Foreign Direct Investment and Zimbabwe’s Indigenisation and Economic Empowerment Act: Friends or Foes?

T. Chidede* and TV. Warikandwa**

1. Introduction

The implementation of Zimbabwe’s indigenisation policy as well as the promulgation of relevant enabling legislation has triggered an unintended economic slowdown. The economic slowdown has been exacerbated by economic sanctions imposed on Zimbabwe by the United States of America (USA) and European Union (EU)1 in response to the land reform programme.2 Subsequent economic hardships faced by many of the country’s citizens as a result of the economic slowdown have generated vigorous debates amongst Zimbabwe’s policy makers, business as well as labour unions regarding the practicality of a sustained implementation of the indigenisation policy and its enabling legislation.3 Part of the issues informing the debates has been the significant decline in Foreign Direct Investment (FDI).4 Questions have thus been raised regarding the efficacy of the manner of implementation of Zimbabwe’s Indigenisation and Economic Empowerment Act (IEEA)5 and its suitability to affording room for stimulating FDI.6 In addressing issues relating to a need to grow FDI in Zimbabwe, it is submitted that the indigenisation programme is necessary.

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3 Hove (2012) at 72.
4 The Reserve Bank of Zimbabwe has pointed out that “Net foreign direct investment decreased to United States Dollars (USD) 300,6 million in 2014, from USD 373,1 million in 2013.”
and therefore not subject to debate. There is an undying need to increase room for participation of all marginalised persons, groups and communities in Zimbabwe in the economic mainstream.\(^7\) The indigenisation policy and IEEA adopted by Zimbabwe’s government resonate with the purport, spirit and objective of key economic empowerment goals set out in section 14(1) of the 2013 Zimbabwean Constitution. Section 14(1) of Zimbabwean Constitution provides that the State must “...facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities in Zimbabwe.”\(^8\)

The approach adopted by the Zimbabwean government in pursuit of the country’s indigenisation policy is therefore not illegal or contra bonos mores. Justification at law of the indigenisation programme in Zimbabwe can be found in the two leading cases of *De Sanchez v Banco Central de Nicaragua*\(^9\) and *AMCO v Indonesia*.\(^10\) Here, the courts unequivocally emphasised that states do enjoy a customary international law right to regain ownership of industries as part of their territorial and economic sovereignty. This approach is consistent with the school of thought that a substantial foreign ownership of national resources and/or business sectors threatens national and economic sovereignty.\(^11\) Therefore, in order to regulate the influx of foreign owned business entities which pose a significant threat to economic sovereignty, some governments elect to craft and implement policy interventions aimed at limiting foreign ownership.\(^12\)

However, the courts’ decisions in *De Sanchez v Banco Central de Nicaragua* and *Amco v Indonesia* should not be taken to suggest that pursuing the indigenisation policy is a just cause for negating the attraction of FDI as a complimentary economic approach to realising sustainable economic growth. Scholars like Munyedza have argued that the approach

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\(^7\) See section 14(1) of the 2013 Zimbabwean Constitution. See also section 2(1) of the IEEA which defines an “indigenous Zimbabwean” as “… any person who before 18th April 1980 was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest.”

\(^8\) See the Constitution of the Republic of Zimbabwe, 2013 (hereafter “the Constitution”).

\(^9\) *De Sanchez v Banco Central de Nicaragua* 770 F.2d 1385 US Court of Appeals 5th Cir September 19 1985.

\(^10\) *AMCO v Republic of Indonesia* (Merits) 1992 89 ILR 368 at paragraphs 405 and 466.


\(^12\) One classical example of a government which has adopted an indigenisation approach is South Africa which has seen its parliament enacting laws such as the Broad-Based Black Economic Empowerment Act 53 of 2003 and Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.
adopted by the Zimbabwean government in attempting to increase the participation of previously disadvantaged indigenous people in the economic mainstream scares away foreign investors.\textsuperscript{13} Munyedza’s view has the law and economics school of thought as its basis in that it places emphasis on the need to ascertain any law’s and policy’s economic impact before a decision to implement them is adopted.\textsuperscript{14} As such, it is important to employ the law and economics school of thought as a mechanism to evaluate the IEEA’s suitability to growing FDI in Zimbabwe.

However, questions have to be raised regarding how else, in a global economic environment driven by a neoliberal economic agenda,\textsuperscript{15} the indigenisation programme could have been implemented without incurring a backlash from global super powers such as the USA and the United Kingdom (UK).\textsuperscript{16} The USA and UK have contributed a vast majority of foreign owned companies which have operated in Zimbabwe since its independence up until the implementation of the indigenisation programme.\textsuperscript{17} It is therefore common cause that the USA and UK would resist the indigenisation policy in pursuit of their business interests. In view of the foregoing, it is reiterated that the underlying objectives of the indigenisation programme as embedded in the IEEA should not be opposed. Rather than condemning the indigenisation programme, it is plausible to propose that the indigenisation policy and the IEEA be implemented in a manner that compliments a favourable business environment for both domestic and foreign investors.\textsuperscript{18} It is expected that such an approach could assist in easing the current economic hardships the country is facing.

\textsuperscript{16} See TV Warikanda; PC Osode, “Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organisation”, 2014 28(2) \textit{Speculum Juris} at 41.
\textsuperscript{18} Staff Reporter, “Change indigenisation law, IMF tells Zim” New Zimbabwe 11 March 2015. See also G Mnyuki, “Repeal Indigenisation Act: Robertson” Nehanda Radio 14 July 2014. See further NKC Independent
The article is divided into five parts. The first part introduces the thesis of the article and briefly discusses objectives underpinning the indigenisation policy. The second part advances the argument that foreign investment is a vital component for enhancing economic development in Zimbabwe. FDI should be viewed as a mechanism for generating resources aimed at funding indigenisation programmes. The third part critically examines the approach to the indigenisation policy as set out in the IEEA with a view to assessing its shortcomings in advancing foreign investment. Part four proffers modest recommendations towards meeting the needs implicit in the indigenisation policy vis-à-vis FDI, whereas part five offers concluding remarks.

1.2 A synopsis of the IEEA’s objectives

The Zimbabwean colonial government utilised deliberate and systematic disempowerment mechanisms which led to the exclusion of indigenous Zimbabweans from the economic mainstream.19 As a result, the ushering in of a new political dispensation in 1980 generated a lot of expectations especially among the indigenous persons who wished for the reversal of inequalities inherited from the era of colonial rule.20 The Zimbabwean government has introduced legislative and policy initiatives aimed at addressing colonially induced imbalances thus increasing previously disadvantaged indigenous persons’ access to national resources and participation in the economic mainstream, added to facilitating business control or ownership.21 The IEEA is one such contemporary measure introduced by the government to address the economic imbalances and its policy objectives are to: 1) economically empower indigenous Zimbabweans22 by increasing their participation through

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20 D Clarke, Foreign companies and international investment in Zimbabwe, Gweru: Mambo Press 1980 at 15.

21 Clarke (1980) at 15. For instance, immediately after independence in 1980, there were a plethora of legislative and policy initiatives by the government to acquire millions of hectares of land from the white commercial farmers in order to redistribute to the indigenous citizens. See generally S Moyo, “Land reform and redistribution in Zimbabwe since 1980” in Moyo S & Chambati W (eds), In land and agrarian reform in Zimbabwe: Beyond white-settler capitalism Dakar: Council for the Development of Social Science Research in Africa (2013).

22 See section 2(1) of the IEEA regarding the definition of an indigenous Zimbabwean.
economic expansion, and growing their productive investment in the economy so as to create more wealth for poverty eradication;\(^23\) 2) create conditions that will allow the disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity;\(^24\) 3) develop a broad-based domestic private sector that is the engine of economic growth and development in a growing market economy;\(^25\) and democratise ownership relations in the economy and eliminate racial differences arising from economic disparities.\(^26\) The IEEA provides for a need for indigenisation in the resource and non-resource based sectors.\(^27\)

The Indigenisation Economic Empowerment (IEE) General Notice 114 of 2011 provides for indigenisation in the mining sector by requiring businesses operating in the sector to dispose 51 percent equity to designated entities. The indigenisation policy as reflected in the IEEA unambiguously insists that all foreign-owned companies with a share capital above US$500 000 operating in Zimbabwe are to cede 51 percent of their shares or interest therein to indigenous Zimbabweans.\(^28\) Further, a number of economic sectors have been reserved for indigenous Zimbabweans.\(^29\) By implication, there shall be no non-indigenous business which will be allowed to invest in the reserved sector unless under special circumstances as determined by line Ministries and approved by Zimbabwe’s Cabinet. The current sector specific compliance provisions are set out as follows:

**Sector Compliance Provisions as Provided by Enabling Regulatory Instruments**

23 Section 3(1)(a) of the IEEA.
24 Section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA.
25 See section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA.
26 See section 3(5)-(6) of the IEEA. See also the IEEA’s for a specific outline of its intent and objectives.
27 Section 3(5) of the IEEA provides that: “The line minister may prescribe that a lesser share than fifty-one per centum or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections (1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one per centum or the controlling interest shall be attained.”
28 See section 3(1) of the IEEA.
29 These reserved economic sectors include the following: agricultural production of food and cash crops; transport (buses, taxis and car hire services); retail and wholesale trade; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts; marketing and distribution. See section 3, 4 and 5 of Statutory Instrument 66 of 2013 [CAP 14:33 IEE (General) (Amendment) Regulation, 2013 (No.5). See also the National Indigenisation and Economic Empowerment Board website available at http://www.nieeb.co.zw/index.php/sectors/reserved-sectors (accessed 02 February 2016).
<table>
<thead>
<tr>
<th>Sector</th>
<th>Minimum net asset value</th>
<th>Lesser share of non-indigenous businesses</th>
<th>Years to comply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenisation and Economic Empowerment General Notice 459 of 2011</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manufacturing</td>
<td>Of or above one hundred dollars ($100 000)</td>
<td>26%</td>
<td>1st year</td>
</tr>
<tr>
<td></td>
<td></td>
<td>36%</td>
<td>2nd year</td>
</tr>
<tr>
<td></td>
<td></td>
<td>46%</td>
<td>3rd year</td>
</tr>
<tr>
<td></td>
<td></td>
<td>51%</td>
<td>4th year</td>
</tr>
<tr>
<td>Indigenisation and Economic Empowerment General Notice 280 of 2012 – Other Sectors</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Services</td>
<td>See Part I of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Tourism</td>
<td>See Part II of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Education and Sport</td>
<td>See Part III of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Arts, Entertainment and Culture</td>
<td>See Part IV of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Engineering and Construction</td>
<td>See Part V of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Energy</td>
<td>See Part VI of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Services</td>
<td>See Part VII of Notice 280</td>
<td>51%</td>
<td>1 year</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>See Part VIII of Notice 280</td>
<td>30-51%</td>
<td>1 year</td>
</tr>
</tbody>
</table>
To realise the IEEA’s set objectives, in 2013, the government of Zimbabwe crafted an economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) with a view to achieving sustainable economic growth and development as well as social equity, *inter alia*, anchored on indigenisation, empowerment and employment creation.\(^\text{30}\) Chapter 3 of the ZIMASSET states that the blueprint is also expected to consolidate the gains and opportunities brought by the indigenisation policy and increase FDI, among other things. The objectives of the ZIMASSET explicitly seek to further the indigenisation programme as well as grow FDI. Zimbabwe is a mineral rich country with an abundance of diamond, gold and platinum deposits amongst other mineral resources. Such minerals attract resource-seeking investors. It is therefore not surprising that between 1990 and 1999, Zimbabwe attracted FDI estimated at United States Dollars (USD) 950 million.\(^\text{31}\) However, critics have said that the ZIMASSET is not implementable within a short period of time due to the financial challenges facing the country.\(^\text{32}\) A clear indicator of these financial challenges is the significant decline in FDI from USD 950 million, in the period 1991 to 1999, to USD 400 million between 2000 and 2011.\(^\text{33}\) This indicates a decline in FDI by USD 550 million. In effect, between 2000 and 2011, FDI in Zimbabwe measured a negative real economic growth rate averaging 5%.\(^\text{34}\)

\(^\text{30}\) See the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET), October 2013 – December 2018.

\(^\text{31}\) See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe’s ZIMSTATs for 2012, 2013 and 2014.


\(^\text{33}\) See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe’s ZIMSTATs for 2012, 2013 and 2014.

The table below provides further evidence of the negative effects of the continuous decline in FDI.

**Current account (percentage of Zimbabwe’s Gross Domestic Product at current prices)**

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016(e)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade balance</td>
<td>-7.7</td>
<td>-28.7</td>
<td>-23.5</td>
<td>-23.1</td>
<td>-23.7</td>
<td>-17.9</td>
<td>-19.3</td>
</tr>
<tr>
<td>Exports of goods</td>
<td>28.3</td>
<td>40.3</td>
<td>30.7</td>
<td>27.4</td>
<td>27.2</td>
<td>23.9</td>
<td>23.9</td>
</tr>
<tr>
<td>Imports of goods</td>
<td>36.0</td>
<td>69.0</td>
<td>54.1</td>
<td>50.5</td>
<td>50.9</td>
<td>41.8</td>
<td>43.1</td>
</tr>
<tr>
<td>Services</td>
<td>-2.0</td>
<td>-6.9</td>
<td>-7.0</td>
<td>-6.9</td>
<td>-5.6</td>
<td>-5.0</td>
<td>-3.2</td>
</tr>
<tr>
<td>Factor income</td>
<td>-5.1</td>
<td>-8.3</td>
<td>-7.7</td>
<td>-7.5</td>
<td>-7.5</td>
<td>-7.2</td>
<td>-6.6</td>
</tr>
<tr>
<td>Current transfers</td>
<td>7.2</td>
<td>14.0</td>
<td>13.5</td>
<td>12.1</td>
<td>13.7</td>
<td>12.3</td>
<td>11.8</td>
</tr>
<tr>
<td>Current account</td>
<td>-7.6</td>
<td>-29.8</td>
<td>-24.6</td>
<td>-25.4</td>
<td>-23.1</td>
<td>-17.8</td>
<td>-17.2</td>
</tr>
</tbody>
</table>

Source: African Economic Outlook 2015; (e) estimates

It is without doubt that within the Zimbabwean government there have been divided views over the need to attract FDI. The current Minister of Youth, Indigenisation and Economic Empowerment, Mr Patrick Zhuwao has allegedly steadfastly objected to attracting FDI in favour of promoting an exclusively indigenisation agenda.\(^{35}\) Is there merit in Minister Zhuwao’s approach? Addressing this question requires reference to be made to contemporary debates advanced regarding the benefits of FDI to African countries. At the centre of these debates are concerns regarding the value addition of FDI investments from the Western investors as opposed to their Asian counterparts, in particular China.\(^{36}\) FDI must translate to a transfer of property to the host country and grow economies.\(^{37}\)

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However, there appears to be a general realisation in Africa that Western investors are reluctant to grow African economies whereas Asian investors especially those from China are perceived to have, through FDI, driven economic growth and infrastructure development.\(^{38}\) Perhaps this is the perspective that Minister Zhuwao held in his steadfast pursuit of an ultra-indigenisation agenda that, on the face of it, is not entirely FDI responsive. Contrary to Minister Zhuwao’s arguably anti-FDI stance, Zimbabwe’s Minister of Finance, Patrick Chinamasa has pronounced that there was need to introduce:

“...frameworks, templates and procedures for implementing the indigenisation policies in a manner that both promotes investment and eliminates discretionary application of the law. Such measures will contribute immensely towards the ease of doing business in the country and will render the services sector of our country conducive for Foreign Direct Investment”\(^{39}\)

Minister Chinamasa’s pronouncement also appears to be an attempt at reconciling differences between the government of Zimbabwe, the International Monetary Fund and the World Bank, due to the implementation of the IEEA.\(^{40}\) Minister Patrick Chinamasa’s views were then augmented by the President of Zimbabwe Mr Robert Mugabe’s public pronouncements regarding the need to implement indigenisation laws in a manner that does not frustrate foreign investors, especially those in the banking sector.\(^{41}\)

2. Is indigenisation more important than FDI in Zimbabwe?

Whilst Zimbabwe must not be seen to mortgage its riches for little or no significant returns, the benefits obtained from FDI by the host country must be weighed against what it losses in the same process. The process of weighing FDI losses against its benefits is not easy as allegations of foreign investors plundering national resources with little benefits being received by host nations are so often advanced. For example, Chinese investors have been

\(^{38}\) H Edinger; J Jansson, “China’s Angola model comes to the DRC”, (2008) The China Monitor Issue 34, at 4-6. China has used the R41, resource for infrastructure contracts with Angola with significant infrastructure development being observed in Angola. The Western investors were reluctant to invest in a country which had been destroyed by war yet it was resource rich. The story of Angola today is now different due to the China-Angola R41 resource for infrastructure investment contract.


\(^{40}\) “Change indigenisation law, IMF tells Zimbabwe” New Zimbabwe 11 March 2015.

\(^{41}\) “Indigenisation: President has spoken” Herald Zimbabwe 15 April 2016 also available at http://www.herald.co.zw/indigenisation-president-has-spoken/ (accessed 03 May 2016).
accused of being ruthless extractors of African resources.\textsuperscript{42} Similar accusations have been levelled against Western investors.\textsuperscript{43} Ofodile has branded FDI practices of China on the continent as the third scramble for Africa,\textsuperscript{44} whilst Konings labelled them a strategic partnership for the continent.\textsuperscript{45} The West has also been accused of being exploiters of Africa’s resources without significantly contributing to the continent’s development.\textsuperscript{46} Whatever the nature of Western and Chinese business practices on the continent, statistical evidence points to China’s business activities in Sub-Saharan Africa translating to an annual 5% economic growth over the past decade\textsuperscript{47} with the net effect of this economic growth being “…the bolstering of human development indicators across the continent and improving African people’s standards of living.”\textsuperscript{48} This therefore is clear evidence of the importance of FDI to Zimbabwe or any country for that matter, regardless of whether it is from the West or China.

Nevertheless, it is important to point out that though China has been the largest foreign investor in Zimbabwe with a total FDI of over USD 600 million in 2013, it has cautioned the Zimbabwean government regarding the manner of implementing the IEEA to the extent that

negatively impacts FDI.49 The increasing investment gap and recession in foreign aid has made developing countries to turn to FDI as a mechanism to circumvent development financing constraints.50 There is empirical evidence that countries are engaging in a race to the bottom syndrome or “beggar-thy-neighbour” investment incentive competition in an effort to lure investors.51 This is a strategy to increase FDI inflows by removing all investment and trade restrictions thereby attracting investors out of neighbouring countries.52 FDI is necessary in developing economies to accelerate economic development because these countries cannot achieve these goals through their domestic investment.53

FDI is largely viewed as one of the major contributors to economic growth54 as well as a means to alleviate poverty and acquire additional funding for national programmes.55 Gross Domestic Product (GDP) is the most commonly used tool to measure a country’s economic growth.56 GDP is the total value of goods and services produced in an economy within a certain period of time and can be measured by adding up all of the economy’s income,

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52 Olney (2013) at 191.


55 It is argued that FDI significantly contributes to poverty alleviation when it is targeted at labour intensive industries and when interactions with local firms can create spill overs. L Colen; A Guariso, “What type of foreign direct investment is attracted by bilateral investment treaties?” in Moran TH, Graham EM & Blomstrom M (eds) Does foreign direct investment promote development? Institute for International Economics: Washington DC (2005) at 139.

56 Musila and Sigue (2006) at 28.
investment, government purchases and net exports.\textsuperscript{57} Zimbabwe’s real GDP decelerated to 3.7 percent from an estimated 4.4 percent in 2012.\textsuperscript{58} Zimbabwe’s economy remains unstable with an unsustainably high external debt, massive deindustrialisation and lack of investment.\textsuperscript{59} The government should thus establish and implement an effective enabling policy environment for investment otherwise it may not achieve sustainable economic growth.\textsuperscript{60} According to the 2012 World Bank Doing Business Report, Zimbabwe was ranked 122 out of 183 countries considered with respect to the country’s ability to protect investment.\textsuperscript{61} It is a generally accepted view that the best way to lock a nation into a sustainable economic development mode is to advance policies that are favourable and guarantee foreign investment protection.\textsuperscript{62}

After the year 2000, there have been a series of government initiatives and policies which were hostile to FDI and magnified risks for foreign investors and this prompted substantial foreign disinvestment.\textsuperscript{63} For instance, the land reform policy and soaring inflation rates spearheaded foreign disinvestment.\textsuperscript{64} The land reform policy, in particular, strained Zimbabwe’s relations with the US and the EU since most of the farms appropriated belonged to their nationals.\textsuperscript{65} As a result, economic sanctions were imposed by the US, the EU and Australia against Zimbabwe\textsuperscript{66} and eventually led to a critical shortage of foreign

\begin{thebibliography}{99}
\item \textsuperscript{59} \textit{African Economic Outlook Report} (2014) at 38.
\item \textsuperscript{60} AB Zampetti; P Sauve, “International investment” in Guzman AT & Sykes AO (eds) \textit{Research handbook in international economic law} United Kingdom; Edward Elgar Publishing Limited 2007 at 217.
\item \textsuperscript{62} Zampetti and Sauve (2007) at 217.
\item \textsuperscript{63} DL Richards; RD Gelleny, “Economic globalisation and human rights” Cambridge: Cambridge University Press (2009) at 17-38. However, it should be pointed out that whilst the Zimbabwean government adopted policies that prompted foreign disinvestment, it also adopted mechanisms to remedy such disinvestment. One such mechanism is the Kadoma Declaration signed by the country’s social partners on the 4\textsuperscript{th} of September 2009 in Harare. See in particular articles 1, 2 and 3 of the Kadoma declaration.
\item \textsuperscript{64} Richards and Gelleny (2009) at 185.
\item \textsuperscript{65} See US Department of State Diplomacy in Action (2012).
\item \textsuperscript{66} See US Department of State Diplomacy in Action (2012).
\end{thebibliography}
currency, decline of FDI inflow\textsuperscript{67} and Zimbabwe was unable to obtain financial and credit loans from multilateral financial institutions such as the World Bank, International Monetary Fund and the African Development Bank.\textsuperscript{68} Furthermore, high levels of hyperinflation, valueless currency as well as complicated exchanged-rate policies made it difficult for investors to obtain foreign currency amid continued shortages of fuel, electricity and other important goods.\textsuperscript{69}

According to the 2006 World Investment Report compiled by the United Nations Conference on Trade and Development (UNCTAD), FDI inflows dropped from US$103 million in 2005 to US$40 million in 2006 as a result of Zimbabwe’s severe economic crisis.\textsuperscript{70} In 2014, the IMF reported that Zimbabwe’s economic environment remains difficult and unstable and urged that policy efforts be directed towards restoring fiscal and external sustainability.\textsuperscript{71} Given that scenario, it is a common cause that the economy or industrial base of Zimbabwe urgently needs FDI capital to finance and support its indigenisation as well as developmental programmes. This view informs the imperative proposition that foreign investment should be harnessed to the realisation of specific development objectives that each individual country has set for itself.\textsuperscript{72}

3. The IEEA’s position in advancing FDI
The major obstacle to the success of the IEEA lies in the manner in which it has been implemented.\textsuperscript{73} Empirical evidence shows that since the inception of the IEEA there have been considerable FDI outflows and dwindled FDI inflows in Zimbabwe.\textsuperscript{74} The UNCTAD observed that the indigenisation policy had a significant impact on FDI flow in and out of the

\textsuperscript{67} The Report on attracting FDI by the Foreign Affairs Parliamentary Portfolio Committee has cited sanctions by the EU and the US, corruption and inadequate funding of the ZIA as some of the major challenges impeding foreign investors into Zimbabwe. See “Corruption scares investors”.

\textsuperscript{68} US Department of State Diplomacy in Action (2012).

\textsuperscript{69} US Department of State Diplomacy in Action (2012).


\textsuperscript{72} Zampetti and Sauve (2007) at 217.


\textsuperscript{74} Munyedza (2011) at 9.
country. In order to lure FDI, investors need clarity regarding the provisions of the IEEA and what they seek to achieve with regards to issues such as: 1) the recent imposition of the indigenisation levy by Minister Patrick Zhuwao and its legitimacy; 2) whether or not the specified share transactions issues regarding the 51% equity threshold are negotiable or not; 3) the submission of indigenisation plans; and 4) the plausibility of payment against compliance with the law.

The manner of implementing the IEEA has been contested since its inception in 2007. The former governor of the Reserve Bank of Zimbabwe, Gideon Gono warned government to guard against implementing the IEEA in a manner that would frustrate and threaten foreign investors. The Canadian ambassador to Zimbabwe, Lisa Stadelbauer, has argued that Canadian investors are hesitant to invest in Zimbabwe because of the uncertainties informing the application of the indigenisation law in the country. A case in point with regards to a need to clarify the framework of the IEEA is that in December 2015, IEEA General Notice 394A titled “Frameworks, Procedures and Guidelines for Implementing the IEEA” was gazetted by the government with the Finance Minister, Mr Chinamasa being credited for the legal instrument. Minister Chinamasa provided for a 5 year compliance period with the IEEA. The publishing of General Notice 394A immediately drew the attention of Minister Zhuwao whose ministry is responsible for indigenisation. Minister Zhuwao disagreed with Minister Chinamasa’s 5 year period and instead proposed a 1 year compliance period. The differences between the two ministers’ pronouncement presented a basis of confusion amongst investors. However, guidance on ascertaining an investor friendly implementation period could be obtained from the “10-point plan for economic growth” introduced by the President of Zimbabwe, Mr Robert Mugabe, which advocates amongst other issues for a need to promote private sector investment. To that end, Minister Chinamasa’s longer

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76 For a detailed analysis of these issues see Matyyak (2016) at 15-18.
77 See Southmark Trading (Pvt) Ltd v Karoi Properties (Pvt) Ltd 2013 ZWHHC 52.
compliance period might be regarded as investor friendly. Recently, the IMF head of mission, Domenico Fanizza, speaking at press briefing pointed out that Zimbabwe needs to review its indigenisation laws to attract FDI and generate money to pay off its IMF debt.\(^1\)

Another problem with regards to the IEEA emanates from section 3(5). Section 3(5) provides as follows:

“"The line Minister may prescribe that a lesser share than fifty-one percent or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections [3](1)/(b)/(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained."\(^2\)

Zimbabwean policy makers through their pronouncements appear to suggest that the 51% equity share threshold can be negotiated.\(^3\) However, the last part of section 3(5) of the IEEA points out that “...but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained.” From the wording of section 3(5), there appears to be no room for a negotiation regarding the 51% equity threshold. Again, the mixed statements from policy makers have the potential to scare away potential investors as investing under such circumstances could be tantamount to undertaking a high risk business venture.

The challenges besetting the implementation of the IEEA have been compounded by Minister Zhuwao’s pronouncement of an indigenisation levy in pursuit of the objectives set out in section 17(1)-(6) of the IEEA. Matyszak has argued that the objectives of the levies provided for in section 17 could be equated to the imposition of surcharge against all businesses whether indigenous or not, to facilitate indigenisation and empowerment programmes.\(^4\) However, Minister Zhuwao imposed a 10% levy on all foreign owned business on their annual income in the first year rising to 12.5% in the second year. According to Minister Zhuwao, the levies were meant to raise internal resources for funding


\(^2\) See section 3(5) of the IEEA.

\(^3\) Matyszak (2016) at 16.

\(^4\) Matyszak (2016) at 16.
the indigenisation programmes and would be distributed through community share ownership schemes. Non-compliance with the levy was accompanied by possible closure of foreign firms which do not comply with the March 31, 2016 deadline. The Confederation of Zimbabwean Industries then sought dialogue with government regarding the imposition of the levy which threatened private sector investment.

It is important to point out that, regardless of the reservations from Western investors concerning the IEEA, the Chinese have not been deterred from investing in Zimbabwe under the “harsh indigenisation dominated economic conditions” with exceedingly positive outcomes. China has injected over half a billion USD in FDI into Zimbabwe. Between 2008 and 2010, China invested up to USD 45 million. In 2011, the investments rose to over USD 460 million.85 There is also significant evidence of investments towards infrastructure development with an estimated USD 3, 5 billion thermal power project expected to produce 1000 megawatts being undertaken by China Railway International.86 In the mining sector, despite the Zimbabwean government’s recent order to cease mining operations at the Marange Diamond Fields,87 Anjin Diamond Mine has become one of the leading diamond miners in the Kimberly Process and has injected USD 300 million to a mining venture that was producing more than 7 million carats annually.88 Further Chinese investment projects include plans to build the Kunzvi Dam with a capacity of 158, 4 million cubic meters of water with Avik International a Chinese company being one of the contractors in a project estimated to cost at least USD 370 million.89

An illustration of the turnover of China’s projects in Zimbabwe is made in the diagram below:

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89 “Chinese Firm to build Kunzvi Dam” Herald Zimbabwe 30 November 2012.
China’s Project turnover in Zimbabwe for the period 2002-2012 in million USDs

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Value</td>
<td>73.82</td>
<td>45.64</td>
<td>47.62</td>
<td>89.32</td>
<td>75.30</td>
<td>86.64</td>
<td>158.88</td>
<td>65.09</td>
<td>138.05</td>
<td>398.91</td>
<td>382.96</td>
</tr>
</tbody>
</table>


Chinese companies have been willing to employ Zimbabweans in the pursuit of their projects in the process creating the much needed employment.\(^9\) An illustration of the preparedness of the Chinese firms to employ locals has been made in the table below.

**Statistical evidence of Chinese companies employing Zimbabweans**

<table>
<thead>
<tr>
<th>Company name</th>
<th>Number of Locals Employed</th>
<th>Number of Chinese Employed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anhui Foreign Economic Construction</td>
<td>4000</td>
<td>-</td>
</tr>
<tr>
<td>Nantong Construction Group</td>
<td>690</td>
<td>35</td>
</tr>
<tr>
<td>Sinosteel Zimbabwe</td>
<td>7000</td>
<td>4</td>
</tr>
<tr>
<td>Sino-Zimbabwe Cement Plant</td>
<td>400</td>
<td>30</td>
</tr>
<tr>
<td>Tianze</td>
<td>160</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: Government of Zimbabwe 2015

However, regardless of the positives drawn from FDI from China, one cardinal principle that should not be lost by the Zimbabwean government in implementing the indigenisation policy is that lack of clarity essentially undermines foreign investor confidence. The IEEA sets a tone that there should be no expropriation of shares by the government for indigenisation purposes. Rather, shares should be acquired at a fair market value. However, the IEE Regulations\(^1\) do not give clarity as to whether or not companies will be appropriately


\(^1\) See IEE General Notice 114 (General) Regulations of 2011.
compensated for the 51 percent share ceded to the locals. With regard to the mining sector only, the 2011 IEE Indigenisation Regulations provide that, “...the value of shares or other interests required to be disposed of to a designed entity ... shall be calculated on a basis of valuation agreed to by ... the Minister and the non-indigenous mining business concerned.” In this regard, it is apparent that the implementation challenges of the indigenisation policy are a consequence of inherent problems in its conception and misalignment of the enabling IEEA with the Constitution and the Indigenisation Regulations.

The IEEA focuses more on ownership and control. Section 3 of the IEEA seeks to bestow majority (51 percent) ownership and control of the country’s resources to the indigenous Zimbabweans. Foreign investors will only be able to own 49 percent of their investments. The 51- 49 percent threshold is non-negotiable. The IEEA appears to use a one-size-fits-all approach to indigenisation without exceptions. It mandates that 51 percent shares of every “public company and any other business” shall be owned by an indigenous Zimbabwean. However, there are attempts by the government to review the IEEA to make it flexible. Such attempts have translated into the formulation of a new indigenisation framework. The new framework aims at ensuring that the pursuit of the indigenisation and economic empowerment objectives are in conformity with the government’s initiatives to attract FDI and ensure ease of doing business for investors. The framework was introduced after joint consultations between Finance and Economic Development Minister Patrick Chinamasa, Youth, Indigenisation and Economic development Minister, Patrick Zhuwao and the Reserve Bank of Zimbabwe Governor, Dr John Mangudya. This approach suggests a renewed awareness of the significance of pursuing an integrated approach to attracting FDI and implementing indigenisation policies.

Nevertheless, it is submitted that the two empowerment models, Production Sharing Model (PSM) and Joint Empowerment Investment Model (JEIM), still remain as the best

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92 See section 3(2) of IEE General Notice 114 (General) Regulations of 2011.
93 Section 3(1)(a), 3(1)(b)(iii), 3(1)(c)(i), 3(1)(f) and 3(5) of the IEEA.
94 Section 3(1)(a), 3(b)(iii), 3(1)(c)(i), 3(1)(f) and 3(5) of the IEEA.
95 F Share, “New indigenisation framework unveiled” Herald Zimbabwe 5 January 2016. For example, the new framework seeks to invoke section 17 of the IEEA so that it recognises businesses that are complying with indigenisation legislation. This would be done by providing compliance rebates, indigenous shareholding rebates, and rebates for achieving socially and economically desirable objectives.
possibilities of meeting the IEEA’s ideological, legal and policy necessities. PSM is a broad cover for an assortment of production sharing agreements signed between governments and extraction companies concerning how much of a resource extracted from the country each will receive. Investors will be allowed to recover their initial capital investment or appropriate return on investment and operational costs before the sharing of production outputs or profits. JEIM, with the exclusion of mining, agriculture and particular tourism investments, will see locals being encouraged to enter into joint ventures as a way of generating capital built wholly on Zimbabwean-owned enterprise.

4. Recommendations
It is possible to advance foreign investment through the IEEA, but, in order to achieve this; a few significant refinements to it are required. It is therefore proposed as follows:

a) The IEEA needs to be clarified and/or amended to render it more investor-friendly than it currently is. Whilst foreign investors/companies must not be granted greater rights than domestic investors/companies or the state, they should be assured of the right to conduct business on an equal basis without suffering discrimination due to their foreign origin. It is hoped that such an approach safeguards economic empowerment of indigenous persons and development at the same time encouraging foreign investment.

b) The IEEA should go beyond exclusively focusing on ownership of already existing foreign business firms but also on technical, human capital and managerial skills development of the black entrepreneurs (indirect empowerment) as well as the economic development of the nation as a whole. Such an approach will not scare away investors in fear of losing control over their businesses. South Africa’s Black Economic Empowerment (BEE) generic scorecards could provide guidance on allocating percentage points to criteria such as ownership (20%), management

97 “Indigenisation Act to be amended”.
98 “Indigenisation Act to be amended”.
control (10%), employment equity (15%), skills development (15%), enterprise and supplier development 15%, preferential procurement (20%) and socio-economic development (5%).

c) The IEEA should also develop a financing plan to support the previously disadvantaged indigenous entrepreneurs. Revenue obtained from FDI could be one such source of financing the indigenisation programme. However, creating a hostile business environment will not attract but scare away the much needed FDI.

d) Similar to the BEE, the IEEA should recognise that all sectors have different thresholds because of different circumstances. A one-size-fits-all or blanket approach to economic empowerment is not the most appropriate and convenient approach to employ. Foreign investors should “be allowed to recover their initial capital investment, an appropriate return on investment and operational costs before the sharing of production outputs or profits.”

5. Conclusion

This article demonstrated that the IEEA must be commended as a sound legal instrument for advancing the inclusive participation of previously disadvantaged indigenous Zimbabweans in the mainstream of the nation’s economy. Equally important, it has been proposed that the IEEA should be implemented in a manner that promotes the attraction of the much-needed FDI into the country. Further, it has also been pointed out that the IEEA needs to be clarified and/or amended in order to provide certainty and confidence to foreign investors. At the time of writing the article, the Zimbabwean government had embarked upon clarifying the harmony between attaining IEEA objectives and creating a sustainable investment environment. The government of Zimbabwe must be commended for trying to address the concerns relating to the negative impact of an ultra-indigenisation policy through developing a policy framework to clarify its indigenisation laws. Should the policy framework be a success, the much needed balanced approach between the pursuit of FDI and indigenisation will be realised. It is clear that indigenisation alone will not lead to the levels of economic growth envisaged by the country’s policy makers. To that end, the ZIMASSET policy may not succeed and the country’s economic challenges will persist. It is

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100 See Amended Broad-Based Black Economic Empowerment Codes of Good Practice, 2012.
101 “Indigenisation Act to be amended”. 
therefore hoped that the views advanced in this article will inform a robust approach to pursuing FDI and realising the objectives of the plausible indigenisation programme.