**THE UNIVERSITY OF ZAMBIA**

**DIRECTORATE OF RESEARCH AND GRADUATE STUDIES**

**SCHOOL OF LAW**

# Foreign Investment in Zambia: Analysis of Development Agreements and Investment Promotion and Protection Agreements

By

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A dissertation submitted to the University of Zambia in fulfilment of the requirement for the award of the degree of Master of Laws (LLM) in International Investment Law

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**ABSTRACT**

**FOREIGN INVESTMENT IN ZAMBIA: ANALYSIS OF DEVELOPMENT AGREEMENTS AND INVESTMENT PROMOTION AND PROTECTION AGREMENTS**

This study discusses the competing interests between foreign investment protection and the citizen's right to the enjoyment of the country's natural wealth with regard to exploitation of mineral resources. Following the cancellation of Development Agreements (DAs) under section 160 (1) of the Mines and Minerals Development Act 2008, the relationship between the Zambian government and foreign investors is strained and some affected mining companies have threatened legal action. The continued use of a similar Agreement, the Investment Promotion and Protection Agreement (IPPA), has been questioned by many. The situation has necessitated an investigation into the contents of these Agreements and benefits, if any.

The question investigated by the study is how the Zambian government has fulfilled its obligation to ensure respect for the citizen's right to the enjoyment of the country's natural wealth in the face of competing interests from the foreign investors on their right to protection by the host State. Relying on a desk review of secondary sources, with a study population of 11 DAs, the study evaluates the contents of 4 randomly selected DAs out of the 9 accessed and the contents of the IPPA standard Agreement. It makes a quantitative analysis of all clauses in the selected DAs and the IPPA to determine their significance and import. Each of the Articles is analysed for its significance to show the share proportion of benefits to government and to the companies/foreign investors.

The main findings of the study, among others, are that:

1. all the four DAs analysed contain adverse legal provisions and have more benefits to foreign investors than government;
2. under the IPPA template, government has more benefits than investors;
3. the Guiding Principles provide useful guidance to the negotiation process to benefit Zambians but require some amendments and regular review;
4. the law under the repealed Mines and Minerals Act, 1995 was adequate to benefit Zambian citizens but was flouted in the name of foreign investment protection.
5. the law under the current ZDA Act, 2006 is adequate. Foreign investors do not therefore require 'additional protection.'

Based on these findings, the study has concluded that the guarantee provisions adequately protect foreign investors. The investors do not therefore require 'additional protection' by negotiating conditions outside what the law provides. It has further concluded that government's obligation to satisfy the competing interests between foreign investors and benefits to citizens cannot be effectively fulfilled at the same level because successful fulfillment of either will be at the expense of the other. Against this background, it is recommended that government should prioritise national development and ensure respect for the citizen's right to enjoyment of natural wealth by *inter alia*, creating a natural resources fund for the proceeds from the mining sector, laying of natural wealth-related Agreements before Parliament for ratification and strengthening of the government negotiating team in terms of representation and capacity to effectively protect the interests of the state.

## DEDICATION

To the memory of my late father, **Raymond Ndui Kwibisa**,

whose counsel I shall forever treasure.

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**LIST OF ACRONYMS**

| | |
|---|---|
| ANOVA | - Analysis of Variance |
| BIT | - Bilateral Investment Treaty |
| COMESA | - Common Market for Eastern and Southern Africa |
| DA | - Development Agreement |
| FDI | - Foreign Direct Investment |
| FNDP | - Fifth National Development Plan |
| FTA | - Free Trade Area |
| GATT | - General Agreement on Tariffs and Trade |
| GRZ | - Government of the Republic of Zambia |
| IC/GLR | - International Conference on the Great Lakes Region |
| ICC | - International Chamber of Commerce |
| ICSID | - International Convention on the Settlement of Investment Disputes |
| IPPA | - Investment Promotion and Protection Agreement |
| MFEZ | - Multi Facility Economic Zone |
| MFN | - Most Favoured Nation |
| SACU | - Southern African Customs Union |
| SADC | - Southern African Development Community |
| UNCITRAL | - United Nations Conference on International Trade Law |
| UNCTAD | - United Nations Conference on Trade and Development |
| UNFCCC | - United Nations Framework Convention on Climate Change |
| ZCCM | - Zambia Consolidated Copper Mines |
| ZDA | - Zambia Development Agency |

**LIST OF STATUTES**

**ZAMBIAN**

Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia

The Arbitration Act No. 19 of 2000

The Citizens Economic Empowerment Act, 2006

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**Goetz and Others v Burundi,** ICSID Award, 1998

**Kuwait v Aminoil,** [1982] 21 I.L.M. 976

**Metalclad Corporation V Mexico,** Award. 30 August 2000, 5 ISCID Reports 209

**Middle East Cement v Egypt,** ICSID Award, 2002

**Parkerings-Compagniet Vs Lithuania,** ICSID case No. ARB/05/8, Award. 11 September, 2007

**Revere Copper v Opic,** [1978] 56 I.L.R 257

**Tecmed V Mexico** (ICSID case no. ABR (AF) /0012 Award of 29th May 2003)

**Texaco v Libya** [1977] 53 I.L.R. 389

**Wena Hotels Limited v Egypt** (ICSID Case No. ARB/98/4 Final award, 8 December 2000)

# 1.0 CHAPTER ONE

## 1.1 INTRODUCTION

Zambia is party to numerous international treaties and conventions at the global, regional and sub-regional level. These treaties cover a variety of fields such as trade and investment, diplomatic relations, climate change and human rights. In the field of trade and investment, Zambia is party at the global level to the General Agreement on Tariffs and Trade (GATT)[1], the United Nations Convention on Contracts for International Sale of Goods[2] and the Convention on Transit Trade of Land-Locked States,[3] among others. At the regional level, she is party to the Constitution of the Association of African Trade[4], the Treaty establishing the African Economic Community[5]and the African Trade Insurance[6] while at the sub-regional level, she is party to the Common Market for Eastern and Southern Africa (COMESA) Treaty, the treaty of the Southern African Development Community (SADC)[7] and the SADC Protocol on Trade.[8]

The signing and subsequent ratification and/or accession of each of these treaties, conventions, agreements or by whatever name called, places upon Zambia a number of obligations, most of which are quite onerous. In this regard, Zambia's international treaty obligations are as many and varied as are the treaties/conventions and agreements to which she is party.

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[1] Date of accession 24/02/1982.
[2] Acceded to on 01/01/1988.
[3] Ratified on 09/06/1967.
[4] Date of signature 18/01/1984, date of ratification 04/04/1984.
[5] Date of signature 03/06/1991, date of ratification 26/10/1992.
[6] Date of signature17/02/2001, date of ratification 17/02/2001.
[7] Date of signature1708/1992, date of ratification 16/04/1993.
[8] Date of signature 24/08/1996, date of ratification 03/02/2001.

One of the obligations that Zambia has assumed as a consequence of ratifying and acceding to various treaties is that of ensuring that her natural wealth is used primarily for the benefit of her citizens and for the development of the country. The right of a people to the enjoyment of their country's natural wealth is found in many international legal instruments that Zambia has signed such as the United Nations Charter, the COMESA Treaty, the African Charter on Human and Peoples Rights, the Charter of Economic Rights and Duties, the International Conference on the Great Lakes Region (IC/GLR) Protocol on the Illegal Exploitation of Natural Resources and the SADC Protocol on Mining. All these international legal instruments adopt the view that the wealth of a country should be primarily used for the benefit of its people as of right. For instance Article 21 (1) of the African Charter on Human and Peoples Rights provide as follows:

> *All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*

This provision is replicated in Article 3 (1) of the IC/GLR Protocol on the Illegal Exploitation of Natural Resources. Zambia has therefore undertaken to ensure that its citizens benefit from the natural resources of their country not in one international legal instrument but several such instruments and at all levels; global, regional and sub-regional level.

The standard of conduct expected of governments in this regard is clearly stated in the case of *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*[9]. The complainants alleged violation of Article 21 of the Charter by government's failure to monitor and regulate the operations of oil companies in Ogoniland which, they claimed, led

[9] Communication No. 155/96 (2001) Africa Commission on Human and People's Rights.

to lack of material benefits accruing to the local population. In holding the Nigerian Government liable, the Commission stated that 'governments have a duty to protect their citizens … by protecting them from acts that may be perpetrated by private parties. The Nigerian Government has given a green light to … oil companies to devastatingly affect the well-being of the Ogonis.'[10]

### 1.2 ANALYSIS OF SOME OF ZAMBIA'S OBLIGATIONS

An analysis of some of Zambia's obligations at the national and international level shows that contradictions exist between them. Consequently, legal challenges may arise in the process of fulfilling such obligations. The United Nations Resolution 1803 on Permanent Sovereignty over Natural Resources and the COMESA Treaty are cases in point. On the one hand, the former declares that *the right of the peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the state concerned.* [11] This obligates Parties to the United Nations Chatter to ensure that their country's natural wealth is used for the benefit of their citizens and for national development. On the other hand, under the COMESA Treaty, Member States undertake to protect and guarantee investments by inter alia refraining from nationalisation of private investments or expropriation and imposition of excessive and discriminatory taxes. This obligation poses a challenge as it is too broad and therefore open to varied interpretation. What constitutes 'excessive and discriminatory taxes' referred to in the COMESA Treaty, could be a potential cause of disputes. Under the Zambian Constitution for instance, Parliament is mandated by Article 114(1) to impose tax. In executing this function, and in light of the fact that tax is imposed by government and not negotiated between government

[10] Ibid paragraph 57.

[11] See United Nations General Assembly Resolution 1803 (XVII) (1962).

and foreign investors, government may impose tax which may be considered by foreign investors as 'excessive.'

On the question of expropriation, it can be argued that the intention of expropriation and nationalisation, which should ideally be done for public good and for the benefit of the citizens of a particular state, is in line with UN Resolution 1803. In this regard, any restriction on nationalisation, expropriation and imposition of tax may deny citizens their sovereign right to the enjoyment their country's natural wealth.

It is evident from the foregoing analysis that a country such as Zambia with so many international legal obligations, some of which are contradictory, has a challenge in fulfilling these obligations. For instance, in trying to protect investors by not imposing 'excessive and discriminatory taxes', the country could not only be depriving itself of the much needed revenue for national development but also its citizens of the right to the enjoyment of their country's natural wealth.

Other challenges in fulfilling obligations may arise mainly with regard to treaty obligations that hinge on the relationship between the host country and foreign investors. Obligations such as Article 21 (5) of the African Chatter may pose challenges in implementation. It provides as follows:

> *States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation and particularly that practised by international monopolies so as to enable their people to fully benefit from the advantages derived from their national resources.*

This provision presupposes that international monopolies do practice economic exploitation and it is incumbent upon countries hosting such companies to identify and eliminate this economic exploitation in all its forms. The manner in which this is done will no doubt pose some challenges.

Still on the issue of host country and foreign investor relationship, the Charter of Economic Rights and Duties of States provides in Article 2 (2) (a) that

> *Each state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in accordance with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.*

It further provides in Article 2 (2) (b) that

> *Each state has the right to regulate and supervise the activities of transnational corporations within its jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform to its economic and social policies.*

These provisions are particularly important because they uphold the sovereignty of the member states by giving prominence to domestic legislation. Besides, considering the fact that most foreign investors usually exploit a country's natural resources, there can be no better way to guarantee the enjoyment of this sovereign right than by enacting domestic legislation specifically dealing with the treatment of foreign investors. Non-regulation of activities of foreign investors will no doubt infringe on a people's right to the enjoyment of their sovereign right as observed in the Nigeria case cited earlier. It is this regulation of

foreign investor activities or lack of it and the consequences thereof that this study will focus on in the following chapters.

The importance of domestic legislation has been rightly explained by a recent United Nations Conference on Trade and Development (UNCTAD) study thus:

> *when a state has domestic laws on investment in place, guarantees and concessions for investors, in keeping with national laws, can be rescinded by enactment of a different law*[12]unlike where these are provided for under an international treaty which cannot be unilaterally altered by a host country.

Although this proposition may appear as though it negates investment protection, it actually enhances protection because the presence of legislation ensures that there is no arbitrary dispossession of investments. International law further recognises the importance of domestic legislation in relation to expropriation and the issue of compensation by providing that where the question of compensation gives rise to controversy, the national jurisdiction of the state taking such measures shall be exhausted.[13] This means that priority in the settlement of investment disputes between the host State and the investor is given to the laws of the state admitting the investment. The role of domestic legislation in upholding the sovereignty of a nation can thus not be overemphasised.

### 1.3 DOMESTICATION OF INTERNATIONAL LEGAL INSTRUMENTS

International treaties or conventions that Zambia has signed and ratified and /or acceded to are not legally binding on her unless and until their provisions are made part of the domestic legislation. This process is known as domestication. Domestication of conventions and

[12] UNCTAD series on International Investment Policies for Development. p.45
[13] Ibid. p.45.

treaties is a requirement for Zambia because she follows a dualist system in the application of international legal instruments.[14]

The principle of Permanent Sovereignty over Natural Resources has been domesticated into Zambian law by the Constitution of Zambia itself and through a number of statutes such the Citizens Economic Empowerment Act, the Lands Act and the Mines and Minerals Development Act. The Constitution of Zambia solemnly declares in the Preamble thus:

> *We, the People of Zambia…pledge to ourselves that we shall ensure that the State shall...conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations.*

This declaration inspires hope for a prosperous Zambia that utilises its resources for the benefit of not only the current generation but future generations too. The reality of this undertaking will be brought to the fore in the chapters that follow. They will seek to demonstrate whether or not the manner in which the state has conducted its affairs on natural resources in general, and mineral resources in particular, has helped to preserve, develop, and utilise such resources for the benefit of the citizens.

With regard to investment opportunities, s.21 (1) of the Citizens Economic Empowerment Act provides as follows:

> *Notwithstanding any other law after the commencement of this Act, the ministry responsible for commerce, trade and industry shall reserve, as prescribed by the President, specific areas of commerce, trade and industry for targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies.*

[14] Dualist system requires that international law be incorporated into the municipal law because municipal law assumes primacy over international law.

Section 21 (2) (b) of the said Act further provides that

> *Licences to foreign investors to engage in specific business, as prescribed by the President, shall be granted on the basis of joint ventures and partnerships with citizens and citizen empowered companies.*

The Act defines 'citizen empowered company' as 'a company where twenty-five to fifty percent of its equity is owned by citizens.'[15] 'Citizen influenced company' is 'a company where five to twenty-five percent of its equity is owned by citizens and in which citizens have significant control of the management of the company.'[16] 'Citizen owned company' means 'a company where at least fifty point one percent of its equity is owned by citizens and in which citizens have significant control of the management of the company.'[17]

The title of the Act itself is self-explanatory; it seeks to economically empower the citizens by allowing them to have significant control of the management of identified companies. The emphasis on 'citizens' is a clear indication that the 'citizen' is the focus of this empowerment and an environment is being created where the citizen should enjoy the benefits of the country's wealth. The requirement for foreign investors to partner with the locals or the citizens and the restriction on equity participation by non-nationals shows the preferential treatment offered to the citizens. It is evidently clear that all this is aimed at ensuring that the citizens enjoy the wealth of their country. This is clearly in line with the principle of Permanent Sovereignty over Natural Resources.

Under the Lands Act, Chapter 184 of the Laws of Zambia, s.3 (5) provides that

[15] Section 3, Citizens Economic Empowerment Act.
[16] Ibid.
[17] Ibid.

> *All land in Zambia shall, subject to this Act, or any other law be administered and controlled by the President for the use or common benefit, direct or indirect, of the people of Zambia.*

This provision clearly states that the land is held by the President *for the use or common benefit, direct or indirect, of the people of Zambia.* The Act further provides in relation to alienation of land to Non-Zambians thus:

> *Subject to any other provisions and procedures relating to alienation of land, the President may alienate land to a non-Zambian under the following circumstances*:
>
> (d) where the non-Zambian is a company registered under the Companies Act, and less than twenty-five per centum of the issued shares are owned by non-Zambians;
>
> (f) where the non-Zambian is a Co-operative Society registered under the Co-operative Societies Act and less than twenty-five per centum of the members are non-Zambians;
>
> (g) where the non-Zambian is a body registered under the Land (Perpetual Succession) Act and is a non-profit making, charitable, religious, educational or philanthropic organisation or institution which is registered and is approved by the Minister for the purposes of this section.

As in the Citizens Economic Empowerment Act, it is evident that this particular provision also seeks to empower the citizens through partnerships and restriction on equity participation by non-nationals. Non-Zambians are only allowed to own a maximum of 25 percent of the shares in a company while 75 percent is reserved for Zambians. It is only in situations where the Non-Zambians are engaged in non-profit making ventures that the restriction on equity participation does not apply.

Having thus domesticated some of the provisions of international legal instruments on Permanent Sovereignty over Natural Resources, Zambia has an obligation both at the international and national level to ensure that her nationals benefit from the natural wealth of their country. Mineral wealth is no doubt one of the country's natural resources which is contentious. While most foreign investors want to exploit this resource, the citizens also want to enjoy the benefits from this resource that their country is endowed with. Further, mineral wealth should, in line with the Principle of Permanent Sovereignty over Natural Resources, be used for the development of the nation of Zambia.

Under the Mines and Minerals Development Act, certain mining rights are exclusively reserved for Zambia nationals. Section 7 (3) of the said Act provides that *a prospecting permit, small scale-mining licence, small-scale gemstone licence and an artisan's mining rights shall not be granted to a person who is not a citizen of Zambia or a company which is not a citizen-owned company.* Section 7(4) further provides that *a mining right for industrial minerals shall only be granted to a citizen of Zambia and a citizen-owned company*.

Government has occasionally made pronouncements on this issue of citizen's enjoyment of the natural wealth of their country. For example, on the occasion of the second reading of the Mines and Minerals Development Bill in 2008 during the Second Session of the Tenth National Assembly, the Minister of Mines and Minerals Development then, Kalombo Mwansa, implored the House with the following words '*Mr Speaker, I therefore wish to seek full support of the House on this Bill and pave way for increased participation of Zambians in the ownership of mines and for enhanced benefits from the mining industry for all the*

*people of Zambia'* [18]The key phrase in this statement is *'enhanced benefits from the mining industry for all the people of Zambia'* It is key because it is in line with the principle of Permanent Sovereignty over Natural Resources. The proceeding chapters will demonstrate government's fulfilment of this undertaking, or lack of it.

Empowerment of citizens so that they fully benefit from the natural wealth of their country takes many forms. As earlier pointed out, one common form in relation to companies is the restriction on equity participation by non-nationals. For example, the Republic of South Africa in pursuit of its Black Empowerment Policy, envisages that by 2014, at least 26 per cent of all shares in the mining sector will be in the hands of the citizens.[19]

With regard to investment promotion and protection, although the Republic of Zambia has not enacted specific legislation, it has undertaken many policy reforms and amended and repealed many laws with the view to achieving the same object of investment promotion and protection. The Investment Act of 1989 was repealed and replaced by the Investment Act of 1991and this was again replaced by the Investment Act of 1993. The 1993 Act was later amended in 1994 and 1995. Finally, in 2006, the Investment and Privatisation Acts were merged into the Zambia Development Agency (ZDA) Act.

Part IV of the ZDA Act is dedicated to investment promotion and guarantees. Among the promotion measures, the ZDA Board is mandated *inter alia*, to promote private investment by taking measures and actions which help to create and maintain a predictable and secure

[18] Parliamentary Debates, Wednesday 19th March, 2008.
[19] Parliamentary Debates, Wednesday, 16th March 2011.

investment climate.[20] Further, the Board is tasked to endeavour to conclude investment promotion and protection agreements with prospective investors[21].

The investment guarantees under the Act are protection from acquisition except for a public purpose and in accordance with the law, prompt payment of compensation which is adequate and externalisation of funds without restriction.[22] With regard to dispute settlement, the standard practice is to have dispute settlement provisions to supplement protection provisions.[23] The ZDA Act provides for dispute settlement under the Zambian law.[24] However, it may appear this protection is considered inadequate by most foreign investors as evidenced by the case of mining companies over the Development Agreements (DAs). As this study will show, mining companies have little or no faith in the domestic courts and prefer to submit to international arbitration instead.

In trying to promote and protect investments, as in any situation, some risks may arise that are not adequately covered by the protection provisions in the bilateral agreements. The study by UNCTAD referred to earlier, points out that there is a possibility of having measures which, although not necessarily unfair or even unpredictable, affect foreign investors in a disproportionate manner compared to domestic enterprises, so that pertinent assurances are considered necessary.[25] Examples include discriminatory taxation, royalties and arbitrary refusal of licences.[26] It is on the basis of such perceived inadequate guarantees that investors

[20] ZDA Act NO.11 of 2006, s.17(a)
[21] Ibid s.17(j)
[22] Ibid s. 19
[23] See Sornarajah, M., 2004.The International Law on Foreign Investment. Cambridge: Cambridge University Press, pp 101- 106.
[24] The Arbitration Act No. 19 of 2000.
[25] UNCTAD series on International Investment Policies for Development. supra note 4 at 47.
[26] Ibid.

try to protect themselves further by attempting to negotiate special privileges and guarantees over and above what is expressly provided for by law.

The controversy surrounding the cancelled DAs concluded between the Zambian government and some mining companies is a case in point. Upon the mining companies' request for special 'guarantees' or assurances to adequately protect their investments, the Zambian government, in a desperate attempt to offer such protection, went as far as providing for the scope and content of the DAs in the Mines and Minerals Act of 1995, thereby making the DAs part of the law. Section 9 of the said Act titled '*Development Agreements'* as amended by Act No. 41 of 1996 provides as follows:

> (1) *For the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia, the Minister may, on behalf of the Republic, enter into an agreement relating to the grant of a large-scale mining licence.*
>
> *(2) An agreement referred to in subsection (1) shall be known as a development agreement, and may contain provisions binding on the Republic in relation to-*
>
> *(a) mining operations under a large-scale mining licence, or the financing of any mining operations under such a licence;*
>
> *(b) the circumstances or the manner in which the Minister or the director shall exercise any power or discretion conferred on them by this Act in respect of the licence; and*
>
> *(c) the settlement of disputes arising out of or relating to the agreement, the administration of this Act, or the terms or conditions of a large-scale mining licence, including provisions relating to the settlement of any such dispute by international arbitration.*

The controversy over the cancellation of the DAs was exacerbated by the stabilisation clauses found in Part D (Taxation) of most of the DAs which appear to have been generated from a standard template. In clause 15(1) of the DA between the Zambian government and Chambeshi Metals Plc, a mining company owned by ENYA Holdings BV, a British-based company, the Zambian government undertook, for a period of fifteen years, not to increase various taxes, amend the tax regimes applicable at the time of signing of the agreement as well as not to impose new taxes.[27] The Agreement states further that '*GRZ shall ensure that no law, statute, regulation or enactment shall be passed or made which would discriminate against the Company in respect of any such matters referred to in Clause 15.1 or otherwise in its conduct of Normal Operations or any other circumstances under this agreement when compared to other mining companies…*'[28]

This 'freezing' of the law actually placed the DAs above the law, a situation which is unacceptable as every agreement ought to be subject to the law of the land in which it will be administered. Although the Zambian government amended the Mines and Minerals Act in 2007 'to revise the provisions of section nine so as to subject the provisions in a Development Agreement to the law,'[29]there are still many unresolved issues over the DAs with some companies seeking re-negotiation of the agreements and others threatening legal action. It can be argued that this situation could have been avoided had the Zambian government exercised some caution in the manner and extent of providing for special guarantees in the name of protecting foreign investments.

[27] Chambishi Cobalt and Acid Plants and Nkana Slag Dumps Development.
Agreement (Republic of Zambia and Chambishi Metals Plc, 11 September, 1998) p 29.
[28] Ibid p.29 - Clause 15.2.
[29] Mines and Minerals (Amendment) Bill No. 7 of 2007. Objective (a).

## 1.4 LITERATURE REVIEW

Kamuwanga, M., deals with the art of negotiating investment contracts in order to make contracts mutually advantageous to both parties and how Zambia and other developing countries can increase their benefits from foreign investment through investment contracts.[30] Although the central theme is a chapter on Negotiating Contracts, she confines her investigations to prescribing remedies for effective negotiations. The particular chapter appears more like a User's Guide on negotiations in this regard. She further cautions that developing countries with constantly changing economies may sometimes conclude contracts that become detrimental in operation[31] but does not discuss likely factors that may lead to this situation. This study will go further than this by identifying possible factors that may lead to contracts becoming detrimental in operation because for a solution to be found, the problem(s) must first be identified. Kamuwanga further observes in relation to developing countries that there are things within their power that they can do, but does not say what these things are.

This study will go a step further by actually pointing out 'the things' that can be done in order to ensure that situations where contracts become detrimental in operation are avoided as much as possible.

Mwenda, K.K., examines the efficacy of law and policy on the regulation of FDIs in Zambia.[32] He also analyses the relationship between fiscal incentives and the attraction of

[30] Kamuwanga, M., 1995. Negotiating Investment contracts, Investment Law in the Context of Development. Lusaka: Multi-media Publications. p5.
[31] Ibid p.7.
[32] Mwenda, K.K., 2000. Contemporary Issues in Corporate Finance and Investment Law. Washington DC: Penn Press. p2.

FDI. Technology transfer and transfer prising and the factors that discourage FDI in Zambia are also discussed.

As regards the benefits of FDI to the host country, Mwenda discusses the major ways in which multinational corporations may affect the economy. He does not however, state whether or not the Zambian economy has been affected and if so, how? This study will show how foreign investment can actually affect the country negatively or positively through the grant of investment guarantees. It will further show what ought to be done to avoid the negative impacts of FDI with regard to guarantees.

Isayev, U.T., writing on 'Foreign investment in the transition, how to attract it and how to make it work,' states that policies in FDI still contain such obstacles to FDI as unstable tax systems, lack of transparency, bureaucratic interference, weak legal institutions and the existence of weak labour markets among others.[33] He further points out the importance of having comprehensive structural reforms and an active government policy on attracting foreign investment. He also makes mention of the encouragement and protection offered by some laws in various countries. Conspicuously missing in Isayev's paper is the 'how' part of all the situations discussed. With regard to the first observation, 'how' these obstacles can be tackled in order to guarantee the safety of investments has not been addressed. On the issue of attracting investments, 'how' to protect the safety of the investments has not been touched. On the protection of laws offered in other countries, 'how' any of them has worked has not been stated. Further, the problems (if any) that may result from such guarantee have not been identified. In addressing the 'how" part of the issue of investment protection, this study will

[33] Isayev, U.T., 2005. Foreign Investment during the transition: How to attract it, and How to make the best use of it. Kyrgyz: Foreign Investment Agency Publications, p 3.

begin by pointing out some of the problems resulting from investment guarantees and then proceed to suggest ways on how to avoid them.

Joong, W.C., in his analysis of FDI's determinants, trends in flows and promotion policies discusses the desire by most countries to attract FDI at all costs and gives reasons for this strong desire as income generation and technology transfer[34]. He further identifies the determinants of FDI as attractiveness of the economic conditions in host countries, the policy framework towards private sector, trade and industry and the investment strategies of Multi-national Enterprises.[35] Other than giving this chronicle of determinants, he does not discuss how the investments so attracted must be protected in order for the income generation to continue. This study centres not only on promotion but also protection of the investments and problems associated with the latter concept.

Zhan. J, (ed) in his paper on 'Investment Promotion Provisions in International Investment Agreements' discusses mainly the provisions or clauses in International Investment Agreements (IIAs) observing that the emphasis is more on investment protection than investment promotion.[36] He underscores the importance of investment guarantees as the most important means of investment promotion and cautions on the need for countries to always endeavour to strike a balance between investment promotion and protection.[37] Although he observes that putting more weight on one component may lead to overlooking possible new approaches in the area of FDI, he does not bring out the 'possible new approaches that can be overlooked' and the consequences of so doing. This study focuses on the legal effects of

[34] Joong, W.C., 2003. Foreign Direct Investment: Determinants, Trends in flows and Promotion Policies. Beijing: Pacific Publishers, p.8.
[35] Ibid p.9.
[36] Zhan, J. (ed.), 2008. Investment Promotion Provisions in International Investment Agreements. New York: United Nations Secretariat. p.16.
[37] Ibid

investment guarantees offered by governments of host states to investors. It seeks to bring to the fore the impact of investment protection provisions on the host country.

Perera, R.A, in his discussion of the 'Legal Challenges in International Investment Law' focuses on the evolving jurisprudence in this branch of the law [38]. He points out new terms that have evolved such as 'pre-investment expenditure' and 'indirect expropriation' and how these have been interpreted by the courts. He cautions host states to be weary of these new developments in their quest to negotiate investment contracts. He dwells more on how international courts have decided matters before them concerning these new developments. The focus of this study is not only on new jurisprudence that has evolved but how this can affect host countries when giving guarantees to prospective investors.

Karl, P.S. & R. Pedro (eds) in their paper that gives a broad overview of developments in the international legal framework for FDI examines the key substantive issues of law and policy concerning FDI.[39] An analysis of current situations in FDI attraction is given and an observation made that many are seeking to attract FDI by dismantling restrictions on its entry and operations and by offering strict guarantees both national and international against measures seriously damaging the investor's interests[40].

The paper does not give the effect of such measures. This study will not only discuss the guarantees but will also give the impact of such guarantees on the host state.

[38] Perera, A.R., 2005. Current trends in International Investment Agreements: New Legal Challenges for Developing Countries. Paris: OECD Secretariat. 2005. p.114.
[39] Karl, P.S and R. Pedro.,1999. Trends in International Investment Agreements: An Overview. New York: United Nations Secretariat. p.16.
[40] Ibid p.31.

## 1.5 STATEMENT OF THE PROBLEM

*The country's relationship with foreign investors who were affected by the cancellation of DAs under Section 160 (1) of the Mines and Minerals Development Act, 2008 is strained and the investors have threatened legal action. The continued use of a similar Agreement, the Investment Promotion and Protection Agreement (IPPA), has been questioned by many. The situation has necessitated an investigation into the contents of the Agreements.*

In 2007, the Mines and Minerals Amendment Bill No. 7 was introduced to *inter alia,* revise the provisions of s.9 so as to subject the provisions in a DA to the law, increase the mineral royalty on base metals from zero point six per centum (0.6%) gross value to three per centum (3%) gross value, and provide for the inclusion of fiscal terms from a DA.[41] The said Bill was duly passed by Parliament and became law in 2008, thereby effectively abolishing the DAs. Since the introduction of these changes to the mining fiscal and regulatory regime, there has been a lot of debate with regard to the scope and content of agreements and the contractual obligations that the executive arm of government, mandated to conclude agreements on behalf of the Republic of Zambia, should assume when dealing with foreign investors. There is a general perception that investors benefit more from the rights in the agreements than they are bound by the obligations therein. With regard to the DAs, not even the amendment to the Mines and Minerals Act and the subsequent repeal of the Mines and Minerals Act of 1995 has been able to atone for the perceived damage caused by the DAs on the citizen's right to benefit from their country's natural wealth. The continued existence of a different type of agreement, the IPPAs, has therefore been received with mixed feelings. Some sectors of society consider the move as nothing more than mere nomenclature, whether the agreements are called IPPAs or DAs is not important because the real danger is still lurking behind

[41] Daily Parliamentary Debates (Hansard). National Assembly of Zambia, 2nd March and 5th April 2007.

whatever name the agreement is given. However, government through the then Minister of Finance and National Planning, Ng'andu Peter Magande, assured the nation when introducing the new mining tax regime that the intention was 'to get a fair return on our resource.'[42] Government has maintained this reasoning with regard to the IPPAs.

### 1.6 JUSTIFICATION FOR THE STUDY

There are many scholarly works on the subject of FDI in general and investment incentives in particular. Hence, a deliberate effort has been made to avoid discussion on incentives as it is felt that this subject has been ably and exhaustively tackled by other scholars. However, this author knows not of any scholarly works in Zambia dealing specifically with investment guarantees and the extent to which foreign investments should be protected vis- a vis the peoples' right to enjoy the natural wealth of the states in whose territories the investments are admitted.

### 1.7 AIM

This study will critically analyse the law on investment guarantees as provided for in the ZDA Act no. 11 of 2006 and other related statutes and the clauses contained in the DAs and IPPAs. The ramifications, adequacy or otherwise of the law on issues of investor protection will be discussed with a view to finding solutions to the problem and proposing ways in which foreign investor protection can be beneficial to both the investor and the nationals of the countries that host them. It is hoped that the study will make a contribution in terms of knowledge and information to the process of concluding agreements between government and foreign investors to ensure that both parties enjoy the benefits emanating therefrom. Through recommendations, the study will help government avoid assuming obligations that

[42] Daily Parliamentary Debates, February 4 2007. <http://www.parliament.gov.zm/dedates>

are not only difficult to fulfill but also detrimental to the welfare of its citizens. Further, it will provide policy makers in the relevant ministries or institutions with best practices which may be useful in amending existing policy or formulating new policy.

## 1.8 OBJECTIVES

**General Objective:**

To determine the adequacy of the guarantee provisions in the current Zambia Development Agency (ZDA) Act, 2006 and the repealed Mines and Minerals Act, 1995.

**Specific Objectives:**

1.8.1. To evaluate clauses in the cancelled DAs in terms of benefits to the parties.

1.8.2. To evaluate clauses in the existing IPPAs in terms of benefits to the parties.

1.8.3. To assess the relevance of the IPPA Standard Template and Negotiation Guidelines in terms of benefits to the Zambian people.

## 1.9 HYPOTHESES

The following hypotheses are made:

1.9.1. Special guarantees in agreements are to the detriment of the citizen's right to the enjoyment of their natural wealth.

1.9.2. IPPA framework allows foreign investors to benefit more from the rights in the agreements than they are bound by the obligations therein.

1.9.3. The securing of investments through investment guarantees attracts more foreign investors into a country.

## 1.10 RESEARCH QUESTIONS

The study will seek to answer the following questions:

1.10.1. Do special guarantees in agreements work to the detriment of the citizen's right to the enjoyment of their natural wealth?

1.10.2. Does the IPPA framework allow foreign investors to benefit more from the rights in the agreements than they are bound by the obligations therein?

1.10.3. Does the securing of investments through investment guarantees attract more foreign investors?

## 1.11. METHODOLOGY

The proposed study will basically be a desk review of secondary sources such as Parliamentary Debates, Scholarly Journals, Statutes, DAs, and Constitutions. The review will involve quantitative analysis of all clauses in selected DAs and the IPPA template to determine their significance and import. Each of the articles /sub-articles will be analysed for their significance to show the share proportion of benefits to government and the companies.

Further, Heads of selected government institutions will be interviewed to provide qualitative aspects on government policy. The selected institutions include ZDA IPPA Secretariat,

Ministry of Commerce, Trade and Industry and Ministry of Justice. Some selected investors will also be interviewed in order to balance the paper.

The study population is 11 DAs, which is the total number of mining DAs concluded between Zambia and the foreign mining companies. The study sample is four out of the nine DAs accessed. The four will be randomly selected.

## 1.12. RESEARCH LAY OUT

The study will be divided into five chapters as follows:

### 1.11.1 **Chapter One**

**Introduction and Background**

This chapter will introduce the research topic and also give background information on the same.

### 1.11.2 Chapter Two

**Scope and Purpose of Investment Promotion and Protection Agreements.**

The chapter will discuss the scope and purpose of the IPPAs. It will critically analyse all the clauses in the standard template to determine the beneficiary. Further, two government documents namely the 'Guiding Principles on IPPA Negotiations' and the 'Standard

Template on IPPAs'[43] whose objective is to give policy direction on the required contents of IPPAs will be analysed. The provisions of the ZDA Act and other relevant statutes on investment guarantees will be critically analysed to determine their adequacy or otherwise. The circumstances that may lead to investors asking for special protection will be identified and the consequences thereof brought to the fore.

### 1.11.3 Chapter Three

**Lessons Learnt from the Implementation of Development Agreements in Zambia**

This chapter will examine the legal framework within which the DAs were operating during their subsistence. An analysis of the contents of selected DAs will be made to identify the causes of the problems in implementation that subsequently occurred and how they have been addressed. Further, the chapter will compare and contrast the legal and regulatory framework for DAs and the IPPAs to assess the precautionary measures (if any) put in place to avoid a recurrence of the DA situation.

### 1.11.4 Chapter Four

**Learning from Other Jurisdictions**

This chapter will draw lessons from other jurisdictions on how they have or are implementing the IPPA concept. One country and one region have been selected for this purpose, Botswana and the Four Tigers of Asia respectively. Botswana has been selected because, like Zambia,

[43] The two documents are produced by the IPPA Secretariat which is under the Ministry of Commerce and Industry.

the mainstay of its economy is mining. Zambia's economy is largely dependent on copper mining[44] while Botswana's economy is dependent on diamond mining.[45] The concerns of the extractive industry affect both countries in this regard. The Four Tigers of Asia, namely South Korea, Taiwan, Malaysia and Singapore, have been selected because they are the world's fastest growing newly industrialised economies and are also noted for maintaining exceptionally high growth rates.[46] Two of the four Asian tigers namely, Singapore and Taiwan, have been randomly selected to represent the region. It is hoped that some lessons will be learnt from the tiger economies.

### 1.11.5 Chapter Five

**Summary, Research Findings and Recommendations**

The summary and research findings will be given in this chapter and based on the findings, conclusions will be drawn and recommendations on the way forward will then be made.

## 1.13. CONCLUSION

It is hoped that through this study, a modest contribution will be made to the body of knowledge on the process of concluding agreements between government and foreign investors to ensure that while both parties enjoy the benefits emanating therefrom, the citizen's right to the enjoyment of the natural wealth of their country is respected. It is further

[44] Lungu, J., 2009. "The politics of reforming Zambia's mining tax regime." 6 Southern Africa Resource Watch Issue 8.1. <http://www.sarwatch.org/sarwadocs/politics_Reforming_Zambia_Minig_Tax_Regime.pdf > (accessed 17th March, 2011)
[45] See African Development Bank-Economic Diversification Support Programme Report 2009: Botswana. p.12. <http://www.afdb.org/fieldmin/uploads/afdb/Documents/Projects-and-operational/AR%20Botswana1En.p> (accessed 15th March, 2011)
[46] The Four Asian Tigers <http://www.medbib.com/Asian-Tigers> (accessed 27th May 2010)

hoped that the study will help the executive arm of government, mandated to conclude agreements on behalf of the Republic, avoid entangling itself in agreements that are detrimental to the welfare of its citizens.

## 2. CHAPTER TWO: INVESTMENT PROMOTION AND PROTECTION AGREEMENTS IN ZAMBIA.

This chapter is divided into two parts; Part I discusses the policy issues that inform the law on Investment Promotion and Protection in Zambia. It then gives a critical analysis of the legal and regulatory framework and negotiation guidelines for Investment Promotion and Protection Agreements (IPPAs) with particular emphasis on foreign investment protection. Part II discusses issues of foreign investment protection from an international perspective. It seeks to identify pertinent potential legal difficulties in present legislation and policy in the country with a view to casting them in a context congenial to the general principles and arbitral practice on foreign investment protection at the international level.

### 2.10. PART I: POLICY CONTEXT

> *"There can be no understanding of the law, whether national or international, without prior understanding of the policy issues it seeks to deal with."* - Peter Muchlinski[47]

Zambia's Commerce and Trade sector policy is clearly articulated in the long-term national vision – the Vision 2030. This is Zambia's first ever written long-term plan which expresses Zambia's aspirations by the year 2030[48]. The national vision is for the country *'to become a prosperous middle income nation by the year 2030.'* The Vision will be operationalized through the five year development plans starting with the Fifth National Development Plan (FNDP) (2006 – 2010) and national budgets.[49] As a planning instrument, the FNDP aims at focusing government's policy and programmes on desired objectives.

[47] Muchlinski., 2008. "Policy Issues" in The Oxford Handbook of International Investment Law. Oxford: Oxford University Press. p.19.
[48] Vision 2030. p.vi. Available at <http://www.mofnp.gov.za>
[49] Ibid

The main objective in the trade sector, in line with the Zambian government's pronounced policy of a market based private sector led economy, is export promotion. This objective will be achieved through the concept of Multi-Facility Economic Zones (MFEZs) which concept takes into account domestic trade, investment and exports.[50] MFEZ will be operationalized through the Zambia Development Agency (ZDA) and be supplemented by the Private Sector Development (PSD) Programme.[51] Another broad policy objective of this sector, relevant to this study, is to assist domestic firms to increase their levels of efficiency and therefore withstand increasing competition in the domestic market.[52]

The specific policy prescriptions are to;

1. improve transportation and other economic infrastructure in areas with potential;
2. regularly undertake investment identification programmes;
3. encourage joint ventures between domestic and foreign investors;
4. review the incentives regime and ensure that domestic investors are not discriminated against;
5. regularly sensitize immigration and other officers that interact with investors on the value of investment and thus the need to treat investors with courtesy;
6. market Zambia's investment opportunities at fairs; and
7. continuously review investment administrative procedures with a view to enhancing the investment climate.

From the foregoing, it is evident that policy is focused more on investment promotion with particular emphasis on enhancing opportunities for the domestic investor. In line with the policy prescriptions, the ZDA Act, which is the legal framework on investment, is skewed

[50] See Fifth National Development Plan (2006 – 2010) Lusaka: Government Printers. p.125.
[51] Ibid
[52] Ibid. p.126.

towards investment promotion than investment protection. This is evident from the aim of the ZDA Act which is *to foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy*[53]. There is no reference to *protection of investments* either expressly or by implication. Although the Act has some provisions on investment protection, these do not form the core issues under the Act. In addition, the many investment promotion provisions in the ZDA Act; S.17 (a) to (J) and s.18 (1) and 18(2) (a) to (g) compared to the few investment protection provisions s.19 (1) and (2), s.20 (a) to (d) and s. 21, confirm this assertion.

## 2.11. HISTORICAL BACKGROUND OF IPPAs

Before the introduction of the Government Technical Negotiating Team[54] in 2007, parties negotiating an investment agreement were at liberty to determine their own procedure and the contents of the agreement based on the law in force in the country. This system changed after the country's experience in negotiations with Zambia Sugar Plc in 2007 over a sugar expansion project at Nakambala Sugar Estates.[55] The negotiation process was laden with so many problems most of which reflect the competing interests of the two parties; the foreign investor and the host State. During the negotiations, a number of challenges with regard to the implementation of the proposed clauses in the agreement were identified. Most of the proposals were not only offensive to public policy but also undermined the sovereignty of the nation and imposed onerous obligations on government. For instance, there was a proposal that restricted the government to enact or change legislation, a proposal to amend the laws of

[53] See Preamble to ZDA Act No. 11 of 2006
[54] A Committee constituted by cabinet office to negotiate IPPAs with prospective investors. During the privatisation of the mines, Government had constituted a similar negotiating team called GRZ/ZCCM Privatisation Negotiating Team. The difference is that the former has Terms of Reference in the ZDA Act, while the latter had 'a detailed approved procedure for all aspects of the agreements with potential buyers.
[55] Interview with a member of the GRZ Technical Negotiating Team.

the country to conform to the proposed agreement and a proposal for government to make an undertaking that relevant authorisations, consents, permits and licences required for the project would be processed within 48 hours.[56]

This experience brought to the fore the need for guidance to members of the Zambian negotiating team so that they adequately protect the interests of the country during negotiations with foreign investors. It is submitted that prior to execution of any agreement or contract, it is vital to take such precautionary measures as a means of guarding against undesirable provisions finding their way into the agreement. The Zambian government was therefore compelled to constitute a standing committee called the Government Technical Negotiating Team to negotiate IPPAs with prospective investors on its behalf. The Terms of Reference of the Government Technical Negotiating Team are *to negotiate and sign IPPAs with prospective investors on behalf of the Government of the Republic of Zambia in accordance with the provisions of the Zambia Development Agency Act No. 11 of 2006, section 17 (J).*[57] In addition to negotiating the agreements in accordance with the stated law, the negotiating team is also guided by two documents called the *Guiding Principles on IPPA Negotiations* and the *Standard Template on IPPAs*[58] whose objective is to give policy direction on the required contents of IPPAs.

The Government Technical Negotiating Team comprises eight members, two of whom are drawn from the Ministry of Commerce, Trade and Industry, and one officer from each of the following institutions; Ministry of Justice, Ministry of Labour and Social Security, the Zambia Revenue Authority, the Zambia Development Agency, the Environmental Council of

[56] Ibid
[57] See 'The Guiding Principles on IPPA Negotiations' produced by the Ministry of Commerce, Trade and Industry, Lusaka.
[58] See Appendix I and II. The documents are produced by the Ministry of Commerce, Trade and Industry, the ministry responsible for coordinating the activities of IPPAs.

Zambia and the Immigration Department under the Ministry of Home Affairs. The negotiating team is chaired by the Director responsible for industry in the Ministry of Commerce, Trade and Industry. The said ministry also hosted the IPPA Secretariat from inception until 2010, when Secretariat was transferred to Zambia Development Agency (ZDA.)

## 2.12. SCOPE AND PURPOSE OF IPPAs

The purpose of the IPPAs that the Government Technical Negotiating Team is mandated to negotiate under the ZDA Act is to facilitate the aim and objective of the Act. The aim is clearly stated in the preamble as follows: *to foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy*.[59] Another aim is *to promote greenfield investments through joint ventures and partnerships between local and foreign investors.*[60] These aims and objectives are consistent with the private sector led economic policies of the government.

With regard to the scope, IPPAs may cover any type of investment in all sectors and industries in any region within Zambia except *an industry manufacturing arms and ammunition, explosives, military vehicles and equipment, aircraft and other military hardware, or an industry manufacturing poisons, narcotics, dangerous drugs and toxic, hazardous and carcinogenic materials and an industry producing currency, coins and security documents.*[61] This wide scope is a positive attribute because it allows investment in a lot of sectors of the economy. At the time of the study, 30 IPPAs had been concluded

[59] See Preamble to the Zambia Development Agency Act No.11 of 2006.
[60] Ibid
[61] See second schedule to the ZDA Act No. 11 of 2006.

between the Zambian government and various companies in different sectors such as mining, agriculture, construction and the energy sector.[62] Out of the 30 Agreements in different sectors, only two were in the mining sector; one with Maamba Collieries Limited relating to the development of a Coal-fired Thermal Power Plant and the other with Zhonghui Mining Group Limited relating to Development Project for the exploration, mining, concentrating and smelting of copper and other metals.[63] The mining sector is particularly important to this study because it involves mineral wealth, a natural endowment of the country from which citizens should benefit as of right under the Principle of Permanent Sovereignty over Natural Resources.

## 2.13. JUSTIFICATION FOR IPPAs

In his opening address to the tenth session of the National Assembly in 2008, then Republican President, the late Levy Patrick Mwanawasa, stated the following with regard to negotiation of agreements in general and DAs in particular: 'It is the view of my administration that all the requirements for doing business and incentives should be in the relevant legislation and regulations and should not be a discretionary matter. In view of this, there will no longer be any need for special agreements with investors in the mining sector and eventually all the sectors of the economy.'[64] The statement effectively abolished 'special agreements' with investors and was the genesis of the formal termination of the DAs. It was expected that the conclusion of any kind of 'special' agreements between government and investors, be they DAs or IPPAs or by whatever name called, would cease. On the contrary, the practice has continued with the IPPAs still in place and even the introduction of a new

[62] See Appendix III: IPPAs Between the Government of the Republic of Zambia and various mining companies.
[63] Ibid.
[64] President's Opening Address to the Tenth Session of the National Assembly – 2008 at p 34.

type of agreement called the Public-Private Partnership Agreement provided for under Part V of the Public-Private Partnership (PPP) Act No. 14 of 2009.

The continued existence of the IPPAs has been justified by the Zambian government by simply distinguishing them from the DAs as follows:

1. IPPAs, unlike DAs, are essentially means of safeguarding property rights by, *inter alia*, guaranteeing against usually costly and unnecessary unilateral expropriation of private property. Further, they minimize barriers to entry into particular markets and associated costs associated with expansionary projects;
2. IPPAs operate within the law unlike DAs which operated outside the law. IPPAs are basically a higher version of a Memorandum of Understanding;
3. no fiscal incentives outside those provided for in the Zambia Development Agency (ZDA) Act are granted to investors under the IPPAs as was the case with DAs;
4. IPPAs are consistent with standard practice and in particular the Multilateral Guarantee Agency (MIGA) of the World Bank; and
5. IPPAs concluded with private firms are essentially the same as those negotiated with sovereign states.[65]

## 2.14. FOREIGN INVESTMENT PROTECTION UNDER THE ZAMBIA DEVELOPMENT AGENCY ACT

Part IV of the ZDA Act is devoted to investment promotion and guarantees. The relevant sections dealing specifically with investment protection are s.19 which deals with protection from acquisition, s.20 on transfer of funds and s.21concerning settlement of disputes.

[65] Interview with member of Government Technical Negotiating Team.

It is submitted that a thorough understanding of the nature and types of risks a foreign investor is likely to encounter with regard to their investment is necessary to determine the adequacy or otherwise of the foreign investment protection provisions under the Act. However, such a detailed analysis is beyond the scope of this chapter. Identification of the risks should suffice. Generally, under international law, foreign investment risks cover non-commercial risks such as expropriation, nationalization, currency inconvertibility and transfer restriction, war and civil disobedience and breach of contract.[66]

Investment guarantees under the ZDA Act are reproduced in full to allow for a thorough analysis of each one of them. Section 19, which makes provision for protection from acquisition states as follows:

> *An investor's property shall not be compulsorily acquired nor shall any interest in or right over such property be compulsorily acquired except for public purposes under an Act of Parliament relating to the compulsory acquisition of property which provides for payment of compensation for such acquisition.* It further provides that *any compensation payable under this section shall be made promptly at the market value and shall be fully transferable at the applicable exchange rate in the currency in which the investment was originally made, without deduction for taxes, levies and other duties, except where those are due.*

Under s.20, the law provides that *notwithstanding any other written law relating to externalization of funds, a foreign investor may transfer out of Zambia in foreign currency and after payment of the relevant taxes; dividends or after-tax income, the principal and*

[66] See Sornarajah, M., 2004. The International Law on Foreign Investment. Cambridge: Cambridge University Press. p.101.

*interest of any foreign loan, management fees, royalties and other charges in respect of any agreement; or the net proceeds of sale or liquidation of a business enterprise.*

On the settlement of disputes, s.21 provides that any dispute arising as a consequence of an investment under this Act shall be settled in accordance with the Arbitration Act.

Each of these guarantees is now analysed based on what it seeks to achieve.

### 2.14.1. THE TAKING OF PROPERTY

The issue of guarantees against the taking of a foreign investor's property is cardinal and it goes to the core of the foreign investor-host country relationship. Writing on this subject, Sornarajah remarks that 'this guarantee is intended to remove what the foreign investor fears to be the greatest threat to his investment.'[67] The fear is justified. This is so because such taking is not without legal basis, it is anchored upon the host country's sovereign right to control foreign investments within its territory. Therefore, once an investor decides to transact their business in a foreign land, they have voluntarily accepted to subject themselves and their investment to the laws of that land.[68] This puts their investment within the parameters open to expropriation or nationalization by the host State. An observation has been made on this subject as follows: 'It is a great privilege to be able to engage in business in a country other than one's own. By being permitted to undertake commercial or manufacturing activities or transactions through business incorporated in another country…foreigners may have to accept a number of restrictions in return for the advantages

[67] Ibid. p.101.

[68] See Scheuer, C., 2004. "Investments, International Protection." p.1. Available at http:www.Univie.ac.at/intlaw/wordpress/pdf/investments-int_protection.pdf. (Accessed on 1st October, 2011.)

of doing business through [such] local companies.'[69] Indeed restrictions are bound to be there and they may come in many ways one of which could be the taking of the foreign investor's property by the host State. It is submitted that the reasons for such taking usually vary and mainly hinge on implementation of national economic policies. The nationalization policies embarked upon by the Zambian government in 1968[70] is a case in point.

One scholar has concluded that 'as a consequence of the sovereign right of states over foreign investor's property, there has been a search for legal methods of conferring protection upon foreign investments.'[71] Thus the taking of property under such circumstances is governed by internationally accepted rules; it should be for a public purpose, should be non-discriminatory, should comply with rules of basic due process and compensation should be payable in the event of a taking.[72]

Applying these international legal requirements to the provision on protection from acquisition in the ZDA Act, it is worth noting that save for the issue of non-discrimination which is not expressly stated, the guarantee provisions under the Act adequately meet the requirements for a legal taking of foreign investor's property by the host State. The public purpose aspect of the requirement is expressly stated. Further, the taking of property under the ZDA Act is an exception to the rule which means that its occurrence is conditional upon the need to satisfy a public purpose. Compliance with rules of basic due process and compensation are covered under the phrase *under an Act of Parliament relating to the compulsory acquisition of property which provides for payment of compensation for such acquisition.*

[69]Elettronica Sicula S.P.A (ElSI) case (1989) ICJ Reports p.15.

[70] See the Mulungushi Reforms Speech by President Kenneth Kaunda, President of the Republic of Zambia.
[71] Sornarajah, M. supra note 66 at 76.
[72] Ibid.

Apart from the ZDA Act, the Constitution of Zambia also makes provision for protection from deprivation of property in Article 16(1) thus:

> *Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.*

This provision highlights two important elements with regard to the taking, these are the duty to compensate and the quantum of compensation, which is that compensation should be adequate. Article 16 (3) further provides that *An Act of Parliament such as is referred to in clause (1) shall provide that in default of agreement, the amount of compensation shall be determined by a court of competent jurisdiction*. From a legal standpoint therefore, it is clear that the arbitrary taking of foreign investment property in Zambia is adequately protected.

However, it is submitted that protection of foreign investments is not the only requirement from the host country, there is also the requirement to ensure that citizens benefit from these investments. Muchlinski has remarked that 'it is important to balance the protection of investors and their assets with the right of the host country to regulate foreign investments and to develop national economic policy.'[73] For the purposes of this study, it is this balance that ought to reflect in the guarantee provisions. In the subject guarantee provision, this balance is well reflected; the part for the investor is adequately covered as earlier observed.

[73] Muchlinski, P., supra note 47 at 1.

The benefits for the citizens is covered by reference to the aspect of developing national economic policy which is under the phrases 'for public purposes' and the reference to deduction of taxes where they are due upon the payment of compensation in the event of a taking. By implication, the taxes so collected will add to the general revenue of the republic and ultimately to the development of the national economy. In this regard, a balance has been struck between investment protection and citizen's interest and national development.

### 2.14.2. EXTERNALIZATION OF FUNDS

One of the changes to the Zambian economy which is a result of the economic reforms of the 1990s is 'the removal of controls on externalization of profits.'[74] Former commerce minister Felix Mutati justified this change in the following words: 'one of the three pillars of improving our investment environment is reforms and under these reforms, we will uphold the rule of law and permit anyone who makes money to take it out with no questions asked.'[75] Government's position was clear then as it is now - foreign investors registered with the Bank of Zambia were free and they are still free to take money out of the country without restriction. This was enshrined in the repealed Investment Act, Cap. 385 and is now provided for in the ZDA Act.[76] The guarantee provisions on externalization of funds places no restriction on either currency convertibility or transfer of funds out of the country. Further, it gives the foreign investor the liberty to transfer any portion of their funds as they desire, be it dividends, interest on any foreign loan, or the net proceeds of sale or liquidation of a business enterprise. In this regard, the provisions are adequate in guaranteeing protection in terms of transfer of funds.

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[74] See "Major concerns relating to the Zambian economy." http;//www.Sarpin.org/countryPovertypapers/Zambia/political_Governance/aug2002_no2/page2. (accessed on 5th October, 2011)

[75] "Government won't question investors who externalize profits-Mutati." The Post, 28th May, 2010. p1. Available at http://www.postzambia.com/postprint_article.php?article.Id=9631

[76] See s. 36 of the Investment Act, Cap 385 and s.20 of the ZDA Act.

### 2.14.3. SETTLEMENT OF DISPUTES

Investor-host State arbitration has become a common occurrence.[77] It is therefore undisputable that dispute resolution mechanisms now play a vital role in determining the choice of an investment destination. Christoph Schreuer has argued that 'from the investor's perspective, the most important aspect of international protection of investments is the settlement of investment disputes.[78]The challenge however, is that there are different perceptions regarding what constitutes 'effective dispute resolution.' This concept is perceived differently from the foreign investor's and host country standpoint and the choice of law will depend on the perception. The host country will typically favour the choice of its own legal order. The investor will favour a system of law that provides stability and security from unilateral changes in the host State law.[79] Consequently, based on the conviction that the Zambian law is adequate to deal with investor-host-State disputes, the ZDA Act provides for the settlement of disputes under the Zambian Arbitration Act No. 19 of 2000. There is no reference to any international tribunal. Clearly, this provision is contentious.

An argument is advanced by Muchlinski that investors may perceive host country laws and procedures not to be sufficient as a means for the resolution of disputes with the host country. They may prefer an international approach to dispute settlement.[80] With regard to the dispute settlement provision in the ZDA Act therefore, it can be argued that it is itself a source of disputes. Besides, it potentially creates a loophole for the search for alternative ways of resolving the problem. Consequently as earlier observed in this study, where the law is

[77] Gantz, D.A. (2004) "Investor-State arbitration under the ICSID, the ICSID additional facility and the UNCTAD arbitral rules." Arizona. p.1.
[78] Schreuer, C. supra note 68 at 1.
[79] Muchlinski, P., supra note 47 at 1.
[80] Ibid.

inadequate or is perceived to be so, investors may try to circumvent the problem using other avenues such as a 'negotiation within negotiations' or negotiating conditions outside the law.

From these three investment protection provisions in the ZDA Act, it is clear that the Act does adequately cover all the risks that may affect foreign investment. Since the legal and regulatory frameworks are or ought to be the sources of foreign investment protection, the investor, whose main purpose for investment is the profit motive, will seek other ways of minimizing their risks in order to maximize their profits. They may be forced to look elsewhere, usually outside the law for solutions to their problem. They may try to negotiate certain terms of the agreement outside what the law provides. In view of this observation, it is therefore submitted that the perceived lacuna in the law has created room for what would be called 'mini negotiations' on some terms within the main negotiations. It has opened an avenue for what may be termed 'negotiation within negotiations.' It is inevitable that the investor engages in such negotiations for them to meet their objective. Thus, it can be argued that from the investor's perspective, such negotiations are necessary. It is further argued that it is on the basis of such perceived inadequacies in the law that foreign investors are compelled to negotiate certain terms outside the law as evidenced by the stabilization clauses negotiated in the DAs. Arguably, as seen from the DA experience, it is such terms that more often than not result in challenges in implementation. Implementing the agreement may prove to be detrimental to national development or fulfillment of the resultant obligations may be onerous on government.

## 2.15. CRITICAL ANALYSIS OF THE IPPA GENERIC TEMPLATE AND GUIDING PRINCIPLES

### 2.15.1. THE IPPA GENERIC TEMPLATE

The IPPA generic template (Appendix II) is one of the working documents for the Government Technical Negotiating Team, providing guidance on the 'dos' and 'don'ts' in the negotiation process between Government and prospective investors. This template is critically analysed below to show what each provision therein relates to. Particular attention is paid to the rights and obligations of the parties with a view to determining which party has the most benefits under the agreement. This is against the general perception that most agreements concluded between the Zambian government and foreign investors are usually lopsided with very few benefits accruing to the former than the latter. The foreign investor is perceived to be getting the most benefits.

The template contains a total of 24 Articles excluding the Date and Parties clause and the Attestation clause. The 24 Articles analysed are those containing operative paragraphs that prescribe the duties and rights of the parties. Article 1 is the interpretation clause details of which will not be analysed because they are meant to merely facilitate the understanding of the document. Article 2 is the 'term' of the agreement. It provides for the duration of the agreement and this is not specified. It merely states that the agreement *will continue for as long as any licence, permit or certificate of registration issued by the Designated Agency under the ZDA Act remains in force including any period of renewal therefrom in terms of the ZDA Act.* It is submitted that the linking of the term to the licences and other authorisations under the ZDA Act is a positive attribute because it provides checks and balances with regard

to compliance with the relevant requirements and the law. In light of the foregoing, the benefits of this clause, in the author's view, accrue to the Government of the Republic of Zambia.

Article 3 is titled Grant of Rights by the Government. The Article contains a clause where the government grants to the company *the right to employ or procure the employment of such persons (whether Expatriates or Zambian nationals) on such terms as the company considers necessary or appropriate* (3.1.1.1.) It is submitted that this provision grants sweeping powers to the company with regard to the choice of its employees. Since the decision regarding who should be employed is in the company's sole discretion, it is most likely that more expatriates will be employed compared to Zambian nationals. The term 'expatriates' is defined in the interpretation clause as meaning *individuals who are not Zambian nationals but who live and work at some time in the Republic of Zambia for the implementation and operation of the Development Project*. This provision is for the benefit of the company because of the wide employment powers it has conferred on it. Under the same Article, the company is given *the right to grant valid, effective and enforceable encumbrances and security interests in order to obtain financing in connection with the Development project.* The financing to be obtained is definitely for the benefit of the company.

The obligations of the Designated Agency (ZDA) are provided for in Article 4. These are to certify that the company is eligible for tax and duty exemptions, to renew the company's licence and assist the company to expeditiously obtain the required permits in accordance with the law. Clearly these provisions are to the benefit of the company as they are all meant to facilitate its operations. However, they can be said to benefit government only to the extent that they are required to be applied in accordance with the Laws of Zambia.

Article 5 spells out the obligations of government. Clause 5.1.1obligates the government to grant the necessary work permits, visas and related documents. It also obligates government, in appropriate cases, to decline to grant any such documents. The first part of the clause is no doubt to the benefit of the company. The second part of the clause is meant for the protection of the interests of the country. This is expressly stated in the following phrase '*…decline to grant an application, or expel a person previously admitted, so as to protect its economic and security interests and public health and safety of the Republic of Zambia*.'

Under clause 5.1.2, the government is obligated to act in a timely manner to minimise delays in the implementation of the project. This is to the benefit of both parties. Clause 5.2, in the author's view, goes to the core of the agreement and is hereby reproduced in full:

> *The Government confirms that there shall be no fiscal terms or tax schedule provided for in any Investment Promotion and Protection Agreement and that all fiscal matters shall be as provided for in the respective tax codes, the ZDA Act and also as provided for by any authority established by law for the purposes of local government power to impose taxation within the area for which that area is established and to alter taxation so imposed, in accordance with Article 114(4) of the Constitution of Zambia. Fiscal matters shall therefore only be cross-referenced in the relevant agreement in order to prevent any attempt to secure fiscal incentives outside the tax law.*
>
> The point here to note is that this arrangement of not providing for fiscal terms in the agreement is a complete shift from that under the DAs where such terms were provided for in the agreement itself and subsequent changes were difficult to effect. The move

appears to be an attempt to introduce a corrective measure to prevent the recurrence of the mistakes in the DAs. The current arrangement will allow for the agreement to operate within the existing laws and regulations as amended from time to time. In this way, the agreement is subject to the law as it ought to be and not the law being subject to the agreement as was the case in the DAs. An interesting part of this clause is the reason for the decision, which is *in order to prevent any attempt to secure fiscal incentives outside the tax law.* This is a confirmation to the observation made earlier in this study that investors may look for solutions outside the provisions of the law when they deem it necessary. It is submitted that this clause securely protects the interests of the country.

The latter part of the clause empowers the Local Government to impose taxation in their respective areas. The benefits of such empowerment will accrue to the country in general and the local people within whose locality the company is situated in particular.

Article 6 relates to the obligations of the company. Clause 6.1.1 and 6.1.2.1 obliges the company to comply with the Laws of Zambia with regard to application for permits and compliance with the terms thereof and to adhere and observe standards and practices concerning the protection of health and the environment respectively. This is for the benefit of the people of Zambia. In clause 6.1.2.2, the company is under an obligation to employ qualified Zambian nationals and to observe labour laws on employment. This is undoubtedly for the benefit of the Zambians.

Clause 6.1.2.3 places an obligation on the *company to support the Business Development Programme (an annexure to the agreement) with a view to assisting and encouraging businesses within Zambia with a particular emphasis on businesses directly or indirectly majority owned by Zambian citizens.* This provision reflects the economic policy of the

Zambian Government as reflected in the Citizens Economic Empowerment Act of 2006. The Act seeks to economically empower Zambian citizens by giving preferential treatment to business majority owned by Zambians. Therefore, the obligation, a replica of one of the provisions in the Citizens Economic empowerment Act, creates a conducive environment for Zambian businesses to thrive thereby economically empowering the proprietors, majority of who should be Zambians.

Under clause 6.1.2.4, the company is required to keep government informed on the implementation and results of the Local Business Development Plan by submission of Annual Progress Reports. This monitoring mechanism is to the benefit of the country. Clause 6.2 relates to the company's compliance with the law on obtaining permits. This ensures that the interests of the country are protected. The company is further obligated under clause 6.3 to allow government representatives to observe and inspect the implementation of the Development Project. Again, this is for the benefit of the country. There is an obligation in clause 6.4 for the company to provide to the Designated Agency full details of all environmental tests, environmental assessments and studies carried out in relation with the project. This ensures the company's compliance with environmental regulations. In the interpretations clause, 'environmental regulations' *means any law of Zambia which has as a purpose or effect the protection or the prevention of harm or damage to the environment or to provide remedies in relation to the harm or damage to the environment.* The benefit to the country of this provision is evident.

The company has, under clause 6.5, the sole responsibility for the economic and technical feasibility, operational capacity and reliability of the Development Project. It may appear

the aim here is to have an efficient Development Project which will be beneficial to the country.

Article 7 relates to Insurance and obligates the company to take out insurance policies and coverages with respect to the project assets while Article 8 entitles the company to all incentives under the ZDA Act. Insurance cover is for the benefit of both parties while entitlement to incentives is a sole benefit of the company.

Clause 9.1 is an undertaking by the company to perform its obligations under and observe all the terms of the project documents to which it is party. Project Document is defined as the various agreements for the financing and construction of the Development Project such as the financing documents, construction contracts and permits. Further, the company undertakes not to terminate, amend, depart from or enter into any agreement without prior notification and approval of government unless the proposed agreement has a financial implication of less than a specified amount.

Under clause 9.2 is the period within which government should respond after such notification is given. The reasons on which an objection may be based are also tabulated and include a material increase of the cost passed through to government, impairment of performance or implementation of present agreement and material adverse effect on the credit-worthiness or financial resources of the company. Clearly, the objective of these two clauses is to ensure that the implementation of the Development Project is not jeopardized by the company's financial transactions with third parties and also to avoid placing unnecessary financial obligations on government.

Clause 9.3 and 9.5 is a reporting obligation of the company on the activities in respect of the Development Project and the factors that adversely and materially affect the Development Project respectively. Under clause 9.4, the Parties undertake to meet twice every year to discuss the progress of the Development Project and clause 9.6 is a requirement for the company to inform the government of any impeding winding-up or insolvency. All these reporting requirements are to the benefit of government as it enables it to take necessary measures for the effective implementation of the Development Project.

In Article 10, the Parties undertake to observe confidentiality with regard to information on the other party in relation to the Development Project. A list of the exceptions to this is also given. The benefit here is for both Parties. Article 11 relates to the 'Right of First Refusal' on any equipment used in connection with the Development Project and sold or to be sold by the company in the Republic of Zambia. This right is granted to the Zambian registered companies. It follows therefore that again, the benefit is for the citizens.

Clause 12 is on Force Majeure. It gives the definition of the term, events not constituting force majeure and obligations of the parties during an event of force majeure. This clause is for the benefit of both Parties because it 'insulates' the parties from liability during the occurrence of a force majeure event. Clause 13 is an elaborate Dispute Resolution clause. It provides *inter alia*, that disputes shall be referred to arbitration in accordance with the Arbitration Act No. 19 of 2000 and the rules made thereunder, that the seat for arbitration shall be Lusaka, Zambia and that the award shall be final and Parties waive their right to

appeal or review by any court. Ideally, arbitration should be for the benefit of both parties but in this agreement, the arbitration provision is skewed towards Zambia's benefit.

Clause 14.1 tabulates events that shall constitute a company default and the remedy available to government which is that government shall have the right to terminate the agreement and claim compensation. Clause 14.2 gives a reverse situation of 14.1. It gives details of what constitutes government default and the remedy available to the company in such an event. Events not amounting to company default are given in clause 14.3 and the option of arbitration given in a situation where there is a dispute with regard to payments under this provision. The benefit in this provision is for the company.

Events that may lead to a declaration of a default on either Party are given in clause 14.4. and the parties option in the event that either of them disputes the existence of a default or value of damages suffered is provided in clause 14.5. Clauses 14.6 to 14.8 relate to the rights and remedies available to any party against the other, the possibility of continuing performance of contract despite a breach and term of clause 13 and 14 to the effect that they shall survive the termination of the contract. Since these provisions carter for either party, they are for the benefit of both of them.

Clause 14.9 gives the government the right to execute against the company in the event that the company fails to comply with any award made against it. Clause 15 is on Notices and gives instances in which service shall be deemed to have been given. The benefits here are for both parties. Clause 16 relates to Waiver by the Parties to the effect that failure to insist on strict performance by the other party of the agreement shall not

constitute or be deemed a waiver of that Party's right to enforce the agreement. Both parties are catered for under this provision.

Under clause 17, the company is granted the right to transfer, with the consent of the Designated Agency, its licence or an interest in the licence together with the benefit of the agreement. The Designated Agency covenants not to withhold such consent unnecessarily. This arrangement is for the benefit of the company.

Compulsory Acquisition is provided for in clause 18 to the effect that the investment under the agreement shall not be compulsorily acquired except for a public purpose and in accordance with the law. It also provides for payment of prompt compensation upon such acquisition. Acquisition of the property is definitely for the benefit of the country. Payment of compensation only restores the company to the position it was before and no further. There is no provision for payment of interest on the compensation, so the company has no benefit.

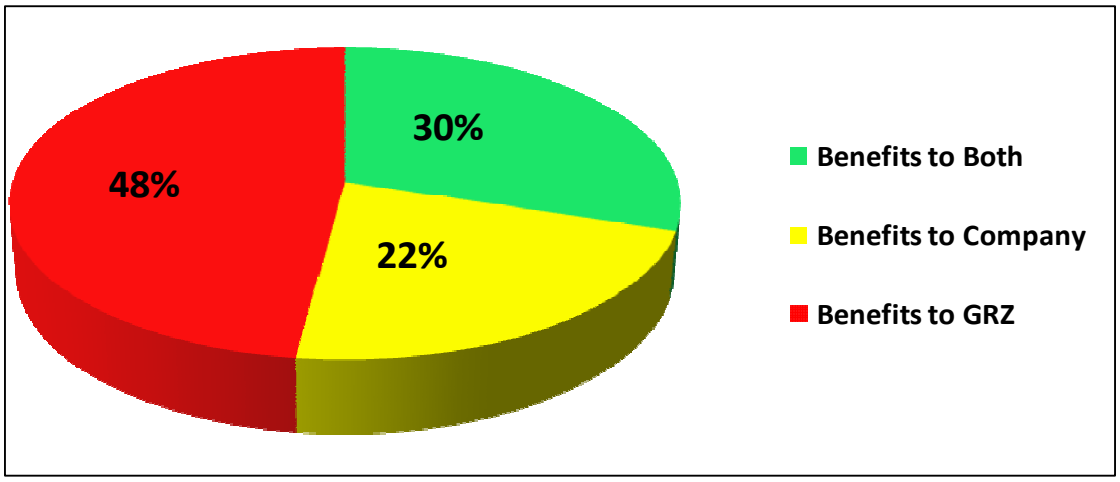
Clause 19 is an affirmation by the company that it has not engaged in any corrupt activities to secure the agreement. No benefits accrue to either party under this provision. Clause 20 is titled 'Entire Agreement' and is a safeguard against introduction into the agreement of elements not mutually agreed by the parties. Indemnification is covered under clause 21 and either party undertakes to indemnify the other against losses incurred due to negligence of the party. Indemnity is for the benefit of both parties.

Under clause 22, government acknowledges and undertakes to remain bound by its obligations under international law relating to international investment promotion and

protection. This is meant for the benefit of the company. Clause 23 relates to the Applicable law as being the Laws of Zambia and so benefits Zambia. The last clause, Clause 24 is on Warranties by Signatories wherein each signatory confirms that they have been duly authorized to conclude the agreement by their respective principles. This provision benefits both parties by ensuring that they do not conclude contracts that are void for lack of authority.

Out of 44 clauses and sub-clauses contained in the 24 Articles analysed, 21 clauses are for the benefit of government alone. This represents 48% of the total benefits in the IPPA generic template. 10 clauses are for the benefit of the company alone, representing 22%. The remaining 13 clauses are for the benefit of both parties. This represents 30% of the benefits. These results are shown in the Pie Chart below:

Figure 1: Benefit Analysis of Clauses in IPPA Generic Template (n=44)




*Source:* Author constructed from IPPA Generic Template, Zambia

Apart from the operative paragraphs analysed above, the template has other interesting features worth noting. These include the recitals and the appendices. The recitals are

particularly important because they provide the background to the agreement thereby forming the basis on which the agreement is premised.

Paragraph (a) of the recitals captures the vision and aspirations of the government on behalf of the people;

> *WHEREAS the Government and the Designated Agency (ZDA) are keen to advance the social and economic development of the Republic of Zambia and as a matter of national policy, have committed themselves to encouraging and promoting the sustainable development and use of the natural resources of the Republic of Zambia through local and foreign investment, particularly through major projects which involve the development of land, water and other natural resources for the benefit of local and foreign investors as well as for the benefit of the Zambian nationals.*

It is worth noting that while the first part of the recital is quite informative with regard to the principle under Permanent Sovereignty over Natural Resources, the latter part appears to have lost focus. On the issue of development of the nation, it is clearly indicated that the two parties representing the government *are keen to advance the social and economic development of the Republic of Zambia.* The method to be used to achieve this objective is *by encouraging and promoting the sustainable development and use of the natural resources of the Republic of Zambia.* The recital goes further to explain how this will be done, that is to say, *through local and foreign investment.* The beneficiaries of the programme appear in the last sentence - *for the benefit of local and foreign investors as well as for the benefit of the Zambian nationals*. It is in this part that the recital diverts from the Principle of Sovereignty. The beneficiaries ought to be nationals of the host

State. The combination in this sentence 'of foreign and local investors' appears misplaced and is contentious. It is highly unlikely that government policy would be that of benefiting foreign investors at the expense of its citizens!

The recitals also make provision for the disclosure of the amount of money the company intends to spend on the Development Project and the actual activities for which the money will be expended.

Under the Appendices section is a provision for the company to provide details of the Local Business Development Programme. The definitions and interpretation clause defines Local Business Development Programme as the plan that encourages the participation of Zambians in the provision of goods and services to the company. Through this arrangement, the citizens are empowered economically because of the business opportunities that are created. For instance, under the Maamba Collieries IPPA, transportation services required by the company will be outsourced to local business entities and so will the procurement of consumables.[81] The Appendix section also makes provision for the company to give details of its employment plan. This enables the negotiating team to have a picture of the number of jobs to be created under the project from the outset. The Maamba IPPA employment plan shows that more Zambians are employed compared to the non-Zambians.[82]

A major weakness of this agreement is that it can only be terminated for a material breach. It has no provision for termination for convenience. The danger here lies in the fact that not every eventuality is provided for in the agreement and instances may occur where it becomes necessary for either party to opt out of the agreement. With no escape clause in place,

[81] See Appendix IV - Local Business Development Programme for Maamba Collieries Limited IPPA.
[82] See Appendix V. Employment Plan from IPPA between GRZ and Maamba Collieries Limited.

government is tied to this agreement and it cannot opt out at any time convenient to it. The situation is exacerbated by the fact that the agreement has no duration clause as duration is tied to licence period. It is submitted that a clause on termination for convenience is a necessary safeguard in any contract or agreement. Besides, it is every party's right which ought to be exercised without restriction.

### 2.15.2. GUIDING PRINCIPLES

The title of these Principles clearly states that they are 'Principles to guide the Investment Promotion and Protection Agreement negotiations.' The Principles are therefore meant to provide policy guidance to the GRZ Technical Negotiating Team in the course of its negotiations with the prospective investors. These Principles are extremely important to the negotiators as they can either build or break the negotiation process and ultimately the main purpose for which the negotiations were meant, that is to say, investment promotion and protection. In this regard, the principles have been reproduced in their entirety to allow for a thorough analysis.

The first Principle states that 'government policy is that all Investment Promotion and Protection Agreements be signed, subject to fiscal provisions as in the respective legislation. This means that all fiscal matters should be provided for in the respective tax codes and only cross-referenced in the IPPA.'[83]

Under the second guiding principle, any negotiations undertaken would require ministerial endorsement and subsequent ratification by the ZDA Board.[84] Guiding Principle No. 3 relates

[83] Guiding Principles on Investment Promotion and Protection Agreements. (2007) Ministry of Commerce, Trade and Industry. Lusaka. p.1.
[84] Ibid.

to incentives and states that 'any incentive granted under section 58 of Part VIII of the ZDA Act No.11 of 2006 which states that the Minister responsible for Finance may, for purposes of promoting major investment in an identified sector or product of not less than ten million United States Dollars or the equivalent in convertible currency, in new assets that qualify for those incentives, should be ratified or endorsed by the Minister of Commerce Trade and Industry and Minister of Finance and National Planning.'[85]

The fourth Principle states that 'the correct interpretation of section 60 of the ZDA Act No. 11 of 2006 on relief or exemption from any tax or duty is that contractors and subcontractors do not qualify under this provision. These organisations do not qualify because they are not party to the Investment Promotion and Protection Agreement and do not hold a licence, permit or certificate under the ZDA Act.'[86]

The fifth Principle states that 'local authorities and statutory bodies such as the District Councils, Workmen's Compensation Fund Control Board, Water Board, the Environmental Council of Zambia, ZESCO, and others are autonomous from the central government and [investors] should negotiate separately and directly with these bodies.'[87]

Guiding Principle No.6 on labour matters provides that 'labour issues are very dynamic as conditions that govern employment are a function of so many factors *vis-à-vis* social, economic, political and environmental. As an example, the minimum wage is reviewed every year and at the time of the study it was ZMK 268,000.00 (approximately USD 28) and in this regard, therefore, the interpretation of stability period should not relate to labour matters.'[88]

[85] Guiding Principles, supra note 83 at 1.
[86] Ibid
[87] Ibid
[88] Ibid

Guiding principle No.7 states that 'the correct interpretation of stability period should be in line with section 55 of Part VIII of the ZDA Act No.11 of 2006 which states that an incentive offered under this part shall be valid for a period of five years from the grant of the licence, permit or certificate or for such period as the Minster responsible for Finance may prescribe as amended by ZDA Act No. 5 of 2009.'[89]

The last Guiding Principle states that the interpretation of stability period should not relate to fees charged and services provided by autonomous bodies.[90]

It is submitted that the giving of policy guidance to the Technical Negotiating Team is a positive step as it aims at ensuring that the negotiations are conducted within the confines of what is approved by government. Further, the text of the guidelines is very instructive because it does not only explain what is meant by a particular principle but also gives examples of the issues referred to.

The first Guiding Principle appears to be a safeguard against investors negotiating tax matters in the IPPA itself. This effectively means there is no negotiation window on tax matters. Tax matters are incorporated into the IPPAs by cross-reference to the various legislation on tax already in force. Unlike in the DA experience where issues of tax were provided for in the agreement itself, it may appear that caution has been exercised in the IPPA and the danger of allowing individual investors negotiating their own tax terms eliminated. It may therefore be argued on the basis of this provision that the problems experienced with the DAs of

[89] Guiding Principles, supra note 83 at 2.
[90] Ibid

resistance by mining companies to changes to the fiscal regime are not likely to occur with the IPPAs as they seem to have been adequately taken care of, at least on paper.

The requirement under Guiding Principle No.2 for endorsement by the Minister and subsequent ratification by the ZDA board of any negotiations between the GRZ Technical Negotiating Team and the company ensures checks and balances in the negotiation process and guards against corruption in the award of contracts.

It may be argued that Guiding Principle No.3 does not guide but actually misguides the Negotiating Team. The legal provision referred to in this principle basically empowers the Minister of Finance and National Planning, in consultation with the Minister of Commerce, Trade and Industry to specify additional incentives for investments in an identified sector or product. The requirement under this Guiding Principle is for such incentives to be ratified or endorsed by the same pair of ministers who specified the additional incentive. In the view of the author, this serves no useful purpose for lack of objectivity. This is because the same ministers who identify the additional incentives are again the same ones who should ratify their own activity. An ideal situation requires that an independent person ratifies proposals.

The Negotiating team is properly guided by Guiding Principle No 4 with regard to subcontractors. Since subcontractors are not party to the agreement, it follows that they are not bound by the terms thereof. Accordingly, they cannot enjoy the benefits emanating from the same.

With regard to Guiding Principle No. 5, it is submitted that the aspect of promoting the autonomy of the various statutory bodies is commendable. Imposition of levy for instance, will help grow the local authorities' financial base.

Arguably, this arrangement is not without challenges. Instances will occur that might have an indirect effect on the implementation of the IPPAs. One inherent danger in this arrangement is that of having the central government bound by the terms of the agreements concluded between the prospective investors and statutory bodies. A case in point is where an investor negotiated with the Water Board for the abstraction of water from the Zambezi River. The request was granted but it resulted in the country breaching its obligations under the Zambezi River Authority Act containing an agreement between the Republics of Zambia and Zimbabwe on the utilization of the Zambezi River.[91] In this regard, it is submitted that statutory bodies should have either been made part of the negotiating team or respective statutory bodies should be invited to join negotiations when necessary. The proposal would not undermine their autonomy but would ensure effective coordination between Central Government and local authorities for the benefit of the country.

With regard to wages under Guiding Principle No.6, the interests of the employees of these companies are protected by delinking the issue of stability from minimum wage. This is commendable. Indeed stability clauses should not be used as an excuse for not effecting wages increments as the two concepts are unrelated. On the same issue of stability, further guidance provided in Guiding Principle No. 8 is equally important. Stability should not be extended to agreements concluded with local authorities and Statutory Boards. Rightly so because these entities are not party to the agreement providing for the stability clause. It is a

[91] Interview with GRZ Technical Negotiating Team Member.

good thing to tie the stability period to the licence period as it guards against having stability periods negotiated for unreasonably long periods as was the case in the DAs where some stability clauses were as long as 15 to 25 years.[92]However, the discretionary powers given to the minster to prescribe an extension of the period negates this good intention because discretionary powers are by nature prone to abuse.

A strict examination of these Guiding Principles in terms of which aspect in investment promotion and protection they cover reveals that they are skewed towards investment promotion. They try to protect the interest of government while attracting investment. It is clear that protection of foreign investment is not reflected in any one of the Guiding Principles.

## 2.16. PART II: FOREIGN INVESTMENT PROTECTION FROM AN INTERNATIONAL PERSPECTIVE - PERTINENT POTENTIAL LEGAL DIFFICULTIES IN ZAMBIAN LEGISLATION AND POLICY

An issue related to the taking of investor's property involves what is referred to as 'creeping expropriation.' It is also called defacto, disguised, constructive, regulatory, or consequential expropriation.[93] The term creeping expropriation may be defined as 'the negative effect of governmental measures on the investor's property rights, which does not involve a transfer of property but a deprivation of the enjoyment of the property.'[94] The same term has been explained this way:

[92] See DA between the Government of Zambia and Chambishi Metals PLC. (Dated 11thSeptember, 1998.)
[93] Leon, P., 2009. "Creeping expropriation of mining investments: An African perspective." Journal of Energy and Natural Resources Law. Vol 27 No.4 p.598.
[94] Parkerings-Compagniet Vs Lithuania, ICSID case No. ARB/05/8, Awrad. 11 Septenber, 2007 Available at http:// ita.law.uvic.ca/documents/Parkerings.pdf. (Accessed 3 October, 2011.)

> 'creeping expropriation must be analysed in consequential rather than in formal terms. What matters is the effect of governmental conduct, whether malfeasance, misfeasance or nonfeasance, or some combination of the three, on foreign property rights or control over an investment not whether the state promulgates a formal decree or otherwise expressly proclaims its intent to expropriate.'[95]

Three main elements come out in these definitions; the first is the fact that the effect of governmental action is cardinal. This was settled in ***Metalclad Corporation v Mexico*** in the following words; 'the government's intention is less important than the effects of the measures on the owner of the assets or the benefits arising from such assets affected by the measures.'[96] The second element coming out of the definition is that no actual or physical taking of the property is involved. It is only the amount of interference by the host State with ownership rights of the investor and its effect on the investment that constitutes the taking.[97] The third element of regulatory expropriation, in the words of Justin Marlles, 'is the showing of some diminishment in the value of the investment caused by the governmental regulatory action.'[98]

It is submitted that there is an inherent danger of misinterpretation of host State action in this type of expropriation. Arguably, a host State may have its operations grind to a halt in an effort to trade cautiously in order to avoid its actions being perceived as indirect expropriation. In such a situation, the presence of foreign investments would effectively set the pace for governmental action especially with regard to the power to regulate the activities of foreign investors. This would in turn have negative effects on its citizens. Besides, the

[95] Reisman, W.M, and R.D. Sloane., (2003) "Indirect expropriation and its valuation in the BIT generation." 74 British Yearbook of International Law 115 at 121.
[96] Metalclad Corporation V Mexico. Award. 30 August 2000, 5 ISCID Reports 209, at para 107.
[97] Ibid.
[98] Marlles J.R.,(2005) "Public purpose, private losses: Regulatory expropriation and environmental regulation in international investment law." Journal of Transnational Law and Policy vol.16:2 309.

nature of the constituent elements of this type of expropriation makes it difficult to determine its presence which makes such determination subjective and therefore contentious.[99] The following observation has been made with regard to the difficulties associated with this type of expropriation, 'despite a number of decisions from international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated.'[100] The situation has been exacerbated by the regulatory shade of creeping expropriation.'[101] This means government's power to regulate may be restricted as it is difficult to draw a distinction between a legitimate regulatory measure and one intended to deprive the foreign investor of their rights.[102]

Regrettably, the IPPA generic template does provide for this type of expropriation in clause 18.1 in the following words; 'the investment under this agreement shall not be compulsorily acquired ***or subjected to measures equivalent to compulsory acquisition*** except for a public purpose…' As this study will show, this clause is fatal to government. It has grossly compromised the country's sovereign rights with regard to its relationship with foreign investors. Through this provision, the Zambian government has opened itself up to scrutiny on every single move relating to regulation of foreign investors. Every governmental action relating to regulation, will have to be well calculated lest it be interpreted as expropriatory.

There are many arbitral decisions in which government action has been interpreted as creeping expropriation. ***Bilourne and Others v Ghana***[103]is one such decision. The case concerned an investment by a Syrian national of a hotel and recreation facility in Accra,

[99] Ibid
[100] "Indirect expropriation and the right to regulate in International Investment Law." (2004) Organisation for Economic Co-operation and Development. Working Paper No. 4.
[101] ibid
[102] Ibid
[103] UNCITRAL Ad hoc Tribunal, Award 1989.

Ghana. After substantial progress had been made in the development of the site, government officials issued a stop work order on the basis of missing construction permits. Subsequently part of the project was demolished. The arbitral panel found that a series of governmental acts and omissions which 'effectively prevented' the investor from pursuing his investment project constituted constructive expropriation.

Other cases where a finding of indirect expropriation was made are ***Goetz and Others v Burundi***[104] ***and Middle East Cement v Egypt.***[105] Both cases involved revocation of permits by the respective governments.

However, the ICSID tribunal's decision in ***Generation Ukraine Inc. v Ukraine***[106] case shows that arbitral practice is not consistent. In this case, the claimant, a United States corporate vehicle company wholly-owned by a US national sought damages for the spoliation of its alleged investment in commercial property in Ukraine. It alleged 3 instances of indirect expropriation; state administration's failure to produce revised land lease agreements with valid site drawings, the local government's cancellation of the company's 49 year land lease rights and denial of rights to use adjoining property as a construction staging area. The tribunal rejected all the claims and contentions.

The difficulties in distinction between creeping expropriation and legitimate government action or regulation have generated a lot of debate. Proponents of creeping expropriation blame its existence on the unlimited powers of host States. One has observed that the power of investors and host States are structurally asymmetrical. The heart of the asymmetry is that investors are subject to exposure to the host State as contract, party, regulator sovereign and

[104] ICSID Award, 1998.
[105] ICSID Award, 2002.
[106] ICSID Case No. ABR/00/9. Award of 6 September, 2003.

judge.[107]This essentially means investors are at the mercy of the host State. One argument with regard to tax regulation is that subtle use of 'screws' of regulatory and tax regulation available to government and in particular their application to specific cases make it much harder to detect the abuse of government powers against foreign investors that underlies modern investment treaty disciplines.[108]

The proponents have called for the curbing of what is commonly called the 'fiscal appetites of governments' alleging that most host States use tax regulations because squeezing foreign investors by taxation is a less conspicuous abuse of government power.[109]

The challenge in establishing creeping expropriation or indeed any other area in international investment law, as Sornarajah has rightly concluded, is that 'there are no relevant treaties among a number of states which furnish a comprehensive code of law on foreign investment.'[110] The absence of an internationally agreed treaty or convention in the area of investment law has resulted in lack of guidance at the international level. Consequently, there is heavy reliance on general principles of law in addressing international investment issues. As one scholar has rightly observed, 'international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered permissible and commonly accepted as falling within the police or regulatory power of the state and thus, non-compensatable.'[111] The unsettled nature of international investment law has been exacerbated by the rapid changes in this field of law. This in itself presents a number of challenges as there is no international standard of protection and related issues, for instance with regard to

[107] Gantz, D.A. supra note 77 at 1.
[108] See Marjosola, H., (2009) "Public private conflict in investment treaty arbitration: A study of umbrella clauses." Helsinki Law Review. Helsinki: Edilex Edita Publishing. pp 103 -107.
[109] Ibid
[110] Sornarajah, A., supra note 66 at 89.
[111] Reinisch, A., 2005. "New developments in Indirect expropriation." p.108.

the amount of compensation or indeed the standard of such compensation in the event of taking of investor's property.[112] There are two competing standards, one advocates for 'prompt, adequate and effective' compensation while the other advocates for 'appropriate and reasonable' compensation.[113] Under the Zambian law, the standard in the Constitution is 'adequate' compensation and in the ZDA Act and the IPPA template is 'prompt' compensation.[114] There is no express mention of the term 'effective.' It can be argued that this is implied. Unlike the 'expropriation' clause that this study has classified as 'fatal', the compensation clause in the IPPA, the ZDA Act and the Constitution can be classified as adequate because by expressly stating that compensation should be prompt and adequate, it has to a large extent satisfied the international requirement.

The basis for the duty to compensate in the event that foreign property is taken is ***Germany V Poland*** also known as the ***Chorzov Factory case.***[115] Brief facts of the case are that Germany sought a declaration that the court, having decided on Germany interests that the Polish government's attitude towards certain Germany companies whose undertakings it took over was not in conformity with the Convention concerning Upper Silesia, Poland was now under a duty to compensate these companies. Poland objected stating that the Convention did not contemplate differences in regard to reparation claimed for its violation and that the Convention provided alternative remedies. The Court overruled the objection stating that it is a principle of international law that a breach of an engagement involves an obligation to make reparations in an adequate form.

[112] See Sornarajah, A., supra note 66 at 90.
[113] See Bjorklund A.K (ed) "Emerging jurisprudence in international investment law" in Investment Treaty Law (Current Issues III) 2009 at p.10. See also Schreuer,C., 2005. "The concept of expropriation under the ETC and other investment protection treaties." p1.
[114] See Article 16 of the Constitution of Zambia.
[115] Permanent Court of International Justice (ICIJ) (1998) Series A No. 17

Under the Zambian situation, apart from providing for prompt compensation, the IPPA template goes further to provide that the affected party shall have the right to prompt review by judicial or other independent authority of the valuation of the investment. It is submitted that reference to 'other independent authority' has the potential of causing misunderstanding between the parties. It is not very clear from the clause what this *other independent authority* would be especially that it has not even been defined. Nothing in this clause precludes an international entity from being that independent authority.

An outstanding feature of international investor protection is the standard of treatment particularly the fair and equitable treatment (FET). The FET standard is designated as a rule of international law and is not determined by the laws of the host State.[116] This means that domestic law may be the cause for a violation of an international standard,[117] for instance on protection against 'arbitrary' or 'discriminatory measures. This is likely to occur under the National Treatment and Most Favoured Nation standards which generally require that the treatment offered to foreign investors should be comparable to that accorded to the domestic investors in the same business or investment sector.[118] The problem with this condition is that there are many factors that may compel a State to embark on certain domestic policies in favour of domestic investors. Some of the factors are protection of the national economy and public health considerations. In circumstances such as these, certain controls and actions are inevitable although they may be perceived as discriminating against foreign investors. Besides, the policies embarked upon by a state and the subsequent legislation are in that state's sole discretion as they hinge on issues of sovereignty. Certain policy considerations compel the host State to give more privileges to local investors compared to foreign investors. A case in point is the economic policy of the Zambian government as reflected in

[116] Schreuer C., supra note 68 at 9.
[117] Ibid
[118] Ibid p.12.

the Citizens Economic Empowerment Act of 2006. The Act seeks to economically empower Zambian citizens. It therefore follows that investors who are Zambian citizens will be given treatment which is more favourable than that given to their counterparts who are not citizens. This is inevitable if the objectives of this particular statute are to be achieved. Conversely, such treatment may be deemed discriminatory under the national treatment standard.

It is evident from the foregoing analysis that equality of competitive conditions between foreign and local investors cannot be guaranteed in absolute terms.[119] It can only be guaranteed subject to certain exceptions such as public policy considerations which itself involves many aspects; economic, public morals, national security, public health and many others. In light of this, the likelihood of there being more exceptions than the norm in this area is high. This subject has been aptly summarized by one scholar in the following words: 'from a development perspective, the issue of non-discrimination is highly contentious, especially in relation to different treatment between domestic and foreign investors given that the developing countries may seek to protect the development of indigenous industrial production and service provision in the face of potentially negative competitive pressure from powerful foreign investors.[120]Too much investor protection will create an impression that national sovereignty has been given up… while too much discretion for the host country will raise fears of bad governance and a resultant poor investment climate.[121] The need for a careful balance of interests between protection of foreign investors and enhancement of national development presents itself once again.

[119] Muchlinski, P., 2009. "Caveat Investor?" The relevance of the conduct of the Investor under the fair and equitable standard.' International and Comparative Law Quarterly. p.533.
[120] Ibid.
[121] Ibid.

The manner in which disputes between the host State and foreign investors are settled is very important. Contention in this matter arises due to the competing interests of sovereignty and the obligation to protect the foreign investor. On the one hand, the host country, as a sovereign state, must uphold its sovereignty and as earlier observed, will provide for dispute settlement under its domestic laws. On the other hand, the same host State, as a member of the international community, must abide by the norms and practices accepted internationally on the matter and provide for international arbitration which is preferred by foreign investors as reflected in this statement, 'it is the ability to access a tribunal outside the sway of the host State which is the principal advantage of a modern investment treaty…the effectiveness of substantive rights is linked to the availability of an effective enforcement.'[122]Though the issue of what law to apply remains unsettled, it may appear international law is somewhat superior. In any case, International law, as Maniruzzaman observes, will apply to the extent that it is incorporated in the domestic law.[123]

The dispute resolution provision in the ZDA Act and in the IPPA generic template is restricted to arbitration under the Zambian law. Although the Arbitration Act in force in Zambia, (Arbitration Act No 19 of 2000) has incorporated the rules of arbitration under the United Nations Conference on International Trade Law (UNCITRAL), this arrangement is contentious especially with regard to clause 13.8 of the IPPA template to the effect that the decision of the tribunal shall be final and binding to the parties who shall give effect to it. Another interesting provision in the template is clause 13. 12 where the parties waive their rights to appeal or to any review of such award by any court or tribunal. These provisions may appear to be ousting the jurisdiction of the international tribunals on the settlement of

[122] Vadi, V., 2007. "Critical comparisons: The role of comparative law in investment treaty arbitration." Denva Journal of International law and Policy." Vol 39:1. p.69.
[123] Manniruzzaman, A.F.M., 2001. "State contracts in contemporary international law: Monist versus Dualist controversies. "European Journal of International Law. Vol 12. No. 2, p. 316.

investment disputes. As arbitral jurisprudence has shown, it is highly unlikely that investment disputes between foreign investors and the host country can be settled solely on domestic legislation. While it is appreciated that domestic legislation plays an extremely important role in foreign investor-host country disputes, it should also be acknowledged that this role is limited. Indeed as a country admitting the investment on its territory, the host State's laws will be relied upon only to the extent that they provide adequate protection to the investment. Beyond this, regard may be had to international law. One scholar explains it this way: 'if contractual rights held by the investor are affected in a way not in conformity with the principle of p*acta sunt servanda* and national law does not provide adequate remedy, an arbitral tribunal is likely to resort to law other than national law.'[124] It is in this regard of determining the adequacy or otherwise of the protection provisions that might be the entry point for international arbitration.

On the standards of protection for foreign investors, one of the principles is that of non-discrimination. This involves two main elements namely the Most-favoured Nation (MFN) standard and the National standard of treatment. Writing on the subject, Muchlinsky aptly distinguishes the two standards. The MFN ensures that investors and investments from one country are treated in the same or no less favourable manner than like investors from other countries. National treatment standard ensures that investments from outside the host country are treated in the same or no less favourable manner than like investors from inside the host country.[125] Once again, each of these conditions presents its own challenges. With regard to the former, obligations assumed under certain regional economic groupings may compel the host State to give preferential treatment to member states of an economic grouping to which it is a member. Consequently, investors from regions outside that grouping may, according to

[124] Spiermann, O., 2004. Individual rights state interests and the power to waive ICSID jurisdiction under bilateral treaties. p.174.
[125] Muchlinski, P., supra note 47 at 528.

the MFN standard, be considered as having been discriminated against. Compliance to these standards by countries such as Zambia is not guaranteed due to her membership in various groups such as the SADC and COMESA regional economic groupings. For instance, under the COMESA Treaty, Article 56(1) provides that the Member States shall accord to one another the most favoured nation treatment. This obligates the Member States to afford preferential treatment to other Member States and this privilege may not be extended to non-member states.

Another important standard of treatment is the fair and equitable treatment standard. The requirements of this standard were settled in ***Tecmed V Mexico***.[126]It requires a particular approach to governance on the part of the host country that is encapsulated in the obligations to act in a consistent manner, free from ambiguity and in total transparency, without arbitrariness and in accordance with good faith.[127]In line with this, an observation has been made that from a legal perspective, fairness in the procedural field is connected to the necessity of any legal system to ensure that the rights of the parties are respected and that every step of the procedure follows the formal indications of the law.[128] This can be achieved through the international law principle of 'Pacta sunt servanda' or acting in good faith. Under this principle, parties to a treaty are obliged to act in good faith in their dealings with each other.

In **Wena Hotels Limited v Egypt**,[129]the tribunal held that senior government officials breached the standard of fair and equitable treatment by providing assurances to the investor purporting to safeguard its investment and then failed to act upon them when it became

[126] ICSID case no. ABR(AF) /0012 Award of 29th May 2003 available at <http:// www.worldbank.org/ICSID/cases>
[127] Ibid at paras 154-5
[128] Reinisch, A. at 127.
[129] ICSID Case No.ARB/98/4 Final award, 8 December 2000 para 85-7.

imperiled, thus leaving the investor in the lurch. The element of good faith was lacking in the official's action.

## 2.17. CONCLUSION

The policy issues that inform the law on Investment Promotion and Protection in Zambia indicate that policy is focused more on investment promotion than protection, with particular emphasis on enhancing opportunities for the domestic investor. Similarly, the legal framework on investment, the ZDA Act, is also skewed towards investment promotion than investment protection. Evidently, investment protection has not received as much attention as investment promotion at the national level.

From the international perspective, the legal challenges in the protection of foreign investments cannot be better expressed than in the words of Muchlinski that 'core investment protection issues raise developmental-related questions.'[130] As this study has shown, the measures that require to be taken in the protection of foreign investment such as the fair and equitable treatment, the national treatment and the most favoured nation requirement, more often than not tend to impede national development, thereby infringing on the citizens right to the enjoyment of the natural wealth of their country. In the name of foreign investment protection, a country may fail to protect its domestic industries, or to enforce public policy regulations. In view of the foregoing, it is submitted that the obligation of host states to protect foreign investment on the one hand and respect for the citizen's right to the enjoyment of the natural wealth of their country on the other hand, cannot effectively be fulfilled at the same level. Successful fulfillment of either one of them will be at the expense of the other. Therefore, a country like Zambia, faced with numerous development problems but aspiring to

[130] Muchlinski, P., supra note 47 at 31.

become *a prosperous middle income country by the year 2030*[131], the obvious choice between the two should be national development. This is confirmed by the choice of ZDA, whose main aim is to foster economic growth and development, to host the IPPA Secretariat and coordinate all IPPA activities.

[131] See Vision 2030, supra note 2.

# 3. CHAPTER THREE: LESSONS LEARNT FROM THE IMPLEMENTATION OF DEVELOPMENT AGREEMENTS IN ZAMBIA.

## 3.1. INTRODUCTION

This chapter will examine the legal framework before and after the era of Development Agreements (DAs). The focus of the legal framework before the DAs were cancelled will be on legislative provisions under which the DAs were operating during their subsistence in order to determine the adequacy or otherwise of the law governing mining operations at the time while the focus after the cancellation of the DAs will be on the new fiscal regime introduced by government in order to determine whether the change was really necessary. The chapter will then give an analysis of the contents of four randomly selected DAs out of the nine that were accessed.[132]The selected DAs, which are basically similar to the rest of the DAs in both form and content,[133] will be analysed with a view to identifying contentious issues and/or onerous obligations to government. The selected DAs are the Mufulira Mine, Smelter and Refinery and Nkana Mines, Concentrator and Cobalt Plant Development Agreement, (also known as the Mopani Development Agreement,) the Kansanshi Development Agreement, the Chambishi Mine Development Agreement and the Chambishi Cobalt and Acid Plants and Nkana Slag Dumps Development Agreement. A further analysis of the contents of the DAs will be made to identify the causes of the problems in implementation of the DAs that subsequently occurred and how they have been handled. Further, the chapter will compare and contrast some aspects in the implementation process of

[132] Zambia concluded a total of 11 DAs with foreign mining companies. Out of the 11, only 9 were accessible at the time of the study. Accessibility became difficulty presumably due to the controversy surrounding DAs.
[133] The DAs appear to have been generated from a standard template because clauses in all of them are basically similar. Most of the DAs were drafted by Clifford Chance of London.

the DAs and the Investment Promotion and Protection Agreements (IPPAs) to assess the precautionary measures, if any, put in place to avoid a recurrence of the DA situation.

## 3.2. THE LEGAL FRAMEWORK WITHIN WHICH THE DEVLOPMENT AGREMMENTS OPERATED

### 3.2.1. HISTORICAL BACKGROUND

It is a notorious fact that mining has been the mainstay of Zambia's economy. The country has relied on mining for its development ever since commercial copper mining started in 1928.[134] John Lungu observes that, 'in years of good international copper prices, the copper mines produced more than 80 percent of the country's foreign exchange requirements and more than 50 percent to government revenue.'[135] Conversely, in years of poor international copper prices, the sector's contribution to foreign exchange requirements and government revenue was poor as shown by the following comment: 'the collapse of the price of copper on world metal markets coupled with lack of investments in mining machinery and prospecting activities by the then state-owned Zambia Consolidated Copper Mines (ZCCM) brought about underperformance of the copper mining sector and consequently reduced copper revenue for the government.'[136]

[134] Lungu, J., 2009. "The politics of reforming Zambia's mining tax regime." 6 Southern Africa Resource Watch Issue 8.1.
http://www.sarwatch.org/sarwadocs/politics_Reforming_Zambia_Minig_Tax_Regime.pdf (accessed 17th March, 2011)
[135] Ibid p.1
[136] Lungu,J., 2008. "Copper mining agreements in Zambia: renegotiation or law reform? 35 Review of African Political Economy. 408.

In early 1990s, it was estimated that the state-owned ZCCM was making a loss of up to USD 1million per day[137] and by the late 1990s, production had crushed to record lows.[138] This bad economic situation was worsened by the prediction then that the price of copper on world metal markets would remain low for several years.[139] Since copper mining was the mainstay of the economy, this development had devastating effects on the economy and subsequently led to government's decision to privatise the mines in the late 1990s and early 2000s.[140]

### 3.2.2. THE MINES AND MINERALS ACT OF 1995

On 13th September, 1995, Parliament enacted the Mines and Minerals Act. The Act came into force on 1st November, 1995, through Statutory Instrument No. 166 of 1995.[141] The enactment of this statute was in response to the prevailing poor economic performance at the time caused by the low world copper prices.[142] This statute paved way for the following three aspects which are of importance to this study:

a) development agreements, provided for in section 9(1) and (2) of the Act;

b) privatisation of the mines,[143] under section 9(2)(d); and

c) stabilisation commitments, also provided for under section 9 (2) (d).

The purpose for which the development agreements were created is clearly stated as 'encouraging and protecting large scale investments in the mining sector in Zambia.'[144] It is easy to discern from the context that privatisation of the mines was also meant to encourage

[137] Ibid. p 405-409.
[138] Mwambwa, S., A. Griffiths and A. Kahler. 2010. "A Fool's Paradise? Zambia's mining tax regime." Briefing Paper No. 1. p.7.
[139] Mwanawasa, L.P., 2008. "Speech to the Tenth Session of National Assembly of the Republic of Zambia." http://www.zambain.economist.com. (accessed on 12 April, 2011)
[140] See J. Lungu, supra note 131 at 16.
[141] See section 1 of the Mines and Minerals Act of 1995.
[142] See the Mines and Minerals Bill - Daily Parliamentary Debates, 2005.Http.www.parliament.gov.zm.
[143] Ibid
[144] See section 9 (1) of the Mines and Minerals Act, 1995

large scale investments through direct foreign investment in the mining sector. Accordingly, stabilisation commitments were incorporated into the DAs for the purpose of protecting the investments.[145]

The desperation with which foreign direct investment was needed in the mining sector[146] is reflected not only in the Act but also in the DAs themselves. For instance, the Act set out very generous fiscal incentives to attract new investors to the sector, in addition to the general incentives available to all investors as set out in the Investment Act, also of 1995.[147] The investment incentives, found in Part XII of the Act, include relief from tax and relief from customs and excise duty.[148] It is worth noting here that these incentives were in addition to those contained in the Investment Act. They could therefore be negotiated over and above what was provided for in the Investment Act.

Further, since the Act mandated the Minister to enter into DAs, it was implied that the Minister could negotiate the terms of such agreements with the mining companies. That the parties were free to negotiate the terms of the agreements contrary to what was provided by law is evidenced by the lack of uniformity in the tax schedules attached to the DAs of various mining companies.[149] Writing on the matter, Professor John Lungu makes the following observation: '…despite the Mines and Minerals Act specifying that the mineral royalties should be set at three percent for those holding large scale mining licences, the rate negotiated by most companies was 0.6 percent of the gross value of the minerals produced.[150] Lungu's observation could not have been more accurate. While section 66(1) of the Act

[145] Lungu, J. Supra note 131 at 16.
[146] Author's emphasis. A detailed explanation is given later in the chapter.
[147] See Mines and Minerals Development Act, 1995.
[148] Ibid.
[149] See Schedule 8, Tax Schedules to various DAs.
[150] Lungu, (2009) supra note 131 at 15.

provides in mandatory terms that the holder of a large scale mining licence shall, in accordance with his licence, this Act and the terms of any relevant development agreement, pay to the Republic a royalty on the net back value of minerals produced under his licence at the rate of three per centum,[151] none of the analysed agreements show that the mining company paid the fees prescribed under the Act. Mopani Mines for instance paid royalty at the rate of 0.6 per cent,[152] while Chambishi Metals paid at the rate of 2 per cent.[153] With regard to corporation tax, Lungu observes that the agreements reduced corporation tax from the original 35 percent to 25 percent.[154]

The fact that rates prescribed by law in mandatory terms were able to be changed for different companies is a clear manifestation that individual companies negotiated their own rates. While it is appreciated that most DAs were negotiated against the backdrop of low copper prices on the international metal markets,[155] it is submitted here that allowing individual companies to negotiate their own fiscal regimes contrary to the provisions of the law was a weakness in the implementation of the Act. Such practice had the potential of causing a lot of problems as provisions of the law were flouted in the name of attracting investors.

Regarding generous clauses in the DAs themselves, an example is that relating to long tax stabilisation periods. Under this clause, mining-related tax would not be increased by government for periods ranging between 15 to 20 years.[156] The justification for these long stability periods was the then prediction that the price of copper on the world metal markets would remain low for several years and that because of the low copper prices it would take

[151] Section 66(1), Mines and Minerals Act of 1995.
[152] See Schedule 8, paragraph 2(1) of the Mopani Agreement.
[153] See Schedule 8 paragraph 2(1) of the Kansanshi Development Agreement.
[154] Lungu, J., 2009. Supra note 131 at 1.
[155] Ibid.
[156] See Development Agreements concluded between the Government of the Republic of Zambia and the Mopani Copper Mines Plc, dated 31st March, 2000.

long for mining companies to recoup their investments.[157] Contrary to what was predicted, it turned out that the price of copper on the world metal markets rose from an average of USD 1,714 per tonne in 2001 to USD 6,893 per tonne in 2007, an increment of over 400 percent.[158] Public reaction to this unprecedented increase in copper prices was expressed through calls to the government for the renegotiation of the DAs. The basis for this was that the low tax paid by the mining companies based on the generous tax concessions contained in the DAs was not commensurate to the profits that the companies were getting due to the increased copper prices.[159] The realisation that the Zambian citizens were being denied a chance to benefit from their country's natural wealth caused a lot of discontent and pressure on government to renegotiate the DAs mounted.[160]

### 3.2.3. ENACTMENT OF NEW LEGISLATION: THE MINES AND MINIRALS DEVELOPMENT ACT NO.7 OF 2008

The call by the Zambian people on government to renegotiate the DAs was finally heeded in 2008. The then Republican President, Levy Mwanawasa, announced during the official opening address to the Tenth Session of the National Assembly that government had decided to put in place a new fiscal and regulatory framework in the mining sector.[161] It was announced that this decision was based on the findings contained in a Report of the Special Team of Experts appointed by government to study the issue in great detail which report revealed that the DAs in their present form and in the current circumstances are unfair and unbalanced.[162] In that regard, the DAs no longer meet their stated purpose of providing

[157] See Mwanawasa, L.P. supra note 138 at 1.
[158] Lungu (2008) supra note 136 at 409.
[159] Ibid.
[160] Ibid. p 409 – 410.
[161] See Mwanawasa L.P. supra note 138 at 6.

[162] ibid

maximum benefits to the Zambian people and an appropriate return to the mining companies.[163]

In moving with the changing times, new legislation was enacted in 2008 to reflect government's desired changes expressed in the President's opening address to National Assembly. This was the Mines and Minerals Development Act No.7 of 2008, which repealed and replaced the Mines and Minerals Act, 1995. A significant provision in the new Act is section 160(1) which cancelled all existing mining development agreements. The provision expressly states as follows:

> 'A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the Republic from the commencement of this Act.[164]

Through this statute too came the prohibition on government from 'signing any new mining development agreements.'[165]

It is worth noting that the cancellation of the DAs was a unilateral action by one of the parties to the agreements, the Government. Under general rules of contract law, this amounts to a breach of contract. Under international principles of investment law, the legality of this unilateral action by Government may be challenged on the basis of breach of a stabilisation clause. To ascertain the validity and binding nature of stabilisation clauses on the host State would require a determination, by the Arbitral tribunal, of whether the sovereign powers of a

[163] ibid
[164] Section 160 (1) of the Mines and Minerals Development Act No. 7 of 2008. The section defines development agreements as an agreement relating to large scale mining licence entered into between Government and a mining company under section nine of the repealed Act.
[165] Section 159 of the Mines and Minerals Development Act No.7 of 2008.

state can be limited by contractual obligations assumed by the state.[166] Such a detailed analysis is beyond the scope of this chapter, suffice it to state that the matter still remains unsettled although the general view of most scholars is that stabilisation clauses are valid and enforceable against host states under international law[167] Arbitral decisions on this matter include Texaco v Libya[168] Revere Copper v Opic[169] and Kuwait v Aminoil.[170]

Changes to the new mining fiscal regime included an increase of mineral royalty tax from 0.6 percent to 3 percent.[171] Since government's desire and objective was to have a situation where 'the nation received a fair return from its resources,'[172] this upward adjustment on the rate of mineral royalty tax was justified on that basis. In addition to these changes, the new mining fiscal regime also included the following:

a) an increase of corporate tax from 25 percent to 30 percent;
b) an increase of mineral royalty tax from 0.6 percent to 3 percent (on gross value rather than on net back value);
c) an introduction of withholding tax on interest, royalties, management fees and payments to affiliates or subcontractors in the mining sector at 15 percent;
d) an introduction of variable profit tax of up to 15 percent on taxable income which is above 8 percent of gross income;

[166]Curtis, C.T., (1988) "The legal security of economic development agreements' 29 Harvard International Law Journal 317-347
[167] Cotula, L., (2008) Reconciling regulatory stability and evolution of environmental standards in investment contracts: towards a rethink of stabilization clauses' 1 Journal of World Energy Law and Business. 158.

[168] [1977] 53 I.L.R. 389

[169] [1978] 56 I.L.R 257

[170] [1982] 21 I.L.M. 976

[171] See the 2008 National Budget Address delivered to National Assembly on 25th January, 2008 by Ng'andu Magande, then Minister of Finance and National Planning at 19 and 20.
[172] Ibid.

e) an introduction of a windfall tax to be triggered at different price levels for different base metals. For copper, the windfall tax will be 25 percent when the copper price is between $2.50 to $3.00 per pound or $ 2.500 or $ 3000 per tonne; 50 percent when the price exceeds $3.

f) the separation of hedging income from mining activity for tax purposes;

g) the reduction of capital allowances from 100 percent to 25 percent.

The reference price on which these taxes would be based would be the price tenable at the London Metal Exchange, Metal Bulletin or any other metal exchange market recognised by the Commissioner General of taxes.[173]

The reaction of the mining companies to the new fiscal regime was as expected; they made counter proposals or effectively challenged the new regime. Their reaction was made through the Chamber of Mines to the expanded Parliamentary Committee on Estimates and Revenues.[174] The mining companies for instance, indicated that they would only accept the introduction of a windfall or a variable tax and not both. They insisted that they only be subjected to the variable profits tax.[175] They further objected to the reduced capital allowance in preference to the status quo.[176]

At the time of the study, the issue relating to the counter proposals had not yet been resolved. On its part however, government has always justified the introduction of the new mining regulatory framework and fiscal regime as a means of ensuring that its citizens benefit from

[173] See 2008 National Budget Speech at 19-20.
[174]See Report of the Expanded Committee on Estimates 2009. Available at http://www/parliamentgov.zm/index.php?option=com_docman&task=doc_view&gid=436(accesed 7th October, 2011.)
[175] Ibid p 27
[176] Ibid

the country's natural wealth.[177] These measures taken by Zambian government are not unprecedented. Similar experiences by different countries all over the world abound. For example, in the wake of the ever-increasing energy prices in the mid-2000s, Bolivia, Ecuador and Venezuela claimed a right to a greater share in the profits of their natural resources.[178] Another example is that of the Republic of Ecuador's amendment of its hydrocarbon law in April 2006. By this amendment, 50 percent of extraordinary income by foreign oil companies was required to be paid to the state.[179] This 'extraordinary' income could be equated to the windfall tax in Zambia's new fiscal regime. Another example is the province of Alberta in Canada that once had a complete review of the royalty and tax regimes with the goal of ensuring that the Albertans received a fair share from the energy development through royalties, taxes and fees.[180] In view of the foregoing, it can be concluded that the Republic of Zambia did not do anything unusual when it introduced a new fiscal regime following the recovery of copper prices on the world metal market.

[177] Author's emphasis.
[178] Maniruzzaman, A. F. M., 2009. "The issue of resource nationalism: risk engineering and dispute management in oil and gas industry." 5 Texas Journal of Oil, Gas and Energy Industry Law. 84.
[179] Ibid.
[180] Ibid p. 85.

## 3.3. ANALYSIS OF CONTENTS OF SELECTED DEVELOPMENT AGREEMENTS

### 3.3.1. THE MUFULIRA MINE, SMELTER AND REFINERY AND NKANA MINES, CONCENTRATOR AND COBALT PLANT DEVELOPMENT AGREEMENT

The Mufulira Mine, Smelter and Refinery and Nkana Mines, Concentrator and Cobalt Plant Development Agreement, also called the Mopani Development Agreement, was executed between the Government of the Republic of Zambia and the Mopani Copper Mines Plc, a Zambian registered company owned by Carlisa Investments Corporation (a joint venture company comprising Glencore International AG and First Quantum Metals limited.)[181] The date of execution of the agreement is 31st March, 2000.[182]

Preambular paragraph 4 of the agreement provided in part that 'the development and operation of the smelter, refinery, concentrators and cobalt plant will secure the maximum benefit for and adequately contribute to the advancement and the social and economic welfare of the people of Zambia including the people of the vicinity of the contract area in a manner consistent with their needs and the protection of the environment.'[183] This background information on which the agreement was premised inspired a lot of hope in the agreement because it was in line with the sovereign right of a people to the enjoyment of the

[181] Mopani Copper Mines Plc. http://www.ebizguides.com/guides/sponsors/alone.php? Sponsor=336 & country=15. (accessed 13 March, 2011.)
[182] See Mopani Development Agreement.
[183] Paragraph 4 of the Preamble to the Agreement between Government of the Republic of Zambia and Mopani Copper Mines Plc, dated 31st March, 2000.

natural wealth of its nation as enshrined in most international legal instruments to which Zambia is party and which Zambia has ratified or acceded such as the United Nations Charter, the African Charter on Human and Peoples Rights, the Charter of Economic Rights and Duties, the International Conference on the Great Lakes Region (ICGLR) Protocol on the Illegal exploitation of Natural Resources and the SADC Protocol on Mining.

For instance Article 21 (1) of the African Charter on Human and Peoples Rights provides that:

> *All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*

In line with this, the Constitution of Zambia solemnly declares in the Preamble thus:

> *We, the People of Zambia…pledge to ourselves that we shall ensure that the State shall...conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations.*

This is an undertaking to ensure that citizens benefit from their country's natural wealth. Similarly, under the Lands Act, Chapter 184 of the Laws of Zambia, s.3 (5) provides that:

> *all land in Zambia shall, subject to this Act or any other law, be administered and controlled by the President for the use or common benefit, direct or indirect, of the people of Zambia.*

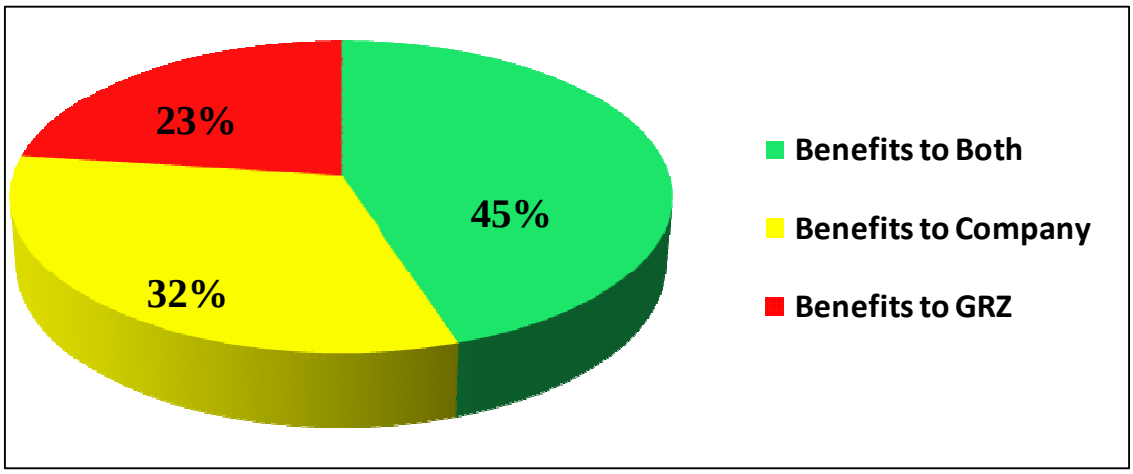
This study argues that these statutory provisions have not been effectively implemented to the benefit of the Zambian citizens as shown in the section that follows.

### 3.3.2. BENEFIT ANALYSIS OF THE AGREEMENTS

The following analysis of the clauses in the DAs is intended to show how skewed they were in terms of benefits to the parties. A critical analysis of the operative paragraphs of the

Mopani agreement brings the following aspects to the fore: out of the 147 clauses and sub-clauses contained in the agreement, 34 clauses are for the benefit of Government alone. This represents 22.8 percent of the total benefits in the agreement. The clauses which are for the benefit of the company alone are 47; this represents 32.3 percent of the benefits. The remaining 66 clauses are for the benefit of both parties. This represents 45 percent of the benefits. These results are shown in the Pie Chart below:

Figure 2: Benefit Analysis of Clauses in Mopani Mine DA (n=147)




*Source*: Author constructed from Mopani Agreement.

It is clear from the foregoing analysis that the company derived more benefits from the agreement than did the government. More details of the benefit analysis are contained in Appendix 1.

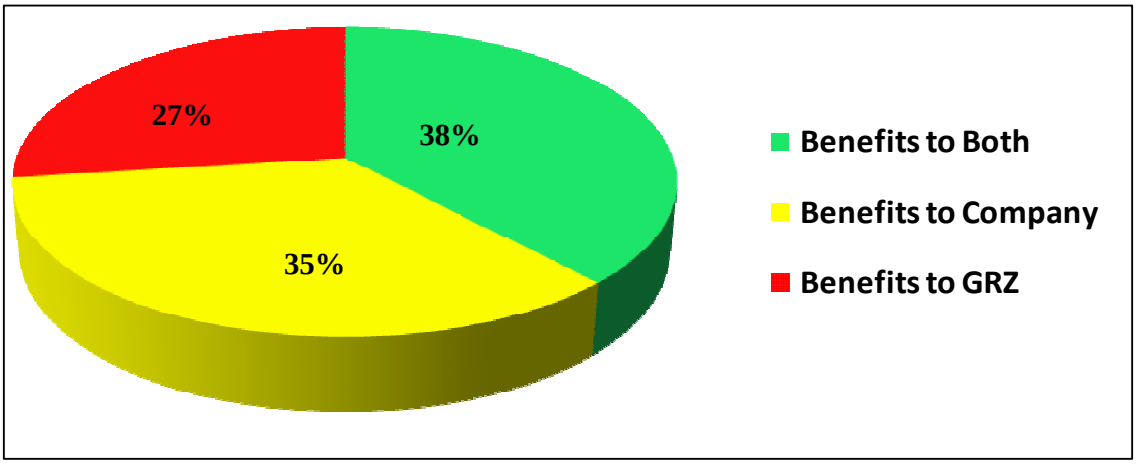
### 3.3.3. THE CHAMBISHI MINE DEVELOPMENT AGREEMENT

The Chambishi Mine Development Agreement was concluded between the Government of the Republic of Zambia, the Non-Ferrous Company Africa Mining Plc and the China

Nonferrous Metal Industry's Foreign Engineering and Construction Corporation (Group), Chinese state-owned enterprises[184] and executed on 29th June 1998[185].

The 118 operative paragraphs of the agreement analysed in terms of benefits to the parties show that 32 clauses are for the benefit of the government alone. This represents 27 percent of the total benefits. The analysis further reveals that 41 clauses, representing 35 percent of the total benefits are for the mining company alone. The number of clauses which are for the benefit of both the government and the company is 45. This represents 38 percent of the total benefits. A graphic representation of the benefit analysis is given below:

Figure 3: Benefit Analysis of Clauses in Chambishi Mine DA (n=118)




*Source*: Author constructed from Chambishi Mine Agreement.

As is the case in the Mopani agreement, the mining company has more benefits amounting to 35 percent compared to 27 percent benefits accruing to government. A more detailed analysis of the agreement clauses is given in Appendix II.

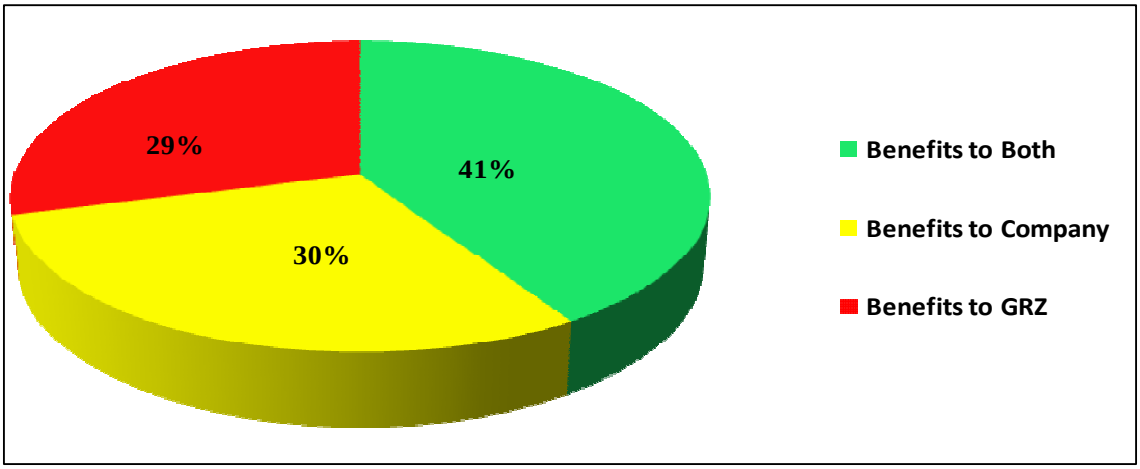
[184] Chambishi Copper Mines. http://www.sarpn.org.za/documents/d000240318-Zambia_copper-mines_Lungu_Fraser.pdf (Accessed 19 April, 2011)
[185] See Chambishi Mine Development Agreement.

### 3.3.4. THE KANSANSHI DEVELOPMENT AGREEMENT

The parties to the Kansanshi Development Agreement are the Government of the Republic of Zambia and Cyprus Amax Kansanshi Plc, a wholly-owned subsidiary of Phelps Dodge Corporation of the United States of America.[186] The date of execution of the agreement is 14th March, 1997.[187]

The agreement has 110 operative paragraphs which have been analysed to determine which benefits accrue to which party. The results are shown below:

Figure 4: Benefit Analysis of Clauses in Kansanshi Mine DA (n=110)




*Source*: Author constructed from Kansanshi Development Agreement.

This shows that 32 out of a total number of 110 clauses are for the benefit of the government, 33 clauses for the benefit of the company and the remaining 45 clauses are for the benefit of both the government and the company. This represents 28.7 percent of the total benefits to the government, 30.0 percent to the company and 41.3 percent to both parties.

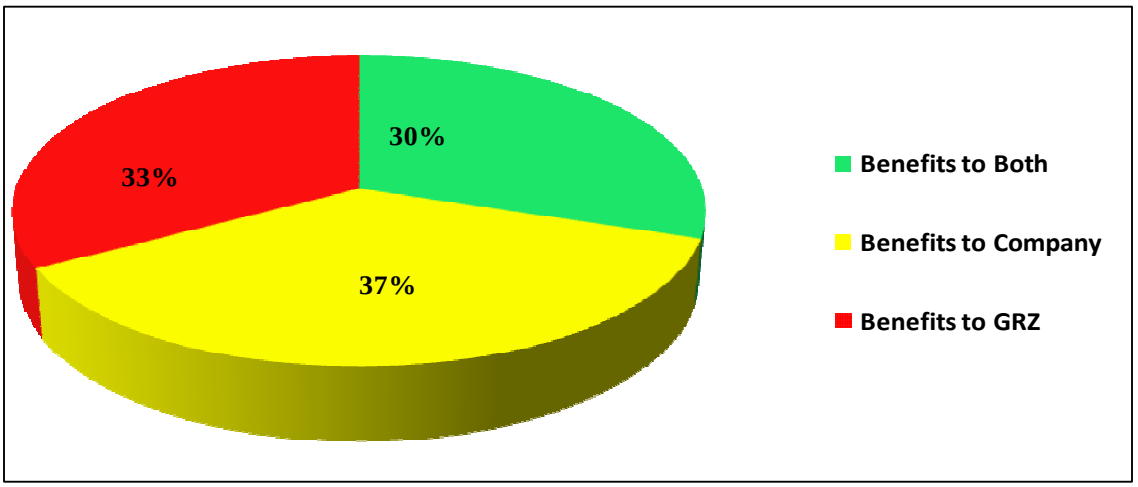
[186] Kansanshi Copper Mines. http://www en.wikipedia.org/wiki/First-quantum minerals.
[187] See Kansanshi Development Agreement.

It is worth noting that like in the case of the other two agreements analysed earlier, the most benefits accrue to the mining company, that is to say, 30.0 percent benefits to the company against 28.7 percent benefits to the government. More details of this analysis are found in Appendix III.

### 3.3.5. CHAMBISHI COBALT AND ACID PLANTS AND NKANA SLAG DUMPS DEVELOPMENT AGREEMENT

This agreement was concluded between the Government of the Republic of Zambia and Chambishi Metals Plc, a company owned by Anglovaal Mining Limited (Avmin) a South African Mining and Development Company[188] and executed on 11th September, 1998.[189] The agreement contains 120 clauses, 40 (33 percent) of which are to the benefit of the government, 44 (37 percent) to the benefit of the company and the remaining 36 (30 percent) are to the benefit of both parties.

Figure 5: Benefit Analysis of Clauses in Chambishi Cobalt (n=120)




*Source:* Author constructed from Chambishi Cobalt and Acid Plant Agreement.

[188] Chambishi Metals Plc. http://www.miningweekly.com/topic/chambish-metals-plc (accessed 24 April, 2011)
[189] See Chambishi Metals Development Agreement.

The following figures represent the following percentages; 33 percent benefits to the government, 37 percent to the mining company and 30 percent to both the government and the company. This shows that the company has, once again, more benefits than the government. Appendix IV shows the analysis in detail.

The unavoidable conclusion one draws from the analysis of the foregoing four different DAs is that the cancelled DAs contained more clauses that were to the benefit of the mining companies than they did clauses that were to the benefit of the government. Despite the fact that the agreements were concluded with different mining companies and at different times and have some variations in the contents, all the four agreements analysed are skewed towards the mining companies in terms of benefits.

A statistical computation using Analysis for Variance (ANOVA) in Microsoft excel tool pack was done to test the significance of the results at 95% confidence level and it confirmed that the benefits to government were indeed insignificant. Confidence level is a level of confidence conveniently used to capture the true population value. Confidence interval (CI) is the upper and lower limit representing a confidence range at *p*-value or *alpha* 0.05[190]. At 95% confidence level an estimated benefit for government assessment of DAs were as follows:

Figure 6: Test for statistical significance

| Mining company | Estimation | *p*-value |
|---|---|---|
| Mopani Mine | 23% CI [16.2 – 29.1%] | 0.4276 |
| Kansanshi Mine | 29% CI [20.5 – 37.5%] | 0.3951 |
| Chambishi Mine | 27% CI [19.0 – 35.0%] | 0.5333 |
| Chambishi Cobalt | 33% CI [24.6 – 41.4%] | 0.4465 |

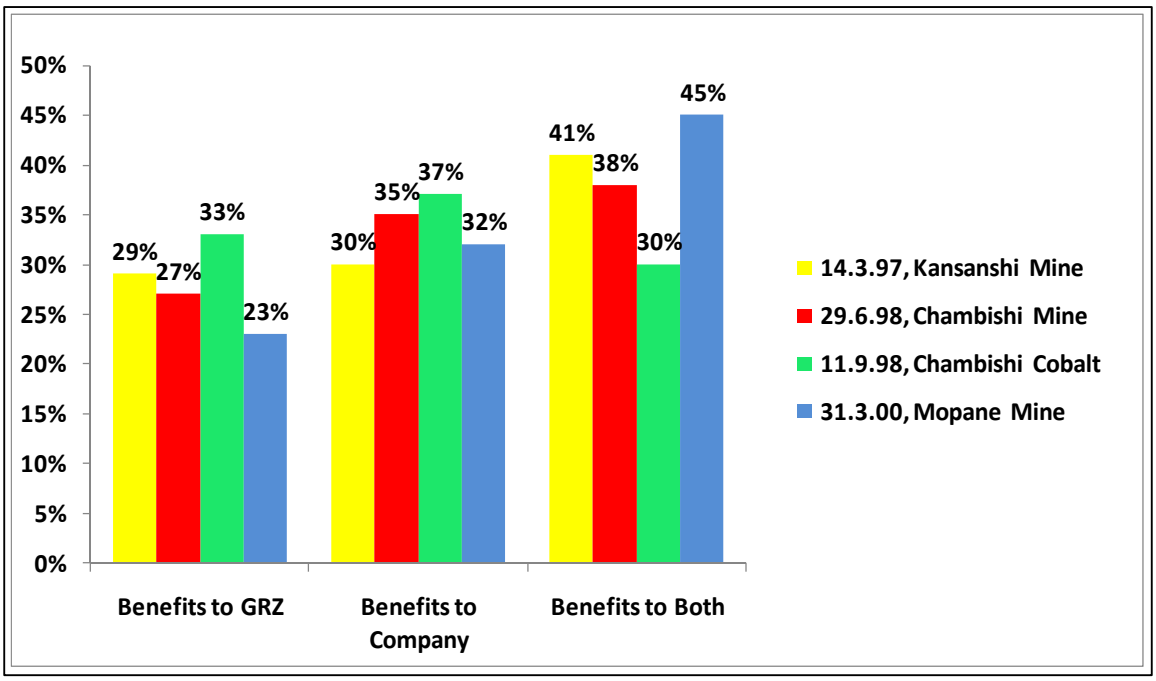
*Source:* Results of Benefit Analysis of Clauses on selected DAs

[190] http://en.wikipedia.org/wiki/Confidence_interval

The *p*-values more than 0.05, were insignificant. Therefore, benefits to government on the assessment of DAs were not significant.

In terms of the trend analysis of benefits profiled by year to the different sectors, the results are as shown in the bar graph below:

Figure 7: Benefit Analysis of Clauses in Four selected DAs




*Source:* Author constructed from the Mining Development Agreements

The DAs analysed were executed between the years 1997 and 2000. The pattern of the benefits analysis to GRZ shows a downward trend. Save for the case of Chamhishi Metals DA which was at 33 percent, GRZ progressively benefited less from the DAs from 29 percent to 23 percent. The situation with regard to benefits to the mining companies is the exact opposite. There is an upward trend in benefits from the DAs. Save for Mopani Mines at 32 percent, the mining companies progressively benefitted more over the years from 30 percent

to 37 percent. Benefits to both parties also show an downward trend. Apart from the Mopani Mine DA at 45 percent, the benefits progressively decreased from 41 percent to 30 percent.

## 3.4. SALIENT FEATURES IN THE DEVELOPMENT AGREEMENTS.

A further analysis of the actual contents of the clauses of the four DAs analysed reveals that the lop-sided nature of the development agreements is not only in terms of the number of clauses benefiting the various mining companies but also in terms of the import of such clauses. A number of such clauses place onerous obligations on government which obligations have dire consequences on the government and its people. Examples of such clauses are given below:

### 3.4.1. TAXATION STABILITY

The clause on taxation stabilisation is found in all the agreements analysed.[191] It is submitted that the clause is not only contentious but also places very onerous obligations on government. Under this clause in the Mopani agreement, which has been reproduced in full for purposes of thorough analysis, the government made an undertaking for the stability period of fifteen years, not to do any of the following*:*

> *increase corporate income tax or withholding tax rates applicable to the company (or change the basis of calculation which would result in a decrease of deductions available to the company in computing its liability to such taxes) from those prevailing at the date [of the contract]. Amend the VAT and Corporate Tax regimes applicable to the company and any management or marketing company from those*

[191] Clause 14 Kansanshi DA, clause 15 Chambishi Metals DA, clause 16 Mopani Agreement, and clause 15 of the Chambishi Mine Development Agreement.

*prevailing as at the date of the agreement, (and as set out in detail in Schedule 8). Impose new taxes or fiscal imports (including new import and export duties or other new duties or new royalties on normal operations) on the conduct of normal operations or sale or export of products therefrom or increase withholding taxes applicable to the company.*[192]

It is not difficult to discern the intention of the parties for including this clause in the agreements. On the part of government, the obvious reason was to attract large-scale foreign investments in the mining sector,[193] which is one of the objectives of the Mines and Minerals Development Act in general and the development agreements in Particular. It is acknowledged that the use by a host State of stabilisation clauses as an incentive for attracting foreign investment in the country is not unusual. Stabilisation clauses of one kind or the other are in use in Sub-Saharan Africa, North America, Eastern and Southern Europe, South and Central Asia, the Middle East, Latin America and the Caribbean.[194]

It has been acknowledged that some countries use 'sweeping stabilisation clauses, along with other terms that appear to tilt the project in favour of the investor, as a way of securing a large investment project and enticing further development in the country.'[195] Nothing can be farther from the truth than this observation in relation to the status of the cancelled mining development agreements in Zambia. As observed earlier in this study, all the four agreements analysed had more benefits in favour of the mining companies than the government.

[192] Ibid.
[193] Section 9(1) of the Mines and Minerals Act of 1995.
[194] Shemberg, A., 2008. "Stabilisation clauses and human Rights." 4. http://www.ifc.org/ifcext/media.nfs/content/Stabilisation_Clauses_Human_Rights. (accessed on 17th March, 2011).
[195] Ibid. p5.

On the part of the mining companies, the one obvious reason for the inclusion of this clause in the agreement was for legal certainty and predictability in the legal environment governing the investment project.[196] It was 'a way to ensure that the host State will not enact laws that eliminate or damage the commercial viability of the project.[197] One commentator has summed up the investor's perception of stabilisation clauses in the following words; 'investors see stabilisation clauses as neutralising the effects of prerogatives of the host State that would otherwise allow it to unilaterally modify the key conditions responsible for the financial and economic performance of the investment venture.'[198]

Certainly, both parties may have had their reasons for including the tax stabilisation clause in the agreement and are justified in their own right. However, this study argues, as the proceeding paragraphs will show, that the tax stability clause undermines the sovereignty of the state with regard to imposition of tax and the power to enact legislation. Further, the study argues that allowing the mining companies the privilege of paying taxes at a fixed rate for a period of fifteen years would not only deprive the country of the much needed revenue for national development but would also deprive the many Zambians wallowing in poverty of the right to benefit from the mineral wealth with which their nation is endowed. Such a situation would be contrary to the spirit of the agreement of providing benefits to the local people as reflected in the preamble referred to earlier and as pointed out by the then Republican President Levy Mwanawasa.[199]

Another element that comes to the fore from this analysis of tax exemption for the mining companies is that through these lopsided agreements, the government deprived the treasury of

[196] See Faruque, A., 2006. "Validity and efficacy of stabilisation clauses: Legal protection V functional value" Journal of International Arbitration. 223.
[197] Ibid.
[198] Peter, W., 1998. "Stabilisation clauses in state contracts" International Business Law Journal. 885.
[199] Mwanawasa, L.P., 2008. Supra note 138 at 3.

a lot of revenue because it closed several sources from which such revenue could be got. This is so because tax exemption straddled across many different types of tax including *inter alia* corporation tax, royalties and excise duty.[200] On this basis, it is argued that this arrangement just facilitated the making of more profit by the various mining companies due to the low rates of tax paid on different types of tax.

In view of the foregoing, it is the author's considered view that the attraction of foreign investment notwithstanding, a shorter stabilisation period of about three years and exemption of only a particular type of tax would have been a better way of handling the DAs. Further, the execution of the DAs should have been staggered rather than the quick succession manner in which it was done.[201] Alternatively, only one DA should have been executed as a pilot project before embarking on extensive execution of DAs.

### 3.4.2. ENVIRONMENTAL STABILITY

All the agreements analysed provide for a stability period in relation to obligations of the respective mining companies regarding environmental matters.[202] The interpretation section of the agreements defines stability period 'as the period commencing as of the date of the agreements and ending on the fifteenth (15) anniversary of the date of the agreement.'[203] This, in essence, means the environmental stability period, like the taxation stability period, was to last for a period of 15 years. Therefore, for fifteen long years, government would 'not take any action (and would procure no action is taken by any of its ministries, departments or agencies over which it has operational control acting on its behalf) under or in enforcing any

[200] See section 15 of the Chambishi Mine Development Agreement.
[201] Out of the four DAs analysed, one was executed in 1997, two in 1998 and the other in 2000.
[202] Clause 12.3 Mopani DA, clause 12.15 Chambishi Mine Development Agreement, clause 12.2 Chambishi Metals DA and clause 12.3 of the Kansanshi DA.
[203] See Interpretation section of all the DAs.

applicable environmental laws with the intent of imposing fines upon the company payable under environmental laws or (enacting new fines and penalties thereunder) which are payable in respect of non-compliance with such environmental laws and where the environmental plan provides for a remedy of the same in accordance with specified time table and the company is in material compliance with that time table.[204]

Still on environmental issues, there is yet another undertaking in all the analysed agreements that for a period of fifteen years, government would not effect any changes or enact new legislation and regulations or repeal any legislation or regulation which would prevent the company complying with the environmental plan and time tables contained therein without making provision for the company to be exempt therefrom.[205]

It is not in dispute that stabilisation clauses may be used in relation to environmental issues. As Shemberg has observed, stabilisation clauses are also used to protect the investment ventures from the cost of adjusting to changes of the environment and social legislation.[206] It is submitted that what is in issue is the long stabilisation period in a such a field that is prone to so many natural changes, most of which are beyond the control of man.

Innocent though such provisions may appear, it is submitted that they have far reaching consequences. Since changes in the environment may occur at any time, it is inevitable for the law to change with the changing times. For instance the effects of global warming and the resultant climate change on the environment have become more pronounced in recent years than was the case twelve years ago when the subject agreements were concluded.[207] A point

[204] Part D of the Mopani Development Agreement. See also Part D of the other DAs.
[205] Ibid.
[206] Shemberg, A., 2008. Supra note 194 at 3.
[207] Between 1997 and 2000.

that merits mention here is that had the DAs not been cancelled, the new amendment to the Income Tax Act[208] relating to the payment of carbon tax would not have applied to the mining companies by virtue of the provisions cited earlier. This point illustrates the volatile nature of the environment mentioned earlier. Payment of carbon tax is related to issues of global warming which were not so important during the era of the DAs.

Further, the country has assumed environment-related obligations under international legal instrument such as the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol by the ratification of these instruments.[209] Consequently, a need might arise to amend legislation in force on the protection of the environment, that is the Environmental Protection and Pollution Control Act, Chapter 204 of the Laws of Zambia (and other related Acts) in order to effectively address the current environmental challenges. Clauses such as the ones cited, that prohibit enactment of legislation or amendment of existing legislation for the sole purpose of protecting the interests of foreign investors, are clearly not progressive and should not be allowed to be applied without room for change.

[208] Income Tax (Amendment) Act of 2006.
[209] The dates of ratification for the United Nations Framework Convention on Climate Change and its Kyoto Protocol is 28/05/1993 and 7/7/1998 respectively.
http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc. (accessed on 22 April, 2011)

### 3.4.3. NO CHANGE OF LAW

Equally contentious and outrageous is a clause in all the analysed agreements which states that GRZ shall ensure that no law, statute, regulation, or enactment shall be passed or made which would discriminate against the company in respect of tax matters.[210] It is worthy of note that the situation created by this arrangement is that it made the DAs superior to the law of the state in which the investments were admitted. For fifteen years, there would be no change of the law relating to payment of the various taxes. The effect is that the law would be 'frozen' or remain unchanged as it relates to the DAs, for fifteen years. The fact that the law would remain unchanged for fifteen years, so as to protect mining companies from adverse effects actually placed the DAs above the law. It made the DAs more superior than the legal framework within which they ideally ought to have operated. It is submitted that this situation was irregular because generally, every agreement ought to be subject to the law of the land in which it will be administered. The law should 'dictate' what the agreements should contain. The DAs should not have been an exception.

The clause contains a proviso which adds no value to it at all. The proviso states that 'government would be at liberty to pass or make any law, statute, regulation or enactment to enable the performance or amendment of a development agreement entered into by it and another mining company or joint venture prior to the expiry of such period.'[211]

It is submitted that this proviso does not offer any relief or alternative to the 'freezing' of the law. It does not change anything and is arguably unrelated to the matter because government

[210] Clause 14(2) of the Kansanshi Development Agreement.
[211] Ibid.

has, as a matter of course, the sovereign right and executive power to conclude agreements with any party. Such power can certainly not be derived from an agreement!

The 'freezing' of the law aforementioned is meant to make new laws inapplicable to the investment project. In some quarters, the view over this kind of situation is that it transforms the status of the investment. One commentator observed with regard to the DAs that '…the agreements have a highly unusual legal status. They cannot be reversed by future legislation and the mining companies position is strengthened by the stability period which ensure the policies at the time of signing cannot be changed for between 15 and 20 years.'[212]

Undoubtedly, from the investor's point of view, such freezing stabilisation clauses are necessary because the 'clauses are seen as providing the much needed predictability by policing government behaviour so that investors know beforehand what their rights shall be in the event of change of law'[213]

The question of whether such stabilisation clauses can actually bind a sovereign state is beyond the scope of this study. Suffice it to say that the question is still unsettled and scholarly opinion on the matter remains sharply divided.[214] Arguing against the motion, Maniruzzaman has remarked that it is each state's undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion.[215] This position has been further augmented by the following remark, 'a state may face exceptional circumstances requiring it to legislate, notwithstanding the stabilisation

[212] "Their Backs Against the Wall." Zambia Analysis, Issue No.2, June 2007. p 10.
[213] Faruque, A., 2006. "Validity and efficacy of stabilisation clauses: Legal protection v functional value." 23 (4) *Journal of International Arbitration.* 322.
[214] See Nwaokoro, J., 2005. "Enforcing stabilization of international energy contracts." Journal of World Energy Law and Business. 103.
[215] Maniruzzaman, A.F.M., 2005. "Some reflections on stabilisation techniques in international petroleum, gas and mineral agreements." International Energy Law and Taxation Review.162.

clause in the contract to the contrary, in order to protect the public interest.'[216] This situation can be said to be true regarding the case of the cancelled DAs in Zambia.

### 3.4.4. WAIVER OF SOVEREIGN IMMUNITY

Government's waiver of its sovereign immunity is perhaps the most absurd of all the clauses in this agreement. The clause on the waiver of sovereign immunity provides as follows:

> *GRZ irrevocably agrees that should any proceedings in relation to, arising out of or in connection with this agreement be taken in any jurisdiction against it or its assets, no immunity (to the extent that it may at any time exist, whether on the grounds of sovereignty or otherwise) from those proceedings shall be claimed by it or on its behalf, or with respect to its assets, and GRZ hereby irrevocably waives any such immunity which it or any of its assets now has or may acquire in the future in any jurisdiction.*[217]

Still on the issue of waiver of sovereign immunity, there is a clause which states in part that:

> *GRZ irrevocably and generally consents in respect of the enforcement of any arbitral award or determination of a Sole Expert against it in any proceedings in any jurisdiction to the giving of relief or the issue of any process in connection with such proceedings (including, without limitation, the making, giving, enforcement or execution against or in respect of any property whatsoever,(irrespective of its use or intended use) of any decision, award, order or judgment which may be made or given*

[216] Ibid
[217] Clause 24 .1. Mopani Development Agreement.

*in such proceedings and the granting of any injunction or order for specific performance or for recovery of land or other property.*[218]

Further, under clause 22.6 the Chambishi Mine development agreement for example, GRZ irrevocably submits to the jurisdiction of the United Kingdom and waives, to the extent permissible by applicable law, any objection to such arbitration whether on the ground of venue or on the ground that the arbitration has been commenced in an inconvenient forum.[219]

Sovereign immunity generally means that a sovereign state (including its agents, its property and activities) is immune from the jurisdiction of the courts of another sovereign state.[220] In this regard, it has been concluded that 'it would be difficult for a party to successfully institute legal proceedings against the foreign government if that government raises the defence of sovereign immunity, which is a grave consideration of international law.[221]

The Zambian government decided to dispense with this protection for obvious reasons, to accommodate the interests of the investors. In view of this, the conclusion one may draw from this step taken by government is that the country willingly threw away its legal protection all in an attempt to encourage foreign investment. It is submitted that this was not necessary.

[218] Clause 22 .8. Mopani Development Agreement.
[219] Clause 22.6, Chambishi Mine Development Agreement.
[220] Cross, E. 2010. "Sovereign Immunity in Commercial Transactions." p.1. http://www.bowmwn.co.za/LawArticles/Law-Article~id~1820584887.asp (accessed on 25 March,2011)
[221] Ibid

### 3.4.5. CLAUSES IN CONTRAVENTION OF THE LAW

a) Under clause 15 (a) and (b) of the Mopani Agreement, the privileges accorded to non-Zambian citizens and their dependants during residency in Zambia, relating to the importation and exportation of household goods and personal effects free of duty and tax, is not only inappropriate but also irregular. Pursuant to s.4 and 9 of the Diplomatic Immunities and Privileges Act, Chapter 20 of the Laws of Zambia, such privileges are conferred only to members of a Diplomatic Mission accredited to Zambia and/or International Organisations to which the Republic of Zambia is a member, by an Order (Statutory Instrument) made by the Minister responsible for Foreign Affairs.[222] The clause in question is therefore in blatant disregard of the law.

b) It is submitted that the sovereignty of the state should be upheld at all times and in all situations. For a country to waive its sovereignty for the sake of concluding one DA is just unconscionable. Besides, the action is contrary to the State Proceedings Act, Chapter 71 of the Laws of Zambia. This statute governs civil proceedings by and against the State and the civil liabilities and rights of the State and its servants.[223] The question regarding the nature of relief or what type of orders may be made against the State is governed by the provisions of s.16 (1) in the following words;

> *in any civil proceedings by or against the state, subject to the provisions of this Act, the court shall have power to make all such*

[222] See sections 4 and 9 of the Diplomatic Immunities and Privileges Act, Cap 20.
[223] See Preamble of the State Proceedings Act, Chapter 71 of the Laws of Zambia.

> *orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require provided that- (i) where in any proceedings against the state any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court may not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and (ii) in any proceedings against the state for the recovery of land and other property, the court shall not make an order for the recovery of land and or the delivery of the property but may in lieu thereof make an order declaring that the plaintiff is entitled as against the state to the land or property or to the possession thereof.*[224]

In light of the above provisions of the law, it is clear that the relief provided in the various DAs is not tenable against the State because it contravenes the State Proceedings Act. This is particularly so because enforcement of decisions of international arbitral tribunals is done pursuant to domestic laws of the parties. In this regard, any arbitral award would have to be enforced using the State Proceedings Act.

The undeniable fact is that the country had to undress itself of the legal protection in order to allow for the determination of the Sole Expert to be enforceable under the agreements. It is submitted that this move was absolutely unnecessary considering that the agreements were with companies

[224] Section 16 (1) State Proceedings Act, Chapter 71 of the Laws of Zambia.

doing business in Zambia. It is submitted that the domestic legislation in force for the time being in Zambia is adequate.

### 3.4.6. CLAUSES OVERRIDING STATUTE

All the four agreements analysed contain clauses that override statute, a situation which is irregular. For instance, clause 14.1 of the Mopani Development Agreement provides as follows; while Schedule 8 is not meant to override applicable legislation, in the event of any ambiguity between the applicable legislation and Schedule, GRZ and the company agree that the provisions of Schedule 8 shall prevail.[225]

It is submitted that there is manifest contradiction in this clause because it actually does the exact opposite of that which it purports to avoid, which is overriding legislation. It is an accepted principle of international law that an agreement ought to accord with the law of the state in which it is going to operate. Ideally therefore, the law should take precedence in the event that a contradiction occurs.

### 3.4.7. Unnecessary provisos and claw back clauses.

In all the agreements analysed, most of the obligations of the company contain either a proviso or a claw back clause that is not necessary. Such clauses appear to be a subtle way of effectively negating the mining company's obligations. Examples of such obligations include the following:

[225] Clause 14 .1, Mopani DA.

a) Clause 3.2 (c) under the Mopani agreement relating to the company's forward selling plan of copper cathodes or other metal treatment products. This is an exception to the company's right to market and export such products without reference to GRZ and obligates the company to afford preferential treatment to manufacturers whose processing facilities are located in Zambia. There is a proviso that 'the application of this preference should not operate so as to cause the company to incur any greater cost or otherwise suffer any prejudice.'[226] Since determination of these factors is in the sole discretion of the company, the likelihood of not effecting this obligation is high as the company may choose to offer business to foreign manufacturers instead of local ones.

Still under the Mopani agreement, clause 4.2 on Procurement of materials, equipment and services allows the company to procure these services internationally. However, there is a proviso that obligates the company to procure the services locally from companies that meet the specifications of the tender and not to discriminate actively against such businesses in the award of the tender. This provision is negated by a claw back clause which follows immediately after it and couched in the following words; 'in the event of active discriminate, notwithstanding the rights of GRZ under this agreement, the validity of the award shall not be affected.'[227] The purpose for including this clause is not difficult to understand. It is to allow the company to do as it pleases. Effectively, this arrangement defeats the non-discrimination

[226] Clause 3.2 (c) Mopani Agreement.
[227] Clause 9.1 Mopani Agreement.

obligation placed on the company. In this regard, the company has therefore no obligation at all.

b) Clause 9.1 of the same agreement which relates to the social assets and Municipal infrastructure services gives an obligation to the company to ensure the provision of the transferring social assets to the employees of Smelter Company, their registered dependants and qualified third party users. There is an undertaking by the company to review the registration practice for determining eligibility of dependants to qualify as registered dependants.[228] This obligation and the related undertaking is negated by the proviso to the clause which entitles the company 'to alter any registration practice if it is reasonably of the view that any existing practice from time to time has been subject to abuse.'[229]

   The inherent danger in this clause is that determination of whether or not there is abuse of the practice is in the sole discretion of the company and discretionary powers are often open to abuse. Consequently, the company may choose to alter such registration to suit its needs and elude the fulfilment of its contractual obligations.

c) An example of a claw back clause in the Kansanshi agreement is clause 9 on infrastructure use. Whereas clause 9.1(a) obligates the company to allow the public and GRZ access to any roads constructed or maintained by the company, clause 9.1(b) and (c) gives the company discretion on the matter.

[228] Clause 9.1, Mopani DA.
[229] Ibid.

The said clause states that the company shall consider allowing (but shall not be required to allow) GRZ to have access over the contract area. This discretionary power given to the company thus negatives the company's obligation stated earlier.

d) Clause 6.13 under the Chambishi Cobalt and Acid Plants agreement relates to the constitution of a committee comprising of a member each from the Ministry of Mines, the Ministry of Labour and Social Security, the Ministry of Local Government and Housing and the company itself. The task of the committee as reflected in the agreement is to monitor the implementation of the training and human resources management programme.[230] However, the clause clearly states that the committee shall have no power to bind the company.[231] It is submitted that the constitution of such a committee in this regard is useless because it has no power over the affairs of the company for which it is created.

e) Clause 9.2, 9.3, 9.4 and 9.5 of the same agreement obliges the company to provide the following services, medical, educational, recreational and municipal services to its employees. These good clauses that would greatly benefit the employees are nullified by clause 9.6 which states that in the event that the company determines that it will become unable to comply with the provisions of clauses 9.2 to 9.5, for any reason whatsoever, it shall forthwith

[230] Clause 6.13, Chambishi Metals DA.
[231] Ibid

give notice to GRZ. GRZ agrees that it will accept such non-compliance and that no action will be taken…'[232]

The problem with this clause is twofold; firstly, it gives too much power to the company by allowing it to determine whether or not it would be able to comply with the obligation. It is submitted that such determination should be left to the prevailing circumstances and should not be an option to the company as it is likely to be abused. Secondly, the reasons for non-compliance are open-ended, that is to say, 'for any reason whatsoever.' This situation is open to abuse because the company may use even reasons that are unrelated to the matter as a basis for failure to comply with its contractual obligations.

### 3.4.8. EXEMPTIONS ACROSS VARIOUS SECTORS

It appears that stabilisation clauses have now almost encompassed everything. This is not surprising because investors want to give themselves as much legal protection as possible.[233]As it has been rightly observed, 'today, however, investor concerns being addressed through stabilisation clauses have broadened to include the risk of arbitrary or discriminatory legislation against the investor, physical or creeping expropriation by the host state, nullification of the contract pursuant to national law, or more specific issues of accelerated depreciation and amortization of assets, long loss carry-forward periods, royalty rates or guarantees that foreign exchange can be repatriated or kept in a protected offshore account.'[234]

[232] Clause 9.2, 9.3, 9.4 and 9.5, Chambishi Metals DA.
[233] See clause 16 (6) of Mopani Agreement.
[234] Shemberg, A., 2008. Supra note 194 at 4.

The above approach appears to be the one taken in negotiating the DAs. That this was so is evidenced by the nature of exemptions granted to the company. The exemptions were not only in the mining sector but straddled across other sectors too. A case in point is clause 16.6 in the Mopani agreement in which GRZ exempts the company for a period of fifteen years from liability to pay Excise Duty on power applicable to the company's purchases of electricity in relation to the operation of the facilities during such period.[235] The clause is further clarified by stating that for the avoidance of doubt, the company shall not incur any liability in relation to non-payment of the Excise Duty on power pursuant to this clause 16.6.[236] Clearly, the Energy Sector that provides power to the mines was indirectly affected by the agreement although it was not a party to it. Considering that the mines use a lot of power, one may safely conclude that this measure was a great saving on the part of the company but translated, yet again, to loss of revenue to the government.[237]

Another sector not party to the agreements but indirectly affected was the Lands sector. In clause 16.7 of the same agreement, *GRZ* confirms that the company shall not pay any property transfer taxes associated with the acquisition of the assets under the Sale and Purchase agreement and the transfer of the facilities to the company.[238] In Zambia, *p*ayment of property transfer tax is governed by the provisions of s.4 (1) of the Property Transfer Tax Act, Chapter 340 of the Laws of Zambia. Exemptions to payment of the said tax are provided for in s.6 (1) of the Act, which gives a long list of entities eligible for such exemption. These include, *inter alia*, the government, any foreign government, international organisations and charitable organisations. It should be noted here that corporate entities such as the subject companies, doing business with a view to profit, are not so exempt. The exemption of the

[235] Clause 16.6, Mopani DA.
[236] Ibid
[237] Author's emphasis
[238] Clause 16.7, Mopani DA.

companies under the cancelled agreements was therefore not justified because it had no legal basis. Further, as observed in other instances, this measure once again translated to loss of revenue to the treasury.

### 3.4.9. MISCELLANEOUS

a) Ideally, the obligation to develop an investment site should rest with the investor. The DAs should therefore have had more benefits to the government than the mining companies. However, all the agreements analysed reveal a different trend of the mining companies having more benefits than the government. This is mainly due to unnecessary provisos and claw back clauses contained in the DAs.[239] The other issue is that the DAs were overly protective of the mining companies. This assertion is based on the fact that the agreements contain too many instances in which government's acceptance is deemed to have been granted after lapse of a period of notice.[240] Likewise, they contain too many instances when the company's non-compliance with obligations shall be excused.[241]It is submitted that both arrangements are to the detriment of the government.

b) Clause 16.4 contains an unreasonable undertaking by government. It states as follows: GRZ covenants to reimburse the company (or, at its option, make offsetting changes in any law, statute, regulation, or enactment applicable) to ensure the company is fully, fairly and timely compensated for any costs incurred by it by reason of failure by GRZ to comply with the provisions of

[239] These are found throughout the text of all the four analysed DAs.
[240] Examples include clause 8.2, 8.9 and 9.8 of the Mopani DA.
[241] Examples include clause 2.2, 4.2 and 6.3 of the Mopani DA.

clauses 14, 16.1 and clause 16.3. The company acknowledges that this will be its sole remedy for such failure to comply with clauses 14, 16.1 and 16.3.[242] It will be recalled that clause 14 relates to a schedule to the agreement that should apply and override statute in the event of ambiguity between the two, clause 16.1 is an undertaking not to increase any taxes applicable to the company and clause 16.3 is an undertaking not to change the tax law relating to the company. Undoubtedly, the issues in these clauses are highly contentious and it was not prudent for government to bind itself in such a manner because firstly, the alternative measure, which is at the option of the company, to make offsetting changes in the law, is highly irregular because, as earlier stated, laws should not be made or changed to satisfy one entity or individual or agreement. Besides, this makes the law subject to the agreement instead of the agreement being subject to the law. Secondly, making the foregoing the sole remedy for non-compliance by the mining companies is unreasonable and not fair on the part of government. In the interests of both parties, alternative remedies should have been negotiated and provided.

c) Clause 15.4 of the Chambishi Mine Development Agreement automatically entitles the mining companies to any favourable changes to the Laws of Zambia which are of general application to the mining sector. Undoubtedly, this placed the mining companies on a higher pedestal, thus giving them undue advantage over the Zambian government. The paradox in the DAs with regard to changes in law is that on the one hand, the law relating to taxation and environmental concerns was frozen and not allowed to change for the benefit

[242] Clause 16 .4, Mopani DA.

of the mining companies. On the other hand, the same companies where to benefit when the law of general application changed by having the change automatically extended to them. It is clear from the foregoing that there was a serious attempt by the company to benefit either way. It is submitted that rights and obligations in an agreement ought to be uniform so that all the parties should derive maximum benefits.

The force majeure clause is another one of the contentious clauses in these agreements. The contention relates to the fact that there are too many events of force majeure in favour of the company as against those in favour of the government. Since a force majeure is basically meant to excuse performance of a party for failure to fulfil its contractual obligations due to unforeseen circumstances beyond its control,[243] it is important that the interests of both parties are taken into consideration. The situation under the DAs is lopsided because of the many events classified as events of force majeure which work against the interests of government. For instance 'unavailability of equipment or materials, failure by GRZ or any of its applicable ministries, departments or agencies to grant or issue to the company (as consultant/operator) the necessary consents and permissions to enable them operate in Zambia or to import equipment into Zambia or to grant or issue the necessary permits for non-Zambian employees of the company to enter into Zambia and take up employment in a timely fashion.'[244] The only obligation for the mining companies, which also applies to government, is the standard obligation in

[243] See International Chamber of Commerce (ICC) Commission on Commercial Law and Practice Bulletin. p.1 http://www.iccwbo.org/policy/law/id331/index.html
[244] See clause 26.2 of the Mopani Development Agreement.

force majeure clauses 'to notify the other party of the occurrence of the event of force majeure and the steps taken to try and mitigate it.'[245]

It is submitted that allowing such classification of force majeure events aforesaid was detrimental to government because there were no corresponding force majeure events to excuse government's non-performance. As one commentator has rightly pointed out, 'negotiating force majeure and hardship clauses means operating at the very core of the contract. It is important that the clauses are balanced and apply equally to all parties of the contract.'[246] As observed earlier in this study, government was once again trying to retain the investors by agreeing to such unbalanced conditions.

It will be recalled that the problems that subsequently occurred with the implementation of the DAs stemmed from one clause in the DAs. This is the clause relating to stabilisation or 'freezing' of the law on tax matters. This one aspect actually led to the cancellation of the DAs as government could not fulfil the obligation not to change the law on taxation in the face of changes of the price of copper on the world metal markets.[247] As earlier stated, this obligation was quite onerous to government and its continued fulfilment would have been to the detriment of the Zambian citizens. Although the Zambian government has justified the introduction of the new mining fiscal regime, the mining companies appear to still have issue with the government

[245] See International Chamber of Commerce. Supra note 243 at 1.
[246] Ibid.
[247] Lungu,J. (2008) supra note 136 at 9.

because they have raised counter proposals.[248] In 2009, government allocated K3 000 000.00 (equivalent to USD 652) for mining development agreement re-negotiation.[249]At the time of the study, the government and mining companies were engaged in some kind of renegotiation but suffice it to say the issue had not yet been resolved. Unaware of the purported 'negotiations' between government and the mining companies, the general public has to date continued to call for the renegotiation of the agreements.[250]

## 3.5. COMPARISON BETWEEN SOME ASPECTS OF DEVELOPMENT AGREEMENTS AND INVESTMENT PROMOTION AND PROTECTION AGREEMENTS

As earlier stated in this study, the legal framework during the era of DAs, that is the Mines and Minerals Act of 1995, provided for the DAs in the statute itself. The Act provided for the name of the agreement itself and some of the contents it should have.[251] Further, the Act even pointed negotiations in a certain direction, that is, towards the 'inclusion of stabilisation commitments in agreements.[252] Since all this was contained in the Act, in essence, the DAs and what they stood for were part of the law. On the contrary, the situation with regard to the IPPAs is different. The legal framework for the IPPAs, that is the Zambia Development Agency Act, does not provide for the agreement itself in the Act. Rather, it provides the legal basis on which such agreements should be based. The Act simply mandates Zambia Development Agency (ZDA) ' to negotiate and sign IPPAs with prospective investors on behalf of the Government of the Republic of Zambia in accordance with the provisions of the

[248] Ibid.
[249] See Report of the Expanded Committee on Expenditure 2009. Supra note 38.
[250] "15 CSOs demand mining agreements re-negotiation." The Post. Thursday, 16th June, 2011.
[251] See section 9(2) of the Mines and Minerals Act of 1995.
[252] See section 9(2) (d) of the Mines and Minerals Act of 1995.

Zambia Development Agency Act No. 11 of 2006, section 17 (J).'[253] It is submitted that this arrangement limits the negotiations within the confines of the law, thereby avoiding situations of negotiating 'special' agreements that are contrary to what the law provides as was the case with the DAs.

Another distinctive feature between the two types of agreements aforementioned is that under the DAs the minster responsible for mines was vested with discretionary power with regard to the negotiations with the investors.[254] It is submitted that discretionary powers have the potential to be abused and are therefore not appropriate in such agreements. The then Republican President did allude to this fact when he announced the abolition of DAs. He directed that all the requirements for doing business and incentives should be in the relevant legislation and regulations and should not be a discretionary matter.[255] Under the IPPAs, such discretionary power has not been provided for. Instead, the final decision on the negotiations with prospective investors lies with the ZDA Board.[256] The advantage here is easy to see, the process will be transparent, objective and as by law provided because the mandate of the ZDA Board is provided for in the Act.[257] Thus, the danger of foreign investors negotiating 'special' agreements as was the case in the DAs is thereby eliminated.

Further, whereas negotiations under the DAs were not properly guided, negotiations under the IPPAs are guided by the GRZ Technical Negotiating Team. This comprises officers from different ministries and institutions who are experts in various fields. It is submitted that such an arrangement has the potential of bringing together different ideas that can enrich the

[253] Section 17 of the Zambia Development Agency Act No.11 of 2006.
[254] See section 9 (2) (d) of the Mines and Minerals Act.
[255] Mwanawasa, L.P. supra note 138 at 34.
[256] See section 17 of ZDA Act.
[257] See section 17 of ZDA Act.

negotiations. The arrangement under the DAs that relied on the minister's discretion had limitations in terms of expertise because the minister may be a politician who may not have the requisite expertise in the field.

Further, a standing committee such as the GRZ negotiating team aforementioned provides consistency in the negotiation process. This in turn facilitates easy identification of learning points and makes it easy for the team to avoid making similar mistakes in subsequent negotiations. A point worthy of mention here is the guidance given to the technical team, that is, the Standard template and the Guiding Principles which will ensure that negotiations are in line with the law and policy directives. This arrangement was not there in the DAs.

Under the DAs, tax exemptions were contained in the agreement itself. The situation is different under the IPPAs. Tax exemptions are merely cross-referenced with the respective tax codes in different legislation. This means that the investors cannot negotiate tax exemptions but have to follow what the law provides. This is in line with the Presidential directive at the occasion of the abolition of the DAs in 2008. Then Republican President Levy Patrick Mwanawasa, stated 'that all the requirements for doing business and incentives should be in the relevant legislation and regulations.'[258]

With regard to stability clauses, their use is limited in the IPPAs unlike the way they were used in the DAs. Under the former, stability clauses do not apply to environmental matters any more. Neither do they apply to many other taxes like excise duty or property transfer tax. In this regard, they do not straddle across so many sectors of the economy as was the case under the latter.

[258] Mwanawasa, L.P. supra note 138 at 34.

## 3.6. CONCLUSION

This chapter has examined the legal and regulatory framework during the era of the DAs and identified some weaknesses therein. These include the making of the DAs as part of the law, the use of discretionary powers by the minister, and the use of different types of stabilization clauses in the DAs. The chapter has also examined the 2008 fiscal regime and argues that the changes made were necessary in order to enable the people of Zambia benefit from their country's wealth. The chapter further analysed the clauses of four DAs and has concluded that the mining companies had more benefits under the agreements than did the government. The cause of the problems that arose in the implementation of the DAs was identified and the effort made to address the problem discussed. Lastly, the chapter compared and contrasted some aspects under the two types of agreements and concluded that the IPPAs arrangement has better chances of concluding good agreements for the country because the negotiations are guided and are limited because they are conducted within the confines of the law. Further, the chapter has identified some precautionary measures under the IPPAs such as restriction on the use of stabilization clauses, not providing for tax exemptions in the agreement itself but simply making reference to the tax legislation in force and restrictive use of discretionary powers.

# 4. CHAPTER FOUR: LEARNING FROM OTHER JURISDICTIONS

## 4.1. INTRODUCTION

This chapter draws lessons from other jurisdictions on how they have or are implementing the Investment Promotion and Protection Agreements (IPPAs) concept in general and investment protection in particular. One country and one region have been selected for this purpose; Botswana and the Four Tigers of Asia respectively. Botswana has been selected because, like Zambia, the mainstay of its economy is mining. Zambia's economy is largely dependent on copper mining[259] while Botswana's economy is dependent on diamond mining.[260] The concerns of the extractive industry affect both countries in this regard. The Four Tigers of Asia, namely South Korea, Taiwan, Malaysia and Singapore, have been selected because they are the world's fastest growing newly industrialised economies and are also noted for maintaining exceptionally high growth rates.[261] In addition, they are regarded as high investment attraction and protection jurisdictions.[262] Since the four Asian Tigers all share similar characteristics as favourite investment destinations, two of them namely, Singapore and Taiwan, have been selected to represent the region.

For purposes of this study, the aspects considered in the comparator jurisdictions are limited to the following: the respective government policies and legislation on investment, taxation procedures, State practice on IPPA concept and examination of some pertinent clauses in one

[259] Lungu, J., 2009. Supra note 131 at 13.
[260] See African Development Bank-Economic Diversification Support Programme Report 2009: Botswana. p.12.<http://www.afdb.org/fieldmin/uploads/afdb/Documents/Projects-and-operational/AR%20Botswana1En.p> (accessed 15th March, 2011)
[261] The Four Asian Tigers <http://www.medbib.com/Asian-Tigers> (accessed 27th May 2010)
[262] See Sari, C.R., 2010. "Does investor protection affect the choice of earnings management methods through real activity manipulation and accrual manipulation?" p.5.Volume 6, No.6**,** Journal of Modern Accounting and Auditing. ISSN 1548-6583.

Bilateral Investment Treaty (BIT) executed by Singapore. The above aspects have been chosen because under the DAs experience in Zambia, these issues were highly contentious. Lessons from other countries would be particularly helpful in this regard. The proceeding section is an analysis of each of the selected countries in terms of the aforesaid aspects:

## 4.2. BOTSWANA

### 4.2.1. POLICIES AND LEGISLATION ON INVESTMENT

According to the UNCTAD Report of 2003, Botswana is one of the most successful of all small developing countries in attracting and managing foreign direct investment (FDI) to achieve economic growth and transformation. For over 30 years of independence, it has had an open and welcoming regime for foreign investors. Foreign investors have been treated well and have been able to conduct business in a fully functional legal and economic climate.[263] Another Report records that the country has been commended for its good track record of sound macroeconomic policies, good governance and high levels of investment made possible by the prudent utilisation of mineral wealth.[264] Ironically, this success story on FDI is despite the fact that there is no foreign investment law[265] in Botswana. In other words, there is no specific statute on Investment Promotion and Protection as is the case in some countries such as Iran whose new law on investment under the name 'Foreign Investment Promotion and Protection Act' (FIPPA) was ratified by the Parliament in 2002.[266] It has been observed that this law has enhanced the legal frame work and operational environment for foreign investors in Iran.[267]

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[263] United Nations Conference on Trade and Development Report . 2003. Investment Policy Review: Botswana. p.49. <http://www.unctad.org/en/docs/iteipcmisc10-en.pdf.> (accessed 4th may.2011)

[264] Africa Development Bank: Economic Diversification Support Programme Report. 2009. p.11<http://www.agdb.org/fieldmin/uploads/afdb/documents/projects-and-operational/AR%20%Botswana1En.p>

[265] UNCTAD Report. Supra note 263 at 30.

[266] Organisation for Investment, Economic and Technical Assistance of Iran. 2003. Foreign Investment Promotion and Protection Act.(FIPPA) < http://www.iraninvestment.org> (accessed 28 March, 2011)

[267] Ibid

It is worth noting that the absence of a foreign investment law or an extensive Bilateral Investment Treaty (BIT) network has not hindered FDI[268] because of Botswana's established good practice in this area. It has been observed that other things being equal, a foreign investment law is not necessary in Botswana.[269] The extent to which this statement is truthful is not the subject of this study. Suffice it to say that as this study will show, Botswana has judiciously utilised existing FDI-related legislation to achieve excellent results in the field of investment. For instance**,** all types of manufacturing activities are governed by the provisions of the Industrial Development Act, 1988.[270] By implication, all foreign investors in this field are subject to this law as there is no other law which is specific on foreign investment.

The Constitution is the main statute on investment in Botswana particularly with regard to investment protection. Pursuant to section 8 of the Constitution of Botswana, expropriation is only allowed for public policy reasons and where there is an enabling law to provide for prompt and adequate compensation.[271] Section 8 (1) (b) provides as follows:

> *No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied, that is to say … provision is made by a law applicable to that taking of possession or acquisition … for the prompt payment of adequate compensation.*[272]

[268] UNCTAD Report, 2003. Supra note 263 at 28.
[269] Ibid
[270] Ministry of Trade and Investment. Botswana: "Foreign Trade and Investment - rethinking of economic growth." p.1.<http://www.mti.gov.bw> (accessed on 17th February, 2011)
[271] Constitution of Botswana, section 8(1) (b).
[272] Ibid.

A point that warrants mention here is that the law specifically makes provision for the expropriation of mineral resources. Under section 8 (1) (b) (i), no property of any description shall be compulsorily taken possession of … except where the following conditions are satisfied, that is to say, the taking of possession or acquisition is necessary or expedient … in order to secure the development or utilisation of the mineral resources of Botswana.[273] In the event that this occurs, the obligation to pay compensation is satisfied if adequate royalties are paid in its stead. This arrangement is provided under section 8(3). Payment of compensation 'shall be deemed to be satisfied in relation to … law applicable to the taking of possession of minerals or the acquisition of rights to minerals if that law makes provision for the payment at reasonable intervals of adequate royalties.[274]The reason for this reserve power by government on mineral rights is easy to understand, the government wants to have control of the country's mineral wealth. That this is so is demonstrated by the fact that most mining companies in Botswana are not wholly owned by private companies but are joint ventures between private companies and the government.[275]

With regard to standards of treatment and protection of specific interests of foreign investors, there is no legal provision in Botswana for equal treatment of foreign investors regardless of which country they come from. This is exacerbated by the fact that not even her membership in regional groupings has led to her affording preferential treatment to investors from such grouping's member states.[276] The UNCTAD Report confirms that there are no known departures from this principle.[277]

[273] Constitution of Botswana, Section 8(1) (b) (i).
[274] Constitution of Botswana, Section 8(1) (a) (iii) and section 8 (3).
[275] For instance, Debswana, the largest mining company in Botswana is a joint venture between De Beers Company of South Africa and the Government of the Republic of Botswana. Each entity holds 50 percent equity.
[276] See UNCTAD Report. Supra note 263 at 28.
[277] Ibid.

An observation has been made with regard to exchange controls that Botswana continues to adhere to a policy of progressive liberalisation and simplification of exchange controls.[278] She abolished foreign exchange controls in 1999 and there are no prohibitions on foreign ownership of companies.[279] Further, Botswana does not impose restrictions on the transfer of profits or proceeds of disinvestments.[280]This arrangement is very favourable to foreign investors and is undoubtedly of great interest to them.

A distinct and interesting legislative feature is the restriction on negotiations with investors in certain areas. For instance the mining law does not entitle investors to negotiate contractual rights in respect of licence terms and the mining development programme, except for diamond-mining investors.[281] Further, the Income Tax Act provides in section 54 for the conclusion of Tax agreements with investors but restricts negotiations with regard to the deductions allowable on mines and minerals as reflected in the twelfth schedule, except for diamond mining.[282]

Another legislative provision worthy of note is one relating to the procedure on concluding agreements provided for in the Act. The Income Tax Act of Botswana provides in section 54 for the conclusion of tax agreements between the government and any person. The Act mandates the minister, on behalf of the government, to enter into a tax agreement with any person who is or may become liable to tax under the Act.[283] The Act provides in s.54(2) that 'any agreement entered into under this section shall, be laid before the National Assembly as soon as possible after it is entered into, and shall not take effect unless or until it is approved

[278] Publication by Ministry of Trade and Investment. Supra note 278 at 1.
[279] Ibid.
[280] See UNTAD Report. Supra note 263 at 49.
[281] Ibid
[282] See Income Tax Act of Botswana, Chapter 50:01. Twelfth Schedule, paragraph 11.
[283]Ibid. section 54.

by resolution of the National Assembly.'[284] The language of this legal provision is unambiguous and the intention is clear, any such agreement should, by law, be ratified by National Assembly. In the Zambian legislative procedures on conclusion of agreements, this measure does not exist. Pursuant to Article 54 (3) of the Constitution, the clearing house for agreements in Zambia is the office of the Attorney-General.

The Income Tax Act of Botswana further provides that 'any agreement entered into under this section may be amended or cancelled in like manner. The agreement may vary the provisions of the Act by providing for exemption from tax on dividends, royalties.'[285] It is worth noting that the variation of the provisions of the Act notwithstanding, the said tax agreements are still subject to the law. This is stated in sub-section 4 which provides that 'if any agreement entered into under this section imposes any liability to tax, such liability shall be deemed to be a liability imposed under this Act and all the provisions of this Act including any variations thereto which may have been made under this section (3) shall apply.'[286]

The above provisions can be distinguished from Zambian's cancelled DAs that were provided for in section 9 of the repealed Mines and Minerals Act of 1995. Unlike the DAs which could not be cancelled and were effectively 'above the law,' the tax agreements under the Income Tax Act of Botswana can be cancelled like any other agreement and are also subject to the law as clearly stated in s.54(4).

### 4.2.2. TAXATION

It has been observed regarding taxation in Botswana that 'the main thrust of reforms to the tax system has been aimed at establishing a better balance between direct and indirect taxes

[284] Income Tax Act, Supra note 289 section 54 (2).
[285] Ibid. Section 54 (4).
[286] Ibid.

in order to attract foreign investment.'[287] Undoubtedly, a good legal framework and fiscal regime is cardinal to the foreign investor-host country relationship due to the complex and usually contentious nature of tax matters. Tailoring tax reforms in this manner is therefore a step in the right direction. The principal law on taxation in Botswana is the Income Tax Act.[288]The rate of company income tax is 25 percent while the additional company tax is 10 percent, with the effective company tax rate thus at 35 percent.[289] The country does not only impose tax but also offers relief from tax in appropriate situations. For instance, the Act provides that business may deduct annual allowances at rates ranging from 10 percent to 25 percent on plant and machinery[290] and 2.5 percent on industrial and commercial buildings.[291] Further, additional tax relief to business may be applied for pursuant to section 52 which makes provision for Development Approval Orders or additional tax relief. Section 52(3) provides that 'a business which wishes to be granted additional tax relief in respect of any activity shall apply ...'[292] Under section 52(1) (a), the minister may make an order, to be known as a development approval order, prescribing any business which proposes to carry out a project which would be beneficial to the economy of Botswana or to the economic advancement of the citizens of Botswana as a business which may be granted additional tax relief.[293]The following are given consideration when determining additional tax relief:

a) the number of Botswana citizens who will be employed in relation to the project or activity and the capacities in which they will be employed;
b) any facilities proposed for training or imparting of skills to Botswana citizens;
c) any provisions made for the eventual replacement of non-resident employees by Botswana citizens;

[287] Publication of Ministry of Trade and Investment. Supra note 278 at 1.
[288] Cap 52:01
[289] See Income Tax Act, Cap 52:01.
[290] Ibid. Schedule 3, paragraph 5(1)
[291] Ibid. Schedule 3, paragraph 3(1)
[292] Ibid. Section 52(3)
[293] Ibid. Section 52 (1) (a)

d) any provision made for participation of Botswana citizens in management of the business;

e) the area in which the proposed development project or activity will be carried on; [294]

It is clear from the above-mentioned that the development of the Botswana economy is fundamental and hence it being factored into tax relief incentives in foreign investment arrangements. Another measure aimed at the development of the Botswana economy is in relation to rural investments. For rural investments, a nominal rate of 15 percent corporate tax and exemption from withholding tax on dividends from after-tax profits are also applied.[295]The intention here is clear, it is to encourage investors to locate their investment projects in rural areas.

In the same vein, farming and mining companies are allowed to carryover losses indefinitely.[296] Carryover losses relating to mining are provided for under the mining capital allowance in paragraph 1 of the twelfth schedule to the Income Tax Act as follows: '… in ascertaining the business chargeable income for any person for any tax year from a business of mining, there shall be deducted from his or her business assessable income an allowance to be known as mining capital allowance, computed in accordance with 100 percent mining capital expenditure made in the year in which such expenditure was incurred with unlimited carry forward of losses.'[297]

[294] Income Tax Act. Supra note 289. Section 52 (4) (a) to (e).
[295] Publication of Ministry of Trade and Investment. Supra note 278 at 1.
[296] See Income Tax Act. Supra note 289. Paragraph 1 of the Twelfth schedule.
[297] Ibid

In the manufacturing industry, the carryover of losses is allowed. Losses can be carried over for 5 years to offset gains.[298] Manufacturing has a lower corporate tax rate than other sectors. The basic company tax rate for manufacturing is 5 percent (compared to 15 percent in other sectors) and the additional company tax rate is 10 percent.[299]

Pursuant to paragraph 9 of the twelfth schedule to the Income Tax Act of Botswana, there is a 15 percent withholding tax on dividends classified as follows; 15 percent on each payment of dividend made to a resident, 15 percent on each payment of dividend, interest, commercial royalty, management or consultancy fee made to a non-resident and 10 percent on each payment of entertainment fee made to a non-resident.[300] Capital gains, or income from the sale of capital goods such as machinery, are taxed as ordinary income except for stock sales which are exempted from taxes.[301] The top income tax rate is 25 percent and there is no payroll, social security, capital allocation or wealth taxes.[302]

As stated earlier, no negotiations are allowed except for diamond mining because a legislated fiscal regime applies to non-diamond mining. According to the UNCTAD report mentioned earlier, the fiscal regime for diamond mining is subject to case to case negotiation of key provisions, including taxation and government participation. [303]This approach underscores the importance of diamond mining and marketing to the economy of Botswana. However, over-dependence on diamond mining has its own problems. It has been noted that 'Botswana's international reputation as a highly successful and reliable location in diamond

[298] Publication of Ministry of Trade and Investment. Supra note 278 at 1.
[299] UNCTAD Report. Supra note 263 at 47.
[300] Income Tax Act. Supra note 289; Schedule 12 paragraph 9 (a) - (c).
[301]See KPMG., 2010. "Botswana: taxation of international executives." p.12 <http://www.kpmg.com/global/en/issuesAndInsights/ArticlesPublications/TIES/Documents/Botswana>(accessed 3rd May, 2011)
[302] Ibid
[303]See UNCTAD Report. Supra note 263 at 44.

mining had not carried over to strong investment activities targeted at other minerals'[304]To address this concern, the country has been making efforts at diversification to reduce dependence on diamond mining. In this regard, the fiscal regime for diamond mining 'was reformed in 1998 in order to encourage additional private investment and production of other minerals.'[305]A chronicle of the key elements of the new fiscal regime is contained in the UNCTAD Report and includes the following:

a. royalty of 5 percent on the sales value on precious metals and 3 percent on other metals;
b. immediate depreciation of mining capital expenditure;
c. indefinite loss carry forward; pre-development exploration expenditure booked to profit and loss when incurred;
d. a sliding-scale rate of income tax, starting at 25 percent and rising as the ratio of taxable income exceeds one third; and
e. taxation may not be varied by agreement but the minister has power to remit or defer royalty.[306]

### 4.2.3. STATE PRACTICE ON INVESTMENT PROMOTION AND PROTECTION

Botswana is ranked 38 out of 181 in the World Bank's *Ease of Doing Business Survey - 2010* and also 38th in protecting investors.[307] With respect to the World Bank's governance indicators, it performs above average. It is ranked at 67.1 percentile for regulatory quality and

[304] Ibid
[305] Ibid.
[306] UNCTAD Report. Supra note 263 at 44.
[307] See World Bank. Doing Business 2010 Report. http://www.mpa.gov.sq (accessed 29 April, 2011).

for the rule of law, it is at 68.9 percent.[308] One thing which is abundantly clear in these rankings is the correlation between them. The ranking on the protection of investors (which is of particular interest to this study) cannot be achieved if there is no proper regulatory quality in place and the rule of law is not respected. It may appear that the government of Botswana is performing well in this area as stated in the following excerpt: 'the government adheres to transparent policies and maintains effective laws to foster competition and establishes clear rules of the game. Bureaucratic procedures are streamlined and open, although somewhat slow and not excessively overbearing compared to other countries. Government tender process is open.'[309] The importance of having such a system in place cannot be overemphasised. As it has rightly been observed, 'legal protection includes not only the rights prescribed by regulations and laws, but also the effectiveness of enforcement.'[310]

The government encourages foreign investment to spur growth, employment and exports.[311]This is as expected of any developing country because 'developing countries see the role of foreign direct investment as crucial to their development.[312] Writing on the issue, Ibi Ajayi states that 'FDI is regarded as an engine of growth as it provides much needed capital for investment, increases competition in the host country industries and aids local firms to become more productive by adopting more efficient technology or by investing in human and/ or physical capital.'[313]

[308] Financial Standards Forum. Country brief: Botswana. 2009. p.8 <http:/s/www.esatndardsforum.org > (accesed 1st May, 2011)
[309] Ibid
[310] Titman, S. and K.C. John Wie., 2006
Paper presented at the 2006 International Conference on Finance (Taipei)
[311] Financial Standards Forum. Supra note 308 at 9.
[312] Ajayi, S.I. (ed). 2006. "The determinants of foreign direct investment in Africa: a survey of evidence." p.11
[313] Ibid. p13.

In attracting and retaining FDI therefore, the government has put in place a number of incentives for the foreign investors. These include *inter alia* exemptions from sales tax for importing machinery and equipment needed for production of exports, exclusive licences for a specific area in cases where market demand is limited resulting in marginal investment projection.[314] Further, there are some region-specific incentives such as those applicable in the Selebi Phikwe region under an initiative called the Selebi Phikwe Regional Development Programme.[315]According to one recent report, application may be made for a special incentives package for projects located in this region which create employment for Botswana citizens and in which the output is exported outside the Southern African customs region. The package includes a capital grant towards the fixed cost of the project, a step-down re-imbursement of unskilled labour costs, and augmentation and training grants.[316]The benefits that emanate from investment incentives in general are many and scholarly literature is replete with information on the subject.

Apart from incentives, foreign investors are also guaranteed protection and treated to many other favourable conditions. These are aptly summarised in the Botswana country brief as follows; all foreign exchange controls were abolished in February 1999. Foreigners can invest in the stock exchange. Capital, dividends, profits, interest, royalties, wages and management fees can be freely remitted without limitation or restrictions. Foreign companies are allowed to own 100 percent of a domestic company. The government does not require investors to locate in specific geographical areas, or use of a specific percentage of local content, manufacture subsidies for imports, meet export targets, or use local sources of financing.[317] Evidently, these are very favourable conditions for foreign investors to transact

[314] Financial Standards Forum. Supra note 308 at 1
[315] Ibid.
[316] Ibid
[317] Ibid p.53.

their business. As is the case in many other countries, nationalisation of property is forbidden by the constitution. This can only be done under public policy considerations.[318]

An interesting feature of the Botswana practice is that regarding the treatment of foreign companies. It is worth noting that in Botswana, no legal distinctions are made between foreign and domestic companies.[319] This is in line with the international law principle of National Treatment. Eric Peterson has explained the principle thus: 'National Treatment ensures that foreign investors and their investments are treated comparably to local investors or investments of the host State.'[320] This practice is unlike that pertaining in most developing economies where domestic companies or industries are protected against foreign companies. The government of Botswana is not only adhering to the National Treatment principle but to its sister principle of Most Favoured Nation (MFN) Treatment. According to Eric Peterson, the MFN treatment ensures that foreign investors and their investments are treated comparably to foreign investors or investments from third states.[321] It may appear Botswana is able to adhere to the MFN treatment despite her membership in some Regional Economic groupings such as Southern African Development Community (SADC) that may impose on her an obligation to afford preferential treatment to member states of the grouping.

Although Botswana accords this favourable treatment to foreign companies, there are certain aspects of investment that are the preserve of domestic companies. For instance there are several sectors that are closed to foreign investors. Among them are manufacturing of school furniture and uniforms, welding, bricklaying, street vending, butchery, fresh produce,

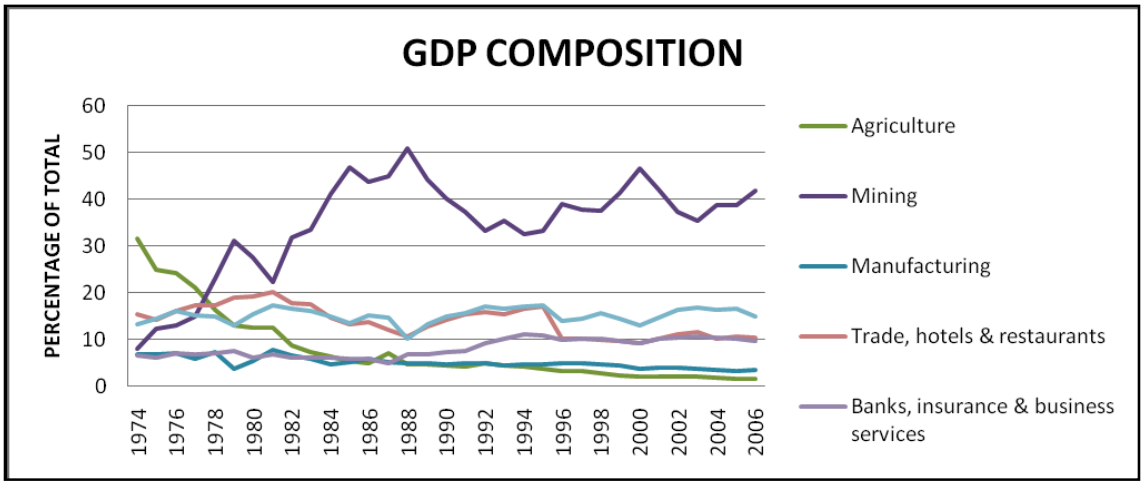
[318] Constitution of Botswana. Cap 1. Section 8.
[319] Financial Standards Forum. Supra note 308 at 8.
[320] Peterson, E.L., 2009. "Human rights and bilateral investment treaties, mapping the role of human rights law within investor-state arbitration." p.13
[321] Ibid

clothing boutiques and bread making.[322] It is submitted that this measure effectively protects domestic industries. With regard to procurement, government procurement practices do involve some preference schemes and reserve certain tenders for 100 percent citizen-owned companies.[323]Another distinct aspect is the granting of work permits to expatriates. This may be contingent on the establishment of demonstrable 'localisation' efforts.[324]It is submitted that although both foreign and domestic companies are accorded the same treatment under the national treatment principle, practice on the ground shows that domestic companies are placed on a higher pedestal.

The mining industry in general and diamond mining in particular is one industry that by its very nature attracts a lot of foreign investment. As mentioned earlier in this study, the biggest mining company in Botswana, Debswana is a joint venture between the government of Botswana and De Beers Company of South Africa.[325] The diamond sector is critical to the economy, accounting for 30 percent of Gross Domestic Product (GDP) and 50 percent of government revenue[326] as shown in the diagrams below:

[322] Financial Standards Forum. Supra note 308 at 2.
[323] Ibid. p.4.
[324] Ibid
[325] See UNCTAD Report. Supra note 263 at 47.
[326] Ibid

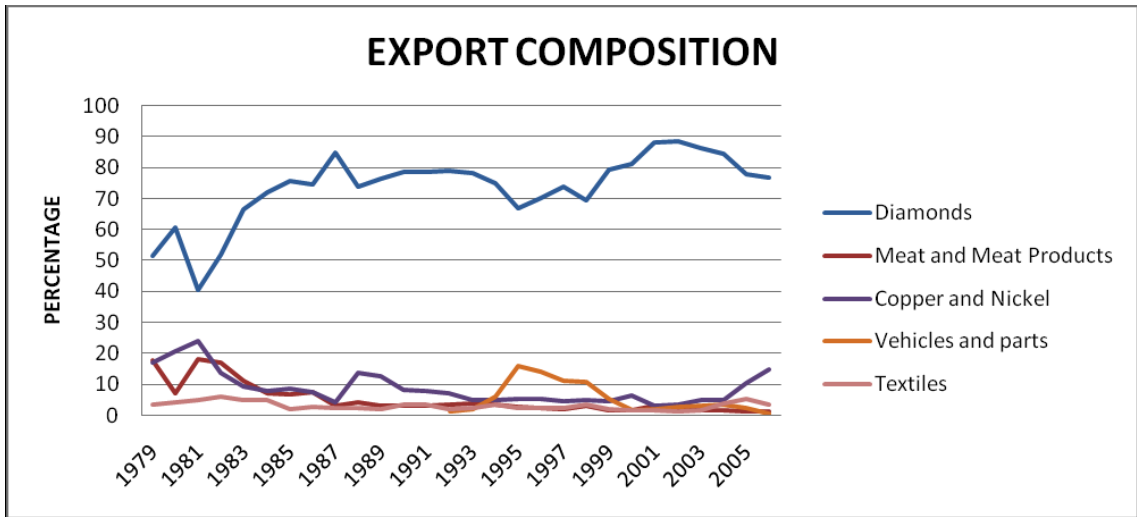
Figure 8: Botswana GDP Composition




**Source: Botswana Statistical Bulletin.**

The dominance of the mining sector in Botswana economy is also reflected in the composition of exports. Mining contribution to the total exports shows an increasing trend for diamonds.[327]

**Figure 9: Botswana Export Composition**




**Source: Botswana Financial Indicators.**

[327] Ibid

A remarkable achievement regarding Botswana's diamond mining is its prudent use of the proceeds. Particularly outstanding is the establishment of a Sovereign Wealth Fund to invest much of the proceeds from diamond exports.[328] According to the Botswana country brief, the revenue from diamond exports was used by the government to invest in the public goods: roads to virtually all parts of the country, health care, schools, education, housing, electricity generation and distribution**.**[329] Botswana's reputation of being the best managed and among the most economically successful countries in Africa[330]could be attributed to this judicious use of resources. It is interesting to note that whereas mineral wealth has brought conflicts in some parts of Africa such as the Democratic Republic of Congo (DRC), it has been a blessing to Botswana.

Regional integration has also played a vital role in the economic success of Botswana. Botswana is a member of both SADC and the Southern African Customs Union (SACU). Both groupings have as one of their gaols the liberalisation of trade amongst their members. Consequently Botswana has benefited from tariff free export of goods especially under SACU.[331]

### 4.2.4. BILATERAL INVESTMENT TREATIES AND/OR INVESTMENT AGREEMENTS EXECUTED

The table below from the UNCTAD Report shows the number of Bilateral Investment Treaties (BITs) that Botswana had entered into by December, 2010.

[328] Financial Standards Forum. Supra note 308 at 4.
[329] ibid
[330] ibid
[331] See UNCTAD Report. Supra note 263 at 50.

Figure 10: Botswana Bilateral Investment Treaties

**Total number of Bilateral Investment Treaties concluded, 1 June 2010**

| Reporter | Partner | Date of signature | Date of entry into force |
|---|---|---|---|
| Botswana | Belgium and Luxembourg | 7-Jun-06 | ---- |
| | China | 12-Jun-00 | ---- |
| | Egypt | 2-Jul-03 | ---- |
| | Germany | 23-May-00 | 6-Aug-07 |
| | Ghana | 4-Jul-03 | ---- |
| | Malaysia | 31-Jul-97 | ---- |
| | Mauritius | 17-Aug-05 | ---- |
| | Switzerland | 26-Jun-98 | 13-Apr-00 |
| | Zimbabwe | 30-Jun-03 | ---- |

Source: United Nations Conference on Trade and Development- 2010.

Clearly, Botswana enters into very few agreements or treaties in the investment sector.

From the foregoing, it is clear that for both Zambia and Botswana, most of the laws and practices on foreign investment are similar. What appears to be different is the manner in which these common laws are implemented. For instance, Botswana's practice in relation to protection of foreign investors has shown strict adherence to the law. In contrast to Zambia, it has not ceded its sovereign rights in the name of foreign investor protection. It continues to uphold its laws and sovereignty. Further, in the running of the mining sector, unlike the situation in Zambia where this is entirely in private hands following privatisation of the mines in the 90s, the practice in Botswana of having active government participation in the industry through joint ventures with private companies has shown that positive results can be achieved. With regard to utilisation of proceeds from the mining sector, Unlike in Zambia where the proceeds from mining companies are purportedly kept in a Mining Resource

Account (MRA) at the Bank of Zambia[332]without any tangible benefits, the prudent use of a similar fund in Botswana, the Sovereign Wealth Fund, has shown that it can greatly help in investment in developmental projects. Botswana's requirement to lay agreements before National Assembly for ratification is no doubt a sure way of guarding against concluding 'special' agreements that are ultra vires the law as was the case with the cancelled mining DAs in Zambia.

## 4.3. SINGAPORE

### 4.3.1. POLICIES AND LEGISLATION ON INVESTMENT

In any State, government policy and legislation in force on investment plays an important role in attracting FDI. Dimopoulos makes the following comment on the issue, 'States have gradually acquired an increased awareness on the role of law and regulation as an important factor in investment decision making and have made efforts to establish an international legal environment by enacting rules allowing, protecting and promoting foreign investment.[333] The 2009 Investment Climate Report on Singapore confirms that Singapore has acted in the manner described by Dimopoulos. According to the Report, 'Singapore's legal framework and public policies are generally favourable towards foreign investors.'[334]

Under the legal framework in Singapore, one of the principle laws that particularly affect foreign investors is the Income Tax Act. The Income Tax (Amendment) Act was passed on

[332] See Report of the Expanded Committee on Estimates. p.20. Available at http://www.parliament.gov.zm/index.php?option=com_docman&task=doc_view&gid=436. (accessed 7th October, 2011)
[333] Dimopoulos, A., 2009. "Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy." p.1
[334] 2009 Investment Climate Statement: Singapore. Bureau of Economic, Energy and Business Affairs.p.1 <http://www.state.gov/e/eeb/ris/other/ics/2009/117192.html> (accessed 26 April, 2011 )

29th December, 2009.[335] According to the Singapore Tax News, the Key provisions in this statute include the following:

**a.** reduction in the corporate income tax rate from 18 percent to 17 percent;

**b.** enhancement of loss carry-back relief scheme- allowing qualifying deductions to be carried back for up to three years immediately preceding the tax year;

**c.** enhancement of existing capital allowances regime with 75 percent of the write off in the first year and 25 percent in the second year;

**d.** introduction of a tax framework for qualifying amalgamations to minimise the tax consequences arising from such amalgamations; and

**e.** withholding tax exemption on fees paid to non-residents for management services performed outside Singapore.[336]

Besides the amendments aforesaid, the Government of Singapore also passed the Income Tax (Amendment) (Exchange of Information) Act, 2009 on 22nd January 2010.[337] This statute seeks to facilitate the implementation of the Organisation on Economic Cooperation and Development (OECD) Standard with treaty countries upon request.[338]

Another amendment to the Income Tax Act was the introduction of section 34 in 2010.[339] According to the Singapore Country Summary Report, this legal provision was introduced 'to ensure that all related party transactions are concluded in accordance with arm's length

[335] Singapore Tax News. p.1 http://ey.mobi/publication/vwluassets/SingaporeTaxNews_issue_2010jan/sfile/singaporeTaxNews- (accessed 5th May, 2011).
[336] Ibid.
[337] I*bid*
[338] 2009 Investment Climate Statement: Singapore. Supra note 334 at 1.
[339] Ibid

standard.[340] The rationale for the arm's length principle is generally to ensure fairness between the parties to an agreement.

Apart from the many amendments to the Income Tax Act, Singapore also enacted and subsequently amended the Arbitration Act of 2001 for domestic arbitration based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.[341] From the foreign investor's view point, incorporation of international law rules into domestic legislation is important in their relations with the host country particularly in relation to arbitration because it is perceived as a way of ensuring that justice prevails in the event that a dispute arises.[342] This is so because 'an international tribunal might interpret the chosen host State's law in light of international law on the basis of various international elements of the contract concerned, and thus could come up with an acceptable decision on the dispute.'[343]

Singapore ratified the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) on August 21, 1968, and the International Convention on the Settlement of Investment Disputes on November 13, 1968.[344] The conclusion that one draws from Singapore's ratification of these international legal instruments is that she wants to enhance her relationship with foreign investors by submitting to the appropriate legal requirements. Investor-host State disputes are bound to arise and the manner in which they are handled can either build or break FDI prospects in a country.

[340] Singapore Country Summary. p.1.
<http://www.rsmchiolim.com.sg/res_ta/CLSF_Notes_Singapore_as_a_base_for_investment_mar08.pdf>(accessed 8th March, 2011.)
[341] Ibid.
[342] See A. F. M. Maniruzamann., 2009. "The issue of resource nationalism: risk engineering and dispute management in the oil and gas industry." 5 Texas Journal of Oil, Gas and Energy Industry Law. p.92.
[343] Ibid.
[344] Singapore Country Summary. Supra note 340 at 1.

One of the advantages of FDI is that it creates job opportunities for the locals. However, this may be a source of disputes between the foreign investor and host country especially where labour rules and policies are not clearly stated. In Singapore, 'the government follows a policy of allowing free market forces to determine wage levels. There is no minimum wage law and the wage system is flexible. The National Wage Council (NWC) recommends non-binding wage adjustments on an annual basis which apply to all employees in both domestic and foreign firms.'[345]

It is submitted that this arrangement is porous and might disadvantage the local citizens because it is prone to abuse by the foreign investor. Although 'empirical studies of manufacturing industries have tied higher levels of foreign investment to higher wages,[346] in a situation where there is no guidance on payment of wages, the investor might choose to pay very low wages even though they have the capacity to pay higher wages. In this regard, it is submitted that this policy should be applied only in selected fields because, as one Report has rightly observed,' flexible labour markets might be important especially for efficiency seeking investors such as assembly operations who invest in countries for a short period and move on soon after.'[347]

### 4.3.2. TAXATION

Singapore introduced a number of tax measures in 2010. These are contained in the following paraphrased excerpt from the Economic Survey of Singapore, 2010.

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[345] Ibid
[346] Goldberg, L., 2004. "Financial-Sector foreign direct investment and host countries. New and old lessons." <http://app.ny.frb.org/research/staff_reports/sr183pdf> (accessed 4th May, 2011)
[347] International Labour Organisation. 2009. "The Impact of codes and standards on investment flows to developing countries." Employment Working paper no.25. p.5.

a) Productivity and innovation credit (PIC) scheme aimed at encouraging businesses to invest in innovation and productivity enhancing activities. Tax deductions of up to 250 percent or allowances of up to $ 300,000 of expenditure during each year of assessment are allowed in activities such as Research and Development or spending on prescribed automation equipment.

b) Mergers and Acquisition (M&A) tax allowance and stamp duty relief aimed at helping companies restructure, upgrade and expand their businesses through mergers and acquisitions. M&A allowance of 5 percent of the value of the acquisition and up to $200,000 of stamp relief is granted upon qualifying conditions.

c) Land Intensification Allowance (LIA) aimed at supporting the intensification of industrial land use for sectors with large land and low gross plot ratios (GPRs). Under this programme, an initial allowance of 2.5 percent and annual tax allowance of 5 percent is granted on capital expenditure incurred for the construction, renovation or extension of a qualifying building or structure.

d) Simplified General Time of Supply (GTS) accounting rules which allowed businesses to account for Goods and Services Tax (GST) either when a tax invoice is issued or when payment is received, whichever is earlier.

e) Import GTS Deferment Scheme under which businesses could defer import GTS for at least one month.

f) The Angel Investors Tax Deduction Scheme aimed at stimulating business angel into Singapore-based start-ups and encourage more angel investors to add value to these start-ups. Under the scheme, there is a tax deduction at the end of the two-year

holding period based on 50 percent of investment costs and tax deduction is allowed to be offset against total taxable income.[348]

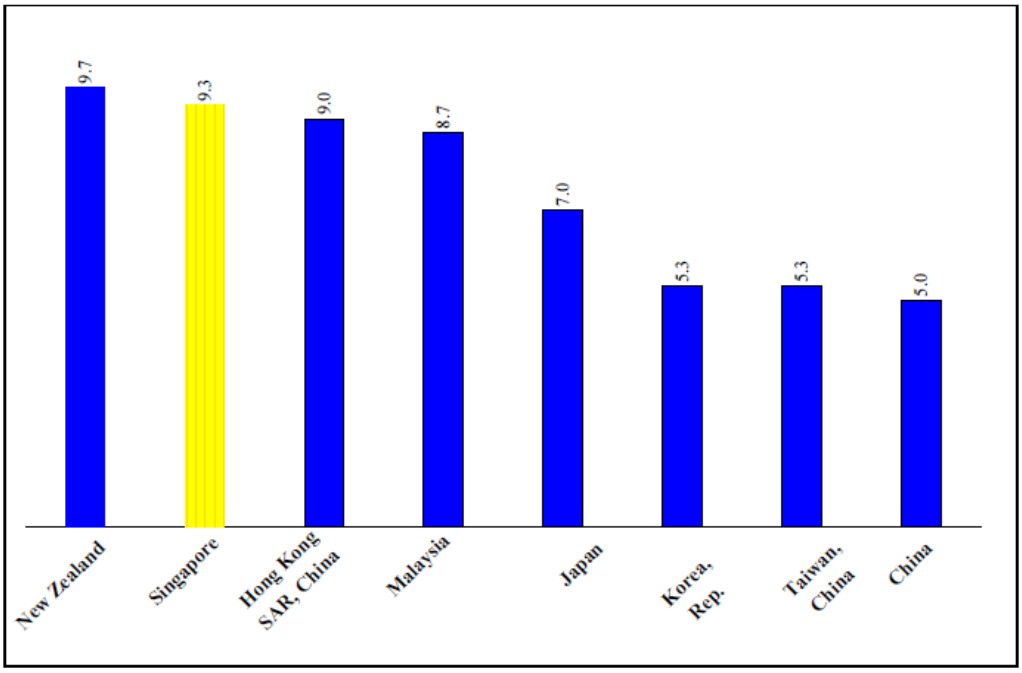
Corporate income tax in Singapore is comparable to other jurisdictions examined and is at the rate of 17.0 percent.[349]

### 4.3.3. STATE PRACTICE ON INVESTMENT PROMOTION AND PROTECTION

The World Bank's *Ease of Doing Business Report* ranks Singapore 2nd overall for protecting investors.[350] The following graph illustrates the Protecting Investors Index in Singapore compared to the best practice and selected economies:

[348] Ministry of Trade and Industry. "Economic Survey of Singapore 2010." http://www.mti.gov.sigapore (accessed on 5th May, 2011)
[349] World Bank .2011." Ease of doing business." p.50. http://www.doingbusiness.org/-/media/fdpcom/doc%20business/documents/profiles/country/dbll.(accessed 7th May, 2011)
[350] Ibid

Figure 11: Protecting Investors - Singapore




*Source:* Doing Business 2011 - Singapore

The Report states that Singapore has not expropriated property owned by foreign investors.[351] The result is that investor confidence is enhanced. It would not be speculation therefore to attribute the high rate of FDI in Singapore to this outstanding performance in investor protection reflected in the World Bank Report. The high level of investor protection in Singapore and other Asian countries has led to their being used as a yardstick in this area. According to one commentator, 'the East Asian countries of Singapore, Indonesia, Japan, Korea, and India provide a useful setting for testing the importance of investor protection.'[352]

Singapore has signed Investment Guarantee Agreements (IGAs) with all ASEAN member nations, the Belgium-Luxembourg Economic and the following economic partners: Bahrain, Belarus, Bulgaria, Canada, China, the Czech Republic, North Korea, Egypt, France,

[351] Ibid

[352] Sari, C.R., 2010. Supra note 261 at 5.

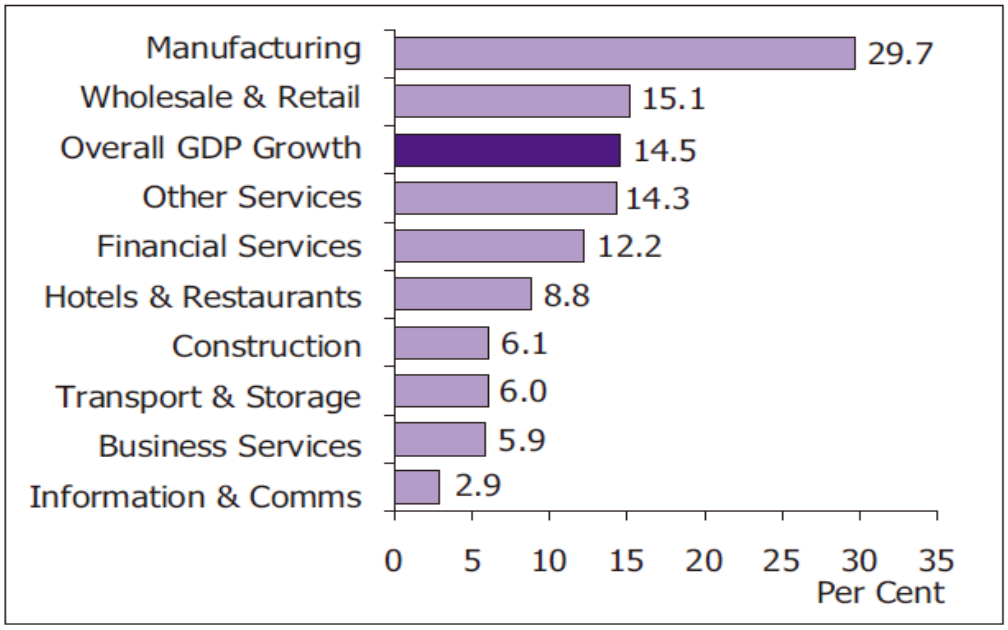
Germany, Hungary, Latvia, Mauritius, Mongolia, the Netherlands, Oman, Pakistan, Peru, Poland, Saudi Arabia, Slovakia, Slovenia, Sri Lanka, Switzerland, Taiwan, Turkey, Ukraine, the United Kingdom, the United States, Uzbekistan and Zimbabwe.[353]

This long list of countries that have invested in Singapore attests to the fact that investor protection is good. This is more so because the countries represent different geographical regions. The investment guarantee agreements mutually protect nationals or companies of either country against war and non-commercial risks of expropriation and nationalisation for an initial period of 15 years and continue thereafter unless otherwise terminated.[354]

Apart from the good protection guarantees, it is evident that the initial investment promotion initiatives played a primary role in attracting FDI. Singapore based its economic growth on concentrated investments from targeted foreign sectors. It set up an Economic Development Board (EDB) in 1959 to create infrastructure for industry and to identify the most promising sector to attract foreign investments.[355] The EDB, which is Singapore's investment promotion agency, focuses on securing major investments in high value-added manufacturing and service activities as part of the strategy to replace labour-intensive, low value-added activities.[356]Since Singapore's economy is a heavily trade-dependent one,[357]major investments are in the manufacturing industry. The industry was the major contributor to economic growth in 2010[358]as shown in the graph below:

Figure 12: Singapore GDP and Sectoral Growth Rates

[353] World Bank .2011. Supra note 349 p.46.
[354] 2009 Investment Climate Statement: Singapore. Bureau of Economic, Energy and Business Affairs.p.1 <http://www.state.gov/e/eeb/ris/other/ics/2009/117192.html> (accessed 26 April, 2011)
[355] Ibid. p.2.
[356] Ibid.p.2.
[357] Ibid
[358] See Ministry of Trade and Industry Economic Survey of Singapore 2010. Supra note 348 at 2-3.




Source: Economic Survey of Singapore, 2010

Like any other host State, Singapore offers a lot of incentives to foreign investors not only to attract but also to retain them. Singapore has an interesting arrangement whereby local laws give regulatory bodies wide discretion to modify regulations and new conditions.[359] Unlike the situation in Zambia were individuals, particularly ministers are mandated by statute to use discretionary powers in certain circumstances[360] hence creating room for abuse of these powers, it may appear that discretionary power under the Taiwan arrangement is not prone to abuse because of the many people involved. According to one Report, 'agencies use this [discretionary power] positively to adapt incentives or other services on a case by case basis to meet the needs of both foreign as well as domestic companies.'[361] The sector-specific approach to incentives has great potential to benefit the host State because it drives development in a particular desired direction in which investors would not ordinarily invest.

[359] Ibid
[360] See s.9 of the Mines and Minerals Act of 1995.
[361] See Ministry of Trade and Industry Economic Survey of Singapore 2010. Supra note 348 at 5.

It is for this reason that it has been remarked that incentives 'have become increasingly important for national policymakers who are trying to promote' specific investment projects.[362]It is not unusual for host States to point investors to invest in a particular field.

Singapore specifically offers numerous incentives to encourage foreign investors to start up business, particularly in targeted growth sectors.[363]The government also provides incentives and assistance to firms to automate and invest in labour-saving technology.[364] In addition, there are other measures put in place for the benefit of foreign investors. Foreign investors are not required to enter into joint ventures or cede management control to local interests, and local and foreign investors are subject to the same basic laws.[365] Further, Singapore places no restriction on reinvestment or repatriation of earnings or capital.[366] There are no discriminatory or preferential export or import policies affecting foreign investors. This practice adheres to the principles of national treatment and most favoured nation treatment. However, national treatment may not be accorded in the provision of subsidies/incentives or programmes to help develop local entrepreneurs and to assist local companies to expand and upgrade their operations.[367] The government does not require investors to purchase from local sources or specify a percentage of output for export. The government also does not require local equity ownership.[368]

A major complaint by most foreign investors is that relating to procedures. These are sometimes too bureaucratic, long and complicated. However, in Singapore, procedures for

[362] Blomstrom, M. and Ari Kokko. 2008. "The economics of foreign direct investment incentives". http://www2.hhs.se/eijswp/168.pdf (accessed 1st May, 2011)
[363]See Ministry of Trade and Industry. "Economic Survey of Singapore 2010 Supra note 348 at 38.
[364] Ibid
[365] 2009 Investment Climate Statement: Singapore. Bureau of Economic, Energy and Business Affairs.p.1 http://www.state.gov/e/eeb/ris/other/ics/2009/117192.html (accessed 26 April, 2011.)
[366] Ibid
[367] Exceptions in the area of investment: Singapore.http://www.mofa.go.sp/region/asia_paci/singapore/jsepa-6-2.pdf (accessed on 11th May,2011 )
[368] See 2009 Investment Climate Statement: Singapore. Supra note 335 at 47.

obtaining licences and permits are generally transparent and not burdensome, but some exceptions apply.[369] This enhances investor promotion efforts. Some scholars on the matter have provided evidence showing that Investment Promotion Agencies may stimulate inflows of FDI by alleviating the burden of red tape.[370] In Singapore, procedures can be faster for investors in areas considered national priorities.[371]To address the concerns regarding cumbersome licensing procedures, Singapore has established an online licensing portal to provide a one-stop-application point for multiple licences.[372]

It should be noted that Singapore does not only offer incentives and favourable conditions to foreign investors but also imposes certain restrictions on their activities where necessary. In the field of labour for instance, Singapore imposes a ceiling on the ratio of unskilled /semi-skilled foreign workers that a company can employ, and charges a monthly levy for each unskilled or semi-skilled foreign worker.[373] Further, despite Singapore's general openness to foreign investment, in some cases, Articles of incorporation may include shareholding limits that restrict ownership in corporations by foreign persons.[374]

In any foreign investor-host country relation, disputes between the parties are inevitable despite having protection guarantees in place or offering numerous incentives. The institutions that handle such disputes are usually a source of concern to foreign investors because 'they frequently do not perceive the courts of host States as sufficiently impartial to

[369] Ibid
[370]Harding, T. and Beata S. Javorcik. 2008."Roll out the red carpet and they will come." <http:// economics.ox.ac.uk/member/beta/javorak/IPA.pdf> (accessed on 6th May, 2011)
[371] Ibid

[372] 2009 Investment Climate Statement: Singapore. Supra note 335 at 48.

[373] Ibid
[374] Ibid

settle investment disputes.'[375] International institutions are usually preferable. Singapore has established institutions to facilitate the handling of such disputes. Examples include institutions such as the Singapore International Arbitration Centre (SIAC) and the Singapore Mediation Centre (SMC) which actively promote mediation and reconciliation for settling commercial disputes.[376]

The establishment of these institutions is vital in facilitating FDI in Singapore because, as has been rightly observed, 'an important part of a favourable legal framework for foreign investment is the availability of appropriate mechanisms for the settlement of disputes.'[377] The institutions mentioned above add some credibility to the dispute settlement mechanism.

[375] Schreuer, C., 2009. International centre for settlement of investment disputes (ICSID) p. 1. http://www.univie.ac.at/intlaw/wordpress/pdf/100-icsid-epil.pdf (accessed 8th may, 2011)
[376] 2009 Investment Climate Statement: Singapore. Supra note 354 at 48.
[377] Schreuer, C. 2009. Supra note 375 at 1.

### 4.3.4. EXAMPLES OF BITS AND/OR INVESTMENT AGREEMENTS

The figure below shows the BITs concluded between Singapore and other States by 2010.

Figure 13: Singapore Bilateral Agreement

(Total number of Bilateral Investment Treaties concluded, 1st June 2010)

| **Partner** | **Date of signature** | **Date of entry into force** |
|---|---|---|
| Bahrain | 27-oct-03 | 08-Dec-04 |
| Bangladeshi | 15-May-00 | 13-Jan-04 |
| Belgium and Luxemburg | 17-Nov-78 | 27-Nov-80 |
| Cambodia | 04-Nov-96 | 24-Feb-00 |
| Canada | 30-Jul-71 | 30-Jul-71 |
| China | 21-nov-85 | 07-Feb-86 |
| Czech Republic | 08-April-95 | 08-Oct-95 |
| Egypt | 15-April-97 | 20-Mar-02 |
| France | 08-Sep-75 | 18-Oct-76 |
| Germany | 03-Oct-73 | 01-Oct-75 |
| Hungary | 17-Apr-97 | 01-Oct-75 |
| Indonesia | 16-feb-05 | 21-Jun-06 |
| Jordan | 16-May-04 | 22-Aug-05 |
| Korea | 02-Dec-08 | 08-Mar-09 |
| Kuwait | O5-Nov-09 | --- |
| Lao | 24-May-97 | 26-Mar-98 |
| Latvia | 07-Jul-98 | 18-Mar-99 |
| Libyan Arab Jamahiriya | 08-Apr-09 | ----- |
| Mauritius | 04-Mar-00 | 19-Apr-00 |
| Mexico | 12-Nov-09 | --- |
| Mongolia | 24-Nov-09 | ---- |
| Netherlands | 16-May-72 | 07-Sep-96 |
| Oman | 10-Dec-07 | 12-Oct-08 |
| Pakistan | 27-Feb-03 | ----- |
| Peru | 08-Mar-95 | 04-May-95 |
| Poland | 03-Jun-93 | 29-Dec-93 |
| Saudi Arabia | 10-Apr-06 | 05-Oct-07 |
| Slovakia | 13-Oct-06 | 06-Jun-07 |
| Slovenia | 25-Jan-99 | 08-Sep-00 |
| Sri Lanka | 09-May-80 | 30-Sep-80 |
| Switzerland | 06-mar-78 | 03-May-78 |
| Taiwan | 09-Apr-90 | 09-Apr-90 |
| Turkey | 19-Feb-08 | 27-Mar-10 |

*Source:* United Nations Conference on Trade and Development, 2010

The figure shows that Singapore has concluded a lot of bilateral investment treaties. The regional representation is also wide and attests to the fact that investor protection is good.

As mentioned earlier in this chapter, Singapore's economy and the FDI are heavily trade-dependent. Accordingly, a trade agreement, the Singapore-United States Tree Trade Agreement (FTA), has been chosen for the analysis of salient clauses related to investor protection. Chapter 15 of the FTA is wholly devoted to investment matters.

1. The FTA commits the parties to the free transfer of capital, interest, profits, dividends, capital gains, royalty payments, management fees, licensing fees and technical assistance.[378]All these are unimpeded by regulatory restrictions.
2. The FTA contains strong investor protection provisions relating to expropriation and due process; provisions are in place for fair market value compensation for any expropriated investment.[379]Article 15:6 (2) specifically provides that compensation shall be paid without delay, be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken and be fully realisable and freely transferable.[380]
3. For Singapore, the FTA contains specific conduct guarantees to ensure that Government linked companies (GLCs) will operate on a commercial and non-discriminatory basis towards the U.S firms. GLCs with substantial

[378] See United States –Singapore Free Trade Agreement, Article 8:10 (1) (c). See also Article 15:7.
[379] See United States-Singapore Free Trade Agreement, Article 15;6 (1) to (4)
[380] Ibid. Article 15:6 (2)

revenues or assets are also subject to enhanced transparency requirements under the FTA.[381]

4. The FTA enhances transparency in development and application of regulations by requiring, to the extent possible, a party to consult with stakeholders before issuing regulations, to provide advance notice and comment on periods for proposed rules, and to publish all regulations.[382]Host States have often times been accused of abusing their sovereign power to regulate by putting in place 'expropriatory' regulatory measures.[383] It is submitted that this clause in the FTA will help address such concerns.
5. There are no performance requirements on the parties. Article 15:8 (1) provides as follows: Neither Party may impose or enforce any of the following requirements;

    a) to export a given level or percentage of goods or services;
    b) to achieve a given level or percentage of domestic content;
    c) to purchase, use, or accord a preference to goods produced in its territory, or purchase goods from persons from its territory.

6. There is no obligation forcing the transfer of technology,[384]
7. Necessary financing for the investment can be obtained from any source.[385]

The foregoing clauses on investment guarantees in the Singapore/US FTA are basically similar to those cited under the IPPA framework and the ZDA Act in Zambia. Provision is

[381] Ibid. Article 12:3 (d)
[382] Ibid. Article 8:12 (a) - (d).
[383] Ibid.
[384] Article 15:8 (1) (f)
[385] See United States-Singapore Free Trade Agreement. Annex 10 C. Paragraph 6 (a).

made for what would be called ‘standard Investment protection issues’ that is to say, expropriation, externalisation of funds, fair and equitable treatment and creeping expropriation.

The foregoing section has brought out the following distinctive features relating to Singapore such as the absence of ministerial discretion in respect of power to modify existing or introduce new regulations. The Zambian situation is different as discretionary power is in some cases vested in the ministers. It is submitted that by vesting such power in an individual, the Zambian situation encourages abuse of discretionary power.

With regard to wage system, there is no minimum wage law in Singapore and the wage system is flexible. The government follows a policy of allowing free market forces to determine wage levels. Zambia has prescribed a statutory minimum wage but enforcement is still a challenge. On the types of foreign investment, Singapore has concentrated investments on targeted sectors mainly in manufacturing and the system has proved effective. In contrast, Zambia appears to be embracing all the sectors. While this might be good in terms of diversification, it may well fragment her efforts in this area.

## 4.4. TAIWAN

### 4.4.1. POLICIES AND LEGISLATION ON INVESTMENT

In Taiwan, regulations governing foreign direct investment are principally derived from the Statute for Investment by Foreign Nationals (SIFN) and the Statute for Investment by

Overseas Chinese (SIOC).[386] Both the SIFN and SIOC specify that foreign-invested enterprises must receive the same regulatory treatment accorded local firms.[387] This is consistent with the requirements of Article III of the General Trade and Tariffs Agreement (GATT) 1994 on national treatment.

Like in other jurisdictions, the income Tax Act plays a key role FDI in Taiwan. Amendments to this Act are therefore not uncommon. On 28 May, 2010, the Taiwan legislature (the Legislative Yuan) passed an amendment to the Income Tax Act to lower the corporate income tax rate from 20 percent to 17 percent.[388] The new lower rate should boost Taiwan's competitiveness by bringing the corporate tax rates in line with other Asian-Pacific region, including Singapore's 17 percent rate and Hong Kong's 16.5 percent rate.[389] In addition, the Legislature passed the Statute for Industrial Innovation (SII) on April 16, 2010 to attract capital investment in Taiwan for research and development (R&D), innovation and industry upgrading projects.[390] It has been observed regarding the new statute that 'tax incentives on operational headquarters and logistics centres no longer exist under the SII, although certain tax exemptions on logistic centres are still available under other laws governing airport areas and free trade zones.'[391] The SII no longer provides operational headquarters tax incentives. The result is that without the SUI tax provisions, companies with operational headquarters in Taiwan will face taxation on dividends and royalties received from their foreign affiliates.[392]

[386] 2009 Investment Climate Statement –Taiwan.p.3 <http://www.google.com.zm/investment+policiesand+legislationtaiwan> (accessed 5th May,2011)
[387] Ibid.
[388] Taiwan Tax Alert. 2010.p.1. http://www.deloitte-tax-news-de/stevern/internationales-streurrecht/files/uis-taiwawan-tax-alert-030620 (accessed 4th May, 2011.)
[389] Ibid
[390] Ibid.
[391] Ibid

[392] Taiwan. p 4. <http://www.ictg.co.uk.khadmin/publications/pdf/4032pdf.> (accessed 5th May,2011)

### 4.4.2. TAXATION

In Taiwan, Value Added Tax (VAT) is charged at the rate of 5 percent. It is locally referred to as "Business tax" and applies to business persons in all industries under the VAT system.[393] Further, commodity tax (excise duty) of between 8 percent and 35 percent by its price or certain amount by its volume, is imposed on certain designated commodities, whether manufactured locally or imported.[394] Capital gains or gains on disposal of properties are taxable with the exception of the gain from the sale of land, where land value incremental tax is levied instead.[395] Similarly, capital gain on sale of securities is currently also tax exempt and securities transaction tax is levied instead.[396] Export sales and export-related services are subject to zero tax rates.[397] With regard to tax on interest, interest received by a profit seeking enterprise is taxable as non-operating income.[398]

An interesting feature of Taiwan's tax system is that relating to location of the investment project. A foreign company's branch or any other permanent establishment in Taiwan is subject to income tax only on its income from Taiwan source. If the foreign enterprise has neither a branch nor a business agent in Taiwan, it is subject to withholding tax on its Taiwan source income.[399] Generally, all Taiwan source income derived by a non-resident with no permanent establishment in Taiwan will be subject to withholding tax assessments in Taiwan at 20 percent standard rate and losses may be carried forward for 5 years if tax returns are

[393] Taiwan Tax Alert. Supra note 388 at 1.
[394] Ibid
[395] Corporate Taxation System in Taiwan. p.2. http://www.internationaltaxreview.com/pdfs/taxdata/corporate_tax_system_in_taiwan.pdf.(accessed 5th May, 2011)
[396] Ibid.
[397] Ibid.
[398] Ibid.
[399] Ibid. p.10.

certified both in the years the losses occurred and in the years the losses were credited against taxable income, but they cannot be carried back.[400]

Taiwan has an imputation tax system which is designed to reduce overlapping tax payments by shareholders facing both corporate tax at company level and individual tax at individual level.[401] Under this system, the resident individual shareholder is allowed to offset the corporate income tax paid against individual income tax liabilities. On the other hand, dividends paid to non-resident shareholders are subject to 20 percent withholding tax.[402] The new system also allows government to levy a 10 percent profit retention tax on undistributed earnings.[403]

### 4.4.3. STATE PRACTICE ON INVESTMENT PROMOTION AND PROTECTION

It has been observed that countries often employ a mix of incentives to channel investment for development of a particular area or region.[404] Taiwan is among such countries. A peculiar feature of Taiwan's incentive programme is that it is responsive to the emerging challenges of society. That this is so is evidenced by the nature of incentives offered. For instance, there is an incentive programme on accelerated depreciation and tax credits for the investments in emerging or strategic industries, pollution-control systems, production automation and energy conservation.[405]

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[400] Corporate Taxation System in Taiwan. Supra note 395 at 2.
[401] Ibid.
[402] Ibid
[403] Ibid
[404] UNCTAD. 2008. Tax Incentives and Foreign Direct Investment. Advisory studies No.16p. 12. <http://www.> (accessed 16 September 2010)
[405] Ibid

In addition to the sector-specific incentives aforementioned, equipment for Research and Development (R&D) purposes can be brought into Taiwan duty-free[406]and there is a five-year tax holiday for new investments and specifically for the establishment or expansion of scientific, technical and investment enterprises and for investment in transport infrastructure.[407] Other incentives include low-interest loans for developing new and/or cutting edge products, upgrading traditional industries, and importing automation or pollution-control equipment.[408]

Taiwan's other incentive programmes that have specific targets are incentives for manufacturing firms to locate factories in designated industrial parks and they include free rent for the first two years, a 49 percent discount on rent for two years and a 20 percent discount on rent in the fifth and sixth year.[409]Under another incentive programme, state-owned land is available for investors rent-free for the first four years and 50 percent off for the next six years.[410]Under yet another programme, Companies that invest a specific amount or employ a specific additional number of persons in resource poor or less-developed rural areas may deduct 20 percent of the invested amount from their profit seeking enterprise income tax over a five year period.[411]The rationale behind this array of incentives is easy to understand, it is to channel different development projects in specific directions. It is also prudent to spread the net wide as has been done because 'FDI from developed and developing countries are attracted to different selective policies.'[412]

[406] Corporate Taxation System in Taiwan. Supra note 395 at 2.
[407]KPF. Doing Business in Taiwan. p. 15.
[408] Ibid.
[409] 2009 Investment Climate Statement –Taiwan. Supra note 395 at 6
[410] ibid
[411]KPF. Doing Business in Taiwan. Supra note 407 at 23.
[412] Banga, R. 2003. "Impact of Government Policies and Investment Agreements on FDI Inflows." p.5. <http://www.icrier.org/pdf/wp116.pdf > (accessed 8th May, 2011)

Besides incentives, other conditions do exist that are favourable to the foreign investors business. There are relatively few restrictions on converting or transferring direct investment funds, this means that declared earnings, capital gains, dividends, royalties, management fees, and other returns on investments can be repatriated at any time.[413] Banga Rashmi has remarked that 'removal of restrictions attract aggregate FDI'[414] It may appear Taiwan is using this approach in its investment strategy. The Investment Climate Report records that 'in mid-2006, Taiwan authorities started permitting local currency loans obtained from local banks to serve as sources of foreign direct investment.'[415] In addition, foreign companies may invest in state-owned firms undergoing privatisation and are eligible to participate in publicly-financed research and development programmes.[416]Foreign investors can invest without fear of expropriation because 'under Taiwan law, no venture with 45 percent or more foreign investment can be nationalised for a period of 20 years after the venture is established.'[417] As in other jurisdictions, expropriation can be justified only for national defense needs, and 'reasonable' compensation must be given.[418]

With regard to procedures in accessing required permits or approvals to facilitate business, the following excerpt is instructive of the practice in Taiwan:

> *Taiwan's science-based industrial parks and export processing zones have simple and transparent bureaucratic procedures for the investment application process. Outside of these areas, the Department of Investment Services (DOIS) functions as the coordinator between investors and all agencies involved in investment process.*

[413] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 19.
[414] Banga, R. 2003. Supra note 412 at p.6
[415] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 19.
[416] Ibid
[417] Ibid
[418] See August Reinisch, 2009. "Expropriation in International Investment Law." p.5 Http://WWW. See also UNGA Res 1803 (XVII) 1962 and 3171 (XXVIII) 1973. No government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore, or merely "appropriate" compensation.

> *Taiwan has simplified work-permit procedures for foreign white-collar employees. In March 2004, the council of Labour Affairs (CLA) set up a single window to issue work permits for all white-collar workers. It takes 7 to 10 days for the CLA to issue work permits. The work permit may be extended indefinitely as long as the employer considers the employment necessary.*[419]

The regulatory system is quite fair with regard to capital markets and portfolio investment. This is because Taiwan abolished a complicated regulatory system governing foreign portfolio investment in October 2003.[420] Foreign portfolio investors are no longer subject to foreign ownership limits or investment fund limits.[421] Restrictions on capital flows relating to portfolio investment have been removed and the banking, insurance and securities industries have been liberalised and opened to foreign investment.[422] Access to Taiwan's securities markets by foreign institutional investors has also been broadened.[423] It is submitted that these measures are good for the investment sector because, as Banga correctly observes, the role played by host government's policies in attracting FDI is cardinal[424] and removal of restrictions on investor activities is no doubt always a welcome move.

As earlier mentioned, most foreign ownership limits have been removed and the few that have remained have had the rates adjusted upwards.[425] For example there is a 20 percent limit on foreign direct investment on cable television broadcast services, but foreign ownership of up to 60 percent is allowed through indirect investment via a Taiwan entity.[426] In July 2007,

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[419] Ibid.
[420] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 20.
[421] Ibid
[422] Ibid
[423] Ibid
[424] Banga, R. 2003. Supra note 412 at 2.
[425] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 21.
[426] Ibid.

the foreign ownership limit on airline companies was raised from 33 percent to 49.99 percent, with a separate limit of 25 percent for any single foreign investor.[427]

Although scholarly opinion on the benefits of investment tax credits is still divergent,[428] Taiwan administers an investment tax credit in which companies may deduct 5 percent to 20 percent of the amount invested from their profit–seeking enterprise income tax over a five year period.[429] This facility is limited to investment in the following:

a) automation equipment or technology;
b) recycling and pollution control equipment or technology;
c) equipment or technology for use of new and clean energy;
d) equipment or technology for reducing greenhouse gas emissions and enhancing energy efficiency.[430]

It may appear Taiwan is moving with the changing times because these incentives are clearly in response to present-day challenges of climate change.

Despite the foregoing incentives and favourable investment climate, restrictions in investor's activities do occur in some cases. For instance, a foreign investor must apply for and obtain Foreign Investment Approval (FIA) from the Investment Commission in the Ministry of Economics before investing in Taiwan.[431]

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[427] Ibid.
[428] Gugl, E. and George R. Zodrow. 2006. "International tax competition and tax incentives in developing countries." p.2. <http:aysps.gsu.edu/isp/foles/0440-Guglzodrow.pdf> (accessed 8th May, 2011)
[429] 2009 Investment Climate Statement -Taiwan. Supra note 386 at 21.
[430] KPF. Doing Business in Taiwan. Supra note 407 at 22.
[431] Ibid.

In terms of the nature of investments the foreign investors may participate in, the Executive Yuan or Parliament has developed a Negative List of industries prohibited or restricted from investment by foreigners and Overseas Chinese.[432] The prohibited industries include *inter alia* electric power supply, gas supply, water supply.[433] More often than not, prohibitions are usually for security reasons or public health or environmental reasons.

Further, like domestic firms, foreign-invested companies must be located in areas zoned for appropriate industrial or commercial use.[434] Manufacturing firms located in export-processing zones and science-based industrial parks are required to export all their production to obtain tariff-free treatment of production inputs. However, these firms may sell on the local market upon payment of relevant import duties.[435]

Despite the restrictions, investor protection in Taiwan is good as confirmed by the following statements: there have been no reports of private or official efforts to restrict the participation of foreign-invested firms in industry standards-setting consortia or organisations.[436] Removal of restrictions on operations of foreign firms is one of the many ways in which host governments attract and retain foreign investments.[437] Political stability also plays a major role. In terms of political violence there have been no reports of politically motivated damage to foreign investments.[438] It is worth mentioning here that the so called People's Republic of China factor in relation to Taiwan's political stability has no real effect. Despite the 'two China syndrome,' it is submitted that the threat of political instability is not immediate and is balanced by a stable economic setting and other favourable factors.

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[432] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 22.
[433] KPF. Doing Business in Taiwan. Supra note 407 at 9.
[434] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 24.
[435] Ibid
[436] Ibid
[437] Banga, R. 2003. Supra note 412 at 1.
[438] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 23.

With regard to expropriation and compensation, no foreign-invested firm has ever been nationalised or expropriated in Taiwan and there have been no examples of 'creeping expropriation' or official actions tantamount to expropriation reported.[439]This is remarkable considering that 'expropriation' is so wide as demonstrated by Arbitral practice.[440]

Despite this rosy picture on Taiwan's protection of investors, disputes are bound to arise some day and the manner in which disputes between foreign investors and the host State are handled is always a source of concern in FDI. This is more so for Taiwan because she is not a member of the International Centre for the Settlement of International Disputes (ICSID) or the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitrage Awards.[441] As earlier mentioned, foreign investors have very little confidence in domestic courts of the host States. Fortunately for Taiwan, her non-membership to the international bodies has been mitigated by its local enforcement of international awards. 'Judgements of foreign courts are enforced in Taiwan by local courts on a reciprocal basis.'[442] It is on record that Investment disputes with the Taiwan authorities are not common,[443] but in the event that a dispute does arise with regard to any aspect of the investment and the matter is adjudicated upon by a foreign court, such judgment can be enforced locally. [444]

[439] Ibid
[440] See Wena Hotels Ltd V. Arab Republic of Egypt, Award of 8th December 2000. 6 ICSID Reports 68. See also Methanex v United States of America, NAFTA Arbitral Tribunal. Final Award on Jurisdiction and Merits, 3 August 2005.
[441] 2009 Investment Climate Statement –Taiwan. Supra note 286 at 23.
[442] Ibid
[443] Ibid
[444] See Randall,P., 2000. "The evolving regulatory framework for the enforcement of arbitral awards in the PRC." Asian-Pacific Law and Policy Journal. http://www.hawaii.edu/aplpj

### 4.4.4. EXAMPLES OF BITS AND/OR INVESTMENT AGREEMENTS

Taiwan has concluded Bilateral Investment Agreements with the following 26 countries; Argentina, Belize, Burkina Faso, Costa Rica, Dominica, El Salvador, Guatemala, Honduras, India, Indonesia, Liberia, Malaysia, Macedonia, the Marshall Islands, Nicaragua, Nigeria, Panama, Paraguay, the Philippines, Saudi Arabia, Senegal, Singapore, Swaziland, Thailand, Malawi and Vietnam as shown in the figure below:.

Figure 14: Taiwan Bilateral Investment Agreement

(Total number of Bilateral Investment Treaties concluded, 1st June 2010)

| **Partner** | **Date of Signature** | **Date of entry into force** |
|---|---|---|
| Belize | 16-Jan-99 | ------ |
| Costa Rica | 25-Mar-99 | 08-Oct-04 |
| Dominican Republic | 05-Nov-99 | 27-Nov-01 |
| El Salvador | 30-Aug-96 | 25-Feb-97 |
| Guatemala | 2-Nov-99 | 01-Dec-01 |
| Honduras | 26-Feb-96 | --- |
| India | 17-oct-02 | 28-Nov-02 |
| Macedonia | 09-June-99 | 09-June-99 |
| Malawi | 22-Apr-95 | --- |
| Malaysia | 18-Feb-93 | 18-Mar-93 |
| Nicaragua | 29-Jul-92 | 18-Mar-93 |
| Nigeria | 07-Apr-94 | 07-Apr-94 |
| Panama | 26-Mar-92 | 14-Jul-92 |
| Paraguay | 06-Apr-92 | 14-Jul-92 |
| Philippines | 28-Feb-92 | 28-Feb-92 |
| Saint Vincent and the Grenadines | 17-Dec-09 | 01-Feb-10 |
| Saudi Arabia | 31-Oct-00 | --- |
| Senegal | 24-Oct-97 | --- |
| Singapore | 09-Apr-90 | 09-Apr-90 |
| Swaziland | 03-Mar-98 | ----- |
| Thailand | 30-Apr-96 | 30-Apr-96 |
| Vietnam | 21-Apr-93 | 23-Apr-93 |

*Source:* United Nations Conference on Trade and Development, 2010

The Taiwanese use of a 'Negative List' for industries prohibited or restricted from investment by foreigners is commendable. It ensures that specified sectors are exclusively reserved for the local investors and that the domestic industries are protected. This aspect has not been fully enforced under the Zambian situation and foreign investors have very little restrictions with regard to what sectors to invest in.

## 4.5. CONCLUSION

The chapter has discussed the selected countries respective government policies on investment, taxation procedures and state practice on IPPA concept in general and investment protection in particular. It is submitted that there are a lot of common features in the policies and practice of the selected states which are also common to Zambia. However, there are a few features peculiar to some states that Zambia can draw lessons from. Common features include the corporate tax of 17 percent in all the states studied, use of tax incentives and sector-specific incentives to attract and retain investors, the practice of carry-over of losses, application of national treatment and most favoured nation treatment, fair and equitable treatment for investors, and numerous amendments to the Income Tax Acts.

The practice in Botswana deserves particular mention because it is different and may offer valuable lessons to Zambia. The use of existing legislation in negotiating agreements, the establishment of joint ventures between government and private companies to run the mining industry, the special place of diamond mining and prudent use of proceeds from the diamonds and creation of the Sovereign Wealth Fund to allow for investment of these proceeds into public goods are lessons that Zambia can learn from. Other possible learning points are the state's reserve power to appropriate diamond mining companies, inclusion of tax agreements in the Income Tax Act but making it subordinate to the principal Act, the procedure on

negotiating the mining agreements and requirement to lay such agreements before National Assembly for ratification. This would guard against concluding 'special' agreements that are ultra vires as was the case with the cancelled mining development agreements in Zambia.

Under the Singapore state practice, the grant of discretionary powers to statutory bodies and not individuals (particularly ministers) deserves commendation because it reduces on chances of abuse of such discretionary power.

Generally, it is submitted that all the countries studied show that the success of the IPPA concept can be attributed to investment promotion and not investment protection. Investment promotion is concerned with the attraction of investors through favourable investment conditions such as generous incentives while investment protection is concerned with the provision of guarantees against non-commercial risks such as expropriation in order to secure foreign investments against arbitrary dispossession by the host State. None of the countries has brought out significant lessons specifically on investment protection. This attests, as this study has argued, to the fact that there are serious legal challenges with regard to investment protection.

# 5 CHAPTER FIVE: SUMMARY, RESEARCH FINDINGS AND RECOMMENDATIONS.

## 5.1 SUMMARY

This study has brought to the fore the legal challenges of investor protection in light of a people's right to the enjoyment of its country's natural wealth. It has confirmed that the reason for the many challenges of foreign investment protection is due to the 'failure of the international community so far to reach consensus at multilateral level on foreign investment rules.'[445] It has further confirmed that 'core investment protection issues raise developmental-related questions'[446] and established that consequently this impedes national development. It has demonstrated that there are competing interests between foreign investor protection and ensuring respect for citizen's right to the enjoyment of their country's natural wealth and maintaining a country's development agenda. It has argued that foreign investor protection and ensuring respect for citizen's right to the enjoyment of their country's natural wealth cannot be effectively implemented at the same level because successful implementation of either one of them will be at the expense of the other. Against this background, it has argued that respect for the right to enjoyment of a country's wealth is paramount.

Chapter One discussed the numerous treaties and conventions to which Zambia is party and their ramifications. It showed that one of the obligations that Zambia has assumed as a consequence of ratifying and acceding to the various international legal instruments is that of ensuring that her natural wealth is used primarily for the benefit of her citizens and for the

[445] See Sauvant K., 2005. 'Foreign direct investment and development' in Sauvant and Weber (eds.) International Investment Agreements: Key Issues. Chapter 27.
[446] Muchlinsky, P., 2008. "Policy Issues" in The Oxford Handbook of International Investment Law. Oxford: Oxford University Press. p.31.

development of the country. It chronicled the many international legal instruments that Zambia has ratified that oblige her to uphold the right of her people to the enjoyment of the natural wealth of their country.[447] It has argued that the signing and subsequent ratification and/or accession of each of these treaties, conventions, agreements or by whatever name called, places upon Zambia a number of obligations, most of which are quite onerous and sometimes contradictory and therefore pose challenges in fulfilling them.

In chapter two, the policy issues that inform the law on Investment Promotion and Protection in Zambia were discussed. It was demonstrated that policy is focused more on investment promotion with particular emphasis on enhancing opportunities for the domestic investor. It further demonstrated that in line with the policy prescriptions, the ZDA Act, which is the legal framework on investment, is skewed towards investment promotion than investment protection. It was further demonstrated that although the Act has some provisions on investment protection, these do not form the core issues under it. In relation to implementation of the IPPAs, it was demonstrated that there is a high level of adherence to the law. A benefit analysis of the IPPA standard template established that there are more benefits accruing to government than to the other party to the agreement. A critical analysis of the current negotiation guidelines for IPPAs established that the guidelines have some deficiencies and require revision and regular updating.

Chapter Three examined the legal and regulatory framework before and after the era of DAs in Zambia. It demonstrated in relation to the pre-DA era that while the law was adequate, enforcement was extremely poor. It further demonstrated that there was blatant disregard for the law by the government. It established that the cause of the problems that occurred in the

[447] These include the United Nations Charter, the COMESA Treaty, the African Charter on Human and Peoples Rights, the Charter of Economic Rights and Duties, the International Conference on the Great Lakes Region (ICGLR) Protocol on the Illegal exploitation of Natural Resources and the SADC Protocol on Mining.

implementation of the DAs which consequently necessitated their cancellation was the flouting of the law by government in the name of protecting foreign investors and accommodating their 'special' interests. A critical analysis of the contents of selected DAs demonstrated that the mining companies had more benefits under all the agreements than did the government. Regarding the introduction of a new fiscal regime in the face of stabilization clauses in the Agreements, it was established that the practice was not unprecedented and it was argued that the changes made were necessary in order to enable the people of Zambia benefit from their country's wealth. A comparison of the implementation process between the DAs and IPPAs established that there has been an attempt to introduce corrective measures to prevent the recurrence of the mistakes in the DAs. It established that the IPPA arrangement has better chances of concluding good agreements for the country. It demonstrated that IPPA negotiations are guided by the law, there is a restriction on the use of stabilization clauses, tax exemptions are not provided for in the agreement itself but reference is made to the tax legislation in force and there is restrictive use of discretionary powers by the executive.

Chapter Four drew lessons on the implementation of IPPAs from two of the East Asian Tigers and from the Republic of Botswana in terms of government policies and legislation on FDI, related taxation procedures, and examination of some pertinent clauses in one Bilateral Investment Treaty (BIT) executed by Singapore. The basis for the selection of the above aspects was that under the DA experience in Zambia, these issues were contentious and would therefore provide good learning points. The chapter established that there are a lot of common features in the policies and practice of the comparator jurisdictions which are also common to Zambia. It demonstrated that the corporate tax range of 17 percent, the generous use of tax incentives and sector-specific incentives to attract and retain foreign investors, the

practice of carry-over of losses, the application of national treatment and most favoured nation treatment, fair and equitable treatment for investors, effecting numerous amendments to the Income Tax Acts and creation of investment promotion agencies were common practice. It argues that what distinguishes one country from the other in terms of successes scored in implementing the IPPA concept is the manner of implementation of these common policies and laws.

The chapter further established the following learning points from Botswana; the application of a legislated fiscal regime, the establishment of joint ventures between government and private companies to run the mining industry, the special place of diamond mining and government's participation in the industry, the prudent use of proceeds from the diamonds, the creation of the Sovereign Wealth Fund to allow for investment of proceeds from diamond mining into public goods such as roads, schools and hospitals. Further learning points established are the state's reserve power to appropriate diamond mining companies, inclusion of tax agreements in the Income Tax Act but making them subordinate to the principal Act, the procedure on negotiations where no negotiations are allowed except for diamond mining because a legislated fiscal regime applies to non-diamond mining and subjecting the fiscal regime for diamond mining to a case to case negotiation of key provisions, including taxation and government participation.[448] It is argued that although Zambia negotiated the DAs with foreign investors on a case by case basis, the negotiation process was fraught with legal irregularities. The requirement to lay agreements before National Assembly for ratification was established as another learning point. It was argued that ratification of agreements by Parliament would guard against concluding 'special' agreements that are ultra vires the law as was the case with the cancelled mining development agreements in Zambia.

[448]See UNCTAD Report 2003. Investment Policy Review: Botswana. p.49. <http://www.unctad.org/en/docs/iteipcmisc10-en.pdf.> (accessed 4th May, 2011)

Further learning points noted are the determination of additional tax relief for foreign investors which takes into account the number of nationals that will benefit in terms of employment and skills training and provisions made for the eventual replacement of non-resident employees by Botswana citizens. It was demonstrated that these measures are in the interest of the nationals in order to ensure their enjoyment of the country's natural wealth.

The chapter also demonstrated the Asian Tigers' successes with regard to investment protection and why they are renowned for good foreign investor protection. It established that Singapore has not expropriated property owned by foreign investors[449]and that no foreign-invested firm has ever been nationalised or expropriated in Taiwan and there have been no examples of 'creeping expropriation' or official actions tantamount to expropriation reported.[450] It was noted that Singapore uses Investment Guarantee Agreements which mutually protect nationals or companies of either country against war and non-commercial risks of expropriation and nationalisation for an initial period of 15 years and continue thereafter unless otherwise terminated.[451]It is argued that whether a country uses investment guarantee agreements or provides for such guarantees in a separate agreement called by a different name, the effect is the same. It was also noted that Singapore has established institutions to facilitate the handling of commercial disputes such as the Singapore International Arbitration Centre (SIAC) and the Singapore Mediation Centre (SMC) which actively promote mediation and reconciliation for settling commercial disputes.[452] It is argued however, that while the institutions mentioned above may add some credibility to the

[449]See UNCTAD Report 2003. Investment Policy Review: Singapore. p.47. <http://www.unctad.org/en/docs/iteipcmisc10-en.pdf.> (accessed 4th May, 2011)
[450]Ibid
[451] 2009 Investment Climate Statement: Singapore. Bureau of Economic, Energy and Business Affairs.p.1 <http://www.state.gov/e/eeb/ris/other/ics/2009/117192.html> (accessed 26 April, 2011 )
[452]2009 Investment Climate Statement: Singapore. Supra note 335 at 48.

dispute settlement mechanism from the foreign investor's viewpoint, their contribution to the good investor protection reputation of the Asian Tigers is minimal. Similarly, Taiwan's local enforcement of international awards was noted as 'Judgements of foreign courts are enforced in Taiwan by local courts on a reciprocal basis.'[453] It is argued that this measure, like the one on dispute resolution, has no real impact on investor protection. Consequently, it is submitted that the Asian Tigers do not provide any valuable learning points for Zambia in this regard. This submission also applies to the tax system in Taiwan which has an interesting feature relating to location of the investment project. It is noted that this is peculiar to Taiwan due to its historical background with China and therefore does not provide any lessons for Zambia.

The learning point under the Singapore state practice is the grant of discretionary powers to statutory bodies and not individuals (particularly ministers). It is argued that the measure reduces the chances of abuse of such discretionary power. Another learning point is the major role that political stability plays in investor protection. It was established that in terms of political violence, there have been no reports of politically motivated damage to foreign investments in Taiwan. It is submitted that similarly, Zambia has enjoyed political stability since independence in 1964 and the lesson here is to maintain the peace in order to enhance investor confidence in this area.

Generally, the chapter established that the success of the IPPA concept can be attributed more to investment promotion than investment protection in all the countries studied. None of the countries has brought out significant lessons specifically on investment protection. This attests, as this study has argued, to the fact that there are serious legal challenges with regard to investment protection.

[453] 2009 Investment Climate Statement –Taiwan. Supra note 386 at 23.

## 5.2 RESEARCH FINDINGS

The main findings of the study are as follows:

### 5.2.1 LOPSIDED NATURE OF DAs

All the four DAs analysed had more benefits to foreign investors than government. Under the Mopani DA, out of the 189 clauses and sub-clauses contained in the agreement, 43 clauses were for the benefit of Government alone. This represents 22.8 percent of the total benefits in the agreement. The clauses which were for the benefit of the company alone were 61; this represents 32.3 percent of the benefits. The remaining 85 clauses were for the benefit of both parties. This represents 45 percent of the benefits. In the Chambishi Mine DA, out of 152 operative paragraphs of the agreement analysed, 41 clauses were for the benefit of the government alone. This represents 27.0 percent of the total benefits. 53 clauses, representing 34.9 percent of the total benefits were for the mining company alone and the number of clauses which were for the benefit of both the government and the company is 58. This represents 38.2 percent of the total benefits.

Under the Kansanshi DA, 72 out of a total number of 250 clauses were for the benefit of the government, 75 clauses for the benefit of the company and the remaining 103 clauses were for the benefit of both the government and the company. This represents 28.7 percent of the total benefits to the government, 30.0 percent to the company and 41.3 percent to both parties. The Chambishi Metals DA had the following figures; 30 percent benefits to the government, 36 percent to the mining company and 42 percent to both the government and the company.

The DAs analysed were executed between the years 1997 and 2000. In terms of the trend analysis of benefits profiled by year, the results revealed that the pattern of the benefits analysis to GRZ showed a downward trend. Save for the case of Chamhishi Metals DA which was at 30 percent, GRZ progressively benefited less from the DAs from 29 percent to 23 percent. The situation with regard to benefits to the mining companies was the exact opposite. There was an upward trend in benefits from the DAs. Save for Mopani Mines at 32 percent, the mining companies progressively benefitted more over the years from 30 percent to 36 percent.

### 5.2.2 ADVERSE LEGAL PROVISIONS IN DAs

#### 5.2.2.1 GOVERNMENT'S WAIVER OF ITS SOVEREIGN IMMUNITY

The Zambian government undertook not to claim any immunity on grounds of sovereignty in any proceedings against it by the mining companies. It willingly threw away its legal protection and opened itself up to the jurisdiction of other countries (not international tribunals) all in an attempt to encourage foreign investment.

#### 5.2.2.2 CLAUSES IN CONTRAVENTION OF THE LAW

Contrary to s.4 and 9 of the Diplomatic Immunities and Privileges Act, Chapter 20 of the Laws of Zambia, the government conferred immunities and privileges to the mining companies. Under the Act, such privileges are conferred only to members of a Diplomatic Mission accredited to Zambia and/or International Organisations to which the Republic of

Zambia is a member, by an Order (Statutory Instrument) made by the Republican President.[454]

#### 5.2.2.3 CLAUSES OVERRIDING STATUTE.

In the event of any ambiguity between the applicable legislation and the tax schedules contained in the DAs, government agreed that the provisions of the tax schedule would prevail.[455]This is contrary to the international law principle that agreements are subordinate to the law.

### 5.2.3 MORE BENEFITS TO GOVERNMENT UNDER THE IPPAs

Under the IPPA template, which is used as a guide in negotiating all IPPAs, government has more benefits than the investors. Out of 44 clauses and sub-clauses contained in the 24 Articles analysed, 21 clauses are for the benefit of government alone. This represents 48 percent of the total benefits. 10 clauses are for the benefit of the company alone, representing 23 percent. The remaining 13 clauses are for the benefit of both parties. This represents 30 percent of the benefits.

### 5.2.4 GUIDING PRINCIPLES USEFUL

The Guiding Principles are instructive and therefore provide useful guidance to the negotiation team to adequately protect the interests of the country to the citizen's benefit. They are not only within the parameters of the law but even provide examples on pertinent issues in the agreements. However, they require some amendments and regular review to keep abreast of new developments.

[454] See sections 4 and 9 of the Diplomatic Immunities and Privileges Act, Cap 20.
[455] Clause 14 .1, Mopani DA.

### 5.2.5 LEGAL FRAMEWORK ADEQUATE

The law under the repealed Mines and Minerals Act, 1995 adequately protected foreign investors and was also adequate in terms of providing benefits to the Zambian citizens. However, it was flouted by government in the name of foreign investment protection. Similarly, the law under the current ZDA Act, 2006 is adequate. Foreign investors do not therefore require 'additional protection' by negotiating conditions outside the provisions of the law.

## 5.3 RECOMMENDATIONS

These findings have revealed a number of shortcomings in relation to the contents of agreements concluded between the Zambian government and foreign investors. It is apparent that appropriate measures need to be taken for the country to fulfil its obligation to ensure respect of the citizen's right to the enjoyment of their country's natural wealth. In this regard, the following recommendations are made:

### 5.3.1 ADHERENCE TO THE LAW.

It is submitted that foreign investor protection as provided in the ZDA Act No. 11 of 2006 is adequate and must be adhered to and should not be flouted in the name of foreign investor protection. It is therefore recommended that government should at all times adhere to the laws that it enacts until such laws are repealed and replaced. As one scholar has remarked, 'legal protection includes not only the rights prescribed by regulations and laws, but also the effectiveness of enforcement.'[456]

[456] Titman, S. and K.C. John Wie., 2006
Paper presented at the 2006 International Conference on Finance (Taipei)

Further, in the absence of an internationally agreed convention on international investment law, as is currently the situation, adherence to domestic law is of utmost importance as it is the only other source of law beside general principles of international law.

### 5.3.2 REQUIREMENT FOR DOING BUSINESS AND RELATED INCENTIVES TO BE IN THE RELEVANT LEGISLATION AND REGULATIONS.

As has been noted under the DA experience, the problem with providing incentives in Agreements has been that it creates a loophole for 'smuggling' incentives that are outside those provided by law. Consequently, these pose further challenges in implementation. In view of this, it is recommended that incentives of whatever nature and the general requirements for doing business should be provided in relevant legislation and regulations. The proposed legal and regulatory framework, if effectively enforced, would help curtail negotiations of 'special arrangements' as the law will clearly stipulate what is required and exceptions (if any.) The practice under the IPPA where Agreements only make reference to the relevant legal provisions should be retained and encouraged. This will also enhance the binding nature of the Agreements.

### 5.3.3 OPERATIONALISATION OF THE MINING RESOURCE ACCOUNT AND ESTABLISHMENT OF A NATURAL RESOURCES FUND.

Despite Zambia being endowed with so many natural resources, there is nothing to show for it. This can be attributed to lack of systems and procedures in the use of proceeds from these resources. There is need for the country to employ prudent use of the proceeds from mining if her people are to benefit from it. It is therefore recommended that the special account called

'Mining Resource Account' purportedly kept at Bank of Zambia, and currently dormant, should be operationalized, that is to say, the funds should be invested worldwide like any other investment fund. Proceeds from the Fund should be used in providing public goods such as schools, roads and hospitals for the benefit of the Zambian people.

It is further recommended that this arrangement should extend to other natural resources such as water, land and forests. The name should change accordingly from 'Mining Resource Account' to 'Natural Resource Fund' which is more encompassing. Government should provide clear policy guidance on how the funds should be expended. It is proposed that this fund be administered by the ministry responsible for natural resources. It is proposed that the Fund be applied in similar manner as in Botswana and ensure investment of proceeds from natural resources into public goods such as roads, schools and hospitals. In this way, the people of Zambia will truly enjoy the right to the enjoyment of their country's natural wealth.

### 5.3.4 STRENGTHENING OF THE GRZ TECHNICAL NEGOTIATING TEAM.

As has been noted, the negotiation process with foreign investors is often laden with so many problems most of which reflect competing interests of the parties. Sometimes proposed clauses in an Agreement may not only be offensive to public policy but may also undermine the sovereignty of the nation or imposed onerous obligations on government. In this regard, there is need for continued guidance to members of the Zambian negotiating team so that they adequately protect the interests of the country during such negotiations. It is therefore recommended that the GRZ Technical Negotiating Team be retained but strengthened. This can be done in two ways; firstly, by the inclusion of representatives not included in the team from relevant institutions depending on the nature or subject matter of the negotiations in

question. The representatives would provide the requisite expertise in that particular field. Secondly, by the inclusion of Statutory Boards on the team. Currently, there is no such representation. These should either be made part of the negotiating team or representatives of respective Statutory Boards should be invited to join negotiations when necessary.

### 5.3.5 RESTRICTION ON THE USE OF DISCRETIONARY POWERS

Discretionary powers are by their very nature prone to abuse. The ZDA Act gives discretionary powers to the minster to prescribe an extension of the stability period under the Act. It is recommended that the use of discretionary powers should be minimised as much as possible. In the event that it is necessary to use such powers, they should not be vested in an individual but in a body of persons (such as a board) or an institution. This measure would ensure that there is objectivity and no abuse of such powers.

### 5.3.6 AMENDMENT OF IPPA TEMPLATE AND REGULAR REVISION OF THE NEGOTIATION GUIDELINES.

Whether it is by default or design, Zambia seems lost in her own arrangements in the IPPA template and diverts from the Principle of Sovereignty in the Preamble by referring to the beneficiaries of the Act as 'foreign and local investors'! It is recommended that this part be amended to reflect only local investors. It is further recommended that the language of policy guidance should always be unambiguous and the intention clear.

It has been established that a major weakness of the IPPA template is that the Agreement can only be terminated for a material breach. It has no provision for termination for convenience. There is an inherent danger here as not every eventuality is provided for in the Agreement and instances may occur where it becomes necessary for either party to opt out of the

Agreement. With no escape clause in place, government is tied to this agreement and it cannot opt out at any time convenient to it. The situation is exacerbated by the fact that the Agreement has no duration clause as duration is tied to respective licence periods. It is recommended that the template be amended by the inclusion of a clause on termination for convenience. This is a necessary safeguard in any contract or agreement. Besides, termination of agreement for convenience is every party's right which ought to be exercised without restriction.

The dangers of 'Creeping expropriation' with regard to the regulatory power of government have been brought to the fore. Regrettably, it has been noted that the IPPA template does provide for this type of expropriation in clause 18.1 in the following words; 'the investment under this agreement shall not be compulsorily acquired *or subjected to measures equivalent to compulsory acquisition* except for a public purpose …' As this study has shown, this clause is fatal to government. It has grossly compromised the country's sovereign rights and has opened it up to scrutiny on every single move relating to foreign investment regulation. Every governmental action, especially regulatory action, will have to be well calculated lest it be interpreted as expropriatory. It is recommended that this clause be amended by the deletion of the phrase *'measures equivalent to compulsory acquisition.'*

Apart from providing for prompt compensation, the IPPA template goes further to provide that the affected party shall have the right to prompt review by judicial … '*or other independent authority'* of the valuation of the investment. It is submitted that reference to '*other independent authority'* is contentious. It is not very clear from the clause what this other '*independent authority'* would be especially that it has not even been defined. It is submitted that nothing in this clause precludes an international entity from being that '*other*

*independent authority*.' It is recommended that reference to '*other independent authority'* be deleted.

It is further recommended that apart from the foregoing amendments, the IPPA template and guidelines should be regularly reviewed and revised to keep abreast of the law and new trends in the industry. A quarterly review is recommended. Further, it is recommended that the three lead institutions, namely, Zambia Development Agency, Ministry of Commerce, Trade and Industry and the Ministry of Justice should initiate and guide the review process.

### 5.3.7 GOVERNMENT PARTICIPATION IN MINING INDUSTRY

It has been established that Botswana's success story in the administration of the diamond mining industry is mainly due to the fact that 'most mining companies in Botswana are not wholly owned by private companies but are joint ventures between private companies and the government.[457] The special place of diamond mining to the economy appears to be the solution. It is therefore recommended that Zambia adopts a similar strategy and give copper mining a special place. It is strongly recommended that government should be actively involved in the mining industry not leave it solely in private hands. The establishment of joint ventures between government and private companies to run the mining industry is hereby recommended. This will ensure that government plays an active role in the industry.

### 5.3.8 SURBORDINATION OF AGREEMENTS TO THE LAW.

As has been noted, the challenge with inclusion of Agreements in statutes has been that the Agreement may inadvertently become part of the law or the law itself or even making it superior to the law. As a safeguard against such, it is recommended that all Agreements

[457] For instance, Debswana, the largest mining company in Botswana is a joint venture between De Beers Company of South Africa and the Government of Botswana. Each entity holds 50% equity.

should be subordinate to the law. This can be done in the following ways; firstly, by prohibiting inclusion of Agreements in statute because the move is not necessary. Secondly, by ensuring that where the exigencies of the situation demand the an Agreement be provided in statute, the wording of such statute should be sufficiently clear to the effect that the Agreement is subordinate to the law under which it appears and any other law in force.

### 5.3.9 REQUIREMENT FOR PILOT PROJECTS.

The problems noted from the DA experience can be partly attributed to the 'the quick succession manner in which implementation was done.'[458] Therefore, if it is sought to give meaningful contribution of any implementation process to the country's economy, it is recommended that any implementation process of a similar nature be subjected to a pilot project to ascertain its efficacy before embarking on massive implementation. This would mitigate against any loss in the event that such implementation is disastrous as was the case with the DAs. It is submitted that this is neat way of doing things.

### 5.3.10 RATIFICATION OF NATURAL WEALTH-RELATED AGREEMENTS BY PARLIAMENT

The Constitution of Zambia provides in Article 54(3) as follows: *Subject to the other provisions of this Constitution, an agreement, contract, treaty, convention or document by whatever name called, to which Government is a party or in respect of which the Government has an interest, shall not be concluded without the legal advice of the Attorney-General, except in such cases and subject to such conditions as Parliament may by law prescribe.* It is submitted that this legal provision of using the office of the Attorney General as the 'clearing house' is adequate only in relation to ordinary agreements that do not have serious sovereign

[458] Out of the four DAs analysed, one was executed in 1997, two in 1998 and the other in 2000.

implications. It is recommended that in addition to the legal advice of the Attorney General in the clearance process, any Agreements relating to natural wealth such as mines, forests, water and others should be laid before parliament for ratification prior to execution. Amendment of the Constitution to provide for ratification of Agreements relating to the natural wealth of the country by parliament is hereby recommended. The recommendation made here is workable as seen from the situation in Botswana**.**

### 5.3.11 POLICY GUIDANCE ON UTILISATION OF NATURAL WEALTH

There is currently no codified policy guidance on the utilisation of the natural wealth in the country. Policy formulation is the function of the cabinet as provided in Article 50 of the Constitution which provides that 'the Cabinet shall formulate the policy of the government.' It is recommended that cabinet performs its function of policy guidance in this area by formulating policy on natural wealth in relation to *inter alia*, what constitutes 'natural wealth', utilisation of proceeds from natural wealth and criteria for determination of natural wealth-related agreements. The various aspects of guidance on the matter scattered in some government documents should be codified and incorporated into one policy document. Such policy may even help inform legislation on the matter. The proposed measure will not only give direction on the utilisation of the country's natural wealth to ensure the people's enjoyment of their country's natural wealth but will also give true meaning to this somewhat empty declaration in the preamble to the Zambian Constitution*: We, the People of Zambia… pledge to ourselves that we shall ensure that the State shall … conduct the affairs of the State in such manner as to preserve, develop, and utilise its resources for this and future generations.*

# 6 APPENDICES

**Appendix I:**

**IPPA Standard Template**

**THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA**

and

**THE ZAMBIA DEVELOPMENT AGENCY**

**and**

**---------- LIMITED**

**_____**

**INVESTMENT PROMOTION AND PROTECTION AGREEMENT**

**relating to**

**----------**

**----------**

**ZAMBIA**

**_____**

Contents

Annexure I Project Brief

Annexure II Local Business Development Programme

Annexure III Development Sites

Annexure IV Employment Plan

(Information to be provided by the companies as this may vary from company to the other)

**THIS INVESTMENT PROMOTION AND PROTECTION AGREEMENT** is made the ---------- day of ---------- 20-----

**BETWEEN**:

(1) **THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA** (the "Government") acting through the Minister of Commerce Trade and Industry (the "Minister of Commerce") of the first part;

(2) The Zambia Development Agency, established under section 4 of the Zambia Development Agency Act, No. 11 of 2006 ("ZDA" or the "Designated Agency") of the second part; AND

**(3)** ---------- **LIMITED,** a private limited company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia, with its principal/registered office located at Plot No. ----------, ---------- Road, ---------- (the "Company") of the third part.

**WHEREAS:**

(A) The Government and the Designated Agency are keen to advance the social and economic development of the Republic of Zambia and as a matter of national policy, have committed themselves to encouraging and promoting the sustainable development and use of the natural resources of the Republic of Zambia through local and foreign investment, particularly through major projects which involve the development of land, water and other natural resources for the benefit of local and foreign investors as well as for the benefit of Zambian nationals.

(B) The Company intends to undertake the Development Project that will involve various development activities with an approximate expenditure of US$---------- (---------- million United States dollars) to be spent, *inter alia*, on:

(a) ----------;

(b) ----------;

(c) ----------;

(d) ----------;

(e) ----------;

(f) ----------; and

(g) ----------.

(C) Consistent with the Government's policies, the Development Project has been identified by Government and the Designated Agency as contributing to the overall goal of wealth and job creation as set out in the Fifth National Development Plan, and in particular, Government and the Designated Agency recognise that the Company has already accomplished the following:

(i) ----------;

(ii) ----------;

(iii) ----------;

(iv) ----------; and

(v) ----------.

(D) It is a central objective of Government and the Designated Agency to promote the development of rural enterprises and the continued investment in rural communities through sustainable economic activities**,** the Government, the Designated Agency and the Company have agreed to enter into this Agreement to ensure the successful implementation of the Development Project under the auspices of the Zambia Development Agency Act, No 11 of 2006 (the "ZDA Act").

**NOW THEREFORE THE PARTIES HEREBY AGREE AS FOLLOWS:**

1. Interpretation

Definitions

Unless otherwise expressly provided in this Agreement –

"access routes" means all routes, easements and other rights to access which are necessary or expedient to gain and maintain access to the Development Project sites and facilities;

"**affected party**" has the meaning given to it in Clause 12;

"**affiliate**" means, in relation to a specified Person (the **"**First Person"), any other person which, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the First Person. For these purposes "control" (including the terms "controlled by" and "under common control with" and "controls") means the possession, directly or indirectly, of the ability to direct management decisions. Without limiting the generality of the above, such direction is presumed to exist if a First Person possesses, directly or indirectly, the power to direct or cause the direction of management and policy decisions of another person, whether through the ownership of voting securities, by contract or otherwise;

"**Agreement**" means this Investment Promotion and Protection Agreement (together with all annexures and schedules hereto) as varied from time to time in accordance with the terms hereof;

"**ancillary facilities**" means any facilities constructed by or on behalf of the Company, or which the Company otherwise acquires ownership of or rights in, for or in connection with the Development Project;

"**business day**" means a day (other than Saturday, Sunday or public holiday);

"**change in law**" means the amendment or repeal of any Law by the Government of the Republic of Zambia;

"**company default**" has the meaning given to it in Clause 14;

**"construction"** means the design, procurement and building of the infrastructure and ancillary facilities;

**"day"** means a calendar day;

**"debt service"** means for any period the aggregate of all principal, interest, fees and any other amount payable during such period under the financing documents**;**

"**development benefits**" means the benefits accruing to every province and district of Zambia;

**"development project"** means the project cited in recital (B) above;

"**development sites**" means the sites for the construction of the Development Project specifically identified in Annexure III;

"**dispute**" means any dispute or disagreement of any kind whatsoever arising under or in connection with this Agreement, but excluding anything requiring the mutual agreement of the Parties;

"**effective date**" means the date of the Agreement;

"**environmental consents**" means all authorisations, notifications, reports, improvement programmes and assessments required under any Environmental Regulation prescribed by the Laws of Zambia in connection with the Development Project;

"**environmental regulations**" means any Law of Zambia which has as a purpose or effect the protection or the prevention, of harm or damage to the environment or to provide remedies in relation to harm or damage to the environment;

"**expatriates**" means individuals who are not Zambian nationals but who live or work at some time in the Republic of Zambia for the implementation and operation of the Development Project;

"**facilities**" shall include but not be limited to the Development Sites and all equipment, machinery assets and other infrastructure belonging to or operated by the Company;

"**financing documents**" means all loan agreements, notes, indentures, security agreements, guarantees and other documents required by the Company for the financing (including any bridge financing or re-financing) of the Development Project or any part thereof;

"**force majeure event**" means an event, condition or circumstance, or combination of events or circumstances occurring after the date of this Agreement which is not

reasonably foreseeable, beyond the reasonable control and arising without the fault or negligence of the Party claiming force majeure which, despite all reasonable efforts to prevent or mitigate its effects, makes it impossible for a Party to perform its obligations under this Agreement. Subject to the foregoing, force majeure events shall include:

**(a) acts of terrorism or sabotage;**

**(b) nuclear or radioactive explosion ionising radiation or contamination;**

**(c) fire, explosion, lightning, earthquake, storm, hurricane, flood, landslide or other natural calamity or act of God;**

**(d) epidemic or plague;**

**(e) blockade, embargo, any closing of borders, roads, rail links, airports or other assistance to or adjuncts of transport to the Republic of Zambia;**

**(f) act of war (whether declared or undeclared), invasion, armed conflict, act of foreign enemy, revolution, riot, mutiny, rebellion, insurrection, state of siege or civil commotion, in each case in the Republic of Zambia;**

but shall not include:

(i) failure by the Company to obtain or renew any required approval, consent, concession, decree, permit, licence, waiver, privilege and exemption from, or filing with, or notice to any Government Authority relating to the performance of any of its obligations under this Agreement; or

(ii) the existence of any rights in favour of a person, which conflict, or are incompatible, with the rights of the Company in respect of the Development Project;

"**foreign currency**" means any currency other than the Zambian Kwacha;

"**Government default**" has the meaning given to it in Clause 14.3 as well as any act of compulsory acquisition as set out in section 19 of the ZDA Act;

"**Government representatives**" means the persons notified to the Company by the Government who are authorised to bind the Government;

"**judicial authority**" means any court or judicial body established under the Laws of Zambia for the purposes of adjudication of any matter, whether or not such matter when so determined is subject to appeal to any other authority or body;

"**Kwacha**" and "**K**" means the lawful currency of the Republic of Zambia;

"**Laws of Zambia**" means all national, provincial and local laws, regulations or other legal instruments, having the force of law;

"**licence**" means licence No. ZDA/0116/11/07 issued by the Designated Agency to the Company in accordance with section 68 of the ZDA Act;

"**Local Business Development Programme**" means the plan set out in Annexure II hereto that encourages the participation of Zambians in the provision of goods and services to the Company;

"**materials and equipment**" means any goods, supplies, plant, materials and equipment of any kind, including, machinery, vehicles, consumables, parts and components and any spare parts and replacements;

"**market value**" in relation to the value of any asset, property or rights including rights of action, means the value price or consideration which a willing buyer would be prepared to pay to a willing seller of such asset, property rights or right of action in an open market at the relevant date, on the assumed basis that there is no coercion between the parties operating at arms length, and where such parties are fully informed of the subject and market conditions and where the parties are legally able to enter into a binding legal transaction relative to such asset, property, rights or right of action;

"**material breach**" means any change or action taken by any Party to this Agreement that renders this Agreement ineffective except where there is a force majeure event;

"**month**" means a calendar month on the Gregorian calendar;

"**notice**" means a written notice complying with the requirements of Clause 14.5.12;

"**operations**" means the ongoing operations of the Company from time to time and any operations carried out in order to implement the Development Project;

"**parties**" means the Company, the Government and the Designated Agency and their successors and permitted assign**ees** and "party" means any of them;

"**permits**" means all authorisations, approvals, permissions, licences or consents which are, or may from time to time become, necessary or appropriate pursuant to the Laws of Zambia for, or ancillary to, the Project, the operations of the Company or for or ancillary to the fulfilment of the purposes and intents of this Agreement, the financing documents or the development, operation, maintenance and financing of the Development Project;

"**person**" means any individual, partnership or corporation, wherever organised or incorporated, and all other juridical recognised entities, including the Government, other governments, governmental bodies and associations whether or not incorporated and includes references to their respective successors and permitted assign**ee**s;

"p**rescribed fee**" means with respect to a particular permit, the charge or fee, if any, prescribed by the Laws of Zambia;

"**prescribed form**" means with respect to a particular permit, the form, if any (including all information and details), prescribed by the Laws of Zambia for the application for, or renewal of, such permit;

"**project assets**" means the facilities and all assets required for the purposes of, or in connection with, the Development Project (including land, plant, machinery, buildings and intellectual property rights) wherever they are situated;

"**project documents**" means the various agreements for the financing and construction of the Development Project namely:

(a) the financing documents;

(b) construction contracts; and

(c) the permits.

"**project expenses**" means, in relation to any period, the expenses of the Company during such period for the operation and maintenance of the Development Project, including debt service, capital expenditure, depreciation, administration, insurance, maintaining permits, royalties, salaries and overheads, legal, accounting and other professional fees;

"**quarter date**" means the 31 March, 30 June, 30 September and 31 December of each year respectively;

"**shareholder**" means any person entered in the register of members of the Company or holding a beneficial interest in the equity in the Company;

"**shareholder loans**" means amounts advanced to the Company by any Shareholder for the purposes of implementing the Development Project and shall include debentures, quasi equity and internal funding provided by the Company from shareholders equity in order to implement the Development Project;

**"stability period"** means a period of five years from the grant of the licence, permit or certificate, or such period as the Minister responsible for finance may prescribe, in accordance with section 55 of the ZDA Act;

"**tax exemption**" means tax or duty relief provided under the Income Tax Act and Customs and Excise Act after the Board of the Designated Agency has certified under section 60 of the ZDA Act;

"**term**" has the meaning given to it in Clause 2;

"t**ermination date**" means the date on which this Agreement expires or is terminated in accordance with its terms; and

"**year**" means a calendar year in accordance with the Gregorian calendar.

In this Agreement, unless the context otherwise requires:

words importing the singular include the plural and vice versa; words importing a gender include every gender; references to any document (including this Agreement) are references to that document as amended, consolidated, supplemented, novated or replaced from time to time, and to all annexes, Schedules, attachments, supplements and the like which form part thereof; and

terms defined in any number, gender or tense shall have the correlative meaning when used in any other number, gender or tense, and the terms “includes” or **“**including” mean including without limitation.

In this Agreement, references to Clauses and Annexures are references to Clauses of and Annexures to this Agreement.

Headings are inserted for convenience only and shall not affect the interpretation or construction of this Agreement.

2. Term

2.1 The term of this Agreement shall commence on the effective date and shall, save where this Agreement is terminated at an earlier date in accordance with its terms, continue for as long as any licence, permit or certificate of registration issued by the Designated Agency under the ZDA Act remains in force including any period of renewal thereof in terms of the ZDA Act.

3 Grant of Rights by the Government

3.1 The Government grants to the Company throughout the term in accordance with the Laws of Zambia:

3.1.1 the rights and licences to undertake the development and continued operation of the Development Project in accordance with and subject to the terms set out in this Agreement, which includes:

3.1.2 the right to employ or procure the employment of such persons (whether Expatriates or Zambian Nationals) on such terms as the Company considers necessary or appropriate, subject to the laws of Zambia for the implementation and ongoing operation of the Development Project as set out in Annexure IV hereto; and

3.1.3 the right to grant valid, effective and enforceable encumbrances and security interests over the project assets in order to obtain financing in connection with the Development Project.

4 Obligations of Designated Agency

4.1 The Designated Agency:

4.1.1 shall in accordance with section 60 of the ZDA Act certify that the Company is eligible for tax and duty exemptions under Part VIII;

4.1.2 subject to compliance by the Company with the ZDA Act may renew the Licence, prior to the expiration of the initial term of the licence; and

4.1.3 shall assist the Company to obtain expeditiously all Permits required by the Company in relation to the Project on generally applicable and reasonable conditions prior to or

at the time when required pursuant to the Laws of Zambia, subject to compliance by the Company with the provisions in Clause 6.2.

5 Obligations of Government

5.1 The Government shall with effect from the effective date, during the term:

5.1.1 grant applications for work permits, employment passes, visas, travel authorisations rights of entry and residence, and other permits, as necessary for individuals involved in the Development Project, their dependants and their personal effects, in accordance with the Laws of Zambia, in a manner that does not adversely affect the implementation of the Development Project. The Government may, in any individual case, decline to grant an application, or expel a person previously admitted, so as to protect its economic and security interests and public health and safety of the Republic of Zambia, as determined by the Government in accordance with the Immigration and Deportation Act, Chapter 123 of the Laws of Zambia or any other relevant law for the time being in force in Zambia**.** In order to facilitate compliance by the Government with this clause prior to any application being lodged with the Government, the Company shall furnish the Government with the names, qualifications and job descriptions of the persons for whom such application/s are expected to be made and where available, the date or dates by when the appropriate permits will be required; and

5.1.2 take all actions as are required under this Agreement in a timely manner so as not to cause delay to the implementation of the Development Project.

5.1.3 The Government confirms that there shall be no fiscal terms or tax schedule provided in any investment promotion and protection agreement and that all fiscal matters shall be as provided for in the respective tax codes, the ZDA Act and also as provided for by any authority established by law for the purposes of local government power to impose taxation within the area for which that authority is established and to alter taxation so imposed, in accordance with Article 114 (4) of the Constitution of Zambia. Fiscal matters shall therefore be only cross-referenced in the relevant agreement in order to prevent any attempt to secure fiscal incentives outside the tax law.

6 Obligations of Company

6.1 The Company shall:

6.1.1 comply with the laws of zambia and with this agreement and shall ensure that it applies for all permits and that it maintains, and complies with the terms and conditions of all such permits at all times.

6.1.2 undertake the Development Project and pursuant to this, the Company shall: adhere to and observe at all times laws and regulation, including

standards and practices concerning the protection of health and safety and the environment which are in force from time to time;

6.1.3 employ Zambian Nationals who are suitably and appropriately qualified and experienced to undertake the relevant task and to transfer relevant skills to Zambian employees. The Company shall observe labour laws on employment and engagement practices and undertake to continue to operate within the provisions of the labour laws.

6.1.4 support the Local Business Development Programme attached hereto as Annexure II with a view to encouraging and assisting businesses within Zambia with a particular emphasis on businesses directly or indirectly majority owned by Zambian citizens within the content of the Local Business Development Programme; and

6.1.5 inform the Government on the implementation and results of the Local Business Development Plan through the annual submission of progress reports during the period of the Development Project not later than 30th January of the following year.

6.2 The Company shall make or cause to be made, in a timely fashion, all applications (whether initial or renewal applications) for permits in the prescribed form and with the prescribed fee. The information supplied by the Company in the applications shall be complete and accurate and shall satisfy the substantive and procedural requirements of the applicable Laws of Zambia.

6.3 During the term, the Company shall afford and facilitate access by Government Representatives to all elements of the Development Project being carried on in the Republic of Zambia for the purpose of allowing such Government Representatives to observe and inspect the implementation of the Development Project on behalf of the Government;

6.4 The Company will promptly provide full details to the Designated Agency of all environmental tests, environmental impact assessments and studies carried out in relation

to the Development Project in accordance with the applicable Environmental Regulations; and

6.5 The Company shall be solely responsible for the economic and technical feasibility, operational capacity and reliability of the Development Project.

7 Insurance

7.1 The Company shall take out and maintain in full force and effect throughout the term such insurance policies and coverages with respect to the project assets and otherwise in respect of its obligations under this Agreement with financially strong and reputable underwriters or insurance companies to such extent and against such risks as prudent companies engaged in businesses similar to those of the Company normally insure.

7.2 The Company shall provide to the Government from time to time and upon request certificates evidencing that the insurance policies are at all times in full force and effect.

7.3 All insurance proceeds received under any physical damage policy shall be applied to repair, reinstate and replace each part or parts of the project assets in respect of which the proceeds were received to at least the condition they were immediately preceding the physical damage.

8 Incentives under ZDA Act

8.1 The Company shall apply for and be entitled to all applicable incentives under the ZDA Act for the stability period. Qualification for such incentives shall be assessed in accordance with the ZDA Act.

9 Reporting

9.1 The Company shall perform its obligations under and observe all the terms of the project documents to which it is a Party and shall not:

9.2 terminate or permit the termination of any project document to which it is a Party;

9.3 make or agree to any material amendment or variation of any project document to which it is a Party;

9.4 in any material respect depart from, or waive or fail to enforce any rights it may have under, any project document to which it is a Party; or

9.5 enter into any agreement or document which would materially affect the interpretation or application of any project document;

unless the relevant document or proposed course of action has been notified in advance to the Government and there has been no objection by the Government in accordance with Clause 9.2 save that where the monetary value of such termination, amendment, departure from or entry into an Agreement has a financial impact of less than US$ ----------,000 (---------- Thousand United States dollars), this Clause shall not apply.

9.5.1 Within twenty-one (21) business days of receipt of such notification the Government may object on the basis that the proposed financing document or project document or any change to such documents, will or may reasonably be expected to give rise to the result that:

9.5.1.1 The credit-worthiness or financial or other resources available to the Company are or may reasonably be expected to be materially adversely affected and for practical purposes cannot be replaced within a reasonable time;

9.5.1.2 The performance by the Company under such financing document or project document, or modification thereto, shall contravene the Laws of Zambia;

9.5.1.3 The terms of such financing document or project document shall be incompatible or in conflict with the provisions of this Agreement or materially impair its performance or implementation; or

9.5.1.4 Any costs which are passed through to or borne by the Government under the terms of this Agreement are or may reasonably be expected to be materially increased.

9.5.1.5 The objection, non-objection or approval by the Government of any amendment or variation of a provision or of the termination of any financing document or project document or the creation of a new financing document or project document shall be without any liability whatsoever on the part of the Government and shall not lessen, diminish or affect in any way the obligations of the Company under this Agreement.

9.5.2 The Company shall keep the Government advised of its activities in respect of the Development Project through the Designated Agency by the submission of reports as to the progress of the Company's activities under this Agreement. These progress reports shall be submitted within ten Business Days after each Quarter Date up to the date of commissioning of the Company Projects.

9.5.3 The Company and the Government Representatives shall (unless otherwise agreed) meet twice every year to discuss the progress of the Development Project.

9.6 The Company shall, as soon as available, furnish to the Government a report on any factors that materially and adversely, or that might materially and adversely, affect the Development Project.

9.7 The Company, shall, within five (5) business days of receipt thereof, provide, a copy of any notice that may be served on the Company, to Government and the Designated Agency, and all information in respect of any further actions, in relation to the winding-up or insolvency of the Company or other analogous event.

10 Confidentiality

10.1 Each Party shall keep confidential any information whether written or oral, concerning the other Party/Parties or their respective, directors, officers or employees, or the Development Project, which either Party shall receive from the other Party and which shall be marked (if the information is delivered in written form) or otherwise designated as or indicated to be "confidential" at the time of disclosure or which must be understood to be confidential by reason of the circumstances applicable to its disclosure and shall not divulge the same to any third party (save insofar as may be necessary for the purpose of carrying out this Agreement) and save in respect of disclosure to either Party's professional advisers, lenders or as may otherwise be required under the Laws of Zambia

10.2 The provisions of this Clause shall not apply to:

10.2.1 any information in the public domain otherwise than by breach of this Agreement;

10.2.2 information in the possession of the recipient Party which was not obtained under any obligation of confidentiality; and

10.2.3 information obtained from a third party who is free to divulge the same, and which is not obtained under any obligation of confidentiality.

10.2.4 Each Party shall use reasonable endeavours to ensure that their respective directors, officers, employees, subcontractors, agents and affiliates are bound by the requirements of this Clause 9.7.

10.2.5 This Clause 10 shall survive the termination of this Agreement.

11 Right of First Refusal

11.1 Zambian registered companies shall be granted a right of first refusal on any equipment used in connection with the Development Project and sold or to be sold by the Company in the Republic of Zambia.

12 Force Majeure

12.1 If any Party (the "affected Party") is prevented or hindered in its performance of any of its obligations pursuant to this Agreement by a force majeure event, the Affected Party shall be excused from the performance of such obligations (other than any obligation to pay money as and when due) during the existence of such event and shall not be responsible for any damages suffered by the other Party as a result of such suspended performance, and any performance deadline that the Affected Party is obliged to meet under this Agreement shall be extended day-for-day so long as the force majeure event continues.

12.2 The affected Party shall as soon as reasonably practicable after it has occurred give notice to the other Party of the force majeure event, and shall keep the other Party informed of subsequent developments in such circumstances as they occur. The notification shall include details of the force majeure event, including evidence of its effect on the obligations of the affected Party and any action taken or proposed to mitigate its effect. The affected Party shall continue to take any actions within its power to comply with this Agreement.

12.3 As soon as practicable following receipt of the notice in Clause 12.2, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the force majeure event and facilitate the continued performance of this Agreement.

12.4 If any force majeure event continues for longer than six (6) months from the date of the notice referred to in Clause 12.2, on the basis that either of the Parties will be unable (within six (6) months of the occurrence of the said force majeure event) to comply with any of its obligations, then either Party shall be entitled, upon giving to the other Party two (2) weeks written notice, to terminate this Agreement.

12.5 Notwithstanding Clauses 12 to 12.4 the following events or circumstances shall not constitute a force majeure event:

12.6 late delivery to a Party of materials and equipment or spare parts unless such late delivery is itself caused by a force majeure event;

12.7 the failure or inability to make payments under this Agreement except where there is a dispute in respect of such payment and the paying Party is permitted to withhold such payment under this Agreement;

12.8 any event or occurrence to the extent that it could have been prevented, overcome or remedied by the exercise of reasonable due diligence and due care.

12.9 Where the force majeure event has been eliminated or no longer affects a party, a party shall give notice in writing to the other Parties, within seven (7) days when it ceases to be affected by the force majeure, and the obligations in this Agreement shall re-commence forthwith and the applicable period for the performance of the obligation shall be extended by a period equal to the duration of the force majeure event, or such a period as may be agreed to by the Parties to this Agreement.

13 Arbitration

13.1 The Parties shall use their best efforts to amicably settle all disputes, differences and questions whatsoever which may at any time hereafter arise between the parties hereto out of the construction of or concerning anything contained in or arising out of this Agreement through good faith, discussion and negotiation.

13.2 If resolution is not reached within thirty (30) business days (or such longer period as the Parties may agree in writing prior to the expiration of such 30 day period) from the date of notice issued by any Party in accordance with Clause 15 that a dispute has arisen, then the dispute shall be settled by arbitration.

13.3 If a dispute is not resolved by amicable settlement or negotiation as provided in Clause 13.1 above, a Party referring the dispute to arbitration shall serve on the other(s) a request in accordance with the Arbitration Act No. 19 of 2000 and the Rules made there under.

13.4 The Parties agree that three Arbitrators shall conduct the Arbitration. Government and/or the Designated Agency (as the case may be) of the one part and the Company of the other will each appoint one Arbitrator, and the two Arbitrators thus appointed shall appoint the third Arbitrator (each such part constituting a Party for the purposes of this Clause). In the event that the two Arbitrators are unable to agree upon a third Arbitrator within 10 days of their appointment, any Party may apply in writing to the President of the Zambia Association of Arbitrators requesting the appointment of the third Arbitrator within 30 days.

13.5 An arbitrator shall not be a Party, a lender, or any affiliate of any Party. The arbitral tribunal may request and obtain the services of a technical or legal expert to assist in the duties hereunder; provided, however, that any such expert shall not be an employee, lender, or affiliate of a Party to the arbitration.

13.6 The arbitral tribunal shall decide all questions strictly in accordance with the terms of this Agreement and shall give effect to the same but shall not be authorised to exceed a limit of liability established hereunder or expand a guarantee made herein. The arbitral tribunal will, in all cases, have the power to make provisional awards and to order on a provisional basis, any relief which it would have power to grant in a final award.

13.7 The decision of the arbitral tribunal shall be in writing and shall state the reasons for the decision and all facts and circumstances relied upon.

13.8 The award of the arbitral tribunal shall be final and binding upon the Parties to the arbitration who shall give effect to any such award.

13.9 The seat of arbitration shall be in Lusaka, Zambia.

13.10 The arbitration shall be conducted using the English language. All documents or evidence presented at such arbitration in a language other than in English shall be accompanied by a certified English translation thereof, the cost of which shall be borne by the Party relying on the document.

13.11 The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of this Clause 13. For such purpose, this Clause 13 shall be treated as an agreement independent of the other terms of this Agreement and any decision by the arbitrator that all or any part of this Agreement is invalid, illegal or unenforceable shall not entail the invalidity, illegality or enforceability of this Clause13.

13.12 The Parties waive any rights to appeal or to any review of such award by any court or tribunal on any grounds whatsoever other than fraud or manifest bad faith or error in the decision or other grounds permitted under the procedural laws of arbitration. The Parties

further undertake to carry out without delay the provisions of any arbitral Award or decision.

13.13 The cost of such arbitration shall be determined and allocated as between the Parties by the arbitral tribunal in its award.

13.13.1 During the term, arbitration pursuant to this Clause 13 shall be the exclusive means of settling disputes between the Parties arising under or in connection with this Agreement, and each Party hereby waives any right to resort to any other means of resolving such Disputes provided that the provisions of this Clause 13 shall not be deemed to:

13.13.1.1 preclude either Party from bringing any claim in a court having jurisdiction to enforce any award by the arbitrator;

13.13.1.2 preclude either Party from bringing in a court having jurisdiction any claim as a result of a breach by the other Party of its obligation to refer disputes to arbitration and/or to carry out actions to give effect to this Clause 13; or

13.1 preclude the arbitral tribunal or either Party with the approval of the tribunal from seeking from any court having jurisdiction assistance in the taking and disclosure of evidence or the provision of protection for the subject matter of the dispute or security for the amount in dispute.

13.14 The provisions of Clause 13 shall survive the termination of this agreement.

13.15 For purposes of determining any dispute the arbitral tribunal shall take into account the entire Agreement.

14 Defaults, Remedies and Termination

14.1 Each of the following shall be a company default which if not cured by the Company within the time permitted (if any) for cure, shall give the Government the right, pursuant to Clause 14.4, to terminate this Agreement and claim compensation (provided that no such event shall be a company default if it results from a breach by the Government of this Agreement or it occurs as a result of or during a force majeure event):

14.2 failure to pay any sum due to the Government, including any taxes, under this Agreement on the due date and such failure to pay continues for sixty (60) days from the Company’s receipt of a final written demand from the Government; or

14.3 material breach of any of the Company’s obligations under this Agreement and such breach has been notified to the Company and has not been remedied within a period of

sixty (60) days of notification, or such longer period as the Government shall in its reasonable discretion allow for the remedy of such breach;

14.4 termination of any project document resulting from a breach by the Company hereunder;

14.5 forthwith on notice to the Company where:

14.5.1 any proceeding (including the appointment of a provisional liquidator) is instituted by or against the Company seeking to adjudicate the company as insolvent or to wind-up the Company (and such proceeding is not disputed in good faith by the Company within forty-five (45) days of such proceeding first being instituted);

14.5.2 a court makes an order adjudicating the Company as insolvent;

14.5.3 a resolution is adopted for the voluntary winding-up of the company;

14.5.4 a receiver or a trustee is appointed over the whole or any part of the assets of the company and such appointment is not vacated within seventy-five (75) days; or

14.5.5 the Company makes an assignment for the benefit of the general body of its creditors.

14.5.5.1 It shall be a Government default if the Government breaches or fails to perform any of its obligations under or in connection with this Agreement and such breach or failure to perform has, or may reasonably be expected to have, materially and adversely affected the Company or the Development Project and such breach or failure to perform (where capable of remedy), shall give the Company the right pursuant to clause 14.4 to terminate the Agreement and claim compensation, provided that no such event shall be a Government default –

14.5.5.2 if it results from a breach by the Company of this Agreement; or

14.5.5.3 if it occurs as a result of or during a force majeure event.

14.5.6 For the avoidance of doubt, if the failure to make any payment under Clause 14.1.1 is a result of a good faith dispute between the parties concerning the amount to be paid then such failure to pay shall not be a Company Default. If the Parties cannot reach a mutually acceptable resolution with in sixty (60) days of such dispute arising, the matter may be referred by either party to arbitration pursuant to Clause 13. The undisputed portion shall be paid when due.

14.5.7 No act or event referred to in Clause 14.1 and 14.2 shall constitute a Company default or a Government default (as the case may be) until five (5) business days following the delivery of a notice to the defaulting Party of such breach, unless the breach is capable of remedy in which case the defaulting Party shall take all reasonable actions

to remedy the breach within sixty (60) days of delivery of the notice. If the breach is not remedied within such sixty (60) day period the non-defaulting Party may terminate this Agreement by notice with immediate effect and this Agreement shall stand terminated save as provided in Clause 14.1 below and save further for the obligation of any Party duly to discharge any liability or obligation or to pay any amount outstanding by such Party immediately prior to such termination, which shall survive such termination.

14.5.8 In the event that any Party disputes the existence of a default or the value of damages suffered in accordance with the provisions of Clause 14.1 and 14.2 the matter shall be referred to arbitration in accordance with the provisions of Clause 13.

14.5.9 The provisions of Clause 13 and this Clause 14 shall survive the termination of this Agreement.

14.5.10 The rights and remedies given in this Clause 14 shall be in addition to and not in substitution for any other rights or remedies which may be available to any Party against any other Party, which has committed a material default. Any termination of this Agreement shall not relieve a Party which has committed a material default from any obligations accrued up to termination date.

14.5.11 Where, notwithstanding a breach of this Agreement, it is still possible for this Agreement to be performed or continued in substantially the form originally intended and provided for in this Agreement, the Party not in breach shall be entitled to have this Agreement carried out, observed and enforced in accordance with all of its terms by the remaining Party.

14.5.12 In the event that the Company fails to comply with any award made against it (in accordance with the terms of such award), the Government shall be entitled subject always to the Laws of Zambia to execute against the Company.

15 Notices

15.1 Any notice, demand, request, report or other communication to be given by any Party to the other Party or to a shareholder pursuant to this Agreement (a “notice”) shall be:

15.2 in writing;

15.2.1 in the English language;

15.2.2 addressed to the address or facsimile number specified in this Clause 15, and shall be deemed to have been given:

15.2.3 if presented personally, at the time of being presented to the addressee thereof;

15.2.4 if deposited in a regularly maintained and serviced depository for mail for dispatch by registered or certified (or the equivalent) airmail, postage prepaid, return receipt requested, ten (10) business days after such deposit; or

15.2.5 if transmitted by fax, at the time actually received by the addressee on receipt of a proof of delivery by the person sending the fax; or

15.3 Notices shall:

15.3.1 if given to the Government be addressed to:

Ministry of Commerce Trade and Industry
9th Floor Government House
Kamwala
P O Box 31968
Lusaka
Zambia
Attention : The Permanent Secretary
Fax : 260 211 226984

With a copy to:

Ministry of Finance and National Planning
Finance Building
Chimanga Road
Ridgeway
P O Box 50997
Lusaka
Zambia
Attention : The Permanent Secretary
Fax : 260 211 254995

Zambia Development Agency
Privatisation House
Nasser Road
Kamwala
P O Box 30819

Lusaka

Zambia

Attention : The Director General

Fax : 260 211 225270

15.3.2 if given to the Company be addressed to it at :

---------- LIMITED

----------, ---------- Road,

P O BOX ----------,

----------

ZAMBIA

Attention : The Managing Director

Fax : 260 --------- ----------

15.3.3 A Party may notify the other Parties of a change to its name, name of relevant addressee, address or facsimile number, provided that such notification shall only be effective as from the date on which the notice is deemed given in accordance with Clause 15.1.

16 Waiver

16.1 The failure by any Party to exercise, enforce or insist upon strict performance by any other Party of any provision of this Agreement shall not constitute or be deemed a waiver of that Party's rights to enforce this Agreement with respect to any subsequent failure of performance.

17 Transfer

17.1 The Company may, with the consent of the Board of the Designated Agency ("the Board") in accordance with Section 75 of the ZDA Act, transfer the Licence or an interest in the Licence together with the benefit of this Agreement. The Designated

Agency covenants that the consent of the Board to such an transfer shall not be withheld unreasonably save that no transfer of any interest in a Licence may be made without the transfer to such person of a concomitant interest in this Agreement and vice versa.

17.2 If the Company transfers its entire interest in the Licence and its rights under this Agreement in accordance with Clause 17.1, then upon the transferee becoming a Party to this Agreement, the Company shall be discharged from any further liability in respect of any obligation which accrues after the date of that transfer, without prejudice to pre-existing rights accrued by the Government against the Company and vice versa.

17.3 Pursuant to clause 17.1, the Board shall not withhold its consent in circumstances where the proposed transferee has demonstrated its financial capacity and technical ability to meet obligations hereunder or in the case of a change of control of the Company, the acquiring party has demonstrated that it is of appropriate financial standing provided that in no circumstances shall the Board be obliged to grant consent were the proposed transferee or the acquiring party, as the case may be, has previously liquidated, stripped down, closed or abandoned any of its investments in Zambia or elsewhere or has threatened to do so other than in accordance with the ZDA Act.

18 Compulsory Acquisition

18.1 The investment under this Agreement shall not be compulsorily acquired or subjected to measures having the effect equivalent to compulsory acquisition except for a public purpose on a non discriminatory basis. There shall be prompt compensation as provided under Section 19 of the ZDA Act;

18.2 The affected Party shall have the right, under the Laws of Zambia, to prompt review, by judicial or other independent authority, and the valuation of the investment done in accordance with the principles set out in this Clause.

19 Affirmation

19.2 The Company declares and affirms that the Company and its shareholders, directors, officers, employees, and agents have not paid or received, nor undertaken to pay or receive, any bribe, pay-off, kick-back, or unlawful commission and that the Company and its shareholders, directors, officers, employees, and agents have not in any other way or manner paid any sums, whether in Kwacha or Foreign Currency and whether in the Republic of Zambia or abroad, given or offered to give any gifts and presents in the Republic of Zambia or abroad, to any person or company to procure this Agreement. The Company undertakes not to engage in any of these or similar acts during the term of this Agreement.

19.3 The Parties shall not be complicit in any act described in Clause 19.1 including inciting, aiding and abetting and conspiracy to commit or authorisation of such acts, and any such acts shall be subject to appropriate criminal enforcement and sanctions in accordance with the Laws of Zambia.

20 Entire Agreement

20.2 This Agreement constitutes the entire agreement and understanding of the Parties and all prior negotiations and understandings relating to the subject matter of this Agreement are superseded and cancelled by this Agreement.

20.3 No consensual cancellation or variation of, or addition to any of the provisions of this Agreement shall be of any force or effect unless it is expressly agreed in writing and signed by the Parties.

20.4 If any of the terms of this Agreement is held to be invalid, illegal or unenforceable, whether in whole or in part, such invalidity, illegality or unenforceability shall not prejudice the effectiveness of the remainder of this Agreement, and shall be severable therefrom or the scope of the relevant provision shall be deemed to have been limited to exclude such illegality, invalidity or unenforceability.

20.5 The Parties may from time to time by mutual agreement in writing add to, substitute for, cancel or vary any of the provisions of this Agreement.

21 Indemnification

21.1 The Government shall indemnify the Company and its directors, officers and employees against and hold the Company and its directors, officers and employees harmless from, at all times after the date hereof, any and all losses incurred, suffered, sustained or required to be paid, directly or indirectly, by, or sought to be imposed upon, the Company and its directors, officers and employees for personal injury or death to persons or damage to property arising out of the negligent or intentional act or omission of the Government in connection with this Agreement.

21.2 The Company shall indemnify the Government and its ministers, officers and employees against and hold the Government and its ministers, officers and employees harmless from, at all times after the date hereof, any and all losses incurred, suffered, sustained or required to be paid, directly or indirectly, by, or sought to be imposed upon, the Government and its ministers, officers and employees for personal injury or death to persons or damage to property arising out of the negligent or intentional act or omission of the Company in connection with this Agreement.

22 Government's International Law Obligations

22.1 Government acknowledges and undertakes to remain bound by its obligations under international law relating to international investment promotion and protection.

23 Applicable Law

23.1 This Agreement shall be governed by the Laws of Zambia.

24 Warranty by Signatories

24.1 Each of the signatories to this Agreement hereby warrants that he is duly authorised to conclude this Agreement by the Party on whose behalf he appends his signature hereunder, and that such Party is duly authorised to enter into this Agreement.

24.2 The Government warrants that the execution of this Agreement by and/or on behalf of the Government is authorised by law.

**IN WITNESS WHEREOF** the Parties hereto or their representatives, duly authorised, have signed this Agreement the day and year first before written

**SIGNED** by the Minister of Commerce Trade and Industry)
For and on behalf of
(THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA)
_____
by:
In the presence of:
WITNESS:
Signature ……

Name:……..

Address:……..

Occupation: ……

**SIGNED** for and on behalf of )
THE ZAMBIA DEVELOPMENT AGENCY )
by:

In the presence of:
WITNESS:
Signature ……

Name:……..

Address:……..

Occupation: ……
**SIGNED** _____ )
For and on behalf of )
---------- LIMITED )
by: Managing Director
In the presence of:

WITNESS:

Signature ……

Name:……..

Address:…….

Occupation: ……

**APPENDIX II**

## PRINCIPLES TO GUIDE THE INVESTMENT PROMOTION AND PROTECTION AGREEMENT NEGOTIATIONS

1. Government policy is that all Investment Promotion and Protection Agreements (IPPAs) be signed, subject to fiscal provisions as in the respective legislation. This means that all fiscal matters should be provided for in the respective tax codes and only cross-referenced in the IPPA.

2. Any negotiations undertaken with …….. would require Ministerial endorsement and subsequently ratification by the ZDA Board.

3. Any incentive granted under Section 58 of Part VIII of the ZDA Act No. 11 of 2006 which states that **'the Minister responsible for Finance may, for the purposes of promoting major investment in an identified sector or product, by statutory instrument, and in consultation with the Minister, specify additional incentives for investment in an identified sector or product of not less than ten million United States Dollars or the equivalent in convertible currency, in new assets that qualify for those incentives'** should be ratified or endorsed by the Minister of Commerce, Trade and Industry and Minister of Finance and National Planning.

4. The correct interpretation of Section 60 of the Zambia Development Agency Act No. 11 of 2006 on **'relief or exemption from any tax or duty'** is that contractors and subcontractors do not qualify under this provision. These organizations do not qualify because they are not party to the Investment Promotion and Protection Agreement and do not hold a licence, permit or certificate under the ZDA Act.

5. Local authorities and statutory bodies such as the District Councils, Workmen's Compensation Fund Control Board, Water Board, the Environmental Council of Zambia, ZESCO, etc are autonomous from the Central Government and…… should negotiate separately and directly with these bodies.

6. Labour issues are very dynamic as conditions that govern employment are a function of so many factors vis-à-vis social, economic, political, environmental, etc. As an example, the minimum wage is reviewed every year and currently is at ZMK 268,000.00 and in this regard, therefore, the interpretation of stability period should not relate to labour matters.

7. The correct interpretation of stability period should be in line with Section 55 of Part VIII of the ZDA Act No. 11 of 2006 which states that **'an incentive offered under this Part shall be valid for a period of five years from the grant of the licence, permit or certificate or for such period as the Minister responsible for Finance may prescribe'**.

8. The interpretation of stability period should not relate to fees charged and services provided by autonomous bodies.

_____

Chairman - GRZ Technical Negotiating Team
MINISTRY OF COMMERCE, TRADE AND INDUSTRY

INVESTMENT PROMOTION AND PROTECTION AGREEMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA AND VARIOUS COMPANIES

| No. | COMPANY NAME | Pledged Investment (USD) | Pledged Employment | Project Description | Comments and Year of Signature |
|---|---|---|---|---|---|
| 1 | Zambia Sugar PLC | 185,000,000.00 | 3500 | Sugar Expansion Project at Nakambala Estate | Negotiations concluded IPPA signed - 2nd April 2007 |
| 2 | Oval Biofuels Ltd | 25,000,000.00 | 190 (Permananent workers) | Biodiesel Production in Lusaka | Negotiations concluded IPPA signed - 5th July 2008 |
| 3 | UMCIL Universal Mining and Chemicals Indust | 120,000,000.00 | 4500 (by phase 3) | Intergrated Iron and Steel Project in Kafue | Negotiations concluded IPPA signed - 5th July 2008 |
| 4 | Gourock Ltd | 50,000,000.00 | 575 (by year 3) | Manufacture of Edible Oil, Soaps and Plastics in Ndola | Negotiations concluded IPPA signed - 5th July 2008 |
| 5 | ZCCZ Development Ltd | (230,000,000.00) Zone Devpt (900,000,000.00) Total Investment | 6000 | Chambishi MFEZ Development of Zambia - China Economic and Trade Co operation Zone | Negotiations concluded IPPA signed - 9th September 2008 |
| 6 | AEL Zambia PLC | 14,000,000.00 | 298 | Expansion Project in Mufulira Manufature of Industrial Explosives | Negotiations concluded IPPA signed - 2nd December 2008 |
| 7 | Varun Beverages Zambia Ltd | 30,000,000.00 | 77 skilled 600 indirect | Liquid Refreshment Beverages Unit | Negotiations concluded IPPA signed 16 Jan 2009 |
| 8 | El Sewedy Electric Zambia Ltd | 12,600,000.00 | 95 (first year total) | Manufacture of Electric Transformers in Ndola | Negotiations concluded IPPA signed - 7th February 2009 |
| 9 | Zamanita Ltd | 27,551,760.00 | Over 400 by year four | Production of Cooking Oil, Magarine and Feed Cake | Negotiations concluded IPPA Signed - 23rd March 2009 |
| 10 | ETC Bio Energy Ltd | 56,000,000.00 | 2183(by 2017) | Development Project in Mpongwe Bio Energy Production | Negotiations concluded IPPA signed - 25th March 2009 |
| 11 | Medi Care Ltd | 32,200,000.00 | 315 | Provision of Medical Services | Negotiations concluded IPPA signed - 24th March 2009 |
| 12 | Progressive Poultry Ltd | 18,600,000.00 | 87 | Development Project for the Production of Hatching Eggs and Day Old Chicks | Negotiations concluded IPPA signed - 25th March 2009 |
| 13 | J & J Transport Ltd | 16,450,000.00 | 78 | Commerical Cargo Transport System and Satellite Tracking System | Negotiations concluded IPPA signed - 25th March 2009 |
| 14 | Lamasat International Ltd | 21,000,000.00 | 1083 | Development Project for production of Plastic Pipes, Water Tanks, Packaging and Aluminium Materials & Real Estate Development | Negotiations concluded IPPA signed on 29th October,2009 |
| 15 | Ferro Alloys Corporation Limited | 23,402,872.00 | 103 Direct | Processing of Manganese, Zinc and Lead in various parts of the Country | Negotiations concluded IPPA signed on 2nd October, 2009 |
| 16 | Zambeef Products PLC | 81,759,932.00 | 2500 | Expansion Project | Negotiations concluded IPPA signed on 13th November 2009 |
| 17 | M Mobile Telecommunications Zambia | 10,000,000.00 | 200 | Mobile Phone Manufacturing Project | Negotiations Concluded IPPA signed on 23rd January, 2010 |
| 18 | Zhonghui Mining Group Limited | 3,633,000,000.00 | 32425 (by year 5) | Development Project for the Exploration, Mining, concentration and smeltering of Copper and other Metals in Zambia | Negotiations concluded IPPA was signed on 21st July 2009 |
| 19 | TGP Properties Limited (Copperbelt Ci | 160,000,000.00 | 1,500 (construction stage) | Development of world class mixed - use infrastructure which will include: shopping centre, commercial office park, conference facility etc. | Negotiations concluded IPPA signed on |
| 20 | LAMASAT INTERNATIONAL LIMITED | 21,000,000.00 | 1,054 by year 3 (2010) | Expansion and modernisation of the plant and machinery for efficient manufacturing of high quality products | Negotiations concluded IPPA to be signed on 21st July 2009 |
| 21 | Manda Hill Limited | 55,000,000.00 | 1,093 | Construction of additional shopping and other commercial facilities at Manda Hill Shopping Centre | Negotiations concluded IPPA signed on 27th October 2009 |
| 22 | Chobe Agrivision Limited | 50,000,000.00 | 2,000 direct and 20,000 indirect jobs by year 10 | An agricultural investment in respect of primary production and processing of staple food (maize) | IPPA concluded and signed on 12th November, 2009 |
| 23 | Maamba Colleries Limited | 550,000,000.00 | 340 direct jobs in the mining operation | Development of a coal-fired thermal power plant and upgrading of the existing coal mine | Negotiations were concluded on 16th April 2010. IPPA was signed on 24th April, 2010 |
| 24 | CPD Investments Limited | 55,150,000.00 | 4,060 direct and indirect jobs are expected to be created | Development of the Roma Industrial Park | Negotiations concluded on 17th Nov. 2009. IPPA signed in January, 2010 |
| 25 | PicknPay | 25,000,000.00 | 1,481 jobs by year 5 | Establishment and operation of Retail Shops | Negotiations concluded and the IPPA was signed on 22nd July, 2010 |
| 26 | Itezhi Tezhi Power Corporation | 230,000,000.00 | 451 direct jobs by year 4 | Construction of a Power Station at Itezhi Tezhi Dam | Negotiations concluded, IPPA cleared by Ministry of Justice and ZDA Board. The IPPA signed on 18th October, 2010 |
| 27 | Protea Hotels Zambia Limited | 90,277,500.00 | 885 direct and 800 indirect jobs by year | Construction and expanision of existing and new Hotels | Negotiations concluded and the IPPA was signed on 21st September, 2010 |
| 28 | Emman Farming Enterprises | 16,130,000.00 | 70 jobs are to be created by this proje | Establishment and operation Edible Oil, Stock Feed Poultry Plants | Negotiations concluded and IPPA was signed on 15th October, 2010 |
| 29 | Lusaka Premier Hospital | 34,000,000.00 | 204 jobs by year 3 | Establishment and operation of a Modern High Class Hospital | Negotiations concluded and the IPPA was cleared by Ministry of Justice. Although the Cabinet Minister has already signed it the ZDA Board Chairman has not signed it. |
| 30 | Dangote Industries Zambia Limited | 350,000,000.00 | 466 jobs by year 3 | Setting up of a Cement Manufacturing Plant | Negotiations concluded and IPPA was cleared by Ministry of Justice and was signed on 10th December, 2010 |
| 31 | Graduare Properties Limited | 90,000,000.00 | 500 direct and 3,000 jobs are expected to be created | Construction of Student Hostels and Staff Housing, Business Park and a 4 Stall Hotel and Commercial facilities and a Shopping Mall at UNZA | Negotiations are yet to be concluded |
| 32 | Kingdom Properties Limited | 20,000,000.00 | 987 jobs during construction and 750 jobs during the operation stage | Development of a Shopping Mall | Negotiations were concluded and the final document is to be submitted to Ministry of Justice for clearance |
| 33 | Agri Biotech Fertlisers | 20,000,000.00 | About 3300 jobs to be created during construction and operation phase | Establishment of Agricultural Research Centre | First IPPA Meeting held on 28/09/2010 and Negotiations are yet to be concluded |
| 34 | MM Integrated Steel Mills | 52,155,000.00 | | Establishment and Operation of Steel and Plastic Plants in Lusaka | Negotiations are yet to be concluded. |
| | Total pledged Investment/Employmt | **7,425,963,406.00** | 100,665 | | |

# APPENDIX III

INVESTMENT PROMOTION AND PROTECTION AGREEMENTS BETWEEN THE GOVERNMENT OF THE REPUBLIC OF ZAMBIA AND VARIOUS COMPANIES

| No. | COMPANY NAME | Pledged Investment (USD) | Project Description | Progress/Challenges |
|---|---|---|---|---|
| 1 | Zambia Sugar PLC | 185,000,000.00 | Sugar Expansion Project at Nakambala Estate | Expansion project completed |
| 2 | Oval Biofuels Ltd | 25,000,000.00 | Biodiesel Production in Lusaka | Company closed down due to global financial crisis |
| 3 | UMCIL Universal Mining and Chemicals Industries Ltd | 120,000,000.00 | Intergrated Iron and Steel Project in Kafue | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 4 | Gourock Ltd | 50,000,000.00 | Manufacture of Edible Oil, Soaps and Plastics in Ndola | |
| 5 | ZCCZ Development Ltd | (230,000,000.00) Zone Devpt (900,000,000.00) Total Investment | Chambishi MFEZ Development of Zambia - China Economic and Trade Co operation Zone | development of the Economic Zone is on course |
| 6 | AEL Zambia PLC | 14,000,000.00 | Expansion Project in Mufulira Manufature of Industrial Explosives | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 7 | Varun Beverages Zambia Ltd | 30,000,000.00 | Liquid Refreshment Beverages Unit | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 8 | El Sewedy Electric Zambia Ltd | 12,600,000.00 | Manufacture of Electric Transformers in Ndola | |
| 9 | Zamtel Ltd | 122,000,000.00 | Zamtel Expansion Projects | Negotiations concluded but IPPA not signed |
| 10 | Barclays Bank Zambia PLC | 22,300,000.00 | Expansion Programme - Country wide Banking Services | Negotiations concluded but IPPA not signed ZDA Board yet to clear IPPA |
| 11 | Zamanita Ltd | 27,551,760.00 | Production of Cooking Oil, Magarine and Feed Cake | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 12 | ETC Bio Energy Ltd | 56,000,000.00 | Development Project in Mpongwe Bio Energy Production | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 13 | Medi Care Ltd | 32,200,000.00 | Provision of Medical Services | |
| 14 | Progressive Poultry Ltd | 18,600,000.00 | Development Project for the Production of Hatching Eggs and Day Old Chicks | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 15 | J & J Transport Ltd | 16,450,000.00 | Commerical Cargo Transport System and Satellite Tracking System | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 16 | Lamasat International Ltd | 21,000,000.00 | Development Project for production of Plastic Pipes, Water Tanks, Packaging and Aluminium Materials & Real Estate Development | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 17 | Legacy Holdings Ltd | 155,541,342.00 | Development of Mosi - o - Tunya Hotel Country Club in Livingstone | Negotiations suspended at the request of the Company |
| 18 | Ferro Alloys Corporation Limited | 23,402,872.00 | Processing of Manganese, Zinc and Lead in various parts of the Country | construction of processing plant has reached advanced stage |
| 19 | Zambeef Products PLC | 81,759,932.00 | Expansion Project | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 20 | M Mobile Telecommunications Zambia Ltd | 10,000,000.00 | Mobile Phone Manufacturing Project | |
| 21 | African Energy Ltd | 100,000,000.00 | Uranium Mining | Negotiations suspended at the request of the Company |
| 22 | Zhonghui Mining Group Limited | 3,633,000,000.00 | Development Project for the Exploration, Mining, concentration and smeltering of Copper and other Metals in Zambia | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 23 | TGP Properties Limited (Copperbelt City) | 160,000,000.00 | Development of world class mixed - use infrastructure which will include: shopping centre, commercial office park, conference facility etc. | construction will start in 2010 after the completion of the Manda Hill project by the same promoters |
| 24 | LAMASAT INTERNATIONAL LIMITED | 21,000,000.00 | Expansion and modernisation of the plant and machin-ery for efficient manufacturing of high quality products | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 25 | Manda Hill Limited | 55,000,000.00 | Construction of additional shopping and other commercial facilities at Manda Hill Shopping Centre | construction has commenced and is on course |
| 26 | Avlow Limited | 2,350,000.00 | Development of activities related to provision of engineering services and agriculture project | Negotiations concluded but IPPA not signed ZDA Board yet to clear IPPA |
| 27 | Pembe Flour Mills | 20,650,000.00 | Etablishment of a milling and cement/grain bag plant | IPPA cleared by the Ministry of Justice, Attorney General's Office, now awaiting clearance by the ZDA Board |
| 28 | Chobe Agrivision Limited | 50,000,000.00 | An agricultural investment in respect of primary production and processing of staple food (maize) | yet to undertake industrial visit to the Company to establish the situation on the ground |
| 29 | Maamba Collieries Limited | 550,000,000.00 | Development of a coal-fired thermal power plant and upgrading of the existing coal mine | Negotiations still on going |
| 30 | CPD Investments Limited | 55,150,000.00 | Development of the Roma Industrial Park | Negotiations concluded on 17th Nov. 2009 |

**APPENDIX IV:**

**THE MUFULIRA MINE, SMELTER AND REFINERY AND NKANA MINES, CONCENTRATOR AND COBALT PLANT DEVELOPMENT AGREEMENT (MOPANI DA)**

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 2.1 | Obligation to develop | ✓ | | |
| 2.2 | As above | | | ✓ |
| 2.3 | Obligation to expend investment commitment | | ✓ | |
| 2.4 | Compliance with scheduled programmes | | ✓ | |
| 2.5 | Reduction in investment commitment | | ✓ | |
| 2.6 | Wasteful mining practices | | ✓ | |
| 3.1 | Right to import and export | | ✓ | |
| 3.2 | As above | | | ✓ |
| 4.1 | Procurement | ✓ | | |
| 4.2 | Active discrimination in Procurement | | ✓ | |
| 4.3 | Assessment of tenders | | ✓ | |
| 5.1 | Local business development | ✓ | | |
| 5.1 (b) | Variation of local business development programme | | ✓ | |
| 5.1(c) | Management of small business enterprises | ✓ | | |
| 6.1 | Training and human resource management | ✓ | | |
| 6.2 | Amendment of training and human resource management | ✓ | | |
| 6.3 | Non-compliance with training | | ✓ | |
| 6.4 | Notices on training | | | ✓ |
| 6.5 | Reference of matter to Sole Expert by company | | ✓ | |
| 6.6 | Decision of Sole Expert | | | ✓ |
| 6.7 | Employment selection | | | ✓ |
| 6.8 | Training and human | | ✓ | |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | resource management programme | | | |
| 6.9 | Non-discrimination of Zambians on employment | ✓ | | |
| 6.10 | Acknowledgement of GRZ policy on employment | ✓ | | |
| 6.11 | Transfer of employees | | | ✓ |
| 6.12 | Collective bargaining | ✓ | | |
| 6.13 | Redundancy terms | ✓ | | |
| 6.14 | Recruitment of non-Zambians | | ✓ | |
| 6.15 | Privileges of non-Zambians | | ✓ | |
| 7.1, 7.2 and 7.3 | Insurance | | | ✓ |
| 8.1 | Suspension and curtailment of production | | | ✓ |
| 8.2 | As above | | ✓ | |
| 8.3 | Suspension of production | | ✓ | |
| 8.4 | Maintenance of facilities during suspension | | | ✓ |
| 8.5 | Costs of resuming operations | | ✓ | |
| 8.6 | Submission of reports on resumption of operations | ✓ | | |
| 8.7 | Directive to resume operations | ✓ | | |
| 8.8 | Right to submit resumption of operations issue to Sole Expert | | ✓ | |
| 8.9 | Determination by Sole Expert | | ✓ | |
| 8.10 | Determination by Sole expert | ✓ | | |
| 8.11 | Company not to be prejudiced | | ✓ | |
| 9.1 | Social assets and municipal infrastructure services | | | ✓ |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 9.2 | Educational services | ✓ | | |
| 9.3 | Medical services | ✓ | | |
| 9.4 | Municipal infrastructure services | | ✓ | |
| 9.5 | Option on maintenance of transferring social assets | | ✓ | |
| 9.6 | Acceptance of non-compliance | | ✓ | |
| 9.8 | Submission of issue to arbitration | | | ✓ |
| 9.9 | Making social assets available | | ✓ | |
| 10.1 | Records and operating reports | ✓ | | |
| 10.2 | Submission of reports to GRZ | ✓ | | |
| 10.3 | Filling of material data to GRZ | ✓ | | |
| 10.4 | Submission of quarterly reports to GRZ | ✓ | | |
| 10.5 | Submitted reports to be in English | ✓ | | |
| 10.6 | Maintenance of original records and reports | | | ✓ |
| 10.7 | Company to meet cost of reports | ✓ | | |
| 10.8 | Information to be treated as confidential | | ✓ | |
| 10.9 (a) | Documents to remain property of company | | ✓ | |
| 10.9 (b) | Use of information by GRZ | ✓ | | |
| 11.1 | Foreign exchange | | ✓ | |
| 11.2 (a) | Re-introduction of foreign exchange | | ✓ | |
| 11.2 (b) | Use of foreign currency accounts | | ✓ | |
| 11.3 | submission of statement of foreign currency to Central Bank | ✓ | | |
| 11.4 | Right of company to sell foreign currency | | ✓ | |
| 11.5 | Transactions in foreign currency | | ✓ | |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 11.6 | Prohibition of speculative currency transactions | ✓ | | |
| 11.7 | Grant of authority by GRZ | | ✓ | |
| 11.8 | Limit on money borrowed | ✓ | | |
| 11.9 | Non-discrimination against Central Bank | ✓ | | |
| 12.1(a) and (b) | Environmental issues | ✓ | | |
| 12.1 (c) | As above | ✓ | | |
| 12.2 | Compliance with environmental plan | ✓ | | |
| 12.3 | Stability period on environmental matters | | ✓ | |
| 12.4 | Procedure on handling issues of non-compliance | | | ✓ |
| 12.5 | Submission of issue to arbitration by company | | ✓ | |
| 12.6 | Right to amend environmental plan | | | ✓ |
| 12.6(d) | As above | | ✓ | |
| 12.7 | Proposal for variation of amendment plan by company | ✓ | | |
| 12.8 | Notice of objection | | | ✓ |
| 12.9 | Proposal of amendment of environmental plan by GRZ | ✓ | | |
| 12.10 | Informal discussions on proposed amendments | | | ✓ |
| 12.11 and 12.13 | Procedure on handling proposed amendments | | ✓ | |
| 12.12 | As above | ✓ | | |
| 12.14 -12.15 | As above | | | ✓ |
| 12.16 (a) | Right of GRZ not limited | ✓ | | |
| 12.16 (b) | Company not liable | | ✓ | |
| 12.17 – 12.19 | Impact and effectiveness of environmental law | | | ✓ |
| 12.20 | Surrender of land to GRZ | ✓ | | |
| 12.21 | Amendment of | | ✓ | |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | Environmental Liabilities agreement | | | |
| 12.22 | Amendments to reflect detachment of land | | | ✓ |
| 13.1 | Communications | | ✓ | |
| 14.1 | General obligation to pay tax | | ✓ | |
| 14.2 | As above | ✓ | | |
| 15.1 | VAT returns | | ✓ | |
| 16.1 | Taxation stability | | ✓ | |
| 16.2 | Definition of mine | | | ✓ |
| 16.3 | Prohibition of enactment of new laws | | ✓ | |
| 16.4 | Reimbursement to company | | ✓ | |
| 16.5 | Submission of dispute to arbitration | | | ✓ |
| 16.6 | Exemption from payment of excise duty on power | | ✓ | |
| 16.7 | Exemption from payment of property transfer tax | | ✓ | |
| 17.1 | Assignment | | ✓ | |
| 17.2 | As above | | ✓ | |
| 17.3 | Assignment | | ✓ | |
| 17.4 | Discharge of company from liability on assignment | | ✓ | |
| 17.5 | Fixed or floating charges by company | | ✓ | |
| 17.6 | Restriction on rights of mortgagee | | | ✓ |
| 17.7 | Necessity of GRZ's consent | | ✓ | |
| 17.8 | Submission to arbitration | | | ✓ |
| 18.1 -18.3 | Extension of time | | | ✓ |
| 19.1 | Termination | | ✓ | |
| 19.2 | Termination | ✓ | | |
| 19.3 -19.17 | Termination | | | ✓ |
| 19.8 (a) | Termination by GRZ | ✓ | | |
| 19.8(b) | Payments due and payable | | | ✓ |
| 19.8(c) | Option to purchase | ✓ | | |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | assets | | | |
| 19.8(d) | Right of company to dispose of assets | | ✓ | |
| 19.8(e) | Mining area to be left safe | ✓ | | |
| 19.9 and 19.10 | Ownership of assets after termination of agreement | | | ✓ |
| 19.11 | Legislation not to be enforced retrospectively | | ✓ | |
| 20.1 – 20.2 | Amicable settlement of disputes | | | ✓ |
| 21.1 – 21.18 | Determination by Sole Expert | | | ✓ |
| 22.1,22.3 -22.5 | Arbitration | | | ✓ |
| 22.2 | Company to be considered a foreign company | | ✓ | |
| 22.6 | GRZ's submission to United Kingdom jurisdiction | | ✓ | |
| 22.7 | Arbitration | | | ✓ |
| 22.8 | GRZ's consent to enforcement of arbitral award | | ✓ | |
| 22.9 -22.12 | As above | | | ✓ |
| 23.1 | Performance to continue | | | ✓ |
| 24.1 | Waiver of sovereign immunity | | ✓ | |
| 24.2 | Limitation of waiver of sovereign immunity | ✓ | | |
| 25.1 | Applicable law | | | ✓ |
| 26.1 | Force majeure | | | ✓ |
| 26.2 | Force majeure events | | ✓ | |
| 26.3 | Right of company to enforce its rights | | ✓ | |
| 26.4 | Force majeure | | | ✓ |
| 27.1 -27.4 | Variation | | | ✓ |
| 27.5 | Variation | ✓ | | |
| 27.6 | Variation | ✓ | | |
| 28.1 and 28.2 | Consultation | | | ✓ |
| 29.1 and 29.2 | Notices | | | ✓ |
| 29.3 | Notices | ✓ | | |
| 30.1 | Waiver | | | ✓ |

| CLAUSE/SUB CLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 31.1 | Severability | | | ✓ |
| 32.1 | Further acts | | | ✓ |
| 33.1 | Counterparts | | | ✓ |
| 34.1 | Representations and warranties | | | ✓ |

Source: Author constructed from GRZ - Mopani DA of 31st March, 2000.

**APPENDIX V:**

**CHAMBISHI MINE DEVELOPMENT AGREEMENT**

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 2.1 -2.4 | Obligation to develop | | | ✓ |
| 3.1 and 3.2 | Right to import and export | | ✓ | |
| 3.2 (c) | Preferential treatment for local manufacturers | ✓ | | |
| 3.3 | Consideration of agreements entered into with affiliates. | | | ✓ |
| 4.1 | Procurement | ✓ | | |
| 4.2 | Preferential treatment to local companies | ✓ | | |
| 4.3 | Company's option regarding suppliers | | ✓ | |
| 4.4 | Submission of agreements with affiliates | | | ✓ |
| 5.1 | Local business development | ✓ | | |
| 5.2 | Alteration of local business development programme | | ✓ | |
| 5.3 | Notice on variation | | | ✓ |
| 5.4 | Company's option to submit matter to arbitration | | ✓ | |
| 5.5 | Determination of issue by Sole expert | | | ✓ |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 6.1 | Compliance with training and human resource management programme | ✓ | | |
| 6.2 | Alteration of training programme | | ✓ | |
| 6.3 | As above | | | ✓ |
| 6.4 | Submission of matter to arbitration | | | ✓ |
| 6.5 | Right to recruit employees | | ✓ | |
| 6.6 | Non-discrimination in recruitment | ✓ | | |
| 6.7 | Acknowledgment of GRZ's policy | ✓ | | |
| 6.8 | Right to employ non-Zambian citizens | | ✓ | |
| 7.1 -7.2 | Insurance | | | ✓ |
| 7.3 | Reinstatement of elements of project | | ✓ | |
| 8.1 | Suspension of production | | | ✓ |
| 8.2 | Minister's approval | | ✓ | |
| 8.3 | Suspension of production | | ✓ | |
| 8.4 | Maintenance of assets | | | ✓ |
| 8.5 | Submission of reports | | ✓ | |
| 8.6 | Resumption of normal operations | | | ✓ |
| 8.7 | As above | ✓ | | |
| 8.8 | Determination of issue by Sole Expert | | ✓ | |
| 8.9 | Withdrawal of direction to | ✓ | | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | resume operations | | | |
| 8.10 | Project deemed abandoned | ✓ | | |
| 8.11 | Right to curtail production after resumption of operations | | ✓ | |
| 9.1 | Social assets | ✓ | | |
| 9.2 | Acceptance of non-compliance | | ✓ | |
| 9.3 | Compliance pending confirmation | ✓ | | |
| 9.4 | Determination by Sole Expert | | | ✓ |
| 9.5 | Performance of obligations under social services | ✓ | | |
| 9.6 | Infrastructure use | ✓ | | |
| 10.1 and 10.5 | Records and operating reports | ✓ | | |
| 10.6 | Maintenance of records and reports | | | ✓ |
| 10.7 | Expense related to supply of reports | ✓ | | |
| 11.1 and 11.2 | Foreign exchange | | ✓ | |
| 11.3 | Submission of reports to Central Bank | ✓ | | |
| 11.4 and 11.5 | Right to transact in foreign exchange | | ✓ | |
| 11.6 | Prohibition against speculative foreign currency transactions | ✓ | | |
| 11.7 | Grant of authority to transact in foreign currency | | ✓ | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 11.8 | Limits on foreign currency amount. | ✓ | | |
| 11.9 | Non-discrimination in foreign currency dealings | ✓ | | |
| 12.1 and 12.2 | Compliance with environmental issues | ✓ | | |
| 12.3 | Application of stability clause on environmental issues. | | ✓ | |
| 12.4 | Compliance with environmental plan | ✓ | | |
| 12.5 | Submission of dispute to arbitration | | | ✓ |
| 12.6 | Proposal for amendment by minister | ✓ | | |
| 12.7 and 12.8 | Procedure after above proposal | | | ✓ |
| 12.9 | Amendment of environmental plan | ✓ | | |
| 12.10 | No limit on GRZ power | ✓ | | |
| 12.11 | Amendment of environmental law by company | | ✓ | |
| 12.12 | Discussion on above issue | | | ✓ |
| 12.13 | Company not liable for activities prior to effective date | | ✓ | |
| 12.14 | Liabilities assumed prior to effective date | | ✓ | |
| 12.15 | No amendment of environmental law for 15 years | | ✓ | |
| 13.1 | Obligation to pay | ✓ | | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | tax | | | |
| 14.1 | VAT refund | | ✓ | |
| 15.1 | Taxation stability | | ✓ | |
| 15.2 | No change of law on tax | | ✓ | |
| 15.3 | Undertaking to reimburse company | | ✓ | |
| 15.4 | Automatic entitlement of company to favourable laws | | ✓ | |
| 16.1 | assignment | | ✓ | |
| 16.2 and 16.3 | Discharge of company from liability upon assignment | | ✓ | |
| 16.4 | Right to charge or mortgage property | | ✓ | |
| 16.5 | Restriction on mortgagee to sell property | | ✓ | |
| 16.6 | GRZ's consent to assign | | ✓ | |
| 16.7 | Submission to arbitration | | | ✓ |
| 17.1 | Extension of time | | | ✓ |
| 17.2 and 17.3 | As above | | ✓ | |
| 18.1 | Termination | | ✓ | |
| 18.2 | As above | ✓ | | |
| 18.3 | Default notice and submission to arbitration | | | ✓ |
| 18.4 | Termination notice | ✓ | | |
| 18.4 | Approval of company required prior to cancellation of licence | | ✓ | |
| 18.5 | Submission of matter to arbitration | | | ✓ |
| 18.6 (a), (c) and (e) | Events following | ✓ | | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | termination | | | |
| 18.6 (b) | As above | | | ✓ |
| 18.6 (d) | As above | | ✓ | |
| 18.7 | Remaining assets to become property of GRZ | ✓ | | |
| 18.8 | Continuation of certain clauses after termination | | | ✓ |
| 19.1, 19.2, 19.4, 19.5 and 19.6 | Arbitration and Sole Expert | | | ✓ |
| 19.3 | As above | | ✓ | |
| 19.7 | Waiver of immunity | | ✓ | |
| 19.8 | Limitation on waiver of immunity | ✓ | | |
| 19.9 | Cost of arbitration | | | ✓ |
| 19.10 -19.21 | Arbitration procedure | | | ✓ |
| 20.1 | Applicable law | | | ✓ |
| 21.1 | Force majeure | | | ✓ |
| 21.2 | Events of force majeure | | ✓ | |
| 21.3 and 21.4 | Force majeure procedure | | | ✓ |
| 22.1 | Variation | | | ✓ |
| 22.2 | Proposal to modify approved programme by NFCA | | ✓ | |
| 22.3 | Application of major change | | | ✓ |
| 22.4(a) | As above | ✓ | | |
| 22.4 (b) and (e) | As above | | ✓ | |
| 22.4 (c) and (d) | As above | | | ✓ |
| 22.5 | Variation of programme to reflect major change | | ✓ | |
| 22.6 | Reduction in employees not major change | | ✓ | |
| 23.1(a) | Consultation | | ✓ | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 23.1(b) | As above | ✓ | | |
| 23.2(a) | Constitution of monitoring committee | | ✓ | |
| 23.2(b) | Constitution of monitoring committee | ✓ | | |
| 24.1 | Notices | | | ✓ |
| 24.2 | As above | | | ✓ |
| 24.3 | As above | ✓ | | |
| 25.1 | Waiver | | | ✓ |
| 26.1 | Severability | | | ✓ |
| 27.1 | Further acts | | | ✓ |
| 28.1 | Counterparts | | | ✓ |
| 29.1 | Representations and warranties | | | ✓ |

**APPENDIX VI:**

**THE KANSANSHI DEVELOPMENT AGREEMENT**

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 2.1 -2.4 | Conduct of business | | | ✓ |
| 2.2 | Conduct of business | | | ✓ |
| 2.3 | Development of the project | | | ✓ |
| 2.4 | Submission of documents related to the development project | ✓ | | |
| 2.5 | Grant of consent to develop | | ✓ | |
| 2.6 | Determination of Sole Expert on eligibility criteria | | ✓ | |
| 2.7 | Constitution of mining programmes/plans | | | ✓ |
| 2.8 | Status of proposals approved by GRZ | | ✓ | |
| 2.9 | GRZ confirmation of compliance of company's actions with Act | | ✓ | |
| 2.10 | Implementation of approved programme | ✓ | | |
| 3.1 | Right to import and export | | ✓ | |
| 3.1(c) | Preferential treatment for local manufacturers | ✓ | | |
| 3.3 | Consideration of agreements entered into with affiliates. | | | ✓ |
| 4.1 | Procurement | ✓ | | |
| 4.2 | Preferential | ✓ | | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | treatment to local companies | | | |
| 4.3 | Company's option regarding suppliers | | ✓ | |
| 4.4 | Submission of agreements with affiliates | ✓ | | |
| 5.1 | Local business development | ✓ | | |
| 6.1 | Compliance with training and human resource management programme | ✓ | | |
| 6.2 | Alteration of training programme | | | ✓ |
| 6.3 | As above | | | ✓ |
| 6.4 | Submission of matter to arbitration | | | ✓ |
| 6.5 | Right to recruit employees | | ✓ | |
| 6.6 | Non-discrimination in recruitment | ✓ | | |
| 6.7 | As above | ✓ | | |
| 6.8 | Right to employ non-Zambian citizens | | ✓ | |
| 6.9 | Privileges of non-Zambian employees | | ✓ | |
| 7.1 -7.2 | Insurance | | | ✓ |
| 7.3 | Reinstatement of elements of project | | | ✓ |
| 8.1 | Suspension of production | ✓ | | |
| 8.2 | Minister's approval | | ✓ | |
| 8.3 | Suspension of production | | ✓ | |
| 8.4 | Maintenance of | | ✓ | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | assets | | | |
| 8.5 | Submission of reports | ✓ | | |
| 8.6 | Resumption of normal operations | ✓ | | |
| 8.7 | As above | ✓ | | |
| 8.8 | Determination of issue by Sole Expert | | | ✓ |
| 8.9 | Withdrawal of direction to resume operations | | ✓ | |
| 8.10 | Project deemed abandoned | ✓ | | |
| 8.11 | Right to curtail production after resumption of operations | | ✓ | |
| 9.1 | Infrastructure use | ✓ | | |
| 10.1 | Records and operating reports | | ✓ | |
| 10.2 - 10.6 | Submission of reports | ✓ | | |
| 10.7 and 10.8 | Maintenance of records and reports | | | ✓ |
| 10.9 | Expense related to supply of reports | ✓ | | |
| 11.1 and 11.2 | Foreign exchange | | ✓ | |
| 11.3 | Submission of reports to Central Bank | ✓ | | |
| 11.4 and 11.5 | Right to transact in foreign exchange | | ✓ | |
| 11.6 | Prohibition against speculative foreign currency transactions | ✓ | | |
| 11.7 | Grant of authority to transact in foreign currency | | ✓ | |
| 11.8 | Limits on foreign currency amount. | ✓ | | |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 11.9 | Non-discrimination in foreign currency dealings | ✓ | | |
| 12.1 and 12.2 | Compliance with environmental issues | ✓ | | |
| 12.3 | Application of stability clause on environmental issues. | | ✓ | |
| 12.4 | Compliance with environmental plan | ✓ | | |
| 12.5 | Submission of dispute to arbitration | | | ✓ |
| 12.6 | Proposal for amendment by minister | ✓ | | |
| 12.7 – 12.9 | Procedure after above proposal | | | ✓ |
| 12.10 | No limit on GRZ power | ✓ | | |
| 12.11 | Amendment of environmental plan | | | ✓ |
| 12.12 | Discussion on above issue | | | ✓ |
| 13.1 | Obligation to pay tax | ✓ | | |
| 13.2 | VAT refund | | ✓ | |
| 13.3 | Non-payment of import duty | | ✓ | |
| 14.1 – 14.3 | Taxation stability | | ✓ | |
| 15.1 and 15.2 | assignment | | ✓ | |
| 15.3 | Undertaking to GRZ by Assignee | ✓ | | |
| 15.4 | Right to charge or mortgage property | | ✓ | |
| 15.5 | Restriction on mortgagee to sell property | | | ✓ |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 15.6 | GRZ's consent to assign | | ✓ | |
| 15.7 | Submission to arbitration | | | ✓ |
| 16.1 | Extension of time | | | ✓ |
| 16.2 and 16.3 | As above | | ✓ | |
| 17.1 | Termination | | ✓ | |
| 17.2 | As above | ✓ | | |
| 17.3 | Default notice and submission to arbitration | | | ✓ |
| 17.4 | Termination notice | | | ✓ |
| 17.5 | Submission of matter to arbitration | | | ✓ |
| 17.6 (a) (c) (e) | Events following termination | ✓ | | |
| 17.6 (b) | | | | ✓ |
| 17.6 (d) | | | ✓ | |
| 17.7 | Remaining assets to become property of GRZ | ✓ | | |
| 17.8 | Continuation of certain clauses after termination | | | ✓ |
| 18.(1) (2) (4) (5) (6) | Arbitration by Sole Expert | | | ✓ |
| 18 (3) (7) | As above | | ✓ | |
| 18.8 | Limitation on waiver of immunity | ✓ | | |
| 18.9 – 18.21 | Cost of arbitration and arbitration procedure | | | ✓ |
| 19.1 | Applicable law | | | ✓ |
| 20.1 | Force majeure | | | ✓ |
| 20.2 | Events of force majeure | | ✓ | |
| 20.3 and 20.4 | Submission of matter to arbitration | | | ✓ |
| 20.5 | Conditions on sale of company | | ✓ | |
| 20..6 | Extension of time | | | ✓ |

| CLAUSE/SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 21.1 | Indemnity by the company | ✓ | | |
| 21.2 | Exception to indemnity clause | | ✓ | |
| 22.1 -22.3 | Variation | | | ✓ |
| 22.4 (a) (c) | Application of major change | ✓ | | |
| 22.4 (b) and (e) | As above | | ✓ | |
| 22.4 (d) | As above | | | ✓ |
| 22.5 | Variation of programme to reflect major change | | | ✓ |
| 22.6 | Reduction in employees not major change | | ✓ | |
| 23.1 | Consultation | ✓ | | |
| 24.1 and 24.2 | Notices | | | ✓ |
| 25.1 | Waiver | | | ✓ |
| 26.1 | Severability | | | ✓ |
| 27.1 | Further acts | | | ✓ |
| 28.1 | Counterparts | | | ✓ |
| 29.1 | Representations and warranties | | | ✓ |
| 30.1 | Enforceability | | | ✓ |
| 30.1 | No change in law | | ✓ | |

**APPENDIX VII:**

**CHAMBISHI COBALT AND ACID PLANT AND NKANA SLAG DUMPS DEVELOPMENT AGREEMENT**

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 2.1 (a) | Commitment to operate | | | ✓ |
| 2.1 (b) | Commitment to operate | ✓ | | |
| 2.2 | Investment/contingent commitment | | ✓ | |
| 2.3 | Acknowledgement of scheduled programme | | ✓ | |
| 2.4 | Wasteful mining practices | | | ✓ |
| 3.1(a) | Right to import and export | ✓ | | |
| 3.1(b) and 3.2 | Right to import and export | | ✓ | |
| 4.1 and 4.2 | Preferential treatment to local companies | ✓ | | |
| 4.3 | Company's option regarding suppliers | | ✓ | |
| 4.4 and 4.5 | Constitution of committee | ✓ | | |
| 5.1 | Local business development | ✓ | | |
| 5.2 and 5.3 | Alteration of local business development programme | | | ✓ |
| 5.4 | Company's option to submit matter to arbitration | | ✓ | |
| 5.5 | Determination of issue by Sole expert | | | ✓ |
| 6.1 | Compliance with training and human resource management programme | ✓ | | |
| 6.2 | Alteration of training | | | ✓ |

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | programme | | | |
| 6.3(a) | As above | | ✓ | |
| 6.3 (b) | As above | | | ✓ |
| 6.4 | Submission of matter to arbitration by company | | ✓ | |
| 6.5 | Determination by Sole Expert | | | ✓ |
| 6.6 | Right to recruit employees | | ✓ | |
| 6.7 | Non-discrimination in recruitment | ✓ | | |
| 6.8 | Acknowledgment of GRZ's policy | ✓ | | |
| 6.9 – 6.11 | Transfer of employees | ✓ | | |
| 6.12 | Right to employ non-Zambian citizens | | ✓ | |
| 6.13 | Constitution of committee | | ✓ | |
| 6.14 | Constitution of committee | ✓ | | |
| 7.1 -7.2 | Insurance | | | ✓ |
| 8.1 | Suspension of production | ✓ | | |
| 8.2 | Minister's approval | | ✓ | |
| 8.3 | Suspension of production | | ✓ | |
| 8.4 | Maintenance of assets | | | ✓ |
| 8.5 | Submission of reports | ✓ | | |
| 8.6 | Resumption of normal operations | ✓ | | |
| 8.7 | As above | ✓ | | |
| 8.8 | Submission of issue to Sole Expert | | ✓ | |
| 8.9 | Withdrawal of direction to resume operations | | ✓ | |
| 8.10 | Project deemed abandoned | ✓ | | |
| 8.11 | Right to curtail production after resumption of operations | | ✓ | |
| 9.1 | Social assets | ✓ | | |

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 9.2 | Provision of medical services | ✓ | | |
| 9.3 | Education services | ✓ | | |
| 9.4 | Recreational services | ✓ | | |
| 9.5 | Infrastructural services | ✓ | | |
| 9.6 | Notice of non-compliance | | | ✓ |
| 9.7 | As above | ✓ | | |
| 9.8 | Submission of matter to arbitration | | | ✓ |
| 9.9 | Restriction on provision of social services | | ✓ | |
| 10.1 and 10.2 | Records and operating reports | | ✓ | |
| 10.3 and 10.4 | Maintenance of records and reports | | | ✓ |
| 10.5 | Expense related to supply of reports | ✓ | | |
| 11.1 and 11.2 | Foreign exchange | | ✓ | |
| 11.3 | Submission of reports to Central Bank | ✓ | | |
| 11.4 and 11.5 | Right to transact in foreign exchange | | ✓ | |
| 11.6 | Prohibition against speculative foreign currency transactions | ✓ | | |
| 11.7 | Grant of authority to transact in foreign currency | | ✓ | |
| 11.8 | Limits on foreign currency amount. | ✓ | | |
| 11.9 | Non-discrimination in foreign currency dealings | ✓ | | |
| 12.1 | Compliance with environmental issues | ✓ | | |
| 12.2 | Application of stability clause on environmental issues. | | ✓ | |
| 12.3 | Environmental issues | | ✓ | |
| 12.4 (a) | Compliance with environmental plan | ✓ | | |
| 12.4 (b) | Submission of dispute | | | ✓ |

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | to arbitration | | | |
| 12.5 | Proposal for amendment by company | | ✓ | |
| 12.6 | Proposal for amendment by minister | ✓ | | |
| 12.7 and 12.8 | Procedure after above proposal | | | ✓ |
| 12.9 | Amendment of environmental plan | ✓ | | |
| 12.10 (a) | No limit on GRZ power | ✓ | | |
| 12.10 (b) | Liabilities assumed prior to effective date | | ✓ | |
| 12.11 | Discussion on impact and effectiveness of environmental laws | | | ✓ |
| 13.1 | Obligation to pay tax | | ✓ | |
| 13.2 | As above | ✓ | | |
| 14.1 | VAT refund | | ✓ | |
| 15.1 | Taxation stability | | ✓ | |
| 15.2 | No change of law on tax | | ✓ | |
| 15.3 | Undertaking to reimburse company | | ✓ | |
| 16.1 | Assignment | | ✓ | |
| 16.2 and 16.4 | Discharge of company from liability upon assignment | | ✓ | |
| 16.3 | Undertaking by assignee | | | ✓ |
| 16.5 | Right to charge or mortgage property | | ✓ | |
| 16.5 | Procedure on mortgagee to sell property | | ✓ | |
| 16.6 | Restriction on mortgagee to sell property | ✓ | | |
| 16.7 | GRZ's consent to assign | | ✓ | |
| 16.8 | Submission to arbitration | | | ✓ |

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| 17.1 | Extension of time | | | ✓ |
| 17.2 and 17.3 | As above | | ✓ | |
| 18.1 | Termination | | ✓ | |
| 18.2 | As above | ✓ | | |
| 18.3 | Default notice and submission to arbitration | | | ✓ |
| 18.4 | Material default | | | ✓ |
| 18.5 | Termination notice | ✓ | | |
| 18.6 | Submission of matter to arbitration | | | ✓ |
| 18.7 (a), (c) and (e) | Events following termination | ✓ | | |
| 18.7 (b) | As above | | | ✓ |
| 18.7 (d) | As above | | ✓ | |
| 18.8 | Remaining assets to become property of GRZ | ✓ | | |
| 18.9 | Continuation of certain clauses after termination | | | ✓ |
| 19.1, 19.2, 19.5 -19.17 | Arbitration and Sole Expert | | | ✓ |
| 19.3 | As above | | ✓ | |
| 19.4 | As above | ✓ | | |
| 20.1 | Applicable law | | | ✓ |
| 21.1 | Force majeure | | | ✓ |
| 21.2 | Events of force majeure | | ✓ | |
| 21.3 and 21.4 | Force majeure procedure | | | ✓ |
| 22.1 | Variation | | | ✓ |
| 22.2 | Proposal to modify approved programme by company | | ✓ | |
| 22.3 | Application of major change | | | ✓ |
| 22.4 | As above | | ✓ | |
| 22.5 | As above | | ✓ | |
| 22.6 | As above | | | ✓ |
| 22.7 | Variation of programme to reflect major change | | ✓ | |
| 22.8 | Reduction in employees not major | | ✓ | |

| CLAUSE/ SUBCLAUSE | BRIEF DESCRIPTION OF CONTENTS | BENEFITS TO GRZ | BENEFITS TO COMPANY | BENEFITS TO BOTH GRZ AND COMPANY |
|---|---|---|---|---|
| | change | | | |
| 23.1 | Notices | | | ✓ |
| 23.2 | As above | | | ✓ |
| 23.3 | As above | ✓ | | |
| 24.1 | Waiver | | | ✓ |
| 25.1 | Severability | | | ✓ |
| 26.1 | Further acts | | | ✓ |
| 27.1 | Counterparts | | | ✓ |
| 298.1 | Representations and warranties | | | ✓ |

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