

FOREIGN INVESTMENT: THE LAW AND POLICY  
IN ZAMBIA

by

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DEDICATION

This Work is Dedicated to  
my beloved mother

NAMAKANDO

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DECLARATION

I DAVID AKAPELWA AILOLA, do hereby declare that this  
dissertation entitled;

FOREIGN INVESTMENT: THE LAW AND POLICY  
IN ZAMBIA

is entirely the outcome of my own work, and that no part of  
it represents collaboration with others except where other  
research is specifically referred to and acknowledged in  
footnotes and bibliography.

I further declare that this dissertation is not substa-  
ntially the same as any that I have (or may have) submitted  
for a degree or Diploma or other qualification at any other  
University and that no part of it has already been or is  
being concurrently submitted for any such degree, qualifi-  
cation or diploma.

DATE:.....

SIGNED:.....

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The aim of this study is to examine the laws and practices relating to foreign investment in Zambia. But knowing that foreign investment is a controversial topic that has been covered by many respected scholars, it became apparent to me that my opinion alone could not be relied upon. For this reason, I have tirelessly sought the advice and counselling of other scholars. It is particularly to DR. MULWILA that I am highly indebted. In his capacity as my supervisor, his quick and penetrating observations greatly eased my task. I must hasten to mention, however, that all sins of commission or omission are entirely my own.

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LIST OF ABBREVIATIONS

B.S.A.CO.	- British South Africa Company
G.D.P.	- Gross Domestic Product
I.D.A.	- Industrial Development Act
I.M.F.	- International Monetary Fund
I.B.R.D.	- International Bank for Reconstruction and Development
I.C.S.I.D.	- International Centre for Settlement of Investment Disputes.
I.C.C.	- International Chamber of Commerce
I.L.M.	- International Legal Materials
INDECO	- Industrial Development Corporation Limited
CILJSA	- The Comperative and International Law Journal of Southern Africa
CIPEC	- Inter-governmental Council for Copper Exporting Countries.
L.M.E.	- London Metal Exchange
L.M.A.	- Livingstone Motor Assemblers Limited
H.M.S.O.	- Her Majesty's Stationery Office
MINDECO	- Mining Development Corporation Limited
N.C.C.M.	- Nchanga Consolidated Copper Mines Limited
R.C.M.	- Roan Consolidated Copper Mines Limited
R.D.C.	- Rural Development Corporation Limited
RUCOM	- Rural Commercial Enterprises
D.B.Z.	- Development Bank of Zambia
UN/ECA/FAO	- United Nations Economic Commission for Africa and Food and Agricultural Organisation

U.D.I.	-	Unilateral Declaration of Independence
UNIP	-	United National Independence Party
N.Y.	-	New York
Q.J.E.	-	Quarterly Journal of Economics
Z.I.S.	-	Zambia Information Services
Z.C.B.C.	-	Zambia Consumer Buying Corporation Limited
Z.N.D.P.	-	Zambia National Development Plan
ZIMCO	-	Zambia Industrial and Mining Corporation Limited

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ABSTRACT

The question of foreign investment has many dimensions and is accompanied by varied opinions especially in the context of the developing countries. In the newly independent countries of Africa, Asia and South America the admission of foreign investors to the economies of the nation states has met with both appreciation and discontentment. Not very long ago, foreign investors were widely acknowledged as absolutely vital, but neutral agents of capital and technology transfer. Today, the trend has shifted somewhat. They are seen in the eyes of most developing countries not as neutral agents of capital and technology transfer, but as principals of that movement. To a greater extent, this conception is true. Foreign investors today possess great economic and commercial power and pose a challenge not only to the national policies of the recipient states, but also to the economic independence of these states as well.

In this dissertation, we shall not so much concern ourselves with the individual aspects of the challenge that modern foreign investors pose to the newly independent states. Neither shall we pay great attention to the theories regarding the pros and cons of foreign investment. Such aspects as nationalisation, compensation, settlement of investment disputes and obstacles faced by investors in Zambia shall only be touched on where necessary. This is because these aspects

have already been adequately covered by other scholars. Our main concern in this dissertation will be with the development of the institution of foreign investment in Zambia. In this respect, our focus will be on discovering the basis of this institution within the legal context of Zambia.

Our work is covered in six chapters. Under chapter one, our concern is with the theories attributed to the growth of the institution of foreign investment at the universal level.

Chapter two relates to the development and growth of foreign investment within Zambia. In this chapter, expositions are made regarding both the colonial and the Zambian official policies relating to the whole field of foreign investment. A historical review is conducted stretching from the time when the first Europeans established themselves in this country up to the time when the nationalist government took over power and further beyond that historical event into the infancy of the nation.

In chapter three, we have again adopted a historical approach to discover what kind of inducements have been offered to foreign investors to attract them. This review goes back to the days of the B.S.A. Company rule over the territory. It may now be challenged whether incentives are vital to the development of investments, but these came to be very much

believed by the countries of Africa, Asia and South America when they first attained their independence. However, we are not in this chapter going to debate the question of the importance of incentives, but we shall simply be looking at some of the offers, policies and laws made by the various governments that have administered this country in relation to foreign investors.

Chapter four discusses some of the specific laws that were promulgated to accommodate certain specific investments. Most of the projects covered related to government undertakings such as in the railways, electricity and fuel areas. The chapter does not cover all the specific investments that might have taken place. It simply gives random samples.

In chapter five we have taken an analytical approach to examine the country's investment law and the impact they have made on investors. The main aim is to establish the efficacy of the laws in question in relation to the interests of the nation as a whole. The interests of the investors themselves will be covered. Chapter six which constitutes our conclusion will summarise all the issues that the dissertation has raised.



### METHODOLOGY

Many authors of distinction have analysed the question of foreign investment from the economic, legal and political approaches. Our analysis will not depart much from these approaches although much of our attention will be given to the legal view point. Where they bear on the relevant legal rules the political and economic aspects will be considered. And where necessary comparative analysis will be made regarding the legal issues affecting investors in Africa or elsewhere.

Our approach further represents a compromise between a review of earlier works and an investigation of a limited number of areas. This approach has been conditioned by the knowledge that other works have been carried out on similar topics.

CHAPTER ONE

THE GENERAL BASIS FOR  
INVESTING IN DEVELOPING  
COUNTRIES

In 1817, David Ricardo advanced his "Law of Comparative Advantage" in which he viewed goods as Mobile Units, but factors as not being mobile.<sup>1</sup> This was subsequently expanded by others such as Mill, Ohlson, Edgeworth and Marshall.<sup>2</sup> No comparable work had, however, appeared at that time to explain the phenomenon of direct foreign investment.<sup>3</sup> It was only as a result of rapid colonial expansion by the industrialised states between 1870 and 1900 that scholarly interest in the economic and political ramifications of direct foreign investments was provoked. Several reasons were advanced to justify or to explain such investments which occurred in the non-industrialised countries.

Although much emphasis in this work will be directed towards private foreign investment, it is important to mention that a substantial amount of capital placed at the disposal of less developed economies has been provided by the governments of the developed countries as well as international institutions. In the case of government investments the reasons for the trend are as follows:<sup>4</sup>

- (i) The end of colonial domination of the less developed countries witnessed unfortunate experiences on the part of private foreign investors which led to their reluctance to provide more capital.
- (ii) The United States of America as the economic leader of the western countries after the war was less inclined to private capital exports to developing countries.

As most private investors were compelled to invest in the less developed sectors at home, the government, therefore, had itself to provide capital for projects in the developing countries.

- (iii) The ideological tensions between the east and the west led to competitions in the provision of development aid by governments.

Suffice to mention here that most of the capital provided by governments of the developed countries is directed mainly to areas where profits are in fact not assured. These include the construction of harbours, irrigation systems and other investments that have no inherent earning capacity.

On the part of the international institutions, the most notable ones are the Brettonwood institutions - the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), commonly known as the World Bank, and other affiliated bodies such as the International Finance Corporation and the International Development Association. These institutions play a complementary and coordinating role in the task of making capital available

to developing countries. The IBRD and its affiliates are well known in this respect for their involvement and cooperation with private capital suppliers.

It is proposed in this paper to examine the reasons advanced to justify the occurrence of foreign investments in non-industrial countries under three divisions, namely; "Investment as a result of overseas expansion," "Investments for the exploitation of natural resources" and "Other explanations for foreign investments".

#### 1.1. Investments as a Result of Overseas Expansion

According to the view of J A Hobson,<sup>5</sup> writing in 1902, the phenomenon of direct foreign investment came about in response to a basic financial weakness in the capitalist system. It was that weakness which prompted financial leaders to invest overseas in the hope of tapping more profits from there. On this point Guth,<sup>6</sup> is even more blunt. According to him, whereas capital movements during the last decades were influenced by the effects of war - these being reparation loans, debt redemption and reconstruction efforts, today, capital exports are predominantly inspired by normal economic motives viz, making of profits through the export of capital. He, however, adds one factor, the endeavour to assist the less developed countries in their development efforts.<sup>7</sup> This last factor is discussed below.

There are many more writers who view the issue of foreign investments on the ground of overseas expansion. Donald Rothchild and Robert Curry view foreign investment as a result of the activities of multinational companies. These activities are geared towards maximising the advantages created by marketing opportunities as well as cheap production costs in the host countries. These same writers add that by reason of the economic hopelessness that most developing nations find themselves in, the importation of foreign capital and management become the only feasible means of advancements.<sup>8</sup> In other words the desperate situation that the developing countries find themselves in paves the way for foreign investment in their economies.

Similarly, Vernon's theory of "International Product Cycle"<sup>9</sup> can be treated as one explaining the phenomenon of overseas investment. The first stage looks at the production of new products in the home countries of the foreign investors. Coming to the second stage, we find that more emphasis is placed on the exportation of excess products to the non-industrial markets. At this stage foreign investors assume the role of distributors. In stage three, Vernon sees foreign markets as having grown large enough to support manufacturing operations. Foreign firms, therefore, according to this theory begin to establish branches in receiving states.

### 1.2. Investments for the Exploitation of Natural Resources

Some writers have long identified that the pressing problems that are facing the world today are constituted by the need for economic growth and the consequent raising of the standard of living in the developing countries. These countries need to industrialise in the shortest possible time and to expand their share of world trade. It has been pointed out, however, that the inability of these countries to exploit their natural resources poses the greatest hinderance to the above aspirations.<sup>10</sup> Many of the developing countries are in possession of very valuable natural resources, which if properly utilised would go a long way in alleviating their current problems. In fact, Patu Simoko asserts that present quantifiable statistics show that seventy five percent of world raw materials are found in the developing countries.<sup>11</sup> The developing countries, however, lack the basic instruments for exploiting these resources.<sup>12</sup> This leaves a gap which foreign investors came in to fill.<sup>13</sup>

### 1.3. Other Explanations for Foreign Investments

There are numerous other commentaries relating to the phenomenon of foreign investment. Most of these, however, put less stress on the economic basis of that phenomenon. They rather place emphasis on the political and sociological factors of foreign investment. In one view, it has been asserted that the aim of western enterprises that come to invest in the developing countries is really political domi-

nation, rather than successful conduct of business for profit.<sup>14</sup>  
The case of United States investments in China has been raised as an obvious example. All investments carried out by U.S. firms in China, it is said, came about as a result of urging by the State Department (Personnel) and not dictated by business objectives.<sup>15</sup>

The World Bank sees foreign investments in a different perspective.

According to its annual report,<sup>16</sup>

"a revolution of expectancies has been in progress for a considerable period of time. This has been prompted by the coming of age of the colonial countries. It is this revolution of expectancies which is said to have given a sense of urgency to the development of the less developed countries. Consequently, it has been submitted that only when it is managed to change this revolution of expectancies into a revolution of achievements will the world be spared revolutions and serious tension".

According to this view therefore, it can be contended that all foreign investments in developing countries are in response to this revolution of expectancies.

For our part, it can be submitted that foreign investments have also been made possible as a response to the institutionalisation of national markets in recent decades. In most countries, high taxation and sharp progression have impeded the accumulation of private capital and have thus made it necessary for the capital-seeking businessman or enterprise to rely on bank credits and other methods of financing. Direct foreign investments are in this light

a way of avoiding disturbilisation arising from national market institutionalisation.

In another perspective, foreign investments may be understood to be motivated by other than purely institutional causes. The large firms in industrial countries are today primarily interested in obtaining a firm foothold in developing countries in order to secure markets for their products. They also seek to maintain and extend their existing markets. Side by side with these motives is another one aimed at defending those markets against competition and nationalist policies. Tumwine Mukubwa finds professor Vernon's product cycle theory to be relevant in explaining this factor.<sup>17</sup> Using the Tanzania experience, he (Mukubwa) found that even after stringent tariffs had been imposed, many factories were established in that country by foreign owned firms. Here in Zambia, he says, many international companies came to set up business following the Rhodesian U.D.I. According to Mukubwa, the foreign owned firms involved chose to invest in these two countries despite the nationalist measures they had taken because their markets were at stake and they could not hope to yield much if they continued to operate from outside.

Two more motives can be outlined. First, direct investments abroad are frequently regarded by capital exporting firms as a means of promoting their overseas exports since in practice, these capital exports are mostly connected with home products.<sup>18</sup> This can be equated to Mukubwa's<sup>19</sup> assertion that some firms



carry out foreign investments in order to stake out a market for their obsolete machines and spare parts. In the second place, there is also the motivation arising from the low cost of labour in the developing countries. A good example of this exists in Taiwan, where unschooled girls are assembling television components as adequately as the educated, but expensive workers of the parent countries.<sup>20</sup>

### Conclusion

The practice of investing in developing countries is clearly an old one. Its basis is as varied as the types of investments themselves. We have seen that such a basis ranges from the economic considerations to the political and social ones. As to the order of priority, it is not for us to state.

FOOTNOTES

1. Dolph Warren Zink, The Political Risks for Multinational Enterprise in Developing Countries, with a case study of Peru. 1973 Praeger Publishers, New York; p. 18.
2. Ibid. (See also Charles P. Kindleberger, International Economics, 1910 3rd Ed. Homewood-Illinois p. 3)
3. Dolph Warren Zink, Op Cit. See also Wilfred Guth. Capital Exports to less Developed Countries, 1963 Dordrecht - Holland, P. 2.
4. Wilfred Guth, ibid . p. 20.
5. Dolph Warren Zink, supra p. 4.
6. Wilfred Guth, supra.
7. Ibid.
8. Donald Rothchild and Robert Curry Jr, Scarcity, choice and Public Policy in Middle Africa. University of California Press. Berkely 1978, p. 152. See also Stephen Hymer, "The Multinational Corporation and the Law of Uneven Development", in J N Bhugwati, Economics and World Order from the 1970s to the 1990s (New York: Mac Millan, 1972), p. 116.
9. Vernon R, "International Investment and International Trade in the Product Cycle." (1960) 80 Q J E pp 140-207.
10. Nwogugu E 1. The legal problems of foreign Investments. In the Deveoping Countries. Manchester University Press 1955. p. 2.

11. Patu Simoko, Why Underdevelopment? Third World Publishers, Lusaka, 1982 p. 111.
12. Nwogugu E 1, Supra
13. Ibid
14. Robinson RD, International Business Policy. New York: Holt, Rinehart and Winston, 1964 p. 24.
15. Dolph Warren Zink, Op Cit. p. 19. See also Guth Wilfred, Op Cit. P. 4.
16. See International Bank for Reconstruction and Development, Tenth Annual Report, 1954 - 1955, 8 - 39.
17. Tumwine Mukubwa, 1975-77, Zambia Law Journal, p. 143  
Professor Vernon's Product Cycle is explained at Page 20.
18. Guth Wilfred Op Cit. p. 31
19. See Gaydos - Quoted by Adam "Multinational Corporations and World Wide Sourcing" in H Radice (ed) International firms and modern Imperialism, Handsworth Penguin 1975.

CHAPTER WO

THE DEVELOPMENT OF FOREIGN INVESTMENT IN

ZAMBIA

2.0. Introduction

There are several factors that are accountable for the evolution of foreign investments as well as the general economy in Zambia. The most significant of these are the historical, geographical as well as the political factors.<sup>1</sup> We shall discuss the first two aspects now, while the last one will be discussed in other chapters as well as within the context of the post independence situation.

For a very long time, there has been in existence close historical, cultural and political ties between this country and other foreign countries, particularly, the United Kingdom. This relationship naturally extended to the commercial and economic fields. Secondly, the neighbouring countries of Rhodesia (now Zimbabwe) and South Africa have also had a significant role to play in the economic life of this country on account of their close geographical proximity to Zambia.

2.1. Investments in Pre-Independence Zambia

The earliest significant investment in Zambia (or Northern Rhodesia as it then was) was in the field of mining by the British South Africa Company (BSA). This was followed by refining and smelting industries, and also by other

industries in consumer goods such as flour milling and soap-making.<sup>2</sup> Before these developments there was some degree of industrial activity in trading and agriculture, by bodies such as the North Charterland Concession Company and the Mozambique Gold Land and Concession Company Limited.<sup>3</sup>

It must also be mentioned that the timber industry had taken off at least by 1912.<sup>4</sup>

The B.S.A. Company was the administering authority of the territory until 1924 when the British Imperial government decided to assume direct control of the territory. The Company's primary concern was however, with the exploitation of the natural resources of the territory and not the promotion of development programmes for the benefit of the native population, not even to incur administrative costs beyond the minimum required to maintain law and order so as to protect its economic interests. The Company, naturally created its own distorted explanations of its unprogressive stand on the development of the territory. The Company claimed that throughout the life of the Company's administration, Northern Rhodesia remained a financial liability. The administrative deficit for the year ending March 31, 1921, was said to have reached £96,500.<sup>5</sup> This situation was said to have arisen by reason of the territory's incapacity to attract a large influx of European farmers who would have been a source of substantial tax revenue.<sup>6</sup> It is, however, submitted that these excuses were no more than idle propaganda. For it is not surprising that while refusing to

From the time the mining of copper was commenced, it emerged as the dominant and most important export commodity for the colony, which later became independent Zambia in 1964. Thus, for example, between 1945 and 1953, exports of copper accounted for an average of 86.5 percent of total exports. The remaining 13.5 was also derived from the mining industry.<sup>10</sup> When independence came in 1964, this dependence on copper did not decline. In fact it had increased so much that, while copper accounted for about 92 percent of the country's export earnings in 1964, this jumped to about 95.7 percent by 1969.<sup>11</sup>

Copper was also the greatest contributor to the country's Gross Domestic Product (GDP) as shown by Table 1 below. That Zambia (or Northern Rhodesia) had one significant economic activity-viz-copper mining, is hardly surprising since this is in line with the strict profit motive of all foreign investors and colonialist administrators.<sup>12</sup> It was always their style not to spread their investments throughout a country. Contingent upon such a profit motive, they preferred to restrict their activities to only those parts of a country which offered more opportunity for viable exploitation, and it so occurred in this country that the most viable area was that of copper mining.

Admittedly, the profit motive is aided by many other factors. Colonial powers are also renowned for keeping the size (s) of dependent markets small. These markets are often defined by the purchasing power of the natives. This purchasing power

is in turn very weak because the native workers are deliberately ill-paid, hence the no growth situation of the markets. The Advisory Committee (to the Government) on Industrial Development had this in point when they stated in their 1948 report that:

"until the European population in Northern Rhodesia increased to over 35,000 and standard of living of the African population raised above the present level, internally markets will remain too small to support manufacturing industry of a size to require assistance from the government".<sup>13</sup>

Whether an increase in the population of Europeans as well as the raising of the standard of living of the Africans would have increased the size of the market and aided the promotion of industry is not really the subject of this chapter.

TABLE 1

GROSS DOMESTIC PRODUCT BY SECTOR OF (VALUE IN K. MILLION)

	1964	1965	1966	1967
INDUSTRIAL SECTOR				
Agriculture, Forestry and Fishing	53.3	54.8	60.5	66.3
Mining and Quarrying	220.8	208.9	240.1	254.6
Manufacturing	28.2	40.0	60.2	73.2
Construction	20.0	39.4	54.0	55.9
Electricity and Water	5.0	5.3	7.4	8.1
Trade	54.8	17.3	78.3	96.0
Financial Institutions and Insurance	0.6	10.7	11.5	15.8
Real Estate	10.6	9.2	15.2	18.9
Transport and Communications	20.6	32.4	32.4	44.4
Government Administration	21.2	30.4	35.4	42.1
Community and Business Services	19.6	34.1	34.6	55.1
Personal Services	19.6	12.2	14.6	15.7
Gross Domestic Product at 464.9	464.9	548.6	644.5	751.1

SOURCE: OLLAWA P E, Participatory Democracy in Zambia.

Op. Cit. p. 112.



What is fundamental is that because of colonialist designs coupled with selfish interests of private investors, there was created in Northern Rhodesia a mono-economy, much to the disadvantage of the country which was seriously in need of advancement.

By the time of independence therefore, there was almost no significant manufacturing industry in Zambia. The only other activities in addition to those already mentioned, were in the tobacco and beverage sectors which rendered themselves attractive by reason of low investment cost and high yields.<sup>14</sup> One of the major reasons for the low manufacturing capacity of Zambia's economy is that it was obliged by the administration to leave the way for the Southern Rhodesia and South Africa as well as the English industries to fill up the vacuum.<sup>15</sup> According to the practice that obtained during that time, the international mining companies normally exported the mineral (copper) with as little processing as was deemed consistent with the assumed level of profitability of those companies. For this reason, it is not surprising to see that the same mineral resources that were being extracted from this country's mines were meanwhile being exported to London, Johannesburg and Salisbury, where they were processed into finished products and sold back to the people of Northern Rhodesia (Zambia) at very exorbitant prices.

Even at independence, mining continued to be the most dominant economic activity in Zambia. Indeed whatever degree of growth that the country attained directly before independence

was dictated by the foreign mining companies and the European settlers who indulged in related industries.

For these reasons, economic growth in this country was very negligible.

## 2.2. Post Independence Investments

When Zambia became independent, late in 1964, she inherited an economy with very limited supplies of capital in the physical sense. The main reason for this trend as has already been seen was over-dependence on a single export industry of copper mining. On the other hand, the country enjoyed an unlimited supply of capital in the monetary sense.<sup>16</sup> How did this state of affairs come to be? This question becomes particularly significant considering as we have done, the fact that during the colonial period the country had few valuable industries and that her role was mainly that of a raw material supplier and a buyer of finished products. The question is answered below.

The country enjoyed a comparatively healthy economy after independence on account of several reasons. The first reason was that of acquisition of mineral royalties on the eve of independence. These royalties had hitherto belonged to the British South Africa Company. Secondly, the price of copper at that time was reasonably high. Thus even though the government increased its spending, there was still an excess of revenue. Similarly the ending of the Federation of Rhodesia and Nyasaland contributed to the retention of capital within Zambia. Considering that revenue from Zambia's copper mines was used during the

Federation period to develop Southern Rhodesia,<sup>17</sup> then it becomes indisputable that the Federation's disintegration offered more than this single contribution. With it came the picking up of Zambia's non-mining industry which until that time was concentrated in Southern Rhodesia.

In the post-independence era, Zambia's manufacturing sector actually did grow, although this expansion did not contribute significantly to the spread of increased productivity in all sectors of the economy. The manufacturing sector contributed less than 7 percent of the total Gross Domestic Product.<sup>18</sup>

The basic stimulant to ~~the~~ expansion of manufacturing was the Rhodesian U.D.I. which brought in a sense of urgency to the development of local manufacturing industries. The oil pipeline from Dar-es-Salaam, and a major expansion in road haulage, stimulated the establishment of repair shops and associated activities.<sup>19</sup>

Despite this rapid growth in the manufacturing sector, dependence on certain imported parts and material was increasing. Thus it is notable that the domination of Zambia's economy by foreigners did not change immediately after independence. Even in such spheres as agriculture which contributed about 11.5 percent to the GNP at independence, the domination of foreigners was very high.

### 2.3. Conclusion

We have seen that foreign investments in Zambia started during the colonial era. Before the country became independent and well into the era of independence these investments

focussed mainly on the copper aspect. All the other aspects that might have been involved were basically connected to the copper industry.

Another notable factor was that, such foreign investments came to dominate the country's economy to levels where the country lost control of its economic destiny.<sup>20</sup>

This situation compelled the independent government to initiate some reforms. In spite of these reforms however, the government still continued to maintain an open policy towards investors. As we shall see in the next chapter, this policy was accompanied by certain legal guarantees and controls.

FOOTNOTES

1. See sinclair Weeks, Investment in Federation of Rhodesia and Nyasaland. London 1956 p. 23.
2. Mulwila J M: Economic Independence in Zambia and the Role of Law in Economic Development, LL.M Thesis, University of Zambia (un-Published) 1976 p. 71.
3. See the North Charterland Concession Inquiry Report to the Governor of Northern Rhodesia by Commissioner Actg. Justice Maugham, July 1932. His Majesty's stationary office London, 1939
4. A Young, Industrial Diversification in Zambia. Praeger Publishers. New York, 1973
5. Ibid
6. Ibid at p. 30.
7. See Patrick Ollawa. Participatory Democracy in Zambia, The Political Economy of National Development. Devon 1979, p. 66
8. See Sir Theodore Gregory. Ernest Oppenheimer and The Economic Development of Southern Africa, London 1962 p. 392.
9. Mark Bostock and Charles Harvey. Economic Independence and Zambian Copper. Praeger 1972 p.26
10. Baldwin R.E. Economic Development and Export Growth, Buckely 1966 p. 35
11. Annual Report Ministry of Development and Finance 1970: 52-53.
12. Patu Simoko, Why Underdevelopment? Third World Publishers, Lusaka 1982 p. 5

13. See Northern Rhodesia Advisory Committee on Development Third Report, Government Printer. Lusaka, May 1948 p. 30.
14. Ann Seidman. The distorted Growth of Import Substitution Industry. The Zambian Case, Paper presented to the Conference on Natural Resources and National Welfare, July 3 - 9 1974. Lusaka pp 3-5
15. Republic of Zambia, First National Development Plan. 1966- 1970  
p. 1
16. Ibid.
17. See p 31 *supra*
18. Monthly Digest of Statistics, July 1973.
19. Michael Faber, "The Development of Manufacturing Sector". In Charles Elliot ~~1971~~. Constraints on the Economic Development of Zambia, Nairobi, 1971 p 307
20. This point is discussed further in chapter five.

## CHAPTER THREE

### THE INVESTMENT CLIMATE

#### 3.0. Introduction

The discussion in this chapter is limited to legal statutes and regulations pertaining to foreign investment. It will not, however, encompass all of Zambia's laws applying to the organization and functioning of business with international connections. This limitation does not, ipso facto, imply that such laws are unimportant. It is basically caused by reasons of scarcity of time and the scattered nature of the laws that have some bearing on the conduct of business in the country. Some of these laws and regulations include those relating to prices, wages and production. Of paramount importance to us are those offering incentives and protections of various kinds to various foreign investors.

As Zambia had been ruled by three sets of administration (viz-the B.S.A. CO., the Colonial Government and the Federal Government) at various times before independence, it is considered important that the role of each administration regarding the creation of investment conditions should be discussed.

#### 3.1. (a) The B.S.A. Co. Inducements

Generally, before independence, support for foreign capital investors was a policy matter. There were, however, a few instances when legal support was provided. In the case of

the B.S.A. CO. which was the first administrative agency in the territory, its support for external investors and white settlers stemmed from its "forward" policy.<sup>1</sup>

Although the company was mainly concerned with the encouragement<sup>of exploitation</sup> of the country's mineral resources, it viewed the favourable inducements for agricultural development as a source of investment in the mining sector. Further, it was felt that such inducements would also sustain the railway system as they would yield additional revenue from expanded use of transport services.<sup>2</sup>

Accordingly, the B.S.A. Company made full use of its authority to appease the European agricultural investors. The Company by means of a series of treaties in the 1890's with native chiefs, had secured land rights over the entire territory except Barotseland. For this reason it felt it had the power to alienate any land outside Barotseland to European settlers, and Africans occupying such land were obliged to move.<sup>3</sup> The basis for this power, however, was doubtful.<sup>4</sup> It was not until the passing of the Northern Rhodesia Order-in-Council<sup>5</sup> of 1911 that the power to alienate land was given to the Company. The said Northern Rhodesia Order-in-Council provided that "the Company shall from time to time assign land to the natives inhabiting Northern Rhodesia as tribes or portions of tribes and suitable for their agricultural and pastoral requirements, including in all cases, a fair and equitable portion of springs or permanent water."<sup>6</sup> Making use of this power, the Company created Reserves for



Africans, where numerous problems were later encountered. One of the basic problems related to the poor state of the soil that was allocated to the Africans. As Robert Baldwin<sup>7</sup> points out only 7 percent of the native Reserves and Trustlands could be termed "good" for agricultural crops. In addition, only 27 percent of this soil was "cultivable."<sup>8</sup> Indeed, the fact that Reserves and Trustlands constituted 94 percent of the entire area of Northern Rhodesia served to emphasize their lack of fertility.<sup>9</sup>

European farmers on the other hand, obtained very fertile land on the payment, sometimes of a ridiculously low rent.<sup>10</sup> Additionally, the Company offered numerous other inducements to them. These included the following:-

1. free grants of land along the line of rail,
2. free baggage and agricultural equipment from Capetown and Johannesburg to a maximum of one ton (were allowed) in addition to thirty porters for each prospective farmer,
3. free feed for the first year,
4. thirty free heads of cattle for a period of five years.

There was also in existence, the official policy that only European farmers would supply all the agricultural products required by the mines. This policy was a follow-up to an earlier one of supplying the African workers with food as part of their wages.<sup>11</sup> These policies amounted to a camouflage or machinery for ensuring the expansion of the market for European products. They also served as an inducement to

commercial copper mining which is identified with the arrival of the Company (the B.S.A. Co.) in the late 19th Century.<sup>12</sup>

It may be noted that despite the non-availability, at that time, of incentives, a number of Africans managed to increase their crop output, but even that achievement was not complemented by the Government.

To thwart the efforts of the African farmers even further, another incentive was introduced in favour of the Europeans. This incentive related to quotas and prices of produce. The produce of the settlers did not only fetch the highest quotas in terms of market allocations, but also the highest prices.<sup>13</sup>

Similarly, the purpose of the government in avoiding to tax the European population to meet the administrative cost in African areas can also be treated as an incentive to the settlers. Cheap labour was also ensured for the settlers by means of taxing Africans who were in turn forced to seek paid employment in European concerns.

### 3.1. (b) The Colonial Government Inducements.

The takeover of administration in 1924, by the colonial office did not produce beneficial conditions for the Africans since the settlers always managed to secure favourable decisions from the government. The colonial government for instance followed the same policy on native taxation.<sup>14</sup> In the areas of Agriculture the Maize Control Ordinance of 1936

was enacted to establish a Maize Control Board and to give it (the Board) the power to purchase and sell maize at fixed prices. African products were allocated first one quarter of the internal pool while three quarters went to the Europeans. Similarly, the Cattle Control Ordinance of 1937 was enacted to give the European farmers an advantage over their African counterparts.

Again in the early 50's the government came up with what is really an incentive for the non-mining expatriate investments. In 1950, Mr Roy Welensky who was a member of the executive council, proposed in the legislative council thus:-<sup>15</sup>

"that time was opportune for the government to take the initiative in establishing a Finance Development Corporation for the purpose of assisting and establishing industry and business in Northern Rhodesia; that private enterprise should be invited to participate, but should this not materialise, Government should proceed to establish such a corporation with a capital of £250,000".

In response to this call the government agreed to establish the corporation in two stages:-

- (i) An Industrial Loans Board was to be set up first
- (ii) Subsequently, its activities were to be absorbed by the corporation.

The said Industrial Loans Board was established early in 1951 with the following as its objectives:<sup>16</sup>

- (i) to assist industry (the word "industry" was to include all forms of production and processing, but

not the farming industry for which financial assistance was provided under other arrangements) with capital for varying purposes of development, including the financing, of fixed assets, the installation of new or labour saving plant and equipment and the provision of working capital.

- (ii) to render such assistance only in cases when other existing means of assistance are not available on reasonable terms, and for such time as may be necessary to achieve the object for which the aid has been given.

It is submitted that the creation of the Loans Board was indeed an incentive to expatriate investors, for it was not until 1955 that a similar scheme was set up to assist African businessmen.<sup>17</sup> Under the later scheme, some £15,000 was made available in the form of a Revolving Fund operated from the office of the Director of Cooperatives and African Marketing and administered by a Central Committee. In short, the policy of the colonial government can be summed up in the statement of an elected European Representative in the Legislative Council saying,

"The British Empire is primarily concerned with the furtherance of the interests of British subjects of British race and only thereafter with other British subjects, protected races, and the nationals of other countries, in that order."<sup>18</sup>

3.1. (c) The Federal Government Inducements

The privileged position of the European investors was boosted even further in 1953 when the Federation of Rhodesia and Nyasaland was born. Under the Federal constitution it was provided that certain matters such as commerce and industry, were to be the exclusive responsibility of the Federal Government.<sup>19</sup> The Federal Government was also responsible for European education and agriculture.<sup>20</sup> Clearly, therefore, expatriate investors were well catered for. Thus in respect of the said commerce and industry portfolios, the Federal Government introduced a federal tariff to protect industries within the federation. To give more impetus to this measure, the Congo Basin Treaties which allowed privileged access of South Africa goods to the market in Northern Rhodesia were abolished.<sup>21</sup> In their place a Customs Union of the three federal partners was established. This was intended to widen the market for manufacturing industries within the three territories involved.<sup>22</sup>

For its part, the Northern Rhodesia Government adopted a policy of assisting private entrepreneurs. This policy was summed up as follows:-

"The government believes that economic development should be achieved mainly through private enterprise and that Government activity should in general be limited to providing the best possible climate for that development, including the provision of supporting services, such as research and extension services, as well as the maintainance of stable government."<sup>23</sup>

Although Southern Rhodesia dominated in all industrial activities and dumped finished products in the markets of her federal partners, the formulation of all the foregoing arrangements should be viewed as amounting to an incentive to foreign investors.

### 3.2. Post-Independence Inducements

With the attainment of independence in 1964, certain changes were introduced in the investment system.

#### (a) The White Paper on Industrial Development 1964 and 1966

The new African government, as early as 1963 planned a new industrial policy. This policy was finally adopted in 1964 and published in a "white paper" of October, 1964.<sup>24</sup> The main emphasis was laid on the need for the participation of the government in industry.

The government however, elected to create conditions that were conducive to industrial development by private investors. The government's other role was to make plans as well as to give directives regarding the areas requiring development. It was only when there was a specific reason for not leaving the job in private hands that the government was to be directly involved in industry. For the most part therefore, the government devoted great efforts to providing an attractive climate for the investment of private capital in the country.<sup>25</sup>

The basic principle behind the government's entire industrial policy was to support industries which made a contribution to the development and diversification of the economy. For this reason, the government centred its strategy around the need for increased production in manufacturing and agriculture, which it was hoped would make the country's economy less dependent on a single export commodity-copper. In line with this policy, the government allocated a lot of benefits to industries:<sup>26</sup>

- (1) that contributed greatly to the country's self-sufficiency in consumer goods,
- (2) that contributed to the reduction of imports,
- (3) that facilitated the saving of foreign exchange
- (4) that are labour intensive and contribute significantly to the reduction of unemployment and to the development of people's skills,
- (5) that lead to the establishment of other industries,
- (6) that are established in rural areas.

The other criteria for allocating incentives related to the scale of the industry in relation to the size of the local market, the competitive ability of the industry and efficiency of the industry including the experience of its management, and the quality of the product.<sup>27</sup>

It can be deduced from these conditions that the nature of the official incentives varied with the importance of the industry concerned. The incentives that the government outlined are stated below:-

(i) Tariff Protection

The first incentives took the form of tariff protection. This type of measure was contained in the Customs and Excise Act.<sup>28</sup> The intention of the authorities in providing this kind of protection was to facilitate duty-free entry or entry at low rates of duty for raw materials and capital equipment required for industrial purposes.<sup>29</sup> The Act also contained some Anti-Dumping provisions. The purpose of such provisions was to protect businesses setting up in the country against the dumping of low priced goods on the Zambian market by non-resident firms.<sup>30</sup> Another incentive known as a "shut out" was also provided. This provided protection to certain investing firms that proved they required the whole of the local market for their products so as to enable them to realise reasonable returns from their investments. The effect of this incentive was, therefore, to keep out of the country goods of similar nature to those being protected.



The government could grant "shut out" protection where the applicants proved that:-

- (i) they would be able to supply the whole market requirements of the products concerned.
- (ii) the range and quality of their products was suitable to the needs of the local market.

The government also reserved for itself the power to control the prices of the products of firms granted the "shut out" protection as well as to lift or reduce the protection whenever it saw it fit to do so. Suffice to mention that in all cases where protection is sought industries must apply to the Tariff Advisory Board which in turn recommends to the government regarding the granting of protection. No statistics are available to demonstrate the number of industries that have so far been accorded these benefits.

## 2. The Income Tax Laws

Further incentives were guaranteed through the enactment of tax laws. The Pioneer Industries (Relief from Tax Act of 1965) was the first of these laws. The cardinal aim of this Act was to provide income tax relief on the profits of pioneer companies for a period of from two to five years. This Act was not Zambia's own invention for Acts of similar nature are known to have existed in various other developing countries before.<sup>31</sup> Its provisions were carefully tailored to suit its purposes. For

example, it provided that, when an industry was granted pioneer status, it stood the advantage of being exempted from payment of tax for an initial period of two years.

Subsequently, if before the end of that period the total capital expenditure of that industry exceeded K50,000, the period of relief could be extended to cover a third year. And if, during the second or third year the total expenditure went beyond the K100,000 mark, the period of relief would be extended to five years in all.<sup>32</sup> Relief however, could not be granted indiscriminately to anybody who applied for it. It was to be selectively granted solely at the government's discretion. This is so because the government wanted to ensure against granting expensive protection to industries whose contribution to the economy did not justify it. It may be noted that although the intention of this legislation was to limit relief from income tax to new (pioneer) industries only or to those which were not carried out in a commercial fashion,<sup>33</sup> this was not in fact so. The Act did not only provide tax exemptions to the new industries alone, but also provided protection to already existing ones. For this reason, it is submitted that the title of the Act, viz Pioneer Industries (Relief from TAX) Act is a misnomer.

Another set of incentives relating to the sphere of income tax were provided by the Income Tax Act (Chapter 668 of the Laws of Zambia). This legislation permits investors to deduct normal revenue expenditure incurred wholly and exclusively for business purposes in producing business income.<sup>34</sup> It also provides for ~~all~~ allowances in respect of expenditure incurred on plant and machinery, buildings, patents, copyrights, trade marks, research, double taxation, passages and pre-commencement expenditure.

There were many more inducements that the government offered in line with their industrial policy. Thus for example, despite the declared policy of Zambianisation, it was resolved that no unreasonable obstacles were to be placed in the way of work permits for the foreign staff that would be needed by those industries that satisfied government industrial priorities. The government also adopted a policy of maintaining a very liberal exchange rate and regulations. Thus, subject only to the production of the appropriate documentary evidence, investing enterprises were permitted to remit abroad profits, dividends and interests. They could also be granted permission to repatriate capital brought into Zambia together with increases in that capital arising from their operations. The objectives for these liberal regulations were two-fold. First, it was intended to instil confidence among the expatriate community and external investors, and secondly, it was to allow them not only to

invest more of their profits in the country, but also for some of them to acquire Zambian citizenship and identify themselves and their enterprises with the country.<sup>35</sup>

(b) Articles 18 of the Constitution

In 1969, following the economic reforms of 1968, Article 18 of the constitution was amended. Under the old enactment, property could not be compulsorily acquired save for the payment of compensation and only if public interest so required. Furthermore, the proprietor of such property was entitled to automatic remittance of his compensation if he was a foreigner.<sup>36</sup>

The provisions of Article 18 were viewed as an impediment which the colonial administration had inserted in the constitution with the intention of protecting British interests.<sup>37</sup> An historical review portrays also the impression that, the inclusion of Article 18 in the independence constitution emanated from the B.S.A. Company's claims to rights over Zambia's minerals. The British government was no doubt sympathetic to those claims. This can even be seen from the insistence by the British government on negotiations between the incoming government of President Kaunda and the Company instead of taking the new government's view that the mineral rights claims were doubtful. Similarly, the delay in bringing to the new government's attention the new draft constitution while knowing that it contained in Article 18 provisions which were favourable to the Company can also be viewed as part of the ploy.

But since the provisions of Article 18 did not relate specifically to the mineral rights, it can be said that the effect of that enactment was to protect other foreign interests and, therefore, served as an inducement to the then existing as well as future investors. The said article provided as follows:

No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied; that is to say -

- (a) The taking possession or acquisition is necessary or expedient -
  - (i) in the interest of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or
  - (ii) in order to secure the development or utilisation of that, or other property for a purpose beneficial to the community; and
- (b) Provision is made by law applicable to that taking possession or acquisition -
  - (i) for the prompt payment of adequate compensation; and
  - (ii) security to any person having an interest or right over the property, a right of access to a court or other authority for determination of his interests, or right; the legality of the taking possession or acquisition of property;

interest or right, and the amount of any Compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

Under Article 18(2), any person receiving compensation under the provisions of the Article was entitled to remit it abroad. By means of a constitutional amendment,<sup>38</sup> the said Article 18 was repealed. The new enactment empowered the government to compulsorily acquire individual property, the only requirement being that such requisition must be authorised by an Act of Parliament and that compensation must be paid. Where a disagreement arises in relation to the compensation, the National Assembly is empowered to determine the amount and the amount so determined cannot be questioned in any court.

The new Article omitted the provisions of the previous Article 18(2) in respect of remittance of received compensation. The new provision leaves room for the application of the Exchange Control Regulations so that any compensation received for compulsorily acquired property would need exchange control permission before it can be remitted out of the country. As Mulwila submits on this subject, this omission was a deliberate attempt to encourage reinvestment within Zambia.<sup>39</sup>

The 1969 constitutional amendment also made a proviso in respect of share acquisition in companies. It provided under Article 18(2)(r) that:

Nothing contained in or done under authority of any law shall be held to be inconsistent with or in contravention, of subsection (1) to the extent that it is shown such law provides for the taking possession or acquisition, of any property or interest therein or right thereafter by way of the acquisition of shares, or a class of shares, in a body corporate on terms agreed by the holders of not less than nine-tenths in value of those shares or that class thereof.

This proviso was intended to enable the government to acquire shares of minority dissentient members of corporate bodies.<sup>40</sup> The new enactment should nonetheless be viewed as not being very different from its predecessor.

It should rather be viewed as an inducement. Taken against the background of nationalisation which all foreign investors fear, an enactment which provides for compensation and negotiation as this one is indeed an incentive.

Again to quote John Mulwila, "the new procedure of acquisition is basically contractual and therefore, must be distinguished from compulsory acquisition procedure." He further states that, if the new procedure is not evoked, lawful acquisition of property by the government is not possible.<sup>41</sup>

#### (c) Changes in Mineral Taxation

The mining industry was not left out of these encouraging gestures. In 1969, the government changed the taxes affecting the holders of mining rights. It discontinued the

dreaded royalty and export tax systems and introduced the mineral tax which has since been functioning side by side with the income tax system.

The dislike for the old system of taxation arose as a result of a tax formula which exacted a royalty tax of 13.5% on the price of copper less than K16.00 per long ton produced.<sup>42</sup>

This tax formula which was intended to eliminate royalty when the price of copper was low was a continuation of the 1930's system which was established when the prices were high.<sup>43</sup>

It bore little relation to the cost of production and transportation. In 1966, for instance, the cost of transporting one ton of copper was £50.00.<sup>44</sup> The cost of production which varied from mine to mine due to variations in ores and other technical factors was ignored. These factors included the drainage which involved the removal, for instance, of 62.82 million gallons of water at Bancroft everyday while the Chambeshi mine only drained 1.60 million gallons per day.

Similarly, Bancroft needs 1,653 thousand cubic feet of air whereas Chibuluma needs only 491 thousand. In short, as a tax on production the royalty constituted a direct operating cost and reduced tremendously the rate of return on investment.

As indicated above, the other type of tax was the export tax.<sup>45</sup> This was introduced in 1966, when the producer price was abandoned, with a view to enable the government to benefit from the ensuing high rate of profits. Although the export tax was charged on exports, it was in fact a tax on production since nearly all minerals produced in Zambia are



exported.

Even the exemptions that were provided by the income tax Acts,<sup>46</sup> (which provided for the third type of taxation), were rendered insufficient because of the said royalty and export tax systems. These exemptions related to certain expenditures that were incurred on exploration and initial mining operations as well as depletion allowances.

The mineral Tax Act, therefore, introduced changes in the taxation formula and also provided a number of other incentives. Under section 7, mineral right-holder is entitled to a refund of mineral tax in respect of any prescribed period if the average income is less than 12 percent of the average equity in that period. Although this does not seem to appease most mining investors, the government believes that the refund system is of great incentive value both to potential and existing investors, its exact value being dependent on the debt equity ratio of the initial investment.

The government also introduced some allowances in respect of capital expenditure. Starting from April, 1975 all new *mining ventures were allowed to off-set capital expenditure* against taxable income in the year in which the expenditure takes place. As for older mining companies, their capital allowances are determined according to the length of time they have been in production but all of them are allowed a 100 percent immediate deduction.<sup>47</sup> The Income Tax Amendment Act of 1970 also allows a deduction against both the

mineral and income taxes.<sup>48</sup>

(d) The Investment Disputes Convention Act, 1970

The enactment of the Investment Disputes Convention Act (No. 18), 1970, whose effect is to make Zambia a member of the International Centre for Settlement of Investment Disputes (ICSID), is also an incentive to foreign investors. The ICSID is an autonomous body established under the World Bank Convention for the Settlement of Investment Disputes between States and Nationals of other states.<sup>49</sup>

The enactment of the Act in 1970 was necessitated by the Government's move to take over 51 percent equity in the mining companies. While it was possible to settle all the disputes arising between itself and the mining companies under the auspices of the International Chamber of Commerce (ICC) based in Paris, the government declined to endorse such an arrangement, which had been earlier adopted under the ZCBC Management Agreement between INDECO and BOOKER (Zambia) limited.<sup>50</sup>

The government's change of mind in the subsequent agreement(s) arose from its conviction that the ICC was a capitalist institution that has no sympathy for capital importing third world countries.<sup>51</sup> Under the take-over agreements for the mining companies, therefore, the ICSID was to be the centre for settling all disputes arising in future.

But states wishing to submit to arbitration under ICSID must first accede to the ICSID convention by signing and ratifying it. As Zambia had not by that time acceded, her commitment to the take-over agreements obliged her to sign and ratify the convention. Hence, the enactment of the Investment Disputes Convention Act, 1970.

By virtue of this Act, foreign investors should feel encouraged to invest in Zambia, so long as they are able to secure government agreement to settle arising disputes under the ICSID auspices.

Where consent by the government to subject its agreements with foreign investors to the jurisdiction of ICSID is obtained, the Zambian court will have power (according to the Act) to enforce the results of any arbitration award made by the ICSID.<sup>52</sup> In this respect, the enactment of the Act in 1970 can be seen as an incentive. However, investors who are Zambian cannot invoke the Act against the Zambian Government, as they are not nationals of other states.

(e) The Role of Indeco

Another major instrument in the government's efforts to industrialise was the Industrial Development Corporation (INDECO). This Corporation is a government owned company, whose goal has been to spearhead the implementation of the government's policy of industrialisation. In its role as

a principal government instrument for the administration of the industrial policy, INDECO is empowered to apply government funds to upcoming industries in the form of loans and equity. It is also empowered to provide such other things as factory buildings and initial capital for new industries. In the words of Anthony Martin, "its primary objective has been to provide financial support for private projects which it judged to be economically viable".<sup>53</sup> It also looks after industrial promotion at home and abroad. Its other responsibilities involve the conducting of feasibility studies, offering technical and economic advice to prospective investors as well as advising the government on the needs of industry.

Unfortunately for Zambia, despite these incentives and liberal policies and laws, there have been no foreign investors (except those already dominating the economy) queuing anxiously to be given a chance to bring their money and skills into the country.<sup>54</sup>

(f) The Industrial Development Act, 1977

This unfortunate rebuff by potential investors has not, however, deterred Zambia from her course of inviting investors. Thus, despite the country's concern for foreign domination of the economy, it was still felt imperative to enact a more promising Act to achieve full investment. In 1968, while announcing the Mulungushi Economic Reforms, the President promised to enact a Foreign Investments

Protection Act. Accordingly, the President said that this Act would provide that, "a foreign controlled company which is to be established here from a certain date may get a certificate from the government which will guarantee among other things that due dividends and interest payments on foreign capital may be remitted abroad, that repatriation of capital brought in from abroad will be allowed, that no expropriation will occur for a set number of years, that any nationalisation thereafter will be at a fair valuation, the method of which shall be laid down in the certificate."<sup>55</sup>

It was not until nine years subsequently (in 1977) that such an Act was passed under the title, "The Industrial Development Act, 1977."<sup>56</sup> It took so long to enact this legislation perhaps because the country was still fearful of foreign domination of the economy and wanted to give the newly taken over industries a chance to deliver the expected results.<sup>57</sup> Another reason could be that by 1977, the Reforms had proven to be a failure with the country's economy falling to a very low level and the external debt over-shooting the K500 million mark.<sup>58</sup> It appears that a serious appeal for foreign capital had then to be made. Hence the enactment of the Industrial Development Act.

(g) The Main Objectives of the Act

The Industrial Development Act basically contained a package deal of incentives for foreign private investors. The preamble to the Act in fact puts the Act's objectives more succinctly.

It provides as follows:-

"An Act to provide for the licensing and control of manufacturing enterprises, to provide incentives for investments, to regulate the making of contracts relating to the transfer of foreign technology and expertise to enterprises operating in Zambia, and to provide for matters connected with or incidental to the foregoing."

The Act is also an attempt to:-<sup>59</sup>

- (a) reduce the country's reliance on foreign capital equipment and raw materials, foreign technology, managerial and technical skills.
- (b) promote an export sector for finished goods as opposed to primary products,
- (c) distribute equitably the benefits of industrial development.

The Act is divided into five parts. The most important parts for our purposes are parts two, three and four. Under part two dealing with the issue of manufacturing licences, the most important factor is that the Minister of Commerce and Industry is empowered to regulate all matters relating to the manufacturing of products. He *had power to approve or reject applications for manufacturing licences*, subject only to a conditional right of appeal that the Act stipulates for the applicant.<sup>60</sup> Any person wishing to manufacture any product is obliged by provision of the Act to obtain the required licence. Additionally, any application for a licence is required

to include such specifications as the description of the product, place of manufacture as well as other information to describe the feasibility of the whole industry.

Under part three fall provisions relating to agreements for the transfer of foreign technology and expertise. Section 15 in particular provides for conditions which must be observed in every technology transfer agreement. These include the reasonableness of the royalties to be charged, the provision of technical personnel as a precondition for the lawful transmission of technical assistance and the provision of comprehensive instructions in English. Section 16 outlines conditions which cannot be contained in an agreement for technology and expertise transfer.

Thus, it is prohibited, for example, to put restrictions on the use of competitive techniques, or on the manner of sale of products.

Part four deals with industrial incentives. Under Section 18 certain criteria are given by which priority industry status may be determined and offered. Such factors as the maximum utilisation of domestic raw materials, production of intermediate goods which are used by other industries, diversification of the industry's structure, creation of substantial opportunities for permanent employment, improvement of domestic industrial skills or fostering the development of domestic technology and the promotion of

industrial development in rural areas form the basis of the the said criteria.

When declared a priority industry, the enterprise concerned may enjoy the following benefits:-<sup>61</sup>

- (a) preferential treatment with respect to government purchasing.
- (b) Preferential treatment with respect to the granting and processing of import licences.
- (c) rebates on customs duty payable on capital equipment, raw materials and other intermediate goods where:-
  - (i) in the case of capital equipment, labour intensive techniques of production are not a viable alternative.
  - (ii) in the case of raw materials, they are not available from domestic sources of supply.
  - (iii) in the case of intermediate goods, they do not inhibit the creation of domestic value added.
- (d) relief from sales tax in respect of the items described in paragraph (c) subject to the provisions of the said paragraph.
- (e) relief from Selective Employment Tax, for such periods as the minister responsible for the administration thereof may prescribe.
- (f) relief from income tax in such manner and for such period as the minister responsible for the administration thereof may prescribe



Separate incentives are provided for exporting enterprises, enterprises providing training facilities for Zambian citizens, enterprises which are set up in rural areas, enterprises utilising foreign investment and enterprises carrying out research and development programmes.<sup>62</sup> Even the foregoing incentives contained in the Industrial Development Act have unfortunately not attracted as many investors as was anticipated. In its Economic Report of 1979, the National Commission for Development Planning confirms this situation. According to the Report, the Ministry of Commerce and Industry issued 269 manufacturing licences in 1979 to the private sector. Out of these, 12 licences were for new enterprises while the remainder were renewals or additional for already existing enterprises. There were only two to three enquiries about investment in Zambia, but no manufacturing licence was issued to any foreign investor.<sup>63</sup>

### 3.4. Conclusion

It is clear from the foregoing that at various times during Zambia's development some form of investment climate has been striven for. It is also clear that the post-independence attempts have given more legal assurance, without discrimination based on colour, to all would be investors. The efficacy of these Zambian measures will be examined in Chapter Six.

FOOTNOTES

1. See Chapter two p. 8, *infra*
2. Robert E Baldwin, Economic Development and Export Growth, University of California Press, 1966 p. 145.
3. See Report of the Rural Economic Development Working Party, Northern Rhodesia (Lusaka Government Printer, 1961) p. 65  
  
See also Robert E. Baldwin & Ibid p. 154.
4. Mphanza P. Mvunga, The Colonial Foundations of Zambia's Land Tenure System; NECZAM 1980 p. 4.
5. See North Charterland Concession Report to the Governor of Northern Rhodesia by the Commissioner, Mr Justice Maughan, Colonial, No. 73 Great Britain, Colonial Office. (London H.M.S.O. 1932) pp 55-59
6. Robert E. Baldwin, Op.Cit. pp 143-146.
7. Ibid p. P. 143.
8. Ibid p. see also T. Hadfield, "Aspects of the African Agrarian Economy in Northern Rhodesia," in Agricultural Bulletin, No. 17, Northern Rhodesia (Lusaka: Government Printer) pp 2-3.
9. Robert E. Baldwin Op. Cit.
10. See Mr Kalulu - Minister of Lands and Natural Resources' statement in Hansard No. 20c, Daily Hansard, Thursday 4th December, 1969, p. 104.
11. Robert E. Baldwin Op. Cit.  
  
See also Anthony Martin, Minding their own Business Penguin Books 1975. P. 29.

12. Mulwila J.M. LL.M Thesis. Op. Cit. p. 25.  
See also Sir Theodore Gregory, Op. Cit P. 392.
13. Anthony Martin, Op. Cit. p. 32.
14. Legislative Council Debates (No. 11) Second Session,  
Third council 7th March - 1st April 1930, Northern  
Rhodesia
15. Northern Rhodesia Legislative Council Debates, 8th  
September, 1950 p. 195.
16. See Mulwila J.M: Parastatal Companies and the Law in  
Zambia, Ph.D Thesis, submitted to the University of  
London (unpublished) 1980 p. 42.
17. Northern Rhodesia, Report of the Development Authority,  
1955. p. 15.
18. Correspondence with Regard to Native Policy in Northern  
Rhodesia, cmd 3731 - Great Britain (London H.M.S.O. 1930),  
p. 3.
19. Articles 36 - 44 of the Rhodesia and Nyasaland (consti-  
tution) order-in-council, 1953.
20. See Report of the UN/ECA/FAO: Economic survey Mission  
on the Economic Development of Zambia, (Falcon Press,  
Ndola, 1964) p. 9.
21. See Report of the Development Authority, 1955 p. 34.  
See also Mulwila J.M, Ph.D Thesis Op. Cit. p. 43.
22. Arthur Hazlewood, "The Economics of the Federation and  
Dissolution in Central Africa in African Intergration  
and Disintegration, Case Studies in Economic and  
Political Union", ed, Arthur Hazlewood (Oxford Uni-  
versity Press, London 1967) p. 249.

23. Northern Rhodesia, Development Plan 1961 - 65.
24. Annual Report of the Ministry of Commerce and Industry for the year 1964 (Government Printer-Lusaka 1965) Also amended and re-published in 1966.
25. Republic of Zambia, First National Development Plan: 1966 - 1970 July 1966.
26. See Annual Report of the Ministry of Commerce and Industry for the years 1964 and 1966. p. 6.
27. Ibid.
28. CAP 667 of the Laws of Zambia. See also Amendment Acts. Nos. 31 and 47 of 1965.
29. Annual Report of the Ministry of Commerce and Industry for the year 1964. Op. Cit. p. 7.
30. See Section 4, note 28 Supra
31. Hansard No. 4Q. Daily Hansard, Wednesday 18th August, 1965. p. 1062 Co 1.6.
32. See Section 3. of the Pioneer Industries (Relief from Tax) Act
33. Hansard No. 4Q. Op. Cit. p. 1062 Col. 9.  
of CAP 668.
34. See section 29, see also Appendix to the outline of the Government's Industrial Policy. Revised Edition, 3rd January 1966. Op. Cit. p. 9.
35. Zambia's Economic Revolution, Address by President Kaunda at Mulungushi, 19th April, 1968. Government Printer. 4 Lusaka p. 111.
36. John Mulwila, Parastatal Companies and the Law in Zambia, Ph.D Thesis, submitted to the University of London (unpublished) 1980 p. 71.

37. Peter E. Slinn, The Northern Rhodesia Mineral Rights Issue 1922 - 1964. Ph.D. Thesis submitted to the University of London (unpublished) 1974 p. 234.  
See also the British South Africa Company's claims to Mineral Royalties in Northern Rhodesia, Government Printer, Lusaka, 1964.  
See also Simon Kapwepwe in Zambia Daily Parliamentary Debates, 9th October, 1969, Col. 122.
38. Constitution (Amendment) Act (No. 5) of 1969.
39. Mulwila J.M Ph.D Thesis Op. Cit. p. 72.
40. Ibid.
41. Ibid.
42. Prospecting Licence Condition, No. 14. 1965.
43. Imperial Institute; Mineral Resources Departments, Mining Royalties and Rents in the British Empire, 1936 p. 35.  
See also Muna Ndulo, "Mineral Taxation in Zambia," 1975 - 77 Zambia Law Journal Volumes 7-9 p. 37.
44. Mines Industrial Corporations, Mining Year Book of Zambia, 1974 p. 35.
45. Copper (Export Tax) Act Chapter 66 of the Laws of Zambia. Under this Act, the Minister of Finance was however, empowered to exempt any person from paying the export tax.
46. See the Income Tax Act 1966 and also the Income Tax (Amendment) Act. No. 26 of 1970.

47. Muna Ndulo, Mineral Taxation in Zambia. 1975 - 77  
Zambia Law Journal Volumes 7-9, p. 44.
48. See part VI (Mining Deduction) <sup>of the Mineral Tax Act</sup>; See also Income Tax  
(Amendment) Act 1975.
49. E. Mudenda, Zambia National Assembly Hansard No. 21,  
7th January - 25th March 1970 p. 2121.
50. Management Agreement between ZCBC and Bookers (Zambia)  
Limited 30th June, 1968.
51. Mulwila J.M, Ph.D. Thesis Op. Cit. p. 14.
52. Section 4 <sup>of the Investment Disputes Convention Act, 1970</sup>
53. Anthony Martin, Op. cit. p. 65.
54. Ibid.
55. D.K. Kaunda, Zambia's Economic Revolution Op.Cit. p.40
56. Statutory Instrument No. 106 of 1981 also provides  
extra incentives. See sections 3,4,5 and 6 <sup>of IDA</sup>
57. Tumwine G. Mukubwa, "Was the Industrial Development Act  
Necessary? A comment"(1975 - 77) Zambia Law Journal  
volumes 7-9 pp 140-141.
58. 1976 Bank of Zambia Annual Report. See also the 1977  
World Bank Annual Report, p. 110.
59. Ssempebwa E.F: "Law in the context of underdevelopment:  
comment on the Industrial Development Act 1977."  
(1975 - 77) Zambia Law Journal p. 85.
60. See Section 9 <sup>of the IDA</sup>
61. See Section 20 <sup>of the IDA</sup>

62. See Section 21, 22, 23, 24 and 25 of the IDA
63. National Commission for Development Planning Economic Report, 1979. p. 70.

## CHAPTER FOUR

### LEGISLATION ON SPECIFIC FOREIGN INVESTMENTS

In addition to the legal facilities outlined in the previous chapter, the government adopted other measures to cover specific investments. The investments so covered related mainly to loans, stocks, debentures and other bonds that the government acquired or authorised for certain development projects. This practice by the government stretches back to the colonial period. For most part the government has confined its role to giving guarantees for some of the loans, stocks, debentures and bonds. Occasionally however, the government has acquired the loans itself and transferred them to the authorities that manage the projects in question. Some of the projects where these government measures have been applied are discussed below.

#### 4.1. The Rhodesia Railways

The Rhodesia Railways were constructed and operated by the British South Africa Company in the three territories of Bechuanaland, Northern Rhodesia and Southern Rhodesia. The cost of running the system, however, proved enormous as the volume of traffic increased. It was, therefore, decided to minimise this cost by running them as an indivisible whole.<sup>1</sup>



Even this undertaking, however, failed to rescue the operations of the railway system, the reason being that with the increased volume of traffic there arose an obvious need to expand the system and to replace worn out equipment.

As Bechuanaland and Northern Rhodesia could not come to the rescue of the railways in relation to the said expansion programme, Southern Rhodesia was entrusted with the responsibility of raising £30.000,000 for that purpose.

Following this step an Act known as the Southern Rhodesia Railways Act of 1949 was enacted.<sup>2</sup> Under the provisions of that Act, the property of the railways became vested in a statutory body set up under the legislation. The statutory body was divided into two entirely separate parts. The first part comprised the Higher Authority which was entrusted with the task of governing the system, while the second part was known as the Board of Management and its responsibilities related to the operations of the system.

The other two countries of Bechuanaland and Northern Rhodesia, however, retained some obligations towards the railway system by reason of their affiliation to the statutory body. The Higher Authority as early as 1949 adopted a programme of action aimed at improving an increasing traffic facilities of the railway. As the Authority itself had no funds to implement the programme, the governments of the three territories were obliged to assume their duties

as outlined in the agreement. Between 1949 and 1950 they all passed laws to encourage the investment of certain pension funds in the railways development programme. In Northern Rhodesia, an Ordinance called the Rhodesia Railways Loans (Guarantee) Ordinance, 1950 - was enacted by the government guaranteeing that the loan or loans made by the trustees of the pension funds for the railway employees would be repaid. These pension funds amounting to £5,750,000 together with other loans and funds that were available were to form the development capital for the programme.<sup>3</sup>

Again within 1950 itself, the Specific Loan (Rhodesia Railway) Ordinance, 1950 was passed to empower the territory's Governor to invite investors by way of issuing debentures or stocks amounting to the sum of seven million five hundred and forty thousand pounds sterling (£7,540,000) for a specific capital development of the railway system. It is not known whether these debentures or stocks were actually obtained. Suffice to mention that by reason of that ordinance the commitment of the government to the safeguarding of the interests of the investors was assured.

In similar manner, the Governor was also authorised by the International Bank Loan (Rhodesia Railways) Ordinance, 1952 to raise by means of loan from the International Bank a sum not exceeding five million pounds sterling (£5,000,000) for certain other purposes in the railway programme.<sup>4</sup> By the International Bank Loan (Approval) Ordinance, 1953<sup>5</sup>,

the loans agreements envisaged in the international bank loan (Rhodesia Railways) ordinance, 1952 were approved. The Governor raised a loan of fourteen million dollars (£14,000,000) in the currency of the United States which was the equivalent of the sum indicated in the 1952 ordinance.<sup>6</sup>

The commitment of the government to guaranteeing these investments clearly provided inducement and safety to the investors. Some of the guarantees were wide ranging. This can be seen, for example, from the provisions of the Rhodesia Railways (Guarantee) Ordinance, 1950 which provided as follows:-

1. Under section 4, it was undertaken to guarantee repayment of the loan together with interest thereon.
2. The trustees of the pension funds were indemnified against any claim for breach of trust or loss of trust funds (see section 8). Similarly, by obtaining a guarantee from the United Kingdom government in respect of the International Bank Loan, the government assured the investor of the safety of its money. The investment would not have been forthcoming if the United Kingdom which was a member of the Bank and at the same time responsible for the administration of the territory did not provide such guarantee.<sup>7</sup>

#### 4.2. The ZIMCO Loan Stock and Bonds

In 1970, while negotiations for the take-over of the mining companies were going on, the government formed ZIMCO.<sup>8</sup>

This corporation is owned by the government through the Minister of Finance, who had owned the majority of shares in INDECO, before the latter was made a subsidiary of ZIMCO. The arrangement was that the Minister transferred all his shares in INDECO to ZIMCO in exchange for an equivalent shareholding in ZIMCO.<sup>9</sup>

ZIMCO created MINDECO through which it held 51% equity in N.C.C.M. and R.C.M., the two mining companies that were formed after the mines were taken-over. In consideration for the 'A' shares that ZIMCO, through MINDECO was allotted, it (ZIMCO) agreed to create a Loan Stock and Bonds in favour of the minority shareholders in the mining companies. The loan stock and bonds signified ZIMCO's indebtedness to the mining companies.<sup>10</sup> The loan stock represented the long term payments due to N.C.C.M. It carried an annual interest rate of 6% and was known as the "ZIMCO Loan Stock 1982", 1982 being the year of maturity. Similarly, the bonds represented the long-term payments due to R.C.M. They bore 6% annual interest and were known as the "ZIMCO Bonds, 1978" to signify the year of maturity.

The above arrangement came about due to lack of compensation money on the part of ZIMCO and the government. Referring to

the Mining Economic Reforms which he had just announced, President Kaunda<sup>11</sup> said:

"..... I intend to leave it to INDECO to negotiate the value and terms of payment, but again I want to make it clear that what INDECO will pay is a fair value represented by book value. At the same time, I want to make it clear that the government has no money to pay as deposit against these shares, it also cannot afford to release part of the mineral tax or income tax in payment for these shares ..... INDECO will therefore, have to negotiate payment out future dividends bearing in mind the advantage the shareholders derive from associating with the state."

The other reasons one can give for the government's acceptance of the loan stock and bonds arrangement are of course those relating to the need to retain the necessary skills through foreign involvement in the mines as well as ensuring cooperation of RST and ACC (the mining companies that were in operation before the take-over) in future undertakings.

Both the loan stock and bonds were unconditionally guaranteed by the government of Zambia and they carried its full faith and credit so that RST and AAC would have a legal right to demand payment directly from the government in the event that the flow of dividends from N.C.C.M. and R.C.M. to ZIMCO was so small that ZIMCO could not service its loan stock and bonds.

RST and AAC also managed to get the government to agree to guarantee such payment in U.S. dollars to avoid problems that are often attendant to a less acceptable international currency such as the Kwacha.

Although the government's acquisition of 51% shares in major enterprises was not really on the authority of legislative or executive measure<sup>12</sup> the Mines Acquisition (Special Provisions) Act No. 28 of 1970 acknowledges the validity of the "Master agreements" between RST, AAC and ZIMCO, thus affording the much needed confidence and inducement to them as foreign investors.

Indeed it can be argued that the exemption of the two mining companies from paying taxes on the purchase price and on profits realised from the disposal of their holdings was aimed at portraying the government's image as not being opposed to foreign investments.<sup>13</sup> This was, therefore, an incentive. Similarly, by allowing the companies to transfer certain assets and the purchase money free of foreign exchange restrictions,<sup>14</sup> the government was portraying itself as being flexible.

#### 4.3 The General Loans Mediobanca

Soon after independence the government identified the fact that self-sufficiency in energy was the lifeblood of a modern nation and that the development of industry is dependent on the availability of fuel and electricity.

It, therefore, set itself on a course of setting up facilities that would make the supply of energy assured. This course was enhanced even further by the realisation that it was vital to have an unhampered supply of petroleum products to Zambia completely free from the sources of supply from the South, which by reason of its hostile policies had began to make it difficult for Zambia to receive her fuel supplies.<sup>15</sup> The demand of the international community to economically isolate Rhodesia after its U.D.I. had also necessitated the need for self sufficiency in energy.

Between 1966 and 1967, therefore, the government undertook to develop a pipeline from Dar-es-salaam to Ndola in conjunction with the Tanzanian government. A company called Tazama Pipelines Limited was set up by the two governments to promote their economic independence in the sphere of energy supplies. The Zambian government owned 67% interest in the company while the rest went to the government of Tanzania.<sup>16</sup> The Zambian government interests are currently vested in ZIMCO which took over from the now defunct Zambia Energy Corporation Limited.

The necessary funds for the construction of the pipeline were however, scarce. The government was, therefore, authorised through an Act of Parliament to borrow money from Mediobanca Banca di Credito Finaziario S.P.A. for the project.<sup>17</sup> This money was transferred to the Tazama

Pipelines Limited which also agreed to service the loan.

The Zambian government however, guaranteed that in the event of failure by the pipelines company to service the loan, it (the government) shall repay an equivalent of its interest in the project. Section 4 of CAP 642 provided therefore, that there shall be a charge on and paid out of the general revenues of the Republic such money as may be necessary for the repayment of the principal sums as well as the interest.

The Kafue Hydro-electric scheme was another project that was promoted for the purposes of making the country self-sufficient in energy. The main contract for the execution of the scheme was awarded to Energoprojekt of Yugoslavia. Under the Loans (Kafue-Gorge Hydro-electric power project) Act CAP 643, the government was authorised to borrow money for the construction of a power station and other necessary facilities at the Kafue Gorge. Under section 5 of the Act, the government guaranteed repayment from the general revenue in the event of failure by the operators to service the loan.

#### 4.4 Conclusion

We have discussed only a few of the specific investments that the government has authorised for development purposes in Zambia. Clearly, the effect of these government measures, namely the guarantees, loan stocks, bonds and debentures were to give inducement to investors. They made investors feel that the safety of their property was assured.



FOOTNOTES

1. Northern Rhodesia Legislative Council Debates, 7th September to 16th September, 1949.
2. For more details regarding the connection between the railway system and the individual territories reference may be made to 1949 debates referred to above.
3. Northern Rhodesia Legislative Council Debates of 31st May - 24th June 1950, p. 441.

A Federal Act known as the Rhodesia Railways Loans (Amendment) Act, 1955 introduced certain modifications to the Ordinance, and made the Federal Minister of Finance responsible for guaranteeing the repayment of the loans. (See Rhodesia Railways (Amendment) Act No. 18, 1955, section 35(4)(1). The Federal Act was further amended after independence by the Rhodesia Railways Loans (Guarantee) Act CAP 635 to make the Zambian government responsible for the repayment of the portion of the loan(s) that were guaranteed by its predecessors. The government Notice No. 427 of 1965 and statutory instrument No. 154 of 1965 made further adaptations of loans and guarantees by the Zambian government. They also substituted the old colonial terms including terms including the name of the country with the new post independence terms.

4. Northern Rhodesia Hansard No. 75 of 8th November - 20th December, 1952 p. 1029.
5. Amended by No. 21 of 1953 and statutory instrument No. 154 of 1965.

6. Hansard No. 77, Northern Rhodesia Legislative Council, 16th April - 25th April 1953 p. 175.
7. Hansard No. 77. Northern Rhodesia Legislative Council 16th April - 25th April 1953 p. 173.
8. Zambia Industrial and Mining Corporation.
9. J.M. Mulwila, Parastatal Companies and the Law in Zambia. (Ph.D Thesis, submitted to the University of London, 1980 - unpublished) p. 99.
10. M.L.O. Faber and J.G. Potter, Towards Economic Independence, University of Cambridge Department of Applied Economics, Occasional Paper, No. 23, 1971, Cambridge University Press.
11. Kenneth Kaunda "Towards Complete Independence", The Matero Speech, August 11, 1969 (Lusaka: Zambia Information Services) 1969. p. 36.  
  
See also Mark Bostock and Charles Harvey, Op. Cit. p. 126.
12. J.M. Mulwila, Ph.D Thesis Op. Cit. p. 88. The government negotiated for 51% shares just like an ordinary person in an ordinary business transaction; and the parties had reached settlement in a way that reflected their respective bargaining strengths.
13. See section 3 of the Income Tax (Special Provisions) (No. 2) Act, 1970.
14. Mines Acquisition (Special Provisions) Act, 1970, section 6.
15. Zambia National Assembly Hansard 8 - 10 1966/67, Government Printer Lusaka p. 290

16. See Republic of Zambia, The Companies Act CAP 686 of the Laws of Zambia. Form II at the Companies Registry File No. 4130.
17. See the General Loans (Mediobanca) Act, CAP 642.

CHAPTER FIVE

EFFICACY OF INVESTMENT LAWS AND THEIR

IMPACT ON FOREIGN INVESTORS

5.0 Introduction

The foregoing chapters have disclosed that Zambia enacted several laws to deal with the programme of foreign investment that was anticipated after independence. The Industrial Policy of 1964 was the main basis of these laws<sup>1</sup>. These laws included the now repealed Pioneer Industries (Relief from Tax) Act, 1965, the tariff and Anti-Dumping provisions of the Customs and Excise Act, the Income Tax rebates provisions of the Income Tax Act (as amended) and the tax formulae on minerals that are contained in the Mineral Tax Act. Others are the Immigration and Deportation Act that contain provisions relating to the admission of expatriate personnel and the Constitutional (Amendment) Act No. 5 of 1969 providing protection for individual property. It is noticeable that the framing of provisions catering for the interest of foreign investors in these laws followed the same pattern. Thus, on satisfaction of the conditions contained in the Industrial Policy such incentives as exemption from duty ~~or payment of less duty~~ or payment of less duty in respect of importing industries and exemption from paying income tax by approved industries are guaranteed. Some of these conditions are:

- (1) Maximum utilization of domestic raw materials;
- (2) diversification of their industrial structure;
- (3) creation of substantial opportunities for permanent employment;
- (4) improvement of domestic industrial skills or fostering the development of domestic technology.

Although most of the foregoing enactments are still in existence, viz, the tariff, the income tax, employment and property guarantee provisions, the Industrial Development Act, 1977 was a consolidation of many of the provisions of these laws. For this reason it is felt that a discussion of the provisions of the Industrial Development Act is representative of the other enactments where these are similar. Where the provisions differ, however, the individual enactments will be discussed separately.

#### 5.1 Administrative Constraints in the Law

It is quite evident that the Industrial Development Act and other related laws face certain administrative constraints. The demand represented in the task of processing individual applications cannot be under-estimated. Delays are certainly inevitable. There is also a marked shortage of qualified personnel in Zambia who can advise the government on such issues as the amount of rebates to be allowed on imported capital equipment, on types of technology, or on the economic and social viability of an industry including alternatives<sup>2</sup>. In the absence of such skills the

significance of these laws to the country's economic development remains negligible. Taking the case of import licences for example, it is provided under the Industrial Development Act that preferential treatment would be granted to priority enterprises.<sup>3</sup> The significance of import licences to investors is indeed real. Goods cannot be imported into the country without an import licence. It is also a fact that an import licence is a prerequisite to remittance of funds outside Zambia in respect of incoming goods.<sup>4</sup> The process of obtaining an import licence however is a long one. Before the licence can be obtained the investor must apply to the Ministry of Commerce and Industry for registration as an importer. When the application is registered and approved, the importer will be furnished with application forms for foreign exchange, if applicable. With this long process involved in the procurement of import licences and the high number of applicants seeking them the benefits of the incentive is diminished even to a priority investor. In any case, as J.M. Mulwila and Kaye Turner argue,<sup>5</sup> the incentive relating to preferential treatment in respect of import licences can only be appreciated when there is a surplus of foreign exchange to be allocated. But when foreign exchange is in short supply, as is the case now the incentive will not be as attractive as it is supposed to be to foreign investors.

Demonstrably, the Zambian laws accord very wide discretion to those charged with the duty of administering their provisions. It is stated for example under section 5 of the Industrial Development Act that the Minister acts in accordance with the dictates of his opinion. In these days of kick-backs unrestrained actions of officials may lead to the mortgaging of the country in return for a few personal benefits to themselves. Ralph Nader had this in point when he said that "as recent disclosures in the media show, multinational corporations often buy their way into country markets by buying off government officials."<sup>6</sup> There is also the fear that potential investors may be put off by these wide discretions because arbitrariness may appear to be their natural consequence. The country's investment reputation therefore, stands to be tarnished through these blanket powers.

Furthermore, as Ann Seidman argues, although the ministerial intervention in the area of manufacturing remains restricted, primarily to such measures as licensing, quotas, tax holidays and other specific infrastructural projects, perceived as incentives for stimulating desirable growth patterns, or inhibiting those contrary to enunciated goals, the division of responsibilities among the ministers may create a possibility of conflicting and contradictory policies.<sup>7</sup> Taking her own example, the Ministry of Development Planning is responsible for overall planning, although no machinery is provided to enforce any decisions

which it might take. The Ministry of Commerce and Industry is responsible for implementing import substitution. Its influence extends to the purchase of machinery, equipment and supplies for the manufacturing sector as well as finished goods. The Ministry of Power, Transport and Communications, on the other hand, is responsible for providing important infrastructural facilities, which may crucially determine whether and what kinds of manufacturing projects may be established in various parts of the country. Nonetheless, these ministerial activities appear to be inadequately co-ordinated, and are sometimes even conflicting with each other. At the planning level this is illustrated by the fact that the Second National Development Plan reports on one page that an INDECO subsidiary is to establish eight units to machine form and burn 160 million bricks, while on another page it asserts that INDECO's steel Division has on hand studies for two large-scale mechanised factories to produce 160 million bricks.<sup>8</sup>

Indeed conflicting policies and measures are even more likely to arise at the implementation stage. Anne Seidman again gives another ministerial example. The Ministry of Finance is responsible for expanding tax revenues to meet the government's growing budget requirements, and in recent years has been seeking ways of increasing tax revenue from the mines, which produce over half the investible surpluses available in the economy. The Ministry of Mines, on the other hand, has been seeking to reduce taxes on the mines



to induce foreign investors to expand their investments and increase copper exports. Clearly therefore, the appeal that these laws are expected to make to foreign investors is diminished by these inherent contradictions they portray.

## 5.2 Incentives For Research, Training and Technology Transfers

Under the Industrial Development Act, certain benefits are to accrue to investors who incorporate research and training in their programmes. Not that these are ill conceived, but in our view the contribution of such incentives is marginal if not non existent. If anything, these will lead to the opening up of an avenue for tax avoidance. In the first place, research is not defined while it can be said that the government wishes to use these provisions to aid well meaning and fruitful researchers, it is nonetheless still possible to some investors to employ these legal provisions to earn exemption for useless compilations. Indeed even under the term "training" a lot can pass.

A little reading between the lines shows that The Zambian Legislators and policy makers ignored certain national limitations while formulating their enactments. Under the Industrial Development Act, especially, they incorporated provisions prohibiting what are in common usage referred to as "restrictive business clauses"<sup>10</sup>. Some of these provisions

require suppliers of technology to furnish practical explanation on the operations of their equipment in clear and comprehensive English<sup>11</sup>. Although many countries already have national or regional treaties on the issue of restrictive business practices, they have not succeeded in making them mandatory<sup>12</sup>. The Zambian regulations can therefore be said to be heading for the same fate. In this regard it is worthy noting that despite the Industrial Development Act, the practices it seeks to prohibit are still persistent. Similarly, suppliers of technology do not always furnish the required information. Time and again we hear of machines lying idle because no Zambian can operate them<sup>13</sup>.

The framers of the Act further ignored the power of international capital owners and the fact that our law cannot transcend national boundaries. The power of technology owners does not lay in their control of industrial techniques alone but also in their political and financial ability to manipulate developing countries. In other words the "restrictive business clauses" that the Industrial Development Act prohibits shall still subsist because of the monopoly position of foreign investors<sup>14</sup>.

Another short coming imbedded in the provisions of the Zambian law is, in fact, relative to the advanced technology that obtains in the developed countries. Even if control was acquired over a given technique or equipment this cannot

be extended automatically to the incoming ones. Legal controls enshrined in the technology transfer agreements and statutes can be overtaken by increased specialization. In the case of Zambia, the story of Fiat 124 is still ringing in informed minds.<sup>15</sup> The said model, whose ~~a~~<sup>s</sup>sembly agreements contained provisions relating to assured training for Zambians as well as supplies of spare parts was over-taken by the development of Fiat 131 mirafiori. Those provisions were clearly rendered irrelevant by this development.

### 5.3. Tariff Protection Provisions

It has been seen that several provisions have been enacted promising rebates on customs duties payable on capital equipment, raw materials and other intermediate goods that are brought into the country by priority enterprises. Thus in the case<sup>cf</sup> capital equipment, if the enterprise can show that labour intensive techniques of production are not viable alternative, the incentive may be granted. Similarly if an enterprise can prove that local raw materials are not available or that intermediate goods will not inhibit the creation of domestic value added it can be granted the incentive.<sup>16</sup> This means when the enterprise is given this priority status it may be allowed to bring goods into the country at low rates of duty or no duty at all. The provisions containing this incentive however do not state the rate of rebate. They show that the rate of rebate can vary in each case depending on the determination of the

minister - again subjecting the investor to arbitrariness and the country to possibilities of being mortgaged.

Mr S. Zulu observed in this regard that the investor is not interested in merely knowing that the Minister may give him a rebate. He is interested in knowing what rate of rebate is applicable, to determine his return on capital investment.<sup>17</sup> And in this connection Mulwila and Kaye Turner have concluded that the fact that the rate of rebate has not been fixed makes the impact of the incentive very difficult to grasp.<sup>18</sup> Indeed even the promises of relief in respect of exporting enterprises remain nominal because the extent of relief takes various forms and is not ascertained.

#### 5.4. Taxation Laws

There can be no doubt that by taxing international enterprises that come to invest in their countries developing countries can secure significant revenues. As Nicholas Kaldor<sup>19</sup> points out, taxes or compulsory levies provide the most appropriate instrument for increasing saving for capital formation out of resources. By reducing the volume of spending, taxes make it possible for the resources of the country to be devoted to building up capital assets.

For corporate taxation to be effective in any country it requires comprehensive and accurate disclosure of

financial and operational information of the company to the tax authorities. Such disclosures will in turn enable the authorities to assess the taxable income. But as Mark Munansangu<sup>20</sup> points out, in some developing countries, company codes are deficient on the rules of disclosure. The ~~Zambian Companies~~ Act is given as an example. It does not require even domestic companies to submit annual returns, profit and loss accounts balance sheets or directors' reports. It is obviously impossible for the tax department to accurately assess corporate tax without those documents. In the case of foreign companies the only notable requirement is that they should submit an audited balance sheet.<sup>21</sup> With these lax provisions a foreign company that scoops a tax rebate or exemption can make a lot of money. It is, furthermore, well known that the efficiency of any tax system is not just a matter of appropriate laws, but depends on the efficiency and integrity of the tax administration. Unfortunately for most developing countries by reason of inability to secure skilled and experienced personnel of their own, efficiency and integrity are missing. Therefore to offer such generous tax rebates and exemptions, as the ~~Zambian~~ provisions do, can in the light of these administrative handicaps amount to belittling the importance of taxes to a developing economy.

The provisions further ignore the over pricing and other fictitious claims that foreign investors are renowned to make for the purposes of making money. Taking the case of tax exemptions offered in the mining sector, for example, it is clear that there is room for a dishonest investor to swindle the government. Section 7 of the Mineral Tax Act which allows for the refund of mineral tax where the mineral right holder's income in any prescribed period is less than 12 per cent can be used by such dishonest investors to their advantage. Similarly false claims can be tabled in respect of capital expenditure with the possibility that the tax department wont discover.

Talking about the dishonesty of some investors, this is indeed a reality. The overpricing aspect we mentioned above can be used here as an example. A Brazilian senator, Benedicto Ferreira revealed in Parliament in 1971, that a comparison between prices of drugs from the government plant and those charged by private manufacturers disclosed differences of upto 2,500 per cent for neomycin sulphate with sulfadiazine and 1,700 per cent for piperazine adipate<sup>22</sup>.

In this way pharmaceutical multinationals were able to make a turn over of 900 million dollars in 1979 alone. Even as far back as 1963 another Brazilian parliamentary enquiry into overpricing in the pharmaceutical industry had produced shocking revelations. The Sydney Ross company was

paying its parent firm, 595 dollars per kilogram to import phenylephedrine hydrochloride when the international market price was only 100 dollars. Parke-Davis was paying 300 dollars for chroramphemicol whose open market price was only 55 dollars, and Roche was importing Librian at 1,140 dollars, instead of the 100 dollars actual price<sup>23</sup>.

In the light of these revelations, the Zambian provisions for instance, in the area of taxation can be said to be too generous. The tax reforms which we saw in chapter three have left little impact. Indeed despite those tax reforms the mining companies were still unwilling to re-invest their profits at least to the extent that the government would have liked them and instead relied on external borrowing. In the words of President Kaunda:

"Our experience in the last three and a half years has been that they have taken out every ngwee that was owed to them. A major part of the capital for expansion programmes of both mining companies has been obtained from external borrowing and not from retained profits. You may be interested to know that, right now, my government is being asked to approve external borrowing by the two companies of above K65 million"<sup>24</sup>.

Even the introduction of the Mines and Minerals Act in 1976 was not a solution in respect of mining investments. This Act required mandatory state participation in all new mining ventures started by foreign investors. The over pricing and incompetence factors which have already been mentioned can still lead to tax avoidance. And as we shall see later,<sup>25</sup> take overs (and joint ventures) may also be ineffective by reason of lack of management personnel on the part of a host country. The shortcomings of the tax legislation in respect of the mining industry can be relevant to any other form of foreign investment.

Thus when granting relief from sales tax, selective employment tax and Income Tax, it should not be forgotten that, in fact, this as an a priori approach to development offers no guarantee that the desired objective will be achieved<sup>26</sup>. Indeed it could as well be that the taxes which the government is not collecting from priority enterprises might induce development if they were collected.

It is also true that there is a potential danger about the granting of tax relief. This is that it may be granted to firms which would have invested in the country anyway, and so may involve the country in an unnecessary loss of revenue. Although this danger could be guarded against by the Ministry (despite the shortage of expert personnel) there is the unfortunate tendency that once such an



incentive has been guaranteed by statute every prospective investor is going to claim its benefits, and will naturally insist that without it investment is out of question. The very existence of the law therefore undermines the bargaining position of the Ministry<sup>27</sup>. The government could limit the effects of these generous tax laws by granting a tax holiday for profits only to a certain maximum percentage of the capital employed and thereafter charge a tax on any profits in excess of its percentage.

#### 5.5 Incentives For Rural Enterprises

These incentives are intended to induce potential investors to locate their enterprises in rural areas in the hope of reducing the economic imbalance between rural and urban areas<sup>28</sup>. But as Mulwila and Kaye Turner<sup>29</sup> have argued, apart from promising an investor use of facilities provided by Rucom and the Development Bank of Zambia, for which he is to pay a fee, the incentive cannot be said to hold much attraction for an investor. They point out that it is difficult to see how eligibility to apply for loans to the DBZ or for the rental of a factory or office can be an incentive specially tailored to an enterprise sited in a rural area. Their argument proceeds to state that in fact both the urban and rural enterprises are eligible to apply for loans to the Bank and of all the loans given by it, most have gone to the urban-based enterprises.

The real value, if any, of this incentive is undermined by the fact that ample supplies of skilled labour, transportation and other infrastructure are easily obtainable in the urban centres and not in the rural areas. No prudent investor therefore is likely to be attracted by it.

#### 5.6. Provisions Relating to Zambianization and Nationalization

We have seen that the industrial policy as well as the laws that followed it stipulated that certain benefits would accrue to those investors who employed Zambians and provided them with skills. In short these provisions were aimed at enhancing the Zambianization Policy is that some day Zambians would be in control of the economy, we can say that the legislation is vague in that it does not lay down concrete criteria by which such Zambianization can be achieved. Training as we have seen is not defined. The investor can say he is training Zambians when in fact, he is merely acquainting them with the operations of his firm. Even the provision in the Immigration and Deportation Act (CAP 122) that no entry permit may be granted to an expatriate in the absence of a certificate from the Ministry of Labour and Social Services certifying that no local citizens with the necessary qualifications and experience are available is not enough guidance<sup>30</sup>. This is because recommendations to the labour office regarding the non-

availability of qualified Zambians as well as that of trainees in the relevant fields are issued by senior foreign managers themselves. They can therefore feed the Ministry of Labour with false information and continue to frustrate the Zambianization process by obtaining jobs for their expatriate friends.

The foreign investor may however see a certain disincentive in Zambianization provisions. As Charles Harvey<sup>31</sup> states, since the investor cannot expect to find a ready supply of trained and housed workers anyway, he may shy away for fear of incurring heavy expenses on training and housing as well as to avoid low productivity from unskilled workers for an unknown period while they acquire experience.

Coming to the laws guaranteeing immunity against nationalization we see that the investor may be dissatisfied. Although we mentioned in chapter three that Article 18 of the constitution can be regarded as an incentive, it can nevertheless be said that the immunity granted under it is not absolute. The article leaves room for nationalization where "the highest considerations of public interest so require". What constitutes the highest considerations of public interest however has not been defined.

To the investor this can create fears of arbitrariness. In the case of mining investments it has been argued that they are not covered by any guarantee against nationalization<sup>32</sup>. This is because according to section 20 of the

Mines and Minerals Act the government is empowered to participate in the equity of any new mining venture up to any extent and on the terms fixed by the government. This is regardless of whether or not foreign investors are involved.

It is necessary to mention that there are many other weaknesses that are imbedded in the legislation. A careful review of Zambia's investment laws shows that no mention has been made of how many incentives a firm may be granted at any one time. Most of these laws just provide that the Minister may grant an incentive if he is satisfied that it is in the interest of the public to do so or on receipt of advice. It is possible therefore for an investor to be granted a tax holiday, customs rebates or exemptions and many other privileges which will ultimately cause him to be free of any payments.

This situation exposes the country to possible reductions in income, particularly as the administrative machinery has proved to be vulnerable to certain deficiencies and acts of corruption. In this regard Zambian government could have taken a leaf from its East African counterparts. In East Africa the East African Governments declined to give tax holidays arguing that there were many other incentives that both the incoming and the existing investors were already enjoying and that the expansion of

existing businesses was equally desirable.<sup>33</sup>

It is also notable that the Zambian concessions, relating to tax exemptions and customs rebates, do not stipulate the course of action that an investor can take in case of arbitrary withdrawal of his benefits. The Industrial Development Act simply provides that, "where a licence or incentive has been cancelled or withdrawn an application for restoration of such licence or incentive may be made if the circumstances which led to the cancellation or withdrawal are no longer applicable".<sup>34</sup> This seems to leave the investor wondering as to how safe it is to invest in Zambia on the basis of guarantees made to him. The arguments that were made in the Anglo-Iranian<sup>35</sup> case seem to confirm that guarantees made specially to investors may be important to their investment decisions. It was argued in that case that specific undertaking guaranteeing special treatment do constitute a distinct class of contractual commitments, whose direct or indirect violation constitutes in all cases an internationally unlawful act<sup>36</sup>. In that case, it was contended that even if the concession agreement between Iran and the Anglo Iranian Oil Company was not an international one its violation could still be unlawful. In the case of Zambian guarantees to investors, similar arguments may be raised.

Therefore, if the guarantees are withdrawn the investor may plead that he has been subjected to hardships. In short, the silence of the legislation on the issue of

avenues that investors subjected to withdrawals of their guarantees could use can be said to constitute a disparity in these laws.

There are also certain contradictions that are inherently within the provisions of the law itself. The obvious example is that of provisions relating to the promotion of an export industry. Such an industry calls for considerable capital as well as intermediate goods imports. Other provisions relate to the creation of employment opportunities. The contradiction here is that dependence on capital goods will reduce the much needed employment opportunities. This dependence is inevitable since goods that are to be exported must necessarily be of high quality. They must also be homogeneous and identifiable with brand names and this can only be realised from capital intensive projects. Thus despite the criterion spelt out in the law the authorities are faced with the question of priorities. The statute does not provide any assistance with regard to the decision whether or not and to what extent state incentives should be extended to highly capital intensive projects without affecting those that are labour intensive.

On this contradiction Ssempebwa<sup>37</sup> concludes as follows:

"Quite apart from such issues involving conflict of policy; it seems that incentives provided by the Act can play only a very limited role in influencing the choice

of technique so as to reflect the opportunity cost of factors. With all its provisos taken into account, the sum total of this law is a bias in favour of capital. Incentives do not determine viability but they tend to increase the margin of profit. They are therefore a further attraction towards the capital bias. It seems unlikely that the technical question, whether a labour intensive technique is a viable alternative can prevail over the realistic question whether, in the point of view of the investor, such technique is efficient. The administrative authorities will naturally rely on the information produced by the investors whose main interest is profit maximization and in the absence of highly skilled personnel to make independent decisions, such information is likely to carry great weight. The argument is that the Act is yet another contribution to the artificial cheapening of capital and investors will try to avail themselves of this benefit regardless of the effects on the economy until the state has sufficient technical resources to apply the selective incentives efficiently".

## 5.7 Impact of Incentives on Investors

Having discussed the weaknesses that exist in the law relating to investments in Zambia we now proceed to look at the effects that they present. We have already noted that the response of foreign investors to the inducements

contained in the Zambian laws was not very encouraging.<sup>38</sup>

In 1979 for instance no manufacturing licence was issued to any foreign investor.<sup>39</sup> This negative response could have resulted from the investors' displeasure with the incentives, for as we have seen they contain a lot of defects ranging from administrative delays to vagueness in respect of rate of rebates allowed to investors.

Indeed Zambia's experience with foreign investors has not been a very happy one. Even in areas where certain industries were introduced these did not exactly conform to the directives of the government policy. Thus, contrary to the government's desire to use incentives to relegate capital intensive industries to a mere minimum and to replace them with labour intensive projects, the opposite has actually been the case. Two examples of INDECO and Kafue Textiles Company Limited can be given as evidence of this.

INDECO as we have seen was promoted by the government to act as an instrument for implementing the policy of development. It can however be seen that the company is still far from implementing the provisions of the investment legislation. An examination of the details of its operating divisions suggests that for the most part, they tend to follow the pattern already established in the manufacturing industries before most of the incentives were given. Only a few of its divisions are actually engaged in productive activities, and even here some subsidiaries are still more



involved in the importation and distribution of parts or items demanded by the higher income line of rail customers, or for the mines and associated activities<sup>40</sup>. The obvious consequence of importing parts is that it promotes rather than demoting dependency on outside sources. It can also involve high costs in terms of manpower required to manage and operate the new machinery. In this way the national goals of achieving full employment and import substitution are not likely to succeed.

The Kafue Textiles Company Limited is also another project involving foreign capital. This company has doubled its annual capacity from 12 million metres of cotton fabrics to 25 million metres of cotton, polyester and rayon fabrics. The most critical question is whether it is necessary for the country to go into synthetic textiles which require the importation of new machinery and equipment, for a plant now primarily designed to weave and spin cotton fabrics?<sup>41</sup> In addition it will require to import rayon and polyester materials for processing. Has the legislation on investments in the light of this industry been followed? The administration of the law has clearly not been effective. The impact of the incentives in Zambia has not therefore met the government's expectations.

## 5.8 Conclusion

It has been seen that Zambia's investment laws are based on the 1964 Government Policy on industrial development. These laws stipulate certain incentives for enterprises that pursue approved development goals. The incentives **however**, have proved to be tainted with some short comings. In some respects they do not give the investor enough assurance of safety for investment. Thus, for example, the IDA guarantees that the investor will be given duty free permits or duty at reduced rates to bring goods without specifying the rates at which he will be able to do so. Yet in other respects they tend to give unlimited guarantees of tax rebates. It is perhaps because of these contradictions that the investment programme in Zambia has not been successful. Other bottlenecks of administrative constraints have resulted in the spirit of the laws not being followed as has been shown by the INDECO and Kafue Textiles examples.

FOOTNOTES

1. White Paper on Industrial Development, Ministry of Commerce and Industry, Government Printer, Lusaka 1964.
2. There is a marked similarity here with the Chilean response to similar chilean laws. See Stephen F. Lau. The Chilean Response to Foreign Investment. Praeger Publishers. New York, 1972 p. 52.
3. See section 20 of the Rhodesia Railways Loans (Guarantee) Ordinance.
4. Deloitte Haskins and Sells, Doing Business in Zambia Lusaka (a) p. 41.
5. In a paper to be published in a special Issue of African Social Research on small Industries, University of Zambia.
6. Robert Ledorger, Hungry For Profits, IDOC/North America, New York 1975.
7. Ann Seidman, Comperative Development Strategies in East Africa, East African Publishing House 1972 p. 263. See also Ann Seidman, The Distorted Growth of Import substitution in Industry. The Zambian case supra p. 11
8. The Second National Development Plan, Government Printer, Lusaka pp. 96 and 244.
9. Ann Seidman, Comperative Development Strategies in east Africa
10. IDA section 16
11. Ibid section 15.
12. Isaiah Frank, Foreign Enterprise world wide, In Economic Impact; Transnationals; New Dimensions No. 33, A quarterly Review of World Economics p. 32.

13. See the Zambia Daily Mail. Why clay Firm Failed-Zulu. Tuesday May 24, 1983 p. 5.
14. Muller R: "The Multinational Corporation and Underdevelopment of the Third World", in Wiber C.K. Ed. The Political Economy of Development and Underdevelopment. Randon House. New York 1973 pp. 124-151.
15. See Patu Simoko, Why Underdevelopment? supra p. 67.
16. J.M. Mulwila and Kaye Turner. supra note 5
17. Ibid.
18. Ibid.
19. Nicholas Kaldor, Taxation for Economic Development in Taxation for African Economic Development, Edited by Milton C. Taylor at p. 159. See also Moono Mark Michelo Chaampali Munansangu, Legal Incentives to Private Foreign Investors and Economic Independence in Emergent States with Emphasis on Zambia. LL.M. Thesis (unpublished) submitted to the University of Zambia. 1977 p. 10.
20. Ibid.
21. Companies Act Section 226 (3).
22. See Patu Simoko, Why Underdevelopment? supra p. 61.
23. Ibid
24. Times of Zambia 31st August, 1973 p. 1. See Muna Ndulo, Mineral Taxation in Zambia, Supra p. 51.
25. See p. 97.
26. J.M. Mulwila and Kaye Turner supra
27. C.R.M. Harvey, The Fiscal System, in Charles Elliot, Constraints on the Economic Development of Zambia. Oxford 1975 p. 166.

28. See Mr. Chisupa in Daily Parliamentary Debates, 11th August 1977 col. 55.
29. J.M. Mulwila and Kaye Turner supra
30. See Muna Ndulo, "The Requirements of Domestic Participation in New Mining Ventures in Zambia". CILJSA Vol. X No. 3 1977 p. 279.
31. C.R.M. Harvey, The Fiscal System supra p. 169.
32. J.M. Mulwila and Kaye Turner supra
33. Morgan D.J. British Private Investment in East Africa. Report of a Survey and Conference, published by the Overseas Development Institute Limited, 160 Piccadilly London W1 England. 1965 p. 54.
34. IDA section 34
35. (U.K. V. Iran) I.C.J. Pleadings 64 (1951)
36. Fatouros A.A. Government Guarantees to Foreign investors, New York and London 1962, Columbia University Press p. 340.
37. Ssempebwa E.F.<sup>11</sup> Law in the context of Underdevelopment: A comment on the Industrial Development Act." 1975-1977 Zambia Law Journal p. 100.
38. See chapter Three p. 59
39. See National Commission For Development Planning Report, 1979 p. 79 - see also chapter three footnote No. 66.
40. Ann Seidman, The Distorted Growth of Import Substitution. Supra p. 8.
41. Ibid.

CHAPTER SIX

SUMMARY AND CONCLUSION

We have seen in chapter one the various reasons given to explain the existence of the regime of foreign investment. These vary from the purely profit seeking motives based on overseas expansion to the search for and exploitation of the natural resources of the underdeveloped countries. In the case of Zambia we have seen that foreign investment was identified by the various governments as one of the means by which they hoped to achieve economic development. Before endorsing foreign investments as one of the means for achieving development the governments considered many factors, one of which was that it would enable the country to exploit her natural resources. It was believed that without foreign investment it was not going to be possible to realise this goal as the country lacked capital as well as technical know how of its own.

The post-independence Zambian government has continued to this day to call for foreign investors. Its policy which was first outlined in the Government White Paper of 1964-1966 is that inducements would be given to foreign investors who encouraged the use of local raw materials, who created favourable conditions for the employment of Zambians, who established their enterprises in rural areas and those who brought about import substitution, to

mention only some. To lend legal force to this policy the government enacted several laws. These range from Tariff protection laws, income tax laws, property protection provisions, dispute settlement legislation to the manufacturing licencing laws.

Under the Tariff Protection laws, the government provides relief to importing industries. These are allowed duty free entry or entry at low rates of duty for the raw materials and capital equipment that they import into the country. These laws also provide Anti-Dumping protection which aims at eliminating the practice of dumping low priced goods on the Zambian market by competing enterprises based outside the country. "Shut out" protection is also provided under these laws in respect of enterprises that are capable of satisfying the Zambian market.

The income tax laws are mainly contained in the Income Tax Act (as amended) and the Mineral Tax Act. The now repealed Pioneer Industries (Relief from Tax) Act of 1965, however was the most important piece of legislation on the aspect of taxation in respect of investing industries. Its replacement, the Industrial Development Act, offers several exemptions in respect of duty and tax. Its basic theme however is to provide incentives for manufacturing, exporting, rural industries as well as those that are using

foreign investment. It also provides incentives to industries that provide skills to Zambians, conduct research and train Zambians in the use of transferred technology.

Protection of property rights is provided under the constitution. The 1969 amendment of Article 18 of the constitution provided protection against compulsory acquisition of property. Similarly, the government also enacted the Investment Disputes Convention Act, 1970 which enabled the country to become a member of the International Centre for the Settlement of Investment Disputes (ICSID), a body established under the World Bank convention to settle investment disputes between member states and nationals of other states.

Our purpose in examining these and several other Zambian laws in the area of foreign investment is to assess their efficacy both in terms of attractiveness to the **investor and advantage to the country..** **There is no doubt that the theme** behind the legislation is correct. It is aimed at encouraging import substitution, Zambianization and use of local raw materials. Certain loopholes however, have been discovered within the law. Some of the provisions have been found to create fear in the hearts of investors by giving too much discretion to the administrators or by failing to indicate the rate of relief he may be entitled to. Yet many others appear to be indifferent to the administrative inadequacies that the country is facing. They proceed to provide unlimited amounts of relief to



investors even when these may not be necessary.

There is also evidence of contradictions in the law as well as in its administrative machinery. Thus, we have seen for example, that ministries whose policies can have a direct bearing on the activities of investors may have opposed goals and policies. This has been demonstrated by the Ministries of National Development Planning, Finance and Mines whose policies on planning and Taxation have proved to be contradictory. The investor may be frightened by this state of confusion. Similarly, The Industrial Development Act has been shown to contain some contradictory provisions. These contradictions are particularly reflected in the provisions relating to investments in the capital as well as the labour intensive enterprises. The aim of such provisions is to promote both the exporting and the employing enterprises. The contradiction lies in the failure on the part of the legislature to specify the rates of relief in respect of each. It also lies in the fact that it is extremely difficult for the two aspects to be realised without bias.

In conclusion therefore, it has been seen that the Zambian law of foreign investment is clearly a reaction to the pressures arising out of past association with colonialists and capitalist entrepreneurs. In its demands on import

substitution, Zambianization, export promotion and balanced development represented by the emphasis on rural drive, it reflects awareness of the problems of dependence and foreign domination. To this extent, this law is a step in the right direction.

However, this law also represents failure in respect of implementation of its provisions. This has been demonstrated by the already noted loopholes and contradictions. These loopholes and contradictions can however be cured. The loopholes pertaining to the administration of incentives, for example, could be removed from the jurisdiction of an individual minister. An 'Investment Board or committee' could be created to handle all matters relating to incentives. This will not only reduce the danger posed by the placing of all matters in the hands of an individual, but will also enhance the selection of appropriate incentives for needy enterprises. It will also erode the contradictions arising from the involvement of so many ministries and institutions as the Board would formulate its own priorities and submit amendments on the provisions to the government. The other loopholes such as those relating to the provision of skills can also be sealed by way of stipulating a means of showing that training is actually being provided and that it is relevant. In this respect training programmes and results thereof including names of successful trainees

could be made a pre-condition before any or further incentives are given out. The provisions relating to technology transfer, especially those requiring explanations in comprehensive English and 'restrictive business clauses' should not be allowed to fill up the statute book as the government has not got the necessary bargaining strength to enforce them.

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