

**THE REGULATION OF TELECOMMUNICATIONS IN ZAMBIA: AN ASSESSMENT OF  
THE IMPACT OF ZAMBIA'S INSTITUTIONAL FRAMEWORK ON EFFECTIVE  
REGULATION**

**By**



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## DECLARATION

I, **NATASHA BANDA** ( Computer Number: 26129078), DO HEREBY declare that the contents of this directed research paper are entirely based on my findings and ingenuity and I have endeavoured to acknowledge where the work herein is not mine. I further depose to the best of my knowledge that this work has never been presented in any university for academic purposes.

I THEREFORE take full responsibility for the contents, errors, defects and omissions that may appear herein.

9<sup>th</sup> April 2010  
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Date

*Banda*  
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**THE UNIVERSITY OF ZAMBIA**

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## ABSTRACT

An effective regulatory system is one which is able to ensure consumer protection on the one hand and preserve the need to encourage innovation and investment on the other. This research aims to assess the existing institutional framework of Zambia for the purpose of determining the appropriate regulatory design that attracts more investment and ultimately protects the interests of consumers.

An examination of existing literature reveals that there is a gap because very <sup>few</sup> little attempts have been made to test the relevance and effectiveness of the regulatory authority in the telecommunications industry since the enactment of the Information and communications Technology Act, Number 15 of 2009. This paper aims to contribute to this area of knowledge through a comparative analysis of telecommunications regulation in Britain, Jamaica, Chile, Argentina and Zambia.

The existing institutional framework in Zambia will be analyzed in order to assess whether investment returns are best safeguarded through legislative means, administrative restraints or through the enforcement of contractual rights in the courts of law.

Finally, recommendations will be made as to how Zambia can promote credible and effective regulation which ensures consumer protection and safeguards which attract more investment and enhance investor confidence.

## **DEDICATION**

This paper is dedicated to my father, Andrew Bwezani Banda, thank you for the support and to my amazing mother Veronica Phiri Banda, thank you so much for your warm unconditional love, you inspire me.

I also dedicate this to my sisters, Ketiwe Banda Munalula and Towela Banda, my nephew, Akabondo Munalula and my loving brother Andrew Luso Banda.

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## CHAPTER 1

### **1.1 Introduction**

This research aims to assess the impact of core political and social institutions on regulatory structures and performance in the telecommunications industry in Zambia. It focuses on the position that the credibility and effectiveness of a regulatory framework, and so its ability to encourage private investment and support efficiency in the production and use of services, vary with a country's political and social institutions. The research aims to assess what works in the regulation of telecommunications, and, by extension, in utility regulation more broadly. This aim will be achieved through a comparative study for the purpose of determining the appropriate regulatory design that attracts more investment and ensure consumer protection in the telecommunications sector of Zambia.

The privatization of various public utilities in Zambia led to the establishment of various regulatory institutions such as the Communications Authority of Zambia (CAZ) now called the Zambia Information and Communications Technology Authority (ZICT Authority), the Energy Regulation Board (ERB), Public Procurement Authority (PPA), National Water Supply and Sanitation Council (NWASSCO) and many more. An examination of the existing literature reveals that very ~~little~~<sup>few</sup> attempts have been made to test the relevance and effectiveness of these regulatory institutions. Further, there have been no recommendations as to what the appropriate design for Zambia's regulatory regime should be, particularly in the telecommunications industry. This research therefore intends to contribute to this area of knowledge.

#### **a.) Purpose of the study**

In recent times, great emphasis is placed on the right of establishment and promotion of private foreign investment as opposed to trade and shipping thus the need to ensure effective regulation of

this process<sup>1</sup>. This research aims to analyze the regulatory regime in Zambia considering the conclusions drawn by Pablo Spiller and Brian Levy<sup>2</sup> of how institutions shape and constrain government policy. It will examine whether the conclusions reached, in relation to each state which formed the basis of the study, are the same for Zambia in view of the institutional framework and the nature of its regulatory environment. This study will further consider the drawbacks and uncertainties faced by investors in huge sunk non-deployable assets which bring about returns over a long period of time and recommend method to promote consumer protection, certainty and boost investor confidence.

### **b.) Statement of the Problem**

Very little literature has been written on the importance of effective regulation and how institutions constrain and shape government policy in the field of regulation of investors in huge upfront sunk investments in industry specific non-deployable assets. Existing literature reveals that minimal attempts have been made to test the relevance and effectiveness of the regulatory regime in Zambia. It is for this reason that this paper intends to contribute to this area of knowledge.

This contribution will be made through comparative studies of telecommunications regulation in the United Kingdom, the Philippines, Jamaica, Chile, Argentina and Zambia. Given that this paper is a comparative analysis, it will be confined to the industry which formed the basis of the original work. The research will therefore attempt to show whether the Communications Authority of Zambia (now Zambia Information and Communication Technologies Authority) has managed to effectively achieve credible regulation of investors in the telecommunications industry.

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<sup>1</sup> S. Wallsten. **An Empirical Analysis of competition, privatization and regulation in telecommunications.** [World Bank Publications]

<sup>2</sup> P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996]

### **c.) Objective of Research**

The broad objective of this research is to assess the impact of Zambia's institutional framework on effective regulation of telecommunications. The specific objectives of the study are reflected in the research questions.

### **d.) Research Questions**

- What is the concept of regulation and its rationale?
- How do other regulatory bodies ensure consumer protection?
- How effective is regulation of the private sector in Zambia?
- How do the major social and political institutions affect regulatory efficiency?
- What are the constraints, developments and drawbacks on the prime purpose of effective regulation in Zambia?
- Is the judiciary the most secure institution and has it achieved autonomy sufficient for the purpose of securing contractual rights as against other arms of government?
- Recommendations

### **e.) Methodology**

The methodology will essentially consist of an examination of published and unpublished materials. This information will include cases, articles, paper presentations, student obligatory essays and reports.

## **1.2 The Concept of Regulation**

Regulation is an elusive concept, however, the widely accepted definition is that it is sustained and focused control exercised by a public agency over activities that are valued by a community<sup>3</sup> The particular activity of interest discussed in this paper is telecommunications which is one of the main

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<sup>3</sup> P. Selznick. **Focusing Organizational Research on Regulation**. [London: Oxford Press, 1998] p.2

services that the world depends on given the technological changes and growing movement toward making the world a global village. Telecommunications refers generally to the science and technology of communication at a distance by electronic transmission of impulses, such as telegraph, telephone, cable, wireless connection and many more<sup>4</sup>. Clearly, the industry provides one of the major means through which people are able to communicate.

The ultimate objective of regulation of entities is to secure consumer interest and balance them against the need to attract investment. It has been argued that the positive expectations of regulation may not always be met because of the way a country's political and social institutions – its executive, legislative, its judicial systems, its informal norms of public behaviour – interact with regulatory processes and economic conditions<sup>5</sup>. Clearly, a country's institutions influence the confidence of investors and the performance of privatized utilities.

In a further understanding of the notion of regulation, its useful; to think of the word 'regulation' being used in the following different senses<sup>6</sup>;

- a) A specific set of commands where it involves the promulgation of a binding set of rules to be applied by a body denoted to this purpose. For instance, the Information and Communication Technologies, Act<sup>7</sup> or rules as contained in the Zambia Information and Communication Technology Authority (ZICTA) hand book.
- b) As deliberate state influence where regulation has a more broad sense and covers all state actions designed to influence industrial or social behaviour.
- c) As all forms of social control or influence merely incidental to other objectives.

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<sup>4</sup>B. Koops et al. **Telecommunication** [www.thefreedictionary.com/telecommunication](http://www.thefreedictionary.com/telecommunication). 18th November 2009, 12:20 hrs

<sup>5</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication**. [Cambridge: Cambridge University Press, 1996] p. 1

<sup>6</sup>R. Baldwin. and M. Cave. **Understanding regulation: Theory, Strategy and Practice**. [London: Oxford University Press, 1999] p. 6

<sup>7</sup> Number 15 of 2009

Regulation is often thought of as an activity that restricts behaviour and prevents the occurrence of certain undesirable activities but the influence of regulation may also be enabling or facilitative as for example in the case of the Information and Communication Technologies Act (ICT Act), where airwaves are regulated so as to allow broadcasting operations to be conducted in an ordered fashion rather than left to the potential chaos of an uncontrolled market.

It is clear from the foregoing that regulation plays a public role as a means to address public need. It is for this reason that it becomes inevitable for the organs of government to play an active role in reaching this end.

Hence, the approach this essay takes to assess the impact of Zambia's institutional framework on effective regulation and realise the reform needed if any. The aim is to find out how best investors can protect their interest given the institutional framework of Zambia and whether the regulator in the performance of its functions ensures that consumer interests are protected.

### **1.3 Purpose of Regulation**

The purpose of regulation is to achieve certain publicly desired <sup>what?</sup> in circumstances where, for instance, the market would fail to yield results<sup>8</sup>. This research presents the results of a comparative analysis of the impact of core political and social institutions on regulatory structures and performance in the telecommunications industry in Jamaica, Chile, Argentina, the Philippines and Britain. The original study reveals that the institutional endowment of a country determines the credibility and effectiveness of regulation, thus its ability to encourage private investment and efficiency to the benefit of consumers.

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<sup>8</sup>R. Baldwin and M. Cave. **Understanding regulation: Theory, Strategy and Practice**. [London: Oxford University Press, 1999] p. 5

Service providers more often than not fail to produce efficient, competitive outcomes usually due to anti competitive behaviour which is common in business and the law is an important device to curb it. There is also market misconduct and in an industry so important to the community, it is most undesirable to have unethical and unprofessional behaviour. Regulation is thus an attempt to establish a legal and ethical framework within which commerce can flourish.

Provision of communication is a complex activity in that what is put in before the waves spread is a bulk of investment<sup>9</sup>. Therefore, a provider's ability to fulfil effective provision of the services is very important. Investors in the industry put in huge sums of money especially for the sunk investment in non-deployable assets such as cables and towers. To ensure that their interests are safeguarded and quality guaranteed there is need to have strong supervision or management. The prime objectives of effective regulation as seen even from the preamble to the ICT Act are;

- i. To ensure that investors in the industry have the necessary security or confidence required to continue investing in Zambia.
- ii. To ensure that consumers are able to be treated in an equitable manner and assured of a quality service.

Therefore, an effective regulatory regime is one that is able to uphold the protection of both consumer and investor interests.

#### **1.4 State of the Industry and Legislative Framework**

The telecommunications sector is one area that needs prudent management. The law can be used to achieve this end.

##### **a) State of the industry**

The telecommunications sector in Zambia has come a way long from a State Owned and managed sphere dating back to pre-independence days when a private mobile service provider was permitted

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<sup>9</sup>H. Intven. **Telecommunications Regulation Handbook, Module 6**. London: McCarthy Terault. [2008] p. 4

to enter the market in this new product market that had hitherto significant global impact. Since then, there has been phenomenal growth beyond the expectations of the time. This growth was facilitated by the realization that the State Owned entity, Zambia Telecommunications Company Limited (Zamtel), which owned all the backbone infrastructure and/or essential facilities, was not able to keep Zambia abreast with the modern developments that had then already taken place in the global telecommunications market<sup>10</sup>.

Structural adjustment reforms under the auspices of the World Bank/IMF led to the enactment of the Telecommunications Act was enacted in 1994, with the Communications Authority of Zambia being established under the Act. Currently, the 1994 Act has been repealed by the Information and Communication Technologies Act<sup>11</sup> under which section 4 provides for the continuation and renaming of the authority from Communications Authority of Zambia to the Zambia Information and Communications Technology Authority. The industry now comprises three major service providers which are ZAIN, MTN and CELL Z.

Privatization and regulatory reform are viewed as a solution to the problem of poor performance of public utilities and a means to improved service. It is important to note however that institutions interact with regulatory processes and economic conditions. Therefore, the institutional framework of a country plays an important role in the effectiveness of a country's regulatory regime.

Zamtel dates back to 1913 when the first telephone exchange was installed in Livingstone. Since then, the company developed to be a pioneer of the telecommunications industry in Zambia. It offered a wide range of services on its fixed line network. In addition, it offers mobile phone services and internet services under Cell Z and Zamtel. Cell Z was in 2003 awarded best product

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<sup>10</sup>T. Kaira. **Understanding the Dynamics of Competition in Telecommunications Services in Zambia**. [Paper submitted to the UNCTAD Multi-Year Meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, Geneva, 17-19 March 2009]

<sup>11</sup> Number 15 of 2009

launch by the Zambia Institute of Marketing<sup>12</sup>. Entry by private service providers started as early as 1994 when the then Telecel now known as MTN launched itself in 1994<sup>13</sup>. Following this, came Zamcell whose name was changed to Celtel founded in 1998 and launched as ZAIN in 2009<sup>14</sup>.

It is in response to the need to regulate the private sector that The Zambian government in 1994 established the Communications Authority of Zambia. This regulatory body has for a long time now regulated and coordinated the private industries and encouraged effective competitive practices. The authority plays its role by balancing the interests of investors against maintaining consumer welfare.

Mr. Harrington, the then Minister of Communications and Transport in presenting the Telecommunications Bill noted that the intention is ‘the enhancement of standards in the telecommunications services of our liberalized economy adopted’<sup>15</sup>. The Telecommunications Sector was at the time regulated by the provisions of the Posts and Telecommunications Act 18 of 1987, Radiocommunications Act Chapter 796 of 1965 and the Telecommunications Act of 1987 which conferred privileges on the Posts and Telecommunications Corporation Limited a monopoly which prevented the liberalization of the Telecommunications and Postal Sectors.

The Minister further noted that the Telecommunications Bill<sup>16</sup> intended to:

- i. remove the monopoly conferred on the PTC to provide telecommunications services in the country
- ii. Separate postal services from telecommunications services, hence the establishment of Zamtel
- iii. Establish the Telecommunications Authority and Board of Regulators

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<sup>12</sup>T. Lindlof and B. Taylor, **Communication**. eBizguides.com//Zambia, 4<sup>th</sup> March 2010, 17:08 hours

<sup>13</sup>M. Malakata. **Profile**. [www.mtn.com/ .. / GroupProfile.aspx](http://www.mtn.com/.. / GroupProfile.aspx), 4<sup>th</sup> March 2010, 17:00 hours

<sup>14</sup>M. Habbuno. **Celtel Acquisition**. [www.zain.com/ .. / Celtel acquisition](http://www.zain.com/.. / Celtel acquisition), 4<sup>th</sup> March 2010, 17:17 hours

<sup>15</sup> Official Verbatim Report of the Parliamentary Debates of the 3<sup>rd</sup> Session of the National Assembly (21st January to 17<sup>th</sup> March, 1994.) p. 1678

<sup>16</sup> Number 24 of 1994

- iv. Vest the telecommunications administration into the Telecommunications Authority under the provisions of the Act and the general direction of the Minister
- v. Vest the power to license in the Telecommunications Authority.

This was very important because the establishment of the Telecommunication Authority goes with the removal of the monopoly as it is necessary to provide a level playing field. The Minister noted that 'it is necessary to have an autonomous regulator who shall be independent. There are several issues that need to be regulated when dealing with a liberal telecommunications environment and private participation in the provision of these services is one of them'<sup>17</sup>.

In light of this, it is clear that the entry of the private sector into the industry necessitated the establishment of the regulatory authority. This was done in order to create an autonomous body which would effectively regulate competition matters and pricing in order to protect the companies providing the service as well as the citizens who benefit from it. It is here that the benefits of effective regulation can be clearly observed. Regulation promotes efficiency and encourages quality service. Its usefulness cannot be over-emphasised. There has been phenomenal growth since the establishment of the regulatory authority. The Act as well as the establishment of the Authority was undoubtedly in line with international best practice.

## **b.) Legislative Framework**

The Information and Communication Technologies Act (ICT Act) which now repeals the 1994 Telecommunications Act is the main piece of legislation governing the supervision and regulation of the telecommunications sector. The ICT Act in its preamble notes that it is an Act to continue the existence of the Communications Authority of Zambia and rename it as the Zambia Information and Communication Technology Authority (ZICTA).

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<sup>17</sup> Official Verbatim Report of the Parliamentary Debates of the 3<sup>rd</sup> Session of the National Assembly (21st January to 17<sup>th</sup> March, 1994.) p. 1679

It further provides for the regulation of information and communication technology; facilitate access to information and communication technologies; repeal the Telecommunications Act, 1994, and Radio communications Act, 1994; and most importantly protect the rights and interests of service providers and consumers.

### **1.5 Regulatory Design across different Institutional Settings**

The expectations of effective regulation may not always be met because of the way a country's executive, legislative, judicial and informal systems interact with regulatory processes and economic conditions. It has, for instance been argued that a country's institutions influence the confidence of investors and the performance of private utilities<sup>18</sup>. This research looks into the performance of privatized telecommunications utilities in Zambia, by a comparative study with the performance of privatized telecommunications utilities in different political and social circumstances.

Further, it has been shown that, 'in addition to influencing a regulatory system's ability to restrain administrative action, political and social institutions also have an independent effect on the type of regulation that can be implemented and therefore on the appropriate balance between commitment to a particular regulatory system and flexibility in response to technological change'<sup>19</sup>. The results of this study reveal that without this commitment, long-term investment is not likely to take place.

It has been noted that, 'a system that grants generous administrative discretion might not generate the high levels of investment and welfare expected from private ownership. Conversely, a regulatory regime that allows almost no flexibility might still provide adequate incentives for

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<sup>18</sup> P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996] p. 4

<sup>19</sup> Ibid, p.6

investment if it fits the country's institutional endowments<sup>20</sup>. An analysis of the British case suggests that restraint of regulatory discretion is behind the development of regulatory institutions even in developed countries.

Because a large proportion of investor's assets are sunk, a utility will be willing to operate even if it cannot recover its investments so long as it covers its operating costs. The combination of large investments in durable, specific assets and strong politicization means that the utilities are particularly vulnerable to administrative expropriation. The easiest form of administrative expropriation is to set utility prices below the company's long-run average costs<sup>21</sup>. Clearly, where the threat of administrative expropriation is strong, private investors will limit their exposure.

Countries that allow broad administrative discretion often end up with public ownership of utilities, because the hazards of direct private investment are so great. Industries with very small sunk investments or rapid asset depreciation will not be prime candidates of administrative expropriation. Even in rapidly growing economies, utilities are never free of the threat of administrative expropriation. Therefore, a country's institutional endowment guides the empirical analysis of how well each country has resolved its regulatory problems.

A brief consideration of the study which formed the basis of this research is that the case studies highlight the impact of a country's institutional endowment on its regulatory design. The study suggests what kind of regulatory design will be credible given the background institutions of the country in question. The countries which form the basis of the study are divided into three groups.

The first group is the traditional and parliamentary systems. Jamaica and the United Kingdom fall in to this group. They have a strong judiciary and electoral rules that tend to support two strong parties. 'Britain has led the world in the development of a judiciary with an exceptional reputation for probity. Jamaica's judiciary is also well regarded and has ruled against government on

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<sup>20</sup>B. Weingast and M. Moran. The Economic Role of Political Institutions. [Stanford University Press, 1993] p. 9

<sup>21</sup> Ibid, p.13

numerous occasions'<sup>22</sup>. Such systems are considered to have very little or no difficulty in developing a regulatory system capable of sustaining efficient levels of private participation and investment because investors rely on contracts enforceable in the courts of law

The second group is the archetypal presidential system under which Chile falls. 'With the exception of 15 year military rule of General Augusto Pinochet (1973 - 89), Chile has had more than 100 years of civilian rule under a constitution embodying separation of powers, orderly transfer of authority, and regular multiparty election. This long period of stability broken only by the military takeover in 1973, allowed Chile to develop strong respect for institutions allowing the legislature to develop a strong sense of local representation'<sup>23</sup>.

Therefore, although not entirely resistant to extreme pressure, Chile's long standing legislative and executive institutions and its system of checks and balances had the potential to provide credible safeguards against arbitrary changes in the regulatory regime. It therefore has a very stable regulatory design leaving investors with broader options either to rely on protective legislative provisions or on licences conferring contractual rights which are enforceable in the courts of law. This is so because a strong and independent judiciary provides an effective check on government power, on both constitutional and statutory issues. This instils confidence in investors both in the system and the persons controlling it.

The final group is rent-seeking presidential systems in which fall Argentina and the Philippines and have modelled their political institutions after those of the United States, creating a complex system of checks and balances. In both systems, an endemic of lack of respect for constitutional order has given rise to a corrupt bureaucracy and judiciary and reliance on the military to resolve conflicts among interest groups'<sup>24</sup>.

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<sup>22</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996] p.9

<sup>23</sup>M.S. Shugart and J. M. Carey. **Presidents and Assemblies.** [Cambridge: Cambridge University Press, 1992] p. 83

<sup>24</sup>Ibid, p. 56

This means that investors tend to be subject to administrative expropriation. With such weak institutional structures and broad scope for executive dominance, Argentina and the Philippines seem to require regulatory governance that goes beyond reliance on legislation, procedures or contract law and extreme support from the international community.

The case for Zambia is a mixed approach. It will be seen through this paper that the system portrays high levels of executive dominance thus corrupt bureaucracy. Additionally, reliance on legislation is not the best option for any investor because Acts of parliament in Zambia are changed very frequently and not necessarily through the most stable mechanisms. There is therefore no certainty in legislation. A practical example as will be shown was the contentious amendment to section 9 of the Mines and Minerals Act<sup>25</sup> regarding the Development Agreements on which most investors had placed reliance of their terms, rights and obligation in relation to government.

The most reliable institution appears to be the judiciary, which in Zambia faces allegations of being corrupt or lacking probity but has, through various cases been able to prove its autonomy and effectiveness as will be shown in cases such as **Christine Mulundika and 7 others v The People**<sup>26</sup>, in relation to its ability to strike down Acts of Parliament which are inconsistent with the constitution.

Another case is **Frederick Mukongolwa Mushambatwa v Livingstone Municipal Council and the Attorney-General**<sup>27</sup> in which the applicant sought a declaration that the Minister of Local Government and Housing had no power to transfer him and that such transfer constituted maladministration, political harassment and victimisation and lacking in legal or administrative authority. It was held that the Minister's powers to oversee the transfer of staff which existed after 1986 were terminated by Act 21 of 1991 so that at the time of the purported transfer the Minister

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<sup>25</sup> Chapter 213 of the Laws of Zambia

<sup>26</sup> [1995] ZR (SC)

<sup>27</sup> (1990 - 1992) Z.R. 200 (H.C.)

was acting *ultra vires*. This showed their unbiased approach towards actions by members of the executive. Therefore, if the judiciary appears more stable, the best option is for investors to rely on licences conferring contractual rights which are enforceable in the courts of law.

## **1.6 Conclusion**

Telecommunications is a very crucial sector. It needs to be guarded and nurtured for it to grow in a stable fashion. Regulation of any form provides the necessary mechanism for this to be so. Effective regulation will consequently instil public confidence in the financial regime as a whole. However, to achieve the broad objectives, the regulator must have sufficient power and necessary discipline to bring this out. This will be the subject of the next chapter which looks at the power of the authority and the impact of government on its effective performance because a regulator must have sufficient autonomy to foster growth of the industry in developing countries like Zambia.

## Chapter 2

### **2.1 Introduction**

The telecommunications industry is a modern and complex industry. Generally, the Zambia Information and Communications Technology Authority (ZICTA) has technical jurisdiction of regulation in the telecommunications industry in Zambia. It is important to note that a regulator must have adequate autonomy to promote growth of the industry in developing countries like Zambia. Regulation is an important activity for every country. It has the potential to assist in the development process, encourages investment and promotes quality service to the advantage of consumers.

Therefore, the need for a strong regulatory system is a worldwide concern. A regulatory system must be able to ensure consumer protection on one hand and preserve the need to encourage innovation and investment on the other hand. The ZICT Authority is particularly mandated under section 6(2) (i) of the Act to attract and encourage local and foreign investment in information and communication technology and promote the provision of international transit services.

### **2.2 Consumer Protection**

One major role of every regulator is to ensure consumer protection. It is the ultimate objective which every regulator must work to accomplish. There are various ways in which consumer protection is achieved. One such method is price controls. It is also important for regulators to check on product development in order to ensure that consumers receive services that are up-to-date and efficient. This section reviews the methods adopted by the Energy Regulation Board (ERB), the National Water Supply and Sanitation Council (NWASSCO) and the ZICT Authority.

**a. The Energy Regulation Board**

This Board is established under section 3 of the Energy Regulation Act<sup>28</sup> and is mandated to issue operation licences in the Energy sector. The Board is well known for its role as watchdog for consumers through the regular investigations and control of price adjustments in the industry. Consumer protection is a major objective of the board.

In section 6, the functions of the board are stated as being, *inter alia*,

‘to monitor efficiency and performance, receive and investigate complaints from consumers on price adjustments made or services provided by any undertaking, to work in conjunction with the Zambia Competition Commission to monitor the levels of completion and structures within the energy sector... to minimize the impact on the environment of the production, supply, transportation and use of energy and fuel’

These functions clearly reveal the focus on protection of the consumer who under the Act is defined as any person who is supplied or uses the services of any energy or fuel. Another very important function which is aimed at ensuring consumer protection is that pertaining to the mandate on the part of the Board to work in conjunction with the Zambia Bureau of Standards to come up with standards with regard to quality, safety and reliability of the energy and fuel supply.

**b. The National Water Supply and Sanitation Council (NWASSCO)**

Established under section 3 of the Water Supply and Sanitation Act<sup>29</sup> and under section 2 consumers are defined as direct beneficiaries of water supply or sanitation services. Consumer protection under this Act is achieved through some of the functions set out in section 4 and include; ‘...to disseminate information to consumers on matters of water and sanitation and to issue operation licences to water and sanitation service providers... to set tariffs for provision of water and

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<sup>28</sup> Chapter 436 of the Laws of Zambia

<sup>29</sup> Act number 28 of 1997

sanitation utilities, to establish and enforce standards of water and sanitation and to advise utilities on procedures for handling complaints from consumers...’

The Act goes further to provide for the appointment of inspectors who have the mandate to carry out physical inspections and to enforce and ensure compliance with provisions of the Act. In performing these functions, the Council protects consumer’s interests in the field of water supply and sanitation.

**c. The Zambia Information and Communications Technology Authority**

The ZICT Authority is authorized to regulate the provision of telecommunication services to, from, and within Zambia. The functions of the Authority are prescribed in section 5 and include, inter alia;

‘promoting and protecting the interests of consumers, purchasers and other users of telecommunication, disseminate information and promote participation of the public in the provision of electronic communications services, promote research, development and use of new and appropriate technologies in the sector and promote manufacturing and production of relevant apparatus’

The Communications Authority of Zambia has done its best to ensure that consumer protection is achieved and enforced. Even with the continued existence as the ZICT Authority, the need to protect consumers still stands, many improvements must be made.

The Act establishes the User’s Advisory Committee to which consumers of telecommunications can complain and comment on telecommunications service. It also provides for consumer affairs under Part VII of the Act in which such matters as quality of services are highlighted and enforcement mechanisms prescribed. There is need on the other hand to improve on the enforcement of the provisions of the Act in order to ensure compliance.

The implementation of the aforementioned functions undoubtedly ensures that consumer interests are protected. Consumer protection must remain the primary goal of the regulator given that the market is driven by the consumers who will be the users and beneficiaries of the service.

#### **2.4 The Impact of effective Regulation on Private Investment**

The benefits of private investment cannot be over emphasized. It is a potential prospect for development of knowledge and it encourages local firms to improve their standards due to the increase in competition compelling them to introduce new technology and work harder. For instance, it was reported in 2003 that ZAMTEL had improved its mobile phone services from Analogue to GSM (Global System for Mobile Communication) System as a result of Celtel and Telecel which introduced mobile phones and the GSM system<sup>30</sup>.

This is a clear indication of some of the many benefits a country derives from private investment. It is a means to national development and a means of transferring private capital both financial and physical in the public sphere.

Given this, it is important that a country has in place an effective regulatory regime in order to boost investor confidence and continue to encourage private investment. In the telecommunications sector particularly, investments are usually in huge sunk non-deployable assets such as cables, and returns are expected over a long period. This entails the need to improve infrastructure and the imposition of a liberal and effective investment regime.

It is important to note however that different kinds of regulatory institutions have different strengths and weaknesses and the set of qualities that is desirable of a regulator in a given regime may vary according to the kinds of issues and problems that may arise. Because regulation involves activities that are of value to the community, it is inevitable that at some stage, the government of that state will have a hand in how well this activity is supervised and coordinated.

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<sup>30</sup>M. Blomstrom and A. Kokko. **The economics of Foreign Direct Investment Incentives in NBER working paper series**; <http://www.nber.org/papers/w9489>, [ 23<sup>rd</sup> June 2003]

It has been argued that in order to establish whether regulatory action or the regulatory regime is worthy of support (legitimate), the key tests to refer to are 'whether the action or regime is supported by legislative authority, whether there is an appropriate scheme of accountability, whether procedures are fair accessible and open, whether the regulator is acting with sufficient expertise and finally whether the action or regime is efficient'<sup>31</sup>. These tests represent the answer to what may constitute 'good' regulation.

It cannot be disputed that when regulatory action is authorised by parliament it deserves support. If the people, through Parliament, have instructed certain regulators to achieve certain results and the regulators can point to their having produced the result, then they are in a position to claim public support. Most regulatory statutes give regulators broad discretions and implementing the mandate involves interpretation.

For instance, section 6 of the ICT Act provides that; 'the authority shall regulate the provision of electronic communication services and products and monitor the performance of the sector...' this provision is couched in such general terms as to leave the authority with wide discretion.

Further, section 6(2)(f) of the Act orders the regulator to promote the interests of consumers but it is silent on the balance that needs to be drawn between industrial and domestic or large and small consumers' interests. In addition, it gives the regulator scope for exercising judgment and devising solutions. Legislators generally have limited information and expertise in specialist areas, and, though they may know that there is a problem, they may not know how to resolve it. Clearly, an investor in this sense is guaranteed of the expertise by the regulatory body giving them confidence in the system.

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<sup>31</sup>R. Baldwin and M. Cave. Understanding regulation: Theory, Strategy and Practice. [London: Oxford University Press, 1999] p. 77

However, the system in Zambia is such that Acts of parliament are changed any time and this diminishes the confidence in the regulator as the system is seen to lack certainty and stability. A practical example is the amendment to section 9 of the Mines and Minerals Act<sup>32</sup> regarding the Development Agreements between investors and government. This means that, Parliament, although being a fountain of democratic authority and allowing the regulator to have public support, the uncertainty in the system tends to lower the rate at which investors may quickly undertake in the telecommunications sector.

Accountability is also a very crucial aspect for every regulator. It has been argued that 'regulators with imprecise mandates may claim that they deserve the support of the public because they are properly accountable to, and controlled by, democratic institutions. Thus, if parliament itself or another elected institution is not the body holding the regulator to account then the arrangement may be criticized as unrepresentative'<sup>33</sup>. Accountability undoubtedly instils confidence in a regime.

Additionally, the levels of participation that regulatory decisions and policy processes allow to the public, to consumers, and to other affected parties play an important role in the confidence the public will have in the system. 'Technocrats and other administrative representatives for members of the public must be seen to have the highest level of respect for the rule of law otherwise the system will be polluted with corrupt practices and like ill fated events'<sup>34</sup>. This is so because proper democratic influence over regulation is ensured. It is here that the role of the executive is noticed

There is need therefore, to have technocrats who are dedicated to honesty and the need to uphold the rule of law. The case for Zambia however is a difficult one, the high levels of poverty have made people compromise their values and focus on the need to survive. Furthermore, cases such as

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<sup>32</sup>Chapter 213 of the Laws of Zambia

<sup>33</sup>R. Baldwin and M. Cave. **Understanding regulation: Theory, Strategy and Practice**. [London: Oxford University Press, 1999] p. 79

<sup>34</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication**. [Cambridge: Cambridge University Press, 1996] p. 4

**William Steven Banda v The Chief Immigration Officer and the Attorney General**<sup>35</sup> show that administrative officers in Zambia are sometimes vested with wide discretion leaving much room for manipulation of the system.

Furthermore, certain regulatory functions may require the exercise of expert judgment. It has been noted that ‘experts assert that they will come to the most appropriate decision and achieve the best results’<sup>36</sup>. One problem with this assertion is that it may be difficult to assess whether the decision arrived at is appropriate or effective because it is difficult to tell what would have happened had alternative decisions been made. Clearly, a regulator may claim support on the basis of acting efficiently.

The ICT Act expressly grants authority to the ZICT Authority to deal with various matters in the sector. Under Section 6(2) (f) and (g) of the ICT Act, the Authority shall have the following functions:

‘... (f) To promote the interests of consumers, purchasers and other users of information and electronic communications services....

(g) To promote and maintain competition among persons engaged in commercial activities for or in connection with the provision of telecommunication services, and promote efficiency in the economy on the part of persons so engaged...’

This allows service providers to compete effectively in the supply of such apparatus both inside and outside Zambia while the interests of consumers remain protected.

### **2.3 The Telecommunications Market in Zambia**

The telecommunications market has the following major product markets; the internet, mobile telephone and the landline (fixed/terrestrial). There is also the international gateway, which for all

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<sup>35</sup> [1994] SJ 82 (S.C)

<sup>36</sup>J. Landis. **The Administrative Process**. [New Haven, 1983] p. 27

intents and purposes is a part of the fixed/terrestrial product market<sup>37</sup>. Various factors have been observed to have occurred in the telecommunications market, which have helped improve the industry in Zambia:

- (i) Zambia adopted an ICT Policy which has developed in close coordination with other sectors and in alignment with other national development plans.
- (ii) A legal framework has been established, the ICT Act is comprehensive, and expected to improve transparency and predictability of regulatory actions;
- (iii) The international gateway has been liberalized by the removal of prohibitive and anticompetitive measures in the telecommunications sector in order to allow existing service providers to participate and compete alongside ZAMTEL

Notwithstanding these developments, it has been noted that Zambia has one of the lowest fixed density levels compared to other SADC countries due to the lack of readily available infrastructure to allow for a rapid expansion of the telecommunications industry.<sup>38</sup>

### **2.3.1 The Internet Product Market**

Internet has been described as one of the most influential technologies the world has seen. This is because it has totally changed the concepts of communication and information exchange. Many believe that the Internet will soon become like other utilities such as water and electricity which are a necessity in most households.

It has been reported that 'Zambia first became connected to the Internet in 1994 through a slow leased line to South Africa with just about 250 users<sup>39</sup>. The Internet has become a very important and requisite tool to businesses and individuals. 'The three main challenges related to the growth of

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<sup>37</sup>T. Kaira. **A Competition Law Perspective of the Telecommunications Industry in Zambia**. [Paper Submitted to the 1st ICT/Telecommunications Research Symposium organized by the Communications Authority of Zambia, 22 – 23 October, 2008, Holiday Inn, Lusaka] P. 3

<sup>38</sup>T. Kaira. **Understanding the Dynamics of Competition in Telecommunications Services in Zambia**. [Paper submitted to the UNCTAD Multi-Year Meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, Geneva, 17-19 March 2009] p. 4

<sup>39</sup>T. Kaira. **Understanding the Dynamics of Competition in Telecommunications Services in Zambia**. [Paper submitted to the UNCTAD Multi-Year Meeting on Services, Development and Trade: The Regulatory and Institutional Dimension, Geneva, 17-19 March 2009] p. 5

the internet in Zambia include insufficient or less developed communication infrastructure, high cost of delivering internet bandwidth and high cost of computers and related communication accessories;<sup>40</sup> Therefore, the development of the internet is very dependent on the distribution of infrastructure.

Zambia at present has seven licensed Internet Service Providers and the market appears to be fairly open to other entrants, largely due to the large untapped and perhaps yet to be internet-enlightened market<sup>41</sup>. Of the seven, one is owned by ZAMTEL, while the others are owned by private entities. Zambians access internet through broad band and in this area various assets are used including the set up of network towers and transmission centres.

### **2.3.2 The Mobile Cellular Product Market**

Mobile telephone service has really developed in Zambia and Africa generally. It is in fact the fastest growing segment of the telecommunications sector<sup>42</sup>. It has developed at the expense of the landline because it is relatively easier to set-up process than the landline and the convenience and personal touch that are connected with a mobile phone. The mobile phone was in a status symbol when the market was initially opened up in Zambia but things are different now. It is slowly becoming a necessity. It provides a personal directory of contact details, the short messaging service (SMS), facsimile, mobile internet and a payment system that the fixed landline does not.

A survey revealed that even the low income bracket have developed a more advanced taste for expensive mobile phones, although most users use the phone largely for ordinary voice calls and data transmission services such as short messaging systems (SMS). 'The total number of mobile

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<sup>40</sup>R. Maseko. **The Performance of the Internet in Zambia**. [Paper presented at Computer society of Zambia/E-brain public v forum on 31st March 2005 at Long Acres Lodge, Lusaka] P. 3

<sup>41</sup> Ibid. P.3

<sup>42</sup>M. Lubasi. **Investor Relations**. <http://www.zm.zain.com/en/about-us/investor-relations/index.html> 17<sup>th</sup> December 2009

subscribers worldwide has grown from 1.38 billion at the start of 2004 to over 2.12 billion at the end of 2005<sup>43</sup>.

All these factors, amongst others, have contributed largely to the growth and development of this market in Africa. This means that the use of the service is growing entailing that there is need to have wider provision. Therefore, the need for further and more advanced investment in the sector cannot be overstated.

### **2.3.3 The Fixed Landline Product Market**

The fixed landline service seems to be a monopoly in Zambia and a preserve of ZAMTEL. Historically, 'the State-owned Post and Telecommunications Corporation (PTC) Limited was the sole supplier of telecommunications services in Zambia. With 100% funding from the State Treasury, PTC put up the key backbone infrastructure in the industry'<sup>44</sup>. But with the rise in the levels of investment, the service is slowly developing and more institutions are likely to focus on it.

### **2.4 Improvement needed in the Telecommunications Sector**

Lack of private sector entry can debatably lead to high international call tariffs and lack of investment in modern and more efficient international systems. As has been seen, there is a shortage of efficient infrastructure in the fixed telephone service system as well as the international gateway in Zambia. This results in higher costs of managing these systems and relatively higher tariffs.

From what is obtaining in the mobile telephone market and internet product markets, it is clear that allowance of private entry has encouraged competition through modern technological systems as well as higher consumer welfare gains in terms of service delivery and pricing. For instance, 'the price of the cheapest mobile phone handset has reduced from US\$300 in 1998 to US\$30 in 2009. Internet access has also drastically reduced to about US\$1 per hour on average from US\$10 about

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<sup>43</sup>M. Lubasi. **Investor Relations.** <http://www.zm.zain.com/en/about-us/investor-relations/index.html> 17<sup>th</sup> December 2009

<sup>44</sup>R. Maseko. **The Performance of the Internet in Zambia.** [Paper presented at Computer society of Zambia/E-brain public v forum on 31st March 2005 at Long Acres Lodge, Lusaka] P. 7

10 years ago<sup>45</sup>. It is clear that the promotion of both foreign and local investment which creates competition would as a consequence improve infrastructure and promote efficiency.

## **2.5 Conclusion**

Given the above, in order to improve its legitimacy, the ZICT Authority could publish its vision of the mandate and hold discussions. Alternatively, it could, at periodic intervals, jointly produce statements of aims in explanation of the mandate with the Minister responsible for the sector. Further, the Authority's claims could be improved by such steps as the creation of a specialist parliamentary select committee or standing consumer bodies. The telecommunications sector also suffers from lack of systematic and sustainable levels of capital. Notwithstanding these drawbacks, it is the role of every regulatory body to work towards promoting effective regulation, which as shown above, consequently increases the levels of investment and enhances consumer welfare.

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<sup>45</sup>L. Kakubo, **Overview of the Internet in Zambia**. THE AFRICAN INTERNET & TELECOM SUMMIT, Banjul, Gambia 5-9 June 2000. [http://www.itu.int/africainternet2000/countryreports/zmb\\_e.htm](http://www.itu.int/africainternet2000/countryreports/zmb_e.htm). 10<sup>th</sup> December 2009

## CHAPTER 3

### **3.1 Introduction**

In this chapter, the influence that institutions have on the effective regulation will be considered. This will be done through a comparative analysis with the States which formed the basis of the study in relation to this research.

### **3.2 Differences in Regulatory Governance**

Regulation of private utilities in the countries examined reveals that the best way to resolve the need for efficiency and to encourage investment varies from one country to the next. What makes the difference is the country's institutional background. The evidence from this case study suggests that institutional endowments have influenced whether a country is able to put in place a workable governance design for its regulatory system and, if so, the form that the design takes.

#### **a) Jamaica and the United Kingdom**

In the history of telecommunications ownership, regulation, and performance in Jamaica and the United Kingdom, several aspects stand out. Both countries have had sustained periods of high levels of private investment in telecommunications: in Jamaica before 1962 and after 1987 and in the United Kingdom (1982) following privatization. Regulatory incentives took different forms during this period but the regulatory governance system remained similar<sup>46</sup>.

Both the commonalities in the governance structure and differences in substantive restraints can be traced to the similarities and differences in their institutional endowments which were at the time designed in such a way that created workable mechanisms for restraining arbitrary action. Jamaica's

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<sup>46</sup>R. Baldwin and C. McCrudden. **Regulation and Public Law**. (London: Weidenfeld and Nicholson, 1987) p. 13

dismal experience with inadequate investment from 1966 to 1975 was a consequence of misalignment between its institutions and its governance structure<sup>47</sup>.

This buttresses the inevitable impact that institutions have on effective regulation. One of the major reasons for one of the periods of high investment in Jamaica started with the creation and privatization of telecommunications of Jamaica in 1987. In the United Kingdom the high investment period began with British Telecommunications privatization in 1984. The case for Zambia is no different. Following the privatization of the public utilities in the telecommunications industry, private investment, both local and foreign, increased.

The regulatory governance structures in these countries were very similar during the periods of high investment. Licenses served as contracts between the regulated companies and their governments and attempts by government to deviate from the specific provisions of the license could be and were challenged in court.

The specific, long-term licenses allow private companies to feel secure about the expected profitability of their investments, without fear that the government could easily modify the terms of the contract and because the licenses are enforceable in the courts of law, companies are assured of substantial regulatory stability.

In Jamaica the licenses guarantee a specific rate of return and also limit the regulator's ability to disqualify investments or to delay price increases through administrative inaction and provides for speedy arbitration to resolve pricing conflicts. The British Telecom's license is equally specific about price setting, giving the company full price setting powers, subject only to later verification by the regulator that the company has adhered to the specified price-cap structure<sup>48</sup>.

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<sup>47</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996] p. 17

<sup>48</sup>'Handout' prepared for the 20<sup>th</sup> **Annual Telecommunications Policy Research Conference,** Solomon's Island, Maryland, 12-14 September 1992

In Zambia, like Jamaica, the licences limit the regulators ability to disqualify investments or delay price increases as well as provide for resolution of license disputes. The ZICT Act<sup>49</sup> provides in section 48 for the approval of tariffs for services offered by a licensee holding a dominant position in relation to the communications market. Additionally, section 75 provides for the speedy resolution of licence disputes.

In these countries, the emphasis on contract rather than administrative law to provide regulatory credibility is consistent with the nature of their political institutions. A law governing regulation, no matter how precise and specific, would offer little assurance of regulatory stability, whereas the courts in these countries have a strong tradition of upholding contracts among private parties. The threat of legal action seems to be enough to restrain regulators.

#### **b) Chile**

As in Jamaica, regulatory history in Chile splits into high and low investment periods. The different forms of regulation that were in place during the high investment period were well aligned with Chile's institutional endowments in ways that restrained arbitrary regulatory action.

The low investment periods stretched from the end of World War II to the late 1950's and from the period of government intervention in 1971 and nationalization in 1974 through to the regulatory reforms of the mid 1980s. Although many factors contributed to the low investment levels, the vagueness of Chile's Telecommunications law which provided few safeguards against opportunistic behaviour meant that the regulator had wide latitude; it also meant that there were no important limitations on changing the regulatory system itself, since the government could moderate the law through regulatory decrees<sup>50</sup>.

In light of the foregoing, the instances of low investment show that regulatory governance structures were not aligned with the country's institutional endowment, they did not restrain the

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<sup>49</sup> Act number 15 of 2009

<sup>50</sup> A. Gerardo. **The Chilean Political System: An Exploration into the Future.** (*Estudios Cieplan*, 1984) p. 15

regulator's discretion, and failed to limit the potential for unilateral modification of the regulatory system.

In Chile, the law specifies an explicit arbitration process to resolve disagreements, with the courts as final arbiter. Because the law is so specific, it provides almost no room for differences in interpretation, regulatory changes require new legislation. And new legislation would be difficult to pass because of such institutional obstacles as a divided bicameral legislature and president from a minority party; obstacles that were absent under the unified military regime that passed the original legislation<sup>51</sup>.

Generally, during both high-investment periods governance structures were designed to limit regulatory discretion. In addition to specific legislation, which is difficult to change, regulatory credibility was fortified by a judiciary with a record of hearing and impartially resolving regulatory disputes. Any deviation from regulatory instructions or any government attempt to change the system can easily be challenged in the courts.

The law specifies not only the procedures for establishing prices, but also how information is to be processed, virtually eliminating any regulatory discretion over pricing in the short run. Such legislative specificity would not have established the same kind of credible commitment under the parliamentary systems of Jamaica or the United Kingdom, where laws can be amended much more easily than in a presidential system like Chile.

Chile is regarded as having a strong bureaucracy. This is so because the specificity of the sort designed in Chile could be stipulated in a license instead of in legislation, the complexity of the arrangement demands that those who enforce the license, that is, company executives, bureaucracies and the courts be able to navigate its complexity<sup>52</sup>.

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<sup>51</sup> M. Falcoff. Modern Chile, 1970-1989: A Critical History. (Transaction Publishers, 1989) p. 111

<sup>52</sup> Ibid, p.113

The evidence presented for Chile is consistent with the main hypothesis that the performance of utilities is strongly related to how well regulatory governance structures are aligned with the country's institutional endowments.

### c) Argentina and the Philippines

Neither Argentina nor the Philippines has succeeded in putting in place a workable regulatory governance structure. In Argentina investment levels have been reasonable since privatization, but very high rates of return played a role. It has been argued that the gaps in the institutional endowment of the two countries account for their chronic failure to establish workable regulatory governance structures.

Argentina split up its state owned telecommunications company in 1990 and later sold each part to a private consortium. The rules under which the companies were to operate have been changed repeatedly. In the Philippines as well, the regulatory system has not imposed any substantive restraints on regulatory discretion. Formally, the telecommunications sector has been under the control of the regulatory commission since colonial times<sup>53</sup>.

The fragmented legislatures of Argentina and the Philippines which make it difficult to change regulatory laws could provide some support for a stable regulatory regime but that is not enough. Weak judiciaries, disregard for the rule of law, and an absence of informal norms of behaviour that restrain discretionary action undermine any effort to enact legislative restraints on changing the regulatory system.

Furthermore, the historic problems with judicial corruption in both countries seem to constitute a basic institutional flaw that would undermine the establishment of a credible regulatory system since the courts cannot be trusted to restrain the regulators or to block efforts to change the regulatory system in midstream.

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<sup>53</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996] p. 14

### **3.3 Institutional Endowments and the impact on Regulation**

There are countries that have domestic institutions capable of credibly refraining from arbitrary administrative action and those that do not. As has been argued in the preceding chapters, an independent judiciary with a reputation for impartiality, and whose decisions are effectively enforced, is a necessary condition for making credible commitments and thus promoting effective regulation. . Among the countries considered, Chile, Jamaica and the United Kingdom had in place a strong and independent judiciary, while Argentina and the Philippines did not.

A review of the investment conditions in the various states indicates that countries lacking a well functioning judiciary have difficulty in the short term developing a regulatory system capable of sustaining efficient levels of private participation and investment, and there is little reason for them to devote substantial scarce resources to such an effort.

Pablo Spiller and Brian Levy<sup>54</sup> note that ‘alternative mechanisms for securing commitment like international guarantees must be called for in countries with weak regulatory systems because there is more confidence in international standards. Among countries able to use regulation to secure commitment are countries whose political institutions allow commitments through legislation and those that can best achieve such commitment by embedding their regulatory systems in the operating licences of private companies’<sup>55</sup>. It is important to note that legislation needs to specify the process for making regulatory decisions otherwise regulatory discretion will be unchecked.

In regulatory systems where legislation cannot adequately promote regulatory credibility, a solution may be to embed the regulatory process in contract law rather than administrative law. It has been shown that Chile and the United States fall into the group of countries that can embed their regulatory systems in legislation while Jamaica and the United Kingdom fall into the group that will

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<sup>54</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication.** [Cambridge: Cambridge University Press, 1996] p. 18

<sup>55</sup> Ibid, p. 20

find embedding it in contracts more successful. Zambia, which as will be shown, has a regulatory design similar to that of Jamaica, best achieves regulatory efficiency through embedding the system in contract law which confers contractual rights enforceable in the courts of law.

The pertinent issue to be considered then is whether the judiciaries in such states have built a reputation of independence and have the ability to rule against government. This is so because such contracts are entered between an investor and the government of the host state. In Zambia, the independence of the judiciary has been a matter of strong debate. However cases such as **Stora Mbuji and another v the Attorney General**<sup>56</sup> in which a decision made by the president was subjected to judicial review and **Mpongwe Farms v the Attorney General**<sup>57</sup> in which a decision made by the Minister of Lands was subjected to judicial review and declared *ultra vires* on grounds of illegality and procedural impropriety show that the Zambian judiciary has over the years portrayed its ability to rule against government.

The judicial institutions of Jamaica and the United Kingdom are described as similar. It has been noted that, 'Britain has led the world in the development of a judiciary with an exceptional reputation for probity and Jamaica's judiciary is well regarded and has ruled against government on numerous occasions'<sup>58</sup>. These countries both have parliamentary systems of government as well as a strong judiciary which in itself is a positive step towards effective regulation.

From the foregoing, this discussion identifies three complementary sets of mechanisms for restraining arbitrary action:

- i) substantive restraints on regulatory discretion, which can take the form of process regulation or specific substantive rules;
- ii) restraints of either the legislative or licensing variety, on changing the regulatory system;

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<sup>56</sup> Supreme Court Judgment Number 10 of 1993

<sup>57</sup> (2001) ZR 81

<sup>58</sup> Baron, David. **Business and its Environment**. (Englewood Cliffs: Prentice Hall, 1992) p. 12

iii) Institutions for enforcing the substantive restraints and restraints on changing the system.

A central hypothesis explored in the comparative analysis is that all three mechanisms must be in place and properly aligned with the specific characteristics of a country's background institutions for private performance to be satisfactory.

There is a feature of countries requiring specific, substantive rules to achieve credibility, and countries that can use flexible regulatory processes and still restrain arbitrary action. It has been shown that, generally, 'the potential for flexibility in design will be highest in countries whose institutional endowment includes informal norms or bodies of administrative law that restrain the arbitrary use of government power even in the absence of explicit legal restraints'<sup>59</sup>.

Among the countries studied that cannot provide credibility through legislation, Jamaica is in the category requiring specific, substantive rules to achieve regulatory credibility, while the United Kingdom can achieve credibility with a more flexible regulatory process because, *inter alia*, both the rulers and the ruled have inherent observation and respect of the rule of law.

Countries with strong administrative capabilities can set up a regulatory system based on specific, substantive rules that restrain arbitrary action and so can attract investment and promote efficiency and flexibility. Chile is among the countries that can use legislation as its regulatory instrument. Zambia however, has a system in which legislation is repealed, replaced and amended quite regularly and this is not desirable as it may affect or interfere with the rights and interests of the parties involved.

#### **a) Jamaica and the United Kingdom**

Although both have a long tradition of contract law and of upholding contracts against government, judicial review of regulatory decisions is not customary'<sup>60</sup>. This means that regulators may not have

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<sup>59</sup>P. Spiller and B. Levy. **Regulations, Institutions and Commitment: Comparative Studies of Telecommunication**. [Cambridge: Cambridge University Press, 1996] p.22

<sup>60</sup>R. Baldwin and C. McCrudden. **Regulation and Public Law**. (London: Weidenfeld and Nicholson, 1987) p.15

to justify their decisions thus regulatory review is not a strong weapon for regulated firms since regulators can make decisions that effectively preclude judicial review.

Thus, the formal institutions of government in the United Kingdom and Jamaica allow for substantial government discretion and the judiciary plays a minor role in restraining administrative discretion. It has however been noted that in both countries, 'informal rules of legislative decision making restrain the government's ability to shift policy without consulting the interest groups through consensus building'<sup>61</sup>.

Britain's bureaucracy is professional and largely apolitical. The confidence that investors have in these two countries is largely influenced by the inherent respect, even by the informal sector of the rule of law. The even higher threshold for Britain is brought about by the fact that it has an unwritten constitution and even where power is not explicitly constrained; it is hemmed in by mutually recognized boundaries of authority.

All in all, both the United Kingdom and Jamaica have electoral systems that provide for great legislative flexibility and judiciaries that only weakly restrain administrative actions. As a consequence, cannot base their governance structure on legislation, they need further constraints, and as has been seen, both have found them in contract law.

#### **b) Chile**

Chile has had years of civilian rule under a constitution embodying separation of powers, orderly transfer of authority, and a regular multiparty election. This long period of stability developed in Chileans a strong respect for institutions. The legislature is known to have developed a strong sense

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<sup>61</sup>R. Calvert. **The Rational Choice Theory of Social Institutions: Cooperation, Coordination and Communication.** (New York: University of Rochester, 1992) p.12

of local representation. It has been observed that, 'though not entirely resistant to extreme pressure, Chile's long standing legislative and executive institutions and its system of checks and balances has the potential to provide credible safeguards against arbitrary changes in the regulatory regime'<sup>62</sup>. Further, Chile's strong and independent judiciary provides an effective check on government power on both constitutional and statutory issues.

The diffusion of political power allows Chile to select its regulatory governance structures from a large menu of options and because legislation is more difficult to change in Chile than in Zambia for instance, legislation may play an important role in the regulatory governance structure in Chile. Additionally, its strong judiciary provides options for implementing regulatory governance based purely on procedure or contract law.

### **c) Argentina and the Philippines**

Argentina and the Philippines have modelled their formal political institutions after those of the United States, creating a complex system of checks and balances and in both countries an endemic lack of respect for constitutional order has given rise to a corrupt bureaucracy and judiciary and reliance on the military to resolve conflicts among interest groups<sup>63</sup>.

With such weak institutional structures and broad scope for executive dominance, Argentina and the Philippines seem to require regulatory governance that goes beyond reliance on legislation, procedures or contract law. There is a pressing need for international intervention and reform.

There is need to provide proper regulatory and enabling institutions for achieving commercial and industrial expansion. Where an investor, local or foreign, has decided to invest in Zambia, he or she would have to choose under what legal forms he or she can legitimately carry on his or her

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<sup>62</sup>P. Spiller and B. Levy. Regulations, Institutions and Commitment: Comparative Studies of Telecommunication. [Cambridge University Press, 1996] p.13

<sup>63</sup>R. Calvert. The Rational Choice Theory of Social Institutions: Cooperation, Coordination and Communication. (New York: University of Rochester, 1992) p. 37

business. Therefore, there has to be adequate legal framework within which investors can achieve their investment objectives.

### **3.4 Conclusion**

In summary, the regulatory episodes discussed show countries that have institutions capable of restraining administrative action and encourage private investment. Some episodes however, appear to be cases of missed opportunity. In both episodes, the design of regulatory governance is largely influenced by the institutional structures of the state. Domestic institutions in the Philippines for instance, have historically provided an inadequate foundation for a regulatory system capable of restraining administrative discretion.

The countries with regulatory systems that successfully constrained the discretionary power of regulators, such as Jamaica, also had restraints on changing the regulatory systems, thus boosting investor confidence. Zambia is more of a mixed system although highly similar to the design in Jamaica.

## CHAPTER FOUR

### **4.1 Introduction**

Zambia's economy has historically been based on copper mining. However, government is undertaking economic diversification to reduce the reliance of the economy on the copper industry and exploit other components of the resource base by promoting, inter alia, agriculture, tourism, gemstone mining and hydro-power.

Consequently, the Zambian government has established liberalized market-driven economic policies aimed at facilitating private-sector-led economic development. Achieving targeted macroeconomic objectives is also a priority for government in order to ensure that economic diversification and expansion is attainable and sustained. The country's macroeconomic objectives are to: achieve a real Gross Domestic Product (GDP) growth rate of at least 5.0 percent, bring down inflation to 10.0 percent and limit the Government's domestic borrowing to 1.8 percent of GDP<sup>64</sup>.

New bills have been enacted into law, covering some rather important areas. Unfortunately the Legislature is not good at ensuring that the Zambian public is amply informed in between the time the Executive tables the bill and final enactment. People usually only find out about the bill when it has been passed. There is an urgent need to improve sensitization in order to ensure that all Zambians are aware of and understand the laws that are being passed and how they affect them.

### **4.2 The Impact of the Executive on Regulation of Telecommunications**

Reports in the year 2008 revealed that the Communications Authority of Zambia had raised more than 14 billion kwacha (US\$4 million) for rural information and communication technology<sup>65</sup>. The then Minister of Communications and Transport, Dora Siliva informed the public that the money would be used to provide information and communication technology (ICT) services in rural areas.

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<sup>64</sup> Economic Freedom Report: A Review of the Zambian Economy, 2009. p. 3

<sup>65</sup> Sornamohan, V. **Zambia raises USD 4million for Rural ICT Fund:**  
<http://www.networkworld.com/news/2008/062308-zambia-raises-us4-million-for.html>, accessed 19/11/09

The money was raised through service charges levied on mobile-phone service providers and Internet service providers (ISPs) operating in the country by the Communications Authority of Zambia<sup>66</sup>.

Government continues to develop ICT programs which are aimed at rural communities and is working on improvements in urban areas. The fifth national development plan for 2006-10, emphasizes the need to set up rural ICT initiatives, which include the development of telecommunication infrastructure and access to Information and Communication Technologies by the rural population.

The Minister also noted that in addition to the funds raised from the service providers, the Zambian government also set aside US\$1 million to be used for the same program. The programs for rural ICT fund are all to be implemented by the Communications Authority of Zambia, which regulates communication systems in Zambia in cooperation with service providers wanting to extend their services to rural areas<sup>67</sup>. Such initiatives allow Zambians to be empowered by providing the resources for creation of jobs and wealth creation because service providers extend their services to remote rural areas.

It was shown however, that the Communications Authority of Zambia as of June 23rd 2008 had not started releasing the funds claiming that it was still working on a policy that would provide solutions on how the funds should be given out and which people qualify to access them. The Minister noted that the government would compel the authority to start the implementation of the program as soon as possible.

This primarily shows the close links that exist between the executive branch of government and the regulatory Authority, CAZ. Problems such as those shown above arise due to lack of funding in the

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<sup>66</sup>Sornamohan, V. **Zambia raises USD 4million for Rural ICT Fund:**  
<http://www.networkworld.com/news/2008/062308-zambia-raises-us4-million-for.html>, accessed 19/11/2009

<sup>67</sup>Ibid, 19/11/2009

authority and lack of proper regulatory rules. However, the law on Information and Communications Technology has developed extensively. In addition, the law on Information and Communications Technology continues to be revised.

As alluded to earlier, the Information and Communication Technologies (Amendment) Bill, 2010 was passed to amend the Information and Communication Technologies Act, 2009 in order to improve the provisions relating to the negotiation of access agreements by providers of electronic services as well as the setting of tariffs in relation to electronic communication services.

#### **4.3 The Information and Communications Technologies, Act No. 15 of 2009.**

This Act repeals the Telecommunications Act 1994 and Radio Communications Act 1994. It is therefore a very important piece of legislation.

##### **4.3.1 Positive Impact of the Act**

There are definitely important developments in the Act beyond changing the Communications Authority of Zambia's name to the Zambia Information and Communication Technology Authority (ZICTA). ZICTA is an Economic Regulator with the authority to regulate tariffs for principal players and agreements on interconnections.

The establishment of the regulatory authority shows, inter alia, that it is important to address the fact that the Zambia Telecommunications Company is able to restrict competition through interconnection and access agreements. A particular important point is the idea of "cost reflective tariffs" for dominant players in both interconnection agreements and internal tariffs<sup>68</sup>. This will go a long way in helping consumers given the fact that the ultimate goal regulators seek to achieve is consumer protection as shown in the preceding chapters. .

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<sup>68</sup>Sornamohan, V. **Zambia raises USD 4million for Rural ICT Fund:**  
<http://www.networkworld.com/news/2008/062308-zambia-raises-us4-million-for.html>, accessed 19/11/09

On a further point, cross subsidies and discounts are effectively eliminated meaning that ZAMTEL will no longer be able to maintain CELL-Z by making the profits from interconnection agreements with ZAIN and MTN.

#### **4.3.2 Drawbacks**

ZICTA is now self-governing, but this clearly has been compromised with so much room for Ministers to dictate many areas that remain undefined and those provided by various sections of the Act. An important area relates to "access agreements" evidently drafted with the International Gateway (IGW) in mind. The Act clearly implies that although ZICTA would regulate these sorts of infrastructure, how the gateway tariffs are determined may be dictated by statutory instruments issued by the Minister: "The Minister may, by statutory instrument, prescribe matters and other particulars for inclusion in access agreement"<sup>69</sup>.

In light of the foregoing, how much is charged for the IGW by ZAMTEL is largely dictated by Ministers and fees to anyone wishing to build another IGW can also be dictated by Ministers. Therefore, in as much as one may speak of ZICTA pushing for better competition and cost reflective tariffs in the area of interconnection and other central arrangements, with access agreement the wording of the section provides room for the exercise of discretion by members of the executive, being the Minister at the time. This weakens the autonomy of the regulatory authority particularly in economic regulation.

Linked to the above, is the important point of how fees are set for various electronic licensees under part III of the Act<sup>70</sup>. It is part of the responsibility of ZICTA to issue licenses but who determines the scope and levels of fees is not clearly prescribed. Again this is an area where Ministerial influence may play a significant role. Incidentally, there is no proposal that further consultation with the public would be necessary in this area.

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<sup>69</sup> Section 43(6) of the ICT Act Number 15 of 2009

<sup>70</sup> Number 15 of 2009

One other remarkable proposal is the Universal Access and Service Fund which is designed for financing of universal access and service. The aim is to promote extensive availability and utilization of electronic communications in remote areas. The Fund will be administered by ZICTA but regrettably, the Act does not specify how it will be funded. The Act provides that the Minister, on recommendation by ZICTA, shall provide regulations which may include ‘the sources of funding and the manner in which the Fund will be paid’ and ‘the annual contributions payable by any licensee to the Fund, shall not exceed the amount prescribed by the Minister....’<sup>71</sup>.

It is more preferable to use the tax system to raise funds, instead of asking companies to pay more on top of taxes charged. It is either the licensees are taxed properly with sufficient revenue available for the type of fund in question or not. The reason for such parallel arrangements is uncertain; this brings more problems in the sector and discourages investment.

Another irregular element in the Act is the prescribed composition of the ZICTA Board constituted under paragraph 1 of the First Schedule. The Act prescribes national associations like Farmers Union and Law Association of Zambia (LAZ) to have at least one representative on the Board. Consideration has not been made of other associations. A different criterion should have been found. Actually, there is no clear discussion of how the Board Members will be vetted once chosen by associations, except that the Minister may agree to names or ask for another name.

#### **4.3.3 Going Forward**

Generally, the Act represents a positive step, particularly with respect to economic regulation. Whether the provisions of the Act translate in tangible improvement in the sector depends on various questions; how strong will the board be? Will ZICTA have enough resources? How will the International Gateway issue be resolved? How will the Zambia Competition Commission (ZCC) relate to the new functions of the ZICTA? Will ZICTA have adequate courage to impose itself suitably, in regulating a Government owned company like ZAMTEL when the authority itself is

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<sup>71</sup> Section 70(4) of Act Number 15 of 2009

subject to Government Ministerial directions? A lot will depend on the excellence of the personnel within ZICTA and the funding process.

#### **4.4 The role of the Court System**

This section is in light of the fact that disputes may arise and the role of the courts will inevitably arise. It is here that they have a duty to balance the interests of investors, government as well as the public at large bearing in mind that the ultimate goal is to ensure consumer protection.

In the year 2009 Vodacom Zambia took out an injunction against the CAZ over a 3G authorization the authority to Zain. In 2007 the CAZ, now ZICTA issued an experimental authorization to Zain Zambia to conduct trial 3G services. On hearing this, Vodacom Zambia chairperson issued an injunction against the regulatory authority in order to try and stop Zain making use of the already issued test authorization. Vodacom also threatened to sue the Government over the sale of a 75% shareholding in the financially distraught Zamtel.

When 3G was introduced in Europe, licenses were sold for large sums of money. Soon after, some of the money was refunded when it was realized that 3G services were not going to generate the sort of revenues required to pay back this kind of down-payment<sup>72</sup>. Several North African countries have taken the European view and intend to extract the maximum operators will pay. One large West African operator has however been trying to persuade its regulator that 3G is simply a normal network transition and should not be licensed disjointedly<sup>73</sup>.

Mobile service operators are gradually extending their data coverage (through 3G) and are in fact putting in place a network coverage which will be able to offer Internet to a large percentage of people in Africa. Zain Zambia has invested its own fiber network because it will be cheaper than the over-priced national network of Zamtel but it is clear that 3G is something that so far is not likely to

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<sup>72</sup>A. Russell, **3G Services in Zambia: Review of Vodacom v Zain**, *Zambian Economist*, 6<sup>th</sup> August 2009. P.1

<sup>73</sup> *Ibid.* p.2

come up in every African country. Regulators and operators need to consider the question of what a 3G licensee is actually worth.

The privatization of Zamtel will mean Vodacom, MTN and Zain get more competition from the new owner of Zamtel, something it has clearly failed to give in the hands of Government. The courts, regulator and arbitrators must be well vested with the knowledge necessary to ensure the fair and effective management of the process.

#### **4.5 Ability of the Zambian courts to rule against Government**

In relation to cases that may arise, emphasis is placed on the High Court and the Supreme Court because they deal with matters of judicial review. Autonomy of the judiciary entails its independence, freedom to determine how it conducts its affairs or freedom to govern itself.

Impartiality can only be attained if the court or tribunal is both autonomous and independent, otherwise it will tend to favor the executive. It is considered important even at international level through Article 7(1) of the Universal Declaration of Independence 1948. In addition, Article 91 (3) of our constitution declares the independence, impartiality and autonomy of the judiciary.

The provision of autonomy in our laws entails de-linkage of the judiciary from the executive arm of government in running of its internal affairs. It has been argued that the executive has so much control over the judiciary that it is difficult for them to be impartial in the decisions that affect them. Some have argued that it is fear of removal from office.

It has been contended that in cases such as **Kachasu v The Attorney General**<sup>74</sup> regulations imposed by an executive member were upheld at the expense of the pupil's rights. However, the picture has not always been so gloomy. There are situations when the courts have risen to the

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<sup>74</sup> (1967) ZR 145

occasion in defending rights of the ordinary man in cases like **Christine Mulundika and Others v The People**<sup>75</sup>.

Additionally, in **The People v Minister of Information and Broadcasting Services ex Parte Francis Kasoma**<sup>76</sup>, the court issued an order for certiorari to quash the decision of the Minister to create a statutory body known as the Media Council of Zambia. The decision was quashed on the premise that it was made in bad faith and rules of natural justice were never observed because the people to be affected by the decision were not informed.

Further, in **Maxwell Mwamba and Stora Mbuli v the Attorney General**<sup>77</sup> an application was made for review of the decision by the president to appoint two candidates who were allegedly involved in madrax trading. Although the action was brought parties who were not affected by the appointment by the president, the court exercised its discretion and reviewed the decision made by the president.

Autonomy of the judiciary contributes to the perception that justice will be done in individual cases and thus private interests of investors. Judges must be left to decide cases under the law without fear or favour and that they will decide cases on the basis of relevant law and fact pertaining to the case without any pressures, threats or interference of any kind.

#### **4.6 Conclusion**

In conclusion, the institutional framework of any country has a major role to play on how effective regulation will be. In Zambia for instance, it has been seen that influence from the executive branch of government tends to undermine the autonomy of the regulatory authority and this is not desirable. The courts therefore, have a major role to play to ensure that it protect private individuals from arbitrary actions which may deter private investment. The judiciary must be able to rule

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<sup>75</sup> (1995) ZR (SC)

<sup>76</sup> HP/1999/47, Unreported

<sup>77</sup> Supreme Court Judgment Number 10 of 1993

against government where necessary and uphold justice and the rule of law. Investor rights are protected through licences which confer contractual rights enforceable in the courts of law and this calls for an effective and impartial judiciary.

## CHAPTER 5

### **5.1 Introduction**

In this whole account, it is apparent that the Zambia Information and Communication Technologies Authority (hereinafter referred to as ZICTA) though intended to promote competition and investment, will face challenges. The enactment of the ICT Act was undoubtedly an important step which the government took, with the primary objective of ensuring that consumer interests are adequately protected and quality of service guaranteed.

### **5.2 Conclusion**

A regulatory system must be able to ensure consumer protection on the one hand and preserve the need to encourage investment and innovation on the other. It cannot be disputed that successful regulatory policy encourages both private investment and efficient operation. It rests on the development of a regulatory governance structure that constrains arbitrary administrative action and thereby encourages private investment. Institutional endowments and the requirements of regulatory governance influence which regulatory structures are workable in a country.

Competition is an influential spur to innovation and efficiency. When the major telecommunications company in a country fails to develop an adequate communications network, a practical solution is to open up the sector to competition through privatization. In Zambia, this has been achieved through the reception of the participation of private service providers and the recent privatization of Zamtel. Monopolies make competition impossible and affect the quality of a service. It was shown through the legislative debates of 1994 that competition would improve efficiency in the industry.

There is considerable disparity in the extent to which the regulatory regimes in the countries studied facilitated competition. Jamaica's policies were the most restrictive. A single firm received an exclusive license to provide all telecommunications services for 25 years. In the Philippines getting

approvals to provide telecommunications services was a highly discretionary and politicized process. Argentina granted exclusive regional licenses to two firms to provide all local and long-distance voice telephone services for ten years.

Chile and the United Kingdom have regulatory regimes with the fewest restrictions on entry. Regulators have been liberal in approving requests for entry across the range of telecommunications services. Chile also has liberal licensing policies and interconnection rules and enforcement mechanisms that ensure that firms granted licenses will be able to operate.

It has been shown that, before the market was opened up in Zambia, the situation was no different from that prevailing in Jamaica. Zamtel was the sole firm relied on to provide telecommunications services in the country. Over the years however, the market was opened up and now, only Chile and the United Kingdom come close to the situation in Zambia having regulatory systems that facilitate competition and there is improved service.

This is not so for the other countries because in some countries, the institutional and regulatory governance foundation is inadequate to support a regulatory system that flexible enough to take advantage of the full range of opportunities for competition that technological change might bring. Thus, despite the drawbacks identified in the telecommunications sector in Zambia, it has been shown that positive steps have been taken in the industry to promote effective regulation and thus boost investor confidence. The need for reform lies primarily with administration and the external pressure that the regulatory authority is subject to by the executive branch of government.

## **5.2 Recommendations**

Zambia's investment potential in the telecommunications sector has undoubtedly improved although there is need for government to review its policies on investment and improve incentives to investors in order for Zambia to compete favourably on the world market. It is time for Zambia rise to the challenge and make strides in addressing the needs for a competitive global environment

and for facilitation of industrial infrastructure. This however must be done in the interest of the public. The starting point is whether the formation of the ZICTA will actually promote effective regulation which is able to encourage private investment, while still promoting the interests of consumers.

Given that the Authority is essentially a new development, it has the ability to allow the industry to have a clear simple objective of enhancing the development of the economy. ZICTA intends to regulate the provision of electronic communication services and products and monitor the performance of the sector as well as the levels of investment and availability, quality, cost and standards of the electronic communication services, which is suitable and achievable.

**Re-organization and strengthening of private sector support facilities.** It is hoped that ZICTA will address shortcomings in the industry and have the power to do additional works with a clearly focussed and independent growth plan. The overall objective of the Authority should be to create an investment climate in the sector capable of making Zambia the most attractive and preferred destination for foreign direct investment and local investment regionally and internationally in order to improve consumer protection. This will inevitably have to be achieved in compliance with the legal framework governing investment which is the Zambia Development Agency Act<sup>78</sup>.

**Embark on staff training.** In an attempt to protect the interests of consumers by ensuring efficiency and quality service, there is need to promote professionalism and hard work. Telecommunications is an area where developments in technology take place on a regular basis and if there is any need to constantly be aware of these developments, it is certainly in the regulatory environment that this must be so.

**Disseminate Information to Consumers.** Any regulatory authority must be able to demonstrate and deliver appropriate strategies and activities. In pursuance of this effort, ZICTA should learn

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<sup>78</sup> Number 11 of 2008

from best practice examples highlighted in the previous chapters in order that it is successful and most importantly to deal with practical inadequacies in terms of legislation as well as any developments in technology. Consumers must regularly be informed of any changes in the law and developments in the industry because knowledge is a vital tool for development.

Telecommunications is a very technical sector and there is need to promote international best practice. This is the only way Zambia will be able to compete on the international market. More information must be disseminated and constant research made in order to not lose out on any developments. However, to achieve this, it is important that the regulator has sufficient power and necessary discipline to achieve this.

In order to improve its legitimacy, the ZICT Authority should publish its vision of the mandate and hold discussions and produce statements of aims in explanation of its mandate. Further, the Authority's claims could be improved by such steps as the creation of a specialist parliamentary select committee or standing consumer bodies.

**Ensure the implementation of entry restrictions and monitoring.** In light of new financial crimes such as money laundering and financing of terrorism, the law must ensure the affairs of the service providers are legal.

**Create and maintain regulatory best practice monitoring and review mechanisms.** The ZICT Authority must be dedicated to the promotion of marketing of investment opportunities and promotion of compliance. It must seek to uphold investor confidence by creating a competitive and stable macro-economic environment and avoid policy inconsistencies.

It has been shown that, the institutional framework of any country has a major role to play on effective regulation. In Zambia for instance, it has been seen that influence from the executive branch of government tends to undermine the autonomy of the regulatory authority. The courts have a major role to play to ensure that it protects private individuals from arbitrary actions. The

judiciary must be able to rule against government where necessary and uphold justice and the rule of law. Investor rights are protected through licences which confer contractual rights enforceable in the courts of law and this raises the need for an autonomous judiciary.

In general, the Act does represent a positive step, especially with respect to economic regulation. However, whether the provisions of the Act actually lead to improvement in the sector is a major concern. Much depends on the quality of the personnel within ZICTA and its ability to circumvent pressures from the executive.

In relation to cases that may arise, the courts have a major role to play in promoting effective regulation because their ability to rule against government encourages investors that contractual obligations will be upheld and there will be less arbitrary action.

The judiciary must be able to de-link itself from the executive arm of government in running of its affairs. That way, impartiality is promoted and protection of rights and interest upheld. It is encouraging that there are situations when the courts have risen to the occasion in defending rights of the ordinary man in cases like **Christine Mulundika and Others v The People**<sup>79</sup>.

Also, in **Maxwell Mwamba and Stora Mbuji v the Attorney General**<sup>80</sup> an application was made for review of the decision by the president to appoint two candidates who were allegedly involved in madrax trading. Although the action was brought by parties who were not affected by the appointment by the president, the court exercised its discretion and reviewed the decision made by the president. This showed the independence of the courts showing that justice will most likely be done in individual cases and thus private interests of investors.

The private sector is very important because, as it has been shown, the lack of private sector entry can arguably lead to high international call tariffs as well as notably, lack of investment in

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<sup>79</sup> (1995) ZR (SC)

<sup>80</sup> Supreme Court Judgment Number 10 of 1993

contemporary and more efficient international systems. This impacts negatively on consumers who are in fact the beneficiaries of such investments.

It is clear from what is obtaining in the mobile telephone market in Zambia and internet product markets that allowance of private entry has encouraged competition through innovative technological systems as well as higher consumer welfare gains in terms service delivery and pricing. The promotion of foreign and local investment creates competition and consequently improves infrastructure.

The Zambian legal system is a regime where self regulation is recognized by law which has codes of conduct to which all members shall conform. This comes with benefits. Members of the industry almost always have a better sense of where the real problem is than government because they are trained for the job.

Also, members recognize that poor practices of one member reflect badly on all of them. Thus it is in the interest of the industry to raise the standards. This in itself brings about efficiency and accountability.

All in all, it is important that entry restrictions through licensing are maintained in order to protect the industry from dangerous attacks and it is a good thing that such licences are revocable for misconduct and renewable. The ZICTA must regularly monitor the conduct of the business. That is to say, it must check on market players in a manner provided by the law and must fulfil its promises and conduct business in a dignified manner.

In addition, it is very important also for the regulator to check on product developments after it has done research on the same and give notice of any changes. Service providers must be aware of any regulations that are put in place and compliance must be encouraged. It is also vital that there is accountability of funds and affairs of the Authority as a whole.

It has been shown that the best way to protect investments in Zambia is through licences which confer contractual rights enforceable in the courts of law. This is so because protection through legislation is not certain due to the regular modification of laws in Zambia. Laws are amended on a regular basis and this may not be desirable especially for long term investors who need security for their investments.

Inevitably, there are some challenges which the regulator in the telecommunications sector faces, however, the adoption of some of the actions highlighted and lead to the promotion of effective regulation and thus boost investor confidence. Zambia is a country capable of rising to great heights on the international market and this will in turn lead to economic growth. The promotion of effective regulation is no simple task, but it can be done.

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