

# European/Southern African Development Community<sup>1</sup> (SADC) States' Bilateral Investment Agreements (BITs) for the promotion and protection of foreign investments v. Post-apartheid SADC Economic and Social Reconstruction Policy

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## *Abstract*

*This article examines the sustainability of European and SADC States' practice of agreeing bilateral investment agreements (BITs) for the promotion and protection of foreign investments in light of the latter's recent inauguration of black economic empowerment (BEE) as a basic norm of regional customary international law (CIL) and strategy for countering the social and economic legacy of apartheid-rule on their territories for over half a century. It reveals strong elements of exclusivity between those BITs' dispute settlement mechanisms and the "ouster clauses" of SADC BEE legislation and regulations. The mutual incompatibility between the aspirations and expectations of the foreign direct investment (FDI) seeking SADC States on the one hand; and on the other, the investor-sending European nations makes for a problematic and unsustainable union. The article recommends a mutual reappraisal of European/SADC BIT dispute settlement mechanisms in order to optimize BEE's chances of success.*

## **Overview**

SADC States have steadily inaugurated BEE as a regional norm of CIL<sup>2</sup> and strategy to counter the economic and social legacy of apartheid-rule for over half a century on their territories. BEE is habitually justified on practical and juristic grounds. Severe apartheid policies in some member States parties of the SADC had vandalised and scandalised black populations and reduced them to quasi-slaves for the settler European population. The United Nations (UN) steadily outlawed apartheid-rule by legislating against it through treaties and declarations that eventually culminated in the inauguration of *jus cogens*, namely, a norm so critical to international order that no State is permitted to derogate from it. UN legislation that served to expedite this

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<sup>1</sup> \* Unless otherwise stated, all internet sources were last accessed on (03 May 2011).  
Treaty Establishing the Southern African Development Community, 5 RADIC (1993) p.415.

<sup>2</sup> See also *Asylum Case (Columbia v. Peru)* ICJ Reports 1950 p.266.

process includes the International Convention on the Elimination of All Forms of Racial Discrimination (1965);<sup>3</sup> International Convention on the Suppression and Punishment of the Crime of *Apartheid* (1973);<sup>4</sup> and The International Convention against Apartheid in Sports (1985).<sup>5</sup>

John Dugard, arguably the foremost commentator on this subject has observed that:

Apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the United Nations from 1952 until 1990; and was regularly condemned by the Security Council after 1960. In 1966, the General Assembly labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984). The Apartheid Convention was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition it declared apartheid to be criminal. The Apartheid Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976. As of August 2008, it has been ratified by 107 States.<sup>6</sup>

To have attracted this amount of negative and even hostile attention of the organs of the UN - from the General Assembly to the Security Council; and to have become one of the standing features on the annual reviews of UN agencies, apartheid policies in the SADC must have approached dire, even diabolical proportions. Particularly in Rhodesia (Zimbabwe), South West Africa (Namibia), and South Africa, the social and economic legacy of apartheid-rule are still dominant and in some cases resilient enough against the policies of the new democratic dispensation. This situation threatens the possible achievement of the decency and normalcy that had been hoped for through UN criminalisation of apartheid. Therefore, European nations that enter BITs for the promotion and protection of foreign investments with SADC States may do well to note this challenge and perhaps incline themselves toward facilitation of BEE policies rather than prioritise the pursuit of their own national interests.<sup>7</sup>

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<sup>3</sup> United Nations General Assembly Resolution 2106 (XX) December 21, 1965.

<sup>4</sup> General Assembly resolution 3068 (XXVIII), 30 November 1973.

<sup>5</sup> United Nations, *Treaty Series* vol. 1500, p. 161 - adopted by the General Assembly on 10 December 1985 and came into force on 3 April 1988.

<sup>6</sup> John Dugard 'Convention on the suppression and punishment of the crime of apartheid' (2008) United Nations Audiovisual Library of International Law . Available at [www.un.org/law/avl](http://www.un.org/law/avl)

<sup>7</sup> In this connection see especially L. Henkin, *How Nations Behave* (2<sup>nd</sup> edn. Columbia University Press, New York 1979); Stephen Kocs, 'Explaining the Strategic Behaviour of States: International Law as a system structure' (1994) 38 *International Studies Quarterly* 535-56.

The continuing legacy of apartheid-rule in the SADC is summed up in a speech of 28 July 2004 to the joint Namibia Economic Society and Friedrich Ebert Stiftung breakfast meeting by Namibia's Prime Minister - Theo-Ben Gurirab. In it he is unequivocal that the economic and social legacy of apartheid-rule in the SADC is enormously salient, dominant and resilient. Therefore, political freedom's foremost concern should be to dismantle that legacy and annihilate that resilience. BEE policies are the inevitable consequence of that situation.

The past iniquities wrought upon our country and people were vicious acts of exclusion, selfishness and denial of the ideals of equality, democracy, rule of law and justice to the majority. Our shining Constitution and the policy of national reconciliation have enjoined all Namibians to turn our backs on that ugly past and to move on, straightening up the question mark and begin by declaring that we must unite and work together to make Namibia a land of peace, justice and prosperity for all. I must, however, add, as history has taught us, that to forgive is human, but to forget is out of the question!

Freedom and independence brought Black Majority Rule in Southern Africa, brought by former Freedom Fighters and Ex-Prisoners of yesteryears. To tell the truth, this change has actually benefited the previously advantaged more than the previously oppressed, poor, needy, weak and disenfranchised majority. What is the problem with BEE today or ever? None! Black Economic Empowerment is in practical terms the flip side of Black Majority Rule. It is a development strategy to complete the unfinished business of decolonization and eradication of the past social deficit in order to level the national playing field in our pursuit of eradicating poverty and implementing socio-economic transformation programmes.

I have noticed that IMF is rearing its ugly head by preaching the usual stuff, this time about BEE initiatives in Southern Africa. Its scare tactic is to broadcast a falsehood that BEE interventions in economic and financial sectors will scare off foreign investors. IMF's so-called Structural Adjustment Programme has created social dislocations in Africa and scared off foreign investors. We will continue to honour our promise to keep IMF out of Namibia, by ensuring macro-economic stability and reducing budget deficit.<sup>8</sup>

South Africa's Black Economic Empowerment (BEE) Act No. 53 of 2003<sup>9</sup> legally initiated the process for ensuring government policy of targeting the legacy of economic inequality between whites and blacks. The Act seeks to enhance the number of black people that manage, own and control South Africa's economy. The Act facilitates the work of the Department of Trade and Industry's (DTI) in this area by:

- establishing a legislative framework for the promotion of BEE;
- empowering the Minister to issue Codes of Good Practice and publishing Transformation Charters;
- establishing the BEE Advisory Council; and

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<sup>8</sup> Theo-Ben Gurirab, 'Two Perspectives on black economic empowerment.' Available at: [http://www.sarpn.org.za/documents/d0000918/P1031-BEE\\_Namibia\\_2004.pdf](http://www.sarpn.org.za/documents/d0000918/P1031-BEE_Namibia_2004.pdf)

<sup>9</sup> See also Department of Black Economic Empowerment website in the Department of trade and Industry. Available at: <http://www.thedti.gov.za/bee/beehome.htm>

- making provision for matters connected therewith.<sup>10</sup>

Within the region, South Africa appears to have taken the lead-role in this process by publishing in February 2007 a BEE Code of Good Practice.<sup>11</sup> The code has now become a standard by which investments and enterprises are assessed for their compliance with BEE policy and legislation in South Africa. Institutional mechanisms have been established already for the monitoring and continual evaluation of BEE practice in the entire economy.

The South African government has distinguished BEE from affirmative action as follows:<sup>12</sup>

- Although employment equity forms part of it, it does not merely aim to transfer wealth from white people to black people. At the core of the policy is the BEE scorecard, which measures companies' empowerment progress in ownership, management, employment equity, staff training and direct empowerment.
- Private companies have to apply the codes if they want to do business with the government - to tender for business, apply for licences and concessions, enter into public-private partnerships, or buy state-owned assets.
- Companies are also encouraged to apply the codes in their interactions with one another, as preferential procurement will affect most private enterprises throughout the supply chain.

Interim reports show that BEE's effort to include the long-excluded black majority into the mainstream of economic life is paying healthy dividends. BEE is credited with pushing the country's growth rate up by nearly five percentage points in 2005. It is credited with pushing up South Africa's challenge of India as the preferred destination for foreign direct investment (FDI). It is also credited with enormously progressing the total return on equities traded on the JSE in 2005 to forty-seven percentage points. The National Empowerment Fund, (NEF) set up to provide capital for BEE transactions, is working on at least 135 deals worth in excess of R1-billion.<sup>13</sup>

Nonetheless, at its third meeting held at the Union Buildings in Pretoria on 20 May 2010, the Chair of South Africa's Advisory Council BEE, President Jacob Zuma observed that although much progress had been made in advancing black economic empowerment more still needed to be done. He urged the Advisory Council to come

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> See also the South Africa Government Information website. Available at: <http://www.southafrica.info/about/414421.htm>

<sup>13</sup> Ibid.

up with stronger action plans capable of accelerating change. “The Council would need to answer the question: ‘In the South African context, where many people were excluded for centuries, how do we level the playing field?’”<sup>14</sup>

Zimbabwe, which had also suffered nearly a century of apartheid rule from 1890 to 1980, has actively pursued BEE practice. Its Indigenization and Economic Empowerment Act No. 14 of 2007 was signed into law on April 17 2008. It requires all companies operating in Zimbabwe to arrange for fifty-one percent of their shares or interests therein to be owned by indigenous Zimbabweans.<sup>15</sup> The Statutory Instrument No. 21 of 2010 titled Economic Empowerment (General) Regulations fleshes out those requirements and sets out specific action points to promote BEE. Section 4 of these regulations requires every business to notify the Zimbabwe government the extent of present and future compliance action on their part with indigenization legislation.

Although not as sophisticated as South Africa’s BEE regulations that have scorecards for public procurement ratings,<sup>16</sup> Zimbabwe’s indigenization policy and legislation derives from the same principle of substituting equality for inequality on racial lines in the economic and social structures of the State. In fact, Zimbabwe’s indigenization policy and legislation are consistent with the emergent BEE policies under consideration in Namibia and being practiced in South Africa, except that South Africa's are yet to impinge on land and mining rights to the extent that Zimbabwe's already have done.

The apparent and growing success of BEE in South Africa, coupled with both its copying in Namibia and Zimbabwe – two other countries worst affected by apartheid-

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<sup>14</sup> ‘Media Release: President Zuma Convenes third meeting of BEE Advisory Council’ Available at: <http://www.thedti.gov.za/mediareleases/BEE-statement.pdf> Suggesting that there is 75 per cent room for improving BEE’s performance, see also <http://www.southafrica.info/news/business/11697.htm>

<sup>15</sup> See also South Africa’s Mineral and Petroleum Resources Development Act of 2002 (MPRDA) and its administrative procedures set forth in the Mining Charter.

<sup>16</sup> See also <http://www.thedti.gov.za/bee/beecodes.htm>

rule, and the acquiescence of non-participating SADC States is typical of custom<sup>17</sup> - the process by which norms of CIL are formed under international law.<sup>18</sup> This strongly recommends the view that SADC States may have inaugurated the CIL norm on BEE as a strategy for dealing with the legacy of the international crime of apartheid-rule. Whereas States can generally contract out of general CIL by adopting the Persistent Objector status throughout the formation of a particular norm,<sup>19</sup> there appears to be no scope for geographically alien States to successfully involve themselves or impede the formation of local CIL that is limited to local and not international matters unless it is manifestly contrary to international human rights law. The International Court of Justice underlined this fact when it stated in the *Asylum Case* that:

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.<sup>20</sup>

Columbia had claimed that Peru had incurred international responsibility by allegedly breaching a rule of local CIL on the granting of asylum to fugitives. The Court required the Colombian government to "... prove that the rule invoked by it [was] in accordance with a constant and uniform usage practised by the States in question, and that this usage [was] an expression of a right appertaining to the State granting asylum and a duty incumbent upon the territorial State;"<sup>21</sup> and not whether other alien States regarded such a claim as valid under international law. While this formulation of custom's secondary rules of recognition is not without difficulty regarding creative

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<sup>17</sup> See also Mario Prost and Paul Clark, 'Unity, Diversity and the Fragmentation of International Law' (2006) 5 Chinese Journal of International Law 341; Patrick Kelly, 'The Twilight of customary international law' (2000) 40 Virginia Journal of International Law 449.

<sup>18</sup> See Ben Chigara, *Legitimacy deficit in custom: A deconstructionist critique*, (Ashgate, Aldershot 2001)

<sup>19</sup> See also Jonathan Charney, (1985) 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 British Yearbook of International Law 1.

<sup>20</sup> ICJ Reports 1950 273.

<sup>21</sup> ICJ Reports 1950 276.

determinacy and certainty,<sup>22</sup> rules of CIL have served international tribunals and their clients and continue to, so much so that that has become the theorist and not the practitioner's challenge. Frustrated by this disparity, some theorists have called for custom's abandonment as a source of law, and others for its reformulation.<sup>23</sup>

Commenting on the Organization of African Unity<sup>24</sup> (OAU) and African Union's<sup>25</sup> (AU) combined slow generation of multilateral treaties in comparison to the UN or the WTO for instance, Maluwa<sup>26</sup> observes that this should not be mistaken for a reluctance by either the AU or its predecessor, the OAU, to resort to this most obvious and direct method of lawmaking because "... all AU member States are also members of the UN and are, therefore, for the most part, parties to the UN sponsored multilateral treaties." In this light African regional multilateral treaties often play a complementary rather than competing role with the universal UN processes, paying particular attention to the African situation. Similarly, because member States parties of the SADC are all member States parties of the AU the sub-regional treaties of the SADC, or of the Economic Community of West Africa (ECOWAS) and also the East African Community (EAC) complement rather than compete with those of the AU or UN above them. The authors of the UN Charter must have intended this through Chapter VIII measures of the Charter. Because law making treaties<sup>27</sup> are intricately

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<sup>22</sup> Problematizing this formulation of custom's secondary rules of recognition, see especially Ben Chigara, above, n.18.

<sup>23</sup> See especially Patrick Kelly, 'The Twilight of customary international law' (2000) 40 Virginia Journal of International Law 449; Ben Chigara, 'International Tribunal for the Law of the Sea and Customary International Law', (2000) 22 Loyola of Los Angeles Comparative and International Law Review, 433; Mario Prost and Paul Clark, 'Unity, Diversity and the Fragmentation of International Law' (2006) 5 Chinese Journal of International Law 341; Edward Swaine, 'Rational Custom' (2002) 52 Duke Law Journal 559.

<sup>24</sup> Established in 1963 for the purpose of fostering cooperation among independent African States to deal with African problems, the achievement of political freedom from colonial rule being the dominant one at the time.

<sup>25</sup> Successor to the OAU, the AU was established by the Constitutive Act of the African Union that was adopted by the Assembly of Heads of State and Government of the OAU at its thirty-sixth ordinary session held on 11 July, 2000 in Lome, Togo.

<sup>26</sup> Tiyanjana Maluwa, 'International Law-making in the Organisation of African Unity: An overview' (2000) 12 African Journal of International Law 201, 204.

<sup>27</sup> Law-making treaties are agreements by States on principles that ought to govern them in specific areas of mutual interest or cooperation. Especially, they are capable of creating laws where none existed to inform future conduct of States in a particular area.

twined with the process by which rules of CIL are established,<sup>28</sup> treaty provisions are often used to codify customs that States already regard as binding against one another; and customs sometimes result from treaty provisions, it follows that regional and sub-regional multilateral treaties have tremendous potential to contribute to international law-making.<sup>29</sup>

Brownlie<sup>30</sup> writes that the material sources of custom are very numerous and include diplomatic correspondence, policy statements, press releases, opinions of legal advisers, official manuals on legal questions, executive decisions and practices, state legislation, international and national judicial decisions. Therefore, the adoption of BEE policy, legislative and administrative measures to implement it; the setting up of governmental departments responsible for implementing it; the creation of Advisory Councils that set strategies for accelerating and evaluating BEE progress; and the privileging of BEE as the centrepiece of national public procurement policy suffices as justification for the proposition that BEE has become a norm of regional CIL in SADC States.

Moreover, the SADC's 'powerful and concerned' States, namely South Africa, Namibia and Zimbabwe have in a very short time precipitated radical practice on the matter. This has met with the approval/acquiescence of other SADC States. Those States that achieved political independence from their colonizers in the 1960s under the United Nations decolonization programme appear to sympathise with their counterparts that only achieved political freedom more recently.

In the *North Sea Continental Shelf Cases*,<sup>31</sup> the ICJ stated that passage of time is not itself a significant matter in the determination of the question whether State practice had crystallised into a new norm of CIL. "[E]ven without the passage of any

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<sup>28</sup> *North Sea Continental Shelf cases*, ICJ Reports 1969 3. See also Ben Chigara, above, n.18, 250-306.

<sup>29</sup> See also Patrick Dumberry, 'Are BITs Representing the 'New' Customary International Law in International Investment Law?' (2010) 28 Penn State International Law Review 675-701; Tiyanjana Maluwa 'South Africa and the African Union' (2005) 2 International Organization Law Review 103, 105.

<sup>30</sup> Ian Brownlie, *Principles of Public International Law*, (7th edn OUP, Oxford.2008) 6 -7.

<sup>31</sup> *Federal Republic of Germany v Denmark and The Netherlands*, ICJ Reports 1969, 3.



considerable period of time, a very widespread and representative participation ... might suffice of itself, provided it included that of States whose interests were specifically affected".<sup>32</sup> It is arguable that South Africa, Namibia and Zimbabwe - the three post-liberation SADC States, worst affected by apartheid-rule, may have contributed to international law by inaugurating a new norm of regional CIL on BEE for the specific purpose of countering the economic and social legacy of apartheid-rule on their territories. This development recommends the view that under general international law, transitional States may now have a right/duty to deliberately take redress measures without incurring responsibility in order to correct the unjust legacy of international crimes such as apartheid and even slavery. There is no shortage of justifications for this determination.

Perhaps SADC States have an unrivalled claim to moral legitimacy to institute BEE policies. South Africa had remained under apartheid-rule until its first democratic elections of 1994, while Namibia had remained under apartheid-rule until its first black-majority-rule government led by SWAPO in 1990. Zimbabwe had remained under apartheid-rule until its first black-majority-rule government led by ZANU(PF) in 1980. The post-apartheid governments of these States must now substitute equality for inequality; and broad based inclusion for majority exclusion as their basic economic and social norm. This challenge alone is a sufficient enough moral requirement to progress BEE.

Shaw<sup>33</sup> writes that "the duration and generality of a practice may take second place to the relative importance of the states precipitating the formation of a new customary rule in any field". Maluwa<sup>34</sup> writes that despite being the youngest member State party of the African Union and by inference of the SADC, South Africa has steadily assumed a leadership role on the African continent. Both the powerful and specially affected parties required to participate for the process of custom to be valid in the creation of a local CIL on BEE in the SADC, namely South Africa, Namibia and Zimbabwe have been involved. Their practice has either been approved or acquiesced

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<sup>32</sup> Ibid. para. 73.

<sup>33</sup> Malcolm Shaw, *International Law*, (6<sup>th</sup> edn. CUP, Cambridge 2008) 80.

<sup>34</sup> Tiyanjana Maluwa, n.29, 103.

with by other Member States parties of the SADC. This recommends the view that BEE may already have become a norm of regional CIL in the SADC.

## I

### **BIT dispute resolution dynamic, an incubator for anti-BEE practices?**

Yet an interesting counter-emergent practice is also making headway in the sub-region. It is investors' resort to the dispute settlement mechanisms contained in BIT agreements for the promotion and protection of foreign investments.

The proposition that foreign European nationals/investors could rely on dispute settlement agreements contained in BIT agreements for the promotion and protection of foreign investments to oppose SADC governments' efforts to redress economic and social inequality that is directly linked to apartheid-rule risks defaming the BIT framework for the promotion and protection of foreign investments as a tool for the maintenance of the immoral fruits of apartheid-rule. Such a proposition would undermine also the credibility of the UN system in its entirety because the UN has condemned apartheid-rule as a crime against humanity. In particular, it would challenge the UN's commitment to:

- (i) The millennium development goals that champion economic and social development for the specific purpose of progressing the fight against poverty, hunger and disease everywhere in the world.
- (ii) The Human Security agenda which BEE appears more favourable to than the BIT empowerment of individuals from European States to challenge and foil SADC States effort to redress apartheid engineered economic and social inequality.
- (iii) Its agenda to promote and ensure the rule of law, peace and security, and human rights protection.<sup>35</sup>

Further, such a proposition would be contrary to the priorities of several UN mandates,<sup>36</sup> including the ILO,<sup>37</sup> the UNHCR Human Security Commission,<sup>38</sup> and

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<sup>35</sup> See also Ben Chigara, 'Social justice: the link between trade liberalization and Sub-Saharan Africa's potential to achieve the United Nations Millennium Development Goals by 2015' (2008) 26 *Netherlands Quarterly of Human Rights* 9-42.

<sup>36</sup> See also UN Research Institute for Social Development website, [http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/791B1580A0FFF8E5C12574670042C091?OpenDocument](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/791B1580A0FFF8E5C12574670042C091?OpenDocument)

UN MDGs,<sup>39</sup> to name a few. Therefore, the concurrent development of BEE as a basic norm of SADC States for the countering of the economic and social legacy of apartheid rule on their territories for over half a century on the one hand; and the development of BITs for the regulation of investment disputes on the other is clearly a matter of legal curiosity. The two appear still to be temporally diametrically opposed in the SADC, at least in light of the emergent jurisprudence.

The proposition that foreign nationals/investors could invoke dispute settlement mechanisms contained in BITs to compel SADC States to either abandon BEE policies altogether, or compensate them for non-commercial risks that they had suffered as a result of BEE practice appears to be unsustainable for a variety of reasons.

Firstly, that proposition is oriented towards the perpetuation of the fruits of apartheid-rule under the pretensions of the practice of the rule of law.<sup>40</sup> The contradiction that arises is that while apartheid-rule has now been universally proscribed, by way of *jus cogens* – international law's most elite category of norms,<sup>41</sup> its outcomes could remain protected in ways that could threaten peace and security in the SADC. This is because

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<sup>37</sup> The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. See also ILO website, [http://www.ilo.org/global/About\\_the\\_ILO/Origins\\_and\\_history/lang-en/index.htm](http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang-en/index.htm). See also Luis Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism, and International Law – The ILO Regime (1919-1989)*, (OUP, Oxford 2005); Ben Chigara, 'Latecomers to the ILO and the Authorship and Ownership of the International Labour Code' (2007) 29 Human Rights Quarterly 706-26.

<sup>38</sup> The Commission on Human Security was established in January 2001 for the purpose of ensuring a world "free from want" and "free from fear." See also UN Human Security website, <http://www.humansecurity-chs.org/about/Establishment.html>

<sup>39</sup> See also UN website, <http://www.un.org/millenniumgoals/bkgd.shtml>

<sup>40</sup> This is facilitated of course by what Bingham has described as the casual use of the term with very little or no understanding of its tenets or requirements. Outlining the scope of the term, see also Tom Bingham, *The Rule of Law*, (Allen Lane, London 2010) 3-9; 110-1. See also Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (15<sup>th</sup> edn. Pearson, Harlow 2007) 83-5.

<sup>41</sup> Exemplified by the requirement in Article 53 of the VCLT (1969) that any agreement concluded between States is null and void if it conflicts with norms *jus cogens*. "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

of the prevalence in SADC States of salient manifestations of apartheid-rule engineered economic and social inequalities on racial lines.<sup>42</sup>

Secondly, such a proposition would contravene one of the cardinal principles of international law so elegantly enunciated by Judge Huber in the *Island of Palmers case*,<sup>43</sup> namely, that the exclusive ownership and control of a defined piece of the globe by a government is the strongest evidence of any claim to statehood - something that resort to dispute settlement mechanisms contained in BITs for the promotion and protection of foreign investments particularly in relation to counter-claims of title to land makes a strong case against.

Emergent practice of assigning SADC counter property claims to the ICSID strongly challenges this cardinal principle of Public International Law. Foreign nationals/investors, and not States, could terrorise SADC States with all manner of legal suits for what they perceived to be BEE inspired non-commercial risks to their enterprises. The *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe* (2009)<sup>44</sup> and *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa* (2010)<sup>45</sup> cases justify this claim.

However, paragraph 10 of General Comment No. 18 which deals with the obligation to ensure equal treatment of persons and non-discrimination appears to countenance BEE policies:

The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.<sup>46</sup>

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<sup>42</sup> See Alan Paton, *Cry the Beloved Country* (Jonathan Cape, Bedford Square, London 1948).

<sup>43</sup> (*Netherlands v. US*) (1928) 2 R.I.A.A. p.829.

<sup>44</sup> ICSID Case No. ARB/05/6 judgment of 22 April 2009 paras.31 and 43.

<sup>45</sup> ICSID Case No. ARB (AF)/07/01 judgment of August 2010. <http://www.arbitration.fr/3.html>

<sup>46</sup> U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

Therefore, the apparent difficulty created by resort to BIT dispute settlement mechanisms in an effort to maintain property claims that are the legitimate target of BEE practice recommends the view that SADC States' may not be ready yet to participate in BITs. This is because the object and purpose of BITs is to protect the interests of participating States. Therefore, whatever the status of BEE policy in SADC States, BIT dispute settlement agreements have every possibility to trump it. SADC States must be mindful of this fact before they commit themselves to any such agreements with anyone.

BITs commonly confer on nationals of participating States the legal capacity to bring the host State before international tribunals to answer claims of non-commercial risks that their enterprises might have suffered in the host State. This scenario is more troubling in cases where the individual concerned had always been a citizen of the same SADC State that they were now invoking their genealogical links against in order to protect their apartheid-rule ill-gotten treasures.

Henkin<sup>47</sup> has shown how inseparable national interest is, in the conduct of States, even when crafting laws.

One frequently encounters the view that international law is made by the powerful few to support their particular interests. ... Some have elevated this view to a doctrine, questioning whether one may meaningfully speak of international norms, of their observance or violation. ... There are reasons why nations make law and conclude agreements, and why they make particular law; like in many national societies, international law results from the complex interplay of varied forces in international politics. .... – international law is observed by nations as national policy, shared with other nations, in support of an orderly society.

It is in this role as international policy maker that international law ought to be scrutinised for its potential to be abused by the more powerful nations against the weaker nations of the SADC. The probability that the more powerful States could be concluding BITs with dispute settlement mechanisms that empower their nationals to effectively frustrate host SADC States' effort to implement a basic norm of (BEE) is a case in point. Even though SADC nationals could in theory bring similar claims

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<sup>47</sup> Louis Henkin, *How Nations Behave* (2<sup>nd</sup> edn Columbia University Press, New York 1979) 10-11.

against a participating European State, the likelihood of that happening is extremely remote.

Generally, international law's difficulty in this lies in that while it may have proscribed apartheid-rule as a crime against humanity, States are still able through BITs to ensure that their nationals retain and milk the fruits of apartheid-rule contrary to the political, social and economic aspirations of the post-apartheid States; and contrary also to the reasoning of the UN Human Rights Committee which has approved initiatives to correct the effects of practices such as apartheid-rule.<sup>48</sup> The economic and social outcomes of apartheid are not resident in some remote museums of SADC States, accessible only by a boat trip that most cannot afford. No! They are salient and apparent wherever one looks, wherever one may happen to be in those post-apartheid SADC States.

At the turn of the millennium were already in existence over ten thousand BITs. UNCTAD writes that the number of BITs concluded continues to rise. More than two-thirds of the 1,513 treaties signed by the end of 1997 came into existence in the 1990s. In 1997 alone, 153 BITs were concluded - approximately one every two-and-a-half days.<sup>49</sup> By 2002 some 2,181 BITs had been concluded. By 2003, there were 2,265 BITs in existence and involving 176 States.<sup>50</sup> "Most significantly, the number of BITs concluded between developing countries themselves, and between these countries and economies in transition, had also risen substantially during the 1990s. In 1997 alone, over a quarter (27 per cent) of the treaties concluded were between developing countries."<sup>51</sup>

Table 1: Share of BITS per country by region, as at 2002

Region	Number of BITS	Economy	Average BITS /Economy
Developed countries	1170	26	45
Developing countries	1745	150	12

<sup>48</sup> See para.10 of General Comment No.18.

<sup>49</sup> TAD/INF/PR/99001 - 07/01/99.

<sup>50</sup> [http://www.unctadxi.org/templates/Page\\_\\_\\_\\_\\_1007.aspx](http://www.unctadxi.org/templates/Page_____1007.aspx)

<sup>51</sup> TAD/INF/PR/99001 - 07/01/99.

Africa	533	53	10
Latin America and the Caribbean	413	40	10
Asia and the Pacific	1003	57	18
CEE	716	19	38

Source: UNCTAD, BITs databases<sup>52</sup>

This article focuses on the apparent tensions that have arisen from affected SADC States' premature participation in BITs for the promotion and protection foreign investment. Unless these States ensure a completely different approach to dispute settlement, i.e. one that is not opposed to but facilitatory of BEE practice, by participating in standard BITs for the promotion and protection of foreign investments they risk incoherency because they have already made BEE their foremost concern in the post-apartheid social and economic reconstruction agenda.

The recent case of *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*<sup>53</sup> case demonstrates clearly the incoherency that can result when SADC States' agree BITs for the promotion and protection of investment without due diligence. The claimants, several Italian citizens and Luxembourg corporations held interests in South African granite quarrying companies. They claimed that the implementation of South Africa's new BEE legislation, namely, the Mineral and Petroleum Resources Development Act of 2002 (MPRDA) and its administrative procedures set forth in the Mining Charter had effectively extinguished their mineral rights under the "*old order mineral law*" without providing adequate compensation.<sup>54</sup>

It had been argued on behalf of the Claimants that the MPRDA had extinguished "certain putative *old order mineral* rights" that they allegedly held contrary to common Article 5 of the South Africa and Italy BIT on the one hand, and the South Africa and Luxembourg BIT on the other.<sup>55</sup> The South African government had insisted however that the Claimants could not show that their investments under the relevant BITs for the promotion and protection of foreign investments were property

<sup>52</sup> <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1>

<sup>53</sup> ICSID Case No. ARB (AF)/07/01; judgment of August 2010. <http://www.arbitration.fr/3.html>

<sup>54</sup> Para. 56.

<sup>55</sup> Para. 54 (my emphasis).

owned “in a legally relevant sense under the law governing the common law mineral rights, i.e. South African Law,”<sup>56</sup> because “South African law did not grant the Claimants ownership or anything akin to it over the common law mineral rights”.<sup>57</sup> This is sovereignty argument insists upon the competence of the State to determine the laws that govern its territory and as far as South Africa was concerned, its law had not made it possible for common law mineral rights to transfer from those to whom such rights could be vested in, namely, the Operating Companies, or more commonly their lessors, to become investors’ property under the relevant BITs for the promotion and protection of foreign investments.<sup>58</sup>

Further, it had been argued on behalf of the Claimants that the combined effect of MPRDA legislation and the administrative requirements of the Mining Charter of 13 August 2004 had imposed upon the claimants “compulsory equity divestiture requirements with respect to the Claimants’ shares in the Operating Companies”, contrary to common Article 5 to the relevant BITs for the promotion and protection of foreign investments.

The measures complained about in this case are traceable to BEE efforts to increase the participation of historically disadvantaged South Africans (HDSAs) in the ownership of mining assets. They had come about as a result of consultations between the South African Government, the South African Chamber of Mines, the National Union of Mineworkers, and the South African Mineral development Association.<sup>59</sup> The measures require companies to achieve at least twenty-six per cent HDSA ownership of mining assets by 2014,<sup>60</sup> and to publish their equity employment plans directed at achieving a baseline of at least forty per cent HDSA participation in management by 2009. The latter target had still not been met by the deadline date.<sup>61</sup>

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<sup>56</sup> Para. 48.

<sup>57</sup> Para. 49.

<sup>58</sup> Para.49.

<sup>59</sup> Para. 56.

<sup>60</sup> Para. 56.

<sup>61</sup> See also <http://www.southafrica.info/business/economy/policies/miningcharter-140910.htm>



It had been argued also on behalf of the Claimants that the implementation of the MPRDA and Mining Charter provisions had breached “certain due process obligations” provided for under Article 5(9) of the Italy BIT.<sup>62</sup> Further, Articles 5(1) and 5(2) of the relevant BITs required any expropriations to meet all of the following criteria:<sup>63</sup>

- The expropriation must be for public purposes or in the international interest (Italy BIT) or for a public purpose related to the internal needs of the country (Luxembourg BIT).
- The expropriation must be on a non-discriminatory basis.
- The host State must pay immediate, full and effective compensation (Italy BIT) or prompt, adequate and effective compensation (Luxembourg BIT).
- The expropriation must be undertaken under due process of law (Luxembourg BIT).

Clearly, the dispute settlement mechanisms contained in these investment BITs for the promotion and protection of foreign investments is entirely consistent with the object and purpose of promoting and protecting foreign investment. At the core of their design is the dislocation of national strategies that may threaten the purely capital interests of the foreign investor. This makes it extremely unlikely that BITs for the promotion and protection of foreign investments would be designed to facilitate the object and purpose of the MPRDA and Mining Charter regime for ensuring BEE. The decision in this case had enormous ramifications for the entire BEE mission in one of South Africa’s biggest and wealthiest industries.

UNCTAD<sup>64</sup> reports that developing countries typically seek BIT frameworks that promote capital and technological flow to their territories in order to facilitate economic growth and social development. Meanwhile, sending States are interested in creating legal frameworks that will protect foreign investments from non-commercial risks in host States, including the possible nationalization of investments. BITs appear to be pro-foreign investments in that their main driver, the dispute resolution mechanism requires disputes to be settled using international and not national law, and international arbitration tribunals and not national courts. This protects the investors from possible changes to national law after the investment has already

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<sup>62</sup> Above note 49 para. 54.

<sup>63</sup> Para 58.

<sup>64</sup> UNCTAD (1998) *Bilateral Investment Treaties in the Mid-1990s* (United Nations, New York 1998) 1-2.

occurred. Host States can change their national laws at any point in the life of such investments in a way that might be unfavourable to the foreign investor.<sup>65</sup>

In the case of Zimbabwe, many foreign investments had occurred after its Independence from Britain on 18 April 1980. Some had occurred on privately secured farms or commercial interests that were linked in some way to commercial farm holdings. Such investments have dealt with no other government except President Mugabe's own post-apartheid government. They have contributed taxes and other duties to that government. They are not in any way directly or indirectly linked to apartheid-rule. In a sense they could be regarded as proactive facilitators of Zimbabwe's post-independence economic development agenda. However, application of the constitution of Zimbabwe Amendment Act No. 17, 2005 which empowered the Zimbabwe government to confiscate commercial farmland without compensation takes no notice of the good faith of this category of investments.<sup>66</sup>

Moreover, where the sending State has previously concluded a BIT agreement for the promotion and protection of foreign investments with the Zimbabwe government, the dispute settlement standards contained therein may prove to be immune to the new land acquisition legislation - a point conceded by the Zimbabwe Ministry of Foreign Affairs in a *note verbale* dated 21 November 2000, addressed to the Dutch Embassy in Harare.<sup>67</sup>

Emergent practice of seeking use BIT dispute settlement procedures to resolve SADC counter claims to property has enormous potential to result in discriminatory treatment. This is because while foreign nationals could sue for any non-commercial

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<sup>65</sup> Examining the efficacy of BIT dispute resolution mechanisms see also Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, (Kluwer Law International, The Hague 2009); Simon Lester, and Bryan Mercurico (eds), *Bilateral and Regional Trade Agreements* (CUP, Cambridge 2009); Susan Franck, 'The nature and enforcement of Investor Rights under Investment Treaties: Do Investment Treaties have a bright future?' (2005) 12 University of California, Davis, 47-99.

<sup>66</sup> On the standard of treatment upon State expropriation of assets, see especially the *Charzow Factory Case (Merits)*, PCIJ Series A No. 17 (1928). See also Andrew Newcombe and Lluís Paradell, above n .65, 11.

<sup>67</sup> See *Bernardus Henricus Funnekotter and Others (Claimants) v. Republic of Zimbabwe (Respondent)* ICSID Case No. ARB/05/6 judgment of 22 April 2009 paras.31 and 43.

risks that they had experienced through the implementation of BEE regulatory requirements, nationals of the particular host SADC State would have no such recourse even if they had suffered similar risks.

Other foreign nationals whose governments had not concluded similar BIT agreements for the promotion and protection of foreign investments with SADC States could still sue for non-commercial risks that they had encountered if both their home State and the host SADC State happened to be parties to the World Trade Organization (WTO) agreement. The most favoured nation (MFN) principle requires that States Parties should extend to other WTO States Parties, the same treatment that they would accord to goods and services from their most favoured nation.<sup>68</sup> This applies even to MFN treatment premised on a BIT agreement for the promotion and protection of foreign investments that other WTO States Parties were not privy to.<sup>69</sup>

This scenario raises the real prospect that the SADC land issue could soon become a matter of further litigation at the WTO's Dispute Settlement body providing that the MFN principle could be invoked.<sup>70</sup> The question is whether a State as impoverished as present day Zimbabwe could pay its way through the litigation processes and the awards that are steeply mounting against it over its BEE inspired economic reform programmes<sup>71</sup> that foreign nationals may challenge by virtue of the existence of a BIT for the promotion and protection of foreign investments between Zimbabwe and their home States.

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<sup>68</sup> See also *Maffezin v. Spain*, 40 ILM 1129; ICSID Case No. Apr 97/7 judgment of 25 January 2000.

<sup>69</sup> See for instance *Siemens A.G. v. The Argentine Republic*, ICSID, Decision on Jurisdiction, Case No. ARB/02/8; *Maffezini v. Spain*, ICSID, Decision on Jurisdiction, Case No. Apr/97/7, January 25, 2000, 40 ILM 1129; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID, Decision on Jurisdiction, Case No. ARB/03/10, June 17, 2005; *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006. See also Radi Yannick, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the 'Trojan Horse'' (2007) 18 *European Journal of International Law*, 757-774; Gabriel Egli, 'Don't get bit: Addressing ICSID's Inconsistent Application of Most Favored-Nation Clauses to Dispute Resolution Provisions' (2006-2007) 34 *Pepperdine Law Review* 1045-84

<sup>70</sup> For application of this practice, see also *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB (AF)/07/01 para 57

<sup>71</sup> The awards against Zimbabwe in the *Bernardus Henricus Funnekotter and Others Case* exceeded eight million Euros. Judgment of 22 April 2009 para.148.

In terms of international law's prohibition against unequal treatment,<sup>72</sup> Zimbabwean nationals whose farms had been confiscated by their own government under the land acquisition programme would be the only ones with nowhere to go for legal redress as they would have neither BIT agreement dispute settlement mechanisms to invoke against their own State, nor MFN based litigation possibilities. The ouster clauses contained in BEE legislation often restrict national courts from receiving claims that are consequent upon the application of BEE policies. In *Commercial Farmers Union and Others v The Minister of Lands and Rural resettlement and Others (Zimbabwe)* (2010), the Supreme Court held that former owners and/or occupiers whose land had been acquired by the acquiring authority in terms of section 16 B (2)(a) of the Constitution of Zimbabwe could not challenge the legality of such acquisition in a Court of Law. This is because the jurisdiction of the Courts has been ousted by section 16 B (3)(a) of the Constitution.<sup>73</sup> The Court ruled further that decisions of the SADC Tribunal were 'at best persuasive but certainly not binding' because the SADC Tribunal had not been transformed into Zimbabwean law. Consequently its findings had no legal status in Zimbabwe. Consequently, the Supreme Court's decisions were final on the matter.

It is arguable that the UN's failure to include opposable indigenous land claim rights and apartheid-engineered land claim rights in its decolonization, reconstruction and development plans for SADC States has been the Organization's single biggest omission in its peace building effort in the sub-region. Having universally proscribed the practice of apartheid by way of *jus cogens*, the UN could and should have done better than to merely hope that the land issue that most highlighted the unconscionability of the practice of apartheid-rule in the sub-region would simply melt away.

## II

### SADC Land Relations

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<sup>72</sup> See UN Convention against all forms of racial discrimination (1966)

<sup>73</sup> Judgment No SC31/10, Const Application No 81/10, decision of 26 November 2010, p 27.

SADC land issues evoke emotive, counter-claims to property that are traceable to the sequence of colonization or occupation of native indigenous populations by European elements in the late nineteenth century; liberation from colonial rule or occupation; and the introduction of a new and opposable system of land ownership and use by majority-rule-governments starting in the twenty-first century.

In the case of Zimbabwe a comprehensive and thorough study of the country's soils and climate had preceded classification of the nation's land according to its agricultural potential<sup>74</sup> before it was designated private white commercial farmland, black tribal trust land area, or national trust land.

Zone one comprises the most fertile regions of the country with the most potential for agricultural production while zone five comprises semi-desert soils with the least potential for agricultural production. As far as possible, land allocation proceeded on agro-ecological values, with privately owned commercial zones for white farmers situated in the fertile, high rainfall areas with the greatest agricultural potential (Zones I and II) while black peasants' Tribal Trust Lands (TTLs) were situated in infertile, low rainfall areas with the least agricultural potential.

This set up had been achieved by forcible evacuation of natives from their lands, a form of confiscation. Confiscation has been helpfully defined as the capricious taking of property by the rulers of the State for personal gain; while expropriation refers to the assumption of ownership rights by the State for either an economic or public purpose.<sup>75</sup> Throughout this process, legislative force had been the critical tool. This is probably the reason why the Mugabe regime has adopted the Constitution of Zimbabwe Amendment (No. 17) Act, 2005, which empowers the government to acquire commercial farms without compensation, just as the Southern Rhodesia

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<sup>74</sup> Ben Chigara, 'From Oral to Recorded Governance: Reconstructing Title to Real Property in 21<sup>st</sup> Century Zimbabwe' (2001) 30 *Common Law World Review* 36, 42.

<sup>75</sup> See also Dunia Zongwe, 'The contribution of *Campbell v Zimbabwe* to the foreign investment law on expropriations' 2 *Namibia Law Journal* 31, 34.

apartheid laws had authorised successive colonial administrations to confiscate land previously held by the native indigenous population without compensation.<sup>76</sup>

Those laws had also prohibited Africans from holding land in European Areas. The native blacks could purchase land in the designated Native Area, under certain conditions. The designated Native Areas became known as the Native Purchase Areas, a title not embodied in the Legislation until the 1950 amendment to the Land Apportionment Act.

The Land Apportionment Act (1930) had reserved thirty percent of all agricultural land for the 1.1 million Africans and fifty-one percent of all agricultural land for the 50,000 whites.<sup>77</sup> The Land Husbandry Act (1951) had enforced private ownership of land while the Land Tenure Act (1969) had reinforced land classification into African and European areas.<sup>78</sup>

By the application of these legislative acts, natives lost their lands, without compensation and were forced mostly into regions with the least agricultural potential and least favourable rainfall. Commentators<sup>79</sup> are united that expropriations are the severest form of interference with property. Nonetheless, the doctrine of State sovereignty guarantees States the right to expropriate under the principle of eminent domain.<sup>80</sup> The investor could always mitigate against the political, non commercial risk to their investment in the host State by taking insurance guarantees from either the national investment insurance agencies or from the World Bank's Multilateral Investment Guarantee Agency (MIGA).<sup>81</sup> Moreover, the right of States to expropriate is fettered by investment law's requirement that the expropriation must not be discriminatory. Rather it must serve an economic or public purpose and the

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<sup>76</sup> Tracing the evolution of these legal regimes and examining its impact on native and settler-white communities, see especially Ben Chigara, *Land Reform Policy: The Challenge of Human Rights Law* (Ashgate, Aldershot 2004)

<sup>77</sup> See Ben Chigara, above n.74.

<sup>78</sup> Ibid.

<sup>79</sup> See also See also Duni Zongwe, above, n.75, 35; M. Sornarajah, *The International Law on foreign investment*, (3<sup>rd</sup> edn. CUP 2010) 392-40; Andrew Newcombe and Lluís Paradell, above n.65, 40-1.

<sup>80</sup> Duni Zongwe, above n.75, 34.

<sup>81</sup> Ibid. p.35.

expropriating State must comply with its duty under international law to compensate victims of any such expropriation(s).<sup>82</sup> Zongwe writes that: “When compensation follows a taking by the State, expropriations or nationalisations [across-the-board takings by the State, targeted at scaling back or annihilating foreign investment in the economy] amount to forced sales. When, on the other hand, no compensation is paid for expropriations or nationalisations, the taking amounts to a confiscation...”<sup>83</sup> I submit that upon colonisation native black populations of the SADC had suffered confiscation of their lands without the benefit of the latter emergent investment laws or national or international insurance regimes.

The result was that by 1960 more than 25,000 black families were squatting in the Purchase Areas on a “communal basis”. The Advisory Committee of the Southern Rhodesia Government (1962) had reported that: “This set acute problems of satisfactory re-settlement of the squatters and the finding of sufficient suitable land for the more than 3,000 applicants...”<sup>84</sup>

By 1976, a total of four and a half million Africans had been left to crowd in the infertile, drought prone Tribal Trust Lands (TTLs).<sup>85</sup> These circumstances had persisted well into post-apartheid Zimbabwe. The same pattern of expropriation without compensation and the reduction of the indigenous populations into wage earners on European enterprises had been replicated also in South Africa and Namibia.<sup>86</sup> The achievements of this practice have remained largely unaltered to this day. These are the facts that have precipitated the land issues of the SADC.

At his inauguration as South Africa’s third President on 9 May 2009 Jacob Zuma declared that faster land reform would be one of his new administration’s top five

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<sup>82</sup> Ibid. See also Anglo-Iranian Oil Case, ICJ Reports 1952 p.93.

<sup>83</sup> Ibid. p.36.

<sup>84</sup> Ben Chigara, above n.74, 36.

<sup>85</sup> “The Zimbabwe Land Question in Perspective”, Zimbabwe High Commission, Summary of Commissioner’s discussion with Tim Sebastian of BBC News 24 April 2000, p.1.

<sup>86</sup> Ben Chigara Chigara, above, n.76, 16.

priorities.<sup>87</sup> This is because of the existence of an indisputable link between the constitutionalization of SADC land issues and the emergent BEE norm.

*(a) Reverse legislation:*

In 1992 the Mugabe regime began the long process of adopting BEE inspired counter-apartheid measures for the purpose of tackling inequality of opportunity along racial lines. The Land Acquisition Act (1992) was adopted for the purpose of facilitating the redistribution of under-utilised commercial farmland.

Sections 5 and 8 of the Act established the acquisition procedures. Under section 5 acquisitions would be initiated by the issuance of a preliminary notice by the Ministry of Lands and Agriculture against the targeted property. From that point onwards the proprietor would no longer be entitled to dispose of the land without the permission of the Acquiring Authority. The notices were initially intended to have a two-year life span unless otherwise withdrawn or otherwise the land was acquired under section 8 of the Act.

Section 8 of the Act, authorises the Acquiring Authority to issue an Acquisition of Land Order divesting the previous owner of all proprietary interest. However, Section 7 of the Act required such orders to be authorized by the Administrative Court. Applications for confirmation launched by the Acquiring Authority simply overwhelmed the Administrative Court and it became impossible to confirm all such cases. Therefore, the Act was amended in 2000 and the two year limit was rescinded. Notwithstanding, the Supreme Court of Zimbabwe had declared the 2000 amendment unconstitutional and imposed a one-year limit on the effectiveness of Section 5 notices. In 2001, a differently constituted Supreme Court had removed the one year limitation on the operation of section 5 notices.<sup>88</sup> Section 16 of the 2000 Act requires the Acquiring Authority to pay “fair compensation” to the “owner of any agricultural land required

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<sup>87</sup> See Government of South Africa website:  
<http://www.info.gov.za/events/2009/inauguration.htm>

<sup>88</sup> ICSID Case No. ARB/05/6 (22 April 2009) pra.21.



for resettlement purposes and to any other person whose right or interest in land has been acquired in terms of this Act.”<sup>89</sup>

The Zimbabwe government’s land acquisition legislative process had culminated in the adoption of the Constitution of Zimbabwe Amendment (No.17) Act, 2005 that empowers the government to acquire commercial farms without compensation. Moreover, the government had proposed a new Constitution that *inter alia* mandated acquisition of land without compensation. That attempt had been defeated at a referendum in 2000. It is not clear whether it was the land or other issues in that proposal; or poor campaign strategies or timing or other matters that caused its rejection at the referendum. Nonetheless, the constitutionality of this Act was challenged before the Supreme Court and was upheld, but before the SADC Tribunal it was found to be inconsistent with fundamental provisions of the SADC Treaty on non-discrimination.

Both the apartheid-rule land expropriation laws and the Mugabe post apartheid-rule land acquisition laws regard land ownership and use as a constitutional matter. The Zimbabwe government has always contended that the measures it had taken to deprive *Bernardus Henricus Funnekotter and Others*<sup>90</sup> of their properties had been taken in conformity with the Laws and the Constitution of the Republic of Zimbabwe.<sup>91</sup>

Moreover, government had also adopted in June 2001 the Rural Law Occupiers (Protection from Eviction) Act which entitles people squatting on commercial farmland from eviction.<sup>92</sup> If previous land reform legislation had left anyone in any doubt about the trumping of previous land titles, this legislation effectively served to nullify prior land rights and instituted a new land use regime based upon the historical constitutional nature of land allocation and use in Zimbabwe.

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<sup>89</sup> Consolidated Land Acquisition Act (No 16) 2002, CAP 20:10

<sup>90</sup> ICSID Case No. ARB/05/6 judgment of 22 April 2009.

<sup>91</sup> ICSID Case No. ARB/05/6 (22 April 2009) para. 61.

<sup>92</sup> Ibid. para. 32.

Mugabe has persistently argued that: “The resettlement programme, as planned, must never be allowed to fail nor must it be hampered by any extraneous factors or considerations. The communal people, who are far too land-hungry to remain in their present state, should never be denied the land they stand in need of by the antics of a group of selfish settlers. The land is the people’s heritage.”<sup>93</sup> In his address to his ZANU (PF) party, he put it beyond doubt that land reform had become the ultimate test of genuine majority-rule governance in the post-apartheid SADC.

What is clear from the foregoing discussion is that both the post-apartheid majority-rule government and the preceding minority-rule apartheid administrations share the view that Southern Rhodesia/Rhodesia/Zimbabwe’s land issues are a constitutional matter to be regulated and determined only by constitutional imperatives that defer to no other value than sovereign authority. Mugabe has strenuously argued that he has always been motivated by values of fairness and justice. For this reason he has invoked the constitutional law of the land to help undo previous unfairness and injustices with the same brute force that had helped create them, namely laws that recognise and defer to no other interest, i.e. constitutional laws.

Therefore BIT agreements that seek to insulate investments of foreign nationals from BEE practice in the SADC risk portraying themselves as unrepentant imperialists particularly in the perception of SADC States. The petroleum industry has embraced BEE in their dealings with South Africa by adopting a Black Economic Empowerment Charter.<sup>94</sup> The Charter which recites provisions on equality from the Constitution of South Africa and the South African Bill of Rights provides a framework for the industry to “progress the empowerment of historically disadvantaged South Africans in the liquid fuels industry”.<sup>95</sup> Consequently, Shell now

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<sup>93</sup> See President Robert Mugabe's address to the ZANU (PF) Central Committee meeting held Friday September 17, 1993

<http://www.scholars.nus.edu.sg/landow/post/zimbabwe/politics/mugabe.html>

<sup>94</sup> See Shell website,

[http://www.shell.com/home/content/zaf/aboutshell/who\\_we\\_are/our\\_values\\_and\\_principles/bee/](http://www.shell.com/home/content/zaf/aboutshell/who_we_are/our_values_and_principles/bee/) (last visited 8 June 2010).

<sup>95</sup> Ibid.

describes itself on its website as: “A Fully Qualified Black Economic Empowerment Company”.<sup>96</sup>

However, BITs for the promotion and protection of foreign investments generally regard resort to the dispute settlement process in international tribunals as the only way of addressing non-commercial risks that foreign nationals may encounter as a consequence of BEE policy in the SADC. Thus, some have invoked against President Mugabe’s BEE inspired land acquisition programme, litigation that prays both regional and international tribunals for declarations of unjust and illegal appropriation of property; and discrimination on account of their race.

The adoption of the UDHR is commonly described as mankind’s finest moment.<sup>97</sup> But it would be wrong to assume that such a moment had extinguished all of the legacies of mankind’s previous worst experiences, including slavery, apartheid, wars of aggression and genocidal acts. The fact is that it did not. If anything, it merely pointed to the futility of such vices in social ordering processes and sought to point mankind in the direction of a much higher and nobler morality, premised on the recognition, promotion and protection of the inherent dignity of all people all the time.

They differ only in that land acquisition laws of the Mugabe regime regard titles created under apartheid as fruits of apartheid that must be buried just like the system of apartheid that had created them. In fact they regard them as evidence that apartheid still survives in their midst, while the litigants wonder whether the Mugabe regime is aware at all that it is bound by twenty-first century values and not the nineteenth century values that created the land issue.

*b) Apartheid Legislation v the emergent post-apartheid reverse Land Acquisition Legislation: A complex or simple justiciable matter?*

The foregoing discussion shows that the SADC land issues have resulted from application of opposing constitutional laws - one set developed during minority

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<sup>96</sup> Ibid.

<sup>97</sup> See especially Stephen Legomsky, ‘The UN and the Protection of Human Rights’ (2001) 5 Washington University Journal of Law and Policy, 7-15.

apartheid-rule government and another that is developing in the post-apartheid majority-rule era. The purpose of the latter is to correct the foremost injustice of apartheid-rule in SADC States, namely, inequitable land distribution.

Constitutional laws are the basic laws from which all other laws, conventions, procedures and practices of legal systems derive their validity. Resort to use of constitutional laws to transform (during apartheid-rule) and re-transform (in the post-apartheid-era), the demographic distribution of land allocation in the SADC suggests both a recognition and an admission that ultimately it is the law that should order behaviour through a system of rules.

Nonetheless, concerns to invoke the law absent justice appears in both cases to have engineered the land issues. It is difficult to free the concept of law from the idea of justice. This is partly because:

... both are constantly confused in non-scientific political thought as well as in general speech, and because this confusion corresponds to the ideological tendency to make positive law appear as just. If law and justice are identified, if only a just order is called law, a social order which is presented as law is – at the same time – presented as just; and that means it is morally justified. The tendency to identify law and justice is the tendency to justify a given social order.<sup>98</sup>

Invocation of the rule of law by foreign nationals of sending European States that results in constraining BEE policy and practice appears to be premised on what Kelsen<sup>99</sup> has described as the non-scientific tendency to equate law with justice because of the natural assumption that positive laws should be just.

But while a pure theory of law should not oppose the requirement of just law, it is not its function to state what the essential element of justice consists in. Consequently, it is itself incompetent to determine whether a law is just or unjust. Kelsen writes that:

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<sup>98</sup> Hans Kelsen, *General Theory of Law and State*, (Russel and Russel, New York 1945) 5.

<sup>99</sup> Ibid.

“A pure theory of law – a science – cannot answer this question because this question cannot be answered scientifically at all.”<sup>100</sup>

Consequently, by focusing on the law, both apartheid and post-apartheid legislators of the SADC appear to have fooled themselves into a conundrum. By both sets of land laws, they have penalized themselves into an argument that now requires their focus to be shifted from the law to the question of justice. Or perhaps what they have both achieved through their non-scientific tendencies to equate law with justice is to promote what are essentially unsustainable plans. Their non-scientific tendency is facilitated perhaps by the illusion that the courts of justice are the law courts. It is the law that has been assigned with the task of upholding justice. Lucas writes that:

It is a very serious criticism indeed of a legal official that he has acted unjustly, or of a law or legal system that it is unjust. ... Often we draw a contrast between the positive law, which can indeed be unjust while still remaining valid, and the law of nature which perfectly exemplifies our ideal of justice. .... Justice cannot be defined as what the law lays down: there are many uses of the word ‘just’ which cannot be explicated in terms of law – an examiner’s mark, for example – and the fact that laws often are said to be unjust is further evidence against the adequacy of any such definition.<sup>101</sup>

If this appraisal of the circumstances regarding land acquisition legislation in both the apartheid-rule and the post apartheid-rule eras in SADC States is correct, then there is a case for saying that particularly in the apartheid-rule era, the positive constitutional laws enacted to order land allocation were unjust because they undermined social happiness.<sup>102</sup> The effect of those laws is credited with manifesting the inhumanity of apartheid-rule and inspiring black nationalists to wage armed liberation struggles against their oppressors in South Africa, Namibia, Zimbabwe, Angola and Mozambique.<sup>103</sup>

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<sup>100</sup> Ibid. p.6.

<sup>101</sup> John Randolph Lucas, *On justice*, (Clarendon Press, Oxford 1980) 99.

<sup>102</sup> Discussing justice as social happiness in the collective sense, that is, the satisfaction of certain needs, recognized by the competent social authority as needs worthy of being satisfied, see also Hans Kelsen, above, n.98 6-8; Hans Kelsen, *What is justice?* (University of California Press, London 1971) 1-24.

<sup>103</sup> See also David Martin and Phyllis Johnson, *The Struggle for Zimbabwe* (Zimbabwe Publishing House, Harare 1981).

According to Lucas, justice is concerned with not doing people down and “... a person is being done down if his interests are being damaged. ... [I]njustice is done as much if a man’s rights are overridden as if his interests are damaged”.<sup>104</sup>

Apartheid-rule policies had expropriated native indigenous populations of their lands without compensation, and forced them to become wage earners for settler white commercial enterprises, trumping native Africans’ interest in land – doing them down.<sup>105</sup> The same could be said of the Mugabe regime’s Land Acquisition Legislation which regards the property rights of commercial farmers as at an end.

The foregoing discussion makes it clear that the SADC land issues are constitutional matters. They are a result of colonial conquest, confiscation of native lands for almost a century, and attempts by black majority-rule governments to correct colonial injustices. Any attempt to invoke rule of law arguments to insist on the retention of the economic and social structures established under apartheid-rule appear misplaced. Apartheid-rule has been proscribed by the UN in the strongest terms possible, namely though a norm of *jus cogens*.<sup>106</sup> It would also undermine the human sacrifices made to liberate these SADC States from apartheid-rule and serve to emasculate hard won political independence.

The question that remains is whether the new strategy of invoking international tribunals such as the Washington D.C. based ICSID<sup>107</sup> and the Windhoek based SADC Tribunal<sup>108</sup> to settle disputed land rights is sustainable.

### III

#### ICSID Arbitration of the SADC land issue

Franck<sup>109</sup> writes that investment treaty arbitration has a dirty little secret that is daily becoming less, and less secret - namely, that different tribunals reach different

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<sup>104</sup> John Randolph Lucas, above, n.101, 20.

<sup>105</sup> See also Daniel Roger Maul, ‘The ILO and the struggle against forced labour from 1919 to the present’ (2007) 48 Labor History 481.

<sup>106</sup> Supra. n.31.

<sup>107</sup> See also *Bernardus Henricus Funnekotter and Others (Claimants) v. Republic of Zimbabwe (Respondent)* ICSID Case No. ARB/05/6 judgment of 22 April 2009

<sup>108</sup> See also *Mike Campbell (Pvt) Ltd and Others v. Republic of Zimbabwe*, 48 ILM 534 (2009).

outcomes under similar treaty provisions and similar factual circumstances. This raises the question of why sovereign nations demonstrably continue to prefer such an inconsistent, unpredictable, incoherent dispute settlement procedure which costs billions in investor claims each year. It becomes even more curious when one considers three factors.

Firstly, in what has been described as a dramatic change in so short a period of time, the shift from using CIL standards on the regulation of foreign investments to the BIT framework for the promotion and protection of foreign investments represents a substantial feat of international law-making.<sup>110</sup> The first BIT had been signed between the Federal Republic of Germany and Pakistan on 25 November, 1959. The first BIT to be ratified had been signed by the Dominican Republic and the Federal Republic of Germany.<sup>111</sup> Switzerland had also been very quick to embrace the BIT practice. By the late 1960s European nations had generally fully embraced the practice. By 1977 there were approximately 130 BITs between European countries and developing countries.<sup>112</sup>

The US BIT programme had been launched in 1981 and has since concluded over 50 such agreements with developing countries and one other with Canada. The Canada US BIT resulted in the creation of NAFTA when the agreement was extended to cover Mexico.<sup>113</sup>

Japan has concluded at least a dozen BITs with developing countries. The result is that the international legal framework regulating foreign investment comprises a dense network of international investment agreements that are supplemented by general

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<sup>109</sup> Susan Franck, above, n.65, 55-6.

<sup>110</sup> Jeswald Salacuse and Nicholas Sullivan, 'Do bits really work?: An Evaluation of Bilateral Investment Treaties and their grand bargain', (2005) 46 *Harvard International Law Journal* 67, 75. See also Carrie Anderer, 'Bilateral investment treaties and the EU legal order: Implications of the Lisbon Treaty' (2010) 35 *Brooklyn Journal of International Law* 851-82; Jeswald Salacuse, 'The treatification of International Investment Law' (2007) 13 *Law and Business Review of the Americas* 155-66.

<sup>111</sup> See Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, The Hague 1995) 267.

<sup>112</sup> See also Salacuse, J.W. and Sullivan, N.P. (2005) "Do bits really work?: An Evaluation of Bilateral Investment Treaties and their grand bargain", *Harvard International Law Journal* vol. 46 p.67:73.

<sup>113</sup> 32 *ILM* 289.

rules of international law. Newcombe and Paradell write that international investment agreements are now “the primary public international law instruments governing the promotion and protection of foreign investment”.<sup>114</sup>

The popularity of BITs among developing countries is most remarkable, particularly when one considers that the BIT framework imposes obligations that exceed those of the Hull rule that required “prompt, adequate and effective compensation” in the event of nationalization or appropriation of foreign investments – non-commercial risks to foreign investments. For instance, Article 6(c) of the Agreement on Encouragement and Reciprocal Protection of Investments concluded on 11 December 1996 between the Republic of Zimbabwe and the Kingdom of the Netherlands requires ‘just compensation’ which means ‘the genuine value of the investments affected,’ to be provided to the investors ‘without delay, to the country designated by the claimants concerned and in the currency of which the claimants are nationals’. Genuine value may be taken to mean ‘the net asset value thereof as certified by an independent firm of auditors’.

Even if the view were taken that its predecessor, the Hull Rule had been doomed to fail anyway because of its inefficiency, the BIT framework is amazingly efficient especially at ensuring full protection of investor interests, even to the extent of challenging the sovereignty of host States. The Hull rule was infused with counter-business uncertainties. For instance, it failed to specify procedural guidelines on such crucial issues as how to determine the level of compensation, and how any such compensation could be enforced, and by what laws.

The emergent BIT framework provides for no such uncertainties, pointing to applicable laws, forum of dispute settlement and enforcement mechanisms to ensure compliance with arbitral awards in the event of a dispute between the Parties. Franck writes that BITs entitle investors to choose where they will bring their claims.

In what amounts to a sophisticated forum of choice clause, some treaties require investors to choose between litigating their treaty claims in national courts and arbitrating their investment

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<sup>114</sup> Andrew Newcombe and Lluís Paradell, above, n.65, 1.



claims before an arbitral panel in a neutral forum, such as the ICSID, the International Chamber of Commerce (ICC) or an *ad hoc* tribunal organized under the UNCITRAL rules. Other treaties require investors to arbitrate their claims, but let the investors choose the arboreal body that will administer the dispute.<sup>115</sup>

In *Bernardus Henricus Funnekotter and Others*,<sup>116</sup> applicable Zimbabwe law had allowed only for compensation for the fixed improvements on or to the land expropriated.<sup>117</sup> The claimants insisted on the ‘full compensation’ standard referred to in Article 9(1) of the BIT Agreement of 11 December 1996 between Zimbabwe and the Netherlands as the minimum standard of treatment.

The tribunal held that: “In any event, it is on the basis of the applicable rules of International Law that in conformity with Article 9(3) of the BIT, the tribunal must decide ..... In other words, ultimately international law, not the domestic law of Zimbabwe, must determine ...”<sup>118</sup>

According to the Tribunal, where BITs are at issue general international law is invoked when it conforms to the applicable standard contained in the BIT. Therefore, it could be said that the emergent BIT framework is superior to general international law, and is capable through the emergent general state practice, to revise or transform existing rules of customary international law<sup>119</sup> and in some cases to displace relevant national law as in the *Bernardus Henricus Funnekotter and Others case*.<sup>120</sup>

Newcombe and Paradell have found that while actual texts of BITs concluded between different States may differ in some important aspects, they are remarkably similar in their structures and content. Most of them “combine similar (sometimes

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<sup>115</sup> Susan Franck, above, n.65, 54. See also Jason Webb Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2011) 51 Virginia Journal of International Law 397-442; Deborah Swenson, ‘Why do developing countries sign BITs?’ (2006) 12 University of California Davis Journal of International Law and Policy 131-155.

<sup>116</sup> ICSID Case No. ARB/05/6 judgment of 22 April 2009

<sup>117</sup> Judgement of 22 April 2009 para. 100.

<sup>118</sup> Ibid. para103.

<sup>119</sup> On customary international law formation see especially Christine Ochoa, ‘The Individual and Customary International Law Formation’ (2007) 48 Virginia Journal of International Law 119-86; Ben Chigara, above, n.18, 17-48; Bernard Kishoiyan, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ (1993-94) 14 Northwestern Journal of International Law and Business 327-75.

<sup>120</sup> ICSID Case No. ARB/05/6 judgment of 22 April 2009.

identical) treaty-based standards of promotion and protection for foreign investment with an investor-state arbitration mechanism that allows foreign investors to enforce these standards against host States”.<sup>121</sup>

Moreover, investment law empowers individuals/investors to sue their host nation under a treaty concluded between with their home State, a position that substantially alters the Public International Law doctrine of State immunity<sup>122</sup> because an injury to a foreign national is then equated to an injury to his/her State, and the individual/investor is authorised to claim reparation from the host State. Delaume writes that the overwhelming weight of jurisprudence of arbitral tribunals, treaty and provisions of the European Immunity Convention (1972), and Statutory enactments such as the Foreign Sovereign Immunities Act (1976) and the State Immunity Act (1978), as well as the pronouncements of domestic Courts “... all concur that a State party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement”.<sup>123</sup> Moreover, international law is unequivocal that arbitration proceedings against the host State can proceed unilaterally if a State that has assented to submission to arbitration (as dispute settlement mechanisms of BIT agreements for the promotion and protection of investment agreements between SADC States and European agreements require) then refuses to participate in the proceedings.<sup>124</sup>

In *Bernardus Henricus Funnekotter and Others*<sup>125</sup> the Claimants, were Dutch nationals that had direct or indirect investments in large commercial farms in Zimbabwe. They claimed that implementation of the BEE inspired Zimbabwe land acquisition programme had deprived them of their investments in violation of the standards set forth in Article 6 of the BIT for the promotion and protection of foreign investments concluded between the Republic of Zimbabwe and the Kingdom of Netherlands on 11 December 1996.

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<sup>121</sup> Andrew Newcombe and Lluís Paradell, above, n.65, 1.

<sup>122</sup> Discussing the case law on this principle, see also David Harris, *Cases and Materials on International Law* (7<sup>th</sup> edn. Sweet and Maxwell, London 2010) 258-92.

<sup>123</sup> Georges Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 *American Journal of International Law* 784, 787.

<sup>124</sup> *Ibid.* p.788.

<sup>125</sup> ICSID Case No. ARB/05/6 judgment of 22 April 2009

The Zimbabwe government had argued *inter alia* that the Claimants had still not been compensated for the appropriations against their properties because they had failed to engage valuation and certification procedures required under the relevant Zimbabwe procedures for processing compensation claims.<sup>126</sup> The Tribunal held that there was no obligation on the Dutch claimants to exhaust local remedies before going to arbitration.<sup>127</sup> The responsibilities attaching to the parties were therefore beyond the dictates of Zimbabwe's laws and were to be found in the BIT agreement itself and general international law that conformed to the BIT requirements.

Consequently, BIT law could be said to be neither host, nor sending State national law because it is neither generally applicable nor does it depend on State institutions for its application. It is a species of law that regulates conduct of particular individuals and legal entities and their host States regardless of the requirements of the host State's own laws. When disputes arise, they are settled by an independent tribunal usually sitting in a neutral territory and comprised of foreign experts. In some cases arbitration panels may invoke municipal law of the seat of arbitration – *lex loci arbitri*, to govern procedural matters in order to facilitate the enforcement of the award. The arbitration panel in *BP Exploration Co (Libya) Ltd. V Libyan Arab Republic*<sup>128</sup> stated that by providing for arbitration as an *exclusive* mechanism for resolving contractual disputes the parties must be presumed to have intended to create an effective remedy. Even if one of them is a State, “The effectiveness of an arbitral award that lacks nationality – which it may if the law of the arbitrator is international law – generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality.”<sup>129</sup>

This dynamic of dispute settlement that is common to SADC/European BITs for the promotion and protection of foreign investments has the effect of elevating individuals/investors to a status where they can exercise against their host State

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<sup>126</sup> Judgment of 22 April 2009 para.100.

<sup>127</sup> Ibid.

<sup>128</sup> 53 ILR 297 (1979)

<sup>129</sup> Ibid. p.309.

functions previously reserved only for States. Investors may initiate on neutral territory, proceedings against their host State. In this sense, and in some cases the BIT framework for the promotion and protection of foreign investments invests in the investors, new competencies that they probably lack at home, i.e., to sue his own State in a neutral country without the requirement of prior exhaustion of local remedies.<sup>130</sup> This is because BIT agreements for the promotion and protection of foreign investments habitually preclude application of host States' own national laws and their own Courts. This begs the question of why developing States that fought so hard to get rid of the Hull rule only managed to replace it with a framework that appears to weaken them against foreign investors by ascribing to them legal capacities equal to themselves as States. This may be taken to reflect a lack of due-diligence on the part of developing States.

Further, the BIT framework for the promotion and protection of foreign investments appears to disassemble the collective advantage that developing States had under the Hull rule regarding the trading of their resources with the developed world by pitting them in competition one against the other for Western FDI. Guzman writes that, "relative to other potential hosts, developing countries as a group are likely to benefit from forcing investors to enter contracts with host countries that cannot be enforced in an international forum, thereby giving the host a much greater ability to extract value from the investment".<sup>131</sup>

Thirdly, when disputes arise regarding BITs for the promotion and protection of foreign investments concluded between developed and developing States, it is investors from developed nations that are likely to be the applicants, and developing States the respondents. The sum effect of these factors is likely to be that the overall welfare of developing States is diminished and not enhanced. This begs the question

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<sup>130</sup> See also International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, UN Doc A/56/10 Article 44(b).

<sup>131</sup> Andrew Guzman, 'Why LCDs sign Treaties that hurt them: Explaining the popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 638, 639. See also Ben Chigara, 'Trade Liberalization: Saviour or Scourge of SADC Economies?' (2002) 10 *University of Miami International and Comparative Law Review* 7 - 21.

why developing States and SADC States in particular appear to be so keen about the BIT framework for the regulation of foreign investments.

Writers observe that BITs for the promotion and protection of foreign investments habitually serve like economic bills of rights that grant foreign investors substantive protections and procedural rights for the sake of facilitating the inflow of much needed investment. It is widely believed that FDIs enhance the development of infrastructure, and delivery of services and jobs, and facilities such as roads, railway and airports of the host State.<sup>132</sup> Writers<sup>133</sup> note also that investment treaty dispute resolution is still in its infancy and that it will determine the future of BIT agreements for the promotion and protection of foreign investments one way or the other. That may well depend largely on the perceived balance in the allocation of benefits and detriments in the bargain.

A curious question is why SADC States have demonstrated such enthusiasm for the BIT framework for the regulation of foreign investments<sup>134</sup> when it appears that the dispute settlement mechanisms that they promote would insulate foreign investments from all probable risk of non-commercial risks such as those necessitated by BEE policy imperatives, while compelling the host nation to liberalize its economy for the optimum exploitation of investment opportunities.<sup>135</sup> To borrow from Salacuse and Sullivan who have thoroughly studied the rapid expansion of BITs,

The impetus behind the rapid expansion of BITs rests in the desire of companies of industrialized States to invest safely and securely in developing countries, as well as the consequent need to create a stable international legal framework to facilitate and protect those

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<sup>132</sup> See Susan Franck, above, n.65, 48.

<sup>133</sup> Exploring the cost benefit theory and analyses, see also Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A critique', (1980-81) 33 Stanford Law Review 387-445; Charles Brower and Lee Steven, 'Who the should judge?: Developing the International Rule of Law under NAFTA Chapter 11' (2001) 2 Chicago Journal of International Law 193-202; Kenneth Vandeveld, 'Investment Liberalization and Economic development: The role of bilateral investment treaties' (1998) 36 Columbia Journal of Transnational Law 501-27.

<sup>134</sup> Zimbabwe has BITs with Mauritius, a member of the SADC, and also with Indonesia. See UNCTAD, Bilateral Investment Treaties website: <http://www.unctadxi.org/templates/DocSearch.aspx?id=779> South Africa has BITs with the USA (1999); European Community and its Member States (1999); and Canada (1998). See also <http://www.unctadxi.org/templates/DocSearch.aspx?id=780>

<sup>135</sup> "Bits impose obligations that are similar – and, indeed, that exceed – the obligations imposed by the hull rule [even though developing States have always advocated for fewer such legal requirements." Andrew Guzman, 'Why LCDs sign Treaties that hurt them: Explaining the popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 638, 639.

investments. Without a BIT, international investors are forced to rely on host country law alone for protection, which entails a variety of risks to their investments. Host governments can easily change their own domestic law after a foreign investment is made, and host country officials may not always act fairly or impartially toward foreign investors and their enterprises. Investor recourse to local courts for protection may prove to be of little value in the face of prejudice against foreigners or governmental interference in the judicial process.<sup>136</sup>

So why have SADC States been so keen on BITs for the promotion and protection of foreign investments? By accepting the illusory promises of increased capital and technology flow necessary to expedite economic development on their territories - what Salacuse and Sullivan have described as the 'grand bargain,' SADC States that are presently focused on implementing BEE policy imperatives may have misjudged the inconsistency between their foremost concern (BEE policy) on the one hand, and the requirements of BIT dispute settlement mechanisms on the other.

#### IV Observations

The Tribunal award against the Republic of Zimbabwe in *Bernardus Henricus Funnekotter et al.*<sup>137</sup> following expropriation of investments belonging to Dutch nationals for the purpose of progressing BEE inspired land reform policy that targets the undoing of apartheid Rhodesia's foremost legacy shows that it may still be premature for SADC States to commit themselves to the BIT framework of regulating international investments particularly because of their standard requirement to refer the matter for arbitration with an extra-territorial tribunal such as the ICSID. This is largely because the end of apartheid in SADC States did not result in the sudden demise of the legal, economic and social structures that had helped create the bitter fruits of apartheid-rule. It would be more than ambitious to expect that all had suddenly converted to the more liberal universal human rights norm. Indeed many still adhere to the tenets of apartheid-rule and invoke whatever means they can to oppose its characterisation as an abomination.

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<sup>136</sup> Jeswald Salacuse, and Nicholas Sullivan, above, n.110, 75

<sup>137</sup> ICSID Case No. ARB/05/6 (22 April 2009)

In the cases of South Africa, Zimbabwe, Namibia and Mozambique apartheid rule only ended recently. In Zimbabwe's case that was after almost a century of apartheid governance, – tens of decades in which apartheid rule sowed and nurtured its seeds, resulting in an unprecedented undermining of the inherent dignity of indigenous populations. Therefore, until a sufficient reversal of the economic and social legacy of apartheid rule has occurred that results in the rejection, abandonment and replacement of economic, social and legal fruits of apartheid, SADC participation in BITs for the promotion and protection of foreign investments will remain premature because BIT dispute settlement mechanisms care nothing at all for imperatives of BEE policy to undo the worst effects of the legacy of apartheid-rule in the sub-region.

The consequent conflict between the BIT dispute settlement mechanisms on the one hand, and SADC governments' prerogative and popular mandate to undo the worst effects of the economic and social legacies of apartheid-rule on their territories on the other is exemplified in that BITs themselves espouse a requirement of the rule of law that inadvertently insists on the recognition and protection of apartheid-rule engineered social and economic rights that are tainted with the sceptre of unjust enrichment.

For instance Article 6(a) of the BIT for the promotion and protection of foreign investments concluded between the Republic of Zimbabwe and the Kingdom of the Netherlands states that neither Contracting Party shall subject nationals of the other Contracting Party to any measures depriving them, directly or indirectly, of their investments unless the measures are taken in the public interest *and under due process of law*. Moreover, by rule of law is meant that Zimbabwe laws do not apply to any dispute that may arise. The only applicable laws being the specific BIT standards and general international law that is consistent with the BIT instrument itself. This suggests a neutering also of the host State's sovereignty as it cannot refer disputes occurring on its own territory to its own national laws.

A further paradox is that BITs for the promotion and protection of foreign investments also habitually espouse requirements of non-discrimination and require the host State

to ensure to foreign investments treatment no less favourable than that accorded to its own nationals even though nationals of host States have no BIT arbitration procedures to resort to.

Article 6(b) of the BIT between the Republic of Zimbabwe and the Kingdom of the Netherlands states that neither Contracting Party shall subject nationals of the other Contracting Party to any measures that are discriminatory or contrary to any undertaking that the former Contracting Party may have given. BITs for the promotion and protection of foreign investments habitually invoke the non-discrimination standard to perpetuate antiquated exclusions of indigenous populations from participating in the exploitation of their own natural resources.<sup>138</sup> This can perpetuate the marginalisation of host States' indigenous populations' involvement in their own economies, resulting in tensions with enormous potential to create emergencies. The Zimbabwe land tensions are a case in point.

Yet another paradox refers to the much talked about bargain element in BITs for the promotion and protection of foreign investments. It is commonly stated that developing States conclude BITs with capital exporting countries in order to promote foreign investment.<sup>139</sup> BIT dispute settlement mechanisms facilitate the creation of procedural rights that allow investors to enforce substantive rights contained in the particular BIT agreement for the promotion and protection of foreign investments. But as happened in the case of *Bernardus Henricus Funnekotter et al.*, when the interests of foreign investors conflict with BEE inspired constitutional changes, BITs tend to provide investors the opportunity to invoke substantive rights through the procedural rights guaranteed in the dispute settlement mechanism. This process is blind to the contextual realities of the host State and in Shylock manner<sup>140</sup> enables the investor to insist upon his/her pound of flesh, even if the State only has grams of flesh left on the emaciated skeleton of its crumbling economy instead.

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<sup>138</sup> See also Jeswald Salacuse, and Nicholas Sullivan, above, n.110, 90; Kenneth Vandeveld, above, n.133 504.

<sup>139</sup> Jeswald Salacuse, and Nicholas Sullivan, above, n. 110, 77; Susan Franck, above, n.65, 47-99; and Andrew Newcombe and Lluís Paradell, above, n.65, 41.

<sup>140</sup> Shakespeare, *W. Merchant of Venice*.



## Conclusions

This article examined the sustainability of two concurrent practices in the SADC. One is the emergent BEE norm of CIL that is now the focus of new governmental departments with advisory councils that monitor, evaluate and influence its progress. Its purpose is to substitute equality that facilitates broad based black participation in the economy of the SADC, for inequality that had been orchestrated by the practice of apartheid-rule for almost a century in the sub-region.

The other is the potential impact of the emergent jurisprudence on the regulation of SADC/European BITs for the promotion and protection of foreign investments to disrupt BEE policies of SADC governments that are seeking to counter the worst effects of apartheid-rule on their territories. The article has shown that the dispute settlement mechanisms common to SADC/European BITs for the promotion and protection of foreign investments places European foreign nationals/investors in a much stronger position against SADC States than was the case under the former CIL framework espoused by the Hull Rule.<sup>141</sup> Emergent jurisprudence shows that foreign investors to the sub-region are ruthlessly resorting to arbitrating against BEE policies that they regard as a non-commercial nuisance to their investments. This is all happening at a time when SADC States could do without and distractions from the task of dismantling the economic and social effects of apartheid-rule on their territories for more than half a century.

The article has shown that the mutually antithetical dispute settlement mechanisms contained in SADC/European agreements for the promotion and protection of foreign investments on the one hand; and drive to accomplish BEE on the other, makes it premature for SADC States to participate in this type of BIT framework for the regulation of foreign investments because of its opposition to their own basic norm on social reconstruction. Their participation in this type of framework risks compromising their popular mandate to manage and correct the social and economic

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<sup>141</sup> On developing States effort to supplant the Hull rule whose dispute settlement procedures appear less stringent against them in comparison to the dispute settlement provisions common to BITs, see in particular Andrew Guzman, above, n.131, 643; Ben Chigara above, n.131, 7 - 21.

legacies of apartheid-rule that are still very prominent in their societies. Because the procedures common to the dispute settlement mechanisms of SADC/European BITs habitually elevate the competencies of foreign nationals to a level equal to that of States under international law, they serve also to cap the sovereign competencies of the host SADC States.

To stand a chance of benefiting anything at all from the emergent BIT framework of regulating foreign investments, SADC States could exclude all investments that are still hinged to as yet unresolved legacies of apartheid-rule on their territories. Otherwise, their whole campaign against apartheid-rule will have been in vain. One way of ensuring this is to limit the areas of investment to be opened to foreign investors under any BIT agreement for the promotion and protection of foreign investments to only those areas that do not require BEE inspired intervention in order to offset the manifest effects of the economic and social legacies of apartheid.

In particular, foreign investments that are linked to commercial farm holdings appear to be a premature activity for post-apartheid SADC States, especially South Africa, Namibia and Zimbabwe in light of their BEE policies for countering the economic and social legacy of apartheid-rule on their territories for over half a century. Perhaps only after a successful completion of their BEE campaigns to diminish or undo apartheid-rule's legacy in land allocation in these States could certain sectors of their economies become suitable for standard BIT regulated foreign investments. The decision in *Bernardus Henricus Funnekotter et al.*<sup>142</sup> shows that these States would be committing social, developmental and financial suicide if they proceeded otherwise. European interests will be best secured in the SADC by approaches that support and not appear to oppose BEE policies.

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ICSID Case No. ARB/05/6 judgment of 22 April 2009