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An in-depth analysis of foreign investment protection provisions in the new Zimbabwe Investment and Development Agency Act [Chapter 14:37]

INTRODUCTION

The Zimbabwe Investment and Development Agency Act [Chapter 14:37] ('the Act') officially came into force on the 7th of February 2020.[1] As per its preamble, the objectives of the Act is to provide for, *"the promotion, entry, protection and facilitation of investment…"* amongst other things.[2] This article is primarily concerned with the protection element of the Act. It shall delve into an analysis of the foreign investment protection provisions of the Act, which include the non-discriminatory provisions and the provisions protecting foreign investment against expropriation. These provisions will be examined in conjunction with international discourse on the same issues, in order to ascertain the extent to which the Zimbabwean Parliament has gone to protect foreign investors in the Act.

SCOPE OF PROTECTION (TO WHOM DOES THE ACT APPLY)?

As has already been alluded to above, the Act seeks to protect foreign investors and their respective investments in Zimbabwe. The term *'investor'* is defined in the Act as, *"…any person, natural or juristic, who seeks to make, is making or has made an investment in Zimbabwe, including a foreign investor."*[3] Accordingly, a foreign investor is an investor *"…domiciled outside Zimbabwe, who seeks to make, is making or has made an investment in Zimbabwe pursuant to this Act."* The words, *'who seeks to make,'* reveal an intention by Parliament to extend the protection beyond established investors to also include prospective investors. This is a progressive step by Zimbabwe which is in line with the United States Model Bi-lateral Investment Treaty (BIT) of 2004 and the Canada-Peru BIT of 2006.[4]

Turning to the term investment, the Black's Law Dictionary defines it as, *"Capital committed to make income from it,"*[5] and this also includes, *"…movable and immovable property… claims to money,*[6]

[1] http://www.veritaszim.net/node/3933 as accessed on the 14th of April 2020
[2] Zimbabwe Investment and Development Agency Act [Chapter 14:37]
[3] Section 2 of the ZIDA Act (n2 above)
[4] Canada Peru Bilateral Investment Treaty signed on the14th of November 2006 and in force since 20th of June 2007
[5] Black's Law Dictionary Free 2nd edition (retrieved at https://thedictionary.org/investment on 25 April 2020)
[6] See, SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan, ICSID Case No ARB/01/13, Award dated 8 September 2003 at p 347

contractual rights,[7] *intellectual property rights, concessions, licenses…,"* and similar rights to the extent recognized by the Act.[8] A foreign investment for the purposes of the Act refers to, *"…a direct or indirect investment made by a foreign investor, other than any foreign portfolio investment."*[9]

The Act thus, applies to foreign investors and investments made, being made or to be made under the provisions of the Act itself.

NON-DISCRIMINATION OF FOREIGN INVESTMENT

At the centre of investment protection principles are the non-discriminatory requirements. The first is the National Treatment ('NT'), which entails that, a host country should extend to foreign investors treatment that is as favourable as the treatment that is accorded to national investors in like circumstances.[10] In assessing 'like circumstances' some of the factors taken into account include, *"…whether the two enterprises are in the same sector and the impact of policy objectives*…"[11] Proof that the discrimination is motivated by the fact that the enterprises concerned are under foreign control is also helpful.[12]

Notwithstanding the difference between the NT principle in relation to Foreign Direct Investment and NT as applicable to the international trade of goods (in the realm of the World Trade Organisation), NT can also be understood in the latter context where it is adopted to provide that a host state, is to treat the products, services and suppliers of a foreign state no less favourably than it treats its 'like' domestic products, services and suppliers – see generally **Methanex Corporation v United States of America**.[13][14] In both instances, it can be gleaned that the overall intention behind the use of the NT

[7] See, SGS v Phillipines , ICSID Case No ARB/02/6, Award dated 29 January 2004 at p 50

[8] C M. Correa 'Investment Protection in Bilateral and Free Trade Agreements: Implications for the granting of Compulsory Licenses' (2004) Vol 26 Michigan Journal Int'l 331 (available at: http://repository.law.umich.edu/mjil/vol26/iss1/11) at p 336

[9] The ZIDA Act (n2 above) therefore, does not apply to *"…the purchase of Zimbabwean stocks and bonds by any natural or juristic person domiciled outside Zimbabwe, and includes the deposit by such person of moneys in any banking account in Zimbabwe."*

[10] See, the United Nations Conference on Trade and Development Report No.11 Vol. IV (1999) [UCTAD/ITE/IIT/11 (Vol. IV)] retrieved at https://unctad.org/en/Docs/psiteiitd11v4.en.pdf on 19 April 2020 at p 1

[11] See, UCTAD report (n10 above) citing an OECD 1985 report at p 16-17

[12] See, UCTAD report (n10 above) citing an OECD 1993 report at p 22

[13] Methanex Corporation v United States of America, (2005) 44 ILM 1345 at p 10 (of part 4 chapter B). Nonetheless, in SD Myers v Canada (2004) 244 FTR 161; IIC 252 (2004) an ICSID Tribunal was prepared to draw on the WTO jurisprudence in deciding what the phrase 'like circumstances'

[14] Reference can be made to Article III of the General Agreement on Tariffs and Trade 1947, for context and an alternative phrasing of the principle as applicable to the trading of goods on the international market

seems to be the pursuance and maintenance of a degree of competitive equality between national and foreign investors.[15]

The second principle of non-discrimination is the Most Favoured Nation principle (referred hereafter simply as 'MFN'), which mandates that a favourable treatment or advantage granted to another foreigner investors should be extended to all other foreign investors.[16] Therefore, any advantage, favour, privilege or immunity granted to any foreign investor shall be accorded immediately and unconditionally to other foreign investors in like circumstances.[17] Hence, the MFN is intended to give foreign investors the same favourable treatment conveyed upon other foreign investors.

These twin principles prevent discrimination of foreign investors and their investments on the host market and at their core, the MFN and the NT simply perpetuate the fair and equal treatment principle.[18] They are as stated in **Saluka Investments BV (the Netherlands) v Czech Republic**, *"…intended to provide incentive to foreign investors and as a result, relatively moderate infractions by a nation might still violate the standard."*[19] This is the foundation upon which foreign investment is based, and it is a fundamental precursor to any foreign investment as it is generally recognized that there should be '*diplomatic protection and the treatment of aliens.*'[20]

Zimbabwe has now captured the aforementioned twin principles of non-discrimination of foreign investment in Part III of the ZIDA Act. The first instance, where the NT principle is applied is in Section 12 which provides that, foreign investors may invest in, and reinvest profits of such investments into, any and all sectors of the Zimbabwean economy on the same legal conditions imposed on Zimbabweans. In addition, Section 13 captures the NT as it places an obligation on the Agency, mandating that it, *"…accords to foreign investors and their investments, treatment no less favourable than that it accords, in like circumstances, to domestic investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of their investments."*[21]

[15] Albeit the use of the example, it should be noted that the ZIDA Act (n2 above) goes beyond the GATT, as the Act deals with activities of foreign investors in their host countries, which activities encompass a wide array of operations beyond trading in goods

[16] United Nations Conference on Trade and Development Report No.10 Vol. III (1999) [UNCTAD/ITE/IIT/10 (Vol. III)] accessed at https://unctad.org/en/Docs/psiteiitd10v3.en.pdf on the 20th of April 2020 at p1

[17] Ibid at p5. Also see, Article I.I of the General Agreement on Tariffs and Trade (GATT), 1947 for context and an alternative phrasing of the principle and Spanish Unroasted Coffee L/5135 -28S/102, Canada-Aircraft (DS70) and Japan-Alcoholic Beverages II (DS8,10,11) on interpretation of the principle thereto

[18] S P Subedi *International Investment Law: Reconciling Policy and Principle 1st edition* (2008) 71

[19] Saluka Investments BV (the Netherlands) v Czech Republic, Partial Award, ICGJ 368 (PCA 2006)

[20] S P Subedi (n18 above) at p 55

[21] Section 13 of the ZIDA Act (n2 above)

Section 14 (1) then entrenches the MFN principle. It avers, that the Agency, *"… shall accord to foreign investors from one country and their investments, treatment no less favourable than that it accords, in like circumstances, to investors of any other country with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of their investments."*[22] However, subsection 4 of Section 14 places a caveat on the above rights, as the NT and MFN principles do not apply to all actual and future advantages accorded by Zimbabwe by virtue of its membership of, or association with a customs, economic or monetary union, a common market or a free trade area, to Zimbabweans, or to nationals or companies of Member States of such union, common market or free trade area, or of any other third State.

Moreover, the MFN and NT cannot be interpreted to require the Government to accord to foreign investors, *"… any beneficial treatment, privilege or preference that may be granted to Zimbabweans as a result of any law or other measure, the purpose of which is to promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; or any special advantages provided in Zimbabwe by development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries, provided that the legislation or advantages be applied in a transparent manner and subject to objective criteria and not in a manner that would constitute a disguised restriction on the freedom of establishment of foreign investors."*[23]

The next provision which is not necessarily attached to the MFN or NT principle but substantiates the two is Section 16 of the Act. It deals with the Fair and Equitable Treatment principle which provides generally that, every investor shall be entitled to the protection against denial of justice in criminal, civil or administrative proceedings; or breaches of fundamental due process.[24] This includes fundamental breaches of transparency, manifest arbitrariness and any substantive change to the terms and conditions under any licence, permit or endorsement granted by the Government or the Agency to investors and their direct investments.[25]

The above principle is in tandem with international decisions such as in the case of **Metaclad Corporation v United Mexican States**, wherein it was held there is an obligation to treat foreign

[22] Section 14 (1) of the ZIDA Act (n2 above)
[23] See, Section 13 (2) and 14 (5) and (6) of the ZIDA Act (n2 above) with the former provision having the effect of excluding the application of the NT and MF from pre-existing non-conforming measures as at the 7th of February 2020. These include, non-confirming measures embedded in the Indigenisation and Economic Empowerment Act [Chapter 20:29]; the Land Commission Act [Chapter 20:29]; and the Legal Practitioners Act [Chapter 27:07] and their applicable regulations
[24] See, Noble Ventures v Romania, ICSID ARB/01/11 of 12 October 2005 at p 112
[25] See, Section 18 of the ZIDA Act (n2 above) on the right of investors to transparency and the corresponding obligation to do the same on government

investors in a '*transparent and predictable'* manner.[26] **Saluka Investments BV (the Netherlands) v Czech Republic**, reveals that in order to infringe on the principle, a host state's conduct must demonstrate, "...*a relatively higher degree of inappropriateness."*[27] The tribunal in **Genin v Estonia** concurred with this finding as it held that, to violate the provision the act of the host state should show, *"…wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."*[28] The provision is therefore, another progressive step in foreign investment protection by the Zimbabwean government.

EXPROPRIATION & NATIONALIZATION OF FOREIGN INVESTMENTS (ASSETS)

Expropriation refers to, *"… a seizure of private property for some definite public purpose and with the intention and expectation that the property would be paid for in accordance with the legal system… of the country."*[29] In **Starrett Housing Corporation v Iran (Interlocutory Order)** and in **Sempra v Argentina** it was held that expropriation entails, *"…depriving the investor of control over investment…"* and *"…interfering with administration [and] impeding the distribution of dividends…"* are forms of indirect expropriation.[30][31] In similar light, nationalization involves, *"… a determination that a certain business would thereafter be operated by the Government…"* and it usually covers a whole industry.[32] Both of these acts are significant affronts on foreign investment and the rights of investors.

Akinsanya recognizes that, *"There is no disagreement among writers and states… that a sovereign state has the right…to expropriate alien property situated within its territory."*[33] Cementing the above view, J P Bullington avers that, "*When a sovereign state, in the exercise of power of dominium eminens (eminent domain), takes over alien property, terminates state contracts with aliens, or establishes a monopoly in a particular industry…it will… under customary international law provide a measure of compensation to the expropriated."*[34] In the Zimbabwean context, expropriation should be subject to the Constitution and the ZIDA Act, that is, two basic conditions should be adhered with,

[26] Metaclad Corporation v United Mexican States, ICSID Case No ARB (AF)/97/1, 30 August 2000
[27] Saluka Investments BV (the Netherlands) v Czech Republic, Partial Award, ICGJ 368 (PCA 2006) at para 292
[28] Genin v Estonia, ICSID Case No ARB/99/2, Award dated 25 June 2001
[29] W H Reeves (1968) Expropriation, Confiscation, Nationalization – What one can do about them? New York City
[30] Sempra Energy Int'l v Argentina Republic, ICSID Case No. ARB/02/16, Award 284 (28 September 2007)
[31] See, Starrett Housing Corporation v Iran (Interlocutory Order) (1984) 23 ILM 1090, wherein the tribunal held that depriving investors of the effective use and control as well as the benefits of their investment amounted to expropriation
[32] See, Black Law Dictionary (4th edition, 1951)
[33] A Akinsanya 'Permanent Sovereignity over Natural Resources and the Future of Foreign Investment' Vol 22 No 4 (1980) Journal of the Indian Law Institute at p 467
[34] J P Bullington 'Problems of International Law in the Mexican Constitution of 1917' (1927) American Journal of International Law at p 699

"…namely, that the taking is for a public purpose (ie. not arbitrary) and is non-discriminatory …"[35] Reference can also be made to the **Amoco International Finance Corporation v Iran** case on these preconditions to expropriation and nationalization as per customary international law and the nature of a lawful expropriation and nationalization in general.[36]

Nonetheless, there are divergent views on the exact nature and amount of this compensation under customary international law. To understand the predicament, it is pertinent to delve into two opposing views that touch upon issues of state expropriation of foreign assets under customary international law, that being, the 'Hull-Formula' after Cordell Hull, and the contrary views as espoused by the Mexican Foreign Minister as supported by the Calvo Doctrine, as presented by Carlos Calvo.

The Hull formula, emanated from a series of proclamations made by Cordell Hull (then American Secretary of State) to the Mexican Foreign Minister, when Mexico nationalized American property with no compensation in the early to mid-1900s. Hull was of the view that for expropriation to be lawful it had to be predicated on the provision of **prompt, adequate and effective compensation**. Hull surmised his position by stating that,

"The taking of property without compensation is not expropriation. It is confiscation. It is not less confiscation because there may be an expressed intent to pay at some time in the future. If it were permissible for a government to take the private property of the citizens of other countries and pay for it as and when, in the judgement of that government, its economic circumstances and its local legislation may perhaps permit, the safeguards which the constitutions of most countries and established international law have sought to provide would be illusory. Governments would be free to take property far beyond their ability or willingness to pay, and the owners thereof would be without recourse."[37]

A few international judicial and arbitral decisions leaning to the side of the Hull Formula include – the **United States Norway Arbitration Award, 15th of October 1922 (Norwegian Ship-owners Claims case)** the tribunal held that, *"Whether the action of the United States was lawful or not, just compensation is due to the claimants…"*[38] Another decision is the **United States v Panama (DeSabla Claim) 29 June 1933**. In that case an American who had lost part of her estate in Panama as a result of grants by the government of Panama to other persons was granted compensation by a claims commission between the two states. In so doing, it was held that, *"It is axiomatic that acts of a*

[35] Akinsanya (n33 above) at p 473. Also see, Section 72 (3) of the Constitution of Zimbabwe, Amendment No.20 of 2013
[36] Amoco International Finance Corporation v Iran 15 USCTR
[37] A F Lowenfield (2002) 'International Economic Law' (Oxford University Press) 398 citing a letter from the Secretary of State dated 21 July 1938
[38] United States Norway Arbitration Award, 13 October. 1922 1 U.N. Rep. Int'l Arbitral Awards [R.I.I.A] 307 (1918)

government in depriving an alien of his property without compensation imposes international responsibility."[39] In addition, it was stated that the compensation ought to be prompt, effective, and adequate.

Contrary to Hull's notions, and in reply of the same, the Mexican Foreign Minister posited as follows:

"There does not exist in international law any principle universally accepted by countries, nor by the writers of treaties on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character. Nevertheless, Mexico admits, in obedience to her own laws, that she is indeed under obligation to indemnify in an adequate manner; but the doctrine which she maintains on the subject, which is based on the most authoritative opinions of writers of treatises on international law, is that the time and manner of such payment must be determined by her own laws."[40]

The above finds it's grounding in the Calvo Doctrine, propounded by Carlos Calvo a 19th century Argentinian jurist. It stipulates that, "*It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended…."*[41] Therefore, once a foreigner invests in a state, it should be taken that they are bound by the state's laws and no additional law should be used to appease the investors if the same law is not applicable and extended to the locals. Following this logic, if a nation chooses to expropriate the assets of the locals, it can do so with those belonging to foreigners and aspects of promptness and effective compensation only apply if such are normally extended to the locals. This expunged the Western position that, expropriation of foreign assets was only lawful if coupled by prompt, adequate and effective compensation.

ZIMBABWE'S POSITION ON EXPROPRIATION & NATIONALIZATION

Zimbabwe has seemingly followed the position espoused by Hull and most western countries regarding providing adequate, prompt and effective compensation upon expropriating alien property.

Section 17 of the Act adequately provides for recourse in light of expropriation of alien property. Generally, no investment shall be nationalised or expropriated either directly or indirectly.[42] However,

[39] United States v Panama, 29 June. 1933, Annual Digest and Reports of Public Int'l Law Cases 1933-34, 241 at p 243 (1940)
[40] See, A F Lowenfield (n37 above) at p 399 citing the Mexican Minister of Foreign Affairs sentiments on the 3rd of August 1938 in reply to Hull
[41] D R Shea *The Calvo Clause* (1955) page 17-19
[42] Section 17 of ZIDA Act (n2 above)

expropriation and nationalisation can occur in pursuance of a public purpose in accordance with in accordance with due process of law, in a non-discriminatory manner and on payment of prompt, adequate and effective compensation. The same is outlined in Section 71 (3) of the Zimbabwean Constitution which makes these principles of utmost importance.

Indirect expropriation is also acknowledged in Section 17 (5) of the Act. Several factors are considered when establishing whether indirect expropriation has occurred which include: *"…the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; and the duration of the measure or series of measures; the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and the character of the measure or series of measures, notably their object, context and intent."*[43] This excludes non-discriminatory measures that are designed and applied to protect legitimate public welfare objectives, unless the measure is manifestly excessive.

Support for indirect expropriation can be drawn from the case of **CMS Gas Transmission Co. v Argentina Republic**, wherein it was stated indirect expropriation includes where there is a prevention of the legitimate, *"…realization of a reasonable return on investments."*[44] This prevention in the Zimbabwean context should nonetheless be substantial for it to fall within the precepts of indirect expropriation as provided for in Section 17 (5).

A reading of Section 17 (5) of the Act, reveals that not all measures are considered an act of expropriation or nationalization even where the foreign investor's rights have been trampled upon. In the same vein, not all measures adverse to foreign investors/investment warrant compensation. To best understand Section 17 (5), the Zimbabwean case of **Davies v Minister of Lands** is instructive.[45] It deals with the concept of deprivation of property rights. Therein, Gubbay CJ (as he then was) states, *"… I am quite unable to accept the submission…that the concept of deprivation of property is no different from compulsory acquisition or expropriation of property…"* [46]

The Honourable Chief Justice goes on to follow the logic of Professor Murphy in his article *'Interpreting the property clause in the Constitution Act of 1993,'* as he states;

"…expropriation comprehends those situations in which title is taken out of the owner without his or her consent." This is premised on the fact that,

[43] Section 17 (6) of ZIDA Act (n2 above)
[44] CMS Gas Transmission Co. v Argentina Republic, ICSID Case No. ARB/01/8 Award 262 (12 May 2005)
[45] Davies & Ors v Minister of Lands 1996 (1) ZLR 681 (S)
[46] Ibid at p 689

"The main difference between the two categories is that a normal deprivation, such as a building regulation, health regulation or environmental conservation provision, only places a limitation on the exercise of an individual property right, whereas an expropriation actually takes the property away."

Therefore, where property rights are affected but, rights continue to vest in the owner, albeit subject to limitations, compensation does not necessarily follow. American case law supporting this position include - **Danforth v United States** 308 US 271 (1939) at 285; **Sorbino & Ors v City G of New Brunswick** 43 NJ Super 554 (1957) (Court of New Jersey) at 568; **City of Houston v Ross Biggers et al** 380 SW 2d 700 (1964) (Court of Civil Appeals of Texas) at 704; **Flood v Central District of Maricopa County** 104 Ariz 566 (1969) (Supreme Court of Arizona) at 568.

At the international level, the aforementioned case of **Methanex Corporation v USA** supports Section 17 (5) of the ZIDA Act, as it holds that, *"It is principle of customary international law that, where economic injury results from bona fide regulation within the police of powers of State, compensation is not required."*[47] Therefore, some regulatory measures that are lawful can affect foreign investor property rights without necessarily raising the notions of compensation.

Turning specifically to the extent of the compensation, the leading case is the **Chorzow Factory Case (Indemnity) (Merits) Germany v Poland**. Therein it was held where the expropriation is illegal, the compensation must wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed.[48] The ordinary value of the expropriated property suffices were the expropriation is lawful.

On the other hand, different tribunals in cases such as **Texaco v Libya**,[49] and **Kuwait v American Independent Oil (*Aminoil case*),**[50] have come to the position that 'appropriate' or 'just' compensation suffices in any event, taking into account the fair market value of the expropriate assets. Zimbabwe's position seems to capture the latter position in terms of Section 17 (2) of the Act.

The compensation itself, *"shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation) or, where the value of the property was negatively impacted by notice of imminent expropriation, immediately before such notice."*[51] The compensation shall, be paid without delay and shall be fully realisable and freely transferable; and in the event of delay interest begins to accrue. The Zimbabwean position however,

[47] Methanex Corporation v USA (n13 above) at para 410
[48] Chorzow Factory Case (Indemnity) (Merits) Germany v Poland, PCIJ Rep (1928), Series A, No 17, at p 29
[49] Texaco Overseas Petroleum Company v Libya 17 I.L.M 1 (1978)
[50] Kuwait v American Independent Oil (Aminoil case) 21 ILM 976 at para 143-144
[51] Section 17 (2) of ZIDA Act (n2 above)

does not factor in loss of future earnings as was done in the ***Aminoil case***, a position that is consistent with **SD Myers Inc v Canada**[52] and **Libyan American Oil Co (Liamco) v Libya**.[53]

Another form of foreign investment protection manifests itself in Section 19 of the Act which touches on the transfer of funds acquired. It states that investors may without restriction or delay in a freely convertible currency transfer capital, proceeds, profits from an asset, dividends, royalties, patent fees amongst other funds, into and out of Zimbabwe. The only limitation to the above right is that, such funds can only be transferred after paying the relevant fiscal obligations applying thereto. Funds can also be impeded in circumstances such as bankruptcy and insolvency; or criminal/penal offences; for financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; as well as for ensuring compliance with orders or judgments in judicial or administrative proceedings.[54]

DISPUTE RESOLUTION IN TERMS OF THE ACT

Disputes arising from investments in the scope of the Act are governed by Zimbabwean laws in terms of Section 38 of the Act. Where applicable domestic arbitration and any other international arbitration agreed to by the parties can also be pursued. Foreign investors with BIT's that were in force prior to the promulgation of the Act should register such agreements with the Agency within 12 months from the coming into force of the Act. Any other investment thereafter, should be registered within 90 days after such conclusion of the agreement.[55]

Unlike the case of **Emilio Augustin Maffezini v Kingdom of Spain**, it should be noted that the MFN and NT principles do not apply to procedures for the resolution of investment disputes.[56] In this instance, the Zimbabwean position differs from that of the UK Model BIT and the Bulgaria-Cyprus BIT of 1987[57]

ANALYSIS & CONCLUSION

[52] SD Myers v Canada (2004) 244 FTR 161; IIC 252 (2004)
[53] Libyan American Oil Co (Liamco) v Libya (1977) 62 ILR 139
[54] Section 19 of ZIDA Act (n2 above)
[55] See, Section 38 (6) of the ZIDA Act
[56] Juxtapose, Emilio Augustin Maffezini v Kingdom of Spain, ICSID Case No ARB/97/7 dated 25 January 2000 at para 49 wherein the MFN was extended to dispute settlement procedures, with Section 14 (3) of the ZIDA Act (n2 above) which ousts the same
[57] Bulgaria-Cyprus Bilateral Investment Treaty signed on 12 November 1987 and in force since 18 May 1988

The United States Supreme Court in **Banco Nacional de Cuba v Sabbatino**, notes that: *"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on state's power to expropriate the property of aliens."*[58] Zimbabwe's move to enact legislation in respect of foreign investment is therefore a welcome move in this realm of the law since it provides a sense of clarity and stability in the event of a dispute arising. This makes foreign investors aware of the legal investment environment, a feature that helps them navigate the terrain.

In addition, one should be reminded that investors – both local and foreign – make such investments in pursuance of profit and not out of goodwill. Accordingly, foreign investors and their respective investments should be equitably protected such that barring aspects of taxation and any other measures that would normally apply to local investors, they should be entitled to keep the property and profits acquired following their investments.

It should be noted that although it is not the first country and certainly not the last to do so, given Zimbabwe's difficult past with protecting foreign investments, this may go a long way into mending those past perceptions and issues, particularly if the country harnesses this legislation and strictly adheres to its provisions. As has been hinted above, this Act is also in harmony with our Constitution, hence, it is simply bringing into fruition the tenets of Section 71 (3) of the supreme law of Zimbabwe.

Moreover, the Act places credence on Hull's apposite sentiments to the effect that, *"The whole structure of friendly intercourse of international trade and commerce, and many other vital and mutually desirable relations between nations indispensable to their progress rest upon the single and hitherto solid foundation of respect on the part of the governments and of peoples for each other's rights under international justice."* He ends by adding that, *"…the right to prompt and just compensation for expropriated property is part of this structure."* The writer associates himself with these sentiments.

In conclusion, it is clear that despite its shortfalls in previous foreign investment protection, Zimbabwe has taken a positive step towards securing investor protection and this should go a long way in safeguarding the investments of foreign investors, and most importantly in attracting foreign direct investment to a country desperately in need of the same.

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[58] Banco Nacional de Cuba v Sabbatino, 376 U.S 398 at 428 (1964)