

**Rethinking Zimbabwean Agricultural Land Expropriation Laws in Light of the
Funnekotter Case**

**Mini-dissertation submitted to the Centre for Human Rights, Faculty of Law, University
of Pretoria, in Partial Fulfilment for the requirements of the Master of Laws Degree
(LLM) in International Trade, Investment and Business Law in Africa**

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Declaration

Declaration

I, Busani Moyo, declare that this mini-dissertation which is hereby submitted to the Centre for Human Rights, Faculty of Law, University of Pretoria, for Masters of Laws, is my original work and has never been submitted to any tertiary institution for the award of any degree or certificate, and all the works that informed my ideas has been properly referenced.

Signed

Busani Moyo

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Abstract

This study examines whether or not the Zimbabwean agricultural land expropriation laws are consistent with its international legal commitments and obligations enumerated in Article 6 of the Zimbabwe-Netherlands BIT which were expounded in the Funnekotter case. It begins by exploring the concept of expropriation, and the main features of the Zimbabwe's agricultural land expropriation laws, and proceeds to discuss the conditions of expropriation enumerated in Article 6 using the Funnekotter case as a compass, before examining whether or not the Zimbabwe's agricultural land expropriation laws are compatible with article 6 conditions of expropriation. The main conclusion reached is that despite the good intentions and public interests pursued by these agricultural land expropriation laws, they are draconian, and inconsistent with the due process, non-discrimination, and compensation conditions of expropriation. Thus, Zimbabwe may have to re-think its agricultural land expropriation laws in light of the Funnekotter case.

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Chapter One

1.1 Background to the study

Zimbabwe embarked on the fast track land reform programme in an attempt to remedy the social and economic injustices that indigenous Zimbabweans were systematically subjected to by the colonisers.¹ Through this programme, the government attempted to empower indigenous Zimbabweans by giving them land, which is the backbone of the Zimbabwe's economy.² The programme was effected through Amendment 16 which inserted section 16A, and Amendment 17, which inserted section 16B, into Section 16 of the former Constitution of Zimbabwe.³ Unlike the settlement reached at Lancaster House,⁴ these provisions empowered the government of Zimbabwe to expropriate agricultural land for resettlement purposes, but imposed the obligation to compensate farmers on Britain in its capacity as Zimbabwe's former colonial master.⁵ The land reform programme eroded the value of land as an economic asset by giving legal title of expropriated land to the government.⁶ This caused property insecurity which scared foreign investors and slowed Zimbabwe's economic growth. However, these provisions were retained in the Constitution of Zimbabwe of 2013 (Constitution of Zimbabwe) with little changes.⁷

Section 72 of the Zimbabwean Constitution provides for non-justiciable agricultural land expropriation, and compensation for improvements to land by the Government of Zimbabwe, while obligating the British government to pay compensation for expropriated land. Section 72 makes such a provision despite the existence of the Agreement on the Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands (Zimbabwe-Netherlands BIT), among others, which prescribes that

¹ See S Sacco 'Human Rights and the Land Reform; the place of an individual' in S Moyo et al (eds) *Contested Terrain- Land Reform and Civil Society in Contemporary Zimbabwe* (2008) 340 & Mike Campbell and Others *v The Republic of Zimbabwe*, SADC (T) Case 2/2007.

² T Kapunya 'Modelling the Impact of the 'Fast Track' Land Reform Policy on Zimbabwe's Maize sector' published Masters Dissertation, University of Pretoria (2010) 10. He contends that by virtue of being a developing country, Zimbabwe's economy is sustained by the agricultural sector which is uniquely important for several reasons namely; its provision for food, employment, value added to GDP and foreign exchange.

³ Constitution of Zimbabwe 1980.

⁴ Section 16 of the Constitution of Zimbabwe of 1980 originally permitted the government of Zimbabwe to expropriate land for resettlement only against payment of prompt and adequate compensation calculated on market value.

⁵ See Section 16A(1)(c)(1) & PVd Bossche, *The Law and Policy of the World Trade Organisation; Text, Cases and Materials*, (2005) 10, Zimbabwe's engaged in these expropriations despite its need of FDI as a developing country.

⁶ Kapunya (n 2 above) 12.

⁷ Section 72 of the Constitution of Zimbabwe, 2013.

expropriation should be carried against fair compensation in accordance with the due process of law.⁸ Therefore, there is uncertainty as to whether these agricultural land expropriation laws are compatible with the Zimbabwe-Netherlands BIT conditions of expropriation. Although controversial in international investment law, expropriation refers to compulsory transfer of, or severe interference with, property rights of commercial value of an investor in favour of, or by, the state.⁹ According to Reinisch,¹⁰ there are two types of expropriations; direct and indirect expropriation.¹¹ In Zimbabwe, agricultural land was directly expropriated.

1.2 Problem statement

In the year 2013, Zimbabwe passed into law the Constitution of Zimbabwe.¹² This Constitution with its complementary legislation¹³ empowers the government of Zimbabwe to expropriate agricultural land for agricultural resettlement by gazetting the notice of acquisition only, but imposes the responsibility for paying compensation for expropriated land on Britain in its capacity as Zimbabwe's former colonial master.¹⁴ Zimbabwe, however, retains the duty to compensate the land owners for improvements effected on agricultural land.¹⁵ The Constitution further ousts the jurisdiction of courts to review the expropriation process, and proscribes the land owners from challenging the expropriation process before the courts.¹⁶ These laws are a government attempt to reverse racial land tenure relations which happened when Zimbabweans were unjustly stripped of their land without compensation through the British colonial laws which annexed Zimbabwe to the British territory.¹⁷ However, by signing the Zimbabwe-Netherlands BIT, Zimbabwe committed itself to the Netherlands that it will expropriate the investments of the Netherlands nationals in accordance with the due process of law, for public interests, in a non-discriminatory manner and against compensation.¹⁸ This international legal commitment raises questions as to whether Zimbabwe's agricultural land expropriation laws are consistent with the Zimbabwe-Netherlands BIT conditions of expropriation, and if not, the extent thereof.

⁸ See Article 6 of the Agreement on the encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands (1996).

⁹ A Reinisch 'Expropriation' in P Muchliski & C Schreuer (eds) *International Investment Law* (2008) 414.

¹⁰ A Reinisch 'Expropriation' in P Muchliski & C Schreuer (n 9 above) 424-425.

¹¹ See definitions in Chapter Two.

¹² Constitution of Zimbabwe, 2013.

¹³ Land Acquisition Act 3 of 1992, Chapter 20:10.

¹⁴ See Section 72 of the Constitution of Zimbabwe, 2013.

¹⁵ Section 72(3)(a) of the Constitution of Zimbabwe, 2013.

¹⁶ Section 72(3)(b) and (c) of the Constitution of Zimbabwe, 2013.

¹⁷ L Ndlovu 'Following the NAFTA Star: SADC land reform and Investment Protection after the *Campbell* Litigation' (2011) 15 *Law, Democracy & Development* 10.

¹⁸ Article 6 of the Zimbabwe-Netherlands BIT.

The above problem is exacerbated by the fact that Zimbabwe's agricultural land expropriation laws are by and large similar to those it implemented in terms of the former Constitution,¹⁹ but which it unsuccessfully defended before the SADC tribunal,²⁰ and the ICSID tribunal.²¹ In the *Funnekotter* case of 2009, the ICSID tribunal dealt with the question as to whether or not Zimbabwe's compulsory acquisition of the Netherlands national's land without compensation in terms of the former Constitution was consistent with the Zimbabwe-Netherlands BIT conditions of expropriation. The tribunal, therefore, canvassed these conditions of expropriation. The 2013 Constitutional provisions relating to agricultural land expropriation have not been subjected to the international arbitral scrutiny to test their consistency with the Zimbabwe-Netherlands BIT conditions of expropriation. Therefore, it is imperative for this study to examine if the Zimbabwe's agricultural land expropriation laws are consistent with the conditions of expropriation stipulated in article 6 of the Zimbabwe-Netherlands BIT, and if not, the extend of inconsistency thereof.

1.3 Research question(s)

The core question that this study seeks to answer is: are the Zimbabwean agricultural land expropriation laws consistent with Article 6 of the Zimbabwe-Netherlands BIT conditions of expropriation as expounded in the *Funnekotter* case? If not, how can Zimbabwe align its agricultural land expropriation laws with the Zimbabwe-Netherlands BIT conditions of expropriation?

To answer the above question, the following sub-questions need to be answered:

- i. What constitutes expropriation in international investment law?
- ii. What are the main features of Zimbabwe's agricultural land expropriation laws?
- iii. What was the ICSID decision in the *Funnekotter* case on the Zimbabwe-Netherlands BIT conditions of expropriation?
- iv. Are Zimbabwe's agricultural land expropriation laws compatible with Article 6 of the Zimbabwe-Netherlands BIT?

¹⁹ Sections 16A and 16B of the Constitution of Zimbabwe, 1980.

²⁰ *Campbell* (n 1 above).

²¹ *Bernidus Henricus Funnekotter v the Republic of Zimbabwe* ICSID case number ARB/05/6 (Funnekotter case).

1.4 Thesis statement

This study contends that Zimbabwe's agricultural land expropriation laws, which provide for non-justiciable expropriation of agricultural land for resettlement, and compensation for improvements on agricultural land only, are inconsistent with Zimbabwe's international legal commitments and obligations enumerated in the Zimbabwe-Netherlands BIT, particularly article 6 which stipulates the conditions of expropriation.

1.5 Justification of the study

The principal objective of this study is to examine the Zimbabwean agricultural land expropriation laws in light of the Zimbabwe-Netherlands BIT conditions of expropriation as expounded in the *Funnekotter* case. It examines Zimbabwe's agricultural land expropriation laws from an investment perspective using the *Funnekotter* case as the compass. At the end of the discussion, recommendations will be made to guide Zimbabwe on how to expropriate agricultural land in line with its international legal commitments and obligations enumerated in the Zimbabwe-Netherlands BIT. Therefore, this study is important to Zimbabwe, and other developing countries which want a roadmap on how to nationalise investments within the relevant international law parameters.

1.6 Literature review

Many researchers have written about how Zimbabwe's colonial history informs its agricultural land expropriation laws. However, no attempt has been made to investigate the legality of the Zimbabwean agricultural land expropriation laws in light of BITs to which Zimbabwe is a signatory. This study seeks to examine if Zimbabwe's agricultural land expropriation laws are compatible with the Zimbabwe-Netherlands BIT conditions of expropriation stipulated in article 6.

Salacuse²² contends that treatification was prompted by lack of consensus on the applicable customary international law rules on investments. International Investment Agreements (IIA) are an important source and pillar of international investment law because of their certainty and enforceability, thus, they impose international legal obligations on state parties to them. He further contends that countries that enter into BITs commit themselves to faithfully enforce the terms of the treaty, and a breach of these terms imposes an international responsibility on the host state. This argument brings into the fore the question as to whether Zimbabwe's

²² Salacuse JW, *The three laws of international Investment, National, Contractual and International Frameworks for Capital* (2013) 355.

agricultural land expropriation regulatory regime is in keeping with its international legal commitments and obligations arising from the Zimbabwe-Netherlands BIT.

Supedi²³ argues that BITs, like customary international law, re-affirm the right of states to exercise the power of eminent domain for public purposes within the defined contours to protect investors from arbitrary deprivation of their investments. As a rule of thumb, states can expropriate the property of aliens for public purposes, in a non-discriminatory manner, in accordance with due process of law, and against compensation.²⁴ Supedi's approach to expropriation is imperative for this study as it generally lays down BIT principles on expropriation which are relevant for examining the Zimbabwean agricultural land expropriation laws with a view to test their compatibility with the Zimbabwe-Netherlands BIT conditions of expropriation.

Francis²⁵ contends that the *pact sunt servanda* principle requires the BITs signatories to faithfully carry out their treaty obligations, thus, host state laws that violate treaty obligations are illegal and impose international responsibility on it.²⁶ Francis, however, did not examine the legality of the Zimbabwean agricultural land expropriation laws in light of its BIT commitments and obligations, but his argument is important as it lays down the basis for undertaking such examination.

According to Suzy,²⁷ expropriation is the most controversial concept in international investment law, especially the issue of compensation. He contends that since BITs are driven by the capital exporting countries, they have codified the customary international law requirements that compensation must be effective, prompt and adequate although a few BITs provide for appropriate compensation.²⁸ Suzy, however, states that international tribunals sometimes rule that regulatory expropriations are not compensable. Hoffman²⁹ opposes this argument, and contends that expropriation without compensation is confiscatory. Hoffman's argument is further echoed by Reinisch³⁰ and Reisman³¹ who hold that whether expropriation

²³ SP Suberdi *INTERNATIONAL INVESTMENT LAW, Reconciling Law, Policy and Principle* (2008) 76-77.

²⁴ Supedi (n 23 above) 73 & M Sornarajah *The International Law on Foreign Investment* (2010) 208.

²⁵ J Francis & JS Nicholson 'The Protection of Foreign Property under Customary International Law' 6 *Boston College Law Review* 394.

²⁶ Francis and Nicholson (n 25 above) 406 and 413.

²⁷ HN Susy 'Best Practices Indirect Expropriation' *International Institute for Development* (2012) 1.

²⁸ Suzy (n 27 above) 5.

²⁹ AK Hoffman 'Indirect Expropriation' in A Reinisch (eds) *Standards of investment Protection* (2008) 198.

³⁰ A Reinisch 'Expropriation' in P Muchliski & C Schreuer (n 9 above) 436.

³¹ WM Reismn & RD Sloane 'Indirect Expropriation and its Valuation in the BIT Generation' *Yale Law School Faculty Repository*, 1-1-2004 133.

is carried out lawfully or unlawfully, compensation should be paid in full. It is submitted that the latter's argument is the correct international law position. This argument queries the legality of the Zimbabwean agricultural land expropriation laws which provide for compensation for improvements effected on land only. However, these arguments were not contextualised to Zimbabwe, therefore, this study shall examine if the Zimbabwean agricultural land expropriation laws are consistent with the Zimbabwe-Netherlands BIT conditions of expropriation.

Sornarajah³² argues that states with a history of expropriation should guarantee the investors against expropriation if they want to restore investor confidence and attract FDI. Compensation is, however, the most controversial requirement of expropriation. Capital exporting countries advocate for prompt, effective and adequate compensation in cases of nationalisation whereas capital importing countries advocate for appropriate compensation to be used as a standard of compensation payment against expropriation.³³ This argument is not contextualised to any specific country nor does it examine the specifics of Zimbabwe's expropriation laws, hence the necessity of this study.

Sacco,³⁴ as a human rights advocate, argues that compensating the land owners for the improvements on land only is justified to balance the public interests and the interest of the land owners in land expropriations given Zimbabwe's colonial history.³⁵ Sacco analysed Zimbabwe's agricultural land expropriation laws from the human rights perspective and not from the investment perspective as intended in this study.

Ndlovu³⁶ analysed sections 16A and 16B of the former Constitution,³⁷ which provisions were incorporated into the 2013 Constitution, from the SADC regional investment protection perspective. He argues that Zimbabwe's land expropriation was unlawful as it violated its SADC Protocol but he did not examine if these provisions are in keeping with Zimbabwe's international obligations stipulated in the Zimbabwe-Netherlands BIT. More so, Ndlovu used

³² Sornarajah (n 24 above) 99-100.

³³ Sornarajah (n 24 above) 208.

³⁴ See S Sacco 'Human Rights and the Land Reform; the place of an individual' in S Moyo et al (n 1 above) 348 & E Muzengi 'Expropriation is not enough; Rights and Liberties is what matters' in S Moyo et al (eds) *Contested Terrain- Land Reform and Civil Society in Contemporary Zimbabwe* (2008) 393.

³⁵ Sacco 'Human Rights and the Land Reform; the place of an individual' in S Moyo et al (n 1 above) 365.

³⁶ Ndlovu (n 17 above) 10.

³⁷ Constitution of Zimbabwe 1980.

the *Campbell* case as the compass of his discussion whereas, the *Funnekotter* case shall be the compass in this discussion.

Researchers canvassed the expropriation principles without contextualising them to Zimbabwe's agricultural land expropriation laws, whereas the contextual writings canvassed it from the socio-economic and political perspective, and not from the investment perspective. Therefore, this mini-dissertation shall examine the Zimbabwe's agricultural land expropriation laws in light of the Zimbabwe- Netherlands BIT using the *Funnekotter* case as a compass.

1.7 Research methodology

This study shall be desktop and library based. A legal historical approach will be used to trace the developments that led to expropriation of agricultural land and consequently the *Funnekotter* arbitration. More so, a descriptive, analytical and prescriptive approach will be adopted in this research. The descriptive approach will serve to lay out factual and legal issues prior to the analysis. This method will be used for Chapters One to Five. The prescriptive approach will be used to make policy recommendations in Chapter Six.

The primary documents that shall be used will be the Constitution of Zimbabwe, the Land Acquisition Act and the Zimbabwe-Netherlands BIT. More so, case law shall be utilised to clarify legal issues where relevant. Secondary sources such as textbooks and journal articles shall also be used in order to make relevant description and analysis of the issues under consideration.

1.8 Limitation of the study

I am conducting this study in South Africa, so I might not be able to access some sources of information that are relevant for this study which I would have been able to had I been in Zimbabwe. This problem is exacerbated by lack of funding for the research.

In substance, this research will examine Zimbabwe's agricultural land expropriation regulatory regime in light of the Zimbabwe-Netherlands BIT using the *Funnekotter* case as the compass.

This study exclusively deals with the legal issues, and not socio-economic and political issues, save in compelling circumstances to explain the legal issues in the discussion.

1.9 Chapter outline

1.9.1 Chapter 1: Introduction

This is an introductory chapter containing the introduction to the research subject matter, research problem, the research question(s), thesis statement, justification of the study, literature review, research methodology, the limitation of the study and the chapter outline.

1.9.2 Chapter 2: Expropriation

This chapter explores the concept of expropriation and different types of expropriation. It briefly discusses the conditions of expropriation under customary international law.

1.9.3 Chapter 3: The main features of the Zimbabwean Agricultural Land Expropriation Laws

Chapter three explores the historical, socio-economic and political factors that inform the current Zimbabwean agricultural land expropriation laws. It principally discusses the main features of Zimbabwe's agricultural land expropriation laws.

1.9.4 Chapter 4: The Funnekotter Case

This chapter canvasses the conditions of expropriation enumerated in the Zimbabwe-Netherlands BIT using the *Funnekotter* case as the compass for the discussion.

1.9.5 Chapter 5: Analysis of key aspects of Zimbabwe's Agricultural Land Expropriation Laws in the light of the Funnekotter Case

Chapter five examines the compatibility of Zimbabwe's agricultural land expropriation laws with the Zimbabwe-Netherlands BIT conditions of expropriation. Thereafter, it highlights the implications of these laws on FDI.

1.5.6 Chapter 6: Conclusions and Recommendations

This is the last chapter of the study which sums up the key issues discussed in this study and makes recommendations on policy options available for the government to adopt, with a view to ensure the security of agricultural land rights in line with the Zimbabwe-Netherlands BIT commitments and obligations.

Chapter Two

Expropriation

2.1 Introduction

Both BITs and customary international law recognise the hosts' state's rights to exercise the power of eminent domain; however, there is still academic debate as to the meaning and scope of the concept of expropriation particularly indirect expropriation. This chapter explores the concept of expropriation and its two traditional types, that is, direct and indirect expropriation. It ends with a brief discussion of the conditions under which host states may expropriate the investments of aliens under customary international law. It argues that, although controversial, the BITs have minimised the debate as to the meaning and scope of expropriation particularly indirect expropriation.

2.2 What constitutes expropriation?

Like other BITs,¹ the Zimbabwe-Netherlands BIT does not define the concept of expropriation; rather, it merely sets out the conditions under which its signatories may expropriate the investments of nationals of the other state.² Thus, arbitral tribunals have taken it upon themselves to define and develop the concept.³ Expropriation refers to the actions of the state that divest the investor's private property rights including any rights that can be objects of commercial transactions.⁴ This entails that the host state acquires assets of the investor without the investor's consent.⁵ Expropriation simply refers to state actions that materially undermine the economic value of the aliens' investments. It can be accomplished directly or indirectly.

2.2.1 Direct Expropriation

In the *Metilclad Corp v United Mexican States*,⁶ the ICSID tribunal held that direct expropriation involves a deliberate taking of property such as seizure or forced transfer of property title from an investor to the host state.⁷ This is usually achieved through a government

¹ See Article 4(2) of the Treaty between the Federal Republic of Ethiopia and the Federal Republic of Germany concerning Encouragement and Reciprocal Protection of Investments (Ethiopia-Germany BIT) (2004), article 3(1) of the Agreement between the Republic of Finland and the Arab Republic of Egypt on Mutual Protection of Investments (Egypt-Finland BIT) (1982).

² See Article 6 of the Agreement on the Encouragement and Reciprocal Protection of Investments between the Republic of Zimbabwe and the Kingdom of the Netherlands (1996).

³ See in front.

⁴ A Reinisch 'Expropriation' in P Muchliski & C Schreuer (eds) *International Investment Law* (2008) 414.

⁵ SP Suberdi *INTERNATIONAL INVESTMENT LAW, Reconciling Law, Policy and Principle* (2008) 118.

⁶ *Metilclad Corp v United Mexican States*, ARB (AF)/97/1/ (Award, 30 August 2000) 16 ICSID, para 103.

⁷ A Reinisch 'Expropriation' in P Muchliski & C Schreuer (n 4 above) 425.

decree or decisions.⁸ However, this type of expropriation is now unusual as states do not want to alarm foreign investors that they are investor unfriendly. Direct expropriation is easier to determine as it involves an outright transfer of investors property title in favour of the government.⁹

2.2.2 Indirect expropriation

The concept of indirect expropriation is controversial and is expressed in different ways.¹⁰ According to Hoffman's¹¹ conservative definition, indirect expropriation happens when a host state interferes with property rights rendering them so useless that they should be considered to be expropriated. Thus, indirect expropriation is the state's incidental interference with the use of property which significantly affects the reasonably-to-be-expected economic benefit of the property; however, the state need not directly benefit from such interference.¹² This form of expropriation does not interfere with ownership of legal title of the investment, but the economic benefits that should flow from an investment by undermining the economic interests of the investors. Sometimes property may be expropriated without the state's intention to do so. This creates knotty problems in determining which state measures constitute expropriation. The 'sole effect'¹³ criterion and the police powers doctrine have been formulated by the ICSID tribunal in attempt to solve this problem.

In *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*,¹⁴ the ICSID arbitration tribunal ruled that when determining whether a government measure constitutes indirect expropriation, the intentions or motives of the government in formulating and implementing the expropriation measures are less important than the real impact that these measures have on the investments.¹⁵ This position was later buttressed by the ICSID decision

⁸ Supedi (fn 5 above) 118. See Article 4 of the Zimbabwe-Germany BIT, Article 6 of the Zimbabwe-Netherlands BIT and Article 4 of the China-Zimbabwe BIT.

⁹ AK Hoffman 'Indirect Expropriation' in A Reinisch (eds) *Standards of investment Protection* (2008) 151.

¹⁰ "tantamount to expropriation", "equivalent to expropriation", "same effect as expropriation" and creeping expropriation".

¹¹ AK Hoffman 'Indirect Expropriation' in Reinisch (n 9 above) 157.

¹² *Metalclad* (n 6 above) para 9.

¹³ See R Dolzer 'The Impact of international Investment Treaties on Domestic Administrative Law' (2006) 37 *International Law and Politics* 53 & CM Porterfield 'State Practice and the (Purported) Obligation under Customary International Law to Provide Compensation for Regulatory Expropriations' (2011) *N.C.J.INT'L L&Com.REG.* XXXVII 160.

¹⁴ *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, 6 Iran-US CTR (24 June 1984) 219, 225.

¹⁵ SH Nikiema 'Best Practices Indirect Expropriation' (2012), *International Institute of Sustainable Development* 13. See also A Reinisch 'Expropriation' in P Muchliski & C Schreuer (n 4 above) 444-447.

in the *Metilclad case*.¹⁶ Some tribunals have ruled that state measures substantially deprive investors of their investments if they create a ‘persistent or irreparable’,¹⁷ or ‘permanent or irreversible’¹⁸ obstacle to the investor’s enjoyment and disposal of the investment, and thus, constitute indirect expropriation. The sole effect criterion is harsh, especially on developing countries, as it keeps them on guard leaving them with no policy space. This criterion is favourable to foreign investors and not the host governments. It solely considers the extent of damages suffered by the investors when determining whether the government measures constitute indirect expropriation.

On the other hand, the police powers criterion entails that states are not liable for economic injuries sustained by investors which are a consequence of host state regulations that were formulated, and implemented in good faith, and which fall within the accepted parameters of police powers under international law.¹⁹ This doctrine, unlike the sole effect, posits the nature, context and purpose of measures as all important in determining if the state measure is a mere regulation or constitutes compensable expropriation.²⁰ This doctrine is broader than the sole effect criterion, but its scope is not clear. It also gives states police space, and limits state liability, thus it is friendly to the host states as compared to the sole effect doctrine. However, its wide scope leaves investors with little protection given that most expropriations are effected discreetly; thus, many expropriations may qualify as non-compensatory.

There is still uncertainty as to which criterion should be used for determining if indirect expropriation has occurred. The complexity of the concept of indirect expropriation makes it difficult for delimiting the state actions that constitute expropriation although international tribunals have developed legal jurisprudence on the concept and continue to do so. However, it is submitted that although investor friendly, the sole effect criterion offers a better balance between the investor’s rights and the state’s right to regulate.

¹⁶ *Metilclad* (n 6 above) para 103 & R Dolzer and F Block ‘Indirect Expropriations: Conceptual Realignment’ (2003) 30 *International Law Forum du droit International* 162-164.

¹⁷ *Generation Ukraine Inc v Ukraine*, ICSID Award, (16 September 2003), para 20.

¹⁸ *S.D. Myers Inc. v Government of Canada*, Partial Award (13 November 2000) para 283.

¹⁹ B Mostafa ‘The Sole Effect Doctrine, Police Powers and Indirect expropriation under international law’ (2008) 15.1 *Australian International Law Journal* 272 .

²⁰ Mostafa (n 19 above) 267.

2.3 State's rights to expropriate

The BITs²¹ recognise, and re-affirm the customary international law principle that sovereign states have a right to expropriate the investment of foreigners against compensation if it is done in a non-discriminatory manner for public purposes.²² On the other hand, this right imposes an obligation on the host state to pay adequate compensation.²³ This right emanates from the doctrine of state territorial sovereignty.²⁴ This right was confirmed by the Supreme Court of Appeal (SCA) in the *Mike Campbell case*.²⁵ This case was decided by Deputy Chief Justice Malaba with the other judges concurring. In an important case such as this, it would have been better if the other Supreme Court judges wrote independent opinions on the case. This could have helped in the development of the legal jurisprudence on expropriation in Zimbabwe, for example, on the legal issues such as how far can Zimbabwe go back to correct the historical discriminatory injustice as this issue is still not clear.

2.4 Customary international law position on expropriation

An understanding of customary international law regulation of expropriation is imperative for one desiring to explore the BIT's regulation of expropriation.²⁶ This is because BITs codify and clarify the abstract customary international law principles of expropriation. Customary international law is one of the key sources of international law and it applies *erga omnes*. Customary international law circumscribes the state's power of eminent domain to protect the private property rights of foreign investors. It permits the expropriation of alien property in a non-discriminatory manner, for public purposes, and against compensation. A breach of one of these conditions renders expropriation unlawful and imposes an international responsibility on the host state to pay full compensation. Below is a brief discussion of customary international law conditions of expropriation.

²¹ See Article 4 of the Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (Zimbabwe-Germany BIT) (1995), Article 6 of the Zimbabwe-Netherlands BIT and article 4 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 (China-Zimbabwe BIT) (1996)

²² Nikiema (fn 15 above) 7.

²³ R Dolzer 'Case comment *CanocoPhilips v Venezuela and Gold Reserve v Venezuela*, Expropriation: A new focus on Old Issues', (2015) 30.2 *ICSID Review* 382.

²⁴ D Zongwe, 'The contribution of *Campbell v Zimbabwe* to foreign Investment Law on Expropriation' (2010) 2:1 *Namibia Law Journal* 35.

²⁵ *Mike Campbell and Others v The Republic of Zimbabwe*, SADC (T) (Case 2/2007) 1. This position is concretised by the 1962 United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources.

²⁶ A Reinisch 'Legality of Expropriations' in A Reinisch (eds) (2008) *Standards of investment Protection* 173.

2.4.1 Public Purpose

The public purpose condition for the legality of expropriations proceeds from the utilitarian view of governance that the individual person's right to property should yield only to the overriding interests of the greater public.²⁷ Public purpose refers to the interests of public utility.²⁸ According to Zongwe,²⁹ the concept of public purpose is too broad, vague,³⁰ ambiguous and political. The problem with the public purpose requirement under customary international law is that there is no means of reviewing whether the undertaken expropriation is for public purposes.³¹ However, expropriations that are intended to gratify certain political leaders may be unlawful at international law and impose international responsibility on the host state.

2.4.2 Non-discrimination

International law proscribes subjecting the property of an alien to discriminatory laws without justification.³² This entails that states, when expropriating property, should treat aliens and its nationals alike in law and in fact for its measures to be consistent with the non-discrimination principle.³³ Zongwe,³⁴ however, contends that remedial discrimination is lawful where it is aimed at advancing the previously disadvantaged group of people. It is submitted that discrimination is unlawful and imposes an international responsibility on the host state save if it is justifiable.

2.4.3 Compensation

Even if the investor's properties are expropriated illegally, the investors are unlikely to complain if they are adequately compensated for their investments.³⁵ Thus, to investors, compensation is most important in cases of expropriation.³⁶ States have always recognised the corresponding duty of the expropriating state to compensate investors;³⁷ however, they

²⁷ KN Schefer *International Investment Law, Text, Cases and Materials* (2013) 170.

²⁸ *Certain Germany Interests in Polish Upper Silesia*, 1926 PCIJ, Series A, No.7 p22.

²⁹ (fn 24 above) 39.

³⁰ This requirement is vague as it is not clear as to who qualifies as the public.

³¹ Salacuse JW, *The three laws of international Investment, National, Contractual and International Frameworks for Capital* (2013) 316.

³² J Francis & JS Nicholson 'The Protection of Foreign Property under Customary International Law' 6 *Boston College Law Review* 390.

³³ Francis & Nicholson (n 32 above) 398-99.

³⁴ See (n 24 above) 43 & L Ndlovu 'Following the NAFTA Star: SADC land reform and Investment Protection after the *Campbell* Litigation' (2011) 15 *Law, Democracy & Development* 11.

³⁵ Salaccuse (n 31 above) 317.

³⁶ See Schefer (n 27 above) 187 & OECD, "Indirect Expropriation" and the "Right to Regulation" in *International Investment Law*, OECD Working Papers on International Investment, 2004/04, OECD Publishing 3.

³⁷ Schefer (n 27 above) 188.

disagree on whether there is an international norm on the nature of compensation owed an investor whose property has been expropriated.³⁸ The western industrialised capital exporting countries contend that compensation should be adequate, prompt and effective³⁹ while the developing capital importing countries argue for appropriate compensation which takes into account the countries' domestic laws and economic situations.⁴⁰ The international law position on compensation was clarified in the *Chorzow Factory case*⁴¹ widely recognised as a seminal international decision on compensation. In this case, the Permanent Court of International Justice (PCIJ) distinguished between lawful and unlawful expropriations. It held that where reparation is not possible, compensation must as far as possible wipe out all the consequences of an illegal act and re-establish a situation which would in all probability have existed, had an illegal act not been committed.⁴² This is different from compensation for lawful expropriation which should be equivalent to the expropriated investment at the time of expropriation.

There is no evidence that due process is one of the conditions for the legality of expropriations in customary international law. With regard to the three discussed conditions, a breach of one of them renders expropriation unlawful and imposes an international responsibility on the host state to pay full reparation for expropriated investments.

2.5 Conclusion

This chapter has shown that direct expropriation involves the transfer of the investor's legal title to the property in favour of the state whereas the meaning and scope of indirect expropriations remains controversial although the BITs mitigate this controversy. This debate is exacerbated by the fact that, depending on the arbitrator's views, the ICSID tribunals sometimes use the sole effect doctrine or the police powers doctrine, to ascertain if state measures constitute compensable expropriation. However, the sole effect doctrine offers a more balanced approach to this controversy thus; it is often used than the police powers doctrine. Indirect expropriation happens when state measures substantially undermine the economic value of alien's investments rendering them so useless that they should be regarded to be expropriated, while investors retain legal title to their investments. Customary international law requires states to expropriate alien's investment in accordance with the due

³⁸ Salaccuse (n 31 above) 317.

³⁹ Compensation is effective if paid in a freely convertible currency of the investor's choice.

⁴⁰ See Schefer (n 27 above) 188 & Salaccuse (n 22 above) 317.

⁴¹ *Certain German Interests in Polish Upper Silecia*, (n 28 above). Also see Supedi (n 23 above) 123.

⁴² P Blenvenu & MJ Valasek 'Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law' 2009 14 *Kluwer Law International* 230.

process of law, in a non-discriminatory manner, and against compensation. Having defined the concept of expropriation, the next chapter will explore the main features of Zimbabwe's agricultural land expropriation laws.

Chapter Three

The main features of the Zimbabwean Agricultural Land Expropriation Laws

3.1 Introduction

This chapter discusses the main features of the Zimbabwean agricultural land expropriation laws. Firstly, it attempts to contextualise the Zimbabwe's agricultural land expropriation regulatory regime by analysing the historical, social, legal, economic and political factors that inform it. Secondly, it discusses Zimbabwe's international legal obligations to protect property rights and the general importance of land to Zimbabweans. In the main, it explores the constitutional provisions and statutes that regulate the expropriation of agricultural land in Zimbabwe. This chapter will argue that Zimbabwe's agricultural land expropriation laws are informed by its colonial history and the postponement of the solution to the land question by the Constitution of Zimbabwe of 1980.

3.2 Key Laws

In this discussion, the key laws are as follows:

The Constitution of Zimbabwe, 2013 (Zimbabwean Constitution)

Constitution of Zimbabwe, 1980 (Constitution of 1980)

Land Acquisition Act 3 of 1992, Chapter 20:10

Gazetted Land (Consequential Provisions) Act 8 of 2006, Chapter 20:28

Agricultural Land Settlement Act, Chapter 20:01

Rural Land Occupiers (Protection from Eviction) Act 13 of 2001, Chapter 20:26.

3.3 Definition of key concepts

3.3.1 Agricultural land

Section 72(1) of the Constitution of Zimbabwe¹ defines agricultural land as 'land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry, and aquiculture or

¹ The Constitution of the Republic of Zimbabwe Amendment 20 of 2013 (Zimbabwean Constitution).

for any purpose of husbandry'. The same provision also clarifies that this does not include communal lands or land within the boundaries of an urban local authority.

3.3.2 Agricultural land expropriation laws

This is the legal framework regulating compulsory acquisition of agricultural land as defined in Section 72 of the Constitution of Zimbabwe.

3.4 Historical background to the land issues in Zimbabwe

According to Ndlovu,² it is imperative for anyone desiring to review the Zimbabwean land laws to firstly take into account the important historical events that have shaped the current laws because the Zimbabwean land laws are inseparable from history.

3.4.1 The roots of Land problems in Zimbabwe

Unlike Zambia and Malawi which remained British protectorates, Zimbabwe was colonised in 1890³ by the settlers who upon failure to find mineral deposits in Zimbabwe decided to develop the agricultural sector.⁴ Unlike protectorates which remained under the British control, colonies geographically became part of the British territory.⁵ This means that the Zimbabwean land was annexed to Britain; however, only fertile land was taken from indigenous Zimbabweans as compared to the Malawians and Zambians who retained ownership of their land. The colonisation of Zimbabwe was confirmed by the Privy Council in 1918, *In Re Southern Rhodesia*.⁶ The British colonisation of Zimbabwe was motivated by Zimbabwe's fertile soils which were crucial for the development of the agricultural sector. Zimbabweans were brutally crushed when they tried to defend, and regain ownership of their ancestral land in the Anglo-Ndebele war of 1893-4 and the First Chimurenga/Umvukela of 1896-7.⁷ After these wars, the indigenous Zimbabweans were forcibly evicted from their most fertile land, and crowded in the infertile native reserves⁸ which were unsuitable for agriculture. Thus, the colonial administration destroyed the political economy of the native Zimbabweans which was based on agriculture. The author submits that by stripping the indigenous people of their land,

² L Ndlovu 'Following the NAFTA Star: SADC land reform and Investment Protection after the *Campbell* Litigation' (2011) 15 *Law, Democracy & Development* 1.

³ MG Chinamasa 'The Human Right to Land in Zimbabwe: The Legal and Extra-Legal Resettlement Processes' Published Master's thesis, Makerere University, (2001) 13.

⁴ Chinamasa (n 3 above) 13.

⁵ *Sobhuza II, Appellant v Miller and Others* Respondents PC 1926 521-525.

⁶ *Re Southern Rhodesia 1919* AC 211 (PC 1918).

⁷ AS Mlambo 'Land Grab' or 'taking Back Stole Land'; The Fast Track Land Reform Process in Zimbabwe in Historical Perspective' (2005) 3 *History Compass* AF 150, 1-21 4.

⁸ C Mutasa 'A Brief History of Land in Zimbabwe: 1890-Today' 2 <http://www.focusonland.com/download/55031523be8cd/> (accessed 10 February 2016).

their identity and human rights to dignity was also stripped, therefore, they had and have rights to regain them.

The Privy Council's decision was followed by a series of laws that institutionalised unfair land ownership based on racial grounds in favour of the colonisers,⁹ the key ones being the Land Apportionment Act,¹⁰ the Native Land Husbandry Act,¹¹ and the Land Tenure Act.¹² The Land Apportionment Act rescinded the rights of the Africans to own land, and legitimised the land acquisition by the settlers.¹³ This system of unfair agricultural land acquisition was sealed with the enactment of the Land Tenure Act in 1969 which transformed all the undesignated land into white areas and entrenched the racial divisions between the European and African land.¹⁴ Through these laws, the majority of the Zimbabweans were dispossessed of their most fertile ancestral land without compensation.

History shows that the indigenous Zimbabweans were violently dispossessed of their ancestral land by the colonisers without compensation,¹⁵ and they were pushed into inhospitable areas of the country¹⁶ through the colonial laws.¹⁷ Land problems led to the armed struggle, which eventually led to the Lancaster House negotiations that brought the independence of Zimbabwe in 1980. However, the 1980 Constitution postponed a solution to the land question, and in 2000 and 2005, attempts were made to solve this land problem of Zimbabwe, as shall be discussed in the following discussions.

⁹ The colonisers were British and of white race.

¹⁰ Land Apportionment Act of 1930. According to Palmer (at 186) cited by Ndlovu (n 38 above) fn 16, when the Land Apportionment Act was finally passed in 1930, the countries 48 000 Europeans (of whom 11 000 where settled on the land) were given an average of 1 000 acres of land per head of the population. Their share was greater than that of the one million still predominantly rural Africans who had only 29 acres per head of the population.

¹¹ Native Land Husbandry Act of 19 of 1950.

¹² Land Tenure Act of 19.

¹³ M Nyandoro 'Zimbabwe's land struggles and land rights in historical perspective: The case of Gokwe-Sanyati irrigation (1950-2000)' (November 2012) 57.2 *Historia* 306.

¹⁴see V Nnoma 'Son of the Soil: Reclaiming the Land in Zimbabwe' (2008) 43 *Journal of Asian and African Studies* 375 & M Hove & A Gwiza 'The Fast Track Land Reform Programme and Food Insecurity: A Case of Zimbabwe from 1992 to the Present' (8 August 2012) 2 *American International Journal of Contemporary Research* 281.

¹⁵ D Masaka 'Zimbabwe's Land Contestations and Her Politico-Economic Crisis: A Philosophical Dialogue' (2011) 13 *Journal of Sustainable Development in Africa* 33.

¹⁶ Mutasa (n 8 above) 2.

¹⁷ Ndlovu (n 2 above) 4.

3.4.2 Section 16 of the Constitution of Zimbabwe, 1980

The armed struggle led to the Lancaster House Negotiations which gave birth to the Zimbabwean Constitution of 1980 and independence in 1980.¹⁸ The relevant parts of Section 16(1) of the Zimbabwean Constitution of 1980 which regulated property rights read as follows:

Section 16(1): No property of any description shall or interest or right shall be compulsorily acquired except under the authority of a law that –

- (a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interests or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;
- (b) requires that the acquisition is reasonably necessary in the interests of defence in the case of land that is underutilised, the resettlement of land for agricultural purposes;
- (c) requires the authority to pay prompt adequate compensation for the acquisition;
- (d) requires the acquiring authority, if the acquisition is contested to apply to the High Court or some other court before or not later than thirty days after , the acquisition for an order confirming the acquisition.

Section 16 provided for compulsory acquisition of land provided the government paid prompt and adequate compensation. Its compensation standards were burdensome on a newly independent Zimbabwe. Additionally, section 52 of the Constitution insulated section 16 from amendment in the first ten years of Zimbabwe's independence, thus, postponing a solution to the land question.¹⁹ This provision indirectly guaranteed racial protection of agricultural land as large tracts of land were owned by the colonisers owing to colonisation. Therefore, the postponement of social justice by not sharing land contributed to the farm invasions of early 2000, which invasions made parliament enact radical agricultural land reform laws which had dire socio-economic consequences in Zimbabwe. Towards the year 2000, the war veterans and some villagers invaded farms in different parts of the country due to the government's failure to honour its promise to give the indigenous people the land that they fought for in the liberation struggle. The government failed to stop these land invasions as they were spontaneous. The

¹⁸ Ndlovu (n 2 above) 4.

¹⁹ SRA Dlamini 'Taking land reform seriously: From willing seller-willing buyer to expropriation' Published Masters dissertation, University of Pretoria 33.

Zimbabwean land acquisitions were a-traditional as the land invasions happened first and the law was enacted later to legitimise the acquisitions and resettlement.

In terms of section 16, land could be acquired on a willing seller willing buyer (WSWB) basis. Dlamini²⁰ contends that the 'WSWB' policy entails a voluntary transaction between a seller and a buyer which is an imaginary idea rather than actual practice as the landed are not willing to sell their land whereas the government cannot be said to be a willing buyer because it had a legal duty to buy the land for redistribution.²¹ Under the WBWS policy, small pieces of infertile land were bought in Zimbabwe, Namibia, and South Africa as the landed overpriced substandard land that they sold to the government for resettlement.²² Therefore, the WSWB proved an ineffective policy for changing the unjust land tenure system in Zimbabwe leading to the amendments that shall be discussed in the following subtopic.

3.4.3 Section 16A and 16B of the Constitution of Zimbabwe, 1980

Following the land invasions of 2000, parliament inserted section 16A into section 16 of the 1980 Constitution through amendment number 16. The relevant parts of section 16A provide:

Section 16A(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance-

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly—

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

The provisions of sections 16A(1) outline the policy behind sections 16A and 16B. This was confirmed in the case of *Minister of Lands, Agriculture & Rural Resettlement & others v Commercial Farmers Union*²³ (*Minister of Lands case*) where the Zimbabwean SCA held that

²⁰ Dlamini (n 19 above) 50.

²¹ Dlamini (n 19 above) 50.

²² Dlamini (n 19 above) 50.

²³ *Minister of Lands, Agriculture & Rural Resettlement & others v Commercial Farmers Union* [2002] JOL 9495 (ZS).

section 16A should be understood in historical perspective. It further held that the mischief that section 16A was to deal with was lack of financial resources to carry out the land reform as was required by section 16.²⁴ Thus, section 16A empowered the government of Zimbabwe to compulsorily acquire agricultural land for resettlement but shifted the responsibility for paying compensation from the government of Zimbabwe to the British government in its capacity as Zimbabwe's former colonial power.²⁵ It further insulated the Zimbabwean government from paying compensation should the British government fail. However, Zimbabwe retained the obligation to pay compensation for improvements effected on land.²⁶ Section 16A was complemented by the conforming amendment to the Land Acquisition Act²⁷ which stipulated in section 29C that "compensation shall only be payable for any improvements on or to the land". Land could be acquired by gazetting notices of acquisition in terms of section 8 of the Agricultural Land Settlement Act.²⁸ To implement fast track land acquisition and resettlement, the Rural Land Occupiers (Protection from Eviction) Act²⁹ was enacted to legalise illegal land invasions of 2000 at the instruction of the Supreme Court of Appeal.³⁰ These provisions severely affected the security of agricultural land rights although they made the expropriation of agricultural land easier rights.

Constitutional Amendment 17 of 2005 inserted section 16B into section 16 of the Constitution, 1980. The relevant parts of section 16B provide:

Section 16B (2) Notwithstanding anything contained in this Chapter-

(a) all agricultural land-

(i) that was identified on or before the 8th July, 2005, in the *Gazette*,....

is acquired by and vested in the State with full title therein with effect from the appointed day.....

(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.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except

²⁴ Zimbabwe Constitution of 1980.

²⁵ Section 16A(1)(i) of 1980 Constitution, as Amended by the Amendment 16.

²⁶ Section 16A(1)(ii) of 1980 Constitution, as Amended by the Amendment 16.

²⁷ Land Acquisition Act, Chapter 20:10.

²⁸ Agricultural Land Settlement Act, Chapter 20:01.

²⁹ Rural Land Occupiers (Protection from Eviction) Act 13 of 2001, Chapter 20:26.

³⁰ *Minister of Lands* (n 23 above) 11 and 21.

for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land-

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge...

The Zimbabwean SCA, in the case of *CFM et al*,³¹ held that Section 16B transcends over other rights in the Declaration of Rights. This provision transferred the legal title of agricultural land from investors to the government by publishing a notice of acquisition in the government gazette, but, it ousted the jurisdiction of local courts to adjudicate any land acquisition disputes. In 2006, the Gazetted Land (Consequential Provisions) Act³² was enacted to facilitate the evacuation of former land owners from the expropriated agricultural land. This Act criminalised continual occupation of the acquired land by the former title holder.³³ It however clarified that calculation of compensation for improvements on land continued to be calculated in terms of the Land Acquisition Act and not section 16B.

The author submits that while attempting to outdo the restrictions that section 16 imposed on the Government of Zimbabwe, the amendments which inserted sections 16A and 16B into section 16 introduced draconian law which seriously undermined the security of private property rights in Zimbabwe although they enabled the Zimbabwean government to easily acquire large tracts of agricultural land for resettlement.

3.4.4 Scholarly consensus

There is general consensus among scholars that the land reform programme was a politically motivated move as opposed to a socio-economic move.³⁴ Nnoma³⁵ argues that the ZANU-PF led government, facing a threat of political defeat by the then newly formed, allegedly foreign sponsored party, Movement for Democratic Change (MDC), President Mugabe quickly

³¹ See *Commercial Farmers Union ET AL v Minister of Lands and Rural Resettlement ET AL*, ZSC 31/10 (Const Application No 81/10) 6.

³² Gazetted Land (Consequential Provisions) Act 8 of 2006, Chapter 20;28.

³³ Section 3(2) of the Gazetted Land Act.

³⁴ See Masaka (n 15 above) 336, Ndlovu (n 2 above) 2, Mlambo (n 2 above) 16; Nnoma (n 14 above) 382 and Masilela & D Rankin 'Land Reform in ZimbabweE: ZANU PF's Red Hearing ' 1998 20 *East Africa, Geogra.Rev* 12.

³⁵ Nnoma (n 14 above) 393 & R Duncan 'Price or Politics: an investigation of the causes of expropriation' (2006) 50 *Australian Agricultural and Resource Economic Society Inc. and Blakwell Publishing LTD* 89. It can be argued in this case that white farmers were use as the scapegoat for Zimbabwe's domestic problems.

embarked on the fast-track land reform programme and encouraged the land invasions that were already taking place.³⁶ Thus, land reforms were mainly utilised to sustain ZANU-PF's political power as opposed to mitigating Zimbabwe's socio-economic problems.

3.4.5 Britain equally responsible

The international law principle of state succession requires new states to assume rights and obligations of a former state to ensure stability in international relations.³⁷ This entails that when Zimbabwe became independent, it took all the responsibilities and rights created by the former government, which means Britain cannot be responsible for Zimbabwe's obligations. This principle was followed by South Africa in the case of *Florence v Government of the Republic of South Africa*.³⁸

However, the British Foreign Secretary at the Lancaster House Conference in 1979 committed Britain, in an unwritten agreement, to fund Zimbabwe's land acquisitions for land reform.³⁹ Therefore, the international principles of state succession equally apply to Britain. This means that Zimbabwe was under no obligation to compensate the farmers. However, Blair's labour government dishonoured the British government's commitment of 1979 when it got into power in 1997.⁴⁰ This led to the enactment of draconian agricultural land expropriation laws in Zimbabwe to redistribute agricultural land given that Zimbabwe had little resources to fund the programme.

3.5 The Importance of Agricultural land

One of the main economic activities in developing countries, of which Zimbabwe is one, is agricultural production, hence the international protection of the rights to land. Thus, agricultural land is central to the political economy of Zimbabwe.

3.5.1 Zimbabwe's international legal obligation to grant its citizens access to land

Zimbabwe has international legal obligations to protect its citizens from arbitrary deprivation of their property, and to restore land to the native peoples that they lost during colonisation.⁴¹

³⁶ Ndlovu (n 2 above) 2.

³⁷ T Cheng 'State Succession and Commercial Obligations: Lessons from Kosovo' in MH Arsanjani et al (eds) *Looking to the Future: Essays on International Law in Honour of W. Michael Reisman* 2011 678-679.

³⁸ See, *Florence v Government of the Republic of South Africa* 2014 ZACC 22 para 35 where the Government of the Republic of South Africa acknowledged its responsibility to compensate persons who were disposed of their land by the apartheid government.

³⁹ see Mlambo (n 7 above) 9, Nnoma (n 14 above) 377 & Nyandoro (n 13 above) 310.

⁴⁰ T Magaisa 'The Land Question and Transitional Justice in Zimbabwe: Law, Force and History's Multiple Victims' 30 June 2010, 11.

⁴¹ Article 21 of the African Charter on Human and Peoples Rights (ACHPR) (1986) (Zimbabwe ratified it on 30 May 1986) stipulates that in cases of spoliation the peoples have a right to the lawful recovery of their property.

Article 21 of the African Charter on Human and Peoples Rights (ACHPR) guarantees the right of peoples to recover their property, including land.⁴² This right provides policy space for the introduction of social reforms such as land redistribution.⁴³ Therefore, Zimbabwe has an international legal obligation to restore land to its peoples and to protect its citizens from arbitrary deprivation of their property.

3.5.2 Socio-economic and political importance of land in Zimbabwe

According to Dlamini,⁴⁴ land lies at the heart of social, economic and political life of most Africans. Land is even more valuable to Zimbabwe as its population largely depend on farming for food and survival.⁴⁵ Maposa,⁴⁶ contends that the importance of land in Zimbabwe should be understood from a biblical point of view where land is perceived as belonging to God.⁴⁷ He further contends that land is linked to salvation and identity, thus, without land there is no identity. Palmer⁴⁸ describes the importance of land in Zimbabwe thus: “it was about land during the struggle, what the struggle was, the land was. It has thus remained about the land today”. The author submits that the expropriation laws were necessary to consolidate political and economic independence for indigenous Zimbabweans to enjoy their right to dignity, and socio-economic rights.

3.6 The Zimbabwean agricultural land expropriation laws (section 72)

In 2013, Zimbabwe passed into law the new Constitution (Constitution of Zimbabwe)⁴⁹ which was drafted by the Constitution Parliamentary Select Committee (COPAC). In the *CFU et al case*,⁵⁰ the SCA held that section 16B of the former Constitution prevailed over other rights in the Constitution. Many subsections of sections of 16B⁵¹ were uplifted verbatim and placed in section 72 of the Zimbabwean Constitution.⁵² Therefore, it can be argued that section 72 prevails over other rights as shall be seen in the discussion below. The legal framework for the

⁴² ACHPR.

⁴³ Article 2 of the ACHPR.

⁴⁴ Dlamini (n 19 above) 12.

⁴⁵ See Mutusa (n 8 above) 1, Nnoma (n 14 above) 373 & Chinamasa (n 3 above) 12.

⁴⁶ RS Maposa, J Hlonhwana & T Muguti ‘ Marching forward to the past?: Challenges and prospects for the new theology of Land in Zimbabwe’ (2013) 2,1 *European Journal of Sustainable Development* 136.

⁴⁷ Leviticus 25 verse 23.

⁴⁸ Palmer quoted by Ndlovu (n 2 above) 3.

⁴⁹ The Constitution of the Republic of Zimbabwe Amendment 20 of 2013 (Zimbabwean Constitution)

⁵⁰ See OR Jones & C Dunn, 50 ILM 653 (2011)+ 10 http://www.jstor.org/stable/10.5305/intelegamate.50.4.fm?seq=1#page_scan_tab_contents (accessed on 29 May 2016).

⁵¹ Subsection (3) and (4) of section 16B.

⁵² Constitution of Zimbabwe 2013.

Zimbabwean agricultural land expropriation is stipulated in section 72 Constitution of Zimbabwe and statutes that exist subject to the Constitution. General property rights are regulated by section 71. Section 71 requires fair and adequate compensation to be paid in respect of compulsory acquisition of private property and this ensures the security of private property.⁵³

Unlike section 71, section 72 which regulates the right to agricultural land is radical. It exclusively regulates the expropriation of agricultural land thus it is the heart of this discussion. It is based on the fact that sovereign states have power to acquire private property, and this power was exercised in the case of *Mike Campbell (Pty Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement (Pty) (Mike Campbell case)*.⁵⁴ Section 72 is a complete and a self-contained code on the acquisition of privately owned agricultural land by the state because this provision provides for an exclusive regulation of acquisition of agricultural land for resettlement. In fact, section 72 is a hybrid of sections 16A and 16B⁵⁵ of the 1980 Constitution and it reads as follows in the relevant parts:

Section 72 (2), Where agricultural land, or any right or interest in such land, is required for a public purpose, including--

(a) settlement for agricultural or other purposes;

the land, right or interest may be compulsorily acquired by the State by notice published in the Gazette identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication of the notice.

(3) Where agricultural land, or any right or interest in such land, is compulsorily acquired for a purpose referred to in subsection (2)--

(a) no compensation is payable in respect of its acquisition, except for improvements effected on it before its acquisition;

(b) no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application; and

⁵³ Section 71(3)(3)(ii) of the Zimbabwean Constitution.

⁵⁴ In the case of *Mike Campbell (Pty Ltd v Minister of National Security responsible for Land, Land Reform and Resettlement (124/06) (Pty) [2008] ZWSC 1*.

⁵⁵ In the *Mike Campbell case*, the Supreme Court of Zimbabwe held that the amendment 17 to the Constitution of Zimbabwe 1980 exclusively regulated expropriation of agricultural land.

(c) the acquisition may not be challenged on the ground that it was discriminatory in contravention of section 56.

(5) As soon as practicable after agricultural land is compulsorily acquired in accordance with subsection (2), the officer responsible for the registration of title over land must, without further notice, effect the necessary endorsements upon any title deed and entries in any register for the purpose of formally cancelling the title deed and registering the State's title over the land.

(7) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors must be regarded as of ultimate and overriding importance--

(a) under colonial domination, the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land; and accordingly--

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

This provision is unpacked in the discussions below in an attempt to flesh out the main features of Zimbabwe's agricultural land expropriation laws.

3.6.1 Manner and Effect of Acquisition of Agricultural Land

Subsection (2) and (5) of section 72 regulates the manner of acquiring agricultural land and the effect thereof.⁵⁶ They stipulate that where agricultural land, right or interest is acquired for public purposes including, *inter alia*, resettlement for agricultural purposes, the land, right or interest maybe compulsorily acquired by the state by notice published in a government gazette identifying such land,⁵⁷ right or interests in agricultural land. The publication of a land

⁵⁶ Section 72(1) defines agricultural land as land that is used or suitable for agriculture which includes but not limited to horticulture, viticulture, forestry or aquaculture and animal husbandry.

⁵⁷ Section 72(1) defines land as "land" includes anything permanently attached to or growing on land.

acquisition notice immediately divests the landowner of title over land in favour of the state, but before compensation.⁵⁸ Therefore, the publication of the notice of acquisition of relevant property seals the expropriation process and registration of property in the name of the state follows.

3.6.2 Public Purpose

In *CFU et al* case,⁵⁹ the SCA of Zimbabwe held that the public interests served by the agricultural land expropriation laws are provided for in section 16B(2) of the former Constitution.⁶⁰ Section 16B(2) was imported into section 72(2) of the Constitution of Zimbabwe. Impliedly, in terms of subsection (2) as read with subsection (7), of section 72 of the Constitution of Zimbabwe, it is in the interests of the public that agricultural land be expropriated and be distributed to the general indigenous Zimbabweans as a measure to right the wrongs that were systematically implemented by the colonial administration⁶¹ given that the majority of Zimbabweans depend on farming for their survival.⁶² Given that many communal lands are overcrowded, it will be in the interests of the indigenous Zimbabweans that agricultural land be expropriated for land resettlement. The expropriation of agricultural land in Zimbabwe can be understood in terms of Aristotle's theories of distributive justice and rectificatory justice.⁶³ The distribute justice theory justifies the distribution of things that are divisible among the community members such as land to rectify the past land ownership injustices in accordance with rectificatory justice.⁶⁴

3.6.3 Due process

Due process of law simply requires all legal proceedings to be fair, and that one be given an opportunity to be heard before the government interferes with his or her rights. Section 72(3)(b) imported the provisions of section 16B(3) of the former Constitution although with little alterations. In terms section 72, land owners are not notified of upcoming expropriation; instead, they only receive a notice of acquisition of their agricultural land.⁶⁵ This also means

⁵⁸ Section 72(2).

⁵⁹ OR Jones & C Dunn (n 50 above) 10.

⁶⁰ Constitution of Zimbabwe, 1980.

⁶¹ *CFU et al* (N 31 above) 6 & OR Jones & C Dunn (n 50 above) 10.

⁶² Dlamini (n 19 above) 31 & D Johnson et al, *Jurisprudence: A South African Perspective* (1959) 220.

⁶³ D Johnson et al *Jurisprudence: A South African Perspective* (2001) 12-15 & T Mets 'Justice and the Laws: Liberals, Redistribution, Capitalists and their Critics' in C Roedere and D Moellendorf (eds) *Jurisprudence* (2004) 43. This is helpful in limiting state powers.

⁶⁴ Johnson (n 62 above) 15.

⁶⁵ Subsections (2) and (5) of section 72 of the Zimbabwean Constitution.

that the holders of legal title over land are not afforded an opportunity to present their interest to the acquiring authority. This means that there is no fair hearing.

Section 72 further proscribes the holders of legal title over agricultural land from challenging the process of expropriation. It further disallows the land owners to demand compensation for their land in courts of law save for compensation for improvements effected on land.⁶⁶ Section 72(2)(b) ousts the jurisdiction of courts to adjudicate ‘any’⁶⁷ issue relating to compensation save for compensation for improvements that were effected on land prior to expropriation.

Section 72(3)(c) again proscribes the challenging of allegedly discriminatory agricultural land acquisitions in courts of law. The author contends that this provision obliterates the right to equality before the law and equal protection of the law. Section 72(3)(b) is directly contrary to the rule of law which is one of the founding values of the Constitution. The rule of law principle requires that parties to a dispute should have access to courts and a fair hearing, but section 72(3)(b) prohibits the land owners of agricultural land that have been subjected to expropriation to approach the courts for possible remedies.⁶⁸ Overall, section 72 does not provide for due process of law and the *audi alteram partem* rule.

3.6.4 Discrimination

Section 56⁶⁹ of the Constitution protects everyone from unfair discrimination and guarantees all persons equality before the law, equal benefit and protection of the law.⁷⁰ Discrimination is, however, permissible where it can be shown that it is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.⁷¹ This provision is in line with international instruments that prohibit racial discrimination.⁷²

The Constitution of Zimbabwe was drafted after the SADC Tribunal ruled that Amendment 17 of 2005 constituted substantive inequality because its implementation affected the white race only.⁷³ It is against this background that section 72(3)(c) was inserted in section 72. Its purpose

⁶⁶ Section 72(3)(b) of the Zimbabwean Constitution 2013.

⁶⁷ See *Isle of Weight Railways Co. v Tahourdim* (1883) 25 Ch.D 320, it was held that the word ‘any’ is a word which ordinarily excludes limitation except in a statement where the word ‘any’ is qualified. Section 72 likewise is clear that compensation for improvements on land is justiciable. & *R v Hugo* 1926 AD 268 at 271.

⁶⁸ Sokwanele: The Good, the Bad and the Unworthy: Zimbabwe’s Draft Constitution <http://www.thezimbabwean.co/2013/03/the-good-the-bad/> (accessed on 26 February 2016).

⁶⁹ It lists the prohibited grounds of discrimination.

⁷⁰ Section 56(1).

⁷¹ Section 56(5).

⁷² United Nations Covenant on Civil and Political Rights (CCPR) Article 2(1), The United Nations Covenant on Economic, Social and Cultural Rights (CESCR) Article 2.1, ACHPR, Universal Declaration of Human Rights (UDHR) Article 2 and The Charter of the United Nations (UN Charter) Article 1(3).

⁷³ *Mike Campbell and Others v The Republic of Zimbabwe*, SADC (T) Case 2/2007.

is to circumvent the SADC Tribunal's ruling on section 16B of the former Constitution now imported into section 72. Section 72(3)(c) proscribes the challenge of the acquisition of agricultural land on the ground that it was discriminatory in contravention of section 56.

Section 72(3)(c), therefore, affects section 56 of the Constitution by referential operation by stipulating that section 56 will not apply to agricultural land acquisitions. This subsection takes away the right to equality before the law, equal protection and benefit of the law in respect of expropriations of agricultural land. It further obliterates the right not to be unfairly discriminated with specific reference to rights to agricultural land. It is contended that section 72(3)(c) has ousted the jurisdiction of courts to adjudicate issues of discrimination in the acquisition of agricultural land. The same provision has also obliterated the rights of agricultural land owners from instituting the legal proceedings against the government on the basis of section 56. Thus, this provision has rendered invalid the rights to equal protection and benefit of the law to the extent that they relate to expropriation of agricultural land. In the *Mike Campbell case*⁷⁴, Malaba DCJ held that the intention of the law makers must be respected and enforced, thus the same can be said about section 72 limitations.

The reason for permitting discriminatory expropriation of agricultural land for resettlement purposes is motivated by the government of Zimbabwe's desire to even economic imbalances that were brought by colonisation in Zimbabwe.

3.6.5 Compensation by who?

Section 16A of the 1980 Constitution shifted the responsibility to pay compensation from the government of Zimbabwe and placed it on Britain in its capacity as Zimbabwe's former colonial master.⁷⁵ In the year 2013, this section was imported into section 72(7) of the 2013 Constitution without any alteration despite the SADC Tribunal and ICSID tribunal's clarification that the Zimbabwean government has an international legal duty to pay full compensation to the owners of expropriated land.⁷⁶ Section 72(7) explicitly states that the most important factors to be considered when dealing with land acquisition, among others, are that the indigenous Zimbabweans were unjustly dispossessed of their property without

⁷⁴ (124/06) (Pty) [2008] ZWSC 1, In the case of *Winter v Administrator-in-Executive Committee* 1973(1) SA 873 Ogilvie Tompson CJ, held that the legislature competence to oust the jurisdiction of the courts in respect of certain matters. The same can be said in respect of the section 72(3)(c) of the Zimbabwean Constitution.

⁷⁵ Section 72(7) of the Zimbabwean Constitution.

⁷⁶ See *Campbell* (n 73 above) & *Bernidus Henricus Funnekotter v the Republic of Zimbabwe* ICSID case number ARB/05/6 (*Funnekotter case*).

compensation. It is against this background that the Constitution of Zimbabwe imposes the obligation for paying compensation for land that may be expropriated on Britain as British citizens freely took the land of indigenous Zimbabweans. Should the British government fail to pay the relevant compensation through the fund established for that purpose, Zimbabwe absolves itself from such a responsibility save for the acquisitions that were made by Zimbabwe before the effective date of the Constitution and for property that was protected by treaties, and which was acquired before the effective date of the Constitution.⁷⁷ However, the acquisitions that shall be executed after the effective date do not enjoy this protection.

Section 72(7) leaves the owners of agricultural land insecure given that in 1997 Britain denied the responsibility to compensate farmers for expropriations effected by Zimbabwe.

3.6.6 Compensation for improvements on land only

Section 72(3)(a) incorporated section 16B(1)(2)(b) of the former constitution, and regulates compensation of expropriated agricultural land. It expressly provides that no compensation will be paid for acquisition of agricultural land save for improvements effected on the land before acquisition.⁷⁸ The moral argument for this law is that indigenous Zimbabweans were unjustly dispossessed of their ancestral land by the colonisers without compensation thus they cannot buy their land back. Section 72(3)(a) is directly contrary to section 12(1)(b) of the Zimbabwean Constitution which requires the Zimbabwean government to respect international law principles. Compensation for improvements effected on land is repugnant to the international law principle that investors should be paid the genuine value of their expropriated properties and not for part of their properties.⁷⁹

Therefore, where acquisitions of agricultural land are done in the prescribed manner, the land owners are compensated for improvements effected on land whether or not the person whose land is expropriated bought it. Thus, the agricultural land owner's rights to compensation in cases of expropriation extend no more than to improvements on the expropriated land. Section 72 ignores the fact that many white farmers bought agricultural land after 1980.⁸⁰

⁷⁷ Section 295 of the Zimbabwean Constitution.

⁷⁸ Section 72(3)(a).

⁷⁹ *Funnekotter* (n 76 above) 123 & 124. However, section 295 of the 2013 Constitution protects investors who were protected by treaties before 2013 but this protection does not extend to post 2013 expropriations.

⁸⁰ Sokwanele (n 68 above).

3.6.7 Supremacy of the Constitution and complementary legislation

The Constitution is the supreme law of the land in Zimbabwe, and other laws are valid only to the extent of their consistency with it.⁸¹ For the purpose of this discussion, the most important legislation that regulates expropriation of agricultural land is the Land Acquisition Act (the Act).⁸² This Act provides for considerations that the Zimbabwean Land Commission (ZLC) should take into account when valuing the improvements on agricultural land that has been expropriated, and for the valuing of land where compensation is to be paid from the fund established for that purpose in terms of section 72(7)(c) of the Constitution.⁸³

The main factors that are considered in ascertaining the value of land or improvements for the purpose of paying compensation for section 72 acquisitions are regulated by the Schedule (sections 29 and 50) of the Act.⁸⁴ Part 1 regulates factors that are considered in determining the amount of compensation payable for improvements effected on land that has been expropriated. The ZLC should consider the age; nature and conditions of the improvements on land in addition to other factors that add value to the improvements to agricultural land, and the contributions that were made by the state that added value to the respective improvements.⁸⁵ Furthermore, the potential value and marketability of crops is considered for perennial crops such as tea and coffee.

Part II of the schedule is an embodiment of the relevant guiding principles for ascertaining the value of land for the purposes of paying compensation through a fund that is established in terms of section 72(7)(c). The key factors that are taken into account are the size of the land and the agricultural activities that can be carried out on that piece of land. These factors are collectively considered with factors that pertain to improvements on land when fixing the appropriate value of land for compensation purposes.

The Act also regulates the time frames under which compensation should be paid by the government of Zimbabwe for agricultural land that has been expropriated for resettlement purposes.⁸⁶ Section 29C(3) requires the acquiring authority to pay one quarter of the value of improvement upon acquisition or within a reasonable time; however, the Act does not define what constitute a reasonable time. It is inferred that 'reasonable time' in this case is less than

⁸¹ Section 2(1) of the Zimbabwean Constitution.

⁸² Land Acquisition Act, Act 3 of 1993, Chapter 20:10.

⁸³ Section 297(1)(c)(vi) of the Constitution of Zimbabwe 2013.

⁸⁴ Act 3 of 1993, Chapter 20:10.

⁸⁵ Part 1(1) of schedule (section 29 and 50) of the LAA.

⁸⁶ Section 29C(3) of the LAA.

two years as the Act requires that within two years of acquisition, the second quarter of compensation for improvements should be paid. It is also inferred that the balance after the payment of the second quarter should be paid within three years given that the whole amount payable should be paid within five years from the date of expropriation.

3.7 Conclusion

States have power and rights to expropriate private property for public interest. This chapter has shown that Zimbabwe's agricultural land expropriation laws are informed by its colonial history, and that land problems began with the colonisation of Zimbabwe. It has also shown that the principal purpose of agricultural land acquisitions is to give land to indigenous Zimbabweans, although section 72 does not clarify who qualifies as an indigenous Zimbabwean. Nevertheless, it can be inferred from practice that indigenous Zimbabweans are black people. This chapter also showed that agricultural land acquisitions are not justiciable save for issues of compensation for improvements on land. Again, section 72 takes no account of Zimbabwe's international legal commitments and obligations although it is a signatory a number of international instruments. This stance is not explained, thus, it stands to be investigated if the Zimbabwean agricultural land expropriations laws are consistent with its international commitments and obligations.

In light of this, the next chapter will explore the *Funnekotter* case in an attempt to discuss the conditions of expropriation which Zimbabwe committed itself to in the Zimbabwe-Netherlands BIT.

Chapter Four

The Funnekotter Case

4.1 Introduction

The previous chapter has shown that Zimbabwe's agricultural land expropriation laws are informed by its colonial history, and are aimed at giving land back to indigenous Zimbabweans. However, this chapter explores the conditions under which Zimbabwe may expropriate the investments of the Netherlands nationals in terms of the Zimbabwe-Netherlands (BIT). The principal purpose of this chapter is to clearly set out the conditions under which Zimbabwe may exercise the power of eminent in terms of Article 6 of the Zimbabwe-Netherlands BIT which became operational from 1998. Article 6 was canvassed in *Bernidus Henricus Funnekotter v the Republic of Zimbabwe*,¹ therefore this case shall be used as a compass in this discussion. This chapter argues that the article 6 conditions of expropriation are cumulative; thus, a violation of them imposes an international responsibility on Zimbabwe to pay full reparation.

4.2 Reasons for Treatification and significance of treaties

It is imperative for one desiring to analyse a treaty to appreciate the following: reasons for states to sign treaties; significance of treaties, and the implications of signing treaties. To use Salacuse's² vocabulary, 'treatification' was prompted by lack of consensus on customary international law rules that are applicable to foreign investors, and the desire to attract FDI.³ BITs extend the scope of protection provided by customary international law by codifying the customary international law rules of expropriation and clearly setting out the conditions under

¹ *Bernidus Henricus Funnekotter v the Republic of Zimbabwe* ICSID case number ARB/05/6 (*Funnekotter* case).

² Salacuse JW, *The three laws of international Investment, National, Contractual and International Frameworks for Capital* (2013) 355.

³ M Mafi 'Controversial Issues of Compensation in Cases of Expropriation and Nationalisation: Awards of the Iran-United States Claims Tribunal' (2011) 18 *International J Humanities* 84. Customary international law is not settled on the quantum and conditions of payment of compensation.

which states may exercise the power of eminent domain.⁴ This ensures certainty, predictability and foreseeability of investment law.⁵

BITs embody norms that stem from customary rules of state responsibility for injuries to aliens;⁶ however, their certainty and predictability makes them the most important sources of international law on investment.⁷ Since states voluntarily conclude BITs, they are bound by them and have an international legal obligation to perform their terms in good faith.⁸ Any violation is unlawful and imposes an international responsibility on the host state.⁹

4.3 Discussion of Article 6 of the Zimbabwe-Netherlands BIT in light of the *Funnekotter* case

4.3.1 The brief facts of the *Funnekotter* case are as follows:

The claimants were Dutch nationals who had direct and indirect investments in large commercial farms in Zimbabwe which they invested after Zimbabwe's independence.¹⁰ Their investments were protected by the Zimbabwe-Netherlands BIT which came into effect in 1998.¹¹ Article 6 of the BIT sets out the conditions that host states should comply with when expropriating foreign investments of either party.

In 1992, Zimbabwe enacted the Land Acquisition Act¹² which provided the administrative procedure for expropriating land in Zimbabwe.¹³ Section 5 of the Act required the Minister of Land and Agriculture to issue a notice in respect of land he intended to acquire, and finalise the acquisition by issuing the section 8 land acquisition order which divested the land owner of their land.¹⁴ Section 8¹⁵ acquisition was to be authorised by the Administrative Court.¹⁶ The

⁴ See SP Suberdi *INTERNATIONAL INVESTMENT LAW, Reconciling Law, Policy and Principle* (2008) 88 & J Francis & JS Nicholson 'The Protection of Foreign Property under Customary International Law' 6 *Boston College Law Review* 399-403.

⁵ See Supedi (n 4 above) 88 & KN Schefer *International Investment Law, Text, Cases and Materials* (2013) 33.

⁶ JE Alvarez *The Public International Law Regime Governing International Law* (2011) 106.

⁷ See Salaccuse (n 2 above) 332 & Alvarez (n 6 above) 119. However, Guzman contends that BITs are a system of the west on the rest. He adds on that BITs are neo-colonial as they are one sided agreements which only seek to protect the capital investments of the west in the south of the global village.

⁸ Article 26 of the Vienna Convention on the Law of Treaties (1969).

⁹ See Francis and Nicholson (n 4 above) 394 & R Dolzer 'Case comment *CanocoPhilips v Venezuela and Gold Reserve v Venezuela, Expropriation: A new focus on Old Issues*', (2015) 30.2 *ICSID Review* 972.

¹⁰ *Funnekotter* (n 1 above) para 19.

¹¹ *Funnekotter* (n 1 above) para 19. When the Agreement on the encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands (1996) (Zimbabwe-Netherlands BIT) was concluded the Constitution was consistent with this BIT and these investors were thus protected.

¹² Land Acquisition Act, Chapter 20:10.

¹³ *Funnekotter* (n 1 above) para 21.

¹⁴ *Funnekotter* (n 1 above) para 21.

¹⁵ Section 8 of the Act Chapter 20:10.

¹⁶ *S v Anthony Betram Micklethwait ZWHHC 3 2003 11*.

Act provided for payment of fair compensation for land acquired for agricultural purposes. The Administrative Court frustrated the land acquisition process by delaying to respond to the Minister's applications for confirmation of acquisitions.

Little progress was made in terms of the Act, thus, the government attempted to speed up the process by proposing a Constitution which provided for compulsory acquisition of land without compensation.¹⁷ This proposed Constitution was defeated in a referendum in year 2000.¹⁸ This was followed by farm invasions by the war veterans which the Zimbabwean courts held were unlawful, and to have been instigated by the executive government.¹⁹ Later on in 2000, Amendment 16 to the 1980 Constitution of Zimbabwe absolved the government of Zimbabwe from the duty to compensate land owners for their expropriated land but shifted that responsibility to Britain.²⁰ The amendment further prescribed compensating land owners for improvements effected on land only.²¹ The amendment was followed by the conforming amendment to the Land Acquisition Act, which introduced section 29C²² relating to compensation for improvements effected on land only.

In year 2005, the Zimbabwean government inserted section 16B into section 16 of the former Constitution of Zimbabwe²³ through Amendment 17. Through this provision, all farms in respect of which notice of intention to acquire land was issued, were acquired and vested in the state with full title.²⁴ This Amendment came after the Rural Land Occupier Act²⁵ legitimised illegal land invasions.²⁶ Through these laws, Zimbabwe acquired strings of farms owed by the Netherlands nationals, among others, without the authorisation of the administrative court. These amendments also proscribed the land owners from challenging the land acquisition in local courts as was held by the SCA of Zimbabwe in the *Mike Campbell*²⁷ case.

4.3.2 Issues for determination in the Funnekotter case were as follows:

Whether the tribunal had jurisdiction to entertain the matter

¹⁷ 1999 Draft Constitution of Zimbabwe.

¹⁸ *Funnekotter* (n 1 above) para 25.

¹⁹ *Funnekotter* (n 1 above) para 26 & 29.

²⁰ L Ndlovu 'Following the NAFTA Star: SADC land reform and Investment Protection after the *Campbell* Litigation' (2011) 15 *Law, Democracy & Development* 6.

²¹ Section 16A of the Zimbabwean Constitution 1980.

²² *Funnekotter* 9n 1 above) para 28.

²³ Constitution of Zimbabwe 1980.

²⁴ Section 16B of the Zimbabwean Constitution 1980.

²⁵ Rural Land Occupier (Protection from Eviction) Act 13 of 2001, Chapter 20:26.

²⁶ Section 3 of the Act, Chapter 20:26.

²⁷ *Mike Campbell (Pty Ltd v Minister of National Security responsible for Land, Land Reform and Resettlement* (124/06) (Pty) [2008] ZWSC.

Whether expropriations were racially discriminatory

Whether expropriation was effected without following the due process of law

Whether expropriations were for the benefit of the general public

Whether the respondent had a duty to compensate the claimants

Whether there was a state of emergence in Zimbabwe which relieved it of its duty to compensate the claimants.

4.3.3 Parties submissions

The Applicant's argument

The applicants submitted that there are Netherlands nationals within the meaning of the Zimbabwe-Netherlands BIT. They further contended that the government of Zimbabwe expropriated their property without following the due process of law by acquiring their land without authorisation from the Administrative Court. They further argued that farm invasions and legitimisation of illegal invasions through the Rural Land Occupier Act were inconsistent with the due process of law.²⁸

The applicants further argued that by encouraging the war veterans to invade their farms, the government of Zimbabwe acted against public interests.²⁹

More so, the applicants argued that the Zimbabwean agricultural land acquisitions were meant to expel the white farmers; therefore, they were unfairly discriminatory and unlawful.³⁰

More importantly, they alleged that the government of Zimbabwe breached its international legal obligations by failing to compensate them.³¹ Finally, they prayed that Zimbabwean government be found in breach of its international legal commitments enumerated in Article 3 and 6 of the Zimbabwe-Netherlands BIT.³²

Zimbabwe's counter argument

Zimbabwe contended that the land reform programme was meant to give land to masses of the landless Zimbabweans, thus, it served public interests.³³ It further argued that the land

²⁸ *Funnekotter* (n 1 above) para 42.

²⁹ *Funnekotter* (n 1 above) para 39 &74.

³⁰ *Funnekotter* (n 1 above) para 39 &74.

³¹ *Funnekotter* (n 1 above) para 75.

³² *Funnekotter* (n 1 above) para 81.

³³ *Funnekotter* (n 1 above) para 55.

invasions that followed the defeat of the year 2000 constitutional referendum were spontaneous and it unsuccessfully tried to abate them and the violence thereof.³⁴

It further argued that the land reform was conducted in accordance with the Land Acquisition Act and the Constitution.³⁵

It further contended that the land reform programme affected the holders of large tracts of land who happened to be whites owing to the colonial discriminatory land tenure relations.³⁶

Zimbabwe further submitted that a state of emergency made it impossible for it to compensate the applicants. It further blamed the applicants for failing to institute proceedings for compensation in terms of Zimbabwe's domestic laws.³⁷

Overall, Zimbabwe argued that its land reform measures were consistent with Article 6 of the Zimbabwe-Netherlands BIT.

4.4 The Decision

The Tribunal ruled that it had jurisdiction to hear the matter on the basis that the applicants were Netherlands nationals and their investments fell within the definition of investments as per Zimbabwe-Netherlands BIT, and that this BIT provided for adjudication of disputes arising from it at the ICSID as both states were members of the ICSID Convention.

While the claimants argued that the Government of Zimbabwe violated paragraphs (a), (b) and (c) of article 6 of the Zimbabwe-Netherlands BIT, the Tribunal observed that the conditions of expropriation enumerated in Article 6 are cumulative.³⁸ This entails that a breach of one of them violates article 6,³⁹ and this imposes an international responsibility on the host state. Article 6 read as follows:

Neither Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

a) the measures are taken in the public interest and under due process of law;

³⁴ *Funnekotter* (n 1 above) para 56.

³⁵ *Funnekotter* (n 1 above) para 61.

³⁶ *Funnekotter* (n 1 above) para 83 & 84.

³⁷ *Funnekotter* (n 1 above) para 83 & 84.

³⁸ *Funnekotter* (n 1 above) para 98.

³⁹ *Funnekotter* (n 1 above) para 98.

b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

c) the measures are accompanied by provision for the payment of just compensation.

Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants. The genuine value of the investments shall include, but not exclusively, the net asset value thereof as certified by an Independent firm of auditors.

Instead of examining compliance with all the conditions of expropriation as per the BIT, the ICSID Tribunal decided to examine compliance with paragraph (c) of article 6 which requires payment of compensation for any expropriation. The Tribunal further observed that if this condition is violated, it becomes unnecessary to examine other conditions since they are cumulative. Zimbabwe was found not to have made an attempt to compensate the complainants and it was observed that in its counter claim, it expressed its intention to honour its international legal obligations in terms of article 6(c).⁴⁰

The tribunal held further that there was no state of emergency, and that even if it was there; Article 7 still required the government of Zimbabwe to compensate the investors. The Tribunal was dissatisfied with Zimbabwe's explanation of how the alleged state of emergency prevented it from compensating the applicants. Thus, it held that the Government of Zimbabwe violated Article 6(c); hence, it did not proceed to examine the other conditions of expropriation.

The author argues that looking at the economic situation of Zimbabwe in early 2000; Zimbabwe would have been able to pay compensation if it wished. Requiring Zimbabwe to pay compensation for land takes us back to the Lancaster House negotiations which once broke up because of this issue. The moral argument for this is that when it is said that Zimbabwe should pay, in reality it is the tax payers that bear the burden of buying their land back. The majority of Zimbabweans are poor and live in poverty, so adding such a heavy burden on them can cripple them financially. Notwithstanding this, Mugabe utilised the situation to his political advantage and the BIT legal obligation still needed to be honoured.

⁴⁰ *Funnkottter* (n 1 above) para 101.

After ruling on Zimbabwe's breach, the Tribunal went on to consider how to award damages. It awarded the claimants 8, 222 000 euros of the total of 10, 690 000 euros that they claimed. One may argue that there was no fairness in the award of damages considering that Zimbabwe is a developing country and its economy was almost crumbling. However, the BIT had to prevail. The manner in which the tribunal dealt with compensation shall be discussed in the following section when fleshing out the principles of compensation.

4.5 Analysis of the case

The ICSID Tribunal in the *Funnekotter* case held that the conditions of expropriation are cumulative. This implies that if a state violates one of the conditions enumerated in Article 6 which stipulate that expropriation should be accomplished for public purposes, in a non-discriminatory manner and against compensation in accordance with due process of law, such expropriation is unlawful. The Government of Zimbabwe was found to have violated Article 6 upon finding that its expropriation was not accompanied by compensation. The Tribunal only canvassed compensation requirement and emphasized the need for compliance with the other three conditions of expropriation as a violation of one of them would render the respective expropriation unlawful. It is against this background that this section will explore the four conditions of expropriation enumerated in Article 6 of the Zimbabwe-Netherlands BIT. The ICSID arbitration jurisprudence, court decisions and international legal theory will be relied on in this discussion in an attempt to flesh out what these four conditions of expropriation entail. The *Funnekotter* decision shall be used as the compass in this discussion.

4.6.1 Public purpose

The requirement of article 6(a) that expropriation should be accomplished for public purposes cannot be over emphasised.⁴¹ Its meaning should be interpreted in good faith and in accordance with the object and purpose of the BIT.⁴² In *Saluka Investments BV (the Netherlands) v the Czech Republic*,⁴³ the ICSID Tribunal held that when interpreting BITs, relevant rules of international law including customary international law should be applied. The same shall be applied when interpreting paragraph (a) of article 6.

⁴¹ In the *Funnekotter* (n 1 above) para 98, the ICSID tribunal observed that the conditions enumerated in article 6 are cumulative.

⁴² Article 31(1) of VCLT.

⁴³ *Saluka Investments BV (the Netherlands) v the Check Republic* (A Partial Award of 22 May 2006) para 254.

The PCIJ defined public purpose as reasons of public utility in the *Chorzow Factory* case.⁴⁴ This entails that the property rights of an individual should yield only to the interests of the general public. Sonarajah⁴⁵ contends that public purpose is not a condition for effecting lawful expropriation. His argument is echoed by Zongwe⁴⁶ who contends that the concept of public purpose is vague, broad and ambiguous. Because of the ambiguity of the concept of public purpose, international courts rarely examine whether or not state acquisitions of foreign investments serve the interests of the public, except in compelling circumstances, as public interests are purely domestic political issues. This position is embraced by many international courts and tribunals.⁴⁷

The purpose of BITs is to protect foreign investor's private property⁴⁸ because of the inviolability of rights to private property.⁴⁹ The public purpose requirement of expropriation proceeds from the utilitarian view of governance that private property rights can only yield to the overriding interests of the greater public.⁵⁰ However, states can easily couch their expropriation measures to fall within the public purpose requirement. Tribunals do not discard the public purpose requirement when adjudicating and they will not ignore self-serving expropriations by government officials as this falls short of meeting public interests.

The BIT and customary international law public purpose condition of expropriation should also be understood in light of the international human rights law principle of continuing violations.⁵¹ Beginning from 1890, indigenous Zimbabweans' property rights continued to be violated as their land which was taken away from their ancestors still remained under ownership of the minority. Thus, Zimbabwe had a duty to lawfully expropriate land for resettlement to end these continued violations of indigenous people's rights to land. After all, Mugabe's ZANU-PF government could have been right but failed to clarify and show the connection between the expropriation of agricultural land, and the social and economic purposes of this expropriation in Zimbabwe given that prior to the year 2000 land invasions, the Zimbabwean communal lands were very congested and poverty stricken. In the *Funnekotter* case, it would have been

⁴⁴ *Chorzow Factory case (Claim for Indemnity) (Merits), Germany v Poland, 1928 PCIJ, Ser A. No 7, Judgment No. 13 (13 September 1928)*

⁴⁵ M Sornarajah *The International Law on Foreign Investment* (2010) 407.

⁴⁶ D Zongwe, 'The contribution of *Campbell v Zimbabwe* to foreign Investment Law on Expropriation' (2010) 2:1 *Namibia Law Journal* 39-40.

⁴⁷ *James v United Kingdom* (1986) 8 EHRR 123.

⁴⁸ See the preamble of the Zimbabwe-Netherlands BIT & Salaccuse (n 2 above) 393.

⁴⁹ Francis & Nicholson (n 4 above) 403.

⁵⁰ Schefer (fn 5 above) 170.

⁵¹ *Swaziland: Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 43-51.

very difficult and unlikely for the Tribunal to rule that Zimbabwe breached this condition as the expropriated farms were redistributed to the landless Zimbabweans, war veterans, and of course to the ruling elite.

4.6.2 Due process

Article 6(a) of the Zimbabwe-Netherlands BIT requires that expropriations by the host states be accomplished in accordance with the due process of law, without defining what ‘due process’ entails. The ICSID tribunal in the *Funnkottoer* case stressed the importance of expropriating property in accordance with this condition but it did not unpack it.⁵²

In investment law, due process is a requirement of procedural fairness throughout the whole expropriation process.⁵³ According to Supedi⁵⁴, expropriation without due process of law happens when compulsory acquisition of investments is accomplished in violation of the principle of equality before the law, and the right to fair hearing. It is submitted that due process of law requires that expropriation be accomplished in accordance with the rule of law.

In the *Campbell case*,⁵⁵ the SADC Tribunal held that the fundamental rights embraced in the rule of law, among others, are the right to access to courts and the right to a fair hearing, before deprivation of one’s rights or interests. Additionally, the rule of law requires disputes to be adjudicated in accordance with law by independent and impartial arbiters.⁵⁶ This right is further provided for by the ACHPR.⁵⁷ Therefore, domestic laws that oust the jurisdiction of local courts to review the compulsory acquisition of investments are repugnant to the rule of law principles.

Furthermore, for a hearing to be fair, the affected party should be notified of the impending expropriation and such expropriation should be carried out in a transparent manner.⁵⁸ In the *Metalclad*⁵⁹ case, the ICSID Tribunal ruled that Mexico trampled on the due process requirement by failing to notify the applicant of impending expropriation and by not giving him representation in the discussion that led to expropriation of his investment. Thus, the due

⁵² See *Funnkottoer* (n 1 above) para 98 where the tribunal observed that the conditions of expropriation are cumulative.

⁵³ Schefer (n 5 above) 177.

⁵⁴ (n 4 above) 74.

⁵⁵ *Mike Campbell and Others v The Republic of Zimbabwe*, SADC (T) (Case 2/2007) 27.

⁵⁶ *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 2 (CC) para 82.

⁵⁷ Article 26 of the ACHPR.

⁵⁸ Schefer (fn 5 above) 177.

⁵⁹ *Metalclad Corp v United Mexican States*, ARB (AF)/97/1/ (Award, 30 August 2000) 16 ICSID, 103.

process requirement requires the involvement of the property owner throughout the expropriation process and the process needs to be justiciable.

It is inconceivable that compulsory acquisition of land can be said to be in accordance with due process of law where there is no access to courts.

4.6.3 Non-Discrimination

Although contentious, non-discrimination is a firmly established yardstick of the legality of expropriations in customary international law, and in paragraph (b) of article 6 of the Zimbabwe-Netherlands BIT. The ICSID tribunal in the *Funnekotter*⁶⁰ case emphasised the importance of complying with this condition when expropriating; however, the Tribunal did not canvass the concept. Maniruzzaman⁶¹ contends that non-discrimination is an international law concept of equality expressed in the negative form. It has the status of *jus cogens*.⁶² Discrimination is prohibited by a plethora of international instruments.⁶³

Like other BITs, the Zimbabwe-Netherlands BIT does not define the principle of non-discrimination, but the Convention on the Elimination of all Forms of Racial Discrimination (CERD)⁶⁴ comprehensively defines it as follows:

...any distinction, exclusion, restriction, or preference based on race, colour, 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.

The above definition shows that unlawful discrimination happens when the host state makes unreasonable distinctions among investors⁶⁵ based on investors' personal characteristics.⁶⁶ Thus, singling out foreign investor's property for expropriation without justification is discriminatory, unlawful and negates public purposes.⁶⁷ To be lawful, there must be proportionality between the object of discrimination and a discriminatory measure.

⁶⁰ *Funnekotter* (n 1 above) para 98.

⁶¹ AFM Maniruzzaman 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment; An Overview' (1999) 8 *J Transnational L & Policy* 58.

⁶² Sonarajah (fn 45 above) 409.

⁶³ UDHR; ACHPR; CESC & UN CPR.

⁶⁴ Convention on Elimination of All Forms of Racial Discrimination Article 1.

⁶⁵ Salaccuse (n 2 above) 317.

⁶⁶ Schefer (n 5 above) 180.

⁶⁷ See *Eureko B.V. Republic of Poland*, Partial Award, 19 August 2005 para 242, *ADC Affiliate Limited and ADC and ADMC Management Limited v Republic of Hungary*, ICSID ARB 03/16 award, 2 October 2006 para 442 & Maniruzzaman (fn 61 above) 59.

Non-discrimination should be in law and in fact in order to achieve material equality.⁶⁸ Equality in law proscribes discrimination of any kind whereas equality in fact permits unequal treatment to establish equilibrium between different situations.⁶⁹ The former resembles formal equality whereas the latter entails the implementation of the equality principle with due regard to relevant facts and circumstances. The latter, therefore, permits the adoption of the discriminatory post-colonial expropriation measures to advance previously disadvantaged people. Thus, equality in fact proscribes substantive discrimination.

However, the non-discrimination condition of expropriation is not absolute. Equality entails that equals must receive the same treatment while unequal treatment among unequals is acceptable. It is against this background that the International Covenant on Economic, Social and Cultural Rights (CESCR)⁷⁰ in paragraph 3 of article 2 empowers developing countries, which include the post-colonial states, to determine the extent to which they can guarantee the economic rights enumerated in the Charter. This provision enables post-colonial states to pursue social justice by reversing the past structural discrimination with current structural discrimination.⁷¹ This is called affirmative action, and it is meant to advance previously disadvantaged people such as blacks and women.⁷² Therefore, discrimination by the formerly colonised people towards former colonial investors and other investors is permissible if it is meant to end economic domination of the nationals by the investors of the former colonial power.⁷³ Post-colonial expropriations maybe necessary to bring a state of economic equilibrium between the former colonial investors and the nationals of the respective state; thus, they are lawful.

Overall, it can be observed that unjustified discrimination is unlawful hence it imposes an international responsibility on the host state. Thus, Zimbabwe's expropriations that are discriminatory are inconsistent with article 6(b) save if they are justified.

4.6.4 Compensation

Even if host states may expropriate alien investments in a discriminatory manner and unilaterally, investors are unlikely to complain if they are adequately compensated. The

⁶⁸ Committee on Economic, Social and Cultural Rights, General Comment No.20, Non-Discrimination in Economic, Social and Cultural Rights (art.2, para.2) U.N.Doc.E/C.12/GC/20 (2009) para 36 & 37.

⁶⁹ Maniruzzaman (n 61 above) 62

⁷⁰ CESCR.

⁷¹ Zongwe (n 46 above) 43.

⁷² See Zongwe (n 46 above) 43 & Maniruzzaman (n 61 above) 61-62.

⁷³ Sonarajah (n 45 above) 409.

compensation principles remain controversial although BITs have minimised this controversy. Both BITs and customary international law require expropriations to be carried out against compensation.⁷⁴ BITs as pillars of international law on foreign investment clearly set out concrete rules that regulate applicable standards of compensation in expropriation cases.

In the *Funnkotter*⁷⁵ case, the ICSID Tribunal observed that both BITs and international law require host states to compensate aliens for their expropriated property.⁷⁶ In this case, the Tribunal found Zimbabwe to be in breach of its international legal obligations enumerated in paragraph (c) of Article 6 which required it to compensate the Dutch investors.

Article 6(c) of the Zimbabwe-Netherlands BIT decrees that just compensation must be paid for all expropriations. Some scholars argue that just compensation embraces the HULL formula of adequate, prompt and effective⁷⁷ compensation which was re-affirmed by the PCIJ's authoritative decision on compensation in the *locus classicus* of the *Chorzow Factory* case.⁷⁸ This standard was advocated for by the applicants in the *Funnkotter* case arguing that the BIT has no *lex specialis* rules that regulate unlawful expropriations thus Zimbabwe's land expropriation fell within the confines of customary international law. The *Chorzow Factory* decision ordains full reparation as the bedrock of international law on compensation.⁷⁹ This entails that reparation must as far as possible wipe all the consequences of an illegal expropriation and re-establish a situation which would in all probability have existed had an illegal act not been committed.⁸⁰ Where reparation is not possible, international law prescribes the payment of full compensation. Thus, full compensation is not limited to the payment of market value but it includes future profits that the investment would have made. It also includes increase in value of the property at the time of adjudication.⁸¹

Additionally, full compensation requires that compensation must be prompt, adequate and effective. Promptness requires the payment of investor's compensation immediately before or after expropriation of their property while effective compensation is one that is in the form of

⁷⁴ See Schefer (n 5 above) 187-190 & Zimbabwe-Netherlands BIT, article 6(c).

⁷⁵ *Funnkotter* (n 1 above) para 140.

⁷⁶ See *Campbell SADC* case 55, *Funnkotter* (n 1 above) para 115 & Salaccuse (n 2 above) 314

⁷⁷ See W Shan *The Legal Protection of Foreign Investment: A Comparative Study* (2012) 53 & Supedi (n 4 above) 79.

⁷⁸ *Chorzow Factory* (n 44 above.).

⁷⁹ P Blenvenu & MJ Valasek 'Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law' (2009) 14 *Kluwer Law International* 230.

⁸⁰ Blenvenu & Valasek (n 79 above) 230.

⁸¹ *Funnkotter* (n 1 above) para 111.

legal currency which is fully convertible and transferable.⁸² Adequate compensation includes the actual value of the expropriated investment and expected profits whose realisation was hindered by an illegal expropriation.⁸³ Full expropriation demands more than the requirements of Article 6(c) which requires the payment of the genuine value of the expropriated investment.

The Tribunal further ruled that both article 6(c) and international law prescribe that damages must correspond to the genuine value of the investment at the time of expropriation.⁸⁴ Thus, if the net asset value, which is the value of an investment as per books of accounts, is lower than the genuine value, then compensation will be higher than the net asset value.

The Tribunal further clarified that damages should be valued based on market value of the expropriated investment in the host country on the date in which the investor was divested of her investment.⁸⁵ It follows that property must be valued just before the intention to expropriate becomes well known. This is helpful in estimating the genuine value of the expropriated property unlike valuing it after the intended expropriation became known as this has a tendency to reduce the genuine value of the property in the market.

In both BITs and international law, genuine value is the market value, which is the value of the investment independent of origin and past success. In simple terms, market value is the value that a willing buyer would have paid to a willing seller of an enterprise of going concern. This value disregards the diminution of the property due to anticipated expropriation or the expropriation itself, and further disregards factors that might have increased the value of the investment at issue.⁸⁶ The nature of the investment and the circumstances of its expropriation determine the manner of calculating the value of the said investment. The author contends that the market value method of valuation, despite its popularity, is nothing but the speculative value of an investment as the willing buyer and willing seller are hypothetical and not a reality. The author further contends that the market value method of valuation can be described as a calculated estimation of what expropriated property would have cost had it been freely sold in an open market at the time of expropriation.

⁸² Schefer (n 5 above) 189.

⁸³ Schefer (n 5 above) 189.

⁸⁴ *Funnekotter* (n 1 above) para 123.

⁸⁵ See WM Reisman & RD Sloane 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) *Yale Legal Scholarship Repository* 133, *Funnekotter* (n 1 above) para 124 & Salaccuse (n 2 above) 314.

⁸⁶ Supedi (fn 4 above) 124.

The Tribunal further held that the genuine value of the expropriated agricultural land should be determined by the market value of the whole farm at the time of its expropriation,⁸⁷ which depend on the size of the farm; the region in which it falls; the quality of the soils; the productivity of the farm, the condition and importance of the farm equipment.⁸⁸ Thus, the value of a farm requires the valuation of the land itself and the things that are attached to it so as to ensure that the state or the general public are not unjustly enriched at the expense of a foreign investor.

To ensure that investors are appropriately compensated, interests are compounded from the date of dispossession until full payment of the amount owed in cases where the investor is repaying loans with compound interest.⁸⁹ The notable purpose of compensating foreign investors is to fill in the gap caused by expropriation and protect investors from suffering material damages as a result of expropriation, and enable them to quickly re-invest their capital in another country or in a different sector of the economy.

Overall, Article 6(c) requirement that ‘just compensation’ must be paid to a claimant entails that it must be paid promptly. According to Salaccuse,⁹⁰ compensation is just when, in the absence of exceptional circumstances, an investor is paid an amount equivalent to the genuine value of the expropriated property at the time of expropriation. This amount must be in the form of legal and freely convertible currency,⁹¹ and must be economically usable by the foreign investor, and the investor must not wait for years for it.⁹²

4.7 Conclusion

Article 6 of the Zimbabwe-Netherlands BIT re-affirms the customary international law position that states have a right to exercise the power of eminent domain. As opposed to the unclear customary international law, this BIT stipulates that hosts states should accomplish expropriation if they meet these conditions: public purpose, non-discrimination, due process of law and just compensation. These conditions are cumulative; therefore, violation of one of them renders expropriation unlawful and imposes international responsibility on the host state. BITs create a special legal relationship as between signatories and so is the Zimbabwe-

⁸⁷ *Funnekotter* (n 1 above) para 130.

⁸⁸ *Funnekotter* (n 1 above) para 132.

⁸⁹ *Funnekotter* (n 1 above) para 144-146.

⁹⁰ (n 2 above) 318.

⁹¹ Salaccuse (n 2 above) 318.

⁹² *Funnekotter* (n 1 above) para 144.

Netherlands BIT. Thus, Zimbabwe as a signatory of this BIT is bound by it and has an international legal obligation to perform its terms in good faith.

This discussion has shown that no matter how important expropriation may be, and whether lawful or unlawful, the host state retains the duty to compensate the foreign investors whose investments have been expropriated as compulsory acquisitions without compensation constitute confiscation.⁹³

In light of this, the next chapter will examine whether Zimbabwe's agricultural land expropriation laws are compatible with the conditions of expropriation provided in the Zimbabwe-Netherlands BIT.

⁹³ See A Reinisch 'Expropriation' in P Muchliski & C Schreuer (eds) *International Investment Law* (2008) 436; Expropriation without compensation equals confiscation.

Chapter Five

Analysis of key aspects of Zimbabwe's Agricultural Land Expropriation Laws in light of the *Funnekotter* case

5.1 Introduction

This chapter begins with an explanation of how the international law doctrine of *pacta sunt servanda* justifies the review of the Zimbabwean agricultural land expropriation laws in light of Zimbabwe's BIT commitments. The main part of this chapter examines whether Zimbabwe's agricultural land expropriation laws are in tandem with the conditions of expropriation enumerated in article 6 of the Zimbabwe-Netherlands BIT as expounded in the *Funnekotter*¹ case. This examination is a comparative analysis in which the Zimbabwean agricultural expropriation laws are compared with conditions of expropriation enumerated in Article 6 of the Zimbabwe-Netherlands BIT. This chapter ends with a discussion of the implications of Zimbabwe's agricultural land expropriation laws on foreign direct investment (FDI) in Zimbabwe.

The pertinent laws in this discussion are:

1. The Constitution of Zimbabwe 2013 (Zimbabwean Constitution)
2. Zimbabwe-Netherlands Bilateral Investment Treaty concluded on 11 December 1996 and still in force (Zimbabwe-Netherlands BIT)
3. Land Acquisition Act 3 of 1992, Chapter 20:10

This chapter argues that the Zimbabwe's agricultural land expropriation laws are not compatible with the conditions of expropriation and its international legal obligations stipulated in article 6 of the Zimbabwe-Netherlands BIT. On the other hand, the Zimbabwean agricultural land expropriation laws are viewed as a means of giving agricultural land to the landless Zimbabweans chiefly for agricultural purposes since the majority of Zimbabweans depend on farming for survival. Nevertheless, this chapter argues that these laws have negative implications on Zimbabwe's ability to attract FDI.

¹ *Bernidus Henricus Funnekotter v the Republic of Zimbabwe* ICSID case number ARB/05/6 (Funnekotter case).

5.2 The doctrine of *pacta sunt servanda*

The customary international law principle of *pacta sunt servanda*² as codified in the Vienna Convention on the Law of Treaties (VCLT)³ is the cornerstone of international law⁴ and international relations. This principle entails that a treaty that is in force is binding upon its signatories and must be performed in good faith.⁵ BITs are *lex specialis* and only bind the respective parties. Such *lex specialis* is binding as between Zimbabwe and the Netherlands. Dolzer⁶ contends that BITs limit the sovereignty of states as they require domestic measures to be accordingly aligned, and any disregard to the BIT commitments is costly as it imposes international responsibility on the state in breach. This doctrine also applies to contractual relationships between states and aliens.⁷ Therefore, states that made international commitments should implement them accordingly through their domestic policies.

Two theories attempt to explain the relationship between international law and national law; the monist and the dualist theories. The monist theory contends that national law and international law are two components of a single body of law that concurrently regulate the same subject matter.⁸ This theory further contends that in cases of conflict between domestic and international law, the later should prevail over domestic law.⁹ This position is explained by Kelson, a popular monist positivist philosopher who contends that international law derives from state practice as opposed to domestic law which is made by states in exercise of their domestic jurisdiction.¹⁰ According to Kelson quoted by Martin,¹¹ international law is a higher legal order that domestic law should yield to, and this position has been adopted by the VCLT.¹²

² DJ Dugard *International Law: A South African Perspective* (2011) 414.

³ Article 26 of the Vienna Convention on the Law of Treaties (1969).

⁴ S Lekkas & A Tzanakopoulos 'Pacta sunt servanda versus flexibility in the suspension and termination of treaties' in C J Tam et al (eds) *Research Handbook on the Law of Treaties* (2014) 316.

⁵ See Article 26 of the VCLT & J Francis & SL Nicholson 'The Protection of Foreign Property under Customary International Law' (1965) 6 *Boston College Industrial and Commercial Law Review* 390.

⁶ R Dolzer 'The Impact of international Investment Treaties on Domestic Administrative Law' (2006) 37 *International Law and Politics* 953 and 972.

⁷ See P Healy 'Pacta Sunt Servanda once again: the story of Greece and Ireland' (2015) 14 *Working Papers in History and Policy* 5 & International law Commission 29.

⁸ M Dixon *Textbook on International Law* (2013) 91.

⁹ Dixon (n 8 above) 91.

¹⁰ Dixon (n 8 above) 91.

¹¹ See Dixon (n 8 above) 91 & J Crawford Brownlie's *Principles of Public International Law* (2012) 49.

¹² See article 27 of the VCLT. This provision is subject to article 46 of the VCLT which relieves a state of its international legal obligations if the treaty was concluded in material violation of one or some of the internal laws of the state.

Therefore, the monist theory entails that BITs have a higher status than the host state's domestic laws.

On the other hand, the dualists contend that international law and domestic law operate at different spheres although they regulate the same substance, with international law regulating the relations between states, while national laws regulate relations within a state.¹³ The dualists argue that international law is not binding unless it is domesticated and where the two conflict, national law should supersede international law.¹⁴ The dualists contend that international law and national law are dual legal systems regulating the same rights and obligations at international and national platforms respectively, thus, domestic laws prevail over international law on domestic issues.¹⁵ This means that state measures maybe lawful within their territory even though they may be unlawful at international plane.

Zimbabwe follows the dualist approach¹⁶ whereas the Netherlands¹⁷ follows the monist approach. This makes the Zimbabwe-Netherlands BIT an ugly creature as the two governments have different legal traditions which entails different legal implications. However, the doctrine of *pacta sunt servanda* proscribes states from relying on their domestic laws to avoid their treaty obligations¹⁸ which they consented to.¹⁹ It should be pointed out that the government of Zimbabwe voluntarily negotiated and adopted the Zimbabwe-Netherlands BIT in good faith. By voluntarily negotiating and adopting this BIT, Zimbabwe voluntarily accepted this BIT to dictate the manner of expropriating the investment of the Dutch nationals. Thus, by adopting this BIT, Zimbabwe voluntarily surrendered its sovereignty to the extent that this BIT is applicable to it.

It is settled customary international law that treaty obligations must be performed in good faith and this is the basis of treaty relationships.²⁰ Customary international law provides that parties to treaties that are in force are bound by them and should enforce them in good faith. Although not a signatory of the VCLT, Zimbabwe is bound by customary international law requirement

¹³ See Dixon (n 8 above) 91 & M N Shaw *International Law* (2014) 21.

¹⁴ Crawford (n 11 above) 48.

¹⁵ Dugard (n 2 above) 423.

¹⁶ See sections 326 and 327 of the Constitution of Zimbabwe 2013.

¹⁷ Article 94 of the Constitution of the Kingdom of the Netherlands 2008.

¹⁸ WW Park & AA Yanos 'Treaty obligations and national law: Emerging Conflicts in International Arbitration' 58 (2006) *Hastings Law Journal* 251.

¹⁹ See M Hansungule 'The Suspension of the SADC tribunal' 35 *Strategic review for South Africa* 142 & Mike Campbell and Others v The Republic of Zimbabwe, SADC (T) (Case 2/2007) 25.

²⁰ Shaw, N and Shaw, QC (2014) *International Law* Cambridge University Press: Cambridge United Kingdom 23.

for performance of treaties in good faith,²¹ therefore, it is important to examine if Zimbabwe's agricultural land expropriation laws conform to the conditions of expropriation enumerated in Article 6 of the Zimbabwe-Netherlands BIT which were expounded in the *Funnekotter* case.

5.3 Examination of Zimbabwe's agricultural land expropriation laws in light of the *Funnekotter* case.

5.3.1 Recapitulation of Zimbabwe's agricultural land expropriation laws

The review of the Zimbabwean agricultural land expropriation laws has been canvassed in Chapter Three,²² however; these are the key features provided in the Constitution of Zimbabwe:²³

- i) Subsections (2) and (7) of section 72 stipulate that agricultural land expropriations are meant for redistribution of land for agricultural resettlement purposes.
- ii) Section 72(3)(c) provides that agricultural land acquisitions cannot be challenged on the ground that they are discriminatory.
- iii) Subsections (2) and (3) of section 72 stipulate that agricultural land is acquired through publishing the notice of acquisition in the government gazette and such acquisition is not justiciable.
- iv) Section 72(7) provides that Britain is responsible for paying compensation for Zimbabwe's agricultural land expropriations, whereas section 72(3)(a) imposes on the government of Zimbabwe, the duty to compensate land owners for improvements that they effected on agricultural land.

5.3.2 Section 72 public purpose versus BIT public purpose

The ICSID Tribunal in the *Funnekotter*²⁴ case stressed a point that was made by the Zimbabwean SCA in *Minister of Lands, Agriculture & Rural Resettlement & others v Commercial Farmers Union*²⁵ - that Zimbabwe should only pursue expropriation that serves the interests of the public. Tribunals adjudicate the issues of public purpose only in exceptional

²¹ See Sections 12(1)(b) and 326 of the Constitution of Zimbabwe 2013.

²² Chapter 3.

²³ Constitution of Zimbabwe 2013.

²⁴ *Funnekotter* (n 1 above) para 98.

²⁵ See, *Minister of Lands, Agriculture & Rural Resettlement & others v Commercial Farmers Union* [2002] JOL 9495 (ZS) 2, the Supreme court of Appeal, in the case of *Commercial Farmers Union v The Minister of Agriculture, Land and Rural Resettlement and others* SC 132/2000 required the government to satisfy the public purpose condition by expropriating agricultural land in accordance with the rule of law. It further required the government to compile a list of the landless Zimbabwe's and the farms targeted for expropriation for agricultural resettlement.

cases,²⁶ for example, in the case of *CMD*²⁷ where the ICSID Tribunal held that host state actions that are designed to harm investors do not serve public interests and thus are unlawful. Section 72 of the Constitution of Zimbabwe is clear that the purpose of agricultural land expropriations is; to resettle the landless Zimbabweans for agricultural purposes, among others. The policy behind this law is that indigenous Zimbabweans were dispossessed of their land without compensation²⁸ and they fought for this land in the liberation struggle.²⁹ This right to expropriate land is re-affirmed by article 21(2) of the ACHPR.³⁰ Section 72's aim is to uplift the previously disadvantaged people³¹ and ensure that agricultural land title, rights and interests of foreign investors yield only to the general interests of the public.³² This law is in line with the utilitarian view of governance.³³ Although the concept of public purpose is vague and political, this study argues that the interests pursued by Zimbabwe in terms of section 72 are genuine given Zimbabwe's colonial history and that many people need land for their survival as the majority of Zimbabweans depend on farming for survival.

Overall, the public interests served by section 72 are consistent with the notion of public purpose enumerated in article 6(a) of the BIT. Since the ICSID tribunal in the *Funnekotter* case³⁴ held that the conditions of expropriation enumerated in article 6 are cumulative, this study now proceeds to examine if Zimbabwe's agricultural land expropriation laws are consistent with the BIT due process requirement of expropriation.

5.3.3 Section 72 due process versus the BIT due process

The ICSID tribunal in the *Funnekotter* case stressed that article 6(a) also requires that expropriation be accomplished in accordance with the due process of law.³⁵ This entails that Zimbabwe should accomplish expropriation in a fair and transparent manner in accordance

²⁶ *James v United Kingdom* (1986) EARR 123.

²⁷ See *CME Czech Republic B.V. Netherlands v Czech Republic*, UNCITRAL Arbitration Proceedings, Partial Award, 13 September 2001, para 612 & *Walter Fletcher Smith Claim* (Cuba, USA) Award Washington D.C, May 2, 1929 917-918.

²⁸ D Masaka 'Zimbabwe's Land Contestations and Her Politico-Economic Crisis: A Philosophical Dialogue' (2011) 13 *Journal of Sustainable Development in Africa* 331.

²⁹ L Ndlovu 'Following the NAFTA Star: SADC land reform and Investment Protection after the *Campbell* Litigation' (2011) 15 *Law, Democracy & Development* 1.

³⁰ African Charter on Human and Peoples Rights (ACHPR).

³¹ Section 72(7) of the Constitution of Zimbabwe 2013.

³² International Law Commission on State Responsibility, 15, OECD 2004/4.

³³ KN Schefer *International Investment Law, Text, Cases and Materials* (2013) 170.

³⁴ *Funnekotter* (n 1 above) para 98.

³⁵ See chapter 4 .

with the rule of law throughout the whole expropriation process.³⁶ Although agricultural land is acquired in accordance with the Constitution as per section 72,³⁷ another interpretation of this provision may be that there is no due process of law as the legal title over agricultural land is acquired by the state immediately upon publication of notice of acquisition of agricultural land in a government Gazette.³⁸ Additionally, section 72 makes no provision for the land owners to challenge the manner of acquisition of their agricultural land. Thus, this provision is repugnant to the notion of due process enumerated in article 6(a) of the Zimbabwe-Netherlands BIT which requires expropriation to be carried out fairly and in a transparent manner. There is no transparency as expropriation of agricultural land is accomplished without the involvement of the land owner. There is no fairness too, as section 72 does not give room for the landowner to be given a fair hearing prior or during nor after the expropriation process, neither does it provide for a notice of intention to acquire agricultural land prior to the notice of acquisition. This section gives room for arbitrary deprivation of investors' investments and is draconian as investors interests can be interfered with without restraint.

Supedi³⁹ contends that expropriation is in accordance with the rule of law if investors have access to independent and impartial courts for challenge the acquisition of their investments. The rule of law embraces the right to access to courts, and the right to a fair hearing before deprivation of ones rights or interests.⁴⁰ On the contrary, section 72 ousts the jurisdiction of courts to hear disputes relating to the manner of acquisition of agricultural land and compensation thereof, save for compensation for improvements effected on land prior to expropriation. More so, investors are specifically proscribed from approaching courts to apply for review of the expropriation process or even to challenge any expropriation which may appear to be discriminatory. Thus, section 72 provides for deprivation of investors agricultural land without access to courts and without a fair hearing contrary to the rule of law requirement and the due process condition of expropriation. The ousting of the court's jurisdiction is indicative of the fact that there is no *audi alteram partem* rule and that section 72 is draconian in so far as it relates to due process. This is a direct violation of Zimbabwe's commitment in article 6(a) of the Zimbabwe-Netherlands BIT. Courts, however, have the jurisdiction to review

³⁶ Schefer (n 33 above) 177.

³⁷ Zimbabwe Constitution 2013.

³⁸ Section 72(2) of the Zimbabwe Constitution 2013.

³⁹ SP Suberdi *INTERNATIONAL INVESTMENT LAW, Reconciling Law, Policy and Principle* (2008) 74.

⁴⁰ *Metilclad Corp v United Mexican States*, ARB (AF)/97/1/ (Award, 30 August 2000) 16 ICSID, para 103.

expropriation that is not accomplished in accordance with section 72 of the Zimbabwean Constitution.

Although expropriations effected in terms of section 72 will be lawful in Zimbabwe, they will be internationally unlawful to the extent that they are contrary to article 6(a) of the BIT which transcends domestic law in terms of the doctrine of *pacta sunt servanda*.

5.3.4 Section 72 versus the BIT non-discrimination requirement

The ICSID tribunal in the *Funnkotter*⁴¹ case stressed that Zimbabwe should accomplish its expropriation in a non-discriminatory manner. Supedi⁴² contends that government measures constitute unlawful discrimination if they result in differential treatment between domestic and foreign investors that are engaged in the same line of business and in like circumstances. Expropriation measures that arbitrarily discriminate between domestic and foreign investors are unlawful.⁴³ The same is true about measures that discriminate without justification,⁴⁴ and discrimination which is disproportionate to the purpose it seeks to achieve.⁴⁵

However, section 72(3)(c) proscribes landowners from challenging the expropriation of their agricultural land on the ground that it violates section 56 of the Zimbabwean Constitution.⁴⁶ Section 72(3)(c) which affects section 56 by reference obliterates the right to equality before the law and the right to equal protection of the law. Therefore, section 72(3)(c) is repugnant to the non-discrimination requirement enumerated in article 6(b) of the Zimbabwe-Netherlands BIT.

More so, by referential operation, section 72(3)(c) permits agricultural land to be acquired in a discriminatory manner but without justifying such discrimination in terms of section 56(3). Without justifying discriminatory expropriation, it cannot be said that there is proportionality between the discriminatory measures and the purpose that a discriminatory measure seeks to achieve. In fact, section 72(3)(c) is directly contrary to the primary objects of the BIT, which

⁴¹ *Funnkotter* (n 1 above) para 98.

⁴² Supedi (n 39 above) 74.

⁴³ See *Azurix Corp v The Republic of Argentina* (14 July 2006) ICSID arb/01/12 para 392 & Salacuse JW, *The three laws of international investment, National, Contractual and International Frameworks for Capital* (2013) 101.

⁴⁴ AFM Maniruzzaman 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment; An Overview' (1999) 8 *J Transnational L & Policy* 59.

⁴⁵ *ADC Affiliate Limited and ADC & ADCM Management Limited*, (2006) ICSID ARB/03/16 para 442.

⁴⁶ Constitution of Zimbabwe 2013.

is to promote and protect foreign investors from arbitrary seizure of their property by the host state. The author contends that section 72(3)(c) is contrary to both the customary international law and article 6(b) notion of non-discrimination; thus, it is unlawful in international law as it gives leeway for the government to unjustly target foreign investors to exclude them from business.⁴⁷

5.3.5 Section 72 Compensation versus BIT compensation

Section 72 of the Zimbabwean constitution divest the investors of legal title to land, and this immediately imposes an international legal obligation on Zimbabwe to compensate investors of expropriated land.⁴⁸ However, section 72(7)(a) as read with section 72(7)(c)⁴⁹ imposes the obligation to compensate legal title holders of agricultural land that is expropriated for agricultural purposes on Britain.⁵⁰ The basis of this law is that the British colonisers violently dispossessed the indigenous Zimbabweans of their fertile land without compensation.⁵¹ Zimbabwe's moral argument for this law is that the Zimbabweans cannot pay for their land which they were violently dispossessed of by the colonisers'.⁵² Section 72(7)(c) is inconsistent with customary international law and article 6(c) of the Zimbabwe-Netherlands BIT which provide that a host state that expropriates a foreign investors property has a corresponding duty to pay compensation. Again, Zimbabwe cannot commit an international tort and expect Britain to shoulder its international legal obligation. This position is not provided for under international law.

Additionally, section 72(3)(a)⁵³ explicitly states that the Government of Zimbabwe will compensate the landowners for improvements effected on agricultural land prior to expropriation. This law is based on the fact that the occupiers of Zimbabwe in 1890 were unjustly dispossessed of their land by the British without compensation thus Zimbabweans can

⁴⁷ D Zongwe, 'The contribution of Campbell v Zimbabwe to foreign Investment Law on Expropriation' (2010) 2:1 *Namibia Law Journal* 50, However, there was a dissenting opinion in the SADC tribunal in the Campbell case where Justice Tshosa held that the amendment 17 did not constitute unlawful discrimination.

⁴⁸ See *Mike Campbell and Others v The Republic of Zimbabwe*, SADC (T) Case 2/2007 55 & *Funnekotter* (n 1 above) 115.

⁴⁹ Constitution of Zimbabwe 2013.

⁵⁰ Section 72(7)(a) of the Constitution of Zimbabwe 2013.

⁵¹ Section 72(7)(a) of the Constitution of Zimbabwe 2013.

⁵² <http://www.newszimbabwe.co.zw/2016/03/11/govt-hailed-setting-land-compensation-fund/> (accessed on 12 March 2016) The Zimbabwean Minister of Finance Patrick Chinamasa said that the Zimbabwe's expropriation of land without compensating the title holders was contrary to BITs to which Zimbabwe is a signatory.

⁵³ Constitution of Zimbabwe 2013.

only pay for improvements on land and not for the land itself.⁵⁴ This provision is couched as though it applies only to land that was expropriated by colonisers during colonisation. However, this provision does not explicitly make such a limitation, but applies to all agricultural land whether the landowner bought it or not. The ICSID tribunal in the *Funnekotter* case interpreted the article 6(c) ‘just compensation’⁵⁵ to mean compensation that corresponds to the genuine value of the investment at the time of expropriation.⁵⁶ It further held that in respect of land, genuine value is the Zimbabwean market value of the land itself and all the things permanently attached to it and not just improvements on land as stipulated in section 72(3). Again section 72(3) of the Constitution⁵⁷ is particularly contrary to article 6(c) of the Zimbabwe-Netherlands BIT and customary international law which require the government to pay the genuine value of property at the time of expropriation. It is in fact illegal given that the Constitution⁵⁸ and the BIT are legal instruments which should speak to each other and in cases of conflict the BIT transcends the Constitution.⁵⁹

Section 29C of the Land Acquisition Act⁶⁰ which is complementary to section 72 of the Constitution⁶¹ provides that at least one quarter of compensation should be paid at the time of acquisition of land. It follows that calculation of the value of compensation to be paid should be calculated at the time of acquisition or earlier. Thus, the time for calculating compensation and interests in terms of the Land Acquisition Act is consistent with customary international law and article 6(c) of the Zimbabwe-Netherlands BIT which require the calculation of compensation and interests to be done at the time of expropriation.

Section 29C(3) of the Land Acquisition Act⁶² prescribes that compensation for improvements should be paid in cash within five years from the date of expropriation although the currency that should be used in payment of compensation is not specified.⁶³ This provision is contrary to article 6(c) of the Zimbabwe-Netherlands BIT which requires prompt payment of compensation. In the *Funnekotter* case, the ICSID tribunal interpreted the prompt payment of compensation requirement of article 6(c) to mean at the time of dispossession. As to the

⁵⁴ Section 27(7)(a) and (c) of the Constitution of Zimbabwe 2013.

⁵⁵ Article 6(c) of the Zimbabwe Netherlands BIT.

⁵⁶ *Funnekotter* (n 1 above) para 123.

⁵⁷ Constitution of Zimbabwe 2013.

⁵⁸ Constitution of Zimbabwe 2013.

⁵⁹ Article 27 of VCLT.

⁶⁰ Land Acquisition Act, Chapter 20:10.

⁶¹ Constitution of Zimbabwe 2013.

⁶² Chapter 20:10.

⁶³ Section 29C(4) of the Act, Chapter 20:10.

currency for payment of compensation, it cannot be said that section 29C(4) is repugnant to article 6(c) of the Zimbabwe-Netherlands BIT which requires compensation to be paid in freely convertible currency as this is not explicitly excluded in section 29C(4), but, it would have been better if it made such a provision. With regard to the timeframe within which to compensate investors, section 29C is clearly contrary to Zimbabwe's international legal obligations to compensate investors at the time of expropriation as its five year time limit cannot be said to be prompt although one may argue that it is reasonable considering that Zimbabwe is a developing country with little resources.

When valuing land for compensation by Britain in terms of the fund established for such purpose, Part II of the Schedule (sections 29C and 50) of the Act⁶⁴ is consistent with the factors prescribed by the ICSID tribunal in the *Funnekotter* case in valuing land. It requires the consideration of the regions in which the land falls which are classified in terms of the rainfall they receive.⁶⁵ More so, Part I of the Schedule (sections 29C and 50) of the Act⁶⁶ is consistent with the *Funnekotter*⁶⁷ decision that when determining the value of improvements on land, all the factors that add value to land shall be taken into account. Overall, the Schedule (sections 29C and 50)⁶⁸ is consistent with article 6(c) of the Zimbabwe-Netherlands BIT. However, it should be noted that the valuing of land and permanently attached things only applies to land that is compensated by Britain whereas the valuing of improvements on land only applies in respect of compensation for improvements on land that will be paid by the government of Zimbabwe.

To ensure that investors are appropriately compensated as per article 6(c) of the Zimbabwe-Netherlands BIT, compound interest is calculated on the genuine value of the land from the day it is expropriated to the day of final payment of compensation owed to investors depending on the circumstances.⁶⁹ The Zimbabwean agricultural land expropriation laws, however, are silent about interests in respect of compensation payments. Thus, they fall short of meeting the international standards by not providing for at least simple interest in respect of compensation for expropriated agricultural land.

⁶⁴ Chapter 20:10.

⁶⁵ *Funnekotter* (n 1 above) para 132.

⁶⁶ Chapter 20:10.

⁶⁷ *Funnekotter* (n 1 above) para 144.

⁶⁸ Chapter 20:10.

⁶⁹ Land Acquisition Act, chapter 20:10.

Section 72 is framed as if all agricultural land is owned by the British investors who got it during the colonial period. This provision ignores the reality that many farms were bought after independence, mostly by the Dutch,⁷⁰ which entitles them full compensation in terms of the BIT in cases of expropriation of their investments. Thus, section 72 compensation standards are inconsistent with article 6(c) of the Zimbabwe Netherlands BIT and customary international law compensation standards.

5.4 Implications of the Zimbabwean agricultural land expropriation laws on FDI

One of the principal purposes of the BITs is to promote and sustain FDI⁷¹ by clearly setting out enforceable rules that proscribe arbitrary expropriation of foreign investments.⁷² These rules are enforced through an international forum. Countries enter into BIT commitments with hope that they will attract FDI which is important in bringing foreign capital and technology necessary for accelerating the country's economic development.⁷³ The reason for concluding BITs is to strengthen the security of property rights and consequently attract FDI given that insecure property rights discourage the inflow of FDI as was experienced by Zimbabwe in the early 2000 during the land acquisitions.⁷⁴

Despite the judgment of the ICSID tribunal that found the Government of Zimbabwe in breach of its commitments in the *Funnkotter* case and ordered Zimbabwe to pay compensation plus interests compounded from the date of expropriation, Zimbabwe has not yet compensated the farmers for their investment in land. Zimbabwe's refusal to compensate the foreign investors and the enactment of draconian agricultural land expropriation laws gives the impression that foreign investors are not welcome in Zimbabwe and this has led to low FDI in Zimbabwe. This fact is buttressed by the World Bank Doing Business Report of 2015 that Zimbabwe is one of the countries with a hostile business environment globally and within the SADC region, thus, it receives the least share of FDI relative to its size in the region.⁷⁵

⁷⁰ See Masaka (n 28 above) 344 & CJ Richards 'Learning from Failure: Property Rights, Land Reforms, and the Hidden Architecture of Capitalism' (2006) 2 *American Institute for Public Policy Research* 3.

⁷¹ FDI refers to the foreign capital inflows that add to the capital stock of the home state.

⁷² Salaccuse (n 43 above) 356.

⁷³ Salaccuse (n 43 above) 363.

⁷⁴ See F Gwenhamo 'Foreign Direct Investments in Zimbabwe: The Role of Institutional Factors' working paper number 144, August 17 2009, 3 and 6 & Richards (n 70 above) 5.

⁷⁵ Zimbabwe Independent 28 November 2015.

Whereas secure property title is a pillar for a healthy economy, Zimbabwe's agricultural land expropriation laws nevertheless undermine the security of property rights.⁷⁶ On this note, they cause two main problems: they scare investors and turn land into dead capital, although Sikwila⁷⁷ contends that there is no evidence that indigenisation and weak property rights undermine efforts to attract FDI. The author's view is that Sikwila's argument cannot be sustained as it fails to explain why Zimbabwe's inflow of FDI dropped when Zimbabwe announced its intention to expropriate agricultural land without compensation. It also fails to explain why the Zimbabwean economy suddenly collapsed when Zimbabwe implemented the fast track land reform programme. More so, the insecurity of property also discourages development as this land cannot be used to obtain bank loans. It also discourages long term investment in the agricultural sector and this in turn reduces agricultural production.⁷⁸

Conclusively, Zimbabwe will struggle to attract and sustain FDI until it amends its expropriation laws, and conduct itself in accordance with its BIT commitments and protect foreign investors from arbitrary acquisition of their investments. Such an act will send a positive message to the foreign investors. Since secure property rights are a foundation of economic growth, it follows that with insecure property rights in Zimbabwe; its economy is likely to crumble⁷⁹ like a house with a weak foundation.

5.6 Conclusion

This chapter has shown that the Zimbabwe's agricultural land expropriation laws are not in keeping with Zimbabwe's commitments and international legal obligations enumerated in article 6 of the Zimbabwe-Netherlands BIT as expounded in the *Funnekotter* case. The

⁷⁶ 'Government to repossess idle land' <http://www.bulawayo24.com/index-id-business-sc-local-byo-87207.html> (accessed on 28 April 2016), The Minister of Lands, Douglas Mombeshora warned farmers that the government might repossess idle land. This shows that some land remains idle after land reform and that even the new landowners are not free from arbitrary dispossession in terms of section 72.

⁷⁷ MN Sikwila 'Foreign Direct Investment: Does it matter? A case for Zimbabwe' (2015) 11 *Research in Business and Economics Journal* 1.

⁷⁸ JA Anderson 'How much did property rights matter? Understanding food insecurity in Zimbabwe: A critique of Richardson' (2007) 106/405 *African Affairs* 684, Anderson attributes low agricultural productions to drought and disagrees with this conclusion.

⁷⁹ 'Panic as Zimbabwe economy dies' <http://www.bulawayo24.com/index-id-business-sc-economy-byo-87693> (accessed on 6 May 2016) There is a great fear that Zimbabwe is moving towards economic meltdown similar to that of 2007/2008.

justification for examining Zimbabwe's agricultural land expropriation laws in light of the BIT is the doctrine of *pacta sunt servanda*.

This chapter examined the legality of Zimbabwe's agricultural land expropriation laws by comparing them with article 6 of the Zimbabwe-Netherlands BIT conditions of expropriation. The discussion revealed that the purpose of Zimbabwe's agricultural land expropriation laws is genuine and is in keeping with the public purpose of the Zimbabwe-Netherlands BIT. However, there is no due process, neither is discrimination proscribed in the acquisition of agricultural land. Thus, section 72 of the Zimbabwean Constitution is inconsistent with paragraph (a), and (b) of article 6 of the Zimbabwe-Netherlands BIT.

Additionally, the Constitutional requirement that Britain compensate owners of expropriated agricultural land is directly contrary to both the Zimbabwe-Netherlands BIT, and the customary international legal duty to compensate investors in cases of expropriation. More so, the provision for compensating investors for improvements effected on land only and not for land itself directly violates the Zimbabwe's-Netherlands BIT, and customary international legal obligation to pay genuine value of expropriated investment. However, the time for calculating compensation and the factors to be considered in valuing improvements effected on agricultural land is consistent with the Zimbabwe-Netherlands BIT commitments. Overall, the inconsistencies of Zimbabwe's agricultural land expropriation laws undermine the security of agricultural land, and scares investors from the agricultural sector and even other sectors of the economy.

Chapter Six

Conclusions and Recommendations

6.1 Introduction

This mini-dissertation sought to examine whether Zimbabwe's agricultural land expropriations laws are compatible with its international legal commitments and obligations enumerated in article 6 of the Zimbabwe-Netherlands BIT as expounded in the *Funnekotter* case. This study explored the concept of expropriation; the main features of Zimbabwe's agricultural land expropriation laws and factors that inform them; discussed the Zimbabwe-Netherlands BIT conditions of expropriation using the *Funnekotter* case as the compass; and analysed the key aspects of the Zimbabwe's agricultural land expropriation laws in light of the *Funnekotter* case.

6.2 Summary of findings

Chapter Two of this study unpacked the meaning of expropriation, and argued that in direct expropriation, investor's legal title to property is transferred to the state as opposed to the controversial indirect expropriation where investors retain the legal title to their investments despite the investor being substantially deprived of the economic benefits of his investment. It was further argued that the sole effect criterion is more helpful in ascertaining state measures that constitute indirect expropriation as compared to the police powers doctrine; however this debate is yet to be settled. It was further argued that states have a customary international law right to expropriate investments of aliens for public purposes, in a non-discriminatory manner and against compensation.

Chapter Three explored the main features of the Zimbabwean agricultural land expropriation laws. It argued that Zimbabwe's agricultural land expropriation laws are mainly informed by its colonial history. It further argued that the purpose of these laws is to give land to the landless indigenous Zimbabweans. Despite the good intentions of expropriating agricultural land, the process thereof is draconian, and conflicts with some fundamental values of the Zimbabwean Constitution, especially the rule of law. Compulsory acquisition of agricultural land is not justiciable save for issues of compensation for improvements effected on land. The Constitution empowers the government of Zimbabwe to expropriate agricultural land, but imposes the responsibility for payment of compensation of expropriated agricultural land on Britain, contrary to the international law principle that an expropriating state has a corresponding duty to compensate.

Chapter Four canvassed the Zimbabwe-Netherlands BIT conditions of expropriation using the *Funnekotter* case as the compass. In this chapter it was argued that the BIT conditions of expropriation are cumulative, and a violation of one of the conditions renders expropriation unlawful and imposes an international responsibility on the host state to pay just compensation. It was further argued that the public purpose requirement is too broad, vague and political, and states can easily couch their measures to fit this requirement, and as in *Funnekotter* case, tribunals rarely question this requirement. It was further observed that investors are more concerned with compensation for their investments than anything else.

Chapter Five analysed and evaluated Zimbabwe's agricultural land expropriation laws in light of the Zimbabwe-Netherlands BIT conditions of expropriation as expounded in the *Funnekotter* case. This analysis is justified by the doctrine of *pacta sunt servanda*. The main argument of this chapter was that the Zimbabwean agricultural land expropriation laws are overall not in keeping with the Zimbabwe-Netherlands BIT conditions of expropriation. It was, however, observed that these laws are consistent with the BIT public purpose requirement. Notwithstanding this, these laws are directly contrary to the due process and non-discrimination requirements of expropriation. The chapter further showed that these agricultural land acquisition laws provide for confiscatory expropriation given that only improvements on land are compensated whether or not the expropriated land was bought. Additionally, imposing the obligation of compensating owners of expropriated agricultural land on Britain is repugnant to the BIT and international law. Overall, these agricultural land expropriation laws are draconian; they undermine the security of agricultural land rights; and consequently scare foreign investors from the agricultural sector, and this in turn cripples the other sectors of the economy.

6.3 Conclusion

This study has shown that in terms of both customary international law and the Zimbabwe-Netherlands BIT, Zimbabwe as a sovereign state has a right to exercise the power of eminent domain and this right should be exercised for public purposes, in a non-discriminatory manner, in accordance with the due process of law and against compensation. This BIT, like other BITs,¹ does no more than listing the conditions of expropriation, thus, tribunals play a great

¹ See Article 3 of the China model BIT version iii, article 4(2) of the Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the encouragement and reciprocal protection of investments (Germany-Namibia BIT) (1994), article 4 of the Agreement between the Government of the Republic of Zimbabwe and the Government of the Kingdom of Sweden on the promotion and reciprocal protection of investments (Sweden-Zimbabwe BIT) (1997), and article 3 of the Agreement between the Government of the Great Britain and Northern Ireland and the People's Republic of Benin for the Promotion and Protection of investments (United Kingdom-Benin BIT) (1988).

role in unpacking these conditions. However, tribunals are reluctant to adjudicate the public purpose requirement; hence the concept remains less developed, vague, and unclear. The other reason for its vagueness is that it is more of a political than a legal issue. More importantly, no matter how laudable the purpose of expropriation could be, and whether lawful or not, compensation for expropriated investments should be paid by the host state. This obligation cannot be shifted to another state; neither can it be avoided by reverting to domestic legislation. Compensation is central in expropriation cases.

Additionally, this study has shown that the land problem in Zimbabwe is rooted in its colonisation more than a century ago, thus, its agricultural land expropriation laws are informed by colonial history. In the colonial period, Zimbabwe's land was annexed to Britain. This explains why Zimbabwe's land laws are informed by its colonial history and not its international commitments. Notwithstanding, Zimbabwe still retains a duty to faithfully carry out its international obligations. It is for this reason that Zimbabwe's agricultural land expropriations were examined in light of the *Funnekotter* case. This examination concluded that the purpose served by the agricultural land expropriation laws is pure and commendable given that these laws are meant to enable the government to get land and redistribute it to the landless indigenous Zimbabweans. However, the study shows that the expropriation process is draconian, arbitrary and confiscatory, and directly contrary to the Zimbabwe-Netherlands BIT conditions of expropriation. It was argued that Zimbabwe's agricultural land expropriation laws circumvent the due process of law, are unjustly discriminatory, and its compensation standards fall short of Zimbabwe-Netherlands BIT standards. Overall, these draconian laws undermine the security of agricultural land, and this scares investors, and lowers FDI; thus, Zimbabwe may have to rethink its agricultural land expropriation laws in light of the *Funnekotter* case.

6.4 Recommendations

In light of the above conclusions and findings, this study recommends the following:

6.4.1 Amendment of section 72 of the Constitution of Zimbabwe, 2013

It is recommended that the parliament of Zimbabwe amend section 72 with a view to align its agricultural land expropriation laws to its international legal commitments and obligations as stipulated in article 6 of the Zimbabwe-Netherlands BIT. This amendment will impose the duty to compensate farmers for their expropriated land on the government of Zimbabwe. It will further provide for payment of fair compensation at the time of compulsory acquisition of agricultural land, as well as compensation for improvements on land only in respect of land

owned owing to the colonisation of Zimbabwe. It will also provide for judicial review of the whole process of agricultural land expropriations including suspected unjustified discriminatory expropriation. The amendment will provide for the giving of adequate notice of the impending expropriation before the final acquisition. An amendment of this nature will send a message to the international community that Zimbabwe is committed to strengthening the security of property, especially agricultural land rights, in accordance with its international commitments.

6.4.2 Challenge the legality of the ouster clauses in the Constitutional Court

It is recommended that the legal representatives of persons whose land is acquired in terms of section 72 challenge the legality of the ouster clauses in the Constitutional Court. The lawyers will have to argue that section 72 only ousts the jurisdiction of Zimbabwean courts to review the expropriation processes but not the adjudication of the legality of these ouster clauses. They will further argue that the Constitutional Court has jurisdiction and authority to strike down the ouster clauses as unconstitutional without necessarily reviewing the expropriation process. If successful, they will have to pray that the Constitutional Court orders the parliament to make relevant amendments to the Constitution in accordance with its foundational principles and values.

6.4.3 Renegotiation or Termination of the Zimbabwe-Netherlands BIT

If the government of Zimbabwe does not want its agricultural land expropriation laws to bow down to its BIT(s) commitments, it may firstly try to renegotiate the terms of the BIT with the Netherlands. These amendments to the BIT will change the rights of the investors in accordance with the Zimbabwean Constitution when the amendments come into effect.² The advantage of BIT renegotiation is that if successful, the bilateral investment relations will continue, although under different conditions. However, if they fail to reach an agreement, it may be better to agree to terminate the agreement. Termination of the BIT will not prejudice the Dutch investors

² E Chitsove 'Are Indigenisation measures compensable? A case study of the measures taken under the indigenisation and economic empowerment laws of Zimbabwe,' published LLM thesis, University of Pretoria, 2014, 75

in Zimbabwe as the survival clause will continually protect them in the next 15 years from the termination date.³

6.4.4 Adoption of a term based agricultural land title

This study recommends the adoption of term based agricultural land title similar to that of Zambia. Term based title will balance the government's desire to control the period of land ownership with the land owner's or occupant's desire to have a secure agricultural land title. Martin⁴ summarises the advantages of land titling as follows:

If recognised under legal title, these units of value could be used as collateral for loans, leading to multiplying effect through added investments, growth in relative value, increased tax revenue, and increased funding infrastructure.

In fact, untitled agricultural land is dead capital, but, titling gives it a breath of life and it becomes live capital. In addition, titled land will have to be transferable. Thus, agricultural land titling together with amendments as per the first recommendation will strengthen the security of agricultural land, improve Zimbabwe's investment climate, and send a new welcoming message to the foreign investors, thus attract FDI.

6.4.5 Amend the Land Acquisition Act or enact an Act of parliament that will exclusively regulate the expropriation of agricultural land

It is recommended that parliament amend the Land Acquisition Act, or alternatively enact a statute that will exclusively regulate the expropriation of agricultural land. The current Act only regulates the calculation of value of compensation for improvements effected on land and the value of land that is compensated by Britain. There is also a Zimbabwe Investment Authority Act which provides for protection of foreign investors in terms of domestic laws. These two statutes do not regulate the expropriation process of agricultural land as it is exclusively regulated by the Constitution. The amendment or new statute will exclusively regulate the expropriation process of agricultural land and compensation thereof, and include the issues discussed in recommendation number one. South Africa is about to enact such a statute, and its effectiveness is yet to be tested. This new law will balance the government's right to

³ Paragraphs (2) and (3) of Article 14 of the Zimbabwe-Netherlands BIT.

⁴ JC Martin 'Bringing dead capital to life: International mandates for land titling in Brazil' (2008) *31 B.C.Int'l & Comp.L.Review* 121 129.

expropriate and the land owners right to fair compensation. Such a law will strengthen agricultural land rights and attract FDI in the agricultural sector.

6.4.6 Honour the *Funnekotter* decision on compensation

This study finally recommends that the government of Zimbabwe honour the *Funnekotter* decision, and also compensate all the investors who bought agricultural land which was later expropriated without compensation. As a developing country, and a signatory to the CDESCR, Zimbabwe is advised to invoke article 2.1 of the CDESCR and seek financial assistance from developed countries and the donor community to pay compensation due to farmers who lost their land during the agricultural land expropriation programme which was meant to empower indigenous Zimbabweans. However, this should follow Zimbabwe's acceptance of international responsibility to make necessary compensation payments.

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