



**UNIVERSITY OF CAPE TOWN**  
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**THE THREAT OF EXPROPRIATION IN COMMERCIAL CONTRACTS  
ENTERED INTO WITH STATES: LESSONS FROM THE CASE OF LAP  
GREEN NETWORKS OF LIBYA AND THE ZAMBIAN GOVERNMENT**

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A research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws (in Commercial Law) in approved courses, and a minor dissertation at the University of Cape Town. The other part of the requirement for this qualification was the completion of the programme of courses.

I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertation papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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NSWANA FAITH MATAMBO

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DATE

FEBRUARY 2014

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*The views expressed herein are those of the author only and do not reflect the opinion of neither the Faculty of Law of the University of Cape Town, nor those of the supervisor of the paper, Karin Lehmann.*

## ABBREVIATIONS

- BIT** - Bilateral Investment Treaty
- FDI** - Foreign Direct Investment
- ICSID** - International Centre for the Resolution of Investment Disputes
- IIA** - International Investment Agreements
- LAA** -Lands Acquisition Act
- LAP** - LAP Green Networks Limited
- MIT** -Multilateral Investment Treaty
- SADC** -Southern African Development Community
- UN** -United Nations
- ZDA** - Zambia Development Agency
- ZPA** -Zambia Privatisation Agency
- ZPPA** -Zambia Public Procurement Authority

## ABSTRACT

Foreign direct investment (FDI) continues to be made into Africa, as an important means of strengthening the national economies of the various countries in which it is undertaken. However, while FDI inflows continue into these economies, there has been a relative decline in FDI attractiveness into Africa as shown by Africa's share of global FDI inflows which stood at only 4.4 per cent in 2010.<sup>1</sup> One of the factors that deter FDI is political instability caused by government actions. It is noted<sup>2</sup> that in some instances following a regime change, there is a repudiation of former contracts with foreign firms, increasing the risk of expropriation and thereby reducing the volume of FDI<sup>3</sup>.

An example of a regime change that resulted in the cancellation of contracts with foreign firms and the expropriation of property rights that had been acquired as a result of those contracts, is that which occurred in Zambia in 2012 with the [repossession] by the government of Zamtel Limited, a telecommunications company, and the termination of a concession agreement entered into by the government with Zambia Railways Limited. While the right to expropriate property of citizens is the sovereign preserve of every state (provided that such expropriation is in the public interest and is accompanied by adequate compensation for the person from whom the property is expropriated) there remain instances where states abuse this sovereign right and carry out unlawful expropriations.

Although most states have legislation which regulates expropriations, there remain some gaps in domestic legislation that do not adequately safeguard the rights of persons whose property is expropriated. Unlawful and arbitrary

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<sup>1</sup> A Mijiyawa 'What Drives Investments in Africa? An Empirical Investigation with Panel Data' p 2, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/What%20Drives%20Foreign%20Direct%20Investments%20in%20Africa%20An%20Empirical%20Investigation%20with%20Panel%20Data.pdf>, accessed on 14 July, 2013.

<sup>2</sup> Ibid p 12.

<sup>3</sup> Ibid.

expropriations carried out by states without impunity, are a major deterrent to FDI.

It is therefore necessary to consider whether the current international law framework relating to expropriations, provides an effective means for safeguarding the interests of property owners whose property is expropriated, where domestic legislation falls short of the required standard. These considerations will in this paper be examined in the context of international commercial contracts entered into by foreign entities with governments. These considerations are further necessary in order to offer solutions to foreign investors who may find their property unlawfully expropriated as a result of political action, and who may be unable to seek proper or meaningful redress under the domestic laws of the expropriating states. Establishing the extent of the remedies that are provided by international law may seek to encourage FDI inflows into developing economies, even in the face of the real risk of political instability resulting in arbitrary or unlawful expropriations.

## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1 Background

The policy of privatisation of state controlled enterprises in developing countries has largely resulted in foreign direct investment (FDI) inflows being made into these countries and consequently, foreign firm participation in privatisation transactions. In Zambia, a policy of partial and full privatisation of state owned entities was embarked upon in 1992 with the creation of the Zambia Privatisation Agency (ZPA)<sup>4</sup> which was tasked with overseeing the privatisation and commercialisation of these enterprises<sup>5</sup>. This commercialisation and privatisation has continued to be undertaken and is primarily regulated by the Zambia Development Agency (ZDA)<sup>6</sup> which replaced the ZPA. The general mandate of the ZDA is to facilitate both local and foreign investments that are made into the Zambian economy and to this end, it has been at the centre of negotiations whenever any state owned entity is sought to be privatised either fully or partially.

It is against this background that the ZPA and then later the ZDA, has overseen several privatisations which have included the partial privatisation of the largest stated owned entities such as the Zambia National Commercial Bank<sup>7</sup>, the privatisation of the Zambia Consolidated Copper Mines (ZCCM)<sup>8</sup>, the privatisation of Zambia Railways through the signing of a concession agreement between the Government of Zambia (hereinafter the

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<sup>4</sup> Established by the Privatisation Act, Chapter 386 of the Laws of Zambia.

<sup>5</sup> Preamble to the Act

<sup>6</sup> Established by the Zambia Development Agency Act No. 11 of 2006

<sup>7</sup> This involved the acquisition of a 49 per cent stake in the Bank together with management control, by Rabo Bank of the Netherlands, while 0.2 per cent of the shareholding was transferred to minority shareholders and the Government of Zambia retained the remainder of the shareholding. 'Zanaco: A successful privatisation story' *The Zambian Economist*, 4 October 2008, available at <http://www.zambian-economist.com/2008/10/zanaco-successful-privatisation-story.html>, accessed on 27 March, 2013.

<sup>8</sup> The privatisation of ZCCM was achieved through a series of sale agreements with respect to the various mines that comprised the consortium, which began in about March of 1997 through to the end of 2000 between the Government of Zambia and several local and foreign entities. S Kangwa 'Report on the Privatisation of Zambia Consolidated Copper Mines' *The Copperbelt University School of Technology and Mining Department*, July 2001, available at <http://pubs.iied.org/pdfs/G02454.pdf>, accessed on 27 March, 2013.

“government”) and Railway Systems of Zambia Limited<sup>9</sup>, which is a subsidiary of NLPI Limited, a Mauritian registered company and more recently, the privatisation of the national telecommunications provider, Zambia Telecommunications Company Limited (Zamtel).

A common factor in each of these privatisations is that they were achieved by means of valid legal share and or asset sale agreements entered into with the government, irrespective of the motive or purpose (political or otherwise) for which they were concluded. In the majority of these transactions, the government would retain minority shareholding in the former state entities and the other party to the transaction would assume majority shareholding and possibly, management control of the particular entity. Another common factor in each of these privatisations has been that the counterparties have been foreign incorporated or registered entities. Also important to note, is that all these privatisations were concluded during the 20 year political rule of the Movement for Multi-Party Democracy (MMD), whose tenure unexpectedly came to an end in September of 2011.

It is true therefore that a lot of these privatisations were initiated and perhaps even driven by several political factors and interests of the ruling government. However, what is also significant, and of relevance to this paper, is that these privatisations, which were overseen by legitimately established statutory bodies<sup>10</sup>, and which often involved government calls for bidders to participate in buy-ins into the various enterprises that were sought to be privatised, (following which there would be a selection of a successful bidder), were concluded as legally binding contracts which could only be set aside in accordance with their respective terms.

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<sup>9</sup> J Batwell ‘Zambia to review RSZ Concession’ *RailAdvisor.com; Global Railway Information*, 7 September 2012, available at <http://www.railjournal.com/index.php/africa/zambia-to-review-rsz-concession.html>, accessed on 27 March, 2013.

<sup>10</sup> Such as the ZPA, the ZDA and the Zambia Public Procurement Authority (established by the Public Procurement Act No. 12 of 2008).

The ushering in of the new Patriotic Front (PF) government in Zambia in September 2011, saw with it shifts in policy issues such as privatisation. The new government had prior to elections, intimated that it would ‘reverse’ several of the privatisation transactions concluded by the then ruling MMD government, as these transactions were allegedly marred with corruption. In particular, the then opposition PF had singled out the privatisations of the Zambia National Commercial Bank, Zambia Railways and more prominently, that of Zamtel. It was no surprise therefore, that almost immediately after the new Government assumed office, the wheels were set in motion<sup>11</sup> for these ‘reversals’ to begin to occur, with the reversal of the Zamtel privatisation and later the termination of the Zambia Railways Concession Agreement being the first two major reversals that have occurred. What is interesting however, is that rather than arbitrarily and without any legal basis, reversing these privatisations, the Government sought to exercise its sovereign right of expropriation and used this as the basis for cancelling the above two agreements.

## **1.2 Case Study: Government of the Republic of Zambia v LAP Green Networks of Libya**

In June 2010, following a series of negotiations between the government of Zambia and LAP Green Networks of Libya (LAP)<sup>12</sup>, a Share Sale and Purchase Agreement, for the purchase by LAP of 75 per cent shareholding in Zamtel (represented by 250,000,000 shares in Zamtel) was concluded between the two parties<sup>13</sup>. As stated earlier, in terms of the agreement, the government was to retain 25 per cent shareholding in the company. The decision to

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<sup>11</sup>In October 2011, pursuant to a presidential directive, a public inquiry into the sale of Zamtel was commissioned. “Potential Effects of the Reversal of the Sale of Zamtel on Foreign Direct Investment in Zambia” *Augustine Clement Solicitors*, 2 February, 2012 available at <http://www.augustineclement.com/potential-effects-of-the-reversal-of-the-sale-of-zamtel-on-foreign-direct-investment-in-zambia/> accessed on 27 March, 2013

<sup>12</sup> Lap GreenN is a Mauritian Company, which has its headquarters in Uganda, and is a wholly owned subsidiary of Libya Africa Investment Portfolio (LAP). LAP is in turn wholly owned by the Libya Investment Authority which is Libya’s sovereign wealth fund, available at <http://www.lap-greenn.com/our-history.php>, accessed on 17 July, 2013.

<sup>13</sup> N, Mwape “Zamtel biggest investment abroad- Lap GreenN” *Zambia Daily Mail* 8 June 2010, 3. LAP GreenN paid a purchase price of USD 257,000,000 for the 75 per cent shares in Zamtel.

privatise Zamtel was taken by the government following the poor performance of the company for several years prior to its privatisation<sup>14</sup>.

As stated earlier, almost immediately after assuming office, the new government set about 'reversing' the Zamtel sale. In October of 2011, the President announced that a commission of inquiry was to be set up to look into the sale of Zamtel. The commission of inquiry, which was chaired by the Minister of Justice concluded its work in October 2011 and among its key recommendations<sup>15</sup> were the "*immediate termination of all Agreements relating to the sale of Zamtel to LAP*" and the "*immediate return of 100 per cent of Zamtel to the people of Zambia*"<sup>16</sup>.

The President agreed with the recommendations of the commission of inquiry and on 23 January 2012, the government of Zambia, through the office of the Attorney General, served on Zamtel, a "Notice of intention to acquire property and a Notice to yield possession" (the Notice)<sup>17</sup>. The Notice, which was issued in the name of the President, and which resolved that "*...it was desirable and expedient and in the interest of the Republic...*" that the 'property' (which was in this case the 250,000,000 million shares in Zamtel that had been purchased by LAP) be compulsorily acquired and that in accordance with the provisions of the Act, notice be given to the company (LAP), to such effect.<sup>18</sup> The notice stated further that the President had "*certified that the property was urgently required*" and called upon LAP to yield possession<sup>19</sup> of the property on or before 24 January 2012.

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<sup>14</sup> Ministerial statement given by the Honourable Minister of Transport and Communications Professor Geoffrey Lungwangwa MP to the National Assembly of Zambia on 7 August, 2009 available at [http://www.parliament.gov.zm/index.php?option=com\\_content&task=view&id=976&Itemid=86](http://www.parliament.gov.zm/index.php?option=com_content&task=view&id=976&Itemid=86), accessed on 17 July, 2013.

<sup>15</sup> "Report to H.E The President of the Republic of Zambia Mr Michael Chilufya Sata of the Commission of Inquiry into the Sale of Zamtel Chaired by Hon. Sebastian Zulu S.C. Minister of Justice" p 3, available at <http://www.lusakatimes.com/wp-content/uploads/2012/01/zamtelfinalreport.pdf>, accessed on 23 July, 2013.

<sup>16</sup> Ibid

<sup>17</sup> Government gazette citation

<sup>18</sup> Sections 5 of the Lands Acquisition Act.

<sup>19</sup> In accordance with section 6 of the Lands Acquisition Act

Following the issue of the Notice, and without further announcement made by the government on the issue of compensation to LAP for the compulsorily acquired shares in Zamtel, LAP filed a constitutional petition into the Lusaka High Court on 19 March 2012<sup>20</sup>, seeking several orders relating to the protection of LAP compulsorily acquired shares in Zamtel. The particular relief sought in the Petition will be set out later on in the paper. At present, there has been no agreement reached between LAP and the government and the two parties continue to be embroiled in litigation over *inter alia*, the legality of the expropriation and the applicable compensation.<sup>21</sup>

### 1.3 Aims and significance of the study

#### 1.3.1 Aim of study

The main aim of this study in this paper is to analyse the nature and extent of the relief<sup>22</sup> that is available under regional and international law to an investor whose property is unlawfully expropriated by a state, and to highlight the inadequacies thereof. Unlawful expropriations are those which in terms of international customary law, cannot, objectively viewed, be said to be for public purpose, non-discriminatory and accompanied by adequate compensation<sup>23</sup>. In this regard, a discussion will be made of the major international law tribunals or bodies (and the relevant principles or treaties which may be relied upon), both regionally and in the wider international community, to which disputes relating to unlawful expropriations may be brought by an affected investor. The jurisdiction of such tribunals and the nature of reliefs that they may provide, based on applicable international law principles or treaties, will also be examined.

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<sup>20</sup> Constitutional Petition filed into the Principal Registry of the Lusaka High Court on 19 March 2012. Accessed on 15 June 2013.

<sup>21</sup> *Ibid*

<sup>22</sup> An important objective of the paper is to set out the practical reliefs that would be available to investors, against the background that there may be many possible theoretical reliefs, but few practical ones which may actually allow the investors to recover their investments, or at least mitigate the commercial losses that they may have incurred as a result of the expropriation.

<sup>23</sup> Y Xiaodong *State Immunity in International Law* (2012) 307.

Another aim of the study is to consider the effectiveness of orders that may be made by regional or international tribunals in light of the fact that such orders may be unenforceable within the domestic laws of the states against which they are sought to be enforced. Further, it will be shown with the illustration of case law that even in the event that such an order made by a regional or international tribunal can be registered within a state's domestic laws, there still remains the real challenge of enforcing the order against the state. In this regard, it is important to consider whether the refusal of a state to comply with an order of an international tribunal, the jurisdiction of which it validly submits to, can be said to be a breach of its international law obligations, for which it can be held accountable. In other words, it will be considered whether there are any sanctions, administrative or otherwise that may be imposed on a recalcitrant state to serve as a future deterrent to such a state or any other state against carrying out unlawful expropriations.

The study ultimately aims to show that despite the existence of regional and international tribunals that may have jurisdiction to hear investment disputes (such as the Zamtel dispute), the remedies that are available to investors remain largely inadequate for the various reasons that will be pointed out. An attempt will be made at proposing solutions that would effectively address the inadequacies highlighted, in order to ensure that more effective remedies are available to investors who find themselves in the unfavourable position that LAP finds itself in.

### *1.3.2 Significance of study*

As stated earlier, expropriations, motivated largely by political considerations and not made for public purpose, will continue to be carried out, particularly following a regime change. This is true more so in developing countries. In the era of FDI, it is necessary to set out the remedies that are available to investors who find themselves in the unfortunate situation of having their investments unlawfully expropriated. It is particularly important to set out the remedies that are available under international law because in most cases,

any actions that may be commenced against a state in the context of domestic law may be frustrated by the state, particularly in those states where there is no real separation of power between the executive functions and those of the judiciary.

Establishing whether there are any remedies available under international law, and the mechanisms by which a dispute for an unlawful expropriation may be brought before an international tribunal, is important for investors engaging in FDI as it provides them with options that may allow them to protect their investments or at least mitigate the losses that they would suffer as a result of unlawful takings by states. This is crucial for investors who very often have invested substantial amounts of money or infrastructure into the respective foreign state economies and stand to suffer significant losses to their business ventures as a result of unlawful expropriations. Corollary, establishing the remedies that may be available under international law where a state unlawfully expropriates property, may serve to encourage foreign investors to invest into state economies<sup>24</sup>, even against the real risk of arbitrary expropriations which may not be accompanied by adequate or effective compensation.

#### **1.4 Chapter outline**

In the second chapter, a brief review of the law relating to property expropriation will be provided. The review will also consider the procedure that follows an expropriation and the recourse that is available to an affected property owner. Case law will be used to illustrate how the Zambian courts have dealt with disputes over state expropriation and the decisions reached in this regard.

The focus of the discussion in this chapter will be on whether the Zambian Constitution which recognises property ownership as a fundamental right

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<sup>24</sup> Particularly into developing economies which are prone to political instability or arbitrary state action driven by political motives.

seeks to adequately protect against unlawful expropriations. This is in light of the fact that the constitutional provision that contemplates property expropriation by the state does not mandate it to carry out an expropriation only where this is done for a public purpose or in the public interest, in line with most modern Constitutions of democratic states.

The discussion will further involve an examination into whether the Constitution grants other fundamental rights, and in particular the right to just administrative action, which serve to further strengthen the protection of property rights. In both cases, reference will be made to the South African constitutional provisions which offer seemingly stronger protections for the right to property ownership and from which the Zambian constitutional provisions can be adapted.

The third chapter will consider in a little more detail, the current dispute between the government of Zambia and LAP over the expropriation of the 250,000,000 shares that had been acquired by LAP in Zamtel. The provisions of the Lands Acquisition Act that were relied on as the legal means by which the expropriation was carried out as well as the reasons advanced by the Government for its action, will be analysed in brief detail. Thereafter, the discussion will move to consider the actions that followed the expropriation, with particular reference to the pending court litigation between LAP and the Government and the efficacy of the remedies sought by LAP in the various court applications, within the existing legal framework in Zambia vis-à-vis property expropriation.

The fourth chapter will be the focus of the discussion and will consider the recourse that is available to an investor in the position of LAP under international law. This will be achieved by analysing the jurisdiction of the judicial wing of the Southern African Development Community (SADC) at the [African] regional level and that of the International Centre for the

Settlement of Investment Disputes (ICSID) under the ICSID Convention, and the ICSID Additional Facility Rules at the international level.

The discussion will be centred on considering the limited orders that may be made against states by the adjudicating bodies, often resulting in the inadequate protection of investors' interests following the unlawful expropriation of their property. It will be argued in this chapter that although there are some limitations inherent in the jurisdiction of the regional and international adjudicating fora which may therefore restrict the orders that they can make against erring states, there are other means by which effective remedies can be provided for investors, particularly where the orders serve as deterrents against future unlawful expropriations. Reference will be made to case law, to illustrate how the relevant adjudicating bodies have dealt with investment disputes relating to unlawful expropriations and the orders that have been made against states in those disputes.

An attempt will also be made at considering the possible options, if any, that may be available to LAP under the international law framework in the event that it is unsuccessful in obtaining the orders that it seeks against in the Government, in the applications that are before the Zambian courts.

Chapter five will be a summary and conclusion of the above four chapters. It will further provide recommendations for additional safeguards such as the insistence by investors engaging in FDI activities such as privatisation, of the conclusion of bilateral investment agreements and other international investment agreements. The chapter will also recommend the imposition of some measure of sanctions, administrative or otherwise, for states that refuse to comply with the orders made by international tribunals, as this may serve the double purpose of forcing the erring states to comply with such orders and also acting as deterrents for future unlawful expropriations by states.

## CHAPTER 2

### 2. EXPROPRIATION OF PROPERTY IN ZAMBIA

#### 2.1 Legal basis for the expropriation of property in Zambia

##### 2.1.1 *Property ownership as a right under the Zambian Constitution*

Under the Zambian legal system, ownership is the most complete right in a thing. Generally speaking, it entitles the owner to use his property in the way he wishes.<sup>25</sup> However, there are instances in which the right to ownership may be limited and one of these ways is through state takings or expropriation. It is accepted that although the protection of a citizen's rights in property is an important principle in a civilised society, the state has always been able to acquire rights in citizen's property, when doing so is considered to be in the public interest.<sup>26</sup>

In Zambia, the general law relating to property ownership and the expropriation<sup>27</sup> thereof is contained in the Constitution of Zambia.<sup>28</sup> The Constitution is the supreme law of Zambia and any law that is inconsistent with it is void to the extent of the inconsistency.<sup>29</sup> The Constitution<sup>30</sup> provides for the protection of fundamental rights and freedoms of persons in Zambia, which includes the protection from the deprivation of property without compensation.<sup>31</sup> It is thus accepted under the Zambian legal order that the right to property ownership is a fundamental right, ensured and protected by the Constitution.<sup>32</sup>

In articulating the right to property ownership, the Constitution provides firstly that *"no property of any description (including any interest or right in*

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<sup>25</sup> F Mudenda *Land Law in Zambia: Cases and Materials* (2007) 63.

<sup>26</sup> Gildenhuis 1-2 in M Southwood *The Compulsory Acquisition of Rights* (2000) 2.

<sup>27</sup> In Zambia, the term "compulsory acquisition" is used in both the Constitution and legislation to refer to expropriation. The term 'expropriation' will be used in this discussion to refer to compulsory acquisition in Zambia.

<sup>28</sup> Chapter 1 of the Laws of Zambia.

<sup>29</sup> Article 1 (3).

<sup>30</sup> In Article 11.

<sup>31</sup> Article 11(d).

<sup>32</sup> Mudenda op cit 1 at 64.

*property) is to be expropriated except by an Act of Parliament which provides for payment of adequate compensation for the property”<sup>33</sup>. The Constitution further directs in this regard that the Act of Parliament so enacted to provide for compensation, should make provision for the determination of the amount thereof by a court, in instances where there is no agreement on the amount of compensation payable.<sup>34</sup>*

It is clear from the above that the Zambian Constitution contemplates the expropriation of property by the state. Such expropriation will only be constitutionally valid however, if it is carried out in accordance with the provisions of relevant legislation which provides for the payment of compensation. There is no further guidance given on the purpose for which property expropriation is to be undertaken and the factors that must be had regard to, in the determination of what would amount to adequate compensation.

A bare reading of the constitutional provision would suggest that, provided that an expropriation is carried out in accordance with the provisions of the relevant Act of Parliament that regulates the expropriation and determines the compensation payable, it can be carried out for any reason, even if that reason is arbitrary or illegal. So for example, legislation that has the effect of permitting the arbitrary expropriation of property by the state would not be unconstitutional. It is obviously incomprehensible that the Constitution would sanction an arbitrary expropriation, or even one that is carried out in bad faith by the state, provided that this is done in accordance with the relevant legislation. However, the provision as it is drafted, leaves room for expropriations to be carried out for no proper or justifiable reason, where there is no legal or, more importantly, constitutional basis to challenge such expropriations.

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<sup>33</sup> Article 16 (1).

<sup>34</sup> Article 16 (3).

In contrast, the South African Constitution<sup>35</sup> provides with respect to property expropriation that property may only be expropriated in terms of a law of general application, in the public interest<sup>36</sup>; or for a public purpose subject to compensation which should have been agreed by those affected or which is set by the court.<sup>37</sup> In setting out additional basic requirements that expropriations must comply with, particularly that expropriations must be undertaken for a public purpose, or in the public interest, the Constitution provides stronger safeguards (than those provided under the Zambian Constitution) for property owners against illegal or arbitrary state takings because the latter will be required to show that it has complied with all the requirements set by the Constitution, if the expropriation is to be constitutionally valid and therefore legal.

It is submitted that in the constitutional and democratic state that Zambia professes to be, the Constitution should expressly provide that property expropriation is only to be undertaken, where there is a public purpose or public interest that plainly demands such expropriation. It is accepted that constitutional provisions are to be given a purposive interpretation to avoid the absurd consequence of their literal interpretation resulting in illegal or unconstitutional outcomes. However, interpretation is a preserve of the courts with the consequence that different results may be reached, even on a purported purposive interpretation. This is particularly problematic in jurisdictions where, like in Zambia, there is no specialised constitutional court that is specifically established to interpret the various constitutional provisions and the rights afforded thereby. As the position is in Zambia, too much leeway is given to an Act of Parliament to determine, to a large extent, the protection that will be given to property rights against state takings, which is a matter that should mainly be a preserve of the Constitution.

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<sup>35</sup> Constitution of South Africa, 1996

<sup>36</sup> The public purpose for which property may be expropriated is explained in section 25 (4) as including the nation's commitment to land reform, and reforms to bring about equitable access to all South Africa's natural resources.

<sup>37</sup> Section 25 (2) (a) and (b).

Another issue of concern relating to the inadequacy in the protection of property rights against 'unlawful' expropriations in the Zambian constitutional order relates to the fact that there is no constitutional provision giving an affected property owner the right to challenge an expropriation by the state, even one that is not accompanied by adequate compensation. Expropriation of property which is invariably an administrative act must be subject to review if it is carried out in an unjust manner against an affected property owner. In the event that the Act of Parliament enacted to regulate property expropriation does not give the affected property owner the right to exercise their right to just administrative action, they are left with no recourse to challenge the state's action and are therefore further deprived of their constitutional right to property ownership.

There is a right to judicial review of an administrative act that is unreasonable, arbitrary or illegal under the Zambia legal system, based on the common law *audi alteram partem* rule. However, in terms of the Zambian High Court civil procedure relating to judicial review<sup>38</sup>, an aggrieved person must first seek leave of the court before they can file their application and the court may refuse to grant such leave, in its discretion.<sup>39</sup> There is no legislative obligation on the state to provide written reasons for its decisions or for the affected person to be given a fair hearing.

An aggrieved person can therefore only rely on the judicial review of the administrative act, and that if a court finds that the state did not follow the proper procedure in taking the administrative decision that it did, only then will the person have an opportunity to be given a hearing or to request for written reasons of the decision made against him. However, if this leave to file an application for judicial review is refused, this is the end of the matter act that adversely affects his rights.

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<sup>38</sup> Order 53 of the Rules of the Supreme Court of England, 1999.

<sup>39</sup> Order 53, rule 3.

By way of comparison, in the South African context, the protection against arbitrary or unlawful expropriation is further strengthened by the right to just administrative action which is lawful, reasonable and procedurally fair<sup>40</sup> as guaranteed by Constitution.<sup>41</sup> The right to just administrative action is given further effect to, in the Promotion of Administrative Justice Act (PAJA)<sup>42</sup>. The right to just administrative action guaranteed by the Constitution enables persons affected or aggrieved by decisions of the state relating to the expropriation of property, to be given written reasons for the decision taken by the state<sup>43</sup> or to bring an application for judicial review before the courts<sup>44</sup>, for the purpose of requiring the latter to review the decision of the former. In this way, the state is 'precluded' from carrying out an expropriation if there is no justifiable reason (being public purpose or public interest) for doing so.

The right of an aggrieved person to directly challenge before the courts, a potentially unjust administrative decision to expropriate his property, as is the case in the South African system (through the constitutionally mandated PAJA), is of utmost importance in the safeguarding against arbitrary or unreasonable expropriations.

### *2.1.2 Procedure relating to property expropriation in Zambia*

The primary piece of legislation that regulates the expropriation of property in Zambia is the Lands Acquisition Act (the "LAA").<sup>45</sup> The purpose of the LAA is primarily to make provision for the "compulsory acquisition" of land and other property and to provide for matters incidental to or connected to the purpose of such acquisition.<sup>46</sup>

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<sup>40</sup> Section 33(1).

<sup>41</sup> In section 33.

<sup>42</sup> Act 3 of 2000.

<sup>43</sup> Section 33 (2).

<sup>44</sup> In accordance with the provisions of the PAJA which was enacted in pursuance of the directive given by s 33(3) of the Constitution for the enactment of national legislation which would give effect to the rights in subsections (1) and (2).

<sup>45</sup> Chapter 189 of the Laws of Zambia.

<sup>46</sup> Preamble to the Act.

In terms of the LAA, property is defined as “...including land and any interest or right over property...”<sup>47</sup> The above definition is however not comprehensive<sup>48</sup> in setting out the kind of property that is encompassed thereunder. However, it is submitted that the drafters of the LAA must have intended for the term ‘property’ to be given its literal meaning as including property of any kind<sup>49</sup> that is capable of being expropriated. Further the fact that there is currently no other Act that regulates the expropriation of property in Zambia, lends legitimacy to the assumption that the LAA contemplates the expropriation of all kinds of property.

The LLA empowers the President to expropriate property of any description whenever he is of the opinion that “*it is desirable or expedient, in the interests of the republic to do so*”<sup>50</sup>. The relevant section does not set out the instances in which the President may decide that it is ‘desirable’ or ‘expedient’ to expropriate property and thus this remains largely within his subjective determination.

In attempting to provide guidance on when the President may form the requisite opinion for the purposes of expropriating property, it has been held by the High Court of Zambia<sup>51</sup>, that the fact that the Act is silent on the question of the purpose for which the President may expropriate property upon payment of compensation, does not *per se* give the state a blanket right to expropriate property without any [public] cause or purpose.<sup>52</sup>

Following the President’s decision to expropriate property, the relevant Minister is required to serve a notice of the intention to expropriate property on the persons interested in the property.<sup>53</sup> The notice is also required to

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<sup>47</sup> Section 2.

<sup>48</sup> The Act does however set out a comprehensive definition of “land” that may be expropriated. This definition will however not be set out as it does not directly relate to the discussion in the paper.

<sup>49</sup> This would conceivably include both tangible and intangible property.

<sup>50</sup> Section 3 of the Act.

<sup>51</sup> *Wise v The Attorney General* (1990/92) ZR 124.

<sup>52</sup> *Ibid*, 129.

<sup>53</sup> Section 5.

invite any person claiming to be interested in such property to submit such claim to the Minister within four weeks of the publication of the notice.<sup>54</sup>

In addition to the notice to persons affected as described above, the Minister is also required to serve a further notice on them, to the effect that they are required to yield possession of the property to be expropriated, upon the expiration of the period stated therein. This may be included in the original notice of expropriation<sup>55</sup> or in any subsequent notice.<sup>56</sup> The period stated in the notice should not be less than two months from the date of service of the notice<sup>57</sup> and upon expiration of the stated period, the President or any person authorised by him may take possession of the property.<sup>58</sup>

The LLA further provides that where the President certifies that the property in question is urgently required, the persons to whom any notices of the expropriation would have been served, may be required to yield possession of the property to the government on the expiration of such lesser period as the President may direct.<sup>59</sup>

The LAA then sets out the procedure that is followed with regard to compensation for the expropriated property. It provides that Minister is required to pay, on behalf of the government, the amount of compensation as agreed between the affected property owner and the latter, or in default of agreement, in accordance with the principles of the LAA, to the person whose property is expropriated.<sup>60</sup>

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<sup>54</sup> Section 5(2).

<sup>55</sup> Contemplated in section 5.

<sup>56</sup> Section 6(1).

<sup>57</sup> Ibid.

<sup>58</sup> Section 6(2).

<sup>59</sup> Ibid.

<sup>60</sup> As provided for by section 10.

In setting out the relevant principles to be taken account in assessing the amount of compensation payable<sup>61</sup>, the LAA provides firstly that a court, determining the issue of compensation, will take into account the value of property.<sup>62</sup> The determination of the value of the property is however subject to several qualifications. For example that any money granted by the Government for the development of the property or any other investment or donations made by the Government will be taken into account and deducted from any amount of compensation payable.<sup>63</sup>

Where a dispute arises over the amount of compensation payable, and if such dispute is not settled within six weeks of publication of the notice to yield possession, either the Minister or the person affected by the compensation is permitted to refer the dispute to the High Court. The court is then to determine the compensation payable.<sup>64</sup>

Where there is a dispute regarding the amount of compensation payable, the LAA provides that the government may only take possession of the expropriated property after payment of the amount regarded by the Minister as “*just compensation*” to the affected property owner<sup>65</sup>, presumably leaving the final determination and the possibility that the government will be ordered to pay additional compensation for a later date.

It is logical to conclude in this regard that since there will almost always be disagreement relating to the amount of compensation that should be paid to an affected owner, the effect of the provision, at least in theory, is that prior to

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<sup>61</sup> Section 12 generally provides the various guidelines on the payment of compensation following the expropriation of property.

<sup>62</sup> Section 12(b) contemplates that the relevant value will be arrived at by having regard to the amount which the property might be expected to realise if sold in the open market by a willing seller at the time of publication of the notice to yield up possession.

<sup>63</sup> Section 12 (b) (i).

<sup>64</sup> Section 11 (2).

<sup>65</sup> Section 11 (4).

the government tendering effective compensation for the expropriation<sup>66</sup>, it cannot remove the property from the possession of the property owner.

However, the default position under the LAA is that the government may take possession of the property prior to offering compensation to the property owner, unless there is a dispute as described above.

### ***2.1.3 Investment laws and the expropriation of property***

The principle investment code for Zambia is the Zambia Development Agency (ZDA) Act. The purpose of the Act is primarily to attract and facilitate trade and investment in Zambia.<sup>67</sup> In doing so, the Act provides for certain investment guarantees for investors.<sup>68</sup>

One of the guarantees provided for investors, is the protection from expropriation of property.<sup>69</sup> The protection from expropriation is worded in much the same way as under the Constitution and provides that property will only be expropriated for a public purpose and in accordance with relevant legislation which provides for the payment of compensation.<sup>70</sup>

The ZDA Act goes on further to provide that the amount of compensation payable in the event of an expropriation, should be made promptly at the market value and *“will be fully transferable at the applicable exchange rate in the currency in which the investment was originally made, without deductions for taxes, levies and other duties, except where those are due”*.<sup>71</sup>

The protection of investors from unlawful expropriation as stated under the ZDA Act points to the fact that in the case of an expropriation against an investor, the latter is, in addition to the Constitution and the Lands

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<sup>66</sup> After it has served the requisite notice of the expropriation on the property owner.

<sup>67</sup> Preamble to the Act.

<sup>68</sup> Part IV: Investment Promotion and Guarantees.

<sup>69</sup> Section 19.

<sup>70</sup> Section 19(1).

<sup>71</sup> Section 19(2).

Acquisition Act, also guided by the ZDA Act on the legal position relating to property expropriation in Zambia.

Two issues arise with respect to the 'expropriation section' under the ZDA Act. Firstly, in stating that property will only be expropriated "*for public purposes in accordance with an Act of Parliament that provides for compensation*", it is merely restating the constitutional position and to this end, it adds nothing to the substantive rights that investors have against arbitrary deprivation or expropriation of their property by the state.<sup>72</sup>

Secondly, although the provision under the ZDA Act simply restates the constitutional position regarding property expropriation and acknowledges that expropriations will be carried out in accordance with an Act of Parliament enacted for this purpose, a further provision purports to set out how the compensation payable for the expropriation is to be calculated, and the manner in which payment is to be made to the affected investor<sup>73</sup>.

It is submitted that this additional 'regulation' regarding the determination of the compensation payable is potentially problematic. The main issue that arises in this regard is that the LAA, which is the legislation enacted to "*make provision for the compulsory acquisition of land and other property, and to provide for matters incidental to or connected to the foregoing*"<sup>74</sup>, does not contemplate the regulation of compensation for state expropriations by any other Act and therefore, does not qualify the relevant provisions thereunder, on the manner in which the compensation to be paid should be calculated. The obvious result of the above is that there is some conflict between the position

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<sup>72</sup> It is further submitted that the ZDA Act which was drafted and came into force many years after the Lands Acquisition Act, could have expressly stated that expropriations are to take place in terms of the latter Act (and not simply state that this will be done "*in accordance with an Act of Parliament which provides for expropriation ...*" ), as the latter is invariably the Act that is being referred to in this regard. As the primary investment code for Zambia, the ZDA Act should be express in referring investors (particularly foreign investors who are not familiar with Zambian laws), to specific other Acts which will regulate the different aspects of their activities (and those not regulated by the former), so as to ensure certainty.

<sup>73</sup> For example the section (section 19 (2)) refers to the payment of compensation at the prevailing exchange rate and that the compensation will be made in the currency in which the investment was originally made.

<sup>74</sup> Preamble to the LAA

regarding the determination of the amount of compensation and whether such compensation is payable under either the LAA or the ZDA Act, at the election of the affected investor.

Where an investor has their property expropriated, it would be preferable to have the amount of compensation payable determined under the more favourable provisions of the ZDA Act. However, if the state purports to base their expropriation on the authority of the LAA which regulates all issues relating to property expropriation, including those relating to compensation, it is not clear whether an investor can insist on having the compensation payable, calculated in accordance with the guidelines set out in the ZDA Act.

There is an argument that could be made that since the Constitution does not preclude the guarantee by the state of greater compensation in specific instances, the LAA simply sets out the minimum compensation to which any person whose property is expropriated, is entitled as required by the Constitution, and that the ZDA Act can therefore provide for greater compensation for investors.

This position could then well be clarified by a proviso<sup>75</sup> in the LAA that the provisions therein relating to the calculation of compensation, are subject to those provisions in other legislation<sup>76</sup> that provide for [more] favourable compensation.

The apparent disconnect between the two compensation provisions under the ZDA Act and the LAA, renders its guidance for [foreign] investors on the legal position with respect to property expropriation in Zambia, uncertain.

The following chapter will demonstrate how LAP has relied on the constitutional provisions relating to property protection as a fundamental

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<sup>75</sup> Such a proviso would have to be by way of amendment to the LAA as it was enacted before the ZDA.

<sup>76</sup> Including the ZDA Act.

right in Zambia, in its dispute with the Zambian government. The inadequacies of the protections offered by the Constitution will be highlighted in the discussion of the various applications that have been commenced by LAP before the Zambian courts.

It will also be shown how LAP has argued against the government, that the procedures laid down by the LAA for the expropriation of property, were not properly followed by the latter, therefore rendering the expropriation of the latter shares arbitrary and illegal.

## CHAPTER 3

### 3. EXPROPRIATION OF SHARES OWNED AND HELD BY LAP GREENN OF LIBYA IN ZAMTEL BY THE ZAMBIAN GOVERNMENT

#### 3.1 Basis for the expropriation of the LAP GreenN owned shares in Zamtel

##### 3.1.1 *Findings of the Commission of Inquiry appointed to look into the privatisation of Zamtel*<sup>77</sup>

A Commission of Inquiry (the “Commission”) was established to determine how the sale of the shares in Zamtel to LAP GreenN (“LAP”) was conducted, and to ascertain whether all the requisite procedures relating to the sale were complied with.<sup>78</sup>

It is worth stating at the outset that it is highly unlikely, based on the various statements issued by the government prior to the setting up of the Commission intimating strongly that the sale of Zamtel shares would be reversed, that the latter could have reached a different conclusion than it did; primarily that the sale was improper and that it should be reversed. There is a strong argument, based on a reading of the Report of the Commission, that the ‘evidence’<sup>79</sup> relied on by the Commission was selective so to support only a conclusion that the sale of the shares was illegal or improper.

The main recommendation of the Commission was that all agreements relating to the sale of Zamtel to LAP be terminated and that there should be

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<sup>77</sup> The Commission of Inquiry was appointed by the President in October of 2011 and was chaired by the Minister of Justice.

<sup>78</sup> Terms of Reference of the Commission *Report to H.E the President of the Republic of Zambia, Mr Michael Chilufya Sata of the Commission of Inquiry into the sale of Zamtel* (2011) 13, available at <http://www.lusakatimes.com/wp-content/uploads/2012/01/zamtelfinalreport.pdf>, accessed on 23 July, 2013.

<sup>79</sup> Namely Appendix II of the Report which contains the list of documents perused by the Committee (pp 81-84), Appendix IV of the Report which contains the oral submissions made to the Committee by those parties invited to give submissions by the former (pp 86-94) and Appendix VII which contains the written submissions made to the Committee (pp 110- 130) as read with the Summary of the Technical Committee Key Findings at pp 5-11 of the Report.

[immediate] return of all the shares acquired by LAP in the former.<sup>80</sup> The recommendation by the Commission was largely based on its finding that the price at which Zamtel was sold showed that it was “grossly undervalued” and that “the government paid more than it received”. The Commission’s further finding was that the effect of the ‘gross undervaluation’ was that the government had in essence given the 75 per cent shareholding in Zamtel to LAP, as a gift.<sup>81</sup>

In reaching its conclusion and making the above recommendation, the Commission in its Report relied entirely on the apparent improper valuation of the fixed assets of Zamtel by a valuation company that was engaged by the previous government.<sup>82</sup> The Commission was of the view that the improper valuation<sup>83</sup> of the assets by the said company led to an undervaluation of Zamtel’s assets. There is no basis (other than the claim of the impropriety of the valuation), on a reading of the Report of the Commission, upon which the latter came to a conclusion that there had been an undervaluation of the fixed assets of Zamtel, leading to the sale of the 75 per cent of shares therein to LAP at undervalue.

It is also noteworthy that the apparent undervaluation of the shares in Zamtel was a matter entirely within the preserve of the government which had appointed the valuation company and therefore, one for which LAP could not be held accountable. In view of the serious nature of an expropriation,

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<sup>80</sup> As stated in the recommendations of the Commission of Inquiry in their Report to the President.

<sup>81</sup> Ibid.

<sup>82</sup> Summary of the Technical Committee Key Findings: Valuation of Zamtel Assets/*Business Report of the Commission of Inquiry into the sale of Zamtel* 6.

<sup>83</sup> According to a statement made to the Zambian Parliament by the Minister of Transport and Communications Hon. Dora Siliya, MP on 13 February 2009 on the engagement of the company appointed to undertake the valuation of Zamtel, namely RP Capitol Group, the valuation method used was that of a discounted cash flow. E. Shapiro et al *Modern Methods of Valuation* (2009) at 35, a discounted cash flow (DCF) method of valuation is a method for determining the current value of a company using future cash flows adjusted for time value. This is conceivably the valuation method that was criticised by the Commission as being improper. However, the Report does not relate the stated method of valuation actually undertaken by the company, that is, DCF, to that of the valuation of the fixed assets referred to therein. Furthermore, Shapiro states that what is essential to determine in valuation, is the market price of the subject matter; that is, what a willing buyer would pay a willing seller in an arm’s length transaction. This important aspect of valuation was not considered by the Commission in its critiquing of the valuation of the Zamtel assets and thus there is a strong force in the argument that the former undertook a superficial analysis of the said valuation.

particularly one of significant commercial investment such as that made by LAP in Zamtel, the apparent undervaluation of assets was not a sound basis for expropriating the shares from LAP- at least not by trying to impute some impropriety on the part of the latter for purchasing 'under-valued' shares.

It is further interesting to note that nowhere in the Report of the Commission, was LAP given an opportunity to lead evidence that either supported or dispelled the findings of the former on the various issues relating to the apparent impropriety of the sale of the said shares to the latter. The basic tenets of natural justice require that the party against whom a claim is made and against whom a decision will ultimately be made, be given an opportunity to be heard. This important aspect seems to have been overlooked by the Commission in its determination of the manner in which the sale of assets occurred.

### ***3.1.2 Expropriation of the shares pursuant to the Lands Acquisition Act***

Following the main recommendation of the Commission as highlighted above, the government, through the Attorney General of Zambia, served a notice<sup>84</sup> on LAP of the government's intention to expropriate the shares held in Zamtel by the latter. The notice served to LAP on the 23<sup>rd</sup> day of January in 2011 purported to simultaneously give notice to LAP of the intention of the President to expropriate its shares in Zamtel, and notice for the former to "yield possession" of the shares to the government on the 24<sup>th</sup> day of January 2011.

It is submitted in this regard that there was no reasonable notice period that was afforded to LAP particularly in light of the 'property' sought to be expropriated by the government. It is inconceivable that the legislature could have sanctioned the expropriation of property from owners thereof, without affording the latter a reasonable notice period within which to properly hand

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<sup>84</sup> A Notice of intention to acquire property and a Notice to yield up possession as required by sections 5 and 6 respectively, of the Lands Acquisition Act. See 2.1.2 above: "*Procedure relating to the expropriation of property in Zambia*".

over their property to the state. The reasonableness of a notice period would obviously vary depending on the circumstances of each case. It is expected that in the case of a substantial investment by a foreign investor into a major company such as Zamtel, a notice period requiring the former to give up its majority shareholding in the latter within a day of learning of the government's intention to expropriate the said shares is unreasonable.

In terms of the "Notice of intention to acquire property" served on LAP, it was stated therein that the President had resolved that it was in the public interest to expropriate the shares held by the former in Zamtel.<sup>85</sup> Although there is no requirement under the Lands Acquisition Act (the Act empowering the expropriation) for the government to state the public interest it seeks to achieve by the expropriation, it is argued that there should exist a genuine public interest or purpose for which the expropriation is undertaken.

In this regard, although such public interest may not (in the absence of an express statement by the government on the interest sought to be advanced by the expropriation) be immediately apparent to the public, it should at least be deductible from the events surrounding the expropriation and the [potential] benefit that it would have for the public. As pointed out above, one of the main contentions of the government prior to the serving of the requisite notice on LAP was that the shares in Zamtel were under-valued resulting in the former not having paid sufficient consideration therefor. If the public interest sought to be advanced or protected was the payment of sufficient consideration for the said shares, this could surely have been achieved by other less drastic means such as by re-negotiating the relevant transaction documents to require LAP to pay more consideration for the shares, or to allow the government to acquire more shareholding in Zamtel from LAP, without the government having to pay consideration for such acquisition of shares from LAP.

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<sup>85</sup> As provided for by Section 5 of the Lands Acquisition Act.

Another point to note relating to the public interest factor of the expropriation is the fact that Zamtel provides essential telecommunication services to the Zambian public and that the proper operation and management thereof is vital in order to satisfy the important public purpose of providing those services. However, immediately prior to the privatisation of Zamtel and the acquisition of majority shareholding in the company by LAP, the former was on the brink of insolvency and had lost a large number of subscribers due to its operational inefficiencies<sup>86</sup>. The privatisation of Zamtel was therefore accepted as the most effective way through which the company's operations could be strengthened, to allow for the company to serve the important public purpose of providing effective and efficient telecommunication services to the Zambian public.<sup>87</sup>

It is therefore logical to conclude in this regard, that the greater public purpose was actually served by the sale of the majority shares in the company to LAP, in so far as the latter was able to overcome the challenges that were facing the company prior to the decision of the government to privatise it. Furthermore, it might be argued that returning full ownership and management of Zamtel to the very government which had caused the company to face the operational challenges and potential insolvency as described above would actually be contrary to the public interest.

It is interesting to note that although it is clear that the requisite notices served to LAP under the auspices of the Lands Acquisition Act were as a direct consequence of the findings and recommendations of the Commission of Inquiry<sup>88</sup>, no wrong-doing was alleged on the part of LAP in the said notices. The only contention in the notice was that it was "*desirable and in the interest of the Republic*" for the shares to be expropriated. It is accepted that an illegality

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<sup>86</sup> This was according to the Ministerial statement made to the Zambian parliament by the Minister of Communications and Transport on 7 August, 2009 on the partial sale of Zamtel at p 4.

<sup>87</sup> Ibid, at 2.

<sup>88</sup> The findings and recommendations intimated strongly, wrong-doing on the part of LAP and more particularly in the form of corruption in collusion with the former ruling government. It is noteworthy however that no wrongdoing was expressly alleged against LAP by the Commission.

such as corruption by one or both parties to a transaction, would taint the transaction and if this was the allegation (which would have to be proved against LAP), the government could well have been justified in reversing the sale of the majority shares in Zamtel to LAP.

A claim of corruption on the part of an investor against which a state had expropriated investment assets was well illustrated in the case of *World Duty Free Co. Ltd v Republic of Kenya*<sup>89</sup> in which the Kenyan government was alleged to have unlawfully expropriated the applicant's investment. However, it came to light that the investor had obtained the relevant contract by bribing the then ruling Kenyan President. Kenya successfully argued for the case against it to be dismissed on the basis that corruption clearly violated international public policy as well as Kenyan law and that the investor was not entitled to maintain any of its pleaded claims. In the context of the expropriation by the Zambian government of LAP's shares in Zamtel, the actions of the government could well have been justified if there was a clear and proven case of corruption on the part of LAP in procuring the shares.

The above discussion makes a strong case for the unlawfulness or at the very least arbitrariness of the expropriation of LAP's 75 per cent shares validly and legally held in Zamtel, by the Zambian government. The events and statements by the government preceding and following the expropriation of the shares strongly point to the fact that the expropriation was largely driven by extraneous political factors; largely, the current government's disapproval of the former government.

## **3.2 Litigation proceedings relating to the dispute between LAP and the government before the Zambian courts**

### ***3.2.1 Judicial review proceedings***

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<sup>89</sup> ICSID Case No. ARB/02/08 Award February 6, 2007.

Following the expropriation of the shares by the government as described above, LAP immediately sought legal redress before the Zambian courts to try to preserve its ownership of the shares in Zamtel.<sup>90</sup> The first main application that it made before the courts was one for judicial review<sup>91</sup> of the government's decision to expropriate the shares.

In the application for judicial review<sup>92</sup>, LAP contended in the main that the government's decision to expropriate the shares was ultra vires and illegal<sup>93</sup> that the expropriation did not meet the procedural requirements<sup>94</sup> of the Lands Acquisition Act, that LAP was not given the opportunity to be heard regarding the expropriation and finally that the government's decision was arbitrary and unreasonable.<sup>95</sup>

Two months following the commencement of judicial review proceedings by LAP however, the company decided to discontinue<sup>96</sup> the proceedings that were before the High Court. The court did not therefore have the opportunity to make rulings on the contentions of LAP against the state as raised in its application. There was no reason advanced by LAP as to why it was withdrawing the judicial review proceedings. However, it can be deduced that the reason for the withdrawal of the proceedings could have been motivated by an 'appreciation' by LAP of the nature of judicial review and the inherent limitations of the redress that can be sought as well as the orders that may be given by a court in such an action. For example, any finding of the court in judicial review would have related only to the propriety or lack

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<sup>90</sup> J. Ngoma "LAP vows to fight for Zamtel" *The Post* 8 January 2012, 4.

<sup>91</sup> The proceedings were commenced on 31 January 2012 under cause number 2012/HPC/0039. In accordance with the rules of Zambian High Court procedure, LAP had first needed to seek leave of the court prior to it commencing judicial review proceedings against the government. The requisite leave was granted by the court on 10 February 2012.

<sup>92</sup> The application was made through a Statement of Action and Originating of Notice of Motion which was filed into the Principal Registry of the High Court on 12 February, 2012.

<sup>93</sup> LAP argued specifically that the expropriation of shares was not contemplated by the LAA albeit the reference to the expropriation of "*property of any description*". This according to LAP is evidenced by the overwhelming reference to 'land' in the LAA and that this therefore showed the intention of Parliament when drafting the Act to limit its application to the expropriation of land. For that reason, LAP reasoned that the government acted ultra vires and illegally in expropriating the shares by means of the LAA.

<sup>94</sup> Op cit 84.

<sup>95</sup> At paragraph 3.1.1 of the Originating Notice of Motion for judicial review proceedings.

<sup>96</sup> A Notice of discontinuance was filed into the Principal Registry of the High Court on 20 March 2012.

thereof of the procedure used by the government in deciding to expropriate the LAP-owned shares in Zamtel. Even in the event that the court found that the government did not follow the right procedure in expropriating the shares, the court might simply have ordered the government to go back and follow the right procedure.<sup>97</sup> The court would not, in judicial review, make a determination on the merits of the government's decision to expropriate the shares from LAP. Thus a claim by LAP that the expropriation was illegal or politically motivated or indeed not for a public purpose, would be inappropriate in judicial review proceedings as the court would not be able to pronounce itself on such matters which would directly relate to the merits of the dispute between the parties.

In the context of the expropriation of its shares, it could be argued that LAP would conceivably desire a determination by the court that the government's decision to expropriate the shares was improper or illegal and that the said shares should therefore be returned to the former. In the alternative, LAP would conceivably be claiming pecuniary relief such as compensation or damages for the expropriation. Such reliefs cannot however be claimed in judicial review.

### **3.2.2 *Constitutional Petition***

Following its discontinuance of the judicial review proceedings against the government, LAP filed a constitutional petition<sup>98</sup> in which it primarily sought to protect its constitutional right to property ownership of the shares<sup>99</sup>. In the

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<sup>97</sup> If the court were to conceivably so order, it would be unlikely that the government would reverse its decision to expropriate the shares but would simply do so by following the right procedure as directed by the empowering statutory provisions, which would leave LAP in the same position as before it commenced the proceedings.

<sup>98</sup> The Constitutional Petition was filed into the Principal Registry of the High Court on 19 March 2012 under cause number 2012/HP/0287. The Petition, which is LAP's main action against the government before the Zambian courts, has not yet been finally determined and the proceedings are therefore ongoing.

<sup>99</sup> Pursuant to Articles 11 and 16 of the Constitution, which provide respectively for the protection of fundamental rights and freedoms (including the right to property ownership and non-discrimination) and that

Petition, LAP is seeking several declarations from the court on the government's decision to expropriate the property.

LAP *inter alia* seeks a declaration that the government's decision was null and void as it was in contravention of the Constitution and the Lands Acquisition Act. It is further seeking a declaration that the procedure used by the government to expropriate the shares was unlawful and that the court should therefore order the former to return the expropriated shares to LAP. Further still, LAP is seeking an order of prohibition to prevent the government from interfering in the 75 per cent equity interest of the former in Zamtel. In the alternative to the above orders and declarations that it seeks, LAP is seeking an order for compensation of its expropriated shares, to be calculated at the market value of the shares at the date of the expropriation. The hearing of the petition is ongoing and thus the issues raised therein have not been finally determined.

It is interesting to note that recently, the court ruled in favour of an application by LAP to have the petition heard in a neutral country.<sup>100</sup> The reason advanced by LAP in the application<sup>101</sup> was that its witnesses had been intimidated by government officials and that there was a real likelihood that they would continue to be intimidated during trial. In opposing the application<sup>102</sup>, the government contended that LAP had not cited any rule in support of its application and it was therefore not supported by law.

The court in allowing the application stated that the government did not deny or challenge the LAP's allegations regarding the intimidation of its witnesses and that it was therefore led to the conclusion that the allegations were true.<sup>103</sup>

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there is to be no expropriation of property except in accordance with an Act of Parliament which provides for the payment of adequate compensation, .

<sup>100</sup> A Ruling on the application was delivered on 19 February 2013. The High Court ruled that the matter be heard in the United Kingdom.

<sup>101</sup> Ex parte application to adduce evidence by alternative means.

<sup>102</sup> The government filed an Affidavit in Opposition into the Principal Registry of the High Court on 19 January 2013.

<sup>103</sup> Paragraph 26 of the Ruling.

In response to the state's contention that the application was not supported by any law, the court found that there was no prohibition against the receiving of evidence abroad and that as a result, it was not precluded from allowing the application made by LAP.<sup>104</sup>

The government has appealed<sup>105</sup> the court's decision to allow the application by LAP. The appeal has not yet been determined by the Supreme Court and thus it remains to be seen whether the High Court's decision to allow the application will be upheld.

It is commendable that the High Court in the first place allowed the application, particularly in light of the fact that there is no express rule or provision of the law that provides for the determination of disputes over which the Zambian courts have jurisdiction, to be heard before the courts of another country. The court's ruling in this regard does at least point to some measure of independence on the part of the court in determining the dispute and may provide some assurance that the determination of the issues raised in the petition will be impartial and based on sound legal reasoning.

### ***3.2.3 Order for interim relief***

Following the filing of its constitutional petition before the High Court, LAP sought an order for interim relief<sup>106</sup> from the High Court, directing the government not to deal further with the expropriated shares until the petition had been finally determined.

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<sup>104</sup> Paragraph 32 of the Ruling

<sup>105</sup> In a Notice of Appeal filed into the Supreme Court on 26 February 2013.

<sup>106</sup> Order for Interim Relief filed into the Principal Registry of the High Court on 22 March, 2012.

LAP argued<sup>107</sup> that the government had on several occasions since the expropriation, made known its intentions of re-selling the shares to third parties. In particular it was submitted, the government had stated that it intended to restructure ownership of Zamtel to ensure that Zambian citizens owned the bulk of the shares therein. LAP further argued that if the shares were transferred to third parties and the High Court ruled in favour of the government returning ownership of the shares to LAP, the proceedings would be rendered academic as the shares would no longer be in the possession of the government.

In opposing the order for interim relief, the government submitted that the correct procedure under Zambian law was that the main application before the courts had to be determined before an order was given, for the purposes of enforcing or securing the provisions of the applications. The government argued that even in the event that LAP was entitled to interim relief, damages would be an adequate remedy<sup>108</sup> if the High Court found in favour of the latter. The government argued in this regard that the claim for compensation made by LAP (in the constitutional petition) to be calculated at the market value of the shares was in essence a claim for damages and thus LAP would in any case be satisfied with such an order (for compensation or damages), in the event that the shares were not returned to it. The main argument made by the government and on which the matter fell to be determined, was whether the order for interim relief sought by LAP was in effect an order for an injunction against the state.<sup>109</sup>

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<sup>107</sup> In the Affidavit in opposition.

<sup>108</sup> The Zambian Supreme Court case of *Hondling Xing Xing Building Company v Zamcapital Enterprises Limited* 2010/HP/439, is authority for the proposition that an injunction (which the government argued was in essence an order for interim relief) will usually not be granted where damages will be an alternative and adequate remedy to the 'injury' complained of if the applicant succeeded in the main action.

<sup>109</sup> Affidavit in Opposition to Summons for an Order of Interim Relief at paragraph 18

An injunction against the state cannot be obtained by virtue of the State Proceedings Act<sup>110</sup> and the government therefore argued that the relief being sought by LAP was therefore not tenable at law. LAP argued that the order for interim relief was not an injunction but was rather akin to the relief sought in judicial review to “*stay or defer the continued implementation of an administrative decision until the determination of the matter*”<sup>111</sup>.

The court by referring to various sources that provided meaning to the words used by LAP in its application for the order, concluded that the relief sought by the latter was “*no more than an ingenious application for an injunction against the state*”<sup>112</sup> and that it could therefore not grant LAP the relief it sought, by virtue of the prohibition in the State Proceedings Act. The court went on further to state that even in the [unlikely] event that the application by LAP did not amount to an injunction against the state, the damages sought by LAP in the petition in the form of compensation would be adequate as a remedy in the event that LAP succeeded in its petition. The court ruled that it would not be impossible to determine all the damages to which LAP would be entitled if the constitutional petition was determined in its favour, and that the existence of that fact did not therefore warrant the granting of the order sought by LAP.<sup>113</sup> The order for interim relief sought by LAP was therefore dismissed.

The court’s ruling in this regard may suggest that in the event that it finds in favour of LAP in the petition, an order reversing the expropriation is unlikely and that perhaps an order for compensation is more likely to be granted.

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<sup>110</sup> Chapter 71 of the Laws of Zambia. Section 16 thereof provides that in any proceedings against the state, where the relief sought is an injunction, a court shall not grant an injunction.... “*but may in lieu thereof make an order declaratory of the parties*”.

<sup>111</sup> Affidavit in Support of Summons for an Order of Interim Relief at paragraph 21.

<sup>112</sup> As stated by the Hon. Mr. Justice Wood at paragraph 14 of the Ruling.

<sup>113</sup> Op cit 112 at paragraph 24 of the Ruling.

## CHAPTER 4

### 4. REGIONAL AND INTERNATIONAL LAW RESOLUTION OF INVESTMENT EXPROPRIATION DISPUTES

Having considered the domestic proceedings commenced by LAP against the government in the preceding chapter, and the possible limitations in the actions that may be validly commenced by an investor<sup>114</sup> and the orders<sup>115</sup> that it may seek from the courts within the existing framework of the Zambian law, it is necessary to consider whether the international legal framework for the resolution of investment disputes provides investors with an additional avenue, free of the limitations highlighted in the previous chapter.

Further, and as has been evidenced by an application sought by LAP before the High Court<sup>116</sup> to have the constitutional petition heard in a neutral country (for the reason that there has been improper influence exerted over the domestic proceedings by the state or its elements to the detriment of LAP), it is vitally important for investors to have recourse to a neutral regional or international adjudicating forum at which host states will be unable to exercise any improper influence over the determination of a dispute with an investor.

The discussion hereunder will also involve a consideration of the international law requirements for lawful property expropriation. These requirements have crystallised into what is sufficiently referred to as the customary international law on property expropriation and have been restated in various forms in different jurisdictions. However, the Zambian law

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<sup>114</sup>Having regard to the limitations relating to the commencement of important proceedings by an affected property owner such as judicial review proceedings against the government discussed at 2.1.1.

<sup>115</sup>This issue is illustrated at 3.2.1 where the limitations relating to the remedies that can be validly sought by an affected party in judicial review are highlighted. A further example to the limited orders that may be made against the government is discussed at 3.2.3 above relating to the granting of interim relief to an affected party, particularly against the state (in accordance with the provisions of the State Proceedings Act) for the reason that damages would be an adequate remedy.

<sup>116</sup>An ex parte application to adduce evidence by alternative means discussed at 3.2.2 above.

requirements for property expropriations as stated by the Constitution<sup>117</sup> and the LAA<sup>118</sup> have not adequately adopted these requirements with the result that there is insufficient protection of property rights for investors in Zambia. The potential consequence of this inadequacy in the protection of investors' property rights could be that more investors, at least those in Zambia who may find themselves in LAP's position will seek recourse within the international law framework. The discussion will therefore serve the useful purpose of informing investors of the appropriate forum before which they could bring their claims against states and the procedure that must be followed in bringing the said claims.

The starting point in achieving a discussion encompassing the issues highlighted above will be to set out a general overview of the resolution of investment disputes by international (including regional) tribunals. The discussion here will be premised on the existence of disputes arising out of international investment agreements or trade treaties governing the investment relationship between the parties, where it has been agreed that any disputes arising will be determined by arbitration before tribunals selected by the parties. This is due to the fact that most major investments are regulated by such agreements or treaties and the determination of investment disputes (such as those relating to unlawful expropriations) provide a strong reference point for the determination of those investment disputes not regulated by such treaties.

For the reason that investment agreements are not always regulated by investment treaties, it is necessary to consider in turn, an identified regional and international tribunal that have jurisdiction to hear investment disputes and the remedies that may be awarded to investors by those tribunals, where there is no guiding investment treaty or other international investment agreement pursuant to which the dispute may be determined, and whether

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<sup>117</sup> Refer to the discussion on the 'property clause' of the Zambian Constitution at 2.1.1 above

<sup>118</sup> Refer to the discussion at 2.1.2 above

such remedies are ultimately adequate for the protection of investors' property rights in host states.

#### 4.1 General approach to state expropriations by international tribunals

##### 4.1.1 *Expropriations in breach of investment agreements*

Investment agreements between states and foreign investors tend to be governed by international investment agreements (IIAs), bilateral investment treaties (BITs), multilateral investment treaties (MITs) or preferential trade agreements and not by the existing domestic laws of the host state. These treaty based agreements are preferable to ordinary contracts governed by the domestic laws of host states because they provide a clear and neutral regulatory framework within which investment agreements are concluded. In particular, they offer investors with strong guarantees with respect to *inter alia* fair and equitable treatment, and protection from expropriation.<sup>119</sup>

With respect to the protection from expropriation, a large number of IIAs, BITs or MITs provide that the contracting state will not expropriate property unless for a public purpose, in accordance with a law of general application and upon payment of adequate or appropriate compensation.<sup>120</sup> An expropriation that does not conform to the requirements as stated is therefore a breach of the treaty obligations and falls to be resolved by the relevant dispute mechanisms agreed to by the parties.

It follows that if a tribunal or other adjudicating forum resolving a treaty dispute finds that a particular expropriation is in breach of the stated requirements and is therefore unlawful, it should make an appropriate order against the expropriating state. The most common orders given by tribunals

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<sup>119</sup> G Chien Yen *The Sharp Edge of International Investment Agreements: Expropriation and Dispute Settlement*, (2011) 2.

<sup>120</sup> There are several variations to the wording that may be used in this regard. These are however the general requirements relating to the legality of expropriations. G Chien op cit 115 at 5.

against states in this regard are pecuniary in nature<sup>121</sup> and more particularly, in the form of compensation.

Further, to the extent that an unlawful expropriation is a breach of agreement between the state and an investor<sup>122</sup>, it is logical to conclude that tribunals should be able to make other orders against the state that relate to breach of contract, such as specific performance. An order for specific performance would naturally have the effect of nullifying an unlawful expropriation by the state as the latter would be required to perform under the agreement as it would have prior to the expropriation.

Although the majority of cases<sup>123</sup> that have dealt with unlawful expropriations have limited the orders against the erring states to pecuniary compensation<sup>124</sup>, in the landmark case of *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libyan Arab Republic* (TOPCO), the sole arbitrator determined that *restitutio in integrum* was the preferred remedy in international law and he therefore ordered the Libyan government to resume performance under the relevant concession agreement. The conclusion on the appropriate remedy arrived at in that case was however premised on the finding that the arbitration was directly governed by customary international law<sup>125</sup> and not by domestic law. It may therefore be that an arbitral tribunal that solely applies domestic law to an investment dispute due perhaps to a choice of law clause by the parties would not give an order having the effect of a *restitutio in integrum* as was the case in TOPCO.

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<sup>121</sup> Schreuer notes that ICSID Tribunals almost always grant relief in the form of pecuniary damages. C. Schreuer 'Non-Pecuniary Remedies in ICSID Arbitration' (2004) 4, 20 *Arbitration International* 325. See also, J. Cantegreil 'The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law' (2011) 22, 2 *European Journal of International Law* 442.

<sup>122</sup> Where a clause in the agreement provides that the state will not carry out an 'unlawful expropriation' or more accurately one that is not in accordance with the laws of the state governing expropriations.

<sup>123</sup> The leading cases in this regard are the Libyan oil cases between 1971 and 1974. *British Petroleum v Libyan Arab Republic* 53 ILR 297 (1973); *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libyan Arab Republic* 53 ILR 389 (1977) and *Libyan American Oil Co. v Libyan Arab Republic* 20 ILM 1 (1981).

<sup>124</sup> J. Cantegreil op cit 119 at 443.

<sup>125</sup> A. Norton and M. Patrick 'Law of the Future or a Law of the Past- Modern Tribunals and the International Law of Expropriation' (1991) 85 *The American Journal of International Law* 480. The arbitrator in TOPCO, in coming to his conclusion, relied heavily on the case law of international arbitration tribunals.

#### 4.1.2 *Expropriations in breach of international customary law*

The majority of IIAs, BITs or MITs provide that states may only expropriate investments if the takings are for a public purpose, in accordance with due process of the law and accompanied by appropriate compensation<sup>126</sup>. To these requirements is also often added one that the takings must be non-discriminatory. The above requirements have crystallised sufficiently to represent what is now the customary international law<sup>127</sup> on expropriation.<sup>128</sup>

Tribunals adjudicating upon international investment disputes relating to the legality of an expropriation, particularly where the agreement between the parties does not refer to the requirements for a valid expropriation or where international customary law on expropriation is directly applicable, will therefore first have to determine whether there has been an expropriation, and after it has so determined, assess the conduct of the expropriating state against the requirements stated above.

The most contentious requirements are usually those relating to the public purpose or interest for which expropriations are made and the appropriate or adequate compensation payable.

The public purpose requirement is recognised by most legal systems and will usually give rise to a similar discussion in each system. The assessment of

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<sup>126</sup> Compensation is deemed appropriate if it is adequate, effective and prompt. *World Bank Guidelines on the Treatment of Foreign Direct Investment* 6, available at <http://italaw.com/documents/WorldBank.pdf>, accessed on 12 November, 2013.

<sup>127</sup> This is the “modified” customary international law on expropriations, particularly with respect to the requirement for the payment of compensation. The requirements for compensation were first laid out by United States Secretary of State Cordell Hull in 1938 and became known as the Hull doctrine;—namely that [in addition to the other requirements for a lawful expropriation], compensation should be prompt, adequate and effective. The doctrine has however found less support over the years, particularly amongst developing countries and the requirement has been commonly reformulated as the right to receive ‘appropriate compensation’. This standard is less onerous and allows states to for instance, take into account its relevant laws and regulations and all other circumstances that it considers pertinent in offering compensation for the expropriation. K. Smith et al *The law of Compensation for Expropriated Companies and the Valuation Methods used to achieve that Compensation*, 2001, available at <http://users.wfu.edu/palmitar/Law&Valuation/Papers/2001/Smith.htm> accessed on 12 November, 2013.

<sup>128</sup> UNCTAD, DIAE and IA (7/2011). *UNCTAD Series on International Investment Agreements II 27*.

whether a taking has been made in the public interest in accordance with international customary law will sometimes, and rightly so, involve a determination of whether it has been made in pursuance of a legitimate public welfare objective, as opposed to a purely private gain or illicit end<sup>129</sup> which serves only to benefit the government's political interests and not those of the citizens.

In *ADC v Hungary*<sup>130</sup>, the tribunal noted that a reference to 'public interest' required some genuine interest of the public and that "*...if mere reference to public interest could magically put such interest into existence in order to satisfy the requirement, the requirement would be rendered meaningless as it would always be met*"<sup>131</sup>. In *BP v Libya*<sup>132</sup>, the arbitrator held that the taking of a foreign oil company as an act of political retaliation did not qualify as a public purpose. The tribunal in that case concluded that the nationalisation of the company violated international law as it was made purely for extraneous political reasons and was arbitrary and discriminatory in character.<sup>133</sup> It could be therefore, that a tribunal will not simply accept an expropriation as being for a public purpose simply because it is stated as such, and will assess the public purpose sought to be achieved by a state, before satisfying itself that the requirement has been met.

## **4.2 Investor-state dispute settlement within the framework of the judicial organs of African regional institutions<sup>134</sup>**

### ***4.2.1 Southern African Development Community***

The Southern African Development Community (SADC)<sup>135</sup> is the principal framework for regional integration in southern Africa and its aims and

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<sup>129</sup> Ibid.

<sup>130</sup> ICSID Case No. ARB/03/16.

<sup>131</sup> At paragraph 432.

<sup>132</sup> *Supra* n 9 .

<sup>133</sup> Schreuer *op cit* 5 at 329

<sup>134</sup> The Institutions that will be discussed are the Southern African Development Community, the Common Market for Eastern and Southern Africa and the African Union.

objectives are set out in the SADC Treaty. One of the objectives of SADC is to achieve economic growth and alleviate poverty<sup>136</sup> and to this end, FDI is an important activity that seeks to achieve this goal within the region. It is noted that SADC is both a major recipient and provider of FDI in a diverse range of sectors.<sup>137</sup>

To the extent that FDI is a means to achieve economic growth within the SADC region, it can be assumed that an act by a member state, such as an unlawful or arbitrary expropriation of a foreign investor's assets, that has the effect of threatening FDI, is at least an indirect breach of an objective of the treaty, giving the institution or the relevant organ thereof, 'jurisdiction' to intervene in the state conduct complained of.<sup>138</sup>

Within the framework of the *current* SADC Treaty, disputes fall to be adjudicated by the SADC Tribunal<sup>139</sup> (the "Tribunal") which is the judicial wing of SADC. The matters relating to the composition, powers, functions and other matters concerning the governing of the Tribunal are prescribed in a Protocol<sup>140</sup>.

The Tribunal's jurisdiction extends *inter alia* to the adjudication of disputes between member states and between natural or legal persons and member states.<sup>141</sup> It would appear, *prima facie*, that a foreign investor (which in the context of the discussion is a legal person) who at least has an establishment within the member state has *locus standi* to commence proceedings against a member state with which it is in dispute, before the Tribunal. The right of a

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<sup>135</sup> SADC was established by the Declaration and Treaty of the Southern African Development Community, at the Summit of Heads of State of Government on 17 August 1992 in Windhoek, Namibia.

<sup>136</sup> As provided for in Article 5 (1) (a) of the SADC Treaty.

<sup>137</sup> D. Zampini, 'Developing a balanced framework for FDI in SADC: a decent work perspective'-Chapter 5 *Monitoring Regional Integration in Southern Africa Yearbook 2008*, 1.

<sup>138</sup> In terms of the Protocol on the Tribunal of the SADC, the Tribunal has jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and the Protocol and which relate to the interpretation and application of the Treaty.

<sup>139</sup> The Tribunal is established by Article 9 of the SADC Treaty. The Tribunal which came into operation after the requisite Protocol was signed has been disbanded and thus the discussion is premised on the structure, jurisdiction and powers of enforcement of the Tribunal as contemplated by the Protocol.

<sup>140</sup> The Protocol establishing the Tribunal was signed by SADC on 7 August, 2000.

<sup>141</sup> Article 15(1) of the Protocol.

person to bring a dispute before the Tribunal is however qualified: such person can only approach the Tribunal after they have exhausted all local remedies in the member state.<sup>142</sup> They are only able to approach the Tribunal directly if there are no effective domestic remedies available or if the proceedings thereunder are unduly prolonged.<sup>143</sup>

A notable advantage to an investor of bringing a dispute before the Tribunal relates to the impartiality and independence of the judges appointed thereto<sup>144</sup>. Once a judge is appointed, he is not a delegate of government or his own country.<sup>145</sup> Furthermore, judges appointed to the Tribunal may not hold a political or administrative office in any other state for the tenure of their term at the Tribunal.<sup>146</sup> This ensures that they are not unfairly influenced by any member states in the decisions that they reach. An investor therefore does not have to contend with judges, who may not, for political or other reasons, wish to decide against a state, as may be the case where the dispute is heard before the domestic courts.

The above factors highlight how the current framework of the Tribunal<sup>147</sup> provides, to some extent, a reliable means for an investor to bring a dispute against the state in the context of regional law. However, there are some constraints to the Tribunal's effectiveness in resolving disputes such as investment disputes, relating particularly to the enforcement of the Tribunal's decisions against member states.

Firstly, there is no express mention either in the Treaty or the Protocol on the status of the SADC law in the member states.<sup>148</sup> This entails that there is still a possibility that national law will prevail over the Tribunal's decisions, unless

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<sup>142</sup> Article 15 (2) of the Protocol.

<sup>143</sup> Ibid.

<sup>144</sup> Article 3(6) of the Protocol.

<sup>145</sup> O. Ruppel and F. Bangamwabo, *The SADC Tribunal: a legal analysis of its mandate and role in regional intergration- Chapter 8* *Monitoring Regional Integration in Southern Africa Yearbook 2008*, 14.

<sup>146</sup> Ibid.

<sup>147</sup> As stated in the Protocol which has not as yet been amended.

<sup>148</sup> O. Ruppel and F. Bangamwabo op cit 147 at 21.

the national laws of the member state give recognition to the superior status of the SADC law<sup>149</sup>.

The need for the SADC law, at least the law as it relates to the jurisdiction of the Tribunal to determine disputes between states and other persons, to rank above national laws is imperative for the effective enforcing of the orders of the Tribunal against states. This is due to the fact that most domestic legal systems may not recognise the decisions of other jurisdictions or may have limitations regarding the enforcement of the orders made by the courts or tribunals in those jurisdictions.

In Zambia for example, the decisions of 'foreign' courts or tribunals are enforceable using two principal methods. The first of these methods is in terms of the Foreign Judgments (Reciprocal Enforcement) Act<sup>150</sup> by which the decisions of courts in countries which have a reciprocal arrangement for enforceability with Zambia are enforceable by mere registration.<sup>151</sup> In terms of the second method which is outside the Act, the person in whose favour a decision is made would have to re-commence an action in a Zambian court and proceed using the judgment of the foreign court as a cause of action.<sup>152</sup>

The above example of the Zambian position further illustrates the need for the SADC as a regional organisation to attain the status as a supra-national body which will require member states to allow for the superior recognition of the decisions of the Tribunal<sup>153</sup> and the direct enforcement of the orders thereof,

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<sup>149</sup> Ibid.

<sup>150</sup> Chapter 76 of the Laws of Zambia

<sup>151</sup> The SADC as a regional organisation of states is not a "country" capable of entering into a reciprocal arrangement for the enforcement of foreign judgments in Zambia and thus the decisions of the Tribunal are not enforceable by registration in accordance with the provisions of the Act. Furthermore, there is not yet a single country that has entered into such an arrangement with the Zambia.

<sup>152</sup> This was stated in the unreported Zambian Supreme Court case of *Zanetta Nyendwa vs. Kenneth Paul Spooner* 2009/HP/250 and re-confirmed by the High Court in the case of *Attorney General v Dr Frederick Jacob Titus Chiluba and 7 others* 2007/HP/FJ/004.

<sup>153</sup> M Hulse (2012) Silencing a Supranational Court: The Rise and Fall of the SADC Tribunal, available from <http://www.e-ir.info/2012/10/25/silencing-a-supranational-court-the-rise-and-fall-of-the-sadc-tribunal/>, accessed on 10 February, 2014.

so as to further assure investors of proper redress against unlawful state action.

It has been submitted<sup>154</sup> that in the context of community (regional) judgments, national courts should not have jurisdiction to decline to enforce them.<sup>155</sup> The Protocol could therefore do well to provide that judgments of the Tribunal are to be directly enforceable in the member states against which they are made. This would inevitably require an amendment to the Treaty mandating member states to enact national legislation which would allow for the direct enforcement of the decisions of the Tribunal.

The potential implication of the non-ranking of SADC law within the hierarchy of the legal systems of member states may create challenges for investors in their attempts to enforce decisions of the Tribunal against states before their respective domestic courts.

Perhaps the biggest constraint to the effectiveness of the Tribunal and one which significantly impedes the protection of investors in investment disputes with states is the fact that the Tribunal has no power to impose any sanction against a state that defies an order or judgment thereof. Where an aggrieved party brings to the attention of the Tribunal the refusal of a state to comply with its decision, the Tribunal is required to refer the matter to the Summit<sup>156</sup> for the latter to take appropriate action against the state.<sup>157</sup> The Summit is empowered to determine whether or not it will impose sanctions, and if it will so impose sanctions, the type of sanctions that it will impose, on a case by case basis.<sup>158</sup>

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<sup>154</sup> By notable scholar Richard Frimpong Oppong.

<sup>155</sup> R F. Oppong, 'Enforcing judgments of the SADC Tribunal in the domestic courts of member states' Chapter 7 *Monitoring Regional Integration in Southern Africa Yearbook 2010*, 125.

<sup>156</sup> The Summit of the Heads of State or Government of SADC established by Articles 9 and 10 of the Treaty.

<sup>157</sup> Article 33(1) (a) of the Protocol. It is noteworthy however, that sanctions are to be imposed where a state has "*persistently failed, without good reason, to fulfil obligations assumed under the Treaty*". It is unclear therefore, whether a state that fails only once to comply with the provisions of the Treaty, even where such failure is of a serious nature, would have sanctions imposed against it by the Summit.

<sup>158</sup> Article 33 (2) of the Protocol.

Leaving the imposition of sanctions for failure to comply with decisions of the Tribunal solely to the discretion of the Summit has inherent dangers. Firstly, it is inevitable that the Summit in making decisions will largely be guided and influenced by diplomacy and regime solidarity for the state concerned.<sup>159</sup> It is therefore unlikely that it would readily impose any sanctions or at least sanctions that would be serious enough to serve as a future deterrent against disregarding orders of the Tribunal, to the state concerned or indeed other member states.<sup>160</sup>

Secondly, the Summit, in making its decisions regarding the imposition of appropriate sanctions, does not exclude the participation of the state against which the decision is to be made.<sup>161</sup> The non-exclusion of the state concerned in the decision making process regarding possible sanctions, does not prevent that state from improperly influencing the other member states or at least a majority of them, through lobbying or other means, to vote against the imposition of any sanctions against it.

The above point is well illustrated by the suspension and subsequent disbanding of the Tribunal that occurred in 2010 and 2012 respectively<sup>162</sup>. The suspension of the Tribunal followed a series of decisions taken against the Zimbabwe government by the Tribunal between the years 2007 and 2010<sup>163</sup>, most notably that of *Mike Campbell (Pvt) Ltd and Others v Government of the Republic of Zimbabwe*<sup>164</sup>.

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<sup>159</sup>O. Ruppel and F. Bangamwabo op cit 147.

<sup>160</sup> The outcome of the Mike Campbell case discussed below (see fn 168) and the subsequent steps taken by the SADC Summit as a result of the Tribunal's judgment is evidence of the fact that no sanctions will readily be imposed on a member state even when objectively viewed, the state has committed a wrongful or unlawful act that warrants the imposition of sanctions.

<sup>161</sup> Article 33 (2) of the Treaty simply provides that the Summit will decide appropriate sanctions on a case by case basis and states nothing further regarding the participation of the state subject of the possible sanctions, in the decision making process.

<sup>162</sup> As provided in the Communiqué on the Extraordinary Summit of Heads of State and Government of SADC held at Windhoek, Namibia on 20 May 2011 and the Final Communiqué of the 32<sup>nd</sup> Summit of SADC Heads of State and Government held at Maputo, Mozambique on August 18, 2012, respectively.

<sup>163</sup> Between this period, the SADC Tribunal adjudicated upon 20 cases which essentially involved claims of human rights abuses by the Government of Zimbabwe. Mike Campbell Foundation *The SADC Tribunal: Set up, Scope, Review and Outcome: Justice Denied*, available at <http://www.mikecampbellfoundation.com/page/sadc-tribunal-background-scope-wti-review>, accessed on 3 December, 2013.

<sup>164</sup> SADC (T) Case No. 02/2007.

In that case, the applicants brought a claim before the Tribunal challenging the unlawful expropriation of its agricultural land by the Government, in breach of the latter's obligations under the Treaty.

Furthermore (and before the main matter was determined by the Tribunal), the applicant sought an interdict preventing the government evicting it from the land, pending determination of the matter by the Tribunal. The Government, however, defied the interdict and proceeded to brutally evict the applicants from the land in question.

With respect to the interdict that was disregarded, an urgent application was brought by the applicants before the Tribunal, which in turn referred the non-compliance by the Zimbabwe government with its order to the Summit, for the latter to take appropriate action<sup>165</sup>. No action in the form of imposition of sanctions or otherwise was however taken by the Summit against the government.

When the main matter was concluded by the Tribunal, it ruled that the expropriation of the land was unlawful<sup>166</sup> and in breach of the Treaty obligations. The Tribunal ordered *inter alia* that the government pay compensation to the applicants for the compulsory acquisition of their property.

The Zimbabwe government ignored the orders of the Tribunal and instead sought to withdraw from the Tribunal's jurisdiction.<sup>167</sup> Following its

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<sup>165</sup> This is in accordance with Article 32 (5) of the Protocol.

<sup>166</sup> The Tribunal in this regard grounded its findings on the fact that the expropriation was racially motivated and therefore a breach of Article 6 of the SADC Treaty. Furthermore, that the action of the Zimbabwe government was not in accordance with the principles of human rights, democracy and the rule of law as well as equity, balance and mutual benefit as required by Article 4 of the Treaty. O. Ruppel and F. Bangamwabo *Monitoring Regional Integration in Southern Africa Yearbook* (2008), 5.

<sup>167</sup> On 7 August 2009, Zimbabwe's Justice Minister Patrick Chinamasa wrote to the Tribunal to inform it of Zimbabwe's withdrawal therefrom, arguing that the Tribunal did not have jurisdiction over Zimbabwe and that Zimbabwe would no longer be bound by any of the former's past or future judgments. Mike Campbell Foundation op cit 163.

withdrawal from the Tribunal, the government of Zimbabwe embarked on intense lobbying<sup>168</sup> of other member states to support its position taken on the Tribunal.<sup>169</sup> This resulted in the Summit's decision to suspend the Tribunal and ultimately to disband it.

The Protocol establishing the Tribunal has not been formally repealed by the Treaty. However, the disbanding of the Tribunal effectively brought its current existence to an end. At a recent SADC Summit meeting<sup>170</sup>, it was resolved that a new Protocol on the Tribunal should be renegotiated, but that its mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between member states.<sup>171</sup>

The proposed structure and revised jurisdiction of the Tribunal effectively eliminates any possibility of a foreign investor having its investment dispute with a member state, determined by the Tribunal. An investor within a member state of the SADC region is therefore restricted to having their disputes heard by domestic courts, which restriction often poses a major disadvantage for the reasons highlighted above.

### **4.3 Investor-state dispute resolution within the framework of international institutions**

#### ***4.3.1 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>172</sup>***

Outside the regional legal framework, there exists no 'international court' which hears and determines investment disputes between states and foreign investors. Therefore, in the wider international context, such disputes fall to

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<sup>168</sup> The Zimbabwe Minister of Justice, Chinamasa, successfully lobbied his ministerial counterparts in other SADC countries to support Harare's stance on the removal of the Tribunal. L. Nathan 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (November 2013) 35 *Human Rights Quarterly* 4 at 877.

<sup>169</sup> Ibid.

<sup>170</sup> Held on 18 August, 2013 in Lilongwe, Malawi.

<sup>171</sup> 'SADC Tribunal', available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>, accessed on 3 December, 2013.

<sup>172</sup> The Convention entered into force on 14 October, 1966.

be adjudicated largely by international arbitration tribunals, usually appointed by the parties in their investment agreement prior to the dispute arising.

Recognising that investment disputes between investors and host states are most effectively resolved through arbitration<sup>173</sup>, the World Bank conceived a special forum for arbitrating investment disputes known as the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID).<sup>174</sup> The ICSID (the “Centre”) has provided a platform where eligible states and foreign investors can bring their investment disputes to neutral arbitration tribunals which are constituted and administered in terms of the Centre’s arbitration proceedings.<sup>175</sup>

The Centre has jurisdiction over legal disputes arising directly out of an investment between a contracting state<sup>176</sup> and a national of another contracting state, where the parties consent in writing to submit their dispute to the Centre.<sup>177</sup> Where the parties have given their consent as required by the Convention, no party may withdraw it unilaterally.<sup>178</sup> The requirement of written consent by both parties before the Centre can assume jurisdiction merits some further comment.

The wording of the Convention is unequivocal in requiring written consent of the parties, notwithstanding that it has jurisdiction over the parties by virtue of the state involved in the dispute being signatory to the ICSID Convention. In addition, the requirement that the parties consent in writing to their dispute being submitted to arbitration by the Centre does not state anything further on the procedure to be followed by the parties in giving the said

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<sup>173</sup> For the reason largely that investors may be discriminated against or receive some other unfair treatment before the local courts of a host state.

<sup>174</sup> L Reed et al *Guide to ICSID Arbitration* (2004) 2.

<sup>175</sup> Chapter IV of the ICSID Convention.

<sup>176</sup> There are currently 158 contracting states under the ICSID Convention, available at <https://icsid.worldbank.org/ICSID/>, accessed on 9 December, 2013.

<sup>177</sup> Article 25(1) of ICSID Convention.

<sup>178</sup> Ibid.

consent.<sup>179</sup> It is reasonable to conclude therefore, that the consent can be given in the investment agreement concluded by the parties, by way of a clause providing for arbitration by the Centre in the event of a dispute arising.

‘Consent in writing’ may still also be given where the investment agreement does not provide for arbitration by the Centre, where the relevant investment laws of the host state or treaty under which the investment agreement was concluded, confer jurisdiction on the Centre.<sup>180</sup> In such a case, the requirement for written consent by both parties is only ‘perfected’ when the investor writes to the state accepting the jurisdiction of the Centre (prior to the dispute arising) or where it brings a claim against the state to the Centre, after a dispute has arisen.

The position is unclear where the state repeals the laws conferring jurisdiction on the Centre, after an investor has consented to the jurisdiction of the Centre by submitting a dispute thereto. Conceivably, if a state were to repeal the applicable laws in this manner, this would effectively amount to a unilateral withdrawal of consent which is prohibited. However, it is more than likely that if the request for arbitration submitted to the Centre has already been accepted, it would proceed with the arbitration irrespective of the state action against it.

The arbitration tribunal to hear the dispute is required to be constituted by the Parties themselves<sup>181</sup> or if they fail to do so within 90 days of submitting their dispute to the Centre, the Chairman thereof appoints arbitrators to constitute a tribunal. The tribunal that is appointed decides the dispute in accordance with the rules of law chosen by the parties.<sup>182</sup> If the parties however fail to choose the law to govern the proceedings themselves, the tribunal is bound to

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<sup>179</sup> L. Reed et al op cit 174 at 35.

<sup>180</sup> Ibid.

<sup>181</sup> Article 37 of the ICSID Convention.

<sup>182</sup> Article 42(1).

apply the law of the contracting state party to the dispute and such other international laws as may be applicable.<sup>183</sup>

The fact that the tribunal may apply the law of the host state in an investment dispute can prove manifestly unfair to an investor in certain situations, particularly where that law does not adequately protect the interests of the investor. Furthermore, the very reason that referring a dispute with the host state to the Centre is preferable for an investor is because the laws of the host state may be inadequate or ineffective in the first place. The Convention may have done well to elevate international customary law or some other neutral international law system (over the national law of the contracting state) to govern the proceedings, in such an event.

Notwithstanding the above potential prejudice relating to the applicable law to an investor, the tribunal may determine the dispute *ex aequo et bono*<sup>184</sup> if the parties so consent.<sup>185</sup> The tribunal may in such a case therefore, refer to a neutral legal system.

The award given by the tribunal after it has determined the dispute is binding on the parties and is not subject to appeal except in accordance with the Convention.<sup>186</sup> Each contracting state is required to recognise an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by the award, as if the latter were a final judgment of a court in that state.<sup>187</sup>

A question arises as to whether the reference to “pecuniary obligations imposed by the award” in the Convention<sup>188</sup> limits the awards that may be given by a tribunal, to those that are pecuniary in nature. It has been

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<sup>183</sup> Ibid.

<sup>184</sup> According to Black’s Law Dictionary 6th ed. (1990) at 256, this refers to a judgment based on considerations of fairness, not on considerations of existing law.

<sup>185</sup> Article 42 (3).

<sup>186</sup> Article 53 (2) .

<sup>187</sup> Article 54.

<sup>188</sup> Ibid.

submitted<sup>189</sup> that the fact that ICSID tribunals have generally granted pecuniary relief rather than ordered specific performance, is not based on any fundamental restriction on their power to do so, but rather by the fact that investors almost always seem to frame their claims in monetary damages.<sup>190</sup>

The statement by the International Court of Justice in the old authoritative case of *Factory at Chorzow (Germany v Poland)*<sup>191</sup>, provides authority for the proposition that tribunals may order non-pecuniary relief such as specific performance or restitution, particularly where there has been unlawful state conduct. In that case the court stated that “*the essential principle contained in the notion of an illegal act as established by decisions of international tribunals, is that reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*”<sup>192</sup> The reasoning of the court in this case is particularly significant in the context of unlawful state expropriations, in which investors more often than not would prefer to continue with their investment in the host state.

The Centre’s tribunals have in the past ordered non-pecuniary awards or relief, particularly in the form of specific performance or injunctions where the claims related to unlawful expropriations.<sup>193</sup> In the case of *Enron v Argentina*, the claimants argued that stamp taxes assessed by the government were tantamount to an expropriation, and that they should therefore be declared unlawful and annulled by the tribunal.<sup>194</sup> The Argentine government objected to the Centre’s jurisdiction to grant the claimants’ relief by arguing that the tribunal could only make a finding that there was an illegal expropriation and award compensation if appropriate, but could not impede

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<sup>189</sup> By notable scholar, Christoph Schreuer,

<sup>190</sup> C. Schreuer Non-Pecuniary Remedies in ICSID Arbitration, *Arbitration International* Vol 4 No. 20, p 329.

<sup>191</sup> 1928 P.C.I.J (Ser. A) No. 17 (Sept 13)

<sup>192</sup> Paragraph 125.

<sup>193</sup> Most notably the decisions of *Antoine Geotz v Brundi* 10 February ICSID Case No. ARB/01/2 2000 and that of *Enron Corporation and Penderosa Assets, LP v Argentine Republic* ICSID Case No. ARB/01/3 2007.

<sup>194</sup> Schreuer op cit 190 at 330.

an expropriation that fell within the ambit of state sovereignty.<sup>195</sup> The claimants however argued that an ICSID award could deal with non-pecuniary determinations, including specific performance and injunctions, and the tribunal agreed with them in this regard. The tribunal stated that based on its examination of the powers of international courts and tribunals to order measures concerning performance or injunction, it had the powers to order such relief.<sup>196</sup>

#### **4.3.2 ICSID Additional Facility Rules**

The Centre also has jurisdiction over disputes in terms of the Additional Facility Rules (the “Rules”) of the Convention.<sup>197</sup> The Rules apply to investment disputes submitted to the Centre between parties, at least one of which is a contracting state. Thus, an investor who is not a national of a contracting state or who enters into an investment agreement with a state that is not a contracting state under the ICSID Convention, can still bring a dispute to be arbitrated under the auspices of the Centre, provided that the requisite mutual consent to the Centre’s jurisdiction is given by the state party.

A distinguishing feature of the Rules (from disputes brought under the ICSID Convention), is that the parties must first seek the approval of the Secretary General of the Centre before their consent to the Centre having jurisdiction over their dispute, can be given effect to.<sup>198</sup> If the parties consent to the jurisdiction of the Centre under the auspices of the Rules in their investment agreement, a copy of that agreement is required to be submitted to the

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<sup>195</sup> Ibid, 331.

<sup>196</sup> Ibid.

<sup>197</sup> Which were adopted by the Administrative Council of the ICSID in 2006.

<sup>198</sup> Article 4(1) of the Additional Facility Rules.

Secretary General and he thereafter must give his [further] consent to the Centre having jurisdiction over a dispute that may arise between the parties.

The requirement for the Secretary General to give his consent seems counter intuitive for two reasons. Firstly, the fact that the Rules exist in the first place to provide an international investment arbitration platform for parties who do not qualify to have their investment disputes arbitrated under the main ICSID Convention, implies that the Centre has extended its jurisdiction to those parties if they so wish (and if they give their written consent), and that by the Rules, the Secretary General consents beforehand, to such parties bringing their disputes before the Centre.

Secondly, and in the case of the requirement to submit an investment agreement that contemplates the jurisdiction of the Centre to the Secretary General for what would conceivably be an 'assessment' by him of the agreement and the suitability of a dispute arising thereunder to arbitration under the Rules, does not seem essential or even necessary. A foreign investor who undertakes an investment in a state is usually sophisticated and understands clauses such as those relating to arbitration and the conditions under which it can institute a claim under the Rules against the host state, and the consequences thereof. The state party likewise is more than likely to understand the content of the Rules, and the instances in which a dispute can be brought to the Centre thereunder. In any event, the tribunal that is constituted to hear a dispute is competent to rule on whether it has jurisdiction to determine a particular dispute which is purported to be brought in terms of the Rules.

Another point to note about the Rules is that the provisions of the ICSID Convention are not applicable thereto<sup>199</sup> and that tribunals constituted under

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<sup>199</sup> Article 3 of the Rules.

the Rules cannot take advantage of the of the Convention's self-contained provisions on recognition and enforcement of awards.<sup>200</sup>

The Rules therefore have inherent limitations in providing investors with a relatively easy international platform to which they can bring their investment disputes. The apparent 'discrimination' in some of the terms and procedures of the Convention and the Rules, seems unwarranted and even unfair, particularly for those investors who may be nationals of contracting states and find themselves in the unfortunate position of being in an investment dispute with non-contracting states.

The Rules nonetheless provide an important avenue through which investors can have their disputes with host states settled in the international arena, free from the challenges of having them adjudicated in the domestic legal system of the host state.<sup>201</sup>

The existence of the Centre as a body specialised in administering and enabling the resolution of investment disputes in the international legal framework is vitally important for a number of reasons. Firstly, the resolution of disputes under the auspices of the Centre, allows for investors to take full advantage of the benefits of arbitration. In the context of investment disputes, time is often of the essence as in some cases investors are unable to proceed with their business undertakings as a result of an asset, which is central to their business operations, being expropriated. The fact that generally arbitrations proceed without undue delays and that tribunals render the decisions fairly quickly is of great importance to investors in this regard.

Although arbitrations are as a general rule private proceedings, and the awards made thereunder, confidential and not available to the public, the Secretary General of the Centre is required to publish, with the consent of both disputing parties, reports of conciliation commissions or awards

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<sup>200</sup> L. Reed et al op cit 174 at 10.

<sup>201</sup> L. Reed et al op cit 174 at 55.

rendered by arbitral tribunals in ICSID proceedings.<sup>202</sup> This ensures that other foreign investors are guided in the manner in which they may bring investment disputes in the international law framework or the remedies that may be available to them in the event of disputes arising.

Investment arbitrations under the Centre however, still pose some challenges for investors. Firstly, and in direct contrast with the flexibility enjoyed by tribunals in making awards, is the fact that tribunals are not bound by the common law doctrine of *stare decisis*<sup>203</sup>. The lack of binding case law leads to lack of uniformity in the awards made by the tribunal over similar investor-state disputes.<sup>204</sup> It is argued that “*although the ICSID has been widely accepted as an international body providing for international investment dispute arbitration, it has not yet attained the status of an overarching tribunal in international investments that is responsible for investor-state dispute resolution*”.<sup>205</sup> It is further submitted<sup>206</sup> that in the context of investor state dispute resolutions conducted within the framework of the Centre, precedent should play a role because state measures affect not only investors, but other third parties for whom it is vital that precedent in respect of any decision made in a dispute between the investor (to whom it is connected) and the state, apply. This would be of significance in any related claim that such third party may bring against the state, to a tribunal constituted under the Centre.

Perhaps the most notable impediment to the Centre’s ability to fully address the scepticism that may be had by foreign investors investing into developing economies, for reasons of unlawful expropriations of investment assets by host states<sup>207</sup>, is the fact that no provision is made for action to be taken against a party that defies an award of the tribunal. Although it is accepted that there are inherent limitations that an arbitral tribunal has in relation to

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<sup>202</sup> In accordance with the ICSID Administrative and Financial Regulation No.22

<sup>203</sup> M. Dimsey (2008) *The Resolution of International Investment Disputes*, 40.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> M Dimsey op cit 108 at 41.

<sup>207</sup> Particularly in politically and economically volatile states where such expropriations are more likely to occur.

ensuring the enforcement of an award by a state, it is submitted that the Convention could have well provided a mechanism whereby tribunals report to the Centre which in turn reports to the relevant organ of the World Bank, on the state's conduct and depending on the extent of disregard of the award by the state, appropriate action could be taken against the state such as the imposition of [administrative] sanctions<sup>208</sup> or expulsion from the Convention.

The Centre, in setting out the consequences of non-compliance with orders of tribunals in this way, would serve as an effective deterrent to unlawful state conduct, and would further augment the serious and binding nature of investment arbitrations concluded under the Convention or the Rules.

#### **4.4 Possible proceedings that may be brought by LAP against the government of Zambia under the current international framework for investor-state dispute resolution**

##### **4.4.1 Agreement-based arbitration**

It is probable<sup>209</sup> that the main 'sale' agreement entered into between LAP and the Zambian government, namely the Share Sale and Purchase Agreement including other relevant transaction documents and agreements relating to the sale of the shares in Zamtel, contains an arbitration clause requiring the parties to refer any dispute that may arise between them to arbitration<sup>210</sup>.

There is a possibility that the Zambian High Court may dismiss LAP's applications that are before it, in light of any decision by LAP to commence arbitration proceedings parallel to the Zambian proceedings.<sup>211</sup> Therefore, any

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<sup>208</sup> These could be to the effect that the recalcitrant state is not to benefit from the programmes or projects initiated by the World Bank Group.

<sup>209</sup> The SPA is not a publicly available document and thus an attempt at discussing its possible provisions is based on the assumption that it contains the usual clauses (such as arbitration) clauses found in sale agreements relating to large commercial transactions.

<sup>210</sup> The parties were further most likely to have referred their dispute to international institutional arbitration.

<sup>211</sup> It has been held by the High Court in the Supreme Court case of *Development Bank of Zambia Limited and KPMG Peat Marwick vs. Sunvest Limited and Sun Pharmaceuticals Limited* Judgment No. 3 of 1997 that the courts will generally dismiss an action before it if it determines that there is a "multiplicity of process" relating to the same matter as a result of a litigant commencing process before different for a. In that case, the court held

claims brought by LAP in arbitration proceedings must be couched in terms different to those in the domestic proceedings and to the extent possible, must be based on a distinct cause of action so as to prevent the dismissal of the proceedings by the domestic courts. There is further the possibility that the arbitration tribunal constituted to hear the dispute between LAP and the government may stay any proceedings<sup>212</sup> pending the determination of the matter by the domestic courts.

To the extent that LAP will be able to commence parallel proceedings against the government, this would be of significant advantage as LAP could then bring different claims that it may have against the government, separately before the two fora. An example relates to the declarations being sought by LAP in the constitutional petition before the domestic courts relating to *inter alia*, the return of the shares to LAP on the basis that the expropriation was illegal. An arbitral tribunal would not have the jurisdiction to make such a declaration and thus the parallel proceedings would allow LAP to seek such declarations before the domestic courts and the appropriate remedies from an arbitration tribunal.

Further, in the event that there is no determination by the court of the amount of compensation that is payable to LAP or that the amount determined is ineffective, there is more likelihood that an arbitral tribunal would carry out a realistic and market-based calculation of the compensation payable by the government.

The benefits of arbitration proceedings in general, as discussed in the previous chapter would be available to LAP if it decided to commence such proceedings. An important advantage of arbitration as it relates to the dispute

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that there would be a multiplicity of process where: (a) the parties in two or more matters were the same; (b) the causes of actions in two or more matters were the same or similar (c) that two or more matters were arising from the same transaction of facts; and (d) the remedies or reliefs sought or likely to be granted in two or more matters were the same or similar.

<sup>212</sup> There could be determinations in the local courts that may act as issue estoppels binding on the arbitration tribunal and in such a case, a stay of the proceedings would be necessary.

between LAP and the government is the timeous determination of the dispute by the tribunal that is appointed by the parties. This would be particularly significant for LAP which may be anxious to have a clear position on its Zamtel shareholding as to enable make a determination on whether it may need to make another investment if its Zamtel shares will not be returned to it. However, the fact that in the context of the current dispute between LAP and Zamtel, the proceedings of a tribunal may have to be stayed as a result of the proceedings before the domestic courts, may to some extent, remove the advantage of the timeous determination of disputes, offered by arbitration.

#### ***4.4.2 Regional based investor-state dispute resolution***

LAP would only be able to commence proceedings against the government under the auspices of the s SADC Tribunal in its un-repealed form, if the country in which it was incorporated, that is Libya, was like Zambia, also a member state of the SADC. LAP would however, still be able to commence proceedings before the Tribunal if *locus standi of legal persons* is interpreted (by the Tribunal itself) to extend to before the court does extend to legal persons who are nationals of non-member states but who are resident<sup>213</sup> in member states.

Therefore, there currently does not exist a means for the commencement of proceedings for unlawful expropriation by LAP the government under the current legal framework of the SADC discussed above and any attempts by LAP to follow this route in seeking to resolve its dispute with government would be an exercise in futility.

#### ***4.4.3 International institution-based investor-state dispute resolution***

The primary international institution that is mandated to hear investment disputes is the International Centre for the Settlement of Investment Disputes

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<sup>213</sup> Residence status may for example have been achieved by LAP if it registered a foreign branch or office in Zambia.

(ICSID), discussed above. As already pointed out<sup>214</sup>, the ICSID has jurisdiction to hear investment disputes between states and investors where either, the state is a contracting state of the ICSID Convention and the investor is a national of a contracting state of the Convention, or where only one of the parties is a contracting member thereof.<sup>215</sup>

Although Libya is not a contracting state to the Convention, and LAP is therefore not a national of such contracting state, Zambia is a contracting state to the Convention<sup>216</sup>. As such LAP may commence proceedings against the government under the auspices of the ICSID as the latter would prima facie have jurisdiction to determine the matter. However, the fact that the ICSID would have jurisdiction to determine any investment dispute that would arise between the government and LAP would have to have been agreed between the parties in their relevant transaction documents prior to the dispute arising.<sup>217</sup> If this was not agreed in the transaction documents by the parties, LAP and the government would have to both give their written consent (outside of the transaction documents), and in particular after the after the dispute has arisen, to have it determined by the ICSID.

LAP may also be able to refer its dispute with the government to the ICSID if any investment treaty between its own government and the Zambian government provides for the referring of investment disputes to the ICSID, or where any Zambian investment laws<sup>218</sup> confer such jurisdiction on the ICSID. In such a case, the ICSID would assume jurisdiction upon LAP commencing proceedings against the government.

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<sup>214</sup> See discussion on the ICSID Convention at 4.3.1.

<sup>215</sup> Article 25 (1) of the ICSID Convention.

<sup>216</sup> Zambia ratified the Convention on 17 June, 1970 and deposited its instruments of ratification on 17 July, 1970, available at

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>, accessed on 19 January, 2014.

<sup>217</sup> As provided by Article 25(1) of the ICSID Convention which requires written consent to have been given by the parties, of the ICSID's jurisdiction over the dispute.

<sup>218</sup> Under the auspices of the ZDA Act, section 17 (j) thereof makes provision for the government to enter into Investment Promotion and Protection Agreements (IPPA) with investors. IPPA's primarily seek to guarantee investments made into Zambia. However, the particular IPPA that is negotiated with the government will prescribe the manner in which disputes will be resolved and the relevant tribunal that will have jurisdiction over the dispute. (I presume none has been entered into with either Libya or LAP?)

The resolution of investment disputes under the auspices of the ICSID is through arbitration and thus the advantages of arbitration as highlighted in the preceding sections would be available to LAP in the determination of the dispute. Further, the fact that the government would be unable to unilaterally withdraw<sup>219</sup> from the proceedings once the ICSID assumes jurisdiction of the dispute would ensure that the former continues to participate in the proceedings until the final determination thereof.

Finally, bringing the dispute before the ICSID would entail that any possible orders made against the government (which in the context of ordinary arbitration would usually be private), would be in the international public domain and this may serve to ensure compliance with the order by the government, for fear of international public reprisal for any failure to comply therewith.

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<sup>219</sup> Article 25 (1) provides that there may be no unilateral withdrawal from the proceedings where both parties have consented in writing to the jurisdiction of the ICSID.

## CHAPTER 5

### 5. CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

The right to expropriate property owned by citizens is the [necessary] right of every sovereign state. In some instances, the property in the hands of private citizens is required for a greater public purpose and it therefore becomes necessary for the state to take ownership of that property in order to utilise it for the benefit of the public, even if this is in conflict with the rights of property ownership of the affected citizen[s].

Expropriations must, however, only be undertaken by the state where there is a genuine and legitimate public interest or purpose sought to be protected or achieved by the expropriation and where the property owner who through no fault of his own, finds himself the unfortunate target of an expropriation, receives adequate compensation from the state, in a timeous and fair manner.

Unfortunately, States have been known to abuse this sovereign right to expropriate property, doing so where there is no real or legitimate public purpose for the expropriation. In the context of commercial trade, there are numerous instances of unlawful or arbitrary expropriations of foreign investments by host states and in most instances, these expropriations have been motivated by the state's own interest such as the need to 'drive out' those investors who do not serve its political interests and not by any real public need. Further still, in some expropriations of foreign investments, states have failed or even refused to compensate the affected investors.

The discussion in the preceding chapters has been an attempt at considering the various mechanisms through which a foreign investor may effectively commence proceedings against a host state where there is a clear case of an

unlawful expropriation<sup>220</sup>. This is in light of the unique nature of disputes between states and other private entities such as investors, with the result that the resolution of the dispute by the courts of the host state may prove ineffective for the investor, for a variety of reasons such as the perceived or actual partiality or lack of independence of the national courts in determining the dispute. The need therefore for impartial and independent international fora, in which investors may commence proceedings against states, cannot be overstated.

The discussion of the various fora in which investors may commence proceedings against states for unlawful expropriations has also considered the possible orders that may be made against states, and whether such orders are effective for investors who allege illegality on the part of the state. Generally, and largely due to the sovereign nature of states, domestic, regional and international courts and tribunals are constrained in the orders<sup>221</sup> that they may make against states. In some instances, particularly in the case of domestic and regional courts, these constraints are not as a result of any particular limitation on their power but are rather borne out of political considerations and the unqualified respect for state sovereignty.

Further, and connected to the above point, is that in order to be effective, orders that are handed down by regional and international courts or tribunals for unlawful expropriations, should serve as a deterrent to those and other states against carrying out unlawful or arbitrary expropriations of investments. The effective imposition of appropriate sanctions against states would serve as an effective deterrent and would do well to be expressly included as part of the orders that may be made against a state.

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<sup>220</sup> In the case of a lawful expropriation, it is assumed that an investor does not challenge the expropriation as being unlawful or arbitrary. There may be a dispute between the parties as to the amount of compensation payable but this does not equate to a challenge over the legality of the expropriation. The discussion in the paper therefore centred on the case of unlawful expropriations- where the expropriation does not meet the requirements of the host state or customary international law, including the refusal or non-payment of compensation by the state.

<sup>221</sup> For example an order that the expropriation by the host state is unlawful and that therefore, the expropriation should be reversed.

The discussion of the current dispute between LAP Green Networks of Libya (LAP) and the Zambian government has made out an apparently clear case of at the very least an arbitrary, and possibly even an unlawful expropriation<sup>222</sup> of the former's shares owned and held in Zamtel. The outcome of the [known] proceedings between LAP and the government will provide an important source of reference for foreign investors in Zambia, and in other developing nations who may be future subjects of unlawful expropriations, particularly where there has been a regime change.

There will be important lessons to be learnt by foreign investors, from the case of LAP and the government. Perhaps the most important lesson will pertain to the need for 'jurisdiction' or dispute resolution clauses of investments agreements, to include the jurisdiction of effective regional or international courts or tribunals that have a specific mandate to settle investment disputes and which may therefore provide effective relief in the event of an unlawful expropriation of the investment assets being carried out by the state.

## **5.2 Recommendations**

In the current era of FDI, regional economic organisations<sup>223</sup> should expressly include in the jurisdiction of their respective judicial organs, the determination of investment disputes between member states and foreign investors. Effective regional courts and tribunals will provide an independent platform for investors to commence proceedings against states outside domestic courts. This will serve to increase investor confidence and also allow for increased FDI, regionally.

Further, the ability of investors to commence proceedings before regional tribunals will prove cost effective as in the absence of such tribunals, investors

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<sup>222</sup> This is to the extent that LAP succeeds in their contention that the government did not comply with the provisions of the Lands Acquisition Act in that no notice was given of the expropriation was required under the Act, that there was no public interest sought to be advanced by the government and that there has been no tender of compensation by the government.

<sup>223</sup> The reference to regional organisations is specifically a reference to African regional organisations.

will rely on having their disputes determined by international tribunals. The costs involved in instituting proceedings before international tribunals are often significantly higher than those instituted before regional tribunals. This further disadvantages investors who may have already suffered serious financial losses as a result of the expropriations of their property.

However, regional courts and tribunals can only operate effectively if they acquire supra-national status. Regional organisations must therefore require member states to subordinate some measure of their domestic laws to those of the regional courts or tribunals.<sup>224</sup> This will ensure that any orders given by regional courts are not overruled by domestic courts, therefore undermining the operation of the former.

On the international platform, the ICSID provides the most effective mechanism for the resolution of investment disputes. However, it is recommended that in addition to the supervisory powers of the ICSID to ensure compliance (by states) with the orders of the tribunals constituted under its auspices, there should be a reporting mechanism to the World Bank (as the umbrella organisation to which ICSID belongs) by the former, through which it is recommended that appropriate action<sup>225</sup> be taken against states that disregard compliance with orders of ICSID tribunals. This would be particularly relevant where the state involved is a beneficiary of World Bank funding in some form, or benefits from the activities thereof.

Although the ICSID serves as the most important forum available internationally which is specifically mandated to hear investment disputes, it is submitted that there is need for an international investment court, created under the auspices of the United Nations ("UN"). Such a court would ordinarily have jurisdiction over member states of the UN which consent to

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<sup>224</sup> This should be done with respect to those matters or areas of law over which the regional court or tribunal has jurisdiction and which jurisdiction the member states have validly consented to.

<sup>225</sup> Appropriate action could relate to the imposition of administrative sanctions or even the refusal to provide funding to the state concerned.

its jurisdiction. The advantage of such a court is that it would be able to give orders against states that an arbitration tribunal may be limited in its powers to give, such as declaratory orders or nullification of illegal state actions. In the context of unlawful expropriations, such a court may direct that the state reverse the expropriation. Further still, the court may recommend to the relevant organ of the UN <sup>226</sup> that relevant sanctions be imposed against a state which fails to comply with an order thereof.

For investors, the need for clauses in investment agreements, prohibiting unlawful expropriations must become more comprehensive. In this regard, it would be worthwhile to include the standards of international customary law as to when an expropriation will be deemed lawful. Further, such clauses should (with reference to the relevant legislation), point out the relevant procedure to be followed in the case of a dispute arising regarding an expropriation, including the procedure for the payment of compensation or any damages to the investor.

Further, it is recommended that investors insist on the conclusion of BITs or other forms of investment protection agreements with states, containing international law standards of protection for the investor, before concluding the relevant investment agreements. These BITs should further contemplate the jurisdiction of investment dispute-specific tribunals such as the ICSID, ensuring that any consent that may be required before such tribunals may assume jurisdiction, is 'perfected' prior to the dispute arising.

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<sup>226</sup>This could be the General Assembly (GA) which is the main deliberative assembly and in which all member states have equal representation. The GA would be appropriate because any decision to impose sanctions would be based on consensus on the majority of member states.

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