THE EFFICACY OF THE ZAMBIAN INVESTMENT ACT (NO. 5 OF 1986) IN THE ATTRACTION OF PRIVATE FOREIGN INVESTMENT FOR DEVELOPMENT.

BY

WINNIE SITHOLE MWENDA

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I, WINNIE SITHOLE MWENDA, Do hereby solemnly declare that this dissertation represents my own work and that it has not previously been submitted for a degree at this or another University.

Signed: ....

Date : ....1st October, 1990......

APPROVAL

This dissertation of WINNIE SITHOLE MWENDA is approved as fulfilling part of the requirements for the award of the degree of Master of Laws by the University of Zambia.

Signed: ...Mvunga..................Date: 1st October 1990

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ABSTRACT

The Zambian economy, like many others in the so called less developed or developing world, is experiencing a severe depression characterised by high balance of payments deficits, a very high inflation rate, high debt burden, a manufacturing sector highly dependent on imported raw materials with very little foreign exchange earning capacity and high unemployment levels, among other things. These economic indicators of depression have been alluded to, among others, in the business, labour academic and political circles in the land. Indeed, the Head of State, President Kenneth David Kaunda, has himself time and again acknowledged the existence of the state of depression and has called for a radical restructuring of the economy in order to make it more competitive and able to meet the needs of primarily the domestic but also the international economy.

In order for Zambia to restructure her economy, however, she needs a large volume of investment. It is this need for a large volume of investment which of necessity brings in the question of how to make the investment climate in the country more attractive to the much sought after private foreign investors since local investment has proved insufficient to meet the developmental aspirations of the country and foreign aid, which has to be shared among a host of other needy countries, is inadequate. With the heavy debt burden the country is faced with

and the problems it has with debt servicing due to limited foreign earnings, more loans would be disastrous to the economy. In the circumstances more private foreign capital is the answer to the economic problems afflicting the nation. Attracting private foreign investors is not, however, by any means an easy task since their capital is in great demand in both developed and developing countries and as such investors can afford to be highly selective, opting for countries where the investment climates are most favourable. This is understandable in view of the risks involved in investing in foreign countries.

Realising the competitive nature of private foreign capital, the Zambian Government has expressed its desire for private foreign investment through policy statements and stances. The investment Act, No. 5 of 1986 is a culmination of the Government's efforts to attract more private foreign investment into the country by providing incentives to foreign investors. This paper critically analyses the Investment Act to gauge its efficacy in attracting private foreign investors and also examines the effect of other factors such as expropriations of private property and the rising crime rate on private foreign investment flows into the country.

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Winnie S. Mwenda

1990

DEDICATION

To my children

T A B L E   O F   C O N T E N T S

ABBREVIATIONS

1. AAC - Anglo-American Corporation,
2. BSA Co.- British South Africa Company.
3. EDP - Emergency Development Plan.
4. FNDP - First National Development Plan.
5. 4^{TH}NDP - Fourth National Development Plan.
6. GDP - Gross Domestic Product.
7. INDECO - Industrial Development Corporation.
8. INDP - Interim National Development Plan.
9. IMF - International Monetary Fund.
10. MINDECO- Mining Development Corporation.
11. NCDP - National Commission for Development Planning.
12. NIEC - National Import and Export Corporation.
13. NCCM Ltd. - Nchanga Consolidated Copper Mines Limited.
14. PTA - Preferential Trade Area for Eastern and Southern African States.
15. RST - Rhodesian Selection Trust.
16. RCM Ltd- Roan Consolidated Mines Limited.
17. SADCC - Southern African Development Co-ordination Conference.
18. SNDP - Second National Development Plan.
19. TDP - Transitional Development Plan.
20. TNDP - Third National Development Plan.
21. UNDP - United Nations Development Programme.
22. UNIP - United National Independence Party.
23. ZINCOM - Zambia Industrial and Commercial Association.

INTRODUCTION

The level of development of any given country is essentially a function of the volume of its investment. It is, therefore, hardly surprising that countries throughout the world have for decades, and more recently, developing countries in Africa and indeed on other continents, been preoccupied with the development of policies and other measures aimed at attracting foreign investors' capital - a necessary ingredient in development. Indeed as Ocran puts it, "almost everywhere in Africa, the potential role of foreign investment in the economy is acknowledged in national development plans and economic policy statements".[1] The fact that foreign investors' capital is highly sought after and the investors can afford to be highly selective, opting for countries where the investment climate is most favourable has made the race for foreign investors hot. Governments are coming up with investment codes which offer incentives to foreign investors to try and induce them to invest in their countries. Appreciation should be given to the fact that from a foreign investor's point of view the business of investing involves undertaking a risk with his capital in anticipation of future gain. One economic writer aptly presents the situation thus:

> "not only does the size of international capital flows respond to the relative

> attractiveness of investing abroad as compared to investing at home but also the allocation of foreign investment among countries and among industries reflects profit prospects as seen by the investor".[2]

There are a number of factors which influence the decision of a foreign investor as to whether to invest in a particular country or not. These may be listed as economic, political and legal. Under economic factors, the investor is motivated by reasons of profitability and market opportunities in the host country. Thus an investor will undertake direct foreign investment so as to gain access to resources-physical, human and financial and to escape from unfavourable conditions in his domestic market, such as saturation of the domestic market, taxation, antitrust policies and to overcome tariff barriers.[3]

The political ideology prominent in the host country will have a major bearing on the decision by the investor to invest in the country. Thus a capitalist investor will almost certainly not invest in a country pursuing socialist or communist ideologies. The reverse is also true, that is, an investor from a socialist or communist country is not likely to invest in a capitalist country. The political stability of the host country is also a relevant consideration in as far as the foreign investor is concerned. Under political factors also fall matters such as the host country's record of nationalisations and expropriations, the process of governmental change (electoral or revolutionary), the political posture of the power elite, for example, the politicians, union leaders, the armed forces, academics and the mass media toward foreign investment, public and private ownership.[4]

The host country's legal environment is another area which the foreign investor will look into before deciding whether to invest in a particular country or not. Taxation laws, the freedom to repatriate dividends, profits and capital, the degree of financial disclosure required, the extent to which equity participation by residents of the host country and government is required, the forms of business organisations permitted and the extent to which nationals of the host country must be employed by the company, are all relevant considerations.[5]

Other additional factors which a foreign investor will take into account before reaching a decision on whether to invest in a particular country or not are the safeguards adopted by the host country which may protect his position as a result of international law and treaties and the actions of the United Nations and its agencies in their endeavours to protect the rights and interests of foreign investors in member states.

The Zambian economy, like many others in the third world or the so-called underdeveloped or developing countries, is experiencing a severe depression characterised by the following factors, inter alia, high balance of payment deficits, very high inflation, high debt burden which requires servicing, a business sector dominated by the trading sector and a manufacturing sector highly dependent on imported raw materials with very little foreign exchange earning capacity. Other indicators of the depression are industries which operate below capacity leading to a situation where they are unable to compete favourably with other countries in the region and the international community as a whole; high unemployment levels and a run-down social and economic infrastructure, for example, hospitals, schools, markets, roads etc.

The Zambian economy has sunk into a deep crisis which has been caused mainly by the continuing high prices of oil on the world market which began their upward spiralling in 1973.

This crisis has been characterised by a worsening balance of payment deficit. Thus for example, while export prices rose by 151 per cent between 1980 and 1985, this increase was more than offset by a simultaneous increase in import prices which saw the import price index rising to 990.57 as against the 1979 base of 100. This represented a rise in import prices of more than 800 per cent,[6] clearly a very unfavourable balance of payments position which has worsened todate. With such high balance of payments deficits, it comes as no suprise that the country is faced with a run-down social and economic infrastructure since the limited resources it earns have to be used, as a matter of priority, primarily to import essential goods to keep the wheels of industry running and for debt servicing. Inflation has been rising at an alarming rate reaching 67 per cent by April, 1987 from the 1986 figure of 60 per cent. Commensurate to the rise in the rate of inflation has been the decline in levels of capacity utilisation in the economy with some key industries registering levels as low as 12 per cent. Higher interest rates on the world money market resulted in the country's external debts rising from US $3.2 billion in 1980 to approximately US $5.6 billion at the beginning of 1987.[7]

As at 31 December, 1988 the external debt stood at $6,190,717,000.[8] The formal employment sector fell from 381,490 in 1980 to 365,190 employees in 1984, a decline of 4.3 per cent. Between 1985 and 1988 formal sector employment declined from 361,520 to 360,720, representing a - 0.2 per cent fall over the same period.[9] While the decline in the employment may appear low, in reality the number of people in formal employment in Zambia is not something to be proud of considering the fact that Zambia has a population of over 7 million people. Any decline in employment opportunities therefore means an increase in the number of unemployed persons.

The indicators of depression enumerated above have been alluded to in the business, political and other circles in the land. Indeed the highest authority in the land, the President, has time and again acknowledged the existence of these economic indicators of depression[10] and has called for a radical restructuring of the economy in order to make it more competitive and able to meet the needs of both the domestic and international economy. In order for Zambia to restructure her economy, however, she needs a large volume of investment. It is this well recognised need for investment which of necessity brings in the issue of finding the best means of attracting foreign investors to invest in the country since the country does not have enough capital of its own for accelerated economic development. The Zambian government has, indeed, not remained idle but has put in a lot of effort to try and attract the elusive foreign capital. These efforts which shall be dealt with in detail later in this paper culminated in the enactment of the Investment Act, No. 5 of 1986.

This paper deals with direct private foreign investment as opposed to portfolio investment and official aid for a number of reasons given shortly. Direct private foreign investment as the name suggests, is investment undertaken by private foreign enterprises as opposed to that undertaken by foreign governments and international agencies. Such enterprises can either set up a subsidiary enterprise in the host country, set up a new company altogether or enter into a joint venture with the host country. Portfolio investment covers such things as governmental loans, loans by international agencies, borrowing via bonds and short-term loans including bank loans and export credits.[11] Official aid refers to monetary grants and technical assistance at governmental level. This aid is normally meant to support the public sector in the setting up and maintenance of infrastructure. The reasons for the author's preference to deal with direct private foreign investment rather than the other types of investment are, firstly as we have noted earlier on, Zambia is faced with a high debt burden which requires servicing. Attracting more portfolio investment would mean attracting more debts which would need servicing because all debts place an obligation on the debtor to repay interest and principal regardless of the project's success. Direct investment, however, not being a debt, has with it the merit of being flexible with the investor's returns depending on the success of the investment. From this it is quite obvious that Zambia needs direct private foreign investment rather than portfolio investment. Secondly, portfolio investment normally involves transfer of capital only, whereas direct investment usually comprises of a transfer of not only capital but also a package of auxiliary factors like technology, managerial skills and know-how and training of local managers. It provides plant and equipment and helps in the training of workers and the creation of indigenous skills in administration, marketing and other business techniques. Direct investment does, by changing the market structure, contribute to more vigorous competition, helps in establishing contacts with overseas banks, capital markets for products, sales organisations and other institutions and also contributes indirectly to filling the savings and foreign exchange gaps by contributing to tax revenue.[12] Thirdly, as regards foreign aid, while it is true that it is costless in the sense that it does not entail payment of interest or dividends or the repayment of principal, it is also true that it comes with strings attached and therefore poses a greater threat to national independence and sovereignty of the host country than other forms of finance. The amount of aid, the terms on which it is made available and its distribution among recipients is ultimately determined by the governments of donor countries. Compounding the above, moreover, foreign aid is not sufficient because it has to be shared among many needy countries. Fourthly, official aid and private investment are complementary in the development process. Donor governments have become increasingly aware that while official aid and technical assistance will continue to be a mainstay of the development effort of many developing countries, official aid and private foreign investment are complementary in that effort. Indeed, while official aid has gone:

> "predominantly to support the public sector in the form of assistance to administration, education, public health and the creation and maintenance of economic infrastructure such as roads, ports and power supply, private investment has provided the bulk of external contribution to the directly productive sectors, manufacturing, mining, oil production and agriculture".[13]

Fifthly, direct private foreign investment helps in reducing the number of the unemployed by providing more jobs for the indigenous people than portfolio investment or official aid since the investment is done directly into productive sectors of the economy whereas under portfolio investment and official aid, employment opportunities are created when the government decides to use the borrowed money or aid in employment generating ventures but not othwewise. Sixthly, bringing an efficient internationally competitive enterprise into the local economy can, in the long run, stimulate other businesses to adopt improved management and technological methods. Lastly, foreign investors often become lobbyists in their home countries for the project and more generally, for the host country.[14] The lobbying is done by the foreign investors projecting a favourable image of the country in which they have invested thereby attracting more investors.

This paper is aimed at analysing the provisions of the Investment Act, 1986[15] with a view to determining the effectiveness or otherwise of the same in achieving its declared objectives of, inter alia, creating an atmosphere conducive to attracting foreign investors.

Chapter I deals with the development of private foreign investment in Zambia from the time of Cecil Rhodes' British South Africa Company's (B.S.A CO.) occupation in 1891 right through the colonial government era (1924-53), the Federal gevernment era (1953-63) up to independence in 1964. All policies, incentives, guarantees and legislation directly or indirectly aimed at attracting private foreign investment are reviewed.

Chapter II looks at post-independence private foreign investment in Zambia. A review of government policy statements (evident in economic reforms, development plans and other government documents), offered to foreign investors, made to gauge the weight attached to the attraction of private foreign investors by the government and the role played by the said investors in the economic development of the country.

Chapter III critically analyses the provisions of the Investment Act 1986 with a view to determining whether or not the Act is capable of achieving its declared objectives. The incentives and guarantees offered by the Act are analysed to determine their effectiveness, more especially, against the background of the severe depression being experienced by the country and its effects which include, amongst others, rigid foreign exchange controls.

Chapter IV takes a look at the post - 1986 climate for private foreign investment in Zambia. The Zambian Government's attitude towards foreign investment as evidenced by its policy statements and pronouncements found in Development Plans passed after 1986 and Press statements by Government leaders are examined.

Chapter V deals with other factors which the author feels have a hand in determining the size and direction of private foreign investment flows in the country.

Chapter VI offers suggestions for improving the investment climate in the country thereby making it more conducive to private foreign capital. The conclusion follows thereafter.

FOOTNOTES

1. T.M. Ocran, 'The Legal Framework of Foreign Investment in Africa.' Zambia Law Journal 12 (1980) p.1.

2. G.L. Reuber et al., Private Foreign Investment in Development. (Oxford: Clarendon Press, (1973) p. 47.

3. I.A Litvak, C.J. Maule, 'The Issues of Direct Foreign Investment.' In I.A. Litvak, C.J. Maule (ed.), Foreign Investment: The Experience of Host Countries. (New York: Praeger Publishers, 1970) p.11.

4. I.A.Litvak, C.J. Maule, 'Issues of Direct Foreign Investment, p.15.

5. ibid p.19.

6. GRZ, Fourth National Development Plan 1989-1993. Foreword by President K.D.Kaunda, (Lusaka: Government Printer, 1989) p. i.

7. GRZ, Fourth National Development Plan, loc. cit.

8. Per Minister of State for Finance and Planning, Mr Rabbison Chongo in his address to Parliament on Tuesday 18 July, 1989, reported in the Times of Zambia, Wednesday, July 19, 1989. p.1.

9. Source: Central Statistical Office, reported in the Fourth National Development Plan, op. cit., p. 66.

10. In January 1989, the President of Zambia, Dr. Kenneth David Kaunda was reported to have reiterated that Zambia was finding it difficult to generate more foreign exchange to help multinational companies remit their profits. See Times of Zambia, 25 January, 1989 p.1.

11. G.L. Reuber, Private Foreign Investment in Development, p. 53.

12. P. Streeten, 'New Approaches to Private Overseas Investment.' In P. Ady (ed.), Private Foreign Investment and the Developing World. (New York: Praeger Publishers, 1971) p. 59.

13. Organisation for Economic Co-operation and Development, 'Investment in Developing Countries - Facilities for the promotion of foreign private investment in developing countries' (Paris: n.p.

14. G.L. Elicker, 'Foreign Investment in Africa'. Paper presented to the African Regional Conference of the International Bar Association, Law Association of Zambia and the African Bar Association. Lusaka, November 11-13, 1987 p.3.

15. Act No. 5 of 1986,

CHAPTER I

PRE-INDEPENDENCE PRIVATE FOREIGN INVESTMENT IN ZAMBIA

A. Private Foreign Investment in Northern Rhodesia from the late 19th century to 1924 - The British South African Company Era.

The British Government first extended its power over the region later to be known as Northern Rhodesia (now Zambia), in 1891. The Crown did not, however, directly administer the country but did so through the British South Africa Company (hereinafter referred to as the B.S.A Co.), headed by Cecil John Rhodes which, through treaties, established itself in 1891 and was granted a Royal Charter in 1889. Before 1911 the area was divided into two parts and administered separately, namely North-Western Rhodesia and North-Eastern Rhodesia. The two territories were combined into a single territoty known as Northern Rhodesia through the Northern Rhodesia Order in Council, 1911. The B.S.A Co. administered Northern Rhodesia until 1924 when it came under direct British rule.

Before the discovery of huge deposits of copper on the Copperbelt and before mining of this natural resource started in earnest during the second half of the 1920's, the economy of Northern Rhodesia was almost entirely of rural subsistence with 96 per cent of the population practising subsistence farming.[1] The European settlers who arrived in the late nineteenth and early twentieth centuries and who in 1921 numbered about 3,500:

> "were more than half of them administrators or traders; those that were engaged in the production of goods were preponderantly farmers, a few of them growing tobacco for export, the rest farming maize partly for local consumption and partly for sale abroad".[2]

Thus foreign investment in Northern Rhodesia at this time was mostly in farming and a little in trading.[3] Farming by the settlers was concentrated along the line of rail running from Livingstone in the South to the Copperbelt in the North. The Railway line was built by private capital to achieve three primary objectives namely, to make possible the export of heavy minerals primarily via the port of Beira, to facilitate the flow of imports via both Beira and the Union of South African ports and to provide for internal distribution between the main centres of economic activities.[4] At this point in time, very little investment in mining was made and this was chiefly in the mining of lead and zinc. Mining was therefore done on a very small scale and so was manufacturing and construction. The Zambezi Sawmills near Livingstone was the only significant manufacturing establishment. Thus as Baldwin remarked "a world-wide ranking of countries for the early 1920's starting with the most economically backward, would certainly find Northern Rhodesia near the beginning of the list."[5] That this was so was mainly due to the fact that the growth of the cash economy was slow because its growth depended on attracting European settlers, but although official policy was geared towards attracting more settlers, the distance of the territory from the export markets and its general lack of development tended to discourage a lot of the prospective settlers from settling in Northern Rhodesia. Africans were employed mostly as farm labourers, domestic servants, rail workers, porters and mine labourers. They thus formed the unskilled labour force. It can, therefore, be seen that although abundant land for agriculture and cheap African labour acted as incentives to foreign investors, foreign investment in Northern Rhodesia was on a very small scale from the late nineteenth century to the early 1920's. The situation, however, changed dramatically with the acquisition by the B.S.A Co. of exclusive mineral rights over Northern Rhodesia and the opening up of the Copperbelt to large scale mining.[6]

B. Private Foreign Investment in Northern Rhodesia from 1924 to 1953 - The Colonial Government Era

The B.S.A Co., in accordance with the provisions of the Charter, administered Northern Rhodesia until 1924 when it relinquished its administration of the territory. It, however retained its economic privileges. A governor was thereafter appointed and a legislative council established. From the backward, rural territory just described above, Northern Rhodesia was remarkably transformed within two decades, into one of the most rapidly growing economies in the world. The impetus for this growth came almost entirely from the creation of a large-scale copper industry.[7] Indeed Sir Roy Welensky,[8] in a statement to the Legislative Council, made an important observation on the importance of the copper industry to Northern Rhodesia. He said:

> "from one who had a little knowledge of the Territory round about the time the Government took over from the B.S.A Co., one appreciated the lack of development, and I think it is no over-statement to say that in fact, until the base metal deposits became known and were developed in this country there was very little money available for social or any other form of development. It is no over-statement to say, Sir, that the whole key to the expansion of all services in this country has been the base metal industry".[9]

The transformation of Northern Rhodesia from the backward territory began in the late 1920's with the opening up of four copper mines, namely Roan Antelope, Mufulira, Rokana and Nchanga. There were a number of reasons for the creation of a large scale copper industry. One of them being the presence of high grade ores on the Copperbelt and the policy of the B.S.A Co. started in 1923 of granting exclusive prospecting rights over large areas to interested investors.[10] The other reason was the rise in copper prices in the 1920's as the electrical and automotive industries expanded throughout the world. The result was the attraction of powerful financial companies who were prepared to undertake exploratory drilling on a large and systematic scale. Two such financiers were the Rhodesian Selection Trust (RST), an American company and the Anglo-American Corporation (AAC) of South Africa.[11] With this large scale investment in copper, production of the mineral rose from "virtually nothing at the end of the 1920's to 138,000 long tons by 1934, 213,000 tons by 1935 and 251,000 tons by 1943."[12] The opening up of the Copperbelt to large scale mining was the beginning of private foreign investment of significance. This was followed up with investment in refining, smelting and investment in other industries in consumer goods such as flour milling and soap making.[13]

The investment policy of the Colonial Government was one which welcomed foreign investors. The Government took it upon itself to do everything possible to attract foreign investors to help in the development of the country. Thus in his proposal to the Legislative Council for the establishment of a Finance Development Corporation for the purpose of assisting and establishing industry and business in Northern Rhodesia, Sir Roy Welensky informed the House that private enterprise would be invited to participate. He also assured would-be investors that the country offered "splendid fields for development in investment".[14] Mr Davis, member of Parliament for Luanshya, seconding the motion, also echoed the Government's sentiments on the question of investment and suggested that everything possible be done to get private enterprise to interest itself in coming to the territory and providing capital for development.[15]

Apart from the Colonial Government's policy of attracting foreign investors, the development of the copper mines was an added incentive to the investors who could invest in other industries which supplied the mining industry with the necessary materials for copper production, for example, electricity, rail transportation, timber, ferrous and metal production. Abundant and cheap African labour was another incentive to foreign investors.

The development of Northern Rhodesia brought about by the income from the copper mines did not, however, affect Africans to any significant extent as this development was confined mainly to the 'line of rail' and most Africans lived in rural areas. Perhaps one explanation for such a state of affairs was the assertion made by elected European representatives in the Legislative Council in 1930 who are quoted as having said:

> "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".[16]

The above then was the position as regards private foreign investment under the Colonial Government. We now proceed to look at private foreign investment in the Federation of Rhodesia and Nyasaland and the Federal Government's policy towards foreign investors. Incentives offered by the Federal Government to attract foreign investors shall also be examined.

C. <u>Private Foreign Investment in Northern Rhodesia from 1953 to 1963 - The Federal Government Era</u>.

i) <u>Origins of the Federation</u>

The Union of the two Rhodesias[17] and Nyasaland in the form of a Federation in 1953 was not a new idea. The amalgamation of the two Rhodesia's was considered as far back as 1916.[18] At that time the plan was opposed by the settlers in Southern Rhodesia who feared that amalgamation would postpone indefinitely their chances of getting responsible government. The granting of responsible government to Southern Rhodesia in 1923 and the passing of control of Northern Rhodesia from the B.S.A Co., to the British Government in 1924, temporarily diverted attention from the issue of amalgamation.

However by the late 1930's interest had been revived to such an extent that the British Government appointed the Bledisloe Commission[19] on request from Northern and Southern Rhodesia to reopen the case. The Commission reported against immediate amalgamation but suggested the setting up of regular consultative machinery. Settler pressure mounted in the late 1940's and 1950's. The door for the settlers getting what they wanted was opened in 1951 with the coming into power in Britain of the Conservatives headed by Winston Churchill. A series of meetings were held from 1951 to examine the possibilities of greater collaboration and to frame recommendations. Early in 1953 a plan was produced recommending as a matter of urgency that the three territories (Northern and Southern Rhodesia and Nyasaland) be brought together under a federal form of government. This was endorsed by a referendum in Southern Rhodesia in April, 1953 by approximately two-thirds majority. Later the proposal was approved by the Legislative Councils of Northern Rhodesia and Nyasaland and the Government of the United Kingdom. The Federation of Rhodesia and Nyasaland was thereupon established by Order in Council and came into being formally on 3rd September, 1953.[20]

ii) Arguments for the establishment of the Federation

There were a number of economic reasons advanced by proponents for the Federation. The most forceful of these were, inter alia, the unification of the markets of the three territories. Under a federation goods produced or manufactured within the Federation would circulate freely within the area and a new Federal Tariff would replace the territorial tariffs in the three countries. Intergration of the economies of the three territories was another argument for the establishment of a Federation, since, it was argued, the resources and requirements of the three territories were complementary. The economic base would thus be broadened and a strong economic unit thereby created resulting in a more stable economy.[21]

iii) Federal and Territorial Governments' responsibilities

The Federal government's responsibilities included such matters as external affairs, defence, immigration, public health, non-African education, and (in the two Rhodesias), non-African agriculture. The individual territorial governments exercised residual powers in such fields as law and order, taxation, other than income tax (which was the responsibility of the Federal Government), sales taxes, customs, excise and export duties, labour, mining, African education, African agriculture and provincial, district and native administration.[22]

iv) Effects of Federation on Northern Rhodesia

The Federal Government preferred the South when it came to major government capital projects and industry as a result, was concentrated in Southern Rhodesia. The bulk of the capital employed in Northern Rhodesia was subscribed by private entrepreneurs who were resident outside the territory and those in most cases invested in the beverages and tobacco industries where the market was wide.[23] Industry in Southern Rhodesia grew so much that it resulted in a situation where Northern Rhodesia became a major importer of manufactured goods from Southern Rhodesia. Investors in Northern Rhodesia were even sceptical about investing in other manufacturing industries for fear that goods produced in Northern Rhodesia would not compare favourably with those manufactured in the South.

The Federal Government's control over income tax worked against the interests of Northern Rhodesia in two ways. Firstly, it prevented the territory from raising the rate of income tax on the copper companies which would have been the only way of financing higher government expenditure on African education and agriculture. Secondly,it diverted tax from the copper industry to the South. Indeed, Antony Martin writes on the state of affairs thus:

> "the net drain from Northern Rhodesia to the rest of the Federation based on the difference between federal tax receipts originating there and direct federal expenditure in the north plus the territory's share of

> income tax has been reliably computed at £56 million in six years from 1954 to 1959-60. The extent to which the drain impoverished the economy can be seen when this figure is set against total capital expenditure of only £50 million by the Northern Rhodesian government in the same period. Total tax loss to Northern Rhodesia during the federal period was £97 million".[24]

The Federal Government was also able to deploy economic resources of the three territories behind a strategy of social and economic development which concentrated on the needs of the Europeans, the maintenance of the dual economic structure and continued economic discrimination along racial lines. Thus the tax and foreign exchange revenues which the Government milked from Northern Rhodesia copper mines (which were by far the biggest generator of wealth in the whole Federation), were for the benefit of the European settlers, most of whom lived in Southern Rhodesia.

v) Federal Government's investment policy and incentives

The Federation was a member of a group of countries known as 'sterling countries'. These were a group of countries having close traditional, commercial and financial ties with the United Kingdom which found it advantageous to keep most of their reserves and settle their debts to one another in sterling with balances held in London for that purpose. Member countries in the sterling area were the United Kingdom, other self-governing countries of the British Commonwealth (except Canada), dependent territories and protectorates of the British Commonwealth and Ireland, Burma, Iraq, Iceland, Libya and Jordan.[25] The Federal Government's investment policy was one which welcomed foreign investors but as a member of the sterling area, it was expected to follow policies which strengthened the sterling area's central gold and dollar reserves. Thus, investment in mining, agriculture, forestry, manufacturing, fisheries, housing and hotels, transport and communications, power etc. were welcomed as long as they resulted in the strengthening of the sterling area's central gold and dollar reserves.

Special efforts were made to encourage long or medium term enterprise which would benefit the Federation's economy by either earning or saving hard currency or by contributing to industrial efficiency. Investment of capital from overseas was not only welcomed by the Government but the Government's policy was to encourage overseas financial participation in the development of the Federation particularly investment which would promote the establishment of industry based on local raw materials. In a statement on Foreign Investment Policy of the Federation prepared by the Federation of Rhodesia and Nyasaland at the request of the American Consulate

General in Salisbury,[26] the Federal Government's policy on the same was summarised as follows:

(a) To encourage overseas investment in and European immigration to the Federation;

(b) To encourage and protect where justified, the development of primary and secondary industries, especially those based on the Federation's products or considered necessary to its economy, in order to achieve a greater measure of self sufficiency, a healthy trade balance through increased exports and to provide a means of improving the standard of living of the indigenous population and absorbing more skilled immigrants from overseas; and

(c) To encourage the growth of primary and secondary industry and multilateral trade by taxation relief in respect of capital expenditure, by assisting in finding export markets by trade agreements with other countries and by protection against dumping and other unfair competition.

The Federal Government was aware of the benefits to be derived from private foreign investment, thus, its policies and legislation were framed to provide a favourable investment climate. Laws and regulations affecting business in the Federation applied equally to local and foreign investors' enterprises. An example of such laws were the Federal tax law, company and land tenure laws. Under the Federal income tax laws and Constitution, all companies whether local or foreign, were obliged to pay a Federal income tax.[27] Provisions of the Companies Ordinance,[28] applied equally to local and foreign companies with the exception of the provision which required non resident companies having a place of business in the Territory to furnish details of their operations to the Registrar of Companies. Crown land under the land tenure laws was available to both foreign and local investors.

Investment of any kind were allowed entry and the Government's stated policy was to permit remittances of current earnings without restriction. Capital originating from sources outside the sterling area which was put into "approved investments" which comprised of investment in mining, agriculture, processing of raw materials, secondary industries, building and construction and the tourist trade,[29] could be repatriated to the country of origin at any time after the original investment of the capital. However, capital put into "unapproved investments" which covered investment of a highly speculative sort for example buying and selling of real estate[30] could not be repatriated until ten years after the date of the original investment.

The Federal Government owned and operated most public utilities such as railroads, civil aviation, posts and telecommunications and electricity but it considered industrial development to be essentially the responsibility of private enterprise. In fact, British private capital through the medium of the B.S.A Co. was responsible for the early economic development of the Federation. Through subsidiary companies the company took part in the flour and maize milling industries, and had interests in forestry and saw milling. The company retained its monopoly over mining rights but encouraged prospecting by both small and large prospectors in lands not already alienated to existing companies.[32] The building of the Kariba Dam and the cheap power thereafter provided acted as an added incentive to private foreign investors who also had cheap transportation (and of course labour) at their disposal. Added to this, the Federation's geographic proximity to the Union of South Africa served to encourage investors from that country who made capital investments in the Federation.

The Federal Government's policy towards private foreign investment was thus one of welcoming and encouraging it. By so doing, the Federation achieved two of its main objectives which were, to raise the rate of industrialisation and absorb more skilled immigrants from overseas. As for improving the standard of living of the indigenous population, very little was done and the little achievement in this area only benefited the few Africans living in the urban areas.

vi) Dissolution of the Federation

The Federation of Rhodesia and Nyasaland was dissolved at the end of 1963 to be followed in Northern Rhodesia by responsible self-government with Kenneth Kaunda as Prime Minister. According to Martin,[33] the Federation collapsed mainly due to the political judgement made by Harold Macmillan[34] and Iain Macleod[35] at the beginning of the 1960's that the only viable policy for Britain in Africa was to liquidate its imperial commitments. Also, the exponents of the federal case, who relied heavily on the supposed economic benefits of the bigger political unit were unable to convince African political leaders in Northern Rhodesia and Nyasaland who were opposed to the Federation from the beginning, that the so called benefits were real to them and to their fellow Africans.

FOOTNOTES

1. R.E.Baldwin, Economic Development and Export Growth: A Study of Northern Rhodesia: 1920-1960. (University of California Press, Berkeley & Los Angeles, 1966) p.17.

2. A. Martin, Minding Their Own Business - Zambia's Struggle Against Western Control, (London: Hutchinson & Co. Ltd, 1972) p.28.

3. Bodies such as the North Charterland concession Company and the Mozambique Gold Land Concession Company Limited were involved in trading and agriculture, see the North Charterland Concession inquiry: Report to the Governor of Northern Rhodesia by the Commissioner, Mr Justice Maughan. (Colonial No. 73 London: H.M.S.O., 1932).

4. S.Weeks, M.K. Loring, Investment in the Federation of Rhodesia and Nyasaland (Washington 25 D.C: Government Printing Office, 1956) p.52.

5. Economic Development and Export Growth, p.16.

6. The presence of copper deposits on the Copperbelt had been known by the indigenous people and worked in a small way for a very long time.

7. See R.E.Baldwin, Economic Development and Export Growth, op. cit p.29.

8. Then Member of Parliament for the Broken Hill constituency. He later became the Governor of the Federation of Rhodesia and Nyasaland.

9. Northern Rhodesia, Legislative Council, Debates, (8th September, 1950), col. 194.

10. A.Martin, Minding Their Own Business, p.30.

11. Despite its name, the Anglo-American Corporation was a British and south African firm also controlling large mineral interests in the Republic of South Africa, see Baldwin Economic Development and Export Growth, p.32.

12. A.Martin, Minding Their Own Business, p.30.

13. J.M. Mulwila, 'Economic Independence in Zambia and the Role of Law in Economic Development'. LL.M. thesis, UNZA, 1976 p.71.

14. Northern Rhodesia, Legislative Council, Debates, (8th September, 1950), col. 194.

15. ibid col. 202.

16. Correspondence with Regard to Native Policy in Northern Rhodesia. cmd. 3731, G. Britain (London: H.M.S.O 1930) p.3.

17. Northern and Southern Rhodesia.

18. Weeks and Loring, Investment in the Federation of Rhodesia and Nyasaland, p.7.

19. Weeks and Loring, loc. cit.

20. See the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, Proclamation No. 2, GN. 295 of 1953.

21. C.H.Thompson, H.W. Woodruff, Economic Development in Rhodesia and Nyasaland. (London: Dennis Dobson Ltd, 1953).

22. See the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, S.I. No. 199, Government Notice No. 243 of 1953, Appendix VIII, schedule.

23. A. Seidman, 'Natural Resources and Welfare: The Case of Copper'. Paper presented to a conference on Natural Resources and National Welfare. Lusaka, July 3-9, 1974.

24. Minding Their Own Business, p.36.

25. As a member of the sterling area, the Federation was obliged to pool its dollar resources with those for the sterling area as a whole. Consequently, while exchange transactions were not subject to control within the sterling area (except Hong Kong), all payments to non-sterling countries required exchange control approval - See Weeks & Loring, Investment in the Federation of Rhodesia and Nyasaland. p. 19.

26. Quoted on p. 114 of Weeks & Loring, Investment in the Federation of Rhodesia and Nyasaland.

27. See The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, Chapter VII SS, 80-87.

28. Volume VII, Chapter 216 of the 1950 Edition of the Laws of Northern Rhodesia.

29. Weeks and Loring op.cit p. 19.

30. Weeks and Loring, loc.cit.

31. Weeks and Loring, p.13.

32. ibid p.14.

33. Minding Their Own Business, p. 37.

34. The then British Prime Minister.

35. The Colonial Secretary.

CHAPTER II

POST-INDEPENDENCE PRIVATE FOREIGN INVESTMENT IN ZAMBIA

(A) Pre-Economic Reforms Period: 1964-1968

(i) Government's Policies

Zambia became politically independent in 1964. The political independence was not, however, accompanied by economic independence, the main reason being, as we have noted in Chapter I, the exploitation of Zambia's resources by the colonial government and settlers who repatriated the wealth amassed at the expense of the country's development. The major economic concerns covering such areas as building, construction, manufacturing, breweries, wholesale and retail trade, distribution, engineering, banking and insurance were foreign owned or dominated. One can thus rightly say that economically speaking the population was crystalised into three groups, namely, Europeans on top and in command of the country's major economic sectors, such as mining and commercial farming; in between, Asians and other non-African minority communities who controlled most medium - level industrial and commercial activities such as wholesaling and retailing and at the bottom the indigenous African population who were engaged in selling their labour cheaply to the two economically powerful groups or were living simply as peasant farmers or small-time traders.[1]

The construction industry provides a good example of the extent of foreign domination in the economic life of the country at independence and a few years after. It has been reported that out of the two hundred largest construction companies that existed at independence only one was Zambian owned. There were only two Zambian quantity surveyors out of a total of one hundred and thirty-five and one Zambian civil engineer out of two hundred and seventy-seven in 1964.[2] Lack of financial resources was one factor which militated against more indigenous participation in the economic activities of the nation since the existing financial institutions were reluctant to lend money to the indigenous people.

Prior to the 1968 economic reforms (which were announced by the President of Zambia, Dr. Kenneth David Kaunda at Mulungushi on 19th April, 1968 during an address to the National Council of the ruling party, the United National Independence Party (UNIP), the government more or less continued the industrial, commercial, agricultural and trade policies started by the colonial government. Thus the trade and payment system did not suffer any governmental restrictions and foreign investors could remit their profits, earnings and dividends without hinderance as long as they possessed the necessary documents. Section 18 of the 1965 Constitution[3] protected the property of any person (foreign investors included), from being compulsorily acquired except where the taking of possession or acquisition was necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or land resettlement or in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community. Adequate compensation had to be paid for the property compulsorily taken and the person having a right or interest in the property so taken could contest the legality of the acquisition of the property or the amount of compensation to which he was entitled or for purposes of obtaining prompt payment of compensation. A person entitled to such compensation was guaranteed of remitting the said compensation within a reasonable time, the whole amount of compensation (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Zambia. Furthermore, the state did not impose constraints on imports from the sterling area, just as was the case under the Federal Government. However, imports from areas outside the sterling area were allowed into the country subject to the importer obtaining the necessary import licence.

Government's industrial policy of the time was outlined in a document entitled "Outline of Government's Industrial Policy" published as a White Paper in October, 1964.[4] This policy can basically be stated as one which was aimed at supporting selected industries which could make a net contribution to the development and diversification of the economy. Government encouraged, where practicable, industries that contributed towards making the country self-supporting in consumer goods which were in more general demand, thereby reducing imports and saving foreign exchange. Government placed special emphasis on those industries which were labour intensive, whilst industrialists were expected to make satisfactory arrangements for the training of Zambian nationals. The encouragement of those industries which had a potential likely to lead to the establishment of other related industries was stressed and so was the policy to actively encourage, where practicable, the setting up of industries outside the main centres so that the benefits of development could spread throughout the territory.

During the pre-economic reforms period, the mining sector was controlled, both at the administrative and operational levels, by the two foreign mining giants mentioned in Chapter I (the AAC and RST). Although the Zambian Government had a share in the returns of the mines, its participation in this crucial sector was hampered by lack of know-how and low level of educational attainments among the indigenous people. However, the Government took several measures to increase the state's share of the economic returns. The measures culminated in the enactment of the Mining Ordinance (Amendment) Act, 1965[5] which was intended to empower the Government to control mining rights and privileges hitherto enjoyed by the B.S.A Co. The Government thus began to receive the royalties that were formerly due to the B.S.A Co. from the mining companies. In addition, it also received income and export taxes from the mining companies.

One outstanding feature of the state's participation in the industrial, commercial and agricultural sectors during the pre-economic reforms period was its dormancy. The state facilitated rather than directly participated in these sectors and foreign companies thus continued with their ownership of the biggest and most economically crucial of the enterprises. This state of affairs was partly the result of the economic heritage from the colonial masters and partly the result of a deliberate policy by the Government of promoting free enterprise on which the country could rely for a large part of its development through minimum governmental intervention and encouragement of private foreign investment. This open-handed policy did, however, lead to domination by foreign interests of the productive sectors of the economy which was difficult to upset despite attempts to promote more participation by the indigenous people.

Government's policy on foreign investment during this period was evident in the development plan[6] of 1966 known as the First National Development Plan (FNDP). This was the third post-independence plan. The first post-independence plan was the Emergency Development Plan, 1964 (EDP) which was a prelude to the eighteen months' Transitional Development Plan (TDP) which ran from 1965 to June 1966. The Transitional Development Plan was basically a means of bridging the period of transition from internal self-rule to full independence. The FNDP contained eight stated objectives covering the diversification of the economy; the growth of employment, incomes and prices; the reduction of inherited differentials between the rural and urban areas; the expansion of training linked with a programme of Zambianisation and an expansion of housing, health and social welfare and a wide spread extension of transport and communication.[7] The FNDP confirmed the country's considerable faith in private foreign investment in that, for example, out of the total capital investment of £429 million during the FNDP, £147 million (34.3%) was anticipated to come from the private sector which, as we know, was foreign dominated.[8] Hence, although the Government encouraged active participation by the public sector in the fulfilment of its FNDP objectives, this was seen basically as "a prerequisite for dynamic private enterprise especially when a large percentage of the investment was devoted to establish the economic infrastructure which promoted the expansion of the productive private sector."[9] Apart from its financial contribution, private foreign investment was also associated with expertise which was of great importance to a country like Zambia where entrepreneurial abilities and skilled manpower were in short supply.[10]

(ii) Statutory and other incentives to private investors

A number of statutes were either passed or amended by the Government prior to the economic reforms of 1968 aimed at attracting both local and foreign private investors. These statutes fell, *inter alia*, under the following heads: income tax legislation, customs and excise legislation and the exchange control legislation.

(a) Income Tax Legislation

The Pioneer Industries (Relief From Income

Tax) Act, 1965[11] was passed to encourage, by way of relief from income tax, the establishment and development of new industrial and commercial enterprises in the hope that additional avenues of employment would be opened, the standard of living of the people raised and the economy strengthened and diversified. The Act offered the following incentives amongst others, five year tax holidays to selected new industries, both local and foreign; capital allowances on plant and machinery, covering such areas as relief towards machinery acquisition and wear and tear, capital allowances on buildings; patents, copyrights and trade marks; concessions on research, pre-commencement expenditure and relief from double taxation.[12] Other statutory incentives offered by Government to provide an attractive climate for the investment of private capital were enumerated by the Minister of Commerce and Industry, Mr Nalilungwe in his address to Parliament while presenting the Pioneer Industries (Relief From Income Tax) Bill for the second reading thus:

> "We have provided industry with a firm network of tariff protection, of duty-free entry of raw materials and components parts. We have given under the Income Tax legislation operating in this country generous capital allowances in respect of investment in plant, machinery and buildings. The Exchange Control legislation provides that foreign owned companies may remit abroad profits, dividends and interest. They may also repatriate capital brought into Zambia, together with increases in

> capital arising from their operations. Under the same regulations, there is no restriction in respect of payments made to any country for purchase of commercial and industrial goods".[13]

The Taxes Charging and Amendment Ordinance of 1964,[14] provided for the grant of a special tax rebate of 2s 6d in the pound[15] for those companies recently set up in Zambia which had previously been exempted from payment of Territorial Surcharge.

(b) The Customs and Excise Legislation

The law on customs and excise in force during this time, the Customs and Excise Act, 1955 was amended by the Customs and Excise (Amendment) Acts of 1965[16] to provide for tariff protection, waiver of duty on raw materials and component parts and to make anti-dumping provisions. Through the amendments brought about by the Amendment Acts of 1965 the Government provided tariff protection to selected new and developing industries which were chosen by the Tariff Advisory Board (T.A.B) set up primarily to investigate applications for tariff protection and suspensions on the basis of information submitted by individual manufacturers. The T.A.B was also entrusted with the duty of recommending to the Minister of Commerce and Industry how the local market could be protected.[17] The Customs and Excise (Industrial Drawbacks and Rebates) Regulations 1966[18] made allowance to manufacturers to claim full remission of customs duty on some raw materials used in manufacturing provided the manufacturer was registered by the Controller of Customs and Excise.[19] Regulation 4(2) of the said Regulations provided for a drawback of customs or excise duty paid on goods manufactured in Zambia and exported to any country.

(c) <u>The Exchange Control Legislation</u>

The Exchange Control Act[20], was passed in 1965 to confer powers and impose duties and restrictions in relation to gold, currency, securities, exchange transactions, payments, debts, and the import, export, transfer, and settlement of property, and for purposes connected with the matters aforesaid.[21] However, for the protection and retention of foreign investment in Zambia, non-resident companies, could, despite the restrictions, remit profits and dividends subject to the production of the necessary documentary evidence. Proceeds of the sale of their investments could also be repatriated by foreign investors provided the original investment was made with funds brought into Zambia by the investors. Additionally, foreign exchange to cover the cost of imports was made available by the importer's bank against production of relevant documentation including an import licence for the goods subject to import control.

(B) <u>Post-Economic Reforms Period: 1968-1986</u>

In the year or two before the announcement of the economic reforms, the Government had began to increasingly seek greater participation in the management of the country's economic sectors. This was due mainly to the Government's dissatisfaction with the low-level participation by indigenous Zambians who for reasons of lack of know-how and finances were unable to participate effectively in the private sectors. Financial institutions further compounded matters by their reluctance to lend money to indigenous businessmen.[22] The Government felt that in the circumstances, only it could participate effectively in the economic life of the country on behalf of the people to ensure that the nation had control of the vital resources of the country and also provide avenues for the acquisition of skills pertaining to economic development and participation. Another factor which contributed to the formulation of the economic reforms was the effect on the economy of massive repatriation of profits made by foreign investors on their investments. During the first three post-independence years the country experienced an economic boom and growth which brought considerable financial benefits and profits to foreign enterprises. These foreign enterprises repatriated large portions of their profits and ploughed back as little as possible into the businesses thereby substantially reducing the country's financial resources. It is therefore understandable that the Government felt compelled, in order to stabilise the economy, restrain unnecessary flow of foreign exchange and ensure that the available capital went a long way towards the development of the country, to actively participate in the major sectors of the economy and at the same time induce an atmosphere in which indigenous Zambians could have an equitable share in the commercial and industrial life of the country. The changes in the economic structure of the country announced firstly in 1968, then 1969 and 1970 should, therefore, be seen in the light of the aforesaid factors. The economic reforms can thus be said to have been aimed at the Government acquiring control of the major means of production, distribution and resources in the country and encouraging the growth of a Zambian class of businessmen.

(i) <u>Important measures passed at Mulungushi</u>

The first measure to be passed was the restriction of local borrowings by resident expatriate businesses[23] whose loan applications from then onwards would be referred to the exchange control authorities who would consider them using the same criteria they used when approving or rejecting applications for loans from foreign controlled companies. Retail trade licences would be restricted to Zambian businessmen except in the centres of big towns where resident expatriate businesses could operate.[24] Road services licences were to be restricted to companies or co- operatives with at least 75 per cent Zambian shareholding, Zambian partnerships and individuals. Building Mineral Permits (issued to people wishing to extract sand and other building minerals), were to be restricted to Zambian nationals. Sub-contracts by large companies, were to be awarded to Zambians. Contracts of K100,000 or less by the Public Works Department (PWD) were to be awarded to Zambian co-operatives, partnerships and individuals.

One of the most important developments in the commercial and industrial sectors which was announced at Mulungushi was the impending acquisition of 51 per cent shares by the Government in some 25 selected industries. President Kaunda "asked" foreign owners of the selected companies in the building, brewing, transport, retail and wholesale and newspaper publishing industries to "invite" government to participate in their concern by acquiring 51 per cent of the shares of the companies. This marked the beginning of what would later be known as 'state corporations' or 'parastatal companies'. The take-over schemes were implemented by the Industrial Development Corporation (INDECO),[25] the first of Government's instruments to implement the take-overs. The 51 per cent take-overs were made possible with the amendment of the 1965 Constitution by the repeal of Section 18 after a referendum held on 17th June, 1969. Amendments to the Constitution required the holding of a referendum in which the Government obtained the majority votes. The said section was accordingly repealed and replaced by Article 18 of the Constitution (Amendment) (No. 5) Act, 1969, which amongst other things repealed the provision of sub-section (2) of the former section 18 which had prohibited the prevention of a person entitled to compensation for property compulsorily acquired from remitting within a reasonable time after receiving the compensation the whole of the compensation (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Zambia.

One could say that perhaps the most economically significant part of the Mulungushi Reforms were the restrictions on profit repatriation which were to apply to all foreign-controlled companies. Exchange Control Regulations were to be amended to allow foreign-controlled companies to remit dividends abroad only when those dividends did not exceed 30 per cent of the equity capital of the companies concerned, provided that the 30 per cent did not exceed half of the said companies profits.[26] It should be remembered that all the above measures were taken as a way of controlling the repatriation of profits and dividends which had hitherto taken place unrestricted. The mining sector was not significantly affected by the 1968 economic reforms although President Kaunda did voice his concern at the lack of mining development since independence and hinted at things to come when he expressed concern at the virtual lack of re-investment by the mining companies which, he said, were reaping huge profits from the mines.[27] The President announced at Mulungushi that the Government would change the royalty system (which was the system in force at the time) to ensure that the Government got money from the mining companies while at the same time meeting the companies' interests. The mining companies would from then onwards be allowed to remit abroad as dividends only half of their profits. The other half had to be re-invested in Zambia.

Despite the launching of the economic reforms, President Kaunda felt that it was necessary to clarify the position of foreign investors in the new economic set up. He thus announced at Mulungushi that Zambia recognised the importance of attracting foreign capital and the skills that go with it. "The economic reforms I have outlined today are not aimed at foreign investors," said President Kaunda.

> "They are designed to implement in the business world the philosophy of Humanism. First by giving the Zambian people a chance to make their way against resident expatriates who refuse

> to become citizens of Zambia and yet continue to enjoy, by exploiting us, our economic boom, and, second, by letting the state and ultimately the common man control the activities of certain types of large scale business and share in its reward. Foreign investors and foreign businessmen are welcome in Zambia. I want to announce straight away that it is my intention to enact legislation safeguarding approved foreign investments".[28]

(ii) Measures passed after Mulungushi

Further measures passed by President Kaunda after Mulungushi aimed at strengthening state control of the economic sector of the country included the relaxation of the Exchange Control Regulations in so far as they affected the resident (as apposed to non-resident) foreign investors as long as they allowed 51 per cent of their businesses to be in Zambian hands and the nationalisation of the insurance sector which had hitherto been in private hands. Other post-Mulungushi measures were the delegation of most important activities to the newly created importing agency, the National Import and Export Corporation (NIEC) and the discontinuation of retail and wholesale trade by foreign companies as from January 1972. Further, a directive was issued to foreign banks to form a merger with the National Commercial Bank and then offer the state 51 per cent equity participation. This directive, however, failed to materialise and the banks were left in private hands but directed to be incorporated in Zambia with paid-up capital of not less than

K2 million.[29]

(iii) <u>The Mining Reforms</u>

Until January, 1970, copper mining was in the hands of the two major companies, the AAC and RST. On 11th August, 1969 in what came to be known as the 'Matero Declaration'[30] President Kaunda announced that the Government would take control of the mining companies by acquiring 51 per cent of their interests. Following the declaration, the Mines Acquisition (Special Provision) Act[31] was passed which facilitated the acquisition by the state of a 51 per cent interest in AAC's and RST's operating ventures. Under agreements reached between the Zambian Government and the mining companies, two new groups were formed to own and operate the mines affected by Government participation. These two new companies were the Roan Consolidated Mines (RCM Ltd) and the Nchanga Consolidated Copper Mines Limited (NCCM Ltd). A government corporation, the Mining Development Corporation (MINDECO) held 51 per cent of the equity in RCM Ltd. and NCCM Ltd. AAC through the Zambia Copper Investments Limited and the Zambia Anglo-American Limited (ZAMANGLO) owned 49 per cent of NCCM as well as 12 per cent in RCM. RST held 20 per cent of RCM, 17 per cent was publicly held.[32]

Through the mining reforms all rights of ownership or partial ownership of minerals reverted to the state.[33] The President also renounced, without payment of compensation, the Litunga's rights over the determination of prospecting and mining leases in certain areas and put them in state hands[34] and proposed the discontinuation of the concept of holding mining rights in perpertuity and the creation of legislation obliging foreign companies to develop the areas for which mining licences were acquired. The Mines and Minerals Act, 1969[35] was thus enacted as a follow-up to the presidential directive. This Act vested all mineral rights in the President on behalf of the people and made regulatory restrictions in such areas as the acquisition of mining rights, conditions in and duration of prospecting. The Act made it a condition for the grant of mining rights that the applicant should agree to the Republic having the option to acquire an interest in any venture which might be carried on by the applicant in the proposed area. The Mineral Tax Act was enacted in 1970 which brought into being a mineral tax of 51 per cent of profits (of copper sales)[36] thereby doing away with the royalty and export tax formulae which had been a source of discontent for the mining companies. In addition to mineral tax the mining companies were to pay company (income) tax on the profits which remained after the mineral tax had been levied.

Thus as one writer puts it, "as a result of all these taxes the copper mining companies paid to the Zambian Government around 73 per cent of their profits".[37]

(iv) Government's investment policy after the Economic Reforms

The economic reforms discussed above represented a watershed in Government's investment policy in Zambia. The reforms were followed in the 1970's by the world-wide depression and a slump in the prices of copper (the commodity on which Zambia heavily relied as a source of export earnings needed for the purchase of equipment, machinery and inputs into the agricultural, manufacturing and contruction industries) as a result of recession in most of the copper-consuming countries and technical advances in industry which reduced the need for copper. The new realities of the Zambian economy brought about by the depression and slump in copper prices, namely, the presence of a government deficit, a deficit on current foreign exchange transactions and a realisation of the difficulties of achieving the desired economic development, prompted a more careful thinking on priorities and allocations.[38] The need for private foreign investment during this period was even greater as can be seen from the objectives of the Second national Development Plan (SNDP) 1972 - 1976, which reflected the prevailing adverse economic climate and the need for more foreign capital. The SNDP was meant to continue the work started by the FNDP. Its main goals were to increase and expand the diversification process initiated under the FNDP in order to reinforce <u>inter alia</u>:

(a) the attainment of self-sufficieny in food supplies together with an improvement in income;

(b) the expansion and diversification of industry and mining through import substitution, which emphasised a greater utilisation of local materials and ensuring an improvement of living conditions in the rural population by creating employment;

(c) the initiation of comprehensive measures for regional development;

(d) the linking of educational programmes to the country's manpower requirements;

(e) the provision of social infrastructure on a country-wide basis; and

(f) the provision of the necessary development of physical infrastructures such as transport, communications and power.[39]

Before 1977, there was no legislation which directly regulated investment in Zambia. The statutes discussed at the beginning of this chapter operated indirectly as some of the means available to make the investment climate in Zambia more conducive. The first legislation to directly regulate investment in the country was passed in 1977. This was the Industrial Development Act, 1977.[40] This Act was passed to provide, amongst other things, incentives for investment, regulate the making of contracts relating to the transfer of foreign technology and expertise to enterprises operating in Zambia and to provide for licensing and control of manufacturing enterprises. The Act was meant to make the investment climate in Zambia much more attractive for both local and foreign investors. It thus had provisions which offered incentives for priority enterprises (that is, enterprises which made maximum utilisation of domestic raw materials, produced intermediate goods which were used by other industries, diversified their industrial structures, created substantial opportunities for permanent employment, improved domestic industrial skills or fostered the development of domestic technology and industries which promoted industrial development in rural areas - section 18(2)).[41] Section 21 of the Act offered incentives for exporting enterprises which included relief from tax or customs duty payable on the importation of machinery intended for use in the manufacture of products for export, favourable adjustment to export tariff rates, relief from import tariff in respect of raw materials and preferential treatment with respect to the granting and processing of import licences. Section 22(1) entitled any enterprise which provided training facilities or incurred training expenses for Zambian citizens to write off such expenses against income tax. Enterprises in rural areas also had incentives offered (section 23). Enterprises utilising foreign funds (foreign investment) were offered the following incentives:

(a) a right to remit, on cessation of business interest the value of such foreign capital or such investment, subject to the law relating to the exchange control at the time of application for remittance;

(b) on making an application therefore, an election to remit any accrued profits or dividends during the twelve-month period immediately following the end of the financial year to which the application referred, subject to any law relating to exchange control at the time of application;

(c) any remittable profit which was reinvested in Zambia was credited to any amount which would be remitted on cessation of business;

(d) immunity from nationalisation unless the highest considerations of public interest so required.[42]

A foreign enterprise which expended money on research and development or requested a recognised research institution to conduct research and development had no tax charged on such expenditure (S.25). The Industrial Development Act can thus be seen as the legislation which President Kaunda promised at Mulungushi in 1968 to enact which would safeguard approved foreign investments.[43]

The Industrial Development Act was, however, repealed and replaced by the Investment Act, 1986[44] due to dissatisfaction with the former Act by interested persons and institutions. The 1977 Act drew a lot of criticisms from the business community, prospective investors and economic and financial experts which the Government alluded to as genuine fears and apprehensions in the light of what was happening in other African countries.[45] The main aspects of the 1977 Act which drew criticisms and which led to its eventual repeal were that the tone of the Act was negative and generally discouraged prospective investors to establish businesses in Zambia and also that too many points in the Act were left to the discretion of the Government thus introducing an element of uncertainty and arbitrariness in the process of decision making. A further criticism of the 1977 Act arose from the fact that applications to set up business by foreign investors faced red tape, that is to say, too many government ministries, departments etc. (for example the Ministry of Commerce and Industry, the Ministry of Lands and Natural Resources and local authorities) requested to be consulted before an investor was allowed to set up business thereby causing him inconvenience and unnecessary expense. In addition, the investor was required to make the investment first before he applied for incentives which would or would not be granted to him and also, no protection or guarantees were assured to a prospective investor in respect of the incentives or benefits under the Act - creating the impression that they could be withdrawn at anytime to the detriment of the investor. In the existing legislation, it was argued, there were too many, sometimes unnecessary and cumbersome procedures, regulations and controls which had the potential to strangle honest business and that the 1977 Act tended to favour Government investment at the expense of private enterprises. The law, according to the critics, was restrictive in the manner in which it was applied with regard to licensing, control of manufacturing enterprises as well as the administration of regulations relating to the transfer of technology and expertise. The main defect of the Act, it was observed, was that it restricted itself to the manufacturing sector leaving aside completely agriculture, tourism and service sectors without properly codified incentives.[46] The Industrial Development Act 1977, though defective and thus unable to deliver the goods as effectively as intended, was an instrument which the Government introduced to create a favourable investment climate for both local and foreign investors. Further evidence of the importance the Government continued to attach to foreign investment was the Third National Development Plan (TNDP) 1979-1983, drawn up in 1979. While the First and Second National Development Plans were designed to provide the basic economic and social infrastructure, initiate measures to diversify the agricultural and industrial base of the economy and promote self-reliance and self-sustained growth, the TNDP constituted a departure from the earlier two plans in several respects and represented a major national endeavour to correct past trends and make planning the principal means of promoting economic development of the country. The TNDP was firstly, a comprehensive plan covering the Government, parastatal and private sectors. Acknowledging the importance of the private sector in the development of the economy, President Kaunda had the following to say in the foreword to the TNDP:

> "While the public sector will continue occupying commanding heights of the economy and supply the main driving force behind development, there is a clear recognition in the plan that, in the transitional period from capitalism to socialism, the private sector, both domestic and foreign will play an important role in fostering

increased investment and rapid economic growth of the economy".[47]

The TNDP secondly, postulated a major shift in the investment pattern in favour of three productive sectors, namely, agriculture, industry and mining with emphasis on increasing agricultural and industrial production within the economy in order to reduce the country's heavy dependence on imports and establish a self-generating and self-sustaining economy. Thirdly, the TNDP accepted the provision of gainful employment opportunities to the local labour force as a major development objective and sought to promote this through increased utilisation of existing productive capacities, adoption of labour-intensive technology and by undertaking specific measures designed to raise the level of productivity of small scale farmers and subsistence producers in the agricultural sector and through the setting up of village and small scale industries in both rural and urban areas.

The above then were the Government's policies towards foreign investment as evident from the development plans and other policy statements and the incentives (statutory and otherwise) which were passed or announced after independence but before the enactment of the Investment Act, 1986 to attract the much needed foreign investment.

FOOTNOTES

1. J.H. Chileshe, Third World Countries and Development Options: Zambia (Vikas Publishing House Pvt. Ltd, 1986) pp. 57-58

2. C. Christie, 'The Construction Sector'. In C. Elliot (ed.), Constraints on the Economic Development of Zambia (Nairobi: Oxford University Press, 1971) p. 379.

3. Appendix 3 of the Laws of Zambia, Zambia Independence Order, 1964, schedule 2.

4. Reported in GRZ, Annual Report of the Ministry of Commerce and Industry for the year 1964 (Lusaka: Government Printer, 1965) p.6.

5. Act No. 5 of 1965.

6. A development plan is a "blueprint, a deliberate and purposeful act to influence economic activity. Consequently it contains both desired objectives and methods by which those objectives can succeed". See J.H. Chileshe, Third World Countries p. 59.

7. GRZ, First National Development Plan 1966-70 (Lusaka: Office of the National Development Plan, 1966).

8. GRZ, Second National Development Plan 1972-76 (Lusaka: Ministry of Planning & Finance, 1972) p.12.

9. First National Development Plan, p.11.

10. S.H.Goodman, 'Investment Policy in Zambia'. In, Bastiaan de Gaay Fortman (ed.), After Mulungushi - The Economics of Zambian Humanism. (East African Publishing House, 1969) p. 170.

11. Act No. 55 of 1965.

12. Act No. 55 of 1965, ibid.

13. Zambia, National Assembly. Hansard (18th August, 1965), col. 1061.

14. Ordinance No. 37 of 1964, S 50(2)

15. Note that Zambia was at that time still using the pound sterling as its currency.

16. Act Nos. 31 and 47 of 1965.

17. Annual Report of the Ministry of Commerce and Industry for 1964, p.2.

18. S.I. No. 58 of 1966.

19. Regulation 4 (3) (a).

20. Act No. 2 of 1965.

21. See the preamble to the Act.

22. Zambia, President of, Zambia's economic revolution ('The Mulungushi Declaration') Address by President Kaunda at Mulungushi, 19 April (Lusaka: Zambia Information Services, 1968) p. 27.

23. Note that before the announcement of the economic reforms there were no restrictions on local borrowings by resident expatriate businesses. Restrictions only applied to foreign controlled companies.

24. Zambia, President of, Zambia's economic revolution, p.30.

25. Initially set up as a loan bank but later took on the role of holding company for a number of companies in commerce, industry, transport, tourism etc.

26. Zambia's economic revolution, Op. ct.p.50.

27. Zambia's economic revolution, loc. cit.

28. Zambia's economic revolution, pp. 48-49.

29. See O.S. Saasa, 'Zambia's Policies towards Foreign Investment, Research Report No. 79 (1987), p. 34.

30. This was an address by president Kaunda to the UNIP National Council held at Matero Hall, Lusaka on 11 August,1969.

31. Act No. 28 of 1970.

32. GRZ, Zambia: Economic Facts and Figures (Lusaka: Government Printer, n.d. (c. 1972) p.17.

33. See S. 3(1) of the Mines and Minerals Act, No. 46 of 1969 which vests the rights of ownership of minerals in the President on behalf of the Republic.

34. The Litunga was the King of the Lozi people of Barotseland (now Western Province of Zambia). In 1890 he entered into an agreement with the BSA Co. in which he granted the latter exclusive and perpetual rights of Barotseland (which, according to the BSA Co. covered the whole of the Western part of Northern Rhodesia including the Copperbelt region). The Litunga had rights over the determination of prospecting and mining in these areas.

35. Act No. 46 of 1969.

36. Schedule to Act No. 27 of 1970.

37. O. S. Saasa, 'Zambia's Policies towards Foreign Investment', p. 26 et seq.

38. S. H. Goodman, 'After Mulungushi' p. 174.

39. Second National Development Plan 1972 - 76, op. cit.

40. Act No. 18 of 1977.

41. See also S. 20 of the Act.

42. See S. 24 of the Act.

43. See n. 28 supra.

44. Act No. 5 of 1986.

45. Zambia, National Assembly Debates, (11th March, 1986) col. 2595.

46. Zambia, National Assembly Debates, ibid, cols. 2594 et seq.

47. GRZ, Third National Development Plan, 1979 - 83 (Lusaka: Government Printer, 1979) p.iv.

CHAPTER III

THE INVESTMENT ACT, No. 5 OF 1986 - A CRITICAL ANALYSIS.

A. Brief background to the Act

An Investment Code or Act, is aimed at defining the policy of a particular government with respect to permissible types and areas of investment; the mechanism through which investments are to be channelled and administered; the executive authority responsible for examining, approving and supervising them and the conditions of entry or establishment as well as the rights and privileges of the investor and the criteria for investments to receive special benefits. The code thus becomes the basic and comprehensive reference document for investment in the particular country - a basic recognisable structure of legal relationships between investors and the host country. The major criteria for investments to receive special benefits are usually the generation of foreign exchange through increased exports or import substitution, technology transfer, creation of jobs (particularly those involving training and improvement of skills); economic diversification; geographic diversification; local participation in investment; stimulative effect to the rest of the economy and protection of local capital from competition. Benefits granted normally include reduction of business and non-business risks, for example, guarantees against interference in decision making and expropriation without compensation, the right to repatriate profits, guarantees against changes in law and measures to increase profits through tax holidays, drawback of duties and accelerated depreciation.

Having given a general overview of the nature of investment codes, we now go on to review the Zambian investment code, namely, the Investment Act, 1986.

The Investment Act enacted in 1986 was meant to repeal the Industrial Development Act 1977 (Act No. 18 of 1977, Chapter 674 of the Laws of Zambia) which as we have seen in Chapter II had its own shortcomings; to revise the law relating to investment in Zambia, in particular the provisions relating to the granting of incentives, the registration of manufacturing enterprises and agreements for the transfer of foreign technology or expertise, and the procedures for dealing with applications to invest in Zambia; to establish the Investment Council and the Investment Co-ordinating Committee and to define their functions.[1] The Act was evidence of the Government's continued attitude of welcoming foreign investment and its wish to attract more and more, particularly when the investment was associated with transfer of technology and management skills.[2] According to Mr Subulwa (during debate on the investment Bill), the criticisms levelled against the Industrial Development Act showed that it is not only the number or value of incentives that have the greatest attraction or impact on an enterprises' decision but:

(a) the clarity and precision of stated Party and Government policy with any business sector;

(b) the clarity with, and the extent to which prospective investors understand, without ambiguity, at the stage when the investment is planned, the benefits to be derived from such investment; and

(c) the validity and performance of the policy framework and the incentives scheme that permit long-term planning and commitment.[3]

The Investment Act 1986 was passed with the aim of rectifying the criticisms (outlined in Chapter II above), levelled against the Industrial Development Act. Thus, according to Mr Subulwa, when drafting the Investment Bill particular attention was paid to all the criticisms levelled against the earlier Act with a view to rectifying them. To this end, the tone of the Bill (Investment Bill), completely changed so as to remove the negative aspects by simply giving prominence to rights and obligations rather than penalties under the Bill. The charge of arbitrariness was dealt with by clearly pre-defining the policies of the Party (UNIP) and the Government affecting local and foreign investors. The Bill catalogued in a precise manner the incentives available to the prospective investor and also the criteria upon which such incentives were to be granted. This, in the Government's view, would allow an investor to assess and ascertain whether or not his investment satisfied the criteria laid down and, therefore, whether or not the incentives provided would automatically be available to him.[4] Under the new Act, applicants would be aware from the start, of their rights, privileges and obligations. Areas calling for independent and individual or collective decisions were drastically reduced. Regulations and controls which tended to inhibit investment, particularly in the manufacturing sector were removed in recognition of the need to expedite the registration of enterprises which wish to invest in Zambia. Also removed were regulations and controls which affected the transfer of technology and expertise. Agriculture, tourism and other service sectors were provided for in the Bill with particular incentives. All these improvements, according to Mr Subulwa, were meant to make the Investment Act become "the basic and comprehensive reference document for investment in Zambia."[5] Most important, the new Act strove to broaden the range of incentives which deserving enterprises would enjoy.

B. Review and Critical Analysis of main provisions of the Investment Act, 1986.

(i) Establishment of Investment Council and Investment Co-ordinating Committee and their functions.

The Investment Act establishes the Investment Council (hereinafter referred to as 'the Council') consisting of the Prime Minister who is the chairman of the Council, the Ministers responsible for industry, finance, national planning, mines, tourism, energy, co-operatives and agriculture and three or less other Ministers appointed by the President from time to time.[6] The functions of the Investment Council are generally to supervise the implementation of the Act and to do all such acts and things as are necessary to develop and foster investment in Zambia,[7] in particular, to supervise the Investment Co-ordinating Committee and approve national policies and annual priority programmes; to deal with applications for investment licences referred to it by the Investment Co-ordinating Committee; to deal with any appeals or complaints received by it[8] and to give the Committee general or specific directions with respect to the discharge of its functions.[9] It is the author's contention that the Investment Council as presently constituted is too narrowly represented since it is entirely composed of the Cabinet. The Council would have had more representative composition if interested parties like the Chambers of Commerce and Industry, the Zambia Industrial and Commercial Association

(ZINCOM), the Zambia Export Board, the Zambia Bureau of Standards, the Zambia Association of Manufacturers, the labour movement etc. were represented on it. A broader and more representative Council would, in the author's view, be much better placed to supervise the implementation of the Act than is the case now. This shortcoming in the Act has been noticed by the business community, and in the words of Mr Ronald Penza, Chairman of the Lusaka Chamber of Commerce and Industry, the Council is comprised of people who are too busy with other matters to perform their functions well. Since it is composed of members of the Cabinet, Government bureaucracy does, unfortunately, rear its head in the operations of the Council.[10]

Section 8 of the Act establishes the Investment Co-ordinating Committee (hereinafter referred to as 'the Committee') which consists of the Director of Investments, a public officer of or above the rank of Permanent Secretary who is the chairman of the Committee, a representative each from the Ministries responsible for industry, home affairs, finance, labour, agriculture, co-operatives, planning, energy, tourism, mines and lands, a representative of the Bank of Zambia and not more than five other members as are from time to time appointed by the Minister of Commerce and Industry on the recommendations of any organisation he chooses. The functions of the Committee, subject to the control and any general or specific directions of the Council, are to:

(a) recommend for the approval of the Council national policies and programmes designed to develop and foster investment in Zambia; to co-ordinate and implement the policies and programmes approved by the Council;

(b) receive suggestions, complaints or proposals relating to investment in Zambia;

(c) assist potential investors as may be necessary to encourage investment in Zambia;

(d) receive and investigate every application made by persons intending to invest in Zambia;

(e) in accordance with the directives of the Council, agree to the terms and conditions of each application approved for investment in Zambia;

(f) issue investment permits and investment licences; and

(g) liaise with such Government Ministries and departments, local authorities or other bodies as may be necessary in order to assist an investor in complying with any permissions, authorisations, licences, land, and other things required for the purposes of the business enterprise.[11]

It is submitted that the composition of the Committee could be made more representative than at present to ensure participation by a cross-section of interested parties in the important functions of the Committee enumerated above. Hence, although amongst the Committee members (who are civil servants in the main), there is one from the Bank of Zambia, the five other members of the Committee should come from the parastatal and private sectors. The organisations where they are to come from should be clearly laid down in the Act and the discretion given to the Minister to appoint the five members of the Committee should be taken away from him. This is in view of the fact that discretionary power is often open to abuse.

(ii) <u>Definition of 'Foreign Investor'. Procedures on application for investment permits and licences</u>.

A foreign investor is defined by the Act as "any person who makes an investment in the form of foreign exchange valued in excess of US$35,000 in any business enterprise in Zambia as well as any non-Zambian who makes an investment in any business enterprise in Zambia".[12]

An investment may be deemed to have been made in the form of foreign exchange when it is made in the form of plant machinery, know-how, or any other valuable asset imported into Zambia or from funds which are by law remittable from Zambia.[13]

This definition of 'foreign investor' can be interpreted to include Zambians so long as they have the necessary foreign exchange to invest and as 'foreign investors', they would then be entitled to all benefits accruing to all foreign investors including that of externalising funds. If this is what the Act envisaged, that is to say, if Zambian nationals were to be allowed to externalise foreign exchange earned in Zambia to countries of their choice instead of re-investing it in the country, then the whole purpose of attracting foreign investors to boost the economy would be defeated. Fortunately, in practice such a situation would not occur due to the rigid foreign exchange controls which ensure that nationals of this country do not remit foreign exchange in the form of profits, dividends etc. It is appreciated that the Government's reasons for including Zambians, by implication, in the definition of 'foreign investors' were to entice some Zambians who legally have investments outside the country to bring the said money or investments into the country to help in the creation of employment and to enable the Government to describe companies which have entered into joint ventures with itself, aid donors or international development agencies who bring in more money than stipulated, as foreign investors.[14] That could, however, have been done without extending the definition of 'foreign investors' to Zambians. A different provision could have been made for local investors providing the criteria for their investment without defining them as 'foreign investors'. Section 14(1)(b) also extends the definition of 'foreign investor' to any non-Zambian who makes an investment in any business in Zambia. This provision suffers from vagueness since an investment of US$100 would still be deemed an investment within the meaning of the Act entitling the owner to the status of 'foreign investor'. It can be seen from this example what absurd interpretations can be made of the provision. Compounding matters is the fact that the amount of foreign exchange entitling a person to be a foreign investor in terms of section 14(1)(a) (US$35,000), is too little for any meaningful investment. The ceiling should therefore, be raised to something in the range of US$100,000 to discourage opportunists from investing in Zambia.

Any foreign investor, not exempted from the provisions of the Act by a Statutory Instrument passed to that effect needs an investment licence to operate a business in Zambia. A prospective foreign investor submits a written application to the Committee accompanied by detailed information on the following matters, amongst others, the nature of the proposed business activity and the place where it is to be carried on, the proposed capital structure, amount of investment, number of persons to be employed and the projected growth over the next ten years, the qualifications, know-how, experience and other relevant particulars of the applicant and his staff to carry on the business activity, the incentives for which the applicant expects to qualify and the details of such qualifications.[15] A foreign investor who does not receive the decision of the Committee, favourable or otherwise, within three months of applying, is at liberty to lodge a complaint to the Council which investigates the complaint and communicates with the complainant within thirty days of the lodging of the complaint.[16] Once the applicant is informed of the success of his application, he meets the Committee to agree on the terms and conditions of the investment licence and incentives (if any). Thereafter he is issued with an investment permit valid for 3 years from the date of issue, which apart from containing the agreed terms and conditions, and incentives (if any), authorises him to make all arrangements necessary for the commencement of his business and gives any other information which may be prescribed.[17] The Director of Investments thereafter liaises with Government Ministries, departments, local authorities and any other bodies as are necessary in order to assist an investment permit holder in complying with any formalities or obtaining any permissions, authorisations, licences, land and other things required for the purposes of the business enterprise. When the holder of an investment permit commences business he notifies the Committee of the fact in writing and the Committee issues an investment licence in lieu of the permit.[18] The terms and conditions of the investment licence (which may include incentives) are deemed to include an undertaking by the investor to maintain proper financial and accounting records and to furnish to the Committee periodic reports, records, returns, samples and data relating to the operations of the business enterprise, and to permit the Committee or its agent reasonable access to monitor the operations of the enterprise. The Committee and investor may agree that the terms and conditions of the investment licence contain the following undertakings by the investor:

(a) to invest not less than a specified amount in cash, machinery, buildings or otherwise;

(b) to employ and train Zambian nationals to the fullest extent possible with a view to the replacement of foreign personnel as soon as is practicable and;

(c) to purchase Zambian goods and services, if, in terms of price, quality and availability, such goods and services are competitive with similar imported goods and services.[19]

Any investor whose investment permit or licence is revoked as a result of a materially false or fraudulent misrepresentation or in consequence of incorrect information supplied to the Committee may appeal to the High Court.[20]

The above procedures which have been provided for applying for investment licences is obviously in conflict with the Government's declared policy of attracting foreign investors. Due to the long time it takes from the lodging of an application for a licence to the processing of the application and finally to the issue of the investment licence, business opportunities may be lost in the course of waiting for the licence to be processed through sections 16-17. The procedures involved in the processing of applications should therefore be streamlined to shorten the time involved and to remove the frustrations caused to investors due to the time factor.

(iii) <u>Facilities and incentives offered to investors</u>

(a) <u>Incentives offered to exporters of non-traditional products</u>

All business enterprises to which the Act applies which earn foreign exchange through export of non-traditional products (defined as products other than copper, lead, zinc and cobalt) or services, are entitled, in addition to other incentives granted by the Act, to the following facilities, that is to say, retention of a percentage of their foreign exchange earnings (presently pegged at 50 per cent of the earnings) and utilisation of the said foreign exchange for purposes and on terms and conditions as the Minister responsible for finance determines either by himself or through the Bank of Zambia; preferential rate of tax on part of their income as determined by Parliament from time to time; access to any foreign exchange revolving fund which may be set up to promote exports from Zambia; and access to any free trade zones which may be set up in Zambia.[22]

The 50 per cent retention available to exporters of non-traditional products or services, according to Mr Penza (the Chairman of the Lusaka Chamber of Commerce and Industry), is a very minor incentive because it is meant or aimed at investors already in industry. What are needed are incentives which will retain existing investors as well as attract new ones. Besides this, the percentage of foreign exchange retention, the utilisation thereof and on what terms and conditions are very crucial matters hinging on the success or otherwise of the whole facility and in the words of Mr Jacques Dodenbier, General Manager of Bonar Colwyn (a foreign-owned Company), "it is not healthy to leave such a crucial matter to be decided upon at the whims and fancy of a Minister of Finance".[23] Adding to the above anomaly is the fact that the procedure involved in acquiring the 50 per cent foreign exchange retention is laborious. Thus on the question of how Zambia can stimulate her non-mineral exports, the Times of Zambia Business Review Column of Monday 5 December, 1988 indicated that there are two incentives which would bring about that, namely the export retention and export drawback but, said the Review, "officialdom ensures that both can be obtained only after great difficulty and delay".[24] The 50 per cent export earnings retention is indeed very difficult to obtain following the revision of procedures for its acquisition in the wake of Government accusations that exporters sell their foreign exchange on the black market. Previously the exporter could easily get his foreign exchange from his commercial bank whereas now the application has to go to the Foreign Exchange Management Committee (FEMAC). Perhaps one would say here that if the accusations by the Government that exporters sell their foreign exchange on the black market are true, then the Government was justified in bringing more stringent measures for its procurement. However, it can still be argued that the stringent measures cannot stop those exporters who wish to sell their foreign exchange on the black market from doing so in view of the very attractive black market rate of exchange and also the restrictions on the use of the foreign exchange that abound once it is obtained, that is to say, the exporter cannot use the foreign exchange in any manner he likes but for the importation of things like spare parts, machinery and materials not found locally.

As for the foreign exchange revolving fund and free trade zones, no such facilities have so far been set up in Zambia. These provisions cannot, therefore, be said to be incentives since there is no guarantee that a foreign exchange revolving fund or free trade zones will ever be set up in Zambia.

Although exporters of non-traditional products and services have been provided with incentives by the Act, investors who invest in import - substitution businesses have not been provided with any incentives by the Investment Act. This is a serious anomaly since import - substitution industries help in saving the scarce foreign exchange by producing locally goods which would otherwise be imported.

(b) Incentives for agro-based Industries

Business enterprises which generate income from husbandry, pastoral, poultry, fish rearing, agricultural or forestry activity are entitled to preferential rates of tax on parts of their incomes as provided by Parliament from time to time; exemption from payment of selective employment tax (this is a tax levied on employers of expatriates not exempted by the Selective Employment Act, Chapter 666 of the Laws of Zambia. Presently the rate of tax is 20 per cent); access to preferential borrowing as may from time to time be declared by Government and other facilities as Government may from time to time declare.[25]

It should be noted at this point that the above facilities (incentives) apply to business enterprises which were in existence at the time the Act was passed, but for a business enterprise which commenced business after the enactment of the Act to qualify for incentives it has to meet the following criteria, namely,

(b.1) it has to be an exporter of non-traditional products or services which bring in not less than 25 per cent of its total gross earnings for the particular year; or

(b.2) it is an enterprise which uses a high proportion of local raw materials and resources (labour included) amounting to more than 75 per cent of its total annual operating costs or;

(b.3) it is an enterprise of which 85 per cent of its labour force work in facilities located in rural areas; or

(b.4) it is a small scale or village enterprise registered under the Small Industries Development Act, 1981 (Act No. 18 of 1981) or

(b.5) it satisfies such criteria as may be prescribed from time to time.[26].

Business enterprises which wish to avail themselves of incentives have to apply to the Committee for a certificate of incentives. However, foreign investors who provided relevant information relating to incentives when applying for investment licences need not make a separate application for incentives. Within six weeks of receipt of the completed application the Committee must issue a certificate of incentives to the investor. An investor who does not receive the decision of the Committee within two months of applying or who is aggrieved by any decision of the Committee may appeal to the Council, and to the High Court from a decision of the Council. The certificate issued to an investor whose application is approved covers those incentives for which he qualifies.[27]

(iv) Common Incentives

Every holder of a certificate of incentives is entitled to the following incentives from the date of commencement of operations or granting of the certificate of incentives, whichever is the later, namely, for five years, a 50 per cent deduction from taxable income each tax year of the total salaries paid to Zambian workers. This deduction does not, however, apply to salaries of Zambian workers which are in excess of five times the minimum wage fixed for general workers (the minimum wage for general workers has been fixed at K2.50 per hour by the Minimum Wages Conditions of Employment (General) Order, 1989, Statutory Instrument No. 94 of 1989). The holder of a certificate of incentives is also entitled to full exemption from tax on dividends for a period of five years; he is entitled to a deduction from taxable income, each tax year, of 50 per cent of the expenses incurred on any training programme agreed upon by the Committee to train Zambian employees and expenses incurred on any research and development programme agreed upon by the Committee conducted by either the enterprise itself or a recognised research institution on behalf of the enterprise for the purpose of adapting a technology or product to local conditions or substituting a local input for an imported one.[28]

On the face of it, the above incentives seem attractive in that the tax holidays allow the business enterprises to recover their capital more quickly and maintain higher liquidity in their early years, thus reducing the attendant high risk to investors. However, an incentive like the one found in Section 26(1)(b) - full exemption from tax on dividends for a period of 5 years - does not really act as an incentive as such since, as one writer puts it:

> "An exemption of tax is a function of profit. It is of little use if there is no tax liability and many enterprises, particularly infant industries, earn little profit in their early years anyway".[29]

Indeed, dividends are hardly expected in the first years of business. Therefore, a grace period of five years or more after the first five years of exemption could be more meaningful.

Exporters of non-traditional products and services who hold certificates of incentives are, in addition to facilities offered in section 23(1), **entitled to a drawback of duties and** sales tax paid on imported inputs used in producing goods for export and a deduction of 50 per cent from taxable income, of the cost of any programme of export promotion and foreign market prospection agreed upon by the Committee.[30]

In addition to common incentives, enterprises in rural areas enjoy the following incentives, namely, the payment of one-third of the prevailing rate of tax for companies for the first five years of operations; one-half of the prevailing rate of tax for companies for the next five years of operations and two-thirds of the prevailing rate of tax for companies for the next five years of operations.[31]

A holder of a certificate of incentives in relation to small scale enterprises and village enterprises enjoys the following additional incentives in addition to the common incentive enjoyed by all holders of certificates of incentives, viz, exemption from payment of tax on income for the first five years of operations and payment of one-half of the prevailing rate of tax applicable to him during th the next five years.[32]

A holder of a certificate of incentives in respect of two or more categories specified in section 24(1) is entitled to all the incentives provided for each category for which he qualifies and any incentives granted are not to be affected to the detriment of the holder of a certificate of incentives by an amendment to the Act which comes into effect after the issuance of the certificate of incentives.[33] Other than this guarantee in section 30(3), the Act does not provide specific guarantees to the foreign investor that the incentives will not be withdrawn without very good reasons for doing so. The failure by the Act to provide specific guarantees to investors makes the criticism levelled against the repealed Industrial Development Act (that the absence of protection or guarantees creates the impression that the Government can withdraw them at any time to the detriment of the investor), applicable to the present Act.

Every holder of a certificate of incentives is obliged to maintain proper books of accounts and within four months after the end of each financial year submit the following information to the Committee, namely, summarised accounts including the balance sheet and statement of account; a schedule of the employees, indicating whether each employee is a Zambian or a non-Zambian and any other information which the Committe may require to determine whether the enterprise continues to be qualified within the category in respect of which it was granted incentives. The investor is under an obligation to afford the Committee reasonable access to verify the information so provided.[34]

The certificate of incentives granted to any investor may be withdrawn by the Committee with the prior approval of the Council and the investor called upon to reimburse the State the value of any benefits received where it is found that the certificate of incentives was issued as a result of a materially false or fraudulent representation or in consequence of materially incorrect information supplied to the Committee by the applicant.

Before such a course of action is taken, however, the holder of such a certificate is given a period of thirty days or longer in which to show cause why the certificate should not be withdrawn. The certificate is withdrawn when the holder fails to show cause why the said certificate should not be withdrawn or fails to comply with such notice within the time given. Other instances where the certificate of incentives can be withdrawn are where the holder of the certificate fails to implement the project in respect of which the certificate was issued and fails to notify the Committee of the reasons for the failure to implement the project; where he is in breach of the provisions of part V of the Act (dealing with facilities and incentives), or where he ceases to be qualified within the category in respect of which the certificate was issued.[35] A person whose certificate of incentives has been withdrawn has the right to appeal to the High Court.[36]

(v) Registration of Manufacturers

Any person who wishes to manufacture any product for sale in or outside Zambia must be registered under S.33(1) of the Act. Failure to register amounts to an offence attracting penalties. Every manufacturing enterprise which is the holder of an investment permit is registered by the Director of Investments who thereafter issues a certificate of registration.

(vi) Agreements for the transfer of foreign technology or expertise.

Every agreement for the transfer of foreign technology must be registered by the beneficiary as soon as it is made, otherwise it cannot be acted upon.[37] Contravention of this provision amounts to an offence under the Act. Every agreement for the transfer of technology or expertise which is the subject of an investment permit or complies with Section 37 (which sets out the conditions required in all agreements for the transfer of foreign technology or expertise), is registered by the Director of Investments who maintains a register for that purpose. However, before any agreement for the transfer of foreign technology or expertise can be registered, it must contain the following provisions, namely: that royalties or fees charged for the technology or expertise bear a reasonable proportion to the use of such technology or expertise. This provision was included to ensure that there is no exploitation of the licensee through excessively high fees. The agreement must contain a provision that any liability to pay royalties or fees will cease upon the lawful termination of the agreement or in the event that the technology or expertise becomes public knowledge through no fault of the licensee and that in the case of a third party acquiring the use of the technology or expertise through no fault of the licensee, there would be a reduction in the royalties or fees payable. Another provision which every agreement for the transfer of technology or expertise must contain is that where necessary, technical assistance will include technical personnel, full instructions and practical explanations expressed in clear and comprehensive English on the operation of any equipment involved. This provision ensures that the technology transferred is put to full use by ensuring that technical personnel are provided to train local personnel and instructions manuals for further explanations are available on the operations of any equipment involved. Other provisions are, that the transferor will provide technical assistance in connection with marketing programmes and purchasing of equipment involving the use of the technology or expertise so provided and that the transferee will acquire the right to continued use of such technology after the termination of the agreement. A provision such as this is meant to safeguard the transferee against any moves by the transferor to prevent the former from using the technology or expertise after the termination of the agreement. For the continued use of the technology or expertise after the termination of the agreement, every agreement for the transfer of technology or expertise must have provision that where the transferee so requires, the transferor will continue to supply spare parts and raw materials for a period of up to five years following the termination of the agreement. Finally, every agreement for the transfer of technology or expertise must provide that the transferee will enjoy the benefits and privilegs of the most favoured licensee, subject to any agreement to the contrary.[38]

Conditions in agreements for the transfer of foreign technology and expertise which are prohibited under the Act are those which restrict the use of competitive techniques; provide for any form of control over the management of the licensee's enterprise; restrict the manner of sale of products to any country; restrict the sources of supply of inputs; restrict the volume or structure of production; or limit the ways in which any patent or other know-how may be used.[39]

(vii) Externalisation of Funds

Applications for approval to externalise funds from Zambia for purposes of repayment of foreign loans, interest thereon, investments, payments of dividends, royalties or fees in respect of an agreement for the transfer of foreign technology or expertise, management fees, externalisation of profits or proceeds on disposal of assets, payments to personnel working in Zambia etc. giving details in support thereof, have to be made to the Committee except in cases where such externalisation is permitted under some other law. A foreign investor who includes relevant information regarding externalisation of funds when applying for an investment licence need not make such an application.[40]

The Committee is obliged to approve every application for externalisation of funds if satisfied that the externalisation is for a bonafide business commitment in accordance with the Laws of Zambia.[41] The approval to externalise funds is evidenced by a certificate of approval to externalise funds issued by the Director of Investments. The holder of a certificate of approval to externalise funds is entitled to apply to the Bank of Zambia to externalise the funds to which the certificate refers subject to the laws or procedures prevailing.[42] An investor aggrieved by the decision of the Committee in respect of his application to externalise may appeal to the Council, whose decision is final.[43] It is evident from this provision, that there is no guarantee that once an investor is issued with a certificate of approval to externalise funds, he will end up externalising the said funds.[44] On the question of externalisation of funds, it can therefore, be said that since this can only be done subject to the law and procedures relating to exchange control, there has been no improvement on the arrangement which existed before the enactment of the Investment Act, 1986, whereby foreign companies could only remit profits and dividends subject to exchange control laws and procedures. A guarantee to externalise money is a major consideration in any investment decision and so this anomaly should be looked at with all the seriousness it deserves because if the right to externalise is restricted, confidence in the host country is severely eroded and the desire to re-invest the profits withers away.

One omission which is apparent in the Act is that concerning the fact that land is free in Zambia (the only payments being minimal annual rent and service charges). All land in Zambia vests in the President and is held by him in perpertuity on behalf of the people of Zambia.[45] A bona fide foreign investor will have no problems in obtaining a lease for a piece of land where he can set up his premises from the State. An inclusion of this piece of information in the Act would go a long way in making the investment climate more conducive to foreign investors considering the fact that in some countries land can only be obtained at great cost.

Zambia became a member of the International Centre for Settlement of Investment Disputes in 1970 after ratifying the Convention on the Settlement of Disputes between States and nationals of other States which was opened by the International Bank for Reconstruction and Development for signature on 18th March, 1965.[46] The International Centre for Settlement of Investment Disputes is an autonomous international institution whose purpose is to provide facilities for conciliation and arbitration of investment disputes. An Act was passed in Zambia in 1970 (Act No. 18 of 1970 - The Investment Disputes Convention Act) which gives effect to the said Convention. With this background it is rather unfortunate that the dispute settlement procedure and law applicable to such disputes were not provided for in the Investment Act. This should have been done because, although the above Convention applies to Zambia, most investors would not know of the existence of such a facility just from a glance at the Investment Act. Foreign investors do not first look elswhere for their rights, privileges and obligations but expect to find answers to all their queries in the Act. This is all the more so since, as Mr Mundia, Member of Parliament for

Libonda, said in his contribution to the debate on the Investment Disputes Convention Bill, the Bill was something which the Government felt would extend some sort of confidence to some people who would like to invest in this country in future, that the country is prepared to abide with international way of settling disputes involving investments in this country.[47]

Despite the shortcomings in the investment Act, 1986 brought out by the above analysis of the Act, it does however, have some positive developments which make it an improvement on the Industrial Development Act, 1977 on a number of points, one of which is that it simplifies the law relating to the setting up of business enterprises especially the provisions relating to registration of manufacturing enterprises which no longer require manufacturing licences to manufacture goods as long as they are registered under the provisions of the Act[48] (note that under the Industrial Development Act, 1977, every company which intended to manufacture goods had to obtain a manufacturing licence). Another positive development brought about by the Act is that the incentives available to the prospective investor and the criteria upon which such incentives are granted have been catalogued in sections 23-29 of the Act.

The red tape which applications faced in the form of too many Government Ministries, departments, local authorities etc. requiring to be consulted to give consent or authority before an investor was allowed to set up business has, to some extent, been removed by the creation of the Investment Co-ordinating Committee which, in terms of section 9(c) and (g) does all things necessary to ensure that an investor complies with all formalities or obtains permissions, authorisations, licences, and other things required for purposes of the business enterprise. Thus, as Mr Subulwa said in Parliament while presenting the Investment Bill for the second reading,[49] "the regulations or controls which tended to inhibit investment, particularly in the manufacturing sector...... were removed with a view to expedite the registration of enterprises which wish to invest in Zambia". However, the most important improvement brought about by the Act is the provision for agriculture, tourism and service sectors which were conspicuously absent in the repealed Industrial Development Act. Incentives attached to these Sectors have also been enumerated in sections 23(1) and (2) and 24 of the Act. This is as it should be since it is in the areas of tourism and agriculture that a lot of foreign investment is needed. All in all, the Investment Act has tried to broaden the range of incentives which deserving enterprises enjoy with particular emphasis placed on incentives to encourage exports of non-traditional goods, agro-based industries, exploitation of local raw materials and to encourage labour-intensive technologies and enterprises.

While acknowledging the fact that the Investment Act is an improvement on the repealed Industrial Development Act, 1977 on the above mentioned points, the fact remains that its shortcomings by far outweigh these positive developments and as can be seen from the above discussion, the Act in many ways carries forward the provisions which brought about the criticisms and repeal of the Industrial Development Act.

FOOTNOTES

1. Preamble to the Act.

2. Per Subulwa, Minister of Commerce and Industry (as he then was), Zambia, National Assembly Debates (11 March, 1986) col. 2600.

3. Zambia, National Assembly Debates, col. 2596.

4. ibid col. 2597.

6. S.3.

7. S.4(1).

8. S.4(1) & (2)

9. S.4(3).

10. Per interview with the author on 2 May, 1989.

11. S.9.

12. S.14.

13. S.14(3).

14. Zambia , National Assembly Debates, (11 March, 1986) cols. 2691-2692.

15. S.16(1).

16. S.17(6).

17. S.18(1).

19. S.20.

20. S.22(5).

21. GRZ, Budget Address, January, 1982. Minister of Finance, then Hon. K.S.K.Musokotwane, 1982 (Lusaka: Government Printer, 1982) p.23.

22. S.23(1). Once created, these are meant to support the production of more exportable goods. Under this arrangement, people in the programme would pay less, for e.g. water charges, electricity etc. as an incentive for them to produce more for export - per Subulwa, Zambia, National Assembly Debates, (11 March, 1986), col. 2692.

23. Zambia Daily Mail, 2 January, 1989.

24. Times of Zambia, 5 December, 1988, Business Review Column.

25. S.23(2)

26. S.24.

27. S.25.

28. S.26.

29. M Mbao, 'The Investment Act, 1986 of Zambia', Journal of African Law, 1986, Vol. 30, No.2, p.202.

30. S.27(1)(a) & (b).

31. S.28.

32. S.29.

33. S.30(1) & (3).

34. S.30(4).

35. S.31(1) & (2).

36. S.31(5).

37. S.36(1).

38. S.37(1).

39. S.37(2).

40. S.38(1) & (2).

41. S.38(3).

42. S.39.

43. S.38(6).

44. Per interview with Mr D. Chilipamushi, Senior Investment Economist, Investment Co-ordinating Committee, 19 April, 1989.

45. See S.4 of the Land (Conversion of Titles) Act, Cap. 289 of the Laws of Zambia.

46. Per Minister of Development and Finance. Zambia, National Assembly Debates. (18 March, 1970) col. 2121.

47. Zambia, National Assembly Debates 18 March

1970), cols. 2122-2123.

48. S.33(1).

49. Zambia, National Assembly Debates, (11 March, 1986), col. 2597.

CHAPTER IV

POST-INVESTMENT ACT, 1986 CLIMATE FOR PRIVATE FOREIGN INVESTMENT

The continued importance attached to the attraction of private foreign investment by the Zambian Government after the enactment of the Investment Act, 1986 is evident from Government's policy statements and pronouncements found in Development Plans passed after 1986 and Press statements given by Government leaders and people in the business community. Before we take a look at the Development Plans passed after the enactment of the Investment Act in 1986, it will be fruitful firstly to analyse the performance of the economy during the Third National Development Plan period (1979-83) in that we will be in a position to understand the reasons which led to the changes in the objectives of the later Development Plans.

(i) Performance of economy during the Third National Development Plan, 1979-1983

The performance of the economy during the Third National Development Plan as measured by the real Gross Domestic Product (GDP) was unsatisfactory. The annual growth rate realised was a mere 0.06 per cent which fell far short of the projected growth of 4.8 per cent per annum. The main factors attributed to this state of affairs was a decline in investment levels and volumes of imports due mainly to foreign exchange constraints. Thus in the investment area, the actual aggregate investment was 15 per cent as against the planned 29 per cent of the GDP over the plan period. Imports were only 62 per cent of the planned level.[1] The performance of the mining sector was below the expected level while the agriculture and manufacturing sectors did not fare well either. High prices of oil and the falling prices of copper on the world market brought about a significant rise in the country's import bill at a time when the country's export earnings were declining rapidly. The result was a big deficit on the country's external trade current account. This led to serious debt problems forcing the country to resort to borrowing from the International Monetary Fund (IMF)[2] and the World Bank for balance of payments support as well as commercial banks and multilateral institutions for short term borrowing to sustain a reasonable level of imports and medium to long-term borrowing to finance the development programme.

Since 1983, the Government undertook a succession of adjustment programmes worked out in close collaboration with the IMF and the World Bank to restructure the economy. These programmes called for the adoption of specific macro-economic measures of which the most notable ones were the imposition of credit ceilings in order to reduce money supply; reduction in public expenditure (especially on welfare services and subsidies); reduction of the overall Government budget deficit; imposition of ceilings on wage rises; rescheduling of repayments of external debts; decontrol of prices and interest rates; the progressive devaluation of the Kwacha (Zambia's currency) and the auctioning of foreign exchange.[3] Despite these measures being taken, however, the problems afflicting the economy did not ease. If anything, they worsened as evidenced by the fact that unemployment rose to record levels and per capita income reportedly fell from US$630 in 1981 to less than US$200 in 1987.[4] Inflation rose to very high levels reaching a peak of 67 per cent in April 1987[5] pushing the prices of basic essential commodities beyond the reach of the majority of the people. As President Kaunda put it in the foreword to the Fourth National Development Plan:

> "the rate of domestic inflation had reached record levels while capacity utilisation in the economy declined with some key industries registering levels as low as 12 per cent".[6]

The balance of payments deficit which was brought about by the high prices of oil which Zambia had to import and falling prices of copper (Zambia's prime foreign exchange earner) on the world market, resulted in serious foreign exchange constraints. This state of affairs had the effect of making the investment climate less attractive to both existing and potential foreign investors since with the foreign exchange constraints the foreign investors already in the business could not easily remit earnings from their investments. They could not also obtain sufficient foreign exchange to import essential raw materials for production. This led to a decline in capacity utilisation. This climate was evidently unconducive to the attraction of more private foreign investors and hence the resultant decline in investment levels.

(ii) <u>Interim National Development Plan (INDP) 1987-88</u>

The Interim National Development Plan (INDP) * July 1987 - December 1988 with the development strategy theme: "Growth From Own Resources", was brought into being with the above economic background. This plan came after Zambia had broken off her ties with the IMF due to the differences brought about by the move by Zambia to launch the New Economic Recovery Programme which did not have the blessings of the IMF. The changes brought about by the new programme and which did not please the IMF were, <u>inter alia</u>, the limiting of debt servicing payments to 10 per cent of external earnings, the fixing of the exchange rate at K8.00 to one US Dollar; the cancellation of foreign exchange auctioning; the imposition of a price freeze on all products and the re-introduction of price controls (starting with 12 commodities regarded as essential) and the fixing of lending interest rates at 15 per cent with a margin of 5-20 per cent ceiling.[7] The principal objectives of the INDP were, amongst others, to compress non- essential and luxury imports and to limit debt service payments. By so doing, it was hoped that resources for development would be released. Capacity utilisation was to be increased in enterprises producing essential or basic goods or goods for export. This was necessary in view of the importance of essential goods to the community and the importance of producing goods for export in order to earn the much needed foreign exchange. Other objectives of the INDP were the stabilisation of the economy by controlling inflation and the promotion of a self-sustaining economy through increased profitability and re-investment of profits in enterprises utilising local raw materials. In order to reduce dependence on copper earnings, whose prices on the world market had been falling since the mid-1970's, it was an objective of the INDP to diversify exports by promoting non- traditional exports and export of manufactured goods. The Government further aimed at restructuring the production and consumption patterns so as to use foreign exchange as a strategic resource which had to be spent for the development of the country. Government subsidies which were threatening its coffers were to be reduced gradually and targeted to the needy while employment opportunities were to be increased through the establishment of village and small scale industries based on local raw materials.

Commenting on the loss of value of the kwacha and the subsequent fixing of the exchange rate at K8.00 to one US Dollar during the launching of the New Economic Recovery Programme, President Kaunda observed that this was discouraging investment and therefore, outrightly counter-productive. He went on to state that the country is determined to create an environment which is conducive to investment and that stability of the exchange rate is vital in this regard as it ensures financial stability and helps in the control of inflation.[9] As regards the manufacturing sector which has a history of over-dependence on imported inputs, the strategy recognised the need for the sector to generate more foreign exchange, reduce import dependence, increase industrial efficiency and encourage investment. The strategy also sought to proceed from investment in selected rehabilitation, move on to replacement investment and finally to new investment.[10]

(iii) Fourth National Development Plan, 1989-1993

The Fourth National Development Plan (hereinafter referred to as the 4th NDP)[11] represents the second phase in the implementation of the New Economic Recovery Programme. It has been noted that some positive achievements were recorded during the

INDP period notably, the positive growth rate of 2.7 per cent recorded in the 1988 fiscal year after almost a decade of economic decline.[12]

The intended principal targets during the 4th NDP have been laid down as a periodic review of the exchange rate and interest rates and the reduction of budget deficit to below 2 per cent of GDP by 1993. It is well known that the budget has been recording a deficit since the income from copper fell sharply in the mid - 1970's and any reduction in the deficit would go a long way in the resuscitation of the economy. This is possible in view of the fact that one of the objectives of the 4th NDP is to gradually reduce subsidies so as to reduce pressure on the budget deficit. It is the intention of the Government to reduce the annual growth of money supply to below 40 per cent by 1993 and to reduce the rate of inflation which has risen to record levels and has made life unbearable for the average man to below 20 per cent in 1993. Capacity utilisation which has fallen to levels as low as 12 per cent and less in some industries, is to be increased to above 70 per cent of industrial averages by 1993 and the number of controlled items reduced to one by 1993.[13]

It is the aim of the Government during the plan period for the country to strive to restore economic equilibria, achieve a more efficient allocation of human, financial and material resources, expand the productive base and capacity of the economy and contrive to build on the (relative) success recorded during the INDP in its attempt to attain sustainable economic growth.[14]

(a) <u>Government's policy towards foreign investment during the 4th NDP</u>

It is Government's policy as indicated in the 4th NDP to encourage private foreign investment by provision of appropriate incentives in industries based on the utilisation of local raw materials and for setting up capital goods industries on their own or in co-operation with the public sector enterprises in the relevant fields. However, private foreign investment in consumer goods industries based on imported raw materials will be discouraged.[15] Private foreign investment in priority sectors (which include the agricultural sector and manufacturing of non-traditional goods for export) and other productive sectors will be encouraged and supported. Since enhanced levels of investment are critical to the growth process, it is the Government's intention to vigorously work with the private sector to boost investment so as to create more employment, raise productivity and increase disposal incomes of the working class.[16] Investment by the private sector (both local and foreign) are expected to increase by 17.4 per cent. Total investment by the same sector are planned at K5,480 million, out of which 42.0 per cent is expected to be invested in manufacturing and trade, 26.3 per cent in agriculture and water development and 10.5 per cent in tourism.[17]

(b) Government's policy towards private foreign investment as evidenced by Press Statements

That the Zambian Government is now attaching greater importance to private foreign investment and is taking even more measures to attract sizeable flows and that the business environment is changing at a faster pace to assure foreign investors that their investment are secure and safe is further evident from speeches given by the Head of State, other Governmental officials and businessmen to foreign investors and delegations of would-be investors. An example in this regard occurred when President Kaunda was reported, on 25 January, 1989, to have renewed Zambia's appeal for private foreign investment to generate foreign exchange. He is reported to have said, at State House when he received Mr Robert George, Chairman and chief executive of Lumus Industries U.S. which has invested in Zambia in the Gwembe Valley Development Company, that the problem of foreign exchange shortages discouraged would-be investors but that the country looked forward to "the help of other investors to generate more foreign exchange and make profit as profit means a lot to us in Zambia."[18] On Monday 5 June, 1989, while on a visit to Canada, President Kaunda invited Canadian businessmen to invest in Zambia since it has political peace. Addressing members of the Board of Trade and Rotary Club of Ottawa at a luncheon, President Kaunda said that Zambia offered a very attractive investment climate which included a stable political situation, good climate and soil, and adequate water supply. He also said that there was adequate and cheap electricity supply, abundant labour force with good working relations, a well established communications infrastructure and an attractive package of incentives.

> "We stand ready to co-operate and work with all serious investors and those willing to join hands with us in the exploitation of our abundant human and natural resources. Their investment is bound to be handsomely rewarded, said President Kaunda".[19]

At the same luncheon, President Kaunda informed the businessmen that about 60 per cent of land identified as suitable for agriculture was still under-developed and that agriculture therefore offered the country the best opportunity for rapid contribution to economic growth through increased production and establishment of agro-based industries besides providing employment.

While on a tour of Bulgaria, on Saturday 17 July, 1989, the Secretary-General of UNIP, Mr. Grey Zulu appealed to the regional committee of the Bulgarian Communist Party in Plovdiv, the country's most industrious and agricultural town, to encourage companies in the town to exploit Zambia's investment opportunities. Speaking during a dinner hosted by the regional committee secretary at a hotel, Mr. Zulu said that Zambia had vast investment opportunities for firms and friendly governments with the means to exploit the available resources.[20]

Besides such speeches by the Head of State and other leaders, businessmen have launched a search for foreign investors with the blessings of the Government. Thus for example, on 22 March, 1989 it was reported by the Press that Zambian manufacturers had launched an intensive search for foreign partners for joint ventures approved under the 4th NDP and that with the support of Government through the National Commission for Development Planning (NCDP), manufacturers would lobby for funds from aborad to embark on the projects scrutinised by the NCDP. Chairman of the Zambia Association of Manufacturers Mr. Dev Babbar was reported as saying that manufacturers should look for partners in countries like India, France, the European and Scandinavian states.[21] In May, 1989, an eight-man investment promotion team headed by the Chairman of the Lusaka Chamber of Commerce and Industry Mr. Ronald Penza, comprising private businessmen, an official from the NCDP (representing the Government) and representatives of the Zambia

Industrial and Mining Corporation (ZIMCO), went to Portugal, Cuba and the United States of America to seek investment promotion opportunities.[22]

(iv) <u>Extent of investment by private foreign investors since 1986</u>

From the above, one would not be too wrong to say that more than ever before, the political and business climate is ready for the attraction of more private foreign investment for accelerated economic development. This notwithstanding, however, available statistics show that since the enactment of the Investment Act, 1986, the number of investors who have invested in Zambia and the value of their investment is so small as to lead one to conclude that the battle to attract more private foreign investors is an uphill one which will need concerted effort from the Government of Zambia and the nation as a whole. According to the Register of Foreign Investment kept by the Investment Co-ordinating Committee, since the coming into force of the investment Act, No. 5 of 1986, todate, only 63 foreign investors have been issued with investment permits. The number of applications for investment licences does not exceed 70 since 1986[23] and the total value of the investment made by the successful applicants in plant, machinery and cash amount to US $\$$132.5 million.[24] The value of investment made by foreign investors in the country since 1986 is, as can be seen from the above figures, rather too small in a country which is trying to attract sizeable flows of foreign investors to bail it from the economic malaise afflicting it. These figures are proof that despite the Zambian Government's avowed policy of attracting more private foreign investors and the enactment of the Investment Act as an aid in this regard, the country is far from being successful in its endeavours and the Act has not achieved much in terms of helping to attract private foreign investors. The reasons for this have already been discussed in Chapter III supra. All one can say at this point is that the Investment Act has not proved to be very attractive to foreign investors. Other factors to be discussed in Chapter V infra, are also playing a role in making the investment climate in Zambia less attractive than it would otherwise be.

FOOTNOTES

1. GRZ, New Economic Recovery Programme - Interim National Development Plan 1987-88 (Lusaka: Government Printer, 1987) p.1.

2. Zambia's relationship with the IMF goes back to 1973 when an unconditional Stand-By arrangement was negotiated to cushion the economy against the dislocation of transport routes following the Rhodesian border closure in January, 1973. Since then, the country negotiated five Stand-By Arrangements with the IMF, the last one being in 1986 for a total of Special Drawing Rights (SDR) 229.8 million - K.D.Kaunda, 'New Economic Recovery Programme' - Speech delivered on 1 May, 1987 (Lusaka: Government Printer, 1987) p.2.

3. K.D.Kaunda's Speech, p.3.

4. ibid. p.4.

5. GRZ, Fourth National Development Plan 1989-1993 Foreword by President K.D.Kaunda (Lusaka: Government Printer, 1989) p.i.

6. GRZ, Fourth National Development Plan. ibid. p.i.

7. K.D.Kaunda's Speech op.cit. p.5. et seq.

8. 'New Economic Recovery Programme', INDP op. cit. p.4.

9. K.D.Kaunda's Speech op. cit. p.6.

10. GRZ. INDP op. cit. p.50.

11. The abbreviation of the Fourth National Development Plan to 4th NDP instead of FNDP is to avoid confusion with the First National Development Plan whose abbreviation is 'FNDP'.

12. GRZ, Fourth National Development Plan op. cit. p.i.

13. 4th NDP, ibid. pii. Some of the objectives, for e.g, the periodic review of the exchange rate and the reduction of the number of controlled items to one by 1993 have already been affected with the announcement by President Kaunda during a speech to the Nation on 'The State of the Economy' on Television Zambia on 30.6.89 reported in the Press on 1.7.89 that with

effect from 30.6.89 the rate of the Kwacha had been fixed at K16 per 1 US Dollar and that all commodities whose prices were controlled were decontrolled with the exception of Mealie Meal. Responsibility for effecting prices of all decontrolled commodities would lie with manufacturers who would also recommend the maximum retail prices for the commodities.

14. 4th NDP ibid. p.ii. - Emphasis in brackets, mine.

15. ibid p. 535.

16. ibid p. 541.

17. ibid p. 542.

18. Times of Zambia, Wednesday 25 January, 1989.

19. Zambia Daily Mail, Wednesday 7 June, 1989.

20. Zambia Daily Mail, Monday 17 July, 1989.

21. Times of Zambia, Wednesday 22 March, 1989.

22. Times of Zambia, Wednesday 17 May, 1989.

23. Note that the figure 60 is an approximation due to the fact that the Register of Investments only contains information on successful applications. At the moment the Investment Co-ordinating Committee has not compiled a list of all applications, successful or otherwise. The rejection rate for applications is very minimal, according to the Senior Economist at the Investment Co-ordinating Committee Secretariat, Mr D. Chilipamushi.

24. Per Chilipamushi, Senior Investment Economist, Investment Co-ordinating Committee.

CHAPTER V

ADDITIONAL DETERMINANTS OF PRIVATE FOREIGN INVESTMENT FLOWS

An investment code, although admittedly an important tool in the attraction of foreign investors for the reasons given in Chapter III above, is only a part of a broad business, legal, political and social climate which must be conducive to the activity the country is trying to encourage. Apart from the investment code, an investor will evaluate the following factors, amongst others, the infrastructure of the host country, its stability, the quality of its labour force, its financial institutions, the effectiveness of its bureaucracy, its history or relations with foreign investors (covered under this head are the country's history of expropriations of private property, the extent of Government interference in business affairs and the extent of disclosure of confidential information required by the host country) and a host of other factors. These other factors which may be grouped under the heading of 'political and industrial stability' may be summarised as the need to be convinced that the government of the host country has the intention and ability to maintain law and order and prevent the destruction of property and the disruption of ordinary economic and commercial life; the need to be persuaded that there will be no arbitrary government interference in business affairs, that commercial contracts will be enforced in courts of law and that no undue pressure will be exerted in connection with wage negotiations or industrial relations generally. In particular, the foreign investor needs assurance that foreign interprises will not be adversely discriminated against in relation to domestic enterprises and lastly, the foreign investor needs a definite assurance that if, for any reason the government should expropriate his enterprise he will receive full compensation, assessed, perhaps, with the assistance of independent experts.[1]

The United States of America, although a developed country, provides a good example of the effects of a combination of the above factors on the attraction of foreign investors. In the early 1980's foreign investment in petroleum exploration was very heavy in the United Sates of America, a country which offers no special inducement to foreign investment. The reason for the influx of foreign investors in petroleum exploration was that in a period of worldwide currency and political instability, the United States offered an extremely predictable and stable environment with a highly developed infrastructure in which investors had the highest degree of freedom in decision-making.[2]

Zambia does have a fairly developed infrastructure, is politically stable and has a high quality labour force. It also has a good number of financially viable financial institutions and does not unduly or arbitrarily interefere in business affairs of investors. The country also has laws which ensure that commercial contracts are enforced in courts of law. The Zambian Government does not bring undue pressure to bear on employers in connection with wage negotiations or industrial relations in general and does not discriminate against foreign enterprises in relation to domestic enterprises either in terms of laws or policies. Despite these attributes of a fairly attractive investment climate, however, Zambia's history of expropriations of private property and the ever rising crime rate amongst other things, have both had a negative impact on its quest to attract private foreign investors into the country. These impediments are examined hereunder.

(i) Expropriations generally and their effect on private foreign investment

One of the major reasons for most of the developing countries' failure to attract more private capital than at present is the general lack of confidence in the governments concerned. This lack of confidence is brought about by the history of expropriations of private property by most developing countries which arouse a sense of insecurity in foreign investors who are wary of investing in such countries. The need for the creation of a satisfactory climate for investment by any country which needs foreign capital has indeed been repeatedly acknowledged by the United Nations General Assembly. Thus a United Nations report states that any measure which impairs the assets of any investor in a given country is likely to affect negatively the decision of potential investors in other fields of activity and even in other countries.[3]

The right of every state to expropriate foreign private property as an expression of its sovereignty is well recognised by international law.[4] This is indeed so because the power to expropriate is a deeply rooted consequence of the inalienable right of every state to possess the power of 'eminent domain', that is, the power of the state to extinguish private ownership or rights over any property required for public purposes. Expropriation, or as it is sometimes known, nationalisation or compulsory acquisition or compulsory purchase, is the taking of private property for public use upon providing adequate compensation. Thus the appropriation of private property without the offering or granting of adequate compensation to the owner is an act of confiscation and not one of expropriation.[5]

In Zambia the term used to describe the compulsory acquisition of private property for public or state use is 'nationalisation'. A general definition of nationalisation accepted in international law is that it is a term used to describe the process whereby property, rights and interests in property are transferred from private to public ownership by agents of the state acting on the authority of a legislative or executive measure. After transfer, the property remains in the ownership of and is exploited by the state.[6] Nationalisation is one event in Zambia and indeed elsewhere, which foreign investors fear most and which tends to dampen the investment climate. Such a reaction is expected since nationalisation deprives owners of their hard earned property and even though compensation is given it cannot adequately compensate for all the hard work, personal sacrifice and commitment put into the venture.

(ii) <u>Expropriations in Zambia, the constitutional guarantee against expropriation without compensation and their effect on private foreign investment flows.</u>

Zambia as a developing country ranks rapid economic development high on the list of priorities and to achieve this end there is need to exercise full powers of sovereignty over natural resources and wealth. Having achieved political self-determination, the desire to exercise the powers of self-determination of the economy and to ensure an equitable distribution of the country's wealth have led the Government to occassionally resort to nationalisation of private property. However, being mindful of the fact that private investment (both local and foreign) is necessary for the economic development of the country, the Government has entrenched a guarantee in the Constitution of the Republic which has the effect of placing limitations on the rights of the Government to nationalise or compulsorily acquire private property.

Section 18 of the Independence Constitution thus guaranteed the protection of private property from compulsory acquisition except under certain circumstances and on prompt payment of adequate compensation after the acquisition and guaranteeing the remittance of the money outside the country free from any deduction, charge or tax made or levied in respect of its remission. Compulsory acquisition of property with compensation was allowed when it was in the public interest or when it was a compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right was held by a body corporate established by law for public purposes in which no moneys had been invested other than moneys provided by Parliament.

The Zambian Government like other governments in the developing countries seeking rapid economic growth, felt that section 18 of the Constitution in the form it was, was a limiting factor in its quest for economic development. It was argued that the existing law on expropriation embodied in section 18 of the Constitution was designed to serve the economic interests of the colonial government and with the advent of independence and a major shift in emphasis of economic planning towards rapid development and state participation, it was obsolete and had to be repealed. Being an entrenched provision section 18 of the Independence Constitution was repealed after a referendum held on 17th June, 1969 in which the Government obtained the desired majority to enable it to repeal the section. It was thereafter replaced by article 18 of the Constitution (Amendment) (No. 5 Act), 1969. The new provision brought about several changes to the repealed provision which had the effect of watering down the guarantee to a point where it had very little effect. The provision dealing with prompt payment of adequate compensation was replaced with one which guaranteed payment of compensation only (note that 'prompt' payment of compensation was removed). Also, whereas under section 18 of the Independence Constitution an aggrieved person could bring an action in court for

for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he was entitled and for purposes of obtaining payment of the compensation, article 18 of the 1969 Constitution (which applies in the same form todate), provides that in default of agreement, the amount of compensation is to be determined by resolution of the National Assembly and no compensation so determined can be called in question in any court on the ground that it is inadequate. The implication of the new provision is that whereas an aggrieved person can contest the legality of the acquisition or ask for a determination of his interest or rights in the property acquired, he cannot challenge the adequacy of the compensation in any court of law. Section 18(2) of the Independence Constitution which prohibited the prevention of a person entitled to compensation under the section from remitting within a reasonable time after receiving the compensation (free from any deduction, charge or tax made or levied in respect of its remission) to a country of his choice outside Zambia (with the exception of cases where there was an attachment order for any amount of the compensation or where reasonable restriction on the manner in which any amount of compensation was to be remitted were imposed), was completely left out in the new provision. The effect of the omission of section 18(2) of the Independence Constitution was to restrict, from then onwards, the externalisation of compensation received in connection with property compulsorily acquired by the Government. From then onwards, in order for the compensation so received to be remitted to any country outside Zambia, exchange control permission would be needed.[7] The omission, it has been submitted was in effect a deliberate attempt to encourage reinvestment in Zambia.[8]

It is submitted that in the form it is now, article 18 of the Constitution reduces the conduciveness of the investment climate since in the event of a foreign investor's enterprise being nationalised, he cannot challenge the amount of compensation in a court of law if he feels that it is inadequate. As the law stands at present, in the event that the Government and investor do not reach an agreement on the amount of compensation payable, a select committee of the National Assembly determines the amount and its decision cannot be questioned in any court of law. This is a serious setback in a country which is trying hard to provide a conducive atmosphere to woo private foreign investors. Perhaps a mitigating factor in this issue of compensation for nationalised industries is the fact that, as we found out in Chapter III above, Zambia is a member of the International Centre for Settlement of Investment Disputes (hereinafter referred to as 'ICSID') and therefore foreign companies whose properties are nationalised and find that they are unhappy with the amount of compensation determined by a select committee of the National Assembly, can have recourse to the facility offered by the Centre.

As the 1986 nationalisations of the milling companies show, many investors do challenge the amount of compensation given and not the legality of the nationalisation (that is, whether the nationalisation has been done for a public interest) or the fact of nationalisation. Since the issue of adequate compensation is crucial in cases of nationalisation, despite the fact that Zambia is a member of the ICSID and can therefore refer cases between itself and private foreign companies to the Centre for resolution, it would do well to amend the Constitution to allow property owners whose property is nationalised to challenge the adequacy of the compensation in courts of law. Such a provision in the Constitution would go a long way in reducing the fears of investors and potential investors of having their investment nationalised without adequate compensation. This is the more so in view of the fairly recent nationalisations of the milling companies, and more recently, trading companies which have created a sense of insecurity and apprehension in foreign investors. Milling companies were nationalised at the end of 1986 by the State after riots on the copperbelt towns (the copper-producing towns of Zambia) which left a number of people dead following a hike in the price of mealie meal - Zambia's staple food. The price increase by the Government had been preceded by frequent shortages of the commodity and so the Government had to move in and take over the companies allegedly in the national interest. The nationalisations of the trading companies which came into effect at midnight of 20 February, 1988 stemmed from the problem of containing black marketeers who have brought a lot of hardships on the Zambian consumers. Essential commodities like cooking oil, soap, washing powder and sugar are very difficult to find in legal retail outlets but are in plentiful supply on the black market. The fight against black marketeers (which is still on) had been going on for a very long time without success and measures such as the nationalisations of trading companies belonging to Asians, Zambians of Asian origin and indigenous Zambians who were suspected of either being engaged in black marketeering or abetting black marketeers by supplying them with essential commodities, was a desperate attempt by the Government to contain the scourge. However, the only problem with the exercise was that the screening was not done properly and a lot of traders were found innocent and had their businesses handed back to them after losing a lot property and business.

Another problem which has been associated with payment of compensation has been delays in payment of the same to the affected parties. Thus, for example, some ex-owners of the milling companies nationalised in 1986 have not been paid compensation todate (1989). This has in some cases been attributed to disagreements between the parties on the amount of compensation due - a good example in this regard is the disagreement between the former owners of Chimanga Changa Milling Company and the State over the amount of compensation payable - but due to the time which has lapsed since the takeovers, this excuse is not good enough since in cases of this nature, for the compensation to be meaningful (what with the ever falling value of the kwacha and its fluctuating rate against other foreign currency), it must be paid promptly.

An alternative to the vesting of the power to adjudicate on the adequacy or otherwise of compensation in courts of law would be to constitute an independent compensation body[9] which would be given the duty to perform the function. This body would have to be composed of members of the Government as well as private citizens (experts in the field). This would provide an assurance of impartiality in the handling of compensation cases.

(iii) <u>The rising crime rate and its effect on the attraction of private foreign investment</u>

A rather frightening phenomenon which has gripped the country in recent years and which is seriously threatening the investment climate is the sharp rise in the crime rate. Day in and day out reports abound in the national Press about cases of private citizens being attacked and killed and having their property of various descriptions stolen. This happens to all sections of the community, foreign investors included. This state of affairs has reached such an alarming stage that political leaders are calling for an intensification of efforts by the police and other members of the defence forces as well as the general public to arrest the situation which is threatening to go out of control. Indeed, in his opening remarks at the official opening of the Senior Police Officers' political education Seminar at Mulungushi Hall, Lusaka on Tuesday 17th January, 1989, the then Prime Minister Mr Kebby Musokotwane was reported to have noted that the police seminar was very essential because it was taking place against "rapidly changing circumstances inside Zambia and around us. The increasing crime-wave in Zambia is threatening investors and crippling the economy through smuggling and other shady deals".[10] The Zambia Daily Mail comment of 18 January, 1989 on page 4 had the following to say on the increasing crime wave:

> "As one of the countries in dire need of of harnessing its financial and human resources, Zambia cannot afford to sit back and let organised crime take root. Such a situation will not only give help to lawlessness but will also scare away investors, many of whom are genuinely committed to seeing this country's economy back on an even keel. But nobody can pretend that the battle against organised crime has been an easy one over the past few years.... It is refreshing to hear that the Zambia Police Force has taken measures to strengthen some of its crime-bursting wings."

Statements of assurance such as the one immediately preceding are important in view of the fact that potential investors need to be convinced, as mentioned at the beginning of this Chapter, that the host Government has the intention and ability to maintain law and order and to ensure the safety of their
through criminal activities
person and to prevent loss or destruction of property /
leading to a disruption of economic and commercial life through criminal activities. In light of the above, it is therefore absolutely essential that something is done as a matter of utmost urgency to arrest or stem the rising crime rate in the country.

(iv) <u>Other measures and their impact on the attraction of private foreign investment</u>

In these days of limited investment resources which many a country, developing and developed, are competing for, a country which wishes to succeed in the race for foreign investment must do all it can to ensure that its representatives travel the world to search for potential investors by marketing, so to say, their country. This is done by projecting a favourable image of their country in the minds of potential investors in the financial and economic centres of the world. A lot of countries are doing this. The Zambian Government has realised the importance of doing this and the recent delegations from both the Government and private sectors going to financially strong countries for purposes of wooing foreign investors bear to witness to this new development. An example in this regard is the recent tour (already referred to in Chapter IV supra), by the Chairman of the Lusaka Chamber of Commerce and Industry Mr Ronald Penza and his investment promotion team sponsored by the United Nations Development Programme (UNDP) to Portugal, the United States of America and Cuba. The team comprising of representatives from the private sector, Government and the parastatal sector went to these countries to seek for investors who, according to Mr Penza, showed more than a casual interest in investing in Zambia.[12]

This augurs well for the attraction of foreign investors but more such trips should be organised in future. The possibilities of more such trips materialising are high since organisations like the UNDP have expressed willingness to sponsor further investment promotional trips abroad.[13] Another matter which should be seriously looked into by the Government if the country is to attract more foreign investors is the placing of suitable advertisements in carefully selected publications in the financial and economic centres of the world which would make known the tax and other advantages the country is offering and the opportunities that are available.[14] This is presently done in regional publications like the Southern Africa Development Co-ordinating Conference (SADCC) newsletter, the Southern African Economist, but more advertisements should be placed in the other notable publications in the industrialised world.

It is the author's contention that if the issues raised in this Chapter are seriously addressed and looked into with a view to rectifying or improving on them, the investment climate in Zambia will definitely improve.

FOOTNOTES

1. D. Walker, 'Fiscal Measures to Promote Foreign Investment'. In E.F. Jackson (ed.), Economic Development in Africa - Papers presented to the Nyasaland Economic Symposium, Blantyre, 18 to 28 July, 1962 (Oxford: Basil Blackwell, 1965) p.228.

2. Gordon L. Elicker, 'Foreign Investment in Africa'. Paper presented to the IBA/ABA/LAZ joint seminar, Lusaka, Zambia, November 11-13, 1987 p.6.

3. U.N. Doc. E/3325 para. 172, Feb.26, 1960.

4. See the Anglo-Iranian Oil Case (1956) I.C.J. Rep.36.

5. Edward D. Re, Foreign Confiscations in Anglo-American Law (New York Oceana Publications 1951).

6. Gillian M. White, Nationalisation of Foreign Property (London: Stevens & Sons, 1961) p.41.

7. Per Simon Kapwepwe, then Zambia's Vice-President G.R.Z. National Assembly Debates, 9th October, 1969 col. 122.

8. J.M.Mulwila, 'Parastatal Companies and the Law in Zambia'. PhD thesis, London, 1980 p.72.

9. S. Amoo 'Law and Development and the Expropriation Laws of Zambia'. In M. Ndulo (ed.), Law in Zambia (East African Publishing House, 1984) p.264.

10. Times of Zambia, Wednesday 18 January, 1989.

11. Zambia Daily Mail, Wednesday 18 January, 1989.

12. Zambia Daily Mail, Wednesday, May, 17 1989 and Zambia Daily Mail Trade Fair Supplement, Thursday June 29, 1989. p.3.

13. Reported on p.3. of the Zambia Daily Mail Trade Fair Supplement, Thursday 29 June, 1989.

14. D.Walker, 'Fiscal Measures to Promote Foreign Investment', op. cit. p.229.

CHAPTER VI

SUGGESTIONS FOR IMPROVING THE INVESTMENT CLIMATE IN ZAMBIA

All things put together, it has been concluded and rightly so, that the investment climate in Zambia is generally not attractive or conducive to investors, whether local or foreign.[1] The reasons for this rather unpalatable conclusion which generally hinge on the lack of a comprehensive and attractive investment code and the absence of a sound and straight forward investment policy have already been pointed out in Chapters III and V above. To improve the investment climate so as to make investing in Zambia attractive, a number of measures which the Government should take, apart from these already discussed in Chapter III above, are given below.

Firstly and most importantly, the Government must come up with a clear cut policy on investment in Zambia and must therefore desist from frequent changes in policy directions and stances which impair its credibility.[2] The problem which has been apparent in Zambia in this regard has been that whereas policy statements have been made known by the Government, these have been subjected to frequent changes which has brought about inconsistencies in policies. An example in this regard has been the on and off control and de-control of prices and the frequent devaluation and over-valuation of the kwacha. Indeed as the Chairman of the Export and Import Bank of the United States, Mr John Bohn said to foreign reporters and businessmen in Jakarta and Hong Kong during a telepress interview from Washington, the best investment climate is created by clear and precise rules in which the investors can have the greatest confidence. "It is clarity and consistency of the rules," said Mr Bohn, "far more important than any short-term incentives, that will govern the investors' decision."[3]

Once the Government has clarified its policies on investment in Zambia, the next step it should take is to redefine the Investment Act. Zambia, as one Italian legislator Senator Mario Pedini put it while on a fact-finding mission to Zambia, has an unlimited potential for growth. A good number of Italian businessmen have indicated their desire to invest in Zambian agriculture provided the country's legislation regarding private foreign investment is made attractive.[4]

The redefining or review of the Investment Act can commence by making the Act applicable to both local and foreign investors and specifying areas where foreign entrepreneurs can invest[5] and areas for the exclusive jurisdiction of local entrepreneurs. Information on such areas is presently lacking in the Investment Act. Alternatively, the Government could come up with an Investment Register along the lines of the one introduced in Zimbabwe in early 1989 where high priority projects are listed. Under the Zimbabwean model, the projects listed in the register for which the Government wishes to mobilise domestic and external resources are classified into manufacturing, agro-based, rural development, transport, telecommunication projects, energy and water resources and mining projects.[6] These projects are by no means exhaustive but act as guidelines. An investor can identify and implement other projects. An investor who shows interest in a project outlined in the register is invited to examine a detailed version of the project (kept by the Government as classified material) to enable him to make a more informed decision.

As a follow-up to the specification of the areas for both local and foreign investors, the Investment Act should be made equally attractive to both local and foreign investors and this calls for attractive incentives for both categories of investors. In the view of businessmen as expressed by the chairman of ZINCOM, the Government must get its priorities right and make the investment climate conducive to local investors first before thinking of foreign investors.[7] This view seems rather extreme and comes from a man representing the interests of local private businessmen but the fact remains that we need foreign investors for accelerated economic development and so both foreign and local investors should be given appropriate incentives. By being give appropriate incentives also, local businessmen would be given an opportunity to participate fully and effectively in the development of the country's natural resources and industries while at the same time benefiting from the resources and know-how of foreign investors. Having said this, however, it is imperative that the Government does not give red-carpet treatment to all foreign investors but should enlist the help of experts to thoroughly evaluate all investment proposals to ensure that every proposed investment is economically viable and technically feasible so that it is sure to bring substantial socio-economic benefits to the counrty, more especially to the rural areas or enable the transfer of advanced technology and provide training opportunities; achieve balance of payments benefits through the production of new exports or by import-substitution; make more intensive use of local raw materials and processed inputs; use labour intensive technology or increase productivity.

The definition of "non-traditional products" by the Investment Act to mean products other than copper, lead, zinc and cobalt is unclear. There is a need for a clear definition of "non-traditional products" in the Act not only to guide those intending to go into the export sector but also to assist the Government to direct the scarce resources to more profitable ventures. At the same time it will help potential investors in non-traditional products in identifying what type of goods will command demand on the international market since not all non-traditional products can be on high demand on the international market. In addition to the above, the Government should come up with an official export policy which is presently lacking. What sectors should be targeted as export leaders? What type of goods and services? What foreign markets should be targeted? Is it indigenous or foreign capital or a combination of the two which should form the export base?[8] These are a few among a myriad of questions which must be answered in the country's endeavour to define an export policy and make investment in that sector an attractive venture.

Admittedly, company tax constitutes one of the basic source of revenue for the Government but if excessive, it may prove a repelling force to foreign investors It is no secret that income tax on companies in Zambia is too high (40 per cent of income from manufacturing companies and

45 per cent from others).[9] One cause for high tax levels in Zambia is that the Government has never come around to sufficiently broaden the tax base. The informal sector which is ever expanding and profitable is, for example, not taxed. This has led to the Government concentrating on the formal businesses which are continuously over-taxed. Private foreign investment may be encouraged by reducing the burden of taxes falling on business profits and by a tax system which ensures that expenditure which a firm regards as a cost of production is recognised as such under the tax legislation. Here what is referred to is capital expended on, for example, such things as providing housing accommodation for workers which is not regarded as allowable deductions (housing being in such a critical shortage in Zambia today, provision of such facilities is absolutely essential) and expenditure on the construction of roads connecting the factory to the main road network. A liberal view of what constitutes deductable expenditure for income tax purposes should thus be taken without undue delay, since from the foreign investors' point of view, it is much more important for the Government to do everything that will reduce costs and enable them to make a profit than to be granted exemptions when profits are made because if costs are not limited it is very difficult for them to make a profit in the first place.

In order to make the investment climate much more conducive to private foreign investors, it has been suggested that the controls which threaten to strangle business like rigid foreign exchange controls should be eased. Botswana which applies no foreign exchange controls is a good example of a country benefiting from exhchage control relaxation.[10] This is not to say that there should be no exchange controls in Zambia. That is impossible given the scarcity of foreign exchange in the country (Botswana, one of the world's largest diamond producers, has no foreign exchange constraints and so can afford to do away with exchange controls). What is suggested here is that the bureaucracy attendant to the processing of applications and remittance of foreign exchange (once that is secured), should be removed. More effort to generate more foreign exchange through a vigorous export drive should be made to help clear the pipeline created by a backlog of successful foreign exchange applications. This would act as a great incentive to would-be foreign investors because it is of vital importance to the foreign investor to be able to convert into his home currency the earnings on the capital that has been invested and to remit the said currency to his home country or any other country he chooses.

In order to make the commencement of business by foreign investors easier, it is suggested that all the procedures relating to the proper setting up in business be harmonised, that is to say, the Investment Act should have a provision where all the requirements for work permits, application forms and other documents required for purposes of setting up business are provided. There is also need for co-ordination of efforts between the authorities in Lusaka and the areas where investors are heading for to ensure that the investors are assisted in every possible way. The country's administrative procedures should thus be geared to the end of encouraging private foreign investment and unnecessary delays, paper work and red tape should therefore be eliminated.

CONCLUSION

There is no denying that a country like Zambia can derive great benefits from private foreign investment which can also play an important catalyst role in fostering the process of economic development. Indeed the importance of private foreign investment in this regard can be seen from the fact that a lot of developing countries the world over, and indeed in Africa, are seeking it. Thus, for example, Ghana, Guinea, Cote D'Ivoire, Kenya, Nigeria, Senegal, Uganda and recently Zimbabwe amongst others, are stepping up efforts to foster private foreign investment.[11] Geographically speaking, Zambia is at a disadvantage because it is in Southern Africa, a region with a special problem in that most investors are likely to be wary of commitments to the region given the conflicts in this part of the world brought about by South Africa's destabilisation policy against its frontline neighbours.[12] This gives all the more reasons for a concerted effort to woo investors with special incentives since, in as far as private foreign investment is concerned, a lot of other countries, developing and developed, are searching for it and in the final analysis, the highest rewards go to those who make the most effort to woo it.

The Investment Act 1986, provides a framework for channelling and controlling available investment in accordance with national goals while at the same time providing a structure within which the foreign investor can operate. With such attributes, it is important that the amendments to the Act proposed in this paper and the other suggestions put forward to make the investment climate much more conducive than at present, are implemented without delay while at the same time bearing in mind that the removal of the deterrents to private foreign investment mentioned in this paper, is much more beneficial than the creation of new incentives. Although private foreign investment is, as we have seen throughout the paper, essential for accelerated economic development, the full development of the country lies, in the final analysis, in the hands of the indigenous Zambians themselves, hence the New Economic Recovery theme "Growth From Own Resources". There is thus a need for both the Government and the local private sector to play their part also in getting the economy going before stagnation erodes the noticeable achievements of the post-independence era. Additionally, regional co-operation in the form of the Southern African Development Co-ordination Conference (SADCC)[13] and the Preferential Trade Area for Eastern and Southern States (PTA),[14] should be encouraged to harmoniously intergrate the economies of member states and gradually reduce their dependence, particularly, but not only, on the Republic of South Africa; for accelerated economic development and regional self reliance. In the long-run the present dependence on foreign aid and investment will be eliminated and the economies of member countries become self-sustaining.

FOOTNOTES

1. Ronald Penza's views, interview 2nd May, 1989.

2. A. B. Chikwanda, 'New Economic Recovery Measures.' Paper presented to ZINCOM Economic Symposium on the analysis of the New Economic Recovery Measures, Mulungushi Hall, Lusaka 1-2 October, 1987.

3. Reported in the Times of Zambia, Friday 6th January, 1989 at p.2.

4. Zambia Daily Mail, Wednesday 22nd March, 1989.

5. B. Chisanga (Executive Assistant (Economics)), 'FNDP: The Role of the Private Sector' Zambian Business, Journal of ZINCOM Issue No.1 (March 1989) p.20.

6. Reported in the Zimbabwean Press: The Herald, 9th May, 1989.

7. Per Chikwanda during an interview with the writer on 30th May, 1989.

8. B. Chisanga, The Role of the Private Sector, Zambian Business, op. cit p.22.

9. Income Tax (Amendment) Act No. 28 of 1988 S 5.

10. Reported in the Zambia Daily Mail, Tuesday 16th May, 1989 p.4.

11. Zambia Daily Mail, 16th May, 1989.

12. The situation might hopefully change for the better with the independence of Namibia after elections in November, 1989.

13. SADCC which comprises 9 member states came into being on 1st April, 1980. All the member states signed a declaration which committed them to work harmoniously to integrate their economies, and gradually to reduce their dependence, particularly, but not only, on the Republic of South Africa and for accelerated economic development and regional self-reliance-Southern Africa: Toward Economic Liberation, A Declaration by Governments of Independent states of Southern Africa made at Lusaka on 1st April, 1980. (London: Blakrose Press (TU), 30 Clerkenwell, Close EC1, 1980).

14. The PTA treaty comprises 12 original signatory states plus 3 others who joined later. The treaty was signed in Lusaka on 21st December, 1981 and came into force in 1982. Its major aims were to promote trade and monetary co-operation among member states. To this end, there was going to be a systematic removal of barriers to trade, for example tariffs and restrictive import licensing. - International Organisation, 'Economic Liberation and Regional Co-operation in Southern Africa' - SADCC and PTA. Vol. 37. No. 4, 1983.

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