THE LEGAL CHALLENGE OF RELIEVING ZAMBIA FROM ONEROUS TERMS IN DEVELOPMENT AGREEMENTS

BY

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DECLARATION

I, **Mulenga Stella Chileshe** do hereby declare that this essay represents my own research. I further declare that I have duly acknowledged the works of others and not infringed any copyright in the preparation hereof. This is the first submission of this work and it has not previously been submitted for award of a degree at this or another university.

I bear absolute responsibility for any errors, omissions or other defects herein.

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DEDICATION

This work is dedicated to the memory of my late parents, **Agnes White Mutale**, and **Edward Chileshe a**nd the entire **Chileshe family**, whose special pride I know will be theirs on the occasion of my successful completion of the law degree program.

ABSTRACT

This study acknowledges the contribution of development agreements to the inflow of foreign capital and technology which are necessary for economic development, especially in the mining sector. It is also acknowledged that development agreements play an important role in investment. However, when a country is desperate for capital and investment (as Zambia was at the time of entering into the development agreements) and when a country is afflicted with a number of other shortcomings, including the corrupt practices of its leaders, it may well sign up to contracts which, in due course, may be detrimental in operation. Should a state that finds itself saddled with an oppressive investment contract despair, or should it take steps to withdraw from the contract? Better still, should such a state repudiate the contract and risk earning a reputation as a rogue state having no respect for the sanctity of contract?

This study explores these questions and suggests that what is needed is a greater awareness among underdeveloped countries of the pitfalls of contract negotiation in the alienation of commercial interests in strategic industries, so that they can reject the worst deals and extract much better terms in future. In this vein this study looks at the legal challenge of relieving Zambia from such onerous terms in development agreements. A significant step in this direction has come with the recent enactment of the Mines and Minerals Development Act (no.7 of 2008) as well as the amendment of the Income Tax Act (no.1 of 2008).

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CHAPTER 1

1.0 BACKGROUND TO DEVELOPMENT AGREEMENTS IN THE MINING SECTOR

1.1 INTRODUCTION

Foreign Direct Investment (FDI) in the mining sector in Zambia has been a very topical issue in the recent past, particularly in connection with Development Agreements. Developing countries attempt to shore up their economies using various methods. One approach used is to increase foreign investment by improving their investment climate. FDI is defined as a long term investment by a foreign investor.[1] This is important to the receiving or host country because it is a means of increasing capital available for investment and economic growth needed to reduce poverty and increase citizens' living standards. Foreign Direct Investment also results in the transfer of new technology, skill and knowledge.[2] However, countries have to make their investment 'packages' attractive enough for foreign investment and this sometimes involves a relaxation of regulations so as to draw in such investors. A critical question that remains to be answered is, at what cost is this to the country?

This chapter introduces the reader to the background issues relating to the conclusion of Development Agreements which followed the privatisation of state owned enterprises in the mining industry. The focus of the study as a whole is to analyse the legal challenge faced by the Republic of Zambia in relieving itself of what are widely believed to be onerous terms in Development Agreements signed between the government and various mining investors in the country. It will be shown that the said

[1] C. Mtine, 'Mining As a Re-Emerging Industry In Zambia' University of Arizona (December 2006), 3

[2] Mtine, 'Mining As a Re-Emerging Industry,' 3.

Agreements were conferred not just with ordinary contractual force, but also with statutory force through the enactment of supportive legislation.[3]

1.2 STATEMENT OF THE PROBLEM

The study examines the Zambian government's act of having committed itself to a number of long term and apparently legal undertakings in Development Agreements. These undertakings, having proved disadvantageous, caused government to react through the enactment of the new Mines and Minerals Development Act.[4] In order to assess whether the position adopted by the Zambian government is legally acceptable, the study looks at a number of principles of law such as that of sanctity of contract[5] which provide the fundamental framework within which such Development Agreements were undertaken. An examination of the terms of some of the Development Agreements[6] is also integrated in the analysis of whether the Zambian government did actually breach the terms contained therein. The study documents the role that corrupt practices may have played in the conclusion of the agreements, on the part of those entrusted with the sale of the mines.

Furthermore, the study notes that because of the contractual and arguably statutory effect given to the Development Agreements at the time of their entry into force, a simplistic repeal of the old Mines Act[7] may not have relieved the Republic of its obligations, not least because of the mining investors' legitimate expectations and the possibility that their rights under the Agreements may have already crystallised. According to a reliable source,[8] at the time of conducting this research, one of the large-scale mining investors wrote to the Zambia Revenue Authority for clarification on the application to

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[3] The Mines and Minerals Act (1995) Chapter 213 and the Income Tax Act, Chapter 323 of the laws of Zambia

[4] (2008). Sections 159 and 160

[5] Cheshire and Furmston, Law of Contract. (Butterworths 1991)12th edition

[6] Development Agreement between The Government of the Republic of Zambia and Konkola Copper Mines PLC

[7] (1995)

[8] Senior Inspector, Zambia Revenue Authority

it of the new taxes. It indicated that it continued to pay the revised taxes under protest and reserved the right to take appropriate legal action pending an authoritative statement from Zambia Revenue Authority.

In assessing the legal propriety of the government's repeal and enactment of the mining legislation, regard is had to various pieces of legislation,[9] provisions of the Development Agreements themselves, as well as case law that is relevant to the problem. Reference is also made to some of the international instruments that give a guide on matters of investment and Transnational Corporations[10].

1.3 RATIONALE OF THE STUDY

This study deals with three distinct but interrelated problems. Firstly, it is argued by reference to the principle of sanctity of contract that the enactment of the new Mines Act by the government may not be without legal consequence at the instance of the mining investors with whom the government concluded Development Agreements. This is so because the new Act purported from the date of its commencement,[11] to cease the continued operation of the development agreements.

The study notes that the subject agreements, through the use of 'stability clauses,' expressly vested upon the mining investors certain rights of favourable taxation to endure for a specified number of years into the future and that those years have not elapsed. As such, it is argued that it may well, *prima facie,* constitute a breach for the state to proceed to enact law that is at odds with the provisions of the said Development Agreements. By reference to the Interpretation and General Provisions

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[9] For example, the Constitution of Zambia, Chapter 1 of the laws of Zambia, the Interpretation and General Provisions Act, Chapter 2 of the laws of Zambia, the Zambia Development Agency Act No.11 of 2006,

[10] For instance, Draft United Nations Code on Transnational Corporations (1986), the ICCPR and Resolutions of the United Nations

[11] 1st April, 2008

Act,[12] as well as authoritative case law, this study tests the legal credibility of the argument that the rights and privileges conferred by the agreements accrued in favour of the investors and so cannot be taken away without prior waiver or consent of the investors.

Secondly, the study examines whether the Zambian constitution allows parliament or the president by executive act, to cede or 'agree' to freeze the state's powers to make or unmake a law for a particular period. This study argues that the very notion of sovereignty entails the freedom to act as a state chooses. The state may choose to limit its own freedom and if it does so by contract, and that contract is given statutory force by the law making organ of that state, then the contract is binding on that state. However, it is argued that because sovereignty entails an absolute right, among other things, to pass laws, the state cannot be denied its right to revise laws which turn out not to be beneficial. This is so even if the state had undertaken by contract not to revise those laws. It is argued that where a state chooses to legislate against a contract, although it may or may not incur legal liability, its sovereign right to legislate will remain intact.

Thirdly, an analysis of the impact of Development Agreements on the legal framework for investment in Zambia is given, in the light of section 160 of the new legislation by which the government no longer considers itself bound by the Development Agreements. It will be demonstrated that corrupt practices and abuse of office attended the privatisation of the mines, a process that was actualised by signing development agreements.

At a time when developing countries are competing for investments, Zambia should be anxious to avoid being seen as a country that does not live up to its contractual commitments. This perception had, in fact, been referred to by a cartel of mining firms operating in Zambia, who painted a picture of doom, warning of an economic recession and serious damage to Zambia's reputation as a favoured

[12] Chapter 2 of the Laws of Zambia, section 14(2) (c)

destination for foreign direct investments.[13] The question could be asked whether Zambia should simply submit to the provisions of the Development Agreements, or should it argue that vitiating factors justify their repudiation.

The challenge for Zambia therefore, is how to relieve the Republic from such onerous terms without running the risk of legal liability. To analyse this challenge, it may be helpful first to explore the historical context of Development Agreements as well as the history of mining legislation in Zambia. This follows in the next chapter.

1.4 RELATED QUESTIONS FOR INQUIRY

1.4.1 Does the Zambian constitution allow parliament to cede or 'agree' to freeze the State's powers to make or unmake a law for a particular period?

1.4.2 Does the repeal of an enactment operate to completely erase all rights, (including rights falling for enjoyment in the future), which were acquired under the prior existing law?

1.4.3 Can an agreement concluded in and falling to be performed wholly in Zambia purport (by implication) to exclude the jurisdiction of the Zambian courts in dispute resolution, even if this is agreed to by the State, given that even the State is bound by the constitution, which is the supreme law of the land?[14]

1.5 JUSTIFICATION FOR THE STUDY

This study is justified on the basis that it reveals some of the important issues in international investment law and practice which form the core of contention between transnational corporations

[13] K. Kafunda, 'Tax Law Comes Into Effect', Vox Pop, 2 (April/June 2008) 16.
[14] Articles 1 and 94 of the Constitution, Chapter 1 of the Laws of Zambia.

(foreign investors), their home states and host states[15]. The study also relates to the problems that are experienced between the developed and the poor developing nations. It has been noted[16] further that the paradox of foreign investment is that it reflects the conflict between the pursuit for economic development and economic self-determination. Foreign investment vests control of a segment of the economy in foreign hands which implies detraction from indigenous control. In this view, the objective of the government policy must be to scrutinize foreign investment entry and control its operations within the economy.[17]

Secondly, the study is significant for its timeliness. At the time of embarking on this research, Zambia was experiencing one of its most prosperous times in its history of copper mining. However, minerals, being a wasting asset, can not be expected to always provide Zambia with the income that was being generated, hence the need to maximize Zambia's benefits from the window of opportunity presented whilst the conditions exist.

1.6 OBJECTIVES OF THE STUDY

The principal objectives of this study were twofold, namely:

1.6.1 To assess the legal propriety of the efforts of the Zambian government, through the enactment of the new Mines Act,[18] to extricate the Republic from the more onerous or less beneficial provisions of the development agreements signed with the mining investor companies.

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[15] M. Kamuwanga, Negotiating Investment Contracts: Investment Law in the Context of Development. (Lusaka: Multimedia Publications, 1995) 5

[16] Kamuwanga,Negotiating Investment Contracts, 5

[17] Kamuwanga,Negotiating Investment Contracts, 5

[18] Act No 8 of 2008

1.6.2 To assess the proper legal position of the Development Agreements entered into by Zambia and also the impact, if any, on the legal framework of investment.

1.7 RESEARCH METHODOLOGY

The study proceeded in a number of different ways to gather data. It was mostly based on analytical research.

1.7.1 Data collection

- Desk top research regarding a review of existing legal instruments that focus on the area of study. A number of authoritative texts by various authors were examined in order to gain an insight into the major legal and policy issues raised by the study. Sources such as newspapers, journals and magazine publications were also referred to in order to integrate issues that were current and relevant to the area of study.

- Where necessary, unstructured interviews with personnel at relevant institutions were conducted to extract practical data for analysis.

- The internet was also employed as an additional source of data for analysis.

1.7 BACKGROUND TO THE STUDY

At the time this study was undertaken, the problem that had arisen in the wake of an unprecedented rise in copper prices[19] was that the Republic of Zambia was precluded from benefiting from such windfalls due to the nature of commitments contained in the Development Agreements referred to above. Examples of such commitments included:

[19] Copper prices on the London Metal Exchange rose from US$ 0.70 per pound in 2003 to US$ 7.75 per pound in 2006

1.8.1 The undertaking not to change the royalties or taxes payable by the investing mining companies for the entire duration of so called 'stability periods'[20] (contained in what are known as 'stability clauses') and in some cases these were as long as 20 years.

1.8.2 Undertakings to compensate the investing mining companies in the event that the Energy Regulation Board or the Government of the Republic of Zambia, during the stability periods, required the said companies to pay higher electricity tariffs than those agreed in the power supply contracts executed with power utilities.[21]

1.8.3 Undertakings to exempt, by Statutory Order, the investing mining companies from the application of the provisions of various laws.[22]

1.8.4 Undertakings to resolve any disputes arising out of the Development Agreements by means of arbitration outside Zambia.

Driven by the need to mitigate the onerous terms of the Development Agreements and hence maximise benefits accruable to the Zambian people from the boom in copper prices on the international market, the government responded, in April 2008, with the enactment of a new Mines and Minerals Development Act[23] (hereinafter the 'new Mines Act').

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[20] These are periods defined in the various development agreements (for instance, 20 years in the Development Agreement between the Government of the Republic of Zambia and Konkola Copper Mines PLC) as time frames during which taxation and royalties may not be altered and no preferential treatment of any kind may be given in favour of other mining entities without extending such treatment to them.

[21] Konkola Copper Mines Development Agreement

[22] For example, the Mines and Minerals (Environmental) (Exemption) Order, The Pension Scheme Regulation (Investment) (Exemption) Order, the Companies (Fees) (Exemption) Order, the Companies (Resident Directors) (Exemption) Order, the Customs and Excise (Excise Duty) Suspension Regulations, the Mines and Minerals (Royalties) (Remission) Order, and the Customs and Excise (Konkola Copper Mines) (Remissions) Regulations 2000.

[23] Act No. 7 of 2008

1.9 DEVELOPMENT AGREEMENTS AND THE ENACTMENT THE MINES AND MINERALS ACT NO. 7 OF 2008

Condemning all imports of capital or foreign investment would not be prudent. What is needed is a greater awareness among underdeveloped countries of the dangers, so that they can reject the worst deals and extract much better terms in future.[24] In this vein this study looks at the legal challenge of relieving Zambia from such onerous terms in Development Agreements.

The enactment of the new Mines and Minerals Development Act[25] was complimented by an amendment to the Income Tax Act in order to provide for a new tax regime for mining entities, as of 1st April 2008. It is noted that Zambia found itself in the peculiar position whereby the legal framework governing its relations with investors in the mining sector was comprised in a number of Development Agreements that were given statutory backing. The said Agreements were given statutory effect by the repealed 1995 Mines and Minerals Act,[26] (hereinafter the "old Mines Act"), section nine of which provided in part that:

> " 9. (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...a development agreement, ...(that)... may contain provisions which notwithstanding the provisions of any law or regulation shall be 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..."

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[24] Bostock and Harvey, Economic Independence and Zambian Copper, 20

[25] Act No 8 of 2008, section 2 which enacts that the Act "shall come into operation on 1st April 2008".

[26] Formerly Chapter 213 of the laws of Zambia

An examination of some of the Development Agreements executed between the government of Zambia and various mining investors revealed that most of them had committed the government to a tax and royalty regime that could not be altered, in some cases for periods as long as 20 years.[27]

The new Mines Act, in section 159, abolishes the power of the minister to enter into any new Development Agreements relating to the grant of a large-scale mining licence or any other mining right. Section 160 proceeds to enact that:-

> "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"[28]

However, owing to the contractual and arguably statutory effect given to the Development Agreements at the time of their entry into force, a simplistic repeal of the old Mines Act followed by the enactment of a new one may not necessarily have relieved the Republic of its obligations. Issues of sanctity of contract, accrued rights and state sovereignty clearly arise in this context and will be discussed in succeeding chapters.

1.10 DEVELOPMENT AGREEMENTS AND THEIR USE IN VARIOUS JURISDICTIONS

In the context of this study, Development Agreements are essentially investment agreements concluded pursuant to section 9 of the 1995 Mines Act and governing the relationship between the Zambian government and the 'new owners' or majority shareholders in the mining companies in Zambia.

Development Agreements, in their generic sense, are agreements between a land owner and a developer, setting out the terms under which improvements to land are to be effected and how the costs of development will be apportioned and in some cases, how the profits generated therefrom will

[27] Fraser and Lungu, 'For Whom the Windfalls?'
[28] 1st April 2008.

be shared[29]. Such agreements have special characteristics which distinguish them from ordinary contracts. The contracting parties are not ordinary private persons, one of them being the state or a government organ, the other very commonly being a foreign corporation. The object of the contract is usually long-term exploitation of natural resources, involving expensive plants and installations. The tribunal in the LIAMCO[30] arbitration described them in the following terms:

> "The petroleum concession agreements entered into between LIAMCO and the Libyan Government constitute the subject matter of the dispute. These agreements, as other similar agreements, are classified by some international jurists under the type of the so called 'international development contracts.' A contract of this type is a semi-public agreement made between a State and a private individual, whose object covers a project of public utility or the exploration of certain natural resources, and in which are defined the rights and obligations of the parties in their mutual relationship."

An example of a place where Development Agreements have been used in the generic sense is the North Eastern state of Massachusetts in the United States of America. This state has a municipality of about a dozen towns called Cape Cod which offers development agreements to prospective investors in various industries, notably, the tourism and construction industries.[31] Pursuant to regulations issued under the Cape Cod Commission Act, municipalities are free to enter into development agreements concerning how particular land is to be developed. The benefits of development agreements of this kind are spelt out in the following quotation:

> "The value of development agreements is found in their ...allow(ing) (communities) the extraction of certain public benefits without running afoul of prescribed rules ... and other regulatory restrictions. They can be helpful to the landowner and developer as the executed contract provides protection against regulatory changes that may jeopardize a long term project."[32]

It was noted earlier that the power to conclude Development Agreements was vested by section 9 of the 1995 Mines Act in the minster. The opening words of the said section disclose the policy

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[29] Longworth Consulting Worldwide Limited at www.longworthconsulting.co.uk 20th August 2008
[30] Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic (1977), 20 I.L.M. 1, 29-30 (1981)
[31] http://www.capecodcommission.org 6th September 2008
[32] Cape Cod Commission Website http://www.capecodcommission.org 6th September 2008

objective behind vesting the minister with those powers, namely, that such power was given 'for the purpose of encouraging and protecting' large scale mining in Zambia. It is clear both from section 9 and the quotation above (on the benefits of Development Agreements), that such agreements are intended to protect the mutual interests of both the developer (investor) and the landowner. The Republic of Zambia would benefit from the capital inflow and tax receipts that a successful policy of encouraging large scale mining would bring. On the other hand, by giving the minister the power to conclude investment agreements that actually protect large scale mining investments, the anxiety of possible nationalisation that the mining investors must have entertained was significantly reduced. It may help to recall that in 1968, mines that were in the hands of private investors were nationalised following the Mulungushi and Matero speeches of Dr. Kenneth Kaunda, the then president of Zambia.[33]

A brief look at development agreements and their use elsewhere shows that they are a versatile tool that have been employed by different governments or states to pursue their desired economic policies targeting specific areas.

1.10.1 Tanzania

Of the countries examined, Tanzania has entered into development agreements with mining investors, notably Barrick Gold, a United States Gold Mining company. The agreement concluded in 1994 is to run for 25 years, but unlike the case with Zambia, it does not purport to override existing laws on taxation, labour or the environment. The Tanzanian royalty rate is set at 5 percent[34] for precious

[33] M. Bostock and C. Harvey, Economic Independence and Zambian Copper. A Case Study of Foreign Investment. (New York: Praeger Publishers, 1972) 124.

[34] O. James Otto, C. Andrews, F. Cawood and J.Tilton, ' Mining Royalties, A Global Study on their Impact on Investors, Government and Civil Society.' (Universities of Witwatersrand and Canada 2006) 14.

stones and metals, in contrast to Zambia's 0.06 percent set out in the Development Agreements and prescribed under section 66 of the old Mines Act.

1.10.2 Botswana

Botswana on the other hand, does not have development agreements that cover as wide a scope as those that Zambia has in the mining industry. Botswana instead has mining agreements with foreign investors but these are not called development agreements and are concluded broadly on terms already provided for by law, so far as concerns royalties, taxation, appropriation and environmental protection[35].

1.10.3 Chile

Chile is currently one of the largest copper producing countries in the world. In the year 2000, Chile produced 35 percent of the world's mined copper and was home to the largest copper mine in terms of production.[36] In terms of tax and royalty, the position in Chile is somewhat different, with foreign investors having the option to sign into the existing package of provisions set by law, or by signing an 'investment contract' providing for a fixed corporate tax rate of 42 percent for between 10 and 20 years with zero royalties[37]. This, in comparison to Zambia's 25 percent corporate tax rate[38] and 0.6 percent royalty[39] for 20 years, shows that Zambia is getting a raw deal. Yet, research on the Chilean model reveals that there is growing concern that the country's current tax regime with respect to the

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[35] Department of Trade and Industry, 'Botswana Shines' (2007).

[36] http://www.nationsencyclopedia.com/Americans/Chile-MINING.html 20 August 2008

[37] S.D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law' McGeorge Global Business and Development Law 19 (2007), 337.

[38] Schedule 7, Clause 1(b) Konkola Copper Mines Development Agreement; Schedule 8 of Chambishi Metals Plc Development Agreement

[39] Section 66 of the (repealed) Mines and Mineral Act, Chapter 213 of the Laws of Zambia

foreign mining sector is in need of revision and that the taxation and royalty rates above are bound to change with proposals that government has put forward[40].

From the foregoing survey of countries, it emerges that Zambia's rates of royalty and taxation in the mining industry are comparatively lower and that Development Agreements as signed up to by Zambia are unique in their expression of legal supremacy whereby their provisions apply 'notwithstanding the provisions of any law.'

[40] O. James Otto and J.Tilton, (2006) 'Mining Royalties', 124

CHAPTER 2

2.0 THE HISTORY OF MINING LEGISLATION IN ZAMBIA AND THE CONCLUSION OF DEVELOPMENT AGREEMENTS

In the first chapter, the general use and application of development agreements was discussed. In this chapter, in order to give a broader view of the regulation of the mining industry in the past, this background is extended to cover the legal framework governing the grant of commercial mining rights in Zambia in much earlier times. The legal relationship that characterised the colonial (and immediate post-colonial) government on the one hand, and the holders of mining rights on the other, is traced from the inception of commercial mining in Zambia, through the colonial administration, on to independence and then nationalisation. The political and economic climate that surrounded the conclusion of development agreements is then discussed in some detail. The discussion sheds light on the issue of corruption, which appears to have surrounded the privatisation of the mines.

In the section that follows, the development of mining regulation in Zambia is traced from colonial times to the present day.

2.1 THE COLONIAL PERIOD

The structure of the mining industry and the legal framework within which it operated can be seen much more readily as a legacy from the Chartered Company[41] than as a legacy from the Colonial Office administration.[42] The British Government, unwilling to be involved in the expense of running overseas territories and not wishing to further burden the British taxpayer, conceived the idea of

[41] The British South Africa Company, incorporated by Royal Charter in 1889

[42] Bostock and Harvey, Economic Independence and Zambian Copper, 23.

using another method of colonial expansion, that of granting a charter to a private company[43]. The preamble to the Charter incorporating the British South Africa Company (BSA) stated that:

> "the existence of a powerful British Company, controlled by British subjects, and having its particular field of operation in that region... would be advantageous to the commercial and other interests of our subjects in the United Kingdom and in the Colonies."[44]

The Charter further authorised the BSA to hold, use and retain for its own purposes and on the terms of the Charter the "full benefit of the concessions and agreements as aforesaid, so far as they are valid, all interests, authorities and powers" referred to in the concessions and agreements. The territory was deemed to be under British influence in terms of the Order in Council of 1889 and although the BSA exercised vast powers over mineral rights, the Crown retained sovereignty over the territory[45]. By 1900, the BSA Company had obtained concessions and treaties in certain parts of Northern Rhodesia. It had also obtained administrative powers under Orders in Council[46] throughout the territory as well.

These administrative powers differed considerably between North Western Rhodesia and North Eastern Rhodesia, being considerably wider in North Eastern Rhodesia. A comparison of the North Western Rhodesia Barotseland Order in Council of 1889 and the 1890 North Eastern Rhodesia Order in Council shows how greatly they differed. Whereas the administrator in North Eastern Rhodesia had authority to initiate legislation for the Governor's approval, and to grant interests in land, no such rights existed in relation to Barotseland North Western Rhodesia. In the latter area, there were no statutory rights of grant. Any such rights of grant arose from a series of concessions, which

[43] M. Stamp. A History of the Mineral Rights of Northern Rhodesia, (London: Maxwell Stamp Associates Limited, 1967) 2.
[44] Stamp, History of the Mineral Rights, 6
[45] Stamp, History of the Mineral Rights, 7
[46] Barotseland North Western Rhodesia Order in Council 1889 and North Eastern Rhodesia Order in Council 1900

included the Lochner concession.[47] A 1900 concession[48] between Lewanika, the Paramount Chief of Barotseland, and the Company related only to the Batoka and Mashukulumbwe areas and grants could only be made with the consent of Lewanika.

The position of the BSA Company in Barotseland was subject to the obligations of the charter granted to them in December 1889, which was extended over the territory under British influence north of the Zambezi and south of the territories of the Congo Free State and the German sphere by the Agreement of February 1891.[49] This Agreement was supplemented in November 1894 by a memorandum. Notwithstanding these agreements, however, the BSA Company had no rights of government in the Barotse country, where the administration of justice to British subjects was regulated by the Africa Order in Council of 1889. The relations of the BSA Company to Lewanika were based upon the Agreement of 1890.[50] This agreement was "to be considered in the light of a treaty between the Lozi (Barotse people) and the government of Queen Victoria." In exchange, the Barotse establishment was promised British protection, a consideration of £2000 per year, as well as assistance in the form of education to subjects and armoury to the King.

In the years between 1900 and 1911, the North- Eastern and North Western parts, of the territory now known as Zambia, were administered separately. However, in due course, it emerged that the two territories would be better administered as a single territory. This was achieved by the 1911 Northern Rhodesia Order in Council, which revoked both the North Eastern and North Western Rhodesia Orders in Council. The Northern Rhodesia Proclamation of 17th August 1911 was the instrument passed to give effect to the amalgamation. The country remained under company rule and

[47] On 27th June 1890, Frank Lochner an emissary of the Chartered Company of the British Empire in Southern Africa, signed a treaty with King Lewanika of the Lozi people of present day Western Province, Zambia.

[48] The concession stated that it covered all the areas where Lewanika exercised dominion apart from Barotseland proper, that is to say, the area between Sesheke and Lealui, where the Lozi live.

[49] Stamp, A History of the Mineral Rights of Northern Rhodesia, 106 (PART II, Appendices)

[50] Stamp, A History of the Mineral Rights of Northern Rhodesia, 106.

governing powers were vested in a company administration and a Council of Company Officials, subject to ultimate British control, although this was terminated on 1st February 1924 by the Northern Rhodesia Order in Council[51]. The British government assumed responsibility for the administration if the territory, while the status of Northern Rhodesia became that of a protectorate. This situation obtained until 1st August 1953, when the territory was made part of the ill fayed British Central African Federation. The Federation was dissolved in December 1963 and by 24th October 1964, Northern Rhodesia became the independent state of Zambia.[52]

Throughout the colonial period, royalties were payable to the BSA Company and varied depending on the licence granted to a mining company by the BSA. Typically, this was about 13.5 percent[53]. Tax was chargeable at the effective corporate tax rate on profits at 51 percent and this accrued both to the colonial government[54] and to the United Kingdom Exchequer[55] in London, where the company was headquartered. According to one source,[56] for the thirty years preceding independence, royalties from copper from the Copperbelt alone gave the BSA Company over £80,000,000 after tax from copper producing companies which it licensed. In 1964 alone, the company's share of royalties exceeded £7,000,000.00 after tax. Past British governments benefitted from the BSA's royalty income by an amount of approximately £15,000,000 paid in tax by the company.[57]

2.2 THE ATTAINMENT OF INDEPENDENCE, 1964

The most significant change that came with independence was the signing of a tripartite agreement between the Zambian and British governments on the one hand, and the BSA Company on the other,

[51] Ndulo, Mining Rights in Zambia,2
[52] Ndulo, Mining Rights in Zambia, 2
[53] Ndulo, Mining Rights in Zambia, 224
[54] Ibid
[55] Bostock and Harvey, Economic Independence and Zambian Copper, 37
[56] Harvey and Bostock, Economic Independence and Zambian Copper, 37
[57] Stamp, A History of the Mineral Rights of Northern Rhodesia, (II)

in terms of which all mineral rights were to be vested in the President, including mineral royalties, on behalf of the Republic of Zambia.[58] In consideration, the two governments were to contribute equally to compensate the Company £4,000,000. The vesting of mineral rights in the President on behalf of the Republic was achieved by the 1965 Mining Ordinance (Amendment) Act.[59] In this legislation all other existing rights, including the special grants, were preserved under the same conditions as were contained in them when they were granted by the Company.[60] At Independence the mineral rights previously held by the BSA Company were transferred to Northern Rhodesia, henceforth to be exercised by the Zambian Government. The rights enjoyed under the Barotseland agreement continued by virtue of section 8 of the Zambia Independence Act, 1964, which provided for the safeguard of agreements relating to Barotseland.[61] The British Government gave up its sovereignty over the territory by virtue of granting independence to Northern Rhodesia, now known as Zambia.

The fact that the Zambian government merely stepped into the shoes of the BSA Company had certain implications. The recognition of existing grants meant that the North Charterland Exploration Company and the Paramount Chief Litunga of the Lozi tribe continued to have the exclusive right to grant mining rights in the North Charterland concessions area and the Western Province respectively.[62]

The existence of the Paramount Chief Litunga's special powers caused legal difficulties which inhibited prospecting in the area. The recognition of existing rights also meant that over areas which

[58] Stamp, A History of the Mineral Rights of Northern Rhodesia, 140
[59] Act No. 5 of 196, which removed all reference to the British south Africa Company
[60] Ndulo, Mining Rights in Zambia, 224
[61] Extinguished by the 1969 Reforms which found legislative expression in the Mines and Minerals Act of 1970.
[62] Ndulo, Mining Rights in Zambia, 130

the mineral rights were wholly or partly alienated, royalty on any minerals produced was only payable in proportion to the extent to which the government held the mineral rights.[63]

The Zambian government thus inherited a system which it operated within a legal framework built by the Chartered Company. It could make grants of prospecting rights only in areas open to prospecting as this excluded areas already covered by valid and operating grants made by the Company.[64] In practice it meant large areas of the country were held in perpetuity under such grants, in which neither prospecting nor mining was taking place.

Government found itself with no legal power to compel such development, nor could it compulsorily acquire the land or terminate the grants as the rights of the grant-holders were safeguarded in the independence Constitution.[65] This safeguard was afforded by the inclusion of a Bill of Rights in the said Constitution, which protected the right to property. The protection was further entrenched by section 72 of the independence Constitution, which provided for the holding of a referendum in respect of any measure proposing to alter that section or any provisions in the Constitution relating to Chapter 3 (the Bill of Rights).

The practical realities whereby government was inhibited in its control of some of the potential mining areas meant that the government's acquisition of mineral rights from the BSA Company in 1964 was of little practical significance.[66] The law in force tied the government so much to the past and consequently was far from ensuring national aspirations in mineral development. All it really meant was that the government received tax revenue and royalty payments if minerals were produced.

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[63] Ndulo, Mining Rights in Zambia, 129

[64] Ndulo, Mining Rights in Zambia, 131

[65] Section 18, 1964 Constitution of Zambia: Appendix 3 1965 edition

[66] Ndulo, Mining Rights in Zambia, 131

If nothing was mined, however, there was nothing it could do.[67] It also entailed that the in-coming government had a duty to abide by the Barotseland Agreement, a fact recognised by section 8 of the Independence Constitution. This was perceived as an obstacle to development because it severely restricted what the government could do with the mines.

2.3 THE 1969 ECONOMIC REFORMS, THE MINES ACT (1970) AND THE TAX LEGISLATION

On June 17 1969, a referendum was held to approve constitutional changes which included permitting compulsory purchase of land without compensation in the case of absentee landlords. Zambia's first President, Dr. Kenneth Kaunda announced that all existing private rights of ownership or partial ownership of minerals would revert to the State and that the grants in perpetuity made by the BSA Company would be cancelled.[68] Owing to the foreign ownership of the mines before nationalisation, most of the money generated from sales and profits was being externalised at the expense of local development. Dr Kaunda's government was unhappy with the mining investors' lack of investment in the country and he expressed his disapproval of:

> "unscrupulous people who, in collusion with their suppliers overseas, inflate the prices of merchandise and in this way build fat accounts for themselves overseas while the nation is suffering from foreign exchange drain and from inflated prices...I am disappointed at the virtual lack of mining development since independence...the mining companies could have embarked upon further expansion if they chose to devote part of their profits for this purpose."[69]

In his speech of August 11, 1969[70] the President announced the government's intention to introduce reforms whereby (among others):

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[67] Ndulo, Mining Rights in Zambia

[68] Bostock and Harvey, Economic Independence and Zambian Copper,77

[69] K. Kaunda, 'Zambia Towards Economic Independence,' Mulungushi speech, April 19, 1968 (Lusaka: Zambia Information Services, 1968)

[70] Kaunda, 'Zambia Towards Economic Independence'

(i) the government would acquire a majority (51percent) interest in the mines;

(ii) all rights of ownership or partial ownership of minerals would revert to the state;

(iii) that the Litunga's special rights would be terminated;

(iv) Special Grant areas in which no mining exploration had taken place for at least 5 years would be ceded to the state;

(v) other Special Grants would be converted to merely exploration licences of 25 years duration[71].

These reforms subsequently found legislative expression in the 1969 Mines and Minerals Development Act, which came into effect on January 1, 1970. Before 1969, there were three main taxes on holders of mining rights, namely, royalty, export tax and income tax.[72] Until independence in 1964, the royalty was fixed by and was payable to the British South Africa Company.[73] The royalty was incorporated in the prospecting licence. It became payable to the Zambian government by virtue of the Mining Ordinance (Amendment) Act, No. 5 of 1965. After Independence, the tax was continued by the Zambian government for some time, largely because it proved to be very profitable in terms of actual government revenue. Most mining companies were by 1966 paying an average of £87.86 royalty per short ton and this brought in a substantial amount of income for the state.[74] It was also a political decision in that the government was not sympathetic to mining rights holders on this issue as they had done little about it under the BSA Company.

Along with the reforms referred to above, and to correspond with the new system of mining rights, the government passed the Minerals Tax Act of 1970. This law abolished the royalty and copper

[71] Bostock and Harvey, Economic Independence and Zambian Copper,77
[72] Ndulo, Mining Rights in Zambia, 224
[73] Ndulo, Mining Rights in Zambia, 224
[74] Ndulo, Mining Rights in Zambia, 225

export taxes, and introduced instead, a 'mineral tax' which was based entirely on profits.[75] For copper, this tax was imposed at the rate of 51percent. Lead, Zinc and Amethyst were taxed at 13 percent whereas gold was taxed at 20 percent.[76] Income tax for corporates was at 45 percent, so that effectively, the mining companies were paying about 73 percent of profits in taxes in respect of profits on copper[77].Compared to the current development agreements, these rates of taxation were substantial. Before the enactment of the Mines and Mineral Development Act 2008 and the Income Tax Act 2008, the 1995 Mines and Minerals Act provided specific incentives for mining investors. For example, mineral royalty, which is essentially a tax paid on a mineral removed from Zambia, was charged at 0.6 percent of the value of minerals produced.[78]

2.4 POST-1991: POLITICAL AND ECONOMIC LIBERALISATION

The story of Zambia's economic performance since nationalisation had not been particularly impressive. As the Zambian economy experienced a prolonged recession in the 1980s exacerbated by balance of payments deficits and reduced earnings from the copper sales, the country was forced to turn to the International Monetary Fund (IMF) and World Bank for assistance[79]. However, certain conditionalities were attached to the loans it was granted, such as devaluation of the currency, trade liberalisation, reduction in the mine labour force and a general wage freeze. Unemployment, deteriorating social standards and hyper inflation heightened dissatisfaction with the United National Independence Party (UNIP) government.[80] UNIP's political legitimacy was thus severely undermined

[75] Ndulo, Mining Rights in Zambia, 225
[76] Mines and Minerals Act 1970
[77] Ndulo, Mining Rights in Zambia, 233
[78] Section 66,Mines and Minerals Act (1995), Chapter 213 of the Laws of Laws
[79] N. Simutanyi, 'Copper Mining in Zambia: The Developmental Legacy of Privatisation', Occasional Paper 165 (July 2008)2
[80] Simutanyi, 'Copper Mining in Zambia' 2

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[79] N. Simutanyi, 'Copper Mining in Zambia: The Developmental Legacy of Privatisation', Occasional Paper 165 (July 2008)2
[80] Simutanyi, 'Copper Mining in Zambia' 2

by an economic crisis that saw the copper mining industry no longer able to provide employment to the majority of the Zambia labour force or act as the engine of growth for the entire economy.

With the coming into power of the Movement for Multiparty Democracy (MMD) government in 1991, liberalisation measures were introduced. The Government started discussing the possibility of privatising copper mining.[81] Privatisation of the Zambia Consolidated Copper Mines was a condition repeatedly attached to several loans from the IMF and World Bank and was a pre-condition for Zambia to qualify for debt relief through the Highly Indebted Poor Countries (HIPC) initiative.[82]

A number of legislative reforms took place. In particular, the Privatisation, Investment, and Companies Acts were passed, as were a host of many other statutes[83] designed to suit the requirements of the new era of liberalisation. In relation to the mining industry, a number of legislative instruments were passed, providing exemptions to the mining investors from some provisions of the new enactments. Examples are the Mines and Minerals (Environmental) and the (Exemption) Order[84] which exempt the mining investors from the application of certain environmental laws. This is consistent with some sections[85] of the development agreements, in terms of which liability for environmental effects will be judged by standards specifically agreed and referred to in the Development Agreements and not by reference to provisions of 'environmental laws.' Two others are the Companies (Fees) (Exemption) Order and the Companies (Resident Directors) (Exemption) Order,[86] both of which exempt the Mining Companies from sections of the

[81] A Dymond. 'Undermining Development? Copper Mining in Zambia', Scotland's Aid Agency –SCIAF (October 2007) 8
[82] Dymond 'Undermining Development?' 9
[83] The Securities Act, the Banking and Financial Services Act, the Zambia Competition Act, the Pensions and Insurance Act, and the National Pension Scheme Act, are examples of such legislation.
[84] (S.I. No. 19) The Mines and Minerals (Environmental) (Exemption) Order, 2000
[85] Common Clause 12.3 of Development Agreements for Chibuluma, Konkola Coopper Mines, Chambishi Cobalt and Acid Plant, Kansanshi
[86] (S.I. No. 32) The Companies (Resident Directors) (No. 2) Order, 2000

Companies Act; the former from the payment of certain fees and the latter from the requirement to have at least half of the Directors of companies resident within the country.

This approach of exempting the mining companies from the application of various laws whilst subjecting other entities to them, once more demonstrates the extent to which the government went to accommodate the interests of the companies.

2.5 THE CONCLUSION OF DEVELOPMENT AGREEMENTS: POLITICAL AND ECONOMIC CONTEXT

Development Agreements in Zambia were precipitated by a protracted process of economic reform, mainly featuring privatisation. This was a key element of the liberalisation agenda of the Movement for Multi Party Democracy (MMD) government following the 1991 presidential and parliamentary elections. In 1992, the passing of the Privatisation Act[87] saw the creation of the Zambia Privatisation Agency (ZPA), which oversaw the privatisation of 257 companies by December 2001[88]. The enactment of a privatisation law was also a conditionality of the World Bank under the first Privatisation and Industrial Reform Credit (PIRC I) facility.[89] Another conditionality under the 1995 (International Monetary Fund) Enhanced Structural Adjustment Facility (ESAF) was the privatisation of the state owned mining company, the Zambia Consolidated Copper Mines Limited (ZCCM).

The proposals of these international financiers mainly emphasize that governments of countries that get loans from them must adopt, among other measures, a free-market economy approach in their economic restructuring programmes.[90]

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[87] Chapter 386 of the laws of Zambia

[88] L. Situmbeko and J. Zulu, 'Zambia: Condemned to Debt. How the World Bank and International Monetary Fund have Undermined Development,' World Development Movement (April 2004), 26.

[89] Situmbeko and Zulu, 'Zambia: Condemned to Debt' 24

[90] K. Mwenda, Zambia's Stock Exchange and Privatisation Programme: Corporate Finance Law in Emerging Markets.

During the said period the most significant policy changes were enshrined in the 1995 Investment Act,[91] whose reform was a condition of the PIRC II loan.[92] This Act (which has since been repealed by the Zambia Development Agency Act No. 11 of 2006) established the Zambia Investment Centre (ZIC) to assist companies through the process of buying into the Zambian economy. It provided the general incentives that applied to all investors as well as special incentives that applied to particular industries. The Act also abolished foreign exchange controls and permitted investors to repatriate dividends, management fees as well as principle and interest on foreign loans.[93]

Furthermore, the Mines and Minerals Act (1971)[94] which regulated the nationalised industry was repealed to give way to the Mines and Minerals Act of 1995. It is quite evident that the Mines and Minerals Act of 1995 was passed in order to harmonise the law in this area with the economic policies of liberalisation that were being pursued at the time in order to attract private investment and foster development. The 1995 Mines and Minerals Act provided specific incentives for mining investors. For example, mineral royalty, which is essentially a tax paid on a mineral removed from Zambia, is charged at 0.6 percent of the value for minerals produced.[95] The 1995 Act also provided latitude for companies to minimise their income tax returns by deducting monies expended on investments in mining. The Act further provided the mining investors with relief from paying customs duties for machinery and equipment.

(The Edwin Mellen Press, 2001) 9.

[91] Chapter 385 of the laws of Zambia, now repealed by the Zambia Development Agency Act, No. 11 of 2006

[92] A. Fraser and J. Lungu, 'For Whom the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines,' Civil Society Trade Network of Zambia (2006) 10

[93] Part IV of the Act on general incentives.

[94] Chapter 329 of the Laws of Zambia,(1971 edition)

[95] Section 66, Mines and Minerals Act 1995

The privatisation of the mines was undertaken reluctantly because, as one observer has noted, the mines symbolised national sovereignty[96] and the very idea of privatising them was rather unpopular among Zambians, who had become accustomed to the mines being an extension of the Zambian state in the provision of social services and amenities.

A further illustration of the circumstances in which the Zambian government found itself is afforded by the sentiments of the then Minister of Justice and nominated Member of Parliament, Mr. George Kunda,[97] on the Development Agreements. The learned Minister had the following to say:

> "Mr. Speaker, I just want to explain the genesis of these development agreements particularly the clause relating to the stability period. The development agreements were being negotiated in the year 2000 and at that time, the bargaining power of the negotiating team of the government was very weak. Mr. Speaker, the mines were losing according to our records about US$ 1 million per day and this is documented. This entailed that the investors could dictate certain terms because they were the people coming up with the money to invest in the mines. What happened is that a law was brought to this august House whereby development agreements were more or less placed above the law. This meant that provisions of development agreements would override the law and unfortunately, this is what we found".

In summary, it may be noted that the signing of the Development Agreements was influenced chiefly by economic and political factors. Apart from the influence of corruption, other factors included the overbearing donor pressure, lack of appropriate levels of bargaining power and skill and the unsustainable loss of an estimated US$1 million for each day that the mines remained un-operational. During this time the government still had to meet the cost of wages to the workers, it had to pay electricity bills to Copperbelt Energy Corporation and it had to pump water 24 hours a day out of the mines to keep them from flooding.[98]

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[96] Simutanyi, 'The Development Legacy of Privatisation,'3
[97] Zambia, National Assembly, Debates (22nd March 2007).
[98] Bank of Zambia source

2.6 POLITICAL INTERFERENCE AND CORRUPTION IN THE PRIVATISATION OF MINES

The privatisation of the mines started with the sale of Kansanshi Copper Mines in January 1997 and ended with the Konkola Mines' sale on 31st March 2000.[99] According to the Zambia Privatisation Agency (ZPA), Privatisation Status Report of March 2001, the amounts agreed upon as the sale price were not all paid at the close of sales. Actual cash considerations constituted only a fraction of the total amounts. In the case of Kansanshi for example, of the total of US$ 28 million agreed upon, US$ 3million was the cash at close, US$10 million was to be paid after completing pre-feasibility stage and the remaining US$ 15 million after completing the feasibility study[100]. Likewise, in the case of Konkola division and other assets grouped with it, US$ 30 million was the cash at close and the balance of US$ 60 million would be paid in six instalments of US$ 10million each after year six of close. By these deferred terms of payment, the investors were basically mining Zambia's minerals, selling them on and then paying the Zambian government, several years after the sale. These deferred payments meant that the actual cash received by government was just a fraction of the figures announced.[101]

The privatisation process of the Zambian mining industry was supposedly implemented pursuant to the Privatisation Act.[102] However, the fact that the Zambia Privatisation Agency (ZPA), a statutory body established by the Privatisation Act to implement and manage the country's privatisation programme, was sidelined by a negotiating team appointed by President Frederick Chiluba, has generated much speculation about the possible existence of corrupt practices in the sale of the

[99] F. Mutesa, 'Transparency and the Rule of Law in the Privatisation of Zambia Consolidated Copper Mines (ZCCM) Assets' Transparency International, Zambia (2002) 5.
[100] Mutesa, 'Transparency and the Rule of Law,'
[101] Mutesa, 'Transparency and the Rule of Law,' 2
[102] Chapter 385 of the laws of Zambia (now repealed)

Zambian mines.[103] It is also significant in this regard that a former chief executive officer of the ZPA has described the privatisation of Zambia's state owned enterprises as 'an act of unprecedented vandalism by the Chiluba regime,' the 'biggest fraud in economic history.'[104]

Similarly, a study by the Refugees Studies Centre, Oxford, has described the privatisation of the mines in Zambia as a 'looting exercise' and a 'lesson in how not to privatise.'[105] Such critics have pointed to the departure from the Privatisation Act in the negotiation of the sale of the mines and have pointed to possible collusion, bordering on corruption, on the part of those who were entrusted with the task of disposing of the country's main economic assets.[106] That corruption and abuse of office clearly attended the sale of the mines is further evidenced by the recent conviction[107] by a Lusaka Magistrate of Francis Kaunda, the chairman of the negotiating team on the Zambia Consolidated Copper Mines (ZCCM) privatisation team. This was in connection with the fraudulent sale of a primary school that was part of ZCCM's non-core assets.[108] At the time of writing this work, an appeal against the conviction is yet to be heard.

The involvement of former Republican President Frederick Chiluba and others in the irregular sale of the mines can be seen in a number of documented anomalies. For example, in March 1997, several years after the privatisation programme had commenced and a year following the beginning of the privatisation of ZCCM assets, Chiluba appointed the Government of the Republic of Zambia

[103] F. Mutesa,'Transparency and the Rule of Law in the Privatisation of Zambia Consolidated Copper Mines (ZCCM) Assets' Transparency International, Zambia (2002) 5.
[104] The Post, 16 December 2007.
[105] T. Kenny and P. Feeney, 'Zambia: Deregulation and the Denial of Human Rights: Rights and Accountability in Development,' Oxford: Refugee Studies Centre (2000)
[106] Mutesa,'Transparency and the Rule of Law,' 5
[107] Times of Zambia, 19th March 2008.
[108] Times of Zambia, 19th March 2008.

(GRZ)/ZCCM Privatisation Negotiating Team (GRZ/ZCCM-PNT).[109] The rationale for the appointment of this committee alongside the ZPA was ostensibly because the privatisation of ZCCM was deemed a matter of national importance in which government desired to have greater influence[110]. The major role of the said committee was supposed to be advisory in nature. The appointment was, however, contrary to section 32 of the Privatisation Act, which provided for the appointment by the ZPA Board of an independent negotiating team. One source documents how the appointment of Francis Kaunda (the chairman of the team negotiating the privatization of ZCCM) was 'ratified' by the ZPA Board. Under the ZPA Act,[111] only the ZPA board could appoint members of a negotiating team for the sale of any state-owned enterprise. There was no provision for the appointment of such a member by any other authority, meaning that the question of ratification could not possibly arise.

The negotiations between the GRZ/ZCCM Negotiating Team and the bidders for the mines were mired in secrecy. This lack of transparency in the privatisation process only served to heighten suspicion that corruption played a part in reaching some of the agreements which government entered into. In fact, when the question of transparency and accountability on the sale of the mines was raised, the then minister of Mines and Minerals Development, Dr. Kalombo Mwansa, alleged in parliament that some of the people involved in the negotiating team were bribed.[112]

One source has lamented the secrecy surrounding development agreements and notes that for close to a decade since the first of them were struck, trade unions, MPs, local government and even the regulatory authorities that are supposed to keep the companies to the promises they made in the

[109] F. Mutesa,'Transparency and the Rule of Law in the Privatisation of Zambia Consolidated Copper Mines (ZCCM) Assets' Transparency International, Zambia (2002) 12

[110] Mutesa,'Transparency and the Rule of Law',12

[111] *Section 32, Chapter 385 of the laws of Zambia*

[112] The Post, 29 January 1999.

agreements had not been allowed to see them. Indeed, it is curious that assets that constituted the lifeblood of a nation's economy could be sold and the details of the sale kept away from the public. It is noted that the GRZ/ZCCM Privatisation Negotiating Team dispensed with the engagement of consultants to lead the negotiating and bidding process and the powers came to rest upon this committee. Maintaining the same team (GRZ/ZCCM-PNT) to negotiate with various bidders for a long time had potential for facilitating private gain.

Although procedures for award of tenders to bidders existed under the ZPA Act, these were openly disregarded. The sale of Luanshya/Baluba mine is a case in point. An award by the ZPA negotiating team to a highly experienced mining company, First Quantum Minerals Incorporated of Canada, was reversed by the Chiluba-appointed team a day later, in favour of the Binani Group, an Indian company without any sound track record in the mining industry.[113] No reasons were advanced to explain this reversal of the decision of a statutory body that was supposed to operate without political interference. The bidders were given a 48-hour ultimatum in which they were to submit fresh bids and it turned out that the Binani bid bettered that of First Quantum Minerals by a marginal fraction.[114]

This prompted the latter to protest, arguing that the contents of its bid must have been leaked to Binani. The matter was taken to court, where First Quantum contested the decision to award

Luanshya mine to Binani. Several interesting revelations emerged in the court case,[115] which strengthened the view that the ZPA Board must have come under pressure from the political elite to award the sale to Binani. From the court case it was also revealed that officials at ZPA disbelieved Binani's pledge to retain the over 6000 workforce at Luanshya mine. They also had doubts about

[113] G. Mudenda and M. Mbinji, 'Nchekelako: An Afronet Reader on Corruption in Zambia', Afronet Publications, (2002)
[114] Mutesa, 'Transparency and the Rule of Law', p 23
[115] Mutesa, 'Transparency and the Rule of Law', p 23

Binani's ability to raise capital to finance its development projects.[116] Binani's lack of exploration and mining experience also weighed in favour of the decision to reject its offer. However, all this was overlooked for inexplicable reasons. In due course, Binani's Roan Antelope Mining Company of Zambia (RAMCOZ) was unable to service its debts and was placed in receivership by the Zambia National Commercial Bank, vindicating the ZPA's earlier doubts about the company's mining credentials.[117]

Another anomaly arose in respect of the requirement to disclose interest in terms of the ZPA Act, by any person on the negotiating team whose presence on the team could engage a conflict of interest in relation to a particular sale.[118] In this regard, Avmin Company Limited, one of the bidders, announced during the preparatory stages of their bid that Francis Kaunda was their representative. Mr. Kaunda never disputed this, yet he never declared any interest in the deal, which he proceeded to preside over.

The foregoing discussion has shown that although the Privatisation Act was passed in 1992, the mines were only privatised between 1997 and 2000. Although the legal framework to deal with the privatisation was well in place, the negotiation of development agreements was largely compromised by corruption and the lack of adherence to the law by the then head of state and his accomplices.

[116] F. Mutesa, 'Transparency and the Rule of Law' (2002) 12

[117] According to Bank of Zambia source, the company was placed in receivership in November 2000

[118] Section 11, Zambia Privatisation Act, Chapter 386 of the laws of Zambia

CHAPTER 3

3.0 LEGAL ANALYSIS OF THE RIGHTS OF FOREIGN INVESTORS IN THE MINING INDUSTRY

This chapter examines the issue whether there was an accrual of rights and privileges in favour of the investors in the interval between the signing of the development agreements and the commencement of the Mines and Minerals Development Act of 2008 (which has purported to free the Republic from the said agreements). It also looks at whether such rights can be taken away without the prior waiver or consent of the investors. Furthermore, the question whether a sovereign state may, by contract, constrain its right to legislate is also discussed, as well as the question whether it is constitutionally open to parliament to foreclose its power to make or unmake a law.

The principle of accrued rights in the context of the legal relationship subsisting between the mining investors and the Zambian government is also examined. The analysis is conducted by reference to legislation, to judicial authorities on the subject in both Zambia and England as well as to the writings of authoritative commentators.

3.1 APPLICABLE LAW

It is necessary to establish, from the onset, whether the legal principle that is about to be discussed applies to the case of the mining investors and the Zambian government. To do this, the provisions of the Development Agreements on the issue of the applicable law are examined below.

The Development Agreements between the Government of the Republic of Zambia and the various mining investors, namely Cyprus Amax Kansanshi Plc,[119] China Non-Ferrous Metal Industries

[119] Development agreement dated 14th March 1997, in respect of the Kansanshi Mine

Corporation Group,[120] Chambishi Metals Plc,[121] Konkola Copper Mines (Vedanta)[122] and Chibuluma Mines all contain a provision with respect to the 'law applicable.' This provision stipulates the law that governs the construction and interpretation of the various agreements. Except for the Konkola Mine Agreement, the relevant governing law clause is worded identically in all of the other above mentioned Agreements as follows:

> "This agreement shall be governed by and construed in accordance with the laws of Zambia which the Parties acknowledge and agree includes, so far as they are relevant, the rules of international law"[123]

Therefore, in order to analyse what rights or liabilities attach to the parties in respect of any alleged breach of any provision of the Development Agreements, it is necessary to look at what the Zambian law provides. If the issue concerns a relevant principle of international law, then according to the above quoted clause, this branch of the law could be looked at, as a source of law in determining the legal rights of the parties. It was noted in the first chapter of the study that the government of Zambia recently enacted the Mines and Minerals Development Act.[124] In that Act, by section 160,

'a development agreement which was in existence before 1st April 2008[125] shall, notwithstanding any provision to the contrary contained in any law, or in the development agreement, cease to be binding on the Republic from that date.'

As a general proposition of law, any sovereign state may make the laws it chooses to. However, it is questioned whether a sovereign can, by a simple amendment of the law, free itself from contractual commitments. Legal issues of state sovereignty and constitutionality, sanctity of contract and accrued rights clearly arise in this context.

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[120] Chambishi Mine Development Agreement (29 June 1998)
[121] Chambishi Cobalt and Acid Plants and Nkana Slag Dumps Development Agreement (11 September 1998)
[122] Konkola Deep Mines Development Agreement (31 March 2000)
[123] Cyprus Amax Kansanshi Development Agreement, Clause 19, China Non Ferrous Metals Development Agreement Clause 20, Chibuluma Mines Development Agreement Clause 20.1, and Clause 20.1 of the Development Agreement Chambishi Plc for the Acid and Cobalt undertakings.
[124] Act no 1 of 2008
[125] This is the date of commencement of the Act

According to a report current at the time of writing this work, the mining companies were planning to sue the state, arguing that they had a legal remedy 'to restore their inherent rights...enshrined in Development Agreements.'[126] It was further stated that although the investors were paying the new taxes, it did not necessarily mean that they had accepted the tax regime and that they reserved the right to take legal action. This argument essentially relies on the notion of accrued rights, which is discussed below.

3.2 THE PRINCIPLE OF ACCRUED RIGHTS

A right is said to accrue when it vests in a person, especially when it does so gradually or without his active intention, for instance, by lapse of time or by the determination of a preceding right.[127] It would appear that the principle of accrued rights is basically a proposition of law whereby the rights and liabilities of parties to some legal relationship (where such rights are intended to continue existing into the future), are to be determined by reference to the state of the law existing at the time of entering into such a relationship. It is a general principle that laws do not operate retrospectively.

In Zambia, the principle of accrued rights is expressed both in statute and case law. Under statute, it is expressed in the Interpretation and General provisions Act[128] as follows:

> "14 (3) Where a written law repeals in whole or in part any other written law, the repeal shall not...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;...."[129]

The above provision is relevant to the current study as far as it relates to section 160 of the Mines and Minerals Act.[130] It is crucial for examining whether the pronouncement that development agreements

[126] Zambia Daily Mail, 24 November 2008,
[127] P.G. Osborne, A Concise Law Dictionary. (London: Sweet & Maxwell,1964)8
[128] Chapter 2 of the Laws of Zambia
[129] Section 14 (3)

shall cease to be binding on the Republic, has thereby 'affected a right or privilege' that may have been 'acquired or accrued... under any written law'.

In the first place, it is not doubted that the repealed Mines and Minerals Act is a 'written law' within the meaning of the Interpretation and General Provisions Act. Secondly, it is also acknowledged that if the terms of development agreements were designed to apply 'notwithstanding the provisions of any written law,' then, whatever the current Mines and Minerals Development Act states should be inapplicable to the development agreements entered into prior to the new enactment. However, the new Mines Act is clearly intended to deal with development agreements. This raises the issue whether the Zambian government has legitimately freed itself from the development agreements without interfering with accrued rights.

3.2.1 Zambian and English Case Law

An examination of Zambian case law suggests that the protection of accrued rights from legislative interference is not an absolute one. The courts have tried to develop some criteria relating to the application of the principle. In the case of *Godfrey Miyanda v the Attorney General*,[131] the appellant joined the Zambia Army as a cadet officer during the currency of the Defence Act, 1955. The said Act provided that officers could only be dismissed after they had been given an opportunity to be heard on any allegations against them. By the time of the appellant's graduation from cadet officer to commissioned status and his subsequent dismissal, the Defence Act 1955 had been repealed and re-enacted, the repealing law omitting the terms referred to. Following the appellant's summary dismissal, the issue arose whether or not he had an accrued or acquired right not to be dismissed without an opportunity to be heard. The court held that the plaintiff had an acquired and accrued

[130] Act No. 1 of 2008
[131] 1985 ZR 168

right which survived the repeal of the Defence Act 1995. It further held that in terms of section 14 (3) (c) of the Interpretation and General Provisions Act,[132] the right had been preserved as a relevant chain of events had been triggered by his recruitment as a cadet officer under the Defence Act 1955.[133]

Another case in which the principle of accrued rights was applied is the case of *Mopani Copper Mines Plc v the Zambia Revenue Authority.*[134] In this case, the Zambia Revenue Authority (ZRA) raised an assessment for Value Added Tax against the Appellant. ZRA alleged that the Appellant had improperly claimed the disputed amount as input tax following the amendment of Section 18(4) of the Value Added Tax Act,[135] by the Value Added Tax (Amendment) Act No. 2 of 2002. The commencement date of the new legislation was 1st April 2002. The repealed Section 18(4) provided that input tax could not be deducted or credited after a period of three years from the date of the relevant tax invoice. The effect of the new amendment, however, was that, as from 1st April 2002 the invoices on which input tax relief could be claimed should not be more than twelve months old (thereby shortening the period from 3 years to one year). The Tribunal, in finding that Mopani were entitled to protection of an accrued right, held that it agreed with the Appellant that retrospective operation should not be given to a statute so as to impair an existing right or obligation otherwise than with regard to matters of procedure.

"It would certainly not be in the public interest that the Respondent could be allowed to change the rules midstream and gravely prejudice the rights of the taxpayer... It is therefore a substantive and vested right of the Appellant and it must be protected."

Other cases have qualified the application of the principle relating to the circumstances under which such rights can be abrogated.

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[132] Cap 2 of the Laws of Zambia
[133] [1985] ZR p 185
[134] Revenue Appeals Tribunal Reports
[135] Cap. 331 of the Laws of Zambia

The English case of *Pearce v Secretary of State for Defence and Another*[136] is equally authoritative on the point. In that case, the court observed that it was an established principle in the construction of statutory provisions that they should not be interpreted as taking away accrued rights unless they expressly or by necessary implication so provide. This view is also consistent with that expressed by the Zambian Supreme Court in the case of *the Attorney General v Thixton,*[137] where the court took the view that that case was a matter that involved the fundamental right to liberty of a subject. By reason of the fact that the amended legislation encroached on the human rights of the subject the majority of the court held that the statute had to be construed strictly and that an existing right should not be considered as destroyed "unless there be express words or the plainest implication," quoting *Henshall v Porter.*[138]

In summary, it is clear from the cases discussed that accrued rights:

1) As a general rule will be protected from interference by subsequent legislation;
2) Will generally be protected but where circumstances permit, they will more readily be taken away if they concern an ordinary as opposed to a fundamental right;
3) Can however be taken away if there can be gathered from the subsequent legislation a clear intention not to preserve them.

In the case at hand, the intention behind section 160 of the Mines and Minerals Act was to cease the binding effect of the development agreements on the republic of Zambia. Therefore, it may be said that there was a clear intention on the part of the government to take away the accrued rights of the mining investors when the Act was passed. From the point of view of domestic law, a state is entitled

[136] 1988 2 All ER 349
[137] SJZ No. 1 of 1967
[138] (1923) 2 K.B. 193.

to take away accrued rights by legislation if the terms of the legislation are clear enough in their intention to take away such rights.[139]

In relation to international law, it does not matter if the taking away of such rights affects the contractual rights of a private person, as expressed in the case of *Kahler v Midland Bank,*[140] where it was expressed that the law of the forum not merely sustains, but because it sustains, may also modify or dissolve the contractual bond. If a sovereign can dissolve the contractual bond in these circumstances, the question remains whether a state, through a contractual undertaking, may freeze its right to pass laws.

3.3 CAN A SOVEREIGN FREEZE ITS LAW-MAKING POWER BY CONTRACT?

An analysis of the question whether a state may freeze its law making power by contract brings to light a problem which has been at the centre of many disputes between investors and host states. It shows a tension between the two competing interests of the investor and the host state in respect of long term investments involving huge amounts of capital, such as in the extractive industries like copper mining. The foreign investor who commits huge financial resources into a long-term industrial project is keen to secure the assurance of legal stability to protect his investment from expropriation and to ensure that financial returns are free from oppressive taxes or cumbersome restraints with regard to repatriation of earnings. On the other hand, the host state, often desperately low or totally lacking in capital and skill resource is keen to ensure that the wasting asset that is being extracted from its territory yields decent developmental returns for its people.

According to a noted authority in transnational business law, modern agreements between states and foreign corporations often contain, in addition to choice-of-law clauses, the specific commitment on

[139] See the case of In Re Joseph (1973) ZR 256, where a British solicitor's accrued right to apply for admission to the Zambian bar as an advocate was adjudged to have been taken away by the Legal Practitioners' Act 1973.

[140] (1950) AC,24 and (1949) 2 ALL ER

the part of the contracting state not to alter the terms of the concession by legislation or by any other means, without the consent of the other party.[141] This is done by provisions known as 'stabilisation clauses' written into investment contracts. As demonstrated in Chapter 1, all the development agreements signed by Zambia in the mining industry do feature stability clauses that refer to a 'stability period' during which the Zambian government may not (among other things) alter the taxation or royalties' regime applicable to the mines. Now that the Zambian government has in fact altered the said regime, does this engage its liability under international law?

3.3.1 Application of International Law

The traditional view is that a contract between a state and a private person, even if involving a person of foreign nationality, is to be governed by domestic law. This view is reflected in early decisions of the World Court,[142] such as in the *Serbian and Brazilian Loan Cases.*[143] In this case, the Permanent Court of International Justice stated that "any contract which is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country." This might suggest that international law does not apply in the cases at hand. However, at the outset, it will be acknowledged that international law does apply in the instant case, for the simple reason that the parties have expressed their intention that it should apply. They have, in other words, (at least partially) 'internationalised'[144] the development agreements signed between them by their explicit reference to the application of international law, as noted earlier. Further evidence of the partial de-localisation and internationalisation is to be seen in the dispute resolution clauses in the development agreements, all of which defer to arbitration abroad.

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[141] K.J. Vandevelde, 'Bilateral Investment Treaties: The Second Wave', Michigan Journal of International Law p14

[142] (The Permanent Court of International Justice) See France v. Kingdom of Serbs, Croats and Slovenes p 23

[143] France v. Kingdom of Serbs, Croats and Slovenes (1929) 23P.C.I.J. (ser A)

[144] Vandevelde 'Bilateral Investment Treaties: The Second Wave' 14

It may be convenient at this stage to examine some of the cases that have been the subject of arbitral and judicial awards in the context of alleged failure by a state to abide by its contractual obligations (particularly the stabilisation clause) undertaken in a development agreement.

The case of *Lena Goldfields v the USSR* (1930)[145] was one of the earliest cases which involved both a choice-of- law clause and a stabilisation clause. In relation to the choice of law, the parties based their agreement 'upon the principles of good will and good faith' as well as on 'reasonable interpretation of the terms of their agreement.'[146] Under the stabilisation clause, the USSR undertook not to 'make any alteration in the agreement by Order, Decree, or other unilateral act, or at all, except with Lena's consent.'[147] The court of Arbitration took the view that the purpose of this provision was to protect Lena's legal position, that is to say, to prevent the mutual rights and obligations of the parties from being altered by any act of government, legislative, executive or fiscal.

It was argued that the USSR's domestic law would apply on all matters not excluded by the contract whereas in respect of all other matters, the proper law was contained in the principles of law, such as those recognised under Article 38 of the Statute of the Permanent Court of International Justice.[148] The matter was decided in favour of the investors by applying the principle, so well recognised as part of the law of civilised nations, of unjust enrichment, thereby preventing the USSR government from nationalising the enterprise of the investor without compensation.

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[145] A. Nussbaum 'the Arbitration between Lena Goldfields and the USSR Government', 36 Cornell Quarterly Law Review 31

[146] Nussbaum, 'the Arbitration between Lena Goldfields and the USSR Government'

[147] Nussbaum 'the Arbitration between Lena Goldfields and the USSR Government' 46

[148] This mandates the court to apply '(a) international conventions, whether general or particular establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

Another case worth examining is *British Petroleum Exploration Company (Libya) Ltd. v Government of the Libyan Arab Republic.*[149] In that case, the Libyan government was taken before an arbitral tribunal by the BP Exploration company, an oil mining firm, following the enactment of legislation by the Libyan Government that nationalised the assets of the company. With regard to the claim that there was a 'breach of contract,' the Sole Arbitrator held that the BP Nationalisation law and the actions taken by the Respondent, did constitute a fundamental breach of the BP Concession as they amounted to a total repudiation of the agreement and the obligations that had been undertaken. The Arbitrator ultimately decided the case 'on the basis of rules of applicable systems of law.'[150]

The case of *Texaco Overseas Petroleum Company (TOPCO)/California Asiatic Oil Company v the Government of the Libya Arab Republic*,[151] is another which also concerned the nationalisation of the oil extraction undertaking contrary to the contractual commitments made by the Libyan government. One argument advanced on behalf of Libya was that the Libyan Government, being possessed of the sovereign power over the management and disposal of its natural wealth and resources, could not validly freeze those powers by contract in favour of a private person, without reserving to itself the right to resume control of those resources. This was consistent with the international law position whereby states have the sovereign right to expropriate assets and to regulate activities within their jurisdiction, based on the principle of permanent sovereignty of states over natural resources. This was affirmed by the United Nations General Assembly resoulution1803 of 1962[152] and is now generally recognised, according to one author, as being a principle of customary international law.[153] The judgment however in this case was that the very nature of sovereignty entailed a power or a

[149] 17 International Legal Materials 3 (1978)
[150] BP Exploration Company v Libyan Arab Republic, 1930.
[151] 17 ILM 3 (1978)
[152] Articles 1 and 4 of the UNGA Resolution on the Permanent Sovereignty Over Natural Resources, 1962
[153] L. Cotula, , Regulatory Takings, Stabilisation Clauses and Sustainable Development, OECD Global Forum, March 2008

freedom on the part of the state of Libya to limit its own choice of action by contract in relation to its dealings with TOPCO.

3.4 LEGAL VALUE AND EFFECT OF STABILISATION CLAUSES

As discussed above, the legality and binding nature of stabilisation clauses was upheld in *Texaco v Libya and in BP Exploration v Libya.* This view reflects the dominant position in international arbitral awards.[154] It is however important to distinguish these decisions from the cases that Zambia faces. First, the cases discussed above all involved expropriations rather than lesser forms of regulatory change. Their authority on the legality and binding nature of stabilisation clauses relates more to undertakings not to nationalise, rather than commitments not to regulate. According to one author, the legality and binding nature of stabilisation clauses which restrict the right to regulate and the consequences of a change to the regulatory framework by a state not amounting to expropriation, has not yet been properly tackled in arbitral awards.[155] Issues concerning the consequences of breaches of stabilisation clauses have been tackled in some arbitral awards, although mainly with regard to expropriation. In this context, payment of compensation emerges as the main legal effect of such breaches.[156] The amount of compensation depends on a range of factors such as the costs incurred by the investor because of the violation well as the investor's legitimate expectations generated by the presence of a stabilisation clause.

3.5 THE CONSTITUTIONAL DIMENSION

The constitution of Zambia contains provisions which authorise the Zambian government to compulsorily acquire property provided that adequate compensation is paid to the aggrieved

[154] Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development, OECD Global Forum, March 2008, 7
[155] Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development'
[156] Cotula, 'Regulatory Takings, Stabilisation Clauses and Sustainable Development'

person.[157] From this provision, it is arguable that if the constitution permits an interference with property rights in this way, then, a lesser interference such as an alleged breach of an undertaking not to disturb the fiscal regime applying to an investor must, by implication, be permitted as well. The result would be that to the extent that Zambian law applies to the determination of the rights of the parties under the development agreements, Zambia could argue that the interference with the acquired rights of the investors is merely an exercise of sovereignty permitted by the constitution. It has been noted that,

> "like in those situations resulting from measures affecting acquired rights .... the breach of ordinary contracts between states and aliens, being governed by municipal law, constitutes the exercise of a sovereign power, and therefore, cannot involve, per se, international responsibility.'[158]

However, another matter concerns whether damages are payable because even the constitution recognises the right of a person deprived of a proprietary right to be compensated.[159]

The second constitutional issue relates to the legality and validity of stabilisation clauses under domestic law as viewed from the point of the constitution. It is questioned whether the constitutional principles on the separation of powers are respected by the executive and whether this branch of government has the power to enter into commitments that prevail over legislation adopted by parliament (freezing clauses). A reputable author[160] has noted that where stabilisation commitments are unconstitutional, the implications may be complicated by the long-standing principle of international law whereby states cannot plead the provisions of their domestic legal system to justify non compliance with, or legal challenges to their international obligations. In *Overseas Revere*

[157] Article 16(1) and (3) of the Constitution of Zambia, Cap 1 of the laws.
[158] Vandevelde K. J. 'Bilateral Investment Treaties: The Second Wave' 14
[159] Article 16 (3)
[160] Vandevelde K. J. 'Bilateral Investment Treaties: The Second Wave'

Copper and Brass Inc v Overseas Private Investment Corporation (OPIC)[161] the arbitral tribunal held that "under international law, the commitments made in favour of foreign nationals are binding, notwithstanding the power of parliament and other governmental organs under the domestic constitutions to override or nullify such commitments." But if a comparison is made between treaties and contracts, insights may come from Article 46 of the Vienna Convention on the Law of Treaties. While confirming the general principle that states cannot invoke domestic law rules, this provision also contains an exception for 'rules of internal law of fundamental importance.' Arguably, constitutional provisions such as the separation of powers do constitute internal rules of fundamental importance, which the host state cannot violate through entering into investment contracts that freeze parliament's power and which a diligent investor should be aware of before concluding such a contract with the host state.

In summary it could be stated that the rules relating to the protection of acquired rights show clearly that not all acquired rights are immune from abrogation. Where such rights do not involve a fundamental right, the courts in Zambia (reflecting the position of domestic law, which applies by virtue of the development agreements), have upheld legislation abrogating accrued rights as long as the intention to take away the accrued right is clear. In the case of the Mines and Minerals Act 2008, it is very clear that the state intended to cease the continued application of development agreements.

As far as stability clauses are concerned, it has been demonstrated that these are generally valid as a matter of international law and where they are abrogated, compensatory awards have been made to investors. However, Zambia's development agreements apply Zambian law ahead of international law, which applies only where it becomes relevant. Both the domestic law and international law appear to be favourable to Zambia, so far as they recognise the right of a sovereign to nationalise the

[161] (1978) 56 ILR 257

assets of a foreign investor (and by implication to cause a lesser interference such as a change in the fiscal provisions applying to investors). It would appear that Zambia's liability, if any, would depend on whether international law is considered to override domestic law provisions on the question of validity and enforcement of stability clauses. Zambia might well have to face the prospect of compensating the mining investors, should the view be taken by an arbitral tribunal applying international law, that the enactment of a law abrogating the development agreements constitutes a breach of contract.

CHAPTER 4

4.0 CONCLUSIONS AND RECOMMENDATIONS

In this final chapter, it is proposed to draw conclusions from the discussion of the preceding chapters and to make recommendations. There are seven recommendations proposed, and these appear after a brief discussion of the issues relating to the question of incentives in Development Agreements and also to the question of liability for possible breach of the said Agreements.

4.1 FISCAL INCENTIVES AND DEVELOPMENT AGREEMENTS

This study has examined the question of relieving Zambia from onerous provisions in Development Agreements. It has revealed that the said Agreements came into force as part of the privatisation exercise of government owned enterprises and in pursuance of the economic liberalisation policy backed by donors and investors. Further, at the time of entering into the Agreements with the foreign investors, copper prices were at their all time low on the global market. Zambia as a consequence was pressured to succumb to the wishes of the investors. The question may be asked whether incentives are relevant in order to attract investors. On the evidence of war-torn but investment-rich territories like the DRC Congo, Somalia, (or indeed Mozambique and Angola in the recent past), it is apparent that in the extractive industries such as copper mining, investors will venture into such territories as long as there are high levels of returns on investment. The general position that fiscal incentives are not major determinants of foreign direct investment is reinforced by studies on the Zambian economy.[162] A notable academic supports the view that incentives are not always the decisive criterion on which a decision to invest is made. Another commentator observes that none of the few

[162] Kenneth Mwenda, Legal Aspects of Foreign Direct Investment in Zambia, Murdoch University Electronic Law Journal, Vol. 6 No. 4 (December 1999)

industries that were granted pioneer status under Zambia's Pioneer Industries (Relief from Income Tax) Act 1969 were attracted by fiscal incentives.[163]

4.2 CONTRACT AND STATUTE

It is trite law that liability in contract arises where there is a breach. Zambia has indicated its intention to discharge itself of the obligations undertaken in the Development Agreements. From a purely contract law perspective therefore, this indication amounts to a breach and a repudiation of contract. However, because the Development Agreements stipulate Zambian law as the applicable law, it is the conclusion of this study that the Republic of Zambia, having expressly stated by statute that it does not consider itself bound by the Development Agreements, is indeed not bound by them as a matter of domestic law.

Contract law derives from the common law in Zambia. As between common law and statute law, the latter prevails where there is a conflict. It is therefore the further conclusion of this study that from a statutory law point of view, the Republic of Zambia is still not bound.

4.3 INTERNATIONAL LAW

At the international level, the United Nations Resolution 1803 which sets the Principle of Permanent Sovereignty recognises the existence of states' sovereignty over their resources which must be exercised in the interest of the people. This is also found in Article 2 of the Charter on the Economic Rights and Duties of States which stipulates that each state has the right within its national jurisdiction to regulate and exercise authority over foreign investment and to take measures that ensure that such activities comply with laws and regulations and conform to its national objectives and priorities.

[163] A. Martin, Minding Their Own Business, (London: Penguin Books, 1975), 65.

The taking of state measures affecting the contractual rights of aliens, where those contractual rights have been 'internationalised' by a choice-of-law clause, may entail liability to pay damages, as the cases of the oil companies' nationalisation show. At the level of international law, the authorities surveyed in this study suggest that in arbitral proceedings claiming damages for breach, a foreign corporation would succeed where the contract incorporated a stability clause.

It is therefore the conclusion of this study that whilst it is perfectly legal in the name of sovereignty for states to enact laws that adversely affect contractual rights, liability on the international law plane would nevertheless arise.

4.4 CONCLUSION

The study has concluded that corruption and abuse of office at the highest levels of political authority did play a part in securing some rather unfavourable terms for Zambia in the development agreements. The study also concludes that the legal framework existing at the time to deal with matters of privatising the mines had adequate safeguards for ensuring transparent and beneficial state divestiture.

As the Zambian economy is predominantly dependent on the mining industry, especially copper, the nation cannot afford to permit such a wasting asset to be exploited by foreign interests in a manner that yields little benefit to the development of the economy. The enactment of the 2008 Mines and

Minerals Development Act and its abolition of Development Agreements is therefore to be welcomed, but caution must be exercised to ensure that such liability as may arise from arbitral proceedings for alleged breach of contract on the part of the Zambian government must be settled amicably ahead of any arbitral award.

4.5 RECOMMENDATIONS

4.5.1 Government institutions established to enhance public accountability or to fight corruption, such as the Auditor General's office and the Anti Corruption Commission, need to be strengthened by giving them adequate resources and powers of prosecution without having to refer to anyone. In this regard, the security of tenure of the Director General of the Anti Corruption Commission (ACC) must be constitutionally assured so as to give the ACC the maximum possible independence from political interference.

4.5.2 To improve accountability in governance, and therefore stem the tide of abuse of office and corruption, there is need for other legislative reforms that will strengthen the system for checks and balances. Particularly important in this regard, is the role that the legislative wing of the state can play in providing a countervailing force to the powers of the executive branch.

4.5.3 Policy makers and companies should bear joint responsibility for treating royalty payments and associated taxes in a transparent manner that promotes public accountability. There has been a public outcry in Zambia on the level of secrecy that surrounds the Development Agreements when, in fact, these are premised on the natural resources of the nation from which the citizens are supposed to be beneficiaries. The aim should be for revenues generated in the mining sector to contribute to economic growth and social development.

4.5.4 Tied to the recommendation above, is the need for Zambia to join the Extractive Industries Transparency Initiative (EITI). This initiative is designed for countries heavily dependent on mining revenue. It is an approach to mining taxation that seeks to enhance accountability and transparency in mining taxation. It compels, on the one hand, mining companies to make public their profits and on the other, governments to disclose how much revenue is collected

from the mines and to what use such income is applied. In this regard, the public would be able to judge whether the benefits accruing to the country are commensurate with the remittances being received and also assess the effectiveness of the public expenditure framework, especially in relation to the areas of mining operations.

4.5.5 When determining which taxes and levels of tax to apply to the mining sector, policy makers should not only consider ways to achieve individual tax objectives, but also take into account the cumulative effects of all taxes. Such awareness must recognise the importance of each tax type in achieving specific objectives. The overall tax system should be equitable to both the nation and the investor and should be globally competitive.

4.5.6 Should the matter concerning the enactment of the Mines and Minerals Development Act of 2008, which purports to relive Zambia from the obligations contained in the development agreements, be escalated to arbitration as threatened, it is recommended that compensation for the mining companies be negotiated ahead of any arbitral settlement. This way, the quantum of compensation is likely to be substantially less than would be payable if an award were to be given by a tribunal.

4.5.7 To further mitigate any compensation payable in the preceding recommendation, heavy reliance must be placed on relevant international law principles such as the exercise of permanent sovereignty over natural resources. The Charter on the Economic Rights and Duties of States could be pleaded in this regard. Another principle that could be relied upon is the equitable principle of unjust enrichment, by which judicial and arbitral tribunals generally disapprove of parties profiting unjustly from a bargain. It is unjust for the companies to reap so huge a benefit from the rise in copper prices when in fact they concluded their contracts by representing the price of copper as being incapable of rising beyond a particular price.

BIBLIOGRAPHY

STATUTES

1. The Barotseland -North Western Rhodesia Order in Council 1889
2. The Banking and Financial Services Act, Chapter 387 of the Laws of Zambia
3. The Constitution of Zambia (1964)
4. The Income Tax Act, Chapter 323 of the Laws of Zambia
5. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia
6. The Income Tax (Amendment) Act No. 1 of 2008
7. The Mining Proclamation 1912
8. The Mining Ordinance (Amendment) Act, No. 5 of 1965
9. The Mines and Minerals Act 1970
10. The Mines and Minerals Act (1995), Chapter 213 of the Laws of Zambia
11. The Mines and Minerals Development Act No 7 of 2008
12. The North Eastern Rhodesia Order in Council 1900
13. The Northern Rhodesia Proclamation 1911
14. The Northern Rhodesia Order in Council 1924
15. The Privatisation Act, Chapter 385 of the Laws of Zambia

CASES

1. *The Attorney General v Thixton* (1967) SJZ No. 1

2. *British Petroleum Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic* (1978) 17 ILM
3. *France v. Kingdom of Serbs, Croats and Slovenes Concerning the Payment of Various*
4. *Henshall v Porter* (1923) 2 K.B. 193
5. *In Re Joseph* (1973) ZR 256
6. *Kahler v. Midland Bank* (1950) A.C 24, (1949) 2 ALL ER
7. *Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic* (1977) 20 I
8. *Mopani Copper Mines Plc v. the Zambia Revenue Authority*
9. *Overseas Revere Copper and Brass Inc v. Overseas Private Investment Corporation (OPIC)* (1978) 56 ILR 257
10. *Pearce v Secretary of State for Defence and Another* (1988) 2 All ER 349
11. *Serbian Loans Issued in France* (1929) P.C.I.J. (ser A)
12. *Texaco Overseas Petroleum Company (TOPCO)/California Asiatic Oil Company v. the Government of the Libya Arab Republic* (1978) 17 ILM 3

AUTHORITATIVE TEXTS

1. Bostock, M. and Harvey C. Economic Independence and Zambian Copper: A Case Study of Foreign Investment. New York: Praeger Publishers, 1972
2. Kamuwanga, M. Negotiating Investment Contracts: Investment Law in the Context of Development. Luasaka: Multimedia Publications, 1995
3. Mudenda, G. and Mbinji, M. Nchekelako: An Afronet Reader on Corruption in Zambia. Lusaka: Afronet Publications, 2002

4. Mwenda, K. Zambia's Stock Exchange and Privatisation Programme: Corporate Finance Law in Emerging Markets. The Edwin Mellen Press, 2001.
5. Ndulo, M. Mining Rights in Zambia. Lusaka: Kenneth Kaunda Foundation Press, 1987
6. Osbourne, P.G. A Concise Law Dictionary. London: Sweet & Maxwell, 1964
7. Stamp, M. A History of the Mineral Rights of Northern Rhodesia. London: Maxwell Stamp Associates Limited, 1967

JOURNALS, ARTICLES AND PAPERS

1. Cotula, L.'Regulatory Takings, Stabilisation Clauses and Sustainable Development.' OECD Global Forum (March 2008)
2. Dymond, A. 'Undermining Development? Copper mining in Zambia.' Scotland's Aid Agency (SCIAF) (October 2007)
3. Department of Trade and Industry, 'Botswana Shines' (2007).
4. Franck, S.D. 'Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law.' McGeorge Global Business and Development Law 19 (2007)
5. Fraser, A. and Lungu, J. 'For whom the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines,' Civil Society Trade Network of Zambia (2006)
6. Kafunda, K. 'Tax Law Comes Into Effect.' Vox Pop, 2 (April/June 2008) 16.
7. Kaunda, K. 'Zambia Towards Economic Independence,' Lusaka: Zambia Information Service (1968)
8. Kenny, T. and Feeney, P. 'Zambia: Deregulation and the Denial of Human Rights: Rights and Accountability in Development,' Oxford: Refugee Studies Centre (2000)
9. Martin, A. 'Minding Their Own Business'. London: Penguin Books (1975)

10. Mtine, C. 'Mining As a Re-Emerging Industry in Zambia.' University of Arizona (December 2006) 3

11. Mutesa F. 'Transparency and the Rule of Law in the Privatisation of Zambia Consolidated Copper Mines (ZCCM) Assets'_Transparency International, Zambia (2002)

12. Mwenda, K. 'Legal Aspects of Foreign Direct Investment in Zambia.' Murdoch University Electronic Law Journal 6 (December 1999)

13. Nussbaum, A. 'The Arbitration between Lena Goldfields and the USSR Government.' Cornell Quarterly Law Review 36

14. Otto, J. and Andrews, C. 'Mining Royalties: A Global Study on their Impact on Investors, Government and Civil Society.' Universities of Witwatersrand and Canada (2006) 14

15. Simutanyi, N. 'The Development Legacy of Privatisation.' Occasional Paper 165 (July 2008)

16. Situmbeko, L. and Zulu, J. 'Zambia: Condemned to Debt. How the World Bank and International Monetary Fund have undermined Development,' World Development Movement (April 2004).

17. Vandevelde, K.J. 'Bilateral Investment Treaties: The Second Wave' Michigan Journal of International Law

OTHER SOURCES

1. Chambishi Mine Development Agreement
2. Chambishi Cobalt and Acid Plants and Nkana Slag Dumps Development
3. Chibuluma Mines Development Agreement
4. Kansanshi Mine Development Agreement
5. Konkola Deep Mines Development Agreement

6. United Nations General Assembly Resolution on the Permanent Sovereignty Over Natural Resources, 1962. Articles 1 and 4
7. Zambia National Assembly Debates, 22 March 2007

NEWSPAPERS

1. The Post
2. Times of Zambia
3. Zambia Daily Mail

WEBSITES

1. http://www.nationsencyclopedia.com/Americans/Chile-MINING.html
2. Cape Cod Commission Website http://www.capecodcommission.org
3. Longworth Consulting Worldwide Limited at www.longworthconsulting.co.uk