

# **Foreign investment protection laws in Zimbabwe; A comparison of the Zimbabwe Investment And Development Agency Act [Chapter 14:37] and the Protection Of Investment Act of South Africa, Act 22 Of 2015**

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## **Abstract**

Since 1980, Zimbabwe has adopted various measures and enacted multiple laws which were aimed at promoting and protecting foreign investment. These laws have been subject to tumultuous debates between various schools of thought. These measures and laws were influenced by the various approaches that Zimbabwe adopted towards foreign investment at different periods. This paper argues that Zimbabwe has subscribed to different theories underpinning foreign investment and also identifies the recognised forms of foreign investment in Zimbabwe. In this paper, it is established that Zimbabwe has used and currently uses the both Bilateral Investment Treaties (Hereinafter BIT) and national legislation to protect foreign investment. This paper comes from the premise that Zimbabwe's foreign investment legal regime has been chaotic over the years. It contends that, while Zimbabwe has now codified previously incongruent legislation under the Zimbabwe Investment and Development Agency Act [Chapter 14:37] (hereinafter ZIDA Act) and taken steps to reverse to varying degrees, controversial policies and laws such as those relating to land reform program and indigestion, scepticism remains about the investor-friendliness and protections granted to foreign investment in Zimbabwe. It is against this background that this paper seeks to examine the foreign investment protection mechanism per ZIDA Act and compare it with the Protection of Investment Act 22 of 2015 of South Africa (hereinafter PIA). The main aim of the comparison is to identify the similarities and differences between the two Acts and to identify the lessons that Zimbabwe can draw from the PIA. This paper also identifies some of the gaps and inconsistencies in Zimbabwe's approach to foreign investment protection and recommends corrective measures.

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## 1. Introduction

This paper seeks to study Zimbabwe's investment laws and deliberate on the various theories underpinning foreign investment that Zimbabwe has subscribed to over the years. In order to achieve this objective, this paper is structured into several sections. The paper will begin by providing a brief background on the protection of foreign investment, its genesis and evolution in Zimbabwe. Secondly, it will discuss the two main forms of foreign investment and the implications of each. Thirdly, an overview of Zimbabwe's historical context of FDI from independence to date will be provided followed by a discussion on the different theories of FDI that Zimbabwe subscribed to at different phases. These theories are the Classical Theory, Dependency Theory and Middle Path Theory. The middle path theory is more identified with in this chapter because it offers a balanced perspective. Further, the paper will discuss the ZIDA Act and compare it with the PIA. The main aim of the comparison will be to identify the similarities and differences between the two Acts and to identify the lessons that Zimbabwe can draw from the PIA.

## 2. Background

Zimbabwe is a democratic republic that attained independence in 1980.<sup>1</sup> The first president of Zimbabwe was Canaan Banana who served from 1980 to 1987. President Robert Mugabe served from 1987 to 2017, and President Emmerson Mnangagwa has been president from 2017 to date. Post 2000, Zimbabwe became characterised by an unstable political atmosphere and a highly fragile economy.<sup>2</sup> The legal atmosphere during President Mugabe's regime was a victim of the unstable political atmosphere. The unstable political, economic and legal environments caused a lot of uncertainty, and this was an undesirable feature for

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1 A Nyanguru and M Peil 'Zimbabwe since Independence: A People's Assessment' (1991) Vol. 90 Oxford University Press No. 361 1

2 Inflation in Zimbabwe rose from 22% in 1995 to 58.5% in 1999 and 80% by mid 2000. By 2008 the inflation rate had risen to near the 100 00 per cent mark. S Mclean 'Mugabe at war: the political economy of conflict in Zimbabwe' (2002) Vol 23, Third World Quarterly, No 3, pp 513–528, 552; TS Conkling 'Analysis Of The Zimbabwean Hyperinflation Crisis: A Search For Policy Solutions' Published Bsc Thesis The Pennsylvania State University (2010) 18. Zimbabwe also experienced political instability as evidenced by the ruling government's intolerance for opposition and political violence mainly directed at civilians from 1997 to 2008; I Lupahla 'The fixed effects of political instability and conflict on economic growth and development' (2018) Political Economy Southern Africa 2

an investment destination or host for investors.<sup>3</sup> Zimbabwe's history pertaining land is characterised by gross violation of investors' rights as evidenced by Zimbabwe's expropriation of white owned farms without compensation through the land reform programme which can be traced back to as far back as 2000.<sup>4</sup> The expropriation of land without compensation was authorised by Amendment 16<sup>5</sup> and 17<sup>6</sup> of the Constitution of Zimbabwe. Section 16B(3) of Amendment 17 further ousted the jurisdiction of the courts to hear and decide on matters relating to land acquisition. This government action was against the precepts of the non-discrimination principle which demands that investments should not be impaired by arbitrary or discriminatory measures by the State.<sup>7</sup>

The expropriation of white owned farms resulted in the SADC Tribunal case of *Campbell v Republic of Zimbabwe* SADC (T) 2/2007<sup>8</sup> and the ICSID case of *Funnekotter and others v. Republic of Zimbabwe* Case No. ARB/05/6)<sup>9</sup> wherein the compulsory acquisition and expropriation of farms was challenged. The SADC Tribunal found that the acquisition of white owned farms was unlawful and discriminative; due process was not followed and the aggrieved white farmers were denied access to courts of law.<sup>10</sup> The white farmers involved in the Campbell case were foreign investors in Zimbabwe and were not afforded protection under the law. In the Funnekotter case, Zimbabwe was found to have directly expropriated the property of white farmers in Zimbabwe who were foreign investors. The ICSID found the expropriation was unlawful, due process was not followed and the aggrieved white farmers were denied access to the courts and the compulsory acquisition was discriminatory

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3 ME Kuveya 'Foreign Direct Investment and the Curse of Property Rights in Zimbabwe.' Published Thesis University of Pretoria, (2019) 50

4 D Zongwe, 'The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations' Comparative Research in Law and Political Economy. Research Paper No. 50 (2009) 3 <https://digitalcommons.osgoode.yorku.ca/clpe/158/> (accessed 18 January 2023)

5 Constitution of Zimbabwe Amendment No. 16, Act 5 of 2000 of 19 April 2000.

6 Constitution of Zimbabwe Amendment No. 17, Act 5 of 2005 of 14 September 2005.

7 R Dolzer and C Schreuer Principles of International Investment Law (2012) 89.

8 *Campbell v Republic of Zimbabwe* SADC (T) 2/2007

9 Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (International Centre for Settlement of Investment Disputes.(ICSID) Case No. ARB/05/6)

10 *Campbell v Republic of Zimbabwe* SADC (T) 2/2007 53 and 58

Post 2018, the Republic of Zimbabwe as led by President Emmerson Mnangagwa brought a number of changes to the legal framework that governs foreign investments in Zimbabwe. Firstly, through the Finance Act No. 1 of 2018, the Indigenisation and Economic Empowerment Act,<sup>11</sup> which endeavoured to have foreign public companies and any other foreign businesses cede at least 51 percent of their shares to indigenous Zimbabweans was amended.<sup>12</sup> The mandate is however, still applicable to foreign businesses, companies or entities that are involved in the extraction of platinum and diamond.<sup>13</sup> Secondly, in 2020 the ZIDA Act was signed into force with the intention to promote, facilitate and protect foreign investment in Zimbabwe.<sup>14</sup> Prior to the ZIDA Act, Zimbabwe did not have detailed legislation that protected foreign investment. The ZIDA is the first Act that sought to promote investor confidence by explicitly providing for the rights of foreign investors and investment in Zimbabwe. The ZIDA Act is without doubt a progressive legislative piece which seeks to promote investor protection in Zimbabwe by placing obligations on the Government to protect foreign investment. It is against this background that this study seeks to investigate Zimbabwe's legal framework and advance lessons from the future.

### **3. Genesis and evolution of foreign investment protection**

Foreign investment generally refers to investments that are made by the nationals of one country in another country, the host country.<sup>15</sup> In International Investment Law (hereinafter IIL), an investor is a foreign person who commits resources in another country for a long time for the purpose of making a profit.<sup>16</sup> Foreign investment can be characterised as both a blessing and a curse because on the one hand, it enhances economic development, facilitates the transfer of technology and leads to the creation of jobs, and on the other hand, foreign investment can

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11 Indigenisation and Economic Empowerment Act Chapter 14:33

12 E Chitsove 'Indigenisation Laws and Bilateral Investment Treaties in Zimbabwe' (2017) University Of Botswana Law Journal 73. Section 42 of the Finance Act No 1 of 2018 amended the Indigenisation and Economic Empowerment Act [Chapter 14:33] to the effect that diamond and platinum became the only extractive industries that were subject to indigenization

13 Section 3(1) of the Finance Act No 1 of 2018

14 Preamble of the Zimbabwe Investment and Development Agency Act [Chapter 14:37]

15 M Agosin and R Mayer, 'Foreign investment in developing countries: does it crowd in domestic Investment? (2000) UNCTAD Discussion Paper No. 146 1

16 C Yannaca-Small 'Definition of Investor and Investment in International Investment Agreements' (2008) OECD 11

create challenges such as economic dependence, exploitation of resources and exploitation of human capital.<sup>17</sup> It can thus be argued that foreign investment is a double edged sword. The protection of foreign investment can be traced to as far back as the 13<sup>th</sup> century when the Hanseatic League was formed with one of its main purposes being to protect the interests of its members which had been granted by foreign States.<sup>18</sup> In seeking to protect foreign investment, the Hanseatic League led to the birth of principles which later became known as the National Treatment (hereinafter NT).<sup>19</sup>

In the 17<sup>th</sup> century, the signing of treaties that were known as Friendship, Commerce and Navigation Treaties (FCN) surfaced.<sup>20</sup> These treaties sought to address issues which would prompt cordial relations between States and promote the protection of foreign investment.<sup>21</sup> In these treaties were provisions that sought to protect foreign investment from expropriation without compensation, permit repatriation of profits and provide for dispute settlement mechanisms.<sup>22</sup> However, with States that were not part of these treaties, European States and the United States of America relied on the gun boat diplomacy to protect its citizens and their investment who were in other States.<sup>23</sup> The United States of America as one of the major economic powers of the 18<sup>th</sup> and 19<sup>th</sup> century led the initiative to develop international doctrines that

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17 P Pinto and B Zhu 'Fortune or Evil? The effects of inward foreign direct investment on corruption' (2006) Saltzman Working Paper No. 10 7 [https://ciaotest.cc.columbia.edu/wps/iwps/0015614/f\\_0015614\\_13618.pdf](https://ciaotest.cc.columbia.edu/wps/iwps/0015614/f_0015614_13618.pdf) 9 (accessed 12 April 2023)

18 J Carsten, 'The City of Lübeck and the Internationality of Hanseatic Trade' in W Justyna and J Stuart (eds) *The Hanse in Medieval and Early Europe* (2012) 37

19 K Yannaca-Small Arbitration Under International Investment Agreements: A Guide to Key Issues (2018) 412

20 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1482> (accessed 12 November 2025)

21 J Coyle 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) Colombia Journal of Transnational Law 51. The United States of America and the Italian Republic entered into a FCN Treaty in 1948. Ireland and the United States of America also entered into an FCN Treaty in 1950. These FCN treaties were mainly aimed at strengthening bonds of peace, encourage economic relations and promote mutually advantageous commercial intercourse.

22 R Wilson *United States Commercial Treaties And International Law* (1960) 38

23 The gunboat diplomacy was a measure used to protect the property of aliens in host States by the home States. The gunboat diplomacy, mainly used by super powers, facilitated the use of threats of force and economic sanctions to protect the interests and investment of their nationals while in host states. The use the gunboat diplomacy was seen when Germany, Britain and Italy initiated what later came to be known as the Venezuelan Blockade Crisis in a bid to coerce Venezuela to compensate nationals of the aforementioned states for the loss they suffered during civil war. P Terry, 'The Return of Gunboat Diplomacy: How the West has Undermined the Ban on the Use of Force' (2019) Vol 10 Harvard National Security Journal Vol. 78

sought to protect aliens and the property of aliens in other States.<sup>24</sup> With time, Customary International Law (hereinafter CIL) developed and one of its principles, particularly State responsibility for injury to aliens, sought to protect the property of aliens.<sup>25</sup> This meant that the property of foreign investors including foreign investment was guaranteed some protection. CIL was developed and still is instrumental in the protection of foreign investment. However, to date, all international efforts to have an international treaty that governs and protects foreign investment have been in vain. Thus, the protection of foreign investment remains governed and dictated by CIL, IIL and national laws in various States. The initiative to enact national laws that protect foreign investment was as a result of States' realization that the legal framework is a determinant in the attraction of foreign investment.

#### **4. Forms of foreign investment**

There are two main forms of foreign investment. These are foreign direct investment and portfolio investment.<sup>26</sup> For a long time, these have been considered to be distinct from each other. However, there are scholarly concerns as to whether these should still be treated as separate and distinct in the modern world or should be treated as mutual and interconnected phenomena.<sup>27</sup> Proponents of the former argue that the two should be treated as distinct because foreign direct investment guarantees sustainable economic growth whereas portfolio investments do not.<sup>28</sup> Foreign direct investment is investment wherein an investor transfers tangible and or intangible assets from one country to another for the purpose of establishing

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24 In 1938, the United States of America demanded compensation for agricultural land that had been expropriated from Americans since 1927. It was through diplomatic dialogue between the United States Secretary of State Cordell Hull and the Mexican government that the 'Hull formula' was made and used as the preferred remedy or formula for compensation for expropriation. F Okpe 'A Historical Account of the Internationalization of Invest Disputes: What the Global South Should Know When Negotiating Bilateral Investment Treaties' (2017) Florida A & M University Law Review 229

25 M Sornarajah, *The International Law on Foreign Investment* (2010) 345

26 Sornarajah (n 26 above), 8

27 M Humanicki, R Kelm and K Olszewski 'Foreign Direct Investment and Foreign Portfolio Investment in the contemporary globalized world: should they be still treated separately?' (2013) National Bank of Poland's Working Paper No. 167 <https://mpra.ub.uni-muenchen.de/58410/> (accessed 12 April 2023)

28 Y Ahmad, P Cova and R Harrison 'Foreign Direct Investment versus Portfolio Investment: A Global Games Approach.' (2004) University of Wisconsin Whitewater 1 [https://www.uww.edu/documents/colleges/cobe/economics/wpapers/05\\_03\\_ahmad.pdf](https://www.uww.edu/documents/colleges/cobe/economics/wpapers/05_03_ahmad.pdf) (accessed 12 April 2023)

wealth or a profit generating enterprise that is under his partial or total control.<sup>29</sup> On the other hand, portfolio investment is the buying of securities, shares or stakes in a company that is already functioning for purely financial benefit.<sup>30</sup>

Foreign direct investment often leads to sustainable economic growth. This is because foreign direct investment involves the transfer of capital, skill and technology to start an enterprise. There are more benefits and risks associated with this form of investment and perhaps that is the reason why it is afforded protection under CIL.<sup>31</sup> Foreign direct investments demand a lot of input from the investor, they are for a long period of time, the investor assumes a large measure of risk and the host State's economy benefits substantially.<sup>32</sup> Portfolio investments have fewer benefits and less risks and perhaps the reason why they are not protected under CIL. With foreign direct investment, the investor owns the investment and manages it whereas with portfolio investment, the investor does not control nor manage the investment but is only interested in the profit. Currently, the extent to which portfolio investments are considered investments for the purposes of attracting legal protection under IIL is dependent on the dictates of each BIT. Portfolio investments are recognized in various BIT such as that of Zimbabwe and United Arab Emirates,<sup>33</sup> China and Zimbabwe,<sup>34</sup> and Zimbabwe and Germany.<sup>35</sup> On the contrary, the ZIDA Act excludes portfolio investments such as shares, stocks, bonds in the definition of foreign direct investments. This means that a foreign investor cannot claim protection of portfolio investments in terms of the ZIDA Act.<sup>36</sup> Consequently, foreign investors might be hesitant to invest in portfolio investments since they are not afforded legal protection in terms of the ZIDA Act.

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29 Sornarajah (n 26 above) 9

30 United Nations Conference On Trade And Development. Scope And Definition. UNCTAD Series on Issues in International Investment Agreements II. (2011) 29

31 Sornarajah (n 26 above) 9

32 Salini Construttori SPA and Italstrade SPA v Kingdom of Morocco (ICSID Case No ARB 00/4) Decision on Jurisdiction of 16 July 2001

33 Article 1 of the Agreement Between The Government Of The Republic Of Zimbabwe And The Government Of The United Arab Emirates On Promotion And Reciprocal Protection Of Investments.

34 Article 1 of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments

35 Article 1 of the Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments.

36 Section 2 of the Zimbabwe Investment And Development Agency Act [Chapter 14:37]

**5. Historical context of foreign investment protection in Zimbabwe and the theories of foreign direct investment Zimbabwe subscribed to at different phases.**

### **5.1 Zimbabwe's Historical Context from 1980 to 1994**

Zimbabwe attained independence in 1980 under President Mugabe and inherited the colonial government's policy and attitude on foreign investment. World Bank records show that FDI increased from USD\$1 8550 million in 1980 to USD\$2 849 million in 1985.<sup>37</sup> This was an FDI inflow growth of 83.82%.<sup>38</sup> This growth was a result of Zimbabwe's open and friendly policies which attracted FDI. In this phase, from 1980 to 1995, Zimbabwe adopted a trade openness policy which attracted investment. Pursuant to pressure from the World Bank and the International Monetary Fund, Zimbabwe also adopted the Economic Structural Adjustment Programme (Hereinafter ESAP) which was meant to liberalise the economy in 1991.<sup>39</sup> At this phase, Zimbabwe's investment policies were heavily influenced by economist thinking. In 1992, Zimbabwe enacted the Zimbabwe Investment Centre (hereinafter the ZIC Act) as part of the ESAP.<sup>40</sup> The ZIC Act provided for the establishment of the Zimbabwe Investment Centre which was solely responsible for approving investment proposals and issuing licenses and permits to foreign investors. The ZIC Act was established to attract investors. This attitude was intended to attract FDI driven by Zimbabwe's desire to benefit from the gains of FDI.

One can argue that in this period, Zimbabwe subscribed to the Classical Theory of FDI which postulates that foreign direct investment seeks to benefit the host State and the host State benefits more than the home State.<sup>41</sup> This theory maintains this

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37 World Bank (2014). World Development Indicators published by the World Bank, Washington D.C

38 World Bank (2014). World Development Indicators published by the World Bank, Washington D.C

39 J Muzurura 'Determinants of foreign direct investment (FDI) in Zimbabwe: What factors matter?' (2016) Midlands State University Research in Business and Economics Journal. 3 See also M Tekere 'The Poverty Reduction Forum: Structural Adjustment Program Review Initiative' (2001) University of Zimbabwe Trade and Development Studies Centre 5

40 Tekere (n 40 above) 5

41 A Abay, 'Dependency Theory to the Study of Foreign Direct Investment (FDI) and Its Relevance to the Horn of Africa: A Matthew Effect?'(2022) Vol 2 International Journal of Humanities Social Science and Management, Issue 3 112

view because of several factors. Firstly, foreign investment facilitates the flow of capital from the home State to the host State. It also facilitates the transfer of skills and technology.<sup>42</sup> Proponents of this theory further argue that foreign investment widens the tax base and thus more revenue for the host State.<sup>43</sup> The Classical Theory further asserts that foreign investment benefits the host State because the investor usually facilitates the improvement of health, transport, educational facilities and infrastructure in general.

During this phase, Zimbabwe started signing BIT. Some of the first BIT to be signed were between Zimbabwe and countries such as Mozambique in 1990, Malaysia in 1994, Portugal in 1994, the United Kingdom in 1995, Switzerland in 1996 and Netherlands in 1996.<sup>44</sup> Zimbabwe entered into a number of BIT in this phase because of its trade openness policy which was influenced by economist thinking and its desire to attract FDI and its benefits as in line with the Classical Theory of FDI. Zimbabwe experienced FDI growth in this phase because of its trade openness policy. In this phase, there was no law that strictly provided for FDI protection. The ZIC Act did not enshrine provisions intended to protect foreign investment. FDI was protected through the BIT that existed between parties.

In 1992, Zimbabwe enacted the Land Acquisition Act. This Act provided for protection of FDI in the form of agricultural land in that it provided for the compulsory acquisition of land which would be accompanied by fair compensation.<sup>45</sup> The Act also provided those affected by compulsory acquisition the right to approach the court challenging the price of the acquisition only and not the acquisition itself. Expropriation or compulsory acquisition with compensation was in line with BIT to which Zimbabwe was a party to then.<sup>46</sup>

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42 Abay, ' (n 42 above)

43 J Toone, 'Mirage in the Gulf?: Examining the Upsurge in FDI in the GCC and Its Legal and Economic Implications for the MENA' (2013) Region Emory International Law Review 713

44 <https://investmentpolicy.unctad.org/international-investment-agreements/countries/233/zimbabwe> (accessed 13 February 2025)

45 Section 1 and 2 of the Land Acquisition Act 1992

46 Article 9 of the Russian Federation - Zimbabwe BIT (2012); Article 4 of the China – Zimbabwe BIT (1996); Article 5 of the Czech Republic - Zimbabwe BIT (1999); Article 4(2) of the Zimbabwe – Germany BIT (1995); Article 5 of the Korea – Zimbabwe BIT (2010); Article 6 of the Netherlands – Zimbabwe BIT (1996); Article 9 of the Zimbabwe – United Arab Emirates BIT 2022; Article 5 of the South Africa – Zimbabwe BIT (2010).

## 5.2 Zimbabwe's Historical Context from 1995 to 2008

From the years 1995 to 2008, Zimbabwe as led by President Mugabe experienced unprecedented decline in FDI.<sup>47</sup> In 1995, Zimbabwe abandoned the ESAP which was meant to liberalise the economy.<sup>48</sup> The ESAP did not rapidly increase FDI as had been expected. FDI as a percentage of the Gross Domestic Product declined from an average of 15% to 4% between the years 1995 to 2000.<sup>49</sup> The Gross fixed capital formation (hereinafter the GFCF) which is the total value of new investments declined from an average of 23% to 2% in 2010.<sup>50</sup> Abandoning the ESAP was motivated by political reasons and not purely economic reasons.

In 2000, following a failed referendum on a Constitution draft, the parliament of Zimbabwe decided to amend the Constitution to the effect that the victims of the land reform program would immediately lose their interest in land.<sup>51</sup> Per this Constitutional Amendment, FDI in agricultural land had been stripped of all protection because the Government could expropriate agricultural land and only compensate for improvements and not the land itself. In 2005, the Government of Zimbabwe amended the Constitution again. This was the 17<sup>th</sup> Constitutional Amendment which prohibited deprivation of property.<sup>52</sup> Section 16(1) of the Constitutional Amendment prohibited the compulsory acquisition of any property, right or interest except through a law that permitted acquisition of land for redistribution. This meant that all other FDI property was accorded full protection except for agricultural land. It is in this phase wherein Zimbabwe witnessed the Land Reform Programme. The amendments were strongly influenced by political reasons and not economic reasons nor thinking.

In 2006, the Government of Zimbabwe enacted the Zimbabwe Investment Authority Act (hereinafter the ZIA Act) which repealed the ZIC Act. The purpose of the ZIA Act

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47 Muzurura (n 40 above) 3

48 Muzurura (n 40 above) 3

49 Muzurura (n 40 above) 4

50 Muzurura (n 40 above). 4

51 Section 16A of the Constitution of Zimbabwe Amendment Act (No.16) of 2000

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

was to establish the Zimbabwe Investment Authority.<sup>53</sup> The Purpose of the Zimbabwe Investment Authority was to promote, encourage and facilitate investment in Zimbabwe. The Zimbabwe Investment Authority was also responsible for approving investment licenses. The ZIA Act was welcomed but it was not substantially different from the ZIC Act. Section 32 of the ZIA Act provided for investor protection in terms of the laws of Zimbabwe.<sup>54</sup> In as much as this was a step in the right direction, it was not enough. The ZIA Act should have gone a step further and enshrined the exact protections that are afforded foreign investors. This approach left the FDI protection framework fragmented.

In 2007 Zimbabwe passed the Indigenisation and Economic Empowerment Act [Chapter 14:33] (hereinafter the IEEA). This Act was signed into law in 2008. The purpose of the Act was to foster the involvement of Zimbabweans in the country's economic activities which they did not have access to.<sup>55</sup> Section 3 of the IEEA Act mandated the Government to take measures to ensure that at least 51% of all foreign public companies are owned by indigenous Zimbabweans. This section was applicable to all foreign and domestic investors in any sector of the economy. From Zimbabwe's indigenisation law, one can argue that Zimbabwe was now subscribing to the Dependency Theory of FDI.

According to the Dependency Theory, the relationship between developed and developing countries is characterized by an unequal exchange of resources in which developed countries extract raw materials and cheap labour from developing countries and then sell back the finished goods at a higher price. The Dependency Theory asserts that foreign investment can have negative consequences for and on developing countries, such as the exacerbation of economic and social inequalities, the exploitation of natural resources and the perpetuation of underdevelopment. It has been argued that foreign investment does not bring substantial economic development.<sup>56</sup> In Zimbabwe, it can be argued that this theory was seen to apply.

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53 Section 3 of the Zimbabwe Investment Authority Act [Chapter 14:30]

54 Section 32 of the ZIA Act states that The property or interest or right therein of every investor to whom an investment licence has been issued in terms of this Act shall be accorded every protection afforded by the laws of Zimbabwe.

55 Section 1 of the Indigenisation and Economic Empowerment Act [Chapter 14:33]

56 T Debele 'The contribution of foreign direct investments for regional economic development: in the case of Oromia regional state' Published MA Thesis, Addis Ababa University (2019) 9

This is because FDI exacerbated social and economic inequalities. The rich became richer and the poorer became poor. This is why the government of Zimbabwe introduced the IEEA so that indigenous Zimbabweans can be included in economic activities. FDI was substantially benefiting the investors and not indigenous Zimbabweans.

The IEEA did not in any way protect foreign investors. Rather, it discriminated foreign investors for the benefit of indigenous Zimbabweans. This was a violation of CIL which provides for protection in the form of non-discrimination and morefully the NT.<sup>57</sup> The IEEA placed foreign investors on an uneven footing when compared to domestic investors in like circumstances.<sup>58</sup> In addition, it failed to provide protection in the form of Fair and Equitable Treatment. Indigenisation laws, morefully the IEEA violated the international minimum standards of treatment which is protection that must be afforded to foreign investors.<sup>59</sup> Elements of the international minimum standard amongst others are access to justice, due process, fair and non-arbitrary treatment and non-discrimination.<sup>60</sup>

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57 SN Balinda 2016 'Factors Attracting Foreign Direct Investments (FDIs) in Rwanda: The Case of Selected Companies (2016) Saudi Journal of Business and Management Studies 165.

58 UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs (2009) 35

59 JA VanDuzer, P Simons, and G Mayeda 'Integrating sustainable development into international investment agreements: a guide for developing country negotiators.' (2013) Commonwealth Secretariat 111. The International Minimum Standard at inception was one that sought to protect the lives and liberty of foreign nationals. With time, it evolved to the extent of also protecting foreign investors' property and their investment. As such, the debate that exists today is whether or not the international minimum standard elements are still as in the 20th century or have evolved, developed and expanded with time. FET has been recognized as part of the International Minimum Standard and in some instances the two have been held to be equivalent thus causing uncertainty in the extent and scope of the International Minimum Standard. AS Mussi 'International Minimum Standard of Treatment' 10 <https://asadip.files.wordpress.com/2008/09/mst.pdf> (accessed 15 March 2023). On the other hand, the International Minimum Standard has been seen as a standard that has been vague since inception and full of controversy. Its extent, scope and obligations on States not not been clearly defined because of the Calvo Doctrine and the National Treatment Principle. Arguments being that if by the National Treatment, foreign investors are accorded the same treatment as domestic investors, then the same protection accorded to domestic investors must be accorded to foreign investors. T Weiler 'A Historical Analysis of the Function of the Minimum Standard of Treatment in International Investment Law' in T Weiler and F Baetens (eds.), *New Directions in International Economic Law* (2011) 345.

60 A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 233; United Nations Conference for Trade and Development (UNCTAD), 'Fair and equitable treatment' (UNCTAD Series on issues in international investment agreements 1999) 37 [https://unctad.org/system/files/official-document/unctaddiaeia2011d5\\_en.pdf](https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf) (accessed 12 June 2023)

### 5.3 Zimbabwe's Historical Context from 2017 to 2024

In November 2017, President Mugabe stepped down as the president of the Republic of Zimbabwe and President Mnangagwa became the successor. This marked the beginning of a new political dispensation. Zimbabwe under President Mnangagwa had a different attitude towards FDI. This was first witnessed by the drafting and publishing of the Zimbabwe Investment Guidelines and Opportunities in Zimbabwe.<sup>61</sup> These guidelines reflected Zimbabwe's commitment to international best practices such as non-discrimination. In 2018 President Mnangagwa's regime amended the IEEA through the Finance Act No. 1 of 2018. Through the Finance Act No. 1 of 2018, the IEEA which endeavoured to have public companies and any other businesses to cede at least 51 percent of their shares to indigenous Zimbabweans was amended.<sup>62</sup> The IEEA had been enacted under President Mugabe's presidency. The amendment was progressive and in line with international best practices which protect FDI such as the NT and Fair and Equitable Treatment.

In February 2020, Zimbabwe enacted the ZIDA Act. The ZIDA Act repealed the ZIA Act [Chapter 14:30], the Joint Ventures Act [Chapter 22:22], and the Special Economic Zones Act [Chapter 14:34], all of which included investment laws. The ZIDA Act is applauded for clearly stating the rights and obligations of both the State and investors and thereby consequently protecting foreign investment. According to Kondo the ZIDA Act balances the rights and obligations of foreign investors thus making the legal framework clear.<sup>63</sup> The ZIDA Act accords investors with guarantees and rights which invariably are protections and place obligations on the State to protect foreign investment. Part III of the ZIDA Act provides for "investor guarantees and non-discriminatory treatment" and therein enshrines provisions which protect

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61 <https://www.idbz.co.zw/investor-relations/zimbabwe-investment-guidelines> (accessed 13 February 2025)

62 Chitsove (n 13 above) 73. Section 42 of the Finance Act No 1 of 2018 amended the Indigenisation and Economic Empowerment Act (Chapter 14:33) to the effect that diamond and platinum became the only extractive industries that were subject to indigenization

63 T Kondo Law and Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe, , (2021) 152

foreign investment.<sup>64</sup> Non-discrimination is a principle and protection at the heart of investment laws. To note is that not all guarantees are protections. Some guarantees have the effect of protecting like the guarantee against expropriation and some do not like the guarantee to transfer funds. However, the bottom line is all guarantees are a formal assurance which are binding on the State. Sections 11 and 20 of the ZIDA Act state that all investments must be established in accordance with and shall be subject to the laws of Zimbabwe. The implications are that an investment that has not been established in terms of the laws of Zimbabwe cannot be protected in terms of the ZIDA Act.<sup>65</sup>

As aforementioned, Zimbabwe under the presidency of President Mnangagwa adopted a different attitude towards foreign investment. One can argue that Zimbabwe since the coming into power of President Mnangagwa subscribed to the Middle Path Theory of investment. The Middle Path Theory of investment is a cautious and neutral theory of foreign investment which considers the positive and negative effects of foreign investment. It is a merger of the Classical and Dependency Theory of investment. This theory acknowledges that foreign investment brings development but such development might come at a cost which might include environmental degradation.<sup>66</sup> This theory does not support the view that foreign investment should be done away with because of its negative effects, rather, it asserts that countries must attract foreign investment and at the same time adopt laws and policies that will regulate foreign investment and consequently curb the negative effects of foreign investment.<sup>67</sup> The Middlepath Theory recognizes the

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64 Some of the protections provided by the ZIDA Act include Freedom of movement per section 12, Non-discrimination in sections 13 and 14, Fair and Equitable Treatment in section 16 and guarantee against expropriation in section 17.

65 It is common practice in BIT to provide protection to investors and investments that are legally established. The definition section of the SADC Model BIT defines investment as an enterprise or assets that are acquired or established in terms of the law of the host State; China Zimbabwe BIT of 1996; 2012 U.S. Model Bilateral Investment Treaty

66 Nigeria is known to be one of the biggest oil producers in the world. Revenue from oil in the year 2003 was estimated to be around \$20.9 billion. Unfortunately, foreign investors and political elite benefit from oil production and not the whole society. This is worsened by the fact that the oil industry of Nigeria has been characterized by gross violations of both environmental and human rights violations; A Osuoka 'Gas flaring in Nigeria A human rights, environmental and economic monstrosity. (2005) The Justice Climate Programme 8

67 R Jackman 'Dependence on Foreign Investment and Economic Growth in the Third World' (1992) Vol 34 No. 2 World Politics 124

importance of the host country's development objectives and the need for a mutually beneficial relationship between the investor and the host country. It emphasizes that foreign investment should not be viewed as a zero-sum game, where the investor benefits at the expense of the host country, but rather as a win-win situation, where both parties can achieve their objectives through cooperation and exchange of resources.<sup>68</sup>

Zimbabwe has without doubt shown alignment to the Middlepath Theory as evidenced by its mantra "Zimbabwe is Open for Business" and the enactment of the Finance Act No 1 of 2018 and the ZIDA Act. Zimbabwe is awake to and desirous of benefiting from FDI and at the same time, Zimbabwe is awake to the evils or negative impact of FDI. As such, Zimbabwe's approach to FDI is one that is open and inviting but also makes it clear that FDI is supposed to comply with local laws. This is done in order to mitigate the potentially adverse effects of FDI. Thus Zimbabwe has in line with the Middlepath Theory been working towards having an FDI environment that is beneficial to both Zimbabwe and foreign investor. This attitude is influenced less by political thinking and influenced strongly by economic thinking and reasoning.

## **6. A comparison of the protection afforded foreign investors and investments in the PIA and ZIDA Act.**

The purpose of this section is to compare the protection afforded foreign investors and investments in terms of the PIA and the ZIDA Act. The PIA is the primary legislation which governs and protects foreign investment in South Africa. The main aim of the comparison will be to identify the similarities and differences in foreign investment protection between the two acts and to identify the lessons that Zimbabwe can learn from the PIA. This section will begin by giving a brief background of the PIA and thereafter proceed to identify the similar protections afforded by the two Acts. This section will end by identifying the differences that

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68 J Torre, 'Foreign Investment and Economic Development: Conflict And Negotiation' (1981) Journal of International Business Studies 9

exist between the two acts and noting the lessons if any that Zimbabwe can draw from the PIA.

### **6.1 Brief background of the PIA**

Towards the end of 2015, the government of South Africa terminated numerous BIT and promulgated the PIA.<sup>69</sup> The termination was as a result of the ever growing concern in South Africa caused by BIT, more fully by the unbalance of their content, the inadequate safeguard of the regulatory powers of the host State, the lack of transparency, lack of public scrutiny and the exposure to arbitral claims which triggered large compensation and the shortcomings of international investment arbitration.<sup>70</sup> The PIA was enacted with the intention and objective of having one uniform and certain piece of legislation that would regulate, govern and protect foreign investment in South Africa and also provide for the rights of the State. The termination of BIT and the promulgation of the PIA was as a result of the *Piero Foresti, et al. v. Republic of South Africa*<sup>71</sup> case which revealed that South Africa had afforded foreign investment much protection at its own expense and in so doing had restricted its right to regulate, govern and adopt policies aimed at empowering citizens. The PIA became operational on the July 13, 2018 and up to date faces both praise and criticism.

### **6.2 Objectives of the ZIDA Act and PIA**

The main purpose of the ZIDA is to promote and provide for the entry, protection and facilitation of foreign investment in Zimbabwe.<sup>72</sup> The ZIDA Act also sought to establish the Zimbabwe Investment and Development Agency which would be a one stop center for all investment issues. Based on the provisions of the Act, one is

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69 Some of the terminated BIT include, the BLEU (Belgium-Luxembourg Economic Union) - South Africa BIT (1998), the South Africa - Spain BIT (1998), the Italy - South Africa BIT (1997), Netherlands - South Africa BIT (1995) and the South Africa - United Kingdom BIT (1994)

70 Gazzini, 'Rethinking the promotion and protection of foreign investments: the 2015 South Africa's Protection of Investment Act' (2017) SSRN 2 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2960567](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960567) (accessed on 26 August 2023)

71 Piero Foresti, et al. v. Republic of South Africa ICSID Case No. ARB(AF)/07/1. (This case was between various Italian citizens, a Luxembourg Corporation and South Africa. The claimants argued that the Mineral and Petroleum Resources Development Act of 2004 was tantamount to an expropriation of their mining rights as provided for under the Belgium Luxembourg BIT)

72 Preamble of the Zimbabwe Investment and Development Agency Act [Chapter 14:37]

inclined to argue that one of the ZIDA Act's objectives is to balance the rights and obligations of both the State and foreign investors and in so doing attract foreign investment.<sup>73</sup> Section 20 and 21 of the ZIDA provides for the responsibilities and obligations of investors.<sup>74</sup>

The PIA has three objectives. The first is to provide for the protection of foreign investment in accordance with the Constitution of South Africa and in a way that balances public interest and investors' rights and obligations.<sup>75</sup> The second is to affirm South Africa's right to regulate investment in the public interest.<sup>76</sup> The third objective is to confirm the Bill of Rights as provided for in the South African Constitution and all the laws that apply to all investors and investments in South Africa.<sup>77</sup> Consequently, the PIA is fair in that it provides a balance between public interests and the interests of foreign investors.<sup>78</sup> In terms of section 13(3) and 13(4) of the PIA, international arbitration is no longer the first port of call in as much as investor-state disputes are concerned. The government of South Africa may consent to international arbitration subject to the exhaustion of internal remedies which include approaching a competent court, tribunal or statutory body. The removal of international arbitration as the primary dispute resolution mechanism has been described as a drastic measure considering the fact that international arbitration is widely accepted and viewed as a neutral platform to solve investment disputes.<sup>79</sup>

The ZIDA Act and PIA are contextualised differently and have different backgrounds. Despite the different backgrounds, the ZIDA and PIA ultimately seek to protect foreign investment. The PIA was enacted after South Africa resolved to terminate BIT and protect foreign investment using domestic legislation. Moreover,

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73 Part III of the ZIDA Act enshrines the rights and protections granted to investors and investment while Part IV of the ZIDA Act enshrines the obligations and responsibilities of the investor.

74 Investor's obligations and responsibilities as per the ZIDA Act are similar to what is usually contained in legality clauses of BIT. Some BIT do not include legality clauses but compliance with domestic law has been inferred to be an implied condition for granting international protection to investments even in the absence of treaty language to that effect. R Yotova, 'Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' (2018) University of Cambridge Paper NO. 43 ; Plama Consortium Limited v Bulgaria, Award, IIC 338 (2008), Award of 27 August 2008, para 144-6

75 Section 4(a) of the Protection of Investment Act of South Africa

76 Section 4(b) and 12 of the Protection of Investment Act of South Africa

77 Section 4(c) of the Protection of Investment Act of South Africa

78 Gazzini, (n 71 above) 18

79 Gazzini, (n 71 above) 18.

the ZIDA was not enacted following a resolution to terminate BIT. As such, the ZIDA co-exists with BIT while the PIA does not.<sup>80</sup> The PIA clearly states that one of its objectives is to reaffirm the state's right to regulate and expressly states the right to regulate in section 12 but the ZIDA Act does not expressly state this objective nor enshrine a provision that affirms the State's right to regulate.<sup>81</sup>

It is important to note that the ZIDA Act and the PIA define investment differently. The definition determines the nature of foreign investments that are afforded protection. The scope of investments as per the ZIDA Act is different from the scope of investments per the PIA. Section 2 of the ZIDA Act defines foreign investment to mean direct or indirect investment made by a foreign investor to the exclusion of foreign portfolio investments.<sup>82</sup> On the other hand, the PIA in terms of section 2 defines investment to include shares, stocks, debentures, securities and loans to an enterprise. In terms of the ZIDA Act, the effect of such exclusion is that investments such as stocks, shares, securities and debentures cannot be protected by the ZIDA Act.

### **6.3 Similar foreign investment protections in the ZIDA Act and the PIA**

#### **6.3.1 Protection against expropriation**

Section 10 of the PIA prohibits expropriation by according foreign investors with property rights. It accords investors the right to property as in terms of section 25 of the Constitution of South Africa which provides that no one may be deprived of their property and expropriation can only be in terms of a law of general application. The ZIDA Act and the PIA offer similar protection to investors in as much as expropriation of property is concerned. Foreign investment is protected from expropriation in terms of section 17 of the ZIDA Act. However, the compensation standards are different. In terms of section 25(3) of the Constitution of South Africa, the amount of compensation, the time and manner of payment must be just and equitable while in

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80 Despite the ZIDA coexisting with BIT, there are inconsistencies in as much as the definition and scope of investment is concerned. The ZIDA Act does not recognise portfolio investments as foreign investment nor does it afford portfolio investments legal protection in terms of the ZIDA. On the contrary, portfolio investments are recognized in various BIT such as that of Zimbabwe and United Arab Emirates, China and Zimbabwe, and Zimbabwe and Germany. Zimbabwe is per these BIT obligated to protect portfolio investments.

81 Section 4(b) and 12 assert South Africa's right to regulate.

82 Section 2 of the ZIDA Act defines Foreign portfolio investments as Zimbabwean bonds and stocks.

terms of section 17(1) of the ZIDA Act, compensation for expropriation must be prompt, adequate and effective. The compensation formula enshrined in the PIA is less satisfactory from an investor's stand point compared to what the ZIDA Act offers. The compensation formula enshrined in the ZIDA Act is the same as the Hull's Formula of compensation.<sup>83</sup> The compensation provision in the PIA is vague and subjective because there is no clear definition of what is "just and equitable" or how it is arrived at.<sup>84</sup> Therefore, in as much both the PIA and the ZIDA Act protect foreign investors from expropriation, the ZIDA Act gives more assurance of the compensation.

### **6.3.2 Transfer of funds**

The PIA and ZIDA Act grants foreign investors the right to repatriate funds in sections 11 and 19, respectively. However, the provision providing for transfer of funds in the PIA is short and not detailed. It simply states that a foreign investor may repatriate funds subject to tax and other applicable laws. The provision that allows for transfer of funds in the ZIDA Act is detailed in the sense that it states the types of funds that may be transferred out of and into Zimbabwe. These funds include contributions to capital, proceeds and profits from assets, dividends, liquidation and payments from the settlement of investment disputes amongst others. To note is that such transfer is subject to compliance with tax laws and the government may delay transfer in circumstances relating to bankruptcy, insolvency or in compliance with an order or judgement of judicial or administrative bodies. Despite the different wording in the PIA and ZIDA Act, the protections enshrined are substantially similar.

### **6.3.3 Fair Treatment**

The PIA protects foreign investment by granting foreign investors and investment fair administrative treatment as per section 6 whereas section 16 of the ZIDA Act provides for fair and equitable treatment. The protections granted by the acts are

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83 Hull's Formula is the internationally accepted standard of compensation for expropriation in international law. It was developed by the U.S. Secretary of State Cornell Hull 1938 following nationalizations in Mexican in 1917. It demands that compensation for expropriation must be prompt, adequate and effective. YA Kadir 'Hull Formula And Standard Of Compensation For Expropriation In Postcolonial States Hull Formula.' (2017) Vol. 19, No. 2, Kanun Jurnal Ilmu Hukum 232

84 Gazzini, (n 71 above)

similar. Both the PIA and the ZIDA Act protect foreign investment in that provisions of both acts guarantee administrative justice,<sup>85</sup> prohibit arbitrariness and guarantee procedural justice or due process when dealing with foreign investors and foreign investment.<sup>86</sup> The PIA provides the right to approach a court to have a dispute settled by way of application of the law and the ZIDA Act protects foreign investment by entitling foreign investment and investors to equal access before the law.<sup>87</sup> Consequently, it can be held that despite the headings of sections 16 and 6 of the ZIDA Act and PIA respectively being different, they are in substance the same and protect foreign investors and investments in similar ways.

#### **6.3.4 Physical protection of foreign investment**

The physical protection of investment is an indispensable aspect of foreign investment law on the international arena and in IIL. From time immemorial, the physical protection of foreign investment has always been topical amongst scholars. Some developing States have argued that the protection of foreign investment must be the same as that afforded to domestic investors,<sup>88</sup> and some developed states have argued that the protection of investors ought to be in terms of international law and more fully the international minimum standard for the treatment of aliens/foreigners.<sup>89</sup> Section 9 of the PIA provides that foreign investors and their investment must be accorded with a level of physical protection similar to that which is provided to domestic investors and protection which is also in sync with the minimum standards of CIL subject to available resources and capacity. The ZIDA on the other hand as per section 16(2) (b) states that every foreign investor shall be entitled to the protection of investment. The ZIDA Act does not provide for the nature, scope and extent of the protection. Both the PIA and the ZIDA are alive to the importance of physical protection of property and do provide it. The protection

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85 Section 6(1) of the PIA and section 16(1)(a) of the ZIDA Act.

86 Section 6(1) of the PIA and section 16(1)(c) and (b) of the ZIDA Act.

87 Section 6(3) of the PIA and Section 16(1)(c) and (b) of the ZIDA Act.

88 Arguments being that if by the National Treatment, foreign investors are accorded the same treatment as domestic investors, then the same protection accorded to domestic investors must be accorded to foreign investors. Weiler (n 59 above)345.

89 Sornarajah, (n 25 above), 122 Developing States have consistently held foreigners must be treated in accordance with the international minimum which could be a higher standard than which is provided in the domestic laws of the host State.

provided by both acts is similar in that both ultimately make reference to CIL. Section 326 of the Constitution of Zimbabwe states that CIL is part of Zimbabwean law unless it is inconsistent with the Constitution or Act of Parliament and Zimbabwean legislation must be interpreted in a way that is consistent with CIL. As such, despite the ZIDA Act not expressly making reference to CIL, the ZIDA Act must be interpreted in a way consistent with CIL.

#### **6.4 Different foreign investment protections in the ZIDA Act and the PIA**

##### **6.4.1 Non-Discrimination**

The protection of foreign investors and foreign investment is gravely incomplete in the absence of provisions that protect foreign investors and foreign investment from discrimination. There are two twin principles which protect foreign investors and their investment from discrimination. These are the NT and the Most favoured Nation (hereinafter MFN). Section 8 of the PIA provides for the NT. The ZIDA Act provides for both the MFN and NT in terms of sections 13 and 14 respectively. The common protection in both Acts is that of NT. The MFN is lacking in the PIA. However, since South Africa has done away with BIT, there is no need for the MFN because all foreign investors and investments are equally accorded the rights, benefits and obligations under the PIA.

##### **6.5.2 Enforcement of Standards**

The PIA provides for dispute resolution procedures in terms of section 13. The ZIDA Act provides for dispute resolution procedures in terms of section 38. The PIA extinguished the possibility of mandatory arbitration.<sup>90</sup> As such, in terms of the PIA, disputes can be resolved by reporting such dispute to the Department of Trade which will in turn facilitate dispute resolution by appointing a mediator.<sup>91</sup> The PIA

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90 The extinction of international arbitration has met both criticism and appraisal. The extinction has been seen as an extreme measure considering the fact that international arbitration has been celebrated for years for being out of reach of local politics influence. On the other hand, the extinction of international arbitration brought in mediation which is less aggressive and causes parties to reach a common ground of compromise which does not cause the investment to be discontinued. T Gazzini 'Travelling The National Route: South Africa's Protection Of Investment Act (2015)' 21 [https://ueaprints.uea.ac.uk/id/eprint/66429/1/\\_05\\_Gazzini\\_final.pdf](https://ueaprints.uea.ac.uk/id/eprint/66429/1/_05_Gazzini_final.pdf) (accessed on 27 January 2024)

91 Section 13(1)-(3) of the PIA.

also makes recourse to competent courts, independent tribunals or statutory bodies in South Africa available in the face of investor-state disputes.<sup>92</sup> Consequently, enforcement of standards of protections granted by the PIA rests with domestic authorities. In terms of the PIA, international arbitration is no longer mandatory, the state may consent to international arbitration subject to the exhaustion of internal or domestic remedies.

In terms of the ZIDA Act, disputes arising pertaining to the ZIDA Act or any of its provisions are to be resolved by arbitration as provided for by the Arbitration Act of 1996 or international arbitration by mutual consent of the parties.<sup>93</sup> However, if there is a BIT between Zimbabwe and the foreign investor's home state, the dispute can be resolved through the dispute resolution mechanisms which are provided for in the BIT.<sup>94</sup> This is a major difference between the PIA and the ZIDA. In terms of section 13(5) of the PIA, international arbitration is no longer mandatory. The government of South Africa may consent to international arbitration subject to the exhaustion of domestic remedies. The ZIDA demands that all foreign investments which were established by any BIT and that claims protection from such BIT must register itself with the Zimbabwe Investment and Development Agency. Failure thereto will be deemed to be a waiver of the protection afforded by the BIT and as such, all disputes arising thereafter to which that foreign investor is party will be resolved by domestic courts or domestic arbitration.<sup>95</sup>

## **7. Way Forward**

Drawing a lesson from the PIA, it is recommended that the ZIDA Act's definition of investment be amended and broadened to include portfolio investments, claims to money or contractual obligations with economic value, intellectual property rights and all other rights or permits and licenses conferred by law. This amendment will align the ZIDA to some of Zimbabwe's BIT which define foreign investment to include portfolio investments. Currently, ZIDA Act does not recognise portfolio

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92 Section 13(4) of the PIA

93 Section 38(1) of the ZIDA Act. Arbitral awards are final and are in terms of section 36 of the Arbitration Act [Chapter 7:15] and are enforceable through the High Court of Zimbabwe.

94 Section 38(2) of the ZIDA Act

95 Section 38(5) of the ZIDA Act

investments as foreign investment nor does it afford portfolio investments legal protection in terms of the ZIDA while portfolio investments are recognized as foreign investment and afforded legal protection in various BIT such as that of Zimbabwe and United Arab Emirates,<sup>96</sup> China and Zimbabwe,<sup>97</sup> and Zimbabwe and Germany.<sup>98</sup>

Additionally, as South Africa did, it is recommended that Zimbabwe sets up a commission of inquiry to review and investigate the relevance and or need of BIT in this age considering the fact that Zimbabwe has enacted the Zimbabwe Investment and Development Agency Act which substantially provides for the protection of foreign investment and foreign investors.

To balance the rights of both the state and foreign investor, it is recommended that the ZIDA Act be amended to enshrine Zimbabwe's right to regulate like the PIA. The right to regulate is important because it would help balance foreign investment protection with Zimbabwe's interests. As such, pursuant to the right to regulate and with foreign investors being aware, Zimbabwe would be able to freely adopt measures, laws and or policies that are meant to advance national interests, national development, economic justice and equity and sustainable of the environment.

## 8. Conclusion

In summation, Zimbabwe's legal framework protecting foreign investment is satisfactory. The ZIDA Act and the PIA offer similar protection in that they both prohibit expropriation, entitle foreign investors to equal protection of the law, physical protection of property, due process and fair treatment. The major shortfall in Zimbabwe's domestic framework is that it has a limited definition of foreign investment. It defines foreign investment to be a direct or indirect investment to the exclusion of portfolio investments. The PIA and most BIT that are in force in

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96 Article 1 of the Agreement Between The Government Of The Republic Of Zimbabwe And The Government Of The United Arab Emirates On Promotion And Reciprocal Protection Of Investments.

97 Article 1 of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments

98 Article 1 of the Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments.

Zimbabwe widely define foreign investment to include portfolio investments, intellectual property, goodwill, movable and immovable property and debentures. Therefore, it is imperative that the ZIDA Act be amended to incorporate a wide definition of foreign investment. This would help align the ZIDA to most BIT and go a long way in attracting foreign investors who might be interested in investing in portfolio investments. All in all, both acts protect foreign investment and there is no substantial difference between the protection afforded by both acts.