

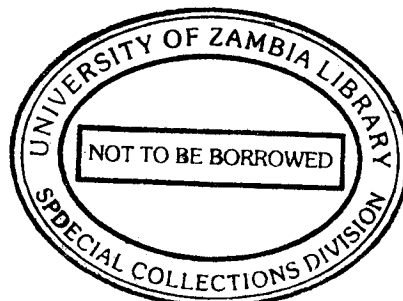
ABSTRACT

At Independence Zambia was a baby born with a copper spoon. The economy thrived under a multiparty free socialist economy. The booming economy was boosted by sufficient foreign exchange resulting from high Copper prices. Towards the end of the sixty's copper prices began to fall. The then ruling party leader decided to nationalize mining copper mines and prominent private companies claiming the country had not benefited from political independence. In the early seventy's falling copper prices exacerbated the situation. Copper prices continued to drop and Zambia was forced into structural adjustment by IMF/WORLD BANK. Increased import costs and low earning from exports of copper led to poverty levels in excess of sixty percent.

The new MMD Government which took over from UNIP in 1991 under the tutelage of IMF/WORLD BANK, embarked on economic reforms which UNIP leaders had ignored. The new Government liberalized the economy, privatized parastatals, established investment centre , export board, small scale industries organization, ZEPZA (which never operationlised) and Zambia Privatization Agency Copper prices had continued to deteriorate resulting in increased demand for balance of payment support. Poverty was attributed to falling trade which manifested in unemployment, reduced investments and worsened the exchange rate. The Zambia Development Agency Act is an attempt to revive the economy through concerted efforts at attracting investments, reviving industry and promoting exports and supporting small scale investors through financing, technical support and provision of data.

**IS THE ZAMBIA DEVELOPMENT AGENCY ACT AN
EFFECTIVE INSTRUMENT OF DEVELOPMENT
THROUGH A ONE STOP SHOP FACILITY**

BY



RICHARD CHAKABA

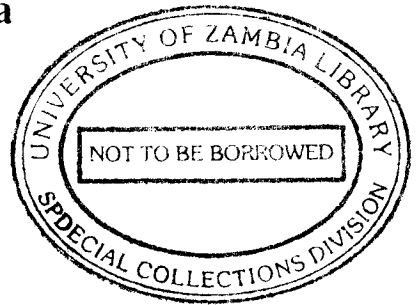
**A dissertation submitted to the faculty of law of the University of
Zambia in partial fulfillment for the award of the Degree of Bachelor of
Laws**

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FEBRUARY 2008

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Signature 

Dated this 21/02/08

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I first and foremost thank the Almighty God for giving me an opportunity to pursue my Studies to this day. God is faithful and with his help all things are possible.

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My family for loving me in spite of my absences from my responsibilities.

For all those that have been there for me during my Studies, thank you.

DEDICATION

I dedicate this Research paper to my daughter TIRZA

GLOSSARY

AGOA	African Growth and Opportunity Act
BITs	Bilateral International Treaty
COMESA	Common Market for Eastern and southern Africa
DA's	Development agreements.
DBZ	Development Bank of Zambia
EPZs	Export Processing Zones
EU	European Union
FDI	Foreign Direct Investment
FNDP	Fifth National Development Plan
FTAs	Free Trade Area
GDP	Gross Domestic Product
HIV/AIDS	Human Immuno-Virus Acquired Immune Deficiency syndrome
JITAP	Joint Integrated Technical Assistance Project
KCM	Konkola Copper Mines
LDI	Local Direct Investment
MCTI	Ministry of Commerce, Trade and Industry
MFEZS	Multifacility Economic Zones
NTES	Non Traditional Exports
SADC	Southern African Development Community
SEDB	Small Enterprise Development Board
SWOT	Strength, weaknesses, Opportunities and Threats.
US	United States
ZCCM	Zambia Consolidated Copper Mines
ZDA	Zambia Development Agency
ZEPZA	Zambia Export Processing Zones Authority
ZIC	Zambia Investment Centre
ZPA	Zambia Privatization Agency
ZRA	Zambia Revenue Authority

STATUTES

The Immigration and Deportation Act, Chapter 123 of the laws of Zambia
The Zambia Investment Act, Chapter 382
The Zambia Privatization Act, Chapter 386
The Zambia Export Development Act
The Zambia development Agency Act
Tanzania Investment Act, 1997
Small Scale Enterprises Development Board (SEOB) Act No. 29 1996
Zambia Export Processing Zones authority
Tanzania Export Processing Zones Act of 2002
Namibia Foreign Investment Act No. 27, 1990
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ABSTRACT

At Independence Zambia was a baby born with a copper spoon. The economy thrived under a multiparty free socialist economy. The booming economy was boosted by sufficient foreign exchange resulting from high Copper prices. Towards the end of the sixty's copper prices began to fall. The then ruling party leader decided to nationalize mining copper mines and prominent private companies claiming the country had not benefited from political independence. In the early seventy's falling copper prices exacerbated the situation. Copper prices continued to drop and Zambia was forced into structural adjustment by IMF/WORLD BANK. Increased import costs and low earning from exports of copper led to poverty levels in excess of sixty percent.

The new MMD Government which took over from UNIP in 1991 under the tutelage of IMF/WORLD BANK, embarked on economic reforms which UNIP leaders had ignored. The new Government liberalized the economy, privatized parastatals, established investment centre , export board, small scale industries organization, ZEPZA (which never operationlised) and Zambia Privatization Agency Copper prices had continued to deteriorate resulting in increased demand for balance of payment support. Poverty was attributed to falling trade which manifested in unemployment, reduced investments and worsened the exchange rate. The Zambia Development Agency Act is an attempt to revive the economy through concerted efforts at attracting investments, reviving industry and promoting exports and supporting small scale investors through financing, technical support and provision of data.

CHAPTER ONE

1.0 INTRODUCTION

In October 1991, the new MMD government took office on a platform of economic reforms. Under the tutelage of IMF/World Bank a number of reforms were legislated to transfer the economy from a state controlled economy to one driven by the private sector.¹ The reforms among others were to transfer public companies to private sector,² to boost foreign direct investment,³ to increase non traditional exports⁴, to boost investment in particular products and areas,⁵ and boost small scale entrepreneurship.⁶ However, in 2006 the Zambia Privatization Act, the Zambia Investment Act, the Export Development Act, the Zambia Export Processing Zones Act, the Small Scale Development Act, were repealed and merged into the Zambia Development Agency Act(ZDA Act).⁷ The ZDA Act created the Zambia Development Agency which assumed the functions of the five organizations created under the repealed five acts referred to above. The aims of the new Act are to foster economic growth and development by promoting trade and investment through an efficient, effective and coordinated private sector led economic development strategy; to establish the Zambia Development Agency as a one stop facility; to streamline bureaucratic procedures and requirements faced by investors etc.⁸

1.1 Research Objectives

The proposed research is an attempt at identification of weaknesses in the ZDA Act in the context of stated objectives. Going by the genesis of the new Act, the

¹ www.state.gov.2/8/2007

² Zambia Privatization Act, Cap 386

³ Zambia Investment Act, Cap 385

⁴ Zambia Export Development Act, Cap318

⁵ Zambia Export Processing Zones Authority, Act no. 7 of 2001

⁶ Small Scale Enterprises Development Board(SEDDB)

⁷ Zambia Development Agency Act no.11 of 2006.

⁸ *ibid*

new Zambia Development Agency has taken over a wide range of functions. The aim is to streamline the functions performed by the aforementioned institutions in order to make Zambia an attractive foreign direct investment destination. On the other hand, the Act provides for post privatization activities, privatization and commercialization of remaining state owned enterprises, promotion of exports and Greenfield investments, establishment of a trade development fund to be used in financing activities that support micro and small business enterprises and other business enterprises to be determined by the Board of the Agency and help Zambians acquire shares in publicly and privately owned companies, as well as trade and industrial development.⁹ Thus, the Act has various sections dealing with the various functions which have been taken over by the new Act. Furthermore, the bill provides for implementation of the various sections at different times in order to facilitate a smooth transition to a one stop-shop. The question one asks is how does the new Act deal with the fact that the functions taken over were performed by going concerns whose workers and activities were assumed by the new Agency at implementation of new Act?

It should be mentioned here that the Zambia Export Processing Zones Authority created under Act no.7 of 2001 did not takeoff due to contentious issues raised by various stakeholders. The research will answer the question how was the new Act formulated in order to address the shortcomings of the hitherto amalgamated Acts.

3.0 Justification/Rationale

The ZDA Act is a new act legislated in 2006 and implemented in 2006. Functions of hitherto bureaucratic institutions have been taken over by the Agency created under the new Act.¹⁰ Consequently the new Act must address concerns of a huge number of stakeholders. A number of workshops have been held by various stakeholders to examine the new Act in the context of their respective interests. So far none have looked at the bill in its totality. This research is an attempt at the wholesome examination of the Act in the quest to address the desire to remove bureaucracy inherent in the repealed bills. The study will also look at how the

⁹ ibid

¹⁰ ibid

existing Acts that impinge on development in the context of ZDA Act will affect the provisions in the new Act and how these challenges should be addressed.

4.0 Research Methodology

The research will adopt desktop study of various legislation relating to Zambia Development Agency as well as consultancy papers on the Act. Desktop approach will also cover the process of implementing the act. Interviews will be conducted with stakeholders who include former executives of the five dissolved institutions, relevant Government Ministries, Zambia Development Agency authorities and Zambia Chamber of Commerce.

6.0 Study Outline

The study final presentation will be in six chapters. The chapters will be in the following format:

6.1 Chapter One

This is mainly the introduction part of the study. The country profile will be given here. The genesis of economic reforms will be epitomized. The rationale behind the Zambia Development Agency Act will also be explained. Finally the objectives will be summarized.

6.1 Chapter Two

The process of drafting the Zambia Development Agency Act will be outlined. Views and recommendations from key stakeholders regarding the act will be presented. An attempt will then be made to identify drafting mistakes.

6.2 Chapter Three

This chapter will be on a comparative study of similar legislation in a few commonwealth countries .i.e. South Africa, Botswana, Australia etc. Lessons to be learnt from these countries will close the chapter.

6.3 Chapter Four

The chapter will be on research findings. The findings will centre on stakeholder perceived weaknesses of the Zambia Development Agency Act and related legislation Conflicts.

6.4 Chapter Five

This chapter will trace the process of implementation, highlight difficulties experienced and summarize recommendations by key stakeholders.

6.6 Chapter Six

The chapter is on conclusion of the study. Recommendations required to achieve the objectives of the Zambia Development Agency Act will be given by this student.

Furthermore the benefit of the study to this student will be shown.

CHAPTER TWO

2.0 PROCESS OF ECONOMIC REFORMS

This chapter traces the process of development since Zambia's independence. The major reforms that characterized attempts to offset the results of falling copper prices are discussed. Legislation repealed to pave way for new ZDA act is examined. The objectives of the new ZDA act are also brought out.

2.1 Country Profile

Zambia attained independence in 1964 with a population of 3.5m and copper prices high on the world market. At independence Zambia had perhaps the least developed national human resource of all emerging Africa.¹¹

The independence education profile was less than a hundred university graduates- which included one lawyer, one engineer and two doctors. There were also 1200 full Cambridge School Certificate holders and less than 1 percent (32000) of the population having completed the full primary course at the time.¹² After independence, government took measures to increase access to education. The priority of government was to meet the urgent need of training high level manpower for the country.¹³

The decade after independence was characterized by broad based expansion. Enrolment in secondary schools increased by over 450 percent and students in form v increased nearly 10 times. The University of Zambia which opened in 1965 had between 1969 and 1974 produced 860 graduates.¹⁴

¹¹ J.M.Mwanakatwe, *The Growth Of Education In Zambia Since Independence*, Lusaka. Oxford University Press(1968)

¹² Jaspa Employment Advisory Mission, *Narrowing the Gaps*, (1977) ILO, Addis Ababa.

¹³ J.M.Mwanakatwe, *The growth of Education*, 1968.

¹⁴ Jaspa Employment Advisory Mission, *Narrowing the gaps*,

The booming economy made it possible for this expansion. During the period covering 1965 to 1970, the country's real GDP increased by 83 percent at a rate of 10.6 percent annually or 8.2 percent per capita.¹⁵

In 1969 it had become apparent that the gap between goals and what was financially feasible was widening. The government concluded that independence had not brought the intended economic emancipation.¹⁶

2.2 Genesis of Reforms

When Zambia attained independence it boasted of a vibrant private sector. But this economic and business profile was eventually lost with the coming of nationalization.¹⁷

In 1969 government acquired a 51 percent stake of equity in two mining companies, namely Nchanga Consolidated Copper Mines (NCCM), and Roan Consolidated Mines Ltd (RCM) by issue of Zambia Industrial and Mining Corporation Ltd (ZIMCO) bonds. In 1973 government redeemed the ZIMCO bonds and took full control of operations of the mining companies.¹⁸

The country's economy was affected adversely in the early 1970's by the rise in oil prices and the drop in copper prices. At the time copper formed the backbone of the economy and contributed 90 percent of export earnings. Government revenue declined sharply and balance of payments and budget deficits began.¹⁹

In 1975 in a landmark speech dubbed the 'watershed speech', Dr Kaunda expressed concern over the huge bill that government had to shoulder as a result of subsidies, grants and other expenditures to parastatals. He proposed a drastic cut on subsidies to parastatals by as much as 60 percent because of the seriousness of the economic situation. Among other changes, all freehold titles

¹⁵ Jaspa Employment Advisory Mission, Narrowing the gaps.

¹⁶ J. Molloy, *African Aims and Attitudes*, Cambridge university Press (1974)

¹⁷ Richard Sakala, *Difficult Decisions Changing a Nation*, Sentor Publishing (2001)

¹⁸ Sakala, *Difficult Decisions*

¹⁹ UNCTAD, *Investment Policy Review Zambia*, United Nations, p3

to land were abolished, while all vacant and undeveloped lands in urban areas were reverted to the state.²⁰

2.3 Economic Reforms

In October 1991, the new Movement for Multiparty Democracy (MMD) won a landslide election and formed government on a platform of economic reforms²¹. At the time, government was in debt and was unable to maintain investment in the copper industry. Declining terms of trade for commodity prices worsened the situation. Growth National Product(GDP) had averaged 1.5 percent in the 1970's, 1.4 percent in the 1980's and 0.3 percent in the 1990's. Zambia's economic growth was second lowest in Southern African Development Community (SADC) after Mozambique, a country experiencing civil strife. It was well below the SADC average of one percent and Sub Saharan African Average of 2.4 percent.²².

Under the tutelage of IMF/World Bank a number of reforms were legislated to transfer parastatal companies to private sector, to boost foreign direct investment(FDI), to increase non traditional exports, to boost investment in particular products and areas, and promote small scale entrepreneurship.²³

The new MMD government introduced various pieces of legislation to reverse the decline of the previous decades. The Investments Act of 1993 was the main regulator of investments and Investment guarantees.²⁴ The Act provided for both general incentives and special incentives. General incentives applied to any investor investing in a business enterprise under the Act.²⁵ Income tax on portion of income originating from the export of non traditional products was at a rate of fifteen per centum.²⁶ Income tax on income received from a rural enterprise for each of the first five years for which such business was carried on was reduced by such amount as is equal to one seventh of that tax which would

²⁰ Kenneth Kaunda, Speech to National Council of UNIP, (1975)

²¹ www.state.gov.2/8/2007

²² UNTAD, Investment Policy Review of Zambia, United Nations, p3

²³ www.state.gov.2/8/2007

²⁴ The Investment Act cap 385

²⁵ *ibid*

²⁶ *ibid*

otherwise be so chargeable on such income.²⁷ The act also provided for capital allowances deducted in ascertaining gains or profits at special rates.²⁸ Income received by way of divided from farming was exempt from tax for the first five years of operations.²⁹ Where double taxation agreements existed between Zambia and another country, the foreign tax payable by the investor was allowed as a credit for that investor against Zambian tax.³⁰ Investment in mining attracted deductions provided for under the mines and minerals Act.³¹ Notwithstanding the provisions of the Immigration and Deportation Act an investor who invested a minimum of two hundred and fifty thousand United States Dollars or the equivalent in convertible currency and who employed a minimum of ten persons was entitled to a self employment permit or resident permit.³² Small scale enterprises were exempt from tax for the first three years of operation in an urban area, and for the first five years of operation in a rural area.³³ Tax incentives relating to investments on the Lusaka Stock Exchange (LUSE) included a reduction of corporate income tax to 30 percent, no restriction on foreign ownership and shareholding levels and no capital gains tax.³⁴ Other special incentives included a commitment by Investment Centre to assist an investor in identifying suitable land for investment and applying to the responsible authorities for the land in accordance with established procedures.³⁵ Furthermore the investor was assisted in obtaining water, electricity, transport and communication services and facilities, as well as in obtaining any license or authorization for the purpose of commencing or operating the business enterprise.³⁶

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ *ibid*

The Export Development Act 1996 established the Export Council and the Export Board of Zambia.³⁷ Export Board of Zambia had the mandate of promoting the development and growth of non traditional exports(NTES), including services, thereby facilitating the diversification and expansion of the export base and increasing export revenue.³⁸

In 1992 Privatization Act was passed by Parliament. The Zambia Privatization Agency was the statutory body established.³⁹ The functions of the agency included the following, that is to say: implementing the privatization program according to the policy guidelines issued by the cabinet;⁴⁰ overseeing all aspects of the implementation of the privatization program in Zambia;⁴¹ monitoring progress of the privatization program;⁴² recommending to the cabinet the most appropriate method of sale for each state owned enterprise to be privatized;⁴³ maintaining close liaison with all relevant institutions in the process of privatization.⁴⁴

The Zambia Export Processing Zones Authority was established in 2001 under the Act.⁴⁵ The functions of the Authority among others were to develop export processing zones;⁴⁶ consider and determine applications for licenses under the act;⁴⁷ provide services for obtaining other relevant licenses and facilities;⁴⁸ administer, control and regulate export processing zones in order to ensure compliance with this act.⁴⁹

The Small Enterprises Development Act provided for the establishment of the Small Enterprises Development Board and defined its functions;⁵⁰ established

³⁷ Export Development Act (1996) cap,318

³⁸ ibid

³⁹ Zambia Privatization Act, Cap 386

⁴⁰ ibid

⁴¹ ibid

⁴² ibid

⁴³ ibid

⁴⁴ ibid

⁴⁵ Zambia Export Processing Zones Authority, Act No.7 of 2001.

⁴⁶ ibid

⁴⁷ ibid

⁴⁸ ibid

⁴⁹ ibid

⁵⁰ Small Scale Enterprises Development Board(SEDB)

the Small Enterprises Development Fund;⁵¹ provided for the development of the micro and small enterprises;⁵² provided for the registration of micro and small enterprises.⁵³

Part iv of the Act contained financial services and incentives.⁵⁴ The Board in order to facilitate the flow of financial services to the small sector , on its own or in corporation with other promotional agencies , would identify small entrepreneurs, institutions and projects which require financial assistance;⁵⁵ provide information on source of finance and promote local investment for micro and small enterprises;⁵⁶ assist micro and small enterprises with the preparation of business plans, project proposals and other loan application documents with a view to promoting accessibility to financial resources.⁵⁷ Incentives included exemption from the payment of licensing fees under any law;⁵⁸ and exemption from the payment of rates on factory premises for the first five years.⁵⁹ Furthermore, the trades licensing act did not apply to an enterprise registered under this act.⁶⁰ And any financial institution providing loan or other financial relief or facilities to registered micro and small enterprises were entitled to exemption from payment of tax on income or interest payable on and received from loans provided to an enterprise carrying on manufacturing activities.⁶¹

2.4 Post Reform Country Performance

Zambia's population grew from 10.7million in 2000 to 11.5million in 2004 or 7.74 percent during the period. ⁶²

⁵¹ ibid

⁵² ibid

⁵³ ibid

⁵⁴ ibid

⁵⁵ ibid

⁵⁶ ibid

⁵⁷ ibid

⁵⁸ ibid

⁵⁹ ibid

⁶⁰ ibid

⁶¹ ibid

⁶²UNCTAD, Investment Policy Review of Zambia(2005),United Nations,

Zambia's GDP at market prices grew from an average of 2.4 (1998-2001) to 3.3 in 2002, 5.1 in 2003, 5.4 in 2004. GDP per capita (dollars) grew from 317.1 in 2000 to 470.6 in 2004. Inflation declined from 26.0 in 2000 to 18.0 percentage in 2004.⁶³(Appendix 1)

GDP by sector in percentage shows that agriculture sector recorded a drop from 22.3 in 2000 to 20.9 in 2004. Industry GDP in percentage grew from 25.3 in 2000 to 29.7 in 2003 before dropping to 26.9 in 2004. Manufacturing recorded consistent modest increases from 11.4 in 2000 to 12.1 in 2004. Mining recorded increases from 4.1 percentages in 2000 to 7.8 percentage in 2003. Services recorded a minimal drop from 52.4 percentages to 52.2 in 2004.⁶⁴

FDI inflows (millions of dollars) increased from 121.7 in 2000 to 334.0 in 2004 due to the opening up of the economy in the 1990's.⁶⁵ This was attributed to privatization program, investments in copper and cobalt extraction, and Greenfield investments in the agriculture sector particularly horticulture and floriculture production, and in tourism.⁶⁶

A linkage has been between FDI inflows and the price of copper (appendices 2). Since 2003 the copper prices increased from \$1560 per metric ton in 2002 to \$2816 in 2004.⁶⁷The major two new mines were Kansashi mine by first Quantum Minerals from Canada and the Lumwana Mine by Equinox Minerals from Australia. Other mines which were invested in were Ramcoz Mine in Luanshya and Konkola Copper Mines (KCM), the largest copper producer in Zambia.⁶⁸

Copper as percentage of total exports was 60.3 in 2000, 63.5 in 2002 and thereafter declined to 61.9, 58.0, 52.1, in 2002, 2003 and 2004 respectively. Total exports on the other hand had increased steadily from US \$ millions (fob) 746.0 in 2000 to 1067.2 in 2004⁶⁹. FDI has contributed to the growth of non-

⁶³ ibid

⁶⁴ ibid

⁶⁵ ibid

⁶⁶

⁶⁷ ibid p 10

⁶⁸ ibid,p5

⁶⁹ ibid,p 5

traditional exports (i.e. non-natural resources) and an overall diversification.⁷⁰ Cotton and tobacco have emerged as expanding export sectors(17 percent of exports in 2004 compared to 8 percent in 2000) and metal manufactures(mainly base metals, including copper waste and scrap) recorded an increase , rising from 1 percent in 1995 to 7 percent in 2000 and 4 percent in 2004.⁷¹ Thus FDI inflows had made a modest contribution to the much needed diversification of the economic base and exports.

Exports of goods and services (percent of GDP) increased from 21.1in 2000 to 30.6 in 2003 before declining to 19.8 in 2004.⁷²

During the period 2000 to 2004 population living below the national poverty line was in percentage 72.9 in 2000, 72.9 in 2001, 72.9 in 2002, 72.9 in 2003.⁷³

The Human Development Index (HDI) rank was 153 in 2000, 153 in 2001, 163 in 2002, and 166 in 2003.⁷⁴

The period 1999 and 2002 was of consecutive growth with real GDP rising 3.7 per annum in spite of depressed and falling copper prices and the departure in 2002 of the largest foreign investor (Anglo America) in copper production⁷⁵.The trend of falling GDP seems to have been reversed as a result of the new approach to economic management put in place in the late 1990's focusing on fiscal discipline, better governance , and the promotion of economic growth.⁷⁶

During the period 1996 to 2000 Zambia's FDI performance at the average of 161.4 in millions of dollars was lower than the SADC average of 6470.9 millions of dollars, and the SADC minus South Africa average of 4258.5 million of dollars. The performance was lower than Ghana, Mozambique, South Africa and LDC's. Zambia's performance was thus better than Botswana(72.3),

⁷⁰ Ibid, p11

⁷¹ Ibid,p 11

⁷² Ibid, pxi

⁷³ Ibid, p xi

⁷⁴ Ibid,p xi

⁷⁵ Ibid

⁷⁶ Ibid, page6

Lesotho (30.1), Namibia (99.2), Uganda(260.4), Tanzania(110.7).(see appendices 3).⁷⁷

In 2001 Zambia enacted ZEPZA Act for development of export processing zones. The Act was repealed in 2006 without having been implemented. Reasons given were that the government would have lost revenue if the incentives contained in the act were accessed by existing companies who were under the existing tax regime but qualified to be in the zones as they exported eighty five percent of their commodities. The Act was also found to be discriminatory to local investors who were just beginning to export and could not meet the thresholds to qualify for incentives under the act.⁷⁸ Furthermore, government had hoped that one or two big investors would express interest to put up a processing zone but none was forthcoming. In fact, government itself had a problem to finance the zones.⁷⁹

The Mozambique decree no. 62/99, of September 1999 introduced industrial free zones (IFZ), the equivalent of ZEPZA. The provision was that an application for IFZ should be reviewed and approved taking into account principally, the micro and macro economic impact of the undertaking and provided that at least eighty five percent of the annual production is to be exported.⁸⁰

In the period 2001 to 2004 Zambia's FDI inflows grew from 161.4 to 164.9 millions of dollars (average)⁸¹. The FDI inflows were better than Ghana (106.0), and Lesotho. Botswana had more than trebled its inflows from 72.3 million dollars average to 225.0 million dollars average. Mozambique increased its inflows from 178.5 to 267.9 million dollars average. Namibia more than doubled its inflows from 99.2 to 245.3 million dollars average.⁸² Namibia had introduced IFZ in 1994.⁸³ Uganda's inflows increased from 260.4 to 473.4 million dollars average. Tanzania increased from 110.7 to 200.5 million dollars

⁷⁷ Ibid, page 6

⁷⁸ Interview: John Mulongoti 3/2/2008

⁷⁹ ibid

⁸⁰ Mozambique Decree no. 62/99, of 21 September 1999

⁸¹ Investment Policy Review of Zambia

⁸² ibid

⁸³ Namibia Export Processing Zones Act of 1994

in the period 2001 to 2004.⁸⁴ Tanzania had introduced its Export Processing Zone Act in 2002.⁸⁵

Zambia's export performance has been high in cotton yarn, fresh flowers, fresh vegetables, leather products, honey, and paprika.⁸⁶ The commodities have performed in attractive markets. Promotional efforts should aim at broadening the supply capacity.⁸⁷ The underachievers in attractive markets are,soya beans, cheese, handicrafts,, processed fruits, wheat flour, blankets and toweling.⁸⁸ Performers in unattractive markets include major export industries, gemstones, sugar, tobacco, and cotton.⁸⁹(Appendix 4)

2.5 Statement of the Problem

Overall, Zambia's FDI inflows have not changed significantly in the period 1991 to 2005.⁹⁰ On the whole , FDI has been concentrated in the mining sector⁹¹.This has occurred in spite of reforms to diversify the economy.

The rise in FDI since 2003 is explained by the rise in copper prices by 80 percent from \$1560 per metric ton in 2002 to \$2816 in 2004.⁹²It is estimated that the mining sector attracted more than half of FDI through foreign owners First Quantum of Canada, Equinox of Australia, JW of Australia and Vendata Resources of UK.⁹³ However, these Investors are relatively small when compared to sector leaders such as BHP Billiton, which has a market capitalization of \$123 billion.⁹⁴ Obviously, Zambia's reform programme needs to go further.

Zambia's privatization of the Zambia Consolidated Copper Mines sold in seven bundles was very controversial. In each case during the first stage of sale, buyers were able to negotiate legal stability contracts called 'Development

⁸⁴ Investment Policy Review of Zambia

⁸⁵ Tanzania Export Processing Zones Act of 2002

⁸⁶ Jitap, Narrowing the Gaps, page 25

⁸⁷ Ibid ,page 21

⁸⁸ Ibid, page 21

⁸⁹ Ibid, page21

⁹⁰ UNCTAD,Investment Policy Review of Zambia(2005),United Nations.

⁹¹ Ibid,page 5

⁹² Ibid, page 5

⁹³ Ibid, page 6

⁹⁴Ibid page 5

Agreements,(DAs) lasting twenty years. These contracts provided special fiscal terms for the new private owners. The terms of the development agreements, which with hindsight of strong copper prices, appear too generous.⁹⁵

By international comparison Zambia today earns far less from its mining activities than any other mining country in the world. Average effective tax rate at 31.7 percent is 8 percentage points lower than the next lowest country in the world. Better rates are, Mozambique at 53 percent, Angola at 52.9 percent, Botswana at 49.1 percent, Namibia at 48.2 percent, Tanzania at 45.4 percent, Indonesia at 45.2 percent, Australia at 40.5 percent, Peru at 39.2 percent. ⁹⁶For the mining industry the fiscal regime is lighter than in many other countries in terms of royalties and taxes, and a number of financial incentives are also provided. These companies currently enjoy reduced tax levels; mineral royalty tax at 0.6 per cent, copper and cobalt price participation fees are tax deductible, exercise on electricity is not charged (usual rate is 5 percent), company tax rate is reduced to 25 percent (from 35 percent) and losses can be carried forward for a period of 20 years, withholding tax on interest, dividends, royalties and management fees paid to shareholders and affiliates is exempted, duty free importation of capital equipment and utility vehicles is allowed.⁹⁷

The investments made by investors have brought them huge returns. However, significant revenue to the government has been foregone. This revenue could have been useful in funding the infrastructure upgrade essential to Zambia's development.⁹⁸

In January 2007 the government made changes to the mining tax regime in an effort to secure more benefits from the mining sector. After these changes were legislated, the government announced it would negotiate with holders of the development agreements so that they move to the 2007 regime voluntarily .Nothing happened as the holders were not willing.⁹⁹ The government has now decided to introduce a new fiscal regulatory regime in order to bring about an

⁹⁵ Ibid page 21

⁹⁶ Times of Zambia, 19th January 2008 page1

⁹⁷ Ibid page 1

⁹⁸ Ibid page 1

⁹⁹ Ibid page 1

equitable distribution of the mineral wealth between the partners. The new regime introduces a windfall tax and a variable profit tax that has been designed to work in periods of both high and low prices and for both low and high cost mining projects. ¹⁰⁰The measures will be legislated in the near future and the mining companies will react to measures.

The involvement of FDI in industry is linked to production of inputs for the mining sector and food and beverage for the local market. ¹⁰¹Business relationships between foreign affiliates and local companies are limited. In the case of machinery, however, the supporting companies are also often foreign affiliates who only have a marketing presence, importing their products from abroad. ¹⁰²

Recent FDI is linked to acquisition of existing assets under the government's privatization programme. ¹⁰³ The main foreign investors purchasing privatized assets such as CDC and Lonrho had already had a long standing presence and were expanding their shareholding in these companies. ¹⁰⁴

Zambia has underperformed in using FDI in support of development and poverty reduction. Even though it has in many respects greater potential to attract FDI than other LDCs in the region, it is, relative to population and size of economy, being outpaced by its neighbors. ¹⁰⁵Moreover spillovers from FDI to local enterprises, including technology transfer have been rather limited, and have not contributed to strengthening competitive production and diversifying Zambia's production and export base. ¹⁰⁶

Does the Zambia Development Act legislate radical reforms in the sphere of trade and investment and creation of a new structure and organization that would completely correspond to the condition of economic activity Zambia finds herself in.

¹⁰⁰ Ibid, page 1

¹⁰¹ Ibid, page 42

¹⁰² Ibid, page 11

¹⁰³ Ibid, page 5

¹⁰⁴ Ibid, page 8

¹⁰⁵ Ibid, page 3

¹⁰⁶

2.6 Research Questions

How will the new ZDA act work in practice? What powers and duties are still required? What institutional framework has been put in place? To whom is the ZDA act intended to apply? Are some provisions ambiguous? Are there exemptions to provisions? Will there be authority to make regulations? If so what are the regulations intended to do? What other enforcement provisions might be necessary (to compel institutions that deal with investments and business to facilitate provisions in ZDA act) Are transitional provisions necessary? What has been the experience by countries in the Region as far as linkage between development and foreign direct investment is concerned? How does Zambia compare with regional post reform performance? Is the Act framed to advance the more active utilization of foreign trade in the acceleration of development? Does Zambia's share of foreign trade look likely to increase to the level of developmental needs by the effective implementation of new act? Is the Act framed to build new and promising relations with foreign countries to facilitate trade?. Does the act have a clear goal in foreign trade. Has the Act been framed to achieve substantial, far reaching and long term changes in the structure and management of foreign trade and Investment?

2.7 Methodology

The study had a two pronged approach .Both qualitative and quantitative data was collected through primary and secondary sources.

Data on qualitative aspects was collected through desktop approach and interviews to highlight issues of objectives, policy .and challenges of development in the Zambian context. Using the internet legislation on Investment Laws of SADC countries, current and previous investment reviews of Zambia and other Commonwealth Countries, cost of setting up business, journals and periodicals was collected. And using referenced books the meaning of development in the Zambian context was understood.

Data on quantitative aspects was collected through desktop approach to highlight issues of economic indicators and ranking in comparison with other countries.

CHAPTER THREE

3.0 ZAMBIA DEVELOPMENT AGENCY ACT

3.1 Preamble

An Act to foster economic growth and development by promoting trade and Investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy;¹⁰⁷ to establish the Zambia Development Agency as a one stop facility which will ensure among other matters, client focus, dialogue with the private sector and create confidence in public sector support for business, to provide for the functions and powers of the Agency;¹⁰⁸ to attract and facilitate inward and after care investment;¹⁰⁹ to provide and facilitate support to micro and small business enterprises; to promote exports and globalization;¹¹⁰ to streamline bureaucratic procedures and requirements faced by investors¹¹¹; to facilitate infrastructure development and local services;¹¹² to promote Greenfield investments through joint ventures and partnerships between local and foreign investors; to promote and encourage education and skills training so as to increase productivity in business enterprises;¹¹³ to encourage measures to increase Zambia's capacity to trade and enable business to participate in a competitive global environment;¹¹⁴ to ensure that the private sector takes advantage of and benefits from international and regional trade agreements;¹¹⁵ and to provide for matters connected with or incidental to the foregoing.¹¹⁶

¹⁰⁷ Zambia Development Agency Act(Act no. 11 of 2006),Preamble,73

¹⁰⁸ Ibid, 73

¹⁰⁹ Ibid, 73

¹¹⁰ Ibid, 73

¹¹¹ Ibid, 73

¹¹² Ibid, 73

¹¹³ Ibid, 73

¹¹⁴ Ibid, 73

¹¹⁵ Ibid, 73

¹¹⁶ Ibid, 73

3.2 Purpose/Rationale

The main focus of the Agency was to create an efficient one-stop facility and ensure that investors and exporters are not inconvenienced in any way by bureaucracy.¹¹⁷ The existence of many statutory bodies with very identical functions was a bureaucracy that frustrated would be investors and exporters alike.¹¹⁸

Collectively, the five institutions under the repealed Acts represented vital elements in the development of the Zambian economy and shared the main purpose of furthering the economic development of Zambia.¹¹⁹

A number of reasons were given for the failure by the five statutory bodies to fulfill their mandates. The Government had only been able to fund a maximum of about 15 percent of their respective requirements and, consequently their failure to execute their mandate.¹²⁰ Investors and exporters alike were subjected to a number of licenses when, in fact, one license could serve the purpose. The five institutions were all involved in promoting investment. ZPA was involved in attracting investment in existing public companies sold as going concerns, EBZ in promoting investment in industries dealing in non traditional exports, Investment centre in dealing with both local and FDI in the broader context SEDB in investment by

locals and ZEPZA in export oriented investment in designated infrastructure.¹²¹

The cost of maintaining five different Boards Chief Executives was too exorbitant and at the expense of the activities the five institutions were supposed to carry out.¹²² It was felt that there was duplication of effort and responsibilities when this could be avoided through the creation of an effective one-stop facility.¹²³

¹¹⁷ Report of the Committee on Economic Affairs and Labor on the ZDA bill no.5 of 2006.National Assembly, page 11

¹¹⁸ Ibid, page 11

¹¹⁹ Ibid, page 11 Ibid, page 11

¹²⁰ Ibid, page 11

¹²¹ Interview John Mulongoti Chief Economist, MCTI

¹²² Interview: Margaret Chimanse ZDA 6/2/2008

¹²³ Ibid

The conclusion was that the bottlenecks cited above made it necessary to create the One Stop Agency and that the new Act would create an agency that would be structured in a manner that did not place additional bureaucracy burdens, reduces on running costs, and ensures that there is balanced development in the country.¹²⁴

Under the ZDA Act there would be only one Chief Executive as opposed to five Chief Executives as then obtaining.¹²⁵

The functions that the ZDA will carry out include investment promotion, export promotion, the post-privatization asset disposal/management, development of small scale industries and, indeed, the creation of the multi-facility Economic Zones.¹²⁶

3.3 Objectives

The Agency under the ZDA Act was to assume the functions of the organizations in question, including the additional functions that the Government deemed necessary for its enhanced functionality.¹²⁷

It was claimed that the Act would answer complaints by private organizations of having been left on their own to wade through the maize of regulatory institutions, some to have as many as sixty-five licenses in order for them to operate.¹²⁸ The Act was an answer to an earlier World Bank Report on setting up business in Zambia which cited the maize of Regulatory Institutions as one of the major factors that impedes trade and, particularly, investment into the country.¹²⁹ The report claimed sheer bureaucracy of setting up business in Africa caused reduced foreign Direct Investment (FDI) and Zambia was one of the countries identified as suffering from such constraints¹³⁰

¹²⁴ *ibid*

¹²⁵ *ibid*

¹²⁶ Daily Parliamentary Debates, Tuesday 14/3/2006

¹²⁷ Daily Parliamentary Debates, Tuesday 14/3/2006

¹²⁸ Daily Parliamentary Debates, Tuesday 14/3/2006

¹²⁹ Daily Parliamentary Debates, Tuesday 14/3/2006

¹³⁰ Daily Parliamentary Debates, Tuesday 14/3/2006

3.4 Institutional Framework

The Act establishes the Zambia Development Agency as a body corporate.¹³¹ The functions of the Agency are to further the economic development of Zambia by promoting efficiency, investment and competitiveness in business and promoting exports from Zambia.¹³²

The Act also constitutes a Board of the Agency, composed of sixteen members out of whom are six from the private sector.¹³³

In its formative stage ZDA continued to perform all the functions that were previously undertaken by the dissolved authorities. This is in addition to new functions in the Act.¹³⁴ The Board also approved an initial organization structure. Approved were six core divisions, namely; Investments division, promotion division, Privatization division, SMEs division, Exports division and Research division.¹³⁵ After the initial six months of operation a permanent structure was formulated consisting of six divisions, Investment promotion and privatization division, SMES division, Research division, Audit division, legal division and corporate division.¹³⁶

The Investments promotion and privatization division is responsible for implementing the measures under part IV regarding investment promotion and guarantees. The measures cover both foreign and local investors, in promotion of investment, capacity building of local investors, protection agreements, disseminating information on investment opportunities, financing and partnerships between local and foreign investors.¹³⁷

The Investment promotion and privatization division is responsible for the concept of multifacility economic zones, including all matters contained in statutory instrument establishing each respective MFEZ and necessary for the effective and efficient operations of MFEZ.¹³⁸ The division will also give effect to

¹³¹ ZDA Act no.11 of 2006, sec 4(1)

¹³² Ibid sec 5(1)

¹³³ Ibid, sec 6(1)

¹³⁴ Interview: M.Mwandenga, 12/11/2007

¹³⁵ ibid

¹³⁶ ibid

¹³⁷ ibid

¹³⁸ ibid

the functions of the agency, to develop or facilitate the development of MFEZ by investors, administer, control and regulate MFEZ to ensure compliance with this Act and any other laws relevant to the activities of MFEZ, promote safety and efficiency of operations, and promote and market MFEZ among investors.¹³⁹

The Investment promotion and privatization division is also responsible for privatization of remaining public companies and commercialization of remainder and post privatization activities.¹⁴⁰

SME's division is responsible for promotion and facilitation of the development of micro and small business enterprises. This is done through, creating a conducive environment, appropriate policy formulation, marketing support, research and dissemination of data, monitoring and coordinating activities, development and upgrading of appropriate technologies, locating and developing commercial estates for use by micro and small business enterprises.¹⁴¹

3.5 Incentives

Incentives under the Act are regulated by the Minister of finance in consultation with the Minister of commerce trade and industry¹⁴² and are valid for a period of five years from the date of the grant of licenses, permit or certificate or for such period as the Minister responsible for finance may prescribe.¹⁴³

A minimum threshold of five hundred United States dollars or equivalent in convertible currency, in a priority sector or product, required for one to benefit from incentives as specified under the Income Tax Act or Customs and Exercise Act.¹⁴⁴

Any machinery or equipment acquired by a business enterprise conducting operations in a priority sector or in respect of priority products; or a rural enterprise entitled to exemption from customs duties as specified by or under the Customs and Exercise Act.¹⁴⁵

¹³⁹ *ibid*

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

¹⁴² *Ibid* section 54

¹⁴³ *Ibid*, section 55

¹⁴⁴ *Ibid*, section 56

¹⁴⁵ *Ibid*, section 57

Special incentives apply to investments of not less than ten million united states dollars in new assets that qualify, for the purposes of promoting major investment in an identified sector or product, through statutory instrument by Minister responsible for finance, and in consultation with the Minister.¹⁴⁶

Where a double taxation agreement exists, foreign tax payable shall be as determined by the agreement.¹⁴⁷

3.6 Services

These cover facilitation in identifying suitable land for investment and assisting the investor in applying to the responsible authorities for land, in accordance with established procedures.¹⁴⁸

Where an application is made as above, and the land as been demarcated for the purpose applied for and such land has not been allocated to any other person, body or authority, the authority responsible for the allocation shall, upon payment, by the investor, of the prescribed fees, charges or rates, allocate the land to the investor and the officer responsible for the registration of such land shall make such entries in the appropriate register and shall issue to the investor a certificate of title in respect of that land.¹⁴⁹

Notwithstanding the Immigration and Deportation Act, an investor who invests a minimum of two hundred and fifty thousand United States dollars or the equivalent in convertible currency and who employs a minimum of two hundred persons shall be entitled to a self employment permit or resident permit; provided that such number of the persons so described shall hold managerial and technical positions. The Board shall also assist an investor, who meets the requirements above, to obtain work permits for up to five expatriate employees.¹⁵⁰

Contrast provision above with 1993 Act which had similar provisions except for ten number of employees and no requirement that such number so employed by investor hold managerial and technical positions.

¹⁴⁶ Ibid, section 58

¹⁴⁷ Ibid, section 61

¹⁴⁸ Ibid, section 64(1)

¹⁴⁹ Ibid, section 64(2)

¹⁵⁰ Ibid, section 65(1)

The Board shall assist an investor in obtaining water, electric power, transport and communication services and facilities required for the investment.¹⁵¹

Contrast the above on services and facilities provision with 1993 Act with exact provisions.

The Board shall assist an investor in obtaining any licenses, permit or certificate or authorization for the purpose of commencing or operating a business enterprise.¹⁵²

Contrast the above on registration and licensing provision with 1993 Act with exact provisions.

3.7 Priority Sector or Product

The qualification for incentives includes an amount of not less than five hundred thousand United States Dollars or the equivalent in convertible currency, in a priority sector or product. These incentives are under the income tax Act or Customs and Exercise.¹⁵³ The priority sector and industries are; (a) Floriculture: fresh flowers and dried flowers. (b) Horticulture: Fresh and dried vegetables. (c) Processed foods: wheat flour and other processed foods. (d) Beverages and Stimulants: tea and tea products, coffee and coffee products. (e) Processing and the processing of the following products in the textile sector: Cotton, cotton yarn, fabrics and garments. (f) Manufacturing of the following engineering products: Copper products, Iron ore and steel, cobalt, other engineering products. (g) Beneficiation of phosphates and any other related material into fertilizer. (h) beneficiation of rock materials into cement. (i) production and processing of raw timber into wood products. (f) Production and processing of the following products in the leather sector, cattle hides, crust leather, leather products. (k) Building of Mini-Hydro power stations, education and skills training.¹⁵⁴

¹⁵¹ Ibid, section 66

¹⁵² Ibid, section 67

¹⁵³ Ibid, section 56

¹⁵⁴ ZDA Act, First schedule.

3.8 Stakeholder views on Act

The Board is tilted towards government with a majority of government representatives thus defeating the government's proclamation of a private sector led economic development agenda. A private tilted Board will bring in a more business atmosphere in guiding management.¹⁵⁵

The appointment of chairperson by the minister rather than his peers is unacceptable.¹⁵⁶

The Act is not clear on how the individuals will be selected to the Board and how they will be identified and from which institution.¹⁵⁷

The Act makes scant reference to the MFEZ initiative. The provisions for the establishment of MFEZ is highlighted in only two paragraphs namely;18(1) and18(2).there are very few direct references to prescriptions put in place to target MFEZs. The minister may, on the recommendation of the Board after consultation with the Minister responsible for finance and with the approval of Cabinet, by statutory instrument, declare an area, premises or building to be a multifacility economic zone. A statutory instrument made under subsection(1)shall prescribe the-(a) limits of the area, premises or building declared as a multi facility economic zone; (b) facilities to be provided and maintained within a multi facility economic zone; (c) terms and conditions under which such goods produced and services provided in a multi facility economic zone may be sold, exported, or otherwise disposed of; (d)activities which are prohibited within a multi facility economic zone; (f)the powers and obligations of an investor in a multi facility economic zone;(g) such other matters that are necessary for the effective operations of multi facility economic zones.¹⁵⁸

The trade and Industrial Development Fund and Privatization Trust Account is silent on financing any MFEZ.¹⁵⁹

¹⁵⁵ Daily Parliamentary Debates, Tuesday, 14/3/2006

¹⁵⁶ Ibid, page 12

¹⁵⁷ Ibid, page 12

¹⁵⁸ Chiwama Musonda, Report on the Zambia Business Forum Private Sector Conference on ZDA Implementation, 2007.

¹⁵⁹ ibid

The recently repealed ZEPZA Act of 2001 had elaborate provisions comparable to those of Mozambique decree no. 62/99, of 21 September 1999, Tanzania EPZ Act of 2002, Namibia EPZ Act of 1994, which have not been captured in ZDA Act.¹⁶⁰

Stakeholders concerned that government worried about loss of revenue even from areas where industries have collapsed.¹⁶¹

There is need for ZDA to integrate with other development initiatives such as the Citizens Economic Empowerment, the Development Bank Of Zambia, Zambia National Tender Board, the Zambia Bureau of Standards, and the Zambia Weights And Measures Agency in order to fulfill its mandate.¹⁶²

3.9 Challenges

Zambia is a small least developed country with a population slightly above 10 million and a GDP of USD 4.3 billion in 2003, meaning per capita GDP in Zambia is only USD 395. In economic terms, this means that Zambia is a small player on both the supply and the demand side. As such, Zambia is a price taker for both inputs and outputs.¹⁶³

Zambia is large in terms of area (752 614 square kilometers), landlocked and far away from major world markets. The population is highly scattered among the nine provinces, resulting in highly fragmented productive capacity throughout the country. Thus collection of decentralised inputs and outputs generates additional costs in transportation and administration.¹⁶⁴ Moreover, as a landlocked country, Zambia is disadvantaged against its competitor neighbours.¹⁶⁵ Given these factors, Zambian enterprises are disadvantaged in processing inputs and producing goods that are heavy or voluminous. The distance from the major world markets reinforces this disadvantage.¹⁶⁶

¹⁶⁰ Interview: Fabiano Lukashi 13/12/2007

¹⁶¹ *ibid*

¹⁶² *ibid*

¹⁶³ Project Information Document (PID) Concept Stage Report no. AB 3072

¹⁶⁴ *ibid*

¹⁶⁵

¹⁶⁶

Zambian labor productivity is low compared to India China, but higher than some other African countries. This low productivity more offsets low wages.¹⁶⁷ In 2003 Zambia's capacity utilization rates were lower than Uganda and its neighbour Tanzania. Zambia's capital utilization rates was at 48.4 percentage compare to Uganda at 58.4, Tanzania at 51.1. and there was not much dispersion by size by sector.¹⁶⁸

Zambia is a signatory to a number of multilateral and regional trading agreements which present different challenges and opportunities. The main outstanding issues range from lack of comprehensive trade and industrial policy to inadequate capacity to coordinate all stakeholders in trade matters.¹⁶⁹

The Act obliges the Agency to decide whether or not to grant an investment license within fourteen days of application. However under the previous investment act certificates were to be granted within thirty days and screening was assessed to be routine and non discriminatory. As the Act is new it is not yet possible to assess the efficiency of the application procedure.¹⁷⁰

The ZDA Act involves the government in judging whether every proposed investment is worthwhile on a number of broad criteria of promoting economic development, employment, exports, and transfer of technology. This is a subjective intervention in business activity and its impact is yet to be assessed.

3.10 Analysis of the Law

The Act is divided into eleven parts. Part 1 is preliminary and deals with title, commencement, application and interpretation. Part 2 establishes the Agency and outlines its functions, constitutes a Board of Agency and matters related thereto. Part 3 deals with trade and industry development. It outlines strategies for trade and industry (local and FDI). It also gives trade and business development measures, economic development measures and introduces sector codes. Part 4 deals with investment promotion and guarantees, declaration of multifacility economic zones, protection from acquisition, transfer of funds and settlement of

¹⁶⁷

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid

disputes. Part 5 deals with micro and small business. Part 6 deals with privatization and commercialization. Part 7 introduces trade and industrial development fund and privatization trust account. Part 8 deals with incentives. Part 9 deals with services. Part 10 deals with license, permits and certificates of registration. Part 11 deals with miscellaneous matters.

For the purpose of this study we will deal with new features introduced by the ZDA Act.

Part 3 dealing with trade and industrial development is a new introduced by the act. Under this heading, guidelines will be developed for financing economic development.¹⁷¹ Suffice to say that the Act does not define economic development. Heading also provides for skills and development, in consultation with any private or state institution involved in skills training.¹⁷² other strategies are to develop the capacity of business enterprises to trade in an international competitive market,¹⁷³ promote gender equality in exploiting economic resources,¹⁷⁴ address impact of HIV/AIDS and other diseases¹⁷⁵ and support, facilitate creation of micro and small scale business enterprises and promote their participation in industry.

There is no argument that linkages between FDI and local industry have been at unacceptable levels considering our level of development. However, a very important subject in our developmental strategy has been narrowed down to one or two out of nine items under this head. And these two strategies do not address how local industry can benefit from FDI. There is only mention of financing economic development. The others deal with formation of private sector associations, information on finance, gender, HIV/AIDS and SMEs which issues should be addressed under appropriate headings, ministries and organizations. Thus an opportunity is lost to address the real issues of trade and industry. Linkages between FDI and industry should have been prominent under this head.

¹⁷¹ Section 1

¹⁷² Section 2

¹⁷³ Section 3 2 (1) (f)

¹⁷⁴ Section 12 (1) (g)

¹⁷⁵ Section 12 (1) (h)

The issue of trade is no doubt important for Zambia. In this context the international trade regulatory regime plays a major part. This is captured and reads, 'Concluding trading arrangements, compatible with the rules of WTO, that remove, progressively, barriers to trade between the parties to the arrangements and enhance cooperation in all areas relevant to trade.' The other items deal with disseminating market information to SADC, COMESA and WTO, and participating in conferences to ensure Zambia takes advantage of international trade arrangements, such as those under COMESA, SADC, WTO and ACP-EU Partnership Agreement. Obviously, this is a narrow view of the international trade regulatory regime. The Act should be framed with an offensive objective of benefiting from international trade much more than prevailing. The objective in this regard should be to improve capacity on the supply side to meet rules set by ACP-EU Partnership agreement and improve local and FDI capacity to deal with WTO rules of origin.

3.1.1 Legal Policy Consideration

Economic and social development is a paramount matter of public national and international responsibility¹⁷⁶. This is a far more responsible, function of the law in a developing country like Zambia.¹⁷⁷ Thus law should not be identified one sidedly with the defense of vested interests¹⁷⁸ It should contribute actively, in the light of issues at stake, to the responsible development and regulation of the planning process, and to the adjustment of the competing claims of the interest of capital exporting and capital importing countries.¹⁷⁹ For developing countries, law has a part to play in the formulations of economic policies expressed in accession to multilateral trade agreements (such as WTO) or the conclusion off bilateral¹⁸⁰ trade agreements do not only have economic aspects; the decision, for example, whether a country like Tanzania should accede to WTO- a multilateral

¹⁷⁶ Ibid

¹⁷⁷ W. Friedman Legal Theory 5th Edition Universal Law Publishing p 435

¹⁷⁸ ibid

¹⁷⁹ ibid

¹⁸⁰ Ibid p434

treaty aspiring to international free trade, based on the principal of the most favored nation clause – of whether it should enter into a bilateral trade agreement with the United States of the Soviet Union, implies policy considerations of profound political importance¹⁸¹ in the same vein whether to keep basic industries and utilities under public national ownership as for sake of more rapid and skilled development to grant privileges to private foreign entrepreneurs; whether to accompany such policy with special tax concession and other financial concessions, or modifications of import-export policies, these and other questions vital in the life of a developing country like Zambia figure profound political and economic considerations¹⁸² The way the law is drafted must reflect deep policy considerations. The law is important in formulating the modulations and conditions of joint ventures between FDI and local enterprises¹⁸³ consequently, in developed countries the lawyer is highly esteemed and given a concept of “general counsel” indicating a sole for more than technical legal advice.¹⁸⁴ Thus law in developing countries must not only be limited to limits of administrative discretion and the procedural safeguards of the citizen but must involve administrative contract as an important way of regulating the manifold relations between public authority and private citizens in the provisions of supplies and services.¹⁸⁵ This concept may have increasing significance to international transactions between government and foreign investors.¹⁸⁶ It is obvious that no enterprises, socialist or otherwise, could function efficiently unless it could rely on the sanctions of contract.¹⁸⁷ whether the defendant be a private corporation of a state trust, it use be held accountable for¹⁸⁸ failure to supply promised goods or for defects of quality, incase of FDI who has obtained title to land, it may mean loss of title or else the issues of ‘absence ;landlords’ can offer independence will resurface under the same head are

¹⁸¹ Ibid

¹⁸² Ibid 432

¹⁸³ Ibid 433

¹⁸⁴ ibid

¹⁸⁵ ibid

¹⁸⁶ Ibid 377

¹⁸⁷ ibid

¹⁸⁸ Ibid 377

economic development measures.¹⁸⁹ These measures deal with policy and institutional reforms to be recommended by Agency and include measures necessary for equitable access by both gender and all business enterprises to economic and productive resources¹⁹⁰ in particular , development of training systems targeted at increasing productivity,¹⁹¹availability of capital¹⁹²development of rural strategies and agricultural production,¹⁹³ economic and technology infrastructure and services and development of an information society¹⁹⁴,development of complete industrial and mining sector as well as energy¹⁹⁵, trade development ,technological and research infrastructure¹⁹⁶ finally, the item brings in sector codes to be developed in partnership of major stakeholders to advance objectives of the Act.¹⁹⁷ One feature under this item is the lack of linkages to FDI and Trade and Industrial Fund. Private sector participation in the above measures is already lacking. Some of the critical areas above could be funded through FDI if properly the items above become a wish list whose implementation is not sure

The next feature introduced by the Act is Trade and Industrial Development Fund and privatization Trust account.¹⁹⁸ It should be mentioned here that privatization Trust Account existed under Zambia Privatization Trust Account. This means the innovation is trade and industrial development fund. The new fund is to support economic growth and development by promoting trade and investment.

The Board has been given discretion to determine micro and small business enterprises rural business enterprises and other business enterprises to benefit.¹⁹⁹Partnership in facilitating flow of financial resources to business is emphasized.²⁰⁰

¹⁸⁹ section

¹⁹⁰ ibid

¹⁹¹ Section 14(a)

¹⁹² Section 14(b)

¹⁹³ Section 14©

¹⁹⁴ Section 14(c)

¹⁹⁵ Section 14(e)

¹⁹⁶ Section 14(f)

¹⁹⁷ Section 14(g)

¹⁹⁸ Section 48

¹⁹⁹ bid

²⁰⁰ Ibid 48

There is no mention of linkages to sector codes and priority commodities. Also not clear is how this fund contributes to development through trade and investment.

It remains to be seen how adequate resources under this fund will be in achieving policy objectives. This is a means of ensuring efficiency in the carrying out of the natural development plan.²⁰¹ This haiku with the concept of economic crimes with played outstanding part in the soviet criminal code and the practice of soviet law²⁰² A typical provision is Article 157 of the criminal code which provided that, "issuing for sale in trade enterprises, repeatedly of in large amounts, goods known to be of poor quality, of in large amounts, goods known to be poor quality, non-standard, of incomplete, by the manager of a store depot warehouse, or section by a marketing specialist in sorting spoiled goods, shall be punished by deprivation of freedom for a term not exceeding two years, or by correctional tasks for a term not exceeding 100 tubules of by deprivation of the right to occupy the officer listed."²⁰³ Bad management should not be just a private matter for the parties concerned; it directly affects the national plan, the flow of production and the distribution of assets.²⁰⁴ The reward of profits of the threat of bankruptcy can not suffice.²⁰⁵

Other considerations relate to quality quarantine, can Zambia deliver on the quality guarantee required in international trade. Should there be quality damping of cheap goods from abroad where inputs are low? Consider the following hourly labour rate costs in manufacturing (200); USA US\$ 100, EU US \$ 90, Japan US \$ 85 Australia US \$ 70., Asia US \$30, Mexico US\$18, china US\$5, India US\$2²⁰⁶ would WTO deem the legal framework on quality guarantees as non-territorial barriers. Should Zambia create a safety net for times of economic crisis such as a group of manufacturing, services and agricultural industries, which could

²⁰¹ Ibid 432

²⁰² Ibid p378

²⁰³ Ibid 379

²⁰⁴ Ibid 379

²⁰⁵ Ibid 379

²⁰⁶ Judith Barrister, Manufacturing Earning and Compensation China, Monthly Labour Review, August 2005

maintain a minimum of self sustaining production of essential products, produce and services? What is the implication of openness to local employment vis-à-vis our development at basic level. The ZDA is a product of old legislation. What was done was simply repeal Acts (except ZEDZA). The incentives are not contained in the Act but the conditions qualifying one for incentives are in the Act. This creates flexibility in changing the incentives but also creates uncertainty in locals and investors. Discretion given to the Minister of Finance creates uncertainty about incentives. Thresholds for one to qualify to these incentives have been raised to achieve these policy objectives

CHAPTER FOUR

4.0 REGULATORY FRAMEWORK OF INVESTMENT AND TRADE IN SUB REGION

This chapter is about Investment and trade laws in the sub region especially those countries who have reformed and registered growth .The previsions in their legislation will be a reference point for ZDA to determine how effective new act is likely to address Zambia's challenges.

4.1 Tanzania Investment Act 1997

4.1.1 Institutional Framework

The Act establishes a body known as the Tanzania Investment Centre. The centre is an Agency of the government and under the general supervision of the Minister. It is a body corporate with perpetual succession and a common seal and capable of, acquiring and holding movable property and lawfully do or suffer to do all acts, for the proper performance of its functions under the Act.

The Centre, which is a one stop Centre for investors, is the primary Agency of government to co-ordinate, encourage, promote and facilitate investment in Tanzania and to advise the Government on investment policy and related matters.

A Board of the Centre is responsible for the discharge of the functions of the Centre. The Board consists of a chairman appointed by the President; two members appointed by the Minister from the private sector; two members appointed by the Minister from the public sector; and two other members appointed by the Minister. The Executive Director is the Secretary of the Board.

The Centre should, in liaison with relevant Ministries and other authorities, determine investment opportunities available in the country and the modalities of accessing them.

4.1.2 Services

And for the purposes of making the Centre an effective One Stop Centre, all Government departments, Government agencies and other public authorities are obliged to co-operate fully with the Centre in the performance of its functions under the Act²⁰⁷

However, even though the law is explicitly in the requirement for other government ministries and agencies to fully cooperate, where licenses or approvals are required licenses by an investor, the Centre should liaise inn writing with the relevant authorities as required by the investor.²⁰⁸

The relevant authority which receives for licenses or approvals, should within fourteen working days of receipt of the request, issue the required license or approval or serve a written objection to the Centre.²⁰⁹

Where the Centre does not receive a written objection from the relevant authority within the specified time under the law, the necessary licenses or approval should be deemed to have been granted.²¹⁰

Where the Centre receives any written any objection from the relevant authority within the specified time under the law.²¹¹, it should, where it does not agree with the objection, communicate the objection, within seven days of its receipt, together with its own recommendation to the Minister for his decision.²¹²

And the Minister should within seven days of receipt of the application and the Center's recommendation, notify the Centre and the relevant authority of his decision and the Centre should immediately that decision to the investor.²¹³

²⁰⁷ Section 16

²⁰⁸ *ibid*

²⁰⁹ *ibid*

²¹⁰ *ibid*

²¹¹ *ibid*

²¹² *ibid*

²¹³ *ibid*

Should any person be aggrieved by the decision made pursuant to the provision of investment act, he or she may appeal to the minister²¹⁴

The Minister may, on the advice of the Board may in writing request the relevant Ministry to station at the offices of the Centre any public officers who may be specified and that request shall be complied with.²¹⁵ All applications for certificates of incentives and protection under the Act, should be made to the Centre and the Centre shall, issue certificates in accordance with the provisions of the Act²¹⁶

Incorporation or registration of business enterprises under the Companies Ordinance or under any laws which are relevant to establishment of enterprise;

The filling of Value Added Tax Forms

The filling of investment Registration Forms as the Centre may from time to time prescribe;

Facilitating the obtaining by investors of the necessary licenses, approvals facilities or services;

The filing of immigration forms.

On submission of an application for the incorporation or registration of an enterprise under the act, the officers responsible for the incorporation and registration shall, where the documents of the applicant are in order, complete the processing of the application and issue the requisite certificate to the applicant within a period not exceeding fourteen working days from the date of the submission of the application.²¹⁷

A business enterprise in respect of which a certificate is granted under the Act should be entitled to the benefits which are applicable to that enterprise under the

²¹⁴ *ibid*

²¹⁵ *ibid*

²¹⁶ Section 17

²¹⁷ *ibid*

provisions of the In come Tax,1973, the Customers Tariff Act 1976,the Sales Tax Act,1976,or of any other written law for the time being in force.²¹⁸

The Executive Director should maintain a register in which shall be recorded all agreements for the transfer of foreign technology or expertise which is included in the certificate. Any application pending before the Tanzania Investment Promotion Center established under the National Investment (promotion and Protection) Act.²¹⁹

4.2 Tanzania Exports Processing Zones (EPZ) Act of 2002

4.2.1 Incentives

An investor in the Export Processing Zones shall be entitled to the following incentives-

Exemption from foreign exchange control or restrictions on operations carried on in Export Processing Zone;

Exemption from payment of corporate tax for an initial period of ten years and thereafter a corporate tax shall be charged at the rate of not more than twenty five per centum;

Exemption from payment of withholding tax on dividends and interest for the first ten years;

Remission of customs duty, value added tax any payable in respect of goods purchased for use as raw materials, equipment, machinery including all good and services directly related to the manufacturing in the Export Processing Zones but shall not include motor vehicles, spare parts and consumables.

Exemption from payment of all taxes and levies imposed by local government authorities for goods and services produced or purchased in the Export Processing Zones.

Export Processing Zones

²¹⁸ Section 19

²¹⁹ *ibid*

Exemption from Pre-shipment inspection requirements;

Accessibility to high quality infrastructure;

On site customs inspection of goods in lieu of off-port inspection

Provision of temporary visas at the entry to key technical, management, and training staff for a maximum period of thirty days; thereafter the provisions of immigration Act, 1995 shall apply.

The Investor shall be allowed to sell up to thirty percent of total production of goods produced in the export Processing Zone into the customs territory.

The agent may, depending on the nature of the industry or goods and market circumstances, authorize an investor to sell in the customs territory the amount exceeding that prescribed under sub- regulation (1)

All goods offloaded for sale into the customs territory shall be liable to all applicable duties and taxes.

The Government shall provide work permits for management and technical staff for skills that are not locally available, the number of which shall be determined by the Agent after consultation with the Ministry responsible for labour. The power and functions of the Authority are performed by a Board consisting of the following seven members.²²⁰ A Chairman who is appointed by the Minister; the Permanent Secretaries responsible for commerce and finance, or their representatives; and four persons appointed by the Minister from the business community. The members of the Board elect, from among their number a Vice-Chairman.²²¹ A member of the Board appointed under the Act holds office for a period not exceeding four years and is eligible for re-appointment upon the expiry of his term of office.

The Chief Executive serves as Secretary to the Board to any Committee of the Board²²²

²²⁰ ibid

²²¹ ibid

²²² Ibid Section 14

The Board has power to: 114 determine policy and the courses of action for giving effect to the objects and purposes of the Authority and of this Act. monitor the performance of the authority: review, where necessary , the objects and purposes of the Authority and to recommend, to the Minister, such changes consequent upon such review , as it considers appropriate; establish such committees as it considers necessary to assist it in the performance of the functions of the Authority, and may delegate , to such committee, such of its functions as it considers appropriate. ²²³ The Authority is objective is to promote, attract, encourage and facilitate local and foreign investment in Botswana and, without derogating from the generality of that objective, the function of the Authority are to – undertake investment and export promotions missions within and out side the southern African region representative against or regarding any changes to any such statutory or administrative frame work;

Acquire, purchase, sell develop or otherwise deal with property whether movable or immovable, including contracting of factory shells..

Ensure that all aspects of he investments process in Botswana, including but not limited to the timely receipt government approvals, permits, grants, registrations and fulfillment of any other regulatory authorizations, are facilitated;

Gather intelligence and conduct research to sustain and enhance the competitiveness of Botswana.

4.2.2 Services

The Act does not specifically claim establishment of a One Stop Centre. However, there is the Act provision for Authority to ensure that all aspects of the investment process in Botswana, including but not limited to the timely

²²³ ibid

receipt of government approvals, permits, grants, registrations and the fulfillment of any other regulatory authorizations, are facilitated.

BEDIA has an after care programme for Investor. This emphasis is on identifying problems encountered by new and existing companies in the implementation and operation of projects, and offer assistance resources, including labour and natural resources, by Increasing employment opportunities, Providing for the training of Namibian; Earning or saving foreign exchange; Generating development in the less developed areas of Namibia contribution to advancement of persons socially, economically or educationally disadvantaged by past discriminatory laws and practices. Impact on equal opportunities for women; impact on environment, and measures proposed to deal with adverse environmental consequences.

Incentives ²²⁴ Holder of the certificate is entitled to retention outside Namibia a proportion of any payment, in foreign currency for goods produced or any undertaking carried on which are exported from Namibia. No expropriation except in accordance without undue delay and in freely convertible currency. Where the enterprise is sold to any person ordinarily resident in Namibia, there is available foreign currency for transfer of profits out of Namibia, after deduction of any tax

4.3 Namibia Export Processing Zones (EPZ) Act of 1994

4.3.1 Incentives

Any business or undertaking in retail trade in an export processing zone in respect of any goods manufactured in, or imported into, such export processing zone is exempt from sales tax leviable. There are no additional sales duty leviable in terms of section 5 of the Additional sales Duties Act, 1993 (Act 11 of 1993), or customs or exercise duty, as the case may be leviable in terms of the provisions of the Customs and Excise Act, 1964 (Act 91 of 1964) shall be payable in an

²²⁴ Ibid, sec 9(1)

export processing zone in respect of goods imported into or manufactured in such export processing zone;

AN export processing zone enterprises or an export processing zone management company, shall be entitled to a reimbursement, out of the State Revenue Fund an amount equal to 75% with the direct expenditure incurred by such export processing zone enterprise as the case maybe improving training to Namibian citizens employed by such export processing zone management company or export processing zone enterprise, as the case may be

No export processing zone management company, and no export processing zone enterprise, shall be liable to taxation in terms of the provisions of the Income Tax Act, 1981 in respect of income derived in an export processing zone.

Different conditions may be prescribed or agreed upon for different categories of, export processing zones.

4.4 Analysis of the Law in Sub region

The three neighboring countries have one centre each responsible for investment. The three institutions are bodies corporate with a Board and fall under general supervision of the respective ministers of trade.

The Tanzania investment Act is elaborate on linkages between centre and stakeholder institutions in providing services required by investors. The centre prides itself of being a one stop centre for investors by providing, license, approvals, etc required by law for a person to set up and operate an investment.

The Act is explicit on the role of line minister and agencies. It lays down the performance guidelines. The centre liases in writing with these institutions and the law requires that they respond according to set time schedules.

Where specific services are required the minister may in writing request relevant ministry to station at the centre any public officer specified and that request has to be complied with.

Similarly, Botswana has provisions similar to Tanzania to facilitate investors obtain services. However, in the case of Botswana, The Act has not legislated the role of line minister and agencies. Instead, the centre responsible has guidelines and procedures which bind the centre to facilitate processing of permits, license and other services required by investors.

In the Tanzania Act, the incentives are not in the Act but are under the relevant legislation i.e. Income Tax Act, 1973, customs Tariff Act 1976, the sales Tax Act, 1976 or any written law for the time in face.

The Botswana Act worker no notion of incentives. Instead, emphasis is on non fiscal incentive. The Namibia Act makes no distinction between local and foreign investors. The local and foreign investors are treated equally. There is no emphasis placed on fiscal incentives but on non fiscal incentives.

Provisions are on security of investment and assurance of repatriations of dividends and proceeds from sale of investment. The Act maker assurance of availability of foreign exchange for the purposes of repatriation of proceeds from sale of investment of profit.

IT is clear from the law sub region that emphasis is placed on facilitating the investor to start up a business. The role of fiscal incentives is analyzed above are better placed in terms of non fiscal incentives than Zambia.

4.5 Conclusion

The law on investment in Tanzania, Botswana and Tanzania is in two categories. There is the law an general investment which is not related to trade, and there is the law which is aimed at attracting investment which is export oriented. This is a feature of great significance.

The general investment law and export oriented investment have been flighty separated. This is because the words of the two categories are diverse. Once you are targeted on investment, you can flighty package your incentives and set your goals for each category.

It is clear from the law in the sub region that a pragmatic approach that picks winners and creates a level playing field.

When a government targets particular sectors it is important to pick those that will make a difference

CHAPTER FIVE

5.0 LEGAL ASPECTS OF INTERNATIONAL TRADE AND INVESTMENT

This chapter has reviewed the intricacies in the International trade and investment regime which ZDA must deal with to be an effective instrument of development.

5.1 Foreign Direct Investment

Investment is defined in the Act as contribution of capital, in cash or in kind, by an investor to a new business enterprise, to the expansion or rehabilitation of an existing enterprise or to the purchase of an existing business enterprise from the state.²²⁵

Investor in the Act means any person , natural or juristic, whether a citizen of Zambia or not, investing in Zambia in accordance with this Act, and includes a micro or small business enterprise and rural business enterprise.²²⁶

The two distinguishing features of law on FDI are its complexity and its creativity. The law on FDI embraces the domestic rules and regulations dealing with FDI as well as bilateral and multilateral legal instruments. It is influenced by case law arbitration and numerous other sources. By its nature FDI requires an ongoing reform and learning process. It is made more challenging by the number of interest groups involved. These are transnational companies, local companies, investing promotion agencies, multilateral donors, financial intermediaries, lawyers advising foreign investors, each with its own interest to serve.²²⁷

FDI laws as they are in developing countries are laws of regulation by government over FDI rather than laws of corporate governance. More precisely,

²²⁵ ZDA Act part 1 preliminary

²²⁶ *ibid*

²²⁷ Daniel D.Bradow, Alfred Escher Legal Aspects of Foreign Direct Investment www.aspenpublisher.com 2/12/2007

the FDI regime should contain provisions on such aspects as investment admission and approval, treatment, protection including, expropriation and compensation, incentives, management and dispute settlement.²²⁸

The Zambian legal system for inward investment, is a result of the MMD liberalized market led economy adopted since 1991.²²⁹ The Zambian FDI legal system is three tier with constitution provisions on top,²³⁰ national laws in the middle²³¹ and civic laws at the bottom²³². Some aspects of ZDA Act are FDI specific²³³ while others are localized.²³⁴

The government actively supports, facilitates and rewards new companies in all sectors and this support is equally available to indigenous and FDI without discrimination.²³⁵ Most sectors are open to investment except for those requiring regulation by competent authorities before ZDA can play a part.²³⁶

The current legal system as represented by ZDA has three main features: FDI, domestic enterprise, and FDI/Local partnerships.²³⁷

Monetary and foreign exchange regimes play an important role in investment activities.²³⁸ Nevertheless, FDI also relates to many other matters, such as right of establishment, employment, purchase and sale, contract law, taxation, immigration, arbitration etc.²³⁹ In fact it is argued that legislation alone is not sufficient to attract FDI. There is need to also look at the socio-economic, political and cultural climate in the country.²⁴⁰

It is important to mention here that aspects of discrimination are prevalent in FDI. For example the ZDA Act has introduced thresholds which are beyond the capacity of indigenous people to access. This in essence is targeted at FDI. It is

²²⁸ ibid

²²⁹ Investment Policy Review of Zambia(2005)

²³⁰ Zambian Constitution, Article 16

²³¹ Income Tax Act, Chapter 668 of the Laws of Zambia

²³² Trades Licensing (Amendment) Act 2007

²³³ ZDA Act, sec 20

²³⁴ ZDA Act, sec 35

²³⁵ ZDA Part 1

²³⁶ ZDA Act, sec 2

²³⁷ ZDA Act

²³⁸ Mwanawasa, Speech During Launch of FNDDP 16/1/2007

²³⁹ Interview: John Mulongoti 4/2/2008

²⁴⁰ K.Mwenda Legal Aspects of Foreign Direct Investment in Zambia, Murdoch University Electronic Journal of Law.

clear in most cases to see that incentives are packaged by the host country through debates preceding these pieces of legislation.²⁴¹ Debates in parliament during the enactment of ZDA gives credence to this assertion.²⁴² However, the issue of tax discrimination through legislation that offers generous fiscal incentives to foreigners and operates against indigenous persons has not been put to legal test. What is clear is that the unfair tax discrimination against foreign nationals and their property is regarded in international practice as an unfriendly act which may give rise to protest or retaliation by restoration.²⁴³ As a result a number of developing countries are engaged in a race to the bottom by outdoing each other with incentives.²⁴⁴

There are various schools of thought and theories that explain the determinants of FDI in developing countries. What is not clear is whether or not fiscal incentives are the major determinants.²⁴⁵ A study in Jamaica revealed that two out of a sample of fifty five investors were attracted by fiscal incentives. On the other hand, a similar study undertaken in Korea revealed that fiscal incentives were second to development of markets and management growth in attracting Japanese and American investors to Korea. In Singapore, the results from a similar exercise revealed that fiscal incentives were not important determinants of FDI.²⁴⁶ Also a study undertaken by World Bank shows that generally fiscal incentives cannot be regarded as major determinants of foreign investment.²⁴⁷

One of the benefits of FDI in development is accomplished through technology transfer. Multinationals are usually the main transmitters of such technology. Simply by locating some of its operations outside its home country the MNC engages in the geographical transfer of technology. It is encouraging to note that in formulating trade and industry development strategy the Agency shall have regard development and transfer of technology.²⁴⁸ However, it is important to state

²⁴¹ K.Mwenda, Legal Aspects of Foreign Direct Investment in Zambia

²⁴² Debates in parliament.

²⁴³ K.Mwenda, Legal Aspects of Foreign Direct Investment in Zambia

²⁴⁴ Interview: John Mulongoti(MCTI)

²⁴⁵ K.Mwenda, Legal Aspects of Foreign Direct Investment in Zambia

²⁴⁶ *ibid*

²⁴⁷ *ibid*

²⁴⁸ ZDA Act, sec 2 (d)

that there are no regulations in ZDA nor repealed acts concerning transfer of technology. This foreign technology must complement Zambia's socio-economic plans and needs.²⁴⁹

In FDI, the most prevalent 'perceived obstacles to doing business,' which involve critical legal components or aspects are corruption, street crime, theft or social disorder, presence of organized crime, financing roadblocks(the golden share), exchange rate difficulties(blocked currency), anticompetitive practices, property seizure risks, problematic functioning of the judiciary and misunderstanding of the legal system.²⁵⁰

Apart from being unethical, corruption leads to unequal access to services and raises the cost of doing business.²⁵¹ In Zambia managers report that bribes are paid to speed up legal proceedings.²⁵² This is as a result of delayed justice.²⁵³ According to enterprises also, patronage tops the list of bribes influencing the business environment.²⁵⁴ Businesses are also mostly entangled in bribes to obtain licenses and permits, and bribes related to contracts.²⁵⁵ However, the most serious problem affecting would be investors is financing.²⁵⁶ For large scale businesses, in general, and those in the manufacturing sector, in particular, the most serious problem is 'taxes and regulations'.²⁵⁷

5.2 International trade

International trade is the exchange of goods and services across international boundaries. Industrialization, advanced transportation, globalization, multinational corporations, and outsourcing are all having an impact on the international trade system.²⁵⁸

²⁴⁹ Ibid, page 8

²⁵⁰ Richard's. Hunter, Jr. Seton Hall University(2005), Unitary.

²⁵¹ Government of the Republic of Zambia, National Baseline Survey, 2004 page7

²⁵² Ibid, page 7

²⁵³ Ibid, page 6

²⁵⁴ Ibid, page 6

²⁵⁵ Ibid page 136

²⁵⁶ Ibid, page 135

²⁵⁷ Ibid, page 135

²⁵⁸ http://en.wikipedia.org/wiki/international_trade 2/3/2008

Free trade is usually most strongly supported by the most economically powerful nations, though they often engage in selective protectionism for those industries which are strategically important such as the protective tariffs applied to agriculture by the United States and Europe.²⁵⁹

In a decided case, *United States- Measures affecting Textiles and Apparel Products* (Dispute Ds85), the European Communities were the complainants. The United States (US) was the respondent. The request, dated May, 1997, was in respect of change to US rules of origin for textiles and apparel products. The EC alleged that the US had introduced changes to its rules of origin for textiles and apparel products, which affected exports of EC fabrics, scarves and other flat textile products to the US. As a result, the EC alleged that EC products were no longer recognized in the US as being of EC origin and lost free access to the US market that they had hitherto enjoyed. The EC contended that this was in violation of Articles 2.4, 4.2 of the Agreement on Textiles and Clothing (ATC), article 4.2 of the WTO Agreement on Rules of Origin, Article III of GATT 1994, and Article 2 of the Agreement on Technical Barriers to Trade (TBT).²⁶⁰

Another case was *US-Rules of Origin for Textiles And Apparel Products* (Dispute DS243). In this case India was the complainant and the US was the respondent. Bangladesh, China, the EU, Pakistan and the Philippines were third parties. India argued that prior to the enactment of section 334 of the Uruguay Round of Agreements Act; the rules of origin applicable to textiles and apparel product was the 'substantial transformation' rule. India considered that section 334 changed the system by identifying specific processing operations which would confer origin to the types of textiles and apparel products. Judgment was given against India on all points raised. What is not clear is whether the import is a civil law standard of proof for a preponderance of probability or should it be a higher standard of proof akin to that found in criminal law. And what is the weight of evidence that a complainant should adduce in order to discharge the burden of proof.²⁶¹

²⁵⁹ Ibid, page 2

²⁶⁰ W.C. Fisher and K. Mwenda, (Country of Origin), *A Law and Economics Approach to the Concept of Made in Australia*,

²⁶¹ Ibid, page 94

Zambia recent trade agreements (EBA, COMESA, SADC) Which give new opportunities to expand exports. Sugar is still subject to quotas from the EU under the EBA initiative(20000mt) and South Africa under the SADC Trade protocol(9000mt).Sugar exports are likely to increase once these barriers are removed. EU certificates of Origin are also restrictive.²⁶²

Zambia faced many problems benefiting from duty free access under COMESA FTA. Product specifications in some COMESA markets are very strict. Kenya invoked safeguard measures to protect its own industry, through the imposition of a quota and tariffs. South Africa requires certificate of origin in advance of goods being shipped. Maize exports are constrained by government restrictions. Thus international trade is encumbered with both tariff barriers and non tariff barriers.

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²⁶² Jaspa,Narrowing the Gaps, page16

²⁶³ Ibid, page16

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The Zambia Development Agency Act is a casual approach to development. What Zambia needs after close to forty years of reforms is a strategic shift. Zambia is in a crisis. And in a crisis the law is the one thing that is challenged most. From the independence position of relative prosperity, the Country has gone to the bottom of least developed country in the world. In spite of reforms the human development Index has continued to worsen. Stability and security is not guaranteed in an atmosphere of poverty and underdevelopment. The investor out there is not fooled by rhetoric. They read the statistics both economic and social indicators.

The ZDA Act is a look back to the failed policies of the past. Merging failed institutions and creating one organization does not solve the problem of low investment. When Zambia was creating ZDA the neighboring countries had already created the one stop facility. The reform was not anything unique both to Zambia and the region. Further whilst ZDA Act has reduced on the number of incentives, the neighboring countries which are by the sea also have the equivalent of ZEPZA with more incentives fully functional. In fact the old investment act 1993 had provisions for Multifacility economic zones and Export processing zones contained therein. The fact that these were not implemented and that there were scanty provisions relating to them is another sign of Zambia's casual approach to investment and development. The international community is not there to develop the country. Developed countries have used international law to their advantage. Even where Incentives have been used by developing countries to their detriment, they have continued to advocate for more reforms. Wherever possible they have found lacuna to advance their cause.

Zambia began economic reforms at the time non fiscal incentives were unattractive. The reforms were a piecemeal prescription to development. In comparison to its neighbors Zambia has too many disadvantages. It is landlocked with a scattered small population and no infrastructure for movement of goods and services to all the parts of the country. The reduction in the cost of doing business has not been looked at in the broader context. And the ZDA Act has not addressed the issue of infrastructure with specific provisions that would make this sector a priority it is.

The Act in its present state does not have specific provisions for a one stop facility.

There are no statutory provisions for complete support to local and foreign investors. The linkages between the five departments which are synonymous with dissolved companies are not clear in the Act. They still work as individual units. All that has happened is that the five former institutions have come under one roof as departments.

It is not clear in the ZDA Act what form facilitation will take. The provisions dealing with facilitation are not elaborate and fully legislated. Performance benchmarks for all stakeholders are not in the Act. In the case of review, problem of identifying bottlenecks expected.

This can be attributed to lack of capacity to take advantage of trade protocols due to inadequate investment in the supply side of the key sectors of the economy. Infrastructure was neglected as a result Zambia's cost structure weighs heavily against exporters.

The growth in exports is attributed to the mining activities as a result of new investment through FDI. This sector is small contributor to the economy due to development agreements valid for twenty years from date of signing. As a result the country has not benefited from improved exports. The lost revenue could have contributed to the development that the country so much requires.

The ZDA Act has restricted the sectors to benefit from incentives. This has been done through high thresholds and employment requirements that weigh heavily against local investors. As a result, the local investor is crowded out of business

by FDI. Whilst subsidies have been denied to local investors, the foreign investor will access them through incentives. As the tax regime in Zambia is higher than most neighboring countries except where incentives mitigate them, the local investor is unlikely to compete in the export business. It remains to be seen what form protection of infant industries will take.

The desire to correct the wrong use of incentives seems to have overridden all other considerations in the ZDA act. As a result the incentives are ambiguous in their application. There is so much left to discretion of the Minister responsible for finance. This is likely to create uncertainties to FDI and local investors and compromises the required transparency and will read to distortions in incentives to same or similar industries.

The emphasis on incentives should have been on more coherent, attractive goals based on strategic goals. In the absence of attractive non fiscal incentives which the neighboring countries have, the country will have to continue using fiscal incentives until non fiscal incentives are developed to internationally acceptable standards.

FDI is but one of the tools of development .A developing country will reap maximum benefit if it has reached a certain level of development in education , health, physical infrastructure, technology and or financial and legal framework. The exit of Anglo American corporation showed Zambia's unprepared ness to handle FDI. The necessary legal framework for exit was lacking and the nation was brought to its knees. On the other hand the development agreements are still holding even after the copper prices have increased ten fold. Unorthodox manner in dealing with mining companies will damage the county's reputation and will adversely affect future inflows of FDI. It is therefore important to develop legal frameworks before attracting FDI.

The benefits of membership to international trade protocols are not evident. This is a challenge ZDA will have to address in order to become an effective instrument of development. However, these are matters under the ambit Ministry Of Commerce Trade And Industry. Similarly the lack of Trade Industrial policy will subtract from the efforts of ZDA. The 1994 Trade and Industrial Policy still refers to the repealed Acts and is not reflective of current government thinking.

FDI is interested in all matters of policy. i.e. internal trade, foreign exchange arrangements, competition, taxation, labor, sector regulations, property rights, dispute resolution, BITs., Contract enforcement etc.

Zambia lacks domestic absorption capacity for FDI to generate growth effects. There is little downward linkages between foreign investors and local industries. ZDA has tried to mitigate this by encouraging partnerships with locals but has not put any incentives to this strategy. It should be emphasized here that the kind of equipment used by the mining companies requires huge investment in infrastructure and human resource. As stated earlier, Zambia is not prepared for the level of investment that would result in meaningful import substitution. The increased FDI inflows in 2000 to 2004 were expended on equipment and rehabilitation of the mines.

6.2 Recommendations

Development of policy document on trade and investment must be speeded up ZDA for effective implementation of Act.

The functions of ZDA pertaining to approvals and licensing must be elaborate and legalized through the amendment of the act so as to be transparent.

All stakeholders must be well versed with government policy so as to appreciate and appropriately respond to legislation. In this regard, important policy documents are, Fifth National Development Plan, Vision 2030, Trade and Industrial policy.

There should be a shift from emphasis on amounts of investment to quality and relevance of investment. This is a strategic shift to accommodate local investors and enable them participate in the development of the country.

ZDA must be repositioned to take a more aggressive role in taking advantage of trade protocols. Currently, the Act is framed in a way that Zambia will facilitate for other nations to export to Zambia. This entails building capacity. in ZDA by employing Lawyers in formulating policies and strategies.

The role of financing business should be done through financial institutions. ZDA can not sustain lending to business as resources are not available. Development Bank of Zambia (DBZ) should work closely with ZDA to address the issue of financing.

ZDA must be involved in setting up special trading and industrial zones, where facilities already approved by local authorities, can be accessed by small businesses to reduce cost of setting up business.

Copper is and will remain a strategic commodity for Zambia. Therefore, mechanisms to benefit from the boom in the revenue from copper must be implemented immediately. This is outside the scope of ZDA, and so government is encouraged to act now. Legislation to supersede development agreements should be introduced in parliament.

Revenue arising from the repeal of development agreements should be utilized to build up Zambia's capacity to benefit from FDI. This will include among others, legislation, MFEZ, infrastructure, taxation, education and technical skills, and or administrative framework

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1	MR MAXWELL SICHULA	EXECUTIVE SECRETARY ZAMBIA CHAMBER OF SMALL AND MEDIUM BUSINESS ASSOCIATION
2	MR FABIANO LUKASHI	FORMER MANAGING DIRECTOR ZEPZA
3	MR M. Z. MWANDENGA	DIRECTOR CORPORATE AFFAIRS
4	MRS A. SITALI	CHIEF PARLIAMENTARY COUNSEL MINISTRY OF JUSTICE
5	MR M. MULONGOTI	MINISTER OF INFORMATION AND BROADCASTING SERVICES AND CHIEF GOVERNMENT SPOKESMAN
6	MR ALEX CHISANGA	DIRECTOR NEW SIGNAL LIMITED
7	MR CHARLES MULENGA	LEGAL COUNSEL, ZDA
8	MRSS MARGARET CHIMANSE	ZDA PUBLIC RELATIONS OFFICER
9	MRS EVA JHALA (CONSULTANT)	FORMER PERMANENT SECRETARY MINISTRY OF JUSTICE
10	MR ROBERT B. BANDA	MANAGER POST PRIVATISATION ZDA
11 12	PASTOR PETER MULENGA MR. J. MULONGOTI	PAOG CHIEF ECONOMIST MINISTRY OF COMMERCE TRADE AND INDUSTRY

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APPENDICES

Appendix 1

MAIN ECONOMIC AND SOCIAL INDICATORS

INDICATOR	2000	2001	2002	2003	2004
Population (million)	10.7	10.9	11.1	11.3	11.5
GDP at market prices (billion of current dollars)	3.2	3.6	3.7	4.3	5.4
Annual GDP growth (percentage)	3.6	4.9	3.3	5.1	4.6
Inflation (percentage)	26.0	71.4	22.2	21.4	18.0
GDP per capita (dollars)	317.1	349.5	352.4	413.2	470.6
GDP by sector (percentage):					
• Agriculture	22.3	22.1	22.2	19.3	20.9
• Industry	25.3	25.6	26.1	29.7	26.9
- Manufacturing	11.4	11.1	11.6	11.3	12.1
- Mining ^a	4.1	3.9	3.5	7.8	..
• Services	52.4	52.3	51.7	51.1	52.2
FDI inflows (millions of dollars)	121.7	71.7	82.0	172.0	334.0
Total exports (fob) (US\$ millions)	746.0	897.0	920.0	1,137.0	1,067.2
Copper as percent of total exports ^b	60.3	64.5	61.9	56.0	52.1
Exports of goods and services (percent of GDP)	21.1	27.1	28.6	30.6	19.8
Imports of goods and services (percent of GDP)	31.4	37.3	42.0	41.8	27.1
Gross capital formation (percent of GDP)	18.7	20.0	17.4	16.0	26.0
Population living below the national poverty line (%), 1987-2000	72.9	72.9	72.9	72.9	..
Human development rank ^c	153	153	163	166	..
Adult illiteracy rate (percent of people aged 15 and above)	21.8	21.0	20.1

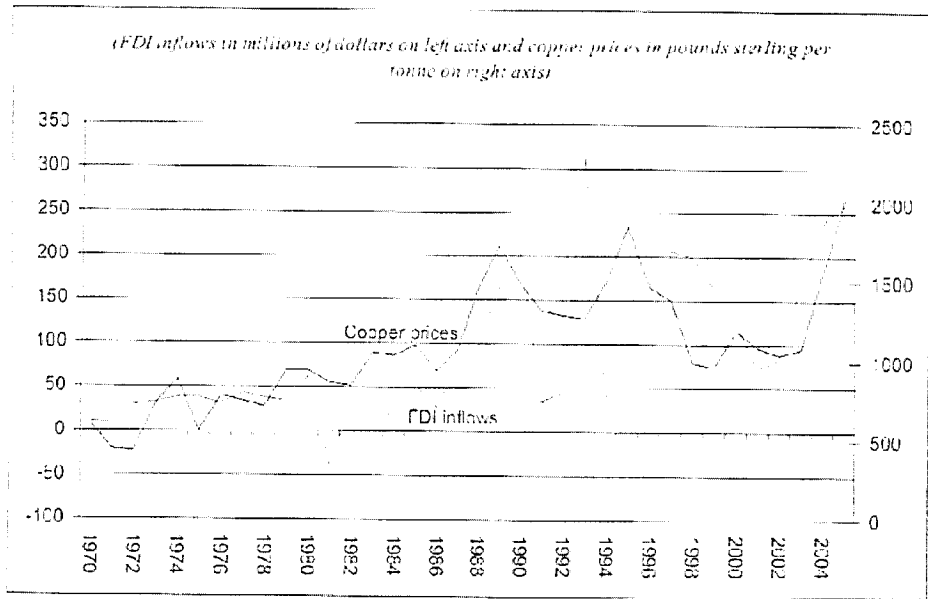
Source: UNCTAD; ECU/TCO Database; World Bank/World Development Indicators; UNDP Human Development Reports 2002, 2003 and 2004.

Table 1.2. Zambia's FDI performance compared to that of selected other countries,
1986-2004
(US\$ and percentage)

Country	ABSOLUTE PERFORMANCE				RELATIVE PERFORMANCE									
	FDI inflows per year		FDI stock		FDI inflows		FDI stock		FDI inflows		FDI stock		FDI inflows	
	Millions of dollars	Dollars	Per capita (dollars)	Per \$1,000 GDP (dollars)	As percentage of GFCF	Per capita (dollars)	% GDP	Per capita (dollars)	% GDP	Per capita (dollars)	% GDP	Per capita (dollars)	% GDP	Per capita (dollars)
	Average (1986-1990)	Average (1991-1995)	Average (1996-2000)	Average (2001-2004)	Average (1986-1990)	Average (1991-1995)	Average (1996-2000)	Average (2001-2004)	Average (1986-1990)	Average (1991-1995)	Average (1996-2000)	Average (2001-2004)	Average (1986-1990)	Average (1991-1995)
Zambia	112.5	106.1	161.4	164.9	3,019.3	14.0	11.6	15.8	14.6	35.5	31.9	47.9	35.9	37.4
Botswana	72.4	-48.2	72.3	225.0	1,382.0	53.8	-31.6	42.6	127.1	31.1	-13.3	15.4	37.5	15.5
Ghana	8.8	101.4	133.4	106.0	1917.4	0.6	5.9	7.0	5.0	1.6	17.2	20.5	15.2	1.3
Lesotho	11.7	19.2	30.1	37.3	478.9	7.5	11.6	17.2	20.7	22.7	23.0	32.6	37.5	4.9
Mozambique	5.0	31.0	178.5	267.9	2,165.7	0.4	2.1	10.3	14.3	2.1	14.8	47.8	69.5	0.7
Namibia	7.3	109.0	99.2	245.3	1526.8	5.4	70.2	55.0	124.8	3.2	36.0	28.5	68.0	2.0
South Africa	-72.7	376.5	1,517.3	2,212.5	4,620.7	-2.1	9.2	34.4	47.8	-0.8	2.6	10.8	18.4	-0.4
Uganda	0.3	46.4	260.4	473.4	520.3	0.0	1.5	7.7	12.9	0.1	10.3	31.5	47.4	0.1
United Republic of Tanzania	-1.0	54.2	110.7	200.5	1,612.9	-0.1	2.7	4.8	7.6	-0.3	11.1	18.3	32.1	-0.2
SADC	283.2	1174.2	3,718.2	6,470.9	8,3484.6	1.9	6.6	18.6	30.3	2.2	6.4	19.7	33.0	1.2
SADC without South Africa	355.9	797.7	2,200.8	4,258.5	3,7201.9	3.1	5.9	14.4	25.4	8.1	17.4	42.0	67.2	4.8
LDCs	1,070.2	634.2	1,586.5	3,885.3	7,195.5	14.4	1.4	2.8	6.0	36.3	4.5	9.3	20.1	2.1

Source: UNCTAD World Investment Report 2005.

Figure 1.1. FDI inflows into Zambia, 1970 - 2004



Appendix 4

World markets

