

sch of Law
Abhy essay
2003

TITLE

A CRITICAL ANALYSIS OF THE INVESTMENT ACT AND THE ZAMBIA
INVESTMENT CENTRE

A research paper submitted to the School of Law at the University of Zambia in partial fulfillment of the requirements for the award of the degree of Bachelor of Laws (LLB).

BY: SASHI NCHITO. COMP No. 98334875

UNZA

AUGUST 2003

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the obligatory essay prepared under my supervision by

SASHI NCHITO

COMPUTER NO. 98334875

Entitled

**“A CRITICAL ANALYSIS OF THE INVESTMENT ACT AND THE ZAMBIA
INVESTMENT CENTRE”**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Obligatory essays.

..... 

..... 1.12.03

~~Prof/Dr./Mr/Ms~~..... M. N. Anula

Date

Supervisor

CONTENTS

	PAGE
Thesis Title.....	ii
Contents	iii
Dedication	vi
Acknowledgements.....	vii
Abstract.....	viii
 CHAPTER ONE	
1. INTRODUCTION.....	1
1.1 Objectives of Study	3
1.2 Methodology.....	3
1.3 Brief Economic History.....	4
1.4 What is Investment?.....	6
1.5 Over view of the main pieces of legislation related to investment.....	7
1.5.1 Privatisation Act.....	7
1.5.1.1 Background.....	7
1.5.1.2 Objectives	8
1.5.1.3 The Competent Authority.....	8
1.5.2 Securities Act.....	8
1.5.2.1 Background	9
1.5.2.2 Objectives.....	9
1.5.2.3 The Competent Authority.....	10

1.5.3	The Investment Act.....	11
1.6	The International Legal Framework for Investment.....	11
CHAPTER TWO		
2.0	Introduction.....	13
2.1	Investment Act, 1993.....	13
2.1.1	Background.....	13
2.2	Objectives of the Act.....	15
2.3	Definition of Investor.....	15
2.4	Investment Centre and Board.....	15
2.5	Procedure for Investment.....	16
2.6	General Incentives.....	19
2.7	Special Incentives.....	22
2.8	Investment Guarantees.....	22
2.9	Relevance of Fiscal Incentives in Attracting FDI.....	23
2.10	Overall Critical Analysis.....	25
CHAPTER THREE		
3.0	Zambia Investment Centre.....	29
3.1	Background.....	29
3.2	Legal Status.....	30
3.3	Function of the Zambia Investment Centre.....	30
3.3.1	Investment Certificate.....	35
3.4	Investment Climate.....	38

3.4.1 Political.....39

3.4.2 Geographical.....39

3.4.3 Economical.....40

3.4.4 Legal40

CHAPTER FOUR

4.0 Conclusions and Recommendations43

4.1 Summary.....43

4.2 Conclusions.....44

4.3 Recommendations.....52

References.....53

DEDICATIONS

This paper is dedicated to the memory of my father the late Joshua Chimese Nchito who encouraged me to always strive for excellence and to my mother Joy Nchito for her steadfast love and care which have been my anchor.

ACKNOWLEDGEMENTS

This page is a thank you page. First and foremost I would like to thank the almighty God in whom I have my being for everything that I have and I am and for making it possible for me to complete this research.

I would like to thank my family jointly and severally for their never-ending love and support which have been a source of strength and comfort. I would like to particularly thank mom for being my tower of strength.

I would like to thank my supervisor Dr. M. Munalula for her guidance and support throughout this research. I would also like to thank all my lecturers who have contributed to my academic achievements.

I would like to thank the staff at the Zambia Investment Centre particularly Mr. Mwitwa, Senior Projects Officer, who happens to be my brother in law, for their support and assistance while I was conducting my research and interviews there.

I would like to thank all my friends with whom I have spent memorable times in joy and strife. I would especially like to thank Kaumbu for being a true friend and a brother and for being there for me when I needed a friend; Maggie, Martha, Ndala, Diana, Sandra, Triphine, Grace, Chituwa, Jackie, Zain, Shalin and Precious for the wonderful times we have had together that brightened my stay at Unza.

I would also like to thank Chibesa (Bezo) Kankasa for the wonderful friendship and sisterhood we have and for being a friend that I have come to trust and rely on.

Lastly but certainly not the least I would like to thank all my nieces and nephews for the joy and happiness they bring in my life.

GLOSSARY

Acronyms used.

FDI	Foreign Direct Investment
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
ITC	International Trade Centre
MIGA	Multilateral Investment Guarantee Agency
OECD	Organization for Economic Co-operation and Development
SEC	Securities and Exchange Commission
TRIMs	Trade Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development
ZIC	Zambia Investment Centre
ZPA	Zambia Privatisation Agency

ABSTRACT

Attracting Foreign Direct Investment (FDI) is an important policy goal for all countries to enhance productivity and economic growth. FDI apart from income generation facilitates technology transfer and improvement of skills. The main issues critical to investment promotion and attraction are economic, political and legal. An investor must be assured of profitability and availability of market. Political stability provides security for an investor. There must be a sound legal framework for investment that addresses such issues as tax policies and repatriation of profits that are of interest to an investor.

Zambia like many other developing countries has been making efforts to make itself more attractive to FDI by adopting liberal economic policies that require input from the private sector. However, there are a number of issues pertinent to investment that have to be straightened. At the core of these problems is the lack of a national investment policy which is crucial in charting the course for investment attraction. Because of this deficiency, the Investment Act (no.39 of 1993) does not have any policy guidelines and therefore does not set any goal for investment such as requirement for minimum investment and the types of investment falling under it.

Furthermore, the Act establishes the Zambia Investment Centre an investment promotional agency as a one-stop support facility for investors but does not provide for inter institutional coordination. The lack of such provision has hampered the operations of the Centre.

Another issue affecting the flow of investment to Zambia is the instability of the currency that is constantly fluctuating and has a high inflation rate.

From the foregoing, there is need for the Government to put in place a national investment policy, amend the Investment Act so that it can have guidelines and adopt better financial regulatory policies that will strengthen the currency.

CHAPTER ONE

1. INTRODUCTION

Foreign Direct Investment (FDI) is an important driving force in globalisation of the world economy and is an important vehicle for channeling economic development. It is evident from the escalating flow of FDI that Transnational Corporations play a major role in the economies of both developed and developing countries. FDI apart from income generation facilitates technology transfer and improvement of skills. FDI is therefore very crucial to a country's economy.

Worldwide, countries have put in place policies that are aimed at attracting FDI. It is important that a country provides an attractive atmosphere in order for investors to invest in that particular country. The main issues that are crucial to investment promotion and attraction can be categorised as economic, political and legal. An investor before investing must be assured of profitability and market opportunities. Secondly, an investor will want to invest in a country whose political climate is stable and secure. Also the political ideologies of the host country must be in line with the business principles of the investor. Thirdly, there must be a sound legal framework for investment that addresses such issues as tax and repatriation of profits that are of interest to the investor.

It is against the above background that many countries have relaxed their regulatory regimes by adopting policies that are investor friendly. These measures include simplification of the screening process for approving FDI, opening up industries to FDI, and encouraging foreign investors to take part in the privatization process.

In the third chapter the paper will analyse the Zambia Investment Center with respect to its legal status, functions, operations and its role in investment promotion and facilitation. Also the chapter will address itself to the investment climate in Zambia which is a critical determinant of the flow of foreign investment.

The Fourth and final chapter will draw conclusions from the preceding chapters and will seek to offer recommendations for the way forward based on the findings of the paper.

1.1 OBJECTIVES OF STUDY

This research seeks to critically analyse the legal framework for investment so that it can provide recommendations that are well suited to the attraction and promotion of foreign investment in Zambia. The research is being conducted at a time when there are calls to amend the current Investment Act and is therefore very alive to the numerous issues raised and seeks to look into pertinent issues affecting investment law in Zambia.

1.2 METHODOLOGY

This research was carried out by way of reviewing relevant pieces of legislation and conducting interviews with officials at the relevant institutions. The research having been focused on the efficacy of the Investment Act, 1993, it was imperative to compare it firstly with the repealed Investment Acts, as it is the third Investment Act, the other two having been repealed. The essence of so doing was to enable the researcher to know where Zambian Investment law is coming from. Secondly, relevant Investment Acts from

Africa were looked at to try and compare the provisions and analyse the differences. Other pieces of legislation such as the Privatisation Act and the Securities Act were also referred to as they form part of main pieces of legislation in Zambia. This was done to highlight the investment activities that are provided for under Zambian law. No books have been written on the exact issue but there are a number of articles that have been written that are relevant to this topic and these were also referred to. The research was two faced in that it was analyzing the Investment Act as well as the Zambia Investment Centre. Therefore for the analysis of the Zambia Investment Centre, interviews were conducted with a number of officials that are well vested in the operations of the Investment Centre and were able to assist the researcher in analysing the efficacy of Investment Centre and also to get a perspective on the practicalities involved in implementing the Investment Act.

1.3 BRIEF ECONOMIC HISTORY OF ZAMBIA

Economic history of Zambia is characterized by the various political phases. Thus the economic history will be discussed with regard to the colonial era, post independence up to 1991 and the period from 1991 to date. Before independence, Zambia had a prosperous colonial economy. During the colonial era, the economic policy welcomed foreign investment and put measures in place to attract foreign investment.¹ Thus the economy was dominated mainly by expatriate business interests and multi-national corporations. Two companies namely, Anglo-American Corporation and Roan Selection Trust

¹ W.S Mweenda. "The Efficacy of the Zambian Investment Act (no.5 of 1986) in the Attraction of Private Foreign Direct Investment for Development."LLM, Thesis, UNZA.1990.p13

dominated the copper industry, which was the economic stronghold of the colonial era. At this time the mining industry was doing very well. The development of the copper industry was an advantage as it provided an incentive to investors who could invest in parallel industries such as electricity supply and rail transportation. There was minimal state interference as many businesses were in the hands of the private sector.² Foreign investors were also attracted by the abundant cheap labor as many native Zambians could only be employed as laborers because the illiteracy levels were so high.

At independence, Zambia inherited a wealthy economy because of the acquisition of mineral royalties, which had hitherto belonged to the British South African Company (BSA).³ At this time the copper prices were reasonably high. However, there was almost no significant manufacturing industry in Zambia as it relied on other countries such as South Africa and Southern Rhodesia to fill this vacuum.⁴ Furthermore, entrepreneurial ability and skilled manpower were in short supply.⁵ The period immediately after independence witnessed rapid economic growth, which was stimulated by the government's expenditure on infrastructure and services, and investment in import substituting manufacturing enterprises.

In April 1968, the Zambian President Dr Kenneth David Kaunda announced economic reforms at Mulungushi that ushered in a program of nationalization of private industries. In his speech, the President appealed to private companies to relinquish controlling

² ibid

³ David Ailola. "Foreign Investment: The Law and Policy in Zambia."LLM, Thesis, UNZA.1983.p32

⁴ ibid, p33

interest to the government. Thus the economy was largely dominated by the state operating through parastatals. These reforms also introduced exchange control policies that limited the repatriation of profits by private investors. Because of these developments, the Zambian economy became closed to foreign investment and the country experienced a major economic slump as the parastatals failed to perform and required government subsidies from time to time. Also, the drop in the price of copper on world markets exacerbated the economic hardships, as it was the mainstay of the Zambian Economy.

In 1991 with the coming in of a new government, the economic policy was changed and a liberalized free market economy was adopted. At the same time, the World Bank embarked on a program of Structural Adjustment that called for privatization of State enterprises. Zambia from 1991 onwards experienced economic transformation, which opened it up for foreign investment.

1.4 WHAT IS INVESTMENT

In common parlance, investment is any activity that involves the conversion of money into some species of property from which a profit can be derived. The Investment Act⁶ defined investment as:⁷

⁵ S.H.Goodman, "Investment Policy in Zambia," in Bastian De Gaay Fortman (ed), After Mulungushi-The Economics of Zambian Humanism. East African Publishing House.1969.p170

⁶ Act no. 39 of 1993

⁷ Section 2

“Contribution of capital, in cash or in kind, by an investor, to a new business enterprise, to the rehabilitation or expansion of an existing business enterprise or to the purchase of an existing business enterprise from the state”

Investment as can be seen from the definition is the input of capital in a business. At country level, the common type of investment is FDI. FDI is the transfer of capital and technology from one country to another. This is done mainly by trans-national corporations that invest in other countries by establishing subsidiaries, affiliates or joint venture.⁸ Another type of foreign investment is portfolio equity investment whereby investors purchase shares but have no control of the management of the company.⁹

FDI is very desirable in developing countries as it forms the bedrock of development. It entails transfer of capital, technology and know-how. FDI also opens up developing countries to the international market. FDI flows are directed mainly to developed countries therefore many developing countries are working hard to make the economies attractive to foreign investors.

1.5 OVERVIEW OF THE MAIN PIECES OF LEGISLATION RELATED TO INVESTMENT

There are quite a number of pieces of legislation that are related to investment. However, for the purposes of this paper only those directly linked to investment will be considered.

⁸ International Trade Centre: “Business Guide to the World Trading System”. 1998.

⁹ *ibid*

This paper will therefore restrict itself to the Investment Act¹⁰, the Privatisation Act ¹¹ and the Securities Act¹².

1.5.1 THE PRIVATISATION ACT

1.5.1.1 BACKGROUND

The political change that swept over Zambia in 1991 brought about a wave of change in the economic policies. Whereas in the previous regime the economy was state controlled and closed to foreign investment, the new regime embarked on an ambitious programme of liberalization of the economy. The process of liberalization entailed adopting economic policies that were attractive to investment especially foreign investment. One of the first programmes to be embarked on was the privatization of the state owned enterprises, which were run down and were operating by means of government subsidies. Privatization of the state owned enterprises is an economic policy that entails the transferring to the private sector interests held by government indirectly or directly in statutory bodies.¹³ The privatization process opened up Zambia to foreign investment and attracted multi-national Corporations from South Africa, the United States, Europe and Asia.¹⁴

1.5.1.2 OBJECTIVES

The Privatisation Act was enacted in 1992 to provide for privatization and commercialization of state owned enterprises; to provide for the establishment of the

¹⁰ Act no.39 of 1993

¹¹ Act no.21 of 1992, Cap 386 of the Laws of Zambia

¹² Act no.38 of 1993, Cap 354 of the Laws of Zambia

¹³ K.K.Mweenda. "Investment Law in Zambia: The Stock Exchange and Privatization." LLM, Thesis, UNZA. 1994

¹⁴ Directory Publishers. Zambia: A Review of Commerce, Industry and Tourism. 2000. Lusaka. p13

Zambia Privatisation Agency (ZPA); and to provide for the sale of shares in State owned enterprises.¹⁵

1.5.1.3 THE COMPETENT AUTHORITY

The Privatisation Act establishes the Zambia Privatisation Agency (ZPA). ZPA is a body corporate with the same attributes as all bodies corporate under the law.¹⁶ The functions of the agency are to plan, manage, implement and control the privatization of state owned enterprises. In so doing, the ZPA shall among other things recommend privatization policy guidelines to cabinet and implement the approved recommendations and shall be the overseer of all aspects of the implementation of the privatization programme in Zambia.¹⁷ The ZPA is therefore the competent authority to deal with privatization.

The ZPA shall privatize by means of public offering of shares; private sale of shares through negotiated or competitive bids; offer of additional shares in a state owned enterprise to reduce Government share holding and the list goes on. The Agency is also given discretion to employ any other means that it may deem fit.¹⁸

The ZPA provides for investment, as both Zambians and non-Zambians are eligible to buy shares.¹⁹ The Act also provides that foreign investors who acquire shares in a state owned enterprise where expertise is needed to upgrade efficiency or capital investment or foreign technology is required to expand the capacity of the business operations are

¹⁵ Cap 386

¹⁶ Section 3, Cap 386

¹⁷ *ibid*, Section 8

¹⁸ *Ibid*, Section 22 as amended by Act no.9 of 1996

entitled to incentives under the Investment Act.²⁰ This provision is aimed at attracting foreign investment as investors under this Act are availed the incentives provided for under the Investment Act.

1.5.2 THE SECURITIES ACT

1.5.2.1 BACKGROUND

The very first Act to deal with Securities was the Stock Exchange Act of 1970. This Act was redundant as many enterprises were in the hands of the state. The Stock Exchange Act of 1990 repealed the Stock Exchange Act of 1970. This Act like its predecessor was redundant but was enacted by the government in bowing to demands by the World Bank and the IMF to liberalise the economy by privatizing state owned enterprises.

The new government in 1991 in a bid to attract foreign investment and facilitate for the selling of shares enacted the Securities Act in 1993.

1.5.2.2 OBJECTIVES

The objectives of the Securities Act are to provide for the regulation of the securities industry and to establish the Securities and Exchange Commission.²¹

1.5.3.3 THE COMPETENT AUTHORITY

Part two of the Securities Act establishes the Securities and Exchange Commission (SEC). The SEC is a body corporate with the attributes of all bodies corporate. The

¹⁹ Ibid, Section 24

²⁰ Ibid, Section 30

functions of SEC include supervision and monitoring of any securities exchange and the settlement of transactions in securities; licensing and monitoring the activities of securities exchanges, dealers, investment advisors; to approve the constitutions of any securities exchange and to regulate the manner and scope of securities on any security exchange.²²

The Lusaka Stock Exchange is the only market structure in Zambia and it is recognized under the Act. However, Zambia cannot be expected to have more stock markets, as its volume of trade in securities is still too small.²³

1.5.3 THE INVESTMENT ACT

The Investment Act is the principal legislation on investment in Zambia. It establishes the Zambia Investment Center (ZIC), a body corporate that is the competent authority to facilitate for and promote investment. This paper has dedicated a chapter each for the Investment Act and the ZIC because of their centrifugal position in Zambian investment.

1.6 THE INTERNATIONAL LEGAL FRAMEWORK FOR INVESTMENT

There have been several efforts to develop a binding multi-lateral instrument containing substantive rule on foreign investment but these have failed in the past. However there

²¹ Preamble, Cap 354

²² Ibid, Section 8

²³ K.K Mweenda, "The New Corporate Law: De-Mystifying the Myth of Stock Exchange," Zambia, Law Journal. Special Edition, 1998.p8

are a number of multi-lateral agreements, which are not binding. Foremost among these is the agreement on Trade Related Investment Measures (TRIMS) which is a World Trade organization measure prohibiting member countries from imposing investment measures that are inconsistent with the provisions of the General Agreement on Trade and Tariffs (GATT) such as local content requirement. Another multi-lateral agreement is the Convention on the Settlement of Investment Disputes between States and Nationals, which was concluded in 1965 and establishes facilities for the resolution of investment disputes through the International Centre for the Settlement of Investment Disputes. There is also the Multilateral Investment Guarantee Agency (MIGA), which provides a multilateral investment insurance mechanism as a complement to national and regional policies. This agreement is based on the belief that foreign investment to less developed countries can be facilitated and promoted by alleviating concerns connected with non-commercial risks²⁴. MIGA is a World Bank initiative.

Zambia is a member of MIGA and ICSID, which are World Bank instruments and are of a binding nature.

This chapter has laid the foundation of the paper by first giving the economic history of Zambia and then examining the major Acts that form part of the legal framework for investment. From the fore going, it is clear that Zambia has embraced liberal economic principles and has tried to put legislation in line with liberalization.

²⁴ Ibid, p279

CHAPTER TWO

2.0 INTRODUCTION

The previous chapter examined the Privatisation Act and the Securities Act and highlighted their role in investment law. This chapter is dedicated to the Investment Act. As has been mentioned, currently, Zambia is pursuing a system of economic liberalization and has recognized foreign direct investment as the key to economic growth and development through additional capital, access to technology and international market. Of concern to this paper is efficacy of the Investment Act in investment promotion and attraction. The Investment Act of 1993 has been amended twice in 1996 and 1998. The Zambia Investment Centre is calling for the amendment of the Investment Act yet again and is in the process of compiling a proposal document to be presented to the relevant authorities. This paper in analyzing the Investment Act will refer to the proposed amendments and seek to provide relevant recommendations in the last chapter.

2.1 THE INVESTMENT ACT, 1993

2.1.1 BACKGROUND

At independence, Zambia inherited an economy that was rich in capital but poor in infrastructure, manufacturing industry and skilled manpower. The Government therefore embarked on a programme of enhancing the economy in the sectors that it was lacking. The first Act to be enacted to this end was the Pioneer Industries (Relief from income tax) Act.²⁵ It was enacted to provide relief from income tax for companies that were

²⁵ Act no.55 of 1965

designed as pioneer industries. The Act was aimed at encouraging the establishment of new industrial and commercial enterprises in Zambia. The Pioneer Industries Act was repealed by the Industrial Development Act²⁶, which was aimed at providing for licensing and controlling of manufacturing enterprises and to provide for matters connected to or incidental to issues pertinent to investment such as transfer of technology and incentives for investment. However the Act did not perform well in the area of investment attraction and it was subsequently repealed by the Investment Act in 1986.²⁷The 1986 Act revised the law relating to the granting of incentives and established the Investment Council and the Investment Coordinating Committee. The main function of the Investment Council was to formulate and approve national policies that were designed to develop and foster investment in Zambia.²⁸

The 1991 Investment Act²⁹ repealed the Investment Act of 1986. The Investment Act of 1991 revised the law relating to investment and established the Zambia Investment Center designed as a one-stop facility for the promotion, coordination, regulation and monitoring of investments. Under this Act, there was provision for tax holidays and duty free importation of capital equipment and vehicles. The 1991 Investment Act was repealed in 1993 by the Investment Act (no.39 of 1993).

This chapter in the following section will focus on the current Investment Act of 1993.

²⁶ Act no. 18 of 1977

²⁷ Act no. 5 of 1986

²⁸ Investment Act 1986, Section 4

²⁹ Act no. 19 of 1991

2.2 OBJECTIVES OF THE ACT

The main objective is to revise the law relating to investment in Zambia so as to provide a comprehensive legal framework for investment in Zambia. The Act continues the Zambia Investment Center constituted under the repealed 1991 Act as a one-stop facility to ease the burden of investors. The Act applies to both local and foreign investors.

2.3 DEFINITION OF INVESTOR

According to the Act, the word investor applies to any person, natural or judicial, whether Zambian citizen or not. This definition is all embracing and encompasses local and foreign investors on one hand and individuals and corporate entities. Thus any local or foreign person or entity who contributes capital in cash or in kind to a new business enterprise or to the rehabilitation of existing business enterprise or to the purchase of existing business enterprise from the state is an investor.³⁰

2.4 THE INVESTMENT CENTRE AND BOARD

The Zambia Investment Centre (ZIC) as constituted under the repealed 1991 Investment Act continues to exist under the present Act as if constituted under it.³¹ The functions of the ZIC include promoting and coordinating government policies on, and facilitating investment in Zambia so as to provide a one-stop facility.³² The present Investment Act establishes the Investment Board that is a body corporate. The Investment Board shall be responsible for the affairs of the Centre. The Board has the power to formulate and

³⁰ Cap 389 of the Laws of Zambia, Section 2

³¹ Ibid, Section 4

³² Ibid, Section 5

implement investment policies; and establish investment guidelines for the Centre and issue investment certificates.³³

It should be noted that although the Act alludes to the Investment Centre being a one-stop facility, it does not provide for a legal framework for it. The difficulties that are coupled with running a one-stop facility will be discussed in the next chapter. Also noteworthy is that the Act despite providing for the Investment Board does not provide for its constitution unlike the repealed 1991 Act.

2.5 PROCEDURE FOR INVESTMENT

Part three of the Act provides for the procedure of investment. The Act provides that any person investing in a business enterprise may apply for an investment certificate.³⁴ The application for the investment certificate shall be made to the Director-General who shall in turn present it to the Board for consideration. If the application meets all the requirements, the Board shall within six weeks of receipt of the application issue an Investment Certificate, with general or special incentives as the case may be.³⁵ An aggrieved applicant can appeal to the Minister ^{or} ~~to~~ further appeal to the high court.

The Investment Certificate once issued shall authorize the holder to make the necessary arrangements for the commencement of the business enterprise described therein. The Certificate shall contain the terms and conditions of Certificate and any general or special incentives given and shall have unlimited duration subject to being utilized within twelve

³³ Ibid, section 7

³⁴ Ibid, section 8

months from the date of issue.³⁶ Furthermore, the Act also provides for the holder of the Certificate to apply for variation and extension of the Certificate.

If the holder of the Certificate decides not to continue with the project, he shall surrender the Certificate to the Board on agreement. The Board has the power to cancel or suspend any certificate where the Certificate was obtained by fraud, deliberate or negligent submission of false information, contravenes the Act, and fails to carry out venture for which the Certificate was issued. Before taking action in the above circumstances, the Board shall notify the investor of its intention and the investor must show cause why such action must not be taken. Where the investor takes remedial action, the Certificate must not be cancelled or suspended. The effect of a cancelled Certificate is that for the duration of the suspension, the Certificate holder ceases to enjoy the rights and benefits conferred under the Act. On the other cancellation totally extinguishes the rights and benefits under the Act and the Certificate shall be returned to the Director-General.³⁷

The Act does not make registration with the Investment Centre compulsory. This makes it difficult to monitor Foreign Direct Investment inflows and to regulate investment. Furthermore, compulsory registration with the Investment Centre will make it easier to collect information relevant for the advocacy of an investment policy. Compulsory registration will provide for effective coordination and facilitation of FDI. These are the reasons that the Investment Centre has advanced for advocating for mandatory registration with the Centre. It should be noted here that the Act does not specify what

³⁵ Ibid, Section 10

³⁶ Ibid, Section 12

kind of investment falls under the Act. It would be helpful if the Government could specify what type of investment falls under it. The Act must specify the aim of the investment. For instance the Law on Investment in Mozambique³⁸ provides that investment must contribute to sustainable economic and social development of the country. The Mozambican Act further states the objectives of investment which include development, rehabilitation, modernization, or expansion of economic infrastructure and the creation of jobs for national workers and raising the professional skill levels of the Mozambican labour force.

The Zambian Act does not have any provisions similar to that in the Mozambican Act and that is why we have an influx of Chinese so called investors who do not contribute anything of economic value to the country. Clear spelling out of the objectives for investment will go hand in hand with mandatory registration with ZIC so that it can monitor what type of investors are coming in and monitor compliance with our policies. Directly in connection with this, one of the submissions for amendment is that the Act should give the Investment Board the power to reject an application for an Investment Certificate if the investment in question has no developmental value. This can only work if the Act in the first place spells out the objectives for investment. The issue of Investment Certificates is a very weighty issue with regard to investment promotion and will be looked at in detail in the next chapter.

³⁷Investment Act 1993, Section 17

³⁸ Law on Investment in Mozambique, Law Number 33 of 1993

2.6 GENERAL INCENTIVES

Part four of the Act deals with general incentives in the Investment Act. These are mainly fiscal incentives. However, it is important to mention that where as the previous Investment Act of 1991 provided for tax holidays and exemptions, the present Act removed such provisions. This matter will be discussed later in the chapter after highlighting the fiscal incentives in the present Act.

The Act provides that the general incentives shall apply to any investor investing under the Investment Act.³⁹ The following is the list of general incentives provided for in the Act.

- An investor shall be taxed 15 % on income received from farming.⁴⁰
- An investor shall be taxed 15% on income which originates from export of non-traditional products.⁴¹
- Income tax from rural enterprise shall for the first five years be reduced by an amount that is equal to one seventh of the amount chargeable⁴². Here it is noteworthy that the 1998 Investment (Amendment) Act redefined rural enterprise to exclude all provincial centers. This makes the definition of rural enterprises very narrow.

³⁹ Section 18, Investment Act, 1993

⁴⁰ Ibid, Section 19

⁴¹ Ibid Section 20

⁴² Ibid Section 21

- An investor shall be allowed a wear and tear allowance of 5 % on buildings used for manufacturing, mining or as hotels (with 10% in the initial year of use).⁴³ Machinery or implements used for farming, tourism or manufacturing are given a 50% per annum wear and tear allowance in the first two years.⁴⁴ Furthermore, capital expenditure on farm improvements qualifies for a farm improvement allowance of 20% of such expenditure for each of the first five years.⁴⁵
- Capital expenditure on the growing of tea, coffee, or banana plants, citrus fruits or other similar plants or trees shall be entitled to a development allowance of 10% up to the first year of production.⁴⁶
- An investor is entitled to a farm improvement allowance of 100% for expenditure on farmland.⁴⁷
- In ascertaining income tax an investor shall be entitled to deductions for any payments made for technical education of employees relating to business enterprise and on any expenditure on research relating to that business enterprise.⁴⁸
- Income by way of dividend from farming shall be exempt from tax for the first five years.⁴⁹
- Where double taxation agreement exists between Zambia and another country, foreign tax payable by an investor to the other country in respect of any foreign

⁴³ Ibid, Section 22 (1) (a)

⁴⁴ Ibid, Section 22 (1) (b)

⁴⁵ Ibid, Section 22(1) (c)

⁴⁶ Ibid, Section 22 (2)

⁴⁷ Ibid, Section 22 (3)

⁴⁸ Ibid, Section 23

⁴⁹ Ibid, Section 24

income shall be allowed as credit for that investor against Zambian tax in respect of that foreign income.⁵⁰

- Mining investments are entitled to mining deductions under the Income Tax Act^{51, 52}.
- A small scale enterprise or a village enterprise shall be entitled to exemption of payment to income tax for the first three years of operations for an enterprise in the urban area and the first five years for an enterprise in the rural area.⁵³
- Section 29 (b) of the Investment Act was deleted by the Investment (Amendment) Act⁵⁴. This section provided for exemption from customs duties and sales tax payable on imported equipment to be used in the enterprise. However investors registered before 27th of January 1996 are not affected by this amendment.
- A small scale manufacturing enterprise shall operate for the first five years without a manufacturing license and shall be exempt from the payment of license fees required for such an enterprise under the law.⁵⁵
- An investor who invests a minimum of two hundred and fifty thousand dollars and employs a minimum of 10 persons shall be entitled to a self-employment or resident permit notwithstanding the provisions of the Immigration Act⁵⁶. The Act also provides that ZIC shall assist an investor to who meets the above requirements to obtain work permits for up to five expatriate employees.⁵⁷

⁵⁰Ibid Section 25

⁵¹ Income Tax Act, Cap 668 of the laws of Zambia

⁵² Investment Act Section 26

⁵³ Ibid, Section 29

⁵⁴ Investment (Amendment) Act, No. 5 of 1996

⁵⁵ Ibid Section 29 (c), (d)

⁵⁶ Cap 122 of the laws of Zambia

The above general incentives show the sectors that the Zambian government wants to improve by way of attracting investment. The Government has conferred more incentives on the agricultural, tourism and manufacturing sectors because its been trying to move away from total dependence on the mining sector which has been the mainstay of the Zambian economy for a very long time.

2.7 SPECIAL INCENTIVES

These were provided for in part five of the Investment Act but they were subsequently removed by the Investment (Amendment) Act⁵⁸ which deleted them. However it is important to note these special incentives conferred exemption from customs and sales duties and sales tax on all machinery and equipment (other than motor vehicles) required for the establishment, rehabilitation or expansion of an enterprise of exporting non-traditional products which result in foreign earnings and invests in agriculture, manufacturing and tourism industry.

2.8 INVESTMENT GUARANTEES

Part seven of the Act deals with investment guarantees. The Act guarantees that no property of any description, or any interest or right over property of any description of an investor shall be compulsorily acquired except for public purposes by an Act of Parliament that provides for compensation thereof.⁵⁹ This part of the Act confers on a foreign investor who has registered foreign capital with the Bank of Zambia the right to

⁵⁷ Section 30, Investment Act

⁵⁸ Act No. 5 of 1996

⁵⁹ Investment Act, 1993 , Section 35 (1)

transfer out of Zambia such capital in foreign currency and after payment of relevant taxes.⁶⁰

2.9 THE RELEVANCE OF FISCAL INCENTIVES IN ATTRACTING FDI

In virtually all countries, providing an environment that is attractive to FDI is seen as critical to national economic policies. The importance of attached to FDI reflects the important contribution that FDI and expertise brings to domestic economies. The ability to offer an internationally competitive tax system is increasingly seen as a determinative factor shaping the investment climate, with corporate income tax identified as part of the tax system that impact most directly on multinational companies.⁶¹ But the question that arises is what additional or incremental investment comes about as a result of tax incentives.

Policy makers have the task of ensuring that their tax systems are internationally competitive and that impediments to FDI are removed. However they must first assess the impact of tax incentives and the cost of implementing them before deciding to adopt them. For instance, tax incentives may be successful in attracting additional FDI where a firm is able to generate profits from undertaking certain business activities. Tax incentives may also be necessary where a similar relief is being offered in another country that is competing for the same investment.⁶² The key issue here is attracting

⁶⁰ Section 35

⁶¹ Organisation for Economic Co-operation and Development. "Corporate Tax Incentives for Foreign Direct Investment: A Guide for Economies in Transition."

⁶² Ibid

foreign investment and providing an environment that will enable investors to choose to invest in one country over the next one.

The onus is on the policy makers in the host country to assess the impact of tax incentives. Where additional FDI resulting from tax relief is expected. It is prudent to assess whether the stream of benefits from increased FDI, including host country taxes collected on the profits from increased capital stock and other spill over effects can offset the stream of costs associated with tax incentive provision.⁶³ It will be more beneficial if the benefits outweigh the costs of implementation.

There are other factors that affect the flow of FDI that policy makers have to take into account. There must be political stability and stability in the macro-economic environment. Whereas tax incentives may enhance the attractiveness of a given host country, they may not be effective in offsetting additional costs incurred when investing there.⁶⁴ If the investors are failing to generate profits, it is unlikely that tax incentives would have notable impact on FDI levels. Tax incentives would only work where there is political and macro economic stability and there is a properly defined legal and regulatory framework that addresses such issues as property rights, repatriation of profits and a free market for currency exchange.

Notwithstanding the foregoing, tax incentives still remain an important feature of FDI attraction but must not be implemented in isolation of other important key factors in attracting FDI. In the case of Zambia, a study has to be conducted by the policy makers to

⁶³ Ibid

⁶⁴ Ibid

determine the effect of tax incentives on the inflow of tax incentives. The most common types of tax incentives are tax exemptions and tax holidays. Tax holidays are incentives that entitle newly established firms in the host countries not to pay corporate tax for a specified period to encourage investment. The Investment Act of 1991 provided for tax holidays but these were repealed by the new Act. Hence currently the Investment Act does not provide for tax incentives. Statistics compiled by ZIC show that there has been declension in the flow of investment into Zambia from 1993. This could be due to the removal of tax holidays. Zambia in the region is the only country with unfavorable tax incentives. Tax holidays may have to be reintroduced in order to make Zambia more attractive to FDI in the region.

The onus is therefore on the policy makers to carryout an assessment on the impact of tax incentives on the inflow of FDI in Zambia and to implement a policy that will be sustainable.

2.10 OVERALL CRITICAL ANALYSIS OF THE INVESTMENT ACT

The Investment Act was enacted to provide a comprehensive legal framework for investment. However there are a number of issues that need to be addressed by an Act of this nature. The core of the deficiencies in the Act is that there is no National Investment Policy. This would provide guidelines for the role of investment in our economy and the nature of investment that we seek to attract.

The Investment Act does not state the objectives of investment. This makes it difficult for ZIC to sieve the investors coming into Zambia. Secondly, the Act does not provide for mandatory registration of foreign investors with ZIC. This makes it difficult for ZIC to monitor the flow FDI and to implement Government policies as it does not deal with all the foreign investors coming into the country.

Furthermore, since the Act deals with both foreign and local investment, it would be beneficial to the local investors if certain types of investments were reserved for them. This would help to improve local production and efficiency and provide a livelihood for the local people, as certain types of investments do not require foreign investors. The Zambian Investment Act must emulate the Ghanaian Investment Code which has reserved certain types in investment areas to local investors to stimulate local participation. The Act does not provide incentives for local investors which makes it very difficult for them to compete with their foreign counterparts as they do not have the muscle to do so. Much as it is important to attract foreign investment, it is also very critical for economic growth and development to improve local investment as it alleviates poverty which is a major economic problem in Zambia.

The Investment Act establishes the ZIC to operate as a one stop facility but does not provide for inter institutional coordination. The Mozambican Law on Investment establishes the Investment Promotion Agency and provides for inter institutional coordination. This helps a lot in the way the promotional agency handles its work and deals with other relevant Government departments. Because of the lack of statutory

provision of inter institutional coordination, ZIC encounters a number of problems in providing services to the investors. This point will be discussed more in the next chapter. Another shortcoming of the Act is that it does not provide for minimum investment amounts. Other investment Acts such as the Ghanaian Foreign Investment Centre Act⁶⁵ provide for minimum investment. The purpose of this is to encourage quality investment and to ensure that all investors will contribute to the economic growth and development of the host country which is the key benefit of FDI. The lack of a provision for minimum investment has to a very large extent negatively affected the quality of investment in Zambia.

Furthermore, the Act no longer provides for tax holidays and tax exemptions. The lack of these incentives may render Zambia a less favorable host country in the region, as it is one of the few countries not to offer them. As was earlier mentioned in this chapter, according to statistics compiled by ZIC the flow of investment to Zambia has been sharply declining since 1993. This may be due to the removal of the incentives but specific research must be conducted to assess what impact (if any) the removal of tax holidays and exemptions has had on the inflow of foreign investment to Zambia.

On the positive side, the Investment Act does bring out the sectors that it seeks to promote by awarding more incentives to them. This is a starting point but we need a more concrete National Investment Policy that will provide a guideline for the legal framework. The Act also scores a point on providing for investment guarantees and protecting the property rights of investors. The provision by the Act for free repatriation

of capital and free exchange of currency is in line with the liberalized economic policies of the day and is very beneficial for attracting foreign investors as it gives them the liberty to freely transfer their money.

This chapter has critically analysed the Investment Act. It has been shown that although the Act was enacted to provide a comprehensive legal framework for investment, it is lacking in a number of areas. Particularly, the Act does not set out the objectives for investment and this has adversely affected the performance of the Act. The Act although establishing ZIC as the investment promotional agency operating as a one stop support facility for investors does not provide for its coordination with other institutions a problem which has seriously hampered its operations as will be shown in the next chapter.

The Investment Act being the principal legislation on investment in Zambia has failed to address many issues pertinent to investment. It needs to be more comprehensive and must address all the relevant issues.

⁶⁵ Act 478, 1994

CHAPTER THREE

3.0 THE ZAMBIA INVESTMENT CENTRE

The previous chapter was dedicated to the analysis of the Investment Act (no.39 of 1993) and it was seen that it is the main piece of legislation on the regulation and promotion of investment in Zambia. This chapter will analyse the Zambia Investment Centre (ZIC), which is the investment promotion agency in Zambia. In the first part a brief background will be given. The second part will give the legal status of ZIC. The third part will focus on the functions and operations of ZIC. The fourth part of this chapter will give a highlight of the investment climate in Zambia which is at the center of all the activities that ZIC is involved in.

3.1 BACKGROUND

The Investment Act (no.5 of 1986) was the first investment act in Zambia. It was under this Act that the first investment promotion body in Zambia was established. The Act established the Investment Council⁶⁶ whose main functions were the implementation of the Act and to do all such things as were necessary to develop and foster investment.⁶⁷ This Act was in force until 1991 when it was repealed by the Investment Act (no.19 of 1991).

The Investment Act, 1991, established the Investment Centre for the promotion, coordination and monitoring of investments and rendering as a one-stop support facility

⁶⁶Investment Act no.5 of 1986, Section 3

providing services to investors in Zambia.⁶⁸ In 1993 the Investment Act 1991 was repealed by the Investment Act (no. 39 of 1993) which is the Act currently in force. However the new Act provided that the Investment Centre shall continue to exist as if constituted under that Act.⁶⁹

3.2 LEGAL STATUS

The Investment Centre operates under the auspices of the Investment Board which is established under the Investment Act 1993 and which is a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power to do all such acts and things as a corporate body may by law perform or do.⁷⁰ The Zambia Investment Centre is therefore a body corporate with full corporate personality. However the Investment Board is responsible for the affairs of the Centre.⁷¹ The Board shall to this end formulate and implement investment policies, establish guidelines for the Centre and issue investment certificates.⁷²

3.3 FUNCTIONS OF THE INVESTMENT CENTRE

The Investment Act 1993 provides for the functions of ZIC as to promote, coordinate Government policies on, and facilitate investment in Zambia so as to provide a one-stop support facility to investors.⁷³

⁶⁷ Ibid, Section 4

⁶⁸ Investment Act, Act no.19 of 1991, Section 4

⁶⁹ Investment Act, Act no. 39 of 1993, Section 4

⁷⁰ Ibid, Section 6

⁷¹ Ibid, Section 7

⁷² Ibid

⁷³ Ibid, Section 5 (1)

The Act provides for a list of functions that shall be performed by the Centre. These are to:

- Promote investment in Zambia;⁷⁴
- Monitor performance of enterprises approved by it and enforce compliance with the terms and conditions of investment certificates approved under the Act;⁷⁵
- Establish and maintain institutional liaison arrangements;⁷⁶
- Assist in securing from any Ministry, government department, local authority or other relevant body any relevant authorization, license, bonded status, land and any other thing required for the purpose of establishing or operating a business enterprise;⁷⁷
- Keep records of all technology transfer agreements relating to investments under the Act;⁷⁸
- Provide consultancy services to investors;⁷⁹
- Collect and disseminate information on relevant laws and regulations, and technical matters, including applicable standards, specifications and quality control procedures;⁸⁰
- Undertake economic and sector studies, including market surveys, with a view to identifying investment opportunities;⁸¹

⁷⁴ Section 5 (2) (a)

⁷⁵ Section 5 (2) (b)

⁷⁶ Section 5 (2) (c)

⁷⁷ Section 5 (2) (d)

⁷⁸ Section 5 (2) (e)

⁷⁹ Section 5 (2) (f)

⁸⁰ Section 5 (2) (g)

- Register investors;⁸²
- Implement decisions made by the Board;⁸³
- Exercise all functions and powers and perform all duties which under or by virtue of the Act or any other written law are, or may be vested or delegated to it: and ⁸⁴
- Do all such things as are necessary or incidental or conducive to the functions specified in the Act⁸⁵

There are many functions that the Act lists which are necessary for the effective operation of ZIC. The general functions of the ZIC are to promote and regulate investment. Although ZIC is established as a one-stop facility to support investors, there are a number of practical problems that arise. To begin with, there is really no framework for inter-institutional coordination. The ZIC is still given problems by other government departments when trying to help investors get started with their projects. A major problem has been with the Immigration Department. According to ZIC⁸⁶, there have been situations where ZIC has granted an investor an investment license but the Immigration Department has rejected his application for a self-employment permit. This has caused a lot of problems for the investor. Moreover, the Immigration Department has a representative sitting on ZIC's Project Approval Committee which is responsible for

⁸¹ Section 5 (2) (h)

⁸² Section 5 (2) (i)

⁸³ Section 5 (2) (j)

⁸⁴ Section 5 (2) (k)

⁵ Section 5 (2) (l)

⁶ Interview with Mrs. Mwikisa, Legal Counsel, ZIC. Lusaka , 25th July 2003.

screening investors and reviewing the investors' credentials. There is therefore no need for the Immigration Department to go and review the investor's credentials as that has already been done by ZIC. This tendency discourages investors as they cannot commit themselves without guarantee that they will be granted the relevant permit by the Immigration Department.

Similarly, investors are hassled by the number of offices they have to go through in order to obtain the necessary permits and licenses. Although the Act provides that ZIC is supposed to assist them, what is obtaining on the ground is quite contrary. The many government departments involved do not want to hand over their powers to ZIC and they fear that they will lose out on the revenue they realize from granting these permits. There needs to be proper coordination among the various departments so that investors are not hassled and the Investment Centre can operate as a one-stop facility. This will go a long way in easing the burden of investors and ZIC.

One of the listed functions of ZIC is to register investors. However, the Act does not provide for mandatory registration. ZIC as was mentioned in the previous chapter, is spear heading the process to amend the current Investment Act and on the issue of registration of investors proposes that the new Act should provide for mandatory registration of investors so that ZIC can monitor in flow of Foreign Direct Investment (FDI) and ensure compliance with government policies and relevant laws of the land. Mandatory registration of investors will also ensure that the investors coming in are screened so that only investors who add economic value to the country will be allowed

the status. What is obtaining now is that investors do not necessarily have to register with ZIC such that their activities are not being monitored by anyone. This situation has led to foreigners coming into the country under the guise of investors when they are just small time businessmen with no intention what so ever to contribute to the economic well being of the people of Zambia.

Furthermore, ZIC offers a number of services to investors such as consultancy, arranging joint venture partnerships, and giving advice on company formation. ZIC also offers advice to investors on the relevant laws such as employment laws and in particular assists investors in staff recruitment. ZIC also ensures that investors get maximum benefit from the tax incentives provided by the government. ZIC is there to offer support services to investors and tries to assist in any way it can but this does not mean that it always works to the satisfaction of its clients.

There are number of activities that ZIC engages in, in order to promote investment in Zambia. It takes part in trade fairs and commercial shows and distributes information on investment opportunities in Zambia. ZIC also participates in trade missions where it sells Zambia as a good place to invest. These activities form the promotional part of ZIC.

The operations of ZIC are hampered by the lack of a national investment policy. Because of this, there are no objectives for investment set out such that people just work without having proper guidelines that will enable them to be in line with the national vision. The Malawian Investment Promotion Act, 1991 has a provision for the statement of

investment policies. This is very helpful for the investment promotion agency. But this is not the case in Zambia.

3.3.1 INVESTMENT CERTIFICATE

One of the key functions of ZIC is to issue Investment Certificates to persons investing in business enterprises in Zambia to confer the status of investors to them. The application for an Investment Certificate shall be made to the Director- General who shall submit it to the Investment Board.⁸⁷ The Board shall within six weeks of receiving such application issue an Investment Certificate if:

- a) the application is in accordance with the provisions of the Act;⁸⁸ and
- b) the activity planned to be undertaken by the business enterprise does not contravene any laws or regulations in force in Zambia.⁸⁹

The Act further provides that the Board in the event of rejecting an application shall give reasons for its rejection.⁹⁰ This is a very good provision as it does not give the Board arbitrary power. The Board must be able to have a guideline for awarding Investment Certificates such that they would be able to supply reasons for rejecting an application as they know exactly what they are looking for. Furthermore, a person aggrieved with the decision of the Board can appeal to the Minister subject to a further appeal to the High Court.⁹¹ This provision is also good as it keeps the Board in check and affords investors an opportunity to have their complaints heard.

The effect of an Investment Certificate is that it shall:

⁸⁷ Section 9

⁸⁸ Section 10 (1) (a)

⁸⁹ Section 10 (1) (b)

⁹⁰ Section 10, proviso

- a) Authorize the holder thereof to make all the necessary arrangements for the commencement of the business described therein;⁹²
- b) Contain terms and conditions of the certificate and any special or special incentives given; and⁹³
- c) Have unlimited period of validity, subject to it being utilized within twelve months from date of issue.⁹⁴
- d) The holder of the Investment Certificate can apply to the Board to have the terms and conditions and the incentives granted there under varied.⁹⁵

An investor who holds an Investment Certificate but fails to commence operations within twelve months from date of issuance can apply to the Board for extension of that period at least sixty days before date of expiry.⁹⁶ Furthermore, where a holder of a certificate decides not to continue with any project to which the certificate relates shall surrender it to the Board and agree on the terms and conditions of the surrender.⁹⁷ Where the holder fails to commence business operations within twelve months from date of issue and does not apply for extension, the certificate shall lapse and shall be cancelled and the holder of the license shall cease to be entitled to any benefits obtainable under the Act.⁹⁸ The provisions of the Act with regard of the Investment Certificate are very flexible as they allow for variation and extension. This lessens the investors' burden as they do not have

⁹¹ Section 11

⁹² Section 12 (a)

⁹³ Section 12 (b)

⁹⁴ Section 12 (c)

⁹⁵ Section 13 (1)

⁹⁶ Section 14 (1)

⁹⁷ Section 14 (2)

⁹⁸ Section 14 (3)

to apply for a whole new certificate if they want to vary the terms and conditions or if they want to benefit from additional incentives.

The board has power to suspend or cancel the Investment Certificate where the investor obtained the certificate by fraud, transfers or assigns the certificate without the Board's approval, contravenes the Act or the terms and conditions of the certificate or fails without reasonable cause to establish the business within twelve months or any extension thereof.⁹⁹ However, the Board shall before cancellation or suspension of the certificate notify the investor of its intentions and state the grounds for such intention and require the investor to show cause within a period of not more than thirty days why the certificate should not be cancelled or suspended.¹⁰⁰ The certificate shall not be cancelled or suspended if the investor takes remedial measures within thirty days.¹⁰¹ The effect of suspension of certificate is that the holder shall for the period of suspension cease to be entitled to the rights and benefits under the Act.¹⁰² On the other hand cancellation results in cessation of the rights and benefits conferred on the holder by the Act and the holder must return the license to the Director-General of ZIC. Here also any person aggrieved may appeal to the Minister subject to further appeal to the High Court.

There are a number of benefits that accrue to an investor by virtue of holding an Investment Certificate. These are:

- it enables the investor to regularize his/her investor status in Zambia;

⁹⁹ Section 17 (1)

¹⁰⁰ Section 17 (2)

¹⁰¹ Section 17 (3)

¹⁰² Section 17 (5)

- Investors are bestowed with investment guarantees that protects them from political risks;
- Ability to acquire land and property in Zambia;
- ZIC assists certificate holders to regularize their immigration status;
- Investment Certificate holders are provided with facilitation, aftercare and advocacy;
- Investment Certificate holders have access to the incentives offered under the Investment Act;
- Investment Certificate holders have access to all services offered by ZIC.

The Investment Certificate is essential for investors as it opens many doors for them. It is therefore vital that investors are encouraged to register with ZIC. The registration of investors by ZIC is also a means through which investors can find out about the investor opportunities and get advice on which sectors of the economy are very viable.

3.4 INVESTMENT CLIMATE

The main determinant of the flow of Foreign Direct Investment (FDI) is the investment climate. Political and economic stability and a welcoming environment are very attractive to FDI.¹⁰³ The attractiveness of a regime increasingly depends on the effectiveness of FDI promotion. The most attractive countries to foreign investors are those that offer low transaction costs for investors and good support and follow up services.¹⁰⁴ The Zambia Investment Centre as the promotional agency for investment must promote FDI in

¹⁰³ UNCTAD. World Investment Report.2001. Promoting Linkages. New York. P5

¹⁰⁴ Ibid

Zambia by offering attractive services, however the larger part of investment climate is determined by government policies. Therefore the ZIC must recommend policies that are competitive and that will attract FDI to Zambia and boost local investment.

There are a number of reasons why investors should invest in Zambia. These are as follows:

3.4.1 POLITICAL

Zambia is a democratic multi-party state that has never known any civil wars. The people of Zambia are very peaceful and the country remains politically stable. Zambia maintains sound and stable relationships with countries in the region and beyond and is a member of various regional and international organizations.

3.4.2 GEOGRAPHICAL

Zambia is a landlocked country and is surrounded by eight neighbours. This gives it a strategic position in Central and Southern Africa. Because of its geographical location, Zambia has road and railway networks that link it to the ports of Dar-es-Salaam, Beira, Benguela, Selebi-Phikwe and Walvis Bay. Zambia is also linked to the ports of Durban and Port Elizabeth.¹⁰⁵ However there is need to improve these networks as they are not well developed.

3.4.3 ECONOMICAL

Zambia has a lot of economic advantages that make it very attractive to foreign investment.

- To begin with, Zambia is endowed with rich natural resources that provide investment opportunities in mining, agriculture, tourism and manufacturing.
- Zambia's strategic location offers easy access to the vast regional consumer market.
- A liberalized economic policy with no foreign exchange controls, statutory protection of investment and the right to repatriate 100% profits;
- A trading system with reduced tariffs and lifting of export controls;
- Abundant skilled and semi-skilled labour;
- Vast tracks of arable land with plentiful water supply and good climate;
- There is potential in the processing of such crops as cotton and textile and timber industries.
- Zambia's privatization program also offers investment opportunities.

3.4.4 LEGAL

Zambia has a well-defined legal framework for investment which just needs polishing. The country also enjoys a working legal system that addresses a lot of issues that are pertinent to investment.

All in all, Zambia's investment climate is quite attractive. However, there are some issues that work as barriers to foreign investment that must be addressed. For instance, Zambia has a very high rate of inflation and is the only country in the region with a double digit inflation rate. This may divert investment from the country. The government needs to work hard and has been working hard to reduce inflation.

¹⁰⁵ Directory Publishers, "Zambia: A Review of Commerce, Industry and Tourism." Lusaka. P13, 2000.

Another pertinent issue is that of repatriation of profits. The Government because of its liberalized economic policies cannot legislate against repatriation of profits. What it is trying to do through the Bank of Zambia is to put in place measures that will encourage investors to keep their money in Zambia. Inflation is one of the factors that cause investors to want to keep their money abroad because they know that their money will lose value here. Another source of concern that might discourage foreign investment is that Zambia does not have a stable exchange value. There is no way investors will feel confident in a country that has a weak currency with an exchange rate that fluctuates constantly.¹⁰⁶ The government must try to overcome these obstacles if it is to boost investor confidence. Also with the above obstacles overcome, investors will on their own want to retain their money in Zambia knowing that it is secure and stable.

This chapter has outlined the functions and operations of the Zambia Investment Centre. It has shown that the general functions of ZIC are to promote, coordinate government policies on, and facilitate investment in Zambia so as to provide a one-stop support facility to investors. The chapter has shown that although the Act provides for ZIC to be a one-stop support facility, that goal has been difficult to achieve as there is no proper guideline for inter-institutional coordination. However it has been shown that ZIC tries to provide a valuable service to investors in Zambia.

The last part of the chapter was focused on the investment climate in Zambia. As an investment promotional agency, ZIC is concerned with the investment climate in the country as it is one of the major determinants of the flow of foreign investment. It has

¹⁰⁶ K.K Mweenda, Contemporary Issues in Corporate Finance and Investment Law, 2000, Penn Press, P37.

been shown that Zambia's investment climate is generally good but the financial aspect has to be seriously addressed as the country has a high inflation rate and an unstable currency. These issues affect the inflow of investment as the investors would not have confidence in a weak currency whose exchange value is constantly fluctuating.

The Zambia Investment Centre through the Investment Board has a big role to play in investment promotion and coordination and this role must not be underplayed.

CHAPTER FOUR

4.0 CONCLUSIONS AND RECOMMENDATIONS

4.1 SUMMARY

This paper in the preceding three chapters has critically analysed the role of the Investment Act (Act no.39 Of 1993) and the Zambia Investment Centre in attracting, promoting and regulating investment especially foreign investment in Zambia. The paper has shown how Zambia's economy has changed from being state controlled in the post independence years before 1991 to being liberalized and driven by the private sector. Liberalization of the Zambian economy opened the country to foreign investment and there has been need to put in a legal framework that will regulate foreign investment. This paper has apart from the Investment Act 1993 looked at the Privatisation Act 1992 and the Securities Act 1993 which provide the major pieces of legislation directly dealing with investment. With the liberalization of the economy, there was need to enact the Privatisation Act to deal with privatization of previously state owned enterprises and the Securities Act to deal with investments in securities and establishment of the Lusaka Stock Exchange which is the only securities market in Zambia.

The paper has shown that the Investment Act 1993 is the principal Act governing investment in Zambia and was enacted to provide a comprehensive legal framework. The Investment Act establishes the Investment Centre whose main function is to promote investment and facilitate investment so as to render itself a one-stop support facility to investors. It has been shown that the Investment Centre plays a key role in investment

promotion and facilitation. However its activities are hampered by lack of coordination with other related laws and government departments.

The paper also highlighted the important role that the investment climate plays in attracting Foreign Direct Investment (FDI). Specific reference was made to the currency problems that Zambia faces that work against it in the attraction of FDI.

4.2 CONCLUSIONS

There are a number of issues that have been raised in the previous chapters with regard to the subject matter. It is very clear from the study of the Investment Act that it does not really address all the issues pertinent to investment. The Act needs to be amended so that it can be made to achieve that which it was legislated to do. The Act seems to have been enacted in a hurry such that it does not have provisions for resolution of practical problems in implementing it. A major problem has been coordination among the various institutions involved with handling investors and reconciliation of the Act with other relevant laws. The Investment Act needs to address this very critical issue that is hampering the promotion of investment in Zambia. The Act must clearly state the role of the Investment Act and ZIC with regard to investment promotion and facilitation. An example of resolving this is the way the Zambian Constitution provides that it is the supreme law of the land all other laws must be consistent with it or they will be declared null and void.¹⁰⁷ In like manner, the Investment Act is the principal legislation dealing with investment and it must therefore provide that all other provisions in other laws dealing with investment must be consistent with it. This would resolve all the conflicts

between different Acts as in many cases where there is a dispute it is not clear which law prevails. However this entails that the Investment Act should be very comprehensive and clear and must take consideration of other relevant Acts. This is not an exercise to be undertaken in a hurry. It has to be done carefully taking into account all the relevant factors.

On the issue of inter-institutional coordination, there is need to have a committee that has all the stakeholders represented to approve investors and give the relevant authorization. Such a committee would need to representation from all the relevant government departments and would be empowered to deal with the issues there and then and Act on behalf of the institutions represented. This would lessen the hassles that investors go through by going from one department to another. Since the Investment Centre is a one-stop support facility, it would be highly enhanced if this committee would operate from there as a specialized wing so that in practice investors would just make one stop at ZIC and obtain all the relevant authorization. This would really make ZIC be exactly what it is intended to be and the investors will be very relieved and investing in Zambia would truly be hassle free.

At the heart of all the problems that are found in the Investment Act 1993 is the fact that there is no national policy on investment. This has led to lack of direction and objectives thus the investment code is inconsistent and incomplete. There is need therefore for the government through the ministries of Finance and Commerce Trade and Industry to come up with a national investment policy that will work as a guideline for the legal framework

¹⁰⁷ Constitution of the Republic of Zambia , Article 1 (3)

of investment in Zambia. This way people handling investment will have objectives and will formulate policies that are in line with the national policy. Also the national policy will enable officials to be focused rather than just working without having any benchmarks. This national investment policy must clearly spell out what the country seeks to achieve from investment, what it expects from investors, what the government itself is committed to do in order to achieve its objectives and must clearly spell out what sectors of the economy it sees as priority and why.

The Investment Act must be more comprehensive and consistent. To this end, where the current Act provides that one of the functions of the Investment Centre is to register investors¹⁰⁸, it does not provide for mandatory registration. The functions of the Investment Centre include regulation of investment and implementation of government policies. In order for the Centre to be able to do this, the Act must provide for mandatory registration so that all investors investing in Zambia are taken account of and the Investment Centre would then ensure compliance with government policies and conditions of certificates. However for such a provision to be effective, there must be incentives coupled with mandatory registration. Most investors would rather not register with ZIC as they do not see what they gain by so doing.¹⁰⁹ Therefore the Act must provide incentives for registering with ZIC and obtaining the Investment Certificate. What the Act provides is that all investors must first go to ZIC before engaging in any business. Currently what the Act provides is that investors must first have their certificate of incorporation before applying for an Investment Certificate. The fact the foreign

¹⁰⁸ Section 5(2) (I)

¹⁰⁹ Interview with A.C. Mwitwa. Senior Projects Officer. Zambia Investment Centre, Lusaka, 25th July 2003

investors can incorporate a company in Zambia without having an investment licence enables many investors to go on with their business without getting approval from ZIC. However if the Investment Act provided that investors must first register with ZIC before going to the registrar of companies then this would be an incentive for investors. This development would of course require harmonization with the Companies Act so that it would also provide that foreign investors could not be registered under it unless they have obtained their investment certificates. Furthermore, since certain types of investment require special licenses to operate, the licencing authorities must only give the licence upon recommendation from the ZIC. This would enable ZIC to screen the investors before they are allowed into the Zambian system as the other regulators do not have the expertise to screen investors. If the above were carried out, the quality of investors would improve as ZIC would be able to turn away those investors who are just interested in ripping Zambians off.

For the country to be progressive and in order for the country to have quality investors, it is cardinal that the Investment Act provides for minimum investment. This would be very helpful in getting investment that is beneficial to the country's economy. This would ensure that we get only those investors that are serious and are willing to invest a substantial amount of money. This would also eliminate small time businessmen who call themselves investors and yet do not have anything meaningful to contribute to the country's economy. In connection with this, the Investment Act must also specify what kind of investment falls under it so that those interested in investing know exactly what type of investment the Act covers.

Although the Act is supposed to cater for both foreign and local investors, it really caters for foreign investors. The Act only provides incentives for foreign investors and this makes it difficult for local investors to compete with foreign investors who are at an advantage. This disparity was brought to the attention of the government whom it is hoped have taken note of it and will take appropriate action.¹¹⁰ Furthermore, the present Investment Act does not restrict certain industries to local investors. This has affected the participation of local investors as they do not have the muscle to compete with their foreign counterparts. There is no harmony between foreign and local investment attraction as the scale is tipped in the favour of foreign investors. Foreign investment plays a very big role in contributing to a country's economic growth and development. However, local investment is also very important to the survival of many in a country as it provides employment for the locals and a means of livelihood and goes to reduce the poverty levels in the country. The Act must also address local investment and put in measures that will encourage local participation. Furthermore, the Act must reserve certain types of industries for local investors so that they can be encouraged and helped to improve. The country is lacking in local investment and many people who would like to invest in certain industries cannot compete with foreign investors. The Act must therefore reserve certain industries to local investors so that local production is encouraged and improved.

In the wake of globalization of the world economy many countries are trying to benefit from foreign investment by among other things having access to the international market.

At the center of this is the issue of how they can make themselves more attractive. Many developing countries have resorted to offering tax incentives. In the Zambian case, the most generous tax incentives namely tax holidays and exemptions have been removed from the Act. This was due to abuse by investors who folded up their business operations as soon as their tax holidays expired. This was a good move as the country was been robbed of huge benefits because it did not get an opportunity to tax these businesses once their tax holidays expired. The essence of offering tax holidays is to encourage investors to set up operations in the country and to help them to settle. It is envisaged that the investors will stay on after expiry of tax holidays so that the country can benefit from their huge operations. Another reason advanced for removing tax holidays was that the government wanted to level the playing field for all investors. However, that notwithstanding, many investors are able to negotiate specific incentives for themselves directly from the government. The republican Vice President attested to this when he remarked that he was impressed with the work of Zambia Breweries who did not enjoy as many incentives as Konkola Copper Mines.¹¹¹ This tendency makes the playing field even more uneven as certain investors are given special treatment.

As was pointed out in chapter two, tax incentives are used as a means of attracting foreign investment. However tax incentives are by far not the major determinant for foreign investment but they may help in attracting additional investment. Each country needs to assess the role that these play and how beneficial they are. The government being the policy makers must carry out a research to access whether tax incentives are

¹¹⁰ The Post Newspaper, 29th July 2003.

¹¹¹ Ibid

really beneficial in Zambia and whether the cost of implementing them is less than the financial benefits. Tax incentives are very costly to the country but if they are bringing in additional investment then there is need to offer more competitive ones. However we have learnt from past experience that certain investors come to just take advantage of our incentives and once they lapse they go away without paying any taxes. Incentives such as tax holidays must be coupled with a condition that the investors must continue operations for a specified minimum period after expiry of tax holiday before folding up and leaving the country. This would enable the country to benefit from the tax that these investors would be required to pay. Furthermore, Zambia must adopt clear policies so that there is a level playing field. The current situation of investors negotiating their own incentives is costly to the country as the investor clearly knows what he wants and the officials quickly assent to his demands without really ascertaining the cost of the action.

Another issue that is adversely affecting the flow of foreign investment is the instability of the Zambian currency. The government must work very hard to bring inflation down and to ensure stable exchange value of the Kwacha. Investors are very concerned with the security of their investment and would therefore not be very happy to invest in a country in which their money is not secure. In chapter three when we looked at the investment climate in Zambia, it was seen that many of the sectors are very attractive but the major hitch is the monetary aspect. In fact statistics show that Zambia attracts the least foreign investment in the region.¹¹² This is mainly due to the problems posed by the currency. The government must therefore take this as priority and address it accordingly otherwise

¹¹² UNCTAD: World Investment Report 1999

we shall continue losing a lot of money from potential investors who are discouraged by the instability of the currency.

Section 30 of the Investment Act provides that the Investment Centre shall assist an investor who invests two hundred and fifty thousand dollars to obtain immigration permits for up to five expatriate workers. This provision should be repealed as it is very retrogressive. It does not help the Zambian employees as it is clear that if that investor sets up a company, the five top posts would be filled by expatriates. This does not help in improving the skills of Zambian employees as they would be sidelined. Zambia has skilled personnel and the investors must come and work with the people we have and if they do not have the particular skills they can always be trained.

The current Act does not have any provision for dispute resolution. This creates a lot of uncertainty. Investors want to be sure that they are protected by the law and that they have an identified means of dispute resolution. Therefore for an Act with the nature of the Investment Act, it is absolutely necessary and cardinal that there is provision for dispute settlement. This provides security to investors.

The Investment Act 1993 is far from providing a comprehensive framework for investment as it does not provide for many issues highlighted above that are pertinent to investment. The lack of comprehensiveness affects the efficacy of the Act. Similarly the Investment Centre currently is far from operating as a one-stop support facility for

investors. There are a number of issues that have to be addressed if the Investment Act is going to be effective in achieving its intended objectives.

There are efforts being made to have the current Investment Act amended. This paper has taken note of some of the proposed amendments. However there is no comprehensive document that has been prepared which contains the proposed amendments. The amendment of the Act is indeed a necessary thing at the moment. A lot of time has to be dedicated to the amendments to be made. If the amendment goes through, it would be the third time that the Act will be amended in ten years. There needs to be an Act that will stand the test of time. The last part of this chapter gives recommendation for the way forward after careful analysis of the subject matter.

4.3 RECOMMENDATIONS

- The Government through the Ministries of Finance and Commerce and Trade and Industry must come up with a national investment policy that will contain the government's objectives for investment and will work as a guideline for the legal framework for investment.
- The Investment Act must be more comprehensive and must provide for what law prevails in case of conflict.
- The Investment Act must clearly spell out its objectives.
- The Investment Act must provide for minimum investment.
- The Investment Act must reserve certain industries for local investors and must provide for certain incentives for them.

- The government must carry out an assessment to find out the role that tax incentives play in the attraction of foreign investment in Zambia.
- The government must also put in place strong financial regulatory policies that will strengthen the currency.
- The Investment Act must specifically provide for inter institutional coordination of ZIC with other institutions dealing with investment so that its operations are not hampered by power struggles.
- There should a specialized wing under the ZIC with representation from all stakeholders to process the applications of investors.
- The Investment Act must provide that no investor will be awarded investor status without an investment certificate.
- The Investment Act must provide for compulsory registration of investors with ZIC.
- Section 30 of the current Investment Act which provides that ZIC will help an investor obtain employment permits for five expatriates must be deleted.

The above recommendations are by no means exhaustive but they encompass all the issues raised in this paper.

REFERENCES

- Mwenda, K.K, Contemporary Issues in Corporate Finance and Investment Law. 2000. Penn Press. P37
- S.H.Goodman, "Investment Policy in Zambia," in Fortman Bastiaan de Gaay, (ed) After Mulungushi- The Economics of Zambian Humanism
- Zambia Law Journal, Special Edition, 1998.
- Mwenda, K.K, A Critical Review of Foreign Investment Policy in Zambia: The Stock Exchange and Privatisation. LLM, Thesis, UNZA, 1995.
- Mwenda, W.S, The Efficacy of the Zambian Investment (Act no.5 of 1986) in the Attraction of Private Foreign Investment for Development. LLM, Thesis, UNZA, 1990.
- Zambia Investment Centre Annual Report, 2001.
- Zambia, A Review of Commerce, Tourism and Industry.
- UNCTAD. World Investment Report.2001
- UNCTAD. World Investment Report. 1999.
- OECD. Corporate Tax Incentives for Foreign Direct Investment: A Guide for Economies in Transition. Handbook.
- ITC. A Business Guide to World Trade. Washington.1998.
- ### ACTS
- Ghanaian Foreign Investment Promotion Centre Act, 1994.
- The Law on Investment in Mozambique. 1992.
- Malawian Investment Promotion Agency Act, 1993.
- Investment Act, 1993, Cap 385 of the Laws of Zambia.
- Privatisation Act, 1992, Cap 386 of the Laws of Zambia.
- Immigration Act, Cap 122 of the Laws of Zambia.