. Notably, for arguments sake, even though 'prompt, adequate and effective' compensation is established as the condition under international law, there is still no universally established denotation of the words 'prompt' or 'adequate' or 'effective'.

2.3.6 Access to International Arbitration

Access to international arbitration tribunals under both public and private international law affords foreign investors protection in relation to expropriations or nationalisations in the event that a dispute arises. A good deal of BITs and IIAs have an arbitration clause in them referring any or particular disputes to arbitration if and when the need arises. Therefore, in the event of a discriminatory taking, a foreign investor is protected by being able to seek remedial relief from arbitration.

⁵⁴ Letter of the US Secretary of State to Mexican Ambassador to the United States, 21 July 1938, as cited in AF Lowenfield, *International Economic Law*, Oxford University Press, 2002. p. 398

2.3.7 Protection through Bilateral Investment Treaties (BITs)

The exact nature and content of a BIT concluded between one State and another may vary with those concluded by other States. However, most BITs follow a certain pattern and contain similar provisions. Most BITs are designed to extend fair and equitable treatment, full protection and security, and MFN and national treatment to investors. BITs are intended to protect such investment from expropriation without compensation and against any mistreatment and to provide a legal remedy generally through international arbitration.⁵⁵

BITs arguably provide a greater standard of protection than local laws on foreign investment within a host State. This is due to the fact that local laws in the abstract, although offering adequate protection to foreign investors are liable to change. However, no State can unilaterally change international law or the provisions of a BIT.

2.3.8 Stabilisation Clauses

Many investment contracts contain a stabilisation clause that seeks to insulate foreign investors from any changes in the legal regime in the host State after the investment has been made. This differs from the protection under BITs under which a host State is not prevented from taking new legal and administrative measures as long as the foreign investor is compensated for the loss incurred. Stabilisation clauses demand that the law prevailing at the time a foreign investor first invests would not be altered to the detriment of such an investor.⁵⁶

2.3.9 Summary

The foregoing consideration of forms of foreign investment protection is not an exhaustive one. Other aspects of foreign investment protection include protection under umbrella clauses, under regional trade and investment treaties and under free trade agreements amongst others. What is clear to conclude is that these principles are not uniformly applied as they heavily depend on the interpretation and application of the arbitral tribunal charged with such a responsibility as the case may be. For instance, in relation to compensation most

⁵⁵ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 84

⁵⁶ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 104

foreign investors call for the application of the Hull Formula whilst host States call for the application of the Calvo Doctrine.

*With specific relation to the issue of discrimination, notwithstanding the standards of equal treatment as demanded by international law, it is clear to note that to ensure competition, to promote local enterprises and balance economic power, it may be necessary to accord preferential treatment. Further, despite the protection accorded, the question still remains as to how the principle of non-discrimination reconciles with such actions as de-colonisation which is discriminatory by its very nature. The SADC tribunal in the *Campbell* case had an opportunity to consider this. This particular case will be discussed in chapter four of this obligatory essay.*

2.4 Conclusion

This chapter has considered the various efforts made to regulate and protect foreign investment. The chapter has also highlighted the position of customary international law in relation to expropriation. A resonating theme found in all that has been discussed is that there is no universal global treaty in relation to foreign investment to ensure the uniform application of all principles affecting expropriation in order to balance the interests of the foreign investor without abrogating the sovereign right of the host State.

CHAPTER THREE

DISCRIMINATION AND THE STANDARD OF FAIR AND EQUITABLE TREATMENT

3.0 Introduction

It is clear that various efforts have been made to ensure the protection of foreign investment. As noted earlier in this work one aspect that can lead to an expropriation being illegal is if the measure is done arbitrary or discriminatory, thus affording a measure of protection. Further, the principles of national treatment and MFN have done plenty to ensure that foreign investors are treated, at least in the abstract, equally as the nationals of the host State and other foreign investors.

This chapter shall consider the issue of discrimination in relation to the standard of fair and equitable treatment. This chapter shall illustrate whether the law as stated in the preceding chapter protecting foreign investment, is adequate in this regard pointing out any exceptions to the principles of national treatment and MFN.

3.1 The Standard of Fair and Equitable Treatment

3.1.1 Origins of the Standard

The concept of “equitable” treatment was first referred to in the 1948 Havana Charter which provided that foreign investments should be assured “just and equitable treatment”. The Article further provided that the International Trade Organisation (ITO) could make recommendations to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one member country to another.⁵⁷

At regional level, also in 1948, the Ninth International Conference of American States adopted the Economic Agreement of Bogota which in the main provided for foreign capital to receive equitable treatment and for States not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of foreign

⁵⁷ Article 11 (2) of the Havana Charter, 1948

investors.⁵⁸ However, like the Havana Charter, the Bogota Agreement failed to come into force due to a lack of support.

Despite this, at the bilateral level, the US treaties on Friendship, Commerce and Navigation (FCN), developed after the First World War contained the terms “equitable” and “fair and equitable treatment”.⁵⁹ Further the Draft Convention on the Protection of Foreign Property by the OECD Council provided under Article 1(a) that each party shall ensure fair and equitable treatment to the property of the nationals of the other parties.⁶⁰

When States began to conclude BITs as the principal vehicle to regulate and promote foreign investment, the standard of fair and equitable treatment was incorporated as a key provision thus leading to its widespread use.⁶¹

3.1.2 Current use of the Standard in International Agreements and State Practice

Currently, the majority of BITs include the standard of fair and equitable treatment. Over the years, even the countries that preferred to maintain national control over foreign investments through the adoption of national treatment provisions have begun to incorporate the fair and equitable treatment standard into their BITs.⁶²

The fair and equitable treatment standard has also found its way into many multilateral trade agreements such as, amongst others; the Association of Southeast Asian Nations (ASEAN) Treaty for the Promotion and Protection of Investments, the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA), the North American Free Trade Agreement (NAFTA) as well as Free Trade Agreements (FTAs) between Australia and Thailand, between Singapore and the European Free Trade Area, and between the United States and Australia.⁶³ This clearly illustrates the wide usage of this standard.

⁵⁸ Article 22 of the Economic Agreement of Bogota, 1948

⁵⁹ Fair and Equitable Treatment Standard in International Investment Law – OECD Working Papers on International Investment, Number 2004/3, p. 4

⁶⁰ Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, OECD, pp. 13-15, 1967

⁶¹ S. Subedi, International Investment Law – Reconciling Policy and Principle, p. 63

⁶² OECD, Fair and Equitable Treatment Standard in International Law, September 2004, p. 3-4. Available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf> (Accessed on 10th September 2010)

⁶³ F. Marshall, ‘Fair and Equitable Treatment in International Investment Agreements’, International Institute for Sustainable Development and the Centre on Asia and Globalisation, Singapore (October, 2007), p. 3

3.1.3 Interpretation of the Standard

Generally, the standard seeks to provide a basic level of protection to foreign investors and is based on the elements of fairness and equity. The problem with this standard however, is that it is difficult to define in concrete terms and is susceptible to various interpretations.⁶⁴ As a result, various views have emerged as to the scope of fair and equitable treatment. These interpretations have suggested three main approaches as to the scope of fair and equitable treatment which potentially imposes very different obligations on host States.

The first approach calls for the standard of fair and equitable treatment to be made in harmony with the minimum standard of treatment owed to foreign investments under customary international law. This approach limits the scope significantly as the only requirements will be those acknowledged as attaining the status of norms under customary international law.⁶⁵ It must be noted however that since the interpretation of the NAFTA Free Trade Commission was issued in 2001, arbitral tribunals have noted the evolution of customary international law and that the minimum standard of the early 20th century is not the functional standard currently.⁶⁶

The second approach is with reference to a minimum standard of treatment under international law, including all sources. This clearly suggests a wider scope than the first approach as it is not limited to obligations arising under customary international law but also includes those arising from other conventional sources of international law including State practice as well as judicial and arbitral case law.⁶⁷

The third approach involves a free-standing, autonomous requirement that should be interpreted according to what is deemed as the ordinary meaning of “fair and equitable treatment”. This essentially means that a treaty shall include an obligation to provide fair and equitable treatment without making specific reference to international law and it is upon an arbitral tribunal to establish what is fair and equitable in the circumstances.⁶⁸

⁶⁴ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 63

⁶⁵ OECD, *Fair and Equitable Treatment Standard in International Law*, September 2004., p. 8, footnote 33.

⁶⁶ F. Marshall, ‘Fair and Equitable Treatment in International Investment Agreements’, p. 6

⁶⁷ F. Marshall, ‘Fair and Equitable Treatment in International Investment Agreements’, p. 6

⁶⁸ F. Marshall, ‘Fair and Equitable Treatment in International Investment Agreements’, p. 6-7

*The aforementioned approaches suggest distinct obligations on a host State. What is clear is that it is unclear which of the three the favoured approach is. However, arbitral tribunals have continually stressed that a finding of what is fair and equitable cannot be established theoretically. Instead such a finding at all times depends on precise conditions on a case by case basis.*⁶⁹

Further, various arbitral awards have interpreted fair and equitable treatment to include the legitimate expectations of the foreign investor in relation to the obligations of the host State. Such obligations may include the host State ensuring a stable business environment. Some tribunals have also referred the standard to include the necessity of due process in administrative decisions with specific protection against discriminatory measures of regulation.⁷⁰

3.1.4 Lucidity of the Standard in relation to Discrimination

The standard of fair and equitable treatment generally seeks to cover the principle of non-discrimination in a somewhat more abstract sense than the standards of MFN and national treatment.⁷¹ As noted earlier in this work, factors such as stability and security as well as favourable regulation by a host State are likely to contribute to a good investment climate and in turn attract foreign investment. Undoubtedly, a host State which provides protection against discrimination is one likely to attract a mass of foreign investment.

However, it is clear from the foregoing consideration of the standard of fair and equitable treatment that this standard escapes a single definition and as such the extent of protection against discrimination varies from one host country to the next depending on which approach is adopted or depending on the interpretation of an arbitral tribunal in the circumstances. This essentially means that there is no definite universal context under which this standard has been considered thus rendering it unpredictable and undoubtedly although widely used, quite problematic for foreign investors especially considering the evolving nature of customary international law.

⁶⁹ *CME Czech Republic B.V v Czech Republic*, UNCITRAL (The Netherlands/Czech Republic BIT) Partial Award 13 September 2001, para 336

⁷⁰ F. Marshall, 'Fair and Equitable Treatment in International Investment Agreements', p. 13-15

⁷¹ WTO, Working Group on the Relationship between Trade and Investment, Non-Discrimination, Most-Favoured-Nation Treatment and National Treatment, Note by the Secretariat, WT/WGTI/W/118, 4 June 2002

Further, very few tribunals in interpreting the standard consider the conduct of the investor itself. That is to say, for “fair and equitable” to be fair and equitable, it should be developed and applied in such a way that is fair and equitable to all parties involved and not just the one. However, the standard in its current functionality has a one-sided nature. It is also clear to note that this standard, like the various efforts to regulate and protect foreign investment as discussed in the preceding chapter, has not been reduced into what may be referred to as a universal global treaty in relation to foreign investment to ensure its uniform application.

3.2 Discrimination

3.2.1 Overview

Discrimination generally can be defined as unfavourable treatment based on prejudice, especially regarding nationality, colour, age or sex.⁷² In relation to discrimination under the measure of expropriation, the third Restatement of the Foreign Relations Law of the United States provides that

“...an expropriation that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law.”⁷³

As noted earlier in this work, discrimination is outlawed by international law on foreign investment especially with regard to the measure of expropriation and the principles of national treatment as well as MFN; and as discussed above the standard of fair and equitable treatment looks to ensure that foreign investors amongst other things are not discriminated against.

3.2.2 The Paradox of (Non) Discrimination

The principles of national treatment, MFN and fair and equitable treatment are part of a system to protect foreign investment against discrimination. However, one of the paradoxes of investment protection is that this system is fundamentally discriminatory in itself.

An example of this would be in relation to an investor protected by a BIT. Such an investor is entitled to be treated fairly and equitably, not to have its investment expropriated, and so on. This is done regardless of whether or not such treatment is lawful under the national law of

⁷² The Readers Digest Oxford Complete Wordfinder. (The Readers Digest Association Limited, 1992), p. 416

⁷³ The Third Restatement of the Foreign Relations Law of the United States, § 712, Comment f.

the host State. Whilst on the other hand a national of the host State is exposed to the full application of the national law especially in relation to change in legislation and subsequent recourse only lies to the national courts. BITs therefore provide legal protection that goes beyond national law and further provide investors with the right to institute proceedings in arbitral tribunals applying international law. These tribunals ordinarily give a remedy for breach of rights secured by the treaty, even if the investor would have no right whatsoever to redress under national law. The consequence of this is that BITs give foreign investors wider rights than the rights nationals possess and as such, they are in that respect, discriminatory.⁷⁴

3.2.3 Discrimination and the Right to Regulate

As a matter of sovereignty, each host State has the right to regulate foreign investment within its area or jurisdiction which includes taking the measure of expropriation. However, such measures must be done within the confines of the law and principles as established in the preceding chapter. In relation to discrimination, this entails that a State has the right to regulate foreign investment as long as such is not done discriminatory. Such protection against discrimination may be through investment agreements or treaties between the foreign investor and the host State which may include stabilisation clauses, the principles of national treatment, MFN and the standard of fair and equitable treatment.

In this light, what is of particular interest is a consideration of whether the objective of investment agreements is to protect foreign investment or whether the objective is to promote and protect sustainable foreign investment. Undoubtedly, if given the opportunity, foreign investors would advocate for the former whilst host States would advocate for the latter.

As aforementioned, the right to regulate is a basic attribute of sovereignty under international law. That is to say, the right to regulate is not granted or given by the investment agreement in question but is inherent in the host State as a matter of sovereignty. What investment agreements ought to consider is the restriction of the right to regulate which ought to be applied as an exception to the general right to regulate.⁷⁵ This ties in well with the proposition that the standard of fair and equitable treatment ought to be fair and equitable to both the

⁷⁴ V. Lowe, 'Changing Dimensions of International Investment Law', University of Oxford Faculty of Law Legal Studies Research Paper Series – Working Paper No. 4/2007, March 2007, p. 48

⁷⁵ H. Mann, 'Investment Law', Available at www.iisd.org/pdf/2003/investment. (Accessed on 30th August 2010)

foreign investor as well as the host State, clearly suggesting that both parties have rights and duties.

However, the current thinking in relation to the purpose of investment agreements is more inclined to the fact that these agreements are entered into for the main purpose of protecting the foreign investment and its investor whether or not this is detrimental to the protection and promotion of sustainable development and sustainable foreign investment as a whole.⁷⁶

What is more is that a strict application of the non-discrimination principle notwithstanding the right to regulate, would require host States, for example, to admit foreign investment to any sector of the economy without any reference made to national security, make inadequate local credit available to foreign investors irrespective of their international resources and deny special assistance to weak domestic enterprises. Such a principle undoubtedly would counteract the international legal principle of preferential treatment for developing countries.⁷⁷

3.2.4 The Concept of Legal Discrimination

As established earlier in this work, there is no universal treaty in relation to foreign investment to ensure the uniform application of all principles of protection. As such, there is no consolidation of basic non-discriminatory provisions in a truly multilateral investment framework as provided under the realm of international trade.

As a rule of thumb, discrimination is illegal. However, there are exceptions to this general rule and many schools of thought are of the view that the general exceptions provided in international trade instruments may be logically carried over to the international investment area as a framework for formally recognising State regulatory autonomy in certain areas.⁷⁸

The General Agreement on Tariffs and Trade (GATT) establishes General Exceptions for legitimate, non-discriminatory regulation. The measures include those relating to public morals; human, animal, or plant life or health; labour; cultural value; and exhaustible natural

⁷⁶ H. Mann, 'Investment Law.'

⁷⁷ S. Asante, 'International Law and Foreign Investment: A Reappraisal', *The International and Comparative Law Quarterly*, Cambridge University Press, Vol. 37, No. 3 (July, 1988), p. 616

⁷⁸ K. Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law', p. 8

resources. Within these areas, States may act in a manner that amounts to discrimination provided the measures are not arbitrary or unjustifiable.⁷⁹

From this premise, three main exceptions have been advanced to apply to MFN and national treatment under international investment law. Firstly are general exceptions which do not only apply to MFN and national treatment but to the whole investment agreement in the circumstances. The most common exceptions of this type allow the parties to the agreement, particularly the host State, to derogate from the provisions of the agreement on grounds of public health, order and morals, national security and protection of the environment.⁸⁰

On this point, the lack of a truly multilateral investment framework or universal global treaty on investment as it were, exposes a measure of absurdity. For example, it might be argued that the expropriation of a foreign investment as retaliation for some action by the national State of the foreign company is a public purpose for the purposes of foreign policy or national security which is clearly a public and not a private matter and falling within the ambit of the general exceptions.

Despite this being a viable argument, the arbitral tribunal in the case of *BP v Libya*⁸¹ held that such retaliation is not a public purpose. This particular interpretation has been fortified by express provisions contained in certain BITs. One such example is of the Costa Rica BIT which stipulated that expropriation must be for a public purpose related to the internal needs of the State party.⁸²

The second type of exception is what is referred to as subject-specific exceptions. These are in relation to the exclusion of the application of national treatment and MFN standards on taxation for instance or any other specific subject agreed upon by the parties to the agreement. Some agreements exclude intellectual property or public procurement from their coverage.⁸³

⁷⁹ Article XX of the General Agreement on Tariffs and Trade (GATT), 1994

⁸⁰ World Trade Organization, 'Concept Paper on Non-Discrimination', WT/WGTI/W/122 (June, 2002), p. 3

⁸¹ *BP v Libya*, (1979) 53 ILR 297

⁸² Article V of the Costa Rica - UK BIT, 1982

⁸³ Article XX of the General Agreement on Tariffs and Trade (GATT), 1994

Thirdly are country and sector – specific exceptions. Some investment agreements include in an annex certain sectors with respect to which either party reserves the right to deny the application of national treatment and MFN standards.⁸⁴

It is clear to note from the foregoing that the general exceptions are similar to those provided for under GATT. However, as illustrated these exceptions are not concrete and may or may not apply as was expressed in *BP v Libya*. It is safe to conclude that under international investment law, exceptions to national treatment, MFN and fair and equitable standard are not as comprehensible as the exceptions under international trade law. This may well be due to the fact that there is a lack of a truly multilateral investment framework or universal global treaty in relation to investment making such exceptions unpredictable in nature and therefore limiting the host State's right to regulate foreign investment for the benefit of sustainable development as a whole.

It is further notable that there are certain instances when a host State seeks to empower its citizens through what is referred to as indigenisation programmes in which particular sectors of the economy are put in the hands of the citizens therefore requiring a taking of foreign owned property but not of property already held by nationals. This can be argued to amount to discrimination as a foreign investor's property has been taken by virtue of the fact that the foreign investor is not a national of the particular host State. This raises the debate as to how far the principle of non-discrimination ought to apply in respect of discrimination against foreign investors as a whole or whether it should fully apply between foreign investors of different nationalities.

In addition, it could be argued also that it is permissible to engage in rolling expropriation of a particular economic sector, so that where a host State is unable to expropriate all foreign business in the sector at the same time, because it cannot afford to compensate all of them, it may select those of a particular nationality to expropriate in each particular phase. Such an action may or may not be discriminatory depending on the particular circumstances and interpretation of the arbitral tribunal tasked. The point being that there is no concrete conclusion on the concept of legal discrimination.

⁸⁴ Article XX of the General Agreement on Tariffs and Trade (GATT), 1994

As aforementioned, there may be instances when a host State seeks to regulate foreign investment through expropriation to establish economic balance between foreign investors and local investors thus creating a conducive and competitive market. However, there is a particular situation that is peculiar to most developing countries. This is in relation to the question whether a host State can expropriate property as part of a program or policy to correct present economic inequalities brought about by a colonial past. This particular question was considered in the *Campbell* case whose contribution to the law on expropriation will be considered in the next chapter.

3.3 Effect of Arbitral Tribunals on the issue of Discrimination

Without a doubt, many international arbitral tribunals have considered matters in relation to discrimination under international investment law. The same can be said for the ICJ. The unfortunate part is that the decisions from the ICJ and various arbitral tribunals are binding only on the parties themselves and have no force as precedent. Article 59 of the ICJ Statute provides that

“..the decision of the Court has no binding force except between the parties and in respect of that particular case.”⁸⁵

This undoubtedly excludes the application of formal precedent properly so-called. However, there is a strong reliance on earlier judicial decisions, which are listed as “subsidiary means for the determination of the rules of law.”⁸⁶

The ICJ explained its approach to prior cases in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*⁸⁷ as follows:

“It is not a question of holding (the parties in the instance case) to decisions reached by the court in previous cases. The real question is whether in this case, there is a cause not to follow the reasoning and conclusions of earlier cases.”

Therefore, in as much as there is no formal doctrine of precedent properly so-called, it can be argued that there is a type of formal precedent in practice. However, there is no formal obligation on the part of the ICJ or other international tribunals to follow the decisions of previous cases as binding precedent.

⁸⁵ Statute of the International Court of Justice (26 June 1945) 33 UNTS 993, Art. 59

⁸⁶ Statute of the International Court of Justice, Art. 38

⁸⁷ *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections Judgment)*, 1998, ICJ Rep. 275, para. 28

It is clear to note therefore that had there been a formal doctrine of precedent properly so-called followed in international investment law, this could have assisted in making clear some of the complexities surrounding the principle of non-discrimination as advanced above. This would provide a measure of certainty, predictability as well as a measure of consistency and equal treatment.

3.4 Conclusion

It is clear to conclude that the standard of fair and equitable treatment escapes a single and concrete definition and as such despite its wide usage, its functionality is erratic or inconsistent. Further, this chapter shows that the principle of non-discrimination under international investment law is not as comprehensible as it is under international trade law due to the fact that an all encompassing global investment treaty is lacking. The chapter has further illustrated the effect of the lack of a formal doctrine of precedent followed by international tribunals. It is further safe to conclude that the principles in relation to the protection of discrimination as established not only under this chapter but the preceding chapter also are more inclined to the protection of the foreign investor and do not entirely consider the needs and interests of the host State especially in relation to the right to regulate and the concept of legal discrimination.

CHAPTER FOUR

MIKE CAMPBELL AND OTHERS v THE REPUBLIC OF ZIMBABWE

4.0 Introduction

The preceding chapters have considered the various efforts that foreign investment law has put forth to counter the issue of discrimination. Further, this obligatory essay has also considered the basis for the legality of expropriations as well as the principle of discrimination in itself balanced against a host State's right to regulate. This chapter shall revisit the case of *Mike Campbell and Others v The Republic of Zimbabwe* (hereinafter referred to as the *Campbell* case) to highlight the input it has made to the foreign investment law on expropriation.

4.1 Relevance to the Study

The Southern African Development Community (SADC) Tribunal in the *Campbell* case, inadvertently or otherwise, attempted to answer the question as to whether a host State can expropriate property as part of an initiative to ameliorate economic inequalities created by colonialism as a right of regulation thus considering an aspect of the notion of legal discrimination as outlined in the preceding chapter. Issues of concern and of particular relevance to this study were in relation to the legality of the expropriation in light of racial discrimination, issues of public purpose and lack of payment of compensation. Therefore, a consideration of this case shall follow to explore its strengths and weaknesses and suggest possible modification.

4.2 Background and Facts

On 11th October 2007, Mike Campbell (Pvt) Limited, a company registered in Zimbabwe moved the SADC Tribunal to dispute the expropriation of agricultural land in Zimbabwe by the government of the Republic of Zimbabwe. As the matter was also pending in the Supreme Court of Zimbabwe at the time,⁸⁸ the claimants applied to the SADC Tribunal in terms of Article 28 of the SADC Protocol for an interim measure to interdict or prohibit the government of Zimbabwe from evicting Mike Campbell (Pvt) Limited *et al.* from the land in

⁸⁸ *Mike Campbell (Pvt) Ltd. et al. v The Minister of National Security responsible for Land, Land Reform and Resettlement and the Attorney-General* (SC 49/07) (2007)

question until the main case had been finalised.⁸⁹ The Claimant contended that the land acquisition process employed by the Republic was illegal by virtue of Article 6 of the SADC Treaty. The land acquisition process was couched in section 16B (2) of Amendment 17 to the Constitution of Zimbabwe which provides thus in relevant part:

“(a) all agricultural land... [reference to national gazettes where specific agricultural lands for resettlement purposes are identified]...is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.”⁹⁰

The SADC Treaty alleged to be contravened provides as follows:

“SADC and member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit.”⁹¹

On December 13th 2007 the SADC Tribunal ruled that Campbell should remain on his expropriated farm until the dispute in the main case had been resolved by the Tribunal. The judgment in relevant part provided thus:

“The Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by its orders, to evict from or interfere with the peaceful residence on and beneficial use of the farm known as Mount Campbell in the Chetugu District in Zimbabwe, by Mike Campbell Ltd and William M. Campbell, their employees and the families of such employees and of William Michael Campbell.”⁹²

On January the 22nd 2008 however, the Zimbabwean Supreme Court (sitting as a Constitutional Court) dismissed the application challenging the forcible seizure and expropriation of their lands without compensation. The Court ruled that:

“By a fundamental law, the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.”⁹³

On January the 23rd 2008 the Zimbabwean government announced that it would seize the farm. Land Reform Minister Dydimus Mutasa said the farm would be handed over to a black

⁸⁹ Protocol on Tribunal in the Southern African Development Community

⁹⁰ Section 16B of the Constitution of Zimbabwe (Amendment No. 17 of 2005)

⁹¹ Article 6 (2) of the Treaty of the Southern African Development Community, Aug. 17 1992, 32 I.L.M. 116

⁹² *Mike Campbell (Pvt) Ltd & one other v The Republic of Zimbabwe – SADC (T) Case No. 02/2007* (Interim Order granted on 13th December 2007)

⁹³ *Campbell - (SC 49/07) (2007)*

owner as part of State land reforms and following the ruling by the Zimbabwean Supreme Court.⁹⁴

On June 20th 2008 the Applicants referred to the Tribunal the failure by Zimbabwe to comply with the Tribunal's decision regarding the interim reliefs. However, as a matter of fact, after November 28 2008, when the SADC Tribunal decided for Campbell, his home of 50 years was burnt to the ground by farm invaders in September 2009.⁹⁵

4.3 Parties Submissions

4.3.1 Applicants Submissions

The Applicants arguments in relevant part were as follows. Firstly, that the Respondent (The government of the Republic of Zimbabwe) acted in breach of its obligations under the treaty by enacting and implementing Amendment 17. Secondly, that the Applicants had suffered racial discrimination since they were the only ones whose lands had been compulsory acquired under Amendment 17 and thirdly that the Applicants were denied compensation in respect of the lands compulsorily acquired from them.⁹⁶

4.3.2 Respondents' Submissions

The Respondents' arguments in rebuttal in relevant part were as follows. Firstly, that the Respondents' acquisition of land from mainly white farmers cannot be attributed to racism but to circumstances brought about by colonial history. In addition, that the compulsory acquisition of lands belonging to the Applicants by the Respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities. Secondly, that the Respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land and thirdly that the Applicants would receive compensation under Amendment 17.⁹⁷

⁹⁴ O. Ruppel & F. Bangamwabo, 'The SADC Tribunal: a Legal Analysis of its Mandate and Role in Regional Integration', *Monitoring Regional Integration in Southern Africa Yearbook* (2008), p. 7

⁹⁵ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 18

⁹⁶ *Mike Campbell (Pvt) Ltd & Others v The Republic of Zimbabwe* – SADC (T) Case No. 02/2007, p 12 - 13

⁹⁷ *Campbell* - SADC (T) Case No. 02/2007, p 15 - 16

4.4 The Tribunal's Findings

As a point of departure, the SADC Tribunal, citing various provisions in international legal instruments pointed out that as a general rule, discrimination of whatever nature is strongly prohibited in international law.⁹⁸ It noted that the SADC treaty neither defines racial discrimination nor offers any guidelines to that effect. However, the Tribunal adopted the definition of racial discrimination as found in the Convention on the Elimination of All Forms of Racial Discrimination (CERD) which provides that racial discrimination is:

“Any distinction, exclusion, restriction or preference based on race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁹⁹

The Tribunal, quoting with approval the Committee on Economic, Social and Cultural Rights distinguished between formal equality and substantive equality. According to the Tribunal, formal equality is achieved if a law or policy treats everyone equal in a neutral manner whilst substantive equality is concerned, in addition, with the effects of laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals.¹⁰⁰

Further quoting the Committee on Economic, Social and Cultural Rights, the Tribunal distinguished between direct and indirect discrimination. The Tribunal pointed out that direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively. On the other hand, indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect when implemented.¹⁰¹

The Tribunal thereafter determined whether Amendment 17 was discriminatory on the grounds of race. It pointed out that even though Amendment 17 did not explicitly refer to white farmers, the effect of its implementation extended only to white farmers and as a result it constituted indirect discrimination or substantive inequality. The Tribunal further pointed

⁹⁸ *Campbell* - SADC (T) Case No. 02/2007, p 45

⁹⁹ Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

¹⁰⁰ *Campbell* - SADC (T) Case No. 02/2007, p 50

¹⁰¹ *Campbell* - SADC (T) Case No. 02/2007, p 51

out that the differentiation in treatment amounted to discrimination as the same was arbitrary and based primarily on considerations of race as opposed to it being reasonable and objective. Therefore the implementation of Amendment 17 discriminated against the Applicants on the basis of race and as such was a violation of the Respondents obligation under Article 6 (2) of the SADC Treaty.¹⁰²

4.5 Review of the Case

Scholar Zongwe in his work has made a detailed analysis of the *Campbell* case. This obligatory essay shall adopt his position as well as provide an additional position of its own. According to Zongwe, three issues are of pertinent concern when considering the Tribunal's findings in the *Campbell* case. These are namely, racial discrimination, public purpose and compensation.¹⁰³

4.5.1 Racial Discrimination

As rightly held by the SADC Tribunal, it is a rule of thumb that a racially discriminatory taking is a violation of international law. What is more, various legal scholars suggest that racial discrimination is a *jus cogens* norm which suggests that no derogation is permitted.¹⁰⁴ However, there are exceptions to racial discrimination in investment law as the principle of anti-discrimination is not absolute in itself. It can be limited by principles of substantive equality usually taking the form of affirmative action. Therefore, post-colonial expropriations carried out to end the economic domination of the nationals of the former colonial power are an exception to the general prohibition on racial discrimination in foreign investment law.¹⁰⁵ As established, the answer to the question as to whether a host State can expropriate property as part of an initiative to ameliorate economic inequalities created by colonialism is an affirmative one. Such affirmative action is inherently discriminatory as such a policy is only likely to apply against citizens of the former colonial power.

The Tribunal in its findings did not explicitly address this issue. The simple finding of Amendment 17 being discriminatory did not answer the question as to how far the exception to racial discrimination could be extended if at all, especially considering the raging debate as

¹⁰² *Campbell* - SADC (T) Case No. 02/2007, p 51 - 53

¹⁰³ D. Zongwe, 'The Contribution of *Campbell v Zimbabwe* to the Foreign Investment Law on Expropriations', p. 21

¹⁰⁴ M. Somarajah, *The International law on Foreign Investment*, p. 398

¹⁰⁵ M. Somarajah, *The International law on Foreign Investment*, p. 398

to whether the principle should or should not be derogated from. The Tribunal by this finding seems to have skirted round the issue of legitimate affirmative action in cases of colonial expropriations which seeks to establish substantive equality by differentiating on the ground of race in order to offset the present effects of the race-based injustices of the past.¹⁰⁶

Granted, the effect of Amendment 17 was only felt by white farmers and hence the finding of indirect discrimination. However, the Tribunal failed to account for the fact that discrimination, whether direct or indirect is not an absolute principle and can be derogated from anyway as the exception aforementioned applies. The question the Tribunal should have gone on to consider is whether the race-based discrimination was fair. This could have been established by considering whether Amendment 17 and its implementation, considering all things fell within the exception to the general prohibition on racial discrimination.

4.5.2 Public Purpose

Zongwe is of the view that it does not belong to international courts like the SADC Tribunal to pronounce themselves on the legitimacy of a sovereign State's legislative purposes. Perhaps the fact that the farm land was grabbed and given to adherents of the ruling party and not to the poor, landless and other disadvantaged and marginalized substantiates the argument that the taking amounted to indirect discrimination. However, this did not explain why the Tribunal declared that Amendment 17 violated Zimbabwe's obligation under the SADC Treaty not to discriminate on the basis of race. A finding of indirect discrimination ought not to have been directly concerned with the text of Amendment 17 but with its implementation as after all the text of the said section did not expressly or explicitly refer to race, ethnicity or people of a particular origin.¹⁰⁷

Further, it is clear from the *Campbell* case that both economic and racial considerations motivated the expropriation. According to Somarajah, it is difficult to determine which motive prevails between economic and racial considerations for when economic nationalism is the reason for the taking both motives are present in equal strength.¹⁰⁸ Zongwe is of the view that this complexity could have been sorted out had the Tribunal ruled that the enactment of Amendment 17 was not illegal while its implementation was not only illegal but

¹⁰⁶ D. Zongwe, 'The Contribution of *Campbell v Zimbabwe* to the Foreign Investment Law on Expropriations', p. 22

¹⁰⁷ D. Zongwe, 'The Contribution of *Campbell v Zimbabwe* to the Foreign Investment Law on Expropriations', p. 23 - 24

¹⁰⁸ M. Somarajah, *The International law on Foreign Investment*, p. 399

also contrary to the statutory purpose of Amendment 17 which was supposed to target certain lands (agricultural land) and not certain people.¹⁰⁹

4.5.3 Compensation

As noted, the issues of racial discrimination and public purpose considered by the Tribunal left more questions than answers. The Tribunal could have justifiably decided the case on the sole ground of compensation.¹¹⁰ As established in the second chapter of this obligatory essay, the general rule is that expropriation is legal. However, there are exceptions to this general rule. These are in the event that the measure taken is not for a public purpose, is discriminatory, does not follow the due process of law, is in breach of a treaty, is in breach of an explicit agreement between the host State and its foreign investor and where the measure is not followed by compensation. If even only one of the aforementioned exceptions is present then the expropriation in question would be deemed illegal.

This is the position illustrated in *Bernardus Henricus Funnekotter and Others v The Republic of Zimbabwe*.¹¹¹ ICSID in this case steered clear of the highly contentious issues of public interest and racial discrimination by deciding the matter solely on the basis of compensation. Zongwe is of the view that the SADC Tribunal in the *Campbell* case could have followed suit to avoid the difficulties it raised by considering the issues of racial discrimination and public purpose. The legal question would have been whether the compulsory acquisition of the Applicants' agricultural lands without compensation constituted an unlawful nationalisation.¹¹²

This is by no means implying that the factors that may deem an expropriation illegal are in some form of a hierarchy. The point to note is that if one of the factors is present and is not litigious then the expropriation should be rendered illegal despite the presence of any other contentious factors. That is to say if an expropriation is not followed by compensation, it should be deemed illegal despite the fact that it is in contention whether or not it was in breach of a treaty.

¹⁰⁹ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 24 - 25

¹¹⁰ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 25

¹¹¹ *Bernardus Henricus Funnekotter and Others v The Republic of Zimbabwe*, (ICSID) Case No. ARB/05/6

¹¹² D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 26

4.6 Contribution of the Campbell Case to the Law on Expropriations

On the one hand, the *Campbell* case seems not to fully consider and recognise the general exception that post-colonial expropriations to rectify economic disparities are legal. The failure by the SADC Tribunal to find that the Zimbabwean expropriations amounted to affirmative action policies or an exception to the general prohibition on discriminatory expropriations clearly contradicts international investment law. The *Campbell* case creates a legal predicament by suggesting that affirmative action policies and measures possibly or actually violate the SADC Treaty.¹¹³

A positive aspect of the *Campbell* case is that it clearly creates an exception to the exception. Zongwe points out that it implies that, if they are based on race and do not compensate the plaintiffs, expropriations can be illegal even if they are part of policies aimed at redressing economic inequalities brought about by a colonial past. However, this exception is only established by necessary implication. The *Campbell* case could have had full precedential value had it found that race-based expropriations are not unlawful, as a matter of principle, if they aim at redressing the economic inequalities caused by a colonial past. Further, those race-based expropriations to correct the effects of colonialism are an exception to the non-discrimination principle but that expropriations as an exception to the non-discrimination principle are unlawful if the expropriating State does not pay compensation.¹¹⁴

This obligatory essay goes further to add that by implication, any other factor that can render an expropriation illegal would be sufficient to be deemed as an exception to the exception. It can be argued that a race-based expropriation to correct the effects of colonialism can still be illegal if such a measure is in breach of a treaty or in breach of an explicit agreement between the host State and the investor, although the latter scenario is quite difficult to envisage. This proposition is supported by the fact that these factors do not exist in some kind of hierarchy.

The *Campbell* case further illustrates the notion that the interpretation and application of the principles in relation to the protection against discrimination are far from uniform. Many tribunals as did the SADC Tribunal may inadvertently make erroneous application of the

¹¹³ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 26

¹¹⁴ D. Zongwe, 'The Contribution of Campbell v Zimbabwe to the Foreign Investment Law on Expropriations', p. 26 - 27

principles thus contributing to the complexities surrounding the issue of discrimination and leading to inconsistencies and lack of uniformity.

4.7 Conclusion

The SADC Tribunal in the *Campbell* case had an opportunity to rule in such a manner that would have contributed effectively to foreign investment law on expropriations. This chapter has revisited this case and has pointed out that the holding of the Tribunal was ineffective and has suggested how the Tribunal should have found. This chapter has come to the conclusion that anti-discrimination principles in international investment law are not absolute. The exception lies in race-based expropriations aimed at correcting the economic inequalities of a colonial past. However, the exception to this exception is primarily that if compensation is not paid then the expropriation would be illegal. This chapter has further explored the idea that the exception to the exception, at least in the abstract, is not limited to the lack of payment of compensation only, but extends to the other factors that may deem an expropriation illegal without the discriminatory aspect in it.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The objective, in the preceding chapters, has been to outline the concern surrounding discrimination in international investment law. This work has outlined the efforts advanced through the international legal framework as well as in customary international law to protect foreign investors against discrimination. This work has also attempted to establish whether or not these efforts have proved to be effective. This chapter shall therefore draw conclusions from the preceding chapters as to the adequacy of the protection against discrimination and make recommendations to determine what needs to be done in order to strengthen the principles protecting foreign investors against discrimination without abrogating the needs and interests of the host State.

5.1 Conclusions Drawn

From the preceding chapters, it can be concluded that there exists, what can be referred to, as an international legal framework in relation to foreign investment protection generally and protection against discrimination in particular. Although this framework is not in the form of a single global treaty on investment, the contributions by the UN and other international organisations as outlined have facilitated a comprehensive development of the main principles of law governing the treatment of foreign investment under international law. However, due to the variance of these efforts, there is neither a uniform interpretation nor application of these principles. Further, not all countries are State party to the plethora of instruments that attempt to govern foreign investment. The adequacy of such principles therefore is brought into question.

It is clear that protection of foreign investors against discrimination has also developed comprehensively and dynamically under customary international law. Most, if not all of the essential principles of foreign investment are now firmly recognised in customary international law so much so that even in the absence of a BIT between a host and home State, a foreign investor is entitled to the protection of such principles. However, it can be concluded from the preceding chapters that a concept of legal discrimination does indeed

exist especially in relation to a host States right to regulate investments within its jurisdiction as a matter of sovereignty. Nonetheless, it is unclear just how far fundamental principles such as national treatment, MFN as well as the standard of fair and equitable treatment can be defied, as it were, in the name of regulation by host States. What is clear to note however, is that the current thinking suggests that investment agreements between host States and foreign investors are entered into for the main purpose of protecting foreign investment whether or not this is detrimental to sustainable development in the host State.

Further, in this regard, unlike international trade law (through GATT) which provides concrete exceptions to national treatment and MFN, the exceptions to the principle of discrimination under international investment law are not as concrete and may or may not apply depending on the circumstances of each particular case. It can be concluded that this is due to the fact that there is no universal global treaty on investment.

Having noted that, it can be concluded that arbitral tribunals as well as the ICJ have contributed to the development of the principles protecting against discrimination as is evident in the *Campbell* case which established an exception to the exception of discrimination. However, there is no formal doctrine of precedent properly so-called followed in international investment law and as a result many complexities surrounding the principle of non-discrimination remain; due to the fact that they are applied differently by different arbitral tribunals.

Lastly, protection of foreign investment is arguably supposed to lead to an increase in its flow. In this regard however, although there is no convincing evidence to suggest that the conclusion of BITs have indeed increased the flow of investment, they have positively and unquestionably instilled a great measure of security in foreign investors. These treaties have provided an assurance to the foreign investor that in the event of governmental interference by a host State, the investor has recourse to an international legal remedy.

It is also clear to conclude that BITs generally do not include any provisions that impose any obligations on foreign investors towards the host countries. Further, it can be concluded that BITs provide legal protection that goes beyond national law and provide investors with remedies for breach of rights as secured by the treaty, even though the investor would have

no right whatsoever to redress under the national law. This has led to a proposition that BITs are discriminatory in themselves.

5.2 Recommendations

From the foregoing, it is clear to conclude that much has been done to substantiate the outlawing of discrimination in international investment law. However, the lucidity and effectiveness of these principles could still yet improve. This paper shall hereunder explore how the principles protecting against discrimination can further be extended without abrogating the rights and needs of the host State.

5.2.1 Global Treaty on Investment

As established, there have been various developments in foreign investment law in relation to the protection against discrimination. These developments have in some respects been codified into a plethora of international instruments at an attempt to standardise foreign investment protection. Further, these principles have also developed under customary international law. However, these developments are not uniformly interpreted nor applied thus leading to the proposition that they are pointing in different directions and adding to the confusion and inconsistency that already exists in the area.¹¹⁵

In order to ameliorate these challenges it is recommended that a global treaty on investment is concluded. This is a recommendation that has been considered before as is evident from the 2001 Doha Declaration. This declaration recognised that any framework:

“...should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.”¹¹⁶

A global treaty would serve as a “balancing act” making provisions that protect foreign investors without abrogating totally the rights and needs of the host State. Such a treaty would make provision for the regulatory authority of foreign States thus providing for a limit to excessive protection of foreign investment.

It must be noted from the framework currently obtaining that host States can simply deprecate a bilateral or other contractual treaty by giving advance notice. It is also easier to

¹¹⁵ S. Subedi, *International Investment Law – Reconciling Policy and Principle*, p. 195

¹¹⁶ The World Trade Organisation’s Declaration on the TRIPS Agreement and Public Health (Doha Declaration) of 2001

renegotiate such treaties since the number of States party to them are not extensive. A global treaty on investment however, would mean greater commitment on the part of a host State for long periods of time as it would be harder to deprecate or withdraw from such a treaty thus strengthening foreign investment protection and as a result strengthening the protection against discrimination in particular. The strength of such a position is illustrated with the situation obtaining under the WTO system in international trade law which does not allow participants to easily select what they want to apply to them. If a State wishes to withdraw from a WTO agreement, it would have to withdraw from the WTO itself.

A comprehensive global treaty on investment would synchronise the regulations and practices in foreign investment law and would bring about a much needed measure of consistency and uniformity in protecting foreign investors. This perhaps would lead to the death of the BIT era as it would be unnecessary to have individual BITs between two State parties to the treaty.

A comprehensive global treaty on investment would standardise and thus strengthen the protection of foreign investors against discrimination as core principles such as national treatment, MFN, fair and equitable treatment, full protection and security the standard of compensation payable would be clearly defined and uniform. A comprehensive global treaty would also address issues in relation to the extent awards can be granted against host States so as not to undermine the principle of State sovereignty.

5.2.2 Reshaping the Right to Regulate

In addition to a global treaty on investment, it is recommended that the aim of all international investment agreements made pursuant to such a treaty or indeed standing on their own right in the absence of such a treaty, be reshaped. As established from the preceding chapters, the current thinking is that the objective of investment agreements is to protect foreign investors rather than to promote and protect sustainable foreign investment.

It is recommended that there is a full review of the fundamental structure and rationale behind existing international investment agreements in order to balance between foreign investment protection and promotion and protection of sustainable development. This is not to say that such reshaped agreements would not provide protection to foreign investors

against discrimination in particular but would in effect solidify the right to regulate on the part of host States thus providing a much needed balance between foreign investment protections generally, the protection against discrimination and the needs and interests of the host State. Such a reshaped thinking would achieve even more positive results that are available from Foreign Direct Investment (FDI).

The first thing which comes to mind as a consequence of such reshaped thinking is that host States would become more aggressive and controlling of foreign investors and their investment thus making discrimination more likely. However, the situation obtaining currently clearly points to the fact that foreign investors can completely replace the host States' laws on how they may be treated with international laws and remedies thus suggesting that in a bargain between an investor and a host State, the host State is at a loss.

It is recommended that in order to reshape the aim and objectives of an international investment agreement, it should be realised by all stakeholders that the right to regulate is a fundamental feature of sovereignty under international law. Therefore, any protection that IIAs confer on foreign investors would be seen as an exception to the general right to regulate. This proposition would even be more plausible if a global treaty on investment is concluded that clearly outlines and enshrines issues of sovereignty thus giving rise to the right to regulate.

In the absence of such a global treaty on investment as the current situation obtains, the preamble or a substantive paragraph can be used in the IIA itself to recognize the inherent right to regulate as the starting point.

5.2.3 Imposing Obligations on Foreign Investors under BITs and IIAs

In the absence of a comprehensive global treaty on investment, the situation obtaining currently clearly points to the fact that BITs and IIAs are discriminatory in themselves as they provide for protection that goes further and beyond that provided in the national law of a host State. The consequence of this is that foreign investors are granted wider rights than the nationals of a host State suggesting a measure of discrimination. Further, BITs and IIAs do not impose any obligations on foreign investors thus leading to excessive protection and the likely result of abuse by a foreign investor.

is recommended that although BITs and IIAs are necessary for the protection of foreign investors against discrimination, the very least that can be done to counter the fact that they are discriminatory in themselves is to impose obligations on the foreign investor. This would undoubtedly assist in protecting the needs and interests of the host State whilst at the same time protecting foreign investors against discrimination. With the exception of a few BITs, most of them are silent on the preservation of the environment or the protection of human rights by foreign investors in the countries where they do their business.

2.4 Arbitral Precedent

In the absence of a comprehensive global treaty on investment, some of the core principles relating to expropriation, compensation and the meaning and application of national treatment, MFN, fair and equitable treatment, full protection and security; have been applied to varying degrees by international courts and tribunals as a result of no internationally agreed definition of these terms. This has led to inconsistencies and lack of uniform interpretation and application of these principles.

It is recommended that in order to ensure certainty and predictability, as well as consistency and equal treatment in relation to the principles protecting against discrimination and exceptions if any, it is necessary that a system of arbitral precedent properly so-called is developed. This would lead to predictability, consistency and certainty as arbitral tribunals would be bound by the findings of previous tribunals. It can be argued conversely that such provisions as Article 53 of the ICSID Convention that States that an award is binding only on the parties involved in the dispute,¹¹⁷ contributes to the absence of a doctrine of precedent. However, this is not a conclusive argument as what is of prime importance to the development of international investment law is not the awards granted but the enunciation of the applicable principles.

Therefore, the *Campbell* case creating an exception to the exception to the principle of discrimination would be able to enjoy full precedential value properly so-called as subsequent tribunals would be legally bound to this finding.

¹¹⁷ Article 53 of the ICSID Convention of 1965

5.2.5 International Investment Court

In order to add to the certainty of the law protecting foreign investors against discrimination, in addition to arbitral precedent, it is recommended that a single international investment court is established to act as an appeal forum stemming from the findings of various arbitral tribunals on the matter of investment. The principles in relation to the protection against discrimination elucidated by such a forum would be binding on tribunals and subsequent cases brought to it thus ironing out the inconsistencies that prevail currently.

In the alternative, a single international investment court could be established to abolish all together the process of arbitration. It could be argued that this would be just as effective as the judges sitting would undoubtedly be those with sharp expertise in matters relating to investment law. Perhaps the only drawback to such a system would be that a single investment court would be burdened to address all the investment disputes which may compromise its efficiency as a fast tracked process as is guaranteed by arbitration. Therefore, it is recommended that it is preferable for the single investment court to act as an appellate court as outlined above.

5.3 Conclusion

The issue of discrimination in international investment law is a complex one. This is due to the fact that on the one hand, a foreign investor ought to be protected against discrimination and on the other hand as a matter of sovereignty, a host State ought to be able to regulate investment within its jurisdiction.

This obligatory essay has considered the various forms of foreign investment protection under the international legal framework and under customary international law and has concluded that although extensive much is still needed to be done in order to add to their effectiveness as outlined in the foregoing recommendations. This work has also discussed the accepted foundations for the legality of nationalisations and expropriations and has concluded that the lucidity, adequacy and suitability of these principles of foreign investment protection are brought into question as to the inconsistencies in their interpretation and application.

This obligatory essay further highlighted the issue of discrimination in particular noting that the standard of fair and equitable treatment under which the principle of non-discrimination is

deeply rooted escapes a single definition and as such the extent of protection against discrimination varies from one host country to the next depending on which approach is adopted in its interpretation and application. This work further discussed discrimination in relation to the right to regulate and explored the concept of legal discrimination concluding that the current situation obtaining seems to be inclined to the protection of foreign investors as opposed to upholding the needs and interests of the host State.

This paper finally considered as a case study, the case of *Mike Campbell v The Republic of Zimbabwe* and concluded, although having its faults that it has positively contributed to the foreign investment law on expropriations by establishing an exception to the exception of the principle of discrimination within the realms of the concept of legal discrimination.

It is the ultimate conclusion of this paper, in light of the foregoing, that the complexities surrounding the issue of discrimination in international investment law can well be elucidated if a comprehensive global treaty on investment is concluded that, like GATT under international trade law, provides for the definition, interpretation, application and exceptions of and to the core principles in relation to the protection against discrimination.

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