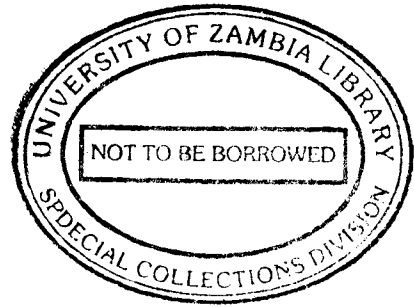


ATTRACTING INVESTMENT BY CONCEDED POSSIBLE GAINS.

Evaluating the rationale of Zambia's investment legislation.

BY

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## DECLARATION

I **CHULU JAPHET WONDER**, student number **22070753**, hereby declare that I am the author of this directed research paper entitled “Attracting investment by conceding possible gains. Evaluating the rationale of Zambia’s investment legislation” and that it is the creation of my own ingenuity.

Due acknowledgement has been given where other scholar’s work has been used or cited.

I truly believe that this paper has not previously been presented to the faculty of Law at the University of Zambia for academic work.

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## **Abstract**

In the quest for national development, developing countries have almost always looked outside themselves for investment in the belief that the coming in of foreign investment will be the means with which to improve their economies and thereby enable them to uplift the standard of living of their citizens and achieve national development in general.<sup>1</sup> Therefore, Zambia has since independence enacted successive pieces of legislation to govern and regulate as well as to encourage, control and monitor the entry and operations of foreign investment into the country.

However, a perception has emerged that Zambia, as a host state, has been too generous and has conceded too much for the sake of attracting investment with the result that no significant gains or benefits have accrued to the nation from these efforts.<sup>2</sup> Another view is that economic and social objectives of what qualifies as an investment policy in Zambia are obscure because the country does not have a clearly defined investment policy.<sup>3</sup> It has also been observed that the 'give and take' spirit that characterised the early post independence Zambia, starting with the Pioneer Industries (Relief from Income Tax) Act of 1965, has since been lost and that instead, the quest for investment has lost focus and meaning and seems only to benefit investors, who are mainly foreigners.<sup>4</sup> In the search for a solution to the problem of underdevelopment, the government appears to have opted to hand over social policy and the public sector to international institutions or the private sector<sup>5</sup> although the interests of these entities are usually at variance with national interests: on the one hand, national development and on the other, profit.<sup>6</sup>

This study examines these concerns in relation to the quest for equitable investment legislation and flows into an assessment of whether the campaign for foreign direct investment has translated into national development.

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<sup>1</sup> N. Mwilima FDI in Africa. African Labour Research Network. Social Observatory Pilot Project (2003), 33.

<sup>2</sup> Ibid 43

<sup>3</sup> 3<sup>rd</sup> National Reference Group Meeting, 'Investment For Development Project', Consumer Unity and Trust Society-Africa Resource Centre (CUTS), Lusaka (2003) 3.

<sup>4</sup> Pioneer Industries (Relief from Tax) Act, s 8, compared with Section 18 of the recently repealed Investment Act of 1993 as amended by act no. 10 of 1998./ E. Shilangwa. 'State must impress investors'. Financial Mail, 30th March 1999. vol. 4, no 12.

<sup>5</sup> 3<sup>rd</sup> National Reference Group Meeting, 'Investment For Development Project', 3.

<sup>6</sup> Mwilima, FDI in Africa. 43

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Special thanks to my family for making the sacrifice to live out of the country without me so that I could complete my Law degree and for their unending support.

I also wish to express gratitude to classmates for making my stay at the University a memorable one.

A special thank you to Mr Mudenda for supervising this essay.

**Table of Statutes**

STATUTES
<p>Pioneer Industries (Relief From Income Tax) Act No. 55 of 1965.</p> <p>The Industrial Development Act no. 18, 1977</p> <p>Land Acquisition Act Cap 289 Laws of Zambia, (1970)</p> <p>Lands (Conversion of Titles) Act (1975) Cap 287, Laws of Zambia.</p> <p>Investment Act No.5 of 1986.</p> <p>Investment Act No. 19 of 1991.</p> <p>Investment Act No 39 of 1993.</p> <p>The Zambia Development Agency Act, 2006.</p> <p>Foreign Investment Act of Namibia and Summary of Special Incentives for Manufacturers and Exporters in Namibia</p>

**Glossary of abbreviations**

CASD	Centre for Advanced Study in International Development, Michigan State University
FDI	Foreign Direct Investment
ICA	Investment Climate Assessment, World Bank
IMF	International Monetary Fund
KCM	Konkola Copper Mines
RUCOM	Rural Commercial
SADC	Southern African Development Community
UNCTAD	United Nations Conference on Trade and Development
USAID	United States Agency for International Development
ZCCM	Zambia Consolidated Copper Mines

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## CHAPTER 1

### 1.1 INTRODUCTION

Foreign Direct Investment (FDI) has been defined as an activity where foreigners come into a country to set up and/or run a business enterprise.<sup>1</sup> Most investments take the form of acquisition of existing assets rather than investments in new assets.<sup>2</sup>

An apt definition for the purposes of this essay says that Investment is ‘every asset that an investor owns or controls, either directly or indirectly that has the characteristics of an investment, including such characteristics as the commitment of capital and other resources, the expectation of gain or profit and the assumption of risk’.<sup>3</sup>

On the other hand there is the country which is host to the investment. The host also has expectations of benefits arising from investment<sup>4</sup>. Some of these expected benefits are transfer of capital and technology, job creation, development of infrastructure, provision of training and skills development and skills transfer. Investment is also expected to improve the host economy by increasing trade, enhancing revenue by increasing levels of taxes collected and also strengthening local enterprises in cases where the investor buys shares in a local company.<sup>5</sup>

In order to facilitate these gains, a host country will normally employ appropriate legislation to regulate such investment as may be made within its jurisdiction. A more detailed examination of these regulations and conditions follows in later chapters of this discussion. Suffice to state at this stage that Zambia has since independence come up with various statutes to encourage, sanction, regulate and control investment in the country.

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<sup>1</sup> N. Mwilima, ‘FDI in Africa’. African Labour Research Network. Social Observatory Pilot Project (2003) 31.

<sup>2</sup> *Ibid*

<sup>3</sup> United Nations Conference on Trade and Development (UNCTAD), ‘Bilateral Investment Treaties ; Trends in Rule making; 1995-2006’. 12.

<sup>4</sup> K. Mwenda, Regulation of Foreign Direct Investment in Zambia. Michigan State University Centre for Advanced Study in International Development (CASD), Occasional Paper No.14 (2000). 10

<sup>5</sup> *Ibid*

## **1.2     Research objectives**

The objective of the study was to evaluate Zambia's investment laws in a historical context to discover the rationale which has inspired this legislation from the Pioneer Industries Act to the Zambia Development Agency Act of 2006.

The study evaluated the legislation to see if it matched up to classical expectations which a host country should have of foreign investment in relation to national development. It examined Zambia's successive investment laws and what they have sought to achieve. It also investigated the pattern changes in these laws in order to establish the shift in the rationale; tracing the declining demands on investors which otherwise would benefit the country and the impact which such reversals have had, for example, the granting of tax holidays and discarding the mandatory requirement for the registration of investment and technology transfer.

The study also endeavoured to find out if Zambia has made any tangible gains from the quest to attract investment inflows and whether these inflows were a consequence of changes in legislation.

## **1.3     Justification**

Many studies have been conducted in the area of investment, but their main aim has almost invariably been to improve investment flows into the country. Thus, previous studies have tended to highlight the shortcomings in investment legislation, interpreting them as obstacles which have made the country unattractive to investors. This has often been with a view to prod government to do more to compete for investors by meeting perceived investor expectations. This thrust has tended to obscure the impact of such a stance on national development as legislation has continued to change to accommodate investors while the quantum of benefits of investment to Zambia has remained uncertain. Need arises therefore, to evaluate the reasoning, if any, behind the decline in terms of gains available to Zambia from foreign investment.

The study evaluated this obscured area and highlighted other views which have taken a different position from mere investment promotion, examining whether there is a correlation between foreign direct investment and development.

This is an area of interest which must concern every Zambian whose desire is to see some tangible benefit of investment accrue to the citizenry of this country, which is endowed with abundant natural wealth and yet is overwhelmed by poverty while there is a preoccupation with investment promotion and investors continue to flock in.

#### **1.4     Methodology**

The study examined the various Acts, from the Pioneer Industries (Relief from Tax) Act of 1965 to the Zambia Development Agency Act of 2006. It also examined investment legislation for Namibia as a sister nation in the SADC region which has similar development needs as Zambia.

Although a visit to the Zambia Development Agency formed a part of the research, the study relied mainly on desktop research which involved the analysis of legislation and other documentation such as United Nations Country Reports, legal documents, books and publications, previous research papers and internet based information. Some statistical and other relevant data was sourced from the Zambia Development Agency and the Jesuit Centre for Theological Research.

The study also utilised relevant material in the Special Collections of the University of Zambia library. All these sources were reviewed as an on-going process for the duration of the research.

#### **1.5     Outline**

The study comprises five chapters. The first chapter is the abstract. Chapter two introduces investment legislation since independence to date. Chapter three examines the various amendments to the Acts and high-light the condescending stance adopted by Zambia towards perceived or real investor demands. Chapter four critically considers the effect on the country of these retractions. Chapter five offers recommendations and concludes the study.

CHAPTER 2

2.1 INTRODUCTION

This chapter introduces the investment legislation from Zambia's independence to date, tracing the evolution of legislation from the Pioneer Industries Act, which is the precursor of investment law in Zambia. This Act and its successor, the Industrial Development Act, comprise the crux of subsequent investment legislation in Zambia.

In order to adequately and fairly compare or criticise later investment law, it is necessary to examine the two early pieces of legislation in some detail. The examination also reveals the 'give and take' spirit which characterised these early statutes. This chapter therefore will highlight the rationale of these statutes as the basis of our arguments in the chapters that follow.

2.2 Background

In the late 1920s a major development occurred in the territory now called Zambia: the discovery of copper in the north. This led to the extension of the railway and the building of the first smelting plants in the so-called copper belt. By the beginning of World War II in 1939, Zambia had become a major producer of copper, and the extreme urbanization of the northwest was under way.<sup>6</sup>

The dominant players in the economy were the mining companies namely Anglo American Corporation and Roan Selection Trust. Other multinational corporations were also active in the country.<sup>7</sup> However, the nature of main economic activities had the inevitable consequence of development being concentrated mainly along the line of rail where the main colonial settlements were located, although more than two-thirds of the population lived in rural areas.<sup>8</sup> This larger sector of the population was mainly involved in subsistence farming which was its mainstay. The

<sup>6</sup> Microsoft® Encarta® Encyclopedia 2003. © 1993-2002 Microsoft Corporation (own software).

<sup>7</sup> M. Kamuwanga. 'Negotiating Investments Contracts', Multimedia Publications, (1995),1.

<sup>8</sup> International Labour Office. 'Narrowing the gaps. Planning for basic needs and productive employment in Zambia', Addis Ababa (1977), 9.

economy of the country at independence was therefore, capitalistic in nature and driven by profit motive.<sup>9</sup>

Against this background, the new Zambian government sought to lift the standards of living of the people by taking development to the rest of the territory of Zambia.

To this end, Government embarked on a program whose focus was the development of sectors of the economy which had been overlooked or neglected or had even lacked before independence.

In order to do this, Government introduced a legal framework which would serve as the basis for its program to attract investment to these target areas of the economy.

The legislation which was introduced was clearly framed for the primary purpose of developing and transforming the country. The investor would merely be the tool for achieving that end.

## 2.3 The Pioneer Industries (Relief from Income Tax) Act No. 55 of 1965

The first piece of legislation for investment purposes in Zambia. The aim of the Act was stated as 'encouraging the establishment and development of new industries and commercial enterprises by way of relief from tax'.<sup>10</sup> It was perceived this Act would encourage investment to flow into areas of the territory that had lagged behind and thereby create a balance in the spread of development in the country as opposed to what had hitherto amounted to concentrating economic activity and, therefore development along the line of rail. It was made very clear by the provisions of the Act that the country meant to reap economic benefits in return for any concessions it may make in terms of incentives by way of tax relief to an investor.<sup>11</sup> The investor had no choice but to accept the 'give and take' situation established by law.

In this vein, Dr Kaunda is quoted as saying,

'We are willing to cooperate with anybody, including governments, provided it is on the basis of equality ... and for mutual advantage'<sup>12</sup>

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<sup>9</sup> Kamuwanga, 'Negotiating Investments Contracts', 1

<sup>10</sup> Preamble of the Pioneer Industries (Relief From Income Tax) Act No. 55 of 1965

<sup>11</sup> Pioneer Industries (Relief From Income Tax) Act No. 55 of 1965. Sect 8(b)

<sup>12</sup> Kamuwanga 'Negotiating Investments Contracts', 7

The Pioneer Industries (Relief from Taxes) Act, though not perfect as enumerated by the observations of the International Labour Office Report of 1977 cited below, was nonetheless a well thought-out and pragmatic initial piece of investment legislation, considering the social- economic state and level of development of the country at that time. This is the Act which was in effect during, and coincided with the economic boom of 1966-1970.

From 1964 to 1974, the country recorded remarkable economic growth.

Substantial rates of growth were registered in the manufacturing sector in this period, in spite of an acute shortage of skilled manpower and a serious communications (transport) bottleneck.<sup>13</sup>

Statistics show the following, among other indicators:<sup>14</sup>

- (i) The industrial production index for all manufacturing sectors increased from 124.4 in 1964, to 221.2 in 1967. According to the Southern African Regional Poverty Network, December 2004, that resulted in 13% growth in the economy.
- (ii) The sectors GDP increased from ZK28m (US\$ 40.3m) in 1964 to ZK 95.5 (US\$ 136m) in 1967.
- (i) Employment expanded 268,000 in 1964 to 372,130 in 1970.
- (ii) A pay rise of 97% was recorded from 1864 to 1969, while the consumer index rose only by 37% in the same period; meaning that there was tangible wealth creation.

However, according to the International Labour Office report of 1977,<sup>15</sup> the pattern of development was not what government had hoped for. The industries established up to 1976 were almost entirely directed at the production of intermediate or consumer goods, while the development of the capital goods sector had remained sluggish.<sup>16</sup> The report goes on to state that even in the consumer goods sector, many of the new factories catered more for the luxury market

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<sup>13</sup> Southern African Regional Poverty Network, December 2004.

<sup>14</sup> Ibid

<sup>15</sup> International Labour Office, 'Narrowing the gaps', 14.

<sup>16</sup> Ibid

than for the provision of necessities. To encourage industry, therefore, the report further called for tariff protection for those recently established industries.<sup>17</sup>

Another revealing observation of the report was that there had been little success in promoting small-scale industries in rural areas.<sup>18</sup> It had also been found that the benefits of manufacturing expansion on the whole had not percolated down very much to these needy areas.<sup>19</sup>

There had also been a lack of consistency between social and financial considerations in the setting up of manufacturing enterprises with the result that factories had been set up in urban areas purely on profitability criteria.<sup>20</sup>

## **2.4 The Industrial Development Act no. 18, 1977**

In order to address the situation, it was felt, among other recommendations in the International Labour Office report, that steps should be taken to increase the local productive capacity and expand the capacity of the production of local inputs and, notably, to expand the scale of production of components in order to enable producers to increase the number of stages of production that could be undertaken locally.<sup>21</sup> It was also recommended that the use of alternative materials and techniques of production relying more heavily on local products must be encouraged.<sup>22</sup> These observations emphasised the necessity for immediate change in strategy for the development goals envisaged by Government to be achieved. This would entail a deliberate thrust towards industrial development.

Not surprisingly, in 1977, government repealed the Pioneer Industries (Relief from Income Tax) Act No. 55 of 1965 and replaced it with the Industrial Development Act no. 18 (1977).

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid.

<sup>20</sup> Ibid

<sup>21</sup> Ibid 15

<sup>22</sup> Ibid



Contributing to the bill in the National Assembly, the Minister of State for Lands and Agriculture at that time bemoaned the failure of Government to raise funds if government (meaning the national economy) did not produce.<sup>23</sup>

Referring to incentives which the Act offered to investors, the Minister stated,

“We have proposed these incentives for investors to move into our rural areas because we would like small and large scale industries to be established in these areas”

In support, Mr Chisupa, M.P. said the aim of the bill was to accelerate the pace of industrialisation in the country:

“Industrialisation will come with many benefits such as employment, opportunities for improvement in quality of life for the majority of our people throughout the country.”<sup>24</sup>

Clearly referring to the International Labour Office report, he added that the gap between the rural and the urban areas would thereby (meaning by industrialisation) be reduced.<sup>25</sup> It is observed that Government was very keenly implementing, at least in part, the recommendations of the International Labour Office as enumerated earlier.

Statistics also show that the Act of 1977 did not succeed in attracting inflows of investment.<sup>26</sup>

Reasons for this failure can mainly be attributed to the ideological inclination of the country which had embraced socialist policies, which were being introduced and implemented during this period. These tended to stifle free enterprise and the profit motive upon which investment thrives.

The country's economy was also by then dominated by parastatals (80%) and this trend continued into the early 1990's.<sup>27</sup> There were also serious misgivings in parliament at this time with regard to government involvement in industry through these parastatals.<sup>28</sup> These bodies were highly politicised units, many of which were routinely mismanaged and yet were being given

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<sup>23</sup> Zambia, National Assembly Debates (9-19 August, 1977), 205.

<sup>24</sup> Ibid 154

<sup>25</sup> Ibid 155

<sup>26</sup> Statistics: The Southern African Regional Poverty Network, December 2004

<sup>27</sup> Zambia, National Assembly Debates (9-19 August, 1977), 206.

<sup>28</sup> Ibid

priority in allocation of scarce foreign exchange.<sup>29</sup> At the same time, access by foreign investors to local finance was constrained due to stringent exchange control regulations while, on the other hand, the overvalued kwacha hurt export earnings.<sup>30</sup>

Further, economic achievements made before 1977 were further tempered by world recession generally, which was triggered by escalating oil prices and falling copper prices. These two elements had dire consequences for Zambia's fledgling and delicate economy with figures showing that the nation's external debt rose from US\$814m in the early 1970's to US\$ 3.24billion by 1980.<sup>31</sup> An important factor was Zambia's involvement in the liberation struggle of its neighbours also cost it dearly. Estimates published in 1977 put the figure at 650million kwacha (US\$ 1.015billion at that time).<sup>32</sup> Envisaged industrial development was therefore not achieved

Meanwhile, the Industrial Development Act had become the subject of persistent criticism from the business community, prospective investors as well as economic and financial experts.<sup>33</sup> Its main defect was that it had restricted itself to the manufacturing sector only, leaving agriculture, tourism and services without properly codified incentives.<sup>34</sup>

Criticism included that the Act required that an investor make an investment first, before being granted incentives. A more detailed discussion on the reasons given for the repeal of the Act follows in later chapters of this essay.

## 2.5 Investment Act No.5 of 1986

In 1986, the first Act to be openly called the Investment Act was enacted.<sup>35</sup> By Section 45, it repealed the Industrial Development Act of 1977.

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<sup>29</sup> Ibid

<sup>30</sup> International Labour Office, 'Narrowing the gaps', 15. The report recommended the examination of the exchange rate and its impact on capital imports.

<sup>31</sup> Statistics: The Southern African Regional Poverty Network, December 2004.

<sup>32</sup> International Labour Office, 'Narrowing the gaps', 53.

<sup>33</sup> Zambia, National Assembly Debates (11<sup>th</sup> march 1986)), 2592.

<sup>34</sup> Ibid

<sup>35</sup> Investment Act No.5 of 1986, repealed by the Investment Act of 1993.

The Act was verbose and more than half of its provisions were devoted to administrative and procedural issues in contrast with the Industrial Development Act which placed emphasis on issues and specific areas of investment and incentives. However, the new Act did not concede any more to the investor than the preceding act, though the country clearly needed investment more. The lack of further concessions can be attributed to the socialist policies still in place and the controlled economy where investment policies were the subject of political decision making processes.<sup>36</sup> Additionally, at this point in Zambia's history, infrastructure development had slowed and that already in existence had begun to deteriorate. Yet, it is one of the critical preconditions for achieving increased competitiveness and growth (and investment) in any nation.<sup>37</sup> Speaking in the National Assembly, the Minister of commerce and Industry stated thus:-

‘In our present adverse economic situation, we can hardly maintain our own industrial installed capacities to operate at acceptable levels, let alone invest in new ventures for lack of foreign exchange.’<sup>38</sup>

The Act was blamed, in the same way fault had been found with earlier statutes, for being unable to make Zambia a competitive investment destination because it did not go a long way enough in creating a conducive atmosphere for investors.<sup>39</sup>

## **2.6 Investment Act No. 19 of 1991.**

The aim of the 1991 Act was to address the shortcomings of the 1986 Investment Act and to provide additional incentives.<sup>40</sup>

It established the Investment Centre, which was to be a one-stop shop for promotion, regulation, coordination and monitoring of investment in Zambia through a Board.

Requirements for the issuance of a licence were almost a duplicate of the provisions of the 1986 Act. However, it is noticed in this Act that there was an attempt to streamline procedure.

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<sup>36</sup> 3<sup>rd</sup> National Reference Group Meeting, ‘Investment For Development Project’, Consumer Unity and Trust Society-Africa Resource Centre (CUTS), Lusaka (2003) 3.

<sup>37</sup> Investment Climate Assessment (ICA) World Bank, (November 2004). 13.

<sup>38</sup> Zambia, National Assembly Debates (11<sup>th</sup> march 1986), 2592.

<sup>39</sup> Ibid (9-19 August, 1977), 954.

<sup>40</sup> Ibid

For example, Section 17 in the 1986 Act had 7 subsections to do with processing of applications, while 5 large subsections of Section 18 provided for issuance of licenses. In contrast, the 1991 Act dealt with the same matters in only 4 subsections under Sections 18, and 2 subsections under Section 19 respectively.

Incentives were at the heart of the 1991 Act.<sup>41</sup> The Act attempted to lure investors by providing generous incentives for an unlimited duration<sup>42</sup> and investment guarantees.<sup>43</sup>

A holistic view of the state of the country shows that the nation had become much poorer than it was at independence.<sup>44</sup> Statistics show, for example, that the per capita GDP had fallen from US\$700, in 1970 to US\$390 by 1998.<sup>45</sup>

The nation came from having almost no debt at independence to owing US\$814m in the '70s, 2.4 billion in 1980, 3.2 billion in 1985, 5.8 billion in 1986<sup>46</sup> and by 1990 estimates put the debt at about US\$ 7billion.

During this period, the UNIP government had come under extreme pressure to reform its economic policies. Government had for some time resisted capitulating to the Bretton Woods institutions and had only half-heartedly introduced the reform program insisted upon by the World Bank Group in order to regain access to World Bank finances which had earlier been cut off.<sup>47</sup>

The reforms which these financiers insisted upon entailed cutting subsidies, privatisation, among numerous other preconditions,<sup>48</sup> but the legitimate and main target for change at that time was the demise of the one-party political system to make way for the re-introduction of plural politics in Zambia.<sup>49</sup>

<sup>41</sup> Zambia, National Assembly Debates (13<sup>th</sup> -29<sup>th</sup> July 1993), 551.  
<sup>42</sup> Investment Act No. 19 of 1993. Section 19(c)  
<sup>43</sup> Ibid Section 40  
<sup>44</sup> Investment Climate Assessment, 13.  
<sup>45</sup> Ibid  
<sup>46</sup> Austroplan. 'Final Report for the United Nations. Development of Lime Production in the SADC Region', (May 1990), 3/22, fig 3.13.  
<sup>47</sup> Lise Rakner. 'Political and Economic Liberalisation in Zambia, 1991-200'. Nordic African Institute (2003),136-7  
<sup>48</sup> Ibid  
<sup>49</sup> Ibid

The 1991 Act entered into force in August 1991. However, the Act came too late to have any impact at this stage in Zambia's history, as the wind of political change was blowing, heralding inevitable regime change. No proposed changes were effected as a result of the enactment of the new Act and the investment climate remained as it had been before. Even at the time Parliament debated the Investment bill, it was preoccupied with the Constitutional Amendment Bill. As a result, debate on the 1991 Investment Bill was scanty and half hearted.<sup>50</sup>

In November 1991, a new regime, promising economic reforms, came into power.

## 2.7 Investment Act No 39 of 1993.

A reversal in donor attitudes was seen as central to Zambia's economic recovery<sup>51</sup> and the importance of obtaining donor approval left the government with its hands tied, to a large extent, with regard to economic policy.<sup>52</sup> The necessary reforms insisted upon by the donor community entailed a shift from a state oriented to a market based economy.<sup>53</sup> With no resources for Zambia to finance its basic imports, the World Bank devised a new policy to assist the country and other nations in a similar dilemma by way of a bridging loan from bilateral and commercial sources.<sup>54</sup> However, to be eligible for these loans, it was a requirement that the country must undertake an adjustment program which comprised policy packages and prescriptions presented to it by the external donors.<sup>55</sup>

The Economic Intelligence Unit Country Report for 1992 observes that the fact that Zambia's economic ideology coincided with that of the Bretton Woods institutions was less than a coincidence.<sup>56</sup>

For example, the policy based loan offered to Zambia for 1993 was conditional upon Zambia's reducing tariffs, developing plans for land markets, offering for sale 60 companies (parastatals),

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<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid 171

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Ibid

privatising Zambia Airways, working out the sale of the mining conglomerate Zambia Consolidated Copper Mines (ZCCM) and reforming its Investment Act, among many other conditions.<sup>57</sup>

Government found it easier to miss and circumvent the World Bank timetable than address the highly contentious and sensitive requirements, such as privatising Zambia Airways and selling off ZCCM.<sup>58</sup> In fact Government even made provision in the budget to pay a subsidy to Zambia Airways, to the chagrin of the donor community.<sup>59</sup> However, in order to demonstrate some goodwill, Government undertook to fulfil some of the easier conditions<sup>60</sup>. Hence in 1993, a new Investment Act was passed.

The preamble to the 1993 Act provided that the Act was to 'revise the law relating to investment in Zambia so as to provide a comprehensive legal framework for investment in Zambia'.

In the National Assembly, the House was asked to enact the new Investment Act :—

‘due to review of pieces of legislation to update them so as to bring them in line with conditions and requirements of the liberalised economy’.<sup>61</sup>

The 1991 Act was therefore placed on the chopping board because it had been found to be discriminatory, discretionary in nature, requiring high revenue costs and because of its inefficient implementation due to institutional incapacity.<sup>62</sup> The new Act was tendered as one that would streamline and improve the incentive management system.<sup>63</sup>

In light of the state of the country's relationship with donors, this language was intended to appease the donor community in order for the country to have access to credit.<sup>64</sup>

Lise Rakner has stated:

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<sup>57</sup> Ibid. 145

<sup>58</sup> Ibid. 166-7

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Zambia, National Assembly Debates, (13<sup>th</sup> -19<sup>th</sup> July, 1993), 550.

<sup>62</sup> Ibid 551

<sup>63</sup> Ibid

<sup>64</sup> Rakner. 'Political and Economic Liberalisation in Zambia', 167

‘Zambia’s political and economic development policies appear driven by donor funding rather than domestically formulated development concerns.’<sup>65</sup>

These policies included the privatisation program which was intended to divest the state of parastatals. The Investment Act of 1993 was therefore to be the legal framework for investment in the new liberal economy, which would invariably involve privatisation and the Zambia Privatisation Agency which was another agency dealing with investment<sup>66</sup>.

## 2.8 Zambia Development Agency Act of 2006.

The 1993 Act remained in force (with a few amendments) till 2006, when it was felt that privatisation had run its course and the other agencies were duplicating the roles and functions of other related agencies which were set up for regulating development, investment and privatisation.<sup>67</sup>

Government therefore felt it appropriate to rationalise all the pieces of legislation which had established these agencies and their respective roles in national development by establishing a one-stop facility<sup>68</sup> which would combine the Investment Act, Zambia Privatisation Act, Export Development Act, Export Processing Zones Act and the Small Enterprises Development Act<sup>69</sup> and place all the affected agencies under one roof.<sup>70</sup> It was said that the new statute would, apart from replacing the 1993 Act, also improve on deficiencies in the 1993 Investment Act.<sup>71</sup>

This essay later examines this new Act to find out what it is intended to achieve.<sup>72</sup>

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<sup>65</sup> Ibid

<sup>66</sup> Zambia, National Assembly Debates, (13<sup>th</sup> -19<sup>th</sup> July, 1993), 550.

<sup>67</sup> Interview: Collins Sifafula, Zambia Development Agency. 12th September, 2007.

<sup>68</sup> Zambia Development Agency Act, Preamble.

<sup>69</sup> Ibid section 84

<sup>70</sup> Zambia Development Agency Act, Preamble.

<sup>71</sup> Interview: Madford Mwandenga, Zambia Development Agency.

<sup>72</sup> *post* 37

## 2.9 Conclusion

This chapter introduced investment legislation in Zambia since independence in 1964 to lay the basis upon which subsequent criticism, examination and comparison of these statutes in subsequent chapters of this essay will be made. It has given a clear background to these statutes in order to enable the reader to see the rationale behind Zambia's constantly changing investment and development policies over the years. In the period soon after independence, the aims for changes in investment legislation were clear and were intended to bring development to the country. However, as the country's economic situation deteriorated, the changes were predicated on demands made on the country by the donor community, that is the World Bank and the IMF, in order for the country to obtain credit. The resulting investment legislation tended towards making concessions to investors without ensuring that any benefits accrued to the nation. This background demonstrates that it takes more than just legislating for investment inflows for the country to develop.



## 3.1 Introduction

Developing nations generally attempt to draw and encourage investment, whether domestic or foreign. In order to realise benefits to the host state, nations normally impose certain conditions on investors, in connection with the establishment and operation of investments in exchange for the granting of a particular advantage.<sup>73</sup> These are known as Performance Requirements.

The rationale for imposing these conditions is to induce and encourage certain investor behaviour in pursuance of particular policy objectives.<sup>74</sup> Some of the aims for implementing Performance Requirements include influencing the location and character of investment, and in particular, costs and benefits.<sup>75</sup>

As this essay is concerned with the question of benefits accruing to Zambia from investment, this discussion is restricted to this area of investment impact.

## 3.2 Possible gains

The benefits of investment lie among the following main means by which investment may positively affect a host state like Zambia.<sup>76</sup> This list is not exhaustive.

1. Capital and Finance - fresh injection into new or already existing enterprises. Investors may establish new entities or buy interests in those enterprises already in existence in the country, for example, through privatisation.<sup>77</sup>
2. Technology – benefits of new technology; the appropriateness of any new technology to the needs of a host country at its stage of development determines the extent to which any benefits may accrue to a host state and must be taken into account. A state may encourage more rational, self-serving choices of technology and discourage others

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<sup>73</sup> United Nations Conference on Trade and Development. 'Trends in Investment Rule Making', 64.

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Mwenda. 'Regulation of FDI in Zambia'. 10.

<sup>77</sup> Ibid

by granting subsidies and imposing special taxes and subsidies for certain types of machinery respectively.<sup>78</sup>

3. Infrastructure development. New investment encourages the development of new infrastructure or expansion of existing facilities. As industry expands, new roads, telecommunications systems and extension of power capacity and supply infrastructure become necessary and invariably follow.<sup>79</sup>
4. Employment creation – The volume and type of employment, the level of wages, labour relations and long-term stability of these foreign controlled enterprises are some of the important issues which arise with investment inflows.<sup>80</sup> A host state like Zambia must be alive to the consequences of investment inflows on these areas of development.
5. Increasing demand for local inputs – By imposing such conditions as will restrict or discourage importation of raw materials, a host nation can increase the use of locally produced materials in the manufacturing process of an investor enterprise.<sup>81</sup> This in turn benefits local producers by providing a ready market and positively impacts on their livelihood and promotes local production. The host country also benefits by reducing expenditure of its foreign exchange.
6. Increased national tax income.<sup>82</sup> New investment results or ought to result in increased economic activity which ought in turn to result in increased tax income for the host state.<sup>83</sup>

The foregoing list serves as a yardstick with which the success or positive consequences, if any, of the effort to attract investment, and any inflows into the country should be assessed.

The essay will now examine the various changes to investment law in Zambia and highlight the stance adopted by the Zambian government towards perceived or real investor-demands in order to

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<sup>78</sup> International Labour Office, 'Narrowing the gaps', 241.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 262.

<sup>81</sup> UNCTAD, 'Bilateral Investment Treaties', 64.

<sup>82</sup> Ibid

<sup>83</sup> Ibid

attract investors into the country. It is thus sought to arrive at a reasonable assessment in the following chapters, of Zambia's strategy in its quest for investment inflows.

**3.3 The Pioneer Industries (Relief from Tax) Act**

The character of both the Pioneer Industries Act and the Industrial Development Act, which are the two earliest pieces of Zambia's investment law demanded a compromise between investor interests on one hand and national interests on the other. The Investment Act of 1985 also made some demands on investors, albeit to a lesser extent,

At the outset, as a key criterion for qualification for designation as a 'pioneer' industry or enterprise, it was necessary to show that it was 'expedient in the public interest' to encourage the development or the establishment by an investor in Zambia of the industry falling, or to fall under the provisions of the Act<sup>84</sup>.

Public interest and national development emerge as the overriding considerations for any undertaking to be designated as a pioneer industry.

Additionally, the industry or enterprise also had to be one which was not being carried out in Zambia on a commercial scale suitable for the economic requirements or development of the country.<sup>85</sup> It also had to be shown that there were favourable prospects for the expansion of the particular industry.<sup>86</sup>

Apart from the requirement making it necessary for the applicant for designation as a pioneer industry to show that there were prospects for expansion of the industry,<sup>87</sup> any tax relief granted to an investor was calculated on the basis of expenditure already incurred and not potential or envisaged expenditure or investment.<sup>88</sup>

<sup>84</sup> Pioneer Industries (Relief from Tax) Act s 3(1) (iii)

<sup>85</sup> Ibid s 3(1) (ii)

<sup>86</sup> Ibid s 3(1) (ii) i

<sup>87</sup> Ibid s 3(1) (ii) i

<sup>88</sup> Ibid s 8(b)

The Act also provided for stringent monitoring mechanisms<sup>89</sup>. The Investor was required to show an estimate of expected rates of production and give a time frame within which production would start, as part of the qualifying process. 2 weeks after marketable production had commenced, investor was required to submit a statement to the Minister (Commerce and Industry) showing rate of production. If satisfied, the Minister would issue a Production Certificate<sup>90</sup>.

It was the satisfaction of these conditions and obtaining a Production Certificate which formed the basis upon which the investor was granted relief from income tax.

However, its limited scope<sup>91</sup> necessitated the enactment of the Industrial Development Act (1977).

### **3.4 The Industrial Development Act (1977).**

This Act incorporated the monitoring and qualifying requirements of the Pioneer Industries Act but its scope was expanded to include industrial development in all areas of the nation.

It was now necessary to submit a comprehensive feasibility study<sup>92</sup> showing the economic viability of the undertaking describing the technology to be employed before a licence could be issued.

The Act also specified that any technology should include full instructions and practical training.<sup>93</sup> In addition, a transferee of such technology would acquire the right to continued use of the technology or expertise after termination of the agreement.<sup>94</sup>

The Act provided incentives to investors which were dependent on the investor meeting certain criteria as qualifications for classification as a 'Priority Industry' and hence eligible for incentives.<sup>95</sup> These were listed under section 18 of the Act and included the maximum utilisation of domestic raw materials, production of intermediate goods which are used by other industries,

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<sup>89</sup> Ibid s 4-8

<sup>90</sup> Ibid s 8(b)

<sup>91</sup> International Labour Office, 'Narrowing the gaps', 14.

<sup>92</sup> Industrial Development Act s 4

<sup>93</sup> International Labour Office, 'Narrowing the gaps', 212. The Second National Development Plan had referred to an Industrial Training Act, which was to compel all employees to contribute towards the training of Zambians. Unfortunately this was not implemented. However, the mining industry already had and maintained a programme to this effect.

<sup>94</sup> Industrial Development Act s 15 (f)

<sup>95</sup> Ibid

diversification of the investor's industrial structure and the creation of substantial opportunities for permanent employment. The investor was also required to demonstrate improved domestic industrial skills and promotion of development in rural areas.

Incentives were further restricted under the section to where:

- (i) in case of capital equipment, labour intensive techniques of production are not a viable option and
- (ii) in case of raw materials, where they were not available from domestic sources<sup>96</sup>.

Further incentives were extended to exporting enterprises under Section 21. In addition, a tax write-off was extended to enterprises providing training facilities in respect of any such expense.<sup>97</sup>

In this regard, expatriate instructors were granted privileges and facilities in the granting of work permits.<sup>98</sup>

Access to local finance was also made conditional upon satisfying the requirement that enterprises must be operating in rural areas. Satisfying that requirement qualified them to apply for loans from the Development Bank of Zambia,<sup>99</sup> to purchase or apply for the rental of any factory or office facilities constructed in the rural area by Rural Commercial (RUCOM),<sup>100</sup> and the use of RUCOM's marketing and advisory services.

Where an enterprise undertook research on behalf of such an enterprise, it was also exempted from tax on expenditure incurred on the research.<sup>101</sup>

Further, an enterprise entitled to incentives for a specified period was prohibited from ceasing production for a period not less than 3 years after cessation of such incentives except for causes

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<sup>96</sup> Ibid s 26(c)(i)

<sup>97</sup> Ibid s 22 (1),

<sup>98</sup> Ibid s 22(2)

<sup>99</sup> Ibid s 23. Exchange Control Act (Regulations) of 1965 prohibited local borrowing by foreign enterprise without Bank of Zambia authority and imposed other restrictions.

<sup>100</sup> Rucom was a government enterprise whose purpose was commercial development of rural areas in Zambia. It operated well equipped workshops and other facilities country-wide.

<sup>101</sup> Industrial Development Act s 25

beyond its control<sup>102</sup>. Under Section 32(1)(a) any enterprise ceasing production contrary to the undertaking given under subsection (h) above could be required to pay sums which would have been payable if incentives had not been granted to such an enterprise.

### 3.5 The Investment Act of 1986

This Act had its foundations on the IDA. Its aim was to address Government's lack of funds for new investment as well as lack of expertise and technology know-how that go into industrial development.<sup>103</sup> It was also admitted that Government had introduced this Act primarily to accommodate investor demands.<sup>104</sup> The previous Act had come under criticism from the business community, prospective investors, as well as economic and finance experts.<sup>105</sup> The main aspects which had drawn criticism were listed as:

1. The negative tone of the IDA.
2. The requirement for an investor to first make an investment before accessing incentives.
3. The need to consult superfluous government ministries before an investor was allowed to set up business.
4. Too many controls which had potential to strangle honest business.

It was felt that measures should be taken to expedite registration of enterprises which intended to invest in Zambia and it had been found necessary to remove regulations and controls which attended the transfer of technology and expertise, among others.<sup>106</sup>

However, apart from a list of incentives, which were granted to all business enterprises which were earners of net foreign exchange and a selected sector of agricultural activity,<sup>107</sup> the Act conceded

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<sup>102</sup> Ibid s 25(h),

<sup>103</sup> Zambia, National Assembly Debates 17<sup>th</sup> January- 23<sup>rd</sup> March 1986, (11<sup>th</sup> march 1986) p2592.

<sup>104</sup> Ibid

<sup>105</sup> ibid

<sup>106</sup> Ibid 2595

<sup>107</sup> Investment Act 1986, s 23(1)

little more to investors.<sup>108</sup> This was characteristic of Government's socialist approach to economic affairs of the country.

Incentives included a preferential tax rate and access to (internal) borrowing,<sup>109</sup> deduction from taxable income and dividends for 5 years, exemption from deductible tax for 3 years.<sup>110</sup> A deduction of 50 per cent from taxable income of expenses incurred on any training programme for Zambians and any research and development programme was granted to investors on such expenses for a period of ten years.<sup>111</sup> The Act required all manufacturing enterprises and any technology transfer agreements to be registered.<sup>112</sup>

Although the rhetoric in the National Assembly had indicated that far reaching changes would be included in the new Act, there was little in the Act in terms of concessions to investors apart from by way of tax.

### 3.6 Investment Act No. 19 of 1991.

By 1991, the world had already experienced profound changes in the global economic arrangement, which culminated in the demise of the Soviet Union in 1991.<sup>113</sup>

Towards 1991, a new Act had become necessary for Zambia to accommodate the demands of the Bretton Woods institutions and the new shift to free-enterprise and a liberal economy.<sup>114</sup>

Under the 1991 Act any person could now apply to invest in Zambia,<sup>115</sup> whereas in the 1986 Act, certain conditions had to be met for one to qualify as an investor; ensuring that the nation drew some benefit in the end.<sup>116</sup> An Investment license could now be issued to authorise the applicant to make arrangements for commencement of operations.<sup>117</sup> Incentives were contained in this license, meaning that the investor did not need to show any commitment with regard to his proposed

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<sup>108</sup> Ibid s 23(2)

<sup>109</sup> Ibid

<sup>110</sup> Ibid s 26

<sup>111</sup> Ibid s 26(d)

<sup>112</sup> Ibid s 33, 36, 37

<sup>113</sup> Microsoft® Encarta® Encyclopedia 2003. © 1993-2002 Microsoft Corporation (own software).

<sup>114</sup> Rakner. 'Political and Economic Liberalisation in Zambia', 136-7.

<sup>115</sup> Investment Act 1991, s 17(1)

<sup>116</sup> Investment Act of 1986, s 14(1)(a)

<sup>117</sup> Investment Act 1991, s 18(1)(a)

investment before he could enjoy incentives<sup>118</sup> such as exemption from duties and sales tax on any machinery, equipment and parts required for the establishment of the enterprise.<sup>119</sup> The license was of unlimited duration<sup>120</sup> and there was no mention of cessation. It follows that an investor could come and leave as he pleased without being made to account for his employees' terminal benefits or any such dues.

The Act did not designate any areas as investment destinations as had been the case in the past, even though rural Zambia still lagged behind in development. There was also no provision for technology transfer, thereby opening the door to any type technology; suitable or otherwise to the country's needs.<sup>121</sup> Additionally, there was no mention of training for Zambians. The Act opened up the tourism industry<sup>122</sup> and gave further incentives and priority status to enterprises earning foreign exchange in the allotment of land, provision of services like water, power, communication services and others.<sup>123</sup> In addition these enterprises were exempted from selective employment tax for a period of seven years.<sup>124</sup> On application by an investor falling under this category, the Act directed the Director General of the Investment Centre to apply for and obtain the necessary land on behalf of the investor.<sup>125</sup> The investor would also have access to any revolving fund set up by Government for research and development.<sup>126</sup>

The Act also gave tax holidays of up to 5 years to small scale enterprises registered under the small Industries Development Act (1981), including income tax, exemption from licensing fees, property rates on factory premises,<sup>127</sup> duties on imported equipment and manufacturing enterprises were permitted to operate without manufacturing licenses for the first five years.<sup>128</sup>

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<sup>118</sup> Ibid s 18(1)(b)

<sup>119</sup> Ibid s 32(1)(a)

<sup>120</sup> Ibid s 19(1)(c)

<sup>121</sup> Mwenda, 'Regulation of Foreign Direct Investment in Zambia'. 6.

<sup>122</sup> Investment Act 1991, s 35

<sup>123</sup> Ibid s 35

<sup>124</sup> Ibid s 32(1) (d)

<sup>125</sup> Ibid s 32(2)

<sup>126</sup> Ibid s 36

<sup>127</sup> Ibid s 37

<sup>128</sup> Ibid



ernment's psyche. It was a culmination of gradually increasing economic and international  
nor pressure as we saw in chapter 1.<sup>130</sup>

### Investment Act of 1993

mbia made further concessions by the enactment of the Investment Act of 1993, primarily at the  
entless instigation of the donor community.<sup>131</sup>

ction 8 of this Act made the investment certificate, which also granted incentives, optional.

ere were no preconditions to the granting of a licence apart from the status of the applicant  
ing one carrying on a business in the field of manufacturing, agriculture, transport, construction,  
ommunication, tourism and services and know-how.<sup>132</sup>

he granting of a certificate previously meant that the applicant had complied with stipulated  
nditions which, among others, included that the applicant had pledged a certain value of  
vestment in money other forms of capital which would impact the economy directly or  
directly. Section 17 of the 1991 Act contained various requirements which it was necessary for  
an investor to satisfy before he could be granted a licence and have access to incentives. But under  
e 1993 Act, a recipient could obtain the licence only to necessary arrangements to commence  
business even though the licence had an unlimited period of validity.<sup>133</sup>

he prominent features of this Act were tax allowances as incentives to investors.

ncentives included tax rebates, tax holidays on dividends for up to 5years,<sup>134</sup> capital gains  
allowances at specified rates,<sup>135</sup> capital expenditure on farm improvements, the growing of

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<sup>9</sup> Rakner. 'Political and Economic Liberalisation in Zambia', 136-7

<sup>0</sup>Ibid

<sup>1</sup> Ibid / Economic Intelligence Unit. The Economist Group. Country Report no. 1, (1992).

<sup>2</sup> Investment Act of 1993, s 2

<sup>3</sup> Ibid s 12

<sup>4</sup> Ibid s 24. For a maximum 5 years

specified fruit trees and farm works allowances.<sup>136</sup> The Act further allowed any loss in any charge year to be deducted from the income of the investor.<sup>137</sup> Investment in mining was also allowed tax reduction.<sup>138</sup> Small scale enterprise was exempted from tax for 3 to 5 years (if in a rural area).<sup>139</sup> Assistance was also made available with finding suitable land<sup>140</sup> for investment, access to water, power and communication services.<sup>141</sup>

Special incentives gave exemption from customs and sales taxes, duties on machinery and equipment required for investment in agriculture and enterprise in non-traditional products.<sup>142</sup> No evidence was required of the actual equipment needs and there were no guarantees against resale of the same before payment of taxes and duties.

Government was of the view that incentives should be the tool to shape the investment climate and therefore make the country competitive in attracting investment.<sup>143</sup>

### 3.8 CONCLUSION

This chapter has shown that the stance taken by Government in investment legislation in Zambia has been condescending in character. The nation has gradually used legislation to give up possible benefits which it should have consolidated instead, to facilitate national development. Further, the absence of provisions in this Act requiring compulsory licensing would pose difficulties in accurately monitoring investment inflows and in actual regulation of investment in the country. Compulsory registration facilitates information gathering which is relevant for the advocacy of an investment policy. Such omissions hamper effective coordination and facilitation of investment. The 2003 Report of the 3<sup>rd</sup> National Reference Group Meeting of the Investment for Development

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<sup>135</sup> Ibid s 22. On buildings, implements, plant and machinery used exclusively for farming, manufacturing or tourism (s 22 (b)) Repealed by Act No. 10 of 1998

<sup>136</sup> Ibid s 22 (b)) Used exclusively for farming, manufacturing or tourism

<sup>137</sup> Ibid s 23. Except in mining.

<sup>138</sup> Ibid s 26

<sup>139</sup> Ibid s 29

<sup>140</sup> Ibid s 32(1)

<sup>141</sup> Ibid s 33

<sup>142</sup> Ibid s 30A/ 31 Special incentives provided by sections 30A and 31 were subsequently removed in 1996 by amendment to the Act.

<sup>143</sup> Zambia, National Assembly Debates (13<sup>th</sup> -29<sup>th</sup> July 1993), 551.

Project also criticised the Act as being a fragmented piece of legislation, which was inadequate for any business purposes let alone investment promotion.<sup>144</sup>

In contrast, the legislation put in place in 1965 and 1977, which were the foundations of the 1986 Act were focused and had clear objectives to achieve in the economic and general development of the country.

In the next chapter, the essay investigates whether there have been any tangible gains for all the incentives and allowances which government has made. According to the Investment for Development Project, what is apparent is that Zambia still needs credible investment.<sup>145</sup>

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<sup>144</sup> 3<sup>rd</sup> National Reference Group Meeting, ‘Investment For Development Project’, 4

<sup>145</sup> Ibid 7

## CHAPTER 4

### 4.1 Introduction

The last chapter demonstrated how Zambia's investment legislation has evolved; from law providing a development-oriented and regulatory framework<sup>146</sup> to that which was so influenced by coercion, in the name of attracting investment under the premise that conceding incentives was sufficient in itself to make the country a more competitive investment destination.<sup>147</sup> This has been the conventional approach towards investment in Zambia.<sup>148</sup> It assumes that Zambia still needs additional resources if it is to grow and develop, yet facts have shown that resources are not the constraint.<sup>149</sup> The stance which the Zambian government has adopted through investment legislation has elevated giving returns to the investor as the primary motive of investment legislation.<sup>150</sup>

However, Investment Attraction data for the period up to 1997 (Index A), show that Sub-Saharan African countries which have been able to attract investment did not achieve that goal by improving their business environment<sup>151</sup> and implementing policy reforms<sup>152</sup> (except Mali and Mozambique), but rather because of their (abundant) natural resources.<sup>153</sup>

The statistics further show that when all factors, including incentives, were relied upon other than natural resources, Zambia ranked twelfth in Sub-Saharan Africa in a basket of twenty nine countries (after Ghana, Senegal, Mozambique and Zimbabwe).<sup>154</sup>

However, when natural resources are taken into account, the business climate index for the period 1995-97, based for the most part on the (estimated) total value of natural resources in each host

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<sup>146</sup> As seen in the Pioneer Industries Act of 1965, the Industrial Development Act of 1977 and most of the Investment Act of 1986),

<sup>147</sup> N. Mwilima 'FDI in Africa', African Labour Research Network. Social Observatory Pilot Project 2003 'FDI in Africa', 43

<sup>148</sup> Hill and McPherson. 'Promoting and Sustaining Economic Development in Zambia'. John F. Kennedy School of Government, Harvard University Press (2004), 504.

<sup>149</sup> Ibid

<sup>150</sup> Zambia, National Assembly Debates (13<sup>th</sup> -29<sup>th</sup> July 1993), 551.

<sup>151</sup> Morisset. 'Foreign Direct Investment in Africa- Policies Also Matter'. Foreign Investment Advisory Service of the International Finance Company and World Bank. (Unpublished, to be published in 'Transnational Corporation'). 1

<sup>152</sup> Ibid 3

<sup>153</sup> Ibid 1, 3.

<sup>154</sup> Ibid 6

country, ranked Zambia fourth in the same basket, after only Namibia, Mali and Mozambique.<sup>155</sup> Besides her natural resources, Zambia's ranking was so much improved as a result of her relatively aggressive privatisation program and liberalisation policy.<sup>156</sup>

It has consequently been asserted that the country has given heed to the wrong proposition regarding how to attract investment in-flows over the years.<sup>157</sup> This is what has led her into whittling away performance requirements and demands on investors, among other lost benefits, which should have otherwise served to enhance national development.<sup>158</sup>

These findings must prod any researcher to reflect on the effects of investment law in Zambia, if any, and also on their consequences, in light of the fact that the country still grapples with acute and chronic economic and development needs today.

This chapter seeks to do so.

#### **4.2 Effects of changes in investment law in Zambia.**

The 'give and take' spirit which is evident in investment legislation in Zambia up until 1986 and partly still detectable in the 1991 Investment Act was predicated on the need for national development, rather than on giving returns to investors.<sup>159</sup>

After 1991, investment legislation emphasised fiscal incentives in order to make the country a favoured investment destination.<sup>160</sup> The effect of such extensive tax regime changes translates into the loss of any benefits which Zambia should have retained had it not granted those incentives.<sup>161</sup>

A popular question is whether these incentives have made a difference in attracting FDI to Zambia.<sup>162</sup> The table below are Investment Centre statistics for the period 1993 to 2001, showing

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<sup>155</sup> Ibid 7

<sup>156</sup> Ibid 8

<sup>157</sup> J Lungu and A Fraser. 'For Whom the Windfalls? Winners and Losers in the Privatization of Zambia's Copper Mines'. Catholic Center for Justice Development and Peace./ [www.minewatchzambia.com](http://www.minewatchzambia.com) (15 December, 2007), P4

<sup>158</sup> Ibid

<sup>159</sup> Zambia, National Assembly Debates (13<sup>th</sup> -29<sup>th</sup> July 1993), 551.

<sup>160</sup> Ibid

<sup>161</sup> Mwilima N. 'FDI in Africa', 43.

<sup>162</sup> Ibid

investment in-flows and employment created under the 1993 Act according to certificates by sector.

Investment in-flows for period 1993-2006 into Zambia<sup>163</sup>

Year	Employment	Total investment US\$(millions)	Main investment areas
1993	43,552	412	Agriculture, Manufacturing, Transport
1994	23,109	328	Manufacturing, Agriculture
1995	31,812	256	Agriculture, Manufacturing, Transport
1996	19,525	190	Agriculture, Manufacturing
1997	14,373	265	Manufacturing, Services, Tourism
1998	21,980	993	Mining, Manufacturing, Services & Tourism
1999	6,051	150	Services
2000	5,056	84	Manufacturing
2001	4,671	116	Manufacturing
2002	4,949	83	Services
2003	11,838	121	Manufacturing, Agriculture
2004	10,448	124	Agriculture, Manufacturing
2005	9,226	267	Mining, Manufacturing, Agriculture
2006	6,369	697	Mining, Manufacturing, Construction, Agriculture

So far, the evidence in the table above fails to show that, as far as Zambia is concerned, incentives have been successful in attracting FDI. A scrutiny of these figures does not show any correlation between investment legislation, the accompanying incentives and fluctuations in investment in-flows. In fact there was a drop from the passing of the Act in 1993 to 1996. In 1998, relatively large amounts of investment came in primarily into the mining sector.

Chamber of Mines' statistics show that from 1991 to 1996, ZCCM's own investment in the copper mines was around US\$125million a year.<sup>164</sup>

<sup>163</sup> Source: The Investment Centre, 2006

Under new investors for the period 1997 to 2003, the average investment figure was around US\$ 135 million per year;<sup>165</sup> an increase of only US\$ 10million over a period of 7 years. Therefore, while the positive benefits of FDI are widely touted, there is a growing recognition that these benefits are not automatic.<sup>166</sup>

Further, interviews conducted for USAID by Econews with 81 British, Swiss and German firms to find out why their firms invested in the SADC region have revealed the following reasons:<sup>167</sup>

- 84% - Size of local market
- 40%- Local raw materials
- 26% - Personal reasons
- 21% - Strategic reasons
- 19% - Privatization

It becomes clear that other considerations determined the incidence and fluctuations in in-flows, giving credence to the view that investors were attracted to Sub-Sahara by the abundant natural resources rather than incentives or policy changes;<sup>168</sup> the two mechanisms which have been eagerly espoused by Zambia through legislation.

This serves as a caution to Government against the wholesale granting of incentives because there is no evidence to show that they have encouraged investment in Zambia or brought development. Besides, there are no modalities in place to ensure that a certain percentage of the profits which an investor makes are ploughed back into the country in order to contribute to development.<sup>169</sup>

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<sup>164</sup> Lungu and Fraser, 'For Whom the Windfalls?' 20

<sup>165</sup> Ibid

<sup>166</sup> McGuigan C. 'Benefits of FDI. Is foreign investment in Bolivia's oil delivering?' Christian Aid, p6

<sup>167</sup> Jenkins and Thomas, 'Foreign Investment in SADC', Econews. USAID, Pretoria, 15<sup>th</sup> April, 2003.

<sup>168</sup> Morisset. 'Foreign Direct Investment in Africa', 1.

<sup>169</sup> Muweme M. 'Zambia: Is China sneaking in deals through the back door?', Jesuit Centre for Theological Reflection /The Norwegian Council for Africa. [www.ipsnews/africa/index.asp](http://www.ipsnews/africa/index.asp) (12th December, 2007)

The basis for this argument is that FDI comes with vested interests, which is to make a profit - and not to develop the host country.<sup>170</sup>

The essay will now examine the possible gains which have been lost to Zambia with reference to the privatisation of Zambia Consolidated Mines (ZCCM) which was conducted in the name of fresh Foreign Direct Investment.

In the case of ZCCM, the role of incentives is ominous by virtue of lack of limits on incentives.<sup>171</sup> It is expected that the investigation of ZCCM in this respect will clearly show the effects of changes in investment law in Zambia.

ZCCM makes for an excellent case study primarily because the role of incentives in the mines has come to prominence now that copper prices are at an all-time high.<sup>172</sup> This has recently led to cries that Government must now renegotiate its concessions to investors.<sup>173</sup>

Secondly, 15% of Zambians live on the Copperbelt and of those, 79% live in urban areas and have historically been economically linked to the copper mining companies.<sup>174</sup> As result, the effects of events in such an important sector of the economy are felt by a wide spectrum of the population of Zambia. Additionally, the mining industry represents a very large portion of investment inflows into Zambia and can, therefore, be said to be representative of the general situation.

In the 1990s, the International Monetary Fund and World Bank advised government that in order to bring in investment, Zambia would have to make itself 'more attractive' than its neighbours and competitors by developing an investor friendly investment regime.<sup>175</sup>

However, it has been found that such competition has led to countries engaging in what may be termed as the 'race to the bottom'<sup>176</sup>; offering more and more financial incentives and reducing

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<sup>170</sup> Ibid

<sup>171</sup> Lungu and Fraser, 'For Whom the Windfalls?' 3, 4.

<sup>172</sup> Ibid 3

<sup>173</sup> Ibid 11

<sup>174</sup> Ibid 62

<sup>175</sup> Ibid 33

<sup>176</sup> Ibid



regulatory requirements on investors.<sup>177</sup> The end result means that the country that ‘wins’ investors has clearly paid too high a price for it.<sup>178</sup>

The following observations represent some of the more pressing features which provide evidence of the cost to the country arising from, or related to, its retreating investment laws.

1. **Inadequate regulation, illegal operations and impunity.**<sup>179</sup>

The mining sector is regulated by the Mines and Minerals Act of cap 323 as amended by Act No. 5 of 2003. Under the original Act of 1995, tax was charged at 3% of the net-back value of the minerals produced.<sup>180</sup> It has since been reduced to 2% of gross value of minerals mined.<sup>181</sup> Where the mineral mined is copper, the rate is 0.6%.<sup>182</sup>

However, the Act permits investors to reduce their tax even further by permitting them to deduct their investment. It also provides that specific investors may enter into Development Agreements with the government under which they may obtain more favourable concessions, including reductions in royalty rates,<sup>183</sup> and relaxed environmental regulations.<sup>184</sup>

Some investors have taken advantage of this position and the fact that state institutions are very weak or lack capacity to effectively regulate investor behaviour.<sup>185</sup> As a result, commitments investors made in agreements with Government may not be honoured.<sup>186</sup> The subjective nature of the criteria for further reduction of royalty rates and other regulations may lead to some political relationships being developed with certain players in the economy, with the result that health, labour, safety, immigration and environmental regulations can be ignored with impunity.<sup>187</sup>

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<sup>176</sup> Mwilima. ‘FDI in Africa’, 15.  
<sup>177</sup> Ibid  
<sup>178</sup> Ibid  
<sup>179</sup> Lungu and Fraser, ‘For Whom the Windfalls?’ 3  
<sup>180</sup> Mines and Minerals Act (as amended by Act No.5 of 2003), s 66. Calculated at the market free-on board at the port of export.  
<sup>181</sup> Ibid s 66  
<sup>182</sup> Ibid  
<sup>183</sup> Ibid s 26(5)  
<sup>184</sup> Ibid s 77  
<sup>185</sup> Lungu and Fraser, ‘For Whom the Windfalls?’ 3  
<sup>186</sup> Ibid  
<sup>187</sup> Ibid

## 2. **Massive redundancies and Casualisation of the workforce**<sup>188</sup>

Employment on the mines reached the peak of 62,222 in 1976.<sup>189</sup> Due to the gradual decline in the industry, it was at 56, 582 in 1991.<sup>190</sup> This figure had fallen to 31,000 by 1997 and continued to fall.<sup>191</sup> In 2001, it was at 19,145 and in 2006, the figure had risen to only 21,000 workers on pensionable contracts.<sup>192</sup>

Growth in employment under new investors has been restricted to contract employment, which is either for a fixed term with no job security or pension, or employment by sub-contractors under the same or even less secure conditions.<sup>193</sup> For example, in the 5 major mining companies there were 2628 contract employees in 2000.<sup>194</sup> In 2004 the figure had risen to 11, 536.<sup>195</sup> At Chambishi mines alone, it was found that of the 2200 workers, only 52 had permanent contracts.<sup>196</sup> These figures show that FDI has not resulted in desired job creation.

A collapse in the quality of employment has also been witnessed.<sup>197</sup> Worsening conditions include inability to access pensionable contracts or the shifting of workers to reduced terms and significantly reduced benefits.<sup>198</sup> This position is attributed to the absence of controls and inadequate regulation which are evident in the 1993 Investment Act.<sup>199</sup>

## 3. **Increased Pensioner poverty**<sup>200</sup>

Employment on the Copperbelt was halved from 45,000 to 22-000 in 1995.<sup>201</sup> In 2004 there were only 31,000 employees.<sup>202</sup> With the number of contract employees at only 11,536 out of a labour force of 31,000, the arrival of new investors in the mines has created increased casualisation of the workforce.

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<sup>188</sup> Ibid

<sup>189</sup> Ibid 21

<sup>190</sup> Ibid

<sup>191</sup> ibid

<sup>192</sup> Ibid

<sup>193</sup> Ibid 22

<sup>194</sup> Ibid

<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> Ibid 3

<sup>198</sup> Ibid

<sup>199</sup> Ibid 3

<sup>200</sup> Ibid

<sup>201</sup> Ibid

<sup>202</sup> ibid

This has resulted in increased poverty in the absence of support after separation.<sup>203</sup> There is also no assurance that at the end of a working life, there will be any pension for a retiree to fall back on.<sup>204</sup> Some investors do not feel bound to adhere to respective labour laws in the absence of adequate regulation enforcement.<sup>205</sup> In this connection, there has been a growing anti-union tendency among new investors, some of whom have eventually abandoned their workers without paying them severance benefits.<sup>206</sup> The consequences on such employees are often desperate.<sup>207</sup>

#### 4. **Failure to protect social infrastructure**

ZCCM had a very active program which provided social amenities, which in turn helped to keep society together.<sup>208</sup> However, new investors have made minimal effort, if any at all, to maintain these facilities.<sup>209</sup>

The mines also made a direct contribution to making the Copperbelt the most developed area of Zambia, maintaining high standards of sanitation, providing health facilities among many other proactive programs.<sup>210</sup> These programs extended beyond ZCCM and affected society at large.<sup>211</sup> However, investment law in Zambia makes no demands on investors to provide any such facilities. As a result of tax incentives which have been granted to the mining industry,<sup>212</sup> government is unable to adequately pick up the burden of maintaining its own people in this respect due to lack of resources.<sup>213</sup> For example, cuts in social services after privatisation led to significant increases in absenteeism due to an increase in the prevalence of malaria.<sup>214</sup> By 2004, 25% of recorded deaths were as a result of malaria.<sup>215</sup> Malaria was also afflicting 30% of the population every year.<sup>216</sup>

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<sup>203</sup> Ibid

<sup>204</sup> Ibid

<sup>205</sup> Ibid 2

<sup>206</sup> Ibid 26

<sup>207</sup> Ibid 29-31

<sup>208</sup> Ibid 4

<sup>209</sup> Ibid

<sup>210</sup> Ibid 8

<sup>211</sup> Ibid.

<sup>212</sup> Ibid 55. The tax rate for the mining industry is zero.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid 4

<sup>215</sup> Ibid

<sup>216</sup> Ibid

**5. Failure to develop the potential of the local population**

It is estimated that at independence, less than 0.5% of Zambia's population had completed primary education.<sup>217</sup> There were only 107 university graduates.<sup>218</sup> Under the UNIP government, the nation took advantage of relatively high copper prices and profits from nationalised companies (before they began to make losses) towards building hospitals, schools and training facilities besides other infrastructure.<sup>219</sup> Income from copper mining accounted for over 50% of foreign exchange earnings and over 60% of government revenue.<sup>220</sup>

Currently, in the absence of tax income from investors on tax holidays due to provisions of investment law, there are inadequate funds for Government to maintain, let alone develop new facilities for its people.<sup>221</sup> It is therefore unable to develop the full potential of its indigenous population.<sup>222</sup> The long term consequences of this situation will hamper development efforts even further because of lack of adequately trained or educated people in the country.<sup>223</sup>

**6 Development of a dependency syndrome**

As a result of inadequate resources flowing into the national treasury due to reduced tax income, government has developed an increasing dependency on donor support to meet its budget and development requirements.<sup>224</sup> This has created a cycle which has resulted in further concessions on Government's part, with donors pushing their agenda in Zambia without resistance. The corollary of the cycle has been more reduction in the amount of tax Government can collect; making it even more dependent on donors to meet its budget and other financial obligations.

An example is the reform of the 1993 Investment Act which was a condition for a loan.<sup>225</sup> The resulting Investment Act gave even more incentives to investors.<sup>226</sup> A recent example is the recently completed 5<sup>th</sup> National Development Plan which has an estimated cost of K65.2 trillion.<sup>227</sup>

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<sup>217</sup> Ibid 7  
<sup>218</sup> Ibid  
<sup>219</sup> Ibid  
<sup>220</sup> Ibid  
<sup>221</sup> Ibid  
<sup>222</sup> Ibid  
<sup>223</sup> Ibid 57  
<sup>224</sup> Ibid 9  
<sup>225</sup> Ibid 11  
<sup>226</sup> Ibid  
<sup>227</sup> Ibid 60

The resources available over the next 5 years for its implementation from normal expenditure are K49.9 trillion<sup>228</sup>. This leaves a gap of about US\$1.5 billion between projected cost and projected local resources, which government has argued that donors should fill.<sup>229</sup> This position only feeds the dependency syndrome.

## **7 Environmental degradation**

The mining sector has been the target of serious attacks arising from serious incidents of environmental mismanagement and pollution which have threatened the lives and health of local people, especially those communities down-wind of Nkana, Mufulira and Kitwe smelters.<sup>230</sup> The range of pollutants includes sulphur dioxide emissions, heavy metal effluent being discharged into rivers which also supply drinking water.<sup>231</sup> There has also been the silting of local rivers which has killed off plant life and fish stocks.<sup>232</sup> The problem of silting of rivers and streams in and around Chingola, for example, has been so serious as to threaten to cause flooding which in turn could wash away roads and bridges and cut the town off from the rest of the country.<sup>233</sup>

The current situation is a result of the development agreements which Government signed with investors which gave investors such concessions as the exemption from environmental laws as long as they remained within ZCCM's pre-privatisation parameters.<sup>234</sup> These agreements have a highly unusual legal status.<sup>235</sup> Due to provisions for Stability Periods, the agreements cannot be contradicted by future legislation because the Stability Periods ensure that the policies which were in place when the agreements were made cannot be changed for between 15 and 20 years.<sup>236</sup>

## **8 Loss of natural resources**

While government cannot collect tax from investors due to provisions in investment legislation which have created extra-generous tax incentives, increased levels of copper production and

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<sup>228</sup> Ibid

<sup>229</sup> Ibid

<sup>230</sup> Ibid 33

<sup>231</sup> Ibid

<sup>232</sup> Ibid 34

<sup>233</sup> Ibid

<sup>234</sup> Ibid 35/ Mines and Minerals Act, s 77

<sup>235</sup> Lungu and Fraser, 'For Whom the Windfalls?' 2

<sup>236</sup> Ibid

products of other investment enterprises mean that the nation is giving away its natural resources for very little benefit to the nation.<sup>237</sup> Since copper is a wasting resource, the nation will be left poorer in the end than it would be without investors under current agreements and investment incentives.

It is observed that revenue is not being collected while at the same time, copper prices have increased exponentially<sup>238</sup> and incomes have jumped upwards.<sup>239</sup> For example, First Quantum's net earnings exploded in just two years; from US\$ 4.6m in 2003 to US\$ 158m in 2005.<sup>240</sup> Towards the end of 2006, the company reported that its profits in the third quarter of 2006 would be triple those in the same period in 2005.<sup>241</sup> Profits for KCM also jumped from US\$ 53m in 2005 to US\$ 206m in 2006.<sup>242</sup> Government collected no tax because the tax rate on mining is zero.<sup>243</sup>

In 2006, First Quantum made a unilateral decision to pay tax even though it was well within the tax holiday granted to it in its development agreement.<sup>244</sup>

The rationale for that decision was that, considering the company's position, it had become embarrassing to continue not to pay.<sup>245</sup>

The study of events at ZCCM can be applied to the whole province of investment and investors in Zambia in genera and gives credence to the assertion that there is a high cost to be paid when a nation attempts to attract investors by conceding incentives. In Zambia's case, it has truly been a 'race to the bottom'.

### **4.3 The Zambia Development Agency Act**

This is the law in force relating to investment in Zambia. It repealed and replaced the 1993 Investment Act (as amended in 1998). One of the objectives of the Act is stated as to provide a

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<sup>237</sup> Ibid 19

<sup>238</sup> Ibid

<sup>239</sup> Ibid 21

<sup>240</sup> Ibid

<sup>241</sup> Ibid

<sup>242</sup> Ibid

<sup>243</sup> Ibid 55

<sup>244</sup> Ibid 57

<sup>245</sup> Ibid

one-stop shop institution in order to reduce the bureaucracy and facilitate the speedy processing of investment licences with the aim of achieving increased investment and therefore fostering economic growth and development, besides promoting trade and investment in Zambia.<sup>246</sup>

An examination of this Act reveals that it does not diverge from the 1993 Act and has retained the old approach of attempting to draw in investors by granting incentives.<sup>247</sup> However, the extent and nature of incentives has not been limited to the Act alone, but room has been created for the discretion of the Minister of Finance to determine the granting of incentives.<sup>248</sup> Where the investment amounts to or exceeds US\$10m, the Minister may specify additional incentives.<sup>249</sup> The ZDA makes no pretence at being anything new but simply the facilitator of the merging of the different organs and functions as contained in its long preamble.<sup>250</sup>

The extent to which it attempts to merge those organs and spell out their functions creates the appearance of an Act lacking focus and vision for long term development. In practice, the investor still has to obtain licences from different ministries to conduct business, for example, incorporation with the Registrar of Companies, applying for land at the ministry of Lands, obtaining permits at the Ministry of Mines, Environmental Council and many others. The Act cannot claim to simplify anything which directly affects business and national development. It is inundated with lengthy administrative provisions for the agency, its Board and functions for the Agency's various departments.

According to the Parliamentary Select Committee report on the ZDA Act,<sup>251</sup> it was rushed through the National Assembly and therefore did not receive the scrutiny worthy of an Act which was meant to play such an important role in business and development in Zambia.<sup>252</sup>

<sup>246</sup> Zambia, National Assembly Debates, Bill No. 5 of 2006, 11.

<sup>247</sup> See Table B below, comparing the Acts

<sup>248</sup> Zambia Development Act sect 54

<sup>249</sup> Ibid sect 58

<sup>250</sup> Zambia Development Agency Act, Preamble.

<sup>251</sup> Zambia, National Assembly Report, Bill No. 5 (2006).

<sup>252</sup> Ibid 17 / R Sichinga, 'Investment Promotion - Making ZDA work for businesses in Zambia'. Innovative

#### 4.4 COMPARISON WITH NAMIBIA'S FOREIGN INVESTMENT ACT

The essay will now make a comparison of the 1993, the ZDA Act and Namibia's Foreign Investment Act.

Namibia has been identified as one of the few countries in Sub-Sahara to have made a success of its efforts to attract investment into that country. The country had the best 'Business Climate for FDI' ranking for the period 1995-1998 among a basket of 29 Sub-Saharan countries.<sup>253</sup> This, of course, does not mean that Namibia has benefited from FDI.<sup>254</sup>

Namibia, like Zambia, has been traditionally perceived as a secure country with satisfactory macroeconomic indicators.<sup>255</sup> In addition, the Foreign Investment Act of Namibia was enacted in 1990 and commenced in 1992. It is therefore contemporary with Zambia's 1991 and 1993 investment legislation which forms the basis for the Zambia Development Agency Act (ZDA).

The preamble of the Act simply states that it is an Act 'To make provision for the promotion of foreign investment in Namibia'. In the same way that the Investment Act of 1993 created a one-stop facility, the Act creates an Investment Centre.<sup>256</sup>

The Act does not discriminate between a national of Namibia and a foreign national. In this connection, the Act provides that a foreign national may invest or engage in any business activity in Namibia which any Namibian may undertake.<sup>257</sup> Under section 3(2), a foreign national is placed in the same position as a Namibian as regards taxation except as otherwise provided by the Act.<sup>258</sup>

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<sup>253</sup> Morisset, 'Foreign Direct Investment in Africa', 7-8

<sup>254</sup> Mwilima, 'FDI in Africa', 34.

<sup>255</sup> Ibid 8

<sup>256</sup> Foreign Investment Act of Namibia Act No. 27 of 1990, s 2.

<sup>257</sup> Foreign Investment Act of Namibia, s 3.

<sup>258</sup> Ibid s 3(2)



The table below shows how Namibia's Act compares with both Zambia's 1993 and the ZDA Act of 2006.

Area of comparison	Investment Act (Zambia) 1993	Foreign Investment Act (Namibia)1990	Zambia Development Agency Act 2006
Qualification	Open to anyone	Open to any one	Open
Reserved categories/ Preference treatment	-	<p>Sect 3</p> <ul style="list-style-type: none"> <li>- Minister may gazette any business as exclusively to be undertaken by Namibians. Foreign nationals may not undertake the same.</li> <li>- License pertaining to natural resources may grant Namibians more favourable terms than those afforded to foreign nationals</li> </ul>	-
Consideration to be made before issuing Certificate.	<p><u>Investment Certificate</u></p> <p>No special considerations</p>	<p><u>Certificate of Status Investment</u></p> <p>(a) Section 7</p> <p>(i)That the investment will promote the interests of Namibia</p> <p>(b) Section 6(2)</p> <p>(ii) Extent to which the proposed investment is likely to contribute towards Namibia's development.</p> <p>(iii)Use of local resources including labour.</p>	<p><u>Investment Certificate</u></p> <p>Section 69</p> <p>(i) Need to promote development and</p> <p>(ii) Creation of employment</p> <p>(iii) Export orientation growth</p> <p>(iv) Environmental impact</p> <p>(v) Possibility of technology transfer</p>

		<p>(iv) Increasing employment opportunities</p> <p>(v) Providing training of Namibians</p> <p>(vi) Earning or saving foreign exchange</p> <p>(vii) Contribution to disadvantaged sector of the population</p> <p>(viii) Provision of equal opportunities for women.</p> <p>(ix) Environmental impact</p> <p>(c) Section 5.</p> <p>(x) Foreign assets of value to be determined by Minister</p> <p>(xi) Any investment or reinvestment by a foreign national of profits or proceeds of sale of an enterprise specified in a certificate</p> <p>(xii) Acquisition of shares by a foreign national in a Namibian company or a participating share in an unincorporated joint venture:</p> <p>(a) of not less than 10 per cent share capital and (b) active involvement of the foreign national in management of the company or joint venture</p>	
Externalisation of	Sect 36.	Sect 9	Sect 20

foreign exchange	<ul style="list-style-type: none"> <li>- No exchange controls</li> <li>- Investor who has registered foreign capital entitled to transfer after payment of any taxes</li> <li>- Allowed for payment of dividends, foreign loans, licence fees, royalties, net proceeds after sale</li> </ul>	<ul style="list-style-type: none"> <li>- Subject to exchange control regulations</li> <li>- Allowed for repayment of foreign loans, licence fees, dividends, royalties, proceeds after sale proportional to foreign composite in the asset, and profits after tax.</li> <li>- If in the opinion of Bank of Namibia, the amount may adversely affect external of payments of Namibia, transfer of proceeds after sale to be paid in instalments</li> </ul>	<ul style="list-style-type: none"> <li>- No exchange controls</li> <li>- Allowed for payment of dividends, foreign loans, licence fees, royalties, net proceeds after sale</li> <li>-</li> </ul>
Incentives to investors	<p>Sect 18-</p> <p>Numerous tax incentives including for non-traditional products ,rural enterprises, deduction on mining, customs duty and sales tax, dividends, rates exemptions, provision for double taxation agreements</p>	<p>There are no incentives for investors in the Act. Special incentives, administered by the Investment Centre, have been reserved for manufacturers and exporters, and are outside the Foreign Investment Act (see attached copy).</p>	<p>Part VII.I Sect 54 – 63</p> <ul style="list-style-type: none"> <li>- At the determination of the Minister</li> <li>- Exemption from customs duties for machinery and business in priority areas.</li> <li>- Eligibility to operate a bonded warehouse</li> <li>- Provision for double taxation</li> </ul>

Namibia's Act does not offer incentives to companies just because they account for investment in-flows and are called investors.<sup>259</sup> The question is not whether they are investors, but whether the investment entity is one which produces for exports or is a manufacturing enterprise. This targeting approach resembles the thrust of the Pioneer Industries Act of 1965 (repealed in 1977) and the Zambia Development Act of 1977 (repealed in 1985). This approach has been successfully employed in other countries, for example, Singapore.<sup>260</sup> It can help countries to achieve strategic objectives related to such aspects as employment, technology transfer, exports and, as was the case in Zambia, development of a particular area.<sup>261</sup> Another advantage of targeting is that it is cost effective.<sup>262</sup> A focused approach to attract export oriented investment is likely to be less costly than where a country attempts to attract FDI in all sectors at the same time.<sup>263</sup>

The comparison of these statutes shows that Namibia has a more strict and conservative investment regime than Zambia. Yet Namibia has been ranked very highly as an investment destination in Sub-Sahara Africa and is preferred before Zambia.<sup>264</sup> That country has achieved that envied position without employing tax rebates and other incentives to attract investors. Under Section 3(2) of Namibia's Act, Namibia collects tax from investors at the same rate as all other businesses unless a particular investor has specifically been granted incentives as a manufacturer or exporter.

#### 4.5 A note on Botswana

Although Botswana has always been open to foreign investment, it has never had a foreign investment law.<sup>265</sup> It relies on laws which regulate and govern the various independent or related sectors to implement policy as well as regulate the entry of FDI.<sup>266</sup>

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<sup>259</sup> Incentives are only available to manufacturers and exporters.

<sup>260</sup> Mwilima, 'FDI in Africa', 36.

<sup>261</sup> Ibid

<sup>262</sup> Ibid

<sup>263</sup> Ibid

<sup>264</sup> Morisset, 'Foreign Direct Investment in Africa', 7/ Appendix

<sup>265</sup> United Nation Conference on Trade and Development, 'Investment Policy Review – Botswana' (2003), 25

<sup>266</sup> Ibid

Therefore, there is no agency which screens foreign investors for approval to invest in Botswana.<sup>267</sup> However, the promotion and facilitation of FDI fall under the functions of the Botswana Export Development and Investment Authority.<sup>268</sup>

The following observations demonstrate Botswana's position on investment, which show that that nation has attempted to strike a balance between the interests of the nation with those of investors.

Partly as a result of the perception that small and medium scale FDI has reduced opportunities for national investors and helped to undermine local skills development,<sup>269</sup> Botswana has excluded certain selected business, namely; retail trade, services and manufacturing from FDI in order to protect local entrepreneurs.<sup>270</sup>

With regard to the mining industry, Botswana has deliberately chosen not to offer a highly competitive fiscal regime.<sup>271</sup> Additionally, there is a high and non-negotiable rate of interest of withholding tax on royalties, interest and fees payable to non-residents currently at 15%.<sup>272</sup> This tax is seen as a strong disincentive to FDI, especially the kind of investment which requires third party debt.<sup>273</sup> The rates of mineral royalty are also high at 5% on the sales value of precious metals and 3% on other minerals.<sup>274</sup>

In the case of diamond mining, key provisions are subject to case by case negotiations because diamond mining and marketing are fundamental to the country's national economic strategy.<sup>275</sup> The country also imposes tariffs on of up to 30% on industrial plant and equipment.<sup>276</sup> In addition, in 2003, the government of Botswana proposed a further tightening of the FDI regime which would include forbidding FDI below a certain size or amount and requiring a prior deposit of investment funds before approving the entry of FDI.<sup>277</sup>

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<sup>267</sup> Ibid

<sup>268</sup> Ibid

<sup>269</sup> Ibid

<sup>270</sup> Ibid

<sup>271</sup> Ibid 43

<sup>272</sup> Ibid 31

<sup>273</sup> Ibid

<sup>274</sup> Ibid 44

<sup>275</sup> Ibid

<sup>276</sup> Ibid

<sup>277</sup> Ibid 51

In spite of all these conditions on FDI, Botswana is one of the most successful of all small developing countries in attracting FDI to achieve economic growth and transformation.<sup>278</sup>

For example, although there no incentives offered to the tourism industry, business grew rapidly during the period 1992 to 2002.<sup>279</sup>

#### 4.6 CONCLUSION

This chapter has shown that, in the case of Zambia, condescending investment legislation has resulted in less than equitable returns from Foreign Direct Investment. The precise cost to Zambia in both financial, social and development terms may not be ascertainable, but from what has happened in the mining sector of this country alone, where copper prices have jumped exponentially upwards since 2003, with Zambia collecting no tax yet, that cost is colossal.<sup>280</sup>

It has also been demonstrated that as tool for development, incentives have brought no benefits to the nations which have granted them. They have instead resulted in increased profits for investors and increased poverty for host nations.<sup>281</sup> There is clearly no link between incentives, on the one hand, and national development on the other,<sup>282</sup> just as there is no link between investment in-flows and positive transformation.<sup>283</sup>

Observations on Botswana evince the existence of alternative means or options through which a nation can frame and successfully manage its investment regime and still attain its development goals without conceding gains to investors. It is on this basis that African states and Zambia in particular have been encouraged to take the development of their territories and peoples in their own hands, instead of depending on outsiders to bring development to them. As this chapter has demonstrated, reliance on outsiders can only be at great cost.<sup>284</sup>

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<sup>278</sup> Ibid 48

<sup>279</sup> Ibid 86

<sup>280</sup> Lungu and Fraser, 'For Whom the Windfalls?' 21

<sup>281</sup> Ibid 43

<sup>282</sup> Ibid

<sup>283</sup> Ibid

<sup>284</sup> Hill and McPherson. 'Press Promoting and Sustaining Economic Development in Zambia', Harvard University. John F. Kennedy School of Government, (2004), 480

## 5.1 Introduction

The previous chapter explored investment legislation in Zambia and showed that the country has incurred losses as a result of the acquiescent character of its investment law. That character stems from the generous incentives and other allowances which have been granted to investors, especially becoming prevalent in the law with the advent of liberalisation in the third republic.

## 5.2 Investment legislation and Incentives.

African countries in general are faced with many socio-economic problems.<sup>285</sup> Most of them have become desperate in trying to find solutions and have taken the advice from such bodies as the IMF and World Bank and have liberalised their economies, reformed their investment laws and policies, introduced generous incentives in the form of tax holidays and other concessions to investors in order to attract FDI in the belief that increased FDI will bring development.<sup>286</sup> Although they have adhered to IMF and World Bank demands and taken steps to comply with those demands, actual flows of FDI into African nations have been on the decline.<sup>287</sup> As these incentives imply financial and other costs, such as administrative costs,<sup>288</sup> prescriptions of the proponents of liberalisation and reform have therefore only resulted in increased hardship for the people of Africa.<sup>289</sup>

In the case of Zambia, this study has examined the results of the investigation of the situation in Zambia's mining industry after privatisation.<sup>290</sup> The study has shown that investment legislation designed to appease such bodies as the IMF and the World Bank, with incentives as their focal point, have not benefited the nation.

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<sup>285</sup> Mwilima. 'FDI in Africa', 42.

<sup>286</sup> Ibid

<sup>287</sup> Ibid 43

<sup>288</sup> United Nations Conference on Trade and Development, 'Incentives and FDI'. Current Studies Series, No. 30 (1996), 12

<sup>289</sup> Ibid

<sup>290</sup> Lungu and Fraser, 'For Whom the Windfalls?' 1.

On the contrary, facts on the ground as well as statistical data in this study show that Zambia's goal of achieving development and transformation cannot be achieved by adhering to the prescriptions of the IMF and World Bank which insist that conditions attractive to investment must first be created in order for development to come. A study by the World Bank itself has shown that fiscal incentives cannot be regarded as major determinants of foreign investment.<sup>291</sup> In Zambia's case, it has been found that the industries that were given pioneer status under the Pioneer Industries Act were not attracted by fiscal incentives.<sup>292</sup>

Other studies such as that undertaken on the role of Mexico's fiscal incentives in attracting investment revealed that only 4.2% of the total number of investors who were polled were influenced by fiscal incentives.<sup>293</sup> A similar study in Jamaica showed that only 2 out of a sample of 55 investors were attracted by fiscal incentives.<sup>294</sup>

The general position is therefore that such incentives are not major determinants of foreign direct investment.<sup>295</sup> Incentives actually constitute lost revenue in so far as they do not play an important part in attracting Foreign Direct Investment and merely worsen the problem of shortage of capital in developing states.<sup>296</sup> The corollary is that the generous incentives which Zambia has granted to investors through investment legislation have actually retarded the country's development.

Additionally, this study has shown there is no evidence that even if substantial investment in-flows were recorded, development would result thereby. In fact the contrary is true, as has been shown in the case of post-privatisation ZCCM.

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<sup>291</sup> Mwenda K 'Legal Aspects of Direct Foreign Investment In Zambia'. Murdoch University Electronic Journal of Law, (December 1999), 1.

<sup>292</sup> Ibid 6

<sup>293</sup> Ibid 5

<sup>294</sup> Ibid

<sup>295</sup> Ibid 6

<sup>296</sup> Kamuwanga, 'Negotiating Investments Contracts', 8.



### 5.3 RECOMENDATIONS

This study echoes the stand taken by researchers, trade unions and non-governmental Organisations from SADC nations at a seminar in February, 2001 which was held in Windhoek, Namibia.<sup>297</sup> While the seminar addressed itself to the problems of Africa in general, the position taken on FDI is apt for Zambia. Therefore this study recommends as follows:

- (i) Zambia should abandon its open door policy to investment incentives and FDI as it has been shown not to bring development but rather increases poverty.<sup>298</sup>
- (ii) Zambia must determine her own national policies and set both her priorities and the context for FDI,<sup>299</sup> as Botswana has done.<sup>300</sup> This is on the premise that social policy and the public sector cannot be handed over to international institutions or the private sector<sup>301</sup> because the interests of these entities are usually at variance with national interests: on the one hand, profit and on the other, national development.<sup>302</sup> The study of post-privatisation ZCCM referred to in chapter 3 clearly justifies this position.<sup>303</sup>
- (iii) Government must resist all additional conditions which come with FDI and instead, set up her own conditions.<sup>304</sup>
- (iv) Zambia should endeavour to acquire technology which is not tied to FDI. In this way, appropriate technology which will enable the people to assimilate and maintain it at a much reduced cost than technology coming into the country with FDI.<sup>305</sup>
- (v) Zambia should take full advantage of regional groupings to which she is a member and develop and expand her market share.
- (vi) Zambia should use the 'targeting approach' to FDI rather than attempt to draw investment into all areas of development at once.<sup>306</sup> The approach is cost effective and

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<sup>297</sup> Ibid

<sup>298</sup> Ibid

<sup>299</sup> Ibid

<sup>300</sup> United Nations Conference on Trade and Development, 'Investment Policy Review – Botswana' (2003). 25.

<sup>301</sup> Ibid

<sup>302</sup> Ibid 43

<sup>303</sup> Lungu and Fraser, 'For Whom the Windfalls?', 19.

<sup>304</sup> Ibid 42

<sup>305</sup> Ibid

<sup>306</sup> Mwilima, 'FDI in Africa', 36.

will enable her to achieve strategic objectives related to priority areas of her development agenda.<sup>307</sup>

- (vii) Development agreements which were entered into to facilitate privatisation should be revisited and revised to make them equitable and enable the state to benefit from the exploitation of its natural resources, for example the copper mining industry.<sup>308</sup>
- (viii) Zambia should aim at employing any investment in-flows to build the industrial base of the country as this has been shown to be a rapid means of transformation of economies and people.<sup>309</sup>
- (ix) Zambia must frame an industrial investment policy which should aim at creating quality employment and favourable conditions in light of new discoveries of minerals and other natural resources, particularly oil.<sup>310</sup>
- (x) Zambia should plan ahead and determine her development agenda rather than let outsiders take control of her destiny as a result of the absence of a national policy.

#### 4 CONCLUSION

The theory which has consistently been advanced by the IMF and World Bank that FDI in its present form brings growth and development needs to be reviewed<sup>311</sup> in light of the fact that evidence on the ground shows the contrary, with African countries showing below expectations results.<sup>312</sup> It is therefore important before admitting FDI that each government should assess what kind of development the country needs and set up policies which guide the development process of the nation and not allow FDI to determine the country's development process<sup>313</sup> Hence FDI should only be allowed to operate under conditions which have been determined by national policy and must conform to certain performance requirements in order to ensure a positive impact

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<sup>7</sup> Ibid

<sup>8</sup> Ibid 70

<sup>9</sup> Ibid 69

<sup>10</sup> Ibid

<sup>11</sup> Ibid 43

<sup>12</sup> Ibid 34

<sup>13</sup> Ibid

on development.<sup>314</sup> This is why Zambia must come up with an investment policy which will drive the investment agenda in the country instead of the need to attract FDI determining investment policy.<sup>315</sup>

The main challenge is for the World Bank, the IMF (the two main proponents of incentives for FDI) and others who argue that FDI is important for growth and development to present information in the form of case studies, which supports their argument.<sup>316</sup> It is as a result of compliance with such unproved assertions that nations like Zambia have ended up with investment legislation which has only benefited investors and left host nations in poverty and unable to take care of their own people.<sup>317</sup>

This study has shown that there is no evidence that FDI brings development.<sup>318</sup> The case of the privatisation of Zambia Consolidated Copper Mines shows that the pursuit of development through increased investment in-flows is also a farce. It has also been shown that Zambia has not made any gains from investment and that any investment inflows into the country have never been a consequence of changes in legislation.

It is therefore incumbent upon Zambian and developing nations in general which have succumbed to the coercion of the donor community and reformed their policies and laws in order to attract investors by granting generous incentives to revisit such legislation.

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<sup>314</sup> Ibid 44

<sup>315</sup> 3<sup>rd</sup> National Reference Group Meeting, 'Investment For Development Project', 3

<sup>316</sup> Mwilima. 'FDI in Africa', 43.

<sup>317</sup> Lungu and Fraser, 'For Whom the Windfalls?', 2

<sup>318</sup> Mwilima. 'FDI in Africa', 43. / Tandon Y. 'The Role of FDI in Africa's Human Development'. Seatini, Harare, (2002).

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**Table 1. FDI inflows and GDP: ranking of 29 African countries, average 1996-1997**  
(Millions of dollars)

	Net FDI Inflows	GDP
South Africa	2313.5	129094
Nigeria	1566.0	36540
Cote d'Ivoire	305.1	10251
Angola	265.5	7396
Tanzania	154.0	6707
Uganda	148.0	6555
Namibia	109.9	3453
Ghana	101.3	6762
Senegal	92.2	4542
Mozambique	68.3	1944
Zimbabwe	66.5	8512
Zambia	64.0	4051
Mali	61.6	2532
Mauritius	46.7	4151
Cameroon	40.0	9115
Benin	31.5	2137
Guinea	20.6	3998
Chad	16.5	1603
Kenya	16.2	9899
Madagascar	12.1	3552
Congo, Republic	8.5	2298
Central African Republic	5.5	954
Ethiopia	5.0	6330
Rwanda	2.4	1771
Congo, Democratic Rep. Of.	1.5	6904
Malawi	1.5	2424
Burundi	1.0	1137
Niger	1.0	1858
Sierra Leone	1.0	940

Source: **World Development Report, World Bank (1999).**

Our indicator captures the attraction of African countries for FDI when they can rely on everything except for their natural resources and market size. Therefore, it reflects not only policy and political variables but also a series of structural factors such as infrastructure, transport costs and human capital. By indicating the attraction of the FDI business climate for each country, it complements the data collected in investors' surveys and cross-country ranking such as *The Africa Competitiveness Report* published by the World Economic Forum. One has to keep in mind, however, that our indicator reflects existing rather than potential data/information and, thus, might be a poor predictor of future FDI flows.

**Table 2. Business Climate for FDI: ranking of 29 African countries, average 1995-1997**

Country	FDI/business climate <sup>a</sup>	ICRG political risk <sup>b</sup>	Institutional Investor <sup>c</sup>
Namibia	1	1	NA
Mali	2	12	13
Mozambique	3	11	18
Zambia	4	4	14
Chad	5	NA	NA
Senegal	6	13	6
Angola	7	18	20
Benin	8	NA	12
Mauritius	9	NA	1
Cote d'Ivoire	10	8	8
Tanzania	11	5	10
Uganda	12	15	11
Central African Republic	13	NA	NA
Ghana	14	7	4
Madagascar	15	9	NA
Burundi	16	NA	NA
Rwanda	17	NA	NA
Zimbabwe	18	4	3
Congo, Rep.	19	14	19
Nigeria	20	17	15
Niger	21	20	NA
Guinea	22	19	17
Malawi	23	6	7
Cameroon	24	16	9
Kenya	25	5	5
South Africa	26	2	2
Ethiopia	27	10	15
Sierra Leone	28	21	22
Congo, Dem. Rep.	29	22	21

Sources: Author's own calculations; Pigato (1999).

<sup>a</sup> The business climate index is defined as net FDI inflows normalized by GDP and the total value of natural resources in each host country.

<sup>b</sup> Political risk rating based on the opinion of banks, TNCs and other institutional investors indicating corruption, political and judicial institutions.

<sup>c</sup> Institutional Investor rating measures a country's creditworthiness, which is mostly determined by economic and financial variables.

The ranking of 29 African countries according to the indicator proposed above is presented in table 2 (first column). In 1995-1997, the most attractive country was Namibia, followed by Mali, Mozambique, Zambia, Chad and Senegal.<sup>6</sup> The least attractive were Congo, Sierra Leone and Ethiopia. Preliminary findings for 1998 indicate

<sup>6</sup> The good ranking of Chad and Zambia reflects that the first country offers great oil reserves (not reflected in our indicator of natural resources) that have attracted companies interested to explore those