

# AN OVERVIEW OF THE LEGAL FRAMEWORK FOR INVESTMENT IN ZAMBIA

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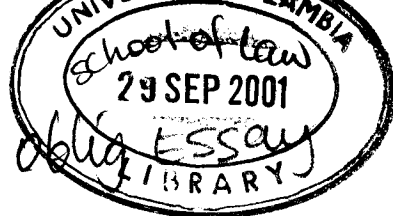
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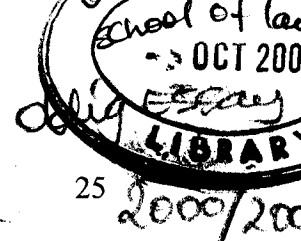
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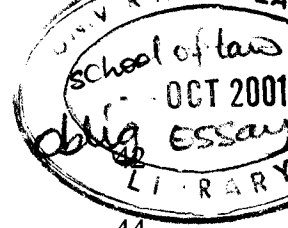


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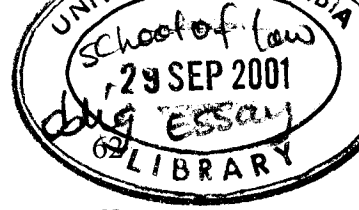
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## **DEDICATIONS**

This paper is dedicated to my parents, Dr. L.C.W. Kaela and Mrs. Rhoda Kaela to whom I salute.

There are three degrees of filial piety. The highest is being a credit to our parents, the second is not disgracing them, the lowest is being able to simply support them

- Confucius (C.551-478 BC)
- . Book of Rights

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First and foremost I would like to thank Almighty God for "I can do everything through him who gives me strength"

- Philippians 4: 13

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## CHAPTER ONE



### 1. INTRODUCTION

The level of development of any given country is essentially a function of the volume of its investment. It is for this reason that developing countries in Africa and indeed other continents have embarked on the development of policies and other measures aimed at foreign investment as a vehicle for development. The Zambian government under the third republic found it imperative to re-introduce economic reforms and restructuring programmes that would create a free market economy.<sup>1</sup> These include promotion and encouragement of private sector and initiative; privatisation of the parastatal companies; the encouragement of wide ownership of shares and the removal of restrictions on shareholding levels and foreign ownership; the establishment of a stock exchange market ;and the promotion of local and foreign investment and removal of and removal of all exchange controls to enable free movement of funds out of the country. These fiscal investment policies have been put in place to support the development of a dynamic and competitive private sector in Zambia.

This paper seeks to determine the efficacy of the investment legislation and whether a competitive private sector has been developed in Zambia. In this respect the paper will give an overview of the various legislation providing for investment in Zambia . This will be followed by an exposition of the salient provisions of the Investment Act,1993, Securities Act,1993, Privatisation Act, 1992 and the Mines and Minerals Act, 1995 .

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<sup>1</sup> A free market existed in Zambia after independence before the advent of the economic reforms , that is , the Mulungushi and Matero reforms of 1968 and 1969 respectively.



Thereafter, a critical analysis of the above mentioned investment legislation shall be made.

This chapter will begin by giving a definition of investment. It will also give a brief historical background of foreign investment policy as well as overview of the International legal framework for undertaking direct foreign investment. Thereafter a general survey of the Zambian legislation providing for investment in various industries within Zambia.

## 1.1 WHAT IS INVESTMENT

The Oxford English Dictionary defines investment as the conversion of money or circulating capital into some species of property from which an income or profit is expected to be derived in the ordinary course of business or trade.<sup>2</sup>

However the enabling Act for investment in Zambia, that is , the Investment Act, 1993 defines investment as

A contribution of capital, in cash or in kind, by an investor, to a new business enterprise to the expansion or rehabilitation of an existing business enterprise or to the purchase of an existing business enterprise from the State.<sup>3</sup>

Investment may involve a Multinational Motor Company putting money into developing a car, or an oil company spending money in north sea oil exploration ,or even buying shares or securities from a public company. Each involves the sacrifice of something now

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The major investors were the Europeans and Asians.

<sup>2</sup>The Oxford English Dictionary Vol. viii ,2nd ed. p. 48

for the prospect of something later. Investment has been primarily the function of private business. One of the most significant forms of international business entails the transfer of capital from one country to another for the purpose of long term investment.<sup>4</sup> This is referred to as foreign investment. Foreign investment consists two categories namely direct and portfolio. The International Monetary Fund defines direct investment as investment in enterprises located in one country but effectively controlled by residents of another country.<sup>5</sup> Portfolio investment on the otherhand is an indirect form of investment which does not entail management or control of an enterprise. A direct foreign investment establishes or purchases some form of permanent enterprise or facility, such as a factory, mine ,plantation, hotel or power station in whose management the foreign investor will participate.<sup>6</sup>Direct foreign investment is not merely a movement of capital, but of persons, organisation, technology know-how and information as well. Investment in general an economy's capacity to produce which is responsible for economic growth.

## **1.2 BRIEF BACKGROUND OF FOREIGN INVESTMENT POLICY IN ZAMBIA**

Zambia's political independence in 1964 was not accompanied by economic independence. The major economic concerns covering such areas as building construction, manufacturing, breweries wholesale and retail distribution, engineering ,banking and insurance were foreign owned or dominated. The status quo was maintained in order to retain the private capital on which the country could rely on for a large part of

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<sup>3</sup>Investment Act ,1993 ,sec 2

<sup>4</sup>Salacuse J W,(1998) International Business Planning : Law and Taxation, p.5

<sup>5</sup>IMF ,Balance of Payments Statistics,vol. 38 pt. 1 at 10 (1987)

<sup>6</sup>Ibid ,p5

its development. Apart from its financial contribution, private foreign investment was also associated with expertise which was a great importance to a country like Zambia where entrepreneurial abilities and skilled manpower were in short supply.<sup>7</sup> In spite of an economic boom and growth unprecedented elsewhere, the Zambian government saw the need for greater participation in the management of the country's economic sector. This was largely precipitated by repatriation of large portions of profits by foreign enterprises.<sup>8</sup> They ploughed back as little as possible into the business thereby substantially reducing the country's financial resources. Another factor that contributed to economic reforms was the limited participation by the indigenous Zambians. The Government embarked on creating an atmosphere would individually and corporately participate in the commercial and industrial life of the country. These factors paved the way for the Mulungushi and Matero economic reforms in 1968 and 1969 respectively. The latter reforms led to the take over of the businesses of major mining companies in the domestic industry by the Zambian government, whereas the former reforms led to the take over of important manufacturing and commercial entities in the domestic economy. These economic reforms introduced state capitalism.<sup>9</sup> The reforms were followed in the 1970's by world-wide depression and a slump in the prices of copper as a result of recession in most of the copper-consuming countries and technical advances in industry which reduced the need for copper.<sup>10</sup> There was need for foreign capital in order to

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<sup>7</sup>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

<sup>8</sup>K. Kaunda, *Zambia Towards Economic Independence* (1968) p.i

<sup>9</sup>K.K. Mwenda, 'A Critical Review of Foreign Investment Policy in Zambia: Direct Investment, The Stock Exchange and Privatisation' Thesis, MBA (1995) p.2

<sup>10</sup>W.S. Mwenda, 'The Efficacy of the Zambian Investment Act(No.5 of 1986) in the

revamp the stability of the economy. The Industrial Development Act, 1977<sup>11</sup> was passed to provide for investment in Zambia. This was the first piece of legislation to directly regulate investment in Zambia. The objective of the Act was to make investment in Zambia conducive and attractive for both local and foreign investors. The Act was, however, repealed and replaced by the Investment Act, 1986.<sup>12</sup> This Act was later repealed and replaced by the Investment Act of 1991. In the late 1980's Zambia was hit by another economic challenge.<sup>13</sup> Apart from Zambia's foreign debt crisis, the IMF and the World Bank, as major financiers placed conditions on governments seeking financial assistance from them to adopt and implement programmes tailored by the IMF and the World Bank.<sup>14</sup> These respective programmes are commonly known as the Structural adjustment programme and the stabilisation packages. In 1992, the Zambian government implemented policies and enacted laws that would provide for a free market economy, in line with the IMF conditions for debt relief. These include the enactment of the Privatisation Act, 1992<sup>15</sup>, the Investment Act, 1993 and the Securities Act, 1993.

### **1.3 THE INTERNATIONAL LEGAL FRAMEWORK FOR UNDERTAKING DIRECT FOREIGN INVESTMENT**

Planning a foreign investment project usually creates concern for a legal framework that will not only regulate foreign investment, but also provide protection of the investment

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Attraction of Private Foreign Investment for Development, Thesis, LL.M (1990) p.52

<sup>11</sup> Act No. 18 of 1977

<sup>12</sup> Act No. 5 of 1986

<sup>13</sup> K.K.Mwenda, op cit. p.3

<sup>14</sup> Ibid

<sup>15</sup> CAP 386 of the Laws of Zambia

once it is made.<sup>16</sup>In order to enhance and regulate foreign investment ,there is need for internationally recognised rules and principles. Unfortunately ,nations of the world have failed to establish a multilateral framework of international rules to encourage investment across boundaries ,similar to the General Agreement on Tariffs and Trade ,which created a multilateral framework to facilitate international trade.<sup>17</sup>However, the ‘Uruguay Round’ of negotiations held from 1986-1994 among members of the General Agreement on Tariffs and Trade created a treaty that affected foreign investment. This is the Agreement on Trade Related Investment Measures, TRIMS. Zambia, which is a member of the World Trade Organisation, is bound by this Agreement This Agreement prohibits all member countries of the World Trade Organisation (WTO) from imposing investment measures that are inconsistent with Article III of GATT 1994 on national treatment or Article XI prohibiting quantitative restrictions on imports. Article III requires that members of WTO treat like import goods in the same way as like national goods. Article XI prohibits the imposition of non-tariff barriers on goods from other member countries. If a member of the WTO applies trade investment measures that are inconsistent with Article III and XI of GATT rules, the TRIMS provides for a transitional period during which the inconsistent trade related measures can be phased out. Developed countries have two years to eliminate such measures , developing countries have five, and least developed countries seven years.<sup>18</sup> However, the efficacy of the agreement as regards investment is undermined by the fact that the scope of investment is limited to goods.<sup>19</sup> Apart from the TRIMS Agreement, Zambia is also a member of the Multilateral

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<sup>16</sup>Salacuse,op cit. p.23

<sup>17</sup>Salacuse, op cit. p.25

<sup>18</sup>Ibid, p. 33

Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID). Although these institutions do not directly regulate investment, they assist in international investment relations. MIGA is an affiliate of the World Bank with the mandate to provide guarantees to investors against non-commercial risks in respect of investments in a member country which flows from other member countries<sup>20</sup>. The guarantee is accorded to investment risks such as restrictions on the repatriation of foreign currency; expropriation of investment property; breach of contract; and political instability. The ICSID like MIGA is an affiliate to the World Bank with the mandate to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.<sup>21</sup> The jurisdiction of the Centre shall extend to any legal arising out of an investment between Contracting States and a national of another Contracting State upon written consent by the parties. Awards given by the arbitrators may be enforced by the domestic courts. Apart from the above mentioned international institutions, foreign investment may be regulated bilateral investment treaties which create a basic legal framework to govern investment by nationals of one signatory country in the territory of the others.<sup>22</sup> Due to the absence of an international legal framework to facilitate and regulate foreign investment, a state or host country has sovereignty to control the entry and establishment of foreign investment within its territory. This was acknowledged by the International Court of Justice in the well-known Barcelona Traction Case which said:

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<sup>19</sup> see multilateral agreements text book

<sup>20</sup> see Article 2 of the Convention Establishing the Multilateral Investment Guarantee Agency

<sup>21</sup> See Article 1 of the Convention on the Settlement of Disputes Between States and Nationals of other States

<sup>22</sup> Salacuse, op cit. p. 35

Customary international offers few binding rules on undertaking a direct foreign investment. Generally speaking the ability of the U.S. business to undertake an investment project in a foreign country is subject exclusively to the sovereignty of the host country. It is well settled in international law that a state has a right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the exercise of economic activities by natural or legal persons.<sup>23</sup>

In Zambia, the enabling legislation for direct foreign investment is the Investment Act, 1993.

#### **1.4 GENERAL SURVEY OF THE LEGAL FRAMEWORK FOR INVESTMENT IN ZAMBIA**

The competent authority for investment in Zambia is the Investment Act, 1993, which repeals the Investment Act of 1991.<sup>24</sup> The main objective of the Act is to provide a comprehensive legal framework for investment in Zambia.<sup>25</sup> Under section 4 of the Act, the Investment centre as constituted under the Investment Act, 1991 is maintained.<sup>26</sup> The functions of the centre includes the promotion and co-ordination of Government policies and the facilitation of investment in Zambia.<sup>27</sup> When compared with the repealed Investment Act, 1991, the present Act has widened the scope of the functions to include promoting consultancy services to investors,<sup>28</sup> and undertaking economic and sector studies including market surveys, with a view to identifying investment opportunities<sup>29</sup> and registering not only manufacturers but also other investors falling under the

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<sup>23</sup>Barcelona Traction Company(Belg v. Spain),1970 ICJ 3. 46-47

<sup>24</sup>See the Preamble of the Investment Act,1993.

<sup>25</sup>Ibid

<sup>26</sup>Investment Act, 1993.

<sup>27</sup>See sec. 5(1) of the Investment Act, 1993.

<sup>28</sup>Ibid sec.5(2) (f)

Investment Act, 1993. The Act provides for the establishment of an Investment Board whose duties shall include providing guidelines for the Centre, implementing investment policies, formulating investment promotion strategies and to issue investment certificates.<sup>30</sup> Any person investing in a business enterprise may apply to the Board for an Investment Certificate, provided the investor obtains the necessary licences, authorisations or permits from the relevant ministry or body.<sup>31</sup> The Act also provides for fiscal incentives under part IV and V of the Act, such as income tax deductions, income tax exemptions on dividend from externalisation of funds after relevant taxation. However, the Investment Act, 1993 is not a conclusive Act as regards investment. It provides for the regulation of investment in general. A number of other Acts supplement the Investment Act, 1993 to cater for specialised investment in specific sectors of the economy. These include the Privatisation Act, the Securities Act, the Banking and Financial Services Act, the Mines and Minerals Act, the Tourism Act and the Companies Act. These Acts will be briefly discussed in their respective order. The Privatisation Act, 1992<sup>32</sup> provides for the commercialisation of State enterprises and the sale of shares in State owned enterprises.<sup>33</sup> The Act provides for the creation of the Zambia Privatisation Agency<sup>34</sup> whose functions include planning, managing, implementing and controlling the privatisation of State owned enterprises in Zambia. The Agency also recommends privatisation policies to the Cabinet, and prepares the long term divestiture sequence plan and submit such plan to the Cabinet. The privatisation of a State owned

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<sup>29</sup>Ibid sec. 5(2) (h)

<sup>30</sup>Ibid See sec. 6 and 7 (2)

<sup>31</sup>Ibid sec. 8

<sup>32</sup>CAP 386 of the Laws of Zambia

<sup>33</sup>See the Preamble of the Act



enterprise shall be in accordance with the divestiture plan whereas the shares of a State owned enterprise shall be allotted by the Agency.<sup>35</sup> The Act entitles foreign investors to incentives under the Investment Act, 1993 if such investor acquires shares in the State owned enterprise where expertise is needed, export market and exposure of global and international linkages is required, and capital investment or foreign technology is required to expand the capacity of the business operations.<sup>36</sup>

The Securities Act, 1993<sup>37</sup> provides for the regulation of the securities industry and the establishment of the Securities and Exchange Commission.<sup>38</sup> The functions of the Commission include the promotion and encouragement of high standards of investor protection and the safeguarding of the interests of the persons who invest in securities, and the encouragement of the development of securities market in Zambia and the increased use of such markets by investors in Zambia. A company may apply to the Commission for a licence to establish and operate a securities exchange. Such licence shall be granted upon satisfaction of certain requirements.<sup>39</sup>

The Banking and Financial Services Act<sup>40</sup> regulates the conduct of banking and financial services and provides safeguards for investors in and customers of banks and financial institutions.<sup>41</sup> Upon application by a company, the Register, in consultation with the

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<sup>34</sup>Ibid

<sup>35</sup>See sec. 17 and 19 of the Privatisation Act, 1992

<sup>36</sup>sec. 30 of the Privatisation Act, 1992

<sup>37</sup>CAP 354 of the Laws of Zambia

<sup>38</sup>See the Preamble of the Securities Act, 1993

<sup>39</sup>Ibid, see sec.8 of the Act

<sup>40</sup>CAP 387 of the Laws of Zambia

<sup>41</sup>See the Preamble of CAP 387

Minister, may grant a licence authorising the company to conduct banking business, provided that the applicant fulfils the require conditions under the Act. Also, any person may be granted a licence upon application authorising the applicant to conduct any financial service business, provided that person complies with conditions under the Act.<sup>42</sup> A foreign bank or financial institutions may establish a representative office in Zambia upon attainment of the relevant licence. The Mines and Minerals Act<sup>43</sup> regulates the mining sector in Zambia. The purpose of the Act is to make provision with respect to prospecting for mines and minerals. In an effort to encourage and protect large-scale investment in the mining sector in Zambia the Act provides for development agreements between the Minister, on behalf of the government , and a potential investor relating to the grant of a large scale mining licence to the said investor.<sup>44</sup> The Act provides for a number of mining rights which include prospecting licence, retention licence, and large-scale mining licence under large- scale mining operations and a prospecting permit, a small- scale mining licence ,a gem-stone licence and an artisan licence under small-scale mining operations.<sup>45</sup> A mining right shall not be granted except to an individual or a company. The Act provides for fiscal incentives such as income tax deductions for any investment in mining including prospecting by the holder of the mining right. The holder of the mining right may also be exempted from paying customs and excise duties and from and other levy in respect of all machinery and equipment required for any of the activities carried on pursuant of the mining rights.

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<sup>42</sup>sec. 10 of CAP 387

<sup>43</sup>CAP 213 of the Laws of Zambia

<sup>44</sup>See sec. 9 of CAP 213

<sup>45</sup>Ibid sec. 6

The Tourism Act<sup>46</sup> provides for the establishment of the Zambia National Tourists Board for the purpose of developing and promoting tourism and to provide for the licensing of tourist enterprises. A person may operate as tour operator or travel agent, provided they obtain a licence from the Board upon application. The holder of a licence or authorisation shall be eligible for such incentives as the Minister may, from time to time, by statutory order, prescribe.<sup>47</sup> Every holder of a licence or an authorisation who enjoys any incentives may be required by the Board to comply with such conditions as prescribed by the Minister, such as submission of financial statements, annual reports outlining developments within the tourist enterprise to which the licence relates and adherence to any plans programmes or reports submitted to the board.

The Companies Act, 1994<sup>48</sup> allows foreign investors to incorporate a company in Zambia under the Companies Act, 1994, provided that more than half of the directors are resident in Zambia.

This chapter has given us a synopsis of the advent of a liberalised economy in Zambia. Apart from this, the Chapter has also endeavoured to explain the regulation of direct investment internationally and how there is need for an international institution, like the World Trade Organisation, to regulate investment. The Chapter has also identified the various pieces of legislation under the Zambian laws that provide for investment in one way or another.

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<sup>46</sup>CAP 155 of the Laws of Zambia

<sup>47</sup>sec. 23, CAP 155

## **CHAPTER TWO**

### **2. INTRODUCTION**

The previous chapter highlighted the various pieces of legislation that are concerned with or contain a provisions that relates to investment. However, this chapter shall restrict its discussion to four pieces of legislation namely the Investment Act, 1993, the Privatisation Act, 1992 the Securities Act, 1993 and Mines and Minerals Act, 1995.

The discussion shall include the historical background of each Act which shall be followed by the identification of the salient provisions of each Act with regards to investment.

#### **2.1 INVESTMENT ACT, 1993**

##### **2.1.1 Background**

The first Act that dealt with investment after independence was the pioneer industries (Relief from Income Tax) Act.<sup>49</sup> As its title suggested, it aimed at providing relief from income tax to companies designed as pioneer industries. The objective of the Act was to encourage the establishment in Zambia of new industrial and commercial enterprises by providing tax relief.<sup>50</sup> Section 13 of the Act empowered the Minister to declare that a company is a pioneer company. A pioneer company was defined in the Act as a company managed on a commercial basis and suitable for development of the country. The status of the 'pioneer' company entitled it under section 12 (1) of the Acts<sup>51</sup> to be

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<sup>48</sup> CAP 388 of the Laws of Zambia

<sup>49</sup> Act No. 55 of 1965

<sup>50</sup> See preamble Ibid

<sup>51</sup> Act No. 55 of 1965

granted a two years tax relief of another year upon proof of 25,000.00 capital expenditure was up to 50,000.00.

However, the provisions of this Act were subject to abuse because too much power was given to the Minister of Commerce and Industry and the Minister of Finance. This Act lamentably failed to induce any meaningful investment in Zambia. One of the factors that played a hand in the failure to secure foreign investment was the policy of nationalization that was started with the Mulungushi Economic Reforms of 1968. These reforms extended state participation in the economy with the aim of phasing out non-Zambians entrepreneurship. The Matero Reforms, 1969 which made provisions for fifty one percent government shareholding also led to failure to secure foreign investment.

This Act was followed by the Industrial Development Act, 1977.<sup>52</sup> This Act repealed the 1969 Act. The Object of the Act was to provide for licensing and control of manufacturing enterprises, to provide incentives for investment, to regulate the making of contracts relating to transfer of foreign technology and expertise to enterprises operating in Zambia, and to provide for matters connected with or incidental to the foregoing. The Act provided incentives for priority industries, that is, one that would provide maximum utilization of local raw materials and production of intermediate goods for use by other industries; had the ability to create and offer opportunities for permanent employment in Zambia; and one that would diversify the industry's structure and use domestic technology that developed in the rural areas.<sup>53</sup> The Act also failed to woo foreign

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<sup>52</sup> Act No. 18 of 1977.

<sup>53</sup> Part 4 Act No. 18 of 1977

investors despite the infusion of more incentives. The failure of the 1977 Act compelled government to enact the Investment Act, 1986.<sup>54</sup> The Act firstly sought to redefine the machinery used for coordinating investment in Zambia and secondly to revise the procedure that existed for the grant of incentives, registration of manufacturing enterprises, and making the contracts for the transfer of technology and expertise. The Act also established two administrative organs which comprised their administrative machinery responsible for implementing the aims and objectives of this Act. These are the Investment Council and the Investment Coordinating Committee.

In 1991 following the ushering of the multi-party politics and the liberalized economic policies, there was need to create a favourable image of the country within the international investment community. The review oriented Investment Council was, therefore, converted to the promotional – oriented Zambia Investment Centre under the auspices of the 1991 Investment Act<sup>55</sup> which repealed and replaced the Investment Act, 1986.

The 1991 Act had special incentives irrespective of which sector they were coming to invest in. But due to abuse some incentives were removed. This Act was repealed and replaced by the current legislation. The current Act has undergone a number of amendments which include the 1996 and 1998 amendments.

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<sup>54</sup> Act No. 51986

<sup>55</sup> Act No. 19 of 1991

### **2.1.1 Objectives**

The Investment Act, 1993, is meant to provide for a comprehensive legal framework for investment within which investment will take place with the liberalization policy of the present government.<sup>56</sup> The Act also seeks to effect government policy of cutting down on the procedures that the investor has to pass through in order to invest in Zambia. The Act applies to both foreign direct investment and domestic investment.

### **2.1.3 Who Qualifies to be an Investor?**

The Act defines an investor as any person natural or juridical whether a Zambian citizen or not investing in Zambia. However, the eligibility of an investor is accorded to a company incorporated in accordance with the Companies Act, 1994.<sup>57</sup> An individual can not be an investor. The investment must have a business proposal that is viable and a project that is worth investing. In order for an investment to qualify it must be worth \$50,000.00.<sup>58</sup>

### **2.1.4 The Zambian Investment Centre**

The Investment Act, 1993 provides for the continued existence of the Investment Centre.<sup>59</sup> The Zambia Investment Centre is an Independent statutory body established in 1992 with the mandate to promote and facilitate new investment in Zambia.<sup>60</sup> The functions of the centre are spelt out in section 5 of the Investment Act as follows:

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<sup>56</sup> See Preamble of Act CAP 389 Laws of Zambia.

<sup>57</sup> CAP 388 Laws of Zambia

<sup>58</sup> This is an administrative decision made by the immigration office

<sup>59</sup> Section 4, CAP 389

- To promote investment in Zambia;
- To monitor the performance of enterprises approved by it and enforce compliance with the terms and conditions of investment certificates approved under the Act;
- Establish and maintain institution liaison arrangements;
- Assist in securing from any Ministry, government department, local authority or other relevant body any permission, exemption, authorization, licence, bonded status, land and any other thing required for the purpose of establishing or operating a business enterprise;
- Keep records of technology transfer agreements relating to investments under this Act;
- Collect and disseminate information on relevant laws and regulations, and technical matters including applicable standards specifications and quality control procedures;
- Provide consultancy services to investors;
- Register investments; and
- Implement decisions made by the Board.<sup>61</sup>

The Act also provides for an Investment Board that shall be responsible for the affairs of the Investment Centre.<sup>62</sup> Its functions include implementation of investment policies, formulation of investment promotion strategies establishment of investment guidelines for the centre and issuance of the investment certificates.<sup>63</sup>

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<sup>60</sup> See section 5(1) CAP 389

<sup>61</sup> See section 5(2), Ibid

<sup>62</sup> See section 6, Ibid

<sup>63</sup> See section 7, Ibid



The Board is also empowered by section 10(1) of the Act to issue investment certificates upon application by any person wishing to invest in Zambia. The application for an investment certificate is made in a prescribed form.<sup>64</sup> Section 11 of the Act provides an applicant a right of appeal against the Boards decision to reject the applications.

### **2.1.5 Fiscal Investment in the *Zambian Investment Act, 1993***

One of the most important features of the Investment Act relates to the provision of incentives. Section 18 of the Act provides that the general incentives provided for under the Investment Act shall apply to any person investing in a business enterprise. Section 2 of the Act defines a 'business enterprise' as any undertaking carrying on business in the field of manufacturing, mining and processing of gemstones agriculture, transport communication, construction, tourism and services or know how. The general incentives under the Investment Act, 1993 include the following:

- Farming income tax and income derived from non-mineral exports taxed at 15%.
- Tax payable by rural enterprise reduced by one seventh of that tax which would otherwise be so chargeable.
- Accelerated capital allowances.
- Dividends to farmers tax exempt for first five years of operation.
- Capital expenditure on farm improvement qualify for farm improvement allowance of a hundred percent of such expenditure.
- Capital allowances which shall be deducted in ascertaining the gains or profits.
- Special development allowances for growing certain crops.

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<sup>64</sup> Section (9) of CAP 385

- Income tax deductions in respect of any loss incurred other than an investment in mining, any expenditure in respect of provision of technical education relating to the business enterprise and expenditure of a capital nature.
- Double taxation agreements with Botswana, Canada, Denmark, Finland, France, Germany, India, Ireland, Italy, Japan, Kenya, U.S.A. and U.K. but to mention a few.
- Tax on companies listed on the Lusaka stock exchange is 30% compared to the normal 35% corporate tax.<sup>65</sup>

Part VI of the Act provides investors with investment guarantees against expropriation and restriction on the externalization of funds.

## **2.2 THE PRIVATISATION ACT, 1992**

The idea of the current privatisation process was conceived in 1991 after the new Movement for Multi Party Democracy Government (MMD) came into power. The MMD included privatisation in their manifesto as a centre piece of economic reform.

It was mainly prompted by highly inefficient parastatals which had increased from 14 at independence in 1964 to more than 150 in 1986. the state was then controlling eighty per cent of the economy with the twenty percent private not allowed to function in a truly private sector manner. This culminated into major distortions and endemic macro economic instability. Furthermore, other reasons for instituting the programme was that

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<sup>65</sup> Part iv of CAP 385 Laws of Zambia

in the parastatal era, there was monopoly in manufacturing and hence no consumer choice.

There were no capital investments for future growth and the government's role in providing the social goods and services had been sidelined due to its participation in business.<sup>66</sup>

Apart from the poor performance of parastatals, privatisation was influenced by multilateral funding agencies like the International Monetary Fund and the World Bank. These institutions pressured the Zambian government to hasten the privatisation process especially the privatisation of Zambia Consolidated Copper Mines. The funding agencies did put up some conditionalities such as meeting the deadlines set by the Zambian government in its privatisation programme for continued funding for the privatisation process and this was done to forestall further financial losses by government.

This led to the enactment of the Privatisation Act, 1992<sup>67</sup> which provided a legal basis for the privatisation programme. The Act also created the Zambia Privatisation Agency (ZPA) which is responsible for all government privatisation issues.

### **2.2.1 Objectives**

The Privatisation Act, 1992 was one of the innovations the government put in place to start the process of divestiture. The Act provides for the privatisation and

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<sup>66</sup> Privatisation News, A publication of the Zambia Privatisation Agency, June/July 2000 Issue No.16., p.13.

commercialization of state – owned enterprises as well as to provide for the sale of shares in state owned enterprises.

The main objectives of the privatisation programmes are as follows:

- To scale down the Government direct initiative in economic activities and corresponding its administrative load;
- To reduce government budgetary cost arising from subsidies and capital expenditure;
- To promote competition and improve the efficiency of enterprise operations;
- To encourage wide ownership of shares;
- To promote the growth of capital markets;
- To minimize the involvement of government;
- To stimulate both local and foreign investment;
- To derive capital incomes for the treasury.<sup>68</sup>

In the attainment of these objectives, the Act provides for the establishment of the Zambia Privatisation Agency (ZPA). ZPA is an autonomous Agency of the Government of Zambia. The function of the Agency is to plan, implement, and control the privatisation of state owned enterprises in Zambia. The Agency also recommends privatisation programme guidelines to the cabinet, implements the privatisation programme in accordance with guidelines issued by cabinet, oversees all aspects of the implementation of the privatisation programme in Zambia, prepares the long-term

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<sup>67</sup> CAP 386 Laws of Zambia

divestiture sequence plan, recommends to cabinet the most appropriate method of sale for each state owned enterprises to be privatised and sets pre-qualification criteria for the selection of potential buyers or investors of state owned enterprises to be privatized.<sup>69</sup>

The Agency's Board ensures that the Agency's operations are at all times consistent with the government's privatisation legislation as provided for in the privatisation Act, 1992.

### **2.2.2 Facilitation of Privatisation as a form of Investment**

Privatisation is a form of direct investment that is provided for under the privatisation Act, 1992. The Zambia privatisation Agency employs different types of methods in the facilitation of privatisation. These include public offering of shares, private sale of shares through negotiated or competitive bids, sale of the assets and business of the state owned enterprise and management or employee buy outs by management or employees in that state owned enterprise. The mode employed by a state owned enterprise for privatisation is contained in the divestiture plan that is prepared by the Agency in accordance with section 8(2) (e). The Agency prepares and the cabinet approves the divestiture sequence plan. The plan lists parastatals in categories in which whole or part of their shares will be disposed of under the privatisation programme. It is the policy of the government to divest fully of its shareholding in all parastatals over a period of five years.<sup>70</sup> Enterprises will be divested in trenches based on the following sequence:

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<sup>68</sup> Zambia Privatisation Agency Progress Report from 4<sup>th</sup> July, 1992 –3 December 1992, p.2.

<sup>69</sup> Section 8 (2) CAP 386

<sup>70</sup> Minister of Commerce, Technical Committee on privatisation in Zambia, "Privatisation in Zambia: Strategies and Design", Lusaka: 1992 p.4

“- enterprises in priority section; parastatals in agriculture and tourism...

- Enterprises with minority shareholding whereby majority ownership will be offered to minimum shareholders while Government retains a portion subsequent divestiture;
- Enterprises where there is good investor demand;
- Enterprises in need of capital investment or technology;
- Enterprises where wide share ownership may be achieved quickly”.<sup>71</sup>

There will be phased, and not total divestment of parastatals where the absorptive capacity of potential investors is such that the enterprise will not be sold completely at the first offering and secondly, where part of an enterprise will be retained for Zambian participation.<sup>72</sup>

A state owned enterprise scheduled for privatisation must comply with such obligations as are outlined under section 21. These including carrying out any recommendations made by the Agency for preparing the company for privatisation, keeping up to date all business records and books of account, prepare a two to three years investment and financing plan and a manpower development plan and prepare statutory accounts and cause them to be audited not later than four months after each financial year.

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<sup>71</sup> Ibid

<sup>72</sup> Ibid

Negotiations for offer of sale of parastatals must be conducted by an independent negotiating team for each sale. An appointee of the team shall be obliged to take an oath of secrecy, and to disclose any personal or professional interest before acceptance. Eligibility for the purchase of securities in parastatals is accorded to both Zambians and non-Zambians. Members and employees of the Agency as well as their immediate family members or professional business partners shall not purchase shares unless the sales by public offer of shares. Political leaders and public officers intending to purchase securities may do so upon public disclosure of their intention to bid for shares in a state owned enterprise.<sup>73</sup>

Although the Act does not allow shares in parastatals to be sold on credit, Zambians are offered incentives which include purchasing shares at a discount or paying in instalments. This is done through the Zambia Privatisation Trust Fund whose aim is to increase Zambian participation in the ownership of shares.<sup>74</sup>

The Privatisation Act also accords foreign investors incentives as provided for in the Investment Act. This is based on the foreign investors acquisition of shares on the foreign investors acquisition of shares in a state owned enterprise where expertise is needed to upgrade efficiency of that state owned enterprise; where participation is necessary to promote the export market; the nature of the business requires global linkages and international exposure or capital investment or foreign technology is required to expand the capacity of the business operations.

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<sup>73</sup> Section 24, CAP 386

<sup>74</sup> Section Ibid

## **2.3 SECURITIES ACT, 1993**

### **2.3.1 Background**

The Stock Exchange Act, 1970 was the first Act of its kind in Zambia. However, it was deemed rather futile due to the stock exchange market. This was because most companies were under state control and ownership as this was the era of state capitalism or centralized economy in Zambia. The Government's retention of companies led to monopolies which suppressed the growth of competition in industry. Shares in parastatal companies were not being traded to the public or to private investors due to the government's hold on them.

The Stock Exchange (Amendment) Act 1971 amended the 1970 Act. This amendment was repealed and replaced by the Stock Exchange Act, 1990. This was basically a replica of the 1970 Act. The enactment of the 1990 Act was a response to the structural adjustment programme. Debt relief from the IMF and World Bank was conditioned on the attainment of a liberalized economic atmosphere which included the divestiture of parastatals to private entrepreneurs.

The 1990 Stock Exchange Act had the same weakness as the 1970 Act. Like the former Act, the 1990 Act did not provide for collective investment schemes, insider dealing, false and misleading information or financial intermediaries.



The Securities Act, 1993<sup>75</sup> repealed and replaced the Stock Exchange Act, 1990. This was in an effort to do away with government control of the securities industry in Zambia. It was also as a result of the new governments (Movement for Multi-Party Democracy (MMD) ambitions programme to attract foreign investment to Zambia. The government perceived its ambitious restructuring programme as a way to impress its international financiers. This was affirmed by parliament debates preceding the enactment of the privatisation Act, 1992:

‘Zambia has agreed to the structural adjustment programme .. we must be in a position therefore, to fulfill conditions that will agree with our co-operating partners...’<sup>76</sup>

One method of liberalizing the economy was through the privatisation programme of state-owned companies and to divest the state of its shareholding in the companies. As a means of raising capital for the expansion of existing enterprises or new enterprise, privatised companies needed to divest shareholding to the public. At the same time, mechanism had to be adopted to ensure that the money invested in a company through the purchase of shares was maintained and not reduced. In order to provide for liquidity of securities where others could exit and be replaced without reducing the money invested, there was need for a stock market. This would provide a forum where private individuals could buy and sell securities. To this end, a securities market was inevitable. This was affirmed by former Minister of Finance when introducing the bill for the enactment of the securities, 1993 where he said:

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<sup>75</sup> CAP 354 Laws of Zambia

‘To facilities privatisation, MMD will as a matter of urgency establish a stock market ...’<sup>77</sup>

In the achievement of its goals to attract foreign investment to the country, the Zambian government has enacted laws that would accommodate its ideological inclinations.

### **2.3.2 The Relevant Authority**

The Securities Act, 1993 provides for the regulation of the securities industry and the establishment of the Securities and Exchange Commission.<sup>78</sup>

The Act regulates portfolio investment, that is, indirect investment that does not involve the direct regulation .

### **2.3.3 Securities and Exchange Commission**

Part II of the Act is concerned with the establishment and functions of the Securities and Exchange Commission. The commission replaces the Council of Stock Exchange which regulated the under the stock exchange Act, 1990. Unlike the Stock Exchange Council, the Securities and Exchange Commission (SEC) has a wider representation.<sup>79</sup>

Furthermore, unlike the Council of Exchange, the SEC has limited discretionary powers to interfere with operations of a securities or stock market.

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<sup>76</sup> See Late R. Penza, former Minister of Commerce, Daily Parliamentary Debates 18<sup>th</sup> June, 1992, p. 144.

<sup>77</sup> Late R. Penza, former Minister of Commerce, Daily Parliamentary Debates 18<sup>th</sup> June, 1992, p. 104.

<sup>78</sup> See the preamble CAP 354 Laws of Zambia

The functions of the commission includes:

- ❖ Supervising and monitoring the activities of any securities exchange and the settlement of transactions in securities;
- ❖ Licensing and monitoring the activities of securities exchange, dealers, investment advisers and their respective representatives;
- ❖ Approving the constitutions charters, articles, by-laws and regulations governing and pertaining to any securities exchange;
- ❖ Issuing, monitoring and enforcing rules for the conduct of participants in the securities industry and for the supervision and investigation of that conduct including rules relating to licensing and for relocation and suspension of licences;
- ❖ Promoting and encouraging high standards of investor protection and integrity among members of any security exchange;
- ❖ Supporting the operations of a free, orderly, fair, secure and properly informed securities market;
- ❖ Regulating the manner and scope of securities or any securities exchange, the exchange rules, listing requirements, margin requirements, capital adequacy requirements, disclosure and periodic reporting requirements, trade settlement and clearing requirements.<sup>80</sup>

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<sup>79</sup> The Council under the 1990: Act was constituted by political appointees of the Minister. The Council was subject to political interference.

<sup>80</sup> Section 4, CAP 354

### 2.3.4 Securities and Stock Markets

Part III of the Act provides for the establishment of a security exchange. The securities Act defines a securities market as place where securities are bought and sold and where information pertaining to such transactions is supplied.<sup>81</sup>

A stock exchange on the other hand is not defined by the Act. Blacks law dictionary defines it as a voluntary association of person who, for convenience provide a common place for the transaction of their business,<sup>82</sup> whereas Odife defines a stock exchange as the institution that provides the framework for investors to exchange ownership of shares, stocks, mortgages or other forms of financial assets.<sup>83</sup> On the basis of these definitions a stock exchange is equivalent to a securities market under the Securities Act 1993.

The securities that are referred to include shares debentures stock or bonds issued by a government or a body corporate; any right or option in respect of any such shares, debentures, stock, bonds or notes; or any instrument commonly known as securities or are prescribed by rule.<sup>84</sup>

The operation of a securities market is enhanced by an institution which assists on order match between buyers and sellers, by affording safety in the settlement of transactions, and by the promotion public confidence.<sup>85</sup> Such an institution is what is referred to as the Securities Exchange. The Act defines it as ‘an exchange established and operated by a

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<sup>81</sup> Section 1, Ibid

<sup>82</sup> Blacks Law Dictionary 4<sup>th</sup> ed p. 1987

<sup>83</sup> Dennis O. Odife, Understanding the Nigerian Stock Market NewYork: Vintage Press 1985 p. 43

<sup>84</sup> Section 2, Ibid

company licensed to do so under the Securities Act.<sup>86</sup> The establishment of a securities exchange is provided for under section 7 of the Act. A company may apply for a licence to establish and operate a securities exchange. A securities exchange is regulated by the SEC. The Act recognizes the Lusaka Stock Exchange (LuSE) as the only licensed institution that provides a market for the buying and selling of securities in Zambia.<sup>87</sup> The LuSE operates a 'unified market' where virtually all securities trading is mediated through a stock exchange.

### **2.3.5 Financial Intermediaries**

Part IV of the securities Act, 1993 regulates the licensing of three kinds of financial intermediaries in Zambia. These are dealers, investment advisers and representatives of dealers and investment advisors.<sup>88</sup>

A dealer is defined as a person who carries on the business of dealing in securities whether as principal or Agent.<sup>89</sup> He may be referred to as a stock broker, as is the case at Common Law.

However, as opposed to common law, a stock broker may be regarded as a principal. The status of an agent enjoyed by stock brokers at common law can also be altered by regulations of a securities or stock exchange. A dealers or stock brokers licence is granted to companies and not individuals.

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<sup>85</sup> Blue Print for the Zambia Securities Market, p. 14

<sup>86</sup> Ibid

<sup>87</sup> See section 9 Ibid

<sup>88</sup> Zambia Law Journal; K. Mwenda. The New Corporate Law De-Mystifying Myth of a Stock Exchange, Special Ed., 1988 p. 7

<sup>89</sup> Section 18, 19 & 20 of CAP 354.

Investment advisers provide advice to persons with respect to investment.<sup>90</sup> Investment advisers include institutions such as banks, registered under the Banking and Financial Services Act, insurance companies under the Insurance Act, advocates or accountants acting in their professional practice, licensed dealer and their representations, proprietors or publishers of newspapers where financial news is made available.

The last category of financial intermediaries is representatives of dealers. Representatives are employed by either the dealer or investment adviser to carry out the functions of either the dealer or adviser. A company shall not be granted a representatives licence.

It must be mentioned that activities of financial intermediaries, when dealing in information on the market must be monitored to ensure that investors are protected from market abuses.

### **2.3.6 Registration of Securities**

Securities may be registered when the issuer of securities or its representative signs a registration statement in the prescribed form and submits the statement together with a prescribed fee to the SEC.<sup>91</sup>

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<sup>90</sup> Ibid

<sup>91</sup> Section 32 (1) Ibid

### **2.3.7 Improper Trading Practices**

The Act unlike the Stock Exchange Act provides for improper trading practices and inside dealing.<sup>92</sup> False trading and manipulation of the securities market are prohibited and commission of such acts constitute an offence.

The Securities Act also provides for a compensation fund where purpose is to compensate persons who suffer pecuniary loss occasioned by any default of a licensed dealer, or licensed investment adviser, or any employee of such a dealer or adviser, in the course of or in connection with any dealing in securities, being a loss in relation to any money, securities or other property which was established to licensee.

## **2.4 MINES AND MINERALS ACT**

### **2.4.1 Background**

The Mines Industry in Zambia has gone through three distinct phases namely the pre-nationalisation stage of the early years of our national independence, that is from 1964-1970; the nationalization stage from 1970 to 1991; and the privatisation area.

At independence in 1964 our Copper Mining Industry was privately owned by the Anglo American Corporation (AAC) and the Roan selection Trust (RST) group companies. At the time, we had vibrant mining sector ranked second in the world in terms of copper output.

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<sup>92</sup> Part VII of the Securities Act, 1993

However, in 1970 the government nationalized the mining companies and consequently in 1982 merged them into one conglomerate the Zambia Consolidate Copper Mines (ZCCM). The nationalisation of the industry inevitably discouraged private investment. Consequently, the government resorted to borrowing from the international Banks such the World Bank, The African Development Bank and the European Union in order to sustain the mining operations.<sup>93</sup> Regrettably, these resources were not efficiently utilized and thus the reliance on external loans just led to persistent capital flight in form of interest payments rather than earning profits on direct investment. Overtime, ZCCM became progressively under capitalized due to lack of investment capital in exploration and mining development. Under capitalization complied with poor management adversely affected production levels.

The contribution of the mining sector to the gross domestic product dropped from 36 per cent in 1970 to 13 per cent in 1996.<sup>94</sup> Furthermore the sectors contribution to Government Revenue dropped from 97 per cent in 1970 to virtually nothing by 1980, thus compelling the government to introduce mineral export tax in 1983 which incapacitated the industry.<sup>95</sup>

These developments had a negative impact on the overall performance of the economy including the mining industry.

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<sup>93</sup> Report by Ministry of Mines and Minerals Development in the Mining Sector. P. 1

<sup>94</sup> P. 2 Ibid

<sup>95</sup> Ibid p.2



When the MMD government came into power in 1991, the mining industry was characterized by low output, managerial shortcomings and lack of investment. There was no mining companies which undertook exploration work in, not even ZCCM. The government was therefore compelled to take bold decisions and embarked on the implementation of a comprehensive economic restructuring programme with emphasis on private-sector led development initiatives.

The MMD government came up with the new Mines and Minerals Act in 1995, which was considered the first progressive mining Act in the Southern African Development Cooperation (SADC) region.<sup>96</sup> By 1998 there were thirty six foreign companies in exploration work.<sup>97</sup> These include Caledonian Mining Limited, Zamanglo prospecting, private limited, Turn Range Exploration Corporation, and Roan Antelope Mining Corporation.

#### **2.4.2 The Competent Authority**

The Mines and Minerals Act, 1995<sup>98</sup> regulates the mining sector in Zambia. The objective of the Act<sup>99</sup> is to make provision with respect to prospecting for mines and minerals.<sup>100</sup>

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<sup>96</sup> Ibid p.2

<sup>97</sup> See Minister of Mines and Minerals, Dr. Syamujaye Parliamentary Debates, 28<sup>th</sup> January, 1991.

<sup>98</sup> Ibid

<sup>99</sup> CAP 213 Laws of Zambia

<sup>100</sup> Ibid

Generally, all rights in mining which includes searching for and disposing of vests in the president.<sup>101</sup> However, rights in prospecting for mining and disposing of minerals may be acquired in accordance with the Act.<sup>102</sup>

A mining right shall not be granted except to an individual or a company for the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia. The Minister may on behalf of the republic enter into a development agreement relating to the grant of a large scale mining licence.<sup>103</sup>

The Act also provides for the granting of rights in large scale operations and small scale operations. Large scale mining operators may be granted a prospecting licence large scale mining licence, or a retention licence.

### **2.4.3 Prospecting Licence**

Section 14<sup>104</sup> outlines the rights granted by a prospecting licence which include exclusive right to carry on prospecting operations in the prospecting area for minerals specified in the licence and to do all such other acts and things as are necessary for or reasonably incidental to the carrying on of these operations. The prospecting licence states the date on which the licence was granted, specifies the minerals in respect of which it is granted

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<sup>101</sup> See preambles of CAP 213

<sup>102</sup> Section 3, CAP 213

<sup>103</sup> Section 9 of the Mines and Minerals Act, CAP 213

<sup>104</sup> Section 4 Ibid

and includes a description and plan of the prospecting area.<sup>105</sup> The duration of the licence shall not exceed two years and is subject to renewal.

#### **2.4.4 Retention Licence**

A retention licence confers on holder exclusive rights to apply for a large scale mining licence within the area for which the retention licence has been granted. A retention licence may be granted for a period not exceeding three years subject to renewal for a single period of three years.

#### **2.4.5 Large-Scale Mining Licence**

A large scale mining confers on the holder exclusive rights to carry on mining and prospecting operations in the mining area, and to do all such things as are necessary for or reasonably incidental to the carrying on of these operations<sup>106</sup>The holder of a large-scale mining licence may

- ❖ Enter on to the mining area and take all reasonable measures on or under the surface for the purpose of mining operations;
- ❖ Erect the necessary equipment, plant and buildings for the purpose of mining transporting, dressing or treating the mineral recovered in the course of mining operations;
- ❖ Dispose of any mineral product recovered;
- ❖ Prospect within the mining area for any mineral; and

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<sup>105</sup> CAP 213

<sup>106</sup> Section 18, Ibid

- ❖ Stack or dump any mineral or waste products.<sup>107</sup>

Part IV of the Act provides for small-scale mining operations which include prospecting permits, small scale mining licences and gemstone licences.

#### **2.4.6 Prospect Permit**

A prospect permit confers on the holder exclusive rights to carry on prospecting operations in the prospecting area for the minerals (not gemstones) specified in the licence.<sup>108</sup> The duration of the licence shall not exceed two years and it is not renewable.

#### **2.4.7 Small-scale Mining Licence**

A small-scale mining licence confers on the holder exclusive rights to carry on mining operations in the mining area for minerals other than gemstones.<sup>109</sup> The duration of a small-scale mining licence is 10 years and is subject to renewal.

#### **2.4.8 Gemstone Licence**

A gemstone licence confers on the holder the same exclusive rights as a prospecting permit and small scale mining licence, but only in relation to gemstones.<sup>110</sup> The licence is granted for a period of 10 years.

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<sup>107</sup> Section 23 (1) Ibid

<sup>108</sup> Section 29, Ibid

<sup>109</sup> Section 34 (1) Ibid

<sup>110</sup> Section 40, Ibid

Part IX of the Act provides for environmental protection measures to be taken by a mining right holder.

#### **2.4.9 Investment Incentives**

Part XII of the Mines and Minerals Act provides for investment incentives that may be granted to mining right holders. Section 96 states that any investment in mining including prospecting by the holder of a mining right shall attract deductions from income tax. The deducting from the expenditure is as follows:

- ❑ Capital expenditure allowances of 25% on plant machinery and commercial vehicles; 20% on non-commercial vehicles; 5% on industrial buildings.
- ❑ Prospecting expenditure under special circumstances
- ❑ Mining expenditure under special circumstances
- ❑ Mining expenditure on non-producing mine
- ❑ Mining expenses incurred by a mine of irregular production close to the end of its life.

A holder of a mining right is exempted from customs, excise and VAT duties in respect of all machinery and equipment (including specialized motor vehicle) required for exploration or mining activities.<sup>111</sup> Section 98 of the Mines and Minerals Act, 1995 may exempt a holder of a mining right in respect of the sale of any mineral from paying mineral royalty tax. Upon application for such exemption.

Exporters of cobalt and copper are levied at 35% of taxable income whereas other mineral and ‘non-traditional’ commodities (i.e. excluding copper and cobalt) attract a levy of 15%. Companies listed on the Lusaka Stock Exchange are levied at 30% of taxable income.

Part IX of the Act provides for Environmental protection during the mining operations.

This chapter has outlined the legal framework for investment in Zambia and has highlighted the relevant provisions with regard to investment. The explanation includes the development of the investment legislation nationalization period to a liberalized economy.

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<sup>111</sup> Section 97 (1) Ibid

## **CHAPTER THREE**

### **3.0 INTRODUCTION**

This chapter shall give a critical analysis of the investment legislation by identifying the shortcomings of the pieces of legislation discussed in the previous chapter. This will include an exposition of the weaknesses and flaws contained in the investment laws.

### **3.1 THE PRIVATISATION ACT**

Zambia privatisation programme once considered by many analysts as the success story of Africa was over ambitious and very hurried. The expected international development of the market did not take place and some privatized companies ended up in liquidation.<sup>112</sup> This was because the privatisation was embarked on at a time when its conceptualization was yet to be grasped.

The absence of a detailed legal foundation for the regulation of certain privatized industries has been a major impediment in the privatisation process.

#### **3.1.1 The Establishment of the Zambian Privatisation Agency**

The Agency is the driving force of the entire privatisation process. It is empowered to plan, manage implement and control the privatisation of parastatals in Zambia. The effective operation of any privatisation agency is dependent on resources, authority and skilled personnel. A privatisation Agency must have sufficient resources that is, financial

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<sup>112</sup> Mwenda, K.K., *The Dynamics of Market Integration: Africa Stock Exchanges in the new Millennium*, Brown Walker Press: USA, 2002 p. 42

and personnel in order to successfully conduct its duties. In the facilitation of the privatisation of parastatals, the Agency must have fixed accessible and adequate funds that will enable the Agency to carry out its functions which include planning and management of privatisation process.

The Zambia Privatisation Agency (ZPA) has and is largely dependent on the donor community of its funding. This is not fixed because donations are seldom given and usually within the discretion of the donor

An Agency must consist of personnel that are well versed in the technical know-how that accompanies privatisation. This includes technical, financial legal and industry knowledge associates with privatisation. Further, the Agency must have sufficient power for effective and timely decision making. This authority should be set out in the enabling legislation which includes decrees ministerial regulations and statutes.

An Agency must be relatively independent in order to implement the enabling legislation in a manner that best serves the industry and objectives as opposed to political concerns. In this regard, the privatisation agency should be a “one-stop shop”. Conditionalities flowing from privatisation such as the need for a work permit, acquisition of title deeds, return of allotments forms should be capable of being acquired at the Privatisation Agency. The responsibilities held by ministries and registries should be centralized i.e. agents from these institutions should be available at the Agency to issue the necessary documents.



The ZPA from the time of its inception to date has had insufficient manpower. This can be noted by the problems that the Agency faced in 1992 when there were too many bidders against a limited number of negotiators from ZPA.<sup>113</sup> As regards skilled personnel, the Act does not provide for the qualifications that each appointee to the Agency should have. It merely provides for appointment of representatives from various organizations.

In addition, the Act does not provide for the specific qualifications that members of the negotiating team should have.

### **3.1.2 Functions of the Agency**

The Privatisation Act, 1991 provides that the functions of ZPA include ensuring that monopolies are not created in the process of privatisation and monitoring the progress of the privatisation programme in Zambia.<sup>114</sup> Privatisation means the transfer to the private sector of part or whole of the equity or other interest held by government directly or indirectly, in a state owned enterprise wholly or partly owned by government.<sup>115</sup> In carrying out the privatisation process the agency must ensure that no monopolies are created. It is submitted that the privatisation process in Zambia has been merely the transfer of companies from government hands to private hands. The existence of monopolies that occurred before the inception of the privatisation programme have been maintained. For instance, upon privatisation of Zambia Breweries it was spilt into two companies, that is, Zambia Breweries Lusaka and Northern Breweries Ndola. Due to stiff

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<sup>113</sup> ZPA progress report from 4<sup>th</sup> July 1992 – 31<sup>st</sup> December, 1992, p. 4

<sup>114</sup> Section 8 (2) CAP 380

competition between the two companies, they decided to merge thereby undermining the prevention of monopolies. Another example is Chilanga Cement (Plc) Ltd which has a monopoly in the production of cement in Zambia.

With respect to monitoring the progress of the privatisation programme, to what extent should the programme be monitored? Shall it end after the privatisation? The Act is silent on this aspect. The Agency must be able to monitor the performance of an enterprise after its divestiture into private hands. This is to ensure that the companies operate in accordance with and in observance of the laws incidental to the privatisation process. This could include compliance with provisions of the Companies Act 1994.<sup>116</sup> Further, the privatised company must not hamper the local industry.

However, this has not been the case in Zambia. The privatisation Act had not provided for the protection of the local industry and job. Further, due to the hurried enactment of the legislation on privatisation, the need for ZPA to coordinate with other regulators, such as government agencies dealing with the regulation of imported goods in the prevention of unfair trading practices by the entrepreneurs of privatised companies, was not catered for. This submission is based on the tendency of privatised companies continued importation of goods obtainable in Zambia from abroad. One such example is Zambian Breweries. Zambia Breweries used to buy maize grains used in the brewing of beer from the Zambia National Milling Company. Upon privatisation, Zambia Breweries began importing maize grains from South Africa at the expense of the local industry.

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<sup>115</sup> Section 2, Ibid

<sup>116</sup> CAP 388

enterprise. For instance, the Zambian government has retained shares in the privatized mines in order to safe guard government interest with regard to changes of control, sale of material assets and broad representation.<sup>118</sup> It is also meant to ensure that privatised companies comply with government policies. The provision operates as a check on the private entrepreneurs by the Government.

It is observed that the said provision has been abused by the government. For instance, in the privatisation of the mines the negotiating team was not formed in accordance with the Privatisation Act, 1992. The committee instituted by the Government to privatise the mines was not a legal entity. The functions and authority of ZPA were sidelined by a politically appointed committee. Such interference negates the autonomy of ZPA.

#### **3.1.4 Methods of Privatisation**

The privatisation law must state the procedures involved in each technique of privatisation.<sup>119</sup> The Privatisation Act provides for various techniques as earlier stated in Chapter two. However, it does not define or explain what each method involves. Potential investors who are ignorant as regards the methods may find it difficult to understand what is involved under each mode of privatisation.

#### **3.1.5 Purchase of Shares**

The intention to bid for the purchase of shares by a Minister is based on the condition of public disclosure. However, the Act is silent on the legal consequences of non-

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<sup>117</sup> Section 2, CAP 386

<sup>118</sup> Ministry of Mines and Minerals Documentation of Development of Mining Sector, p. 23

disclosure. It is submitted that the inability to impose sanction or penalties upon non-disclosure undermines the strict adherence to the said provision.

### 3.1.6 Preparation of Employees

Once a SOE undergoes a privatisation a number of issues arise such as possible retrenchment of employees of SOE's. The Act did not address the welfare of employees upon retrenchment. Though the labour relations Act deals with employment issues, it has not been able to cater for the effects of privatisation. Though ZPA has a social department, it is an administrative creation.

Privatisation involves a change of ownership and thus entails the requirement for a new contract. In this respect, the labour laws must be able to provide for the post divestiture situation of state owned enterprise employees of . The laws must be modernised in order to conform to the privatisation legislation. Labour laws assist in the determination of the investor's ability to set wages and benefits, hire and fire workers and in general and in general manage his work force.

However, the labour laws do not directly make provision for the effects of privatisation. Even though the law gives state owned enterprises an opportunity to choose whether or not to continue with the company after privatisation, most employees are usually in a desperate position to stay on. The inability of the labour laws to protect employees from the effects of of privatisation such as numerous job loses and a reduction in the

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<sup>119</sup> Salacuse, J.W., (1998) International Business Planning Law and Taxation, p. 134

conditions of service for remaining employees has invited a number of court cases against either the ZPA or the privatised company.

In the case of National Milling Company Limited (Appellants) v Grace Simataa and 3 Others. Respondents.<sup>120</sup> The appellants upon privatisation notified the workers that it had moved away from the ZIMCO conditions and would have and use its own. Before privatisation ZIMCO as a parent company had laid down conditions with regards to redundancy packages. These conditions had to be implemented by subsidiary companies which included National Million Company Limited. After privatisation the respondents were declared redundant and the redundancy package offered to them was in accordance with statutory instrument No. 99 of 1994, contrary to the initial package offered by ZIMCO. They were inferior to the ZIMCO revised package. The respondents sued the appellants. The learned trial judge agreed with the workers finding that the appellant had changed the conditions of service for worse and without the consent of the affected employees. The supreme court upheld the decision of the High Court.

Also, in Zambia Oxygen Limited and Zambia Privatisation Agency (Appellants) v Paul Chisakula, Francis Phiri, Yesani Chimwala, Rumbani Mwandira and Richard Somanje (Respondents)<sup>121</sup> the former employees of the first appellants sued the appellants to recover money claimed as the balance of terminal or retrenchment benefits and repatriation allowances to which they claimed to have been entitled by virtue of conditions of service approved by the Board of Directors of the first appellants and to

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<sup>120</sup> SCZ Appeal No. 122 of 1999

<sup>121</sup> SCZ Appeal No. 102 of 1999

take effect from 1<sup>st</sup> April, 1996. Such conditions of service resulted in the employees who were all non-unionsed receiving increased salaries which were actually implemented as well as a retirement package worked out in accordance with clause 35 of the conditions of service for non-represented employees approved by the Board from 1<sup>st</sup> April, 1996 as already stated.

The Board which approved those conditions sat on 23<sup>rd</sup> July, 1996 and changed the conditions that were approved with effect from 1<sup>st</sup> April by paying employees being separated due to retirement or retrenchment or redundancy less than the agreed amount.

The appellants position in the case was that the conditions approved from 1<sup>st</sup> April, 1996, were bloated and extravagant so that the affected employees should be paid packages worked out on a formula which was never stated in evidence but which would generally reflect the position before 1<sup>st</sup> April, 1996 compiled with the payment of gratuity according to the number of years served. The first appellants caused such packages to be worked out which were then paid by the second appellants. The employees sued for the recovery of the balance based on the packages contained in the conditions approved with effect from April 1, 1996. The learned trial judge found for the plaintiffs and the decision was upheld by the supreme court of Zambia.

In the privatisation of National Milling Company Ltd, there was no protection for Zambian managers when new owners cleaned them out. Despite the qualifications of Zambian managers, the new owners brought in expatriates whose qualifications were not questioned. Even though Immigration department regulates the number of expatriates

that may be allowed in accordance with the individual sale agreement , the immigrations role has not been effective. This can be attributed to corrupt practices. This has led to the loss of jobs by a number of well qualified employees.

Even the United States of America, the leader of the free market world has adopted restrictions that protect the local industry. For instance in 1998 the U.S. congress approved legislation raising the number of visas to highly skilled technical workers from 65,000 – 115,000.<sup>122</sup> No matter what investment one takes to the U.S., an investor is not able to import into that country any number of workers. They protect their own jobs.

### **3.2 INVESTMENT ACT, 1993**

The objective of the investment Act, 1993 was to revise the law relating to direct investment so as to provide direct investment in Zambia. The Act provides a regulatory authority, that is, the Zambia Investment Centre; provides for incentives; and ensures investment guarantees.

However, the Act does not provide cardinal issues with respect to investment. These include technology transfer minimal requirement on amount of investment capital, offences and penalties for offending investors re-investment and recognition of old investment to mention a few.

The writer shall identify and analyse the shortcoming of the investment Act.

### 3.2.1 Technology Transfer

Technology transfer is understood to mean a process through which superior technological knowledge of one trading partner is transmitted to the geographical location of another partner.<sup>123</sup> The current investment Act<sup>124</sup> unlike the investment Act, 1986 does not provide for the legislation of technology transfer agreements. Part VII of the repealed investment Act, 1986 made provision for the registration of agreements for the transfer of foreign technology.<sup>125</sup>

The Investment Act, 1993 merely refers to the recording of technology transfer agreements. In contrast, the Ghanaian Investment Promotion Centre Act<sup>126</sup> provides for registration and regulation of technology transfer agreements.<sup>127</sup> The Act defines 'technology transfer agreement' as an agreement relating to an enterprise to which the Act applies that involves:

- The assignment, sale or use of foreign patents, trademarks or other industrial property rights;
- The supply of foreign technical know-how or technological knowledge;
- Foreign technical assistance, design and engineering, consultancy or other technical services in whatever form they may be supplied;

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<sup>122</sup> Ibid.

<sup>123</sup> Mwenda, K.K., *Contemporary Issues in Finance and Investment Law* Penn Press: Washington D.C. USA, 2000 p. 15

<sup>124</sup> CAP 385 Laws of Zambia

<sup>125</sup> Section 36 (1)

<sup>126</sup> 1994, Act No 478 Laws of Ghana

<sup>127</sup> See section 33 of Act No. 478, 1994 Laws of Ghana



- Foreign managerial, marketing or other services.<sup>128</sup>

The absence of a provision on the regulation and registration of investment Act could lead to inappropriate technology being transformed in Zambia.

### **3.2.2 Minimal Requirements on the Amount of Investment**

Though the Investment Act, 1993 provides that any person investing in a business enterprise may apply for an investment certificate, it does not make provision for the minimum foreign capital requirement that must be met by a foreign investor. This has been left to the discretion of administrative authorities such as immigration authorities.

In contrast, however, other developing countries investment codes such as the Ghanaian investment code have stipulated the minimum capital requirement for different groups of foreign investors. For instance, in the case of a joint venture between a Ghanaian and non-Ghanaian, the investment by the Non-Ghanaian of foreign capital must be US \$10,000.00 or more; and where the enterprise is wholly owned by the Non-Ghanaian the foreign investment capital must be not less than US\$50,000.00.<sup>129</sup> Similarly the Tanzanian Investment Act<sup>130</sup> provides that enterprises wholly owned by foreign investors or joint ventures shall enjoy the protection of the Investment Act of the minimum capital is not less than US\$300,000.00; whereas local investors are required to

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<sup>128</sup> Section 40, Ibid

<sup>129</sup> See section 19 (2) GIPC Act 1994

<sup>130</sup>

have a minimum investment capital of US\$100,000.00.<sup>131</sup> This is a clear indication of how the Tanzania investment Act seeks to protect local investors.

### **3.2.3 Offences and Penalties**

Unlike the Namibian Investment code, the Zambian investment Act, 1993 does not provide for offence or penalties to offending investors. The Namibian Act states that any false information rendered with regards to obtaining foreign currency shall invite a fine of \$100,00 or a term not exceeding ten years.<sup>132</sup>

The absence of such provisions in the Zambian Investment Act have rendered the functions of the Zambian Investment Centre (ZIC) difficult. The inability to enforce compliance to terms and conditions of investment certificates and investment laws have undermined the function of the Zambia investment centre. Further, the absence of deterrent measures has led to the continuation of illegal investment practices.

### **3.2.4 Local Industry Protection**

The investment codes in other developing countries have closed up certain sectors of the economy to foreign investors to enable local investors to continue in areas where they can competently operate without the existence of unfair competition from a foreign investor in the same sector. For instance, the Namibian Investment Code allows the minister to restrict investment to Namibians in areas where Namibians can provide services or

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<sup>131</sup> See section of Tanzania Investment Act.

<sup>132</sup> Section 16

produce goods adequately.<sup>133</sup> Also, the Ghanaian investment promotion centre Act, 1994 has reserved certain sectors of industry to Ghanaians.<sup>134</sup> These includes sale of anything, in a market, petty trading ,hawking or selling from a kiosk at any place; operation of taxi service and car hire service; all aspects of pool betting business and lotteries, except football pools; and operation of beauty saloons and barber shops.

However, the Zambian Investment Act, 1993 does not limit the areas in which foreign investors can invest. It has opened all sectors of industry to foreign investors. This has posed a major threat on the effective competition of the local industries. For instance, the fast food sector is flooded with foreign investors who bring with them advanced technological know-how and specialized trade secrets that local fast food operators can not compete with. This can be attributed to the inability to attain capital either due to high bank interest rates and rejection of project proposal.

### 3.2.5 One-Stop Shop

Through the Zambia Investment Centre is *de jure* a one shop facility, *de facto* it is not largely because of governmental presence manifest in the roles of relevant ministries<sup>135</sup> as regards investment.<sup>136</sup> Government ministries are inherently bureaucratic and more so refuse to relinquish their authority to the Zambia investment centre.<sup>137</sup> Such administrative barriers have affected the efficiency of the investment centre.

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<sup>133</sup> See section 3 Namibian Foreign Investment Act, 1992

<sup>134</sup> See 18

<sup>135</sup> These Ministries include the Ministry of Home Affairs, Ministry of Mines, Ministry of Lands.

<sup>136</sup> Interview with legal manager, Zambia Investment Centre, Mrs Mwikisa.

<sup>137</sup> For instance, with regards to investment in the mining sector there is no distinct line between the ZIC and the Ministry of Mines. The latter does not want to relinquish authority in investment in the mining sector.

Ultimately, the investor is inconvenienced by having to move from one department to another in the attainment of the relevant documentation.

### **3.2.6 Re- Investment**

With the repeal of exchange control laws, foreign investors can repatriate large portions of profit out of Zambia. However, the Act does not provide for reinvestment of a certain percentage of the profits attained by the foreign investors. Absence of such a provision had led to the foreign exchange deficiency that the country experiences from time to time. A balance has not been made between the need for foreign exchange brought in by investors, and the retainment of a certain amount by the country.

### **3.2.7 Dispute Settlement**

Yet another shortcoming of the Investment Act, 1993 is the absence of a provision on dispute settlement procedures. In the event of a dispute arising between a foreign investor and the Zambian government, the domestic law shall apply unless a clause in the bilateral agreement state the law that shall be applicable.

Though Zambia is a member of the International Centre for the Settlement of Investment Dispute and has domesticated the convention on the Settlement of International Disputes under CAP 42 of the Laws of Zambia, application of the Convention is dependant on the consent of the parties to the dispute. The Act does not provide foreign investors with a choice of procedures as regards the settlement of the dispute. Countries such as Namibia

and Ghana have included dispute settlement procedures in their investment codes.<sup>138</sup>

The absence of such a provision makes potential investors apprehensive because they would like to protect their investment. A comprehensive dispute settlement mechanism assures investors from any possible risks.

### **3.2.8 Tax Incentives**

The Investment Act, provides investors with general incentives which include reduction of income tax paid with regards to profits made from investment. The tax incentives are basically a replica of the ones provided for under the Income Tax Act. They do not offer much attraction to foreign investors. The effect of this is that capital flow is reduced, thereby, affecting the national economic development. More should be done to attract both foreign and local investors.

### **3.3 MINES AND MINERALS ACT, 1995**

As the regulator of the mining sector, the principal Act is expected to ensure, among other things, that mining operations do not cause ecological damage as well as damage to the health of workers and inhabitants of the neighbourhood through air, water and land; and that they comply to the initial proposed investment. However, the Act has failed to provide for the effective adherence to the above mentioned issues.

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<sup>138</sup> See Annex 2 for the dispute settlement procedures

### **3.3.1 Monitoring of Mining Operations**

The Mines and Minerals Act does not provide for the monitoring of the progress of the mining operation. The effect of this is that foreign mining or exploration companies are likely to carry on different mining operation from the proposed and approved investment.

### **3.3.2 Insurance of Mining Right within a Mining Right**

Whereas the Act accords a holder of a mining right the exclusive right to carry out mining operations in the mining area, it does not provide for the insurance of a mining right within a mining right.

Certain investors or holders of mining rights are not interested in exploring the whole mining area designated, but rather, just a portion of it. This leaves the vast majority of the land unutilized. The effect of this is that investors interested in other minerals within the particular area will not be able to acquire such mining rights.

This will have an impact national development which is heavily dependant on the flow of capital into the country.

### **3.3.3 Geological Survey**

Although the Geological Survey Department in Zambia has a role to provide geological, geographical and geochemical data on a country-wide basis, to act as a national depository for all information relating to the geology of Zambia and to provide support

advisory services to the public,<sup>139</sup> such information has not been readily available. Investors have had to employ private geologists to obtain advice on the potential economic mineral occurrences in certain areas. This proves to be costly, time consuming and risky, thus discouraging private investors in the mining industry.

### **3.4 SECURITIES ACT, 1993**

Whereas the attractiveness of the emerging markets represent a fast growing part of the world economy and that they continue to deliver superior returns, the disadvantages of investing in these markets include constraints such as inadequate liquidity, restrictive regulations on investment, heavy reliance on privatisation as a source of capital growth, and poor financial reporting and limited access to information. This is as a result of over ambitious drafting that did not visualize an appropriate stock exchange that would suit the particular developing country. Zambia is such a country, and this has had adverse effects that will be discussed below.

#### **3.4.1 Repurchase of Shares by listed companies**

Generally, a company shall not be a member of its self or of a body corporate which is its holding.<sup>140</sup> This precludes a company with a share capital from purchasing shares or becoming shareholders.

However, other than the exceptions stipulated under section 46 of the Companies Act, 1994,<sup>141</sup> a company may repurchase shares in accordance with section 75 of the

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<sup>139</sup> Brochure on Zambia Investment Opportunities in the Mining Industry prepared by the Ministry of Mines and Mineral Development, p.10

companies Act. The said provision allows a company, upon the accumulation of profits and by a special resolution, to distribute of dividends or bonus in return for the shares.

The effect of this is that the company, upon the repurchase of shares, reduces the paid up capital and issued shares, thereby increasing the unissued shares without increasing the share capital. Section 75 does not limit the extent to which the company can repurchase shares from shareholders. This means that the company can buy back up to ninety-nine percent shares.

The Securities Act, 1993, however, has not provided for the regulation of the repurchase of shares, leaving the companies Act as the only authority governing the repurchase of shares. As s result of the companies unlimited extent to repurchase shares, the reduction of a company's liquidity is likely to occur.

The right to repurchase a large number of shares reduces the number of shareholders thereby having an impact on the number of investors wishing to invest in the particular company. Investors are more comfortable with a capital market that has adequate liquidity allowing for easy entry and exit on the securities market.

Furthermore, the limitation of the ease of finding a buyer or a seller of shares discourages both foreign and local investors. This will culminate in a reduction of capital inflows which ultimately affects national development.

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<sup>140</sup> Section 46 companies Act, CAP 388 Laws of Zambia



### 3.4.2 Mandatory Offer and Capital Markets Development

The Securities Act, 1993 prohibits the takeover of the securities of any company except in accordance with the securities (Takeovers and Mergers) Rules, 1993.<sup>142</sup> The primary purpose of these rules is to afford fair treatment for shareholders who are affected by takeover and merger transaction.

An investor may purchase the majority shareholding by virtue of a takeover transaction in accordance with the securities (Takeover and Merger) Rules, 1993. the acquisition by the investor of thirty-five percent or more shares in a company places a requirement on the investor to extend a mandatory offer<sup>143</sup> to the minority shareholders.<sup>144</sup> An illustration of a takeover is the sale of the majority shareholding in Chilanga Cement, to Financiere Lafarge SA.<sup>145</sup>

Although mandatory offer assures minority shareholders of the stability of the company,<sup>146</sup> it has adverse repercussions on the development of the capital market. One such effect is that it affects the much needed liquidity on the capital markets that is enhanced by a wider number of shareholders.

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<sup>141</sup> A company can be a member when acting as a trustee or representative; and when the company enters into a transaction such as the leading of money

<sup>142</sup> Statutory Instrument No. 170 of 1993

<sup>143</sup> Rule 56 Ibid

<sup>144</sup> These include holders of each class of equity share capital of the company, whether the class carries voting rights or not, and also to the holders of any class of voting non-equity share capital.

<sup>145</sup> See Appendix 1 for further details of the mandatory offer.

<sup>146</sup> Interview with Mr. L. Mosho, Company Secretary and Legal Counsel of Lusaka Stock Exchange, 12, July 2001.

Yet another effect is that the mandatory of offer defeats the purpose of the Zambia Privatisation Trust Fund<sup>147</sup> (ZPTF) which seeks to encourage Zambian participation in the capital market. Although a mandatory offer does not require minority shareholders relinquish ownership of shares held, minority shareholders are likely to sell their shares due to economic constraints on their part. Consequently, the participation of the Zambian public in the capital market is reduced.

A typical example is the takeover of the major shareholding in Chilanga Cement, that is 50.1 percent. Pan African Cement Limited, during a mandatory offer invited a total of 67,910,056 shares tendered by the minority. This increased the shares of Chilanga plc to 168,130,048 giving it a shareholding of 84.09 percent shareholding from the initial 50.1 percent held. This greatly hampers the development of capital markets.

### **3.4.3 Ownership Restrictions in listed Banks**

The Banking and Financial services Act<sup>148</sup> provides that a person can not without prior approval in writing of the Bank of Zambia acquire shares over twenty-five percent. Further section 24 of the Act prevents a major shareholder of a bank from acquiring or maintaining shares in any other bank. These provisions conflict with the idea of free movement of investment within a capital market. Conversely, the companies Act, 1994<sup>149</sup> provides that a public company shall not impose any restriction on the right to transfer any shares of a company. Neither the Investment Act nor the Securities Act

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<sup>147</sup> This is provided for under section 29 of the Privatisation Act, CAP 386. The ZPTF holds shares in trust for citizens of Zambia for divestiture after a state owned enterprise has been privatized.

<sup>148</sup> Section 23 CAP 387 Laws of Zambia

<sup>149</sup> Section 14(5) CAP 388 Laws of Zambia.

provides for an overriding provision to address the restrictions imposed by the Banking and financial services Act. Such conflicts in the investment laws does not appeal to investors. Investors are interested in consistent, complete and orderly investment laws.

#### **3.4.4 Delivery Versus Payment System**

The Lusaka Stock Exchange (LuSE) regulates the offer to sell made by a shareholder and the acquisition of the securities by the purchaser. This is electronically operated through a central securities depository as opposed to the physical use of certificates. The transaction places a delivery obligation and a payment obligation on the purchaser respectively. In this regard, the internationally recognized principle that requires delivery and payments to be simultaneous, final and irrevocable applies in Zambia.<sup>150</sup>

The change of ownership of securities is made at the Central Securities Depository which is regulated by the Securities and Exchange Commission, whereas the payment for the securities purchased is made to a Bank and this is regulated by the Bank of Zambia. The presence of multiple regulators affects the effective operation of a delivery and payment system.

### **CONCLUSION**

This chapter has pointed out the weaknesses flows and shortcoming of the investment legislation. it has also pointed out the inconsistency prevalent in the above mentioned pieces of legislation. In so doing, the Zambian legal framework on investment has been compared and contrasted with other developing countries' investment codes.

## CHAPTER FOUR

### 4. SUMMARY AND CONCLUSION

This paper has examined the investment laws in Zambia. The discussion included the identification <sup>of the</sup> salient provisions contained in the Investment Act, 1993, Securities Act, 1993, Privatisation Act, 1992 and the Mines and Minerals Act, 1995 as well as a critical analysis as regards their efficacy.

At independence, Zambia adopted a liberalised economy that was largely controlled by the European and Asian settlers. Due to the change in the ideological inclinations, the United National Independence Party government decided to take control of the economy. This saw the birth of state owned enterprises through nationalisation of foreign owned enterprises. This was in an effort to increase the participation of the indigenous Zambians.

However, maintenance of these enterprises proved difficult. This led to continuous borrowing of money from the international financial markets in an effort to revamp these industries. Apart from this, the economy was affected by the 1970's oil crisis and the slump of copper prices on the international market. This worsened the debt crisis being experienced in the country. Zambia was in great need of debt relief which could only be obtained through the multilateral funding agencies, that is, the International Monetary Fund and the World Bank.

These multilateral funding agencies placed conditionalities that had to be met in order to obtain funding. These included adopting structural adjustment programmes such as liberalising the economy. These conditionalities were adopted by the new

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<sup>150</sup> Interview with Mr. Lewis Mosho, company secretary and Legal Counsel LuSE 12<sup>th</sup> July, 2001.

government , that is , the Movement for Multi Party Democracy in 1991. Macro economic policies set by the IMF and the World Bank were introduced.

This led to the enactment of various pieces of legislation that would cater for an open market economy. These include the Privatisation Act ,1992, the Securities Act , 1993, the Mines and Minerals Act , 1995, and the Investment Act, 1993.

The advent of private ownership brought with it a number of problems. This was as a result of hurried and ambitious enactment of enabling legislation . It can also be attributed to the tailor-made policies that were not viable and failed to achieve the expected national economic development.

As a result, the efficacy of the laws has been affected. The failure to take into account the need to place laws in conformity with other related laws has led to inconsistencies, conflicting legislation, and lack of co-ordination among regulators involved in the enhancement of investment. The enactment of the Investment laws has also failed to take into account the social and economic conditions pertaining within the country. More focus has been placed on the attraction of investors as a means to attain the much needed flow of capital.

#### **4.1 CONCLUSION**

However, despite the failure to achieve the intended results, there is room for improvement. This can be achieved through the formulation of legislation that is in conformity with the macro economic policies. In an effort to attract investment into the country , the laws must not only target investment, but also seek to achieve economic

development that will benefit the average Zambian citizen.

## **4.2 RECOMMENDATIONS**

Zambia must adopt regulatory and fiscal framework that are complete and consistent. Investors prefer security of rules that make operating conditions clear. Incomplete and inconsistent laws and regulations often allow great ministerial or administrative discretion which can be abused and hence detrimental.

Apart from the regulatory and fiscal frameworks, Zambia must ensure a stable political environment that will maintain the investment policies over a long period of time. Investors seriously study ways to mitigate or reduce risk and carefully analyse the long-term trends for increasing or decreasing the risk of political, social and economic factors. Investors would like to be assured that the pro-private sector investment policies will be sustained throughout the period of investment.

The functioning of a country's Court system is an essential part of any legal framework for business activity. Potential investors will be interested in the competence and independence of the domestic court system, in its accessibility and efficiency, as well as in the possibility to settle out-of-court. Investors are interested in the applicability of impartial arbitration proceedings that are conducted in accordance with sets of arbitration rules widely used international business and often under the auspices of agencies specifically set up for the purpose of handling international cases. Zambia Judiciary has established a Commercial Court and Mediation procedures. Zambia also has an Arbitration Act which includes most of the provisions of the New York Convention on

the Enforcement of Foreign Awards. Hence, the inclusion of these dispute settlement procedures in investment codes reduces an investors apprehension with regards to investing in developing countries and also enlightens the investor on the various dispute settlement procedures available in Zambia.

Political Interference in the operations of regulatory authorities must not be allowed. Regulatory authorities such as the Zambia Privatisation Agency and the Zambian Investment Centre should be assured their autonomy in the carrying out of their functions. Inherent bureaucratic attitudes displayed by government ministries must be done away with. These autonomous bodies must have a fixed financial reservoir that will reduce their vulnerability to political interference.

Further, they must ensure that there is enough manpower to effectively and efficiently carry out its functions. The manpower should consist of skilled personnel.

Offences and penalties must be included in investment regulatory frameworks to ensure compliance of conditions and rules that may be set out for investors. For instance, requirement of disclosure by a Minister upon the purchase of shares must be accompanied by the consequences of non disclosure. The inclusion of offences and penalties helps regulatory authorities to effectively monitor investors.

In developing the investment regime and increasing its attractiveness to foreign or local investors, a functional one stop shop must be achieved. For instance, in the mining sector

information regarding all laws regulations mineral potential, support services, ability of the skilled workforce and key government contracts is essential. It must be readily accessible preferably in a central location and in a format familiar to the investor.

Also, the availability of the relevant authorities, information about investment, investment opportunities, the necessary documents such as licences, work permanent, title deeds at the Zambia Investment Centre would attract investors because costs and time are reduced. This would be well received by investors.

The Zambian Investment code must provide for the minimum requirement on the amount of investment that can be brought into the country. Also, the sort of investment that falls under the Investment Act must be stated. This information will be beneficial to an investor wishing to invest in Zambia.

The Investment Act, 1993 must provide for the examination and registration of technology transfer agreements. This will enable the regulation of the technology being brought into the country. Inappropriate technology transfer will be restricted.

Like the Ghanaian Investment Promotion Centre Act, 1994, the Zambian Investment Act must protect local investment by closing certain sectors of the industry to foreign investors. Zambian entrepreneurs must be given an opportunity to maintain control of areas where they can adequately provide services and produce goods.

Further, the investment code, in the absence of exchange controls must provide for



re-investment. Foreign investors must not be permitted to repatriate all their profits. They should be given a conditionality of ploughing a portion of their profits back into their country either in a new investment or an expansion of the existing investment.

With regard to the securities market, there is need to merge the multiple regulators involved in the capital market into one single authority that would regulate various transactions such as the delivery and payment system. Further, there is need to do away with the regulatory conflict among regulators in Zambia.

In the attraction of investment and the development of the national economy, there is need to create a competitive capital market in Zambia. This will involve the repeal of un-coordinated legal statutes that may restrict investment within the capital market. Regulators must be able to communicate so as to avoid inconsistent and non-uniform formulation and application of rules in dealing with investors. Further, there must be a centralization of contact points in the avoidance of inconveniences that may be caused to the investors.

Zambian participation in the ownership of companies must be encouraged. There is need to pass legislation that will ensure the participation of Zambian citizens in the capital market.

The regulatory environment in the mining sector should be such that investors have certainty of long-term rights to minerals that are to be developed. Further, the regulatory

authorities must ensure that investors comply with the proposed investment . personnel from the Ministry of Mines and Mineral Development must be attached to a foreign exploration company to monitor and ensure compliance to proposed investment.

Part of encouraging private investors in the mining sector is the availability of reliable well-organised geoscientific information. Exploration and mining companies focus their attention on areas that their geologists advise have good potential for economic mineral occurrences. Having information readily available will service to reduce the cost, time and risk exploration. The collection and organisation of such information in a central location would serve the host government well.

There is need for the Mines and Minerals Act to provide for the issue of a mining right by a mining right holder. This will enable other investors to prospect or explore a portion of the mining right holder's mining area. This will provide a reduction of an investors exclusive right and also prevent the presence of unutilized land that an investor may be interested in.

Areas for improvement in the Privatisation Act would be a moment to late because the privatisation process is almost through. However, countries intending to embark on privatisation of its state owned enterprises must view privatisation as part of a comprehensive economic reform programme, than a mere transfer of ownership. It needs a clear re-defining of the rules of the state and the private sector in production and distribution of services.

Further, it is advisable to start with smaller, less complicated companies to minimize the risks of failure. Thereafter, large commercial companies may follow.

The public must be well informed in order to gain credibility and confidence in the programme. This may be done through Television and Radio public forum's newspapers workshops, gazette notices and other ways. Further, employees must be well informed of the possible consequences of privatisation. This will prepare them for possible retirements or retrenchments. The legislation on privatisation must provide for protection of local labour and their conditions such as minimum wages and redundancy or retirement packages, but to mention a few.

In the privatisation of a company the price should not be the driving motive in accepting bids, but a whole range of broad considerations such as financial and technical capability of the investors to build a growing and profitable enterprise and also in achieving the objective of broader participation by citizens.

To account for the generality of the legislation on privatisation and investment, there is need for regulations to give a detailed explanation of investment laws. This will enable better understanding of the investment laws by both foreign and local investors.

## ANNEX 1

In December 2000, Chilanga Cement Plc (“Chilanga” or the Company”) announced that it had been advised by its majority shareholders, Pan African Cement Limited (“PACL”), itself beneficially owned by CDD Group Plc (“CDC”) through Pan African Holding (“PAHL”), that CDC had entered into a Sale and Purchase of Shares Agreement (“SPA”) with Blue Circle Industries Plc (“Blue Circle”) and Financiere Lafarge SA to sell One Hundred Percent (100%) of the shares it owned in PACL. PACL currently owns 100,219,992 (50.1%) of the shares in Chilanga Cement Plc, 75.2% of the share in The Portland Cement Company (1974) Limited of Malawi, and 51% of Mbeya Cement Company Limited of Tanzania.

In terms of the SPA, the purchasers could nominate assignees to take up the purchasers’ rights and obligations. The purchases nominated Lafarge South Africa (Pty) Limited and Financiere Lafarge SA jointly, (“Lafarge”) to take up Seventy-Five Percent (75%) and Twenty-Five Percent (25%) respectively. The SPA had certain conditions precedent that had to be met in order for the transaction to be completed.

All the conditions precedent to the SPA were fulfilled and the sale of the shares in PACL was concluded on 26 April 2001, which resulted in the transfer of the shares in PACL to Lafarge. Therefore, Lafarge is now the ultimate beneficial shareholders of 50.1% of the shares of Chilanga.

With the completion of the SPA, the Securities and Exchange Commission (“SEC”) determined that PACL would be required to make an Offer to purchase the remaining shares from the minority shareholders. This Circular includes the details of the Offer from PACL, provides an analysis of the Offer completed by an independent financial advisor, and summarises the views of the Company’s directors on the Offer and their recommendation. The Circular also indicates the actions that may be taken by Chilanga shareholders.

## **Offer by Pan African Cement Limited**

### **Background**

As you no doubt are aware from the cautionary notices and the announcement in the press made on 7 May 2001, PACL has made an offer to minority shareholders of Chilanga to purchase the 99,819,912 shares in the Company it does not currently own. This Offer has come about as a result of the sale by CDC, the former beneficial shareholders of PACL, of its shares in PACL, which company also owns 50.1% of Chilanga. To provide equal treatment to all Chilanga shareholders, the SEC ruled that PACL had to make the Offer to buy the remaining shares held by the minority shareholders.

### **The Offeror**

While it is PACL that owns 50.1% of the shares in Chilanga and is making the Offer to minority shareholders, of more importance is the fact the ultimate beneficial shareholder of these shares is Lafarge. Lafarge is a subsidiary of Lafarge SA, which is quoted on the

Paris Stock Exchange, and is one of the largest companies in the cement worldwide. Lafarge SA is divided into four separate divisions, those being; i) cement ii) aggregates and concrete, iii) roofing, and iv) gypsum. The cement division now accounts for 50% of the companies growth operating profit. It has operations in over 70 countries, including Uganda, South Africa, Kenya and Cameroun in Africa. The conclusion of its acquisitions of Blue Circle (if successful) and PACL will further extend its African presence.

## **vi. ACTIONS TO BE TAKEN BY SHAREHOLDERS**

Existing Chilanga shareholders have several options to them. Depending upon the option selected, there may or may not be actions that a shareholder will have to undertake. These are described detail below.

### **6.1 A Shareholder May Do Nothing**

A shareholder may choose to do nothing. Taking no action will confirm that a shareholder does not wish to sell any of the shares he or she currently owns. In this case, a shareholder will simply retain his or her existing shares in the Company.

### **6.2 A Shareholder may Sell a Portion of His or Shares in the Company**

As part of the Offer being made by PACL are required under the Security (Takeovers and Mergers) Rules, 1993, a shareholder may elect to sell a portion of the shares he or she currently owns to PACL. If a shareholder elects this option, he or she should contact the sponsoring broker, Pangaea/EMI Securities, or Cavmont Securities, or Intermarket Securities and tender the shares he or she wishes to sell at the Offer Price of US Cents

Nine Point Seven Nine (USCents 9.79) per share by completing the form of tender attached to the Offer Document from PACL. This tender to shares by shareholders wishing to sell a portion of their shares in the Company must be completed, in writing, during the Offer Period as indicated in the timetable on page 2 of this Offer Document and will be concluded as a normal trade over the LuSE on the trade date at the close of the Offer Period.

Unless otherwise advised by an announcement in the press, offers to sell shares by existing Chilanga shareholders must be received in writing by Pangaea/EMI Securities, or Cavmont Securities, or Internarket Securities not later than 17:00 hours on the closing date of the Offer Period, Friday, 8 June 2001. Postal acceptances postmarked by Friday, 8 June 2001 must be received not later than 17:00 hours on Friday, 15 June 2001. Any changes in these dates will be communicated to shareholders via an announcement in the daily press which will appear on consecutive days in both the Times of Zambia and the Zambia Daily Mail.

### **6.3 A Shareholder May Sell All of His or Her Shares in the Company**

As part of the Offer being made by PACL as required under the Securities (Takeovers and Mergers) Rules 1993, a shareholder may elect to sell all of the shares he or she currently owns to PACL. If a shareholder elects this option, he or she should contact the sponsoring broker, Pangaea/EMI Securities, or Cavmont Securities, or Internarket Securities and tender the shares he or she wishes to sell at the Offer Price of USCents Nine Point Seven Nine (USCents 9.79) per share by completing the form of tender

attached to the Offer Document from PACL. This tender of shares by shareholders wishing to sell all of their shares in the Company must be completed, in writing, during the Offer Period as indicated in the timetable on page 2 of Offer Document and will be concluded as a normal trade over the LuSE on the tender date at the close of the Offer Period.

Unless otherwise advised by an announcement in the press, offers to sell shares by existing Chilanga shareholders must be received in writing by Pangaea/Emi Securities, or Cavmont Securities, or Intermarket Securities not later than 17:00 hours on the closing date of the offer period, Friday, 8 June 2001. Postal acceptances postmarked by Friday, 8 June 2001 must be received not later than 17:00 hours on Friday, 15 June 2001. Any changes in these dates will be communicated to shareholders via an announcement in the daily press which will appear on consecutive days both the Times of Zambia and the Zambia Daily Mail.

#### **6.4 Note for Shareholders Holding Physical Shares Certificates**

Some shareholders may still be in possession of Chilanga share certificates. The trading clearing and settlement arrangements at the LuSE are based on the CSD system which does not sue physical share certificates. Accordingly, those shareholders with physical share certificates intending to participate in the Offer are advised to deposit their shares into the CSD system of the LuSE by contacting any one of the three member broking firms of the LuSE.



## **ANNEX 2**

### **The Namibian Foreign Investment Act, 1992 section 13**

#### **13. Settlement of disputes in respect of Status Investment**

- (1) If a person to whom a Certificate is to be issued under section 7 so elects, the certificate shall provide that any dispute between the holder of the Certificate and the Government in respect of –
  - (a) any issue relating to the amount of, or any other matter in connection with, any compensation payable in a case of an expropriation as provided in section 11;
  - (b) the validity or continued validity of the Certificate, shall be referred for settlement by international arbitration.
- (2) Where a Certificate provides for the settlement of disputes by international arbitration shall be in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law in force at the time when the Certificate was issued, unless by agreement between the Minister and the foreign national to whom the Certificate is to be issued, another method of settling the dispute has been chosen and the Certificate so provides.
- (3) A Certificate which makes provision for international arbitration shall constitute the consent of the holder of the Certificate and the Government to submit to arbitration in the manner provided in the Certificate, and any award rendered in any such arbitration shall be final and binding on the holder of the Certificate and the Government.
- (4) Nothing in this section shall be construed –

- (a) in a case where a Certificate does not make provision for the settlement of dispute by international arbitration, as impairing or limiting the right of the holder of such Certificate, in the event of a dispute, to any remedy available to the holder in any competent court in Namibia;
- (b) in a case where a Certificate does make provision for the settlement of disputes by international arbitration, as precluding the holder and the Minister from agreeing that any particular dispute shall not, as provided in the Certificate, be referred to international arbitration, but be heard and finally determined by any competent court in Namibia.

## **Ghanaian Investment Promotion Centre Act 1994 Section 29**

### **29. Dispute settlement procedures**

1. Where a dispute arises between an investor and Government in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
2. Any dispute between an investor and Government in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration as follows: -
  - a. in accordance with the rules of procedure of arbitration of the United Nations Commission of International Trade Law; or
  - b. in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or

c. in accordance with any other national or international machinery for the settlement of investment dispute agreed to by the parties.

3. Where in respect of any dispute, there is disagreement between the investor and the Government as to the method of dispute settlement to be adopted, the choice of the investor shall prevail.

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